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"I Object" is Not Enough: Tips for Criminal Defense Attorneys on Avoiding Procedural Default

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Tips for Criminal Defense Attorneys on Avoiding Procedural Default

By John H. Blume and Emily C. Paavola

Since 1991, the S.C. Supreme Court has progressively adopted strict (and, at times) unpredictable procedural default rules in criminal cases. The Court has often refused to consider potentially meritorious issues on appeal because it determined that trial counsel failed to properly preserve issues for appellate review. Furthermore, unlike the overwhelming majority of states and the federal system, South Carolina has no plain error rule allowing the Court of Appeals or the Supreme Court to consider significant issues not preserved at trial. *See* John H. Blume & Pamela A. Wilkins, *Death By Default: State Procedural Default Doctrine In Capital Cases*, 50 S.C. L. REV. 1 (1998). As a result, criminal defendants bear the full brunt of trial counsel's failure to comply with South Carolina's draconian, and sometimes byzantine, procedural default rules.

We do not purport to systematically discuss or critique South Carolina's procedural default jurisprudence in this article. For a more complete analysis of South Carolina's procedural default rules from 1991 to 1998, *see* John H. Blume & Pamela A. Wilkins, *Death By Default: State Procedural Default Doctrine In Capital Cases*, 50 S.C. L. REV. 1 (1998); *see also*, Robert Dudek, The Honorable Ralph King Anderson Jr.'s Series on Effective Appellate Practice: Preserving the Record for Appeal, available at www.scbar.org/member_resources/continuing_legal_education/distance_learning. Our purpose is more practical; we hope to provide criminal defense attorneys with practical advice regarding how to properly preserve issues for appellate review. We begin with some of the basic steps counsel must take to avoid a procedural default.

Make a contemporaneous objection and obtain a ruling.

Trial counsel must make a contemporaneous objection. In *State v. Vazsquez*, 364 S.C. 293, 613 S.E.2d 359 (2005), the solicitor referred to the defendant as a "domestic terrorist" in his closing argument and drew a correlation between the events of September 11, 2001, and the defendant's case. *Id.* at 362 n.3. The S.C. Supreme Court admitted that these statements were "troublesome," but found that they were not preserved for review because trial counsel failed to lodge a contemporaneous objection. *Id; see also, State v. Holmes*, 361 S.C. 333, 345, 605 S.E.2d 19, 25 (2004), *rev'd on other grounds, Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that appellant's claims stemming from the solicitor's closing argument were defaulted where trial counsel objected at trial, but only after the solicitor had finished his entire closing argument). *See* Record on Appeal (on file with the authors).

In addition to raising a contemporaneous objection, trial counsel must obtain a ruling from the court. *See State v. Hudgins*, 319 S.C. 233, 460 S.E.2d 388, 390 (1998) (issue procedurally barred where defense counsel objected to solicitor's throwing a ski mask at defendant

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during cross-examination, but the trial judge did not rule on the objection and counsel did not object further or request curative instructions). If the trial judge ignores the objection or merely indicates "objection noted," there has been no final ruling and therefore no preservation. *See Dudek, supra.*

Proffer any excluded evidence.

When an objection stems from the court's exclusion of evidence, trial counsel should seek to proffer the excluded testimony and make any excluded physical evidence a court exhibit. The failure to proffer excluded evidence prevents consideration of the issue on appeal. *State v. Nelson*, 322 S.C. 377, 471 S.E.2d 767 (Ct. App. 1996), *rev'd on other grounds*, *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998). If the trial court refuses to allow counsel to proffer the testimony of a witness, counsel must orally state what the proffered testimony would have been. *See Dudek, supra.*

Where the court refuses to allow *voir dire* in a particular area, trial counsel must either: (a) get the court to issue a clear ruling about whether the court is disallowing a particular question or line of questioning for every potential juror, or (b) attempt to ask the question(s) of every potential juror and obtain a ruling from the court for each individual *voir dire*. The excluded questions should be made a court's exhibit, and all grounds in support of the excluded *voir dire* should be argued on the record. *Id.*

Where the trial judge refuses to give requested jury instructions, the excluded instructions should likewise be marked as a court's exhibit. *Id.* Be absolutely certain, however, that if you submit an instruction in writing, the entire instruction is correct because the appellate courts may justify the refusal to give the instruction on the basis of any type of mistake. Moreover, trial counsel should not rely on the written instruction alone. In *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), the S.C. Supreme Court held that appellant's due process argument concerning the trial court's refusal to charge the jury on his parole ineligibility was not preserved for review "because, at trial, appellant never cited any constitutional basis for his request to give a parole ineligibility charge." *Id.* at 238. Trial counsel did, however, submit a written request for the parole ineligibility charge, which cited the constitutional basis for the request, but trial counsel did not put the argument on the record.

Do not rely on a motion *in limine*.

Remember that trial counsel must obtain a final ruling to preserve an issue for appeal. A ruling on a motion *in limine* is not a final ruling because, at least in theory, it is subject to change based on developments during the trial. *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998) ("Generally, a motion *in limine* seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial") (internal citations omitted). Trial counsel must make an objection when the evidence is offered at trial and obtain a final ruling at that time.

Give specific and complete grounds for the objection.

The objection should be addressed to the trial court in a sufficiently specific manner to bring attention to the exact error. In *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005), the S.C. Supreme Court found that the trial judge erred in applying the moral turpitude standard to determine that the defendant's prior convictions were admissible at trial. *Id.* at 523. Although trial counsel *did* object, the objection was not specifically addressed to the court's application of the moral turpitude standard. *Id.* Instead, counsel objected that the defendant's prior convictions were "too remote." *Id.* Thus, the S.C. Supreme Court held that the issue regarding the trial court's use of the moral turpitude standard was defaulted. *Id.* ("Because the objection was clearly based on remoteness and not the use of the moral turpitude standard, we hold that the issue regarding the use of the moral turpitude standard is not preserved for review").

Similarly, in *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (S.C. 2007), trial counsel objected when the victim's widow testified, during Stone's second capital sentencing proceeding, that she attempted suicide after learning that the State Supreme Court reversed Stone's first death sentence. *Id.* at 488. Trial counsel argued that the cause of the suicide attempt was not the victim's murder seven years earlier, but the financial pressures that the victim's widow and her new husband were experiencing at the time. *Id.* Counsel also stated that "the fact that she was able to testify about this attempted suicide was extremely prejudicial to the defendant and that testimony should have been excluded." *Trial Tr. 1106, on file with the authors.* On appeal, Stone argued that the widow's testimony improperly invited the jury to speculate about the finality of its decision and to consider how its decision might affect the health of the victim's widow. *Stone*, 655 S.E.2d at 488. The S.C. Supreme Court found that this argument was not an "augmentation" of the objection above, but a different line of argument entirely that was not preserved for review. *Id.* at 489. The Court further found that defendant had "abandoned" the argument he did raise at trial by changing his argument on appeal. *Id.* at 488-89.

Give federal grounds as well as state constitutional grounds for the objection.

There are two basic reasons that trial counsel should give federal and state constitutional grounds for trial objections, even when those multiple grounds overlap. First, trial counsel is charged with the difficult task of lodging objections that will immediately correct any error at trial and—if not—preserve the record for review, all on a moment's notice. At the instant in which trial counsel determines that an objection is necessary, the full range of potential

grounds for appeal is not always obvious. When trial counsel gives as many grounds as possible for the objection, appellate counsel has more flexibility to draft the appeal in a manner most likely to succeed. Second, providing all bases for the objection preserves the client's right to pursue the broadest level of review, in both state and federal court, to which he or she is entitled.

A state or federal constitutional argument is not preserved for appellate review where trial counsel fails to argue the constitutional basis for the objection at trial. *See State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). In *State v. Perry*, 359 S.C. 646, 598 S.E.2d 723, 725 (Ct. App. 2004), trial counsel objected when the court allowed the State to introduce evidence of defendant's failure to show remorse both before and after her arrest. On appeal, the Court of Appeals noted that

> [t]he state may not directly or indirectly comment on the defendant's right to remain silent. References to a defendant's lack of remorse are improper as violative of a defendant's Fifth, Eighth, and Fourteenth Amendment rights. Such rules are rooted in due process and the belief that justice is best served when a trial is fundamentally fair.

Id. (internal quotations omitted). Trial counsel's objection, however, was based on relevance. *Id.* The Court of Appeals held that this objection did not encompass the argument that the State's evidence amounted to a deprivation of due process. *Id.* Therefore, that argument was not preserved for appellate review. *Id.*

Explain the basis of the objection.

On one occasion, the S.C. Supreme Court suggested that merely citing a federal constitutional amendment, without more, is insufficient to preserve review of the claim on that ground. In *State v. Schafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), *rev'd on other grounds, Shafer v. South Carolina*, 532 U.S. 36 (2001), the Court stated that Shafer's Eighth Amendment claim based on the trial court's failure to inform the jury of his parole ineligibility was not properly preserved where counsel objected at trial "on the basis of the Eighth Amendment," but "offered no explanation or argument in support of the exception." *Id.* at 529. The Court claimed that "[a]ppellant's objection ... is simply too vague for the Court to review," but nonetheless went on to evaluate and reject Shafer's Eighth Amendment claim. The U.S. Supreme Court ultimately reversed the *Shafer* Court's decision on the merits. *Shafer v. South Carolina*, 532 U.S. 36 (2001). The S.C. Supreme Court has not made such a broad-sweeping claim in any other case since *Shafer*, and no other court has cited *Shafer* for the proposition that merely citing the federal amendment is insufficient to preserve review on that ground. Moreover, such a ruling is inconsistent with U.S. Supreme Court precedent on how to properly federalize a claim. *See Baldwin v. Reese*, 541 U.S. 27 (2004) ("A litigant

wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal").

Based on *Shafer* alone, it is far from clear that trial counsel could never properly preserve an objection by simply citing the federal or state constitutional grounds on which the objection is based. Yet, as a matter of best practice, trial counsel should make an effort to give a succinct explanation of the reasons for the objection, whenever possible, in addition to citing the relevant state and federal grounds in support of the objection.

Other pitfalls

Several other pitfalls await the unwary and can result in failure to properly preserve issues for appellate review:

- **Co-defendant objections**—When a co-defendant's counsel makes an objection that applies to your client as well, you must remember to join in the objection on the record in order to preserve the issue for your client as well as the co-defendant.
- **Directed verdict motions**—Trial counsel often make good directed verdict motions but fail to fully benefit from them by not renewing at the end of defendant's case as well.
- **Unmarked excluded jury instructions**—Excluded jury instructions must be clearly identified. Error will not be preserved for review where the trial court rules that he or she refuses to give instruction numbers 4, 5 and 6, but the record is not clear as to which instructions those numbers refer. Jury instructions should either be clearly marked as court's exhibits or read into the record during argument, or both.
- **Off-the-record discussions**—Similarly, any potential issue that occurs during off-the-record discussions will not be preserved for appellate review. Trial counsel must remember to put everything that transpired on the record after sidebar or in-chambers discussions.

Preservation is possible

The task of properly preserving objections to issues that often arise suddenly in the heat of trial is daunting, but doable. In most circumstances, a few brief and carefully crafted sentences will go a long way toward preserving issues for appellate review. A few examples will illustrate this point.

Example #1—Hearsay

Let's say opposing counsel asks a question that calls for hearsay. Instead of saying, "Objection. Hearsay," try adding one or two sentences designed to preserve your objection on the greatest number of state and federal grounds.

> I object because this question calls for inadmissible hearsay under SCRE 802 and its admission violates the defendant's Sixth and 14th Amendment rights to a fair trial, and the South Carolina Constitution, Article I, Section 14.

In some cases, even if the out-of-court statement fits within an exception or exemption to the hearsay rule, the statement's admission may nonetheless violate the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), in which case you should add:

> I also object because this evidence violates the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington* and the South Carolina Constitution, Article I, Section 14.

In capital cases, you should also object on the basis of your client's Eighth Amendment right against arbitrary infliction of the death penalty and the South Carolina Constitution, Article I, Section 15.

Example #2—Inadmissible Character Evidence

Suppose, in a capital case, the State wants to introduce evidence that you believe is inadmissible character evidence. What should you say?

> I object. This evidence is inadmissible character evidence under SCRE 404, *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and it violates my client's Sixth, Eighth and 14th Amendment rights and the corresponding provisions of the South Carolina Constitution.

Example #3—Relevance and 403

What if you believe that the State's evidence is irrelevant?

> I object. This evidence is irrelevant and inadmissible under SCRE 402, and its admission violates the defendant's Fifth and 14th Amendment rights to due process and a fair trial and the corresponding provisions of the South Carolina Constitution.

Or, maybe the judge overrules your relevance objection, but you believe that the evidence is still inadmissible because it is prejudicial.

> I object because any probative value of this evidence is substantially outweighed by its danger of unfair prejudice, confusion and/or waste of time, and its admission violates my client's Fifth and 14th Amendment rights to due process and his Sixth and 14th Amendment rights to a fair trial and the South Carolina Constitution, Article 1, Sections 3 and 14.

Example #4 – Exclusion of Defense Evidence

Assume the judge excludes a piece of evidence that you want to offer in support of your client's defense. You should certainly object on the basis that you believe that the evidence is admissible under the South Carolina Rules of Evidence. But, you should also add federal and state constitutional grounds.

I object to the exclusion of this evidence because it is admissible under Rule ___ and its exclusion violates the defendant's Sixth and 14th Amendment rights to present a defense and the South Carolina Constitution, Article 1, Section 14.

And, in capital cases, if the excluded piece of evidence is mitigation, you should add an Eighth Amendment objection.

I object to the exclusion of this evidence because it is admissible under Rule ___ and its exclusion violates the defendant's Sixth and 14th Amendment rights to present a defense and the South Carolina Constitution, Article 1, Section 14. I also object because this evidence is mitigating, and its exclusion violates my client's Eighth Amendment right to offer mitigating evidence.

Example #5 – Jury Selection

Let's say your case involves an interracial crime and you want to question prospective jurors about racial prejudice, but the judge says "we don't need to go into that."

I object on the basis that due process under the 14th Amendment and the South Carolina Constitution, Article 1, Section 3 requires the court to interrogate jurors on the subject of racial prejudice if the defendant requests it in circumstances such as these.

And, in capital cases:

I object on 14th Amendment due process grounds, *Turner v. Murray*, 476 U.S. 28 (1986), my client's Eighth Amendment right against arbitrary infliction of the death penalty, and the corresponding provisions of the South Carolina Constitution.

For other limitations on capital *voir dire*, object on the following grounds:

I object to this court's limitation on *voir dire* because *Morgan v. Illinois*, 547 U.S. 1134 (2006), says that if a juror is unable or substantially impaired in his ability to consider both penalties or mitigating evidence, he or she is not qualified to serve. Thus, the defendant is entitled to ask X under the Sixth, Eighth and 14th Amendments, and the South Carolina Constitution, Article 1, Sections 3, 14 and 15.

Remember to proffer any excluded questions for each potential juror's *voir dire*.

When in doubt

When you are uncertain about which state and/or federal grounds apply to your objections, better to be too broad than too narrow. No one ever failed to preserve a claim by objecting on too many grounds. The chart below provides a summary of the sources of individual rights to help you determine which grounds to assert as the bases for your objections.

Conclusion

We recognize that each issue arising at trial will be fact-specific. Only trial counsel can determine, based on all of the circumstances in the particular case, the how and why of each objection at trial. We hope, however, that these tips and examples will help criminal defense attorneys think carefully not only about each objection's function at trial, but also about how to properly preserve those objections in state and federal courts down the road.

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Protected Right	Federal Constitutional Ground	State Constitutional Ground
Speech and Press	1st Amendment	Article I, Section 2
Illegal Search	4th Amendment	Article I, Section 10
Self-Incrimination	5th Amendment	Article I, Section 12
Grand Jury	5th Amendment	Article I, Section 11
Double Jeopardy	5th Amendment	Article I, Section 12
Due Process	5th and 14th Amendments	Article I, Section 3
Speedy Trial	6th Amendment	Article I, Section 14
Jury Trial	6th Amendment	Article I, Section 14
Public Trial	6th Amendment	Article I, Section 14
Compulsory Process	6th Amendment	Article I, Section 14
Confrontation and Cross-Examination	6th Amendment	Article I, Section 14
Assistance of Counsel	6th Amendment	Article I, Section 14
Right To Present A Defense	6th Amendment and 14th Amendment due process clause	Article I, Section 14
Excessive Bail	8th Amendment	Article I, Section 15
Cruel and Unusual Punishment	8th Amendment	Article I, Section 15
Equal Protection	14th Amendment	Article I, Section 3