

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Honorable Milton Kimpson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MALACHI JAMAR BAILEY,

APPELLANT

APPELLATE CASE NO. 2026-001154

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STATEMENT OF ISSUE ON APPEAL

Whether S.C. Code Ann. § 24-13-40(4) is unconstitutional?

STATEMENT OF THE CASE

At its November 2023 term, a Richland County grand jury indicted Appellant for the offense of assault and battery of a high and aggravated nature (ABHAN). R.*(Indictment). On May 12, 2026, Appellant pleaded guilty to ABHAN before the Honorable Milton G. Kimpson. Tr. 1. Deputy Public Defender Jennifer C. Davis represented Appellant; assistant solicitor Lucas A. Pincelli represented the state. Tr. 1. Judge Kimpson sentenced Appellant to ten years' incarceration, suspended to eight years' incarceration followed by two years' probation. Appellant noted a timely appeal and explained, pursuant to Rule 203(d)(1)(B), SCACR, that he was appealing the trial court's denial of time-served credit. R.* (Rule 203 explanation). On May 21, 2026, this Court permitted the appeal to proceed. R.*(Allowed to Proceed Letter).

This appeal follows.

STATEMENT OF FACTS

On April 24, 2023, Appellant and other co-defendants shot several rounds of ammunition into a Richland County home. Tr. 7, l. 7 – 8, l. 17. As a result, Appellant was charged with ABHAN. R.*(Indictment). On May 31, 2023, the Richland County Court of General Sessions set a \$100,000 surety bond with conditions of electronic monitoring, curfew, and house arrest with some exceptions. R.*(Order Setting Bond). He was in pre-trial detention for thirty-eight (38) days before posting bond. Tr. 14, l. 12. On August 21, 2023, while on bond for the ABHAN charge, Appellant was arrested for breach of peace of a high and aggravated nature (BOPHAN) and unlawful carrying of a weapon. R.*(Dec. 11 Emergency Motion to Revoke Bond). On January 8, 2024, the state's motion to revoke bond was denied R.*(Oct. 31 Consent Order, ¶ 2). On September 22, 2025, Appellant was arrested again for simple possession of marijuana and unlawful carrying of a firearm. R.*(Sept. 25 Motion to Revoke Bond); Tr. 3, ll. 14-15; 23, ll. 16-17. The state again moved to revoke bond; on October 8, 2025, Appellant's bond was revoked. R.*(Order Revoking Bond).

Appellant pleaded guilty to ABHAN in exchange for a negotiated "cap" of twelve years' imprisonment. Tr. 3, ll. 13-14. The state dismissed the BOPHAN and unlawful carry charges. Tr. 3, ll. 14-15. Plea counsel requested time-served credit for the 254 days he spent in pre-trial detention, including the thirty-eight (38) days he served when he was first arrested and the 216 days he served after the revocation of his bond, and the 844 days he spent on monitored house arrest. Tr. 14, ll. 4-6. The state took the position that Appellant should not be given credit for *any* time served in pre-trial detention. Tr. 22, ll. 10-11.

Plea counsel acknowledged that S.C. Code Ann. § 24-13-40(4) prohibited a defendant from receiving time-served credit after his bond is revoked. However, Appellant asserted that the

statutory language was ambiguous because it was not clear whether the statute meant he received no credit for time served, no credit for time served after the incident that predicated the bond revocation, or no credit for time served after the bond was ordered revoked. Tr. 16, ll. 1-4, 20-22.

Plea counsel further asserted that the statute was unconstitutional. Tr. 15, ll. 21-22. Plea counsel argued that “at least two briefs” had been filed “challenging those conditions or those amendments...to that statute on various constitutional grounds.” Tr. 15, ll. 22-25. Plea counsel asserted that the statute violated constitutional double jeopardy protections, arguing that if his bond was revoked, and then he was not credited for the time served, he had been punished twice for the same offense. Tr. 16, ll. 10-15. Plea counsel further asserted that a defendant who is not credited for their time served in pre-trial detention suffers “punishment.” Tr. 16, ll. 13-15.

The plea court denied credit for Appellant’s time spent on house arrest. Tr. 25, l. 14. The plea court also decided that it would only credit Appellant for thirty-eight (38) days’ time-served, remarking that: “If, in the future, of course, a higher court determines that you’re entitled to the 200-some-odd days, of course you would get that.” Tr. 25, ll. 11-13. The Rule 203 explanation filed by plea counsel asserted that the statute was unconstitutional under the Double Jeopardy, Due Process, and Equal Protection Clauses of the federal and state Constitutions. R.*(Rule 203 explanation).

STANDARD OF REVIEW

A statute is presumed to be constitutional and will be upheld unless it is unconstitutional beyond a reasonable doubt. *State v. McSwain*, 445 S.C. 276, 282-83, 914 S.E.2d 124, 127 (2025).

ARGUMENT

S.C. Code Ann. § 24-13-40(4) is unconstitutional.

A bond is revoked after a judicial determination by a preponderance of the evidence¹ that a defendant has violated some condition thereof. S.C. Code Ann. § 24-13-40(4) (hereinafter “the Statute”) is punitive by providing that a defendant whose bond is revoked cannot be credited for any time spent in pre-trial detention. By creating a statutory scheme where pre-trial detention is transformed into a punitive endeavor, the Statute violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Further, because pre-trial detention is punitive under the Statute, a defendant whose bond is revoked is required to suffer two punishments for the same offense, violating the Double Jeopardy Clauses of the Fifth Amendment and Article I, Section 12 of the South Carolina Constitution. Accordingly, the Statute is unconstitutional. This Court should reverse and order that Appellant be awarded his time-served credit.

Prior to 2023, as a general rule, all defendants who spent any time in pre-trial detention were entitled to credit for that time against their eventual sentence. S.C. Code Ann. § 24-13-40 (West 2013). There were only two exceptions to this general rule: (1) the defendant was an escapee; and (2) the defendant was serving a sentence for one offense while in pre-trial detention for another. *Id.* On June 20, 2023, however, the General Assembly passed and Governor McMaster signed the Bond Reform Act (hereinafter “the Act”). *Bond Reform*, S.C. Acts No. 83 (2023). The Act made several changes to various statutes affecting bonds. Relevant here, the

¹ While no statute appears to clearly state that preponderance of the evidence is the proper standard to be applied to a bond revocation proceeding, preponderance is the default standard of proof in all cases where the Constitution or a statute does not require otherwise. *See E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 50 (2025). The preponderance standard is also expressly utilized in other related proceedings. *See, e.g., State v. Hamilton*, 333 S.C. 642, 648-49, 511 S.E.2d 94, 97 (Ct. App. 1999) (probation revocation).

statute added two new exceptions to the general rule that every defendant receives every day of credit for time served pre-trial. *Id.* § 8.

In its present form, S.C. Code Ann. § 24-13-40 reads as follows:

The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense; (3) when the prisoner commits a subsequent crime while out on bond; or (4) has bond revoked on any charge prior to trial or plea.

Id. The two new exceptions are sections (3) and (4) of the Statute; time-served credit must now be denied to a defendant who “commits a subsequent crime while out on bond” or “has bond revoked on any charge prior to trial or plea.” *Id.* The purpose of the amendments, as well as the other sections of the Act, are to deter the commission of additional crimes while out on bond. At the time of passage, the Speaker of the House stated: “Today, the House loudly spoke with an overwhelming majority that we are going to crack down on those who continue to terrorize our citizens, especially when they are out on bond.” Mary Green, *SC House Passes Bond-Reform*

Bill, Live 5 WCSC (Mar. 1, 2023);² *see also*, 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”).

The Statute is unconstitutional for two reasons. First, by denying Appellant a benefit to which he was otherwise entitled because of the fact of his bond revocation, the Statute makes pre-trial detention punitive, which is unconstitutional. Second, because the pre-trial detention is punitive, Appellant was punished twice for the same offense.

A. Under the Statute, pre-trial detention is unconstitutionally punitive.

“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). This means that a court must determine what interest a statute implicates, and “what process is due under those circumstances.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-73 (1972). Generally, the government may only impose punishment if it does so through the criminal justice system. *See, e.g., Kansas v. Hendricks*, 521 U.S. 345, 361-62 (1997). This means that a person can only be punished if they are given the process that comes with a criminal trial, *i.e.*, the presumption of innocence or proof beyond a reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970). For this reason, pre-trial detention cannot be punitive because a person in pre-trial detention “has not been adjudged guilty of any crime.” *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979). Therefore, if a person has been detained pre-trial, the state may only “subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment or otherwise violate the Constitution.” *Id.* at 536-37.

² <https://www.live5news.com/2023/03/02/sc-house-passes-bond-reform-bill-vowing-close-revolving-door-repeat-violent-offenders/> (last accessed September 15, 2026).

The Court must look to several factors to determine whether the Statute is punitive. First and foremost, if the General Assembly expressly intended the Statute to be punitive, it is. *United States v. Salerno*, 481 U.S. 739, 747 (1987); see *Ellingburg v. United States*, 607 U.S. 163, 168 (2026) (“And so long as the text and structure of the Act demonstrate that Congress intended at least ‘to impose punishment,’ that ‘ends the inquiry.’”) (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003)). To determine this, the Court may apply several “tests traditionally applied to determine whether a governmental act is punitive in nature.” *Bell*, 441 U.S. at 537. The Court should consider:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted). The first several tests are designed to determine whether the legislature intended to impose a punishment. If it did not, then the Court must apply the last test: “Unless [the legislature] expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned’” thereto. *Salerno*, 481 U.S. at 747 (first alteration added, second alteration in original).

Criminal punishment, historically, was broadly defined: it meant “coercive penalties for...transgressions” against “the laws of society.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 8 (1769). A statute will be considered punitive if it imposes some

disability “for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.....” *Trop v. Dulles*, 356 U.S. 86, 96 (1958); *see also*, *Owens v. Stirling*, 443 S.C. 246, 268, 904 S.E.2d 580, 591 (2024) (the “three purposes of punishment” are “(1) reform or rehabilitation, (2) general deterrence, and (3) specific deterrence”).

Here, the Statute was passed for the purpose of deterring criminal behavior while on bond and working retribution against those who do. The Statute was therefore passed for the purposes of punishment and is therefore punitive. The fact that the Statute exists almost entirely for the purpose of deterrence is near dispositive evidence that the Statute is punitive. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (holding that civil sexually violent predatory commitment was only civil in nature because it required a “lack-of-control” determination; because, in the absence of such a determination, the commitment would “because a mechanism for retribution or general deterrence—functions properly those of criminal law....” (internal quotation marks omitted)). Because the Statute is for the purpose of deterrence, it is “chiefly intended for the prevention of future crimes;” historically meeting the definition of punishment. 4 BLACKSTONE, *supra*, at 16.

Further, the Statute is retributive; another purpose of punishment. *Trop*, 356 U.S. at 97. The general rule in South Carolina is that a defendant is entitled to all time-served credit. S.C. Code Ann. § 24-13-40; *see generally*, *State v. Boggs*, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010) (“Because the language of [the Statute] is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the [four] exceptions applies.”). The Statute therefore exists to deny a benefit to a person as a consequence of past conduct. *See, e.g., Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 345 (1866) (statute barring attorneys from practicing in federal courts for the past conduct of participating in the Civil War on the side of the Confederacy was punitive); *Punishment*, *Black’s Law Dictionary* (12th ed. 2024) (“A sanction—

such as a fine, penalty, confinement, or *loss of* property, right, or *privilege*—assessed against a person who has violated the law.” (emphasis added)). In this way, the Statute can only be punitive.

Therefore, because the Statute is for the purpose of deterrence, and because it works retribution against those defendants whose bond is revoked, the “text and structure of the Act demonstrate that [the General Assembly] intended at least ‘to impose punishment.’” *Ellingburg*, 607 U.S. at 168. Because pre-trial detention cannot be punitive, the Statute violates the Due Process Clause of the Fourteenth Amendment.

B. The Statute violates Double Jeopardy protections

By denying time-served credit to any defendant whose bond is revoked, the Statute allows the state to impose a double punishment on those defendants. Because the Constitution permits only one punishment per offense, the Statute is unconstitutional as applied to Appellant.

“No person shall...be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. Const. amend. V (changed to American English spelling); *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (Double Jeopardy Clause applicable to the states under the Fourteenth Amendment); S.C. Const. art. I, § 12 (“No person shall be subject for the same offense to be twice put in jeopardy of life or liberty....”). The Double Jeopardy Clause requires that “no man can be twice lawfully punished for the same offense.” *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873). “[T]his basic constitutional guarantee is violated when punishment already exacted for an offense is not fully ‘credited’ in imposing sentence upon a new conviction for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

For the reasons stated *supra*, the denial of time-served credit to Appellant in this case is punitive. Therefore, the question becomes whether that punishment, combined with Appellant's sentence, is a double punishment for the purposes of the Double Jeopardy Clause.

Pearce is illustrative here. In that case, a North Carolina court convicted a defendant of a crime and sentenced him to 12-to-15 years' imprisonment. 395 U.S. at 713. Several years later, that defendant's conviction was reversed in a state post-conviction relief proceeding. *Id.* He was retried and convicted a second time. *Id.* This time, he was sentenced to eight years' imprisonment, but he was not credited for the prison time he already served. *Id.* The result was that his new prison term, when combined with the time he had already served, was a longer sentence than originally imposed. *Id.* The Supreme Court held that this factual situation violated the Double Jeopardy Clause. *Id.* at 718. The fact that the defendant's sentence was lengthened meant that he was given two punishments for the same offense. *Id.* "Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed." *Id.*

The logic from *Pearce* can be applied here. According to one court, when addressed with a similar situation:

Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty. His incarceration is indistinguishable in effect from that of one, such as *Pearce*, who is retried after obtaining post-conviction relief. In both instances, the power of the state has been utilized to punish the complainant. Fundamental notions of fair play as well as the double jeopardy clause require that [the defendant] receive credit for pre-commitment incarceration.

Culp v. Bounds, 325 F. Supp. 416, 419 (W.D.N.C. 1971); *see also Wright v. Maryland Penitentiary*, 429 F.2d 1101, 1103 (4th Cir. 1970) (recognizing that the denial of time-served credit "arguably violates...the double jeopardy clause" but ultimately deciding the case on

procedural grounds). There is “no practical, realistic, or substantive difference between time spent in pretrial detention for want of bail and time spent in detention pending an appeal of a conviction or time spent under a subsequently vacated and reinstated sentence.” *Reanier v. Smith*, 517 P.2d 949, 954 (Wash. 1974) (*en banc*).

Another instructive case is *Wilson v. North Carolina*, 438 F.2d 284 (4th Cir. 1971). In that case, the United States Court of Appeals for the Fourth Circuit reviewed a habeas petition from a prisoner serving a life sentence with the possibility of parole after ten years. *Id.* at 285. At the time, in North Carolina, a sentence was not deemed to have begun until all appellate remedies had been exhausted. *Id.* The defendant sought to have the time he spent in prison in between the date he was sentenced and the date of the dismissal of his appeal credited towards his parole eligibility date. *Id.* at 285-86. The Fourth Circuit found that the denial of that time-served credit violated the Double Jeopardy Clause. *Id.* at 286. This is because the prisoner’s confinement while his appeal was pending was punishment, and the Double Jeopardy Clause requires credit for “punishment already exacted.” *Id.* (quoting *Pearce*, 395 U.S. at 717).

Appellant’s bond revocation was not an “offense;” violating the conditions of bond is not a crime.³ However, he was punished when his bond was revoked. He was then punished a second time for the offense to which he pleaded guilty. The first punishment, the denial of time-served

³ Typically, when double-punishment is alleged, the Court must conduct the analysis delineated in *Blockburger v. United States*, 284 U.S. 299 (1932). The rule announced in that case provides that criminal offenses are different for double jeopardy purposes if each offense has an element that the other lacks. *Id.* at 304. However, the *Blockburger* test is inapplicable to this case. *Blockburger* is only implicated when the state seeks to punish a defendant for two different crimes. *Id.* Here, Appellant was punished for one single crime, as well as for having his bond revoked. However, bond revocation is not a crime. If, for example, Appellant had been acquitted of the same crime at trial, the state would have no recourse to attempt to have a sentence entered against Appellant for having had his bond revoked. Thus, the bond revocation is wholly subsumed within the crime because the bond revocation cannot independently create a basis for punishment. Therefore, *Blockburger* has no role to play in this case.

credit, cannot have been imposed due to the bond violation alone, or it would be unconstitutional for the reasons stated in Section A. However, that means that Appellant was punished twice for the one criminal offense to which he pleaded guilty. Under the Double Jeopardy Clause, that is one time too many. Because Appellant's "punishment already endured" was not "not fully subtracted from any new sentence imposed," *Pearce*, 395 U.S. at 718, the application of the Bond Reform Act to Appellant violates the Double Jeopardy Clause. Accordingly, this Court should reverse Appellant's sentence and remand with instructions to credit him with his time served.

CONCLUSION

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



Molly M. Keegan

• W. Chandler Norville
Appellate Defenders

ATTORNEYS FOR APPELLANT

This 17th day of September, 2026.