THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2018-001325

William Ray Ward, #91566 ..... Respondent,

v.

South Carolina Department of Corrections ..... Appellant.

APPELLANT'S REPLY BRIEF

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SC Court of Appeals

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In accordance with South Carolina Appellant Court Rules ["SCACR"] 208(a)(3), 208(b)(3), and 208(b)(5), the Appellant in the instant matter, the South Carolina Department of Corrections ["SCDC"], respectfully submits its instant reply brief to the brief filed by the Respondent, William Ray Ward ["Ward"].

SCDC's instant reply brief accompanies the brief it filed with this Court in support of its appeal of the June 20, 2018 order issued by the Administrative Law Court ["ALC"] in this instant matter. (R. pp. 172 - 187). As reflected by its July 18, 2018 Notice of Appeal (R. pp. 188 – 190), SCDC appeals *only* the following rulings issued by the ALC in its June 20, 2018 order:

> **The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished SCDC are "the gross wages of the prisoner,"** as indicated in [*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)]. These gross wages must be disbursed as provided in [S.C. Code Ann. § 24-3-40(A)]. Not to do so in an error of law, a "violation of the plain language of the statute which directs [SCDC] to disburse the money based on the gross wages." [*Id.*]. (R. p. 184).
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> ...
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> Also, [SCDC] takes the position that the additional itemized expenses totaling $1.92 were not "lawfully" part of [Ward's] gross wages, a position that is contrary to [*Torrence*, 646 S.E.2d at 870, n. 4] and is thus an error of law.[1] Thus, this portion of [SCDC's] decision is REVERSED and REMANDED. **[SCDC] shall classify the entire contract amount as**

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[1] In the footnote associated with this passage, the ALC stated as follows (R. p. 184):

> In addition to addressing the issues raised by [Ward], [SCDC] contends that [it] is required by law to make the prison system self-sustaining. *See* S.C. Code Ann. § 24-3-20. Specifically, [SCDC] cites S.C. Code Ann. § 24-3-190, which provides among other things that "amounts received or to be received from the hire of convicts or from any other source during the current fiscal year [must be] appropriated for the support of the penitentiary." ([SCDC] also cites S.C. Code Ann. § 24-3-400, but this section deals with proceeds from the sale of articles and products manufactured or produced by convict labor, not payments for the labor itself.). [SCDC] concludes that recalculating the wage structure as argued by [Ward] would create a deficiency in the prison industries program. **This argument is outside of the scope of this appeal.** The Court notes, however, that if creating a program that would make prisons self-sustaining, while not favoring prison industries over non-inmate labor furnished by law-abiding citizens, were the goal, then the token $1.00 a month for occupancy of public property for private use could have been increased to rent at market value. [emphasis supplied].

As discussed in its brief, SCDC's instant appeal covers the above-quoted footnote.

> **the hourly gross wage** for the purpose of determining not only whether the wage meets the prevailing wage requirement but also for the purpose of calculating deductions and distribution of [Ward's] pay as set forth in § 24-3-40(A). [*Id.*]. (R. p. 184).
>
> ...
>
> **SCDC's failures to demonstrate that it paid [Ward] the prevailing wage rate and to include the Social Security withholding, Workers' Compensation premium, and SCDC Surplus Fund Amount in the gross wages prior to making deductions thereto were errors of law.** Accordingly, the parts of [SCDC's] decision dealing with the prevailing wage rate and gross wages are REVERSED and REMANDED. [SCDC] must demonstrate that [Ward] was paid prevailing wage rate for the type of labor he provided at the time and in the area that he provided it, pursuant to [S.C. Code Ann. §§ 24-3-410(B)(7) and 24-3-430(D)]. **[SCDC] must also classify the entire contract amount as the hourly gross wages** and calculate deductions and distributions from [Ward's] pay as set forth in [§ 24-3-40(A)]. If the contractual wage rate was also used to pay the inmate while training for the work, then this amount must also be included in the recalculation. (R. p. 185).

[emphasis supplied].

I. AGREEMENT BY PARTIES AS TO ISSUES ON APPEAL

As reflected by the table presented below, Ward accepted the issues on appeal presented by SCDC in its brief,[2] and he addressed them in the order in which SCDC presented them:

Issue	SCDC's Argument	Ward's Argument
I	The procedure by which the ALC fashioned its ruling reversing SCDC's denial of Ward's $1.92 per labor hour back pay claim was imbued with evidentiary error.	Any evidentiary error on the part of the [ALC] was harmless.
II	The ALC erroneously anchored its decision to reverse SCDC's denial of Ward's $1.92 per hour back pay claim upon dicta from *Torrence*.	Ward established that $1.92 was diverted from his gross wages.
III	The ALC erroneously ruled that the $1.92 per labor hour figure SCDC separately charged the private industry sponsor should be included in Ward's gross hourly pay rate.	SCDC has not demonstrated any error in the ALC's treatment of the "overhead" amount deducted from prison industry sponsor remittances.

[2] *See* SCDC's Brief, p. 2.

Issue	SCDC's Argument	Ward's Argument
III(A)	Federal and state law obligated SCDC to charge the private industry sponsor for the inmates' "Prorata Workers' Compensation Premium."	SCDC's overhead charge is not compelled by South Carolina's Workers' Compensation law.
III(B)	Federal law obligated SCDC to charge the private industry sponsor for the inmates' "Prorata Social Security Withholding Payment."	SCDC's overhead charge is not compelled by Social Security laws.
III(C)	State laws prohibiting SCDC from operating at a deficiency obligated it to charge the private industry sponsor a cost attributed to the "SCDC Surplus Fund Account."	There is no legal requirement that the prison industries program operate at a surplus.

II. WARD WAS NOT EMPLOYED BY, NOR DID HE OTHERWISE WORK FOR, ESCOD OR INSILCO

Beginning with the second sentence in the first paragraph of his brief,[3] Ward offered an erroneous assertion regarding the nature of his relationship with the ESCOD and Insilco, the two (2) private industry sponsors for the federally certified prison industries project operated by SCDC at Evans Correctional Institution ["Evans"]:

> While incarcerated at [Evans], a prison operated by [SCDC], [Ward] participated in a prison employment program. He was assigned to a wire harness assembly facility[4] **where he worked for two private companies, ESCOD and Insilco**. [emphasis supplied.]

Ward concluded the first paragraph of his brief with the same erroneous assertion:[5]

> In addition to these amounts, **Ward's private-sector employers** remitted to SCDC an additional sum of $1.92 for each hour of his labor. [emphasis supplied].

Ward peppered his brief with some variation of the erroneous assertion that he was employed by, or otherwise worked for, ESCOD and Insilco:

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[3] *See* Ward's Brief, p. 1.

[4] Ward cited our Supreme Court's decision in *Torrence*. *Id.*, p. 1, n. 1.

[5] *Id.*, p. 1.

> On June 19, 2007, Ward submitted a "Step 1" grievance to SCDC **seeking back wages of $1.92 for each hour worked for ESCOD and Insilco**, along with payment at the prevailing wage for his 320 training hours.[6]
>
> ...
>
> **The law clearly entitles SCDC to hire out prison labor to private-sector industries** so long as it charges at least the prevailing wage for that labor.[7]
>
> ...
>
> SCDC does not explain why it should not simply pay for the cost of workers' compensation insurance for prison industry participants **in the same manner as ordinary SCDC employees**, *i.e.*, by payment of a premium to the State Accident Fund. The fact that inmates **employed** in the prison industries program are supposed to receive workers' compensation does not automatically imply that private users of prison labor must cover the additional premium.[8]
>
> ...
>
> Again, it is unclear why Social Security contributions for inmates working in the prison industries programs should not be paid **in the same fashion as with ordinary SCDC employees**.[9]

[emphasis supplied].

As SCDC illustrated in its brief,[10] Ward offered the identical erroneous assertion in his filed a Step 1 grievance form (R. p. 26):

> [SCDC] is in violation of wages earned by me **while working for private sector [companies] ESCOD and Insilco** at Evans. [SCDC has] withheld illegally all these wages. I grieve all wages owed to me by SCDC under [*Torrence* and § 24-3-40(A)]. [SCDC] is in violation of statute and [*Torrence*, 646 S.E.2d at 870, n. 4]. Therefore, SCDC owes me back wages of $1.92 for every single hour that I worked at Evans ... plus proper interest on these monies. [emphasis supplied].

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[6] *See* Ward's Brief, p. 2.

[7] *Id.*, p. 9.

[8] *Id.*, p. 10.

[9] *Id.*

[10] *See* SCDC's Brief, pp. 3 – 4.

Ward included the same erroneous assertion in his request for action from his Step 1 (R. p. 26):[11] "That I be paid $1.92 for every hour **I ever worked for ESCOD/Insilco** ... plus proper interest on these monies." [emphasis supplied].

As SCDC explained in its brief,[12] this Court, relying upon our Supreme Court's decision in *Williams, et al., v. S.C. Dep't of Corr. et al.*, 641 S.E.2d 885, 887 – 88 (S.C. 2007), unequivocally declared in *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010), that, contrary to Ward's oft-repeated assertion, inmates participating in prison industries projects operated by SCDC *are not* employees of the private industry sponsor. *See also S.C. Dep't of Corr. v. Tomlin*, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010).

Ward's assertion is also negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("People are not imprisoned for the purpose of enabling them to earn a living. ... **But prisoners are not employees.**"). [emphasis supplied].

Moreover, the federal guidelines published by the United States Department of Justice's Bureau of Justice Administration ["BJA"], which apply to projects certified by the federal government under its "Prison Industries Enhancement Certification Program" ["PIECP"], like the project SCDC operated at Evans in which Ward participated, clearly state that "[t]he requisite payment of at least a minimum wage, by a [project], **is in no way intended by BJA to imply that PIECP inmate workers are employees** for purposes of the PIECP statute or any other federal law." 64 FR 17007. [emphasis supplied].

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[11] *See* SCDC's Brief, p. 4.

[12] *Id.*

Thus, Ward was never employed by ESCOD or Insilco, nor did he ever otherwise work for either company. Ward remained, during the entirety of the time he voluntarily participated in the federally certified PIECP project SCDC operated at Evans, an inmate in SCDC's custody.

Just as he was never employed by, or otherwise worked for, ESCOD or Insilco, Ward was never an employee of SCDC. In *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004), our Supreme Court first confronted various issues associated with the labor provided by inmates to federally certified PIECP projects operated by SCDC, like the project operated by the agency at Evans. In its decision, 602 S.E.2d at 55, n. 7, the *Adkins* court ruled that inmates who participated in such projects were not employees of SCDC:

> The concurrence would hold inmates have a private cause of action under the South Carolina Payment of Wages Act. S.C. Code Ann. §§ 41-10-10, *et seq.* (Supp. 2003). However, [§] 41-10-80(C) provides that "[i]n case of any failure to pay wages due to an **employee** ... the **employee** may recover in a civil action." Notably, [§] 24-3-430(F) of the Prevailing Wage statute specifically states that **"[n]o inmate compensated for participation in the program is considered an employee of the State.**" In my view, this further evinces a legislative intent not to create a private right of action. [emphasis supplied by the Court].

By its decision in *Williams*, 641 S.E.2d at 886, n. 3, our Supreme Court confirmed the reality established in *Adkins*:

> In *Adkins*, we noted [Section] 24-3-430(F) provides that an inmate **is not considered an "employee" of the State** and therefore no cause of action could be maintained against [SCDC] under the Payment of Wages Act. [602 S.E.2d at 55, n. 7]. [emphasis supplied].

As inmates are not, under *Adkins* and *Williams*, employees of SCDC, SCDC may not simply, as suggested by Ward in his brief, "pay for the cost of workers' compensation insurance for prison industry participants in the same manner as ordinary SCDC employees, *i.e.,* by payment of a premium to the State Accident Fund." Likewise, SCDC may not simply, as also

suggested by Ward in his brief, pay the Social Security contributions for inmates who participate in prison industries projects it operates "in the same fashion as with ordinary SCDC employees."

If nothing else, SCDC respectfully asks this Court to, at a minimum, issue a decision in the instant matter with language making it clear that under *Cartrette*, *Tomlin*, *Bennett*, *Adkins*, and *Williams*, inmates who participate in prison industries projects operated by SCDC are employees of neither the private industry sponsor nor SCDC.

III. WARD MISAPPREHENDED THE FOOTNOTE FROM *Torrence* UPON WHICH HE ANCHORED HIS $1.92 PER HOUR BACK PAY CLAIM

In crafting his argument that "SCDC has not demonstrated any error in the ALC's treatment of the 'overhead' amount deducted from prison industry sponsor remittances,[13]" Ward asserted as follows:

> In *Torrence,* the Supreme Court reaffirmed *Adkins* and [*Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004)], holding that inmates protesting their wages were confined to a grievance proceeding rather than a declaratory action. **The *Torrence* court also stated in a footnote that it would violate the plain language of Section 24-3-40 if SCDC were to "remove[] any of the money remitted by the private industry sponsor" before distributing a prisoner's gross wages as required by that statute.** [*Torrence,* 646 S.E.2d at 869, n. 4]. [emphasis supplied].

However, Ward failed to offer the entirety of the operative language from the footnote provided by our Supreme Court in *Torrence*, 646 S.E.2d at 869, n. 4, in his brief to this Court, and, as SCDC illustrated in its brief,[14] Ward's also failed to fully quote the footnote from *Torrence* in his brief to the ALC dated March 8, 2016 (R. pp. 56 – 57).

As SCDC explained in its brief,[15] the operative language from the footnote in *Torrence*, 646 S.E.2d at 870, n. 4, provided, in its entirety, as follows:

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[13] *See* Ward's Brief, p. 4.

[14] *See* SCDC's Brief, p. 7, n. 10, and p. 9, n. 12.

[15] *Id.*

> ..., *if appellants prove true* their allegation that [SCDC] *removes* any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§ 24-3-40] based on the **lower** rate, [SCDC] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. *See* § 24-3-40(A). [italicized emphasis supplied; bold emphasis supplied by the Court].

As it did in its brief,[16] SCDC respectfully asserts that Ward failed to "prove true," as required by the above-quoted footnote from *Torrence*, his allegation that SCDC withheld, collected or deducted, or removed $1.92 per hour, or any of the three (3) costs that comprised the $1.92 per hour figure, from his gross wages.

Ward failed to "prove true" his allegation, because, under the structure of the hourly rate at which SCDC invoiced the private industry sponsor for inmate labor costs reflected by their contract, Ward's gross hourly pay never included the $1.92 per labor hour figure.

IV. WARD CONCEDED THAT THE FOOTNOTE FROM *Torrence* UPON WHICH HE ANCHORED HIS $1.92 PER HOUR BACK PAY CLAIM, AND UPON WHICH THE ALC RELIED IN ITS DECISION, WAS MERE *DICTA*

In arguing he established that $1.92 per labor hour was diverted from his gross prison industries wages, Ward framed SCDC's contrary argument as follows:[17]"

> SCDC also argues that Ward failed to prove that SCDC in fact removed $1.92 from his gross wages contrary to law. Although SCDC's arguments in this regard are spread over separate sections of its brief, they reduce to the following propositions: **The *Torrence* footnote acknowledging the impropriety of such a removal was mere *dictum*,** and Ward supposedly failed to "prove true" his claim that SCDC removed a portion of the money remitted for his labor by his prison industry sponsors. [emphasis supplied].

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[16] *See* SCDC's Brief, p. 10.

[17] *See* Ward's Brief, p. 6.

Ward then acknowledged the following concerning the nature of the footnote from *Torrence* upon which he anchored his $1.92 per hour back pay claim and upon which the ALC relied in its decision reversing SCDC on this issue:[18]

> With respect to SCDC's first argument, **Ward acknowledges that footnote 4 was not essential** to the *Torrence* court's narrow holding that, although the plaintiffs' rights could be vindicated in a grievance action, they could not maintain a declaratory action in court. [emphasis supplied].

By agreeing with SCDC that footnote 4 was not essential to the *Torrence* court's narrow holding that the plaintiffs could not maintain a declaratory action in circuit court, Ward conceded that footnote 4 constituted *dicta* under the standard established by this Court's decision in *State v. Addison*, 525 S.E.2d 901, 904 (S.C. Ct. App. 1999):[19]

> Second, the sentence Addison extracts from [*State v. Wiggins*, 500 S.E.2d 489, 492 – 493 (S.C. 1998)] in support of his argument is **dicta** and **is neither binding nor illuminating on the issue at bar**. *See* [*Drummond v. Beasley,* 503 S.E.2d 455 (S.C. 1998)] (**characterizing as dicta certain language in a case concerning a subject not within the question before the court**); [*Hampton v. Richland County Council,* 370 S.E.2d 714, 714 (S.C. 1988)] (concluding discussion of a legal principle in an opinion was dicta where it was **"clearly unnecessary to a resolution of the issue before the court"**); [*Welborn v. Dixon,* 49 S.E. 232 (S.C. 1904)] (**dicta is not binding as precedent**); [*Dennis v. South Carolina Nat'l Bank,* 382 S.E.2d 237, 240 (S.C. Ct. App. 1988)] (construing language in a case as dicta because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof"). [emphasis supplied].

Ward, however, attempted to walk back his concession as follows:

> If this statement was *dictum,* it was a nevertheless an unmistakable signal of the Supreme Court's views on the matter. Not surprisingly, the ALC applied footnote 4 of *Torrence* and ruled that SCDC was not entitled to divert $1.92 of the total amount remitted by private industry sponsors.

With respect to Ward's above-quoted argument, the ALC would not have ruled that the

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[18] *See* SCDC's Brief, pp. 21 – 22.

[19] *See* Ward's Brief, p. 6.

$1.92 per hour figure SCDC collected – separately and apart – from the prevailing hourly wage it charged the private industry sponsor (i.e. ESCOD and Insilco) but for the dicta from footnote 4. The ALC conducted no independent analysis of whether SCDC lawfully charged the private industry sponsor $1.92 per labor hour *in addition* to the prevailing hourly wage for the inmates' labor to cover the three costs which comprise the $1.92 figure (i.e. $0.20 for the "Prorata Workers' Compensation Premium," $0.40 for the "Prorata Social Security Withholding Payment," and $1.32 for the "SCDC Surplus Fund Account").

SCDC's collection of these three (3) costs wasn't prohibited by state statute, federal statute, or federal regulation; footnote 4 from *Torrence*, which even Ward acknowledges as *dicta*, represents the only prohibition against SCDC's collection of these three (3) costs.

Should this Court disagree with SCDC's contention that its collection of such costs from the private industry sponsor – separate and apart from the inmates' prevailing wage – wasn't prohibited, as a matter of law, by state statute, federal statute, and federal regulation, SCDC respectfully urges this Court to remand the adjudication of this issue back to the agency level with an explicit directive for the parties to introduce relevant materials (i.e. Ward's pay records, complete correspondence between SCDC and the South Carolina Employment Security Commission, deposition testimony taken during discovery activity when the parties litigated *Torrence* in circuit court, etc.) into the record from which a fulsome and proper determination of these issues may be made.

V. NO FACTS SUPPORT WARD'S ASSERTION THAT HIS EARNINGS WERE CLEARLY LESS THAN THE PREVAILING WAGE IF THE $1.92 PER HOUR FIGURE WAS NOT INCLUDED IN HIS PAY

In his brief's concluding paragraph, Ward argued as follows: [20]

[20] *See* Ward's Brief, p. 11.

> By law, [Ward] was to earn no less than the prevailing wage for his years of work as a wire harness assembler, including his training hours. It is apparent that Ward was paid at or near the federal minimum wage the entire time (other than during training, when it is conceded that he did not even receive minimum wage).[21] If the prevailing wage calculation includes the $1.92 "overhead" amount remitted by private industry sponsors, those funds could only be disbursed in accordance with S.C. Code Ann. § 24-3-40. **If, on the other hand, the overhead amount can be viewed as separate from Ward's own earnings, those earnings clearly fell short of the prevailing wage requirement.** The ALC properly reversed the denial of Ward's Step 1 and Step 2 grievances and remanded for a determination of the amount of back wages he is owed. If it does not dismiss this appeal on the grounds that the ALC's order was not final, this Court should affirm the ALC. [emphasis supplied].

Ward's assertion that his "earnings clearly fell short of the prevailing wage requirement" if the $1.92 per labor hour SCDC charged the private industry sponsor, by whom Ward was never employed or for whom Ward never otherwise worked, "can be viewed as separate from [his] own earnings" has no foundation in fact.

In its order (R. pp. 181 – 182), the ALC issued the following ruling regarding the prevailing wage, a ruling which SCDC did not appeal:

> The purpose of these programs is to employ inmates without creating an economic advantage either to the private sector entity or to favor inmate labor by providing a supply of labor cheaper than that which could be furnished by the law-abiding citizens of South Carolina. Accordingly, **the Court agrees with [SCDC] that the matter should be remanded for further proceedings to determine the prevailing wage for the labor furnished and/or what the private sector entities (ESCOD and INSILCO) paid non-inmate workers for the same or substantially similar tasks performed in South Carolina during the period he worked on the Project.** This portion of [SCDC's] decision is also REVERSED and REMANDED. [SCDC] shall calculate back pay owed based on a wage rate that is not less than the Federal minimum wage[22] and is not less than that paid for work of a similar nature in the locality in which the work was performed during the period during which it was performed. [emphasis supplied].

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[21] The record is clear that aside from the period of time it paid him "training wages," SCDC paid Torrence an hourly rate equal to or above the applicable federal minimum wage.

[22] *See* note 21 immediately above.

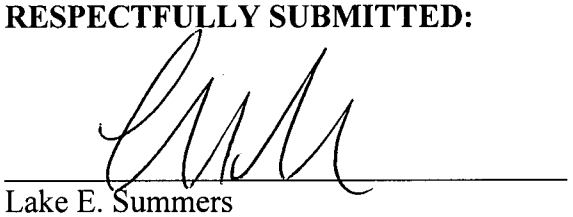
Ward must confront the reality that the hourly rate of pay at which ESCOD and INSILO paid its non-inmate workers has not yet been determined. Such evidence shall be secured by the parties on remand.

It's entirely possible that SCDC paid Ward and his fellow inmates an hourly rate for their prison industries labor that was "not less than that paid for work of a similar nature in the locality in which the work was performed during the period during which it was performed," and any representations by Ward to the contrary should be disregarded.

VI. CONCLUSION

For the foregoing reasons, as well as all of the reasons articulated in its brief, SCDC again respectfully urges this Court to reverse the operative provisions from the ALC's June 20, 2018 decision in the instant matter.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Appellant's Reply Brief complies with Rule 211(b), SCACR.

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