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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE CIRCUIT COURT

Judge J. Cordell Maddox, Jr.

Case No. 2018-001042

THE STATE, PETITIONER,

v.

ARTHUR M. FIELD,
RESPONDENT.

BRIEF OF RESPONDENT

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Respondent, Arthur M. Field Respondent, by and through his undersigned counsel, J. Todd Rutherford, Esquire, hereby objects to the State's appeal from the denial of the State's Motion to Reconsider the original sentence imposed by the Honorable J. Cordell Maddox and requests denial of the motion and dismissal of the appeal on jurisdictional, equitable, substantive, statutory and/or procedural grounds, as set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent was indicted by the State Grand Jury on June 13, 2012, fourteen (14) charges including securities fraud, forgery and conspiracy. Respondent voluntarily surrendered to investigators with the Office of the Attorney General was subsequently incarcerated in Alvin S. Glenn Detention Center. The Honorable J. Cordell Maddox was assigned continuing jurisdiction in On June 21, 2012, a bond hearing was held and the Court set bond at two million (2,000,000) dollars. Respondent remained incarcerated for thirty-three (33) days until a hearing was held on the Motion to Reconsider by filed on behalf of Respondent based, in part, on the fact that the sum was so high as to be opprobrious under the circumstance of the case where the Respondent was a non-violent offender with no criminal record.

On July 19, 2012, a hearing on the Motion to Reconsider was convened before the Honorable DeAndrea Benjamin. Judge Benjamin ordered that bond be reduced to five hundred thousand (500,000) dollars with the special condition of house arrest with GPS Monitoring. Respondent spent fifteen (15) months on GPS Monitoring, confined to his home. On December 13, 2012, Judge Benjamin relaxed the house arrest restrictions to permit Respondent to visit the doctor, to meet with his attorneys, to attend religious services, and/or to work with investigators of the Office of the Attorney General. The Court declined to remove the GPS monitoring

requirement and clarified that the house arrest was only "relaxed." The State objected at the hearing, did not file for reconsideration of Judge Benjamin's decision. Even after the court allowed relaxed house arrest, Respondent spent roughly fourteen (14) hours per day in his residence in order to maintain the charge on the GPS monitoring device and to comply with the relaxed provisions of house arrest. A short time after his release from custody, Respondent entered into a proffer agreement (hereinafter "Plea Agreement") with the State. Pursuant to that agreement, Respondent cooperated over a period of seven (7) months resulting in the re-indictment and subsequent conviction of co-defendant, Fredrick Pfeiffer. The State knowingly induced Respondent to enter into a binding, contractual Plea Agreement on April 12, 2013, that was re-executed by all parties on May 6, 2013. Respondent entered a guilty plea on May 6, 2013, and Judge Maddox granted the State's request to defer sentencing until October 2013. During this time the Respondent fully cooperated with the State's investigation.

It is undisputed that the Respondent substantially performed under the Plea Agreement[1]. Judge Maddox was fully advised of Respondent's cooperation and performance pursuant to the Pleas Agreement on October 8, 2013, when he imposed sentence and on July 9, 2014, when he denied the State's Motion for Reconsideration. Respondent substantially performed in direct and detrimental reliance on the Plea Agreement and the representations by the State. In consideration for such performance by Respondent, the State expressly agreed to be bound according to the language of the Plea Agreement, to wit:

[1] Respondent provided countless hours of cooperation to the Attorney General and its Investigators and attended a number of meetings; provided books, papers and documents to the State; provided hours of testimony and research related to activities of co-defendant Pfeiffer; pled guilty to all Counts of his indictment; stipulated to the total restitution requested by the State; waived significant state and federal Constitutional rights including appeal, collateral attack, habeas corpus, post-conviction relief and appeal and those rights guaranteed under the Fourth and Fifth Amendments to the U.S. Constitution and those guaranteed in the South Carolina Constitution and state and federal statutes.

- To "advise the Court in good faith its own assessment of the extent, value and truthfulness...of Mr. Field's cooperation in this matter"
- To "ask the Court to fashion an appropriate sentence in its discretion given the State's position as to the nature, extent, and effect of Mr. Respondent's crimes and any other relevant factors."
- To abstain from asking "for any specific sentence and that any sentence will be in the discretion of the sentencing court."
- To waive "the right to contest the sentence or any portion thereof or to appeal."

The language of the Plea Agreement confirms the fact that it is final and complete: "It is the intent of the parties that this agreement and the resulting pleas and sentences finally conclude any and all *existing* or *possible* legal proceedings related to indictment 12-GS-47-008 whether direct or collateral, and that all that remains is for Respondent to serve any sentence given by the Court in the manner provided by state law." (Emphasis added).

The State and the Court confirmed Respondent's substantial cooperation and its beneficial effect on all proceedings, both at sentencing and at the hearing on the motion to reconsider.[2] In fact, as a direct result of Respondent's substantial cooperation, Pfeiffer was re-indicted on June 18, 2013. Assistant Attorney General Petrano emailed Respondent to inform him of the re-indictment and to essentially 'thank' Respondent for his assistance in obtaining such a new, expanded indictment.

Due in large part to evidence obtained from Respondent's cooperation, Pfeiffer entered a guilty plea on September 18, 2013, which resulted in saving the State considerable time and money. Hence, the State easily obtained two voluntary pleas in an extremely complex, time-consuming, financial white-collar matter. A trial of either Respondent or Pfeiffer would have put

[2] Co-defendant Pfeiffer indicated he would demand trial in 2014. Moreover, Pfeiffer filed a Motion to Recuse the Attorney General, and was likely to appeal any adverse verdict.

the State and the judicial system to great expense of time, resources and money. All were avoided because Respondent's extensive cooperation.

In rendering the sentence of the Court, Judge Maddox noted that he was taking Respondent's substantial cooperation and his voluntarily entry of a guilty plea into account in determining the sentence, its reduction and the credits. The Court found that Respondent had successfully completed thirty (33) days of incarceration and fifteen (15) months of GPS monitored house arrest and awarded credit for all such restrictions pursuant to the intent of S.C. Code § 24-13-40, as amended. The Court held as a matter of fact and law that Respondent be given credit for a total of 16 months with credit for time served. The Court carefully calculated the suspension period and the credits and factored in the likely effect of those credits in order to roughly equate the two time periods.[3]

The State did not object to these findings, the Plea Agreement, or the sentence as a matter of fact or law. To the contrary, the State publicly announced it was very pleased with the sentence, the Court's decision, and the credits awarded by Judge Maddox. The *Greenville News* reported the fact that Creighton Waters, an Assistant Attorney General who assisted in the prosecution effort, was pleased with Respondent's sentence. Waters also said, "[t]hese cases are difficult. They're different from the norm. People who don't have to sit in the judge's chair could state that they wish there was more time given. But the judge considered all the factors, including the fact that Mr. Field did come in, plead guilty, cooperate and was helpful." The State made no objections at sentencing, thus, waiving any issue related thereto, which is consistent with the terms of the Plea Agreement.

[3] Judge Maddox originally set the suspension period at 29 months and then altered it to 26 months.

Respondent reported to the Anderson County Detention Center on October 11, 2013, as ordered. On October 16, 2013, the Director of the Department of Corrections ("D.O.C.") determined Respondent's credits and good behavior were sufficient to merit release as mandated by S.C. Code §§ 24-13-210 and 220. Such determination is solely within the mandate of the Director(s) of the D.O.C. and the Department of Probation, Pardon and Parole ("D.P.P.P.S."). Upon release, Respondent reported to the D.P.P.P.S. Office in Greenville. Respondent reported to the D.P.P.S. regularly and made monthly payments to satisfy court fines, supervision and restitution.

Assistant Deputy Attorney General Waters moved to reconsider the sentence only after he learned of Respondent's release. The State was dissatisfied with the determination made by the Director of the D.O.C. regarding its determination about credits awarded to Respondent, a decision in the sole discretion of the D.O.C.. The Motion to Reconsider focused upon the improper application of credits by the D.O.C. All other issues were waived. One week prior to the motion hearing scheduled for July 2014, the Attorney General prompted D.P.P.P.S. to issue Respondent a citation of violation for non-payment of the restitution order of October 8, 2013, allegedly based upon Respondent's failure to pay $74,500 per month, as determined by the D.P.P.P.S., which had erroneously amortized the total restitution over 48 months.

Between October 8, 2013 and July 9, 2014, Judge Maddox had sufficient time to review the State's papers, the facts of the case, the allocution, the sentence, the testimony, the case law, all relevant State and federal precedents, the evolution of relevant laws and his prior determinations. The Motion to Reconsider and the Probation Violation matter were heard by the

court on July 9, 2014. Judge Maddox confirmed[4] he had spent many days during the nine (9) month interval reflecting upon all evidence, the facts, the law and his decisions as to both Respondent and Pfeiffer, and believed his sentences were correct as to Respondent, and possibly too harsh as to Pfeiffer.

Assistant Deputy Attorney General Waters again argued both motions. Respondent's counsel strenuously objected to the State's lengthy argument; specifically, the undersigned argued the facts, the law and the sanctity of the Plea Agreement as a complete bar to the Motion to Reconsider.[5] During the hearing, the Court heard testimony from the author of the Legislative Act concerning the meaning and intent of the Legislature when it amended S.C. Code §24-13-40 to expand pre-sentencing 'time served' computations. The Court, once again, evaluated the evidence and the law, and ultimately denied the State's Motion for Reconsideration, indicating that the Court had no desire to change Respondent's sentence even in light of the effect of the credits applied by the D.O.C. The Court stated it understood the argument of the State, but found that Respondent had been effectively confined on significant GPS monitoring and fulfilled the legislative intent of the amended statute, and that no purpose would be served by re-incarcerating Respondent. There was no ambiguity about the Court's announced decision.

During the interval between the reconsideration denial and the 'probation violation' hearing, Judge Maddox heard and reconsidered Pfeiffer's Motion to Amend his sentence. The

[4] To date, the State has failed to provide a copy of the Record on Appeal and/or a Transcript of the proceedings.

[5] Members of the public, the CIF Receiver and his attorneys, and CIF victims were also heard at both the original sentencing and in the reconsideration hearing. Respondent was also given an opportunity to speak; the court considered his sincerity and acceptance of responsibility expressed at the allocution, the sentencing and the reconsideration hearing.

Court granted a reduction in Pfeiffer's sentence in order to bring it more closely in line with that of Respondent—which the Court, again, acknowledged would remain the same.

The Court then took up the matter of Respondent's alleged probation violation for non-payment. During the hearing, the D.P.P.P.S. acknowledged Respondent had already paid all court fines and fees and pre-paid all supervision fees for five (5) years of probation.

After testimony presented by the State, Judge Maddox again assessed the overall situation based on facts and evidence adduced, and re-set restitution at $3,200 per month. The Judge declined to change the sentence or find any probation violation since he purposely wanted Respondent to continue on probation to pay the remaining restitution. The Court had at least three (3) separate opportunities to visit the issue of the sentence, the reduction, the facts, the evidence, the law and the credits. At certain hearings, the Court had actual knowledge Respondent had been released after five (5) additional days of incarceration and completed nine (9) months of probation in reliance upon the Court's original decision.

The Court clearly and unequivocally denied the Motion to Reconsider and determined Respondent's restitution monthly payment, finding no willful probation violation.[6] Respondent resumed his probationary sentence. Approximately thirty (30) days later, D.P.P.P.S. received the revised signed Order confirmed that Respondent was to pay $3,200 per month. Respondent continued to pay in a timely manner and was current in accord with the Court's directive. Respondent completed more than forty (40) months of probation, almost 67% of the assigned term in reliance of the denial of reconsideration by Judge Maddox on July 9, 2014.[7]

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[6] The media reported all of the details immediately following the hearing.

[7] It is reasonable to assume the Order denying reconsideration was or could have been issued at the same time as the Order revising restitution.

No notice of any hearing was given to Respondent or his counsel of any action in this matter following the July 9, 2014 denial of reconsideration. Nothing prevented the State from filing this appeal on or before July 19, 2014. Hence, this appeal was not timely served upon Respondent or his counsel. At some point in February 2015, however, Pfeiffer's attorneys may have sought a revised Order from Judge Maddox to secure Pfeiffer's early release. The undersigned believes it is from such revised Order, which may have peripherally referenced Respondent, that the State sought to appeal. Notice of Intent to Appeal was not filed by the State until February 2015—more than 7 months after the denial of reconsideration by Judge Maddox. This appeal followed.

LEGAL ARGUMENT

I. THIS APPEAL IS UNTIMELY AND SHOULD BE DISMISSED.

Rule 203(b)(2) requires the State serve a notice of appeal "within ten (10) days of ... entry of the order or judgment." Rule 203(b)(2), SCACR. "After a plea...resulting in conviction...a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed....". Moreover, pursuant to Rule 29 of the South Carolina Rules of Civil Procedure, post-trial motions must be timely made and toll the 10-day period only until the reconsideration is decided. Rule 29, SCRCP. Failure to timely file notice of appeal deprives this court of jurisdiction, as this court has repeatedly stated. *Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383 (2000); *State v. Scott,* 351 S.C.584, 571 S.E.2d 700 (2002). Although written notice is generally required, the gravamen of Rule 203 is to ensure the parties have sufficient notice of the Court's Order.[8]

[8] "We find Warren's motion to reconsider her sentence, like the motion to withdraw a guilty plea, is subject to the ten day time period prescribed in Rule 29; thus, because the motion was filed more than three years after imposition of the sentence, Warren's motion is not timely." *State v. Ivory Warren*, No. 4804 (S.C. App. 2011). See *Hill v. S.C.*

Since the State failed to timely appeal Respondent's sentence, or the denial of its Motion to Reconsider, this appeal must be dismissed. Respondent was sentenced on October 8, 2013. No appeal was filed. The Motion to Reconsider was timely filed, but only subsequent to Respondent's release, after a determination by the D.O.C. that release was appropriate[9] The State's Motion to Reconsider was heard—and clearly denied—on July 9, 2014. After several hours of argument on such motion (and on an alleged probation violation) the Court denied the State's motion. There is no doubt that the State had full actual, express, implied, legal and/or inquiry notice as to the court's Order on July 9, 2014 as well as all motions pertaining to Respondent and Pfeiffer.[10] The State did not appeal by July 19, 2014—which would have been 10 days after its Motion for Reconsideration was denied in open court despite ample actual, express, legal and implied notice of Judge Maddox's decision. No appeal was filed until February 2015.

The law imposes a very strict 10-day time clock to force a party to appeal immediately following sentencing or denial of reconsideration of such sentence—assuming the State even had a right to appeal (It is the position of Respondent that the State had no right to appeal pursuant to the Plea Agreement). In the instant action, the State failed to appeal within the 10-day timeframe prescribed and Respondent would be severely prejudiced if the State were allowed to proceed with this untimely appeal. As such, law and equity dictate that this appeal should be dismissed or denied.

Dep't of Health & Envtl. Control, 389 S.C.1, 21, 698 S.E.2d 612, 623 (2010); *State v. Brown*, 358 S.C. 382,387, 596 S.E.2d 39, 41 (2004).

[9] Had Respondent been incarcerated only 3 days longer or reported to Anderson County on October 14, 2013, the Motion to Reconsider would have been untimely. The same 10 days should be applied to the July 9, 2014 Motion to Reconsider.

[10] A revised Order to D.P.P.P.S. within 30 days of the July 9, 2014 hearing.

Should the State argue that a subsequent Order issued regarding Pfeiffer constitutes a final decision regarding Respondent, this contention is without merit. *Bordeaux v. State*, 410 S.C.495, 765 S.E.2d 143 (2014), establishes that oral pronouncement controls if the Court's decision aligns with a Plea Agreement.[11] To the extent any written Order was delayed or ambiguous in the instant action, the oral pronouncement of the sentence by Judge Maddox and the denial of reconsideration must control. Hence, the ruling on July 9, 2014 should stand. Moreover, even if the Court's articulation of it's decision is not controlling, Respondent should not be penalized for any failure of the State or the State Grand Jury Clerk[12] to act in a timely manner, thus, delaying the issuance or publication of any further written Order of the Court. Furthermore, the State should not be permitted to misuse any subsequent Order regarding Pfeiffer's release against Respondent to 're-start' the 10-day time clock.

Respondent could reasonably have expected the reconsideration denial would be treated the same as the restitution revision Order. The State has failed to demonstrate any justifiable grounds for the delay, if any existed, in the issuance or execution of such reconsideration Order by the State Grand Jury Clerk, under its control, or Judge Maddox. It is unjust and unfair to penalize Respondent for such delay, when Respondent justifiably relied upon the State's inaction and has conducted his life accordingly.

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[11] An unambiguous sentence pronouncement will control, whether oral or written, if the sentence is in consonance with the Plea Agreement. See, e.g., *Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010)(declining to give effect to an unambiguous sentencing sheet over an unambiguous plea colloquy because to do so would result in deprivation of the defendant's rights to due process).

[12] State Grand Jury Clerk of Court, James Parks, has been claimed as an employee, agent of, or under the direction and control of the Attorney General's Office by Attorney General Alan Wilson. See *Pascoe v. James R. Parks, Clerk of Court for the State Grand Jury*, 2016-000671 (S.C. 7/13/2016).

II. THIS APPEAL IS NOT PERMITTED AT LAW BECAUSE OF THE RECIPROCAL WAIVER OF APPEAL CONTAINED IN THE PLEA AGREEMENT.

"Regarding plea bargains in general and the law applicable to them, this State and its courts have generally followed federal Fourth Circuit precedent." *State v. Thrift*, 312 S.C. 282,292, 440 S.E.2d 341, 347 (1994) discussing *Santobello v. N.Y.*, 404 U.S.257 (1971) and *U.S. v. Ringling*, 988 F.2d 504 (4th Cir. 1993). This case must be held to the same standard. The Plea Agreement the Respondent and the State are effectively barred from pursuing any appeals or raising any challenges or issues to the sentence rendered by the Court. The Plea Agreement in this matter does not contain explicit language allowing the State to appeal or move to reconsider any sentence by the Court. As a result, the State's motion should be denied and the appeal dismissed.

In *United States v. Guevera,* 941 F.2d 1299 (4th Cir. 1991)(rehearing *en banc* denied by 8 to 4 vote, 90-5840 11/14/91) *cert. den.* 503 U.S.977 (1992)), the Fourth Circuit held that "a plea agreement provision that bars the defendant from appealing, but is silent as to the government's right to appeal, *must* be construed as imposing a reciprocal limitation on the Government's right to challenge a judgment or sentence imposed by the...court." *Id.* at 1299. The Fourth Circuit quoted *Guevera, supra*, with approval in *U.S. v. Blick*, 408 F.3d 162, n.5 (4th Cir. 2005)("when a defendant waives the right to appeal in a plea agreement, 'such a provision against appeals must also be enforced against the government'.")

The Fourth Circuit has made it abundantly clear if the Government causes a defendant to waive appellate rights, but wishes to reserve appellate rights to itself, it must *explicitly* do so in the

Plea Agreement. *Id.*[13] Failure to make such an explicit reservation by the State causes a waiver. *Guevera* rests on the view that a guilty-plea agreement that includes a defendant's appeal waiver but not one by the state is far too "one-sided" if it were to be construed to allow the government to appeal. *Id.* at 1299. This appeal by the State contravenes the constitutional holdings by the Courts and allowing the State to pursue such appeal is not only a breach of the Plea Agreement but a violation of Respondent's due process rights.

Respondent was induced by the Plea Agreement to waive his state and federal constitutional rights to appeal or to seek habeas corpus—both are significant rights. Respondent waived the right to appeal by signing the Plea Agreement; such waiver is automatically reciprocal. Pursuant to the Plea Agreement, Respondent specifically and irrevocably waived his state and federal rights to appeal or collaterally attack his sentence—and the State agreed such sentencing was intended to be final and complete. Paragraph 7 of the agreement provides as follows:

> (7) **Waiver of direct appeals and collateral attacks**: Mr. Field hereby waives any entitlement to and agrees never to pursue any and all direct appeals, post-conviction relief applications and appeals therefrom, state habeas corpus petitions and appeals therefrom, federal habeas corpus petitions and appeals therefrom, or any and all other methods of direct or collateral review of these convictions and sentences. Mr. Field hereby acknowledges that he fully understands the nature and extent of the direct and collateral review he is waiving and is making the waiver in this provision freely, intelligently, and voluntarily. *It is the intent of the parties that this agreement and the resulting pleas and sentences finally conclude any and all existing or possible legal proceedings related to indictment 12-GS-47-008 whether*

[13] The U.S. Attorney acknowledges that failure to explicitly reserve the right to appeal to the government waives such right, but that such waiver is often needed in order to obtain a Plea Agreement. "In the interest of striking a bargain, [the government] may decide that it is necessary for the government to waive its appeal rights…This may be especially appropriate when a negotiated plea reflects the parties' agreement in connection with a particular sentence, sentencing range, or guideline application." *U.S. v. Guevera, supra.* The Attorney General often tries to enforce plea agreements appellate waivers by defendants in South Carolina and the same restriction should be applied to the State herein based upon *Guevera.*

direct or collateral, and that all that remains is for Respondent to serve any sentence given by the Court in the manner provided by state law. (Emphasis added)

The State made no contention that Respondent breached such Plea Agreement at any time. On the contrary, the State expressed its extreme satisfaction with Respondent's performance to Judge Maddox at sentencing and to the media immediately following sentencing. Respondent's counsel raised objection to the State's Motion to Reconsideration based upon the Plea Agreement covenants in the hearing before Judge Maddox on July 9, 2014, thereby preserving all issues for this Court.

The Plea Agreement did not permit any objection at any time during or following sentencing and is binding on the State. The Motion to Reconsider violated the Plea Agreement, and the right to bring such Motion was not preserved. *The State did not explicitly preserve to itself any appellate right whatsoever in the Plea Agreement.* The Plea Agreement expressly states it "is the intent of the parties that this agreement and the resulting pleas and sentences finally conclude *any and all existing or possible legal proceedings* relating to the indictment 12-GS-47-008 whether direct or collateral..." The plain language of the Plea Agreement precludes both the State and the Respondent barring both reconsideration and appeal.[14]

The State drafted the Plea Agreement and had full benefit of Respondent's cooperation. Permitting the State to renege on the binding Plea Agreement is unjust, unfair and violates the Respondent's due process rights. A waiver by the State is a waiver for all time and on all issues. As such, the State has waived all its appellate rights, both as a matter of contract and of law

[14] And, if that is not the case, then Respondent did not enter into this Plea Agreement knowingly and voluntarily or it was obtained by the State through false inducements and under false pretenses.

applicable in this Circuit and State. Hence, this appeal must be dismissed immediately in the interests of equity and justice.

III. THE STATE'S MOTION TO RECONSIDER THE SENTENCE AND THIS APPEAL ARE MATERIAL BREACHES OF THE PLEA AGREEMENT OF WHICH RESPONDENT IS ENTITLED TO SPECIFIC PERFORMANCE.

"The plea agreement process is an essential aspect of the administration of criminal justice ...As a result, the courts have a vital interest in assuring such agreements are adhered to and handled properly." *U.S. v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). A Defendant is entitled to the full benefit of the bargain of the contractual Plea Agreement. *State v. Thrift,* 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). "When a plea rests in any significant degree on a promise...of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. U.S.,* 404 U.S.257,262, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971). A plea agreement rests on contractual principles and each party is entitled to receive the benefit of its bargain even if the result is a considerably reduced sentence by the court. See, *U.S. v. Dawson*, 587 F.3d 640,645 (4th Cir. 2009); *U. S. v. Ringling*, 988 F.2d 504 (4th Cir. 1993); *U.S. v. Dews*, 551 F.3d 204 (4th Cir. 2008)(sentence reduced). Plea agreement analysis must be more stringent than a commercial contract, because the rights involved are fundamental and constitutionally based. The State has immense power and is held to the utmost standards in the criminal prosecution of individuals and must be held to a higher degree or responsibility than a defendant for imprecisions or ambiguities. *Id.*; *Thrift, supra.*

The State may not withdraw from the plea arrangement or do any act in derogation of the contract. *Custodio v. State*, 373 S.C. 4, 644 S.E.2d 36 (S.C. 2007)(specific enforcement mandated);

U. S. v. White, 366 F.3d 291 (4th Cir. 2004) (Government's refusal to abide by ... promise would clearly constitute evidence of "government overreaching" or "fraud in the inducement"). Prosecutors are legally obligated to fulfill the promises they make to defendants who are induced to plead guilty. *State v. Miller*, 375 S.C. 370, 652 S.E.2d 444 (Ct.App. 2007). Defendants have an absolute right to the enforcement of the plea agreement after its acceptance by defendant, performance and approval by the court. The prosecution is not permitted to withdraw from the agreement once it has been accepted by the court. *Jordan v. State*, 297 S.C. 152, 374 S.E.2d 683 (1988); *Santobello v. N.Y.*, 404 U.S. at 262 (1971).

Moreover, "A defendant entering into a plea agreement with the government undertakes to waive certain fundamental constitutional rights; because of that waiver, the government is required to meet the most meticulous standards of both promise and performance." *U.S. v. Gonczy*, 357 F.3d 50, 53 (1st Cir. 2004). The analysis of whether the defendant is receiving every advantage and benefit of the bargain is conducted with great scrutiny in his favor since the defendant has waived so many fundamental rights. *U.S. v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1996). "As a result, the government is held to a greater degree of responsibility than the defendant (or possibly than would either of the parties to a commercial contract) for imprecisions or ambiguities in plea agreements." *U.S. v. Wood*, 378 F.3d 342,348 (4th Cir. 2004). On appeal, this Court must enforce the Plea Agreement in the light most favorable to Respondent and against the State according to its terms, regardless of the State's wisdom or folly in not protecting its rights to object to the sentence, move to reconsider or appeal. *State v. Compton*, 366 S.C. 671,678, 623 S.E.2d 661, 665 (Ct.App. 2005).

"The breach of a promise made to induce a defendant to enter into a guilty plea-and thereby waive important constitutional rights-harms not only the defendant, but...involves the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice..." *McQueen, supra,* 108 F.3d at 66. "Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which cannot be tolerated." *U.S. v. Peglera*, 33 F.3d 412, 414 (4th Cir. 1994).

The State's Motion to Reconsider and the appeal in the instant action constitutes a material breach of the contractual Plea Agreement. Such breaches caused direct, substantial damage to Respondent. Specifically, Respondent was induced to enter into the Plea Agreement and cooperate by the State's covenant not to challenge any portion of the sentencing-- as represented to Respondent by the State and its officers during the proffer and as set forth in Paragraphs 6 and 7 of the Plea Agreement. The State and its representatives informally and formally represented to Respondent and his undersigned counsel that it would not challenge the Court's sentence at any time in any manner. It expressly promised in the Plea Agreement not to seek any specific sentence nor oppose any sentence pronounced nor enter into any further existing or possible legal proceedings based upon the indictment. The Plea Agreement clearly states it concludes all actions and bars any further 'existing or possible' legal proceedings by either party. The Motion to Reconsider and this appeal certainly fall within that prohibition.

The State drafted the Plea Agreement and Respondent is entitled to a liberal interpretation in his favor. The Court has no basis to 're-write' it for what the government now wants it to mean to permit the challenge to the sentence. Upholding a Plea Agreement in a defendant's favor is even

more important when a defendant, such as Respondent, provides substantial cooperation in furtherance of the public interest of obtaining resolution of criminal cases without the necessity of trial, as Judge Maddox determined Respondent had done in regard to Pfeiffer. See *State v. Mathis*, 287 S.C. 589, 592, 340 S.E.2d 538, 540 (1986). The appropriate remedy is the specific performance of the Plea Agreement and construction of all its terms in Respondent's favor. *State v. Sprouse*, 355 S.C. 335, 585 S.E.2d 278 (2003). Here, the Attorney General has willfully violated the Plea Agreement and this appeal must be denied, or the Plea was improperly extracted from Respondent or is vague and must be construed against its authors, the State.

The undersigned, as Respondent's counsel, argued at the hearing on July 9, 2014, that the State sought to effectively increase Respondent's period of actual incarceration without presenting any new facts or previously unavailable argument of law to justify its request. The State could only achieve such goal by objecting to the actual sentence and seeking a specific sentence of its own. Objecting to any sentence imposed and time credits awarded by Judge Maddox on October 8, 2013, was a direct breach of the letter and spirit of the Plea Agreement. Respondent's counsel vehemently objected to the State's attempt to 'back door' the prior sentencing. Respondent upheld his side of the bargain and was legally entitled to specific performance, and such agreement must be construed in Respondent's favor. Any other result violates public policy and deprives Respondent of due process and substantial rights. The Court determined that Respondent was entitled to the benefit of such bargain and that the primary intent of the Plea Agreement and sentencing had been fulfilled in its denial of the State's Motion to Reconsider.[15] Credits for 'time served' is a portion of the sentence and appears on every sentencing sheet signed by Judge Maddox

[15] See *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991); *State v. Dingle*, 376 S.C. 643, 649, 659 S.E.2d 101, 105 (2008)(State estopped from asserting ineligibility for parole after Plea Agreement).

on October 8, 2013. The sentence, the reduction, and the credits were based upon Respondent's cooperation, his entry of a plea, his acceptance of responsibility, and the time spent in incarceration and then confined to his home while under strict GPS monitoring. All components made up the sentence pronounced.

This appeal is an attempt to increase the period of incarceration and is a contractually forbidden attack on the original sentence which should be dismissed as a violation of the Plea Agreement and the appeal should be denied and the sentence upheld. Failure to do so will violate public policy, which favors Plea Agreements as inducement to obtain guilty pleas without the necessity of a trial. It would also send a message to all defendants not to enter into such an agreement with the State for fear of being reneged upon.

IV. THE LOWER COURT'S SENTENCE SHOULD BE AFIRMED AS JUDGE MADDOX PROPERLY USED HIS DISCRETION IN IMPOSING RESPONDENT'S SENTENCE.

This court will give the trial court's finding great deference on appeal and review the trial court's ruling with a clearly erroneous standard. The trial court will not be reversed unless the appellant has shown a gross abuse of that discretion. *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). Where there is any evidence to support the court's factual findings, there is no abuse of discretion. *Id.* It is the responsibility of the trial judge to determine the priority and relationship of sentencing *objectives* in any particular case. 24 C.J.S. *Criminal Law* § 1460. Judge Maddox's Order indicates the *objective* of his sentence was fully met by the result herein and his sentence should be upheld.

As held in *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct.App. 2001) (sentence reduction affirmed):

> A trial judge is allowed broad discretion in sentencing...*Brooks v. State*, 325 S.C. 269, 481 S.E.2d 712 (1997); *Garrett v. State*, 320 S.C. 353, 465 S.E.2d 349 (1995). See also *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976)(trial judge is given wide discretion in determining what sentence should be imposed).... The role of appellate courts in reviewing sentences is to determine: (1) whether the exercise of discretion by the sentencing court was based upon findings of fact grounded in competent, reasonably credible evidence; (2) whether the sentencing court applied the correct legal principles in exercising its discretion; and (3) whether the application of the facts to the law was such a clear error of judgment that it shocks the conscience. *State v. Megargel*, 673 A.2d 259 (N.J. 1996). There is a strong public policy against interference with a trial court's sentencing discretion. See *State v. Echols*, 499 N.W.2d 631 (Wis. 1993). The trial court has broad discretionary powers in imposing a sentence because it is generally in a better position than the reviewing court to determine the appropriate sentence by weighing such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Hernandez*, 745 N.E.2d 673 (Ill. App. Ct. 2001).

In criminal cases, the appellate court reviews only harmful errors of law and is bound by the factual findings of the trial court unless the findings are clearly erroneous. *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). There is a strong public policy in favor of upholding any reasonable sentence that does not amount to a gross abuse of discretion, especially after the trial court has had an opportunity to reconsider its original decision and expressed its intent in the sentencing. See, *Gall v. U.S.*, 552 U.S.38, 128 S.Ct.586, 591 (2007)(sentencing reviewed under deferential standard).[16] The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

[16] "[A] sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed merely as a means to dispense harsh punishment without taking into account the real conduct and circumstances in sentencing." *Id.*

Respondent voluntarily entered a guilty plea in May 2013, based on reliance and the terms of the Plea Agreement with the State resulting from Respondent. The Plea Agreement allowed the State to defer sentencing and to choose when the sentencing hearing would occur. The State had more than five (5) months to prepare for the sentencing hearing, which it scheduled for October 8, 2013. On that date, the State presented evidence and legal argument, never objecting to the sentence imposed, the period of incarceration, or the award of 16 months and 3 days of 'time served' credit in return for Respondent's cooperation and voluntary plea.

The Court entertained legal and factual argument and listened to witnesses, including victims, CIF counsel, and state investigators, at the Motion to Reconsider hearing. The Court also heard from the statute's Legislative sponsor as to the overall intent of the statute and the parameters of GPS monitoring in general as well as Respondent's experience being monitored. The Court took the State's concerns, legal argument and evidence into account prior to confirming the original sentence and credits based upon the facts before it. The Court held even if the State's legal argument had some merit, the actual outcome of the sentence, the credits and the subsequent release of Respondent fulfilled the court's intent in its original sentence under all the circumstances before Judge Maddox. The Court confirmed such intent by similarly denying any attempt to revoke Respondent's probation. Judge Maddox determined the State's goal in obtaining such restitution was paramount and outbalanced any other goal under the circumstances, particularly retribution for a non-violent offender who pled guilty after providing substantial assistance to the State. This Court should not undermine such determination or a lower court's discretion in sentencing.

The court's sentence and denial of reconsideration is entitled to great deference and should be affirmed. *Dorchester County Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 477 (Ct.App. 1996). Judge Maddox made factual findings which should not be disturbed absent a gross abuse of discretion.[17] Substantial justice has been accomplished and the appellate court should support trial court judges in their sentencing determinations.

V. THE MOTION TO RECONSIDER IS NOT PROPERLY BEFORE THE COURT BASED ON THE LACK OF NEW EVIDENCE TO CONSIDER.

Motions regarding Rule 59(e) of the *South Carolina Rules of Civil Procedure* are not a vehicle through which a party can inject new issues for the court to pass on, and they similarly are not a way to get new arguments of fact or law in through the back door. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App. 1990). See also, *Spreeuw v. Barker*, 385 S.C. 45, 682 S.E.2d 843 (Ct.App. 2009); *Kiawah Prop.Owners Group v. Pub.Serv. Comm'n of S.C.*, 359 S.C.105,113, 597 S.E.2d 145,149 (2004); *State v. Sullivan*, 310 S.C. 311,314, 426 S.E.2d 766, 768 (1993). In the absence of new information, a Motion to Reconsider under either Rule 59(e) or Rule 29 is not appropriate. *MayRespondent v. Natl. Ass'n for Stock*, 674 F.3d 369 (4th Cir. 2012)(denial of reconsideration affirmed based on lack of any evidence or argument that could have been raised at initial hearing).

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[17] See *State v. Parker*, 671 S.E.2d 619, 381 S.C. 68 (Ct.App. 2008)(denial of motion to reconsider affirmed where no new information presented at motion to reconsider that could not have been presented at original hearing). ..."On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion..." *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). The court's ruling was not so clearly erroneous as to offend substantial justice. *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000); *State v. Amerson*, 311 S.C. 316, 428 S.E.2d 871 (1993); *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).

To constitute 'new evidence' such information must have been discovered since the original hearing and must not have been discoverable before the hearing through the exercise of reasonable diligence. See, e.g., *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App. 2005). Similarly, in *Wright v. Town of Glennarden*, 89 F.3d 831 (4th Cir. 1996), the court held that there was no abuse of discretion in refusing to consider allegedly 'new' evidence in denial of reconsideration when such could have been presented at original hearing. The State is not allowed to 'do over what it thought it had already done correctly' *Colten v. Kentucky*, 407 U.S.104, 117, 92 S.Ct. 1953, 1960 (1972)." *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (S.C. 2001)(harsher sentence vacated); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct.App. 1995).

At Respondent's sentencing hearing on October 8, 2013, the State had every opportunity to present its arguments before Judge Maddox. The Court allowed statements from the victims, CIF's Receiver and attorneys, and other members of the public. Deputy Attorney General Waters, having been present at all hearings before Judges Cooper, Benjamin and Maddox, had actual or constructive notice of all relevant statutes and case law applicable within this State and the Fourth Circuit.

The Court pronounced sentence, determining that 29 months should be served, but subsequently reduced such term to 26 months after hearing from Respondent. Judge Maddox then discussed the credits to be applied for what he determined was 'time served' based upon the arguments of counsel and the evidence before him. After considering the facts, the evidence and the law, the Court decided to award 16 months and 3 days of credit against the sentence.

The State raised its objection only *after* the D.O.C. calculated the effect of all the credits against the sentence and properly released Respondent. Judge Maddox correctly determined the remedy of reconsideration is extraordinary and should be applied sparingly and only in exceptional circumstances.[18] There were no new facts for Judge Maddox to consider, which had existed prior to the original sentencing. The State made its motion based on the events which took place after the sentencing. The calculation of the D.O.C. and the release of Respondent did not constitute 'new evidence.' Allowing the State to go forward with its motion would effectively mean that the aggrieved party in every case will raise post-sentencing matters in Motions to Reconsider and then on appeal. The Motion to Reconsider was properly denied and such denial should be affirmed.

VI. THERE WAS NO GROSS ERROR OF LAW, AS THE COURT ADHERED TO SOUTH CAROLINA STATUTES AND INTERPRETED SUCH STATUTE LIBERALLY TO EFFECTUATE THE INTENT OF THE COURT'S SENTENCE AND THE IMPLICIT INTENT OF THE LEGISLATURE.

"[P]enal statutes are to be construed strictly against the State and in favor of the defendant. *Williams v. State*, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991)". *See* also, *Hair v. State*, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991)(Construing time frames for eligibility in favor of defendant and against State); *State v. Graves*, 269 S.C. 356, 360, 237 S.E.2d 584, 586 (1977) (Because statute is penal in nature "we must... resolve any uncertainty or ambiguity against the State and in favor of the respondent.[19]

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[18] See *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Ackermann v. U.S.*, 340 U.S.193, 202(1950).

[19] The cardinal rule of statutory interpretation is to determine legislative intent. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct.App. 2005). Legislative intent must prevail if it can be reasonably discovered in the language used,

Bill H3193, entitled "A Bill to Amend Section 24-13-40, as Amended..." was introduced on December 18, 2012. The Bill passed the House on March 6, 2013, by a vote of 94 to 17. The Senate passed the bill on May 15, 2013 with amendments by a vote of 39 to 2. The House concurred by unanimous vote and the ratified Bill was signed by the Governor on June 7, 2013.[20] S.C. Code § 24-13-40. The Act states the credits are to be determined at the time of sentencing, which took place October 8, 2013 in the instant action. The Legislature also delineated between "time served' and the more encompassing term 'any time spent' employed in relation to GPS monitoring.[21] And, it clearly applies to all time on bail release. Otherwise there would be no time 'prior to trial'. The Legislature intended to greatly liberalize the original Section 24-13-40.

These matters were known to the Court, the State, and the Respondent on October 8, 2013 and July 9, 2014. The Court carefully considered the extensive cooperation of Respondent, his guilty plea, his remorse, his incarceration, his GPS monitored confinement from July 2012 through October 8, 2013, and awarded Respondent 16 months and 3 days of 'time served.' Namely, the Court held Respondent successfully completed 33 days of incarceration in a Detention Center and an additional 15 months of GPS monitored 'house arrest' and confirmed such determination in its

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and that language must be construed in the light of the intended purpose of the statute." *State v. Brannon*, 666 S.E.2d 272, 379 S.C. 487 (Ct.App. 2008). The purpose of the statute is to award credits against the sentence and in favor of the prisoner and the Legislature recognized the actual 'severity' of GPS monitoring.

[20] The Bill was available on the South Carolina Legislative website from December 18, 2012, and the final text was updated on May 8, 2013. The State had actual or constructive knowledge of H3193's introduction, passage, ratification and approval as Act #34 at all times relevant hereto. The undersigned House Minority Leader certifies it was the Legislature's intent to override *Higgins* and to provide full credit for time served on all GPS monitoring.

[21] The language must be read to harmonize with its subject matter and accord with its general purpose. *Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468 (2004). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002). The State also enacted S.C. Code Sec. 24-13-1520 providing for 'home detention'. These statutes are to mitigate incarceration and to benefit offenders and to provide an alternative for the State for the expense of incarceration.

subsequent denial of reconsideration. These holdings were within the letter and spirit of S.C. Code § 24-13-40, as amended, and as intended by the Legislature, as attested to by the undersigned, the sponsor of the Amendment. The statute provides for credit for 'any' time served on a GPS monitor prior to sentencing. Such must refer to time on court ordered bail release, since there could be no other interpretation. Respondent was sentenced after the effective date so the law applies and the Court properly awarded the credits.

VII. THE APPLICATION OF GOOD BEHAVIOR CREDITS BY THE DEPARTMENT OF CORRECTIONS WAS PROPER.

The Motion to Reconsider was filed in direct response to the action of the Director of the D.O.C. in releasing Respondent in less time than the State anticipated. Credits for good behavior are statutorily mandated by S.C. Code § 24-13-210(A), *et seq*. It is within the sole purview of the Director to determine credits applicable to a sentence, S.C. Code § 24-13-80(5), § 24-13-220, and to reduce a sentence, S.C. Code § 24-13-230. Only the Director of the D.O.C. may reduce or forfeit credits for good cause. S.C. Code § 24-13-210. The Director may promulgate rules and regulations, S.C. Code § 24-1-90, and is vested with the exclusive management and control of the prison system, and is responsible for the proper care, treatment and management of the prisoners. S.C. Code § 24-1-130. The Director may designate as a place of confinement any available facility, whether maintained by the D.O.C., or by some other entity. S.C. Code §§ 24-3-20 and 30. Any objections the State may have should have been timely directed to the D.O.C. or the Legislature.[22]

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[22] See *Major v. South Carolina Dep't of Probation, Parole and Pardon Services*, No. 26672 (S.C. 06/15/2009), where the Supreme Court, per Beatty, J., stated:

> Confined by these legislative enactments, and the doctrine of separation of powers, a sentencing court is not authorized to determine parole eligibility. Instead, a court's final judgment in a criminal case is the pronouncement of the sentence which includes the ability to designate whether sentences

VIII. THE STATE'S MOTION TO RECONSIDER AND ITS APPEAL ARE NOT ONLY IN VIOLATION OF THE PLEA AGREEMENT, BUT THE ISSUES RAISED ARE MOOT.

During the pendency of the matter currently before the Court, Respondent's sentence was revoked on a probation violation which renders this issue moot. As a result of the of probation violation, the Respondent was taken back into custody and reincarcerated to continue out his sentence. The State has full knowledge of this and was properly made aware by the Respondent. Subsequent to the hearing and the Court's revocation of Respondent's probation, all parties discussed the effective start date where the State and Respondent disagreed. The Court ultimately used is discretion in sentencing and determined the start date of the revocation. Respondent and the State made no objections as to the Court's authority to make its determination as to sentencing. This process further demonstrates the authority of the trial judge to dictate the sentence and details of that sentence. Additionally, the revocation of Respondent's sentence renders any and all arguments by the State moot and this issue should no longer be of concern based on State's argument that Respondent was awarded improper credit.

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run concurrent or consecutive, subject to statutory restrictions. *State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989); see *De La Cruz*, 302 S.C. at 15, 393 S.E.2d at 186 ("Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive ...."). In effectuating a sentencing court's order, the Department has the sole authority to look to the statutes to determine whether a defendant is eligible for parole separate and apart from the court's authority to sentence a defendant. See *Dingle*, 376 S.C. at 649, 659 S.E.2d at 104-05 (noting that the Department has the sole authority to determine [credits or parole] eligibility separate and apart from the court's ability to sentence); *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

CONCLUSION

The Motion to Reconsider was properly denied by the lower court. Any objection the State may have had to the calculation of credits awarded should have been raised at the initial sentencing or to the Department of Corrections at the time of Respondent's release, is now untimely, and is not a proper subject for a motion to reconsider or this appeal. Accordingly, the sentence of the lower Court should be affirmed. It was within the Court's discretion, any error is harmless, and the State expressly waived all rights to contest such sentence in the Plea Agreement. Thus, depriving Respondent of the right to appeal effectively bars this untimely appeal.

For the foregoing reasons, the appeal should be dismissed or denied and the decision of the Circuit Court and the Court of Appeals should be affirmed in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Respondent Brief was sent by United States Mail, postage prepaid, on November 13, 2018 to:

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