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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Greenville County

William Jeffrey Young, Circuit Court Judge

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ELENIE ISHAM PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000734

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# PETITION FOR WRIT OF CERTIORARI

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# INDEX

## ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel where plea counsel advised Petitioner to plead guilty to trafficking more than twenty-eight (28) grams of methamphetamine pursuant to S.C. Code Ann. § 44-53-375(C)(2)(a) where (1) the entire bottle of liquid solution found on Parker which weighed 140.90 grams would have only yielded around three (3) to five (5) grams of methamphetamine after the cooking process was complete; and (2) the trafficking statute requires the selling, manufacturing, delivering, purchasing, or possession of at least ten (10) grams of methamphetamine?

## STATEMENT

### Indictments

On June 22, 2010, Petitioner Elenie Isham Parker was indicted by the Greenville County Grand Jury for (1) three counts of manufacturing methamphetamine in violation of S.C. CODE ANN. § 44-53-375; (2) one count of trafficking more than one hundred (100) grams of methamphetamine in violation of § 44-53-375; and (3) one count of financial transaction card fraud in violation of § 16-14-60. App. 79 – 98.

### Guilty Plea Hearing

On September 7, 2010, Parker appeared before the Honorable Edward Miller to plead guilty to the above-referenced counts. App. 1 – 39. Parker was represented by Frank Eppes, and the State was represented by Assistant Solicitor Joyce Montz. App. 1.

The State presented the factual basis for the plea. According to the State, the first incident occurred on June 6, 2009 where Parker and a co-defendant used a stolen credit card at a Walgreen's in the amount of $600.51 and later used the same card at a Spinx station in the amount of $31.01. App. 25, ll. 7-17.

The next incident occurred on June 7, 2009 when Parker was a passenger in a car stopped for no tail lights and items used to manufacture methamphetamine were found in the car. In Parker's purse, the officer found an actively cooking bottle of methamphetamine inside a Mountain Dew bottle. App. 25, ll. 18-25. According to the solicitor, the Greenville Crime Lab analyzed the fluid as "140.90 grams of methamphetamine." App. 26, ll. 1-2.

On June 8, 2009, a search warrant was executed at Parker's home, and law enforcement allegedly found twenty-one items used to make methamphetamine in the garage. App. 26, ll. 12-18.

On November 6, 2009, officers went again to Parker's residence to serve an arrest warrant on her and she consented to a search. Officers allegedly found twenty-four meth lab ingredients in the garage again. App. 26, l. 24 – 27, l. 8.

At the plea hearing, Parker's plea counsel pointed out that the bottle of liquid found in Parker's purse that the State alleged consisted of 140.9 grams of methamphetamine would have cooked down to three (3) to five (5) grams of methamphetamine. App. 33, l. 21 – 34, l. 7. Nevertheless, Parker's plea counsel allowed her to plead guilty to trafficking twenty-eight (28) grams or more, but less than one hundred (100) grams of methamphetamine pursuant to S.C. CODE ANN. § 44-53-375(C)(2)(a) which carried a sentence of "not less than seven years nor more than twenty-five years, no part of which may be suspended nor probation granted . . . ." App. 4, ll. 12-15.

The plea judge sentenced Parker to (1) nine years imprisonment for trafficking methamphetamine of twenty-eight (28) grams or more; (2) fifteen years concurrent suspended upon the service of nine years and three years probation on one count of manufacturing methamphetamine; (3) fifteen years suspended during probation on the other two counts of manufacturing methamphetamine; and (4) three years concurrent for the count of financial transaction card fraud. App. 38, ll. 1-8.

**Direct Appeal**

Parker filed an appeal with the South Carolina Court of Appeals but it was dismissed on November 24, 2010 pursuant to Rule 203(d)(1)(B)(iv), SCACR. App. 40.

**PCR Application and Evidentiary Hearing**

On May 27, 2011, Parker filed an application for post-conviction relief ("PCR"). App. 41 – 47. The State filed its Return on September 20, 2011. App. 48 – 52.

An evidentiary hearing was held before the Honorable W. Jeffrey Young on February 14, 2013. App. 53 – 70. Richard Warder represented Parker, and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 53. Both Parker and her plea counsel testified at the hearing. App. 56 – 69.

Parker testified that her plea counsel represented her for about eight to nine months before her plea and that they had met twice. App. 56, ll. 19-24. Parker said plea counsel wanted her to work with law enforcement to give them information but she did not feel safe wearing a wire. Her plea counsel told her if she was not willing to work with law enforcement, then she would need to plead guilty. App. 57, ll. 12-21.

Parker also testified that per her plea counsel's advice, she pled guilty to trafficking methamphetamine for the bottle of liquid that was found on her. App. 57, l. 22 – 58, l. 10. She testified that the bottle only contained the items to make methamphetamine and that the bottle did not contain the actual drug. Parker had not mixed up the bottle. The bottle contained Sudafed and some solvent. There was no methamphetamine that had precipitated out of the bottle. App. 58, l. 12 – 59, l. 1.

Parker further testified that in court, the State based her charge on the total weight of the bottle. She tried to discuss with her plea counsel how the State could charge her on the

full weight of the bottle, but her plea counsel would not investigate more. App. 59, ll. 6 – 13. He informed with that "with meth cases [the State] can do different things." App. 62, l. 23 – 63, l. 3. Parker knew there could not have been more than twenty-eight (28) grams of methamphetamine in that bottle. She thought it would have cooked down to about three and a half grams. App. 59, ll. 14 – 23.

Parker's plea counsel testified that as to the bottle of liquid found, he recalled that no methamphetamine had precipitated at that point and it was still all solution. App. 65, ll. 5-16. He told Parker that with a hundred plus grams of solution in that bottle, she could receive a mandatory sentence of twenty-five (25) years, and he felt like it was not a risk challenging the trafficking case with her facing that kind of sentence. App. 65, l. 17 – 66, l. 10; App. 68, ll. 19-22.

Parker's plea counsel also testified that he did not feel at the plea stage that it was important to determine the percentage of methamphetamine actually contained in the liquid solution:

> No. At that stage, no. If we had gone to trial, yes. But everybody around it, the lab guys at Sled, or whoever we were talking to at the sheriff's department, the officers, as well as the solicitor that was prosecuting the case, everybody understood enough about the process to know that it came down to two and a half (2 1/2), three grams (3) of meth.

App. 66, ll. 12-19.

**Order of Dismissal**

On April 2, 2013, Judge Young filed his Order of Dismissal denying Parker's PCR application, finding that she had not established any constitutional violations or deprivations, that her plea counsel was deficient, or that she was prejudiced by her counsel's representation. App. 71-78. Judge Young ruled that plea counsel had conducted a proper

investigation and was thoroughly competent in his representation. Judge Young also found that plea counsel had a valid reason for advising Parker to plead guilty to trafficking methamphetamine since she was found with a liquid mixture weighing over one hundred (100) grams and was arrested for two subsequent methamphetamine labs. Judge Young also ruled that there was no authority for Parker's argument that the liquid portion of the preparation mixture could not be considered in determining the overall weight pursuant to the trafficking statute. App. 74-75. Judge Young ultimately concluded that Parker had not met her burden in proving that her plea counsel failed to render reasonably effective assistance of counsel. App. 77.

This petition for writ of certiorari follows.

## ARGUMENT

**The PCR court erred in finding that plea counsel rendered effective assistance of counsel where plea counsel advised Petitioner to plead guilty to trafficking more than twenty-eight (28) grams of methamphetamine pursuant to S.C. Code Ann. § 44-53-375(C)(2)(a) where (1) the entire bottle of liquid solution found on Parker which weighed 140.90 grams would have only yielded around three (3) to five (5) grams of methamphetamine after the cooking process was complete; and (2) the trafficking statute requires the selling, manufacturing, delivering, purchasing, or possession of at least ten (10) grams of methamphetamine.**

Parker's plea counsel provided ineffective assistance of counsel where he did not challenge the charge against her for trafficking methamphetamine of more than one hundred (100) grams or more and advised her to plead guilty to trafficking more than twenty-eight (28) grams of methamphetamine. The record indisputably shows that the bottle of liquid solution found on Parker would have cooked down to only three (3) to five (5) grams of methamphetamine.

In South Carolina, a person can only be guilty of trafficking in methamphetamine if such person "knowingly sells, manufactures, delivers, purchases, or brings into this State, or [ ] provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or [ ] is knowingly in actual or constructive possession or [ ] knowingly attempts to become in actual or constructive possession of ***ten grams*** or more of methamphetamine . . . ." S.C. CODE ANN. § 44-53-375(C) (emphasis added). Therefore, a person selling, manufacturing, delivering, purchasing, or possessing less than ten grams of methamphetamine cannot be guilty of trafficking in methamphetamine as set forth in this statute. Accordingly, Parker's plea counsel was ineffective in advising her to plead guilty to trafficking in methamphetamine where she was not in possession of at least ten grams of methamphetamine.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). Additionally, the South Carolina Supreme Court has held that the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). However, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Furthermore, courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Thus, the applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court adopted the two-part standard in Strickland v. Washington, 466 U.S. 668 (1984), and applied the Strickland standard to guilty plea challenges based on ineffective assistance of counsel. To prove ineffective assistance of counsel from a guilty plea, the defendant must show: (1) "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases" and (2) that "there is a reasonable

probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 57-59.

**Deficient Performance**

Parker's plea counsel testified that he advised Parker to plead guilty to trafficking in methamphetamine because she was found with a bottle containing over a hundred (100) grams of solution and risked receiving a twenty-five (25) year sentence. App. 65, l. 17 – 66, l. 10. Plea counsel also stated that at the plea stage of the case, he did not feel there was any value in retaining a witness to determine the percentage of methamphetamine in the solution versus the liquid waste even though he conceded that everybody involved in the case "understood enough about the process to know that it came down to two and a half (2 ½), three grams (3) of meth" in the bottle. App. 66, ll. 12-19.

Under South Carolina's statutes criminalizing methamphetamine, Parker was not guilty of trafficking methamphetamine under S.C. CODE ANN. § 44-53-375(C) where the most finished, ready-for-use methamphetamine that could have come from the bottle was three (3) to five (5) grams. App. 34, ll. 6-8.

Section 44-53-375 of the South Carolina Code criminalizes the possession, manufacture, and trafficking of methamphetamine. § 44-53-375. Someone who possesses ten grams or more of methamphetamine can be convicted of the felony of trafficking. § 44-53-375(C). The severity of a trafficking offense depends on the weight of methamphetamine with the penalties beginning to increase at the threshold amounts of twenty-right (28) grams and again at one hundred (100) grams. § 44-53-375(C)(2) and (3).

Section 44-53-110 defines "methamphetamine" as including "any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine." § 44-53-110. Section 44-53-392 states, "Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof." § 44-53-392.

The issue is whether under the South Carolina statutes criminalizing methamphetamine the weight of an unusable portion of a mixture, which makes the drugs uningestible and unmarketable, should be included in the overall weight calculation.

In State v. Kerr, 299, S.C. 108, 382 S.E.2d 895 (1989), the defendant argued that since the mixture of cocaine possessed by him was only 74% pure, that he should only be charged based on 74% of the weight. Id. at 109, 382 S.E.2d at 896. This Court rejected this contention and affirmed the usage of 100% of the weight of the cocaine. Id.

To support its holding in Kerr, this Court cited a Nevada case that reasoned diluted forms of a drug are more dangerous to society because it necessarily means the drug would increase the number of persons who would partake. Id. at 109-10, 382 S.E.2d at 896-97 (citing Sheriff of Humboldt County v. Long, 763 P.2d 56, 58-59 (Nev. 1988). This rationale does not exist with respect to unfinished mixtures of methamphetamine.

In United States v. Jennings, 945 F.2d 129 (6th Cir. 1991), the United States Court of Appeals for the Sixth Circuit observed that while some drugs are diluted "with some other substance" to increase "the amount of the drug [the distributor] has available to sell to consumers," such is not the case where the defendants were found with a Crockpot of a mixture containing a detectable amount of methamphetamine. Id. at 136.

The court noted that "[i]f the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestible by-products of its manufacture." Id. at 137.

Therefore, with a drug such as cocaine, all of the drug – the pure cocaine and any agent used to cut the drug – is consumed. It was undisputed at the plea hearing and PCR evidentiary hearing that the mixture of methamphetamine found in the bottle seized from Parker's purse was unusable in its current form. App. 34, ll. 6-8; 58, l. 10 – 59, l. 23; 60, ll. 22-24; 65, ll. 5-16; 66, ll. 12-19. It was not a diluted form of methamphetamine that would enable its sale to many more users. It was an unfinished product, just a bottle containing Sudafed and some solvent. There was no methamphetamine that had precipitated out of the bottle. App. 58, l. 12 – 59, l. 1.

South Carolina's drug statutes specifically recognize that methamphetamine contains unusable by-products. See S.C. CODE ANN. § 44-53-376. Section 44-53-376 states, "It is unlawful for a person to knowingly cause to be disposed any waste from the production of methamphetamine or knowingly assist, solicit, or conspire with another to dispose of methamphetamine waste." § 44-53-376(A). The enactment of this statute by the Legislature shows its recognition that methamphetamine has significant, inconsumable by-products. When construing this specific provision with the more general statutes criminalizing methamphetamine, it is clear that "any mixture" was not

intended to include the waste from the production of methamphetamine. Specific statutes inform the intent of more general statutes. See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Therefore, the Legislature did not intend the entire weight of the liquid containing the methamphetamine to count against a defendant for determining whether a defendant is guilty of trafficking methamphetamine.

A comparison with the federal drug statute is also instructive. Federal drug statutes recognize the problem of the weight of in-process methamphetamine. See 21 U.S.C. § 841(b)(1)(A)(viii). The federal statute provides that anyone possessing 50 grams of methamphetamine or "500 grams or more of a mixture or substance containing a detectable amount of methamphetamine" are equivalent offenses. See id. This distinction does not occur with respect to cocaine, heroin, or marijuana in its final form. See 21 U.S.C. § 841(b)(1)(A)(i), (ii), (iii), and (vii). However, the federal statute does not criminalize possession of coca leaves when the cocaine has been removed. See 21 U.S.C. § 841(b)(1)(A)(ii)(I). It also treats 1000 marijuana plants as the equivalent of 1000 kilograms of a mixture of marijuana, which recognizes that the entire marijuana plant is not consumed. See 21 U.S.C. § 841(b)(1)(A)(vii). This Court should use the federal statutes as confirmation that "any mixture" of methamphetamine is to be treated differently than "any mixture" of other drugs that are wholly consumed.

Even with this distinction in the federal statute, many federal courts of appeals still use a market-based approach to determining the weight of methamphetamine. See United States v. Stewart, 361 F.3d 373, 377-79 (7th Cir. 2004) (holding that only 2.4 grams of actual methamphetamine present in 825 gram solution could be counted in the

determination of drug quantity under statute calling for 10-year mandatory minimum sentence); United States v. Jennings, 945 F.2d 129, 135 (6th Cir. 1991); see also United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (holding weight of alcohol in which cocaine was mixed should not have been included in calculating weight of cocaine to determine offense level); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992) (holding that unusable crème liqueur in which cocaine had been mixed should not have been included in total weight of cocaine mixture for purpose of calculating defendant's base offense level under Federal Sentencing Guidelines); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992) (excluding weight of unusable and toxic boric acid from packages containing boric acid and a thin layer of cocaine); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (excluding weight of unusable liquid carrier medium where cocaine was dissolved in a liquid).

The federal circuits adopting the market-based approach find support in Chapman v. United States, 500 U.S. 453, 460-61 (1991). In Chapman, the United States Supreme Court dealt with whether LSD blotter paper would be counted as part of the drug's weight. The Court held that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." Id. at 461.

The federal courts adopting the market approach understand the distinction and dangers of a pure drug being mixed with a dilutant in order to increase sales versus an incomplete, indigestible compound that will result in a much smaller finished product. Stewart, 361 F.3d at 378-79; Jennings 945 F.2d at 137. The Jennings court also noted

that mixtures containing methamphetamine are not only not intended for sale, but are often poisonous. Jennings 945 F.2d at 136.

The court in Stewart rejected the idea that the entire mixture containing methamphetamine should be included because it could lead to absurd results. Stewart, 361 F.3d at 378-79. The Seventh Circuit posited the analogy of a defendant dumping his drugs into a toilet and then being charged with the weight of the water in the bowl. Id. The Seventh Circuit further reasoned that "such results would be contrary to legislative intent because Congress was concerned with mixtures that eventually will reach the streets." Substances which do not facilitate the distribution of the drug "should not be counted because there is no rational basis to a sentence based on the entire weight of a useless mixture." Id. at 379 (internal citations omitted); see also Salgado-Molina, 967 F.2d at 29 ("Including the liquid in this case as a measure of punishment is no more rational than including the weight of the Atlantic Ocean in sentencing the hypothetical ocean smuggler" who "float[ed] a few kilograms of cocaine across the ocean.").

In Acosta, the Second Circuit, in determining whether the weight of an unusable portion of a mixture which makes the drugs uningestible and unmarketable should be included in the overall weight calculation, recognized the following in a case where cocaine had been mixed with unusable crème liqueur:

> In stark contrast to the LSD in Chapman, the "mixture" here was useless because it was not ready for distribution at either the wholesale or the retail level. It could not be ingested or mixed with cutting agents unless and until the cocaine was distilled from the crème liqueur. After distillation, it could be sold at the wholesale level or diluted with cutting agents and sold at the retail level. Only at that point, could Congress' rationale for penalizing a defendant with the entire amount of a "mixture" sensibly apply.

Acosta, 963 F.2d at 555.

Tennessee and Oregon have also endorsed the market-based approach for methamphetamine. See State v. Madness, 165 S.W.3d 300, 303-04 (Tenn. Ct. Crim. App. 2004); State v. Slovik, 71 P.3d 159, 161-63 (Ore. Ct. App. 2003). The Tennessee court adopted a market-based approach when interpreting a statute defining methamphetamine as "one hundred grams or more of any substances containing methamphetamine." Magness, 165 S.W.2d at 303. The Oregon statute considered in Slovik stated "ten grams or more of a mixture or substance containing a detectable amount of methamphetamine." Slovik, 71 P.2d at 161. Neither of these statutes are analytically distinguishable from South Carolina's statute. This Court should follow the analysis used in the above-cited cases and determine that as a matter of law, Parker cannot be guilty of trafficking more than twenty-eight (28) grams of methamphetamine under § 44-53-375(C)(2)(a) or even trafficking the required minimum of ten (10) grams of methamphetamine under § 44-53-375(C) where the bottle of liquid seized from her purse would have only yielded around three (3) to five (5) grams of useable methamphetamine.

Parker's plea counsel accordingly rendered deficient performance when he advised Parker to plead guilty to trafficking twenty-eight (28) grams of methamphetamine under § 44-53-375(C)(2)(a) where as a matter of law under the South Carolina statutes criminalizing methamphetamine, the entire amount of the liquid containing the methamphetamine should not have counted towards its weight.

**Prejudice**

Parker was undeniably prejudiced by her plea counsel's advice to plead guilty to trafficking more than twenty-eight (28) grams of methamphetamine where she was not

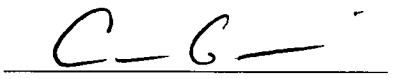
guilty as a matter of law under the provisions of § 44-53-375(C)(2)(a). She received a sentence of nine years imprisonment, no part of which may be suspended nor probation granted. Parker now has a trafficking offense on her record which can serve as a sentence enhancement in the future.

Parker accordingly requests this Court to reverse the PCR court's denial of her PCR application, grant relief, and reverse her conviction for trafficking methamphetamine. In the alternative to an outright reversal, Parker requests this Court to remand for a new trial on the trafficking charge with instructions for the trial court to conduct an evidentiary hearing for a determination of the actual amount of methamphetamine contained in the liquid solution, and if the amount of methamphetamine is not at least ten (10) grams, to dismiss the trafficking charge against Parker.

## CONCLUSION

For the foregoing reasons, Petitioner Elenie Isham Parker respectfully requests this Court to grant her Petition for Writ of Certiorari and allow full briefing on the issue.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

William Jeffrey Young, Circuit Court Judge

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ELENIE ISHAM PARKER,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Elenie Isham Parker, #342603, Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 9th day of October, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of October, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.