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Casenotes: Criminal Procedure — Appellate Review — Plain Error Rule — Advisory Instruction to Jury Suggesting Unavailability of "Not Guilty" Alternative Constitutes Reviewable Plain Error despite Absence of Trial Objection and Presence of "Not Guilty" Option on Jury's Verdict Sheet. State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980)

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CASENOTES

CRIMINAL PROCEDURE — APPELLATE REVIEW — PLAIN ERROR RULE — ADVISORY INSTRUCTION TO JURY SUGGESTING UNAVAILABILITY OF "NOT GUILTY" ALTERNATIVE CONSTITUTES REVIEWABLE PLAIN ERROR DESPITE ABSENCE OF TRIAL OBJECTION AND PRESENCE OF "NOT GUILTY" OPTION ON JURY'S VERDICT SHEET. *STATE v. HUTCHINSON*, 287 Md. 198, 411 A.2d 1035 (1980).

I. INTRODUCTION

Maryland appellate courts ordinarily restrict their consideration of claims of error to those raised and decided in a trial court.[1] Under the Maryland Rules of Procedure, this limitation upon the review of civil and criminal cases is specifically applied to appeals founded upon allegedly erroneous jury instructions.[2] Appellate courts normally do not review disputed jury instructions unless the complaining party has raised a timely objection to them at

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1. MD. R.P. 885, 1085; *see* Squire v. State, 280 Md. 132, 368 A.2d 1019 (1977). Maryland Rule 885 governs review by the court of appeals. The rule states:

   > This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court; but when a point or question of law had been presented to the court and a decision of that point or question of law by this Court is necessary or desirable for the guidance of the circuit court, or to avoid the expense and delay of another appeal to this Court, the point or question of law may be decided by this Court even though it was not decided by the circuit court. When jurisdiction cannot be conferred on this Court by waiver or consent of the parties, a question as to the jurisdiction of the circuit court may be raised and decided in this Court, whether or not raised and decided in the circuit court.

   MD. R.P. 885. Maryland Rule 1085, which governs review by the court of special appeals, is substantially the same as rule 885.

2. MD. R.P. 554, 757. Maryland Rule 757 applies to criminal cases. Section f of this rule provides:

   > If a party has an objection to any instructions, to any omission therefrom, or to the failure to give an instruction he shall make the objection on the record before the jury retires to consider its verdict and shall state distinctly the matter or omission, or failure to instruct to which he objects and the grounds of his objection. Upon request of any party, the court shall receive objections out of the hearing of the jury.

   MD. R.P. 757(f). Section h of the same rule states:

   > An objection is not reviewable as of right unless it is made in compliance with section f of this Rule. An appellate court, either upon its own motion or upon the suggestion of a party, may take cognizance of and correct any plain error in the instructions, material to the rights of the defendant even though the error was not objected to as provided by section f of this Rule.

   MD. R.P. 757(h). Maryland Rule 554 sets forth the rules governing appeal of erroneous jury instructions in civil cases. The federal counterparts to Maryland Rules 554 and 757 are rule 51 of the Federal Rules of Civil Procedure and rule 30 of the Federal Rules of Criminal Procedure respectively.

trial, thereby giving the trial judge an opportunity to correct any deficiency before the jury retires to deliberate.[3] An exception to this rule permits discretionary review of erroneous jury instructions in criminal cases.[4] Pursuant to this exception, a Maryland appellate court may, of its own discretion, recognize and correct any "plain error"[5] in a trial judge's jury instructions that is material to the rights of the accused, even though the defendant did not properly object to the error at trial.[6] This rule of law is more commonly known as the plain error rule.

Maryland appellate courts face a recurrent problem in deciding when to invoke their discretion under the plain error rule. In the past, this discretion has been guardedly exercised by limiting review to exceptional errors.[7] Moreover, in some cases the courts have sought to limit plain error review by articulating precise

3. *See* MD. R.P. 757(f) & (h). See note 2 *supra*.

4. MD. R.P. 757(h). See note 2 *supra*. This casenote focuses on review by Maryland appellate courts of erroneous jury instructions in criminal cases when no prompt objection has been raised at trial. The rule governing appeals of unobjected to errors in jury instructions in civil cases is Maryland Rule 554(e). That rule does not contain a plain error provision similar to the one in Maryland Rule 757(h). Commentators have noted that exceptions to the general rule requiring trial objection to preserve issues for appeal are more readily permitted in criminal cases than in civil ones because in a criminal trial human life or liberty are involved and the consequences of an error tend to be more severe than in civil litigation. Orfield, *Criminal Appeals: Technicality and Prejudicial Error*, 27 J. CRIM. L.C. & P.S. 668, 673 (1937); Note, *Appellate Review in Criminal Cases of Points Not Raised Below*, 54 HARV. L. REV. 1204, 1205 (1941). Appellate court consideration of issues not raised in civil trials is discussed in Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951).

   For an overview of the application of the general rule to errors in criminal proceedings other than incorrect jury instruction (*i.e.*, unobjected to errors in jurisdiction, unconstitutionality of pertinent statutes, defective indictments, misconduct of trial judge or prosecuting attorney, admission of inadmissible evidence), see Note, *Appellate Review in Criminal Cases of Points Not Raised Below*, 54 HARV. L. REV. 1204 (1941). *See also* Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts. 1-3), 7 WIS. L. REV. 91,160 (1932), 8 WIS. L. REV. 147 (1933); Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1959).

5. The Court of Special Appeals of Maryland has spoken of plain error in the following way: "Any error, once recognized, may be called plain error, and unless it can be held to be harmless, it must be considered as material to the rights of the accused." Brown v. State, 14 Md. App. 415, 418, 287 A.2d 62, 63, *cert. denied*, 265 Md. 736 (1972). The court appears to distinguish between plain error in its literal sense and plain error as a term of art. Literally, plain error is any error that is obvious or apparent to a reviewing court from its examination of the record. As a term of art, plain error is synonymous with reviewable plain error. Reviewable plain error is error committed in a trial court that was not objected to, but which, because it is harmful in some material way to the rights of the accused, may be reviewed by an appellate court pursuant to Maryland Rule 757(h). Maryland courts have made it clear that not every instance of plain error, in the literal sense of the term, is reviewable. *See* notes 35-41 and accompanying text *infra*. In this casenote, plain error, unless otherwise indicated, is used in its term of art sense.

   In other jurisdictions, plain error is sometimes called "basic" or "fundamental" error. *See, e.g.*, Comment, *Appeal of Errors in the Absence of Objection: Pennsylvania's Fundamental Error Doctrine*, 73 DICK. L. REV. 496, 500 (1969).

6. MD. R.P. 757(h). See note 2 *supra*.

7. *See, e.g.*, Squire v. State, 280 Md. 132, 368 A.2d 1019 (1977); Dempsey v. State, 277 Md. 134, 355 A.2d 455 (1976).

standards for determining when to recognize a trial court error not properly preserved for appeal.[8] In the recent case of *State v. Hutchinson*,[9] the Court of Appeals of Maryland addressed the issue of whether the omission of a not guilty verdict alternative from the jury instructions in a criminal case, coupled with a misstatement by the trial judge as to the alternatives included on the verdict sheet, constituted reviewable plain error in light of the fact that these improprieties were never objected to at trial and that their detrimental impact was arguably mitigated by other advice given the jury. In the course of holding that the error was reviewable and that the defendant was entitled to a new trial, the court summarily rejected the line of Maryland cases that established rigid formulas to govern application of the plain error rule.[10] Instead, the court chose to be guided in its exercise of discretionary review by a number of broad and flexible considerations, the most important of which was whether the error vitally affected the accused's right to a fair and impartial trial.[11]

This casenote explores the historical development and applications of the plain error rule, evaluates the strengths and weaknesses of the *Hutchinson* court's decision, and examines the possible consequences of the court's expansive reading of the plain error rule.

II. THE FACTUAL BACKGROUND OF *HUTCHINSON*

Following a jury trial, defendant Hutchinson was convicted of rape in the second degree.[12] His conviction was overturned by the Court of Special Appeals of Maryland, which ordered a new trial, because of inadequacies in the trial judge's oral instructions to the jury.[13] The jury had been instructed on the different offenses of which it could find Hutchinson guilty, but the trial judge at no time told the jury in precise terms that it could find Hutchinson not guilty.[14] In addition, the contents of the jury's verdict sheet, which listed "not guilty" among three possible verdict choices, were misstated by the trial judge who told the jury members that the sheet contained "two possible verdicts, Count One guilty of rape in the first degree and Count Two guilty of rape in the second degree."[15] Earlier in the course of the instructions, however, the

8. *See* Reynolds v. State, 219 Md. 319, 149 A.2d 774 (1959); Wolfe v. State, 218 Md. 449, 146 A.2d 856 (1958); Brown v. State, 14 Md. App. 415, 287 A.2d 62, *cert. denied*, 265 Md. 736 (1972); text accompanying notes 42-51 *infra*.
9. 287 Md. 198, 411 A.2d 1035 (1980).
10. *Id.* at 203, 411 A.2d at 1038. *See* notes 42-51 and accompanying text *infra*.
11. 287 Md. 198, 202, 411 A.2d 1035, 1038 (1980).
12. *Id.* at 199, 411 A.2d at 1036.
13. Hutchinson v. State, 41 Md. App. 569, 578, 398 A.2d 451, 456 (1979), *aff'd*, 287 Md. 198, 411 A.2d 1035 (1980).
14. State v. Hutchinson, 287 Md. 198, 201, 411 A.2d 1035, 1037 (1980).
15. *Id.* (emphasis omitted).

jury was informed that a presumption of innocence attends a criminal defendant throughout his trial and that the state must meet its burden of proving beyond a reasonable doubt every element of the offense charged before a verdict of guilty may be returned.[16] No objection to the omission of a not guilty alternative from the verbal instructions or the misstatement of the verdict sheet's contents was made at trial.[17] The court of special appeals nevertheless concluded that the errors at issue constituted the type of plain error that warrants appellate court correction even absent trial objection.[18] It therefore awarded Hutchinson a new trial.[19] The court of appeals affirmed the decision of the intermediate appellate court, holding that the court of special appeals did not abuse its plain error discretion in choosing to review the disputed inadequacies in the *Hutchinson* instructions.[20]

III. EVOLUTION OF THE PLAIN ERROR RULE

The plain error rule evolved as an exception to the general rule that points or questions not raised at trial will not be considered on appeal. In order to facilitate an understanding of the exception, the history of the general rule in Maryland will first be explored.

Before 1825, the court of appeals had a duty to notice all errors apparent on the face of the record even if they were not brought to the attention of a lower court.[21] During the 1825 Session of the Maryland General Assembly, a law was enacted that permitted the court of appeals to consider an error on appeal only if it was apparent from the record that the point or question had first been raised in and decided by a lower court.[22] Originally, application of this rule was limited to civil cases[23] because there was

16. *Id.* at 200-01, 411 A.2d at 1036-37.
17. *Id.* at 200, 411 A.2d at 1036.
18. Hutchinson v. State, 41 Md. App. 569, 578, 398 A.2d 451, 456 (1979), *aff'd*, 287 Md. 198, 411 A.2d 1035 (1980).
19. *Id.*
20. State v. Hutchinson, 287 Md. 198, 208, 411 A.2d 1035, 1041 (1980).
21. Mundell v. Perry, 2 G. & J. 193 (Md. 1830) (appeal filed in 1823 and thus not controlled by the 1825 Act); Speake v. Sheppard, 6 H. & J. 81 (Md. 1823).
22. Act of February 16, 1826, ch. 117, 1825 Md. Laws 92. Although this law was an act of the 1825 Session of the General Assembly of Maryland, it was actually passed on February 16, 1826.
23. For early application of this rule in a civil case, see Cushwa v. Cushwa's Lessee, 5 Md. 44, 54 (1853).

no firmly established right of appeal in criminal cases before 1872.[24] Once the right to appeal a criminal decision was recognized in Maryland, the limitation on review was extended to criminal cases.[25]

Current court rules of procedure applicable to both civil and criminal cases in Maryland reaffirm the doctrine embodied in the 1825 Act by indicating that an issue must generally be presented to and decided by a lower court in order to be considered properly preserved for appeal.[26] This procedure is intended to promote orderly administration of the law.[27] Justice is served by avoiding the expense and delay of appeals and new trials based on errors that might have been corrected by the trial court.[28] Moreover, the procedure seems to promote fair treatment of all parties by encouraging full ventilation of all issues at trial and by discouraging surprise assertion and consideration on appeal of issues not debated in a lower court proceeding. Thus, Maryland courts have ruled that a party who fails to exercise his option to object to a particular error while the matter is still within the power of the trial judge to correct is usually deemed to have waived the error and is estopped from raising it on appeal.[29]

To preserve a claim of erroneous jury instructions in a criminal case, Maryland court rules generally require that an objection be made before the jury retires to consider its verdict.[30] The grounds for the objection must be stated distinctly,[31] and

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24. *See* Mitchell v. State, 82 Md. 527, 530-31, 34 A. 246, 246 (1896). Some criminal appeals were permitted in certain limited situations of relative insignificance. *Id.* In 1872 the Maryland General Assembly enacted a law permitting either the state or the accused in a criminal case to except to any court ruling at trial. Act of April 1, 1872, ch. 316, 1872 Md. Laws 503 (current version at MD. CTS. & JUD. PROC. CODE ANN. § 12-301 (1980)). In 1945 the Court of Appeals of Maryland adopted a rule that made formal bills of exceptions to lower court rulings unnecessary to properly preserve issues for appeal. R. Ct. App. 17, MD. ANN. CODE (Flack Supp. 1941-1947) (current version at MD. R.P. 522(e)). This rule applies today to both civil and criminal cases. MD. R.P. 522, 761. To obtain review of an issue on appeal, it is still usually necessary, however, to make a prompt objection and to obtain a lower court ruling on the objection. *See* Davis v. State, 189 Md. 269, 55 A.2d 702 (1947).
25. *E.g.*, Swann v. State, 192 Md. 9, 11, 63 A.2d 324, 325-26 (1949); Davis v. State, 189 Md. 269, 273, 55 A.2d 702, 704 (1947).
26. MD. R.P. 885, 1085; *see* Squire v. State, 280 Md. 132, 368 A.2d 1019 (1977). See note 1 *supra.*
27. Brice v. State, 254 Md. 655, 661, 255 A.2d 28, 31 (1969). For a discussion of the similar purposes of predecessor rules to rules 885 and 1085, see Basoff v. State, 208 Md. 643, 119 A.2d 917 (1956) (interpreting former rule 9 of the Rules of the Court of Appeals); Ward v. Schlosser, 111 Md. 528, 75 A. 116 (1909) (discussing art. 5, § 9 of the 1904 Code, the predecessor to art. 5, § 9 of the 1951 Code from which rules 885 and 1085 are, in part, derived).
28. Davis v. State, 189 Md. 269, 273, 55 A.2d 702, 704 (1947).
29. *See, e.g.*, Banks v. State, 203 Md. 488, 495, 102 A.2d 267, 271 (1954). A ruling on the objection must be obtained from the trial court in order to preserve the matter for appeal because, without a firm ruling by the lower court, there is nothing for an appellate court to review. Davis v. State, 189 Md. 269, 273, 55 A.2d 702, 704 (1947).
30. MD. R.P. 757(f) & (h).
31. *Id.* 757(f). See note 2 *supra.*

appeal of right is limited to the grounds so advanced.[32] This rule has a salutary purpose. It is designed to furnish the trial judge with an opportunity to correct "inadvertent omissions or inaccuracies in his instructions" while the matter is still before him.[33] Provision is made, however, for discretionary review by an appellate court of any "plain error" in a trial court's instructions to a jury that is material to the rights of the criminal defendant regardless of whether the error was objected to at trial.[34] Thus, failure to observe established procedure for preserving one's right to appeal does not necessarily preclude appellate review of an issue.

Rule 757 of the Maryland Rules of Procedure is the source of appellate court authority to review plain error in a criminal case.[35] Determination of the existence of reviewable plain error under rule 757(h) involves a three-stage process. First, the court must ascertain the existence of an unobjected to mistake that is apparent on the face of the record; that is, it must determine the existence of plain error in the literal sense of that term.[36] Second, the court

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32. MD. R.P. 757(h). See note 2 *supra*.
33. Parker v. State, 4 Md. App. 62, 67, 241 A.2d 185, 188 (1968), *appeal after remand*, 7 Md. App. 167, 254 A.2d 381 (1969), *cert. denied*, 402 U.S. 984 (1971).
34. MD. R.P. 757(h). It is important to note at this juncture that, although the purpose behind the portion of rule 757 requiring objection at trial has been distinctly stated, *see* text accompanying note 33 *supra*, no Maryland court to date has clearly and unequivocally articulated the purpose behind that portion of rule 757 (or its predecessors) which allows discretionary review of erroneous instructions to which no trial objection is made. This lack of explicitly stated purpose is compounded by the absence of any clear judicial declaration regarding which portion of the rule is to be given priority. These voids have probably contributed to the varied interpretations and applications of the plain error rule in the past. The inclusion of a provision for discretionary review of plainly erroneous jury instructions in earlier rules, from which the current rule 757 is derived, appears to reflect a recognition on the part of the draftsmen of those rules that, as important as courtesy to the trial judge and proper observance of procedural rules are, it is even more essential that the defendant receive a fair trial, free of harmful error. The plain error rule is designed to furnish this protection, yet no clear judicial enunciation of this purpose exists in Maryland to furnish guidance for appellate courts confronted with the question of when to invoke their powers of discretionary review. Had the design of the plain error rule been clarified at an earlier time and had this overall scheme been perceived by courts in the past, instances of inconsistent application of the rule might have been minimized and Maryland courts might not have felt compelled to formulate hard-and-fast rules to govern the exercise of discretionary appellate review of plain error. For a discussion of the cases that have formulated these strict and often inappropriate standards, see notes 42-51 and accompanying text *infra*.

    The plain error rule is complimented by the right to effective assistance of counsel, guaranteed by the sixth amendment to the United States Constitution, *see* Powell v. Alabama, 287 U.S. 45 (1932), because both are designed to assure that a criminal defendant is protected from inadequate representation at trial and thereby receives the fair trial to which he is constitutionally entitled.
35. *See* note 2 *supra*.
36. *See, e.g.*, Brown v. State, 14 Md. App. 415, 287 A.2d 62, *cert. denied*, 265 Md. 736 (1972). See note 5 *supra*.

must evaluate the prejudicial nature of the error to determine if it is material to the rights of the accused.[37] In other words, it must determine that the error was harmful to the defendant.[38] Maryland courts have made it clear, however, that even in those situations in which an error in jury instructions has resulted in some prejudice to a defendant, plain error review is not necessarily warranted.[39] Rule 757(h) states that appellate courts "may" review such errors;[40] it does not mandate review. Because discretion to review still exists even when an error results in some prejudice to

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37. Brown v. State, 14 Md. App. 415, 418, 287 A.2d 62, 63, *cert. denied*, 265 Md. 736 (1972). The *Hutchinson* court equated the phrase "material to the rights of the defendant" used in Maryland Rule 757(h) with the phrase "vitally affecting his right to a fair and impartial trial." 287 Md. 198, 202, 411 A.2d 1035, 1038 (1980).

38. *See* Brown v. State, 14 Md. App. 415, 418, 287 A.2d 62, 63, *cert. denied*, 265 Md. 736 (1972). The court in *Brown* stated that "unless [plain error in its literal sense] can be held to be harmless it must be considered material to the rights of the accused." *Id.*

An examination of the relationship between the plain error rule and the doctrine of harmless error may be helpful. The doctrine of harmless error appears to focus on whether an error is reversible, while the plain error rule, as expressed in Maryland Rule 757(h), addresses whether an error is reviewable. *See* Dempsey v. State, 277 Md. 134, 355 A.2d 455 (1976). The test in Maryland for determining the harmlessness of an error under the harmless error doctrine was set forth in Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976):

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated.

Id. at 659, 350 A.2d at 678. Chief Judge Murphy's concurring opinion in *Dorsey* suggests that, for purposes of deciding if reversal of a conviction is warranted, the standard for determining the harmlessness of an error that is not of constitutional dimension may be less exacting. *Id.* at 662, 350 A.2d at 680. It is difficult to conceive of an error that would be considered reviewable under the plain error rule yet harmless under the harmless error doctrine, because the error would have to be substantial enough to be material to the rights of the accused and, at the same time, trivial enough to convince the reviewing court beyond a reasonable doubt that it had no effect on the judgment or verdict. Thus, whenever an unobjected to error in jury instructions is determined to be harmful enough to be reviewable, it will, in all likelihood, be considered harmful enough to warrant reversal and award of a new trial. For further discussion of harmless error, see R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1966); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973); Comment, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967); Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450 (1947).

39. Sine v. State, 40 Md. App. 628, 632, 394 A.2d 1206, 1209 (1978), *cert. denied*, 284 Md. 748 (1979). See note 54 *infra*.

40. MD. R.P. 757(h). See note 2 *supra*. While instructional errors that violate a criminal defendant's constitutional rights might normally be expected to be considered material by an appellate court faced with the question of whether plain error review is appropriate, *see, e.g.*, Stambaugh v. State, 30 Md. App. 707, 710, 353 A.2d 638, 640, *cert. denied*, 278 Md. 734 (1976), there is supportive authority for the proposition that review is discretionary even when the error is of constitutional dimension. *See* Squire v. State, 32 Md. App. 307, 309, 360 A.2d 443, 445 (1976), *rev'd*, 280 Md. 132, 368 A.2d 1019 (1977). Although the court of appeals reversed the judgment of the court of special appeals in *Squire*, it did not address or expressly controvert the assertion of the intermediate appellate court that the bare fact that an error is of constitutional proportion does not *per se* raise it to the level of reviewable plain error. *Id.*

the accused, appellate courts generally engage in a third step: they evaluate the error to determine if it is sufficiently serious or harmful to merit review in the absence of trial objection.[41]

Imposing and observing appropriate limits on the exercise of discretionary review power granted under the plain error rule has been a difficult and recurrent problem for Maryland appellate courts. In the past, some courts have struggled to articulate precise standards to govern the exercise of discretionary review in a manner consistent with the restricted circumstances under which they perceived that such review was to be conducted. In *Wolfe v. State*[42] and *Reynolds v. State*,[43] the court of appeals enunciated a rule that has been employed in subsequent cases[44] to determine the circumstances that justify an appellate court's cognizance of unobjected to plain error. According to *Reynolds*, when an unobjected to error in jury instructions could have or probably would have been corrected by the trial judge had it been promptly brought to his attention, an appellate court should not recognize the error on appeal.[45] Conversely, when the error is such that even if it had been promptly called to the attention of the trial judge correction of the resulting prejudice could not or probably would not have occurred, the lack of objection will be excused, and the error is reviewable.[46]

In *Brown v. State*,[47] the court of special appeals attempted to draw a more precise line of demarcation between reviewable and nonreviewable plain error based upon the *Wolfe* and *Reynolds* decisions. In these two decisions the court of appeals had reached different conclusions regarding the reviewability of unobjected to errors in jury instructions.[48] By comparing them, the *Brown* court developed a standard pursuant to which material plain error would be reviewed if it constituted "an error of *commission* by the

41. *See, e.g.*, Sine v. State, 40 Md. App. 628, 394 A.2d 1206 (1978), *cert. denied*, 284 Md. 748 (1979).
42. 218 Md. 449, 146 A.2d 856 (1958). In *Wolfe*, the trial judge suggested in the jury's presence that the accused, who was not represented by counsel, should take the stand and testify because the case against him was substantial. *Id.* at 452, 146 A.2d at 857. The court determined that this error could not have been corrected even if promptly pointed out at trial. *Id.* at 455, 146 A.2d at 859. Therefore, the court excused defendant's lack of objection, recognized the error on appeal, and awarded a new trial.
43. 219 Md. 319, 149 A.2d 774 (1959). In *Reynolds*, the trial court did not fully explain to the jury the offenses charged or the elements thereof. *Id.* at 324, 149 A.2d at 777. No objection was raised by the defendant at trial. The error was held unreviewable because it could have been rectified had it been brought promptly to the trial judge's attention. *Id.* at 324-25, 149 A.2d at 777.
44. *See, e.g.*, State v. Evans, 278 Md. 197, 211, 362 A.2d 629, 637-38 (1976); Sine v. State, 40 Md. App. 628, 632-33, 394 A.2d 1206, 1210 (1978), *cert. denied*, 284 Md. 748 (1979).
45. 219 Md. 319, 324-25, 149 A.2d 774, 777 (1959).
46. Wolfe v. State, 218 Md. 449, 455, 146 A.2d 856, 859 (1958).
47. 14 Md. App. 415, 287 A.2d 62, *cert. denied*, 265 Md. 736 (1972).
48. *See* notes 42 & 43 *supra*.

trial judge, that is, an error in something the judge said, the effect of which could not be overcome by additional instructions."[49] A mistake would not be reviewed, however, if it were simply "one of *omission*, or something [the trial judge] failed to say."[50] Mechanical application of either the correctability standard enunciated in *Wolfe* and *Reynolds* or the commission-omission standard fashioned in *Brown*, leaves no room for appellate court consideration of the gravity of the disputed error or its harmfulness to the rights of the accused. In apparent recognition of this fact, the *Brown* court, after composing its general guideline, felt compelled to note that the ultimate consideration in deciding when to review plain error is whether "correction is necessary to serve the ends of fundamental fairness and substantial justice."[51]

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49. 14 Md. App. 415, 420, 287 A.2d 62, 64, *cert. denied*, 265 Md. 736 (1972) (emphasis in original).
50. *Id.* (emphasis in original). The *Brown* court's reasons for formulating a commission-omission test are not entirely clear. The court stated that this "guideline" was gleaned from a comparison of the *Wolfe* and *Reynolds* cases. *Id.* See notes 42 & 43 *supra*. These two cases do not, however, support this proposition. The mere fact that the court of appeals chose to review an error involving something the trial judge had said in one instance and denied review of an alleged omission from a jury charge in another does not mean that the court intended only for errors of commission to be reviewable. While the definitive guidance furnished by the absolute rule proposed in *Brown* is attractive in comparison to the aimlessness of a "fundamental fairness and substantial justice" standard, *see* Evans v. State, 28 Md. App. 640, 650-51, 349 A.2d 300, 309 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976); Brown v. State, 14 Md. App. 415, 422, 287 A.2d 62, 65 (1972), the *Brown* standard overlooks the fact that an instructional omission can be just as damaging to the accused's rights and, hence, as deserving of correction as an error of commission. In its use of the term "irremediable error of commission," *id.*, the *Brown* court was apparently contemplating those situations in which the trial judge affirmatively gives the jury an instruction that incorrectly states the relevant legal principles. *Id.* at 421, 287 A.2d at 65. Perhaps the court believed that such errors of commission are more likely to have incurable prejudicial effects on a jury and, therefore, more frequently warrant appellate court correction. It appears more likely, however, that the court's standard is based on a misreading of the two cases. Moreover, the standard was mere dicta because, after it was enunciated, the *Brown* court proceeded to decide the case under the *Wolfe-Reynolds* standard, determining that the error in question was not reviewable as it could have been corrected had it been brought to the attention of the trial judge. *Id.* at 422, 287 A.2d at 65. Thus, although the commission-omission standard has been utilized by a number of courts since its creation, *see, e.g.*, Dove v. State, 47 Md. App. 452, 456, 423 A.2d 597, 600 (1980); Ross v. State, 24 Md. App. 246, 330 A.2d 507 (1975); Taylor v. State, 17 Md. App. 41, 299 A.2d 841 (1973), its persuasive and precedential value is questionable.
51. 14 Md. App. 415, 422, 287 A.2d 62, 65, *cert. denied*, 265 Md. 736 (1972). Indeed, this would always seem to be the paramount factor whenever an appellate court is considering whether to review a point not raised below. *See* T. MARVELL, APPELLATE COURTS AND LAWYERS 121-25 (1978).

More recently, Maryland appellate courts have employed other criteria that allows them to somewhat confine the exercise of plain error discretion and yet still engage in the process of evaluating the seriousness of a contested instructional error to see if it merits review. They have recognized that, in the past, errors have been deemed reviewable absent proper objection at trial only when they are susceptible to characterization as "exceptional"[52] or "compelling."[53] Because these terms are so broad, they are subject to inconsistent application. They do, however, provide some assistance in determining when discretionary review is appropriate as they indicate an intention on the part of past appellate courts to confine the realm of reviewable plain error. In addition, they signal a recognition that the granting of discretionary review is not to be the ordinary practice. The fact remains, however, that "no constant and immutable guidelines" exist to govern the exercise of discretionary review under the plain error rule.[54] A determination that circumstances are sufficiently exceptional or compelling may only be made after preliminary review of the alleged error in the context of the facts, circumstances, and history of the case under consideration.[55] This case-by-case approach renders the plain error rule subject to capricious application. As the situation now stands, plain error is essentially whatever a reviewing court says it is.[56]

Before *State v. Hutchinson*,[57] no Maryland court had ever addressed the issue of whether an inadvertent omission of a not

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52. Dempsey v. State, 277 Md. 134, 142, 355 A.2d 455, 459 (1976). In *Dempsey*, the trial judge, prior to submitting to the jury the issue of voluntariness of the criminal defendant's confession, instructed jurors that he had already made a preliminary finding of voluntariness. *Id.* at 137, 355 A.2d at 457. Because this comment clearly showed the trial court's opinion on an issue that was for the jury, the error was determined sufficiently exceptional to be reviewable despite the absence of trial objection. *Id.* at 143, 355 A.2d at 460. The court held that the error was grounds for reversal because the judge's expression of opinion was "liable to influence the jury on an important question of fact." *Id.* at 150, 355 A.2d at 463 (quoting Coffin v. Brown, 94 Md. 190, 203, 50 A. 567, 572 (1901)).
53. Squire v. State, 280 Md. 132, 135, 368 A.2d 1019, 1020 (1977); Mason v. State, 44 Md. App. 710, 712-13, 410 A.2d 633, 634 (1980).
54. Sine v. State, 40 Md. App. 628, 632, 394 A.2d 1206, 1209 (1978), *cert. denied*, 284 Md. 748 (1979). In *Sine*, the jury instruction regarding allocation of the burden of proving the voluntariness of a confession was susceptible to the improper interpretation that the burden was on the defendant to prove, by a preponderance of the evidence, that his confession was involuntary. The error was held nonreviewable because of the lack of trial objection, even though it may have resulted in some prejudice to the accused and even though defense counsel's failure to object may have been due to either inadvertence or misapprehension regarding the correct law. *Id.* at 633, 394 A.2d at 1210.
55. *Id.* at 632, 394 A.2d at 1209.
56. *See generally* Comment, *Appeal of Errors in the Absence of Objection: Pennsylvania's Fundamental Error Doctrine*, 73 DICK. L. REV. 496, 501 (1969).
57. 287 Md. 198, 411 A.2d 1035 (1980).

guilty alternative from a trial court's jury instructions constituted reviewable plain error. Courts of other jurisdictions that have had occasion to consider this question have generally held that, when a trial court in its instructions to the jury either omits[58] or expressly excludes[59] a not guilty verdict, the accused has been denied one of the fundamental aspects of his constitutional right to a fair trial[60] and appellate court correction is necessary to safeguard that right and assure that justice is done. In those cases in which such an omission has been held to be harmless, the deficiency was deemed adequately redressed by other instructions.[61]

IV. THE *HUTCHINSON* COURT'S ANALYSIS

The principle issue confronting the court of appeals in *State v. Hutchinson*[62] was whether the unobjected to omission of a not guilty verdict alternative from the jury instructions in a criminal case, coupled with a misstatement by the trial judge as to the alternatives included on the verdict sheet,[63] constituted reviewable plain error. A second and related issue, which arose by virtue of the court's affirmative answer to the above question, was

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58. *E.g.*, People v. Stockwell, 52 Mich. App. 394, 217 N.W.2d 413 (1974).

59. *E.g.*, People v. Gibbs, 50 Mich. App. 517, 213 N.W.2d 586 (1973) (trial judge stated to jury that there was "no way" the jury could find that defendant did not commit the offense alleged), *leave to appeal denied*, 391 Mich. 783 (1974); Commonwealth v. Edwards, 394 Pa. 335, 147 A.2d 313 (1959) (trial court instructed jury on five possible verdicts including not guilty by reason of insanity, but omitted a not guilty instruction). *Edwards* may be distinguished from *Hutchinson* because the *Edwards* jury was expressly instructed that it could return "one and only one" of the five verdicts enumerated. *Id.* at 336, 147 A.2d at 314. The *Hutchinson* instructions were not so limiting. *See* text accompanying notes 14 & 15 *supra*.

60. Note that the sixth amendment to the United States Constitution and article 21 of the Maryland Declaration of Rights are the federal and state sources, respectively, of a criminal accused's rights to a fair trial by an impartial jury. U.S. CONST. amend. VI; MD. CONST., DECL. OF RIGHTS art. 21. The right to a fair trial has also been held to be implicit in the constitutional guarantee of due process. U.S. CONST. amend. XIV; MD. CONST., DECL. OF RIGHTS art. 24. *See generally In re* Murchison, 349 U.S. 133 (1955).

Courts do not agree on the exact aspect of a criminal defendant's right to a jury trial that is impaired when an erroneous instruction is given. *See, e.g.*, Dimery v. State, 274 Md. 661, 689, 338 A.2d 56, 70 (1974) (O'Donnell, J., dissenting) (right to a "complete" jury trial), *cert. denied*, 423 U.S. 1074 (1976); People v. Gibbs, 50 Mich. App. 517, 213 N.W.2d 586 (1973) (right to procedural due process), *leave to appeal denied*, 391 Mich. 783 (1974); Commonwealth v. Edwards, 394 Pa. 335, 147 A.2d 313 (1959) (right to have jury instructed that it may return a general verdict of not guilty). The *Hutchinson* court found that the omission violated the fundamental right of a criminal defendant to have the jury instructed on all applicable verdicts. State v. Hutchinson, 287 Md. 198, 205, 411 A.2d 1035, 1039 (1980).

61. *See, e.g.*, Tarpkin v. State, 263 Ga. 67, 222 S.E.2d 364 (1976) (omission from one portion of instructions held harmless in view of later instructions that presented jury with both guilty and not guilty options); State v. Barnes, 297 N.C. 442, 255 S.E.2d 386 (1979) (omission of not guilty alternative followed by later instruction that not guilty verdict must be returned if jury unable to find defendant guilty beyond a reasonable doubt of the offense charged).

62. 287 Md. 198, 411 A.2d 1035 (1980).

63. See text accompanying notes 14 &15 *supra*.

whether the instructions given were so inadequate as to warrant reversal of the defendant's conviction and award of a new trial. The two issues were integrally linked because both reviewability and reversibility turned on the extent to which Hutchinson's rights as a criminal defendant were impaired by the jury charge.

Because no prompt objection had been raised at trial and, therefore, no appeal of right had been preserved, the court of appeals focused its attention on the circumstances under which discretionary review of plain error is appropriate. Judge Cole's majority opinion recognized that, in the absence of prompt trial objection, appellate courts ordinarily decline to review allegedly erroneous jury instructions[64] and that, in past cases, only errors of a "compelling, extraordinary, exceptional or fundamental" nature have been reviewed, absent trial objection.[65] The court also noted that a reviewing court should give due regard to whether an error is "purely technical, the product of conscious design or trial tactics or the result of bald inattention" on the part of the complaining party because such factors militate against the exercise of discretionary review power under the plain error rule.[66]

The state's contention that review of unobjected to errors in jury instructions is inappropriate when correction could have been achieved by pointing out the error in timely fashion to the trial judge was rejected by the majority without any discussion of the cases upon which that contention was based.[67] The court stated that "such an absolute approach is the antithesis of the discretion authorized by the rule."[68] The majority buttressed its contention with a discussion of three recent decisions by the court of appeals and the court of special appeals that it interpreted as signaling

64. 287 Md. 198, 202, 411 A.2d 1035, 1037 (1980).
65. *Id.* at 203, 411 A.2d at 1038.
66. *Id.*
67. *Id.* The cases supporting the state's contention are discussed in notes 42-46 and accompanying text *supra*, and in text accompanying notes 101-06 *infra*.
68. 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980).

that correctability of an error at the trial stage is not to be viewed as the decisive factor in determining when discretionary review of unobjected to plain error is appropriate.[69] The majority indicated that the essence of discretionary review of plain error is whether the error vitally affected the right of the accused to a fair and impartial trial.[70] In the court's assessment, recent precedent indicated that an instructional error that is "likely to unduly influence the jury" constitutes sufficient deprivation of a criminal defendant's right to a fair trial to justify appellate review despite the lack of timely trial objection.[71] The particular aspect of the accused's fair trial right impaired when instructions are confusing, prejudicial, or lacking in some vital detail is "the ability of the jury to discharge its duty of returning a true verdict based on the evidence."[72] Noting the typical sensitivity of a jury to the words of

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69. The three cases were Fowler v. State, 7 Md. App. 264, 254 A.2d 715 (1969); Barnhart v. State, 5 Md. App. 222, 246 A.2d 280 (1968); and Squire v. State, 280 Md. 132, 368 A.2d 1019 (1977). In *Fowler*, the jury was incorrectly permitted to consider the defendant's criminal record in determining his guilt or innocence. The error was held to be reviewable despite the lack of objection at trial. 7 Md. App. 264, 267, 254 A.2d 715, 716 (1969). In *Barnhart*, the trial judge improperly revealed to the jury his preliminary determination regarding the voluntariness of the accused's confession. The error was deemed to be reviewable even though it was not objected to at trial. 5 Md. App. 222, 229, 246 A.2d 280, 285 (1968). In the *Hutchinson* majority's view, the errors in *Fowler* and *Barnhart* both could have been corrected had they been brought to the attention of the trial judge. 287 Md. 198, 204-05, 411 A.2d 1035, 1039 (1980). Both errors, however, were determined to be reviewable. Thus, the majority reasoned that correctability of an error at trial is not to be determinative in deciding when plain error review is appropriate. *See id.* at 204-05, 411 A.2d at 1038-39. The flaw in the *Hutchinson* court's reasoning, however, is that it is not clear that the errors in *Fowler* and *Barnhart* could have been adequately corrected (*i.e.*, the resulting prejudice sufficiently cured) even if they were timely pointed out at trial.

Although the *Hutchinson* majority cited the *Squire* case as additional support for its view that correctability of an error at trial is not to be determinative in deciding when review under the plain error rule is appropriate, the case, as the dissent noted, is more supportive of the opposite position. *Id.* at 217, 411 A.2d at 1045 (Smith, J., dissenting). In *Squire*, the trial judge had given an instruction that placed the burden of proving self-defense upon the accused. This contravened the then very recent case of Mullaney v. Wilbur, 421 U.S. 684 (1975), which had held that such an instruction violated the due process requirement that the state prove every element of its case beyond a reasonable doubt. No objection had been made at trial and the court of special appeals held that the plain error rule could not be invoked because the error could have been corrected by supplemental instructions had the *Mullaney* case been called to the trial judge's attention. Squire v. State, 32 Md. App. 307, 360 A.2d 443 (1976), *rev'd*, 280 Md. 132, 268 A.2d 1019 (1977). Though not expressly stating that the court of special appeals had abused its discretion by declining to recognize the plain error, the court of appeals exercised its own independent discretion to recognize plain error and reversed. The court rested its decision in part on the rationale that, in view of *Mullaney's* newness at the time of the *Squire* trial, its full ramifications were not yet recognized, and hence, even if Squire's defense counsel had been sufficiently aware of *Mullaney* to point out the error to the trial judge, it was highly speculative that appropriate corrective measures could have or would have been taken. Squire v. State, 280 Md. 132, 268 A.2d 1019 (1977).

70. 287 Md. 198, 202, 411 A.2d 1035, 1038 (1980).

71. *Id.* at 205, 411 A.2d at 1039.

72. *Id.*

a trial judge, the court of appeals stated that the judge has a duty to avoid even inadvertent instructional improprieties that may suggest partiality.[73]

The disputed charge in the instant case was deemed by the majority to be sufficiently violative of Hutchinson's fundamental rights as a criminal defendant to merit consideration on appeal despite the absence of objection by defense counsel at trial. The court held that the accused in a criminal case has the right to have the jury advised on all possible verdicts stemming from the evidence, including not guilty,[74] and that because the trial judge in *Hutchinson* at no point instructed the jury that it could find the defendant not guilty, Hutchinson was entitled to a new trial.[75]

The majority disagreed with the state's contention that the omission was rendered harmless by the inclusion of a not guilty alternative on the jury's verdict sheet and by earlier instructions on the presumed innocence of the accused and the state's burden of proving beyond a reasonable doubt every element of the offenses charged.[76] Judge Cole underscored the prestige lent to any verdict alternative that is expressly included in a judge's final oral charge to the jury as opposed to the effect of merely indicating on a printed verdict sheet that such an alternative exists. In light of this, he concluded that the effect on the jury's verdict of the omission of a not guilty alternative from the oral instructions was immeasurable. With Hutchinson's criminal conviction hanging in the balance, Judge Cole refused to speculate as to whether the instructional deficiencies were cured by implications that could be drawn from other instructions.[77] Therefore, the court of special appeals' determination that the error was material and reviewable was affirmed and its award of a new trial was upheld.[78]

Judge Smith filed a strong dissent in which Chief Judge Murphy concurred. The dissent undertook an exhaustive discussion of the line of cases supporting the prosecution's contention that an error that is correctable and not objected to at the trial stage should not be recognized on appeal.[79] Because the error in the instant case could have been easily rectified at trial had it been promptly pointed out, Judge Smith viewed the situation as an inappropriate one for invocation of plain error review.[80] The dis-

73. *Id.* at 206, 411 A.2d at 1040.
74. *Id.* at 205, 411 A.2d at 1039. A recent court of special appeals decision interprets *Hutchinson* as not "flatly requiring an affirmative instruction that the jury must return a verdict of not guilty if the state fails to sustain its burden of proof where such a requirement is clearly implicit from other instructions given." Dove v. State, 47 Md. App. 452, 456, 423 A.2d 597, 600 (1980).
75. 287 Md. 198, 208, 411 A.2d 1035, 1041 (1980).
76. *Id.* at 206-08, 411 A.2d at 1039-41.
77. *Id.*
78. *Id.*
79. *Id.* at 209-18, 411 A.2d at 1041-46 (Smith, J., dissenting).
80. *Id.* at 218, 411 A.2d at 1046.

sent was puzzled by the majority's disregard of this well-documented precedent.[81] Moreover, it was concerned that the majority's decision would precipitate the type of unscrupulous trial practice that strict application of the plain error rule prevents, namely, the strategy of allowing an erroneous instruction to pass without comment, with reasonable assurance that it will afford grounds for appeal in the event of an adverse decision at the trial level.[82]

Judge Smith believed that the omission of the verbal not guilty instruction was sufficiently compensated for by other instructions given by the trial judge and by the inclusion of the omitted alternative on the verdict sheet.[83] In addition, the dissent was willing to attribute to all jurors a certain minimal level of intelligence and a basic comprehension of the judicial process sufficient to alert them to the possibility of a not guilty verdict in a criminal case.[84] In light of these mitigating circumstances, the dissent concluded that this case did not present an error as severe or glaring as those that have motivated past courts to grant discretionary review.[85] In Judge Smith's estimation, the majority was merely engaging in a "quest for error,"[86] and in its haste to protect Hutchinson's right to a fair trial, the court had effectuated an over-balancing of the scales of justice detrimental to the state's rights as a litigant.[87]

V. EVALUATION

The decision of the court of appeals in *Hutchinson* that the omission of a not guilty verdict choice from the oral jury charge in a criminal case constitutes reviewable plain error when accompanied by a trial court's misstatement of the verdict sheet's contents

81. Judge Smith posed this question: "Is it the intent of the majority to overrule all of these cases *sub silentio*?" *Id.*

82. *Id.* A decision by counsel not to object to a particular error at trial for reasons of strategy constitutes grounds for denial of federal habeas corpus relief, and, in some situations, relief can be denied even when the accused does not expressly consent to or participate in the tactic. *See* Henry v. Mississippi, 379 U.S. 443, 451 (1965). Denial of relief is based upon the view that strategic non-objection constitutes a deliberate bypass of orderly court procedure. *Id.* at 452. For a discussion of Maryland and federal cases involving situations in which tactical failure to raise an issue in a prior court proceeding furnished grounds for denial of post conviction relief, see Curtis v. State, 284 Md. 132, 395 A.2d 464 (1978).

In addition to its effect on a criminal defendant's ability to obtain post conviction relief, an attorney's deliberate failure to object to an error at trial may have other consequences. For example, by deliberately not raising an objection for reasons of strategy, an attorney risks bar sanctions for misconduct. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5), DR 7-106(A), DR 7-106(C)(7), EC 7-20, EC 7-25.

83. 287 Md. 198, 218-19, 411 A.2d 1035, 1046 (1980) (Smith, J., dissenting).

84. *Id.* at 218-21, 411 A.2d at 1046-47.

85. *Id.* at 209, 411 A.2d at 1041.

86. *Id.* at 221, 411 A.2d at 1047 (quoting Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

87. 287 Md. 198, 222, 411 A.2d 1035, 1048 (1980) (Smith, J., dissenting).

is admirable. It demonstrates a cautious regard for the fair trial right of a criminal defendant and an appreciation for the devastating consequences of a guilty verdict returned by a jury that was possibly confused or not as well informed as it could have been on the available verdict alternatives. At the same time, the court's decision to classify the particular instructional inadequacies at issue in *Hutchinson* as reviewable plain error is regrettable. A proper determination that an instructional error is material for purposes of plain error review requires not only a resort to guiding precedent to see what types of errors have been deemed material in the past, but also a realistic assessment of the circumstances of each case to determine the likelihood that the error actually detrimentally influenced the jury's verdict. Thus, a certain amount of subjective evaluation is involved which lends a frustrating element of unpredictability to the process of determining what constitutes reviewable plain error. By classifying as reviewable, errors that appear to have had only a slight possibility of detrimentally influencing the jury's verdict, the *Hutchinson* decision adds to rather than eliminates some of the uncertainty that exists in the area of plain error review. Indeed, after *Hutchinson* it appears that as long as a majority of the judges sitting in appellate review of a criminal case can construct a supportive argument that the defendant's fair trial right was somehow possibly impaired by an erroneous jury instruction, they may review the case even though no objection to the error was made at trial to preserve the issue.

An exceptionally strong argument can be made that despite the trial judge's omission and misstatement regarding the contents of the verdict sheet, Hutchinson's jury was fully aware of its option to return a not guilty verdict and simply chose not to do so because it felt that the evidence of guilt dictated otherwise. The jury received thorough instructions on the presumed innocence of a criminal defendant and on the state's burden of proof in a criminal trial. The trial judge advised the jury, *inter alia*, that

> [t]he burden of proof is on the State to prove every element of the crime charged against the defendant, and the defendant is presumed innocent until proved guilty beyond a reasonable doubt. That presumption attends the defendant throughout the trial until or unless overcome by proof establishing his guilt beyond a reasonable doubt and to a moral certainty.[88]

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88. Brief and Appendix for Appellant at E.22, State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980).

The logical deduction to be drawn from this instruction is that if a reasonable doubt exists, the jury cannot find the defendant guilty.[89] To deny that the jury is capable of making this deduction would be inconsistent with the confidence placed in the jury's ability to think logically with respect to other aspects of the case. Regarding the evaluation of circumstantial evidence, for example, it is commonly said that a jury is permitted to draw all reasonable inferences stemming from the evidence presented.[90] This rule presupposes that members of the jury possess certain basic powers of reasoning and logical deduction. To attribute to jurors a certain level of intelligence for some purposes and subsequently deny in effect that they possess such capacity is the epitome of self-contradiction. Yet, the court's ruling in *Hutchinson* that beyond-a-reasonable-doubt and presumption-of-innocence instructions are insufficient to alert the average juror to the fact that not guilty is an available verdict alternative[91] is tantamount to a declaration that the jury is incapable of making even the simplest of logical deductions. It is difficult to reconcile this apparent lack of respect for a jury's skills in comprehending jury instructions with the reliance placed upon its analytical skills at other stages in the judicial process.[92]

The majority in *Hutchinson* noted that the trial court's dual error of omission and misstatement "may well have placed the jury in such a quandry that it was unsure what its obligation to the defendant was."[93] The court did not address the possibility that the lack of objection by trial counsel and the absence of any request by the jury for clarifying instructions suggests that those present in the courtroom understood perfectly that when the trial

89. A recent Maryland case supports the contention that when both presumption-of-innocence and beyond-a-reasonable-doubt instructions are clearly communicated to a jury, the absence of an express "not guilty" instruction in a criminal case is sufficiently compensated for and does not constitute reviewable plain error under Maryland Rule 757(h). Dove v. State, 47 Md. App. 452, 456, 423 A.2d 597, 600 (1980). *Dove* differs from *Hutchinson* in that the omission of a "not guilty" instruction in *Dove* was not accompanied by a misstatement of the contents of the jury's verdict sheet that could have conceivably created confusion in the jury's mind regarding the availability of the "not guilty" alternative. *Id.*

90. United States v. Townsend, 474 F.2d 209, 213 (5th Cir. 1973); Quarles v. United States, 308 A.2d 773, 775 (D.C. 1973).

91. 287 Md. 198, 207-08, 411 A.2d 1035, 1040 (1980).

92. This apparent inconsistency is perhaps reconcilable by imputing to the *Hutchinson* court the view that juries are more adept at drawing inferences from facts than from the law presented to them.

93. 287 Md. 198, 208, 411 A.2d 1035, 1041 (1980).

judge said the verdict sheet contained two possible verdicts, he meant two possible guilty verdicts.[94] Moreover, it is important to note that the trial judge at no time instructed the jury that it had to return a verdict of guilty.[95] He merely stated that if the jury found the defendant not guilty of rape in the first degree then it was to "consider" a verdict of rape in the second degree.[96] Thus, there was no genuine or substantial conflict between the oral instructions and the written verdict sheet that could support a claim that the instructions were inherently ambiguous or a definite source of confusion. At most the omission and misstatement may have created a tenuous misconception regarding the availability of the not guilty alternative — a misconception that, in all likelihood, was amply rectified by other instructions that strongly suggested the availability of the not guilty option and by the inclusion of "not guilty" as an alternative on the jury's verdict sheet.[97]

There is considerable substance to the dissent's contention that the errors of the instant case lacked the deleterious properties that have characterized reviewable plain error in the past. This was not a case in which the trial judge neglected to instruct the jurors on some point of substantive law of which they would have no means of knowing except through judicial advice.[98] Nor do the errors in the instant case carry with them the unquestiona-

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94. This point illustrates one of the major imperfections of the plain error rule. A reviewing court's perception of events at trial is limited to the information contained in the written record. It cannot grasp all the connotations of the spoken word at trial. An appellate court is, therefore, forced to evaluate the materiality of an alleged instructional error without the benefit of knowing with what force, emotion, or inflection the controversial instruction was delivered. "What may appear to be serious error on paper to the appellate court may actually have been harmless and sufficiently deemphasized as to have had no impact on the jury." Comment, *Appeal of Errors in the Absence of Objection: Pennsylvania's Fundamental Error Doctrine*, 73 DICK. L. REV. 496, 502 (1969).

95. Brief and Appendix for Appellant at 8, State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980).

96. 287 Md. 198, 201, 411 A.2d 1035, 1037 (1980).

97. In evaluating an alleged instructional error, a reviewing court is to consider the instructions as a whole. It is not to read isolated portions out of context. State v. Garland, 278 Md. 212, 220, 362 A.2d 638, 642 (1976).

Another circumstance that tended to mitigate the effect of the alleged errors in *Hutchinson* and that should have prompted the jury's awareness of the not guilty alternative was the considerable emphasis placed on that option by defense counsel during his closing argument to the jury. *See* Brief and Appendix for Appellant at E. 12-16, State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980).

98. *Compare* State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980) *with* People v. Glass, 266 Cal. App. 2d 222, 71 Cal. Rptr. 858 (1968). *Glass* was cited by the majority in *Hutchinson* as authority supportive of its decision to review, 287 Md. 198, 206-07, 411 A.2d 1035, 1040 (1980), but it is distinguishable from *Hutchinson*. In *Glass*, the judge omitted from his recitation of verdict alternatives the choice of finding the defendant guilty of manslaughter with gross negligence. 266 Cal. App. 2d 222, 228, 71 Cal. Rptr. 858, 862 (1968). Unlike the omission of a simple not guilty alternative, the exclusion in *Glass* was of an alternative that no jury of laymen could reasonably be expected to be aware absent judicial explanation.

bly prejudicial effects of either an unmitigated misallocation of the burden of proof in a criminal case[99] or an impermissible disclosure to a jury of a trial court's preliminary determination that a criminal defendant's confession was voluntary.[100] Moreover, the remedial effect of other portions of the jury instructions in *Hutchinson* rendered the controversial omissions less glaring than those formerly considered reviewable.

The *Hutchinson* court's categorical rejection of the *Wolfe-Reynolds* line of cases,[101] which employed rigid standards to achieve restrictive application of the plain error rule, was proper[102] but should have been accompanied by an explanation of the underlying reasons for doing so. As did its predecessors, rule 757(h) of the Maryland Rules of Procedure has two operative parts: one dealing with the prerequisites for securing an appeal of right, and the other providing for discretionary review.[103] The purpose of the "appeal of right" portion is to encourage observance of procedural rules and, simultaneously, to promote a certain amount of deference and courtesy to the trial judge in recognition of his difficult task.[104] The purpose of the discretionary review segment is to provide a mechanism for assuring that, above all else, the criminal defendant receives the fair and impartial trial to which he is entitled.[105] Both portions of the rule must be considered in determining when discretionary review is appropriate. The restrictive application that the rule received at the hands of Maryland appellate courts before *Hutchinson*[106] may be attributed to an emphasis by those courts on the first portion of the rule and on the benefits to be derived from encouraging strict adherence to the proper procedures for obtaining appellate review. The liberal application of the rule by the court in *Hutchinson* reflects a shift in focus to the purposes to be served by the latter portion of the rule and a cautious regard for the rights of criminal defendants. Thus, the difference between courts that liberally apply the rule and those that have conservatively applied it may be attributed to the different emphasis placed upon the two portions of the rule in the interest of effectuating what is perceived to be the dominant purpose of the rule as a whole.

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99. *See* Squire v. State, 280 Md. 132, 368 A.2d 1019 (1977).
100. *See* Barnhart v. State, 5 Md. App. 222, 246 A.2d 280 (1968).
101. 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980).
102. See text accompanying notes 42-51 *supra* and notes 50 & 51 *supra*.
103. *See* note 2 *supra*.
104. Moreover, this portion of the rule arguably serves to promote judicial economy by avoiding a multiplicity of proceedings and to secure finality of case disposition so that the rehabilitative aspect of the corrections process may begin. This goes beyond mere courtesy.
105. *See* note 34 *supra*.
106. *E.g.*, Reynolds v. State, 219 Md. 319, 149 A.2d 774 (1959); Wolfe v. State, 218 Md. 449, 146 A.2d 856 (1958); Brown v. State, 14 Md. App. 415, 287 A.2d 62, *cert. denied*, 265 Md. 736 (1972). *See* notes 42-51 and accompanying text *supra*.

The *Hutchinson* court's liberal application of the plain error rule could create legitimate fears that, in time, exceptions made to the general rule will begin to swallow the rule itself. The decision perhaps signals the beginning of a trend toward plain error review of progressively less harmful mistakes than those deemed reviewable in the past, in contravention of the apparent purpose behind narrowly crafting an exception to the general rule that unobjected to errors in jury instructions are unreviewable.[107] This purpose was formerly effectuated by reserving plain error review for errors of exceptionally harmful dimensions.[108] In choosing to review the errors at issue in *Hutchinson*, which were not as egregious as those formerly marking the outer boundaries of material plain error,[109] the court of appeals seemingly disregarded the narrowness of the exception and indicated, by example, an intention to expand the domain of plain error review. The court achieved this expansion by reinterpreting what constitutes material error for purposes of the plain error rule. The court equated the phrase "material to the rights of the defendant" used in rule 757(h) with the phrase "vitally affecting his right to a fair and impartial trial."[110] Because the right to a fair trial encompasses a myriad of other rights, its establishment as the touchstone of plain error review carries the potential for tremendous expansion of the realm of appellate jurisdiction.

Unfortunately, this expansive reading of the plain error rule is unaccompanied by any clear standard to which appellate courts and lawyers in the future may refer to judge how likely an impact on a jury's verdict an error must have to be reviewable. The *Hutchinson* court professes to delineate reviewable plain error as error that is "likely" to influence a jury.[111] Yet its example in granting review of the instant case, in which it was speculative, indeed highly unlikely, that the jury was misled by the disputed errors refutes this. In refusing to speculate on[112] and realistically assess the impact of the instructional inaccuracies on the verdict in *Hutchinson*, the court indicated that it is inclined to grant review whenever there is the slightest possibility that an imperfect instruction detrimentally influenced a jury. Because the *Hutchinson* court actually applied a standard different from the one it pronounced, no standard for determining the requisite

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107. The fact that the plain error rule exists as an *exception* to the general rule that unpreserved instructional errors are not reviewable suggests that its drafters intended it to be narrowly construed. That the rule includes language limiting review to errors *materially* affecting the rights of the accused, *see* note 2 *supra*, is further evidence that the rule is not to be expansively applied.

108. *See* notes 52-53 and accompanying text *supra*.

109. *See* cases discussed note 69 *supra*.

110. 287 Md. 198, 202, 411 A.2d 1035, 1038 (1980).

111. *Id.* at 205, 411 A.2d at 1038.

112. *Id.* at 208, 411 A.2d at 1041.

impact that an error must have on the jury to merit plain error review emerges with convincing clarity.

Perhaps because the stakes are so high in a criminal case and there is no way, short of breaching jury secrecy, to be certain of the influence of a particular error on the verdict, plain error review should be granted even when there is only a remote possibility that an error was damaging. Although such a standard may be criticized as being too generous to a criminal defendant in that it comes close to assuring him the right to a perfect trial rather than a fair one,[113] it serves the apparent purpose behind the plain error rule[114] by assuring that no miscarriage of justice will be allowed to pass unrectified despite the lack of observance of procedural requirements.

In view of the expansive application of the plain error rule by the *Hutchinson* court, the concern expressed by the dissent that the decision will foster less competent practice in the legal profession and a disrespect for the integrity of the judicial system as a whole[115] appears legitimate. *Hutchinson* is available as supportive precedent for those urging discretionary review of slightly tainted jury instructions even though no objection was registered at trial. The decision thus serves to limit the repercussions of an attorney's failure to raise timely trial objection to disputed jury instructions.[116] Although the court warned that technical mistakes in jury instructions and errors resulting from either bald inattention or trial strategy are inconsistent with circumstances justifying invocation of the power of plain error review,[117] the stringency with which these warnings will be enforced is subject to serious question. The admonition regarding technicality of error,[118] for example, seems purely cosmetic because the parameters of technical error are by no means clear, and, as evidenced by *Hutchinson*, an argument can be made that errors of any magnitude have some impact on a jury's verdict. When appellate courts reverse on grounds that appear technical or trivial to a layman, public confidence in the judicial system may be diminished. The court's caveat that bald inattention and trial strategy are unacceptable explanations for an attorney's failure to object[119] appears

113. "A defendant is entitled to a fair trial but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619 (1973); *accord*, Crawford v. State, 285 Md. 431, 451, 404 A.2d 244, 254 (1979). The knowledge that appellate court justices apparently sit ready to correct almost any error his own attorney may overlook should be of additional comfort to the accused. *But see* note 38 *supra* (discussing the rule of harmless error).

114. *See* note 34 *supra*.

115. 287 Md. 198, 218, 411 A.2d 1035, 1046 (1980) (Smith, J., dissenting).

116. Note, however, that an attorney who chooses to speculate on the stringency with which the court's procedural rules will be enforced risks being sanctioned by the bar for malpractice. *See* note 82 *supra*.

117. 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980).

118. *Id.*

119. *Id.*

equally superficial. Short of a confession by the attorney himself, an appellate court cannot be sure of counsel's motives, strategic or otherwise, in not promptly objecting to an error in the instructions. Moreover, the *Hutchinson* court conducted no inquiry into the motive behind defense counsel's failure to object, which indicates an intention to look beyond such considerations and to focus exclusively upon whether a defendant's fair trial right was infringed.

Despite the toothless nature of the court's warnings, the possibility that the plain error rule will be employed as a defense strategy is not to be overemphasized. A defense attorney, recognizing that discretionary review of plain error is erratic, unreliable, and uncertain, is not likely to depend on it to obtain review. Only if the prospect of acquittal were slim, would it be advantageous for an attorney to risk deliberate non-objection.[120] In addition, the prosecution has an interest in purging the trial of all taints that could conceivably furnish the accused with grounds for appeal. The prosecution, therefore, will be inclined to call an obvious error to the trial court's attention and thereby disrupt the strategy of the defense.

VI. CONCLUSION

The court of appeals in *Hutchinson* conducted a rather limited examination of the trial court record in the course of evaluating the materiality of disputed errors in the jury instructions. The particular facts of the *Hutchinson* trial permit a conclusion that the jury was aware of the not guilty alternative despite the deficiencies of the instructions given. Consequently, the court's assessment that the mistakes at issue constituted errors material to the rights of the accused, that is, that they amounted to reviewable plain error, seems unrealistic, but such a decision was necessitated by a concern for the rights of criminal defendants. Had the court ruled for the state in this instance, its determination might have been viewed as an endorsement of the practice of omitting a simple not guilty verdict from the advisory instructions in a criminal case. This would have been unacceptable precedent to establish for it would condone laxity on the part of the courts that might prove to be prejudicial to future criminal defendants.

While the decision correctly repudiated older, more absolute standards for deciding the appropriateness of discretionary review of plain error in a particular instance, it did so without advancing a convincing supportive rationale. Furthermore, the replacement standard set forth in the opinion, with its focus upon

120. *But see* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5), DR 7-106(A), DR 7-106(C)(7), EC 7-20, EC 7-25.

whether the accused's rights to a fair trial are vitally affected by an error, lends itself to expansive application and was unsupplemented by a clear statement of limitation regarding how likely an impact on the jury's verdict an erroneous instruction must have in order to be considered reviewable. As a result, Maryland attorneys have no way of ascertaining, with any reasonable degree of certainty, what types of errors will be deemed sufficiently material to the rights of the accused to warrant plain error review.

Eventually, the court should set forth a clear and unequivocal statement of the purpose underlying the plain error rule in order to guide courts and attorneys confronted with questions concerning its application in a particular instance. The court must also unambiguously verbalize a standard for determining how likely an error is to have detrimentally affected a jury's verdict before it will be considered reviewable absent trial objection. In *Hutchinson*, a chance to achieve both of these goals was presented but the court of appeals failed to resolve these uncertainties.

For the present, the plain error rule is still susceptible to random application. It furnishes a convenient basis for an appellate court to award a new trial whenever it perceives that justice was not served in the lower court and that the defendant did not receive the fair trial to which he is entitled. This cautious regard for the fair trial right of the criminal defendant is commendable if properly balanced against the state's rights as a litigant. The broad concept of a fair trial, which *Hutchinson* indicates is the touchstone of plain error review, defies comprehensive definition.[121] This, in turn, lends an element of unpredictability to the process of granting appellate review under the plain error rule. If, in the future, Maryland courts would supplement their determinations that particular instances of plain error are reviewable with clearly articulated reasoning that is consistent with a firm statement of the underlying purpose of the plain error rule, the permissible limits of plain error review could be more readily ascertained and erratic application of the rule eventually could be eliminated.

Kevin Hessler

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121. *See* Orfield, *Criminal Appeals: Technicality and Prejudicial Error*, 27 J. CRIM. L.C. & P.S. 668, 673 (1937).