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ATTORNEY GENERAL

January 27, 2014

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RECEIVED**

JAN 27 2014

**S.C. Supreme Court**

**Re: Elenie Isham Parker v. State of South Carolina**  
**Appellate Case No: 2013-000734**  
**Lower Court Case No: 2011-CP-23-3619**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Carmen V. Ganjehsani, Esquire  
Trisha Allen, Victim Services Counselor

STATE OF SOUTH CAROLINA  
In The Supreme Court

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JAN 27 2014

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable W. Jeffrey Young, Circuit Court Judge

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Appellate Case No. 2013-000734

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Elenie Isham Parker, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Whether the PGR 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 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 to five 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 grams of methamphetamine?

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for three counts of manufacturing methamphetamine (2009-GS-23-8900 and 2010-GS-23-2106, -2107), financial transaction card fraud (2010-GS-23-2108), and trafficking methamphetamine (2010-GS-23-2218). (App.pp.79-81; pp.83-85; pp.87-89; pp.91-93; pp.95-97). Frank L. Eppes, Esquire represented Petitioner.

On September 7, 2010, Petitioner pled guilty.<sup>1</sup> The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of fifteen years suspended on service of nine years and three years probation for one count of manufacturing methamphetamine (2010-GS-23-2107), fifteen years with the balance suspended during probation for the other two counts of manufacturing methamphetamine, three years for financial transaction card fraud, and nine years for trafficking methamphetamine.<sup>2</sup> (App.pp.37-38).

A notice of appeal was filed at the South Carolina Court of Appeals. By order filed November 24, 2010, the Court of Appeals dismissed the appeal based on Petitioner's failure to provide a written explanation as to what issues could be reviewed. See Rule 203(d)(1)(B)(iv), SCACR. (App.p.40).

Petitioner filed an application for post-conviction relief (PCR) on May 27, 2011 (2011-CP-23-3619). (App.pp.41-47). A hearing was convened at the Greenville County Courthouse on February 14, 2013. (App.pp.53-69). Petitioner was present and represented by Richard H. Warder, Esquire. Karen C. Ratigan, Esquire of the South

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<sup>1</sup> The plea judge did not accept Petitioner's guilty plea to shoplifting, third or greater offense (2008-GS-23-9561). (App.p.45).

<sup>2</sup> The State not prossed ten charges in consideration of Petitioner's guilty plea. (App.p.42).

Carolina Attorney General's Office represented Respondent. The Honorable W. Jeffrey Young denied relief in an order filed April 2, 2013. (App.pp.71-78).

### STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

### ARGUMENT

**The PCR judge did not err in finding Petitioner failed to meet her burden of proving plea counsel was ineffective.**

Petitioner argues plea counsel was ineffective because he failed to challenge the weight of the methamphetamine. Petitioner argues plea counsel should not have advised her to plead guilty to trafficking more than twenty-eight grams of methamphetamine because she was not guilty of the offense as a matter of law under S.C. Code Ann. § 44-53-375(C)(2)(a) (2010). This argument is without merit.

#### A.

At the guilty plea hearing, Petitioner stated she wanted to plead guilty and that no one had coerced or threatened or promised anything in order to have her enter that plea. (App.pp.13-14). Petitioner stated that she wanted to waive her right to a jury trial and plead guilty. (App.pp.14-16). Petitioner stated she was guilty of the charges, satisfied with her attorney, and had been afforded enough time to review the State's evidence

against her. (App.pp.16-17). The assistant solicitor recited the facts to support each of the charges. (App.pp.25-27). Regarding the offense of trafficking methamphetamine, the assistant solicitor stated:

Items used to manufacture meth were found in the car. In [Petitioner]'s purse was an actively cooking bottle of meth that was inside a Mountain Dew bottle. This did have lithium strips and it was boiling. This entire fluid was analyzed as 140.90 grams of methamphetamine per the Greenville Crime Lab. Hazmat was called to the scene.

[Petitioner] was also found in possession of 2.63 grams of dried meth in her purse. . . .

(App.pp.25-26). Petitioner agreed with the State's recitation of these facts. (App.p.29).

Plea counsel then spoke in mitigation. (App.pp.32-34). Plea counsel stated he believed the liquid would have "cooked down to I think 3 and 5 grams of meth." (App.p.34). Plea counsel stated he could not find any guidance in South Carolina case law as to the issue of the liquid being counted towards the total weight. (App.p.34). Plea counsel stated he told Petitioner "that stuff counts as meth under South Carolina law as it exists . . . I also said, you know, with three meth labs she was going to get seven years any way if not more." (App.p.34).

## **B.**

At the PCR hearing, Petitioner stated the liquid in the bottle "was the stuff to make meth with" but that "it wasn't the actual drug." (App.p.58). Petitioner stated nothing had precipitated but that the weight of the bottle was used. (App.pp.58-59). Petitioner stated she did not believe 28 grams of methamphetamine could have been made from that liquid. (App.pp.59-60). Petitioner stated she asked plea counsel how the

State arrived at the amount they used and that plea counsel said “with meth cases that they can do different things.” (App.pp.62-63).

Plea counsel testified he filed discovery motions, reviewed the relevant portions of the State’s evidence with Petitioner, and discussed her version of events. (App.p.64). Plea counsel testified “the big problem with the trafficking case” was the bottle full of liquid that had not yet precipitated any methamphetamine. (App.p.65). Plea counsel testified the parties all understood that the liquid “came down to two and a half (2 1/2), three grams (3) of meth.” (App.p.66). Plea counsel testified he and Petitioner repeatedly discussed that if she was convicted of more than 100 grams of solution, she would receive a 25 year sentence. (App.p.65). Plea counsel testified that “with the state of the law, that it was not a risk worth taking particularly in the light of all the other charges and the fact that she had been – they had found, in her mother’s house, an operating meth lab two days after this meth lab.” (App.pp.65-66; pp.68-69). Plea counsel testified he explained to Petitioner his concern that “by challenging the trafficking case, we would not get a better result. And that, if she challenged the trafficking case, and the law came down against her, she would get 25 years in jail.” (App.p.66). Plea counsel testified some prosecutors will view the weight of the drugs as the solid portion, but that this solicitor’s office viewed the entire amount of the liquid as the weight. (App.p.67). Plea counsel testified the question of marketable versus un-marketable drugs in this area had not been adopted by the Fourth Circuit and that he had “no idea how South Carolina will come down on it.” (App.p.67). Plea counsel testified it “is a very frustrating thing to deal with” and that he gave Petitioner “the best advice I know how to give, given all the facts

and circumstances.” (App.p.68).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner “failed to meet her burden of proving plea counsel did not properly challenge the weight of the methamphetamine mixture.” The PCR judge found plea counsel’s testimony was credible and that he “articulated a valid strategic reason he advised [Petitioner] to enter a guilty plea.” (App.p.75).

**C.**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

**D.**

The PCR judge did not err in finding Petitioner failed to prove plea counsel’s representation was deficient. Plea counsel testified the question of whether the weight of the liquid mixture counts in weighing the methamphetamine was unsettled but that the Thirteenth Circuit Solicitor’s Office policy was to count the liquid’s weight towards the

total weight. Plea counsel testified he did not want to risk Petitioner receiving a twenty-five year sentence in order to advance the argument that the liquid mixture should not count towards the total weight of the methamphetamine. The PCR judge found this was a valid strategic decision under the facts of this case. Where counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). “Counsel’s strategy will be reviewed under ‘an objective standard of reasonableness.’” Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). Plea counsel’s fear that Petitioner would receive substantial time if they were unsuccessful with this argument at trial is understandable, given the overwhelming evidence against her. Even if one disregards the evidence surrounding the three counts of manufacturing methamphetamine and merely considers the trafficking charge, police found both the liquid mixture and solid methamphetamine in Petitioner’s purse. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

The PCR judge did not err in finding Petitioner failed to meet her burden of proving she suffered any prejudice as a result of plea counsel’s advice. Petitioner was, in fact, guilty of methamphetamine trafficking under the statute to which she pled guilty. “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to

impose another meaning.” State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quotation omitted). This court should give words “their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation omitted). Petitioner pled guilty to trafficking more than twenty-eight grams of methamphetamine. Methamphetamine is defined by statute in South Carolina as “any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine.” S.C. Code Ann. § 44-53-110 (Supp. 2012).

Petitioner argues plea counsel was ineffective because Petitioner claims she was not in possession of ten or more grams of methamphetamine as required by the statute. (Cert. Pet., p.8). She argues 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.” (Cert. Pet., p.11). This argument is erroneous. A plain reading of the statute clearly shows Petitioner was guilty of the crime to which she entered a guilty plea. At the plea hearing, the assistant solicitor testified the total weight of the mixture inside the bottle was 140.90 grams. The statute is unambiguous in its definition of methamphetamine and clearly defines it as “any mixture or compound containing amphetamine or methamphetamine.” The statute makes no provisions for distinguishing between the weight of the entire mixture (liquid and solid) or the weight of the solid, dry methamphetamine that would have precipitated from that mixture. Furthermore, Petitioner does not dispute the weight of the mixture or that it was in her possession. As

such, the Petitioner was guilty of trafficking methamphetamine under South Carolina law.

Petitioner's brief cites various cases from a number of states and federal circuits to support her argument that the amount of methamphetamine that would have precipitated should only be used in determining weight. While informative, these cases do not have any precedential value in South Carolina. Petitioner argues that much of the support for her position comes from Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919 (1991) and its progeny. In Chapman, the United States Supreme Court applied a marketability test to determine the weight of quantities of LSD. LSD is often transferred on blotter paper, but the Court held the weight of this paper should not be used to determine the total weight of the drugs because when the LSD is put on the paper, it does not alter the chemical composition of either component. The Court distinguished LSD from methamphetamine, stating "[w]ith respect to other drugs, however, namely phencyclidine (PCP) or methamphetamine, [21 U.S.C.A. § 841(b)] provides for a mandatory minimum sentence based either on the weight of a mixture or substance containing a detectable amount of the drug, or on lower weights of pure PCP or methamphetamine." Id. at 459, 111 S. Ct. at 1924 (emphasis in original). Thus, Chapman explicitly limits the marketability test from being applied to methamphetamine. Even so, Petitioner urges this State to adopt the marketability test. However, this test is hardly dispositive when applied to drugs other than LSD.

For example, the United States Court of Appeals for the Fifth Circuit distinguished Chapman when it wrote, "the Chapman marketability test does not apply when determining whether a liquid is a mixture or substance containing

methamphetamine under § 841.” United States v. Treft, 447 F.3d 421, 425 (5th Cir. 2006). That court also found, “[I]t would appear that the market-oriented analysis [in Chapman] was not intended to apply to methamphetamine or PCP. In fact, this Circuit has recognized as much.” United States v. Palacios–Molina, 7 F.3d 49, 53 (5th Cir. 1993). While Fifth Circuit jurisprudence holds no precedential value in South Carolina, that Court’s interpretation of Chapman and the federal sentencing guidelines for methamphetamine certainly provides a valuable counterpoint to Petitioner’s suppositions. The United States Court of Appeals for the Fourth Circuit has not yet addressed whether the marketability test applies to methamphetamine. The Fourth Circuit, however, has cited Chapman in determining defendants may be charged with the full weight of the mixture in cases concerning heroin and cocaine base. See, e.g., United States v. Campbell, 354 Fed. Appx. 786, 788 (4th Cir. 2009) (finding there was no error in determining the weight of heroin to be that of the entire mixture and not simply the pure heroin); United States v. Carroll, 112 F.3d 510, 1997 WL 225481, at \*2-3 (4th Cir. 1997) (holding “it is clear that any moisture retained in the crack cocaine due to the cooking process must be included in the weight of the crack cocaine”).

Petitioner points to various states that rely on Chapman and the marketability test to support her argument. However, this Court has determined the entire mixture must be considered in imposing sentences for cocaine trafficking. See State v. Kerr, 299 S.C. 108, 109, 382 S.E.2d 895, 896 (1989) (“The Statute, by its clear and unambiguous terms, applies to the aggregate weight of any mixture containing cocaine, not merely the weight of cocaine in its pure form.”) (emphasis in original). Accordingly, this Court should

continue to follow its reasoning in Kerr and decline to apply the Chapman test – which was developed in an LSD case – to methamphetamine.

**E.**

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that she was prejudiced by plea counsel’s performance. Petitioner failed to meet her burden of proving that there would have been a different outcome in her case if she had gone to trial instead of pleading guilty.

As Petitioner failed to meet her burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

**CONCLUSION**

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

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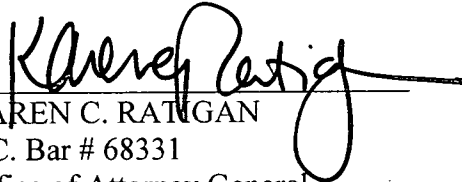
**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 27th day of January, 2014.

  
KAREN C. RATIGAN  
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