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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No. 2021-000957

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

v.

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

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**REPLY BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
TO TORRENCE’S RETURN TO ITS PETITION FOR WRIT OF CERTIORARI**

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The South Carolina Department of Corrections [“SCDC”] respectfully submits, under South Carolina Appellant Court Rule [“SCACR”] 242(g), its reply to the October 22, 2021 return by Thomas Torrence to its September 23, 2021 petition for this Court to issue a writ of certiorari by which to review the Court of Appeals’ decision in the instant matter. *See Thomas J. Torrence, Respondent, v. S.C. Dep’t of Corr., Appellant*, 861 S.E.2d 36 (S.C. Ct. App. June 30, 2021).

By its petition, SCDC presented to this Court the following two (2) questions for review:

- 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?**

By a March 24, 2021 decision, this Court reversed the Court of Appeals’ November 28, 2018 order, which dismissed as interlocutory SCDC’s appeal of the rulings issued by the South Carolina Administrative Law Court [“ALC”] in its January 20, 2016 order (R. pp. 1029 – 43 and pp. 1056 – 70). *See Torrence v. S.C. Dep’t of Corr.*, 857 S.E.2d 549 (S.C. 2021).

In its March 24, 2021 decision, *Id.*, at 551, this Court predicted the two (2) questions SCDC presented for review in its petition:

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].

Torrence offered no grounds in his return upon which this Court should deny SCDC’s petition, and SCDC again respectfully urges this Court to consider the two (2) questions it presented for review.

**I. BY ADOPTING THE ALC’S RULINGS DEFINING AND THEN DETERMINING THE “PREVAILING WAGE” SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR, THE COURT OF APPEALS ANIMATED NOVEL QUESTIONS OF LAW UNDER SCACR 242(b)(1)**

As it did in its petition, SCDC again respectfully asserts the second of the two (2) questions it presented for review addressed rulings by the Court of Appeals in its June 30, 2021 decision that constituted novel questions of law under SCACR 242(b)(1).

Torrence twice disputed SCDC’s assertion in his return (Return, pp. 3 and 14 – 15):

SCDC suggests that the ALC’s acknowledgement of [Torrence’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,<sup>1</sup> 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.

...

**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 first prisoner to successfully navigate the procedural pitfalls and have the issue fully heard. Torrence submits that this Court has on numerous occasions rationalized [S.C. Code Ann. § 24-3-430(D)]. In addition, the Court of Appeals, in [*S.C. Dep’t of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010)], 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 v. S.C. Dep’t of Corr.*, 602 S.E.2d 56 (S.C. 2004),] 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.

[emphasis supplied].

The relevant passage from the ALC’s January 20, 2016 order defeats Torrence’s effort to dispute SCDC’s assertion (R. p. 1037):

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<sup>1</sup> In the footnote associated with this assertion, Torrence cited the following authorities (Return, p. 3, n. 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).”

[Torrence] has asked this Court to determine the prevailing wage based on the record in this case. **In doing so, 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].

Contrary to the argument Torrence offered in his return, the ALC accurately observed in its January 20, 2016 order that no court in our state, including the Court of Appeals in *Cartrette* and this Court in *Wicker*, had previously defined the term “prevailing wage” from § 24-3-430(D). Neither had any court in our state, including the Court of Appeals in *Cartrette* and this Court in *Wicker*, previously calculated an exact hourly wage for inmates participating in prison industries projects operated by SCDC.

In reviewing the ALC’s rulings by which it defined the term “prevailing wage” and then calculated an exact hourly wage SCDC should have paid Torrence for his prison industries labor, which the ALC then declared the “prevailing wage,” the Court of Appeals quoted verbatim the disputed passage from the ALC’s January 20, 2016 order, 861 S.E.2d at 40:

The ALC stated,

[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 [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 Court of Appeals offered no commentary or critique of the ALC’s declaration. Nor did the Court of Appeals, as Torrence attempted to do in his return, provide any examples of decisions in which it or this Court defined the term “prevailing wage” and/or calculated an exact hourly wage for an inmate’s prison industries labor. The Court of Appeals could not do so, because such decisions, contrary to Torrence’s assertion, simply do not exist.

By repeating verbatim the ALC's explicit acknowledgment that the rulings by which it first defined and then determined the "prevailing wage" SCDC should have paid Torrence for his prison industries labor constituted novel questions of law under SCACR 242(b)(1), the Court of Appeals acknowledged – and adopted – the same.

Accordingly, the second question in SCDC's September 23, 2021 petition presents special and important reasons upon which this Court should, under SCACR 242(b), issue a writ of certiorari and review the Court of Appeals' June 30, 2021 decision.

**II. THE COURT OF APPEALS' DECISION ADOPTING THE ALC'S RULING THAT TORRENCE WAS EMPLOYED BY ESCOD WHILE HE PARTICIPATED IN THE PRISON INDUSTRIES PROJECT SCDC OPERATED AT EVANS CONFLICTED WITH A PRIOR DECISION OF THIS COURT AS CONTEMPLATED UNDER SCACR 242(b)(3)**

As it did in its petition, SCDC again respectfully asserts the first of the two (2) questions it presented for review addressed rulings by the Court of Appeals in its June 30, 2021 decision which conflicted with a prior decision of this Court as contemplated under SCACR 242(b)(3).

SCDC's first question for review addressed the Court of Appeals' adoption of the ALC's ruling that Torrence was an employee of ESCOD. This ruling conflicts with this Court's prior decision in *Williams v. S.C. Dep't. of Corr.*, 641 S.E.2d 885 (2007), and, for that matter, the Court of Appeals' prior decision in *Cartrette*.

In the first paragraph of the section from its June 30, 2021 decision styled "FACTS/PROCEDURAL HISTORY," the Court of Appeals declared "**Torrence performed work for Insilco Global Industries/ESCOD (ESCOD)**" while he participated in the prison industries project SCDC operated at Evans.<sup>2</sup> 861 S.E.2d at 38 – 39. [emphasis supplied].

Later in the same section, the Court of Appeals chronicled the claims Torrence articulated in the Step 1 grievance he filed with SCDC, the well-spring for the instant litigation. In doing so,

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<sup>2</sup> See footnote 3 below.

the Court of Appeals observed “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.” *Id.* [emphasis supplied].

Torrence and SCDC contested before the ALC the notion that Torrence was employed by ESCOD while he participated in the prison industries project at Evans, and the ALC acknowledged their dispute in a crucial footnote in 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]. 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].

Unlike the Court of Appeals, which noticeably ignored the parties’ dispute in its June 30, 2021 decision, this Court, in its March 24, 2021 decision, clearly recognized the parties’ dispute on this issue, 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].<sup>3</sup> The ALC further concluded [in its January 20, 2016 order] that [Torrence] “must be paid

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<sup>3</sup> At the bottom of the first page of its January 20, 2016 order (R. p. 1029), the ALC stated “[Torrence] performed work for Insilco/ESCOD (ESCOD), which participated in [SCDC’s Private Sector Prison Industries Program (Program or PSPIP).” [emphasis supplied]. On the final page of its January 20, 2016 order (R. p. 1043), the ALC remanded Torrence’s appeal back to SCDC “to determine the prevailing wage, as defined by the Court above, for all hours of regular and overtime labor performed by [Torrence] for ESCOD.” [emphasis supplied].

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].

**A. TORRENCE ERRONEOUSLY ASSERTED SCDC FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW**

In his return, however, Torrence not only disputed the notion that the ALC ruled he was an employee of ESCOD, Torrence asserted SCDC failed to preserve for review the question of whether the ALC ruled he was an employee of ESCOD.

Torrence raised SCDC’s purported failure to preserve this question in the final sentence of the first paragraph of his return (Return, p. 1): “SCDC’s [January 10, 2019 petition for rehearing to the Court of Appeals] introduced **for the first time on appeal** the enumerated issue of the “employee status.” [emphasis supplied].

Torrence expanded upon his assertion as follows (Return, p. 2):

[This question] 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 Appeals 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, [Torrence] will respond out of an abundance of caution.

Torrence devoted an entire section of his return in support of his assertion that SCDC failed to preserve this question for review (Return, pp. 5 – 7), and he began this section as follows (Return, pp. 5 – 6):

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 [South Carolina Appellate Court Rules], is not ripe for certiorari review.

Although this Court’s March 24, 2021 decision [footnote omitted], which reversed and remanded the November 28, 2018 decision of the Court of Appeals [footnote omitted], 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 Appeal.<sup>4</sup> Although the parties addressed the term/label in the ALC [R. pp. 0732 and 804 – 15]<sup>5</sup> and Court of Appeals [footnote omitted], neither party, in the Court of Appeals, formally raised the issue or argued against South Carolina statute and plethora of 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.

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<sup>4</sup> In the footnote associated with this assertion (Return, p. 5, n. 9), Torrence referred to an earlier footnote (Return, pp. 4 – 5, n. 6), in which he offered the following passage from his Step 2 appeal (R. pp. 0139 and 0518):

Warden asserts that [Torrence] was not an employee of the State, Warden. p. 4, ¶ 6 thru p. 5, ¶ 2. **[Torrence] 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; [SCDC] 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 [Torrence] 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. [emphasis supplied].

While he agreed “he was not a State employee,” Torrence, as shown above, has asserted from the inception of the instant litigation that he was employed by ESCOD. As an important aside, the ALC, in the critical footnote from its January 20, 2016 order (R. p. 1035), embraced Torrence’s effort to distinguish or otherwise parse the terms “employee,” “employed by,” and “worked for.”

<sup>5</sup> In a footnote in his March 26, 2015 brief to the ALC (R. pp. 721 – 83), Torrence asserted as follows (R. p. 732):

[SCDC] will argue [Torrence] is not an “employee” based on [Prison Industries Enhancement Certification Project (PIECP)] participants not being “employees of the state” under [§ 24-3-430(F)] and that the Fair Labor Standards Act does not extend to inmate workers for the purpose of payment of wages because inmates are not employees of the [Prison Industries Program (PIP)] sponsor, see [Williams, 641 S.E.2d at 888]. However, [Torrence] meets the definition of “employee” as defined in [§] 12-8-10(3) for the purpose of Income Tax Withheld. For the purpose of South Carolina Workmen’s Compensation laws, [Torrence] is an “employee” as defined by the employer-employee test in [§ 42-1-130] and is a South Carolina Taxpayer.

As observed above in footnote 4, the ALC embraced if not adopted Torrence’s “on the one hand; on the other” logic to distinguish or otherwise parse the terms “employee,” “employed by,” and “worked for” in the critical footnote from its January 20, 2016 order (R. p. 1035).

Contrary to the assertion he offered in the first sentence of the third paragraph from the above-quoted passages from his return, Torrence did not “originally” address whether he worked for ESCOD in his Step 2 appeal. Instead, Torrence plainly stated in his Step 1 grievance form that he “**was employed by [ESCOD]**, in the SCDC Private Sector Prison Industries Program at [Evans] from June 1997 through [November 2004].” [emphasis supplied]. (R. p. 11). Torrence uttered the same assertions in paragraphs #4 and #5 of the “addendum” he submitted with his Step 1. (R. p. 12).

Thus, from the inception of the instant litigation, Torrence claimed that he was employed by or otherwise worked for ESCOD, the private industry sponsor.

Moreover, and contrary to his argument, SCDC preserved for review in its brief to the Court of Appeals the ALC’s explicit and erroneous ruling that Torrence “worked as a harness assembler *for ESCOD*.” (SCDC’s Jan. 3, 2017 Brief, p. 2, n. 3; p. 14, n. 21; and p. 47).<sup>6</sup>

Upon the Court of Appeals’ November 28, 2018 order, SCDC identified the ALC’s erroneous ruling that Torrence “worked as a harness assembler *for ESCOD*” as an issue in its petition for rehearing. (SCDC’s Jan. 10, 2019 Petition for Rehearing, pp. 2 and 5 – 8).

**B. CONTRARY TO THE ARGUMENT IN HIS RETURN, THE COURT OF APPEALS, BY ADOPTING THE ALC’S JANUARY 20, 2016 RULING, RULED TORRENCE WAS EMPLOYED BY ESCOD**

Torrence acknowledged in his return SCDC’s assertion “that the Court of Appeals adopted the ALC’s ruling [he] was an employee of ESCOD,” but he argued it was “a mischaracterization of **the implied use of verbiage** as well as federal and state law.” [emphasis supplied]. (Return, p. 7).

Torrence then acknowledged the critical footnote from the ALC’s January 20, 2016 decision, and he referenced this Court’s decision in *Williams* in doing so (Return, p. 8):

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<sup>6</sup> See also Torrence’s Return, p. 5, n. 10.

Torrence submits that the ALC was precise in her footnote (R. p. 1035, n. 3) where she analytically detailed the applicable statutory law<sup>7</sup> in defining Torrence was not an employee of the State or the private sector and cited this Court's 2007 decision in [*Williams*] 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."

Torrence next addressed this Court's March 24, 2021 decision (Return, p. 8):

Torrence suggests that this area is where this Court's March [24], 2021 opinion, [857 S.E.2d at 551, n. 3,] appears to imply [he] 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 position<sup>8</sup> or argued against statute or precedent.

In the footnote from its March 24, 2021 decision to which Torrence referred in the above-quoted passage in his return, this Court stated as follows, 857 S.E.2d at 551, n. 3:

The [ALC's January 20, 2016] order includes a footnote which purports to "decline[ ] to address" [Torrence's] status as an employee.<sup>9</sup> 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.

The implication of the above-quoted footnote from this Court's March 24, 2021 decision offered by Torrence is not accurate, as this Court clearly opined the ALC ruled Torrence "was

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<sup>7</sup> In the footnote associated with this passage, Torrence cited § 24-3-430(F).

<sup>8</sup> In the footnote associated with this passage (Return, p. 8, n. 12), Torrence referred to footnote 6 in his return, and he added that his March 26, 2015 brief to the ALC, specifically footnote 7 on page 3 (R. p. 732), "sets forth [his] labor status under South Carolina law, but [he] did not claim to be an employee of ESCOD or the State." As illustrated above, however, Torrence has claimed he "was employed by ESCOD" since the inception of the instant litigation, specifically in his Step 1 grievance. (R. pp. 11 – 12).

<sup>9</sup> On page 5 above, SCDC quoted the entirety of the footnote from the ALC's January 20, 2016 order to which this Court referred in the third and final footnote of its March 24, 2021 decision. (R. p. 1035).

employed by ESCOD” when it bestowed upon him the “unmistakable award ... of a defined method for calculating the prevailing wage.”

Torrence then contested “the employee characterization” identified by SCDC in its September 23, 2021 petition, and he asserted “neither the ALC [in its January 20, 2016 order], nor the Court of Appeals [in its June 30, 2021 decision] ruled against South Carolina statutory law or precedent.” (Return, p. 10).

Torrence concluded this section of his return by asserting “that based on the facts and rationale, neither the ALC nor the Court of Appeals held that Torrence was an employee of ESCOD.” (Return, p. 11).

Torrence’s assertions are defective, because, as this Court clearly recognized in its March 24, 2021 decision, the ALC clearly ruled in its January 20, 2016 order that Torrence “was employed by ESCOD.” As it adopted the ALC’s ruling, with absolutely no recognition of the dispute between the parties on this issue, the Court of Appeals likewise ruled Torrence “was employed by ESCOD” in its June 30, 2021 order.

In *Williams*, this Court considered yet another novel issue concerning inmates’ prison industries pay claims, 641 S.E.2d at 887:

Whether a private industry sponsor and the inmates in a prison industries program have an employer-employee relationship for purposes of the Payment of Wages Act **is a novel issue**. Inmates ask us to find such a relationship based on the test for employment set out in [*Felts v. Richland County*, 400 S.E.2d 781 (S.C. 1991)].

...

We find the *Felts* four-part test is not determinative of employer status in the context of the Payment of Wages Act.

[emphasis supplied].

After ruling the four-part test from *Felts* did not apply, this Court then recognized in *Williams* that “[o]ther state courts have held for purposes of wage statutes that **inmates**

**compensated by the prison are not the employees of prison industry sponsors”** and that “Federal courts have come to the same result under the Federal Labor Standards Act.<sup>10</sup>” *Id.* [emphasis supplied].

The Court of Appeals overlooked *Williams* in its June 30, 2021 decision; it did not refer to it, cite it, or account for it in any way. The Court of Appeals failed to address the holding from *Williams* that inmates, like Torrence, who are compensated by the prison, like SCDC, are not the employees of prison industries sponsors, like ESCOD.

Instead, the Court of Appeals adopted the ruling from the ALC’s January 20, 2016 order that Torrence “was employed by ESCOD,” the private industry sponsor for the project SCDC operated at Evans, and, by doing so, the Court of Appeals’ June 30, 2021 decision is in direct conflict with this Court’s decision in *Williams*.

Accordingly, the first question in SCDC’s September 23, 2021 petition presents special and important reasons upon which this Court should, pursuant to SCACR 242(b), issue a writ of certiorari and review the Court of Appeals’ June 30, 2021 decision.

### **III. TORRENCE’S THIRD COUNTERARGUMENT IS DEFECTIVE**

In third counterargument, Torrence disputes SCDC’s contention that “the Court of Appeals erred by adopting the ALC’s definition and method of [calculating] the prevailing wage” that SCDC should have paid him for his prison industries labor, and he “submits that both the ALC and Court of Appeals conducted a sound analysis and application of the statutory law in [regard] to the prevailing wage statutes.” (Return, p. 11).

Torrence’s third counterargument is inherently flawed, as is readily apparent from the following passage (Return, pp. 11 – 12):

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<sup>10</sup> See footnote 5 above.

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 of Appeals’] remand in *Cartrette* to calculate the prevailing wage, and knowing a remand to [SCDC] would result in [its] continued abuse of discretion in paying less than the prevailing wage, Torrence requested the [ALC’s] calculation **to save time and instill fairness in the agency process**. [emphasis supplied].

Torrence relied upon unsubstantiated and unverifiable supposition in the above-quoted passage (i.e., asserting the outcome of *Cartrette*’s case is due to his “impatience and court-hopping”).

Torrence also conceded in the above-quoted passage that he asked the ALC to define and calculate the “prevailing wage” that SCDC should have paid him for his prison industries labor “to save time and instill fairness in the agency process.” By doing so, Torrence tacitly conceded that he urged the ALC not to conform to the procedures and standards associated with the applicable state laws, federal laws, and federal guidelines governing the federally certified prison industries project operated by SCDC at Evans.

The ALC, in its January 20, 2016 order, did precisely what Torrence asked it to do, namely define the “prevailing wage” and then precisely determine the hourly “prevailing wage.” However, the ALC’s act of defining and then precisely determining the hourly “prevailing wage” SCDC should have paid Torrence for his labor clearly violated the federal guidelines applicable to PIECP projects, such as the one in which he participated at Evans. *See* 64 FR 17010. (“**Prevailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security.)**”).

By adopting the ALC's rulings in its June 30, 2021 decision, the Court of Appeals perpetuated the ALC's error, and nothing from Torrence's third counterargument negates the analysis and argument SCDC offered in its September 23, 2021 petition.

#### **IV. TORRENCE'S FOURTH COUNTERARGUMENT IS DEFECTIVE**

Torrence began his fourth counterargument as follows (Return, p. 16):

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 [1990s] 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 [contests] 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.

[emphasis supplied].

Torrence referenced no evidence from the record in the two (2) above-quoted passages, and his failure to do so is most glaring in the second passage. Torrence cannot legitimately contest SCDC's assertion that the Employment Security Commission ["ESC"] or its successor agency, the Department of Employment and Workforce ["DEW"] does not use or quantify the term "prevailing wage," because the evidence in the record clearly and conclusively demonstrates the ESC/DEW does not use or quantify the term.

The record in the instant matter includes the deposition testimony provided August 10, 2004 by ESC official Rebecca Eleazor in 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).

At her deposition, Ms. Eleazor 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].

Torrence concluded his fourth counterargument as follows (Return, p. 18):

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.

Ms. Eleazor explained the term “mean wage” when she provided live testimony on the ESC’s behalf in circuit court during the trial of *Adkins, et al., v. S.C. Dep’t of Corr.*, Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002):

..., the designations “Low, **Mean**, and High” simply reflect percentile designations. The designation “Low” corresponds to the 25<sup>th</sup> percentile, **the designation “Mean” corresponds to the 50<sup>th</sup> percentile**, and the designation “High” corresponds to the 75<sup>th</sup> percentile. [emphasis supplied]. (R. p. 887).

By defining and then calculating the “prevailing wage” SCDC should have paid Torrence for his prison industries labor in its January 20, 2016 order, the ALC erroneously disregarded the compelling evidence in the record. To compound its error, the ALC failed to conform to the applicable federal guidelines when it defined and calculated the “prevailing wage” SCDC should have paid Torrence.

By adopting the ALC’s rulings in its June 30, 2021 decision, the Court of Appeals again perpetuated the ALC’s error, and nothing from Torrence’s fourth counterargument negates the analysis and argument SCDC offered in its September 23, 2021 petition.

**V. CONCLUSION**

For the foregoing reasons, as well as the reasons articulated in its September 23, 2021 petition, SCDC again respectfully urges this Court to, under SCACR 242(b), issue a writ of certiorari and review the Court of Appeals' June 30, 2021 decision in the instant matter.

**RESPECTFULLY SUBMITTED:**

**s/Lake E. Summers**

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