THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE STATE GRAND JURY
Richland County
Court of General Sessions

Carmen T. Mullen, Circuit Judge

No. 2018-000494

The State, ... Appellant,

v.

Richard M. Quinn, Jr., ... Respondent.

Initial Brief of Respondent

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ISSUES PRESENTED

1. Can the State appeal a guilty plea, which was entered based on a plea agreement to which the State agreed and that the trial court accepted without objection?

2. Did the trial court abuse its discretion in accepting Respondent's guilty plea on the specific factual basis and other terms of the plea agreement with the State?

3. Did the trial court abuse its discretion in imposing a sentence of the statutory maximum one-year imprisonment suspended on two-years of probation and the statutory maximum fine of $1,000.00, plus 500 hours of community service?

4. Did the State present any evidence that the trial judge was biased?

STATEMENT OF THE CASE[1]

On May 16, 2017, the State Grand Jury of South Carolina returned indictments alleging Respondent violated section 8-1-80 of the South Carolina Code of Laws and alleging common law misconduct in office. See Indictments 2017-GS-47-12, 2017-GS-47-13. On October 18, 2017, the State Grand Jury returned an additional indictment for criminal conspiracy. See Indictment 2017-GS-32. Venue was set in Richland County. The Honorable Carmen T. Mullen was assigned to preside over these charges and others against Respondent's father.

The State and Respondent reached a plea deal on specific terms, except sentencing, and the trial court accepted it. The trial court then ordered the maximum sentence permitted under the statute with the incarceration sentence suspended on two years of probation and added 500 hours of community service. The State now attempts to appeal the guilty plea it agreed to and presented to the trial court.

On December 13, 2017, Respondent reached a specific and limited plea agreement with the State. Respondent agreed to resign his elected office and plead guilty to one count of statutory misconduct in office based on limited factual basis and other protections in the plea agreement. The plea agreement required the State to dismiss all other charges against Respondent and all charges against his father, and also re-

[1] Respondent does not consent to be bound by the Statement of the Case and the Statement of Facts contained in Petitioner's brief and, pursuant to Rule 208(b)(2), SCACR, submits its own Statement of the Case and Facts.

quired the State not to use any other information or materials against them in exchange for the pleas. *See* Hearing Tr., Dec. 13, 2017, at 8:5 – 10:17 & Court's Exh. 1 & 2. The State agreed to all terms and the limited factual basis for the plea. *See Id.* at 11:17-19, 25.

The State also wanted to make other allegations during the sentencing phase and told the trial judge she "would get to make a determination whether it should be held against him or not for not accepting responsibility for other acts." *Id.* at 12:3-5. After the plea colloquy, the trial judge accepted Respondent's guilty plea and proceeded to the sentencing phase. *Id.* at 20:9-11. The State then made a long presentation of other allegations and suggested inferences that were not part of the specific plea agreement and concluded by saying "I would ask the Court to take into consideration that he won't accept responsibility for any of this and more." *Id.* at 43:22-24. The court delayed announcing the sentencing. *Id.* at 85:7-10.

Following Respondent's guilty plea, but before the sentencing announcement, the parties submitted supplemental sentencing memoranda addressing a number of issues, including that a sentence of probation would be consistent with similar guilty pleas and that incarceration would not. Defendant's Suppl. Sentencing Memo., Jan. 19, 2018; Defendant's Addendum to Suppl. Sentencing Memo., Feb. 9, 2018. The State filed a letter to the trial court proposing a supplemental colloquy with Respondent prior to sentencing to address the scienter element of the factual basis for the plea. State's Letter Regarding Plea Issues, Jan. 25, 2018, at 2. The trial judge provided that relief to the State as additional assurance of a valid plea before announcing

the sentence, giving the State all the relief it had requested prior to sentencing. Hearing Tr., Feb. 12, 2018, at 8:11-16.

The sentencing pronouncement was subsequently held on February 12, 2018 in Beaufort County. The trial court sentenced Respondent to one year of incarceration, suspended upon service of two years of probation, 500 hours of community service, and payment of a $1,000.00 fine. *Id.* at 10:5-10.

After the sentencing, the State filed a Motion to Reconsider pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure. State's Motion to Reconsider, February 16, 2018. The State's motion asked the lower court to reconsider its sentence and to take into consideration the allegations by the State during the sentencing phase of the December 13, 2017 hearing. The State's motion also argued that the plea was invalid because the State now alleged that the plea lacked a sufficient factual basis. Respondent filed a response on February 27, 2018, and did not object to the sentence.

On February 28, 2018, the motion to reconsider was heard in Beaufort County. During the hearing, counsel for the State moved for the first time to have Judge Mullen recuse herself. Hearing Tr., Feb. 28, 2018, at 42:10 – 43:10. The trial court denied all three issues in the two motions. Order, March 6, 2018.

In the Order denying the State's Motion to Reconsider, the trial court wrote: "As the record reflects, the plea agreement was negotiated and established the factual premise for the guilty plea." *Id.* at 3. The order continued: "While the plea agreement

includes the State will make allegations of a wider range of conduct, the State incorrectly assumes that in considering this information, the Court must take their averments as fact." *Id.* The "Court considered the information provided by the State and the Defendants during the December 13, 2017 hearing and sentenced the Defendants according to the evidence the Court found reliable and relevant." *Id.*

The trial court also rejected the State's "allegations of improper *ex parte* communications" as "patently false" because the State's "consent to such communications is reflected in the record." *Id.* at 5. The court found it "curiou[s]" that "the State's demand for recusal only comes after the Court imposed a sentence different than the State requested." *Id.* The order concluded by saying, the State had cast "a pall on the judicial process in an unfortunate attempt to vacate a plea agreement that is of [its] own making." *Id.*

The State filed a notice of appeal against Respondent only. Respondent moved to dismiss the appeal, arguing that the State had no authority to appeal a guilty plea that the State had agreed to and which the trial court had accepted. This Court denied that motion but said that it would consider the issue "after final briefing is complete and the record on appeal is filed with this court." Order, November 14, 2018.

STATEMENT OF FACTS

It is rare that a person has to defend his own conviction against the State, particularly under a plea agreement with the State that has been accepted without objection by the trial court. The State agreed that if Richard M. Quinn, Jr. pleaded guilty to one count of statutory misconduct on limited facts, then the State would drop the other charges and leave sentencing up to the trial judge. The trial court accepted the plea on the terms agreed to by the State, including that the plea was based on the limited factual allocutions, and then sentenced Respondent to the statutory maximum of one year incarceration suspended on two years of probation and the statutory maximum fine of $1,000.00, plus 500 hours of community service.

For many years, Respondent Richard Quinn, Jr. was a member of the South Carolina House of Representatives and for four years, more than a decade ago, the majority leader. Respondent owned and operated a mail business called Mail Marketing Strategies. Separately, his father owned and operated a political consulting firm. The charges that were dismissed with prejudice alleged the businesses were not separate.

In 2015, the Attorney General of South Carolina designated Solicitor David Pascoe to make a prosecutive decision about "two redacted members" of the House of Representatives as part of an ongoing probe. *See generally Pascoe* v. *Wilson*, 416 S.C. 628, 788 S.E.2d 686 (2016). Eventually, the State charged Respondent with statutory and common law misconduct in office as well as criminal conspiracy. *See* Indictments

2017-GS-47-00012, 2017-GS-47-00032, 2017-GS-47-00013. The State also indicted Respondent's father for criminal conspiracy.

When the charges became public, Respondent's "political career [was] over" and his "business [was] destroyed." Hearing Tr., Feb. 12, 2018, at 10:1-4. The State then offered a plea deal. If Respondent resigned from office and pleaded guilty to statutory misconduct on limited facts, the State would drop the rest of the charges against Respondent and all charges against his father. Subject to this and other specific terms in the final plea agreement, including the State's agreement that Respondent's guilty plea would be based only on specific and limited facts, Respondent took the deal. The State also agreed not to use any other materials or information obtained in the investigation against Respondent and his father. Hearing Tr., Dec. 13, 2017, at 9:18-22 & 11:15-19.

At the plea hearing, Respondent pled guilty, and the State agreed to all terms of the plea agreement for both Respondent and his father. Hearing Tr., Dec. 13, 2017, at 11:15-19, 25; 13:10-11. The trial court accepted Respondent's guilty plea under the terms of the parties' plea agreement. Hearing Tr., December 13, 2017, at 20:9-10 (showing the trial judge stated: "I'm going to accept the plea, obviously . . .."). Then, at the end of the sentencing phase of the plea hearing, the trial court deferred announcing the sentence and stated she would pronounce Respondent's sentence at a subsequent date. Hearing Tr., December 13, 2017, at 84:25 - 85:1.

More than one month after the trial court accepted the guilty plea, the State became unsatisfied with the guilty plea and thereafter thought the sentence was inadequate punishment. The State asked the trial judge to reconsider the sentence, to invalidate the guilty plea, and to recuse. State's Mot. To Reconsider. The trial judge denied all three requests. Order, Mar. 6, 2018. In an unprecedented step, the State then appealed its own plea agreement. Notice of Appeal.

The case had been assigned to Circuit Judge Carmen Mullen. To move the case along in light of a potential plea agreement, she asked if the parties would agree to *ex parte* communications with her, an arrangement expressly permitted by rule. Rule 3B(7)(d), Code of Judicial Conduct.[2] All parties consented and had individual discussions with the trial judge in the lead up to the hearing on the guilty plea. Hearing Tr. Feb. 28, 2018, at 46:23 – 47:7; *see also* State's Mot. to Reconsider at 4 n.1 ("The parties consented.").

On December 13, 2017, Respondent appeared before Judge Mullen to plead guilty. At the start of the hearing, the State outlined "the package agreement": "Rick Quinn, Jr. is pleading guilty straight up ... [to] statutory misconduct in office." Plea Hearing Tr. Dec. 13, 2017, at 6:18–22. In return, "the State is dismissing, as part of that plea, the other charges on the defendant." *Id.* at 7:2–3. And "as part of this

[2] Unlike subsections (a) and (b) under Canon 3B(7), subsection (d) does not require notification and opportunity to respond after receiving consent of all parties.

agreement, your Honor, Richard Quinn, Sr.," (Respondent's father), "the State is dismissing both of his indictments." *Id.* at 7:6–8. Quinn Sr.'s business also pleaded "guilty to one count of failure to register as a lobbyist." *Id.* at 7:21–23.

Respondent's attorney then explained that Respondent was pleading "guilty to one misdemeanor statutory misconduct in office on [a] limited allocution." *Id.* at 8:16–20. This term of the plea agreement was that the guilty plea was based only on the facts that "in 2016, while a member of the House of Representatives," Respondent "failed to report to the House Ethics Committee the name of USC, which he knew was a lobbyist principal." *Id.* at 10:7–10. The year before, USC "leased office space ... from Capital Investments II, LLC, a business with which [Respondent] was associated." *Id.* at 10:10-13. The State agreed, saying it was "fine with the limited allocution." *Id.* at 11:25. Judge Mullen carried out the standard plea colloquy with Respondent, and "accept[ed] the plea." *Id.* at 20:10.

Although the State agreed with the limited factual allocution, the State insisted on giving a lengthy presentation of more allegations during the sentence phase of the hearing and was provided all the time the State wanted to make that presentation. After the nearly forty-five minute presentation, the Court asked, "If the evidence is as damning in your words, and extensive against Rick Quinn and Richard Quinn, as you said here ... why have you dismissed all the charges after four years?" *Id.* at 46:5–14. The State referred to the costs of prosecution and anticipated cooperation from Respondent's father with other targets.

Respondent's counsel pointed out that the State's presentation was just one side of a story and had not been proven and that it was contrary to the terms of the State's plea agreement. Hearing Tr., December 13, 2017, at 41:6 to 81:7. Defense counsel also refuted the State's allegations as being based on misleading documents and uncertain legal theories. *Id.* Respondent's counsel also presented evidence of the good Respondent had done throughout his career and as a family man, small businessman, public servant, and loyal friend. *Id.* at 70–83. At the end of the hearing, the trial judge reaffirmed she was "going to accept the guilty plea." *Id.* at 85:1–2. But the trial court "defer[ed] sentencing for just a bit" due to "the late hour." *Id.* at 84:24–85:16.

While awaiting the trial court's sentence, both sides filed sentencing memoranda. Respondent pointed to examples of misconduct in office with much more egregious facts in which Solicitor Pascoe and other state prosecutors did not ask for jail time. *See* Def. Suppl. Sentencing Memo; Def. Addendum to Suppl. Sentencing Memo. In its supplemental filings after the guilty plea had been accepted, the State again acknowledged: "As part of the package plea agreement, the State permitted the Defendant to accept responsibility for only a limited factual scenario articulated by his attorney during the hearing." State Sentencing Memo. at 3 (filed Jan. 19, 2018).

On February 12, 2018, the court held a hearing "for the sole purpose of announcing the sentences of the parties." Order Denying State's Mot. For Reconsideration at 3. But the State got cold feet: "Apparently I am going to have to object to

this plea going forward now." Hearing Tr., Feb 12, 2018, at 3:23–25. The State tried to "questio[n] th[e] agreement and the validity of the plea." *Id.* at 7:17–18.

Judge Mullen, however, confirmed that Respondent was pleading guilty to "one count of statutory misconduct in office for intentionally failing to report income from USC, a lobbyist principal." *Id.* at 8:11–15. She also noted the State's "theory of political atrocity" but said the State's other allegations outside the plea agreement were not evidence. *Id.* at 8:19–24. The trial court sentenced Respondent to the maximum of a year in prison, suspended to two years' probation, plus 500 hours of public service and a $1,000 fine. *Id.* at 10:5–10.

Somehow, that was not the outcome the State wanted. The State moved for reconsideration, and the trial court held another hearing. The State argued for reconsideration because it now believed the trial court erred by accepting the plea back in December. "The Court ... may have been duped," the State began, Motions Hearing Tr., Feb. 28, 2018, at 13:20–23; duped into not taking "into consideration the State's presentation of facts." *Id.* at 17:3–6. The trial court assured the State that it "heard it, I considered it, and I even think in my sentence I said he may well have done all of those things." *Id.* at 18:19–22. Ultimately, the trial court found the State had not proved those allegations, had agreed to limited terms in the plea agreement, and that Respondent's sentence was proper. *Id.* at 17:16–23.

Then the State attacked defense counsel. The trial court admonished the State to "be careful because in your motion you also said that I said something to you in chambers, which was not correct." *Id.* at 41:16–19. The State's apparent trap was

sprung, and the prosecutor turned to attack the trial court: "You have now stepped off the curb from being a fair and impartial judge to being a witness in this case. There is no way," the State continued, "you can now stay as the judge on this case and I would ask you to step off of this case, allow the Chief Justice to appoint a fair and impartial judge, and recuse yourself." *Id.* at 42:12–18.

Minutes later the State falsely accused the trial judge of having "*ex parte* communication without the State's consent." *Id.* at 46:15–22. The trial court calmly explained: "There has been no *ex parte* communications in this case ... with anyone ... other than what was approved prior to the guilty plea hearing, which I asked both of you and I would never have unless you both agreed, and you both agreed to it." *Id.* at 46:23–47:7. The State eventually admitted it had consented. *Id.* at 60:19–22. The State had confirmed it in writing too. State Mot. to Reconsider at 4 n.1.

The trial court denied the State's motion to reconsider. Order, Mar. 6, 2018. The trial court wrote, "As the record reflects, the plea agreement was negotiated and established the factual premise for the guilty plea." *Id.* at 3. The order continued: "While the plea agreement includes the State will make allegations of a wider range of conduct, the State incorrectly assumes that in considering this information, the Court must take their averments as fact." *Id.* The "Court considered the information provided by the State and the Defendants during the December 13, 2017 hearing and sentenced the Defendants according to the evidence the Court found reliable and relevant." *Id.*

The State now attempts to appeal the trial court's acceptance of the guilty plea, the sentence itself, and recusal.

ARGUMENT

The Court should dismiss this appeal as to Respondent's guilty plea. The State cannot appeal a guilty plea it induced the defendant to make and which the trial court accepted. Permitting the State to undo the deal now would run afoul of the Double Jeopardy Clause, which prohibits the State from placing criminal defendants twice in jeopardy for the same crime. Even if this Court reaches the merits raised on appeal, the Court should affirm the judgment. The trial judge properly accepted Respondent's guilty plea, and the resulting sentence is reasonable and permissible under the statute. Finally, the State's accusations of judicial bias are imaginary and provide no basis for vacating Respondent's valid conviction and sentence.

I. This Court should dismiss the appeal.

This Court should dismiss the State's appeal of Respondent's guilty plea because the State cannot appeal a guilty plea the State negotiated and which the trial court accepted. Allowing the State to renege on its deal now would not only put Respondent twice in jeopardy for the same crime, but it would also upend the plea-deal system. No criminal defendant would agree to plead guilty, knowing that the prosecutor could renege on the deal even after sentencing. *See State* v. *Tillman*, 320 S.C. 61, 63, 463 S.E.2d 94, 96 (Ct. App. 1995) ("Where a guilty plea is induced by prosecutorial promises, those promises must be fulfilled.").[3] To protect Respondent's constitutional rights and the rights of future criminal defendants, this Court should dismiss

[3] The ABA has adopted Prosecution Function Standard 3-4.2(c) to ensure fulfillment of the terms of plea agreements: "A prosecutor should not fail to comply with a plea

the State's appeal as to the guilty plea.

A. Standard of review.

"Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR. If a party prevails on an issue below, that party is not "aggrieved" and may not appeal that issue. *Davis* v. *SCDMV*, 420 S.C. 98, 104, 800 S.E.2d 493, 495 (Ct. App. 2017). It is error to address an issue raised by a non-aggrieved party. *Hudson* v. *Lancaster Convalescent Center*, 407 S.C. 112, 121, 754 S.E.2d 486, 490 (2014).

B. The State cannot appeal a guilty plea.

The State cannot appeal a guilty plea of its own design and agreement. "The State's ability to appeal has historically been limited in criminal matters." *State* v. *Wilson*, 387 S.C. 597, 603, 693 S.E.2d 923, 926 (2010). Generally, the State must live with the trial court's judgment in criminal cases, whether or not the State secures conviction. As the South Carolina Supreme Court explained long ago, "when in the trial, or examination, the result amounts to a final determination of the case, the State cannot appeal." *State* v. *Ludlam*, 189 S.C. 69, 69, 200 S.E. 361, 362 (1938).

This limitation is mandated by the double jeopardy clauses of the United States and South Carolina Constitutions. *See Ohio* v. *Johnson*, 467 U.S. 493, 498 (1984); *State* v. *Holliday*, 255 S.C. 142, 145, 177 S.E.2d 541, 542–43 (1970). The ban

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agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present." ABA Criminal Justice Standards, Prosecution Function 3-4.2(c) (found at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk/#4).

on double jeopardy "protects against a second prosecution for the same offense after conviction." *Johnson,* 467 U.S. at 498. If prosecutors were free to appeal criminal verdicts, defendants could face numerous prosecutions for the same offense, the very danger the double jeopardy clauses are meant to prevent.

This double-jeopardy limitation on the State's ability to appeal in criminal cases applies to guilty pleas. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." *Boykin* v. *Alabama,* 395 U.S. 238, 242 (1969). And because it is a conviction, "once a court accepts a defendant's guilty plea, jeopardy attaches." *Reed* v. *Becka,* 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999). Thus, the State cannot appeal the plea without putting the defendant in jeopardy for a second time, which is forbidden by the double jeopardy clauses. *Ludlam*, 189 S.C. at 69, 200 S.E. at 362. In this way, "the guarantee" against double jeopardy "serves a constitutional policy of finality for the defendant's benefit." *Brown* v. *Ohio,* 432 U.S. 161, 165 (1977).

Courts have allowed the State to appeal in criminal cases in only a few limited circumstances. These exceptions confirm that the State cannot appeal a guilty plea, because all the exceptions involve situations where jeopardy hasn't attached. For example, the State can appeal the quashing of an indictment or the suppression of critical evidence. *Holliday*, 255 S.C. at 145, 177 S.E.2d at 543. Both of these events naturally occur prior to jeopardy attaching. The other exceptions to the no-appeal rule involve obtaining an acquittal through fraud or a reversal of conviction by the trial court on purely legal grounds. *Id.* Because "double jeopardy is not involved in

such situations" — the defendant was never actually in jeopardy — the State can appeal without violating the double jeopardy clauses. *Holliday*, 255 S.C. at 145. But where a court has accepted a guilty plea and the defendant sentenced, jeopardy has attached; and the State cannot put the defendant in jeopardy again. *Reed*, 333 S.C. at 681, 511 S.E.2d at 399.

Preventing the State from appealing a guilty plea is also equitable, because a criminal defendant is generally barred from appealing a guilty plea. *See Vogel* v. *Myrtle Beach*, 291 S.C. 229, 231, 353 S.E.2d 137, 138 (1987). If the loser cannot appeal, surely the winner must also live with the result. Indeed, when the State loses at trial (that is, the jury acquits), the State cannot appeal. *See Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962) (*per curiam*). It would be inequitable to prohibit the State from appealing a loss, but permit it to appeal a win.

The appellate rules confirm that this is not the case. "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR. This is a "wise and well-reasoned requirement" because appellate courts are only "concerned with correcting errors that have practically wronged the appealing party." *Cisson* v. *McWhorter*, 255 S.C. 174, 177–78, 178 S.E.2d 603 (1970). If a party prevails on an issue, the party is not an aggrieved party with respect to that issue. *Davis* v. *SCDMV*, 420 S.C. 98, 103–104, 800 S.E.2d 493, 495–96 (Ct. App. 2017).

When it comes to guilty pleas, the State is not an aggrieved party. A guilty plea "has the same effect in law as a verdict of guilt and authorizes the imposition of the punishment prescribed by law." *State* v. *Cantrell*, 250 S.C. 376, 379, 158 S.E.2d

189, 191 (1967). In no way has the State been aggrieved by the trial court's acceptance of a plea agreement when the State has agreed to the deal, and a party cannot complain of error his own conduct has induced. *See, e.g., Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998) (holding an appellant may not on appeal object to use of substituted phrase in jury charge because he asked for change and judge agreed); *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984); *State v. Carlson*, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, the State negotiated, agreed to, and presented the agreement to the trial court and asked the court to accept the deal. The trial court's acceptance did nothing to aggrieve the State. Thus, the State's appeal of the guilty plea should be dismissed.

II. The trial court properly accepted Respondent's guilty plea.

Even if a prosecutor could appeal the conviction he secured, this Court should affirm the conviction in this case. The trial court did not abuse its discretion in accepting Respondent's guilty plea. The State's complaint about the guilty plea now — that the agreed-upon admitted facts do not add up to the right crime — is wrong, irrelevant, and waived. This Court should affirm.

A. Standard of review.

Appellate courts review the acceptance of a guilty plea for abuse of discretion. *See State* v. *Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). "A determination of voluntariness will normally show the trial judge did not abuse his discretion." *Id.*

B. The trial court properly accepted the guilty plea.

This Court should affirm Respondent's conviction. Respondent pleaded guilty on limited facts by agreement of the State to one count of statutory misconduct in office, and the trial court accepted that plea. The State now argues (State's Initial Br. 33–34) that the trial court's acceptance was improper. This argument is not clear, but it appears that the State now thinks the facts Respondent admitted and to which the State agreed do not add up to the right crime. That is incorrect and irrelevant.

First, the facts Respondent admitted do support the guilty plea conviction. Respondent pleaded guilty to violating Code section 8-1-80, which makes it a crime for "any public officer" to engage in "official misconduct." At the plea hearing, Respondent repeatedly made clear that he was pleading guilty to this charge on the limited facts spelled out in the plea agreement. Hearing Tr., Dec. 13, 2017, at 14:9–13; 14:14–16. Again at the sentencing hearing, Respondent "acknowledged the transaction and admitted that he was guilty of statutory misconduct in office." Hearing Tr., Feb. 12, 2018, at 7:21–24.

The State now claims that Respondent never said he "*intentionally* failed to report USC as a lobbyist's principal ... or *knew* that he was required to do so." State's Initial Br. 34 (emphasis added). But that assertion is belied by the record. Right before pronouncement of the sentencing, the trial judge asked Respondent exactly what the State had requested in its January 25, 2018 letter to "satisfy the elements of section 8-1-80 and ensure no issue is raised on appeal":

> The Court: Are you guilty of one count of statutory misconduct in office for *intentionally* failing to report income from USC a lobbyist principal[?]

Mr. Quinn, Jr.: Yes, ma'am.

The Court: The plea is valid.

Hearing Tr., Feb. 12, 2018, at 8:11-16 (emphasis added); *see* State's Letter Regarding Plea Issues, at 2.

Respondent thus pled guilty to intentionally violating Code section 8-1-80, not once but twice. *See Rollison* v. *State*, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001) ("All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.").

Ironically, the State now complains (at 34) that the "specific facts" detailed by Respondent's attorney "during the guilty plea hearing ... are ambiguous as to scienter." But even if defense counsel's words were ambiguous, the defendant's statement was not. *See, e.g.*, *United States* v. *Lemaster*, 403 F.3d 216, 221 (4th Cir. 2005) ("A defendant's solemn declarations in open court affirming a plea agreement carry a strong presumption of verity, because courts must be able to rely on the defendant's statements made under oath during a properly conducted ... plea colloquy."). And courts construe plea deals against the government, meaning any ambiguity is decided in the defendant's favor. *State* v. *Thrift*, 312 S.C. 282, 295, 440 S.E.2d 341, 348–49 (1994).

Second, even if the facts didn't add up to a crime it wouldn't matter. A "defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which

he is not guilty." *Rollison* v. *State*, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001). Indeed, in *Anderson* v. *State*, 342 S.C. 54, 535 S.E.2d 649 (2000), the South Carolina Supreme Court "held that an individual could plead guilty to voluntary manslaughter under an indictment charging him with murder, even though the facts would not support such a lesser charge." *Rollison*, 346 S.C. at 510–11, 552 S.E.2d at 292 (discussing *Anderson*). Here, Respondent pleaded guilty to violating Code section § 8-1-80. The State agreed to his doing so and under the limited facts that the State is now trying to challenge. Thus, even if the stipulated facts do not support the charge, the plea is valid. The Court should affirm the judgment.

C. The State failed to make a timely objection to the guilty plea.

In addition, without a timely objection at the plea proceeding, a guilty plea should not be considered on appeal. See *State v. McKinney*, 278 S.C. 107, 292 S.E.2d 598 (1982); *State v. Barton*, 325 S.C. 522, 481 S.E.2d 439 (Ct. App. 1997). The Court of Appeals has held, in the context of minors, that counsel must object to appeal the voluntariness of a plea. *In Interest of Arisha K.S.*, 331 S.C. 288, 293–94, 501 S.E.2d 128, 131 (Ct. App. 1998).

This should surely apply to the State's own guilty plea. The State did not object or even attempt to reserve any objection until more than one month after the trial court had accepted the guilty plea with the State's knowing and voluntary consent. Then, the State requested the trial court ensure Respondent had admitted guilt. The trial judge provided the state the exact relief it sought in the State's January 25, 2018

letter regarding plea issues. Nothing more was left for the trial court except to announce the sentence. Thus, the State does not have any basis for appeal of the guilty plea.

Moreover, the State cannot use a motion to reconsider to present an issue that could have been raised prior to acceptance of the guilty plea but was not. An issue may not be raised for the first time in a motion to reconsider. *See, e.g., Johnson v. Sonoco Prod. Co.,* 381 S.C. 172, 672 S.E.2d 567 (2009); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n,* 359 S.C. 105, 597 S.E.2d 145 (2004) (finding an issue raised for first time in petition for rehearing is not preserved); *Brailsford v. Brailsford,* 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008) (holding that the argument was never presented to trial court before filing of motion to alter or amend). The State obtained everything it asked for on the guilty plea prior to sentencing and only after sentencing raised new concerns about the plea. Thus, the State cannot now challenge the guilty plea.

III. The trial court did not abuse its discretion in sentencing.

A. Standard of review.

"On appeal, the trial court's [sentencing] ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." *State* v. *Sheldon,* 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001); *see also Garrett* v. *State,* 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark* v. *Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In addition, when it comes to plea deals, if the State "recommend[s]

a specific sentence, the fact that the judge does not accept the recommendation does not affect the validity of the plea." *Riddle*, 278 S.C. at 150, 292 S.E.2d at 796.

B. The Court should affirm Respondent's sentence.

Because Respondent's sentence is reasonable and permitted by statute, this Court should affirm the sentence. Respondent pleaded guilty on limited facts to violating Code section 8-1-80, which permits the trial judge to sentence the defendant to "not more than one year" in prison and fine the defendant "not more than one thousand dollars." The statute has no mandatory minimum sentence. The trial judge sentenced Respondent to the maximum for both the fine and imprisonment, with the imprisonment sentence suspended to two-years of probation. The trial judge also added 500 hours of community service to the sentence. Respondent did not object.

The trial judge here heard and considered all that was presented; engaged in a thoughtful, almost two-month review of the plea agreement and evidence; and imposed a reasonable sentence that should not be disturbed on appeal. Respondent pleaded guilty to "one count of statutory misconduct in office for failing to report rental income from a lobbyist principal." Hearing Tr. Feb. 12, 2018, at 9:19–21. The trial judge recognized that Respondent "has no criminal record. His political career is over. He has been disgraced. And his family's business has been destroyed." *Id.* 10:1–4. The trial judge also listened to the State's litany of allegations against Respondent, all of which Respondent denied as part of the plea agreement and which the State's plea agreement stated could not be used against him. Hearing Tr., Dec. 13, 2017, Ct. Exh. 2.

On balance, this is a reasonable sentence for a man with no criminal record, whose professional and political life had already been destroyed, and whose only proven crime was a misdemeanor for failing to report the name of a lobbyist principal that made payments to a business with which Respondent was associated. *See Stockton* v. *Leeke*, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977) (holding that "the sentence must not be grossly out of proportion with the severity of the crime"); *see also* Hearing Tr. Dec. 13, 2017, at 10, lines 4-17. Indeed, the trial court could not have sentenced Respondent to much more, except removing the suspended incarceration and two-years of probation. Because this sentence is within the statutory range and the trial court "is to be accorded very wide discretion," this Court should affirm that sentence. *State* v. *Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008).

The State's attack on the sentence is unsupported. The State argues (at 29–32) that the trial court did not consider the State's sentencing slideshow, which was full of unproven, contested allegations. There are two fundamental problems with the State's argument.

First, the trial court did consider the State's presentation and said so again and again:

- "Considering everything before me, the lengthy presentations that were given to me at our hearing on December 13, 2017 on behalf of both the State and the Defense ...." Hearing Tr., Feb. 12, 2018, at 6:2–5.

- "I heard [the State's presentation], I considered it, and I even think in my sentence I said he may well have done all of those things." Hearing Tr., Feb. 28, 2018, at 18:19–20.

- "After I listened to [the State's presentation], obviously I was able to weigh." Hearing Tr., Feb. 28, 2018, at 33:2–9.

- "The Court considered the information provided by the State and the Defendants during the December 13, 2017 hearing and sentenced the Defendants according to the evidence the Court found reliable and relevant." Order at 3.

The State's real gripe then is that it failed to persuade the trial court to sentence Respondent to prison. Of course, the State agreed the guilty plea was based only on the limited facts in the plea agreement and that Respondent and his father "deny every allegation and inference except what is in their allocution." Hearing Tr., Dec. 13, 2017, at 9:14-16, Ct Exh 2. The State also agreed "[a]ll materials and information obtained in the investigation, including searches and seizures by the State, are not to be used by the State against these defendants in exchange for these pleas." *Id.* at 9:18-22; Ct. Exh. 2. Additionally, Respondent's counsel gave a counter-presentation during the sentencing phase of the December 13, 2017 hearing. *See, e.g.,* Hearing Tr. 52:5 – 53:5. The trial court considered and discounted the State's allegations by sentencing Respondent "according to the evidence the Court found reliable and relevant." Order, March 6, 2018, at 4. But a prosecutor's failure at persuasion is no reason to overturn the court's judgment. "The fact that the judge does not accept" a sentence recommended by the State "does not affect the validity of the plea," nor does it affect the validity of the sentence. *Riddle*, 278 S.C. at 150, 292 S.E.2d at 796. Because the trial court here listened to and considered the State's full presentation, the State has no reason to complain after the trial court exercised its discretion to sentence within the statutory penalties.

Despite ample evidence showing that the trial court considered the State's presentation, the State highlights two comments the judge made during sentencing.

First, the State complains that the trial judge said: "As far as the Court is concerned [Respondent] is presumed innocent of those allegations until and unless he is proven guilty." Hearing Tr., February 12, 2018, at 8:21-24. Then, the trial court explained that, "for the purpose of sentencing, Mr. Quinn is presumed innocent of all charges except one count of statutory misconduct in office for failing to report rental income from a lobbyist principal." Hearing Tr., Feb. 12, 2018, at 9:18-21. These comments, according to State, show the trial court did not consider the State's additional allegations of wrongdoing. Not so.

Those comments merely reflect the court's recognition that it must enforce the terms of the plea agreement, meaning the only facts that were admitted or "proven" were the ones Respondent admitted. *See, e.g.*, Order at 3 ("As the record reflects, the plea agreement was negotiated and established the factual premise for the guilty plea."). The baseline for the State's other allegations was a presumption of innocence. The State was permitted to try and convince the trial court to increase the sentence based on other reasons or allegations, but the trial court was not required to agree or accept the allegations—particularly in light of the terms of the plea agreement to which the State had agreed.

Second, the State's allegations were not entitled to any presumption of truth because the State agreed that the only facts Respondent admitted were the ones in the limited allocution according to the State's own plea agreement. *See Id.* at 3 ("The State incorrectly assumes that in considering this information, the Court must take their averments as fact."). A plea deal is a contract, and is interpreted accordingly,

meaning that material terms must be enforced. *United States* v. *Harvey*, 791 F.2d 294, 300 (4th Cir 1986).

In this case, the factual allocution was a material term of the parties' plea agreement. *See Thrift*, 312 S.C. at 295, 440 S.E.2d at 348–49; *see also* Hearing Tr., Dec. 13, 2017, at 8:16–18 ("[H]e's pleading guilty ... on the limited allocution that we will give below."); *Id.* 9:14–16 ("Rick Quinn, Jr. ... den[ies] every allegation and inference, except what is in th[e] limited factual allocution[n]."); *Id.* 83:11–12 (Quinn: "I'm pleading guilty only to the fact that has been described today."). Indeed, the State itself said: "The limited allocution was ... to hopefully maybe ... get the ... defendant over the threshold of admitting to misconduct in office to take the plea." Hearing Tr., Feb. 28, 2018, at 12:14–18 (Feb. 28, 2018). Thus, the limited allocution as the basis for the guilty plea was at the heart of the plea contract.

The limited allocution should, therefore, be enforced. In other words, the only "proven facts" were the ones that Respondent admitted under the terms of the plea agreement. Of course, the State was given the opportunity to present allegations and argue inferences about other misdeeds — which it attempted — and Respondent remained free to refute that evidence — which he did — and also to rely on the terms of the plea agreement. The trial court was "not compelled to accept as established facts" the "inferences and conclusions" that "the State presented in its PowerPoint." Order at 4. If the trial court had been required to accept the State's allegations as true, the limited allocution (and the plea deal) would have been meaningless. *See Stevens Aviation, Inc.* v. *DynCorp International LLC*, 407 S.C. 407, 417, 756 S.E.2d

148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous."). To give effect to the limited allocution and other terms of the plea agreement, the trial court had to treat the State's additional allegations as just allegations.

The State may believe it made a bad deal by agreeing to the limited factual allocution, but buyer's remorse does not unwind a valid contract. *State* v. *Compton*, 366 S.C. 671, 678, 623 S.E.2d 661, 665 (Ct. App. 2005) ("The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully."). The State made its bargain, and the trial court enforced the contract against both sides. As the trial court recognized: "I trust the Solicitor knows more about his case than anyone and certainly has the power to enter into any deal he chooses." Hearing Tr., Feb. 12, 2018, at 9:15-17. That the State now thinks it chose poorly is not for appeal and should not be a burden to this Court. The sentence should be affirmed.

IV. Judge Mullen was not biased and was right not to recuse.

This Court should reject the State's eleventh-hour charge of judicial bias. The State had no problem with Judge Mullen until she suspended the sentence of incarceration to probation. After she handed down the sentence, the State accused her of bias. However, it has never backed up the accusation with facts. The State's chief objection is that the judge had *ex parte* communications with the defense team. But the State consented to those discussions, and the State had off-the-record talks with the judge too. Because there was no evidence of bias, the trial judge was right not to

recuse.

A. Standard of Review

"Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *State* v. *Howard*, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct. App. 2009). "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." *Id.*

B. The State has not presented any evidence of judicial bias.

The State claims (at 41) that its "faith in the impartiality of the lower court has been irreconcilably shaken." As the trial court pointed out, however, this claimed fracture in confidence only occurred after sentencing (when the court didn't send the defendant to prison). *See* Order 5 ("Curiously, the State's demand for recusal only comes after the Court imposed a sentence different than the State requested."). "The fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge." *Id.* (citing *Mortgage Electronic Sys., Inc.* v. *White*, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009)). Otherwise, every judge in every case would be biased after making a ruling.

The State's principal claim regarding bias is that Judge Mullen engaged in *ex parte* communications. But the State itself consented to *ex parte* communications and has repeatedly recognized that fact. For example from the State's own filing: "As the court is aware, it solicited all the parties in this matter to see if they would consent to having *ex parte* communication with the court prior to the plea. The parties consented." State's Mot. to Reconsider at 4 n.1; *see also* Hearing Tr., Feb. 28, 2018, 59:17-

18 (Solicitor Pascoe: "What I was saying was not that I didn't consent. Obviously, I consented."). *Ex parte* communications are expressly permitted as long as both sides consent and they help "settle matters pending before the judge." Rule 3B(7)(d), Code of Judicial Conduct. That is precisely what happened here. Both sides agreed that the trial judge could talk to each side in confidence. Thus, Judge Mullen did nothing improper by speaking to defense counsel and to the State separately before the plea.

Perhaps recognizing that its consent dooms its claim, the State asserts (at 41) that there are "significant disagreements regarding the timing and substance of *ex parte* communications in this matter." But the State never explains what these disagreements are or how they show judicial bias. Changing tacks again, the State argues (at 42) that "regardless of when the consent occurred, the court failed to relay the substance of its communication with defense counsel to the State." But there is no requirement for the court to reveal what is said during the *ex parte* communications by consent.[4] After all, the point of the communications is to help settle the case. *See* Rule 3B(7)(d), CJC. To facilitate that goal, the communications should normally be kept confidential.

Finally, the State throws in the kitchen sink, listing a number of decisions and statements the trial court made in an attempt to show bias. State's Initial Br. 40. None comes close. For example, the State complains about the decision to sever the trials of Respondent and his father. This is an odd complaint given the State not only dismissed with prejudice all charges against Respondent's father, but also because

[4] *See supra*, note 2.

the State provides no explanation for how the severance decision shows bias; and he has forfeited the argument. *State* v. *Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001).

The same goes for the State's strained claim that it was denied "due process to be heard." State's Initial Br. 40. The State does not have due process rights. Regardless, the trial court gave the State ample time to present its case (during the plea and sentencing hearing on December 13, 2017, which lasted an hour and a half).

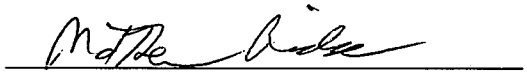
Finally, the State claims the trial judge asked it to "'go light on the facts' prior to the plea." State's Initial Br. 40. Again, the State provides no support for this claim or argument and was provided as much time as the State wanted without interruption to say everything and make as much of a presentation as it wanted.

In short, there is no evidence the judge was biased. And without any evidence, there was no reason for Judge Mullen to recuse. The judgment should be affirmed.

CONCLUSION

This Court should dismiss the State's appeal of its own guilty plea conviction. The State cannot appeal a guilty plea entered under specific terms of a plea agreement, which the State negotiated and agreed to, and after the trial court has accepted it. If the Court nonetheless reaches the merits, the Court should affirm the conviction and sentence and reject the State's claim of judicial bias.

Respectfully submitted by,



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December 14, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE STATE GRAND JURY
Richland County
Court of General Sessions

Carmen T. Mullen, Circuit Judge

No. 2018-000494

The State, ... Appellant,

v.

Richard M. Quinn, Jr., ... Respondent.

Certificate of Service

I certify that on December 14, 2018, the foregoing was served on Appellant via United States mail, first class, postage prepaid, addressed as:

David Pascoe
Solicitor, First Judicial Circuit
P.O. Box 1525
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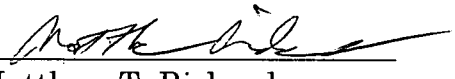
Respectfully submitted,



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December 14, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *State v. Quinn*, No. 2018-000494

Dear Ms. Kitchings:

Enclosed please find for filing with the Court the originals and three copies of each of the Initial Brief of Respondent, Respondent's Designation of Matter to be Included in the Record on Appeal, and Proof of Service in connection with the above-referenced matter. Please return a file stamped copy of each to my courier.

By copy of this letter we are serving copies of these documents on counsel for Appellant.

Thank you for your assistance.

Most respectfully,

Matthew Richardson (2440)

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Enclosures (As Referenced)
cc: Solicitor David M. Pascoe, Jr.

MTR/lhd