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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Jessica Ann Salvini, Circuit Court Judge

Appellate Case No. 2026-000392

The State, ...Respondent,

v.

Benjamin Allen Harkema, ...Appellant.

INITIAL BRIEF OF APPELLANT

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
305 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Benjamin Harkema

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QUESTIONS PRESENTED

Do the provisions of S.C. Code Ann. § 24-13-40(3) and (4) that deny credit for time served in pretrial detention "when the prisoner commits a subsequent crime while out on bond" or "has bond revoked on any charge prior to trial or plea" violate due process, equal protection, and double jeopardy?

STATEMENT OF CASE

For an incident occurring on July 10, 2023, the State charged Ben Harkema with distribution of fentanyl. R. *. He was released on a $5,000.00 surety bond. R. *. For an incident occurring on July 11, 2023, the State charged Mr. Harkema with second offense trafficking methamphetamine 10-28 grams, second offense possession with intent to distribute heroin, failure to stop for a blue light. R. *. Mr. Harkema was released on a $25,000.00 surety bond with the condition that he complete a drug rehabilitation program. R. *.

On May 12, 2025, Mr. Harkema was arrested for breach of peace, and the State moved on the same day to revoke Mr. Harkema's bond. R. *. On June 20, 2025, the Honorable Vernon F. Dunbar convened a hearing on this motion and issued an order revoking Mr. Harkema's bond. R. *.

On February 11, 2026, Mr. Harkema pled guilty to second offense trafficking methamphetamine before the Honorable Jessica A. Salvini. Tr. 1-20. Undersigned counsel represented Mr. Harkema, and Jacob Lampke represented the State. Judge Salvina sentenced Mr. Harkema to five years imprisonment and denied his request for credit for time served. This appeal follows.

STATEMENT OF FACTS

After being arrested for these charges, the Circuit Court released Mr. Harkema on a $25,000.00 surety bond with the conditions that he remain on good behavior and enroll in and complete a drug rehabilitation program. R. *.

On May 12, 2025, the State moved to revoke Mr. Harkema's bond because he was arrested earlier that day for breach of peace. The incident report attached to the motion states:

> On 05/12/2025 at 0328, I Deputy Lovell, responded to [redacted], in reference to a suspicious person. While en route, dispatch advised that there was a male subject messing with their cameras.
>
> Upon arrival, I located a male in the driveway, who initially stated that his name was Wanda Smith with the date of birth of [redacted]. After other deputies observed the make, he was identified as Benjamin Harkema [redacted]/ Harkema was continually speaking of witchcraft, and various religious things. Harkema stated that he was from Lafayette, Louisiana, and that he was going to Lake Hartwell with a girl he met on a dating site, when she dropped him off. Harkema was unable to say what her name was or where she dropped him of at. Harkema stated that he was hit with a baseball bat, but he could not say where it was or who did it.
>
> Harkema would continue to state things such as starting spiritual warfare. Due to Harkema stating such things as witchcraft and spiritual warfare, and that people on methamphetamine are smarter, I believed that is was very possible that Harkema was under the influence of methamphetamine. Due to his possible intoxication, as well as him disturbing the peace and tranquility of the complainants, he was placed under arrest for breach of peace.
>
> Harkema refused EMS on scene, prior to transport.

R. *. According to the Public Index, on June 11, 2025, Mr., Harkema pled guilty to breach of peace, and the Magistrate Court sentenced him to time served of 30 days.[1]

[1] *State v. Benjamin Allen Harkema*, Case No. 8102P0930235 (found at https://publicindex.sccourts.org/Pickens/PublicIndex/CaseDetails.aspx?County=39&CourtAgency=39101&Casenum=8102P0930235&CaseType=C&HKey=82705171661204910

At the hearing on the motion to revoke bond, convened on June 20, 2025, the State provided the basic facts of the underlying charge and the arrest for breach of peace, expressed concern that Mr. Harkema "continues to be around the drug trade," and has "mental health issues going on as well." Tr. 4-5. Undersigned counsel, who "came into this case a little bit late," informed Judge Dunbar he first met Mr. Harkema in early 2025 at an "inpatient drug rehabilitation center in Greenville." Since then, Mr. Harkema had been hospitalized for mental health treatment at the Carolina Center for Behavioral Health and Marshal Pickens Hospital. Prior to the May 2025 arrest, the people around Mr. Harkema "began seeing symptoms of psychosis," including auditory hallucinations. They believed the mental health symptoms appeared before Mr. Harkema relapsed on drugs. Undersigned counsel also pointed out Mr. Harkema's very visible injury around his left eye that resulted from a gunshot wound that required surgery and reconstructive surgery, including an "artificial eye." Tr. 5-7.

Undersigned counsel also informed Judge Dumbar he had contacted the Office of Mental Health[2] regarding the recently developed prescreening process prior to competency evaluations. The Office of Mental Health had someone see him in the detention center where his medication had been adjusted. They needed "time to observe [Mr. Harkema] in a controlled environment and not on drugs." Tr. 7-8.

312284545412011611987114574999721077186856681104841077852691211229968477110010451103 (last viewed Nov. 2, 2026)).

[2] The transcript refers to the Department of Mental Health, but that state agency has been renamed the Office of Mental Health and merged into the South Carolina Department of Behavioral Health and Developmental Disabilities.

At the conclusion of the hearing, Judge Dunbar revoked Mr. Harkema's bond and issued a written order. Tr. 9, R. *.

On February 11, 2026, Mr. Harkema waived his right to a jury trial and pled guilty to trafficking methamphetamine. The State presented the following factual basis for the plea:

> This incident occurred on July 11th of 2023 in Pickens County. Law enforcement attempted to conduct a traffic stop on the vehicle that the Defendant was driving. The vehicle then accelerated and attempted to flee, and at one point slowed down to discard two items out of the vehicle.
>
> The Defendant then pulled over shortly thereafter discarding those items. Officers discovered the occupants had thrown a bag containing roughly 22 grams of methamphetamine from the vehicle, as well as a weapon. The vehicle, eventually, stopped. And the Defendant was found to be the driver.
>
> Both of the occupants denied possession of the methamphetamine. But because the Defendant was in the vehicle and the driver of the vehicle, he was in constructive possession of the drugs.
>
> And he does have a conviction from 2023 making this a second offense.

Tr. 9-10.

Mr. Harkema agreed with these facts, and Judge Salvini accepted the guilty plea. The plea negotiations called for a sentence in the range of five-to-eight years. Tr. 10. As mitigation, the sentencing court considered Mr. Harkema's traumatic brain injury. Mr. Harkema's medical records sometimes refer to the self-inflicted gunshot wound as "an accident" and sometimes as "a suicide attempt." Tr. 4, 11-12. The sentencing court also considered Mr. Harkema's mental health history that included "a bipolar aspect" and "some psychotic features." Mr. Harkema takes Latuda and Depakote. Tr. 4-5,

The State argued for an eight-year sentence, but the sentencing judge pushed back: "What is the aggravating factor that would make this an eight, as opposed to a five?" The

court below rejected the State's argument for a sentence greater than the mandatory minimum and sentenced Mr. Harkema to five years imprisonment. Tr. 16-19.

Prior to the trial court imposing sentence, Mr. Harkema requested credit for time served in pre-trial detention. He argued S.C. Code §21-12-40(3) and (4), "added by act 2023 number 83 that was effective on June 20th of 2023," violate due process, equal protection and the double jeopardy prohibition against multiple punishments. The sentencing court declined to declare the statute unconstitutional and denied credit for time served in pre-trial detention. Tr. 12-19.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

"[W]hen considering the constitutionality of a statute requires" this Court to "presume the statute is constitutional" and "uphold the statute unless [this Court] find beyond a reasonable doubt it does not conform to the constitution." *Owens v. Stirling*, 443 S.C. 246, 260–61, 904 S.E.2d 580, 587 (2024).

ARGUMENT

The provisions of S.C. Code Ann. § 24-13-40(3) and (4) that deny credit for time served in pretrial detention "when the prisoner commits a subsequent crime while out on bond" or "has bond revoked on any charge prior to trial or plea" violate due process, equal protection, and double jeopardy.

S.C. Code Ann. § 24-13-40 provides:

> 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 . . . . 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.

Section (1) does not apply to Mr. Harkema because he does not have a history as an "escapee." Section (2) applies to Mr. Harkema, but only for the for the 30 days that he was serving the sentence for the May 12, 2025 breach of peace conviction offense. Mr. Harkema concedes he is not entitled to credit of these 30 days towards the trafficking methamphetamine sentence. Based on sections (3) and (4),[3] the sentencing court denied Mr. Harkema credit for time served from his arrest on July 11, 2003 until his release on bond on November 6, 2023, and from the completion of his breach of peace sentence on June 11, 2025 until his guilty plea February 11, 2026.

Denial of credit for this time served in pretrial detention violates Mr. Harkema rights to due process, equal protection, and freedom from multiple punishments for the same offense. The Fourteenth Amendment to the United States Constitution provides no state shall "deprive any person of life, liberty, or property, without due process of law." Article I, Section 3 of the South Carolina Constitution provides no person shall be "deprived of life, liberty, or property without due process of law." The Fifth Amendment, applicable to the states thought the Fourteenth, prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *State v. Greene*, 423 S.C. 263,

[3] The General Assembly added S.C. Code Ann. § 24-13-40(3) and (4) as part of the Bail reform Act of 2023. 2023 South Carolina Laws Act 83, Section 8.

814 S.E.2d 496 (2018) (to avoid double jeopardy, one homicide is limited to one homicide punishment per defendant). Article 1, Section 12, of the South Carolina Constitution provides the same protections. *State v. Cuccia*, 353 S.C. 430, 434, 578 S.E.2d 45, 47 (Ct. App. 2003) (Both the United States Constitution and the South Carolina Constitution protect against double jeopardy.").

"Every state and the federal government provide for credit for time served." Kimberly Kessler Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. Rev. 2001, 2005 (2023). This Court and the Court of Appeals historically and consistently interpret § 24-13-40 to require credit for time served, absent a strictly construed exception. *E.g. State v. Grissett*, 442 S.C. 183, 898 S.E.2d 139 (2024) (inmate was entitled to credit against revocation sentence imposed for violation of CSP for time served prior to adjudication of CSP charge); *Allen v. State*, 339 S.C. 393, 529 S.E.2d 541 (2000) (entitled to credit for time served following bond revocation); *Blakeney v. State*, 339 S.C. 86, 529 S.E.2d 9 (2000) (defendant, who was jailed in another county on unrelated charges and had "hold" place on him for current robbery charge, was entitled to credit for time served from date on which sheriff's department issued warrant for his arrest for robbery); *State v. Dozier*, 263 S.C. 267, 210 S.E.2d 225 (1974) ("defendant was entitled to credit on his sentence for time spent in prison in Georgia while contesting extradition to South Carolina); *State v. Brown*, 426 S.C. 63, 824 S.E.2d 476 (Ct. App. 2019) (defendant was entitled to credit for time served for the period of time he was civilly committed after he was found incompetent to stand trial and was deemed to have a genuine mental illness); *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010) (plea judge's denial of jail credit for time defendant served in pretrial detention based upon state's decision to drop charge against defendant

from armed robbery to strong arm robbery was an error at law); *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002) (trial court could not deny credit for time served based on not having imposed life sentence).

In 2023, the General Assembly amended § 24-13-40 to deny credit for time served in pre-trial detention "(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." Carried to the logical conclusions, § 24-13-40(3) and (4) could operate to extend a sentence beyond the maximum statutory penalty. For example, in a situation where § 24-13-40(3) and (4) are applicable, a judge could impose a maximum sentence and deny credit for time served prior to the conviction. Although this Court has not addressed the constitutionality of § 24-13-40(3) and (4), this Court interpreted the S.C. Code § 24-21-560(D), regarding the revocation of community supervision, "to effectuate the intent of the Legislature and remain within the confines of constitutional limitations." *State v. McGrier*, 378 S.C. 320, 332, 663 S.E.2d 15, 21 (2008).

Other states consider credit for time served in pre-trial a constitutional mandate. *State v. Rawls* recognized:

> Jail credits also serve important policy goals. Jail credits were conceived as a matter of equal protection or fundamental fairness. Without jail credit, a defendant would serve double punishment because the time spent in custody before sentencing would not count toward the sentence. In addition, wealthy defendants who could post bail would serve less total time than poor defendants who could not post bail and remained in pre-sentence custody.

219 N.J. 185, 193, 97 A.3d 1142, 1147 (2014). *See also Anglin v. State*, 90 Nev. 287, 292, 525 P.2d 34, 37 (1974) (denial of credit for time in pre-trial detention "would tolerate invidious discrimination based upon a defendant's financial status.").

Recognizing these constitutional requirements, this Court could read § 24-13-40(3) as denying Mr. Harkema credit for time served *only* while he served the 30-day sentence for breach of peace. Wyoming recognized, Denial of credit for presentence confinement may constitute an illegal sentence. *Wayt v. State*, 912 P.2d 1106, 1110 (Wyo. 1996) (citing *Eustice v. State,* 871 P.2d 682, 684 (Wyo.1994)). "However, presentence confinement credit does not include credit for confinement that would persist without regard to the defendant's bonding capacity in the court where he awaits sentencing." *Id*. (Citing *Wilson v. State,* 896 P.2d 1327, 1328 (Wyo.1995). *See also Daffin v. State*, 31 So. 3d 867, 870 (Fla. Dist. Ct. App. 2010) ("If, for example, a defendant posts bond on one charge and is released, only to be reincarcerated later on other charges, he is then being held only on the charges occasioning the later arrest, until and unless the bond posted on the initial charge is revoked."); *People v. Prieskorn*, 424 Mich. 327, 381 N.W.2d 646 (1985) (defendant was not entitled to credit for time spent incarcerated under sentence for unrelated offense committed while he was free on bond for the present offense).

CONCLUSION

Because the provisions of S.C. Code Ann. § 24-13-40(3) and (4) that deny credit for time served in pretrial detention "when the prisoner commits a subsequent crime while out on bond" or "has bond revoked on any charge prior to trial or plea" violate due process, equal protection, and double jeopardy, this Court should declare those sections unconstitutional and award Ben Harkema credit for time served in pre-trial detention. Alternatively, this Court should interpret § 24-13-40(3) and (4) in a manner that does not offend the constitution and award Mr. Harkema credit for time served in pre-trial detention.

(signature on next page)

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
305 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Benjamin Harkema

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