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SC Court of Appeals

The State of South Carolina
In the Court of Appeals

APPEAL FROM SUMTER COUNTY

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

The State..Respondent

v.

Brittany Martin..Appellant

APPELLANT'S PETITION FOR REHEARING

Appellant Brittany Martin respectfully requests rehearing on Opinion No. 2024-UP-274, which was issued on July 24, 2024. Rule 221(a), SCACR.

I. A court's federal constitutional obligation to "make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" is not excused by state issue-preservation rules.

The Opinion held that a court's obligation under *Bose*—"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" — is triggered only when an issue is preserved for review in compliance with the state preservation rules. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). In so ruling, the Court relied on a misreading of *Bose*, reasoning that *Bose* 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." *State v. Martin*, Case No. 2022-001444, 2024 WL 3519192, at *1 (S.C. Ct. App. July 24, 2024)

Bose 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). 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 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. U.S.*, 272 U.S. 658, 672–73 (1926)) (emphasis added); *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) ("[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 is 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).

Moreover, a court's obligation to conduct an independent review did not first arise in *Bose*. Rather, *Bose* confirmed that the Supreme Court has "repeatedly held," in what is now a "well-settled and respected rule[] of law," 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 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964)). Nor has the principle been limited to a "standard of review" issue in prior cases. *See, e.g.*, *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 592 Pa. 66, 85, 923 A.2d 389, 401 (2007)[1] (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.").

Supreme Court precedent agrees. 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. Likewise, in *Edwards v. South Carolina*, the Court determined it "need not pass upon" the petitioners' "conten[tion] that there was a complete absence of any evidence," but *instead* went on to "make an independent examination of the whole record," answering a different question. 372 U.S. 229, 235 (1963).

Finally, even if compliance with state preservation rules is required (it's not), Appellant raised First Amendment arguments sufficient to trigger the Court's "independent examination of the whole record." *Bose*, 266 U.S. at 498–99. Ms.

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[1] 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").

Martin's defense rested on First Amendment principles, *see, e.g.*, R. p. 546, lines 9–16, and the defense requested First Amendment jury instructions on every count, *see* R. pp. 25, 29–30, 31–33. Approaching preservation principles "with a practical eye and not in a rigid, hyper-technical manner," *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011), the extensive attention to this issue by defense counsel was enough to preserve the appellate court's independent obligation under Supreme Court precedent.

Because the Court's decision departed from precedent and failed its duty to ensure that Ms. Martin's conviction "does not constitute a forbidden intrusion on the field of free expression,'" *Bose*, 266 U.S. at 498–99, rehearing is warranted.

II. The Court's ruling requiring multiple objections by defense counsel contravenes South Carolina Supreme Court precedent.

Well-established 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 State v. Johnson*, 439 S.C. 331, 340–41, 887 S.E.2d 127, 131–32 (2023). In this case, even though defense counsel requested a First Amendment instruction, and the trial judge declined the charge, the Court departed from that precedent, applying preservation rules in a "rigid, hyper-technical manner." *Herron*, 395 S.C. at 470, 719 S.E.2d at 644.

Neither *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999), nor *State v. Avery*, 333 S.C. 284, 509 S.E.2d 476 (1998), supported the Court's ruling. In this case, the defense proposed an instruction that the trial court refused. That is 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 regarding armed robbery and involuntary manslaughter. Accordingly, this issue is not preserved for appeal.") (emphasis added). Likewise, in *Ford*, 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).

Imposing an additional, after-the-fact obligation on defense counsel—contrary to decades of precedent—renders an unjust result. The Court's error carries particular weight in this case, where the rejected instruction was proposed to protect a fundamental constitutional right. Even more notably, Ms. Martin was *not convicted* for any charge that received a First Amendment instruction. *See* AIB at 23. Given the circumstances, rehearing on this claim is warranted.

III. The factors cited by the Court cannot justify Appellant's four-year prison sentence for expressive, nonviolent, and nondestructive conduct under the Eighth Amendment's proportionality principle.

Appellant's 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 factors relied upon by the Court cannot mitigate the disproportionality of that sentence.

The Court cited three factors: (1) "the crime for which the jury convicted Appellant," (2) "her prior criminal history," and (3) "the sentence given in *Simms*." *Martin*, 2024 WL 3519192, at *2. First, the crime for which Appellant was convicted, BOPHAN, is likely unconstitutionally vague, AIB at 23–28, and, at the very least, is not "susceptible of exact definition," *State v. Randolph*, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961). Second, Appellant's prior criminal history is not a permissible consideration under *State v. Harrison*, which limits the gross proportionality inquiry to "the *sentence* and the *crime committed*." 402 S.C. 288,

300, 741 S.E.2d 727, 733 (2013) (emphasis added). And even if it were, a mildly checkered past cannot alone justify four years of incarceration. Third, the comparison with *Simms* points irrefutably toward the conclusion that Ms. Martin's sentence is grossly disproportionate. In *State v. Simms*, the defendant was convicted of *interpersonal violence* that caused the *death* of another—*i.e.*, a homicide. 412 S.C. 590, 774 S.E.2d 445 (2015). And yet, Simms was sentenced to less prison time than Ms. Martin, a peaceful protester. If the Eighth Amendment's proportionality principle imposes any limit whatsoever on punishment, Appellant's sentence contravenes that limit. The panel should rehear this claim.

/s/ *Meredith McPhail*

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Certificate of Service

Undersigned counsel hereby certifies that on August 8, 2024, a true and correct copy of Appellant's Petition for Rehearing is served by electronic mail on counsel for Respondent, Mark Farthing (mfarthing@scag.gov).

s/ Meredith D. McPhail

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