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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable William C. McMaster, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT DANIEL MISTRETTA,

APPELLANT

APPELLATE CASE NO. 2025-001473

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the provision of the 2023 Bond Reform Act, which requires circuit courts to refuse to credit time served if a person is re-arrested, without regard to the nature or severity of either offense or whether the person is convicted after the subsequent arrest, is unconstitutional?

STATEMENT OF THE CASE

Appellant pled guilty under direct presentment to attempted kidnapping on July 9, 2025, before the Honorable William C. McMaster, III. Appellant was represented by Charles W. Snyder. Tr. 1. Peyton C. Swancy represented the state. Tr. 1. Judge McMaster sentenced Appellant to fifteen (15) years' imprisonment, with one day time-served credit. Tr. 17. The explanation for an appeal from a guilty plea required by Rule 203(d)(1)(B)(iv), SCACR, stated that Appellant was appealing the plea court's refusal to award credit for time served. On July 25, 2025, this Court allowed the appeal to proceed. R*(Allowed to Proceed Letter).

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

A statute is presumed constitutional, and the validity will be upheld, unless its repugnance to the constitution is clear beyond a reasonable doubt. *State v. McSwain*, 445 S.C. 276, 282-83, 914 S.E.2d 124, 127 (2025). This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution. *Doe v State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017).

ARGUMENT

The provision of the 2023 Bond Reform Act that requires trial courts to deny credit for time served when a person is arrested on a subsequent offense is unconstitutional.

Relevant Facts and Procedural History

Appellant was arrested on August 16, 2023, for kidnapping.[1] The Greenville County grand jury indicted Appellant by direct presentment for attempted kidnapping, in violation of S.C. Code Ann. § 16-3-910, on May 27, 2025. R. *(Indictment). Appellant remained in pretrial detention from the time of his arrest up until the time of his guilty plea. Appellant pled guilty to attempted kidnapping on July 9, 2025. Tr. 1.

During the plea hearing, the state informed the trial court that Appellant had been serving "dead time" on this charge since April of 2023, because at the time of his arrest he had been out on bond for indecent exposure.[2] Tr. 12. According to the state, Appellant was only entitled to time-served credit for the original charge, one day. Tr. 12. Appellant countered by asserting that the statute was unconstitutional and requested credit for the entire time served, 694 days. Tr. 12-13. Plea counsel referenced "at least two lawsuits" challenging the constitutionality of the bond statute. Tr. 13.

The plea court refused to give Appellant credit for the greater than two years he spent in pretrial detention awaiting trial. Tr. 17. The plea court sentenced Appellant to fifteen years' imprisonment, with credit for one day time served and ordered Appellant to register as a sex offender. Tr. 17. On July 25, 2025, this Court permitted this appeal to proceed. R.*(Allowed to

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1 *See State v. Robert D. Mistretta*, Greenville County Case No. 2025-GS-23-01973. This case was dismissed the same day as Appellant pleaded guilty to attempted kidnapping. R* (Tracking Sheet).

2 *See State v. Robert D. Mistretta*, Greenville County Case No. 2023A2320601016.

Proceed Letter). The indecent exposure charge was dismissed without being indicted. *See supra*, n. 2.

Discussion

The Bond Reform Act provides for the criminal punishment of citizens for being arrested—not convicted—of a crime. This is facially unconstitutional, and unconstitutional as applied to Appellant.

Section 24-13-40(3) was part of the 2023 Bond Reform law passed by the General Assembly and signed by Governor McMaster on June 20, 2023. *Bond Reform*, S.C. Acts No. 83, § 8 (2023). Prior to the passage of this act, there were only two exceptions to the general rule that all persons must be given full credit for time served: (1) the prisoner who was incarcerated pretrial was an escapee; and (2) the prisoner was serving a sentence for one offense while awaiting trial on another. S.C. Code Ann. § 24-13-40 (West 2013). The Bond Reform law added two new exceptions, the one at issue here, and another that denies time served credit for any person whose bond was revoked. S.C. Code Ann. § 24-13-40 (3, 4) (current). South Carolina appears to be the only state with a similar sentencing regime. Kimberly Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. REV. 2001, 2005-06 & n.11 (2023) (collecting statutes).

A. The Bond Statute Places an Unconstitutional Condition on the Right to a Trial by Jury.

The bond statute unconstitutionally conditions the fundamental right to a jury trial on the loss of time served credit. For this reason, the statute is unconstitutional, both facially and as applied to Appellant.

"[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013)

(quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983)). For example, a public university violates a professor's freedom of speech by refusing to renew his contract for speaking against the university. *Perry v. Sindermann*, 408 U.S. 593 (1972). And a county government violates the right to travel by only extending healthcare benefits to "those indigent sick who had been residents of the county for at least one year." *Koontz*, 570 U.S. at 604 (citing *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974)). The general purpose of the "unconstitutional conditions doctrine" is to "vindicate the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* Simply, even if the Constitution does not grant a "right" to a specific government benefit, the government cannot deprive a person of that benefit "on a basis that infringes on his constitutionally protected interests." *Perry*, 408 U.S. at 597. Because permitting the government to do so would permit "the government to produce a result which it could not command directly." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…" U.S. Const. amend. VI. "The right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. The right to a trial by jury is among the most important of all fundamental constitutional rights. It is "the only [right] to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting); *compare* U.S. Const. amend. VI *with* U.S. Const. art. III, § 2. There is an "inseparable connection between the existence of liberty and the trial by jury." FEDERALIST NO. 83 (Hamilton). And the absolute language of the Sixth Amendment makes the right to a jury trial one of the few, if not the only, absolute rights. *See* U.S. Const. amend. VI ("In *all* criminal prosecutions…" (emphasis added)).

By the Sixth Amendment's terms, a government cannot force a person to waive their right to a jury trial. Any person charged with an offense who asks for one, must receive one. Of course, most do not. *Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("plea bargaining...is not some adjunct to the criminal justice system; it *is* the criminal justice system" (emphasis in original)).

Under the statute at issue here, however, a person who is arrested twice must make an insidious decision about exercising their right to a jury trial. A person who wants to be tried by a jury could potentially wait months or years to have their case brought to trial, time that they will not be credited for under the statute. In such a situation, a person is forced to choose between their rights and their liberty. The Constitution, however, does not permit the state to force such a choice. The state cannot indirectly force a decision which it could not constitutionally compel directly. *Speiser*, 357 U.S. at 526. By creating a statutory regime which provides no time-served credit, the state creates two groups of individuals: those who quickly plead guilty and thus lose very little liberty and those who go to trial and thus lose months or years of liberty. *See Barker v. Wingo*, 407 U.S. 514, 520 (1972) ("If an accused cannot make bail, he is generally confined...in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions"). In this way, the state conditions a benefit—getting out of jail sooner—on the waiver of the constitutional right to a jury trial; this, it cannot do. *See Perry*, 408 U.S. at 597.

Appellant's case presents another interesting wrinkle. The offense for which Appellant was originally charged—and the offense for which he was out on bond for, triggering application of the statute at issue—was dismissed. Appellant was not convicted of that offense. Therefore, Appellant was forced to spend nearly two years in prison, for which he will not be credited, because he was previously *accused*—not convicted—of an entirely different crime.

For these reasons, the denial of time served credit places unconstitutional conditions on Appellant's right to a trial by jury. Therefore, the statute is unconstitutional. This case should be reversed.

B. The Bond Statute Violates the Due Process Clause.

Appellant was denied nearly two years of time-served credit because of a prior arrest for a crime which the state dismissed. By requiring that trial courts shall not award time-served credit to any person who is arrested while out on bond for another charge, S.C. Code Ann. § 24-13-40(3) violates the Fourteenth Amendment and Article I, § 3 of the South Carolina Constitution both facially and as applied to Appellant. Accordingly, this case should be reversed.

"No State shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (similar). "Nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." *Id.* The Due Process Clause contains two different types of protections. Procedural due process protects against the deprivation of a constitutionally protected interest unless the government provides the person with, at minimum, "notice, an opportunity to be heard in a meaningful way, and judicial review." *State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 895 (2012) (quoting *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). But due process "guarantees more than fair process," it also "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 701, 719-20 (1997). Substantive due process is used to protect freedoms that are not specifically enumerated in the Constitution but are "deeply rooted in this Nation's history and tradition." *Id.* at 721; *see also, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy). The main purpose of substantive

due process is to prevent the government from engaging in conduct that "shocks the conscience," or "interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing, *inter alia*, *Rochin v. California*, 342 U.S. 165, 172 (1952).

Determining whether a due process violation has occurred involves a two-step inquiry; first, the court must determine whether the interest involved is a protected legal interest, and second, the court must determine "what process is due under those circumstances." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-73 (1972). Courts typically do this by reviewing the challenged law under differing levels of constitutional scrutiny. *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 346-47 (2002). A statute that infringes upon a fundamental right must satisfy strict scrutiny, the most exacting scrutiny available. *Id.* at 140-41, 568 S.E.2d at 347. To satisfy strict scrutiny, the state must show that its statute is narrowly tailored to serve a compelling state interest. *Id.* If a fundamental right is not implicated, then courts review using rational basis, wherein the law will be upheld if it is rationally related to a legitimate government purpose. *State v. McSwain*, 445 S.C. 276, 283-84, 914 S.E.2d 124, 127-28 (2025).

The first question is whether S.C. Code Ann. § 24-13-40(3) implicates a fundamental right. The most fundamental of all rights is the right of the citizenry to their personal liberty. U.S. Const. amend. XIV ("No State shall...deprive any person of life, *liberty*, or property, without due process of law..." (emphasis added)).

"Without question, imprisonment is recognized as one of the greatest deprivations of liberty." *Binnarr*, 400 S.C. at 165, 733 S.E.2d at 895. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. It is clear that commitment for any purpose constitutes a significant deprivation of liberty

that requires due process protection." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (collecting cases; internal citations omitted). "There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest." *Tant v. South Carolina Dept. of Corr.*, 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014).

Generally, a person may not be committed to imprisonment without being convicted and sentenced by a court; a person may not be detained pre-trial unless it is required to ensure his presence in court. *State v. Ellefson*, 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976) (citing *Stack v. Boyle*, 342 U.S. 1 (1951)). "The state's interests in bail or pretrial incarceration are to insure [sic] the presence of the accused at trial and to protect the public from a potentially dangerous recidivist." Note, *Credit for Time Served Between Arrest and Sentencing*, 121 U. PENN. L. REV. 1148, 1154 (1973). And the Due Process Clause forbids punishment prior to conviction and sentencing. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 534 (1979); *Salerno*, 481 U.S. at 747; *see also, e.g., State v. Cook*, 37 Wash. App. 269, 271-72, 679 P.2d 413, 415 (1984) ("The restrictions on a person's liberties suffered by pretrial detention is no less 'punishment' than that imposed by the disposition order"); *cf. also, North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969) (the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense"), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

1. The bond statute fails under strict scrutiny.

Since the statute implicates a fundamental right—liberty itself—the next question is what level of scrutiny should apply. The answer is strict scrutiny. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347 (applying strict scrutiny to substantive due process challenge to Sexually Violent

Predator Act because it implicated the fundamental right of "freedom from bodily restraint"). To satisfy strict scrutiny, the statute must be narrowly tailored to serve a compelling state interest. *Id.*

The General Assembly did not expressly provide its purpose for restricting time-served credit based on a subsequent arrest while on bond. This denial is one of a few exceptions to the general rule that full credit for all time served prior to trial must be awarded. S.C. Code Ann. § 24-13-40.[3] It can be inferred that the General Assembly's aim was to deter the commission of crimes while already out on bond,[4] but the General Assembly provides neither a preamble nor prefatory language to that effect. *See generally*, S.C. Acts No. 83, *supra*. The absence of any articulated intent leaves this Court without any guidance from the General Assembly.[5]

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[3] To be sure, this state's statutes did not always require time-served credit for pretrial detention. However, this fact is not particularly relevant to this discussion, because the previous statutes were unconstitutional several times over. For example, the prior S.C. Code Ann. § 55-10 (Michie Co. 1952) provided that a prisoner who appealed their conviction was only entitled to credit from the date of the "commencement of the service of their sentence." This seemingly odd inclusion makes sense when considering that both pretrial bonds and appellate bonds were significantly more common at this time. The present bond statute seems to represent a desire to return to 1950s era credit statutes, but while simultaneously attempting to make the obtainment of bond significantly more difficult. In this way, the new bond law has taken the worst components of ancient and antiquated criminal justice statutes without also bringing along those that benefit those accused with criminal offenses. Secondly, these older statutes predated the Supreme Court's decision in *Williams v. Illinois*, 399 U.S. 235 (1970), discussed *infra*, and were amended—like most other states'—quickly thereafter. *See, e.g., State v. Dozier*, 263 S.C. 267, 272-73, 210 S.E.2d 225, 227 (1974) (discussing 1973 amendment to time-served credit statute, which essentially mirrors the version in effect at the time of the bond reform act's adoption).

[4] Henry McMaster, *Signing Statement*, H. 3532 (Bond Reform) (June 20, 2023) ("urgent need for the General Assembly to close the 'revolving door' for repeat offenders and career criminals").

[5] It is true that acts of the General Assembly carry a presumption of constitutionality. *McSwain*, 445 S.C. at 283-84, 914 S.E.2d at 127-28. However, this does not mean that acts are never unconstitutional, and it certainly does not mean that this Court must abandon its well-established tiers of scrutiny analysis—all of which require the Court to weigh the General Assembly's *purpose* against the right implicated, especially when the General Assembly articulated no

But continuing from the presumption that the General Assembly's goal is to deter the commission of crimes while already out on bond, the statute is not narrowly tailored. Deterring criminal behavior or protecting society from the same is a compelling government interest.[6] *See Salerno*, 481 U.S. at 747. However, the new statute is not narrowly tailored to that aim.

To be narrowly tailored to a compelling government interest, the law must be "necessary" to achieve that interest. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 207 (2023). An instructive example is the South Carolina Supreme Court's treatment of the Sexually Violent Predator Act ("SVP Act"). Facing a substantive due process challenge to the SVP Act, that court determined that strict scrutiny applied. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. The SVP Act was found to satisfy strict scrutiny because it was narrowly tailored to apply only to "a limited subclass of dangerous persons," who by reason of mental illness were "likely to commit a dangerous act." *Id.* at 144, 568 S.E.2d at 349 (citing *Kansas v. Crane*, 534 U.S. 407, 412 (2002)). The SVP Act would not, however, be constitutional if it permitted the state to civilly commit any individual convicted of a sex crime without any determination that he had some disorder preventing him from controlling his behavior. *Crane*, 534 U.S. at 412 ("We do not agree with the State...as it seeks to claim that

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interest. *See id.* (rational basis review); *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 346-47 (strict scrutiny).

[6] Appellant is unwilling to make this concession because the state has only two legitimate, lawful interests in pretrial incarceration: holding those who pose a danger to society and ensuring the presence of the accused in court. *Ellefson*, 266 S.C. at 500, 224 S.E.2d at 669 (citing *Stack*, 342 U.S. 1); Note, *supra*, 121 U. PENN. L. REV. at 1154. Protection of the public is typically a compelling government interest, but that interest does not outweigh the right of the individual to their liberty. As discussed *infra*, the state has myriad other options to achieve the goal of reducing crimes committed by those on bond that would not require it to unlawfully detain its citizens without their conviction for any crime.

the Constitution permits commitment of the type of dangerous offender...without any lack-of-control determination" (emphasis deleted)).

Another instructive example of how a law may be narrowly tailored is *United States v. Salerno*, 481 U.S. 739. In that case, the United States Supreme Court analyzed, *inter alia*, a substantive due process challenge to the Bail Reform Act. *Id.* That act provided that "[i]f, after a hearing...the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." *Id.* at 742 (quoting 18 U.S.C. § 3142(f)). The Court recognized a general constitutional rule that substantive due process prohibits the government from detaining a person prior to a judgment of guilt in a criminal trial. *Id.* at 749. However, there were certain exceptions to this general rule. *Id.* at 749. Finding that the Bail Reform Act was constitutional, the Court pointed out that it was exceptionally narrowly tailored. *Id.* at 750. For example, the Bail Reform Act provided that bail could only be denied for a "specific category of extremely serious offenses,"[7] after an evidentiary hearing wherein the government must establish both probable cause that the crime has been committed by the arrestee and clear and convincing evidence that no set of bond conditions would protect the community, and the provisions of the strict federal Speedy Trial Act[8] still apply. *Id.*

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[7] Currently, crimes of violence carrying maximum terms of imprisonment exceeding ten years, capital offenses, offenses punishable by life imprisonment, Controlled Substances Act violations carrying maximum sentences of greater than ten years, any felony if committed by a person convicted of two or more of the previous offenses, or any felony involving a minor victim and involving the use of a firearm. 18 U.S.C. § 3142(f)(1)(A-E).

[8] That act requires that a criminal defendant be indicted within thirty days of arrest, and tried within seventy days of indictment, with certain excepted days not counting toward the time limit.

When compared with the laws found constitutional in *Luckabaugh* and *Salerno*, the statute at issue is not narrowly tailored. The law denies credit for time served "when the prisoner commits a subsequent crime while out on bond." S.C. Code Ann. § 24-13-40(3). As far as the statute is concerned, it does not matter what crime the original bond was for, how long ago that bond was set, whether the "prisoner" is even guilty of the first crime,[9] the severity of the subsequent crime, or how long the "prisoner" was required to remain in pretrial detention before finally being brought to court. The law may have been aimed at those twice arrested for violent crimes, but there is no statutory limitation prohibiting its application to a person who is on bond for petty shoplifting and is arrested for trespassing, DUI, or public disorderly conduct. The statute's language is also indifferent to whether the accused is actually guilty of any of the charged offenses.

Compared to the SVP Act, which applies only to a narrow subset of sex offenders whom the government can prove dangerous beyond a reasonable doubt, the specific provision of the Bond Reform Act, which applies to any and all criminal offenses, is not at all narrowly tailored. *See Luckabaugh*, 351 S.C. at 141, 568 S.E.2d at 349. And compared to the federal Bail Reform Act, which was passed by Congress to address the exact same societal problem, *see Salerno*, 481 U.S. at 742 ("Responding to 'the alarming problem of crimes committed by persons on release'...Congress formulated the Bail Reform Act" (internal citation omitted)), the statute's issues are even more stark. Unlike federal law, South Carolina has no speedy trial act, a person arrested for a crime has no right to an evidentiary hearing prior to the setting of bond, and the

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18 U.S.C. § 3161. If the government fails to do so, the district court must dismiss the case. *Id.* § 3162(a).

9 Appellant was never convicted of the alleged crime which resulted in the original bond. *See State v. Robert D. Mistretta*, Greenville County Case No. 2023A2320601016.

state certainly has no duty to prove by clear and convincing evidence that the arrestee poses a threat to the community. *See generally, id.* Not to mention the fact that federal law requires time-served credit. 18 U.S.C. § 3585.[10]

Further, the state has numerous less restrictive avenues available for accomplishing the same interest of deterring crime by those out on bond. *Cf., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 809 (2000) (striking down statute where there were plausible, less restrictive means of accomplishing the government's aims). The state could, for example, create a new felony offense which may add consecutive prison time onto the sentences of those who commit certain crimes while already out on bond. *See* S.C. Code Ann. § 17-15-270 (creating felony offense for committing violent crime while under a bond order for a previous violent crime). The state could pass a law that makes bond more difficult to obtain or post if a person is re-arrested. *See id.* § 15(D) (defendant who is charged with a violent offense or felony involving firearm must post a full cash bond). Perhaps the state could impose more streamlined procedures for the state to attempt to revoke the bonds of subsequent arrestees. *Id.* §§ 55(B), 55(C) (doing that). Or, the state could rely upon the wisdom of circuit court judges, who may well punish offenders more harshly in sentencing when the fact of a defendant's re-arrest is brought to the judge's attention. And because the statute denies time served credit to any person who is arrested for a second time, regardless of their offense, it "is not tied to the relative public safety risk presented...and is excessive with respect to the purpose for which it was enacted." *Cf., Powell v. Keel*, 433 S.C. 457, 467, 860 S.E.2d 344, 349 (2021) (quoting *State v. Latalien*,

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10 The federal statute expressly provides that a "defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in...detention...as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed." 18 U.S.C. § 3585(b)(2). This provision was adopted as part of the federal Bail Reform Act. *See* Pub. L. 98-473, 98 Stat. 2001 (1984).

985 A.2d 4, 30 (Me. 2009) (Silver, J., concurring)). To the extent that the statute was enacted to close the "revolving door of repeat offenders," *see Signing Statement, supra* n. 4, its goals are not furthered by denying time served credit to every single defendant who is arrested twice. Simply put, "the ever-growing list of" re-arrestees "dilutes [the statute's] utility." *Powell*, 433 S.C. at 465, 860 S.E.2d at 349 (quoting *Latalien*, 985 A.2d at 30 (Silver, J., concurring)).

In any event, denying credit for time served does not substantially further any government interest. Rather, it has the effect of transforming something intended as non-punitive pretrial detention into something that is punitive. *See* Note, *supra*, 121 U. PENN. L. REV. at 1154 ("Neither interest has a rational nexus with the denial of credit for time spent in jail; on the contrary, they may compel a grant of such credit: otherwise, the implication arises that punishment is the purpose of confinement"). In this case, Appellant was incarcerated for 694 days that he was never credited for because of an arrest for a crime of which he was never convicted. That result can only be punitive in nature. The only way to avoid the reality that Appellant was punished for nearly two years before being convicted of any crime is to reduce his present sentence accordingly.

2. The bond statute likewise fails under rational basis review.

Even if only rational basis review applied, the bond statute would fail. To satisfy rational basis review, a law must be rationally related to a legitimate government purpose. *McSwain*, 445 S.C. at 283-84, 914 S.E.2d at 127-28. A statute fails under rational basis review when it is arbitrary, and not reasonably related to any lawful purpose. *See, e.g., Denene, Inc. v. City of Charleston*, 359 S.C. 85, 93, 596 S.E.2d 917, 921 (2004).

To reiterate, the state has no lawful interest in punishing those who are arrested while on bond, because it is unconstitutional to punish someone prior to conviction. *See, e.g., Salerno*, 481

U.S. at 747. Its only legitimate interests in holding someone prior to trial are to ensure the presence of the accused and to protect the public from someone adjudged to pose a threat to that public. *Ellefson*, 266 S.C. at 500, 224 S.E.2d at 669 (citing *Stack*, 342 U.S. 1). But rather than the careful and measured steps taken by Congress in the Bail Reform Act of 1984, the General Assembly has cast an exceptionally wide net, leading to grossly disproportionate results that are not at all justified by any of its legitimate interests. For example, it may well be the case that a person is incapable of affording bond due to indigency and is thus required to sit idly in jail while being credited for none of their time so doing.

In *Williams v. Illinois*, the United States Supreme Court analyzed a case where a defendant was convicted of a crime and made to pay a fine. 399 U.S. 235, 236 (1970). The maximum sentence authorized for the crime that he had committed was one year; however, due to the defendant's inability to pay the fine, he was kept incarcerated for longer than one year. *Id.* at 236-37. The Court held that imprisonment exceeding the maximum term, which "results directly from an involuntary nonpayment of a fine or court costs," was unconstitutional. *Id.* at 240-41. This was true even though the statute in question did not directly discriminate based on indigency, because even a law "nondiscriminatory on its face may be grossly discriminatory in its operation." *Id.* at 242 (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11 (1956)). An example of this is a statute which might provide a greater amount of "good conduct" credit to those who post bond, and as a result, less to those unable to post bond. *MacFarlane v. Walter*, 179 F.3d 1131 (9th Cir. 1999), *cert. granted, vacated and dismissed as moot sub nom., Lehman v. MacFarlane*, 529 U.S. 1106 (2000).

Williams was decided under the Equal Protection Clause, not the Due Process Clause. *Williams*, 399 U.S. at 240-41. However, it is still instructive here. Indigency is not a suspect

classification, so courts applying the *Williams* Court's logic would apply only rational basis review. *See, e.g., United States v. Skrmetti*, 145 S. Ct. 1816, 1828-29 (2025) (collecting cases). Even so, the Equal Protection Clause generally prevents unequal treatment of criminal defendants on the basis of indigency. *Williams*, 399 U.S. 235; *Tate v. Short*, 401 U.S. 395 (1971). This is because discrimination on the basis of indigency advances no legitimate state goals. In other words, if a criminal law genuinely has a lawful purpose, it must be applied "equally to persons similarly situated, and that any differences of application *must be justified by the law's purpose*." *Town of Iva ex rel. Zoning Administrator v. Holley*, 374 S.C. 537, 541, 649 S.E.2d 109, 110 (Ct. App. 2007) (quoting *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 818 (4th Cir. 1995) (emphasis added)). If the differences in application are not, the law is "arbitrary," and unconstitutional even under rational basis review. *Id.*[11]

The General Assembly's goals are not conceivably furthered by the denial of time-served credit to a person arrested for two separate minor crimes, years apart. They are likewise not furthered by a "grossly discriminatory" regime which denies time-served credit to those who cannot afford bond, while their counterparts who can remain out of incarceration.[12] The bond statute's extremely overbroad application, despite being aimed at only a few career criminals, "negate[s] every conceivable basis which might support it." *Bodman v. State*, 403 S.C. 60, 69-70, 742 S.E.2d 363, 368 (2013) (quoting *Lee v. S.C. Dept. of Natural Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000)).

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[11] For that reason, several jurisdictions have held that it is unconstitutional to deny time served credit, at least on bailable offenses, to criminal defendants. *See, e.g., Ham v. North Carolina*, 471 F.2d 406 (4th Cir. 1973); *Faye v. Gray*, 541 F.2d 665 (7th Cir. 1976); *Martin v. Leverette*, 161 W.Va. 547, 551, 244 S.E.2d 39, 42 (1978); *Wilson v. State*, 82 Wis.2d 657, 264 N.W.2d 234 (1978); *see also,* ARTHUR CAMPBELL, LAW OF SENTENCING § 8:7 (Aug. 2025 update) (collecting cases); *King v. Wyrick*, 516 F.2d 321, 323 (8th Cir. 1975).

[12] *Williams*, 399 U.S. at 242 (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956)).

For these reasons, the statute is facially unconstitutional under the Due Process Clauses of the Fourteenth Amendment and Article I, § 3 of the South Carolina Constitution.[13]

[13] Although the question of severability is somewhat beyond the scope of Appellant's arguments to this Court, it is necessary to address here, since providing Appellant with his requested relief will require the Court to address the issue. Granting Appellant the relief he seeks will not require this Court to nullify the entire Bond Reform Act, because the challenged subsection its severable from the remainder. It is true that the Bond Reform Act does not contain a severability clause. *See generally*, S.C. Acts No. 83, *supra*. However, the remainder of the statute, which goes unchallenged here, is "of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 648-49, 528 S.E.2d 647, 654 (1999). The provision denying time-served credit is but one in several different legislative actions taken in the act to discourage the commission of crimes by those out on bond. *See supra* at 15 (discussing other sections of the Bond Reform Act). It can be fairly said that the General Assembly intended these provisions to stand alone and separate from one another.

CONCLUSION

For the foregoing reasons, this Court should vacate Appellant's sentence and remand with instructions to credit Appellant for his time served.

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Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2025.