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 Court Judge

Case No. 2017-GS-47-12, -13, -32

The State,.....Appellant

v.

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

Appellate Case No. 2018–000494

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in sentencing Respondent based solely on facts offered by defense counsel and concluding that the court was constitutionally prohibited from considering the State's evidence, where Respondent pleaded guilty to an indictment for a continuing offense that encompassed the State's evidence?

II. Does the factual recitation admitted by Respondent that describes only a single ethics violation satisfy the elements of statutory misconduct in office such that a substantial factual basis may exist on those facts alone?

III. Does the totality of events throughout Respondent's guilty plea and sentencing, to include the lower court's solicitation of *ex parte* discussions prompting the State's motion addressing the issue in other cases, give rise to sufficient evidence of judicial bias to merit recusal of the lower court judge on appeal?

STATEMENT OF THE CASE

On May 16, 2017, the State Grand Jury of South Carolina (the "State Grand Jury") returned true billed indictments charging Respondent with statutory misconduct in office, in violation of Section 8-1-80 of the South Carolina Code of Laws Annotated, and common law misconduct in office. R. pp. 357–362. On October 18, 2017, the State Grand Jury returned an additional true billed indictment charging Respondent with criminal conspiracy, in violation of Section 16-17-410 of the South Carolina Code of Laws Annotated. R. pp. 361–362. In the course of the underlying investigation, the State Grand Jury also returned true billed indictments against four other individuals for criminal conduct stemming from their association with Respondent's family businesses. Venue for all cases was set in Richland County. The Honorable Carmen T. Mullen was assigned to preside over the criminal proceedings arising out of the underlying investigation. That investigation, designated State Grand Jury Investigation 2016-257, is ongoing.

On December 13, 2017, Respondent pleaded guilty in Richland County to statutory misconduct in office, Indictment 2017-GS-47-12. The guilty plea was made pursuant to an agreement that resolved charges against both Respondent and his father, Richard M. Quinn, Sr. The terms of the plea agreement provided that Respondent would plead guilty to Indictment 2017-GS-47-12, and the remaining two indictments against him would be dismissed. R. p. 154, line 18–p. 155, line 5. As part of the agreement, Respondent was permitted to enter a "limited allocution," and the State would thereafter present a much broader factual presentation. R. p. 156, line 14–p. 158, line 3. The court elected to defer sentencing for two months. R. p. 233, lines 7–10. Following Respondent's guilty plea, but before the sentencing hearing, the State submitted a Sentencing Memorandum addressing the State's concern that the limited factual basis offered by Respondent and other statements by Respondent and his attorney during the plea were insufficient to establish

a factual basis for the indictment to which Respondent pleaded guilty. R. pp. 37–74. Respondent submitted a reply to the State's Sentencing Memorandum asserting for the first time that Respondent did plead guilty to *intentionally* failing to disclose the name of a lobbyist's principal, contradicting the record of the plea. R. p. 81. In an effort to resolve concerns surrounding the plea, the State then filed a letter to the lower court and defense counsel proposing a supplemental colloquy with Respondent prior to sentencing to address the scienter element of the factual basis for the plea. R. pp. 90–91.

The sentencing hearing was subsequently held on February 12, 2018 in Beaufort County. At the outset of the hearing, counsel for the State requested an opportunity to place an objection on the record regarding the issues raised in the State's Sentencing Memorandum. R. p. 285, lines 20–25. The lower court denied the request and incredibly never allowed the State an opportunity to place its objections or concerns on the record. R. p. 286, line 1–p. 287, line 15. The court thereafter 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. R. p. 292, lines 5–10. The court's stated reasoning for this light sentence was that Respondent was entitled to the presumption of innocence to facts underlying the indictment to which he pleaded guilty. R. p. 290, line 21–p. 291, line 23. At the conclusion of the hearing, counsel for the State again requested an opportunity to state an objection for the record, and the court again denied the request. R. p. 292, line 16–p. 293, line 19.

Following the sentencing hearing, the State filed a timely Motion to Reconsider pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure. R. pp. 6–18. The State's motion asked the lower court to reconsider its sentence and to take into consideration the State Grand Jury evidence presented by the State during the plea hearing. Additionally, because the State was not

permitted to object to the validity of the guilty plea during the sentencing hearing, the State's motion argued that the plea was invalid as it lacked a sufficient factual basis. On February 28, 2018, the motion was heard in Beaufort County. During the hearing, counsel for the State moved Judge Mullen to recuse herself. R. p. 336, line 10–p. 337, line 10. The lower court denied all three motions. R. pp. 1–5. On March 16, 2018, the State served a notice of appeal on all parties.

STATEMENT OF FACTS

This appeal concerns a State Grand Jury investigation into public corruption committed by current and former members of the South Carolina General Assembly. The investigation commenced on March 18, 2016 upon the signing of the case initiation. The present investigation arose from a prior State Grand Jury investigation of former Speaker of the House Robert "Bobby" Harrell, which concluded with six counts of misusing campaign funds, to which Mr. Harrell pleaded guilty. In the course of investigating Mr. Harrell's conduct, SLED uncovered potentially criminal conduct by two other state legislators, James "Jimmy" Merrill and Respondent Richard "Rick" Quinn, Jr. To investigate the conduct of these two individuals, a second State Grand Jury investigation was initiated, which resulted in criminal indictments against Mr. Merrill, Mr. Quinn, former Representative James Harrison, former Representative Tracy Edge, Senator John Courson, and Respondent's father, Richard Quinn, Sr.

This investigation initially focused on Respondent's practice of using his office as House Majority Leader and leader of the House Republican Caucus to channel caucus mailing and political services to a network of Quinn family businesses, thus using his official position to gain an economic advantage. However, as the investigation examined the Quinn businesses more closely, a complex scheme of cash-for-influence political "consulting" was revealed and the investigation centered on the primary Quinn business, First Impressions, Inc. d/b/a Richard Quinn and Associates (hereinafter, "RQA"). Investigation of the Quinns' businesses involved analysis of voluminous bank records, emails, and witness testimony, culminating in the indictment of Respondent and his father. The investigation also resulted in indictments for statutory misconduct in office, common law misconduct in office, and conspiracy against two former employees of RQA who concurrently served as powerful members of the House of Representatives and ceased their

employment with RQA once they lost their House seats.[1] Finally, analysis of the RQA bank records resulted in the indictment of Senator John Courson for converting campaign funds to personal use by passing them through RQA and converting them to cash.

A. Events Leading to the Plea Hearing

On November 28, 2017, a status conference hearing was held before the assigned trial court judge for cases arising from this State Grand Jury investigation, the Honorable Carmen T. Mullen. The hearing was convened to discuss trial scheduling matters. The State was prepared to call its case against Senator Courson for trial, and the court had set a tentative trial date for January 29, 2018. However, based on defense counsel's request, the court delayed the Courson trial. The court then took up the trials of Respondent and his father. The State elected to call both Respondent and his father in a joint trial due to the similarity of evidence and witnesses required of both cases and the hardship separate trials would place on the State. Defense counsel sought separate trials but did not submit a motion to sever the cases. See R. p. 125, lines 13–15 ("MR. PASCOE: And we can better discuss that and we will be prepared if there's a severance motion filed by the defense."). Proceeding without any motion or without any severance hearing, the court scheduled only Respondent's trial for February 26, 2018, granting a non-existent motion to sever without affording the State an opportunity to argue against the severance.[2] R. p. 142, lines 11–14 ("THE COURT: So, I am inclined, I will go ahead and tell you this right now, I am inclined to go ahead and try the case February 26th against Rick Quinn Junior. So we will try that case."). The court offered two

[1] Mr. Edge has also been indicted for perjury based on misstatements made to the State Grand Jury.

[2] While the court indicated she would allow counsel to make a record opposing the severance, the court never actually stopped to permit counsel a chance to respond. R. p. 141, lines 11–17. Indeed, the State contends that the grounds offered by the court for severing the cases was improper but did not have the chance to make the argument. See R. p. 142, lines 15–7.

rationales for severing the cases. First, that Rick Quinn desired to conduct the trial prior to the filing deadline for the House of Representatives and counsel for his father did not have sufficient time to review the discovery materials—despite the fact that both defendants had equal access to the materials. R. p. 141, line 18–p. 142, line 14; cf. State v. Page, 406 S.C. 272, 284, 750 S.E.2d 623, 629 (Ct.App.2013) (solicitor controls *manner* in which cases are called); see also State v. Boys, 302 S.C. 545, 547, 397 S.E.2d 529, 530 (1990) (criminal defendants jointly tried are not entitled to separate trials as a matter of right). And second, the court severed the trials because Respondent and his father elected not to testify against each other or on each other's behalf. R. p. 141, line 18–p.142, line 14; but see, State v. Crowe, 258 S.C. 258, 267, 188 S.E.2d 379, 383 (1972) (defendant not entitled, as a matter of right, to separate trial to make codefendant available to testify); see also State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (severance should only be granted where there is a serious risk that a joint trial would compromise a specific trial right).

Just a month after the status conference hearing, on December 12, 2017, a conference call was held between the State, the court, and counsel for Respondent and his father. During that conference call, the court inquired as to whether the parties recalled granting permission to have *ex parte* communication on a prior occasion while in Beaufort. This inquiry raised concerns because counsel for the State was not present in Beaufort for any grant to engage in *ex parte* communications. To the extent such communications transpired, the State was not informed of the substance of these discussions nor afforded an opportunity to respond. See R. p. 353, line 14–p. 354, line 22.

B. The Plea Hearing

On December 13, 2017, Respondent appeared in Richland County to enter a guilty plea. The plea was made pursuant to a package plea deal that resolved charges against Respondent and his father. In chambers prior to the plea, the court again solicited *ex parte* communication to discuss the plea with the parties. The State did consent to *ex parte* discussions at this point; however, the court has not disclosed the substance of these discussions to the State. The terms of the agreement, as recited for the record by the State, were as follows:

> MR. PASCOE: The package agreement is as follows, your Honor. Rick Quinn, Jr. is pleading guilty straight up and with the knowledge that the State is asking for prison time for Indictment Number 2017-GS-47-12. That's the statutory misconduct in office, your Honor. The State is – and that charge carries up to a year in prison and a thousand-dollar fine, plus forfeiture of office. And I've been informed that Mr. Quinn has already resigned from office.
>
> The State is dismissing, as part of that plea, the other charges on the defendant. That's two charges: one count of criminal conspiracy, GS-47-32; and one count of common law misconduct, GS-47-13.

R. p. 154, line 18–p. 155, line 5. The plea agreement terms were then stated for the record by counsel for Respondent:

> MR. RICHARDSON: Thank you. Quinn, Jr. has resigned from the House as a condition of this plea agreement. He's pleading guilty to one misdemeanor statutory misconduct in office on the limited allocution that we will give below. That's the limited statement of facts, and that's based only on the failure to disclose a name.
>
> * * *
>
> There are three other terms that cover both defendants and the corporation. These are:
>
> Number 1: while we understand Mr. Pascoe's going to make his argument about a wider range of conduct today, Rick Quinn, Jr., Richard Quinn, Sr., and First Impressions, Inc., deny every allegation and inference, except what is in their limited factual allocutions that I'll read in a minute.

> Number 2: all materials and information obtained in the investigation, including searches and seizures by the State, are not to be used in any way by the State against these defendants in exchange for these pleas.
>
> And Number 3: this plea by all defendants today is conditioned on the dismissal with prejudice of all other charges and the closure of and end of any further investigation or prosecution by Solicitor Pascoe or the State of Rick and Richard Quinn, their businesses, and their families for all past conduct and deeds.

R. p. 156, line 14–p. 158, line 3. Finally, addressing the State, the court asked whether these terms were correct. The State confirmed these terms as follows:

> MR. PASCOE: Yes, your Honor. With regards to Rick Quinn's cooperation, I just want to point out, Mr. Quinn has never reached out and said he wanted to cooperate, which is one of the reasons I said I didn't care to have his cooperation, and for other reasons, which I'll go into during my presentation.
>
> Also, I'm fine with the limited allocution. . . . But you know, of course, what you'll hear, the Court will get to make a determination on whether it should be held against him or not for not accepting responsibility for other acts, which the State intends to go into today.

R. p. 159, line 19–p. 160, line 6. Thereafter, the court engaged in a plea colloquy with Respondent to establish the guilty plea was made voluntarily and knowingly. R. p. 161, line 23–p. 166, line 8. Notably, the court specifically inquired whether Respondent was aware that "by pleading guilty, you are waiving that constitutional right to a jury trial; you're waiving all the other constitutional rights that go along with a jury trial; you understand you're coming forward to the Court and you're telling me you're guilty of this charge." R. p. 163, line 23—p. 164, line 3. Following the colloquy, the court accepted the pleas. R. p. 168, lines 9–11.

A close examination of Respondent's sentencing sheet confirms he did not plead to any form of limited indictment or lesser charge. R. p. 363. The sentencing sheet, signed by Respondent and his plea counsel, indicates Respondent pleaded guilty to indictment 2017-GS-47-12, **as indicted**, constituting a violation of Section 8-1-80 of the South Carolina Code of Laws Annotated, CDR Code 0115, Misconduct in Office. R. p. 363. Further, the date of offense listed on the

sentencing sheet is *not* limited to the year 2016, which would reflect Respondent's limited facts. The date of offense listed on the sentencing sheet is April 1, 2010 through April 15, 2017, which reflects the date range listed on the indictment. Thus, Respondent's sentencing sheet contemplates the charge **as indicted**, and does not contemplate any limitation on the charge based on Respondent's limited facts.

After accepting the plea, the court turned to the State for a PowerPoint presentation on the facts underlying the indictment to which Respondent had pleaded guilty. R. pp. 238–282. The presentation offered by the State was not a surprise to either the court or to the defense. A printed version of the slides was provided to both Judge Mullen and defense counsel during the lengthy *in camera* discussions that took place prior to the plea hearing. See id. Despite being fully aware of the extent of factual detail the State intended to present during the plea and having ample time to negotiate for a limitation on this presentation, defense counsel neither objected to the State's presentation of facts beyond those included in Respondent's factual recitation nor did it negotiate with the State to limit the facts presented at the plea. The court's reaction to the opportunity for advanced review of the State's PowerPoint presentation was to elicit *ex parte* communication with the parties.

The only attempt to limit the extent of the State's presentation of the facts came from the court when Judge Mullen on two occasions asked counsel for the State to "go light on the facts so the plea doesn't blow up."[3] While these statements by the court have been disputed, the undersigned stands by his recollection of the discussions that occurred in chambers and has evidence to support it. In spite of the court's instruction to limit the factual presentation by the

[3] Judge Mullen has twice denied on the record making the request of counsel for the State. First during a hearing on the State's Motion to Reconsider (R. p. 335, lines 16–19) and again during an unrelated hearing on Richard Quinn, Sr.'s motion to quash a State Grand Jury subpoena.

State, counsel for the State informed the court that it had no intention of going light on the facts.[4] To date, the court has denied all of the State's requests to make any record or respond to inquiries concerning the court's initiation of *ex parte* communications. Nor has the court ever relayed to the State the substance of its communication with defense counsel.

Following the State's presentation, defense counsel offered remarks in mitigation. Defense counsel's remarks opened with a general complaint that they did not have an opportunity to cross-examine any witnesses or offer experts to discount the material in the presentation, notwithstanding the fact that the court had previously asked Respondent if he understood that by pleading guilty he waived his constitutional rights. Compare R. p. 163, line 22–p. 164, line 1 ("I just want to make sure you understand and appreciate that by pleading guilty, you are waiving that constitutional right to a jury trial; you're waiving all the other constitutional rights that go along with a jury trial."), with R. p. 197, lines 5–9 ("There are no witnesses for us to cross-examine. . . . We don't have the opportunity to call witnesses and to present to you expert testimony, experts from lawyers[sic].").

Respondent, who had been sworn by the trial court as part of the plea colloquy, did not personally deny any of the facts presented by the State. Instead, defense counsel made unsworn assertions that in many instances were contradicted by the evidence presented at the sentencing hearing. For example, defense counsel argued that a bank loan application in which Respondent lists himself as the President of RQ&A (R. p. 241), was generated using information, "without [Respondent's] knowledge and without [Respondent's] signature." R. p. 202, line 17–p. 203,

[4] Indeed, because the State Grand Jury evidence relevant to Respondent's indictment for misconduct in office was so vast, the State's presentation was already a limited factual presentation to the extent that it would have been impossible to discuss all of the evidence in a timely manner. The State selected a variety of documents and demonstrative slides that clearly exemplified Respondent's guilt.

line 6. This document is relevant to the facts underlying Respondent's indictments because it is one of the many items demonstrating his reliance on RQ&A and that his separate business was a sham to avoid reporting requirements. However, this assertion was proven to be incorrect because the loan documents clearly show that Respondent and his wife were personally present at the closing.[5] R. p. 71. The State not only provided this document pursuant to its obligations under Rule 5, SCRCrimP, but also pointed it out to defense counsel in a meeting weeks prior to the plea, ensuring defense counsel had an opportunity to review the full document—including the signature line. R. p. 198, line 13–14 ("He made the same PowerPoint presentation [to defense counsel] about four or five weeks ago, and we appreciated that.").

A second example of unsworn misstatements made to the trial court on behalf of Respondent concerns an email between Respondent and Kevin Hall, an attorney assisting Infilaw with the attempted purchase of the Charleston School of Law. R. p. 276. This exhibit was also relevant to the charge underlying the guilty plea because it demonstrates Respondent both attended meetings and completed tasks on behalf of RQ&A in support of an RQ&A client—further demonstrating that Respondent's purported separation from his father's company was a sham. In mitigation, defense counsel asserted that as soon as Respondent discovered Infilaw was a client of RQ&A he "immediately called Kevin Hall, and said, I can't do this, Kevin, I can't do this; Infilaw's a client of my father's." R. p. 204, lines 16–17. Mr. Hall took great exception to this claim. Shortly after the hearing Mr. Hall drafted and signed a letter explaining,

> I do not recall Rick Quinn declining to meet, talk or perform a task for reasons other than the types of scheduling issues described above, and Rick Quinn never told me that he could not perform a task or do something saying he thought it would be improper, unethical, or a conflict of interest for him to do so.

[5] While the slide included in the State's presentation did not include the lower half of the document, it did point out that the document had been signed by Respondent on March 28, 2014. See R. p. 241.

R. pp. 66–69.

Respondent had the opportunity to testify under oath at sentencing to deny the State's evidence. However, he did not make any sworn statements addressing the State's evidence. Instead, Respondent chose to present misinformation to the trial court through his counsel's arguments, who likely relied upon the false claims made to them by Respondent. The court did not at any point ask Respondent to address the State's facts, nor did the court review the elements of statutory misconduct with Respondent.

C. The Sentencing Memorandum

The two examples of false statements discussed above were presented to the lower court by the State in a memorandum submitted in response to a sentencing memorandum submitted by Respondent prior to the sentencing hearing. R. pp. 51–53. The purpose of the State's sentencing memorandum was threefold. First, to clarify a factual issue with Respondent's limited factual recitation. This matter was later resolved by defense counsel.

The second issue raised by the State's memorandum related to the nature of Respondent's limited factual recitation. During the plea hearing, the lower court did find a substantial factual basis to accept the plea. However, the lower court did not indicate which set of facts comprised the substantial factual basis. This ambiguity was exacerbated by defense counsel's failure to include a *mens rea* element in its limited factual recitation. Respondent's limited facts indicated that he failed to report the University of South Carolina as a lobbyist's principal from which he derived an economic benefit; however, defense counsel indicated Respondent inadvertently failed to report. Defense counsel elaborated, "that had he known that, he should have disclosed that," indicating that the failure was not intentional. R. p. 219, lines 19–20. A single, unintentional failure to report the name of a lobbyist's principal does not amount to a violation of Section 8-1-80,

statutory misconduct in office. In fact, the State agrees with defense counsel inasmuch as they protest that a single failure to disclose a lobbyist's principle is a civil matter for the legislative ethics committee. R. p. 220, lines 2–8.

Finally, the State's memorandum concluded by arguing that, irrespective of the facts to which Respondent accepted guilt, the facts presented by the State during the guilty plea were properly before the court for sentencing. The memorandum also addressed the misrepresentations made to the court discussed above and argued that they should be held against Respondent as an example of the corrupt and dishonest conduct he exemplified.

D. The Sentencing Hearing

On February 12, 2018, a sentencing hearing was held for Respondent and RQ&A.[6] In handing down its sentence to Respondent, the court committed factual and legal errors, and denied the State its due process right to be heard. The State was prohibited from making a record and was denied an attempt to cure the plea that must now be invalidated. The plea taken by the court occurred without the consent of the State and the sentence passed down is not reflective of the indictment to which the State permitted Respondent to plead guilty—misconduct in office.

Because the issue of the sufficiency of the factual basis for the plea had not been resolved, the State intended to address the issue on the record and lodge objections as necessary. The State informed the judge's clerk and Respondent's counsel that it insisted on being heard on the record prior to sentencing to ensure the plea was valid. Once the hearing began, the court refused to permit the State to be heard or lodge objections concerning potential flaws with the guilty plea.

[6] As part of the plea deal, the business, First Impressions d/b/a Richard Quinn and Associates pleaded guilty to failing to register as a lobbyist and charges were dropped against Richard Quinn, Sr.

Upon turning to Respondent's sentencing, the court proceeded to attempt to reconcile its prior plea colloquy. However, the fundamental flaw with the attempt further tainted the plea and reveals itself in the court's first statement with respect to Respondent:

> THE COURT: All right. Well, as part of that same plea agreement, the State agreed to allow Richard Quinn Junior to plead guilty to a single misdemeanor count of statutory misconduct in office in violation of South Carolina Code Annotated Section 8-1-80 *for intentionally failing to report the name of USC, a lobbying [sic] principal, that made payments to Capital II Investments, a company of which he was associated.*

R. p. 288, line 18–p. 289, line 1 (emphasis added).

This is not an accurate description of the charge to which Respondent pleaded guilty. The State never consented to this plea. The charge to which Respondent was supposed to plead guilty and be sentenced is as follows:

> MR. PASCOE: Rick Quinn, Jr. is pleading guilty straight up and with the knowledge that the State is asking for prison time for Indictment Number 2017-GS-47-12. That's the statutory misconduct in office, your Honor.

R. p. 154, lines 18–22.

Indictment Number 2017-GS-47-12 is not limited to a singular act of failing to report. It is a broad indictment that spans seven years and encompasses the numerous acts of corruption detailed in the State's presentation at the plea, and much more.[7] See R. p. 357; see also R. p. 363. Additionally, in its erroneous statement of the charge, the court added an intent aspect that was not present at the plea. At this point, the court had not asked Respondent on the record if his conduct was intentional, as the State suggested. Instead, the court simply presumed, or suggested the answer to a question that it intended to ask later in the hearing. These procedural irregularities may

[7] Indeed, the singular act that comprised Respondent's limited allocution was not contemplated by the indictment itself, as the records custodian for Vista Bank did not provide a complete production of records in response to a State Grand Jury Subpoena.

have been cured if the court had simply read the indictment to Respondent as is standard protocol in such cases, particularly in cases of this significance, but it did not.

Instead, the court engaged in a supplemental colloquy with Respondent in an effort to alleviate any concerns regarding the sufficiency of Respondent's factual recitation, as suggested by the State. However, the court once again misstated the charge underlying the guilty plea, asking Respondent, "are you guilty of one count of statutory misconduct in office *for intentionally failing to report income from USC, a lobbyist principal*[?]" R. p. 290, lines 11–14 (emphasis added). It cannot be stressed enough that this is not the charge to which the State allowed Respondent to plead guilty.

Following this purported remedy of the guilty plea, the court moved on to sentencing and began by undercutting the State's presentation of the facts underlying the indictment:

> THE COURT: At the sentencing portion of the hearing the State presented a PowerPoint alleging a theory of political atrocity by Richard Quinn Junior. As far as the Court is concerned he is presumed innocent of those allegations until and unless he is proven guilty.
>
> Now, the United States and the South Carolina Constitution require no less. Now, the court of public opinion may presume his guilt as to those allegations, but I cannot. If the Solicitor wanted Richard Quinn Junior to be punished for those actions he should have tried him on all counts indicted, or negotiated a different deal. Richard Quinn Junior may be guilty of those charges, but that isn't the deal that was made and it is not what he plead guilty to.
>
> * * *
>
> Now, 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.

R. p. 290, line 19–p. 291, line 21. Thereafter, the court sentenced Respondent to a probationary sentence. Needless to say, the State strongly disagrees with the court's assessment of constitutional

rights retained by a defendant who is pleading guilty and with the description of the plea agreement.

At the conclusion of the sentencing hearing, counsel for the State once again requested an opportunity to voice an objection on the record regarding the sufficiency of the guilty plea. R. p. 292, lines 23–24. The lower court once again denied the State an opportunity to formally object on the record, instructing, "[n]o, sir, you may be seated. You can take it up with the Court of Appeals if you believe in any way I am wrong. I'm confident that I'm not." R. p. 293, lines 16–19.

E. The State's Motion to Reconsider

Following the sentencing hearing, the State filed a timely Motion to Reconsider pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure. See R. pp. 6–18. While the lower court instructed the State to "take it up with the Court of Appeals" at the sentencing hearing, the State first sought an opportunity to develop a record addressing its concerns with the plea and sentencing. Specifically, the State's motion argued that a defendant who pleads guilty to a charge waives the constitutional right to the presumption of innocence and to cross examine witnesses against him. The State's factual presentation was properly before the court for sentencing and should have been taken into consideration.

Additionally, because the State was denied an opportunity to preserve its objection to the sufficiency of the underlying plea, the State's Motion to Reconsider also raised the issue of whether the court's narrow view of the factual basis for the plea invalidated the plea for lack of sufficient factual basis. The lower court's statement of the charged offense—"statutory misconduct in office for intentionally failing to report income from USC" (R. p. 290, lines 11–14)—is not an accurate reflection of the charged offense. Respondent's limited statement of facts at the plea was

ambiguous to intent, and the lower court's attempt to remedy the plea was not only ineffective, but further tainted the plea.

In its Order denying the State's motion, the lower court again mischaracterizes the plea agreement's terms. The Order indicates the agreement permitted Respondent to plead guilty to "a single misdemeanor count of Statutory Misconduct in Office based solely on a limited admission of facts regarding the failure to disclose payments made by a lobbyist principal to a related company." R. p. 1. Indeed, the lower court's Order notes that "[i]n the State's memorandum, Solicitor Pascoe 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.'" R. p. 2. However, the lower court omits the very next sentence from the State's memorandum, which elaborates, "[t]he State agreed to permit the Defendant to limit his acceptance of responsibility as long as it was factually accurate and was made knowing the State would offer an additional factual recitation for the Court's consideration beyond the Defendant's limited allocution." R. p. 7.

The lower court denied the State's motion to invalidate the guilty plea, holding, "I found then, as I do now, that the limited admission of facts Quinn Jr. admitted on the record with the State's agreement, provide a substantial basis for the plea and meet the elements required of Statutory Misconduct in Office." R. p. 3. Thus, the lower court resolves any question regarding what facts inform her determination of a substantial factual basis for the plea—her finding is based solely on the facts articulated by defense counsel, and not the State's facts.

Finally, with regard to the State's motion to recuse, the State's concerns regarding impartiality stem from the totality of events surrounding the guilty plea, including the timing of *ex parte* communications. The State has not disputed that consent was granted for *ex parte*

communications; the disagreement lies in the timing of that consent. The court's Order Denying State's Motion to Reconsider reflects a lack of civility in accusing the State of negatively reflecting upon the judicial process. Counsel for the State has a duty to insist upon an impartial process for all parties involved and to object to any proceeding that fails to meet that standard.

ARGUMENT

I. The lower court erred in determining that Respondent was entitled to the presumption of innocence with regard to a presentation by the State of materials which formed the basis of the underlying indictment to which Respondent pleaded.

A. Standard of review

A trial court is afforded wide discretion in the sources and types of evidence considered in sentencing a defendant. State v. Cantrell, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967). The trial court "must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct.App.2008) (citing Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)). "Generally, the circuit court may conduct an inquiry broad in scope, largely unlimited either as to the kind of information it may consider or the source from which the information may come, to assist it in determining the sentence to be imposed." State v. Thomason, 355 S.C. 278, 285, 584 S.E.2d 143, 147 (Ct.App.2003) (citing State v. Gulledge, 326 S.C. 220, 228, 487 S.E.2d 590, 594 (1997). "[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (citation omitted).

"On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." Hicks, 377 S.C. at 324, 659 S.E.2d at 500 (Ct.App.2008) (citing State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585–86 (Ct.App.2001)). "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." Id. at 324–25 (citing Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). In criminal cases, the appellate court reviews only errors of law and is bound by the factual findings of the trial court

unless the findings are clearly erroneous. State v. Warren, 392 S.C. 235, 237–38, 708 S.E.2d 234, 235 (Ct.App.2011) (citing State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)).

B. Respondent was charged with a continuing offense of misconduct in office, an indictment which was supported by voluminous State Grand Jury evidence and testimony.

Respondent was charged with, and pleaded guilty to, statutory misconduct in office for acts and omissions occurring between April 2010 through April 2017. However, the court held it could not consider those acts because Respondent was innocent until proven guilty, which is clearly an error of law. See Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969) ("A plea of guilty is more than a confession . . . it is itself a conviction"). This Court should hold Respondent's guilty plea encompassed all conduct that forms the basis of the indictment, and that the plea court committed an error of law by cloaking Respondent in the presumption of innocence.

The offense of misconduct in office "may consist of one act or a series of acts." State v. Hess (Hess II), 279 S.C. 525, 528, 309 S.E.2d 741, 743 (1983) (citing Hitzelberger v. State, 174 Md. 152, 197 A. 605, 609 (1938)). As such, the offense may be thought of as a "continuing offense" for which the prosecution may indict a series of acts as a singular crime. Id. (citing State v. Bolitho, 103 N.J.L. 246, 136 A. 164, 172 (Sup. Ct.), aff'd, 104 N.J.L. 446, 146 A. 927 (1927)).

In Hess II, the Court examined a series of indictments for misconduct in office arising from the conduct of the Columbia Police Chief in providing police information to a key member of an organized crime outfit. See also, State v. Hess (Hess I), 279 S.C. 14, 301 S.E.2d 547 (1983) (providing factual background). The defendant was convicted by a Lexington County jury of two indictments for misconduct in office. Subsequently, the defendant was tried, and found guilty, in Calhoun County of one count of misconduct in office and one count of obstruction of justice. The Court vacated the Calhoun County misconduct in office because the defendant had already been

found guilty of the continuing offense of misconduct in Lexington. In vacating the Calhoun misconduct charge the Court noted that a key feature of misconduct in office is its versatility—it may be a singular offense, based upon a single act, or a continuing offense encompassing a series of acts. Id. at 528, 309 S.E.2d at 743 (citing Hitzelberger, 174 Md. at 197 A. at 609). As long as the series of actions are relevant to the underlying charge of misconduct in office, it is within the prosecutor's discretion to charge the multiple acts as a single count of misconduct in office irrespective of whether they occurred on separate days or constitute separate statutory violations. Id. (citing State v. Bolitho, 103 N.J.L. 246, 136 A. 164, 172 (Sup. Ct.), aff'd, 104 N.J.L. 446, 146 A. 927 (1927)). While the offense discussed by the Court in Hess II was common law misconduct in office, the difference between the statutory and common law misconduct lies in the degree of corrupt intent with which the acts were performed, and the analysis with respect to a prosecutor's discretion to charge a single continuing offense is the same for both.

In the instant case, Respondent was charged with a single count of statutory misconduct in office—not multiple counts. Even though Respondent's conduct spanned a number of years and violated numerous statutory provisions, the State made a prosecutive decision that this conduct was committed for the singular purpose of using Respondent's position as a member of the House of Representatives for the financial benefit of himself and his family. For this reason, the date of the offense charged in the indictment spans from April 1, 2010 to April 15, 2017, which encompasses the entirety of Respondent's time in office following his reelection.[8] The sentencing sheet signed by Respondent also reflects this full time period.

[8] Respondent was a member of the House of Representatives for District 71 between 1989 and 2004, when he was defeated. In 2010 Respondent was reelected to the House for District 69, where he served until he resigned pursuant to the guilty plea.

An indictment is a notice document that apprises a defendant of the charge he is called upon to answer and "to enable the court to know what judgement to pronounce." State v. Smalls, 364 S.C. 343, 347, 613 S.E.2d 754, 756 (2005) (citing State v. Gentry, 363 S.C. 93, 102–03, 610 S.E. 2d 494, 500 (2005)). In a State Grand Jury case, the defendant has access to transcripts of testimony presented to the jury, thus the defendant is put on notice of the specific facts upon which the indictment is based and the charge which he will be called upon to answer by examining the materials presented to the State Grand Jury. State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993).

Respondent was charged with a single count of misconduct in office. That single count contemplated a continuing offense that was based upon a consistent pattern of conduct that spanned seven years of Respondent's service in the House of Representatives. While the numerous acts throughout these years that comprised the single misconduct in office charge were not enumerated on the face of Indictment 2017-GS-47-12, they were incorporated into the indictment through many hours of State Grand Jury testimony. Id.

The plea the lower court entered and the sentence it passed down do not reflect the indictment to which the State allowed Respondent to plead guilty. The State permitted Respondent to plead guilty to the indictment for misconduct in office, not the offense as recited by the court, "a single misdemeanor count of statutory misconduct in office in violation of South Carolina Code Annotated Section 8-1-80 *for intentionally failing to report the name of USC*." R. p. 288, lines 20–24 (emphasis added). The lower court runs afoul of the law when it admonishes the State, "[i]f the Solicitor wanted [Respondent] to be punished for those actions he should have tried him on all counts indicted[.]" R. p. 291, lines 3–6. Respondent was at all times charged with only a single count of statutory misconduct in office for the conduct presented by the State. By pleading guilty

to Indictment 2017-GS-47-12, Respondent was pleading guilty to the entirety of conduct presented to the State Grand Jury that informed the indictment. It is for this reason that the State limited its presentation of the facts to April 2010 through April 2017, the time frame reflected in the indictment. The presentation only discussed conduct occurring prior to this time frame to demonstrate the origins of the investigation, and this deviation was pointed out by the State. R. p 177, lines 16–18 ("MR. PASCOE: Your Honor, I'm going to talk about one thing prior to 2010, only because it's what got this investigation started, how the whole thing got started with SLED.").

C. The plea agreement did not limit the conduct forming the basis for the plea; it merely permitted Respondent to admit guilt to a minimal set of facts, while pleading guilty to the charge as indicted.

The plea agreement entered between Respondent and the State did not exclude Respondent's other misdeeds from consideration; it simply limited the number of misdeeds he was required to acknowledge on the record to substantiate the plea and reduce the potential prison exposure from 16 years to one year by dismissing two other indictments. R. p. 314, lines 13–18. If the State had known the court would cloak Respondent in the presumption of innocence to the charge to which he had pleaded guilty, it never would have allowed Respondent to plead guilty to the single indictment.

Neither the State's recitation of the plea agreement nor defense counsel's recitation of the plea agreement indicates that the State had agreed to limit its presentation of the facts in any way. Indeed, defense counsel specifically acknowledged that Respondent was well aware that the State would be presenting facts supporting the underlying indictment. R. p. 157, lines 12–17 ("MR. RICHARDSON: Number 1: while we understand Mr. Pascoe's going to make his argument about a wider range of conduct today [the defendants] deny every allegation and inference, except what is in their limited factual allocutions that I'll read in a minute."). Thus, the plea agreement did not

preclude the State from presenting its facts in any way. Additionally, the record reflects that the State entered into the underlying plea agreement with the understanding that the State's facts were properly before the lower court for its consideration during sentencing.

D. The lower court committed an error of law when she determined that Respondent enjoyed the presumption of innocence with respect to the State's evidence.

There is no precedent or framework for a court to accept a knowing admission of guilt followed by a pronouncement that the defendant is presumed innocent. While it is within the State's discretion to negotiate a plea agreement that limits the facts underlying the indictment, that is not the case presented here. In the instant case, the parties negotiated for a limited admission of guilt, but *not* a limited indictment. By pleading guilty to the offense as indicted, Respondent forfeited his right to be tried by a jury.

A guilty plea is more than an administrative act by which a defendant is processed, "it is itself a conviction." Boykin, 395 U.S. at 242, 89 S. Ct. at 1711; State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Before any guilty plea can be accepted, "[t]he Judge [must] be certain that the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea." Id. at 598, 211 S.E.2d at 891. By pleading guilty, Respondent waived several constitutional rights enjoyed prior to and during trial of the underlying matter. Boykin, 395 U.S. at 243, 89 S. Ct. at 1711.

Prior to accepting Respondent's guilty plea, the lower court engaged in a colloquy to ensure Respondent was fully aware of the constitutional rights he was waiving by pleading guilty. R. p. 163, line 22–p. 164, line 1 ("I just want to make sure you understand and appreciate that by pleading guilty, you are waiving that constitutional right to a jury trial; you're waiving all the other constitutional rights that go along with a jury trial; you understand you're coming forward to the Court and you're telling me you're guilty of this charge"). Among those constitutional rights

waived are the presumption of innocence to the crime for which he is pleading guilty and the right of cross examination at his subsequent sentencing hearing. Boykin, 395 U.S. at 242–43, 89 S. Ct. at 1711–12; Thomason, 355 S.C. at 287, 584 S.E.2d at 148.

During sentencing, the lower court dismissed the State's contention that the presentation of State Grand Jury evidence during the plea hearing was properly before the court. At this time the lower court did not indicate that she had considered the State's evidence and determined it to be unreliable and irrelevant, rather the lower court—reading from a prepared script—indicated Respondent enjoyed the same constitutional rights he had waived during the guilty plea. R. p. 290, line 21–p. 291, line 1 ("THE COURT: As far as the Court is concerned he is presumed innocent of those allegations until and unless he is proven guilty. Now, the United States and the South Carolina Constitution requires no less.").

A criminal defendant need not admit guilt to all of the State's allegations to enter a valid guilty plea. It is not unique for a criminal defendant to plead guilty and voluntarily submit to sentencing by the Court while simultaneously maintaining his innocence. Indeed, as the United States Supreme Court announced in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970), the Constitution is not offended where a defendant determines a guilty plea is in his best interest, despite an unwillingness to accept culpability for the offense. See also, James v. State, 377 S.C. 81, 84, 659 S.E.2d 148, 150 (2008) ("As a primary matter, it is well-settled that a defendant need not admit guilt in order to enter a valid guilty plea. Instead, a guilty plea need only represent a voluntary and intelligent choice among alternative courses of action open to a defendant." (citing Alford, 400 U.S. at 31, 91 S. Ct. 160)).

The instant case was not a guilty plea pursuant to Alford. Rather, it presents a scenario in which a criminal defendant chooses to plead guilty to the charge against him while admitting to

the commission of certain acts and protesting his innocence to other acts which formed the basis of the indictment. Respondent voluntarily chose to plead guilty in this matter in exchange for the benefit of resolving the State's charges against himself and his family. The Alford Court was clear that, "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty. An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Alford, 400 U.S. at 37, 91 S. Ct. at 167 (1970); see also State v. Herndon, 403 S.C. 84, 93, 742 S.E.2d 375, 380 (2013) ("there is no significant distinction between a standard guilty plea and an Alford plea").

The lower court spent two full months deliberating on the sentence to hand down in this case, and during the sentencing hearing itself, the judge read from a prepared script of carefully chosen phrasing. In handing down its sentence, the lower court was perfectly clear that "for the purpose of sentencing, [Respondent] is presumed innocent of all charges except one count of statutory misconduct in office for failing to report rental income from a lobbyist principal." R. p. 291, lines 18–21. This statement grossly misconstrues the law applicable to guilty pleas and the terms of the plea agreement. Despite the fact that Respondent denied committing the various acts presented by the State, Respondent pleaded guilty to an indictment that encompassed that conduct. Thus, his guilty plea was itself a conviction on those facts, whether Respondent admitted them or not. See Boykin, 395 U.S. at 242, 89 S. Ct. at 1711.

During the February 28, 2018 hearing and its Order Denying State's Motion to Reconsider, the lower court appears to attempt to retreat from this statement by insinuating that it considered all of the evidence presented by the State, but "sentenced the Defendants according to the evidence the Court found reliable and relevant." R. p. 4. However, it is abundantly clear from the court's

sentencing discussion that the lower court determined she was constitutionally prohibited from considering it. The State was not asking that the lower court "extrapolate the solicitor's inferences" R. p. 4, but rather that the lower court examine the State's evidence as it would in any guilty plea. Indeed, the lower court could conduct her own inquiry and call her own witnesses if she were so inclined to determine the truth of the matter.[9] However, the court did not do so, and made clear that Respondent enjoyed the benefit of the constitutional protections which he had freely and voluntarily waived when he chose not to contest the charges at trial, and instead pleaded guilty.

By determining that Respondent was "innocent until and unless he is proven guilty" of the factual presentation by the State and declining to consider State Grand Jury evidence directly relevant to the underlying indictment in sentencing Respondent, the lower court committed a reversible error of law. As a result, the sentence handed down by the lower court should be reversed, and the case should be remanded to the lower court for resentencing.

II. The lower court erred in determining that a sufficient factual basis existed for the guilty plea, where the only facts that informed the lower court's finding were those offered by Respondent, which did not include the requisite *mens rea* for the indicted offense of misconduct in office.

A. Standard of Review

A motion to invalidate a guilty plea is within the discretion of the trial judge. State v. Rikard, 371 S.C. 295, 300–01, 638 S.E.2d 72, 75 (Ct.App.2006) (citing State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982)). An abuse of discretion occurs when a trial judge's decision is unsupported by the evidence or controlled by an error of law. Id. (citing State v. Lopez, 352 S.C.

[9] The State directed the court to clear evidence of misstatements offered to undercut the accuracy of the State's presentation. The court could have called Kevin Hall to testify regarding the Infilaw matter described *supra* but chose not to. Had the lower court given any consideration to the State's facts, rather than determine that she was prohibited from considering them, this would have been a fruitful avenue of inquiry.

373, 378, 574 S.E.2d 210, 212 (Ct.App.2002)). "When determining issues relating to guilty pleas, the Supreme Court will consider the entire record, including the transcript of the guilty plea." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

B. The lower court only considered Respondent's limited factual basis, which did not include a *mens rea* element, in determining that a sufficient factual basis existed.

During the December 13, 2017 guilty plea hearing, the lower court determined, after hearing from all parties, that a substantial factual basis existed for accepting the guilty plea. R. p. 233, lines 2–3. While the facts offered by the State clearly established a factual basis for a violation of Section 8-1-80 of the South Carolina Code of Laws Annotated, those facts were not considered by the lower court in evaluating the validity of the guilty plea. This is clear from the lower court's Order Denying the State's Motion to Reconsider, holding, "I found then, as I do now, that the limited admission of facts Quinn Jr. admitted on the record with the State's agreement, provide a substantial basis for the plea and meet the elements required of Statutory Misconduct in Office." R. p. 3.

The specific facts pleaded to by Respondent during the guilty plea hearing, as stated by defense counsel at the outset of the hearing, are ambiguous as to scienter:

> MR. RICHARDSON: [Respondent] agrees that in 2016, while a member of the House of Representatives, he failed to report to the House Ethics Committee the name of USC, which he knew was a lobbyist principal, and which in the previous calendar year had leased office space for less than $30,000.00 total from Capital Investments II, LLC, a business with which Rick was associated as an agent by receiving a benefit from Capital Investments of being relieved from payments on the mortgage note from that property as a guarantor, and also by helping them negotiate the mortgage note for Capital Investments II.

R. p. 158, lines 7–17. While this statement of the facts does indicate that Respondent knew the University of South Carolina ("USC") was a lobbyist's principal, it does not indicate that

Respondent intentionally failed to report USC as a lobbyist's principal from which he derived an economic benefit on his Statement of Economic Interest or knew that he was required to do so by Section 8-13-1130 of the South Carolina Code of Laws Annotated. However, a later statement by defense counsel makes clear that Respondent's failure to report the name of USC was not intentional. During mitigation, defense counsel indicated,

> MR. RICHARDSON: And he admits that *had he known that*, he should have disclosed that, because he was a guarantor and he didn't have to make payments. Now, that's a stretch under the definition of benefit when you're not under the scrutiny that he is under.

R. p. 219, lines 19–23. It is clear from defense counsel's statement that Respondent was unaware of the disclosure requirement. Respondent's failure to disclose the name of USC—and thus his violation of provisions of the Ethics, Government Accountability, and Campaign Reform Act, S.C. Code Ann. §§ 8-13-110, *et seq.*—was not committed knowingly or intentionally.

C. Respondent's facts alone do not constitute a violation of the crime to which Respondent pleaded, statutory misconduct in office.

Statutory misconduct in office, as defined by Section 8-1-80 of the South Carolina Code of Laws Annotated, requires a defendant (1) to be a public officer whose authority is limited to a single election and (2) to be guilty of "any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud, or oppression." Acts of official misconduct, corruption, oppression, and fraud implicate Section 8-1-80 by requiring knowing or intentional conduct on the part of the public official. In such cases, the public official sets out to use his public office for his own benefit to the detriment of the public trust. The South Carolina Attorney General's Office has offered guidance on the definition of "official misconduct" as "any unlawful behavior by a public officer in relation to the duties of his office, *willful in character*, involving *intentional* wrongdoing or total lack of concern for the conduct." 2014 WL 2538230, at *2 (S.C.A.G. May 12, 2014 (citing

C.J.S. Officers § 121, p. 490) (emphasis added). The concept of oppression contemplates the knowing abuse of power to deprive another of rights or property and is active in nature. Model Penal Code § 243.1 (defining official oppression as acting in one's official capacity to subject or deny the rights of another while knowing the conduct is illegal). Likewise, corruption requires an intentional, dishonest abuse of one's public office. See Hess II, 279 S.C. at 17, 301 S.E.2d at 549 (applying definition of corruption as "an act done with intent to gain advantage, not consistent with official duty and rights of others. Corrupt is defined to be dishonest, without integrity, guilty of dishonesty."). And finally, fraud is generally defined as the knowing use of deceit or trickery to induce the actions of another. Black's Law Dictionary (10th ed. 2014) ("**fraud** *n.* (14c) 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment."); Scarborough v. Crosland, 170 S.C. 321, 170 S.E. 453 (1933) ("Fraud comprises all acts, omissions, or concealments involving a breach of a legal or equitable duty and resulting in damage to another. It is synonymous with bad faith, overreaching, and dishonesty, but distinguished from mistake or negligence.")

In addition to the intentional conduct required for official misconduct, corruption, oppression, and fraud, a public official may also violate Section 8-1-80 by being habitually negligent in his duties. This element of the statute does not require dishonest intent and may be implicated by a negligent failure to observe filing requirements, provided that negligence is *habitual*. Clearly, habitual conduct necessarily requires that the failure occur more than once.

The factual recitation provided by defense counsel—the only facts considered by the lower court—contemplate a single failure to file the name of a lobbyist principal. Based on defense counsel's assertion that he should have disclosed the name of USC "had he known that," the conduct alleged by defense counsel was unintentional. R. p. 219, lines 19–23. This singular,

unintentional failure to file is insufficient to constitute a violation of Section 8-1-80 because it is neither *habitual* negligence, nor one of the other intentional acts of misconduct contemplated by the code section. Indeed, the conduct offered by Respondent amounts to a mistake in office, rather than misconduct in office.

i. The court's later attempt to clarify the *mens rea* element failed to cure the plea because Respondent did not plead guilty to a mere filing violation—he pleaded guilty to statutory misconduct in office.

In the time between the guilty plea and sentencing hearing, the State obtained and carefully reviewed the plea transcript. As a result of this review, the State submitted a memorandum to the lower court seeking to address the sufficiency of Respondent's factual basis. See R. pp. 37–74. Respondent thereafter submitted a response that flatly asserts, "[t]he record actually reflects that [Respondent] admitted to this Court that he accepted criminal responsibility for having intentionally failed to report the name of USC." However, the response contains no citation to the transcript indicating where this intent element is found.[10] R. p. 81.

Rather than invalidate the plea altogether, the State believed at this time that the guilty plea could be salvaged by a supplemental colloquy with Respondent that established *mens rea*. To that end, the State submitted a letter to the lower court and defense counsel proposing this solution. R. p. 91. During the February 12, 2018 sentencing hearing, the lower court did engage in a supplemental colloquy with Respondent. However, the court's remedy was ineffective because it misstated the charged offense. If the court had permitted the State to speak at the hearing, the State would have requested the court read the indictment to Respondent to accurately reflect the charge

[10] Respondent's reply also argues that the State admits in its presentation that Respondent violated Section 8-13-1130. R. p. 81. However, the lower court did not take the State's recitation of the facts informing the indictment into consideration for the factual basis of the plea.

to which he was pleading guilty, a process that occurs in courtrooms across the state during guilty pleas, but the court did not give the State an opportunity to make that request. In fact, by not allowing the State to speak, the plea was poisoned even more. In its supplemental colloquy with Respondent, the lower court effectively changed the offense to which Respondent pleaded to a filing violation rather than the continuing offense of statutory misconduct in office:

> THE COURT: All right. Well, as part of that same plea agreement, the State agreed to allow [Respondent] to plead guilty to a single misdemeanor count of statutory misconduct in office in violation of South Carolina Code Annotated Section 8-1-80 for intentionally failing to report the name of USC, a lobbying [sic] principal, that made payments to Capital II Investments, a company of which he was associated.
>
> * * *
>
> THE COURT: Mr. Quinn, are you guilty of one count of statutory misconduct in office for intentionally failing to report income from USC, a lobbyist principal.
>
> MR. QUINN JUNIOR: Yes, ma'am.

R. p. 288, line 18–p. 289, line 1; p. 290, lines 11–15. Respondent was supposed to plead guilty to misconduct, which requires fraud, corruption, or habitual negligence. The court allowed Respondent to simply plead guilty to an ethics violation for failing to file the name of a lobbyist principle on a single occasion.

The lower court's attempt to remedy the plea by surreptitiously inserting a limitation on the underlying indictment and changing the offense to which Respondent pleaded effectively changed the plea agreement. The terms of the plea agreement were stated on the record in accordance with the Supreme Court's instructions in State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). Those terms provided that Respondent was "pleading guilty straight up and with the knowledge that the State is asking for prison time for Indictment Number 2017-GS-4-12. That's the statutory misconduct in office, your Honor." R. p. 154, lines 19–22. In exchange Respondent

was permitted to accept responsibility for only a limited factual recitation provided by his counsel, but he was *not* permitted to plead guilty to an entirely different charge.

By attempting to remedy the plea by asking Respondent if he was "guilty of one count of statutory misconduct in office for intentionally failing to report income from USC, a lobbyist principal" the lower court effectively changed the terms of the plea agreement, thus rendering the supplemental colloquy ineffective to establish Respondent's *mens rea* for the underlying charge.

D. The lower court erred in determining a substantial factual basis existed, therefore the plea should be invalidated.

A guilty plea requires 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." State v. Rikard, 371 S.C. at 302, 638 S.E.2d at 75 (quoting State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975)). To satisfy itself that a plea is valid, the court "is free to use any appropriate procedure for determining the accuracy of the plea." Armstrong, 263 S.C. at 598, 211 S.E.2d at 891. While the record in this case does reflect that the lower court determined that a factual basis existed for the plea, this determination was in error because the record fails to reflect the requisite *mens rea* for a defendant pleading guilty to a violation of Section 8-1-80.

The limited facts offered by Respondent were the only facts taken into consideration by the lower court in determining a factual basis for the plea and those facts fail to adequately establish misconduct in office. For this reason, the lower court's ruling that the plea was supported by a substantial factual basis should be reversed and this Court should invalidate Respondent's guilty plea.

III. The totality of the lower court's conduct demonstrates bias, and Judge Mullen should be recused.

A. Standard of review

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party." Roche v. Young Bros., of Florence, 332 S.C. 75, 84–85, 504 S.E.2d 311, 316 (1998). Such impartiality may be reasonably questioned where his factual findings are not supported by the record. Id. "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct.App.2009) (citing State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct.App.2002)). To merit reversal on appeal, the movant must demonstrate some evidence of extrajudicial bias or prejudice. Id.

B. The State's faith in the impartiality of the lower court has been irreconcilably shaken, and Judge Mullen should be recused from Respondent's case.

The totality of conduct by the trial court throughout litigation of Respondent's case has eroded any confidence the State has in its ability to be impartial in the disposition of the remaining cases in this State Grand Jury investigation. This conduct includes, (1) severing the trials of Respondent and his co-defendant father without a hearing and for grounds generally not appropriate for severance; (2) eliciting *ex parte* communications; (3) failing to inform the parties of the substance of those *ex parte* communications; (4) asking the State to "go light on the facts" prior to the plea; (5) denying the State due process to be heard during the sentencing hearing; (6) disregarding the law and giving Respondent the presumption of innocence to a charge to which he pleaded guilty; and other examples as described below. These factors demonstrate an irreconcilable bias against the State by the trial court, in favor of Respondent. This Court should

reverse Judge Mullen's Order denying the State's recusal motion, and request the Chief Justice appoint a new trial court judge to restore the public's confidence in the resolution of this State Grand Jury matter.

A trial judge should not, except as authorized by law, initiate *ex parte* communications with any party to a case before the judge. Rule 3(B)(7), CJC, Rule 501, SCACR. This prohibition serves not only to prevent a party from enjoying the advantage of discussing matters with the court without the opportunity for retort by opposing parties, but also to avoid the mere appearance of impropriety, whether the concern is founded or not. Burgess v. Stern, 311 S.C. 326, 330, 428 S.E.2d 880, 883 (1993).

A court should guard against even the appearance of impropriety because, "[i]t is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred." Burgess, 311 S.C. at 330, 428 S.E.2d at 883 (1993) (quoting In re: Wisconsin Steel, 48 B.R. 753 (D.Ill.1985)). *Ex parte* communications are permissible when necessary for scheduling, administrative purposes, or emergencies, provided the communication does not concern substantive matters. Rule 3(B)(7)(a), CJC, Rule 501, SCACR. However, in such circumstances, the court must notify all other parties to the case of the substance of the matters discussed and provide the parties an opportunity to respond. Id.

The record of proceedings before the lower court highlights significant disagreements regarding the timing and substance of *ex parte* communications in this matter. It also reflects that the court has failed to notify the State as to the substance of the matters discussed with the defense during *ex parte* communications. Indeed, the court at first denied having any *ex parte* communications, but only corrected herself after being pressed by the State. The following exchange between counsel for the State and the lower court reflects this miscommunication:

MR. PASCOE: I now have, especially after what I've heard today, concerns about whether the Court may have had ex parte communication without the State's consent. So I want that to be part of the record too as to why this Court should recuse itself.

THE COURT: When you make allegations like that, Mr. Pascoe, you better have something to back it up because there has been no ex parte communications in this case.

MR. PASCOE: With who?

THE COURT: With anyone.

MR. PASCOE: With me?

THE COURT: 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.

MR. PASCOE: When did we consent?

THE COURT: You're making something about absolutely nothing.

MR. PASCOE: When exactly did we consent to the ex parte communication?

THE COURT: When we all spoke in chambers before the guilty plea in December.

R. p. 340, line 18–p. 341, line 14.

Both the State and defense counsel agree that consent to *ex parte* communications pursuant to the Court's request occurred. The disagreement is the timing of the consent. As counsel for the State discussed during the February 28 hearing, in the late afternoon of December 12, 2017, the day before the Quinn guilty pleas, the parties engaged in a conference call with the Court. R. p. 353, line 14–p. 354, line 18. During that conference call, the Court inquired whether the parties recalled granting permission to have *ex parte* communication on a prior occasion in Beaufort. The State's concern is that it was not present for that grant of authority to engage in *ex parte* communications. R. p. 354, lines 3–7. Thereafter, on the evening of December 12, *ex parte*

discussions did occur. R. p. 354, lines 15–18 ("And you called me on the night of – that night on December the 12th and you said that you were going to call Mr. Richardson as well.").

The question raised—which remains unanswered—is *when* did that consent occur. The lower court failed to answer this question during the hearing or in its Order and at the very least, both the court and defense counsel suggest consent was initially granted the afternoon of the guilty plea, which is not accurate. Regardless of when the consent occurred, the court failed to relay the substance of its communication with defense counsel to the State and failed to allow the State an opportunity to respond. See Canon 3(B)(7)(a)(ii), Rule 501, Code of Judicial Conduct, SCACR (requiring a judge engaging in *ex parte* communication to convey the substance of the discussion and allow an opportunity to respond). When this type of situation occurs with the court, it is nearly impossible for litigants to have faith that they have not been injured by the *ex parte* communications with the court. Burgess, 311 S.C. at 330, 428 S.E.2d at 883 (1993) (quoting In re: Wisconsin Steel, 48 B.R. 753 (D.Ill.1985)).

The substance of conversations with the court immediately prior to the plea is also at issue. The lower court insists the undersigned has misrepresented the substance of conversations held in chambers prior to the plea in its Motion for Reconsideration. R. p. 335, lines 16–19 ("in your motion you also said that I said something to you in chambers, which was not correct.").[11] However, counsel for the State stands by its recollection of the lower court's instruction to limit its factual presentation.

[11] In a recent hearing on a motion to quash the State Grand Jury subpoena of Richard Quinn, Sr., the lower court specifically denied asking the State to curtail its factual presentation when pressed by counsel for the State.

A further example of extrajudicial events undermining the State's faith in the impartiality of the lower court involves Judge Mullen's assigned Court Reporter, Ms. Wanda Rowe. On February 17, 2018, shortly after Respondent's sentencing hearing, Ms. Rowe published a comment on The State newspaper's website beneath an article addressing the State's objections to the sentencing hearing. The comment, published from Ms. Rowe's Facebook account, chided, "[w]hen a solicitor passes up a golden opportunity to go to trial, but won't take responsibility for agreeing to a plea = classic cop out. Don't blame it on the judge."[12] Immediately after learning of the comment, the undersigned notified Court Administration, who removed Ms. Rowe from the case. Ms. Rowe is Judge Mullen's assigned Court Reporter, and the State can only speculate that this comment is the result of conversations occurring in chambers between court staff and Judge Mullen. However, regardless of Ms. Rowe's motivation to post the comment, the statement has served to further shake the State's faith in Judge Mullen's impartiality.

To date, the State has no knowledge of what was discussed between the lower court and defense counsel during *ex parte* discussions referred to by the court on the December 12, 2017 conference call, prior to the guilty plea. However, the totality of events that have transpired from that time to the present give rise to significant concerns regarding the substance of those *ex parte* conversations and the impartiality and bias of the lower court in resolving Respondent's case. During the conference call on December 12, Judge Mullen indicated that a grant of consent for *ex parte* communications occurred during a meeting in Beaufort at which the State was not present. On December 13, immediately prior to the plea, Judge Mullen solicited *ex parte* communications

[12] Glenn Smith, Court reporter removed from Statehouse misconduct case after criticizing prosecutor online, Post and Courier (Feb. 27, 2018), https://www.postandcourier.com/news/court-reporter-removed-from-statehouse-misconduct-case-after-criticizing-prosecutor/article_a63c7afe-1bda-11e8-8874-07ffa47106ae.html.

with the parties and asked the State to soften its factual presentation. During sentencing, Judge Mullen denied the State the right to raise issues concerning the plea. In her remarks during sentencing, Judge Mullen went to great lengths to undercut the State's presentation of the facts, repeatedly misstating the charge against Respondent and stating that "he is presumed innocent of those allegations until and unless he is proven guilty" for a charge to which Respondent had just pleaded guilty. R. p. 288, line 18–p. 289, line 1; p. 290, lines 21–24; p. 291, lines 18–21.

Following sentencing, Judge Mullen's court reporter is discovered to have posted remarks critical of the State on The State Newspaper's website. Later, in her Order Denying State's Motion to Reconsider, Judge Mullen appears to retreat from her position during sentencing with the cryptic assertion, "[t]he Court considered the information provided by the State and the Defendants during the December 13, 2017 hearing and sentenced the Defendant's according to the evidence the Court found reliable and relevant." R. p. 4. In its totality, these events give rise to significant concerns regarding an extrajudicial bias against the State, in favor of securing a light sentence for Respondent, whose family has significant ties to powerful members of the South Carolina General Assembly. These concerns are not resolved by the court's Order Denying State's Motion to Reconsider but are only clouded by false allegations of impropriety by the State with no factual support. Further, the court's Order fails to make any attempt to resolve the State's concerns about the court's *ex parte* discussions with defense counsel.

Judge Mullen and her staff have demonstrated a strong bias against the State in Respondent's case. To preserve the confidence of the public in the impartial administration of justice in this matter, the Court should reverse Judge Mullen's decision denying the State's request to recuse. Thereafter, a different circuit court judge should be selected by the Chief Justice in

accordance with the Supreme Court's Order regarding selection of trial judges in State Grand Jury matters. Administrative Order State Grand Jury, S.C.Sup.Ct. Order dated March 20, 2003.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse the lower court's Order Denying State's Motion to Reconsider to the extent it holds that Respondent's guilty plea was valid and remand the case to the trial court. Should this Court decline to invalidate Respondent's guilty plea, Appellant respectfully requests this Court hold that the lower court committed an abuse of discretion by sentencing Respondent under the erroneous legal conclusion that Respondent continued to enjoy constitutional rights that were waived during the guilty plea.

Finally, Appellant respectfully requests this Court hold that Judge Mullen should be recused and removed from further involvement in Respondent's case.

[Signature page follows]

Respectfully submitted by,

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Orangeburg, South Carolina.

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 Court Judge

Case No. 2017-GS-47-12, -13, -32

The State,.....Appellant

v.

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

Appellate Case No. 2018–000494

CERTIFICATE OF COUNSEL

The undersigned counsel for the State certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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