THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of General Sessions

R. Kirk Griffin, Circuit Court Judge

Opinion No. 2024-UP-274 (S.C. Ct. App. filed July 24, 2024)
Appellate Case No. 2024-001575

State of South Carolina, ...Respondent,

v.

Brittany V. Martin,...Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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[1] *State v. Simms*, 412 S.C. 590, 774 S.E.2d 445 (2015).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly rejected Petitioner's argument that her conviction for BOPHAN should be vacated for violating the First Amendment and instead affirmed where: (1) the argument was not preserved for appellate review; (2) Petitioner failed to identify any valid exception to our error preservation requirements; and (3) in any event, any independent examination of the factual basis for the conviction to ensure it is not violative of the First Amendment would conclude there is ample evidence of behaviors constituting BOPHAN which do not encroach on the First Amendment?

2. Whether the Court of Appeals properly rejected Petitioner's argument that her BOPHAN conviction must be reversed because the trial court failed to instruct the jury about her First Amendment defense and instead affirmed where: (1) the issue was not preserved for appellate review; and (2) in any event, the trial court did not err in failing to give the requested jury instruction regarding the First Amendment?

3. Whether the Court of Appeals properly concluded that Petitioner's four-year prison sentence with a possibility of parole in one year did not violate the Eighth Amendment's prohibition against cruel and unusual punishment where it was proportionate considering the crime for which she was convicted, her prior criminal history, and the sentence given in *Simms*?

STATEMENT OF THE CASE

Petitioner, Brittany Valencia Martin (Martin), was indicted by the grand jury for Sumter County for one count of breach of peace of a high and aggravated nature (BOPHAN), one count of inciting a riot, and five counts of threatening the life of a public official (2021-GS-43-0091). (R.p.664-p.665).[2] She was represented by Dr. Sybil D. Rosado, Esquire, and Respondent (the State) was represented by Solicitor Ernest A. Finney, III, and Assistant Solicitor Bronwyn K. McElveen of the Third Circuit Solicitor's Office. On May 9, and May 11-13, 2022, the case was tried in the Sumter County Court of General Sessions before the Honorable R. Kirk Griffin and a jury. At the conclusion of trial, the jury acquitted Martin of inciting a riot but convicted her of BOPHAN. The jury was unable to reach a unanimous verdict as to the charges for threatening the life of a public official and as a result the court declared a mistrial on those charges. (R.p.636-p.637). Judge Griffin sentenced Martin to four years' imprisonment with credit for time served. (R.p.660-p.661). A motion for reconsideration of the sentence and a memorandum in support of that motion were filed on Martin's behalf by Bakari T. Sellers and Alexandra Benevento, Esquires. (R.p.34-p.51). The State submitted a memorandum in opposition (R.p.52-p.56) and by order dated and filed October 5, 2022, the motion was denied. (R.p.4-p.6).

Martin timely filed a notice of intent to appeal her conviction and sentence and on October 20, 2022, she filed an emergency motion for appeal bond with Judge Griffin. (R.p.57-p.60). In an order dated and filed November 9, 2022, appeal bond was denied. (R.p.7-p.8). Martin subsequently submitted an appellate brief raising five issues on appeal. (Brief of Appellant). The State filed a brief in response (Brief of Respondent), and Martin filed a brief in reply. (Reply Brief of Appellant). The case was submitted without oral argument and on July 24,

[2] Throughout this return the State has included references to the Record on Appeal before the court of appeals and to individual documents submitted to or issued by that court rather than using citations to the Appendix because no Appendix has been served or filed by Petitioner pursuant to Rule 243(d), SCACR.

2024, in an unpublished, per curiam opinion the South Carolina Court of Appeals affirmed. *State v. Martin*, Op. No. 2024-UP-274 (Ct. App. filed July 24, 2024). On August 8, 2024, Martin filed a petition for rehearing (Petition for Rehearing) and by way of an order filed August 19, 2024, the court of appeals denied the petition for rehearing. (Order denying Rehearing).

On September 18, 2024, a petition for a writ of certiorari to the court of appeals was filed on Martin's behalf by Meredith Dyer McPhail and David Allen Chaney, Jr., Esquires of the American Civil Liberties Union Foundation of South Carolina, and by trial counsel, Dr. Sybil D. Rosado, Esquire. (Petition). This Return to Petition for a Writ of Certiorari, submitted on behalf of the State, now follows.

STATEMENT OF FACTS

Martin and a group she directed began protesting in Sumter in the aftermath of the George Floyd murder in Minneapolis. On May 31, 2020, Martin's actions shut down one of the busiest roads in Sumter. Even after multiple requests by officers to go to the sidewalk and get out of the road, Martin refused. Not only did she refuse to heed the request, but she began engaging and ultimately chest bumping officers who were seeking to move her to a safer location to allow traffic to resume its normal flow. (State's Exhibit 1). Interfering with traffic continued June 1, 2020, as Martin and others rode unsafely on top of multiple vehicles.

Subsequently, on June 2, 2020, while one group of protestors attempted to demonstrate unity and understanding with law enforcement, Martin and the group under her direction belittled them, harassed them, and attempted to spread disunity and hate. (State's Exhibit 2). Later the same evening, a group that she claimed to be leading prevented the normal business operations of a Sunoco gas station while confronting officers and screaming "It's attack time N*****." As a result of Martin's behavior and the group of persons she controlled, which included

significantly disrupting the operations of two gas stations while confronting officers and stopping traffic on one of the busiest roads in Sumter, Sumter County had to institute a 6:00 p.m. curfew on all residents. (State's Exhibits 1, 2, and 5; R.p.238-p.239). Sumter Police Department Chief Roark explained the curfew when he testified:

> The last thing that I wanted to recommend was to do a curfew 'cause in doing so, it closes businesses. . . . But as things began to escalate and continued to move forward, my concern was that we could have a situation where violent activity starts. And what I mean by that is, my concern was that from day one up to the night of the 2nd, which was the morning of the 3rd, when you saw the actions on the video, that it was becoming more and more volatile. . . . And the purpose to do that was to provide a time for things to calm down to prevent potential violent activity or destruction of property. We understand why people were upset. We understand why many people wanted protests. We also were hurt and appalled by the activity of the officers and their conduct. At the same time, there's about 45,000 people in this city and we've got to protect everybody.

(R.p.292-p.293).

On June 3, 2020, the escalation feared by Chief Roark continued. Martin yelled: "Y'all want war, y'all got it. Go call all our hitters now." (State's Exhibit 1; R.p.278). At this point on June 3, 2020 after multiple days of protests, Martin turns to the others gathered in protest, instructing them to call "all our hitters" and explaining "You tell them to get ready, everybody strapped. Everybody." Martin then directs her attention back to the police officers: "Y'all better be ready." (State's Exhibit 1; R.p.279). Unfortunately, she does not stop there. Instead, Martin continues: "Them vests ain't gonna save you. Some of us gon' be hurt, some of y'all gon' be hurt, and we're ready to die for this. We're tired of it. You better be ready to die for the Blue." (State's Exhibit 1; R.p.279). Pointing directly at officers she told them that their bulletproof vests would not save them and then threatened: "I'm dying for the Black. You better be ready to die for the Blue." (State's Exhibit 1; R.p.279).

CERTIORARI

Martin raises three primary arguments in her petition for a writ of certiorari, each of which was specifically addressed by the court of appeals either on issue preservation grounds or on its merits. She also makes various sub-arguments in support of her petition; however, Martin essentially rehashes the same general arguments that were raised to and ruled upon by the court of appeals – arguments that were adequately addressed in a well-reasoned, unpublished opinion. *State v. Martin*, Op. No. 2024-UP-274 (Ct. App. filed July 24, 2024). In her petition, Martin claims there are special and important reasons for this Court to grant certiorari, specifically contending the court of appeals "issued a novel ruling" that "diverged" from precedents of this Court and United States Supreme Court, "thereby allowing a conviction for constitutionally protected speech and a profoundly unjust sentence to stand." (Pet.p.4). The State disagrees and submits a review of the record, appellate briefs, and the opinion of the court of appeals fails to reveal any special or important reasons for this Court to exercise its discretion and issue a writ. Indeed, the court of appeals employed the proper error preservation rules and/or standard of review for each of the issues raised and properly addressed those issues in its opinion. The decision on each issue is consistent with precedent in South Carolina, there was no dissent in the court of appeals per curiam opinion, no actual conflict with prior decisions of this Court, and no substantial constitutional issues preserved for review.

Furthermore, as noted in the heading of the opinion, as an unpublished opinion it has no precedential value and should not be cited or relied upon as precedent. Therefore, it will neither directly nor materially impact other defendants in South Carolina. Indeed, the opinion was based on the specific facts and circumstances of Martin's case, facts which are unusual, if not unique. It will not prohibit or prevent any other defendant from raising a timely and properly preserved

challenge on First Amendment grounds, or any other basis, to a BOPHAN charge stemming from a protest or march. Thus, pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the court of appeals in this matter. Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special or important reasons."). Martin's petition for a writ of certiorari should be denied and dismissed.

ARGUMENT

I.

The Court of Appeals properly rejected Petitioner's argument that her conviction for BOPHAN should be vacated for violating the First Amendment and instead affirmed because: (1) the argument was not preserved for appellate review; (2) Petitioner failed to identify any valid exception to our error preservation requirements; and (3) in any event, any independent examination of the factual basis for the conviction to ensure it is not violative of the First Amendment would conclude there is ample evidence of behaviors constituting BOPHAN which do not encroach on the First Amendment.

In her petition, Martin raises multiple claims arguing the State failed to provide sufficient evidence of BOPHAN that did not involve constitutionally protected behavior. Yet, as recognized by the Court of Appeals, any challenge to the sufficiency of the evidence is not preserved for review on appeal. Furthermore, to the extent the Court of Appeals sought, or this Court seeks, to perform an independent examination of Martin's conviction to ensure it did not impermissibly encroach upon the First Amendment, there is ample evidence in the record of behaviors outside the protection of the First Amendment which constitute proof of BOPHAN.

The Issue is not Preserved

Initially, and as properly recognized by the Court of Appeals, any claim regarding the sufficiency of the evidence and the failure of the trial court to ensure the conviction did not encroach on Martin's First Amendment rights was not preserved for review on appeal. Martin never raised a directed verdict motion related to the BOPHAN charge. She raised a directed verdict claim as it relates to both the riot and threatening charges, but not as to BOPHAN. *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."). A defendant cannot argue on appeal an issue in support of her directed verdict motion when the issue was not presented to the trial court below. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.").

In her petition, Martin relies on the United State Supreme Court's opinion in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), to assert the court of appeals was obligated to conduct an independent review of the record to ensure her conviction was not in violation of the First Amendment regardless of whether the issue was properly preserved for appellate review. She takes issue with the conclusion that this issue was **not** preserved despite the facts that she never requested a directed verdict on the BOPHAN charge and her motion to dismiss the BOPHAN charge did not include a First Amendment argument. Martin argues the decision of the court of appeals was "novel, consequential, and incorrect," and claims: "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." (Pet.p.4-p.5).

To the contrary, it is well established in South Carolina that constitutional questions must be preserved like any other issue on appeal. *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012). This requirement clearly extends to First Amendment challenges to a criminal conviction. *See State v. Gault*, 375 S.C. 570, 573, 654 S.E.2d 98, 99–100 (Ct. App. 2007) ("On appeal to the circuit court, Gault also argued that his speech when confronting the officers could not constitute public disorderly conduct because it did not rise to the level of 'fighting words,' and was therefore protected by the First Amendment pursuant to *State v. Perkins,* 306 S.C. 353, 355, 412 S.E.2d 385, 386 (1991) ('[A]ppellants cannot be punished under § 16-17-530(a) for voicing their objections to sheriff's officers where the record indicates no use of fighting words.'). Gault also advances this argument in his appeal, however, because the issue was not raised before the magistrate, it is not preserved for our review."). A cursory search for caselaw from other jurisdiction similarly finds the necessity for a party to preserve a First Amendment issue for appeal before an appellate court will review such a challenge. *See, e.g., Commonwealth v. Spone*, 305 A.3d 602, 609 (Pa. 2023) (concluding Spone failed to preserve a First Amendment challenge for appellate review where "at no point below did [Spone] argue that her charges should be dismissed on First Amendment grounds, raise the First Amendment as part of her defense at trial, or argue in a post-sentence motion that her convictions must be vacated on First Amendment grounds."); *Matter of J.A.D.*, 872 S.E.2d 374, 382-83 (N.C. App. 2022) (acknowledging the issue preservation requirement for a First Amendment challenge to a juvenile adjudication but finding the argument was adequately preserved because it was sufficiently apparent from the context); *Ex parte Nuncio*, 662 S.W.3d 903, 914-15 (Tex. Crim. App. 2022) (detailing issue preservation requirements for a First Amendment overbreadth challenge but finding the objection had the necessary specificity to preserve the issue for appeal).

Additionally, consideration of the trial court record described in *Bose* supports the ruling of the court of appeals because in *Bose* the issue *was* clearly preserved. In *Bose*, the United States Supreme Court noted:

> In its lengthy, detailed opinion on the merits of the case, 508 F.Supp. 1249 (1981), the District Court ruled in respondent's favor on most issues. Most significantly, the District Court ruled that the petitioner is a "public figure" as that term is defined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 345, 351–352, 94 S.Ct. 2997, 3008, 3009, 3012–3013, 41 L.Ed.2d 789 (1974), for purposes of this case and therefore the First Amendment, as interpreted in *New York Times Co. v. Sullivan*, 376 U.S. at 279–280, 84 S.Ct. at 725–726, precludes recovery in this product disparagement action unless the petitioner proved by clear and convincing evidence that respondent made a false disparaging statement with "actual malice."

Bose, 466 U.S. at 489–90. Martin contends the particular language in *Bose* that an independent review is required in all "*cases* raising First Amendment issues" means issue preservation should not be required, yet in focusing on the word "cases" she fails to recognize the importance of the word "raising" that follows. An issue not *raised* to and ruled upon by the trial court is not preserved for appellate review. *Kennerly*, 331 S.C. at 455, 503 S.E.2d at 221; *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. As correctly recognized by the court of appeals, the United Supreme Court in *Bose* set forth the standard of review for considering the constitutional issue, it did not hold a constitutional issue is exempt from preservation requirements. No exemption applies here; therefore, Martin's argument was properly denied as unpreserved.

The Evidence Supports Martin's Conviction

Additionally, even if the Court of Appeals determined, or this Court determines, to conduct its own examination of the record, the evidence demonstrates the BOPHAN conviction was simply not based on protected speech. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Initially, Martin and the group following her lead engaged in a protest down the middle of a busy road, refusing to move to a sidewalk or out of the roadway. Instead of moving, Martin engaged in a chest bumping with an officer who was simply trying to reopen the road to oncoming traffic. The following day, she again interrupted traffic and engaged in dangerous behavior on the same street as she rode on top of a moving vehicle. (State's Exhibits 1 & 2).

In examining the constitutional reach and limitations of the First Amendment, the United States Supreme Court has explained: "The fundamental right to speak, however, does not leave people at liberty to publicize their views 'whenever and however and wherever they please.'" *Wood v. Moss*, 572 U.S. 744, 745 (2014) (quoting *United States v. Grace*, 461 U.S. 171 (1983)). As one federal district court succinctly noted: "The First Amendment does not entitle a citizen to trespass, block traffic, or create hazards for others." *Frye v. Police Dep't of Kansas City, Mo.*, 260 F.Supp.2d 796, 799 (W.D. Mo. 2003). As the United States Supreme Court previously articulated:

> When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated, in *Cox v. State of Louisiana,* 'We emphatically reject the notion that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471.

Walker v. City of Birmingham, 388 U.S. 307, 316 (1967). As seen in the video on State's Exhibit 1, much of the events of May 31 and June 1 took place down the center of a busy street, ignoring requests by law enforcement to exit the road to allow cars to pass, and even became physical

with Martin chest bumping officers. This behavior is beyond the bounds protected by the First Amendment, and it can and appropriately did give rise to the charge of BOPHAN.

Additionally, as noted above, the First Amendment does not allow protestors to trespass and to cause harm to businesses during their protest. In this case, both the El Cheapo and Sunoco gas stations had their operations interrupted by Martin and the protests she was leading. (State's Exhibit 5). Again, this is the type of behavior that is not protected by the First Amendment.

Finally, the fighting words and threats directed at officers on June 3rd go well beyond protected speech. *See Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (" 'True threats' of violence is another historically unprotected category of communications. . . . True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'"); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (finding advocacy "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" and concluding "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."). In the instant case, even if the court of appeals or this Court independently considers the entirety of the record, the conviction for BOPHAN was supported by ample evidence demonstrating behavior beyond the protection of the First Amendment.

Martin attempts to compare the facts of this case to a United States Supreme Court decision from the civil rights movement, *Edwards v. South Carolina*, 372 U.S. 229 (1963). That case and its facts, however, are vastly different than the behaviors of Martin during these protests. In *Edwards*, 187 defendants were convicted of breach of peace. They entered the State House grounds, walked in an "orderly way" for 30-45 minutes while carrying placards, and there

was "no obstruction of pedestrian or vehicular traffic." *Edwards*, 372 U.S. at 230-232. As discussed, there was nothing quiet or polite about Martin's behavior and significant issues occurred to a private business and traffic based on the protestors' complete disregard for the remaining public.

This case is closer to, but still much more severe than, the disorderly conduct discussed by the United States Supreme Court in *Feiner v. New York*, 340 U.S. 315, 318 (1951). In *Feiner*, the situation was more hostile than in *Edwards*. The defendant urged people to "rise up in arms and fight for equal rights." As the crowd became more agitated, police sought to have him get down off a box and disperse the crowd. The crowd blocked pedestrian movement and spilled into the street interfering with traffic. The defendant ignored the request to cease multiple times and was arrested. The Supreme Court upheld his conviction for disorderly conduct even against a challenge based on the First Amendment.

Here, Martin's behavior went well beyond the protections afforded by the First Amendment. She interfered with traffic, chest bumped officers seeking merely to clear a roadway, confronted officers in the middle of gas station parking lots interfering with the usual course of the businesses, and directly threatened to get "hitters" who were "strapped" with guns to go to "war" and hurt or kill law enforcement officers, telling them they "better be ready to die for the Blue." (State's Exhibits 1, 2, & 5). Her behavior is certainly not the behavior demonstrated in *Edwards* and, instead, qualifies as a breach of the peace of a high and aggravated nature. The Court of Appeals properly affirmed, and certiorari should be denied.

II.

The Court of Appeals properly rejected Petitioner's argument that her BOPHAN conviction must be reversed because the trial court failed to instruct the jury about her First Amendment defense and instead affirmed because: (1) the issue was not preserved for appellate review; and (2) in any event, the trial court did not err in failing to give the requested jury instruction regarding the First Amendment.

In her petition for a writ of certiorari, Martin argues the court of appeals erred in rejecting her argument—that her BOPHAN conviction should be reversed because the trial court failed to instruct the jury about her First Amendment defense—on grounds the issue was not preserved. She contends this conclusion is in conflict with "well-established, decades-old" precedent from this Court, precedent the court of appeals presumably and inexplicably ignored or missed. To the contrary and just as the court of appeals recognized, under well-established, decades-old issue preservation precedent, Martin failed to preserve this issue for appellate review because she failed to object to the First Amendment charge that was given to the jury.

On appeal to the court of appeals, Martin argued the trial court erred in failing to give a jury instruction related to the First Amendment directly connected to the jury charge for BOPHAN. But as properly found by the court of appeals, the issue is not preserved for review. In any event, even if preserved, the jury instruction when read as a whole properly charged the jury.

As to preservation, the trial court asked for proposed jury instructions from the parties. Martin provided proposed jury instructions. (R.p.16). The jury instruction related to BOPHAN provided the suggested elements of the offense and then a series of case citations with parentheticals and general case discussion related to the First Amendment. It did not provide the discussion regarding the First Amendment in a manner consistent with an appropriate jury instruction. Further, the trial court specifically noted:

> I'll read appropriate portions of Ms. Rosado's charge where that -- where that concept is conveyed to the jury. I think a lot of, Ms. Rosado, what you've submitted is while certainly good law, I think some of it is commentary by the Court, you know. I'm going to limit it to elemental portions of the law, so.

(R.p.555). The trial court also explained:

> I'm making my notes as to what I think is appropriate charge from what's been submitted. I'm really kind of -- I've stricken through -- and I'm going to be working on this -- here's what I'll do. As you're making your closings, I will do my best to make it clear on what's been submitted, what I'm charging and what I'm not. We'll take a break after the closings. We'll make copies of the charge and I'll give them to you before I charge on the law.

(R.p.559). Afterward, Martin's counsel responded: "Thank you, Your Honor" indicating her acceptance of the procedure. (R.p.559).

After closing arguments were completed, the trial court provided the parties with a copy of the proposed jury instructions to be given. (R.p.606-p.607). After brief discussion between the trial court and parties that did not relate to the BOPHAN jury instruction, the judge charged the jury. At no point after receiving the court's proposed instructions did Martin indicate the instruction on BOPHAN was lacking, deficient, insufficient, or problematic as it related to the First Amendment. Even after the trial court charged the jury, Martin never indicated any issue with regard to the charge to the jury on the First Amendment. As a result, she did not raise any objection to the trial court and cannot now complain on appeal. *See State v. Avery*, 333 S.C. 284, 296, 509 S.E.2d 476, 483 (1998) (stating when an instruction as given is inadequate, a party must object at the completion of the instructions in order to preserve the issue for review); *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (to preserve objection to jury charge, defendant must raise the issue at trial).

Even if preserved, the jury charge as a whole is a proper statement of the law and correctly advised the jury on how to consider the First Amendment as it related to all three charges. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Mattison*, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013).

In the instant case, the trial court defined the elements of the three offenses. (R.p.619-p.622). After charging on the elements of the three offenses, the court explained to the jury the impact of the First Amendment and its protections of speech. (R.p.622-p.623). As a result, the jury would understand that the First Amendment protection "protects a significant amount of verbal criticism in challenge directed at police officers." The jury was explained the requirement that the words had to make it "inherently likely under circumstances to cause an average person to react with violence and playing no role in the expression of ideas" in order to form the basis of a conviction. (R.p.622). As a result, the jury was properly charged regarding the role of the First Amendment and the type of speech which could still result in Martin's conviction. For all of these reasons, the court of appeals properly rejected Martin's argument and affirmed. Certiorari should be denied.

III.

The Court of Appeals properly concluded that Petitioner's four-year prison sentence with a possibility of parole in one year did not violate the Eighth Amendment's prohibition against cruel and unusual punishment because it was proportionate considering the crime for which she was convicted, her prior criminal history, and the sentence given in *Simms*.

In her petition, Martin argues the court of appeals erred by affirming the trial court's imposition of a four-year prison sentence for BOPHAN. She contends such a sentence for "nonviolent, nondestructive protest is antithetical to the values enshrined in the First and Eighth Amendments" and that it is grossly disproportionate. The State disagrees. Just as the court of appeals recognized, the trial judge committed no error because the sentence of four years' imprisonment with a possibility of parole in one year was not in violation of the Eighth Amendment.

Martin contends the trial court erred in imposing a four-year sentence on her because it violated her Eighth Amendment rights as grossly disproportionate. The sentence was imposed, in significant part, based on Martin's prior criminal record and the inability of prior sentences of probation to prevent her continued criminal behavior. In the context of the crime of conviction and her prior records, Martin's sentence was not grossly disproportionate to the crime and the need for punishment consistent with the court's ability to properly punish for recidivism.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The South Carolina Supreme Court in *State v. Harrison*, 402 S.C. 288, 298, 741 S.E.2d 727, 732 (2013) concluded, consistent with other courts, that Justice Kennedy's concurrence in *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991), is the controlling opinion for determination of whether a sentence violates the Eighth Amendment. Justice Kennedy explained:

> All of these principles-the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors-inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J. concurring in part and concurring in judgment). As the South Carolina Supreme Court articulated:

> Thus, in analyzing proportionality under the Eight Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality. If no such inference is present, the analysis ends. In the **rare instance** that this threshold comparison gives rise to such an inference, intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions. Courts should use this comparative analysis to confirm the gross disproportionality inference, and not to develop an inference when one did not initially exist.

State v. Harrison, 402 S.C. 288, 299–300, 741 S.E.2d 727, 733 (2013) (emphasis added).

In the instant case, no inference of gross disproportionality exists. There is no fixed statutory range for BOPHAN. Instead, it is controlled by section 17-25-30 which provides:

> In cases of legal conviction when no punishment is provided by statute the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.

S.C. Code Ann. § 17-25-30 (Supp. 2020). The sentence of four years' incarceration, which pursuant to section 24-21-610 means Martin would be eligible for parole after serving only one-fourth of the sentence,[3] was proportional to the facts and circumstances of this case—especially considering Martin's prior convictions and failure to rehabilitate with sentences of probation.

[3] Incidentally, Martin has now twice been considered and rejected for parole by the South Carolina Board of Paroles and Pardons.

As discussed above, Martin's behaviors were not as innocent and "undisputedly peaceful and uneventful" as claimed in her brief to the court of appeals. (Brief of Appellant, p.33). She and the group she controlled shut down a busy thoroughfare, interrupted the daily operations of two gas stations, and directly threatened the lives of law enforcement officers. As a result of her escalating behaviors, Sumter was forced to impose a curfew affecting all residents and businesses.

Most significant, however, is the trial court's consideration of Martin's prior criminal record. *See State v. Williams*, 380 S.C. 336, 348, 669 S.E.2d 640, 647 (Ct. App. 2008) ("Finally, the United States Supreme Court has also held a state is justified in punishing a recidivist more severely than it does a first offender.") (quoting *Riggs v. California*, 525 U.S. 1114 (1999)). The convictions presented to the court included:

1. Retail Theft – Illinois - 2008
2. Public Disorderly Conduct – Wisconsin - 2011
3. Possession of Short Barreled Shotgun – Wisconsin - 2011
4. Shoplifting – Georgia - 2014
5. Shoplifting Enhanced – South Carolina - 2015
6. Public Disorderly Conduct – South Carolina - 2015
7. Shoplifting – South Carolina - 2015
8. Leaving the Scene of an Injury or Accident and Willfully Causing Bodily Harm – Iowa - 2019.

(R.p.4-p.6). For these crimes, Martin repeatedly received probationary sentences and was even on probation at the time of her arrest for BOPHAN. The trial court specifically considered this and found: "Probation has not been a deterrent to further criminal activities for [Martin]. An active prison sentence was appropriate in this instance." (R.p.4-p.6). Given the facts of this case, and Martin's prior criminal history, the circumstances do not give rise to the "rare" inference of gross disproportionality required to continue the analysis. As a result, Martin failed to demonstrate her sentence was grossly disproportionate to the facts and circumstances of her

crime—particularly the circumstances of her prior conviction which resulted in probationary sentences and provided no deterrence from future criminal conduct. Accordingly, the court of appeals properly affirmed, and certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, the State submits this Court should deny the petition for a writ of certiorari in its entirety and let stand the decision of the South Carolina Court of Appeals. If the Court grants the petition for a writ of certiorari, the State would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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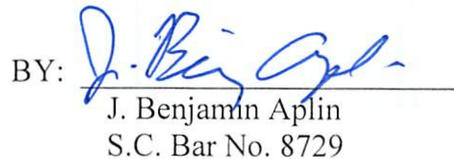
BY: 
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