STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2024-001400

THE STATE, Appellant,

v.

RI'SHON KELTARIAN GILLIAM, Respondent.

FINAL REPLY BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID STUMBO
Solicitor, Eighth Judicial Circuit

102 Court Square, Room 107
Abbeville, SC 29620
(864) 366-5312

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary sources

ARGUMENT

I. Subsection (3) of the revised bond statute is constitutional.

There is no constitutional right to credit for time served in pretrial incarceration. Even if the denial of credit could raise constitutional concerns in some circumstances, such as when a defendant is incarcerated for longer than the statutory maximum due to indigency, no such circumstances are present in this case. Whether credit must or may be given for time served before trial is a sentencing issue, and a matter of legislative prerogative. Gilliam's facial challenge must fail.

A. Definitions.

Before addressing whether there is a constitutional right to credit for time served in pretrial detention, it is necessary to consider what "credit for time served" is.

Pretrial detention is not punitive. State v. Sanders, 251 S.C. 431, 446, 163 S.E.2d 220, 228 (1968) ("The time for which credit is sought was spent in jail awaiting trial and not pursuant to any punishment imposed for the crime charged."); Ex parte Milburn, 34 U.S. 704, 710 (1835) ("A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence . . . ."). The constitution does not allow it to be punitive. Bell v. Wolfish, 441 U.S. 520, 535–36 (1979). Instead, pretrial detention is "regulatory" in nature. See United States v. Salerno, 481 U.S. 739, 746

(1987); see also S.C. Code Ann. § 17-15-10 (providing conditions on bond may be set to ensure defendant's presence at trial and prevent danger to the community). While pretrial detention deprives an arrestee of liberty, it is not part of a defendant's sentence.

When a criminal defendant is sentenced to a term of incarceration after conviction, our legislature has provided that time spent in pretrial detention is normally to be "credited" against the sentence. S.C. Code Ann. §24-13-40. This means the amount of time spent in pretrial detention will be subtracted from the overall length of the sentence imposed. See Vasquez v. Cooper, 862 F.2d 250, 255 (10th Cir. 1988) ("Awarding 'credit' for presentencing jail time is, by its nature, a reduction of the given sentence."). Thus the denial of credit does not increase the length of any defendant's sentence.

The credit serves two main functions. First, it ensures defendants will not spend more time incarcerated than the statutory maximum sentence provides. Second, it reduces unequal outcomes for defendants who are unable to afford bail due to indigency.

Giving credit for time served in pretrial detention is "an act of legislative grace . . . ." Palmer v. Dugger, 833 F.2d 253, 256 (11th Cir. 1987). The "credit" reflects the legislative judgment that because pretrial detainees have been deprived of liberty, even though not for a punitive purpose, such time fairly should be deducted from their ultimate sentence. Thus whether a defendant is entitled to "credit" for time served in pretrial detention is a sentencing issue, not a pretrial

liberty issue. Subsection (3) has no effect on whether a defendant will be released on bond.

"[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7 (1979). Whether sentencing credit must be given for time served is a matter of legislative prerogative. Cf. State v. Burdette, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) (explaining "the penalty assessed for a particular offense is, except in the rarest of cases, 'purely a matter of legislative prerogative,' and the legislature's judgment will not be disturbed" (citation omitted)). As long as the sentence imposed is within statutory limits, it should not be disturbed on appeal:

> Generally . . . appellate review of a sentence ends once it is determined that the sentence is within the limitations set by statute. The legislature defines the limit of the state's penological interest when it establishes maximum sentences. Although incarceration beyond that time may implicate constitutional concerns, the period of incarceration within that time is necessarily discretionary with the sentencing judge.

Vasquez, 862 F.2d at 255. See also State v. Bynes, 304 S.C. 62, 64, 403 S.E.2d 126, 127 (Ct. App. 1991) ("A judge has discretion to impose any sentence which is within the limits prescribed by statute.").

"[T]here is no federal constitutional right to credit for time served prior to sentence." Gremillion v. Henderson, 425 F.2d 1293, 1294 (5th Cir. 1970); see also Palmer v. Dugger, 833 F.2d 253, 254 (11th Cir. 1987); Sanders, 251 S.C. at 445–46, 163 S.E.2d at 228; State v. Virgil, 276 N.C. 217, 226, 172 S.E.2d 28, 34 (1970); Martin v. Pennsylvania Bd. of Prob. & Parole, 840 A.2d 299, 304 (Pa. 2003); Wade R. Habeeb, Right to Credit for Time Spent in Custody Prior to Trial or Sentence, 77

A.L.R.3d 182 (1977). Some courts have recognized an exception to this general rule when a defendant is sentenced to the statutory maximum and, having been unable to make bail due to indigency, will serve more time actually incarcerated than the statute allows. See Palmer at 254. But those facts are not presented by this case.

Instead Gilliam argues subsection (3) is facially unconstitutional. But he cannot meet the high burden of showing a legislative act is facially invalid. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Salerno, 481 U.S. at 745. Statutes are presumed constitutional, and this "weighty" presumption can be overcome "only by a showing of unconstitutionality beyond a reasonable doubt." Planned Parenthood S. Atl. v. State, 440 S.C. 465, 476, 892 S.E.2d 121, 127 (2023); Owens v. Stirling, 443 S.C. 246, 261, 904 S.E.2d 580, 587–88 (2024). Gilliam offers three rationales to support his argument. They will be taken up in turn.

B. Substantive due process.

"So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty' . . . ." Salerno, 481 U.S. at 746 (citations omitted). This statute does neither.

Generally, statutes will be upheld if they have a "reasonable relation to a legitimate state interest . . . ." Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997). Fundamental rights, those which are "deeply rooted in this Nation's history and tradition," are entitled to special protection, and laws affecting fundamental

rights must be narrowly tailored to achieve a compelling state interest. Id. The Supreme Court does not lightly grant fundamental right status to every claimed liberty interest. In order to maintain responsible decision-making and respect for legislative enactments, the Court requires a "careful description" of the asserted fundamental liberty interest. Id. The Glucksberg case illustrates the precision required. There the Court carefully distinguished between the right to "refuse lifesaving hydration and nutrition," which it previously held was within the common law right to refuse unwanted medical treatment, and the right to assisted suicide, which was not a traditionally recognized right. Id. at 724–25 (distinguishing Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990)).

Gilliam argues this Court should apply strict scrutiny analysis to the bond statute, asserting the fundamental right at stake is the interest in "personal liberty." Brief of Respondent at 27. This is not a "careful description" of the claimed fundamental right. The purported right at stake is not generic "liberty," but the right to credit for time served in pretrial incarceration when the defendant's overall period of incarceration does not exceed the statutory maximum. There is no such constitutional right, much less a fundamental right. Harris v. Comm'r of Correction, 860 A.2d 715, 732 (Conn. 2004) (explaining "[b]ecause such credit is not constitutionally mandated, it is not one of those few rights deemed so fundamental that the state cannot impinge upon it in the absence of a compelling reason"). Accordingly, the United States Supreme Court applied rational basis scrutiny to

reject a claim of entitlement to good time credit accrued in pretrial incarceration in McGinnis v. Royster, 410 U.S. 263 (1973).

This statute easily passes rational basis review. The statute is designed to deter habitual criminals from committing repeat offenses while out on bond. This statutory purpose is well within the legislature's police power to protect the public from serial criminals. The threat of denial of credit is rationally related to this goal.

Even under strict scrutiny review, the statute passes muster. The statute is aimed at a narrow class of defendants: those who commit subsequent crimes while out on bond. The consequences are easily avoided by those who don't commit additional crimes while out on bond. The denial of credit only occurs after the defendant has been convicted of the underlying offense and after an evidentiary hearing where the state must show the defendant has in fact committed a subsequent crime while out on bond.

The government's overwhelming interest in deterring serial criminals is so plain that it does not require discussion. Subsection (3) serves this compelling government interest by threatening to withhold sentencing credit from defendants who commit additional crimes while out on bond. The legislature has determined this provision is necessary to close the "revolving door" of repeat offenders who threaten public safety. This legislative judgment is entitled to great deference from this Court. See Planned Parenthood S. Atl., 440 S.C. at 475, 892 S.E.2d at 127 (explaining the need for judicial restraint when considering constitutional challenges to presumptively-valid statutes).

It is conceivable that the denial of credit could raise constitutional concerns in some circumstances, such as when the denial of credit results in a defendant being incarcerated for longer than the statutory maximum due to indigency. See Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (explaining "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency"). But no such circumstances are present here, as Gilliam was sentenced well below the statutory maximum. The act, as applied to this case, does not violate due process.

C. Unconstitutional conditions.

Gilliam's claim that the statute places unconstitutional conditions on the right to jury trial is belied by the plain text of the statute, which makes no connection between the entitlement to credit and the manner in which the charges are disposed. This case is nothing like United States v. Jackson, 390 U.S. 570 (1968), where a kidnapping statute provided for the death penalty only where the defendant proceeded to jury trial. Not only is the death penalty not involved here, there is simply no statutory connection between the entitlement to credit and the exercise of the right to jury trial. Offending defendants are denied credit whether they plead guilty or are convicted after trial.

Gilliam's attempt to show that the statute will have a chilling effect on defendants' exercise of their right to a jury trial rests on pure speculation and is completely untethered from the facts of this case. Gilliam never alleged he pleaded

guilty in order to avoid accruing additional time in pretrial incarceration for which he would not be credited. Indeed, Gilliam was still on bond on his original charges when he pleaded guilty, so his decision to plead guilty rather than proceed to trial on these charges could not have been affected by the concerns he raises in his brief. Under no reading of the statute would Gilliam be entitled to credit for the time he spent incarcerated on his second set of charges. See People v. Arnhold, 504 N.E.2d 100, 101 (Ill. 1987) (explaining "a defendant who is out on bond on one charge, and who is subsequently rearrested and returned to custody on another charge, is not returned to custody on the first charge until his bond is withdrawn or revoked"); Allen v. State, 339 S.C. 393, 396, 529 S.E.2d 541, 542 (2000) (explaining applicant was entitled to credit for time served after "bond was revoked on the first set of charges" and he "was, therefore, clearly in custody on all charges," including subsequently filed charges). This fact further demonstrates why this facial challenge must fail. Many defendants who bond out and are subsequently arrested will remain on bond for their original charges, and subsection (3) will not affect their decision whether to plead guilty or proceed to trial on those charges. Subsection (3) has no bearing on whether bail will be granted or the amount of time a defendant will spend in pretrial incarceration.

Gilliam speculates the statute could chill the exercise of the right to a jury trial, but defendants are equally likely to insist on, rather than forego, a jury trial when faced with the denial of credit upon conviction. Defendants could reasonably decide to file a motion for speedy trial and seek acquittal rather than plead guilty.

Alternatively, defendants could seek reconsideration of their bond order. Surely the statute will not impermissibly burden the right to jury trial in every case, as must be shown to mount a successful facial challenge.

And even if the denial of credit for time served created additional incentive to plead guilty, this would not make the statute unique or unconstitutional. Gilliam asserts the statute forces defendants "to choose between their rights [to a jury trial] and their liberty." Brief of Respondent at 26. But every criminal defendant must balance the costs and benefits of exercising their right to a jury trial. Waiver of that right nearly always results in substantial reduction in their sentence. This does not make pretrial incarceration, or lenient plea offers, unconstitutional. See Corbitt v. New Jersey, 439 U.S. 212, 218 (1978) (explaining "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid"). The bond statute certainly does not "force" any defendant to plead guilty.

D. Apprendi.

The statute does not violate the Sixth Amendment right to a jury trial under the principles of Apprendi v. New Jersey, 530 U.S. 466 (2000), because denial of credit does not increase the statutory sentencing range for any crime. In this case, the sentencing court was free to sentence Gilliam to any term of years within the statutory range. The statutory prohibition against crediting Gilliam for time spent in pretrial incarceration had no effect on the sentencing range.

Gilliam misstates the holdings of the United States Supreme Court cases he cites to support his claim that the Court has extended Apprendi to apply "whenever

additional incarceration occurs due to a specific finding of fact, not just punishment past the statutory maximum." Brief of Respondent at 31. The post-Apprendi cases Gilliam cites deal with increased exposure based on judicial findings, not variations in sentences within the same statutory range. See Blakely v. Washington, 542 U.S. 296, 303 (2004) (examining statutory scheme which provided for graduated sentencing ranges based on the finding of certain facts, effectively increasing the statutory maximum punishment to which defendants were subject); United States v. Booker, 543 U.S. 220, 233 (2005) (addressing federal sentencing guidelines which called for increased penalties based on judicial fact-finding, which the Court stressed were "mandatory and impose binding requirements on all sentencing judges," and explaining the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range").

The basic difference between the statutes discussed in the Apprendi line of cases and South Carolina's bail statute is that our statute does not increase the sentencing range for any crime. Rather, it forbids the reduction of a sentence by denying the default sentencing "credit" for non-punitive pretrial incarceration when defendant has committed an additional crime while out on bond. As argued above, pretrial incarceration simply is not part of a defendant's sentence.

Further, the bail statute does not fit within the rationale of the Apprendi line of cases because it does not involve judicial fact-finding regarding an element of the charged offense. See Alleyne v. United States, 570 U.S. 99, 107 (2013) ("The touchstone for determining whether a fact must be found by a jury beyond a

reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."). Rather, the judicial fact-finding involves a non-element: the defendant's conduct while out on bond. This is what the Court had previously approved of as a "sentencing factor," not an element of the crime. See Id. at 105–06. Because this finding does not affect the sentencing range, it does not implicate Apprendi.

Finally, there is the practical consideration that the denial of credit will not result in longer effective terms of incarceration in every case. The reality of this statute is that, in most cases, trial judges can easily circumvent the mandatory denial of credit by simply reducing the sentence proportionally. See Vasquez, 862 F.2d at 253. In fact, some jurisdictions employ a presumption that sentencing courts take time served into account when fashioning a sentence. See Parker v. Estelle, 498 F.2d 625, 627 (5th Cir. 1974). In this case, the parties took the denial of credit into consideration when negotiating Gilliam's agreed-upon sentence. R.p.20–21. Exceptional cases can be addressed on a case-by-case basis.

II. Statutory procedure.

Gilliam mischaracterizes the State's position in his brief, claiming that under "the state's interpretation of the Statute, any person who is arrested for any crime while on bond for any other crime cannot be credited for any time they spent in pre-trial detention, regardless of whether the person was guilty of either crime." Brief of Respondent at 25. That is not the State's position. A defendant does not lose their statutory right to credit for time served merely by being arrested while out on

bond. Cf. Morrisey v. Brewer, 408 U.S. 471 (1972) (explaining state may not revoke parole based only on arrest report, but parolee is entitled to "some orderly process, however informal"). Credit for time served is denied only when the trial court finds after an evidentiary hearing that the defendant has committed another crime while out on bond. This is the same procedure employed for bond and probation revocation hearings, which frequently result in significant deprivation of liberty. See also State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (finding legislative intent to create pretrial immunity hearing and employing preponderance of the evidence standard). And this procedure does not even come into play until a defendant is adjudicated guilty—via guilty plea or otherwise—of a crime.

The State's arguments are not procedurally barred. The issue whether Gilliam is entitled to credit for time served is preserved for review because it was raised to and ruled on by the trial court. The State raised the issue during sentencing and again in more detail in a motion to reconsider, and the trial court analyzed the issue at length in a written order. While the State originally used the term "arrest" at the sentencing hearing to describe the triggering event, it clarified its position in its motion to reconsider; the State would offer evidence to the trial court's satisfaction to prove Gilliam in fact "committed" a subsequent crime. That the State filed a motion to reconsider clarifying its arguments does not make the issue unpreserved, particularly when the only contested issue was the proper construction of a sentencing provision following a guilty plea, rather than an evidentiary issue not raised during trial. See State v. Field, 429 S.C. 578, 581, 840

S.E.2d 548, 550 (2020) (finding sentencing issue unpreserved, but explaining "[w]e focus not on the lack of any objection at the sentencing hearing, but on the position the State took in its motion to reconsider the sentence"); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (finding sentencing issue unpreserved whether defendant "neither objected to the sentence nor moved the circuit court to alter or amend the judgment"). The trial court had a fair opportunity to rule on the issue. See State v. Morales, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (explaining a "primary purpose of our issue preservation rules is to 'give the trial court a fair opportunity to rule'" and "issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue").

Likewise, that the State dismissed Gilliam's subsequent charges as part of a global resolution of his cases does not procedurally bar the issue as res judicata. Because conviction of the subsequent offense is not necessary to trigger subsection (C), the disposition of that charge is irrelevant. Further, applying the equitable doctrine of res judicata would not be equitable in this case, where the subsequent charges were dismissed pursuant to a global plea agreement which allowed Gilliam to avoid a potential LWOP sentence. Defense counsel admitted during the plea hearing that the parties negotiated on the assumption that Gilliam would not receive credit for the time he served in pretrial incarceration, and that this understanding was supported by a plain reading of the statute. R.pp.8, 14, 20–21.

It would not be equitable to bar the State from raising an argument which was a key factor in a global plea agreement that was extremely beneficial to Gilliam when the parties clearly did not intend the agreement to foreclose the State from advancing the argument that Gilliam was not entitled to credit for time served.

CONCLUSION

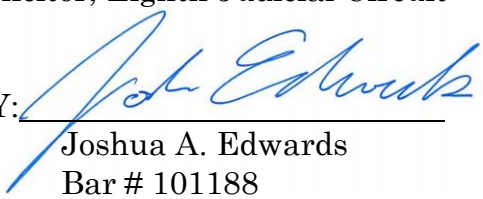
For all the foregoing reasons, it is respectfully submitted that the order of the lower court granting Gilliam credit for time served in pretrial incarceration should be reversed and the case remanded for a determination whether Gilliam committed a crime while out on bond.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

DAVID STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

February 6, 2026