STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ronald J. Sheppard, #320057 Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 12-ALJ-15-0001-AP **ORDER**

This matter is before the South Carolina Administrative Law Court (Court or ALC) upon the Appellant Ronald J. Sheppard's (Appellant) appeal from the decision issued by the South Carolina Department of Probation, Parole and Pardon Services' (Department) full Parole Board in which it denied the Appellant parole following a hearing after a three-member panel of the Board had granted him parole following a prior hearing. Oral argument in this matter was held at the ALC in Columbia, South Carolina on November 20, 2013.

FACTUAL/PROCEDURAL BACKGROUND

The Appellant was indicted by the state grand jury on various charges, prosecuted by the South Carolina Attorney General's office, convicted, and sentenced to a total of twenty (20) years imprisonment. On December 15, 2010, the Appellant appeared before the Parole Board and was denied parole. Neither the victims, law enforcement, nor anyone from Attorney General's office appeared at this hearing (the Record does not reflect that the Attorney General's office was given advance notice of this hearing or later discovered it). On December 14, 2011, the Appellant appeared again before the Parole Board[1] and was advised after the hearing that he had been granted parole. The Appellant was given a form purportedly outlining the conditions of his parole, which the Appellant signed. However, this form was not signed by the members of the Parole Board Panel.

[1] The Parole Board met as a three-member panel for this hearing, which is permissible pursuant to S.C. Code Ann. § 24-21-30(A) (2007).

Notice of the December 14, 2011 parole hearing by the Department was sent to the victims of the Appellant's crimes, law enforcement personnel, and the Lexington County Solicitor. No notice was given to the Attorney General's Office, who prosecuted the case. On the date of the Appellant's hearing, no one appeared to testify in opposition to the Appellant receiving parole. After the December 14, 2011 hearing, the Attorney General's office discovered that the Appellant's hearing had occurred and the office had received no notice. The Attorney General's office notified representatives of the Department that the Attorney General would have opposed granting parole to the Appellant had he been given notice.

After an internal investigation by the Department revealed that it had failed to provide the Attorney General's office with notice of the December 14, 2011 hearing, the Department scheduled a hearing before the full Board regarding the Board's prior decision to grant the Appellant parole. At that hearing, held on January 18, 2012, the Appellant, his attorney, and his supporters testified, as they had at the prior hearing. This time, however, the Attorney General and several victims were present and opposed granting the Appellant parole. The Parole Board denied the Appellant's parole. The Appellant appealed to this Court.[2]

ISSUE

Whether the Parole Board denied the Appellant due process by infringing on a state-created liberty interest in holding the January 18, 2012 parole hearing and denying him parole after having granted parole following the December 14, 2011 hearing?

JURISDICTION

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), and *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003).

DISCUSSION

[2] The Appellant filed a Special Appeal Requesting a Set Aside of Recission [sic] of Parole on January 17, 2012, the day before the hearing before the full Parole Board. On January 25, 2012, the Department filed a Motion to Dismiss Appeal. On February 14, 2012, prior to the Court ruling on this Motion, and after the rehearing by the Parole Board, the Appellant filed a Special Appeal Requesting Reversal of the Decision of the Parole Board and Ratification of the Panel Decision Granting Parole. The Appellant further filed a Request for an Order Consolidating Special Appeals on the same date. The Court granted this Request and consolidated all of the Appellant's filings related to this matter in an Order filed on July 2, 2012, subsuming all of these filings into the present Docket No. 12-ALJ-15-0001-AP.

Notice under Section 24-21-221

The Appellant argues that the notice that the Department sent to the Lexington County Solicitor in Lexington County was sufficient to satisfy the notice requirement in S.C. Code Ann. § 24-21-221(2) (2007) and that the Department was not required to give notice to the Attorney General. This court disagrees.

Section 24-21-221 states:

> The director [of the Department] must give a thirty-day written notice of any board hearing during which the board will consider parole for a prisoner to the following persons:
>
> > (1) any victim of the crime who suffered damage to his person as a result thereof or if such victim is deceased, to members of his immediate family to the extent practicable;
> >
> > (2) the solicitor who prosecuted the prisoner or his successor in the jurisdiction in which the crime was prosecuted; and
> >
> > (3) the law enforcement agency that was responsible for the arrest of the prisoner concerned.

Subsection (2) of this provision requires that the notice must be given to "the solicitor who prosecuted the prisoner . . . ." According to Art. V, Section 24, of the S.C. Constitution, 1895, "The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." As such, the Attorney General has the constitutional authority to supervise, direct, and participate in the prosecution of all criminal cases in courts of record. *See Ex Parte McLeod*, 272 S.C. 373, 377, 252 S.E.2d 126, 127 (1979) ("The[] duties as chief prosecuting officer of the State are performed by the Attorney General, not only through his immediate staff, but through his constitutional authority to supervise and direct the activities of the solicitors or prosecuting attorneys located in each judicial circuit of the State."). While it is true that "the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors in their respective circuits[,]" the Attorney General can prosecute criminal cases "in unusual cases or when the solicitors call upon the Attorney General for assistance." *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 420, 223 S.E.2d 853, 856 (1976). The Supreme Court of South Carolina recently affirmed the role of the Attorney General as the State's chief prosecutor in *State v. Long*, Op. No. 27347 (S.C. Sup. Ct filed January 8, 2014) (Adv. Sh. No. 1) "Furthermore, this Court has always regarded the Attorney General as the State's chief prosecuting officer with broad common law and statutory

authority to prosecute any case on behalf of the State." *Id.* Indeed, the Appellant was indicted and convicted under the state grand jury process, which requires prosecution by the Attorney General or his designee. *See* S.C. Code Ann. § 14-7-1750 (Supp. 2012) ("If the presiding judge considers the indictment to be within the authority of the state grand jury and otherwise in accordance with the provisions of this article, he shall return the indictment by order to the county where venue is appropriate under South Carolina law for prosecution by the Attorney General or his designee.").[3]

The Appellant's argument focuses on the provision in Section 24-21-221(2) requiring notice be given to the solicitor in the jurisdiction where the crime was prosecuted. However, this ignores the requirement to serve notice to "the solicitor who prosecuted the prisoner." Though in the vast majority of cases the solicitor in the jurisdiction in which a prisoner was prosecuted is the one who prosecuted the prisoner, this is not always the situation, as the present case demonstrates. The language of the statute plainly requires that notice given to the solicitor who actually prosecuted the case. The purpose of the statute is to ensure notice is given to everyone who was involved in the inmate's case – the victim of the inmate's crime (or his or her immediate family members if the victim is deceased), the solicitor who prosecuted the inmate's case, and the law enforcement agency responsible for the arrest of the inmate. To adopt the Appellant's interpretation, every time the Attorney General's office prosecuted a criminal case instead of the solicitor that resulted in a conviction and prison sentence, then notice of the inmate's parole hearing would be given to the disinterested solicitor where the case was prosecuted, and the actual prosecutor of the case would receive no notice. This would deny the prosecutor of the case the opportunity to effectively present the State's position regarding on the issue of the inmate receiving parole. Furthermore, if this court were to adopt the Appellant's interpretation of the statute, prosecutors would not be notified of parole hearings, and would then be unable to confer with, or provide status and progress updates to inmate's victims regarding

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[3] The Appellant asserts in Petitioner's Special Appeal Requesting Reversal of the Decision of the Parole Board and Ratification of the Panel Decision Granting Parole (Initial Brief) that "[i]n the twenty-two (22) years during which the State Wide Grand Jury has been established the Attorney General has never asserted any right to notice of parole hearings for individuals prosecuted pursuant to the jurisdiction [sic] statutorily conferred jurisdiction of the State Wide Grand Jury." However, even if this assertion is true, the fact that the Attorney General has not asserted a right in past cases does not mean that he does not have the ability to assert that right in future cases. The fact remains that Section 24-21-221(2) gives the Attorney General the right to notice for each parole hearing involving a case that his office prosecuted. Moreover, it is not for this Court to second guess the Attorney General's exercise of discretion in exercising his statutory right to notice.

upcoming parole hearings for the inmate. This would deny crime victims the rights guaranteed them by the S.C. Constitution and statutory law.[4] Therefore, Section 24-21-221(2) cannot be reasonably interpreted the way that the Appellant suggests.

In this case, an attorney of the Attorney General's staff prosecuted the Appellant in Lexington County. Because the Attorney General (or members of his staff) is constitutionally and statutorily authorized to prosecute cases such as the Appellant's case, the Attorney General was entitled to notice pursuant to Section 24-21-221(2). Thus, because the Department failed to provide the Attorney General with notice of the December 14, 2011 hearing, acknowledged in a letter to the Attorney General dated December 15, 2011, the State was denied procedural due process and the December 14, 2011 hearing was therefore void *ab initio*. Consequently, the panel's granting of parole was invalid and thus no liberty interest was created for the Appellant at the December 14, 2011 hearing. The January 18, 2012 hearing effectively became the first hearing, not a rehearing, and there was no valid prior decision to rescind.

The Appellant argues that pursuant to *Barton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110, "once parole has been granted, a substantive right to liberty has attached and it is a right entitled to constitutional protection." Because this court has ruled that the December 14, 2011 hearing was invalid, it is not necessary to reach this issue. But

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[4] Victims of crime in South Carolina have rights guaranteed by the South Carolina Constitution, among which is the right to "be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision[.]" S.C. Const. art. I, 24(A)(10). "In cases in which the sentence is more than ninety days, the prosecuting agency must forward, as appropriate and within fifteen days, a copy of each victim's impact statement or the name, mailing address, and telephone number of each victim, or both, to the . . . Department of Probation, Parole and Pardon Services . . . ." S.C. Code Ann. § 16-3-1555(B) (Supp. 2012). "Prosecuting agency" for purposes of this article is defined as "the solicitor, Attorney General, special prosecutor, or any person or entity charged with the prosecution of a criminal case in general sessions or family court." *Id.* § 16-3-1510(5) (2003) (emphasis added). "The prosecuting agency must inform the victim and the prosecution witnesses of their responsibility to provide . . . the Department of Probation, Parole and Pardon Services . . . as appropriate, their legal names, current addresses, and telephone numbers. *Id.* § 16-3-1555(D) (Supp. 2012). Using this information, the Department of Probation, Parole, and Pardon Services (or another applicable department) is required to reasonably attempt "to notify each victim [] who has indicated a desire to be notified [] of post-conviction proceedings affecting the probation, parole, or release of the offender, including proceedings brought under Chapter 48 of Title 44, and of the victim's right to attend and comment at these proceedings." *Id.* § 16-3-1560(A). The Attorney General must request from the Department the victim's personal information "upon receiving notice of appeal or other post-conviction action by an offender convicted of or adjudicated guilty for committing an offense involving one or more victims." *Id.* § 16-3-1560(B). In response, the Department "must supply the requested information within a reasonable period of time." *Id.* § 16-3-1560(C). The Attorney General must also confer with victims concerning any kind of post-conviction proceedings, including the status and progress of those proceedings, and must give the victims sufficient advanced notice of proceedings and their right to attend. *Id.* § 16-3-1560(D)-(F). It is evident that if notice was only given to the solicitor for the county in which an inmate was prosecuted, as Appellant suggests, and the solicitor was not the actual prosecuting agency, then the actual prosecuting agency would be unable to fulfill any of its functions set forth in Title 16's provisions above.

even if the Appellant is correct in his interpretation of *Barton*, the present matter is distinguishable from *Barton* because in *Barton* the procedural requirements for the Appellant to be considered for parole were satisfied; the issue in *Barton* was the interpretation of a statute pertaining to the number of votes an inmate needed to be granted parole. There were no prejudicial errors in the hearing process in *Barton*. In contrast, in this case, one of the prerequisites for the first hearing was not met, resulting in the absence of one of the parties due to a lack of mandatory notice. In this case, unlike in Barton, a procedural error tainted the process whereby parole was granted. Because the Attorney General was not given notice, resulting in his failure to appear and provide opposition at the hearing, the December 14, 2011 hearing was invalid and no parole was granted. Consequently, no liberty interest was created.

Section 24-21-645

Setting aside this court's finding that the December 14, 2011 hearing was void *ab initio* for failure to provide one of the parties statutorily required notice, and assuming that the Appellant's inference from *Barton* is correct, the Appellant still had no state-created liberty interest from the December 14, 2011 panel hearing because there was no final decision rendered by the panel from that hearing. Section 24-21-645(A) states: "The board may issue an order authorizing the parole which must be signed either by a majority of its members or by all three members meeting as a parole panel on the case ninety days prior to the effective date of the parole . . . .".[5] The Appellant argues that the word "may" used in this provision means that the Board does not have to issue a written order to render a final decision, but if it does issue an order, then it must comply with the signature requirement. However, this provision cannot be reasonably interpreted in the manner that the Appellant asserts, because to do so would render the signed-writing requirement a nullity. Inmates are not entitled to parole, only to a hearing to determine parole eligibility. *James v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 376 S.C. 392, 395-97, 656 S.E.2d 399, 401-02 (Ct. App. 2008) (citing *Furtick*, *supra*). Thus, the Board *may* issue an order authorizing parole if it believes parole is warranted; or it may decide that parole is not warranted. But if the Board decides that parole should be granted, then the order that it issues authorizing parole must be signed by, in this case, all three members meeting as a

[5] The Court will focus on the first part of the provision, because this case involved a non-violent crime. Parole orders for persons convicted of violent crimes as defined in Section 16-1-60 have different signature requirements under Section 24-21-645(A).

parole panel, or the matter must be referred to the full Board, which has a signature requirement of a majority (for cases involving non-violent offences). S.C. Code Ann. §§ 24-21-30(A), and 24-21-645(A).

In this case, the Parole Board Panel did not issue a written order signed by all of the members of the Panel, which is required for a decision of the Board to be final.[6] All that was issued following the December 14, 2011 hearing was a list of conditions of parole, which only the Appellant signed. This list of conditions could perhaps be a provisional parole order pursuant to Section 24-21-645(A).[7] However, even if this list of conditions for parole constituted a provisional parole order, it would still be an order granting parole, and would have to be signed by all three members of the Panel for the Panel's decision to be a binding, final decision of the Board, pursuant to Sections 24-21-30(A) and 24-21-645(A). Because the list of conditions bears only the signature of the Appellant, this court cannot deem it to be a provisional parole order.

Sections 24-21-645(D) and 24-12-650

Further, Section 24-21-650, the provision immediately following Section 24-21-645, supports reading Section 24-21-645 as requiring the Board to issue written orders when granting parole. Section 24-21-650, which appears to restate Section 24-21-645 (A) and (D), states in pertinent part: "The board shall issue an order authorizing the parole which must be signed by at least a majority of its members with terms and conditions, if any . . ." As has been noted, the Board in this case never issued a written order signed by members of the Panel.

Additionally, Sections 24-21-645(D) and 24-21-650 add a further requirement, which also was not met: a parole order (or "parole certificate") that must be issued by the Director after the Board issues its order and if the Director's order is accepted by the prisoner. This requirement is stated as follows: "The director, or one lawfully acting for him, then must issue a parole order which, if accepted by the prisoner, provides for his release from custody." There is no evidence that such a parole order was ever issued.

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[6] This requirement is analogous to the signed-writing requirement for trial courts. The South Carolina Supreme Court has held that under Rule 58 of the South Carolina Rules of Civil Procedure, "the written order is the trial judge's final order[,]" and that the trial judge is free to change his mind until that written order is entered. *Brailsford v. Brailsford*, 380 S.C. 443, 451-52, 669 S.E. 342, 346 (Ct. App. 2008) (citations omitted). Also, "[a]n oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation." *Id.* at 452, 669 S.E.2d at 346. Moreover, oral orders are not final and effective until and unless reduced to writing. *Id.*

[7] There is nothing to indicate that the list of conditions, which is Appellant's Exhibit 1, is anything more than that – conditions for parole should Appellant be granted parole. It does not appear to be an order of any kind.

Based upon this analysis, even if the December 14, 2011 hearing was valid, because the requirements for a final decision were not met following the December 14, 2011 hearing, the Parole Board Panel rendered no final decision and thus was able to rescind its initial decision without depriving Appellant of any state-created liberty interest.[8]

The Attorney General's Initiation of the Process for the January 18, 2012 Hearing

Even if this court were to find that the January 18, 2012 hearing was a rehearing of the prior hearing, the facts support a finding that such a rehearing was properly conducted. The Parole Board Operation's Manual (Manual) provides that the process of rehearing a case for an offender who has not been released on parole can be initiated by a report that "could come from any source[,]" which "would set forth the reasons why the Board or panel should conduct a re-hearing in order to reconsider its original parole decision." The rehearing process can also be initiated by a "petition or letter received from the requesting party within 30 days of the parole [decision]. This letter or petition must specify the exact reasons why the Board should reconsider its decision." The Manual suggests that a letter or petition would be written. For instance, the Manual states that when a requesting party submits a letter or petition for reconsideration, "[t]he decision to grant or deny a rehearing shall be made in the sole discretion of the Board based upon the letter or petition filed by the requesting party and other documents which are made available to the Board from the parole file." A report, however, need not be in writing and can come from any source.

The Appellant argues that "the Attorney General's office did not file a Motion, nor did they ask for any relief in a court of law. They simply notified the Parole Board of their interpretation of a right to notice pursuant to the notice statute." However, this court finds that the Attorney General acted appropriately by seeking to exhaust the remedies available to him before appealing the Board's decision. In this case, the remedy available to the Attorney General, pursuant to the Department's Manual, was to seek a rehearing by reporting to the Parole Board an error in its procedure that had a prejudicial impact on the outcome of the parole hearing, which he did by contacting the Department. The details of the Attorney General's

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[8] Even had the Parole Board Panel rendered a final decision, the Manual allows the Board or Panel to reconsider or rehear a case even after a final decision is made, under prescribed circumstances. For instance, on page 44 of the Manual, one of the reasons for conducting a rehearing is where "the Board or panel [has] acquired some new material and information [about a prisoner's case] after it has made its final decision."

report, which are memorialized in a letter dated December 15, 2011 from the Department's Director, Kela E. Thomas, indicate that the Attorney General provided the requisite justification for why the Board or Panel should rehear the case, specifically "lack of notice [required under S.C. Code Ann. § 24-21-221] and the resulting denial of the opportunity to appear before the Board to either support or oppose parole." Therefore, the Attorney General properly initiated the process for a rehearing.

The January 18, 2012 Hearing

Because this Court holds that the first hearing was void *ab initio*, the only question remaining is whether the January 18, 2012 hearing comported with the requirements of due process.

This Court holds that the Appellant was afforded due process at his January 18, 2012 hearing. The Appellant was given a fair and impartial hearing, was represented by competent counsel, and allowed to present mitigating evidence. The Appellant does not dispute that he was provided the same opportunities in the January 18, 2012 hearing that he was in the December 14, 2011 hearing. The Appellant's Initial Brief states that "[a]t the hearing on January 18, 2012, the full board heard from [Appellant], his attorney and his supporters."

The Appellant argues, however, that the testimony from the victims was improperly allowed because those victims failed to attend the Appellant's past hearings (the initial hearing before the Board on December 15, 2010 and the December 14, 2011hearing) after being given notice, and "had not filled out the requests from the Parole Board for notification of parole hearings for [the Appellant]." The Appellant asserts that "[a]ny victim that failed to request notice or that received notice and failed to appear should not have been allowed to participate in proceedings after the fact as that prejudices [the Appellant's] right to due process." However, the Appellant cites no authority to support his argument that failure of the victims to fill out requests to be notified by the Board of parole hearings for the Appellant precludes their attendance and commentary at his January 18, 2012 parole hearing.[9] The Appellant also cites no authority to support his argument that by not exercising their constitutional and statutory rights to

[9] Frankly, Sections 16-3-1555(D) and -1560(A) only require the victims to provide information to the Board if they want the Board to notify them. The victims can waive their right to be notified by the Board, buy there is nothing in the parole statutes that would prevent a victim from appearing at a parole hearing and testifying if they ended up getting notice by some other means, such as by the Attorney General in this case; the victims still have the right to appear and comment. S.C. Const. art. 1, 24(A)(10) ; S.C. Code Ann. § 16-3-1560(A) (2003).

attend and comment at the Appellant's parole hearings in the past that they thereby abandoned those rights in future parole hearings. Consequently, these arguments are deemed abandoned on appeal. *See Jones v. Leagan*, 384 S.C. 1, 16-17, 681 S.E.2d 6, 20-21 (Ct. App. 2009) (noting that the appellant's failure to cite legal authority to support one of his arguments made the argument conclusory, and that such arguments are deemed abandoned on appeal).

The Appellant further argues that the composition of the board should have been the same panel of three instead of the full Board, and that having the hearing before the full Board was a denial of due process. Because this Court holds that the December 14, 2011 hearing was void *ab initio*, the January 18, 2012 hearing essentially became the initial parole hearing. Pursuant to Section 24-21-30(A), the chairman of the Parole Board "may direct the members of the board to meet as three-member panels to hear matters relating to paroles and pardons as often as necessary to carry out the board's responsibilities." It is within the discretion of the chairman of the Board to convene the board as a three-member panel or as the full Board. Therefore, the Appellant was not prejudiced by appearing before the full Board at the January 18, 2012 parole hearing. Even if the December parole hearing had not been void *ab initio*, the Appellant still would not have been prejudiced because the rehearing was justified due to the procedural due process violation, and the Board can hold hearings as either a three-member panel or as the full Board. The three-member panels are rotated at random by the chairman. *C.f. Unisys Corp. v. S.C. Budget and Control Bd. Div. of Gen Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) ("An adequate *de novo* review [before an impartial panel] renders harmless a procedural due process violation based on the insufficiency of the lower administrative body."). The fact that the full Board decided to deny Appellant parole is not a matter that this Court can consider. *See* S.C. Code Ann. § 1-23-600(D) (Supp. 2012) ("An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving . . . the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services.").

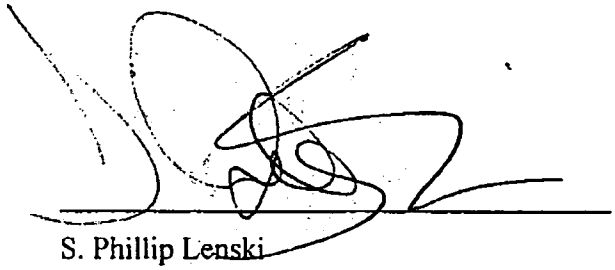
The Appellant further argues that the Attorney General provided "no new evidence . . . in advance of the January 18, 2012 hearing which would determine that the Board should determine that parole should not be granted." He also argues that no new evidence was offered at the January 18, 2012 hearing that supported a rescission of the Board's earlier decision to grant Appellant parole, as due process requires. However, because this court holds that the December

14, 2011 hearing was void *ab initio*, it need not address these arguments concerning the justification of a rehearing and rescission of the decision rendered following the December hearing.

ORDER

IT IS THEREFORE ORDERED that the Decision of the Department is **AFFIRMED.**

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

January 17, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah E. Garland
Law Clerk

January 17, 2014
Columbia, South Carolina