In the Supreme Court of South Carolina

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY

Honorable R. Kirk Griffin, Circuit Court Judge
Appellate Case No. 2022-001444

The State..... Respondent

v.

Brittany Martin..... Petitioner

PETITION FOR WRIT OF CERTIORARI

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

QUESTIONS PRESENTED

I. In "cases raising First Amendment issues," appellate courts are required to "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *E.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). But below, the Court of Appeals broke new ground by ruling that "independent examination" is foreclosed where "Appellant never requested a directed verdict on the BOPHAN charge" and "her motion to dismiss the BOPHAN charge did not include a First Amendment argument."

Is an "independent examination of the whole record" triggered, as the U.S. Supreme Court has held, in all "cases raising First Amendment issues," *Bose*, 466 U.S. at 499, or is it only triggered, as the Court of Appeals held, when a criminal defendant has also satisfied South Carolina's issue preservation rules?

II. At trial, the court rejected Petitioner's proposed jury instruction that BOPHAN must not "be construed to abdridge people's rights to free speech." Was submitting a proposed jury instruction sufficient to invoke appellate review, as this Court held in *State v. Johnson*, 439 S.C. 331, 340–41, 887 S.E.2d 127, 131–32 (2023), or was the Court of Appeals correct that Petitioner was required to raise a *second* objection to preserve the issue on appeal?

III. In *State v. Simms*, a drunk football fan got out of a car, walked over to the victim sitting in another truck, and assaulted him. 412 S.C. 590, 593, 774 S.E.2d 445, 446 (2015). The assault resulted in the victim's death after he fell into a roadway and was run over by another vehicle. *Id.* There, the defendant was convicted of BOPHAN and received 3 years in prison. By contrast, Petitioner received a longer sentence for the same offense based on nonviolent and nondestructive conduct.

Is Petitioner's four-year prison sentence disproportionate under the Eighth Amendment?

STATEMENT OF THE CASE

In the summer of 2020, Brittany Martin took to the streets of Sumter, South Carolina, in protest. From May 30 through June 3, Martin—a Black woman, mother, chef, and activist—and many others exercised their First Amendment right to loudly and publicly express their grief, declare their outrage, and demand justice after the murder of George Floyd. Although Martin's conduct at the Sumter protests featured yelling, profanity, and harsh criticism of law enforcement, she never acted violently, destroyed property, or caused any injury.

After five days of protesting without incident, Martin was arrested by the Sumter Police Department on one count of Instigating a Riot ("Incitement"), S.C. Code § 16-5-130(2), and five counts of Threatening the Life of a Public Official, S.C. Code § 16-3-1040(A). Nearly a year later, the Third Judicial Circuit Solicitor's Office convened a grand jury and indicted Martin on an additional count of Breach of Peace of a High and Aggravated Nature ("BOPHAN"), a common law offense. R. pp. 664–65.

At trial, the State called multiple witnesses to testify, and Martin testified in her own defense. R. pp. 63–64. Throughout trial, the State's officer-witnesses testified about their disapproval of, and even resentment toward, the content of Martin's speech and expressive conduct. R. pp. 204, lines 9–15; 257, lines 15–17; 300, line 22–p. 301, line 16; 470, line 22–p. 471, line 2. In closing arguments, the solicitor failed to specify what conduct the State believed constituted BOPHAN. Instead, she vaguely argued that the jury should conclude that Martin's conduct—which spanned five days of protesting at multiple different times in multiple different locations—satisfied the elements of BOPHAN. *See* R. pp. 567–69. Defense counsel argued that Martin's speech and conduct were protected by the First Amendment. R. pp. 576, lines 3–5; 596, lines 14–15.

In support of her First Amendment defense, Martin requested that the jury be instructed about the First Amendment protections afforded to her on each charged offense. R. pp. 16–33; *see also* R. p. 546, lines 9–16. The trial court first instructed the jury to consider "each charge separately on the evidence and law applicable to it uninfluenced by . . . any other charges." R. p. 612, lines 20–24. Next, the trial court instructed the jury regarding BOPHAN but failed to include any mention of First Amendment principles. The trial court then charged the jury regarding the Incitement and Threatening charges, including First Amendment instructions for both. *See generally* R. pp. 610–25 (jury instructions); *compare* R. pp. 619–20 (BOPHAN) *with* R. pp. 620–21 (Incitement) & R. pp. 622–23 (Threatening a Public Official). Specifically, the court twice instructed the jury that the State's charge of Incitement "must not be construed to prevent peaceable assembling of persons for lawful purposes or protest or petition." R. p. 620, lines 23–25, p. 621, lines 8–10. Likewise, in its instruction describing Threatening a Public Official, the court went to great lengths to explain the protections of the First Amendment. R. pp. 622–23.

Ultimately, the jury acquitted Martin of Incitement, deadlocked on the Threatening charges, and convicted Martin of BOPHAN. R. pp. 637, lines 19–25; 662–63.

Ten minutes after receiving the jury's verdict, the court proceeded with sentencing. R. p. 641, lines 16–25. The solicitor and law enforcement encouraged the court to impose "some level of incarceration." R. p. 645, lines 10–12. Defense counsel urged the court to impose a twenty-one-day sentence, with credit for time served, based on Martin's pregnancy and the fact that she had been nonviolently engaged in protected First Amendment speech and conduct. R. pp. 645–47.

Ultimately, the trial court sparked national outrage by sentencing Martin, who was pregnant at the time, to four years in prison.[1]

ARGUMENT

There are "special and important" reasons to exercise the Supreme Court's authority to grant certiorari in this case, *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C 235, 236, 844 S.E.2d 373, 373 (2020) (citing Rule 242, SCACR): namely, the Court of Appeals issued a novel ruling that diverged from South Carolina Supreme Court and United States Supreme Court precedent, thereby allowing a conviction for constitutionally protected speech and a profoundly unjust sentence to stand. To correct these errors, further review is necessary.

I. The Court of Appeals was wrong to affirm Martin's conviction without conducting an "independent examination of the whole record."

It is well settled that in "cases raising First Amendment issues," appellate courts must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *E.g., Bose*, 466 U.S. at 499. This obligation arises from the federal constitution and is binding on state appellate courts. *See, e.g.*, *State v. TVI, Inc.*, 524 P.3d 622, 630 (Wash. 2023) ("[A]s a matter of federal constitutional law, we do not defer to the trial court's finding on . . . whether the speech is unprotected.") (quotation marks omitted) (emphasis in original).

Here, First Amendment issues permeated Martin's trial. The conduct being criminalized—publicly protesting police brutality in the wake of George Floyd's murder by Minneapolis police officers—"occupies the highest rung of the hierarchy

[1] The Associated Press, *A Black Protester Voiced Anger at Police in South Carolina. She Got 4 Years in Prison*, NPR (Sept. 6, 2022), available at https://tinyurl.com/z53a5hhk.

of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Unsurprisingly, Martin's defense was built on First Amendment principles, *see, e.g.*, R. p. 546, lines 9–16, and she sought to have the jury instructed about the First Amendment protections available to her on every count, *see* R. pp. 25, 29–30, 31–33. Meanwhile, in contravention of the First Amendment, the solicitor urged the jury to convict Martin of BOPHAN merely because her speech "breach[ed] the peace of our community." R. p. 568, lines 2–13; *see Edwards v. South Carolina*, 372 U.S. 229, 236–38 (1963) (affirming protesters' First Amendment right to "stir people to anger, invite public dispute, or bring[] about a condition of unrest").

In spite of that record, the Court of Appeals refused to conduct the independent review required by U.S. Supreme Court precedent. It did not dispute that the case raised First Amendment issues or that Martin asserted a plausible First Amendment defense, but nonetheless held that state issue-preservation rules precluded indendent review because "Appellant never requested a directed verdict on the BOPHAN charge" and "her motion to dismiss the BOPHAN charge did not include a First Amendment argument." *State v. Martin*, Case No. 2022-001444, Opinion No. 2024-UP-274, 2024 WL 3519192, at *1 (S.C. Ct. App. July 24, 2024).

On this issue, the decision of the Court of Appeals was novel, consequential, and incorrect. To counsel's knowledge, this is the first time a court has conditioned independent appellate review in First Amendment cases on a criminal defendant's compliance with state issue preservation rules. That is unsurprising, given that the ruling contradicts U.S. Supreme Court precedent and does not further the interests protected by the Court's issue-preservation rules. Because this claim implicates a "novel question[] of law," a "substantial constitutional issue[]," and involves a decision on "a federal question" that "conflicts with . . . decision[s] of the United States Supreme Court," certiorari is appropriate here. Rule 242(b)(1), (4), (5), SCACR.

A. This case typifies the need for independent appellate review in First Amendment cases.

The doctrine of independent appellate review in First Amendment cases is "grounded in the fear that juries may give short shrift to important First Amendment rights." *Rouch v. Enquirer & News of Battle Creek Mich.*, 487 N.W.2d 205, 214 (Mich. 1992). Unlike appellate review of a trial court's legal rulings, independent appellate review of First Amendment cases guard against the possibility that the factfinder (here, the jury) might, "by way of bias or some other factor," be predisposed to criminalize conduct protected by the First Amendment. *See Bose*, 466 U.S. at 518 (Renquist, J., dissenting). "The common wisdom is that if juries were given more decisional power in [First Amendment cases], either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow." Frederick Schauer, *The Role of the People in First Amendment Theory,* 74 CAL. L. REV. 761, 765 (1986). Indeed, as Justice Renquist conceded in dissent in *Bose*, appellate review of a state court jury trial presents "strongest case for independent factfinding by this Court." *Bose*, 466 U.S. at 518 n.2.

This case typifies the need for independent appellate review. In an ordinary case, appellate courts generally steer clear of jury findings. But here, where the jury was poorly instructed on the First Amendment and was encouraged by the State to convict Martin for engaging in speech that others found upsetting, Supreme Court precedent demands that appellate courts independently examine the record to ensure that Martin's conviction was not secured in violation of the First Amendment. *See, e.g.*, *Edwards*, 372 U.S. at 230 (conducting independent examination of the whole record to determine whether "in arresting, convicting, and punishing petitioners under the circumstances disclosed by this record, South

Carolina infringed on the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances").

B. The Court of Appeals misconstrued *Bose* as merely announcing a "standard of review."

The Court misread *Bose*, reasoning that it only "set forth the standard of review for an appellate court to consider a constitutional issue" and "did not hold a constitutional issue is exempt from preservation requirements." *Martin*, 2024 WL 3519192, at *1. But *Bose* is not so limited:[2] it does not condition the appellate court's duty to conduct "an independent examination" on whether the issue was preserved by a party; rather, such review is required in all "*cases* raising First Amendent issues." 466 U.S. at 499 (emphasis added). According to Black's Law Dictionary, a "case" is "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity." *Case*, Black's Law Dictionary (12th ed. 2024). Likewise, under South Carolina law, a "case" includes the entire history of a legal proceeding, including the nature of the action and the defenses raised. *See* Rule 208(b)(1)(C), SCACR (defining 'Statement of the Case'). That definition is also consistent with how the U.S. Supreme Court uses the term. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009) ("[T]he propriety of a [stay] is dependent on the circumstances of the particular *case*.") (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)) (emphasis added); *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003)

[2] *Bose*'s command to conduct an "independent examination of the whole record" in First Amendment cases did not break new ground. As the majority there acknowledged, the Supreme Court had already "repeatedly held" and applied "uncounted times" the rule that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" 466 U.S. at 498–99, 514 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964) and citing *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 933–934 (1982*); Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 732–733 (1968)).

("[T]he question in each instance is whether *a case* raises" certain issues.) (emphasis added). By contrast, when the Supreme Court tethers an appellate court's analysis to whether an issue was properly raised by a party, it does so clearly. *See, e.g.*, *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 260 (1987) ("[T]his case does not present a proper occasion for us to exercise our discretion to decide an issue despite *petitioner's* failure to preserve it.") (emphasis added); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) ("Having determined that *petitioner* has raised and preserved a contract claim, we turn to the jurisdictional question.") (emphasis added).

C. Extensive precedent establishes that compliance with state law preservation rules is not necessary to trigger the obligation.

Edwards v. South Carolina, which bears remarkable similarities to the facts at hand, further demonstrates that independent appellate review is not restrained by the arguments the defendant made, or didn't make, in the trial court. In that case, nearly two hundred Civil Rights-era protesters had been convicted of breaching the peace. *Edwards*, 372 U.S. at 230. Challenging the convictions in the South Carolina Supreme Court, "[t]he *only question* involved . . . [wa]s whether or not the evidence presented to the trial Court was sufficient to sustain their conviction." *State v. Edwards*, 239 S.C. 339, 340, 123 S.E.2d 247, 247 (1961) (emphasis added). Though "the appellants . . . argued that their arrest and conviction deprived them of their constitutional rights of freedom of speech and assembly," the parties "conceded . . . that whether or not any constitutional right was denied to them is dependent upon their guilt or innocence of the crime charged under the facts presented to the trial Court." *Id.* at 340–41, 247. In other words, according to the South Carolina Supreme Court, "[i]f their acts constituted a breach of the peace, the power of the State to punish is obvious." *Id.* at 341, 247. The South Carolina Supreme Court ultimately concluded that "[t]he acts of the appellants . . .

clearly constituted a breach of the peace." *Id.* at 345, 250. Even though the issue was not litigated in the state court, the U.S. Supreme Court went on "to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution." *Edwards*, 372 U.S. at 230 (citation omitted).

Other cases reaffirm this principle as well. In *New York Times Co. v. Sullivan*, the Court reversed the judgment, holding that a presumption of actual malice for damages in libel actions was unconstitutional. 376 U.S. at 283–84. But the Court went on to answer a distinct question: "whether [the record] could constitutionally support a judgment for respondent." *Id*. at 284. State cases reflect the same. *See, e.g.*, *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 592 Pa. 66, 85, 923 A.2d 389, 401 (2007)[3] (refusing to hold that appellant waived a First Amendment argument) ("Were we to ignore the question, moreover, we would fail to 'make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'"); *Hanch v. K. F. C. Nat. Mgmt. Corp.*, 615 S.W.2d 28, 33 (Mo. 1981) (reviewing First Amendment issue that appellant failed to raise below) ("Inasmuch as appellant is claiming an infringement upon the jealously protected right of free speech, it would appear that a full adjudication on the merits would be in order lest that infringement, if it exists, go unremedied.").

D. Because independent examination of the record is required, the interests served by issue-preservation requirements are not present here.

"[T]he very core of our preservation requirement" is "designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Atlantic Coast Builders & Contractors, LLC v.*

[3] Pennsylvania, like South Carolina, does not review unpreserved errors. *Schmidt v. Boardman Co.*, 608 Pa. 327, 356–57, 11 A.3d 924, 942 (2011) (noting that Pennsylvania "abolish[ed] the plain error doctrine").

Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citation omitted). But neither justification—fairness to the trial court on one hand, and providing a platform for appellate review on the other—is undermined by an independent consideration of whether the Martin's conviction and sentence "constitute[s] a forbidden intrusion on the field of free expression." Unlike ordinary appellate claims, independent appellate review does not look askance at any particular trial court ruling nor depend on the development of discrete arguments below. And because the appellate court must conduct its own *non-delegable*, *independent* examination of the record, the trial court's "platform" does not contribute to "meaningful appellate review." *Id.*; *cf. Bose*, 466 U.S. at 501 ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."). In short, it is the *record* that is being scrutinized, not any particular legal ruling. Indeed, as this very case demonstrates, an appellate court might well determine that "the judgment . . . constitute[s] a forbidden intrusion on the field of free expression" without concluding that the trial court abused its discretion or even erred at all.

E. Independent examination of the record reveals that Martin's conviction did "constitute a forbidden intrusion" on her First Amendment right.

This case illustrates the significant costs of an appellate court abdicating its duty under the First Amendment. Here, the appellate court's refusal to conduct an independent examination leaves undisturbed a criminal conviction based on protected expression. Martin's speech and conduct at Sumter's George Floyd protests were precisely the kind of protected First Amendment activity that cannot be criminalized. *See, e.g.*, *Edwards*, 372 U.S. at 236–38. "[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Connick*, 461 U.S. at

145 (quotation marks omitted), even when it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *Sullivan*, 376 U.S. at 270; "inflict[s] great pain," *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011); is "vituperative, abusive, and inexact," *Watts v. United States*, 394 U.S. 705, 708 (1969); or "stir[s] people to anger, invite[s] public dispute, or brings about a condition of unrest," *Edwards*, 372 U.S. at 238.

In short, expression cannot be punished "unless shown likely to produce a clear and present danger of a serious substantive evil that rises *far above public inconvenience, annoyance, or unrest*." *Edwards*, 372 U.S. at 237 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949)) (emphasis added). Only a narrow sliver of expression constitutes a "serious substantive evil" such that it is beyond the protection of the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). As relevant here, those categories are true threats ("those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Virginia v. Black*, 538 U.S. 343, 359 (2003)); incitement ("advocacy . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); and fighting words ("personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen v. California*, 403 U.S. 15, 20 (1971)).

None of those narrow categories are applicable here. Like the protesters vindicated in *Edwards*, Martin's speech and conduct did not constitute true threats, incitement, or fighting words. Martin was not convicted of threatening public officials and was acquitted of inciting a riot, R. p. 636, lines 4–21, p. 637, lines 23–25, and any disobedience of official orders is not alone enough to support a conviction, *Edwards*, 372 U.S. at 241 (failing to reach a majority to uphold the

convictions based on the protesters' "defiance of (the dispersal) orders"). Martin never hurt anyone or destroyed any property. Instead, her peaceful protest, on a matter of immense public concern, "may [have] indeed best serve[d the First Amendment's] high purpose when it induce[d] a condition of unrest, create[d] dissatisfaction with conditions as they are, or even stir[red] people to anger." *Id.* at 238.

II. Requiring counsel to renew a jury instruction request after the trial court rejected the instruction contravenes South Carolina Supreme Court precedent.

Well-established, decades-old South Carolina Supreme Court precedent holds that "where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *State v. Johnson*, 33 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998); *see also Johnson*, 439 S.C. at 340–41, 887 S.E.2d at 131–32. In this case, even though defense counsel requested a First Amendment instruction, and the trial judge declined the charge, the Court of Appeals departed from that rule. Specifically, the court explained, "Appellant failed to object to the charge the trial court gave the jury. The trial court attempted to give the jury a charge that encompassed Appellant's request to charge. It was incumbent on Appellant to raise to the trial court the inadequacy of the charge as given." Martin, 2024 WL 3519192, at *1. Because the opinion "is in conflict with . . . prior decision[s] of the Supreme Court," certiorari is warranted. Rule 242(b)(3), SCACR.

A. The decision below contravenes long-standing precedent.

Just last year, the Supreme Court reaffirmed this very rule in *State v. Johnson*, 439 S.C. 331, 887 S.E.2d 127 (2023). In *Johnson*, the defendant challenged the admission of certain evidence. *Id.* at 336, 129. In response, the prosecution suggested the court offer a limiting instruction, and defense counsel said, "certainly

if you allow all this stuff in, then certainly I would request a charge." *Id.* At the time, the court took the issue under advisement. *Id.* The court later decided against a limiting instruction, and "[w]hen the trial court asked if either party objected to the charge, [defense counsel] replied he did not." *Id.* at 337, 129–30. Nevertheless, because defense counsel initially requested the instruction, the Supreme Court held that the issue was preserved. *Id.* at 340–41, 131–32.

In support of its reasoning, the Court of Appeals did not mention *Johnson*, instead citing two other, inapposite cases: *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999), and *State v. Avery*, 333 S.C. 284, 509 S.E.2d 476 (1998). Neither case supports the court's ruling. In Martin's case, the defense proposed an instruction that the trial court refused. That is unlike *Ford*, wherein the court held that the defendant "*never objected* to the admission of this testimony. As such, the issue is not preserved for appellate review." 334 S.C. at 453–54, 513 S.E.2d at 390 (emphasis added). It is also unlike *Avery*, where the court determined that no objection ever occurred—not that an objection occurred at the improper time. 333 S.C. at 296, 509 S.E.2d at 483 ("Although appellant originally suggested the jury could return inconsistent verdicts on armed robbery and involuntary manslaughter, *he did not object* to the trial judge's initial or supplemental instructions[.]") (Emphasis added). *Johnson*, the more recent and more on-point precedent, must govern here.

B. Whether or not the trial court "attempted to give" the requested instruction is immaterial.

One possible reading of the court's opinion suggests that preservation requirements are different when a trial court unsuccessfully "attempt[s] to give" the requested instruction than when a trial court simply refuses to give the requested instruction. *Martin*, 2024 WL 3519192, at *1. In substance, that is a distinction without a difference: under well-established governing precedent, the intent of the

trial court does not drive issue-preservation analysis. Moreover, the instructions actually given—not the instructions the court *intended* to give—are what a jury is presumed to have followed. *See, e.g.*, *State v. Reyes*, 432 S.C. 394, 409, 853 S.E.2d 334, 342 (2020). Imposing an additional, after-the-fact obligation—contrary to decades of precedent—on defense counsel to read the court's mind, understand the court is *intending* to give the requested instruction, and correct any error in that intended instruction renders an unjust result. That is especially so in this case, where the rejected instruction was proposed to protect a fundamental constitutional right.

C. The instructions were erroneous and prejudicial.

The trial court's failure to instruct the jury on applicable First Amendment principles was error. Compounding that error, the rest of the instructions—when taken together—actually prohibited the jury from considering Martin's First Amendment defense on the BOPHAN count. The problem arose from three separate facts: (1) The jury did not receive a general instruction about the universal applicability of the First Amendment; (2) unlike on the BOPHAN charge, the Court *did* instruct the jury about First Amendment protections that apply to Incitement, R. pp. 620–21, and Threatening a Public Official, R. pp. 622–23; and (3) the jury was told that they must consider "each charge separately on the evidence *and law applicable to it* uninfluenced by . . . any other charges," R. p. 612, lines 20–24 (emphasis added). Alone, these instructions were not error, but together they convey an erroneous rule of law: that the First Amendment instructions that governed the jury's consideration of Incitement and Threatening a Public Official did not apply to BOPHAN. As a result, the jury instructions provided no protection whatsoever against a conviction for BOPHAN for speech or conduct protected by the First Amendment.

Because of that instructional error, the jury was precluded from considering Martin's only argument for acquittal: that her conduct was protected by the First Amendment. Tellingly, the charges that received a First Amendment instruction—Incitement and Threatening—*did not* result in a conviction, whereas BOPHAN—the only charge *without* a First Amendment instruction—did. Put simply: where the jury was instructed to apply the First Amendment, they were unable to agree on evidence of guilt. The court's instructional errors were plainly prejudicial and therefore require reversal. *See, e.g.*, *State v. Burkhart*, 350 S.C. 252, 263–64, 565 S.E.2d 298, 304 (2002) (reversing prejudicial instructional error regarding "the sole issue in this case").

III. Appellant's four-year prison sentence for expressive, nonviolent, and nondestructive conduct disproportionate under the Eighth Amendment.

Below, Martin argued that her four-year prison sentence for nonviolent, nondestructive protest is antithetical to the values enshrined in the First and Eighth Amendments of the United States Constitution. The Court of Appeals disagreed, pointing to "the crime for which the jury convicted Appellant, her prior criminal history, and the sentence given in *Simms*" and explaining that Martin "was eligible for parole after serving one-fourth of the sentence." *Martin*, 2024 WL 3519192, at *2. Those factors cannot mitigate the sentence's disproportionality. Because this claim "directly involve[s]" a "substantial constitutional issue[]," the Supreme Court's intervention here is necessary. Rule 242(b)(4), SCACR.

A. Martin's actions and criminal history cannot justify a four-year prison sentence.

First, under the language of *State v. Harrison*, the gross proportionality inference is limited to consideration of "the *sentence* and the *crime committed*," 402 S.C. 288, 300, 741 S.E.2d 727, 733 (2013) (emphasis added), and does not permit

consideration of external factors such as criminal history. Under that framework, comparison of Martin's offense to her four-year prison sentence gives rise to an inference of gross disproportionality because Martin never caused injury to another person, and she never destroyed any property.

But even if this Court takes a more expansive view of *Harrison* and considers factors other than the crime itself and the resulting sentence, Martin's criminal history does not undermine an inference of gross proportionality. The State argues that Martin's "sentence was imposed, in significant part, based on Appellant's prior criminal record and the inability of probation to prevent her continued criminal behavior." Respondent's Initial Brief at 17. Essentially, the State argues, Martin should receive a sentence more severe than probation because probation has failed to deter her in the past. But even if that's true, there is a massive and unexplainable gulf between a would-be probationary sentence and the four-year prison term Martin ultimately received. That Martin has a mildly checkered past does not explain or justify a prison term for nonviolent and nondestructive conduct that well exceeds the next longest known sentence for BOPHAN.

Beyond that, the state's deterrence-based argument also rests on a faulty assumption: that Martin knew her actions in this case were criminal and acted anyways, in spite of prior punishment. Deterrence occurs when an individual is presented with a choice: act illegally, or not. If that individual is "deterred" (by a previous punishment or the threat of a future punishment), that individual *chooses* not to act illegally. But BOPHAN is not "susceptible of exact definition." *State v. Randolph*, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961). That extraordinary—likely unconstitutional[4]—vagueness cannot offer Martin or anyone else adequate notice of what conduct is prohibited. Without that notice, Martin could not *choose* to either

[4] Appellant raised this claim below, but the Court of Appeals held that it had not been preserved. Appellant does not raise that issue here.

commit BOPHAN or be deterred from committing BOPHAN—because she could not know what BOPHAN actually prohibits. Deterrence (or the lack thereof), then, was not a factor in this case and cannot ameliorate the disproportionality of a years-long prison sentence for nonviolent and nondestructive conduct.

B. In light of sentence given in Simms, Martin's sentence is grossly disproportionate.

In *State v. Simms*, a drunk football fan got out of a car, walked over to the victim sitting in another truck, and punched him. 412 S.C. at 593, 774 S.E.2d at 446. As the victim attempted to exit the truck, Simms "hit the victim four or five more times," knocking him unconscious. *Id.* The victim "fell into the roadway," where he was run over, killing him. *Id*. Simms was convicted of BOPHAN and sentenced "to ten years' imprisonment suspended upon the service of three years' imprisonment, plus three years' probation." *Id*. In *Simms*, unprovoked violence that resulted in the victim's *death* warranted only three years in prison. The Court of Appeals' conclusion that Martin's four-year sentence for peaceful protest is reasonable in light of *Simms* is inexplicable. If the Eighth Amendment's proportionality principle imposes any limit whatsoever on punishment, Appellant's sentence contravenes that limit.

CONCLUSION

To correct novel and consequential errors of federal constitutional law, as well as misapplication of state Supreme Court precedent, the Court should grant Petitioner's Writ of Certiorari.

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