STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
The Honorable Stephanie P. McDonald, Circuit Court Judge

Opinion No. 2016-UP-070 (S.C. Ct. App. filed 2/17/16)
Appellate Case No. 2016-000980

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEANGELO MITCHELL,

DEFENDANT,

AND

AA ACE BAIL BY FRANCES AND PALMETTO SURETY CORP., SURETIES FOR THE DEFENDANT,

PETITIONERS.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

I. Petitioners' argument concerning alleged tension between S.C. Code Ann. § 17-15-20 and S.C. Code Ann. § 38-53-70 is not preserved for appellate review. Error preservation concerns notwithstanding, Petitioners' argument wholly lacks merit and the trial judge properly estreated the bond pursuant to State v. Boatwright where a bondsperson on an appearance recognizance bond has obligations going beyond simply ensuring the appearance of the defendant in court, and estreatment based upon violation of other bond conditions is proper.

II. The Court of Appeals properly found the Circuit Court's estreatment of one-half of the bond was not error where the circuit court judge carefully considered the required factors and where the amount of the estreatment was not arbitrary or capricious.

STATEMENT OF THE CASE

Deangelo Mitchell was arrested in Charleston County in September of 2011 for possession with intent to distribute cocaine base. He was released on a $25,000.00 surety bond. In December of 2011, Mitchell was arrested for trafficking in cocaine, manslaughter, and distribution of cocaine base, second offense, and a $400,000.00 bond was set. In January of 2012, Mitchell's bond was consolidated for all of the pending charges and a $150,000.00 surety bond was set. The bond contract specifically provided that house arrest and electronic monitoring were conditions of the bond. On February 13, 2012, a $150.000.00 consolidated bond was executed by Appellant and filed with the Charleston County Clerk of Court.

On July 26, 2012, Mitchell appeared before the Honorable Stephanie P. McDonald for a bond revocation hearing. The State alleged that revocation of bond was appropriate because of numerous violations of the house arrest/electronic monitoring term of the bond contract. After hearing testimony and arguments from the parties, the judge issued an order revoking Mitchell's bond and remanding him into custody. On August 8, 2012, the State filed a Notice of Forfeited Recognizance seeking an estreatment of the bond. A hearing was held on this issue on September 7, 2012, and another on October 11, 2012. Subsequently, on September 16, 2013, Mitchell pled guilty pursuant to negotiations with the State and was sentenced to a total of fifteen years' incarceration. Thereafter, on July 8, 2014, Judge McDonald filed an Order of Estreatment of Bond. A notice of appeal was timely served and filed.

On February 17, 2016, the South Carolina Court of Appeals unanimously affirmed Judge McDonald's Order of Estreatment. State v. Mitchell, Opinion No. 2016-UP-070 (S.C. Ct. App. filed February 17, 2016). Petitioner's request for rehearing was denied on April 22, 2016. Petitioner timely submitted a Petition for Writ of Certiorari and the State subsequently filed a Return to Petition for Writ of Certiorari. On December 16, 2016, this Court issued an Order

granting the Petition. Petitioner timely filed a Brief of Petitioner. This Brief of Respondent follows.

STATEMENT OF FACTS

Deangelo Mitchell was arrested in September 2011 for possession with intent to distribute cocaine base. He was released on a $25,000.00 surety bond. In December 2011, Mitchell was arrested for trafficking in cocaine, manslaughter, and distribution of cocaine base, second offense, and $400,000.00 bond was set. Thereafter, pursuant to Mitchell's motion to reconsider or modify his previous bond, Judge James B. Gosnell, Jr., signed an order granting a consolidated bond on January 25, 2012. (R. p. 5). This order was filed in the Charleston County Clerk's Office on January 26, 2012. (R. p. 5). The order specified that release was conditioned upon "$150,000 surety, 24 hour house arrest at [a particular address in North Charleston, SC] with passive satellite monitoring other than work, medical, atty, court and church escorted with family member, girlfriend." (R. p. 5).

Pursuant to this order, Petitioners AA Ace Bail by Frances and Palmetto Surety Corporation agreed to secure Mitchell's bond on February 13, 2012. (R. p. 3-4). Frances C. Jenkins signed as "surety bondman" under the "Appearance Recognizance with Surety" section of the bail form and listed "Palmetto Surety" as the name of the insurance company. (R. p. 4). This bail form was filed along with Judge Gosnell's order and specifically made reference to the order by incorporating it and stating "See Order." (R. p. 3-5). The form stated that the surety would be indebted to the State of South Carolina in the amount of $150,000.00 "should named defendant fail in performing the conditions of this Order." (R. p. 4). The form also provided that the defendant would be released from custody "on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made

against him **and do what shall be ordered by the court** and not depart the State without the permission of the court **and be of good behavior**."[1] (R. p. 3) (emphasis added).

On July 26, 2012, the Circuit Court held a hearing on the State's motion to revoke or modify Mitchell's bond. (See R. p. 7-21; p. 35-41). Mitchell was present at this hearing. (R. p. 36, lines 4-5). The solicitor requested that the court revoke Mitchell's consolidated bond due to repeated violations of the house arrest conditions of his bond. (R. p. 37-38; p. 41). Mitchell testified at this hearing and stated that his bond conditions were never explained to him and his bondswoman never told him he was in violation of his bond conditions. (R. p. 47-50; p. 53-54). He also testified he was employed at his uncle's catering business and that he made regular payments to his bondswoman in the amount of $100 to $200. (R. p. 49; p. 53).

Frances Jenkins, Mitchell's bondswoman, also testified at the hearing. She testified that she knew electronic monitoring was a part of Mitchell's bond. (R. p. 57). She admitted she had been notified by the monitoring company of Mitchell's violations, and each time in response she contacted Mitchell to warn him to stop. (R. p. 58-59). However, in contrast with Mitchell's testimony, Ms. Jenkins testified that Mitchell was not employed, but stated he nevertheless made "regular" payments to her in the amount of $100 to $200 dollars per month.[2] (R. p. 59; p. 61). She averred she did not know where this money was coming from. (R. p. 61, lines 15-17). Ms. Jenkins agreed "100 percent" that "part of [her] job as a bondsman is to help enforce the

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[1] This "good behavior" term was also contained in the bail form Mitchell signed the previous month regarding his previous bond. (See R. p. 1-2). See also S.C. Code § 17-15-20 (stating that "[e]very appearance recognizance or appearance bond will be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what shall be enjoined by the court, and not depart the State, **and to be of good behavior** toward all citizens thereof, or especially toward any person or persons specified by the court." (emphasis added)).

[2] During cross-examination by Mitchell's defense attorney, Ms. Jenkins was presented with a letter dated January 21, 2012, from Mitchell's uncle to the court stating the uncle's intention to employ Mitchell at his catering business if Mitchell was released on bond. (R. p. 61-62). At that point, Ms. Jenkins stated she remembered the letter. (R. p. 63, lines 22-24).

conditions of the bond." (R. p. 74, lines 18-21). She also agreed that the bond form is an "acknowledgment that you do a little bit more than just appearances." (R. p. 74, line 22 – p. 41, line 2). Ms. Jenkins also admitted that she had the ability to move to "come off the bond" for a defendant's violation of the "good behavior" clause present in every bond. (R. 70, line 8 – p. 71, line 17). See S.C. Code § 17-15-20(A) ("An appearance recognizance or appearance bond must be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment **and** to do and receive what is enjoined by the court, **and** not to leave the State, **and be of good behavior** toward all the citizens of the State, or especially toward a person or persons specified by the court." (emphasis added)); S.C. Code § 38-53-50(B) ("If the circumstances warrant immediate incarceration of the defendant **to prevent imminent violation of one of the specific terms of the bail bond**, or if the defendant **has violated one of the specific terms of the bond**, the surety may take the defendant to the appropriate detention facility for holding until the court orders that the surety be relieved. . . ." (emphasis added)).

Upon questioning from the Court, Ms. Jenkins admitted she knew that Judge Gosnell's order granting the consolidated bond required GPS monitoring and that Mitchell "was subject to certain house arrest provisions" and indicated her knowledge of these conditions was the reason she called Mitchell and told him to stop violating those conditions. (R. p. 77, lines 1-8). However, Ms. Jenkins claimed she never received a copy of Judge Gosnell's order containing the house arrest conditions and refused to answer the circuit court's question about whether or not as bondsperson it was "incumbent on [her] to look for a copy of the order and make sure [she] knew what the terms and conditions were." (R. p. 77, lines 9-13). Ms. Jenkins then stated "[b]ut there is so much paperwork that we don't get as bondsman. It's just a lot of things that are left with big open spaces seriously, so." (R. p. 77, lines 14-16). She further testified that she "was

surprised to get a copy of that order, to tell you the truth, that bond order form.[3] (R. p. 77, lines 18-20).

James Robinson, owner of Robinson Monitoring Company, also testified at the hearing. Mr. Robinson testified that normally the bonding agency first informs defendants regarding their bond conditions, but stated when his employees hook up defendants to electronic monitoring, they also inform defendants regarding their conditions. (R. p. 80, lines 12-17). He agreed that the monitoring company would have to know what a defendant's conditions are so the company can tell whether or not there is a violation of those conditions. (R. p. 80, lines 18 – p. 81, line 16). Regarding Mitchell's case, Mr. Robinson testified he became aware of Mitchell's continuing violations of the house arrest provisions of his bond. (R. p. 81, lines 17-20). His office contacted both Mitchell himself and Ms. Jenkins, the bondswoman, regarding the violations. (R. p. 81, line 21 – p. 82, line 5). His office contacted Ms. Jenkins on "several occasions" and at one point told her "she needed to arrest the defendant because he would not comply with what he was doing. He was staying out all night, two, three o' clock in the morning and it was very obvious." (R. p. 82, lines 9-14). Indeed, the GPS reports indicated that Mitchell was in "downtown" Charleston and was nowhere near his home in North Charleston. (R. p. 87-88).

Significantly, Mr. Robinson testified that the first time he told Ms. Jenkins that Mitchell needed to be picked up and put back in jail due to noncompliance, Ms. Jenkins responded "she wasn't feeling good and couldn't do it." (R. p. 89, lines 1-5). On another occasion, after Robinson's office informed Ms. Jenkins that Mitchell was "all over the place" and that "it looks like he's possibly out there doing drug transactions," Ms. Jenkins responded, "well, that's how

[3] Notably, this was the same form that Ms. Jenkins signed agreeing to be the surety on Mitchell's bond. (See R. p. 3-5).

he makes a living." (R. p. 89, lines 6-11). Ms. Jenkins then stated that she would not "pick him up" for the noncompliance. (R. p. 89, lines 11-12). Mr. Robinson stated that once "[i]t got to the point where there was just no compliance," he contacted the solicitor's office to report the violations. (R. p. 82, lines 5-9).

After also hearing testimony from Mitchell's uncle, the Circuit Court issued a ruling revoking Mitchell's bond. (R. pp. 105-107). The trial judge stated that what stunned her the most "is some of the absolute blatant disregard that I have heard today from folks that are supposed to be familiar with this process about compliance with the law and the court orders." (R. p. 105, lines 4-8). The Court then addressed Ms. Jenkins and informed her that "it is a big deal if somebody violates their electronic monitoring. It's a big deal. It's a violation of the court order." (R. p. 105, lines 9-11). The judge then pointed out that although South Carolina law provides that usually defendants are entitled to reasonable bail, S.C. Code § 17-15-10 gives judges the authority to impose certain conditions of release. (R. p. 105, lines 12-24). Specifically, subsection (C) of that statute addresses placing restrictions on travel, association, or place of abode of a person. (R. p. 105, line 25 – p. 106, line 2).

The judge found it was not credible that Mitchell was not aware he was violating his bond by visiting the locations he visited in the late hours of the evening and early hours of the morning. (R. p. 106, lines 3-8). She ruled: "I can't help but find that he has been in violation of court orders from the beginning of this process." (R. p. 106, lines 13-15). The judge also found that "everybody" was aware of what the terms and conditions of Mitchell's bond were and the claims to the contrary were "incredible." (R. p. 106, lines 22-25). Finally, she stated she was revoking the bond for "repeated, repeated, repeated violation of the court orders." (R. p. 107, lines 1-3). The solicitor then advised the court that, "based upon the testimony today," the State

would plan to move forward with the estreatment process. (R. p. 107, lines 13-16). The judge stated, "I think under State v. Boatwright you are more than authorized to do that." (R. p. 107, lines 17-19).

On September 7, 2012, the circuit judge held a hearing on the State's motion to estreat Mitchell's bond. At this hearing, the State argued the bond should be estreated in full due to the bondswoman's willful noncompliance with her duty of ensuring Mitchell followed the house arrest conditions of his bond.[4] (R. p. 112-16; p. 132). The solicitor noted that most bonds are estreated for failure to appear, but that the Boatwright and Workman cases also authorize a court to estreat a bond for violations of other conditions of bond. (R. p. 113, lines 16-25). Petitioners' counsel argued that since Petitioner had been delivered to the State's custody and the bond was revoked, estreatment was not appropriate because the bondswoman had satisfied her duties. (See R. p. 116-31). The judge indicated her belief that Ms. Jenkins had been "flat-out lying" in certain respects at the July hearing, and found there was "bad faith" and "no good behavior" in this scenario. (R. p. 119, lines 2-17; p. 137, lines 1-3). Significantly, the judge also pointed out that acting in violation of a court order is acting in violation of the law and suggested that doing so would violate a "good behavior" condition. (See R. p. 131, lines 3-6). The judge then indicated she did not intend to estreat the entire $150,000, and noted she would need to consider the three "Polk factors" before making a decision. (R. p. 131-38). The judge requested affidavits from the State regarding the costs expended in order to ascertain the effect of Mitchell's noncompliance with the electronic monitoring. (R. p. 136-37). The judge then took the matter under advisement pending receipt of further information. (R. p. 138).

[4] The State also noted that Petitioners could not "plead ignorance" regarding their duty to report violations of electronic monitoring because both Palmetto Surety and Frances Jenkins were involved in a case a few years ago where they were apparently reprimanded for their failure to report electronic monitoring violations after a defendant out on bond cut off his ankle bracelet and subsequently committed a second criminal sexual conduct crime. (R. p. 114-15; see also p. 143-44).

The State subsequently submitted two affidavits and a memorandum setting forth costs totaling $2,876.58. (R. p. 164-69). On October 11, 2012, another hearing was held regarding estreatment of the bond. The State referenced the costs detailed in the affidavits but argued that the court was not limited to those costs because the court was also required to consider the purpose of the bond and the willfulness of the violation. (R. p. 142-43). The State argued that the willfulness of the violation was the most significant factor in this case because the bondswoman was made aware of Mitchell's violation on several occasions yet she deliberately elected not to take appropriate action to address the violations. (R. p. 142, line 25 – p. 143, line 5). The State also pointed out the testimony revealed that the reason the bondswoman chose to allow Mitchell's violations to continue was because he was regular with his payments to her and if Mitchell were placed into custody, those payments would stop. (R. p. 143, lines 6-10). Therefore, the bondswoman "intentionally, willfully defeated the purpose of the bond for her own financial considerations." (R. p. 143, lines 11-12). The State argued that a bondsman assumes responsibility for "all aspects of the bond" and that it is "not within his discretion to pick and choose those aspects to benefit, and ignore those aspects that do not." (R. p. 144, lines 8-12). The solicitor pointed out that "Boatwright establishes that it is within your discretion to estreat his bond." (R. p. 144, lines 12-14).

Petitioners' counsel argued that a bonding company signs an appearance bond, and that there is no case in the state of South Carolina indicating that a bonding company is "the insurer of the defendant's behavior." (R. p. 145, lines 14-18). Counsel noted that Mitchell never failed to appear at any hearing and that he even appeared at the hearing pursuant to which his bond was revoked. (R. p. 145, lines 19-23). Counsel also argued that once Mitchell's bond was revoked,

there was no bond to estreat.[5] (R. p. 145, line 24 – p. 7, line 2). Counsel further stated that "[t]he purpose of the bond is not to enrich the coffers of the state of South Carolina;" instead, "[t]he purpose of the bond is to require the appearance of the defendant." (R. p. 146, lines 13-15).

After some discussion regarding what the appropriate remedy should be when a bondsperson willfully fails to act on known violations of bond conditions, and regarding the responsibility of bondspeople and monitoring companies generally, the judge stated there was "no question in my mind that there have been violations of at least the provisions of the bond by the defendant – we have dealt with that, we have revoked it – but by the bondsperson who should have been policing that, for lack of a better word, and we just need to carve out a remedy." (R. p. 154, lines 9-15). The judge reiterated her previous finding that she did not find it credible that the bondswoman was not aware of the conditions of Mitchell's bond. (R. p. 155, lines 11-14). The judge added that what she would be finding in her order would be "willful violations of the duty to supervise and comply with the contract of the bond order." (R. p. 156, lines 6-8). She agreed with the solicitor's statement that the bondswoman engaged in "active concealment." (R. p. 160, lines 10-12). The judge pointed out that the State's costs were less than she anticipated, but that "under Polk and Boatwright I'm not limited to the amount of expenditure, there has got to be something to address the purpose of the bond. It's almost like punitive damages. There has got to be some teeth in it to deter future behavior, and the willfulness of the violation here." (R. p. 156, line 25 – p. 157, line 12). Finally, the judge stated the estreatment she planned to order would not be more than half of the amount of the bond, but she needed more time to review additional materials and construct the language of her order. (R. p. 161-62).

[5] Note, however, that the bondswoman's violations occurred *before* Mitchell's bond was revoked.

On September 16, 2013, Deangelo Mitchell pled guilty to involuntary manslaughter and a cocaine offense and was sentenced to fifteen years for the cocaine offense and five years, concurrent, for involuntary manslaughter. Subsequently, on July 9, 2014, the Circuit Court judge issued an Order of Estreatment of Bond. (See R. p. 24-30). In this order, the judge found that partial estreatment was warranted due to the fact that "[t]he violations of the defendant, as well as Ms. Jenkins' admitted failure to fulfill her obligations as the bondsperson and take appropriate action to address them, was clearly willful." (R. p. 29). The order also stated that the Court had considered the State's affidavits pertaining to the costs incurred in addressing Mitchell's violations and the other factors set forth in Ex parte Polk, 354 S.C. 8, 579 S.E.2d 329 (Ct. App. 2003), including the purpose of the bond and the nature and willfulness of the violation. (R. p. 28-29). The order also pointed out there was additional prejudice because, as a result of the failure to report the electronic monitoring violations in this case and in other cases subsequently brought to the attention of the Court, the Court felt compelled to impose a moratorium on electronic monitoring until a workable solution was reached. (R. p. 29). Ultimately, it was decided that the Charleston County Sheriff's Office would have to take on the responsibility (and cost) of monitoring arrestees on house arrest. (R. p. 29-30). The order concluded that, considering the willful violations by both Mitchell and the bondswoman – which clearly violated the purpose of the bond order – in addition to the expenses the State incurred in addressing both violations and the further prejudice which eventually resulted in the sheriff's department having to assume responsibility for monitoring, it was appropriate to estreat one-half of the bond amount. (R. p. 30).

ARGUMENT

I. Petitioners' argument concerning alleged tension between S.C. Code Ann. § 17-15-20 and S.C. Code Ann. § 38-53-70 is not preserved for appellate review. Error preservation concerns notwithstanding, Petitioners' argument wholly lacks merit and the trial judge properly estreated the bond pursuant to State v. Boatwright where a bondsperson on an appearance recognizance bond has obligations going beyond simply ensuring the appearance of the defendant in court, and estreatment based upon violation of other bond conditions is proper.

Petitioners contend the Court of Appeals erred by affirming the Circuit Court's order estreating Mitchell's bond where Mitchell was made available for all court proceedings. Specifically, Petitioners assert that regardless of the defendant's violation of the terms of his bond, the surety was exonerated from any liability upon the delivery of the defendant to the court. In support of this assertion, Petitioners argue there is an inherent conflict between S.C. Code Ann. § 17-15-20 and S.C. Code Ann. § 38-53-70 that was not addressed by the Court of Appeals. Petitioners' argument is not preserved for review by this Court because Petitioners failed to adequately present the issue to the Court of Appeals. Even if Petitioners' argument was preserved, the trial judge properly estreated Mitchell's bond pursuant to State v. Boatwright[6], and Petitioners' argument concerning purported tension between S.C. Code Ann. § 17-15-20 and S.C. Code Ann. § 38-53-70 wholly lacks merit.

As a threshold matter, Petitioners failed to adequately present the issue to the Court of Appeals. In their Petition to this Court, Petitioners stated, "The Court's ruling did not address the inherent conflict within our statutes regarding bonding laws." (Petition for Writ of Certiorari p. 4). While the Court's ruling certainly did not address S.C. Code Ann. § 38-53-70, this is because the Court's opinion was simply reflective of the arguments actually made in Petitioners' brief. In Petitioners' brief to the Court of Appeals, Petitioners argued, "When the Defendant is delivered

[6] State v. Boatwright, 310 S.C. 281, 423 S.E.2d 139 (1992).

to the Court or to the Custody of the State the bondsman has satisfied his obligations and any estreatment is improper." (Brief of Appellant p. 6). Petitioners further argued, "The disconnect in the positions of the State and the Appellant in this matter arise over the Court's interpretation of State v. Boatwright, 310 S.C. 281, 423 S.E.2d 139 (1992)." (Brief of Appellant p. 6). Petitioners went on to assert that the applicable language in Boatwright stating, "estreatment for a violation of the good behavior condition is proper" was **dicta**, and the trial judge erred in relying on that language in estreating Mitchell's bond. Petitioners' argument was predicated on the belief that the sole obligation of a bondsman is to ensure the appearance of the Defendant, and since the bondsman produced Mitchell for trial, the bondsman did nothing wrong. Now, in their brief to this Court, Petitioners take a position contrary to what they argued in their brief to the Court of Appeals. Petitioners now concede "The petitioner further acknowledges that estreatment may be proper upon a violation of bond terms, however would argue that the estreatment must be conditional and the penalty should be relieved upon the surrender of the Defendant to the State." (Petitioner's Brief p. 6). In their Petition to this Court, Petitioners seem to wholly abandon their arguments at the Court of Appeals that estreatment is proper only for non-appearance and the trial judge erred in relying on the so-called "dicta" from Boatwright, and instead adopt an entirely new argument.

Notably, in their Brief of Appellant, Petitioners made only a few conclusory statements concerning exoneration. Petitioners cited the **federal** exoneration statute on page 5 of their Brief, subsequently citing two federal cases and asserting in those cases, "Courts examined the Government's attempt to estreat a bond and found that when the Defendant is surrendered into custody it was proper to return forfeited funds and to exonerate the surety." (Brief of Appellant p. 7). Petitioners also stated "The bondsman should have further been exonerated from any

sanctions from the Court." (Brief of Appellant p. 7). Petitioners concluded their argument with a reiteration of their position that estreatment is only proper for a failure to appear and an assertion that, "Even if that were the case here, which it is clearly not, the Appellant would be properly exonerated upon securing the Defendant into the State's custody." (Brief of Appellant p. 8). Significantly, the only citation to S.C. Code Ann. § 38-53-70 in the Brief of Appellant is in the section concerning the amount of estreatment. In that section, Petitioners cite § 38-53-70 as evidence of the factors to be considered by the Court prior to ordering an estreatment. (Brief of Appellant pp. 8-9). Petitioners made no substantive argument concerning exoneration under §38-53-70. As such, the few conclusory statements made in section "A" of their Brief concerning estreatment were not sufficient to allow Petitioners to raise a new argument to this Court concerning exoneration. See State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (an issue not raised in the brief to the Court of Appeals, but instead raised for the first time in the petition for rehearing is not properly preserved for the Supreme Court's consideration in a petition for writ of certiorari) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) ("There are two prerequisites to preserving an issue for consideration by the Supreme Court on a writ of certiorari: (1) the issue must have been raised in the **initial arguments to the Court of Appeals**, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals." (emphasis added)); See also State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal).

As to the merits of Petitioners' unpreserved argument concerning alleged tension between S.C. Code Ann. § 17-15-20 and S.C. Code Ann. § 38-53-70, Section 17-15-20 provides:

(A) An appearance recognizance or appearance bond must be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what is enjoined by the court, and not to leave the State, and be of good behavior toward all the citizens of the State, or especially toward a person or persons specified by the court.

(B) Unless a bench warrant is issued, an appearance recognizance or an appearance bond is discharged upon adjudication, a finding of guilt, a deferred disposition, or as otherwise provided by law. An appearance bond is valid for a period of three years from the date the bond is executed for a charge triable in circuit court and eighteen months from the date the bond is executed for a charge triable in magistrates or municipal court. In order for the surety to be relieved of liability on the appearance bond when the time period has run, the surety must provide sixty days written notice to the solicitor, when appropriate, and the respective clerk of court, chief magistrate, or municipal court judge with jurisdiction over the offense of the surety's intent to assert that the person is no longer subject to a valid appearance bond. If the appropriate court determines the person has substantially complied with his court obligations and the solicitor does not object within the required sixty days by demanding a hearing, the court shall order the appearance bond converted to a personal recognizance bond and the surety relieved of liability.

S.C. Code Ann. § 17-15-20 (2012).

Distinguishably, Section 38-53-70 provides:

If a defendant fails to appear at a court proceeding to which he has been summoned, the court shall issue a bench warrant for the defendant. The court shall make available for pickup by the surety or the representative of the surety who executed the bond on their behalf, a true copy of the bench warrant within seven days of its issuance at the clerk of court's office. **If the surety fails to surrender the defendant or place a hold on the defendant's release from incarceration, commitment, or institutionalization within ninety days of the issuance of the bench warrant, the bond is forfeited.** At any time before execution is issued on a judgment of forfeiture against a defendant or his surety, the court may direct that the judgment be remitted in whole or in part, upon conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment. In making a determination as to remission of the judgment, the court shall consider the costs to the State or a county or municipality resulting from the necessity to continue or terminate the defendant's trial and the efforts of law enforcement officers or agencies to locate the defendant. The court, in its discretion, may permit the surety to pay the estreatment in installments for a period of up to six months; however, the surety shall pay a handling fee to the court in an amount equal to four percent of the value of the bond. **If at any time during the period in which installments are to be paid the defendant is surrendered to the appropriate detention facility**

and the surety complies with the recommitment procedures, the surety is relieved of further liability.

S.C. Code Ann. § 38-53-70 (2008) (emphasis added).

There is no tension between S.C. Code Ann. § 38-53-70 and S.C. Code Ann. § 17-15-20 whatsoever. The language of § 38-53-70 is inapplicable to situations where there has been an estreatment for a violation other than non-appearance. The language at the beginning of the statute stating, "if a Defendant fails to appear at a court proceeding to which he has been summoned" and later language stating, "if the surety fails to surrender the defendant or place a hold on the defendant's release from incarceration, commitment or institutionalization within ninety days of the issuance of the bench warrant, the bond is forfeited" clearly indicates the statute is intended only for situations where the defendant has failed to appear for a court proceeding. Furthermore, the language relieving the surety of "**further** liability" does not clash with the situation here. The further liability language is limited to situations where the defendant has not appeared, the surety is paying the estreatment based on an installment plan, and the surety is later able to produce the defendant for trial. That language is wholly inapplicable to the situation at hand, where the defendant's appearance was never at issue. Petitioners' liability was set at the time of Mitchell's repeated bond violations that were willfully ignored by Petitioners.[7] While Petitioners' actions of bringing Mitchell before the Court limited their liability for any **further** violations he likely would have committed in the future, it did nothing to remedy the previous willful violations of the bond conditions.

[7] Cf Dorsey v. United States, — U.S. ——, 132 S.Ct. 2321, 2330–31, 183 L.Ed.2d 250 (2012) ("[P]enalties are 'incurred' under the older statute when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable.")

As to Petitioners' argument that "If the Courts were to hold a Bondsman accountable for all actions of a Defendant while out on bond, without providing any incentive to deliver a Defendant to the Court in compliance with their appearance bond the system would fail. SC Code Ann Sec 38-53-70 exists for just this reason" (Petitioner's Brief p. 8), the bondsman has a significant motive to deliver a defendant to the Court in compliance with their appearance bond. As discussed in Respondent's Issue II below, remission is vested in the sound discretion of the trial judge. "If bond is forfeited because of ignorance or unavoidable impediment rather than willful default, the trial court may, on affidavit showing cause or excuse, remit the forfeiture in full or in part." Boatwright, 310 S.C. 281, 283, 423 S.E.2d 139, 140. Among the factors to be considered in determining whether and to what extent relief will be granted are (1) the purpose of the bond; (2) the nature and willfulness of the default; [and] (3) any prejudice or additional expense resulting to the State." State v. Workman, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980). Bondsman, thus, have the motive of a prospective remission as an incentive to deliver a defendant to the Court. If a defendant violates the condition of good behavior and the bondsman immediately brings the defendant in or brings the violation to the Court's attention and other action is deemed appropriate, remission of all or part of the forfeited bond is more than appropriate. However if the bondsman, as in the current case, willfully ignores the defendant's breaches of the conditions of his bond, remission is considerably less likely. Bondsman, therefore, still have a motive to deliver a defendant to the court, and the catastrophic failure of the bond system foretold by Petitioners will not, as it has not for years, occur. Furthermore, Petitioners' purported "incentive" of exoneration for delivering a defendant to the Court in compliance with his or her appearance bond led to the bondsperson in this case willfully ignoring the fact that the defendant was violating the terms of his bond because "that's how he makes a

living." It strains credulity to think the legislature intended the exoneration statute to reward bondsmen who ignore egregious violations of bond conditions for their own financial interests with complete financial exoneration upon the defendant's ultimate appearance before the Court.

As to Petitioners' interpretation that exoneration is proper once the defendant is brought to justice regardless of what the defendant did while in the constructive custody of the bondsman, Petitioners' view is inconsistent with the purpose of bond. Furthermore, the inability of the Court to hold bondsman accountable for their mistakes would have dire consequences. Under Petitioners' position, a defendant could be out on bond in a criminal domestic violence case and under the conditions of his bond, be ordered to be of good behavior and to be under electronic monitoring on home confinement and ordered not to have any contact with the victim. That defendant could then violate the terms of his bond and harass the victim at his or her home, while the bondsman, as the bondsman in this case did, decides to not do anything about it. The defendant could ultimately murder the victim and, under Petitioners' view, as long as they eventually bring him in for trial on the original charge, they have done nothing wrong and fulfilled their obligations under the bond. This view is inconsistent with the purpose of bond and would have a deleterious effect on society. Petitioners' purported "incentive" of exoneration for delivering a defendant to the Court in compliance with their appearance bond led to the bondsperson in this case willfully ignoring the fact that the defendant was violating the terms of his bond and possibly selling drugs because "that's how he makes a living."

Finally, the State notes that the Petitioners' arguments below and any arguments made at this Court regarding the propriety of the estreatment itself are wholly without merit. Petitioners' argument at the Court of Appeals was against this Court's precedent and must be rejected. The trial judge's partial estreatment of the bond was in direct compliance with twenty-five-year-old

South Carolina case law. Therefore, the Circuit Court judge could not possibly have abused her discretion by ordering the estreatment.

In State v. Boatwright, the defendant was arrested in Aiken County for forgery and a parole violation in December 1990. Boatwright, 310 S.C. at 282, 423 S.E.2d at 140. He was released on an appearance bond and Fallaw signed as surety. Id. In January, the state of Georgia issued a parole violation arrest warrant for the defendant. Id. Subsequently, he was arrested for criminal domestic violence in Aiken County. Id. He then pled guilty, waived extradition, and was released to Georgia authorities in March 1991. Id. The defendant's forgery case was called for trial later in the month of March. Id. The defendant failed to appear, and a rule to show cause was issued. Id. An affidavit of non-service stated that the defendant was incarcerated in Georgia on April 5. Id. Fallaw, the surety, was served with the rule to show cause and appeared at the estreatment hearing. Id. At the hearing, the circuit court found that Fallaw failed to show cause why he should not be held liable on the bond and estreated one-half of the bond amount. Id. On appeal, Fallaw argued that the circuit court erred in finding that the defendant violated the terms of his bond and erred in ordering that one-half of the bond be estreated to the State. Id.

This Court held that when a defendant is extradited to another state, a surety is no longer able to perform his obligation under the bond contract; therefore, a surety should be released from liability when estreatment is ordered for non-appearance after the defendant has been extradicted. Id. at 283, 423 S.E.2d at 140. Nevertheless, this Court held that since the circuit judge found, and Fallaw conceded, that the defendant breached the condition of good behavior - which was clearly set forth in the standard bond form that Fallaw signed - estreatment was proper because the violation of the "good behavior" condition served as a separate basis for it. Id. This Court then specifically stated that "[e]streatment for a violation of the good behavior

condition is proper." Id. (citing State v. Workman, 274 S.C. 341, 263 S.E.2d 865 (1980)). This Court also pointed out that "[a]s a professional bondsman, Fallaw is certainly aware that **an appearance bond carries conditions beyond the defendant's presence in court**." Id. at 283, 423 S.E.2d at 141 (emphasis added).

The Boatwright opinion is controlling in Petitioners' case. Boatwright makes it clear that an "appearance bond" carries with it conditions beyond simply securing the defendant's presence in court. Boatwright also makes it clear that estreatment of a bond is in fact proper for reasons other than a defendant's non-appearance in court. Contrary to Petitioners' contention at the Court of Appeals, the relevant language in Boatwright is not "dicta" where the Supreme Court upheld the estreatment **solely** on the basis of a violation of a condition **other than** non-appearance. (See Brief of Appellant, pp. 6-7). Where the circuit court judge relied upon the settled precedent of Boatwright, she did not abuse her discretion in ordering partial estreatment based upon the violation of conditions of the bond other than non-appearance in court. Cf. United States v. Vaccaro, 51 F.3d 189 (9th Cir. 1995) (rejecting bail bond company's contention that a bond cannot be forfeited except for a defendant's failure to appear and holding that the district court did not err by ordering a bond forfeiture for the defendant's violation of the "break no laws" condition of a release order incorporated by reference into the bond form); United States v. Santiago, 826 F.2d 499 (7th Cir. 1987) (holding that the district court properly refused to set aside the forfeiture of a bond - despite the fact that the defendant never missed any court dates - where the defendant, by engaging in drug trafficking while out on bond, willfully breached the conditions set forth in a release order incorporated into his bond form which required that the defendant not commit a crime during the period of his release); United States v. Stanley, 601 F.2d 380 (9th Cir. 1979) (upholding the district court's refusal to remit all or part of

the forfeited bail even though defendant attended all required court appearances where the defendant "intentionally breached the travel restrictions of his bond" and was suspected of engaging in smuggling activities during such breach); United States v. Dunn, 781 F.2d 447 (5th Cir. 1986) (affirming the decision of the district judge ordering forfeiture of the defendant's entire bond amount where defendant violated the travel restrictions which were conditions of his bond); United States v. Terrell, 983 F.2d 653 (5th Cir. 1993) (holding that the defendant's "appearance bond" secured not only his appearance in court but also included conditions that the defendant report for drug tests, not possess a controlled substance, and not leave a five-county area). This Court should affirm the Court of Appeals decision affirming the trial judge's ruling.

II. The Court of Appeals properly found the Circuit Court's estreatment of one-half of the bond was not error where the circuit court judge carefully considered the required factors and where the amount of the estreatment was not arbitrary or capricious.

"[T]he State's right to estreatment or forfeiture of a bail bond issued in a criminal case arises from the contract, *i.e.*, the bail bond form signed by the parties." State v. McClinton, 369 S.C. 167, 171, 631 S.E.2d 895, 897 (2006). "The issue of whether a bond forfeiture should be remitted, and if so, to what extent, is vested in the discretion of the trial judge." Ex parte Polk, 354 S.C. 8, 11, 579 S.E.2d 329, 330 (Ct. App. 2003). "[T]he exercise of that discretion by the trial judge will not be set aside unless it is made to appear that it was abused." State v. Holloway, 262 S.C. 552, 555, 206 S.E.2d 822, 823 (1974). "Among the factors to be considered in determining whether and to what extent relief will be granted are (1) the purpose of the bond; (2) the nature and willfulness of the default; [and] (3) any prejudice or additional expense resulting to the State." State v. Workman, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980). "If bond is forfeited because of ignorance or unavoidable impediment rather than willful default, the trial court may, on affidavit showing cause or excuse, remit the forfeiture in full or in

part." Boatwright, 310 S.C. 281, 283, 423 S.E.2d 139, 140 (citing S.C. Code Ann. § 17-15-180 (1985)).

Petitioners contend that the Circuit Court's estreatment amount of $75,000 – one half of the total bond amount – was "arbitrary and capricious and did not comply with the factors established by Ex parte Polk." (Petitioner's Brief p. 8). Petitioners acknowledge the trial court can consider the costs and inconvenience to the State as well as seek to provide a deterrent against defendants from future violations, however, Petitioners aver the Court did not fully examine the facts as they relate to these concepts. Petitioners offer no substantive argument concerning the first two Polk factors, however, as to the third Polk factor, Petitioners assert the State suffered no real or theoretical prejudice in preparing to seek justice against the Defendant on his outstanding charges when he was in custody. Petitioners further assert the only costs put forward by the State in this matter were those created in preparing to estreat the bond, which do not qualify as "costs" under the Polk rationale.

Contrary to Petitioners' contentions, the Circuit Court did not abuse its discretion in deciding to estreat one-half of the bond so this amount was neither arbitrary nor capricious. As discussed previously, under Boatwright, the Court did not err in ordering estreatment for a violation other than non-appearance. Notably, the amount of estreatment in Boatwright was also one-half of the bond amount, which significantly weakens Petitioners' argument that such an amount is arbitrary and capricious. See Boatwright, 310 S.C. at 282, 423 S.E.2d at 140. In their brief at the Court of Appeals, Petitioners did not dispute the "purpose of the bond" factor and agree that "[t]he purpose of Mr. Mitchell's bond being set at $150,000 directly related to the seriousness of the matter, and the danger to the community and potential flight risk associated with potential sentences." (Brief of Appellant, p. 9). Further, the Court's findings regarding the

willfulness of Mitchell's violations and the willfulness of the bondswoman's default (that is, failing to take appropriate action upon learning of Mitchell's violations of his house arrest conditions) have not been challenged on appeal. In any event, they are clearly supported by the record. The default by the bondswoman wherein she knowingly allowed Mitchell to repeatedly engage in what appeared to be drug transactions at all hours of the night because "that's how he makes a living" was not only willful but also repugnant to the dignity of our court system. (See R. p. 89, lines 10-11). The Court also properly considered the costs incurred by the State in attempting to address both Mitchell's and the bondswoman's violations. (See R. p. 28-30). While Petitioners are correct in noting the State did not accrue substantial financial costs in this particular case, the trial judge was more than justified in estreating $75,000 where a punitive amount was necessitated by the egregiousness of the bondswoman's willful default. See Jeffers v. United States, 588 F.2d 425, 427 (4th Cir. 1978) ("Two competing principles control remission. First, a forfeiture should bear some reasonable relation to the cost and inconvenience to the government and the courts. Second, if a violation of a condition of release is more than technical, the court may require a substantial forfeiture to deter not only the defendant but others from future violations." (internal citations omitted)). Accordingly, since the Circuit Court carefully considered the Polk factors and estreated an appropriate amount of the bond, particularly considering the egregiousness of the violations, the Court did not abuse its discretion. The estreatment of one-half of the bond should be upheld.

CONCLUSION

For all the foregoing reasons, the State requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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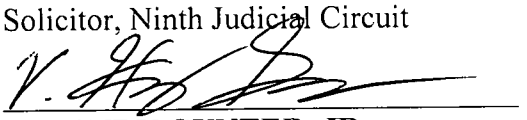

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February 3, 2016

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
The Honorable Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2016-000980

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEANGELO MITCHELL,

DEFENDANT,

AND

AA ACE BAIL BY FRANCES AND PALMETTO SURETY CORP., SURETIES FOR THE DEFENDANT,

PETITIONERS.

CERTIFCATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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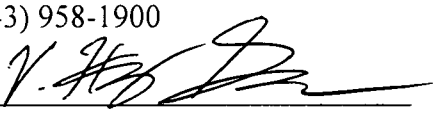
BY: 

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PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert T. Williams, Sr., Esquire
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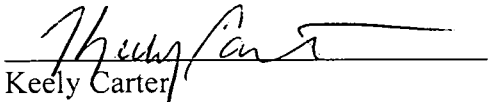
I further certify that all parties required by Rule to be served have been served.

This 3rd day of February 2017.



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