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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2021-000957

Thomas J. Torrence, #094651 ……..……...……. Respondent,

v.

South Carolina Department of Corrections ...…….….... Petitioner.

PETITION FOR WRIT OF CERTIORARI
THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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Pursuant to South Carolina Appellant Court Rule ["SCACR"] 242, the South Carolina Department of Corrections ["SCDC"] respectfully petitions this Court to issue a writ of certiorari to review two (2) rulings by the Court of Appeals from its final decision in the instant matter, styled as *Thomas J. Torrence, Respondent, v. S.C. Dep't of Corr., Appellant*, 861 S.E.2d 36 (S.C. Ct. App. June 30, 2021).

SCDC respectfully asserts the first of the two (2) rulings from the Court of Appeals' June 30, 2021 decision subject to the instant petition conflicts with a prior decision of this Court, while the second ruling presents novel questions of law. *See* SCACR 242(b)(3) and (b)(1).

I. CERTIFICATION BY COUNSEL

In accordance with SCACR 242(d)(1), SCDC's undersigned counsel respectfully certifies he filed a petition for rehearing on SCDC's behalf with the Court of Appeals on July 30, 2021, and he further certifies the Court of Appeals denied SCDC's petition for rehearing by an order filed August 4, 2021.

II. QUESTIONS PRESENTED FOR REVIEW

SCDC, by its instant filing, respectfully petitions this Court to consider only the following two (2) questions animated by the Court of Appeals' June 30, 2021 decision:

A. DID THE COURT OF APPEALS ERR BY ADOPTING WHOLESALE THE ALC'S RULING THAT TORRENCE WAS AN EMPLOYEE OF ESCOD WHILE HE PARTICIPATED IN THE PRISON INDUSTRIES PROJECT SCDC OPERATED AT EVANS?

B. DID THE COURT OF APPEALS ERR BY ADOPTING WHOLESALE THE ALC'S RULINGS DEFINING AND THEN DETERMINING THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR?

These two (2) questions result from the Court of Appeals' comprehensive adoption of two (2) rulings by the South Carolina Administrative Law Court ["ALC"] in the order the ALC issued January 20, 2016 in the instant matter. (R. pp. 1029 – 43 and pp. 1056 – 70).[1]

In its June 30, 2021 decision, the Court of Appeals affirmed the ruling by the ALC in its January 20, 2016 order that Torrence worked for ESCOD, the private industry sponsor for the prison industries project operated by SCDC in which Torrence participated. *Id.*, at 38 ("During this time, Torrence performed work for [ESCOD]."). *See also Id.*, at 39 ("Torrence argued he was entitled to the difference between his wage and the prevailing wage for his work performed for ESCOD both during and after his training period as well as for any overtime hours.").

The Court of Appeals' decision on this issue represents the first question for review in SCDC's instant petition, and SCDC respectfully submits the Court of Appeals' decision conflicts with a prior decision of this Court, as well as the Court of Appeals' own precedent. *See* SCACR 242(b)(3), *Williams, et al., v. S.C. Dep't of Corr., et al.*, 641 S.E.2d 885, 887 (S.C. 2007), and *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010).

In its June 30, 2021 decision, the Court of Appeals also affirmed the rulings from the ALC's January 20, 2016 order by which the ALC defined and then determined the "prevailing wage" SCDC should have paid Torrence for his prison industries labor. 861 S.E.2d at 43 – 45.

[1] In accordance with paragraph (c) of the order issued August 25, 2021 by this Court, styled as *Reduced Number of Copies Required in Appellate Matters*, Appellate Case No. 2020-000447, SCDC is not filing an Appendix in support of its instant petition. For clarity's sake, paragraph (c) from the Court's August 25, 2021 order reads as follows:

> In cases seeking review of a decision of the Court of Appeals, [SCACR 242] requires the petitioner to file two copies of an Appendix. This requirement is suspended. Instead, the necessary documents to comprise the Appendix will be obtained from the electronic records of the case before the Court of Appeals.

Accordingly, SCDC references materials from the Record on Appeal filed December 16, 2016 with the Court of Appeals. *See* SCACR 242(d)(4) and (e)(1).

The Court of Appeals' decision on this issue represents the second question for review in SCDC's instant petition, and SCDC respectfully submits the Court of Appeals' decision presents novel questions of law, as the ALC itself acknowledged in its January 20, 2016 order. (R. p. 1037). ("[Torrence] has asked [the ALC] to determine the prevailing wage based on the record in this case. In doing so, the [ALC] reaches an issue not yet addressed by South Carolina courts."). *See* SCACR 242(b)(3).

III. STATEMENT OF THE CASE

A. TORRENCE'S STEP 1 AND SCDC'S RESPONSE

Torrence voluntarily participated in a federally certified prison industries project operated by SCDC at Evans Correctional Institution between 1997 and 2004 in which ESCOD, Inc. and, later, INSILCO, Inc. participated as the private industry sponsors. (R. p. 129).

Torrence filed a Step 1 grievance form with SCDC dated May 21, 2007 (R. pp. 121 – 27), and he articulated eight (8) claims by which he asserted SCDC unconstitutionally deprived him of his property (i.e., his wages) in an "Addendum" attached to his Step 1 form. Torrence requested the following action in his Step 1: "Payment of wages, withholdings and [interest] as set forth in subsections 1 thru 8 of the Addendum attached hereto." (R. pp. 121 and 123).

By written response dated December 1, 2011 (R. pp. 122 and 128 – 33), SCDC denied the merits of Torrence's wages claims, because the project in which he participated was certified by the federal government (R. p. 132):

> Even if you have a viable claim for relief under § 24-3-430(D), I conclude that SCDC paid you the proper rate of pay for the labor you voluntarily provided to the federal certified project industries project at Evans. In making this conclusion, **I rely upon the guidelines established by the federal government, specifically the United States Department of Justice's Bureau of Justice Administration [known as "BJA"].** BJA published the guidelines application to the PIECP in the Federal Register, specifically 64 FR 17000. **Within these guidelines, BJA declared that**

> **the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects, like the project in which you participated at [Evans], cannot be set below the federal minimum wage.**[2] With the exception of the period of time SCDC paid you "training wages," **SCDC paid you at least the federal minimum wage for the labor you voluntarily provided to the prison industries project it operates at Evans**.[3] [emphasis supplied].

Torrence received SCDC's denial of his Step 1 on December 1, 2011. (R. p. 122).

B. TORRENCE'S STEP 2 APPEAL AND SCDC'S FINAL DECISION

By his December 5, 2011 Step 2 appeal (R. pp. 134 – 44), Torrence challenged SCDC's initial denial of the prison industries wage claims he articulated in his Step 1, and he specifically disputed the rationale by which SCDC denied the merits of the same. (R. pp. 139 – 40).

By its final decision dated February 9, 2012 (R. pp. 134 and 145 – 52), SCDC affirmed its denial of Torrence's Step 1 and likewise denied his Step 2 appeal. In doing so, SCDC rejected the arguments offered by Torrence concerning the merits of his wage claims, and it affirmed the analysis of Torrence's wage claims provided in its response to his Step 1, in which it relied upon the applicable guidelines published by BJA in the Federal Register concerning PIECP projects, such as the project at Evans in which Torrence participated, and the provisions of 18 U.S.C. § 1761, known as the Ashurst-Sumners Act.[4] (R. p. 150).

Torrence received the denial of his Step 2 on February 15, 2012. (R. p. 134).

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[2] SCDC operates three (3) types of projects within its prison industries program: "traditional" projects (*see* S.C. Code Ann. §§ 24-3-320 and 330), "service work" projects (*see* §§ 24-1-290 and 295; *see also* § 24-3-310(3)), and projects certified by the federal government under its "Prison Industries Enhancement Certification Program" ["PIECP"]. SCDC must operate its PIECP projects, such as the project at Evans in which Torrence participated, in conformity with federal law (*see* 18 USC § 1761, the Ashurst-Sumners Act), federal regulations (*see* 64 FR 17000, *et seq*.), and state law (*see* §§ 24-3-40 and 24-3-310, *et seq*.).

[3] SCDC paid Torrence a "training wage" of $0.25 per hour for the first 160 hours of his labor, and $0.75 for the second 160 hours of his labor. SCDC thereafter paid Torrence $5.25 per hour for regular hours and $7.86 per hour for overtime hours. (R. pp. 1036 – 37). SCDC stopped paying "training wages" effective July 1, 1999. *See Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51, 53, n. 1 (S.C. 2004).

[4] *See* note 2 above.

C. TORRENCE'S APPEAL TO THE ALC

On March 2, 2012, Torrence appealed SCDC's denial of his grievance to the ALC, and, by the first two (2) grounds for appeal, he challenged SCDC's conclusion it had paid him wages for his prison industries labor which conformed to the applicable state law, federal law, and federal regulations. (R. p. 56).

D. THE ALC'S JANUARY 20, 2016 ORDER

The first two (2) issues associated with Torrence's appeal identified by the ALC in its January 20, 2016 order concerned the merits of his wage claims (R. p. 1031): (1) whether SCDC improperly failed to pay Torrence the "prevailing wage" during training,[5] and (2) whether SCDC improperly failed to pay Torrence the "prevailing wage" after training.

The ALC concluded SCDC should have paid Torrence the "prevailing wage required by law" during his training period, and it ruled that SCDC's "decision to pay [Torrence] less than the prevailing wage for regular hours and time-and-a-half the prevailing wage for overtime hours during [his training period] is erroneous as a matter of law." (R. p. 1034).

The ALC next considered whether SCDC paid Torrence the "prevailing wage required by law" after the conclusion of his training period, and, in analyzing the term "prevailing wage," the ALC declared as follows (R. pp. 1036 – 37):

> Finally, [SCDC] argues that the $5.25 regular hourly rate conformed to the wage data collected and published by the [South Carolina Employment Security Commission ("ESC")] for the type of work in question. While the Court agrees that verification of wage rates by the ESC is the method of determining the prevailing wage that the federal Guideline and state statutes contemplate, the Court does not agree that the $5.25 regular hourly rate conforms to the ESC data in the record.

[5] *See* note 3 above.

> [Torrence] has asked this Court to determine the prevailing wage based on the record in this case. **In so doing, the Court reaches an issue not yet addressed by South Carolina courts.** While it has been decided that [SCDC] may not pay less than the prevailing wage during training**, no inmate has successfully raised the issue of how the prevailing wage is calculated**.

[emphasis supplied].

The ALC then defined the term "prevailing wage." (R. pp. 1037 – 39).

After doing so, the ALC declared SCDC must pay Torrence "the mean average South Carolina wage of an electronic assembler," which, according to the ALC, equaled $8.82 per hour in 1997 and $9.92 per hour in "1998-1999." (R. pp. 1038 – 39).

Continuing its flawed logic, the ALC ruled that paying Torrence at the rate of $5.25 per hour rather than "the mean average South Carolina wage of an electronic assembler" constituted "an error of law" by SCDC. (R. p. 1039).

While it found some of the evidence in the record "demonstrate[d] that the data necessary to calculate [the mean average South Carolina wage of an electronic assembler] is available from [the South Carolina Department of Employment and Workforce ("DEW")],[6]" the ALC determined the entirety of "the evidence in the record [was] insufficient to calculate [the mean average South Carolina wage of an electronic assembler] for all" the years Torrence participated in the project SCDC operated at Evans (i.e. from 1997 to 2004). (R. p. 1039).

Consequentially, the ALC ordered SCDC to "obtain the data to determine [the mean average South Carolina wage of an electronic assembler] from [DEW]" (R. p. 1039), and it remanded Torrence's claim back to SCDC "to determine the prevailing wage," as the ALC erroneously defined the term, "**for all hours of regular and overtime labor performed by [Torrence] for ESCOD**." [emphasis supplied]. (R. p. 1043).

[6] The South Carolina Department of Employment and Workforce ["DEW"] is the successor state agency to the South Carolina Employment Security Commission ["ESC"].

E. THE COURT OF APPEALS DISMISSED AS INTERLOCUTORY SCDC'S APPEAL OF THE ALC'S RULINGS, AN ACTION THIS COURT LATER REVERSED ON CERTIORARI

By its February 17, 2016 notice of appeal (R. pp. 1044 – 71), SCDC appealed the ALC's rulings to the Court of Appeals. The Court of Appeals, however, dismissed SCDC's appeal as interlocutory. *See Torrence v. S.C. Dep't of Corr.*, Opinion No. 2018-UP-432, -- S.E.2d --, 2018 WL 6199185 (S.C. Ct. App. Nov. 28, 2018).

F. THIS COURT'S MARCH 24, 2021 PUBLISHED DECISION, WHICH REVERSED THE COURT OF APPEALS' DISMISSAL OF SCDC'S APPEAL OF THE ALC'S RULINGS

By a filing dated September 30, 2019, SCDC sought a petition for writ of certiorari from this Court concerning the Court of Appeals' November 28, 2018 decision dismissing as interlocutory SCDC's appeal of the ALC's rulings.

By an order dated March 12, 2020, this Court granted SCDC's petition for writ of certiorari, and, by a March 24, 2021 published decision, this Court reversed the Court of Appeals' November 28, 2018 dismissal of SCDC's appeal of the ALC's rulings. *See Torrence v. S.C. Dep't of Corr.*, 857 S.E.2d 549 (S.C. 2021).

This Court recognized as follows in its March 24, 2021 decision, 857 S.E.2d at 551:

> SCDC asserts it has numerous factual and legal challenges to the decision of the ALC, and the remand mandates, **with no agency discretion**, the exact relief sought by [Torrence]. **SCDC specifically disputes** (1) **that [Torrence] was an employee for purposes of the applicable law**, and (2) **the method of computing [Torrence's] wages mandated by the ALC**. [emphasis supplied].

Later in its March 24, 2021 decision, 857 S.E.2d at 552, this Court again referenced the stripping away of SCDC's discretion by the ALC in its January 20, 2016 order:

> [*Adickes v. Allison & Bratton*, 21 S.C. 245 (1884)] provides an example of a final judgment that nonetheless requires an additional "act to be done." In the case before us, the "act to be done" is a calculation of the prevailing

> wage for Respondent as an employee pursuant to the mandated formulation and method set forth in the ALC order. As in *Adickes*, the remand may be viewed as ministerial or clerical, **for SCDC was divested of any agency discretion**; rather, it was SCDC's sole duty to enter the judgment as ordered by the ALC. Thus, here, the ALC "determin[ed] the rights of the parties" with finality. [*Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Env'l Control***,** 692 S.E.2d 894, 894 (S.C. 2010)]. [emphasis supplied].

IV. AS TO SCDC'S FIRST QUESTION, THE COURT OF APPEALS ERRED BY ADOPTING WHOLESALE THE ALC'S RULING THAT TORRENCE WAS AN EMPLOYEE OF ESCOD

The Court of Appeals declared as follows in the first paragraph of the section from its June 30, 2021 decision styled "FACTS/PROCEDURAL HISTORY", 861 S.E.2d at 38:

> Torrence is currently serving a life sentence without the possibility of parole. Between June 1997 and November 2004, Torrence participated in the prison industries service project (PIP) operated at Evans Correctional Institution. During this time, **Torrence performed work for Insilco Global Industries/ESCOD (ESCOD)**. [emphasis supplied].

Later in the same section, *Id.*, the Court of Appeals described the claims Torrence raised in his Step 1 as follows:

> Specifically, Torrence argued [SCDC] violated state law by paying him an hourly wage below the prevailing wage in the industry. Torrence argued he was entitled to the difference between his wage and the prevailing wage for **his work performed for ESCOD** both during and after his training period as well as for any overtime hours. [emphasis supplied].

In its March 24, 2021 decision reversing the Court of Appeals' dismissal of SCDC's appeal as interlocutory, this Court recognized the dispute between Torrence and SCDC as to whether Torrence was an ESCOD employee, 857 S.E.2d at 551:

> [Torrence] asserted, and SCDC disputed, he was an employee of ESCOD. **The ALC determined [in its January 20, 2016 order that Torrence] was an employee of ESCOD as a matter of law**, finding he "performed [labor] for ESCOD." [R. pp. 1029 and 1043]. The ALC further concluded [in its January 20, 2016 order] that [Torrence] "must be paid the mean average South Carolina wage of an electronic assembler, including

> overtime, for the years **he worked as a harness assembler for ESCOD**." [R. p. 1039]. [emphasis supplied].

The Court of Appeals, however, not only ignored the parties' dispute as to whether Torrence was an ESCOD employee, it totally adopted the ALC's determination in its January 20, 2016 order that Torrence "was an employee of ESCOD as a matter of law."

In doing so, the Court of Appeals committed plain error by determining as a matter of law in its June 30, 2021 decision that Torrence "performed work for" or was in any way an ESCOD employee while he voluntarily participated in the PIECP project operated by SCDC at Evans in which ESCOD served as the private industry sponsor.

Torrence first asserted his employment status in his Step 1 grievance (R. p. 121):

> **I was employed by [ESCOD]**, in the SCDC Private Sector Industries Program at [Evans] from June 1997 thru November, 2004. [footnote omitted]. **During the course of my employment**, I learned that SCDC was withholding certain wages and monies from me in contravention of state law, to which I have a property interest. The S.C. Supreme Court recently ruled in [*Torrence, et al., v. S.C. Dep't of Corr.*, 640 S.E.2d 866 (S.C. 2007)] (filed May 7, 2007) (received by [me] on May 21, 2007), that I must file a Grievance under [SCDC Policy Number GA-01.12]. [footnote omitted]. [emphasis supplied].

In its response to his Step 1 grievance (R. pp. 131 – 32), SCDC rejected Torrence's above-quoted assertions. ("To the extent that you claim in your Step 1 that you worked for or were otherwise 'employed' by ESCOD, I conclude that you never 'worked' for, nor were you ever 'employed' by ESCOD.")

The parties contested whether Torrence was an ESCOD employed before the ALC, and the ALC recognized as much in a footnote from its January 20, 2016 order (R. p. 1035):

> **The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to [Torrence's] labor and his relationship with the [Prison Industries Enhancement Certification Program]**. The Court declines to address in detail the parties' arguments concerning [Torrence's] status as an "employee," since they are not necessary for the disposition of this case. It is true that [Torrence] is not classified as an "employee" of the State. [§ 24-3-430(F)]. [Torrence] is not an "employee" of either the state or the private industry sponsor for purposes of the Payment of Wages Act. [*Williams v. S.C. Dep't. of Corr.*, 641 S.E.2d 885 (2007)]. Nor is [Torrence] an "employee" for purposes of unemployment benefits. [§ 24-3-430(G)]. Yet, it is also true that for some other purposes [Torrence] has the same rights and responsibilities afforded to employees. [Torrence] is required to pay state and federal income taxes and Social Security taxes. [§ 24-3-40(A)(6)]. [Torrence] is entitled to worker's compensation benefits for on-the-job injuries. [18 U.S.C. § 1761(e)(3)]. None of these rights and duties (or lack thereof) directly bear on the disposition of this case. [emphasis supplied].

While it extensively included verbatim passages from the ALC's January 20, 2016 order in its June 30, 2021 decision, the Court of Appeals made no mention of the dispute as to whether Torrence was an employee of ESCOD, and it overlooked the above-quoted footnote from the ALC's January 20, 2016 order.

By contrast, this Court clearly recognized the parties' dispute in its March 24, 2021 published decision, 857 S.E.2d at 551:

> SCDC asserts it has numerous factual and legal challenges to the decision of the ALC, and the remand mandates, with no agency discretion, the exact relief sought by [Torrence]. **SCDC specifically disputes (1) that [Torrence] was an employee for purposes of the applicable law, and (2) the method of computing [Torrence's] wages mandated by the ALC**. SCDC correctly views the ALC order as a final judgment and the remand to the agency as essentially ministerial to execute the judgment ordered by the ALC. [emphasis supplied].

Moreover, this Court, 857 S.E.2d at 551, n. 3, recognized the above-quoted footnote from the ALC's January 20, 2016 order in its March 24, 2021 published decision:

> The [ALC's January 20, 2016] order includes a footnote which purports to "decline[ ] to address" [Torrence's] status as an employee. The presence of the confusing footnote does not alter the result on appealability, **for the**

> **unmistakable award to [Torrence] of a defined method for calculating the prevailing wage removes any question that *the ALC ruled with finality in favor* of [Torrence] on the employee question**. [italicized and bold emphasis supplied].

The ruling in which the ALC declared Torrence "worked as a harness assembler for ESCOD" appeared in the following passage from its January 20, 2016 order (R. p. 1039):

> [Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD*. [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record**. [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

This Court acknowledged the latter half of the above-quoted passage from the ALC's January 20, 2016 order in its March 24, 2021 decision, 857 S.E.2d at 551:

> Additional findings from the [ALC's January 20, 2016] order further confirm SCDC's contention that the ALC order constitutes a final judgment, including:
>
> > Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record [R. p. 1039] [and] IT IS FURTHER ORDERED that [SCDC] disburse, in accordance with [§] 24-3-40, the difference between the amounts previously disbursed and the prevailing wage. This disbursement should be done immediately upon determination of the prevailing wage, but not later than July 1, 2016. [R. p. 1043]. [footnote quoted above].

The Court of Appeals' complete adoption of the ALC's ruling that Torrence was an employee of ESCOD runs afoul of the guidelines published by the United States Department of Justice's Bureau of Justice Administrative ["BJA"]. These guidelines apply to projects certified by the federal government under its PIECP, inclulding the project at Evans in which Torrence participated.

The operative guidelines, 64 FR 17007, clearly state "[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." [emphasis supplied].

Additionally, a key federal circuit court decision also negates the Court of Appeals' adoption of the ALC's ruling that Torrence was an employee of ESCOD. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("Both public agencies and private firms have employees. **But prisoners are not employees**."). [emphasis supplied].

The Court of Appeals' adoption of the ALC's ruling conflicts with *its own decision* in *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010).

In *Cartrette*, 694 S.E.2d at 21, the Court of Appeals relied upon *this Court's decision* in *Williams* when recognizing the following:

> Our supreme court has held the [Fair Labor Standards Act ("FLSA")] does not extend to inmate workers because, for purposes of payment of wages, ***inmate workers are not employees of [private industry] sponsors***. [*Williams*, 641 S.E.2d at 888]. **Other courts, including the Federal Court of Appeals for the Fourth Circuit, have also declined to extend the protections of the FLSA and state labor statutes to inmates**. *See, e.g., Harker v. State Use Indus.*, 990 F.2d 131, 135 (4th Cir. 1993). [italicized and bold emphasis supplied].

In *Cartrette*, 694 S.E.2d at 21, the Court of Appeals then invoked another one of this Court's decisions, specifically, *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2014), as it continued discussing the status of inmates, like Torrence, who participate in SCDC prison industries projects:

> Nonetheless, South Carolina law requires that **inmate workers** in [the prison industries program] enjoy pay and working conditions **comparable** to those enjoyed by non-inmate workers. According to our supreme court, the overall purpose of these statutes "is to prevent unfair competition." [*Adkins*, 602 S.E.2d at 54]. [emphasis supplied].

Later in *Cartrette*, 694 S.E.2d at 23, the Court of Appeals *again* relied upon *Williams* when it ruled the inmate was not an employee of the private industry sponsor:

> As to whether Cartrette was an employee of the private sponsor: [§ 24-3-40(A)] ("Unless otherwise provided by law, the employer of a prisoner authorized to work ... in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages [SCDC]."); [*Williams*, 641 S.E.2d at 887] (holding **a prison industries program sponsor is not an employer of inmates** because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue). [emphasis supplied].

In so ruling, the Court of Appeals affirmed SCDC's determination that the inmate in *Cartrette* was not an employee of the private industry sponsor that participated in the prison industries project under review. 694 S.E.2d at 23.

In its June 30, 2021 decision, 861 S.E.2d at 44, the Court of Appeals acknowledged *Cartrette*,[7] but it completely overlooked *Williams*, in which this Court declared a private industry sponsor, like ESCOD, "is not an employer of inmates."

SCDC respectfully asserts such plain error by the Court of Appeals, namely its adoption of the ALC's determination that Torrence was an employee of ESCOD as a matter of law, conflicts with this Court's decision in *Williams*, and, accordingly, sufficient grounds exist under SCACR 242(b)(3) for this Court to grant certiorari on this question.

V. OUR STATE'S EMPLOYMENT SECURITY COMISSION DID NOT USE OR QUANTIFY THE TERM "PREVAILING WAGE"

In the section of its June 30, 2021 decision styled "FACTS/PROCEDURAL HISTORY," 861 S.E.2d at 40, the Court of Appeals chronicled the ALC's January 20, 2016 order as follows:

[7] The Court of Appeals also overlooked its own decision in *S.C. Dep't of Corr. v. Tomlin*, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010) (overruled on other grounds by *Allison v. W.L. Gore & Assoc.*, 714 S.E.2d 547 (S.C. 2011)), the companion case to *Cartrette*, in which it issued the identical ruling on this issue.

> On January [20], 2016,[8] the ALC issued its order addressing the merits of Torrence's claims. In its order, the ALC found [SCDC] erred by failing to pay Torrence the prevailing wage for his labor pre- and post-training, stating "there is no construction of law under which [SCDC] could pay [Torrence] less than the prevailing wage." The ALC further stated, "The question then becomes, what is the 'prevailing wage' that must be paid for all hours worked in both the training period and thereafter?" Addressing this question, the ALC stated,
>
> > **The [PIP] Guideline ... states that the prevailing wage must be obtained from the state agency that determines wage rates.... In South Carolina, this agency would have been the Employment Security Commission (ESC) at the times relevant to this case, but would now be the Department of Employment and Workforce (DEW)**.

[emphasis supplied].

The Court of Appeals continued chronicling the ALC's January 20, 2016 order as follows, 861 S.E.2d at 40:

> The ALC continued,
>
> > [SCDC] cites a [c]ircuit [c]ourt order in another case as support for the theory that [§ 24-3-410], and not [§ 24-3-430], governs the wage standard applicable in this case.[9] Not only is this [c]ircuit [c]ourt order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This [c]ourt declines to further address the argument that only [§ 24-3-410] applies,[10] noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under [§] 24-3-430.
>
> The ALC continued, "**While the [c]ourt agrees that verification of wage rates by the ESC is the method for determining the prevailing wage that the federal [g]uideline and state statutes contemplate**, the [c]ourt does not agree that the $5.25 regular hourly rate conforms to the ESC data in the record." The ALC stated,

[8] The Court of Appeals mistakenly stated the ALC issued its second order on January 21, 2016.

[9] *See Adkins, et al., v. S.C. Dep't of Corr.*, Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002), discussed below in Section VI.

[10] Unlike the ALC, the Court of Appeals addressed § 24-3-410(B)(7) in its June 30, 2021 decision.

> **[Torrence] has asked this [c]ourt to determine the prevailing wage based on the record in this case**. In so doing, the [c]ourt reaches an issue not yet addressed by South Carolina courts. While it has been decided that the Department may not pay less than the prevailing wage during training, no inmate has successfully raised the issue of how the prevailing wage is calculated.

[emphasis supplied].

The Court of Appeals finished chronicling the ALC's January 20, 2016 order as follows, 861 S.E.2d at 40 – 41:

> In calculating the prevailing wage, the ALC interpreted [§ 24-3-430]. The court stated,
>
> > The Merriam-Webster Dictionary defines "prevail" as "to be frequent: predominate." ... Predominate is defined as "to hold advantage in numbers or quantity." ... **The affidavit in the record of Rebecca Eleazor of the ESC supports the conclusion that the "average" wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage.** The [c]ourt therefore concludes that the "prevailing wage" *equals the mean average wage* for an occupation.
> >
> > **The [PIP] Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates ....** Further, the Guideline states that the prevailing wage must be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers and that no other cost variables may be taken into consideration.... In referring to the ESC data in the record, the [c]ourt concludes that "locality" means the state of South Carolina. Further, the [c]ourt concludes that the data necessary to determine the mean average wage for "work of a similar nature" as contemplated by the state statutes and federal guidelines **may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW**.
>
> (emphasis added). Based on the aforementioned analysis, the ALC found, "The record simply d[id] not support a finding that the mean average wage for an assembler [was] as low as the $5.25 paid [to Torrence]"; rather, the record showed the mean average wage for an electronic assembler was $8.82 in 1997 and $9.92 for 1998 and 1999. The ALC additionally found "the evidence in the record [was] insufficient to calculate the wage for all

> of the relevant years," specifically the years 2000 through 2004. It therefore ordered Torrence's claim be remanded to [SCDC] to determine the prevailing wage for the remaining years of Torrence's labor.

[emphasis supplied].

By unhesitatingly adopting the ALC's analysis, the Court of Appeals, as this Court observed in its March 24, 2021 decision, 857 S.E.2d at 551, n. 3, awarded Torrence "a defined method for calculating the prevailing wage."

By doing so, however, the Court of Appeals erroneously embraced a result which runs contrary to the fact that our state's ESC, the predecessor agency to our state's DEW, did not define or even use the term "prevailing wage."

As reflected above, the Court of Appeals adopted in its June 30, 2021 decision the following factual conclusion articulated by the ALC in its January 20, 2016 order (R. p. 1038): "**[t]he affidavit in the record of Rebecca Eleazor** of the ESC supports the conclusion that the 'average' wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage." [emphasis supplied].

Contrary to the ALC's above-quoted representation, adopted by the Court of Appeals, no affidavit from Ms. Eleazor appears in the record.

Instead, only deposition testimony from Ms. Eleazor appears in the record, and she testified on August 10, 2004 during the litigation of the declaratory judgment action filed in circuit court in which Torrence initially pressed his prison industries pay claims. (R. pp. 533 and 604 – 39). *See Torrence, et al., v. S.C. Dep't of Corr.*, Case No. 2001-CP-40-3409 (S.C. Cir. Ct. May 31, 2005).[11]

[11] The circuit court granted SCDC's summary judgment motion, and this Court affirmed in result the circuit court's grant of summary judgment. *See Torrence, et al., v. S.C. Dep't of Corr.*, 646 S.E.2d 866 (S.C. 2007).

Not only did it mischaracterize the method by which she offered her testimony, the ALC misapprehended the substance of Ms. Eleazor's testimony. By adopting the ALC's analysis, the Court of Appeals likewise misapprehended the substance of Ms. Eleazor's testimony.

At her August 10, 2004 deposition, Ms. Eleazor testified she worked "with the [ESC's Occupation Employment Statistics Program] where we survey employers to collect occupation, employment, and wage data." (R. p. 605). Ms. Eleazor further testified **the ESC**, the agency *exclusively* tasked under BJA guidelines (i.e., 64 FR 170009 – 10(B)) to verify the "prevailing wage," **does "not provide or publish a wage that's called prevailing wage," nor does it "have a wage classification called prevailing wage."** (R. p. 617). [emphasis supplied].

By its January 20, 2016 order, the ALC erroneously did something the ESC itself did not do, namely declare a precise hourly rate of pay for a specified job as "the prevailing wage."

Upon adopting the ALC's flawed analysis, the Court of Appeals erroneously declared a precise hourly rate of pay for a specified job as "the prevailing wage," which the ESC itself did not do. SCDC respectfully asserts such error by the Court of Appeals directly contributed to its erroneous adoption of the ALC's flawed rulings which defined and then determined the "prevailing wage" SCDC should have paid Torrence for his prison industries labor.

VI. AS TO SCDC'S SECOND QUESTION, THE COURT OF APPEALS ERRED BY ADOPTING WHOLESALE THE ALC'S RULINGS DEFINING AND DETERMINING THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR

At the outset of its analysis concerning the ALC's decision to calculate the prevailing wage, the Court of Appeals observed as follows, 861 S.E.2d at 43:

> [SCDC] argues the ALC erred by calculating the prevailing wage for Torrence's labor performed through PIP because it "misapprehended the applicable state law, federal law, and federal regulations." Specifically, [SCDC] asserts [§] 24-3-410(B)(7) is the controlling authority over inmate wages received through PIP, rather than [§] 24-3-430(D). Arguing the

> ALC erroneously ignored the analysis of the circuit court in [*Adkins, et al., v. S.C. Dep't of Corr.*, Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002)],[12] [SCDC] urges this court to adopt the circuit court's holding, which found pursuant to [§] 24-3-410(B)(7), inmates were only entitled to a comparable wage in the industry and not the prevailing wage. [SCDC] therefore asserts the wage Torrence received complied with South Carolina law because it was ten cents over the federal minimum wage for similar labor. **[SCDC] further argues the ALC erred in its calculation of the prevailing wage because the record did not contain sufficient evidence to support the calculation**. We disagree. [emphasis supplied].

Before embarking upon an analysis of the various statutes applicable to prison industries projects operated by SCDC, the Court of Appeals observed as follows, 861 S.E.2d at 43:

> Preliminarily, we find [SCDC's] assertion that [§] 24-3-410(B)(7) preemptively governs inmate wages earned through PIP is a misinterpretation of the law.

After comparing the provisions of § 24-3-410, specifically §§ 24-3-410(A) and (B)(7), and 24-3-430(D), the Court of Appeals determined as follows, 861 S.E.2d at 44:

> Although both statutes refer to inmate wages earned through PIP, we find [§] 24-3-430(D) is the controlling authority, as it directly addresses the rate of inmate wages. [*See Bruning v. S.C. Dep't of Health and Env't Control*, 795 S.E.2d 290, 294 (S.C. Ct. App. 2016)] ("Generally, '[a] specific statutory provision prevails over a more general one.'" (quoting [*Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 511 S.E.2d 355, 357 (S.C. 1999)])).

The Court of Appeals then continued its analysis, 861 S.E.2d at 44:

> However, we find [§] 24-3-410 and other sections within Article 3 still bear importance in determining the legislative intent behind the statutes governing PIP. [*See Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 670 S.E.2d 674, 678 (S.C. Ct. App. 2008)] ("When statutes address the same subject matter, they are *in pari materia[ ]* and must be construed together, if possible, to produce a single, harmonious result."). In comparing these sections with our precedent, it is clear the legislature intended to provide inmates with employment opportunities that would not displace workers in the private sector. *See* [§ 24-3-315] ("The director must determine prior to using inmate labor in a [PIP] project that it will not displace employed workers, ... and that the rates of pay and other conditions of employment are not less than those paid and

[12] *See* note 9 above.

> provided for work of [a] similar nature in the locality in which the work is performed."); [§ 24-3-430(E)] ("Inmate participation in [PIP] may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services."); *see also* [*Cartrette*, 694 S.E.2d at 22] (holding "[f]ailure of [SCDC's] contracts with PIP sponsors to provide inmate workers with time-and-a-half pay for overtime hours when their non-inmate counterparts receive it would create an impermissible and unfair advantage for inmate labor over private labor"). Therefore, we find the legislature created [§] 24-3-430(D) as a safeguard to prevent inmates from becoming a cheaper alternative to their counterparts in the private realm. Accordingly, we find the pivotal inquiry in the instant case becomes how the prevailing wage for a particular industry is calculated.

While acknowledging existence of § 24-3-410, the Court of Appeals did not cite or examine any provision thereof in the above-quoted paragraph or, for that matter, the remainder of its decision.

The Court of Appeals, 861 S.E.2d at 44 – 45, after acknowledging that "Article 3 fails to define the term 'prevailing wage,'" then circled back to adopt the identical flawed methodology used by the ALC in its January 20, 2016 order (R. p. 1038):

> According to the *Merriam-Webster Dictionary*, "prevailing" means to be frequent or predominant. It further defines "predominant" as being most frequent or common. Therefore, based on a plain reading of [§] 24-3-430(D) and its legislative intent, we agree with the ALC's interpretation that to determine the prevailing wage for an industry, [SCDC] must determine the mean average wage for the occupation at issue using records and data from DEW. *See Average*, *Black's Law Dictionary* (11th ed. 2019) (defining "average" as "[t]he ordinary or typical level; the norm"); *Average*, *Merriam-Webster Dictionary* (defining "average" as a level typical of a group, class, or series). Accordingly, we affirm the ALC's calculation of the prevailing wage for the years 1997 to 1999 and its decision to remand Torrence's grievance to [SCDC] for the calculation of the prevailing wage for the years 2000 to 2004.

The ALC's decisions to define and calculate the "prevailing wage" SCDC should have paid Torrence for the labor he provided to the prison industries PIECP project at Evans were contrary to the facts in the record. The Court of Appeals adopted the ALC's erroneous factual

determinations and then affirmed the rulings by which ALC both defined and calculated the "prevailing wage" purportedly owed to Torrence.

Thus, both the ALC and the Court of Appeals fundamentally misapprehended Torrence's employment status by ruling as a matter of law that Torrence was an employee of ESCOD. Both the ALC and the Court of Appeals fundamentally also misapprehended the substantive impact of Rebecca Eleazor's deposition testimony.

Therefore, the foundation of the Court of Appeals' rulings affirming the ALC's decisions to both define and calculate the "prevailing wage" SCDC should have paid Torrence for his prison industries labor is, like the foundation of the ALC's decisions themselves, imbued with evidentiary error.

Moreover, the Court of Appeals' June 30, 2021 decision sounds out one loud discordant note: no evidence exists in the record to reflect what ESCOD actually paid their employees during the same period in which Torrence participated in the PIECP project SCDC operated at Torrence. Thus, the ALC's calculation of the "prevailing wage" SCDC should have paid Torrence during 1997, 1998, and 1999, adopted by the Court of Appeals in its June 30, 2021 decision, raises the very real possibility that the ALC fashioned a "prevailing wage" for Torrence that exceeded the actual hourly wage ESCOD paid their non-inmate workers. No state statute, federal statute or federal regulation even contemplates such an absurd result.

The Court of Appeals' June 30, 2021 decision sounds out yet another loud discordant note: it affirmed the ALC's decision to both define and quantify a "prevailing wage" when the ESC, the agency tasked with doing so, did neither.

The circuit court's order in *Adkins* (R. pp. 860 – 91), which the Court of Appeals acknowledged and which the ALC purposefully overlooked, avoided this fate as acknowledged by the Court of Appeals in its June 30, 2021 decision, 861 S.E.2d at 43:

> Arguing the ALC erroneously ignored the analysis of the circuit court in *Adkins*, [SCDC] urges this court to adopt the circuit court's holding, which found pursuant to [§] 24-3-410(B)(7), inmates were only entitled to a comparable wage in the industry and not the prevailing wage.

Section 24-3-410 is entitled "Sale of prison-made products on open market generally prohibited; penalties," and § 24-3-410(A) makes it "unlawful to sell or offer for sale on the open market of this State articles or products manufactured or produced wholly or in part by inmates in this or another state."

Under § 24-3-410(B)(7), however, the prohibition articulated in § 24-3-410(A) does not apply to "products sold intrastate or interstate produced by [SCDC inmates] employed in a federally certified private sector/prison industries program if the inmate workers participate voluntarily, **receive comparable wages**, and the work does not displace employed workers." [emphasis supplied].

Thus, the "comparable wages" provision from § 24-3-410(B)(7) afforded SCDC the discretion to fashion an hourly wage for Torrence's prison industries labor which conformed to BJA's applicable guideline, as well as wage range(s) published by the ESC, which did not define or quantify a "prevailing wage."

The circuit court in *Adkins* recognized as much (R. pp. 877 – 81 and 886 – 88), and, importantly, this Court did not reject, overrule, or repudiate the circuit court's logic, analysis, or rulings in its decision affirming *Adkins* in result. 602 S.E.2d 51, 53 and 55, n. 6.

Ultimately, the ALC's rulings defining and determining the "prevailing wage" SCDC should have paid Torrence for his prison industries labor, which the Court of Appeals adopted in

its June 30, 2021 decision despite their flawed underpinnings, present novel questions of law, as the ALC itself acknowledged in its January 20, 2016 order. (R. p. 1037). ("[Torrence] has asked [the ALC] to determine the prevailing wage based on the record in this case. In doing so, the [ALC] reaches an issue not yet addressed by South Carolina courts."). Accordingly, sufficient grounds exist under SCACR 242(b)(1) for this Court to grant certiorari on this question.

VII. CONCLUSION

SCDC respectfully asserts its above-provided analysis demonstrates sufficient grounds exist under the provisions of S.C. Code Ann. §§ 1-23-610(B)(d), (B)(e), and (B)(f) to reverse the ALC's two (2) rulings and, by extension, the Court of Appeals' adoption of them in its June 30, 2021 decision.

Therefore, for all the foregoing reasons, this Court should grant, under the provisions of SCACR 242(b), SCDC's instant petition for writ of certiorari and review the two (2) questions SCDC presented herein.

RESPECTFULLY SUBMITTED:

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