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Death by Default: State Procedural Default Doctrine in Capital Cases

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DEATH BY DEFAULT: STATE PROCEDURAL DEFAULT DOCTRINE IN CAPITAL CASES

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> *Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.*[***]

I. INTRODUCTION

You have been appointed to defend a person in a capital trial. Not surprisingly, you are terrified. Still, you prepare motions, interview witnesses, consult experts, research the law, and do everything else necessary for the defense. Finally, the trial date arrives. Your client is found guilty of murder. During the sentencing phase of the proceedings, the solicitor says something

*** Hormel v. Commissioner, 312 U.S. 552, 557 (1941).

that strikes you as unfair. In fact, you had made a motion *in limine* about that very subject. You stand up and object. The judge immediately overrules your objection, having already heard your arguments at the motion *in limine*. After the solicitor finishes talking, you make sure the judge understood your objection. He assures you he did and that you are "protected" for appeal. Of course, you hope the case does not get that far.

Unfortunately, it does—the jury sentences your client to death. You are devastated. You believe the solicitor's tactics were unfair, and you are confident that his rhetoric swayed the jury. Nonetheless, this is a great issue for appeal to the state supreme court. At oral argument, the justices appear interested and concerned. No one asks you about your objection, and the Attorney General's office, arguing for the state, fails to mention it. The briefs focused exclusively on the substance of the claim. Now all you and your client can do is wait.

Three months later, the court issues its opinion. Examining the advance sheet, you see the word in bold—**AFFIRMED**—and your heart drops into your stomach. Surely the justices did not think that the solicitor's statements were fair or constitutional. Your hands are shaking as you flip through the opinion. Then you see the words, hard and cold on the page: "Because we find defendant failed to state at trial the grounds for his objection to the solicitor's statements, this issue is procedurally barred and we decline to consider it." *What?* The judge had told you that you were protected. That should count for something, right? Besides, you had made it clear earlier, at the motion *in limine*, what your grounds were. Apparently, the state supreme court is going to let this egregious error go unaddressed just because, with your client's life at stake, you failed to jump through some stupid, moving hoop.

The preceding situation is nonfiction; however, it is a situation that is not only entirely possible, but describes an increasingly common scenario in South Carolina. Before 1991, South Carolina capital defendants benefitted from lenient policies of error preservation. However, in 1991 the South Carolina Supreme Court put an end to these policies and began enforcing default rules that are more draconian than those of any other American jurisdiction with a death penalty. Furthermore, the South Carolina Supreme Court's decisions have made it difficult for trial practitioners to discern the rules under which they must operate. Taken in combination, the strictness of the new procedural policy, the lack of clarity regarding the applicable rules, and the South Carolina Supreme Court's often ad hoc approach to enforcing the rules severely inhibit consideration of capital defendants' rights. Moreover, the current situation wastes an enormous amount of time and money. This Article explores the problems with the current situation and proposes a partial solution.

Part II of this Article describes South Carolina's most frequently applied procedural rules. Part III then outlines the history and philosophy underlying procedural requirements at trial. Next, Part IV examines the evolution of the South Carolina Supreme Court's treatment of procedural issues in capital cases and attempts to discern the proper balance between the state's interest in

finality and efficient administration of its criminal laws, and the capital defendant's interest in receiving a fair trial. Part V then details the court's current application of the contemporaneous objection rule, using recent case law as a guide. Finally, Part VI advocates the adoption of a plain error rule to address egregious errors in capital cases.

II. SOUTH CAROLINA RULES FOR ERROR PRESERVATION: A BASIC OUTLINE

South Carolina law recognizes the same rules for preservation of error in all criminal cases, whether capital or noncapital. Although it is not possible to determine all the rules,[1] the following discussion attempts to summarize the rules on which South Carolina appellate courts most frequently rely.

A. The Contemporaneous Objection Requirement

The contemporaneous objection rule requires an attorney to make an objection contemporaneous with an alleged error as a prerequisite for direct appellate review of the error.[2] In addition, the trial judge must actually rule on the objection.[3] For example, in *State v. Hudgins*[4] the solicitor threw a ski mask at the defendant "during cross-examination in the guilt phase of the trial."[5] "Although [defense counsel] objected to the solicitor's behavior, the trial judge did not rule on the objection and [defense counsel] did not object further or request curative instructions."[6] The South Carolina Supreme Court found this issue procedurally barred on direct appeal.[7]

Whether the supreme court considers a particular objection to be sufficiently contemporaneous appears to depend on the nature of the objectionable material. For example, when opposing counsel makes an improper argument, counsel must immediately object to the argument and obtain a ruling from the trial court.[8] Furthermore, the court has held that an

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1. While some of these rules are well established, the nuances of others are unclear and seem to be developed by the South Carolina Supreme Court in an ad hoc manner. Consequently, capital defense counsel are frequently unaware of what will be deemed adequate to preserve an issue. This discussion attempts to summarize only the most common rules.

2. *See* State v. Southerland, 316 S.C. 377, 383, 447 S.E.2d 862, 866 (1994), *overruled on other grounds by* State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995); State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994); State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring).

3. *See* State v. Hudgins, 319 S.C. 233, 236, 460 S.E.2d 388, 390 (1995), *overruled on ther grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

4. 319 S.C. 233, 460 S.E.2d 388 (1995).

5. *Id.* at 236, 460 S.E.2d at 390.

6. *Id.*

7. *Id.*

8. *See* State v. Franklin, 318 S.C. 47, 58, 456 S.E.2d 357, 363 (1995). Franklin complained on appeal that the solicitor's penalty phase closing argument unfairly injected "an unreliable factor into the sentencing determination." *Id.* The South Carolina Supreme Court

appellant waives any objection to an improper argument or question if counsel fails to object the first time the argument is made, even if counsel later objects.[9] Likewise, an objection to a juror must be made before the jury is impaneled[10] unless counsel demonstrates that the basis for the objection could not have been discovered prior to impanelment through due diligence.[11] In regard to the trial judge, counsel must object to an improper or prejudicial comment by the court as soon as the comment is made; however, if the "tone and tenor" of the judge's remarks indicate that an objection would be futile, then a failure to object does not preclude consideration of the issue on direct appeal.[12]

B. Specificity of the Objection

A general objection does not preserve an issue for appellate review.[13] Rather, "[a]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge."[14] For example, mere statements that evidence is prejudicial do not satisfy this specificity requirement.[15] The South Carolina Supreme Court frequently invokes this rule to bar appellate consideration of issues in capital cases.[16]

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refused to address the issue because defense counsel had not objected to the argument at trial. *Id.* At least one South Carolina case suggests that, in addition to immediately objecting to an improper argument, counsel must "have a record made of the statements or language complained of and . . . ask the court for a distinct ruling thereon." State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995).

9. *See* State v. Somerset, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981).

10. *See* S.C. CODE ANN. § 14-7-1030 (Law. Co-op. Supp. 1997).

11. Wilson v. Childs, 315 S.C. 431, 436, 434 S.E.2d 286, 289 (Ct. App. 1993).

12. State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (per curiam).

13. *See, e.g.*, State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (stating that a general objection without specific grounds is not sufficient to preserve an issue for appeal); State v. Hess, 279 S.C. 14, 19, 301 S.E.2d 547, 550 (1983) (finding that an objection to "'one or two inaccurate facts'" on a display board is not sufficiently specific to preserve an issue for appeal).

14. Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 107, 352 S.E.2d 302, 310 (Ct. App. 1986). Although *Broom* was a civil case, the same principle applies in criminal cases. *See, e.g.*, State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (finding that the trial judge properly admitted certain evidence because defense counsel's objection was, among other things, "very broadly made").

15. *See* State v. Millings, 247 S.C. 52, 53, 145 S.E.2d 422, 423 (1965).

16. *See, e.g.*, State v. Bennett, 328 S.C. 251, 260, 493 S.E.2d 845, 849 (1997) (barring a character evidence issue where the defense counsel made a vague objection); State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 765-66 (1997) (finding that defense counsel's objection to closing argument was not preserved for review where defense counsel did not state the particular basis for the objection), *cert. denied*, 118 S. Ct. 146 (1997); State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997) (holding argument regarding victim impact evidence to be procedurally barred where counsel merely interjected that he thought the testimony was "going out of the bounds," but did not raise a specific objection); State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996) (holding the issue of whether two aggravating circumstances stemmed from the same act to be procedurally barred because trial counsel did not state the constitutional basis for

A logical corollary to the specificity rule is the principle that an appellant may not raise one ground for an objection at trial and then argue another ground on appeal. Like the rule requiring a specific objection, the state supreme court frequently invokes this rule in capital cases. In *State v. Byram*[17] the South Carolina Supreme Court refused to consider the defendant's argument that he should have been permitted to introduce, in mitigation of punishment, information regarding the identity of the alleged accomplice mentioned in the defendant's confessions.[18] At trial, the defendant offered the evidence to bolster his other statements, not to mitigate punishment.[19]

C. *Motions* In Limine

Obtaining a ruling on a motion *in limine* does not preserve an issue for direct appeal because a motion *in limine* is not considered a final determination of a question.[20] In *State v. Simpson*[21] defense counsel moved *in limine* to challenge the admissibility of testimony regarding a child's hysterical response to the shooting of his father.[22] However, when the solicitor introduced the testimony at trial, defense counsel failed to object to its admission.[23] Accordingly, the supreme court found that the issue was barred on direct appeal.[24]

D. *Curative Instructions*

The South Carolina Supreme Court has held that even when defense counsel makes a contemporaneous objection, the issue is not preserved for appellate review if the trial court offers a curative instruction and counsel

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his objection).

17. 326 S.C. 107, 485 S.E.2d 360 (1997).

18. *Id.* at 112-13, 485 S.E.2d at 362-63.

19. *Id.*; *see also* State v. Humphries, 325 S.C. 28, 35, 479 S.E.2d 52, 56 (1996) (holding arguments were unpreserved where defense counsel objected to victim impact evidence at trial for lack of notice, but alleged on appeal that the evidence was excessive and that the prosecutor's acts were prejudicial), *cert. denied*, 117 S. Ct. 2441 (1997).

20. *See, e.g.*, State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), (holding that appellant failed to preserve an issue by not objecting during testimony), *cert. denied*, 117 S. Ct. 2460 (1997).

21. 325 S.C. 37, 479 S.E.2d 57 (1996).

22. *Id.* at 42, 479 S.E.2d at 59.

23. *Id.* at 42, 479 S.E.2d at 60.

24. *Id.*; *see also* State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390 (1995) (noting that a pre-trial motion to prohibit certain victim impact evidence did not preserve the issue for appeal where there was no contemporaneous objection to the evidence), *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998); *cf.* State v. Holmes, 320 S.C. 259, 266, 464 S.E.2d 334, 338 (1995) (holding that an issue raised in a post-trial motion for a new trial did not preserve the issue for appeal, where defense counsel had not made a contemporaneous objection).

refuses the instruction.[25] In *State v. Tucker*[26] the solicitor suggested that the defendant may have intended to rape the victim he ultimately murdered.[27] Because no evidence of rape existed, defense counsel objected to the statement and moved for a mistrial.[28] On appeal, the supreme court found the issue waived because defense counsel refused a curative instruction offered by the court upon its denial of the motion for a mistrial.[29]

Similarly, if a trial judge gives a curative instruction on an issue to which counsel has objected, the defendant waives the issue for appellate review unless counsel objected to the sufficiency of the curative instruction or moved for a mistrial.[30]

E. Recommendations to Defense Counsel: How to Preserve Errors for Appeal

As will be discussed more fully later in this Article,[31] the South Carolina Supreme Court has not clarified what constitutes a sufficient objection in a capital case. Therefore, attorneys have no foolproof methods for preserving trial error in South Carolina. However, the following strategies may prove useful:

- Any objection should include all possible legal bases. "[I]t is better to be overinclusive than underinclusive."[32] If uncertain whether a constitutional provision applies, counsel should mention it anyway. One capital defense lawyer suggests the following objection: "The accused, John Client, *pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution*, and [the applicable provisions of the state constitution, any state statutes or rules] and other applicable law, moves this Court to . . . ."[33] While primarily focusing on the strongest grounds, "[c]ounsel should assert *all possible grounds* in support of a[n]" argument.[34]

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25. *See, e.g.*, State v. Tucker, 324 S.C. 155, 168-69, 478 S.E.2d 260, 267 (1996) (holding that the appellant waived his objection by refusing the trial judge's offer of a curative instruction), *cert. denied*, 117 S. Ct. 1561 (1997).

26. 324 S.C. 155, 478 S.E.2d 260 (1996), *cert. denied*, 117 S. Ct. 1561 (1997).

27. *See id.* at 169, 478 S.E.2d at 267.

28. *See id.* at 168-69, 478 S.E.2d at 267.

29. *Id.* at 169, 478 S.E.2d at 267; *see also* State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996) (finding that reversal is not mandated because appellant declined the judge's offer of a curative instruction and did not demonstrate prejudice).

30. *See, e.g.*, State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (holding that an objection to the introduction of character evidence is not preserved if counsel does not "make an additional objection to the sufficiency of the curative charge or move for a mistrial").

31. *See infra* Part V.

32. Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 43, 45.

33. *Id.*

34. *Id.* at 44.

- Counsel should reference specific cases in raising objections and making motions. "By citing a case, counsel invokes all of the principles discussed in that case."[35]
- During trial, even a skilled lawyer may forget grounds for objections. Therefore, it is helpful to file motions *in limine* and trial memoranda concerning anticipated issues.[36] "Counsel can then incorporate the memorandum by reference in objections: 'I object based on the grounds set out in my trial memorandum.'"[37] The South Carolina Supreme Court may not recognize this as a fair method for preserving issues, but adding this phrase after mentioning the obvious bases for objection can only enhance the defendant's chances of having his claim heard on direct appeal.
- Counsel must obtain rulings from the trial court.[38] As described above,[39] a contemporaneous and specific objection may not be sufficient to preserve an issue; the judge must rule on the issue.
- If counsel objects to a certain line of questioning, counsel should continue to object and continue to state the relevant grounds every time the improper material is introduced. Unless counsel objects each time, the court may find that the defendant waived the earlier objections through subsequent failures to object.[40]
- Finally, there is no substitute for reviewing new rulings regarding procedural default. Competent counsel should be familiar not only with the United States Supreme Court's death penalty jurisprudence, but also with state procedural rules. Unless procedural rules are followed faithfully, a capital defendant's constitutional rights are little more than an empty promise.

III. RATIONALE FOR SOUTH CAROLINA'S SCHEME OF ERROR PRESERVATION

South Carolina cases rarely explain the reasoning behind the rules regarding preservation of errors. However, in *State v. Torrence*[41] the supreme court explained the rationale for the contemporaneous objection rule. The court stated that "[a] contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition."[42] The court adopted the United States Supreme Court's reasoning in *Wainwright v. Sykes*,[43]

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35. *Id.* at 45.
36. *Id.*
37. *Id.*
38. *See id.* at 46.
39. *See infra* Part II.A-.B.
40. *See* Bright, *supra* note 32 at 46.
41. 305 S.C. 45, 406 S.E.2d 315 (1991).
42. *Id.* at 66, 406 S.E.2d at 327 (Toal, J., concurring).
43. 433 U.S. 72 (1977).

by quoting the following language of that opinion:

> A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous objection rule surely falls within that classification.[44]

Therefore, the South Carolina Supreme Court recognizes that considerations of efficiency and accuracy underlie the rule requiring contemporaneous objections at trial. The contemporary objection requirement serves efficiency because contemporaneous objections encourage prompt disposition of the legal questions in a case; the requirement serves accuracy because contemporaneous objections allow the judge to make immediate rulings that presumably will ensure the proceeding is relatively free of errors that would require additional proceedings.

Several commentators have presented the justifications for error preservation rules more thoroughly.[45] Most of these commentators agree that the various judicial systems in the United States have an interest in finality of judgments and that error preservation rules, particularly the contemporaneous objection rule, serve that interest by refusing to address controversies which the parties did not raise.[46] Professor Daniel Meltzer describes a number of interests served by state court procedural rules:

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44. *See Torrence*, 305 S.C. at 66-67, 406 S.E.2d at 327 (Toal, J., concurring) (quoting *Wainwright*, 433 U.S. at 90).

45. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that the concern for finality in the criminal law system justifies limited usage of the federal writ of habeas corpus); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-88) (summarizing the reasons typically given for using procedural default rules to refuse review of alleged constitutional errors). *But see* Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 26 (1970) (arguing for a more extensive judicial consideration of issues that would ordinarily be deemed waived or defaulted, in part because "[t]he rules of procedure have really become Platonic forms transcending the reality of the everyday world").

46. *See supra* note 45.

> Rules such as these serve critical purposes: the provision of adequate notice to adversaries (and the court) of the matters that are at issue; the allocation of decisions to the appropriate body; the promotion of focused consideration of particular questions at different times, when the pertinent evidence and argumentation can be mustered; and the avoidance of wasteful proceedings by requiring prompt consideration of issues upon whose resolution further matters (or the continuation of the proceeding at all) depend. It is hard to imagine an effective procedural system lacking such rules of the road.[47]

These procedural rules should not merely serve state interests in finality, notice to adversaries, efficiency, and other such goals. Rather, they should reflect a balancing of those interests with defendants' interests in both a fair trial and vindication of their constitutional and statutory rights. Federal courts exercising their habeas jurisdiction implicitly recognize this notion by refusing to honor state procedural rules that do not further "legitimate" state interests[48]

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47. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1134-35 (1986). Other commentators have articulated similar rationales for these rules. See, for example, John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 695 (1990) (footnote omitted), where Professors Jeffries and Stuntz explain:

> In addition to its proper interest in finality, the state has a significant interest in enforcing the procedural rules that give rise to defaults. States have good and legitimate reasons for requiring timely presentation of claims; an orderly adjudicative process depends on such requirements. It is wasteful to wait until trial to decide whether the key piece of government evidence is admissible, and also wasteful to have a second round of review because the litigant did not raise the winning claim on the first appeal. These concerns are no makeweight. Critics of the procedural default doctrine [in federal habeas corpus proceedings] argue that "mere" timing rules are not important enough to justify precluding constitutional claims, yet virtually no one argues that such timing rules should be dispensed with in federal practice. Surely if federal courts are entitled to insist on routine compliance with sensible procedures in their own trials, state courts should also be entitled to do so.

48. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 124 (1990) (refusing to honor a state procedural requirement where enforcing it would constitute an "'arid ritual of meaningless form,' . . . and would further no perceivable state interest'") (quoting James v. Kentucky, 466 U.S. 341, 349 (1984) (quoting Staub v. City of Baxley, 355 U.S. 313, 320 (1958))); Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); *cf.* Spencer v.

or that impose unrealistic obstacles to the assertion of federal constitutional rights.[49] In other words, federal courts reviewing habeas petitions will honor state procedural rules only when the rules provide defendants an adequate opportunity to present their federal constitutional claims for full consideration.

This Article is not concerned directly with how federal courts should balance states' interests in finality with defendants' interests in fair trials and vindication of constitutional rights. Nevertheless, that issue raises two important questions for either the legislature or the South Carolina Supreme Court. First, do South Carolina's current procedural rules fairly resolve the tension between the state's and capital defendants' somewhat conflicting interests? Second, does the South Carolina Supreme Court's current application of procedural rules actually serve the rationale articulated for their existence; namely, allowing judges to make reasoned decisions about appropriately developed issues? If the answer to either of these questions is no, then what should be done about it?

Part IV of this Article addresses the first question—whether South Carolina's procedural rules fairly balance the competing interests of the state and of capital defendants. Until 1991, the South Carolina Supreme Court balanced these interests quite differently from the way it presently balances them. Therefore, the discussion will address the prior method, *in favorem vitae* review, and the reasons for the change. Next, it will address the current balance

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Zant, 715 F.2d 1562, 1573 n.11 (11th Cir. 1983) (questioning whether a Georgia state procedural default rule serves legitimate interests).

49. *See, e.g.*, Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996) (holding that a federal court was not barred from reviewing the merits of a constitutional claim when the applicable state procedural rule was "so unclear that it [did] not 'provide[] the habeas petitioner with a fair opportunity to seek relief in state court'") (quoting Harmon v. Ryan, 959 F.2d 1457, 1462 (9th Cir. 1992); United States *ex rel.* Williams v. Lane, 645 F. Supp. 740, 748 (N.D. Ill. 1986) (holding that no default existed in petitioner's failure to object repeatedly to the prosecutor's patently unconstitutional statements during closing argument because "federal courts are not bound by a state procedural rule that sets the threshold for preserving a constitutional issue so high as to be unreasonable"), *aff'd*, 826 F.2d 654 (7th Cir. 1987) (affirming the district court, but disagreeing with its characterization of the state procedural rule); *see also* James v. Kentucky, 466 U.S. 341, 348-49 (1984) (holding that the defendant did not waive a federal constitutional right when counsel requested that an "admonition" rather than an "instruction" be given to the jury).

The rules described in the text stem from the adequate and independent state ground doctrine. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1, at 807-08 (2d ed. 1994). Before refusing to consider a constitutional claim because the petitioner defaulted the claim under state procedural rules, a federal habeas court must find that five factors are satisfied, one of which is that the state "procedural violation provides an 'adequate' and 'independent' state ground for denying petitioner's federal constitutional claim." *Id.* at 808; *see also* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (finding that in federal habeas proceedings, the procedural default doctrine bars consideration of federal claims if the petitioner defaulted "pursuant to an independent and adequate state procedural rule"). For a comprehensive discussion of the adequate and independent state ground doctrine and the circumstances under which state rules are found inadequate, see LIEBMAN & HERTZ, *supra*.

to determine whether the rules accord sufficient weight to capital defendants' interests in receiving fair trials and whether these rules serve the purposes articulated for their existence.

IV. SOUTH CAROLINA'S RESOLUTION OF THE TENSION BETWEEN CAPITAL DEFENDANTS' RIGHTS AND THE STATE'S INTERESTS IN FINALITY AND ENFORCEMENT OF ITS CRIMINAL PENALTIES

A. In Favorem Vitae *Review: Pre-1991 South Carolina Law*

Before May 1991, South Carolina law implicitly took the view that a capital defendant's right to a fair, constitutional determination regarding both guilt and sentencing outweighed the State's interests in finality and efficient administration of its criminal laws. South Carolina's doctrine of *in favorem vitae* review in capital cases reflected this perspective. First recognized by South Carolina courts in 1794,[50] "[t]his doctrine requires this Court to review the entire record for legal error, and assume error when unobjected-to but technically improper arguments, evidence, jury charges, *etc.* are asserted by the defendant on appeal in a demand for reversal or a new trial."[51] The doctrine mandated reversal even in capital cases in which the court had "grave" doubts that the error was prejudicial, because, as the state supreme court stated, "If in ordering [a new trial] we err, at least such error has not the finality that affirmance on the present record would have."[52] It is not clear whether, in its early days, the doctrine of *in favorem vitae* actually reflected a policy determination that a defendant's interest in receiving a fair trial outweighed or equaled the state's interest in execution of its criminal laws. In *Torrence* Justice Toal offered the explanation that in the eighteenth and nineteenth centuries, *in favorem vitae* represented an effort to give *some* weight to the defendant's interest in a fair trial in a system that otherwise heavily favored the state and granted a defendant few protections.[53]

Regardless of what *in favorem vitae* review originally was intended to achieve, the doctrine evolved during the 1950s, 1960s, and the post-*Gregg*[54] era into a powerful tool for the vindication of capital defendants' rights. For example, of the eleven South Carolina capital convictions reversed between 1962 and 1972, seven were reversed after *in favorem vitae* review.[55] As one

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50. *See* State v. Briggs, 3 S.C.L. (1 Brev.) 8, 9 (1794).

51. State v. Torrence, 305 S.C. 45, 60-61, 406 S.E.2d 315, 324 (1991) (Toal, J., concurring).

52. State v. Livingston, 233 S.C. 400, 409, 105 S.E.2d 73, 78 (1958).

53. *See Torrence*, 305 S.C. at 61-62, 406 S.E.2d at 324-25 (Toal, J., concurring).

54. *See* Gregg v. Georgia, 428 U.S. 153 (1976). *Gregg* ushered in the modern era of capital punishment in the United States.

55. *See* State v. Richburg, 250 S.C. 451, 158 S.E.2d 769 (1968); State v. Bell, 250 S.C. 37, 156 S.E.2d 313 (1967); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966); State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864

commentator notes, these reversals "were in every instance based exclusively or substantially on State rather than federal precedent or rule of law."[56]

Under *in favorem vitae*, courts had the liberty to look at the entire record. For instance, in *State v. Swilling*[57] the supreme court reversed the defendant's capital conviction based, in part, on improper cross-examination concerning the defendant's character and reputation.[58] The defendant's counsel failed to raise the improper cross-examination as an issue on appeal. Nevertheless, the court found that *in favorem vitae* review permitted it to "independently search[] the record for prejudicial error, whether or not objected to below or made a ground of exception here;"[59] consequently, the court explained that "[u]nder all of the circumstances of the case, we think these questions propounded by the solicitor on cross-examination were clearly prejudicial."[60]

In addition to permitting review of unraised or unpreserved issues, *in favorem vitae* review further balances a capital defendant's rights by setting a fairly low threshold for showing prejudice. Thus, *in favorem vitae* required appellate courts to reverse convictions in which errors occurred, even when there were "grave[] doubt[s]" that the errors were prejudicial.[61] For example, in *State v. White*,[62] a capital case involving a rape, the solicitor's closing argument encouraged the jurors to imagine their wives, sisters, and daughters in place of the victim. On appeal, the state argued that even if this argument was improper, there could be no prejudice in light of the overwhelming proof of the defendant's guilt.[63] The supreme court disagreed. It found that in addition to deciding the guilt or innocence of the defendant, the capital jury also possessed the sole discretion to recommend mercy.[64] Because the improper argument could have affected the jury's decision to recommend mercy, reversal was required:

> In view of the absolute discretion of the jury with regard

(1965); State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965); State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963). For a discussion of capital punishment in South Carolina during the pre-*Furman* era, see Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). For an analysis of *in favorem vitae* review as an expression of "deeply felt doubts within that system of justice of the propriety of capital punishment itself," see Laughlin McDonald, *Capital Punishment in South Carolina: The End of an Era*, 24 S.C. L. REV. 762, 774-80 (1972).

56. McDonald, *supra* note 55, at 775. This observation is significant for a number of reasons, the most important being that federal courts hearing federal habeas claims in capital cases lack jurisdiction to consider pure issues of state law. Therefore, state courts provide the only forum for the consideration of certain claims.

57. 246 S.C. 144, 142 S.E.2d 864 (1965).

58. *Id.* at 150, 142 S.E.2d at 867.

59. *Id.* at 147, 142 S.E.2d at 865.

60. *Id.* at 152, 142 S.E.2d at 868.

61. State v. Livingston, 233 S.C. 400, 409, 105 S.E.2d 73, 78 (1958).

62. 246 S.C. 502, 144 S.E.2d 481 (1965).

63. *See id.* at 506-07, 144 S.E.2d at 482-83.

64. *See id.* at 507, 144 S.E.2d at 483 (noting that "[t]he duty of the court in that regard is to see that such discretion is left with the jury").

> to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict. We do know, however, that in asking the jury to determine such issue by relating the circumstances of the case to their loved ones, the Solicitor injected into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality. While we seriously doubt that the argument of the Solicitor had the claimed prejudicial effect and reach our result with reluctance, the probabilities of prejudice to the rights of the defendant are such that we would not be justified in assuming in a death case that it did not result.[65]

Significantly, the *in favorem vitae* presumption lowered the threshold for showing prejudice.

The doctrine enjoyed continued vitality in the post-*Gregg* era. Of course, the South Carolina Supreme Court affirmed many convictions and sentences under the *in favorem vitae* standard,[66] and continued to reverse several others based on errors actually raised and preserved at trial.[67] Nevertheless, the court reversed several cases with unpreserved error after reviewing the entire trial record under *in favorem vitae*.[68] For example, in *State v. Smart*[69] the solicitor's penalty-phase-closing argument referred to his personal decision to seek the death penalty against the defendant.[70] The solicitor's argument also suggested

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65. *Id.*

66. *See* State v. Smith, 286 S.C. 406, 334 S.E.2d 277 (1985); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985), *vacated and remanded*, 476 U.S. 1102 (1986); State v. Damon, 285 S.C. 125, 328 S.E.2d 628 (1985); State v. Koon, 285 S.C. 1, 328 S.E.2d 625 (1985); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985); State v. Lucas, 285 S.C. 37, 328 S.E.2d 63 (1985); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (per curiam); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984) (per curiam); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984); State v. Adams, 279 S.C. 228, 306 S.E.2d 208 (1983); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982) (per curiam); State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).

67. *See* State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987); State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987) (per curiam); State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986) (per curiam); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981).

68. *See* State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988); State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987); State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986); State v. Drayton, 287 S.C. 226, 337 S.E.2d 216 (1985) (per curiam); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (per curiam); State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985); State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) (per curiam); State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982); State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980); State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979).

69. 278 S.C. 515, 299 S.E.2d 686 (1982).

70. *Id.* at 526, 299 S.E.2d at 692.

that the police officers who captured the defendant would be "aggrieved by a sentence less than death,"[71] and that he and other citizens of Lexington County "would strongly disapprove of a life sentence."[72] Although the defendant's lawyer did not object to these arguments, the South Carolina Supreme Court vacated the sentence and remanded the case for a new sentencing trial.[73] The court reasoned that "[j]urors are simply not to consider the opinions of neighbors, officials or even other juries. . . . Capital sentencing is a process specific to the crime and the defendant, and we admonish bench and bar to be guided by this limitation."[74] Similarly, in *State v. Arthur*[75] the trial judge failed to question the defendant sufficiently to determine whether he knowingly and intelligently waived his right to a jury trial.[76] Accordingly, the supreme court reversed the defendant's sentence of death. As in *Smart*, the court implicitly applied *in favorem vitae* review to reverse the defendant's sentence; defense counsel not only failed to object to the judge's questioning but also stated that the defendant had "full knowledge" regarding his waiver and had agreed to waive his right to be sentenced by a jury.[77]

These and other cases, all reversed under *in favorem vitae* review, demonstrate the force that this doctrine had both before and after *Gregg*. Although the court did not reverse every capital conviction, the high percentage of reversals indicates that the doctrine mandated serious consideration of defendants' claims of error. In balancing the state's interest in finality against the defendant's interest in a fair trial, the defendant's interest received its due weight.

B. State v. Torrence: *The Abolition of* In Favorem Vitae *Review*

Through Justice Toal's concurring opinion in *State v. Torrence*, the South Carolina Supreme Court jettisoned the doctrine of *in favorem vitae* review and held that, as in other criminal cases, a contemporaneous objection is required to preserve issues for appellate review.[78] Whether *Torrence* appropriately shifted the balance of the state's interest in finality against the defendant's interest in a fair trial is a question of perspective. The perspective of Justice Toal and the other concurring justices[79] is clear: Given the panoply of protections available to capital defendants, appellate court enforcement of a

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71. *Id.*
72. *Id.*
73. *Id.* at 527, 299 S.E.2d at 693.
74. *Id.* at 526-27, 299 S.E.2d at 693.
75. 296 S.C. 495, 374 S.E.2d 291 (1988).
76. *See id.* at 497-98, 374 S.E.2d at 292-93.
77. *Id.* at 498, 374 S.E.2d at 293.
78. *See* State v. Torrence, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., concurring).
79. Chief Justice Gregory and Justices Harwell and Chandler joined Justice Toal's concurring opinion. *See id.* at 69, 406 S.E.2d at 328.

contemporaneous objection rule most equitably balances the divergent interests of the state and the capital defendant. Therefore, retention of the *in favorem vitae* standard would accord insufficient weight to important state interests and would encourage sabotage by defense counsel.

This Article disagrees with the court's perspective and argues that strict, undeviating adherence to a contemporaneous objection rule—especially one as unclear as South Carolina's—fails to protect adequately capital defendants. The court's opinion relied on conjecture rather than hard fact, and consequently failed to balance appropriately the "cost" of *in favorem vitae* review incurred by the state against the protections provided by the post-conviction relief statute.

1. Analysis of "Dangers" Associated with In Favorem Vitae *Review*

In abolishing *in favorem vitae* review in capital cases, Justice Toal's concurring opinion cited three "dangers" or potential abuses associated with the doctrine's use: (1) "sandbagging" by defense attorneys, (2) second-guessing defense trial strategy, and (3) injecting the trial judge into the adversarial process.[80] Each of the *Torrence* court's concerns is either exaggerated or misplaced.

a. "Sandbagging"

First and foremost, Justice Toal's concurrence found that the doctrine encouraged "sandbagging" by defense attorneys:

> The primary danger associated with the doctrine is that a defendant will deliberately refrain from objecting to an error which occurs during trial. This is what is referred to by some as "sandbagging." . . . [*In favorem vitae* review] encourages defense attorneys to purposefully allow error to occur (such as improper solicitor argument or erroneous charge by the judge) in a case they feel they are losing at trial, thereby tainting the trial, while taking comfort that this Court will reverse a conviction based upon the unobjected-to error.
>
> This strategy *may* serve in some cases to make more probable the conviction of a defendant at trial, but the defense attorney finds solace in an *in favorem vitae* appellate reversal and, possibly years later, a new trial with evidence or witnesses missing.... This practice frustrates the goals of our

80. *See id.* at 64-66, 406 S.E.2d at 326-27 (Toal, J., concurring). In her concurrence, Justice Toal mentions all three of these as potential dangers, but she does not concentrate on second-guessing defense trial strategy; therefore, this potential danger is not discussed in detail in this Article.

> criminal justice system—which is designed not only to protect the innocent but to punish the guilty.[81]

This language grossly overstates the danger of defense lawyers actually engaging in sandbagging. Notably, the supreme court provided no authority, anecdotal or otherwise, to support its accusations. Other courts, particularly federal habeas courts, are concerned that defense lawyers may be sandbagging by failing to assert claims in state court and then raising them for the first time in federal court.[82] However, little or no evidence supports the conclusion that sandbagging occurs. In fact, the available information suggests that capital defense lawyers rarely sandbag. The American Bar Association Task Force on Death Penalty Habeas Corpus examined the issue of sandbagging in federal habeas proceedings and found that "based on the extensive testimony on this question and our own experience, . . . capital trial and appellate lawyers rarely engage in the practice of sandbagging."[83]

Indeed, the accusation of sandbagging ignores the obvious. Many if not most lawyers trying capital cases "lack the sophistication required to 'sandbag.'"[84] Capital trial representation requires extensive time for investigation, consultation with experts, and other tasks not closely related to research, legal argumentation, or constitutional law. Yet, to be capable of

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81. *Id.* at 64-65, 406 S.E.2d at 326 (Toal, J., concurring).

82. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 491-92 (1986) ("Nor do we agree that the possibility of 'sandbagging' vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful."); Johnson v. Singletary, 938 F.2d 1166, 1173-74 (11th Cir. 1991) (noting that "federal habeas review 'may give litigants incentives to withhold claims . . . and may establish disincentives to present claims when evidence is fresh'") (quoting McCleskey v. Zant, 499 U.S. 467, 491-92 (1991)); Cooper v. Wainwright, 807 F.2d 881, 886 (11th Cir. 1986) ("By respecting state procedural rules, federal courts prevent 'sandbagging,' promote finality, and allow state courts the opportunity to add their wisdom to the interpretation of the Constitution."). Only under extremely limited circumstances may a death-sentenced petitioner raise issues not presented in state court proceedings. *See infra* Part V.

83. Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus*, 40 AM. U. L. REV. 1, 118 (1990). Importantly, the ABA Task Force on Death Penalty Habeas Corpus, which reviewed the issue of sandbagging, included state and federal judges from states with the death penalty. In short, the Task Force did not consist of a biased group of abolitionist liberals. Yet they found the rumors of sandbagging to be greatly exaggerated, noting that "[t]he vast majority of Task Force witnesses thought that sandbagging was not as serious a problem as is sometimes represented." *Id.* at 117.

84. Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 693 (1990); *see also id.* at 693-94 (discussing the quality of representation in capital cases and arguing, by example, that a lawyer "whose total knowledge of criminal law is '*Miranda* and *Dred Scott*'" lacks the knowledge to identify and hide constitutional issues at a capital trial).

sandbagging, counsel must possess a vast storehouse of legal knowledge. Among other things, counsel "must be completely conversant with federal constitutional decisions of the state and federal courts throughout the nation [and] must keep abreast of developments in all of the federal circuits, the state appellate courts and the writings of commentators,"[85] to know what issues are "percolating" in the courts.[86]

Appointed counsel in South Carolina will not likely possess the sophistication necessary to engage in sandbagging because they are not required to have any capital trial experience.[87] As a result, many appointed counsel have no experience trying a capital case. Typically, the solicitor has, by far, the most experience in death penalty trials and thus enters a trial with a distinct advantage. Furthermore, the court's discussion of sandbagging assumes that capital trial lawyers do not try to win at trial, but hold back hoping for a reversal on appeal. However, all available evidence suggests exactly the opposite.[88] Thus, the court's discussion of sandbagging failed to take into account the available facts. Sandbagging has never been a significant problem in capital trials.

b. Injection of Trial Judges into the Adversarial Process

The *Torrence* concurrence also contains unwarranted concern about the interjection of a judge into the trial in a quasi-adversarial role.[89] However, the active participation of the trial judge and the solicitor in ensuring that the capital defendant receives a fair trial is a strength of *in favorem vitae* review. This is true for two reasons. First, *in favorem vitae* review requires the trial

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85. *Id.* at 687-88 (footnote omitted).

86. *See id.* at 688; *see also* Bailey v. State, 309 S.C. 455, 424 S.E.2d 503 (1992) (discussing the demands placed on capital defense counsel); Robbins, *supra* note 83, at 117-18 ("The failure of these trial lawyers to raise an issue is the result of ignorance, not any intentional withholding.").

87. In South Carolina the court will appoint two attorneys to represent a capital defendant that cannot afford counsel. *See* S.C. CODE ANN. § 16-3-26(B)(1) (Law. Co-op. Supp. 1997). However, the law requires only that one of the two attorneys has at least five years' experience as a licensed attorney and three years' experience in trying felony cases. *See id.* Attorneys are not required to have experience in trying a capital case or even a murder case.

88. For example, many Task Force witnesses testified that sandbagging was unlikely:

> The Task Force . . . heard considerable testimony indicating that the strong tendency of trial and appellate lawyers is to be far more concerned with winning at trial or on appeal than with possible means of relief thereafter; they have little or no inclination to pass up an opportunity to succeed in their own endeavors on the chance that some other lawyer might succeed in a later proceeding.

Robbins, *supra* note 83, at 117.

89. State v. Torrence, 305 S.C. 45, 66-67, 406 S.E.2d 315, 327 (1991) (Toal, J., concurring).

judge to remain alert to the rights of the accused at all times, not merely when defense counsel rises to object. In a capital trial, this heightened vigilance should be encouraged; it represents one of the most valuable benefits of thorough appellate review in capital cases. Second, *in favorem vitae* review removes any incentive for a prosecutor to employ unfair or improper tactics in capital cases. This review requires the prosecutor to be guided by the law as expounded by the United States Supreme Court and by the South Carolina Supreme Court, not by an estimation of what might be able to slip past inexperienced defense counsel in the heat of trial. Take the example of a solicitor who knowingly (and repeatedly) makes blatantly unconstitutional statements during closing arguments at the penalty phase of a trial, realizing that any objection by defense counsel increases the risk that the jury's attention will be further drawn to the improper argument. With no checks on the solicitor or the trial court, requiring the defendant to object encourages solicitors to push the constitutional envelope. In such a situation, the trial judge should intervene to prevent the solicitor from running roughshod over the rights of the accused. Whatever its faults or possible excesses, the doctrine of *in favorem vitae* at least gives all courtroom players—the defendant, the state, and the trial judge—a stake in ensuring a fair trial for the capital defendant.

2. *Analysis of "Protections" Available to Capital Defendants*

The *Torrence* concurrence also found that strict adherence to a contemporaneous objection rule does not threaten a defendant's right to a fair, constitutional trial because defendants enjoy a number of other protections.[90] According to the concurrence, these protections include:

- The availability of state post-conviction relief proceedings;[91]
- The availability of federal habeas corpus relief;[92]
- The statutory right[93] to a proportionality review of a capital defendant's sentence;[94]
- The fact that the death penalty may be imposed only after at least one statutory aggravating factor has been found to exist beyond a reasonable doubt;[95] and
- The availability of state habeas relief as a last resort.[96]

Citing these protections, Justice Toal concluded that "[t]he conviction of an innocent person is unlikely under our modern system."[97]

Much of the concurrence's analysis misses the point. First, the court's

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90. *See id.* at 62-64, 69, 406 S.E.2d at 324-26, 328 (Toal, J., concurring).
91. *See id.* at 62-64, 406 S.E.2d at 324-25 (Toal, J., concurring).
92. *See id.* at 64, 406 S.E.2d at 325-26 (Toal, J., concurring).
93. *See* S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1976).
94. *See Torrence*, 305 S.C. at 64, 406 S.E.2d at 326 (Toal, J., concurring).
95. *See id.*
96. *See id.* at 69, 406 S.E.2d at 328 (Toal, J., concurring).
97. *Id.* at 64, 406 S.E.2d at 326 (Toal, J., concurring).

focus on whether these protections ensure that only factually guilty persons are put to death is far too narrow. The question should be whether the judicial process, including the contemporaneous objection requirement, sufficiently safeguards a capital defendant's right to be tried *and sentenced* in accordance with the United States Constitution, the South Carolina Constitution, and all available statutory protections.[98] Factual guilt is only one of several relevant factors in considering the legality of a death sentence.

Second, some of the so-called protections cited by the concurrence as justification for abolishing *in favorem vitae* review have little to do with ensuring full review of and redress for constitutional errors during a capital trial. For example, what does the requirement that an aggravating circumstance be proven beyond a reasonable doubt have to do with whether a defendant is protected from an unconstitutional conviction and sentence after a trial at which his counsel failed to object to legal errors? Indeed, the vulnerability of this "protection" to the operation of a contemporaneous objection rule is obvious. Assume, for example, that a jury found the existence of an aggravating circumstance beyond a reasonable doubt, as required, but this finding was based, in part, on an unconstitutional reasonable doubt instruction to which defense counsel failed to object. How reliable was the jury's finding of the statutory aggravating circumstance? How has the defendant been protected? In such a case, enforcement of the procedural rule results in the imposition of a clearly unconstitutional death sentence.

Similarly, it is difficult to understand how the availability of proportionality review protects against unconstitutionally obtained convictions and sentences, or otherwise ensures that defaulted constitutional claims will be aired in some forum. Moreover, the statutory right to proportionality review is a toothless, paper tiger. Since the South Carolina General Assembly enacted section 16-3-25,[99] the South Carolina Supreme Court has never invalidated a death sentence for being disproportionate.[100]

The availability of post-conviction relief and federal habeas corpus relief requires closer consideration. The argument that procedural defaults can best be redressed in the post-conviction process is not wholly without merit. Defense counsel may, at times, choose not to object to evidence or an argument because of the risk involved in calling attention to the problem. At first blush,

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98. The Eighth Amendment of the United States Constitution, U.S. CONST. amend. VIII, requires fair and adequate sentencing proceedings even after an adjudication of guilt. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (imposing the death penalty under a statute that prevented the sentencing body from giving independent consideration to mitigating factors involving the defendant's character or record, or the circumstances of the offense held to be unconstitutional).

99. S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1976).

100. Additionally, the South Carolina Supreme Court has refused to compare the facts of a case in which the judge or jury imposed a death sentence to similar capital cases where the jury or judge imposed a life sentence. *See* State v. Copeland, 278 S.C. 572, 595-97, 300 S.E.2d 63, 77 (1982) (determining that the death sentence imposed on the appellants was appropriate).

a Sixth Amendment[101] ineffectiveness claim in a post-conviction proceeding seems to be an appropriate means of distinguishing deliberate and reasonable trial decisions from failures to object based on ignorance, negligence, or incompetence. However, an examination of Sixth Amendment law regarding ineffectiveness demonstrates the inadequacy of a post-conviction proceeding to remedy trial counsel's inadvertent failures to preserve issues for appellate review.

Strickland v. Washington,[102] which delineates the standard for determining whether counsel's representation satisfies the demands of the Sixth Amendment, requires a petitioner to prove that his attorney's representation "fell below an objective standard of reasonableness,"[103] and that he was prejudiced as a result.[104] Counsel's performance falls below *Strickland*'s "objective standard of reasonableness" only in those rare instances when the performance is outside the "wide range of reasonable professional assistance."[105] A petitioner establishes prejudice under *Strickland* by demonstrating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome"[106] of the proceeding. In application, both the ineffectiveness prong and the prejudice prong are very difficult to satisfy.

Consequently, a finding that trial counsel failed to object to prejudicial trial error does not compel the conclusion that counsel's assistance was constitutionally ineffective. This is true for three reasons. First, post-conviction proceedings turn on judicial dissections of the testimony and motivations of trial counsel, with no guarantee that such long-after-the-fact determinations will yield a fair result. Therefore, trial counsel may posit a "strategic" reason for failure to object when, in fact, none existed. Second, even an admittedly inadvertent failure to object to prejudicial error does not necessarily constitute ineffective assistance. The United States Supreme Court has specifically found that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."[107] The Court thereby acknowledges that a failure to raise even a meritorious objection does not necessarily constitute ineffective assistance.[108] Furthermore, although some trial

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101. U.S. CONST. amend. VI.
102. 466 U.S. 668 (1984).
103. *Id.* at 688.
104. *Id.* at 687.
105. *Id.* at 689.
106. *Id.* at 694.
107. Murray v. Carrier, 477 U.S. 478, 488 (1986).
108. South Carolina's precedent on this question appears to be more favorable than that of other jurisdictions. Since *Torrence*, the South Carolina Supreme Court has not had an opportunity to decide whether a defense counsel's failure to object in a capital trial amounts to

errors are potentially prejudicial, the errors may not be sufficiently egregious to meet the relatively demanding "prejudice" standard required for ineffective assistance of counsel claims.[109] In such cases, courts must consign capital defendants to execution despite the presence of substantial and prejudicial trial errors, simply because their counsel's errors were subject to a heightened standard of prejudice on collateral review. Finally, even if a post-conviction challenge based on counsel's ineffectiveness proves successful, it represents years of litigation that conceivably could have been avoided, thus, placing additional strain on the judicial system.[110]

There are additional reasons a state post-conviction proceeding is an inadequate substitute for *in favorem vitae* review. When a post-conviction applicant loses at the hearing level, the Attorney General's office usually drafts the order denying the application. Post-conviction judges typically sign these orders without making substantive changes, and the South Carolina Supreme Court employs a deferential "any evidence" standard to review the findings in the order.[111] This hardly equals the *de novo* review a legal issue would receive on direct appeal.

Generally, a federal habeas proceeding is unlikely to consider the merits of a defaulted issue at trial because a federal habeas petitioner must prove cause for and prejudice resulting from an otherwise enforceable procedural default.[112] In the alternative, the petitioner must show that a "fundamental miscarriage of justice"[113] would result absent review of the alleged error. Ineffective assistance

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constitutionally ineffective assistance warranting a new trial. However, a trial attorney's failure to raise or preserve meritorious objections in non-capital trials frequently has served as a basis for granting post-conviction relief. *See, e.g.*, Hopkins v. State, 317 S.C. 7, 10, 451 S.E.2d 389, 390 (1994) (finding that trial counsel's assistance was ineffective because counsel failed to object to an amendment of indictment that changed the nature of the offense from a lesser to a greater offense); Jolly v. State, 314 S.C. 17, 19-21, 443 S.E.2d 566, 568-69 (1994) (finding that trial counsel's failure to object to hearsay testimony denied petitioner the effective assistance of counsel); Simmons v. State, 308 S.C. 481, 485, 419 S.E.2d 225, 227 (1992) (finding that defense counsel's failure to object to the solicitor's comments regarding the defendant's exercise of his constitutional right constituted ineffective assistance of counsel); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding that counsel's assistance was ineffective for failing to object to the judge's improper comments to the jury). *But see* Johnson v. State, 325 S.C. 182, 187-88, 480 S.E.2d 733, 735 (1997) (finding that counsel's failure to object to the solicitor's improper comment regarding petitioner's failure to testify did not violate petitioner's right to effective counsel where petitioner could not show that he was prejudiced by this failure).

109. *See* Strickland v. Washington, 466 U.S. 668, 690 (1984); Sosebee v. Leeke, 293 S.C. 531, 534-35, 362 S.E.2d 22, 23-24 (1987).

110. *See infra* Part VI.

111. *See, e.g.*, Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (stating that the court uphold the findings of a post-conviction judge if there is any evidence to support the judge's findings).

112. For a state court's finding of procedural default to be honored in federal habeas proceedings, the finding must be based on an adequate and independent state ground. Among other things, this means that the state procedural rule must be "firmly established and regularly followed." James v. Kentucky, 466 U.S. 341, 348 (1984).

113. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

of counsel is "cause" for a procedural default, but inadvertent errors that fall short of ineffectiveness are not.[114] Two Georgia cases illustrate the point well. John Eldon Smith and Rebecca Machetti were co-defendants in a capital murder case. They were accused of killing Machetti's ex-husband and his wife so that Machetti's daughters could collect on the ex-husband's insurance policies. Both Smith[115] and Machetti[116] were sentenced to death. However, neither sentence was constitutional because women were seriously underrepresented on both juries. The Court of Appeals for the Eleventh Circuit addressed the merits of Machetti's jury composition claim and granted relief because the Georgia state courts had previously reached the merits of this issue.[117] In contrast, Smith's lawyers failed to timely raise the jury composition issue. The Eleventh Circuit found that the ignorance of Smith's lawyers regarding the law supporting the claim did not constitute "cause" for Smith's default.[118] Accordingly, the court deemed the issue waived, and Smith was executed.[119]

Additionally, the United States Court of Appeals for the Fourth Circuit, which reviews federal habeas cases from the District of South Carolina, has even more draconian procedural default rules than the South Carolina state courts. In fact, the court declines to review the merits of claims if there is even a suggestion of default. For example, in *Atkins v. Moore*[120] the sole potential aggravating circumstance that allowed the State to seek the death penalty was a prior murder conviction. The prior murder conviction was marred by obvious constitutional errors, and Atkins petitioned the state court for post-conviction relief from the prior conviction. However, the state post-conviction court applied the state doctrine of laches to bar Atkins's challenge to the prior conviction.[121]

When Atkins challenged the prior conviction in federal habeas proceedings, both the federal district court and the Fourth Circuit found the challenge procedurally barred because of the state court's application of laches. Both courts concluded that laches was regularly and consistently applied in post-conviction relief actions in South Carolina, as required by the adequate and independent state ground doctrine.[122] The courts reached this conclusion

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114. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986); *see also* Jackson v. Herring, 42 F.3d 1350, 1360-62 (11th Cir. 1995) (explaining that defense counsel should have objected to the prosecutor's strikes against all blacks on the venire, although this failure to object did not support an ineffectiveness of counsel claim).

115. *See* Smith v. State, 222 S.E.2d 308, 317-18 (Ga. 1976), *aff'd sub nom.* Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983).

116. *See* Smith v. State, 222 S.E.2d 308, 317-18 (Ga. 1976), *rev'd sub nom.* Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).

117. *See Machetti*, 679 F.2d at 238 n.4.

118. *See* Smith v. Kemp, 715 F.2d 1459, 1470 (11th Cir. 1983).

119. *See id.*

120. No. 97-17, 1998 WL 93409, at *1 (4th Cir. Mar. 5, 1998).

121. *Id.* at *2.

122. *Id.* at *4; *supra* note 49.

despite the fact that laches is, under South Carolina law, a wholly equitable and discretionary doctrine inherently susceptible to uneven application;[123] laches had been applied in only *one* other South Carolina post-conviction relief case, which was not even a capital case,[124] and the state courts did not apply the doctrine in at least two other Post-conviction relief cases, both of which involved delays of approximately the same duration as Atkins's.[125]

In *Kornahrens v. Evatt*[126] the Fourth Circuit ignored state law in order to deny a federal habeas petitioner substantive review of his constitutional claims. Fred Kornahrens, the federal habeas petitioner received a death sentence before the abolition of *in favorem vitae* review in South Carolina. Accordingly, the South Carolina Supreme Court reviewed the entire trial transcript without regard to issues actually raised or preserved by trial counsel; therefore, it reviewed the *merits* of all record-based claims.[127] The state supreme court simply did not apply any doctrine of procedural default in the case. Notwithstanding the South Carolina Supreme Court's substantive review of the record-based issues, and its failure to apply any state doctrine of procedural default, the Fourth Circuit found Kornahrens had defaulted on several issues by failing to object at trial or to raise them on direct appeal.[128] However, the federal courts have no power to create a federal common law of default in federal habeas corpus cases; rather, they may apply only those default rules a state court has both recognized and actually applied in the case at hand.

The recent case of *Johnson v. Moore*[129] is perhaps the most egregious example of death by default. In that case, the Fourth Circuit refused to consider the merits of a *Brady*[130] claim raised by Johnson in state post-conviction proceedings because, during a closing statement at his resentencing trial, Johnson told the jury he had "no defense for anything."[131] The state post-

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123. *See, e.g.*, Archambault v. Sprouse, 218 S.C. 500, 508, 63 S.E.2d 449, 462 (1951) ("There is no hard or fast rule as to what constitutes laches.").

124. *See* McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890, 890 (1981) (applying the doctrine of laches to bar a post-conviction relief application filed seventeen years after the date of the applicant's conviction).

125. *See* McDuffie v. State, 276 S.C. 229, 231, 277 S.E.2d 595, 596 (1981) (reversing a dismissal of a post-conviction relief case involving a fifteen year old conviction); State v. Patrick, 318 S.C. 352, 354, 457 S.E.2d 632, 634 (Ct. App. 1995) (describing a case in which the courts granted relief in the form of a new trial, notwithstanding a sixteen year delay between the time of conviction and the post-conviction relief application).

126. 66 F.3d 1350 (4th Cir. 1995).

127. In *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993), an appeal from a denial of post-conviction relief in a capital case, the South Carolina Supreme Court held that "under *in favorem vitae* review, all direct appeal errors are assumed to have been reviewed by this Court, and thus are barred from collateral attack." The Fourth Circuit ignored this holding in determining that Kornahrens had defaulted on his record-based issues.

128. *See Kornahrens*, 66 F.3d at 1362.

129. No. 97-33, 1998 WL 708691 (4th Cir. Sept. 24, 1998).

130. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court established a rule requiring the State to turn over potentially exculpatory evidence to the defense.

131. *Johnson*, 1998 WL 708691, at *4.

conviction court had refused to consider Johnson's *Brady* claim because of Johnson's so-called admission of guilt at trial. Despite ample evidence that the harmless error doctrine formed the basis for the state post-conviction court's ruling, the Fourth Circuit concluded South Carolina has a regularly applied default rule which bars review of guilt-phase issues *whenever* a defendant makes a closing statement admitting culpability.[132] The Fourth Circuit completely discounted cases in which the South Carolina Supreme Court reviewed guilt-phase issues notwithstanding defendants' closing statements, and spent pages in a futile attempt to demonstrate that South Carolina actually had this particular procedural default rule. Otherwise the court could not invoke the default as a bar to federal consideration of the merits of the issue. However, the dissent in *Johnson* correctly pointed out that "[i]n effect, the majority holds that the PCR court erred in its interpretation of South Carolina law. As the majority itself recognizes, the law of our circuit forbids us from correcting errors of state law on federal habeas review."[133]

In short, in order to avoid reaching the merits of an issue, the Fourth Circuit was willing to "reinterpret"or "invent" South Carolina law to find a default rule where, in truth, only a harmless error rule existed. Given the federal court's default rules and its draconian interpretation of those rules, federal habeas corpus review cannot substitute for the South Carolina Supreme Court's *in favorem vitae* review.[134]

In summary, the protections cited by the South Carolina Supreme Court in

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132. *Id.* at *5.

133. *Id.* at *21.

134. Moreover, federal habeas review of the merits of claims cannot take the place of searching state court review. Enacted in 1996, the federal Anti Terrorism and Effective Death Penalty Act of 1996, § 104, 28 U.S.C. § 2254(d)(1), limited the federal courts' ability in habeas proceedings to review a state court's resolution of federal constitutional issues. As amended, 28 U.S.C. § 2254(d)(1) (1996) provides that application for writ of habeas corpus

> [S]hall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

The Fourth Circuit has interpreted the language in the most restrictive way possible, thus further limiting federal habeas corpus as a mechanism for meaningful federal review of the constitutionality of state convictions. See Green v. French, 143 F.3d 865, 870 (1998).

> [A decision is] contrary to . . . clearly established Federal law [when] either through a decision of pure law or the application of law to facts indistinguishable in a any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Id.

Torrence are not a substitute for *in favorem vitae* appellate review of technically defaulted issues. Moreover, the supreme court's fears regarding sandbagging and disruption of the adversarial process are exaggerated, if not unwarranted. In reality, *Torrence* signaled a fundamental shift away from protection of capital defendants' rights. South Carolina's current contemporaneous objection scheme accords too much weight to the state's interest in finality and too little weight to a capital defendant's interest in a fair trial. This already skewed balance is further exacerbated by the court's rigid, hyper-technical, and at times inexplicable application of its default rules.

V. THE SOUTH CAROLINA SUPREME COURT'S CURRENT APPLICATION OF THE CONTEMPORANEOUS OBJECTION RULE

As noted above, one must ask not only what South Carolina's rules regarding procedural default accomplish in theory, but also what, if anything, they accomplish in practice. This Part examines the South Carolina Supreme Court's application of the contemporaneous objection rule in a sampling of capital cases, with a view toward determining whether the court's reasons for requiring contemporaneous objections are being well served by the court's current practices. A review of the relevant case law compels the conclusion that the court's current practices elevate form over substance. This effectively, although perhaps unintentionally, thwarts capital defendants' attempts to receive fair trials.

A. State v. Patterson

In 1995, in *State v. Patterson*,[135] the State of South Carolina tried Raymond Patterson for capital murder. Notably, Patterson had been convicted and sentenced to death twice before, but appellate courts overturned both convictions.[136] Before Patterson's third trial, Lexington County Solicitor Donald V. Myers explained to the media that twenty-four persons had already agreed Raymond Patterson should be sentenced to death and stated, "'Why should I overrule their opinion?'"[137] As a precaution against more improper statements,[138] prior to the closing arguments, defense counsel moved *in limine*

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135. 324 S.C. 5, 482 S.E.2d 760 (1997), *cert. denied*, 118 S. Ct. 146 (1997).

136. Lisa Greene, *Man Goes on Trial for His Life for Third Time Since '84 Slaying*, THE STATE (Columbia, S.C.), Feb. 6, 1995, at A1.

137. *See id.*

138. On several occasions, the state supreme court has reversed death sentences and convictions due to Solicitor Myers's prejudicial and inflammatory arguments. *See* State v. Sloan, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982) (sentence and conviction reversed); State v. Smart, 278 S.C. 515, 517, 299 S.E.2d 686, 687 (1982); State v. Gilbert, 273 S.C. 690, 698, 258 S.E.2d 890, 894 (1979). In other cases prosecuted by Solicitor Myers, the South Carolina Supreme Court found his arguments or comments to be questionable, but not so severe in the context of the case to warrant reversal. *See, e.g.*, State v. Bell, 302 S.C. 18, 35, 393 S.E.2d 364, 373 (1990);

to prohibit improper arguments by the solicitor. Specifically, the motion objected to arguments "such as the solicitor stating he is standing or speaking for the victim or anything to suggest that anything but a sentence of death would be an affront to the memory of the victims."[139] Defense counsel argued further that such statements are "clearly impermissible.... You can't have any victim's statements or any kind of statements from the prosecutor suggesting that the victim's family wants a death sentence."[140] During the closing arguments, Patterson's counsel objected to several statements made by the solicitor.[141] However, the trial court immediately overruled the objections, presumably because defense counsel failed to state a basis for them.

Following the solicitor's argument, defense counsel moved for "a mistrial based on the improper closing argument."[142] Counsel stated that he was "concerned in light of *Torrence* just how specific the objections have to be."[143] In response, the trial court stated:

> Well, you know, each time that he said something, you did not—*I did not allow you each time to state specifically your objection*, but you objected at the time he asked the question. *My idea is that you are protected.*
>
> Every time you object—I said when he asked the question—when he made the statement, you objected at that time. *My idea is you are protected for that particular statement. On appeal you simply state the grounds then. For that matter you can do it now or we can do it after this thing is over with.*[144]

Counsel then stated additional objections, including an objection to the solicitor's "comments that we in any way suggested that Matthew Brooks killed himself [because that argument] is absolutely unsupported in the record."[145] On appeal, the state did not argue that a procedural bar to consideration of these issues on the merits existed. Moreover, at oral argument the justices asked no questions concerning whether defense counsel preserved any objections to the solicitor's closing argument. Nevertheless, the South

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State v. Patterson, 299 S.C. 280, 284, 384 S.E.2d 699, 701 (1989), *vacated*, 493 U.S. 1013 (1990).

139. Record on Appeal at 2253.

140. *Id.*

141. For example, the solicitor stated, "They tried to say that Mr. Brooks killed himself," *id.* at 2271, and "anything less than [a life sentence] will be a blight on the life of what remains of [the victim's widow] and the memory of [the victim]." *Id.* at 2282. The defense argued that Mr. Brooks was shot only because appellant's pistol accidentally fired during a struggle between appellant and Mr. and Mrs. Brooks.

142. *Id.* at 2283.

143. *Id.*

144. *Id.* at 2284 (emphasis added).

145. *Id.* at 2285.

Carolina Supreme Court found that the issues were not preserved for review because defense counsel did not state his grounds for objection during the closing argument.[146]

Only a strained and hyper-technical reading of South Carolina's contemporaneous objection rule could find the defendant's actions insufficient to merit appellate review. This becomes even clearer when considering the defendant's actions in light of the concerns articulated in *Torrence*. In *Patterson* the trial judge was aware of the bases for the defendant's objections during closing argument, thus satisfying the concern that trial judges should be permitted "to make reasoned decisions by appropriately developing issues by way of argument."[147] The judge stated that he had not allowed defense counsel to state the specific grounds and implied that he understood the grounds.[148] Moreover, far from attempting to "sandbag," defense counsel repeatedly raised the issues to which he objected. Because the trial judge was satisfied with his opportunity to rule on the arguably objectionable questions, it is unclear why the South Carolina Supreme Court considered the objections insufficient. If the supreme court intends to eliminate the procedural protection of *in favorem vitae* review, it should at least consider issues which, while perhaps defaulted in some technical sense, were raised to and clearly understood by the trial judge.[149]

B. State v. Ivey

In *State v. Ivey*[150] the South Carolina Supreme Court once again elevated form over substance. As in *Patterson*, the court applied its default rules in an extremely technical manner that ignored the real concerns underlying the rules.

In *Ivey* a juror sent a note to the judge explaining that she knew one of the persons ("Fletch") about whom a witness testified. Both the prosecution and the defense agreed that the judge should examine the juror about this issue. The judge asked the juror whether her acquaintance with Fletch would affect her ability to be fair and impartial. The juror said it would not, and the judge denied the defendant's motion to remove the juror. The court then recessed until the

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146. *See* State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997), *cert. denied*, 118 S. Ct. 146 (1997).

147. State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (Toal, J., concurring).

148. *See* Patterson Record on Appeal at 2284.

149. The supreme court recognizes that unpreserved issues can be raised at a post-conviction relief proceeding through an ineffective assistance of counsel claim. *See supra* note 108 and accompanying text. However, when considering a clear error objected to by trial counsel, consideration of the issue on direct appeal furthers the ends of judicial economy and conservation of state resources. *See* discussion *infra* Part VI.

150. 331 S.C. 118, 502 S.E.2d 92 (1998).

next morning. Immediately the next morning,[151] *before any testimony was taken*, defense counsel moved to question the juror about her knowledge of Fletch. The judge denied the motion.[152]

On appeal, the defendant argued the trial court erred in denying his motion to question the juror. Citing an 1886 case,[153] the South Carolina Supreme Court found the defendant's request "to ask additional questions of [the juror] was untimely," and held that "[i]f dissatisfied with the trial judge's examination... [the defendant] should have immediately moved for permission to make additional inquiries of the juror."[154] Therefore, the court applied a procedural bar.[155]

The finding of default in *Ivey* is questionable on a number of levels. First, if the supreme court itself had to reach back one-hundred twelve years to find the relevant rule, how could defense counsel have notice of a rule so infrequently applied? Second, all the purposes underlying South Carolina's procedural default doctrine were satisfied by defense counsel's actions: the trial judge understood the nature of defense counsel's motion, had an opportunity to rule, and actually ruled on defense counsel's motion. No one would argue that defense counsel "sandbagged" the issue. The supreme court's finding that the motion was untimely is unconvincing, given the lack of any testimony between the initial questioning of the juror and the request for additional questioning. The timing of the motion did not prejudice the prosecution, nor did it disrupt the orderly administration of the trial. Under such circumstances, what conceivable purpose–other than perhaps an aggressive appellate policy of finding defaults whenever possible in capital cases–did application of the procedural default rule serve? Is rationality a part of the process?

C. *State v. Whipple*

In *State v. Whipple*[156] the solicitor's office gave 479 pages of discovery materials to Whipple's counsel during jury selection, and defense counsel moved to delay the start of the trial for twenty-four hours so that it could review the materials.[157] The trial court delayed ruling on the motion, so counsel renewed the motion after jury selection. Counsel made this motion three times.[158] The trial judge ultimately granted counsel slightly more than five hours to review the materials, during which time counsel also had to prepare

151. *Id.* at 121, 502 S.E.2d at 94.
152. *Id.*
153. State v. Nance, 25 S.C. 168, 171 (1886).
154. *Ivey*, 331 S.C. at 122, 502 S.E.2d at 94.
155. *Id.*
156. 324 S.C. 43, 476 S.E.2d 683 (1996).
157. *Id.* at 50-51, 476 S.E.2d at 687.
158. *Id.* at 54, 476 S.E.2d at 689 (Finney, C.J., dissenting).

an opening statement and eat lunch.[159] After that time had elapsed, defense counsel stated that the defense was ready.[160] On appeal, Whipple argued that he was given insufficient time to review the 479 pages of discovery materials.[161] Notwithstanding the three motions and the trial court's ruling which allowed the defense five hours to review the material, the South Carolina Supreme Court found that by proceeding to trial without further complaint, the defendant waived his objection to the amount of time actually granted by the trial court.[162] In reaching its conclusion regarding waiver, the court relied on a 1979 case, *State v. Brown*,[163] and a 1954 case, *State v. Orr*.[164] Not only are both cases old and obscure, giving rise to the question of how Whipple's counsel could possibly have known that they were waiving an objection, but also the cases appear wholly distinguishable. In *Brown*, the South Carolina Supreme Court found that an issue was not preserved for appeal where, at trial, counsel requested a certain kind of relief and the judge granted counsel's precise request.[165] In contrast, Whipple's lawyers requested a specific kind of relief and the court denied it. In *Orr*, the South Carolina Supreme Court found that the appellant waived any issues regarding jurisdiction, where he not only failed to raise the issue before trial, but also answered in the affirmative several times when asked whether he was ready to proceed.[166] As in *Orr* Whipple's lawyers stated that "the '[d]efense [was] ready.'"[167] However, unlike *Orr*, they did so only after moving *three times* for additional time to consider the state's discovery response and after the trial court ruled on their motions. Thus, the "ready" language can only logically be understood to mean "ready in light of the court's denial of the continuance motion."

D. Conclusion

The cases described in this Part demonstrate that even experienced and conscientious capital defense lawyers are confused about the requirements for preserving issues on appeal. Arguably, the procedural default rules, as applied in capital cases, have become a shell game in which virtually nothing defense counsel does is sufficient to preserve an issue for appeal. In insisting upon a

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159. *See id.* at 51, 476 S.E.2d at 687.

160. *See id.*

161. *See id.*

162. *Id.* Chief Justice Finney dissented in *Whipple*, stating: "The majority finds in the failure to continue to argue with the judge a waiver; I find the issue properly preserved, and that further argument after the ruling had been made would have been improper." *Id.* at 54, 476 S.E.2d at 689 (Finney, C.J., dissenting).

163. 274 S.C. 48, 260 S.E.2d 719 (1979).

164. 225 S.C. 369, 82 S.E.2d 523 (1954).

165. *Brown*, 274 S.C. at 51, 260 S.E.2d at 721. The court explained that "by this additional instruction the trial judge readily granted the only relief which appellant sought at trial." Thus, this exception presents no issue for decision by this Court on appeal. *Id.*

166. *Orr*, 225 S.C. at 372, 82 S.E.2d at 525.

167. *Whipple*, 324 S.C. at 51, 476 S.E.2d at 687.

confusing and hyper-technical application of the procedural rules, the South Carolina Supreme Court ignores both the realities of trial practice and its own responsibilities for safeguarding capital defendants' interests in receiving fair trials consistent with the demands of the United States Constitution.

If the contemporaneous objection rule and other state procedural default rules are to be strictly applied in capital cases, the South Carolina Supreme Court should issue a clear statement regarding the requirements for preserving issues on appeal. However, even a clear statement would be insufficient to protect fully the basic constitutional and statutory rights guaranteed to capital defendants. Additional protection is needed to preserve these fundamental rights. The next Part of this Article proposes that either the South Carolina General Assembly or South Carolina Supreme Court adopt a plain error rule in capital cases.

VI. PROPOSALS FOR REFORM: THE PLAIN ERROR RULE

The South Carolina Supreme Court's current labyrinthine default procedures for error preservation in capital cases are both insufficient on paper and occasionally perverse in their application. First, the rules fail to accord sufficient weight to capital defendants' interests in being tried and sentenced in fair proceedings. Second, far from encouraging lawyers to raise understandable objections upon which trial judges can rule, the supreme court's "rules" create a vast guessing game in which trial counsel must attempt to foresee what the court will deem sufficient to preserve the issue. This guessing game causes repeated unnecessary objections, trial interruptions, and arguments with trial courts in order to ensure that all issues are preserved. Third, the current default rules drastically affect future proceedings in both state and federal courts. In state court post-conviction relief proceedings, applicants are repeatedly forced to argue that trial counsel was ineffective because trial counsel failed to preserve the record for appeal when, in fact, counsel had made every effort to object when necessary and to comply with the court's rules on procedural default. In federal habeas proceedings, even those petitioners whose counsel made valiant efforts to preserve the record are faced with an uphill battle to demonstrate that the state court's finding of "default" should not preclude review of the merits in federal court.

In short, the current application of error preservation rules in capital cases is no more effective than the more flexible plain error rule would be for accomplishing the articulated purposes of the contemporaneous objection rule. The court's refusal to review on direct appeal arguments of which the trial court had full notice and upon which the trial court actually ruled disrupts the efficient administration of trials and encourages expensive, duplicative post-conviction and habeas proceedings. Because the current procedures are unpredictable, inefficient, and unfair to the accused, additional safeguards are needed to ensure a means of redress for prejudicial legal errors.

A. The Plain Error Rule

Unlike every other American jurisdiction with the death penalty, the South Carolina Supreme Court has no plain error rule enabling it to consider significant issues not preserved at trial.[168] As discussed above,[169] the South Carolina Supreme Court had relatively generous appellate review procedures for capital cases prior to *Torrence*. However, South Carolina catapulted itself to the opposite extreme in abolishing *in favorem vitae*.[170] Currently, no matter how obvious or prejudicial an error may be, the supreme court will not consider it on direct appeal unless the defense counsel objected to the error at trial. As described above,[171] what is considered a "sufficient" objection varies from case to case, making it difficult for defense counsel to know whether an objection will satisfy the demands of the day. This vagueness places South Carolina far outside the mainstream, as all other jurisdictions with capital punishment have a plain error rule to correct unpreserved, but prejudicial, defects at trial.

A plain error rule occupies a middle ground between *in favorem vitae* and the rigid (or unpredictable) application of contemporaneous objection rules. A plain error rule is deferential to both procedural rules and the orderly consideration of issues, while remaining mindful of the reality that in some instances glaring, prejudicial errors occur without objection. Furthermore, a plain error rule provides judicial economy and fairness to the defendant while avoiding various systemic problems which result from relying solely on subsequent claims of ineffective assistance of counsel to remedy egregious errors. In many cases, a plain error rule provides capital defendants with the only meaningful way to correct significant injustices at their trials. Accordingly, this Part will describe the operation of a plain error rule, distinguish it from *in favorem vitae* review, and argue that a plain error rule strikes an appropriate balance between the state's interest in finality and a capital defendant's interest in a fair guilt and sentencing trial.

1. The Federal Plain Error Rule

Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[172] The rationale behind this

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168. The federal government and virtually all state and territorial governments also have plain error rules for noncapital cases. *See infra* Tables 1 and 2. Table 1 provides a list of jurisdictions with the death penalty and the sources of their respective plain error rules. Table 2 provides a list of the plain error rules in jurisdictions without the death penalty.

169. *See supra* Part IV.A.

170. *See supra* Part IV.B.

171. *See supra* Part V.

172. FED. R. CRIM. P. 52(b); *see also* FED. R. EVID. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

long-standing policy is clear: "'[A] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice.'"[173] Although recognizing that an appellate court may need to reach the merits of an unpreserved issue to prevent an injustice, a court's application of Rule 52(b), unlike *in favorem vitae*, has fairly strict limits. In 1993, the United States Supreme Court delineated the parameters of Rule 52(b):

> There must be an "error" that is "plain" and that "affect[s] substantial rights." Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[174]

The Court then elaborated on those requirements. First, the court defined "error" as "[d]eviation from a legal rule . . . unless the rule has been waived."[175] Second, the Court observed that "'[p]lain' is synonymous with 'clear' or, equivalently, 'obvious.'"[176] Thus, Rule 52(b) applies only if "the error is clear under current law."[177] Last, the error must "'affec[t] substantial rights.'"[178] "[I]n most cases it means that the error must have been prejudicial."[179] The prejudice inquiry must be made against the backdrop of the entire record.[180] Under Rule 52(b), unlike other harmless error inquiries, "the defendant rather than the Government . . . bears the burden of persuasion with respect to prejudice."[181] At the same time, the Court has made it clear that its prejudice

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173. United States v. Olano, 507 U.S. 725, 732 (1993) (quoting Hormel v. Commissioner, 312 U.S. 552, 557 (1941)); *see also* United States v. Young, 470 U.S. 1, 15 (1985) ("The plain-error doctrine of Federal Rule of Criminal 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement.") (footnote omitted). In rare circumstances, the United States Supreme Court will consider an error that was not briefed or argued before it or presented to the court of appeals. *See* Silber v. United States, 370 U.S. 717, 717-18 (1962) (per curiam).

174. *Olano*, 507 U.S. at 732 (quoting *Young*, 470 U.S. at 15 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936))).

175. *Id.* at 732-33. The Court carefully distinguished waiver from forfeiture: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

176. *Id.* at 734.

177. *Id.*

178. *Id.* (quoting FED. R. CRIM. P. 52 (b)).

179. *Id.*

180. United States v. Young, 470 U.S. 1, 16 (1985).

181. *Olano*, 507 U.S. at 734; *see also* Chapman v. California, 386 U.S. 18, 24 (1967) ("[T]he original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained

requirement in the context of direct appeal is significantly lower than that required in collateral proceedings.[182]

2. *Contrasting Plain Error and* In Favorem Vitae

The differences between the plain error rule and *in favorem vitae* are significant. Because any alleged error must be "plain" or "obvious" under a plain error rule, that rule would not apply in a situation in which "'a convicted person, given time for research, can come up with some sort of theory ostensibly warranting a new trial.'"[183] Furthermore, the plain error rule places the burden of showing that there was a reasonable probability that the error affected the outcome of the proceedings on the defendant. By contrast, under *in favorem vitae*, the South Carolina Supreme Court conducts its own painstaking inspection of the record and, based on its assessment, determines whether to apply *in favorem vitae* to the particular case.[184]

The prejudice requirement of a plain error rule also substantially abates any conceivable risk of sandbagging. Because *in favorem vitae* review required inspection of the record of a capital case for even "technical" errors, counsel conceivably could have sandbagged an issue if it appeared that his client was going to lose.[185] Sandbagging enables counsel to salvage a losing case by raising a technical issue later.[186] This stratagem fails under a plain error rule. First, plain error does not apply to merely "technical" errors, including evidentiary rulings and jury charges; the rule applies only to errors affecting substantial rights.[187] Second, on appeal the defendant would be required to prove more than mere prejudice. A plain error rule would come into play only if it appears reasonably likely that the error complained of affected the trial's outcome.

All jurisdictions with plain error rules generally require that the error either

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judgment.").

182. *See* United States v. Frady, 456 U.S. 152, 166 (1982).

183. State v. Torrence, 305 S.C. 45, 63, 406 S.E.2d 315, 325 (1991) (Toal, J., concurring) (quoting Anderson v. Leeke, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978)); *see also* United States v. Rodriguez, 882 F.2d 1059, 1064 (6th Cir. 1989) ("Plain errors are limited to those so objectionable that they should have been apparent to the trial judge or that strike at the fundamental fairness, honesty or public reputation of the trial.").

184. *See* Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993).

185. As discussed before, the South Carolina Supreme Court based its statement that *in favorem vitae* review encouraged sandbagging by defense counsel wholly upon speculation, and this hypothesis is contradicted by the available evidence. *See supra* Part IV.B.1.a. Virtually any possibility of sandbagging, however remote, is eliminated by substitution of a plain error rule for *in favorem vitae* review.

186. *See* Namet v. United States, 373 U.S. 179, 190-91 (1963) ("[W]e are not concerned with whether the instruction was right, but only whether, assuming it was wrong, it was a plain error or defect 'affecting substantial rights' under Rule 52(b) . . . .").

187. *See* United States v. Olano, 507 U.S. 725, 732 (1993).

resulted in prejudice or undermined the fairness of the proceedings.[188] For example, the Supreme Court of North Carolina has limited application of the plain error doctrine to six identified areas:

(1) a fundamental error, meaning "'something so basic, so prejudicial, so lacking in its elements that justice cannot be done[,]'" or
(2) a grave error, which must amount "'to a denial of a fundamental right of the accused,'" or
(3) an error that has "'resulted in a miscarriage of justice,'" or
(4) an error that denies appellant of "'a fair trial,'" or
(5) an error that "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" or
(6) "where it can be fairly said that 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'"[189]

The adoption of limitations similar to North Carolina's would prevent any abusive practices by capital defense counsel. When an error is so serious as to deny a fundamental right of the accused, such as the right to a fair trial, counsel lacks any incentive to sandbag.

B. Benefits of a Plain Error Rule

1. Fundamental Fairness to a Capital Defendant

Courts generally recognize that plain error rules are especially important in criminal cases.[190] If a plain error rule is considered especially important in criminal cases, then it is even more urgent in capital cases. The South Carolina

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188. *See infra* Tables 1 and 2.

189. State v. Reilly, 321 S.E.2d 564, 569 (N.C. Ct. App. 1984) (quoting State v. Odom, 300 S.E.2d 375, 378 (N.C. 1983) (quoting United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982))) (citations omitted); *see also* Wilson v. People, 743 P.2d 415, 420 (Colo. 1987) (en banc) (noting that plain error must rise to a level which "so undermine[s] the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction"); Tharpe v. State, 416 S.E.2d 78, 82 (Ga. 1992) (stating that the test for unpreserved error "is whether the improper argument in reasonable probability changed the result of the trial"); State v. Desjardins, 401 A.2d 165, 170 (Me. 1979) (noting that plain error is triggered by a showing that "the defendant appellant was deprived of the fundamental fair trial to which he was constitutionally entitled"); Lindstrom v. Yellow Taxi Co., 214 N.W.2d 672, 676 (Minn. 1974) (noting that plain error "'destroy[s] the substantial correctness of the charge as a whole,' cause[s] a miscarriage of justice, or result[s] in substantial prejudice" (quoting Adelmann v. Elk River Lumber Co., 65 N.W.2d 661, 667 (Minn. 1954))) (footnotes omitted).

190. *See, e.g.*, United States v. Atkinson, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, *especially in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.") (emphasis added); *c.f.* FED. R. EVID. 103(d) advisory committee's note ("[J]udicial unwillingness to be constricted by mechanical breakdowns of the adversary system has been more pronounced in criminal cases.").

Supreme Court has recognized "the awesome responsibility of defending a person's life."[191] As previously noted, counsel for a capital defendant must be conversant with new United States Supreme Court decisions plus federal and state decisions of all jurisdictions.[192] Defense counsel must also conduct a thorough investigation into the facts of the case, often with expert forensic assistance, and prepare for a rigorous and time-consuming jury selection process.[193] Beyond this, however, "it is in the sentencing phase that new and different issues, heretofore unknown, are introduced."[194] Before the sentencing phase, counsel must "thoroughly research[] the defendant's entire life."[195] Pursuant to these ends, counsel faces the daunting challenge of coordinating the efforts of paralegals, investigators, and forensic and mental health experts.[196]

Given these demands, it should come as no surprise that even experienced capital litigators will make glaring and prejudicial mistakes. Most lawyers assigned to represent capital defendants in South Carolina are far from "experienced capital litigators," thus exacerbating the risk of fundamental, prejudicial error. A capital defendant should not have to shoulder the burden of a major lapse on the part of counsel; requiring the defendant to bear this risk accords insufficient weight to the defendant's interest in a fair trial.[197] Therefore, South Carolina should join the courts of other jurisdictions and allow review of plain errors in spite of failures by overburdened capital defense counsel to raise contemporaneous objections at trial.[198]

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191. Bailey v. State, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992).

192. *Id.*

193. *See id.* at 460-61, 424 S.E.2d at 506.

194. *Id.* at 461, 424 S.E.2d at 506-07.

195. *Id.* at 461, 424 S.E.2d at 507.

196. *See id.* at 462, 424 S.E.2d at 507. *See generally* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 336 (1993) (considering "the evolving standards of care with respect to the capital defense attorney's obligations to investigate, to make strategic decisions relating to the penalty trial, and to negotiate plea bargains").

197. In *Bailey v. State*, 309 S.C. 455, 463, 424 S.E.2d 503, 508 (1992), the court recognized that capital trial attorneys labor under tremendous stress due to both the nature of the proceedings and their knowledge that their performance will be scrutinized carefully in post-conviction proceedings. An unforgiving contemporaneous objection rule only intensifies these problems and makes it more difficult to recruit able and experienced capital trial attorneys.

198. Other state courts have recognized the importance of plain error in assuring substantial justice. *See, e.g.*, McMillian v. State, 594 So. 2d 1253, 1262 (Ala. Crim. App. 1991) (noting that the "[plain error] rule requires that we notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate action when such error has or probably has adversely affected the substantial rights of the appellant"); Conner v. State, 303 S.E.2d 266, 276-77 (Ga. 1983) (conducting a "review of the record . . . [to] conclude that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor"); State v. Fox, 760 P.2d 670, 675 (Haw. 1988) ("[W]here plain errors were committed and substantial rights were affected thereby, the errors 'may be noticed although they were not brought to the attention of the [trial] court.'") (quoting HAW. R. PENAL P. 52(b)); People v. Robinson, 178 N.W.2d 804, 807 (Mich. Ct. App. 1970) (noting that the plain error rule "requires an appellate court to review the whole case and in

2. *Ensuring the Accuracy of the Outcome of the Trial*

Allowing a conviction or death sentence to stand despite prejudicial error conflicts with the Eighth Amendment mandate of heightened reliability in capital cases. The risk of an unwarranted conviction "cannot be tolerated in a case in which the defendant's life is at stake."[199] The need for reliability at the sentencing phase of a capital trial is even higher:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[200]

Consequently, appellate courts in all other jurisdictions with the death penalty do not view their job as complete simply because counsel did not raise a contemporaneous objection to an error at trial. Instead those courts look to the seriousness of unpreserved errors affecting the fundamental fairness of the proceeding or undermining confidence in the outcome.[201]

State courts in both death penalty and non-death penalty jurisdictions that have adopted a plain error rule recognize the right to review plain errors when those errors have affected the accuracy of a trial's outcome.[202] As has been

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context with that review determine if the error complained of resulted in a miscarriage of justice or if refusal to hold that the error is reversible error is inconsistent with substantial justice"); State v. Marquez, 529 P.2d 283, 286 (N.M. Ct. App. 1974) (stating that "'plain error' has been characterized . . . 'as grave errors which seriously affect substantial rights of the accused, . . . result in a clear miscarriage of justice, [or] are obvious'") (quoting United States v. Campbell 419 F.2d 1144 (5th Cir. 1969)).

199. Beck v. Alabama, 447 U.S. 625, 637 (1980).

200. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also* Mills v. Maryland, 486 U.S. 367, 383-84 (1988) (noting the "high requirement of reliability on the determination that death is the appropriate penalty"); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

201. *See, e.g.*, State v. Ashe, 331 S.E.2d 652, 659 (N.C. 1985) (stating that where an error violates a defendant's constitutional rights, the "defendant's failure to object is not [necessarily] fatal to his right to raise the question on appeal").

202. *See* People v. Kurz, 847 P.2d 194, 195-96 (Colo. Ct. App. 1992) (stating that "[p]lain error exists if [the reviewing court can say with fair assurance], after reviewing the entire record, it is evident that the error 'so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction'") (quoting People v. McClure, 779 P.2d 864, 867 (Colo. 1989)) (en banc); State v. DeMartin, 568 A.2d 1034, 1037 (Conn. App. Ct. 1990) (declining "to review the defendant's unpreserved claim under the doctrine of plain error which is properly used only to preserve the integrity of the judicial process"); Nimmo v. State, 603 P.2d 386, 395 (Wyo. 1979) (noting that an error will not be regarded as harmful unless there is "'a reasonable possibility that in the absence of the error the verdict might have been more

recognized by every jurisdiction other than South Carolina, plain error review of issues not preserved at trial is not only desirable but necessary to assure that a trial's outcome is accurate.

3. *Plain Error Rules Promote Judicial Economy*

In addition to providing a necessary safeguard for a capital defendant, a plain error rule also conserves scarce judicial resources. For example, Maryland recognizes that the scope of appellate court review includes the right to decide an unpreserved "issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."[203] Without considering the costs of continued, time-consuming litigation, the effect of *Torrence* has been to disregard all unpreserved errors and channel any claims based on those errors into post-conviction proceedings. However, this often squanders judicial resources in unnecessary proceedings. Conscientious post-conviction counsel must litigate *all* potential claims. Counsel cannot rely on winning by raising one egregious error under the rubric of an ineffective assistance of counsel claim because, if that claim loses, state courts will rarely consider a successive application for post-conviction relief.[204] To unearth all meritorious claims, post-conviction counsel must investigate, among other things, the crime, the prosecution's conduct, the racial composition of the grand and petit juries, and the post-conviction applicant's mental state. This process involves a complete and reliable investigation into virtually every aspect of the client's social history and background. In short, post-conviction representation of a death row inmate involves an effort equal to that of trial counsel.[205]

To provide adequate assistance in representing a death row inmate in post-conviction proceedings, counsel is entitled to funds for expert and investigative services.[206] Although the legislature set a fee cap of $20,000 for investigative and expert services,[207] a post-conviction applicant may receive funds in excess of the cap if the applicant can show, in *ex parte* proceedings, that the expert services "were reasonably and necessarily incurred."[208]

Costs to the judicial system are not limited to the time for investigation and funds for attorneys, experts, and investigators. In capital cases, evidentiary hearings, which often take a week or more, are invariably required. In the meantime, the post-conviction judge must rule on a wide range of motions.

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favorable to the defendant'") (quoting Reeder v. State, 515 P.2d 969, 973 (Wyo. 1973)).

203. MD. R. APP. P. 8-131(a).

204. *See* S.C. CODE ANN. § 17-27-90 (Law. Co-op. 1976); Arnold v. State, 309 S.C. 157, 173, 420 S.E.2d 834, 842 (1992).

205. *See generally* John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235 (1994) (providing an overview of post-conviction practice and the types of claims often raised in these proceedings).

206. *See* S.C. CODE ANN. § 16-3-26 (C) (Law. Co-op. Supp. 1997).

207. *See id.*

208. *Id.* § 16-3-26(D).

Once the post-conviction judge renders an opinion, appeals to the South Carolina Supreme Court follow. The plain error rule would help eliminate this inefficient process.

Similarly, state writs of habeas corpus are no substitute for a plain error rule. A state writ of habeas corpus is an exceptionally rare remedy, granted only "'where there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'"[209] Additionally, the state habeas petitioner must have "exhaust[ed] all other sources of relief."[210] This option neither promotes judicial economy nor offers adequate protection to an inmate that suffered prejudicial error, though not error of the high magnitude to warrant habeas corpus relief.

To avoid such unnecessary expense and delay, most states have adopted plain error rules.[211] South Carolina's failure to adopt some mechanism for addressing serious unpreserved errors means that in many cases issues which could and should have been resolved on direct appeal will instead be litigated three to four years after the trial in post-conviction proceedings.[212] In cases involving clear errors that will likely result in reversal, such needless delay undermines public confidence in the criminal justice system.

4. *No Meaningful Alternative Exists to Correct Errors*

Except in extreme instances of ineffectiveness of counsel, a capital defendant may have no meaningful opportunity to have the courts correct prejudicial error, either in state post-conviction proceedings or in federal habeas corpus, without a plain error rule. The inadequacy of post-conviction remedies to address technically defaulted legal errors is discussed above in Part IV.

5. *Plain Error Rules Help Prevent Systemic Problems in the Criminal Justice System*

The language in *Torrence* has been taken to an extreme, resulting in gross, systemic problems in the administration of the court system. Extreme interpretations denigrate the trial judge's role and provide solicitors with less incentive to avoid misconduct. As discussed in Part IV, one benefit of *in favorem vitae* was that it caused defense counsel, the solicitor, and the trial

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209. State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring) (quoting Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quoting State v. Miller, 84 A.2d 459, 463 (N.J. Super. Ct. App. Div. 1951))).

210. *Id.*

211. *See, e.g.*, State v. Bassford, 440 A.2d 1059, 1061 (Me. 1982) (stating that "multiple trips to the Law Court strain the limited resources of the judicial system and add to the expense of the criminal process, a cost borne by the public in the overwhelming majority of criminal cases").

212. *See, e.g.*, State v. Hall, 312 S.C. 95, 439 S.E.2d 278 (1994) (addressing only one issue raised on direct appeal because the other claims were not properly preserved at trial).

court to be jointly responsible for the defendant's right to a fair trial. A plain error rule preserves this beneficial feature of *in favorem vitae* and avoids the problems associated with the doctrine.[213] The judge remains an integral player in the trial process at all times without being compelled to act on technical or trivial matters or to second guess trial counsel's strategic decisions. Nothing about a plain error rule compels the trial judge to assume responsibility for all of counsel's decisions, either before or during trial. At the same time, the judge retains an incentive to oversee the solicitor's conduct and rule on glaring acts of misconduct that undermine the fairness of the proceedings and threaten the accuracy of the outcome.

6. All Other Jurisdictions Recognize Plain Error in Capital Cases

Except for South Carolina, appellate courts in every jurisdiction with the death penalty recognize the utility of plain error in capital cases. Even states that ordinarily do not recognize plain error make exceptions in capital cases. For example, Alabama's plain error rule applies only in capital cases:

> In all cases in which the death penalty has been imposed, the court of criminal appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.[214]

Courts in other death penalty states similarly recognize the need for plain error review. For instance, the Louisiana Supreme Court stated that "[b]ecause the penalty of death is qualitatively different from any other sentence, capital cases receive heightened scrutiny from this court and we conduct an independent review, regardless of the failure of defense counsel to object to possible error."[215] The Missouri Supreme Court held, en banc, that in death penalty cases the court will review, *ex gratia*, unpreserved issues for plain error "to determine if manifest injustice or a miscarriage of justice resulted from the [error]."[216] Likewise, the Idaho Supreme Court stated:

> Death is clearly a different kind of punishment from any other that may may [sic] be imposed, and [the Idaho Code] mandates that we examine not only the sentence but the

213. *See supra* Part IV.B.1.b.

214. ALA. R. APP. P. 45A; *see also* McMillian v. State, 594 So. 2d 1253, 1262 (Ala. Crim. App. 1991) (relying on Alabama Rule of Appellate Procedure 45A).

215. State v. Thomas, 427 So. 2d 428, 433 (La. 1982).

216. State v. Nave, 694 S.W.2d 729, 735 (Mo. 1985) (en banc).

> procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below.[217]

C. South Carolina and Plain Error

The South Carolina Supreme Court has expressly declined to recognize the plain error doctrine in criminal cases.[218] However, in *Toyota of Florence, Inc. v. Lynch*[219] the court recognized a limited but significant exception to the contemporaneous objection rule. *Lynch* involved a civil lawsuit against a Japanese corporation. During his closing argument, Lynch's counsel used an exhibit with mushroom clouds and stereotypical Asian figures. Toyota's trial counsel failed to object, and the trial judge found that Toyota waived any objection to the exhibit.[220] On appeal the South Carolina Supreme Court reversed the judgment for Lynch stating that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice."[221] In addition, the court noted that it could "hardly conceive of a more outrageous argument than that made here," finding that "it would be wholly unreasonable for any attorney to anticipate this type of abhorrent conduct."[222]

Recently, the South Carolina Supreme Court made it clear that the court did not adopt a plain error rule in *Lynch*.[223] Furthermore, to date South Carolina courts have applied *Lynch*'s interpretation of the plain error rule only one other

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217. State v. Osborn, 631 P.2d 187, 192-93 (Idaho 1981); *see also* Ross v. State, 482 A.2d 727, 742-43 (Del. 1984) (allowing a defendant convicted of first degree murder to claim plain error despite the defendant's failure to object at trial); Culberson v. State, 379 So. 2d 499, 506 (Miss. 1979) (en banc) (waiving the requirement that counsel make timely objections in capital cases); State v. Noland, 320 S.E.2d 642, 651 (N.C. 1984) (finding that although the defendant failed to object to the prosecutor's remarks, the court would still consider the defendant's allegation of error on appeal due to the severity of a death sentence), *rev'd on other grounds*, Noland v. French, 134 F.3d 208 (4th Cir. 1998); State v. Brown, 607 P.2d 261, 265 (Utah 1980) (allowing a capital defendant to raise a prejudicial error in the absence of an objection).

218. *See* Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) ("This Court has consistently refused to apply the plain error rule.").

219. 314 S.C. 257, 442 S.E.2d 611 (1994).

220. *Id.* at 263, 442 S.E.2d at 615.

221. *Id.*

222. *Id.*

223. *See* Jackson v. Speed, 326 S.C. 289, 306-07, 486 S.E.2d 750, 759 (1997) (noting that *Lynch* is a limited exception to the contemporaneous objection rule and refusing to adopt a plain error rule).

time, also in a civil case.[224] However, the precedent should also apply to criminal cases. On at least one occasion, a criminal defendant has made this argument. In *State v. Peay*[225] the defendant argued that the prosecutor made flagrantly prejudicial remarks during the closing argument. During this argument, the prosecutor commented on the defendant's courtroom attire, stating that the defendant "dressed better to go to the drug deal than he did to come to court."[226] In addition, the prosecutor stated that the defendant dealt drugs in the country "[b]ecause they're so stupid it's harder to get caught in the country."[227] Relying on *Lynch*, the defendant argued that the court should overturn his conviction notwithstanding his counsel's failure to make a timely objection to the prosecutor's closing argument. However, the South Carolina Court of Appeals enforced the contemporaneous objection rule, finding the defendant's arguments procedurally barred.[228] The court described *Lynch* as an "extraordinary" case, and explained that the South Carolina Supreme Court forbade them from addressing issues that counsel failed to preserve properly for appeal.[229] It is not clear when, if ever, the South Carolina Supreme Court would apply *Lynch* to an argument made in a criminal case. Given the Eighth Amendment concerns involved in capital cases, it would be irrational not to apply the *Lynch* rule in that setting.

VII. CONCLUSION

Although South Carolina has long been willing, even eager, to swim against the tide, procedural default rules represent an instance in which the tide, comprised of all other jurisdictions, is correct. The South Carolina Supreme Court ignores both the realities of capital trial defense and its own responsibility to ensure that death sentences are obtained in compliance with the United States Constitution and other applicable law. By jettisoning *in favorem vitae* review to remedy alleged abuses by defense counsel, and by capriciously applying its default rules, the South Carolina Supreme Court set off an atomic bomb to kill a gnat. The court's "solution" to alleged problems has spawned far more serious problems than it solved: expensive, time-consuming, and unnecessary litigation, and tolerance for unreliable death sentences, to name a few.[230] Adoption of a plain error rule would partially solve

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224. *See* Dial v. Niggel Assocs., Inc., 326 S.C. 329, 476 S.E.2d 700 (Ct. App. 1996) (per curiam).

225. 321 S.C. 405, 468 S.E.2d 669 (Ct. App. 1996).

226. *Id.* at 412, 468 S.E.2d at 673.

227. *Id.*

228. *Id.* at 412-13, 468 S.E.2d at 673-74.

229. *Id.* at 413, 468 S.E.2d at 674.

230. Formation of a statewide capital trial defender unit would solve more problems. Unlike private attorneys who lack sufficient time, resources, or specialized knowledge, lawyers in such a unit could stay abreast of developing issues pertinent to capital defense and thus be well equipped to protect defendants' rights by raising the relevant issues at trial. A capital trial

the problems created by *Torrence* and would address the court's concerns about "sandbagging" and proper operation of the adversarial process.

In the meantime, capital defense lawyers should study the court's procedural rulings and be prepared to make detailed objections on all pertinent state and federal grounds, renew objections at every opportunity, and defend the adequacy of objections on appeal. Because capital defendants face an especially serious penalty, their legal claims deserve especially serious consideration. Fundamental principles of justice require no less.

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defender unit could also level the playing field by giving experienced solicitors worthy adversaries—attorneys fully capable of safeguarding capital defendants' rights and preventing prosecutorial attempts to circumvent the demands of the Constitution and other pertinent law.

TABLE 1

PLAIN ERROR IN JURISDICTIONS WITH THE DEATH PENALTY

JURISDICTION	SOURCE
ALABAMA	ALA. R. APP. P. 39(k) ("In all cases in which the death penalty has been imposed, . . . the Supreme Court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court . . . ."); *id.* 45A (stating that the court "*shall* notice any plain error or defect") (emphasis added).
ARIZONA	ARIZ. REV. STAT. ANN. § 12-2102(A) (West 1956) ("Upon an appeal from a final judgment, the supreme court shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error, whether a motion for new trial was made or not.").
ARKANSAS	ARK. CODE ANN. § 5-4-603(d) (Michie 1997) ("[I]f the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason and if the jury found no mitigating circumstances, the Arkansas Supreme Court shall conduct a harmless error review of the defendant's death sentence.").
CALIFORNIA	CAL. PENAL CODE § 1258 (West 1982) ("After hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.").
COLORADO	COLO. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

CONNECTICUT	CONN. R. APP. P. § 60-5 ("The court [on appeal] may in the interests of justice notice plain error not brought to the attention of the trial court.").
DELAWARE	DEL. CT. C.P.R. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
FLORIDA	FLA. STAT. ANN. § 924.33 (West 1996) ("No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant.").
GEORGIA	GA. R. UNIFIED APPEAL IV(B)(2): [In capital cases, t]he Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court.
IDAHO	IDAHO CODE §§ 19-2515, -2827 (1997 & Supp. 1998). Also see State v. Osborn, 631 P.2d 187, 192-93 (Idaho 1981), where the Idaho Supreme Court stated: Death is clearly a different kind of punishment from any other that may may [sic] be imposed, and [Idaho Code] § 19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore

	unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below.
ILLINOIS	ILL. SUP. CT. R. 615(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.").
INDIANA	Lowery v. State, 478 N.E.2d 1214, 1229 (Ind. 1985) ("The failure to properly raise issues in the Motion to Correct Errors generally results in a waiver of the claimed errors. Since the death penalty was imposed in this [case], however, we will review the state of the record concerning these questions.") (citations omitted).
KANSAS	State v. Novotny, 851 P.2d 365, 367 (Kan. 1993) ("[T]he failure to give [an] instruction is 'clearly erroneous [permitting reversal despite the absence of a contemporaneous objection when the] reviewing court reaches a firm conviction that if the trial error had not occurred there was a real possibility the jury would have returned a different verdict.'") (quoting State v. Novotny, 837 P.2d 1327, 1330 (Kan. Ct. App. 1992) (quoting State v. DeMoss, 770 P.2d 441, 445 (Kan. 1989))).
KENTUCKY	KY. R. CIV. P. 61.02 ("A palpable error which affects the substantial rights of a party may be considered by . . . an appellate court on appeal, even though insufficiently raised or preserved for review . . . ."). Rule 61.02 applies to criminal procedure. *See* KY. R. CRIM. P. 13.04.
LOUISIANA	LA. CODE CRIM. PROC. ANN. arts. 841, 920 (West 1997); *see also* State v. Thomas, 427

	So. 2d 428, 433 (La. 1982) ("Because the penalty of death is qualitatively different from any other sentence, capital cases receive heightened scrutiny from this court and we conduct an independent review, regardless of the failure of defense counsel to object to possible error . . . .")
MARYLAND	MD. R. APP. P. 8-131(a): [T]he appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.
MISSISSIPPI	MISS. CODE ANN. § 99-39-21(1) (1994) ("Failure by a prisoner to raise objections . . . shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver."); *see also* Brooks v. State, 46 So. 2d 94, 97 (Miss. 1950) (in banc) ("Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal.") (citations omitted).
MISSOURI	MO. R. CRIM. P. 29.12(b) ("Plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.").
MONTANA	MONT. CODE ANN. § 46-20-104(2) (1997) ("Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment."); *id.* § 46-20-701(1) ("A cause

	may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.").
NEBRASKA	NEB. REV. STAT. § 25-1919 (1995) ("The Court of Appeals or Supreme Court may at its option consider a plain error not specified in appellant's brief.").
NEVADA	NEV. REV. STAT. ANN. § 178.602 (Michie 1997) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
NEW HAMPSHIRE	State v. Hannan, 631 A.2d 531, 534 (N.H. 1993) ("The analysis to determine the effect of a federal constitutional error is the same as that applied to violations of the State Constitution: the error will require reversal unless it is shown 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'") (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).
NEW JERSEY	N.J. R. APP. P. 2:10-2 ("[T]he appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.").
NEW MEXICO	N.M. R. APP. P. 12-216(B) ("This rule shall not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving: (1) general public interest; or (2) fundamental error or fundamental rights of a party.").
NORTH CAROLINA	State v. Ashe, 331 S.E.2d 652, 659 (N.C. 1985) ("Where . . . the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal.").

OHIO	OHIO REV. CODE ANN. § 2309.59 (Anderson 1995) ("In every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.").
OKLAHOMA	Bingham v. State, 165 P.2d 646, 651-52 (Okla. Crim. App. 1946) ("[I]n a capital case, all errors alleged to have been committed during the trial of the defendant will be considered whether such assigned errors were presented to the lower court or properly raised by motion for new trial.").
OREGON	OR. REV. STAT. § 138.220 (1990) ("Upon an appeal, the judgment or order appealed from can be reviewed only as to questions of law appearing upon the record."); *see also* State v. Johnson 521 P.2d 355, 356 (Or. Ct. App. 1974) ("Questions not timely raised and preserved in the trial court will not be considered on appeal in the absence of exceptional circumstances.").
PENNSYLVANIA	Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978): Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach. . . . The waiver rule cannot be exalted to a portion so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen.
SOUTH CAROLINA	NO PLAIN ERROR DOCTRINE
SOUTH DAKOTA	S.D. CODIFIED LAWS § 23A-44-15 (Michie 1998) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a

	court.").
TENNESSEE	TENN. R. CRIM. P. 52(b) ("An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.").
TEXAS	TEX. CRIM. P. CODE ANN. art. 36.19 (West 1981) (stating, in part, that "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant"); *see also* Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc) (noting that, "if no proper objection was made at trial [the accused] will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm'").
UTAH	State v. Brown, 607 P.2d 261, 265 (Utah 1980) ("[N]o objection was made to the omission. Nevertheless, as this is a capital case, we consider the defendant's contention on appeal.").
VIRGINIA	VA. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
WASHINGTON	WASH. R. APP. P. 2.5(A); *see also* State v. Scott, 757 P.2d 492, 495 (Wash. 1988) (en banc) ("The proper way to approach claims of constitutional error [is to determine first whether] the error is truly of constitutional magnitude . . . . If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial . . . .").

WYOMING	WYO. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

All of the states listed above, except Alabama and Arkansas, apply their plain error rules to all criminal cases. Alabama limits its plain error rule to capital cases, and Arkansas applies its rule to those cases in which the defendant faces either the death penalty or a life sentence. Also, Colorado, Delaware, District of Columbia, Hawaii, Illinois, Minnesota, Nevada, North Dakota, South Dakota, Vermont, Virginia, West Virginia, and Wyoming have adopted Federal Rule of Criminal Procedure 52(b).

TABLE 2

PLAIN ERROR IN JURISDICTIONS WITHOUT THE DEATH PENALTY

JURISDICTION	SOURCE
ALASKA	ALASKA CONST. art. I § 9; *see* Bland v. State, 846 P.2d 815, 821 (Alaska Ct. App. 1993) (finding no plain error because, "[o]n review of the current record for plain error, we find the sentence at least arguably appropriate").
DISTRICT OF COLUMBIA	D.C. SUP. CT. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.").
HAWAII	HAW. R. PENAL P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
IOWA	State v. Martin, 55 N.W.2d 258, 260-61 (Iowa 1952) (citations omitted): [A]n exception to the general rule that questions not raised in the trial court will not be considered on appeal exists in case of material defects which are apparent on the face of the record and which are fundamental in their character, or which clearly show manifest injustice, especially in capital cases.
MASSACHUSETTS	MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1998); *see* Commonwealth v. Miranda, 490 N.E.2d 1195, 1198-201 (Mass. App. Ct. 1986) (outlining five exceptions to the contemporaneous objection rule for plain errors at trial).
MICHIGAN	MICH. COMP. LAWS ANN. § 769.26 (West 1982):

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MINNESOTA	MINN. R. CRIM. P. 31.02 ("Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.").
NEW YORK	N.Y. CRIM. PROC. LAW § 470.15 (McKinney 1994) ("[A]n intermediate appellate court . . . may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.").
NORTH DAKOTA	N.D. R. CRIM. P. 52(b) ("Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
PUERTO RICO	P.R. R. EVID. 6 ("Nothing in Rules 4 and 5 [regarding erroneous admission and exclusion of evidence] precludes an appellate court from taking notice of plain and harmful errors . . . in spite of the absence of a timely objection, when the failure to correct said errors would result in a miscarriage of justice.")
RHODE ISLAND	State v. Williams, 432 A.2d 667, 670 (R.I. 1981) ("[E]rrors not asserted in the trial court will only be considered under extraordinary circumstances wherein a defendant has 'suffered an abridgment of his basic constitutional rights.'") (quoting State v. Frazier, 235 A.2d 886, 887 (R.I. 1967) (per curiam)).

VERMONT	VT. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
WEST VIRGINIA	W. VA. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
WISCONSIN	WIS. STAT. ANN. § 901.03(4) (West 1993) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."); *see* Virgil v. State, 267 N.W.2d 852, 865 (Wis. 1978) ("Where a defendant is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the courts should invoke the plain-error rule in order to protect their own public reputation.").