

RECEIVED

OCT 29 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE 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.

**RESPONDENT'S RETURN
TO PETITION FOR WRIT OF CERTIORARI
BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

Thomas J. Torrence
#094651
Perry Correctional Institution 3B-102
430 Oaklawn Road
Pelzer, South Carolina 29669

RESPONDENT, *Pro se*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. STATEMENT OF QUESTIONS ON CERTIORARI	1
II. STATEMENT OF THE CASE	3
III. RESPONDENT’S REPLY / COUNTER ARGUMENTS	5
A. SCDC DID NOT PROPERLY RAISE OR PRESERVE THE “EMPLOYEE” ISSUE BEFORE THE COURT OF APPEALS AND THUS WAS NOT PRESERVED ON PETITION FOR REHEARING OR ON WRIT OF CERTIORARI	5
B. THE COURT OF APPEALS DID NOT ADOPT A RULING OF THE ALC WHICH SCDC MISCHARACTERIZES HELD TORRENCE WAS AN “EMPLOYEE” OF ESCOD WHILE PARTICIPATING IN THE PRISON INDUSTRIES PROJECT SCDC OPERATED AT EVANS	7
C. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE ALC RULING AND METHODOLOGY DEFINING AND DETERMINING THE “PREVAILING WAGE” TORRENCE IS ENTITLED TO RECEIVE FOR HIS PRISON INDUSTRIES LABOR ...	11
D. SOUTH CAROLINA STATUTES, OUR DEPARTMENT OF EMPLOYMENT AND WORKFORCE, AND THE UNITED STATES DEPARTMENT OF LABOR USE AND QUANTIFY THE TERM “PREVAILING WAGE”	16
IV. CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Adkins v. S.C. Dep't. of Corr.</i> 602 S.E.2d 51 (S.C. 2004)	9
<i>Allen v. Pinnacle Health Care Systems, LLC,</i> 715 S.E.2d 362, 367 (S.C. App. 2011)	6
<i>Arnold v. Carolina Power & Light Co..</i> 167 S.E.2d 234 (S.C. 1933)	7
<i>Brown v. Odom,</i> 823 S.E.2d 183 (S.C. App. 2019))	6
<i>Herron v. Century BMW</i> 719 S.E.2d 640 (2011)	6
<i>Kennedy v. S. C. Retirement System</i> 564 S.E.2d 322 (2001)	7
<i>Moodie v. Kiawah Island Inn, Co., LLC</i> 124 F.Supp.2d 711 (2015)	16
<i>Pee v. AVM,</i> 543 S.E.2d 232 (S.C. App. 2001)	15
<i>Purdy v. Moise,</i> 75 S.E.2d 605 (S.C. 1953)	15
<i>S.C. Dep't. of Corr. v. Cartrette,</i> 694 S.E.2d 18 (S.C. App. 2010)	7, 11-12, 15
<i>State v. Bridgers,</i> 495 S.E.2d 196 (S.C. App. 2010)	15
<i>Thomas J. Torrence v. S.C. Dep't. of Corr.</i> 12-ALJ-04-00143-AP (aLJ, January 20, 2016)	1
<i>Torrence, et al. v. S.C. Dep't. of Corr.</i> 646 S.E.2d 866 (S.C. 2007)	12
<i>Thomas J. Torrence v. S.C. Dep't. of Corr.</i> 2018-UP-432 (S.C. App. 11/28/18) Reversed and remanded 857 S.E.2d 549 (S.C 2021)	5

<i>Thomas J. Torrence v. S.C. Dep't. of Corr.</i> 857 S.E.2d 549 (S.C. 2021)	5, 8, 10
<i>Thomas J. Torrence v. S.C. Dep't. of Corr.</i> 861 S.E.2d 36 (S.C. App. 2021)	1, 2
<i>Wicker v. S.C. Dep't. of Corr.</i> 602 S.E.2d 56 (S.C. 2004)	10, 15
<i>Williams, et al. v. S.C. Dep't. of Corr.</i> 641 S.E.2d 885 (S.C. 2007)	8

STATUTES

18 U.S.C. §1761	3, 4, 12
18 U.S.C. §1761(c)	3
18 U.S.C. §1761(c)(2)	4, 12
18 U.S.C. §1761(c)(3)	9
18 U.S.C. §1761(c)(3)	9
S.C. Code Ann. §24-3-40	3, 5, 9
S.C. Code Ann. §24-3-40(A)	9
S.C. Code Ann. §24-3-40(A)(2)(b)	9
S.C. Code Ann. §24-3-315	3, 5, 9, 12, 14
S.C. Code Ann. §24-3-410(B)(7)	12, 17
S.C. Code Ann. §24-3-430	3, 5, 10, 12, 17
S.C. Code Ann. §24-3-430(D)	12, 14-15
S.C. Code Ann. §24-3-430(F)	8
S.C. Code Ann. §24-3-430(H)	9

AGENCY REGULATIONS

20 C.F.R. § 655.10	16
--------------------------	----

20 C.F.R. § 656.40	16
24C.F.R. § 965.01	16
24 C.F.R. § 655.402	16
29 C.F.R. § 1.5	17
64 F.R. 17000 <i>et seq</i>	3, 4, 12, 13, 14, 17
S.C. Code of State Regulations Ann. R. 47-1	18
S.C. Code of State Regulations Ann. R. 47-1.B.3	18
S.C. Code of State Regulations Ann. R. 47-1.B.4	18

OTHER AUTHORITIES

<i>AGREEMENT</i> (March 3, 2001) (Parties: S.C. Department of Corrections and Insilco Technologies)	8, 9, 14
Public Law 90-351, Title 1, § 19(a)	3
South Carolina Appellate Court Rule 208(b)(1)(B)	6
South Carolina Appellate Court Rule 211	6
South Carolina Appellate Court Rule 221(a)	6
South Carolina Appellate Court Rule 242(b)(3)	3
South Carolina Appellate Court Rule 242(d)(2)	7
South Carolina Appellate Court Rule 242(F)	1
South Carolina Attorney General Opinion 2002 WL 31728841 (10/17/02)	17
S.C. Litigation Forms & Analysis § 25:6.50	18
S.C. 1993 Act. No. 181, § 393	3
S.C. 1993 Act. No. 181, § 409	3
S.C. 1995 Act. No. 7, Part II, § 43	3
S.C. 1999 Act. No. 68, § 2	3

Under authority of South Carolina Appellate Court Rule [“SCACR”] 242(F), Thomas J. Torrence [“Respondent” or “Torrence”] respectfully enters a Return in this Court to the South Carolina Department of Correction’s (“DOC” or “SCDC”) September 23, 2021 petition for a writ of certiorari to the June 30, 2021 decision below of the Court of Appeals.

I. STATEMENT OF QUESTIONS PRESENTED ON CERTIORARI

The Court of Appeals denied the appeal of SCDC, styled as *Thomas J. Torrence, Respondent v. S.C. Dep’t. of Corr., Appellant*, 861 S.E.2d 36 (S.C. App. June 30, 2021). By its June 30, 2021 decision, the Court of Appeals affirmed both orders of the Administrative Law Court (“ALC”) from January 30, 2014 (R.. pp. 399-408) and January 20, 2016 (R. pp. 1036-50). The Court of Appeals denied the DOC’s petition for rehearing in an order dated August 4, 2021. SCDC’s petition for rehearing introduced for the first time on appeal the enumerated issue of the “employee status.”

The ALC’s January 20, 2016 order reversed and remanded the DOC’s final agency decisions concerning private sector prison industries prevailing wage claims that were errors of law, affected the substantial rights of Respondent, violated state and federal statutory law, and were supported by substantial evidence in the record. The ALC correctly applied statutory methodology to address the issues and remanded these matters to the DOC with instructions.

The DOC has asked this Court to reverse the Court of Appeals’ June 30, 2021 decision in its September 23, 2021 Brief on Petition for Writ of Certiorari (“Cert.”) p. 1, Questions IV, V & VI. SCDC’s petition includes Question IV, which was not preserved for the DOC’s petition for rehearing and thus, is not properly before this Court on certiorari review.

Torrence respectfully urges this Court to dismiss SCDC’s first Question (“IV”) as procedurally barred and deny the writ as to the remaining questions. Torrence respectfully contends and presents the following four (4) Questions in response:

- A. IN REGARDS TO SCDC’S FIRST QUESTION, THE “EMPLOYEE” STATUS OF TORRENCE WAS NOT RAISED OR PRESERVED IN THE COURT OF APPEALS.**
- B. IN REGARDS TO SCDC’S FIRST QUESTION, SCDC MISCHARACTERIZED THAT THE COURT OF APPEALS HELD TORRENCE WAS AN EMPLOYEE OF THE STATE OR PRIVATE SECTOR SPONSOR CONTRARY TO STATUTORY LAW OR SOUTH CAROLINA PRECEDENT.**
- C. IN REGARDS TO SCDC’S SECOND QUESTION, THE COURT OF APPEALS CORRECTLY AFFIRMED THE ALC METHODOLOGY DEFINING AND DETERMINING THE PREVAILING WAGE.**
- D. S.C. STATUTORY LAW, AGENCY REGULATIONS AND THE U.S. DEPARTMENT OF LABOR UTILIZE AND QUANTIFY THE TERM “PREVAILING WAGE”.**

SCDC has raised three (3) questions in their petition for certiorari. The first question (“IV”) is not properly before this Court as SCDC neglected to raise it to the Court of Appeals in either its 2019 initial (R. p. 1084) or final (R. p. 1202) briefs. The issue was presented for the first time on the petition for rehearing. (R. p. 1234) Torrence contends that the June 30, 2021 decision of the Court of Appeals¹ applied statutory language and labor environment nomenclature which does not, as SCDC implied, conflict with South Carolina precedent on prisoner labor status. Even though the issue as presented is outside the parameters of the South Carolina Appellate Court Rules and South Carolina precedent controlling preservation rules, Respondent will respond out of an abundance of caution.

SCDC’s second question suggests that the South Carolina Employment Security Commission does not define or quantify the term “prevailing wage” and challenges deposition testimony to controvert the record here, further delaying finality and relief. Torrence will show

¹ 861 S.E.2d 36

SCDC's assertion is a misstatement of applicable United States and South Carolina statutory and regulatory law as well as the precedent of our Appellate Courts.

SCDC's third question challenges the Court of Appeals' analysis and holding applying statutory guidance to define and calculate the prevailing wage. This question is an argument in direct contravention of the intent of Congress and our General Assembly, demonstrating the consistent abuse of discretion that resulted in the initiation of this agency grievance for relief.

SCDC suggests that the ALC's acknowledgement of Respondent's claim for calculating the prevailing wage is a novel issue of law under SCACR 242(b)(3). Torrence contends that the methodology of calculating the prevailing wage has been United States and South Carolina law for over twenty-five (25) years,² and has been considered by our Courts previously but that SCDC is now being scrutinized to adhere to the mandatory nature and methodology of the prevailing wage statutes.

Torrence respectfully submits that this Court may affirm the June 30, 2021 decision of the Court of Appeals based on any ground in the Record.

II. STATEMENT OF THE CASE

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

Torrence accepts DOC's STATEMENT, § III, A., Cert., pp. 3-4; with exception that SCDC incorrectly applied the cited federal guidelines.

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

Torrence accepts DOC's STATEMENT, § III, B., Cert., p. 4; with exception that SCDC incorrectly applied the cited federal guidelines.

C. TORRENCE'S APPEAL TO THE ALC

Torrence accepts DOC's STATEMENT, § III, C., Cert., p. 5.

² S.C. Code Ann. §§ 24-3-40 (1993 Act No. 181, § 393); 24-3-315 (1993 Act No. 181, § 409); 24-4-430 (1995 Act No. 7, Part II, §43); 18 U.S.C. § 1761 (Pub.L. 90-351)

D. THE ALC'S JANUARY 20, 2016 ORDER

Torrence accepts the first three (3) paragraphs of DOC's STATEMENT, § III, D., Cert., pp. 5-6; with exception that:

The ALC defined the term "prevailing wage" (R. pp. 1037-1039). After doing so, the ALC declared SCDC must pay Torrence "the mean average South Carolina wage of an electronic assembler," which was extrapolated from the Employment Security Commission ("ESC")³ data contained in the Record⁴ (R. pp. 0640, 0647-48, 0650-51, 0653-54). That analysis comported to federal and state guidelines. SCDC intentionally elected to illegally ignore the annual wage verifications received from the ESC, *id.*

The ALC ordered SCDC to "obtain the data to determine [the mean average wage of an electronic assembler] from [DEW]" (R. p. 1039)⁵, and it remanded Torrence's claim back to SCDC "to determine the prevailing wage" as correctly defined by the ALC," for all hours of regular and overtime labor performed by [Torrence] for ESCOD." (R. p. 1043).

E. THE COURT OF APPEALS' DISMISSAL OF SCDC'S 2016 APPEAL AS INTERLOCUTORY.

Torrence accepts DOC's STATEMENT, § III, E., Cert., p. 7.

F. THIS COURT'S MARCH 24, 2021 DECISION WHICH REVERSED ON CERTIORARI THE COURT OF APPEALS' 2018 UNPUBLISHED OPINION NO. 2018-UP-432.

Torrence accepts DOC's STATEMENT, § III, F., Cert., p. 7 and the two (2) cited provisions by this Court's March 24, 2021 decision. There was disagreement over Torrence's use of the term "employed,"⁶ as well of the use of the term by the ALC and the Court of Appeals

³ Reorganized as the Department of Employment and Workforce ("DEW").

⁴ Calculation methodology mandated by 18 USC § 1761(c)(2) and 64 FR 17009-10 (Mandatory Program Criteria, Inmate Wages, Prevailing Wage Verification)

⁵ Available to any party at any time: (OES Code 93114, later 51-2022) http://www.bls.gov/oes/current/oes_sc.htm

⁶ Torrence's Step 2 Grievance Appeal:

in their opinions. Torrence respectfully submits that the term “employed” is a United States and South Carolina statutory term long utilized in application of the PIECP program. The January 2016 ALC order divested SCDC of discretion where SCDC has consistently and for decades abused its exercise of discretion by failing to comply with the annual wage verifications and by not paying the verified prevailing wage as mandated.

III. RESPONDENT’S REPLY / COUNTER ARGUMENTS

A. IN REGARDS TO SCDC’S FIRST QUESTION, THE “EMPLOYEE” STATUS OF TORRENCE WAS NOT RAISED OR PRESERVED IN THE ALC OR IN THE COURT OF APPEALS.

SCDC has advanced a claim that is procedurally barred as it was not properly raised in the Court of Appeals (R. pp. 1084; 1202) until SCDC’s January 10, 2019 petition for rehearing (R. p. 1234), thus by extension of the SCACRs, is not ripe for certiorari review.

Although this Court’s March 24, 2021 decision,⁷ which reversed and remanded the November 28, 2018 decision of the Court of Appeals,⁸ noted the first issue raised by SCDC was whether “Torrence was an employee for purposes of the applicable law;” Torrence respectfully suggests that this issue is not proper before this Court.

Torrence originally addressed this matter as a description of his labor situation in his Step 2 Grievance Appeal⁹. Although the parties addressed the term / label in the ALC (R. pp. 0732 [Torrence]; R. pp. 0805-06, 0804-14 [DOC]) and Court of Appeals,¹⁰ neither party, in the Court of Appeals, formally raised the issue or argued against South Carolina statute and plethora of

“Warden asserts that Grievant was not an employee of the State, Warden, p. 4, ¶ 6 thru p. 5, ¶ 2. Grievant agrees he was not a State employee. However, the “label” is not of import here. There is ample evidence (i.e. Comptroller General Records; State Treasurer Records; DOC records; S.C. statutory law §§ 24-3-40, 24-3-315, 24-3-430; and Federal and South Carolina Income Tax Returns) to establish that same form of labor for remuneration took place. Regardless of whether Grievant is required as a member of a paid workforce or not, state and federal statutory law that mandate payments for such labor are the issue at bar.” (R. pp. 0139, 0518

⁷ 857 S.E.2d 549

⁸ 2018-UP-432 (S.C. App. 11/28/18)

⁹ See Footnote 6, above

¹⁰ DOC’s Court of Appeals Initial Brief, p. 2, n. 3 (R. p. 1093)

precedent denying such a concept. Even following the ALC's January 20, 2016 Order, SCDC failed to include this matter in the Statement of Issues on Appeal or address the issue in its brief on appeal before the Court of Appeals, other than a footnote referencing Torrence's use of the term in his Step 1 Grievance to describe his labor.

SCDC raised four (4) issues in the January 3, 2017 Final Brief before the Court of Appeals, (R. p. 1092), and five (5) issues in its Reply Brief to the Court of Appeals (R. p. 1203). At no time was the issue in question preserved or raised.

Rule 208(b), SCACR, specifies the content of initial briefs under this Rule and final briefs under Rule 211. Rule 208(b)(1)(B) is specific:

“Statement of Issues on Appeal. A statement of **each** of the **issues presented for review**. The statement should be concise and direct as to each issue and may be stated in question form. Broad general statements may be disregarded by the appellate court. **Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.**” (Emphasis supplied).

The Court of Appeals has previously held that a Health Care Group failed to preserve for appellate review its assertion [] where argument was raised for the first time in motion for reconsideration, and issue was not included in statement of issues on appeal. Appellate Court Rule 208(b)(1)(B); *Allen v. Pinnacle Health Care Systems, LLC*, 715 S.E.2d 362, 367 (S.C. App. 2011).

Torrence submits that there is guiding precedent for adherence to our preservation rules, see, *Brown v. Odom*, 823 S.E.2d 183 (S.C. App. 2019); and *Herron v. Century BMW*, 719 S.E.2d 640, 642 (2011).

Rule 221(a), SCACR is controlling in petitions for rehearing. A petition for rehearing must show points *supposedly overlooked or misapprehended by the Court*. Its purpose is not to *present points lawyers from losing parties overlooked* or to have the case tried a second time in

the Supreme Court. See, *Arnold v. Carolina Power & Light Co.*, 167 S.E.2d 234 (1933); see also *Kennedy v. S.C. Retirement System*, 564 S.E.2d 322 (S.C. 2001),

Torrence respectfully suggests that SCDC has a history of “overlooking points” on appeal and raising an issue for the first time in the petition for rehearing. Torrence points to the prevailing wage case of *S.C. Dep’t of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. App. 2010) where the Court of Appeals admonished counsel for the practice in footnote 7.

“...Furthermore, despite the fact the record in this case appears to reflect a failure to pay overtime at the time-and-a-half rate, the *Department repeatedly asserts for the first time in its petition for rehearing* that it did pay Cartrette time-and-a-half overtime pay for his work on Kwalu projects ‘on numerous and diverse occasions.’ *We are troubled that these assertions*, which might have led to a speedy disposition of this issue before the ALC, *escaped counsel’s attention for so long.*”

694 S.E.2d at 24, n. 7 (emphasis supplied).

Torrence respectfully submits this issue is improperly included in the writ where Rule 242(d)(2), SCACR directs “Only those questions raised in the Court of Appeals and in the petition for rehearing should be included in the petition for writ of certiorari.” (emphasis supplied).

Torrence respectfully asserts that SCDC failed to preserve and raise this issue in the Court of Appeals, and by extension, this Court on certiorari, thus is procedurally barred from review here.

B. IN REGARDS TO SCDC’S FIRST ARGUMENT, SCDC MISCHARACTERIZED THAT THE COURT OF APPEALS HELD TORRENCE WAS AN EMPLOYEE OF THE STATE OR PRIVATE SECTOR SPONSOR CONTRARY TO STATUTORY LAW OR SOUTH CAROLINA PRECEDENT.

SCDC asserts that the Court of Appeals adopted the ALC’s ruling that Torrence was an employee of ESCOD. This is a mischaracterization of the implied use of verbiage as well as federal and state law.

Torrence submits that the ALC was precise in her footnote (R. p. 1035, n. 3) where she analytically detailed the applicable statutory law¹¹ in defining Torrence was not an employee of the State or the private sector and cited this Court's 2007 decision in *Williams v. S.C. Dep't. of Corr.*, 641 S.E.2d 885 in support of that proposition. Therefore, the ALC did not intend, imply, or intentionally rule against statutory law or precedent regarding a prisoner being considered an "employee" of either the State or private sector. The ALC closed any thought in support of SCDC's supposition in specifying that "none of these rights and duties (or lack thereof) directly bear on the disposition of this case." If SCDC disagreed, [they] could have raised the issue in the initial brief in the Court of Appeals.

Torrence submits that holding was accepted by both parties as SCDC did not attempt to raise the issue until the petition for rehearing. Torrence suggests that this area is where this Court's March 23, 2021 opinion, 857 S.E.2d 519, n. 3 appears to imply Torrence is required to be employed to be eligible for the prevailing wage. Torrence notes SCDC cites a litany of precedent for the proposition prisoners are not employees of the State. Torrence agrees and has never contested that position¹² or argued against statute or precedent

Despite SCDC's repeated excerpts highlighting Torrence was "employed" (Cert. pp. 8-13) in this PIECP work environment; one thing is certain and Torrence submits to this Court that the ALC, and subsequently, the Court of Appeals, utilized the language our Legislature utilized in our statutes and precedent to define the PIECP working scenario.

First, Torrence submits that the phraseology "worked for" was utilized by the Court in over twenty-five (25) prisoner wage claims (R. pp. 197 - 367).

Second, even SCDC must concede use of the descriptive and terminology "employed" as to Torrence's labor in its own *AGREEMENT* with the private sector employer (R. pp. 645-46;

¹¹ S.C. Code Ann. § 24-3-430(F) (2007)

¹² See footnote 6, above. Torrence's March 2015 ALC Brief, p. 3, n. 7 (R. p. 732) sets forth [his] labor status under South Carolina law, but did not claim to be an employee of ESCOD or the State.

673-82), specifically ARTICLE 3, Conditions Related to Employment of Inmates; “*the Contractor shall employ a minimum of 60 inmates,*” *id.* (Emphasis added); “the Contractor shall then select those inmate workers that *they wish to hire*” *id.*, (emphasis supplied), and 3.1.1, Training of Inmate Employees (R. p. 674) (original emphasis); and Article 4.4 Non-Discrimination in Employment, “The Contractor shall not discriminate against any employee inmate worker or applicant for employment...” (R. p. 679) (emphasis original and supplied). Torrence submits this language demonstrates the need to use relational terms of common usage in certain environments such as a workplace scenario.

Third, and specifically, our Legislature and Congress, utilizes such relational terms to describe the private sector prison labor scenario:

- i. Section 24-3-40(A): “Unless otherwise provided by law, the employer of a *prisoner authorized to work at paid employment* in the community [] *or in a prison industry program* provided under Article 3...” (emphasis supplied).
- ii. Section 24-3-40(A)(2)(b): “If the *prisoner is employed in a prison industry program...*” (emphasis supplied).
- iii. Section 24-3-315: [enacted for the purpose of demonstrating federal compliance to the DOJ BJA for PIECP certification] “...and other *conditions of employment...*” (emphasis supplied).
- iv. Section 24-3-430(H): “The earnings of an *inmate authorized to work at paid employment...*” (emphasis supplied).
- v. 18 U.S.C. § 1761(c)(3): “...on the basis of their employment...” (emphasis supplied).
- vi. 18 U.S.C. § 1761(c)(4): “...have participated in such employment...” (emphasis supplied).

Fourth, this Court’s own precedent utilizes relational terms of employment without holding prisoners are employees of the State or private sponsor, to describe the PIECP work environment: *Adkins v. S.C. Dep’t of Corr.*, 602 S.E.2d 51, 53 (2004) (“Inmates [] were *employed* in a Prison Industries / Private Sector Program...”, “...at the time of their initial

employment...”; *Wicker v. S.C. Dep’t of Corr.*, 602 S.E.2d 56 (2004) (“...the time he was in training for his *employment...*” “...was entitled to the prevailing wage during his first 320 hours of *employment...*” 602 S.E.2d at 57, (emphasis supplied). Torrence respectfully submits that it is difficult at best to discuss and explain such an important and necessary aspect part of human activity without using the language that all people utilize for that activity.

SCDC attempts to misconstrue this Court’s description of the issues in *Thomas J. Torrence v. S.C. Dep’t. of Corr.*, 857 S.E.2d 549, 551. This Court’s definition of the issue was that “SCDC specifically disputes (1) that Respondent was an employee *for purpose of the applicable law...*” The Court’s concern was that the 2016 ALC’s order was a final judgment and the Court of Appeals addressing SCDC’s appeal on remand. Torrence notes that even this Court, rationalized in citing statutory guidelines (24-3-430) “...provides that inmates must receive the ‘prevailing wage’ for their salaries while employed in the private sector...” 857 S.E.2d at 551. Torrence submits the nomen clature cannot be avoided, even where this Court is cognizant of its own previous holdings.

Torrence respectfully contends the employee characterization by SCDC and respectfully submits to this Court that neither the ALC nor the Court of Appeals ruled against South Carolina statutory law or precedent. Beginning with Torrence’s explanation of using the term “employed” and other relational terms to describe the context of his labor environment in his Step 2 Grievance Appeal, those Courts utilized the same common usage terms to describe Torrence’s interaction in the prison labor context. The ALC employed relational terms with no intent to contradict precedent. The Court of Appeals recognized the use of language as nomen clature and found no reason to reverse and remand.

Torrence submits that although rules of law are often founded on usage, usage is not itself a legal rule, but merely habit or practice in fact, for example, as evidence by the practice of

DOC, our Legislature, Congress, and our Appellate Courts. There exists a presumption of consistent usage that a word or phrase is presumed to bear the same meaning. However, the term “employed” does not automatically denote a legal relationship. Some terminology is agreed upon by society in general in describing the labor for remuneration scenario. There is an expectation that certain language will be used in a given situation or transaction.

Torrence submits that based on the facts and rationale demonstrated above, neither the ALC or the Court of Appeals held that Torrence was an employee of ESCOD. Torrence respectfully asks this Court to deny the petition for writ of certiorari.

C. IN REGARDS TO SCDC’S SECOND ARGUMENT, THE COURT OF APPEALS CORRECTLY AFFIRMED THE ALC METHODOLOGY DEFINING AND DETERMINING THE PREVAILING WAGE.

SCDC asserts the Court of Appeals erred by adopting the ALC’s definition and method of calculation of the prevailing wage in the instant case. Torrence submits that both the ALC and Court of Appeals conducted a sound analysis and application of the statutory law in regards to the prevailing wage statutes.

SCDC asserts that the ALC awarded [Torrence] a defined method of calculating the prevailing wage. SCDC elects to ignore the reality that the ALC applied the statutory law which SCDC had a duty to apply annually, but abused its discretion by continuing to pay Torrence less than the prevailing wage. The federal guidelines (64 FR 17000 *et seq*) instruct SCDC to obtain an annual prevailing wage verification from the appropriate agency [DEW]. Torrence submits that the ALC and Court of Appeals followed the letter of the statutory and regulatory law.

SCDC argues repeatedly the ALC is without authority to define or calculate the prevailing wage. Torrence suggests a second look at the Court of Appeals holding in *Cartrette*, 694 S.E.2d 18, for this proposition. Torrence submits that despite the outcome of *Cartrette*’s cases due to his impatience and court-hopping, that particular case demonstrates that our

Appellate Courts find it acceptable to remand a prisoner prevailing wage claim back to the ALC to calculate the prevailing wage owed. Torrence submits that, based on the Court's remand in *Cartrette* to calculate the prevailing wage, and knowing a remand to DOC would result in SCDC's continued abuse of discretion in paying less than the prevailing wage, Torrence requested the Court's calculation to save time and instill fairness in the agency process.

The Court of Appeals also held in *Cartrette* that, "In addition, we observe section 24-3-430(D) requires inmates receive the same prevailing wage paid to their non-inmate peers for comparable work. However, the question of the prevailing wage to which *Cartrette* is entitled had been remanded to the ALC for further proceedings..." 694 S.E.2d at 22 (emphasis supplied).

SCDC repeatedly asserts and attempts to convince South Carolina Courts at every level that § 24-3-410(B)(7) controls here to the point "comparable wages" language afford[ed] SCDC the *discretion* to fashion an hourly wage for Torrence's prison industries labor which conformed to BJA's guideline, as well as wage range(s) published by the ESC..." (Cert. p. 21). Torrence submits that § 24-3-430(D) is mandatory, not discretionary.

Torrence submits that this proposition contradicts federal and state statutory law found in 18 USC § 1761(c)(2), 64 FR 17000 *et seq*, and S.C. Code Ann. §§24-3-315 and 24-3-430(D). The language of these statutes and regulations definitively mandate the prevailing wage; define the prevailing wage and the process of obtaining annual wage verifications. This Court has previously held that §§ 24-3-315 and 24-3-430 were the controlling statutes in *Torrence*, 646 S.E.2d 866. SCDC submitted a certified copy of § 24-3-315 to the DOJ BJA as compliance with 18 USC §1761 in order to operate PIECPs in South Carolina. SCDC does not enjoy discretion to fashion a wage where the prevailing wage statutes are mandatory.

The ALC did not “fashion” a prevailing wage for Torrence, but merely utilized the ESC/DEW data in the record and available at any given time,¹³ and determined what the prevailing wage was from ESC data in the record and was owed to Torrence; the identical process SCDC must perform upon remand for years 2000 – 2004. Based on SCDC’s assertion that it would object to the ALC calculating the prevailing wage, Torrence respectfully submits the data required need not be studied for comparison, that the appropriate data is collected and available from DEW. Torrence submits SCDC has a fiduciary duty to pay the prevailing wage and not intentionally deprive Torrence based solely on his status as a prisoner.

SCDC has operated this program since 1995 and has never questioned the prevailing wage, despite submitting an application to the BJA asserting compliance with federal law.

SCDC has questioned the deposition in the Record, of Ms. Rebecca Eleazor, from the ESC, and attempts to introduce testimony from a circuit court case dismissed on other grounds to controvert her analysis here. Torrence submits the context of Ms. Eleazor’s deposition is easy to understand.

The ALC’s January 20, 2016 Order properly defined and calculated the “prevailing wage,” R. pp. 1062-1066. The ALC correctly defined the prevailing wage as “the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers,” citing Guidelines at 17009-10 (Court’s emphasis).

Rebecca W. Eleazor of the ESC/DEW, during her August 10, 2004 deposition, R. pp. 604 – 655, despite South Carolina having no legal definition of the term, made a specific correlation of the term, as the agency official in charge of such, that for “prevailing wage,” she would provide “our average wage,” R. pp. 616-627. SCDC contends Ms. Eleazor’s deposition and interjects material not in this record but from a dismissed circuit court case.

¹³ See footnote 5. above

SCDC has “admitted” that § 24-3-430(D) applies to the prison industry program and Torrence, R. p. 657 – 658.

Torrence further submits that SCDC’s own *Agreement* with the private sector specifically states:

“At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix D. The prevailing wage rate for inmate labor is to be *established* annually by the S.C. Employment Security Commission,” R. p. 677 (Emphasis supplied).¹⁴

The ALC properly applied ESC/DEW methodology and the operative Federal Regulation to calculate the prevailing wage here, R. pp. 1065-1066. First, the ALC applied §§24-3-315 and 24-3-430(D) in a statutory analysis, R. pp. 1064-65. Next, the ALC, in noting the method of obtaining the prevailing wage from Guideline at 17010, applied the deposition of Eleazor and associated ESC/DEW documents in the record, R. pp. 1065-66, to ascertain the prevailing, or mean/average wage for the OES or OCC Code for Electronic Assemblers for years 1997 – 1999.

The ALC correctly held that there is “no evidence whatsoever in the record to support the Department’s argument that its wage payment was in conformity with ESC data.” That “to pay [Torrence] less than the prevailing wage is an error of law,” R. p. 1066. The ALC found that “the record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 paid [Torrence],” R. p. 1065. The ALC also relied upon the record containing correspondence from Ted Gladden of the ESC that informed SCDC that the mean average wage I 1997 for electronic assemblers was \$8.82, and for the years 1998 – 199, the wage of \$9.92. The Court of Appeals found this analysis and holding sound.

SCDC has suggested, to have this petition granted, that defining and calculating the prevailing wage is a novel issue, mischaracterizing the ALC’s comment that Torrence was the

¹⁴ SCDC continually asserts the ESC/DEW does not have a term “prevailing wage,” despite SCDC’s own use of the term in their *AGREEMENT*, or the “mean” / “average” wage language correlated between documents, R. pp. 640, 782 and agency correspondence, R. pp. 647 – 654, utilized by both SCDC and DEW in their PIECP wage verification communications and explained by Ms. Eleazor in her deposition. Torrence notes that SCDC failed to comply with every wage verification from DEW.

first prisoner to successfully navigate the procedural pitfalls and have the issue fully heard. Torrence submits that this Court has on numerous occasions rationalized § 24-3-430(D). In addition, the Court of Appeals, in *Cartrette*, remanded the case back to the ALC for an identical process. Since *Wicker*, our Courts have been making rulings regarding the definition of the prevailing wage and determining what the wage should be. In *Wicker* this Court determined the prevailing wage was \$5.25 only because that is the wage Wicker pled that he earned following the Training Period, with neither party understanding that there was a greater issue looming.

Torrence suggests that in crafting the South Carolina prevailing wage statutes in the 1990's, the Legislature is presumed to have fully understood the meaning of the words used in a statute, and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense. *See, e.g., Purdy v. Moise, et al.*, 75 S.E.2d 605 (SC 1953). If the General Assembly declined to define a term within the statute, the Court should construe the word in accordance with its usual and customary meaning. *Pee v. AVM*, 543 S.E.2d 232, 235 (S.C. App. 2001). Where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense. *State v. Bridgers*, 495 S.E.2d 196 (S.C. 1997).

Torrence respectfully submits that the definition of the prevailing wage and the calculation methodology employed by the ALC and the Court of Appeals was correct under statutory and regulatory law. Torrence requests the petition be denied in order to allow the relief process to take place.

D. S.C. STATUTORY LAW, AGENCY REGULATIONS AND THE U.S. DEPARTMENT OF LABOR UTILIZE AND QUANTIFY THE TERM "PREVAILING WAGE".

There exists in the United States a plethora of federal and state statutes and regulations regarding the well-recognized term “prevailing wage.” South Carolina has utilized the term since the 1990’s and cannot now plead it is an alien concept after reaping benefits from the PIECP for decades.

SCDC asserts that the Employment Security Commission (DEW) does not use or quantify the term “prevailing wage.” Torrence contends this assertion and submits that our Legislature, this Court and Congress have adequately defined and quantified the term “prevailing wage” and that the term has been used in South Carolina for a number of years in the employment context.

The U.S. Department of Labor (“DOL”) regularly uses the prevailing wage¹⁵ and maintains a National Prevailing Wage Center (NPWC) that is accessible to the Employment Security Commission of all 50 states. Torrence submits that DEW also exchanges data with the DOL. The case of *Moodie v. Kiawah Island, Inn Co., LLC*, 124 F.Supp.3d 711 (D.S.C. 2015) is a working example of the prevailing wage term usage and calculation emanating from a South Carolina employment situation.

Torrence submits that the DOL regularly employs the prevailing wage as demonstrated by the following DOL regulations:

- i. 20 C.F.R. § 656.40 (Determination of prevailing wage for labor certification process; South Carolina follows an identical process of wage certification when in compliance with 64 FR 17009-10;
- ii. 24 C.F.R. § 965.01 (Preemption of state prevailing wage requirements)
- iii. 24 C.F.R. § 655.402 (Definition of Term); and
- iv. 29 C.F.R. § 1.5 (Procedure for requesting wage determinations).

¹⁵ 20 C.F.R. § 655.10

In South Carolina the prevailing wage has been utilized in not only statutory, but regulatory law as well. In 2002, SCDC, via the Senate Corrections and Penology Committee, sought an Attorney General Opinion concerning the prevailing wage. See 2002 WL 31728841 (S.C.A.G.)¹⁶ This opinion sets forth the mandatory nature of the prevailing wage – as well as the definition [“PIECP inmate workers *must* receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed.”] Guidelines at p. 17009 (original emphasis). This rate, as set forth in the Guidelines, is obtained from DEW. Torrence submits that DEW published state-wide data as opposed to localized data dependent on “surrounding area / locality.” SCDC asserts it wants to “compare” the wages to Torrence’s non-inmate peers in order not to pay Torrence more than those workers, claiming that was not contemplated by the statute. Torrence submits the wage verification is the sole realm of DEW and believes the private sector correctly pays those employees. That is a matter between parties not a part of this action.

The Senate Committee Chairman’s letter expressed “General Counsel for SCDC realized the agency was operating outside the authority and requirements of S.C. Code 24-3-430 in that inmates are being paid less than the prevailing wage for work performed for private companies.” This opinion demonstrates SCDC has long been cognizant of being in violation of the prevailing wage statute of 20 years and cannot now claim ignorance or compliance. SCDC, having been unchecked in their violation of law for so long, displays an entitlement to continuing that position.

Torrence submits, contrary to SCDC’s assertion, that South Carolina regulatory law quantifies the term “prevailing wage.” South Carolina Code of State Regulations Ann. 47-1,¹⁷ # 4, “In the absence of *employer records* the Department may use *prevailing wage* information

¹⁶ This opinion negates SCDC’s proposition that § 24-3-410(B)(7) allows SCDC to “fashion” the prevailing wage.

¹⁷ DEW Regulations

published by the United States Department of Labor, State government entities, employment and trade publications, and similar services to determine the monetary value of services performed by a worker.” (Emphasis supplied) [S.C. Code Regs. 47-1]. *See also* S.C. 47-1B.3.

Torrence also submits S.C. Code Reg. 47-30 (Meaning of Terms) as a guide for DEW to define applicable terms. Torrence also submits for consideration of this proposition, 2 South Carolina Litigation Forms and Analysis § 25:6.50 for an application of prevailing wage.

Torrence respectfully suggests that the term “prevailing wage” may not be defined by Article 3 of title 24, or by DEW, but neither is “average wage” or “mean wage,” but are frequently used in DEW reporting. Torrence also submits that DEW may not define these terms, but they are terms of art within the employment context and have long been used in wage determination in South Carolina.

IV. CONCLUSION

Torrence respectfully submits that for the foregoing reasons, SCDC has not demonstrated sufficient cause to justify granting the petition for writ of certiorari to the June 30, 2021 Court of Appeals decision.

Respectfully submitted,



Thomas J. Torrence

#094651

Perry Correctional Institution

430 Oaklawn Road

Pelzer, South Carolina 29669

RESPONDENT, *Pro se*

Pelzer, South Carolina
October 22, 2021

RECEIVED
OCT 29 2021
S.C. SUPREME COURT