OBJECTION HANDBOOK

Preserving Your Criminal Trial Objections for Appellate Review

(Including Objections Specifically Related to Capital and Juvenile LWOP Cases)

A Publication By:

Justice 360

900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
Justice360sc.org

And

Cornell Death Penalty & Juvenile Justice Projects
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-4196

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INTRODUCTION:

Since 1991, the South Carolina Supreme Court has imposed increasingly strict and unpredictable procedural default rules upon criminal defendants. The Court has often refused to consider potentially meritorious issues on appeal, finding instead that trial counsel failed to properly preserve issues for appellate review. Unlike the overwhelming majority of states and all federal jurisdictions, South Carolina has no plain error rule that would allow the Court of Appeals or the Supreme Court to consider significant issues not preserved at trial. 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 South Carolina's complete procedural default jurisprudence in this handbook. The purpose of this publication is to advise trial counsel how to properly preserve issues for appellate review on the greatest number of state and federal grounds. We focus in particular on objections we anticipate will be relevant in capital trials and trials in which juveniles face a sentence of life without parole ("LWOP"). Many objections relevant to juvenile LWOP cases refer to motions, samples of which are on file with Justice 360. Please contact Justice 360 if you do not already have access to these motions.

There are two basic reasons that trial counsel should give all 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.

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. This handbook identifies some of the more common issues that arise at trial and provides suggested ways to preserve issues on the greatest possible number of state and federal grounds.

HOW TO USE THIS HANDBOOK:

This handbook is divided into six tabbed sections. The first tabbed section provides some general guidelines to assist trial counsel in properly preserving issues for appellate review. Tabbed sections 2-6 address the following topics: (2) pre-trial issues; (3) jury selection and juror misconduct issues; (4) the substantive admissibility of evidence; (5) the solicitor's closing argument; and, (6) objections specific to sentencing proceedings in which juveniles may be sentenced to life without parole. In sections 2-6, each "•" bullet point precedes suggested language for properly preserving your objections on the greatest possible number of state and federal grounds. The symbol **C** identifies objections specifically tailored to capital cases; the symbol **J** identifies objections specifically tailored to juvenile LWOP cases.

Keep in mind that each issue arising at trial will be fact-specific. Only you can determine, based on all of the circumstances in your particular case, which, if any, of the following sample objections are appropriate. Obviously, this handbook cannot address every situation in which you will need to lodge an objection. These are simply some suggestions to get you started and on track toward thinking about how to preserve your objections in state and federal courts down the road.

[1] One Supreme Court Justice recently noted his "concern" that the South Carolina Supreme Court abolished *in favorem vite* review on direct appeals of capital cases, eliminating plain error review even when the defendant's life is on the line, without providing an adequate substitute. Justice Costa Pleicones noted that post-conviction review is a "poor substitute" or *in favorem* (or plain error) review and asserted the court should review a post-conviction claim in the same way it would have under *in favorem* review. *See Winkler v. State*, No. 2014-904, 2016 WL 6900872, at *16 (S.C. Nov. 23, 2016) (Pleicones, J. concurring in part, dissenting in part).

[2] *See* Troy A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & Apellate Advocacy 179, 217-226 (2012) (noting all federal circuits and all but eight states have adopted some form of plain error doctrine); John H. Blume & Pamela A. Wilkins, *Death By Default: State Procedural Default Doctrine In Capital Cases*, 50 S.C. L. REV. 1, 32 (1998).

[3] *See Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

I. Tips for Preserving Error.

• **<u>Make A Contemporaneous Objection & Obtain A Ruling</u>**

- **Generally:** Trial counsel must make a contemporaneous objection. Rule 103(a)(1), SCRE. In addition to raising a contemporaneous objection, trial counsel must obtain a final ruling from the court. *See State v. Hudgins*, 319 S.C. 233, 460 S.E.2d 388, 390 (1998) (finding an issue procedurally barred where defense counsel objected to solicitor's throwing a ski mask at defendant 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.
- **<u>Make a Motion to Strike to Preserve an Objection to Testimony</u>:** A motion to strike is necessary to preserve an objection to testimony in two situations. First, "[w]hen a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility." *State v. Byers,* 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). Second, a motion to strike is necessary when a witness provides objectionable testimony after an objection to the testimony has previously been sustained. *See State v. Saltz*, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001).

Case Studies

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 299 n.3, 613 S.E.2d at 362 n.3. The South Carolina 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).

- **<u>Object to Insufficient Curative Instructions</u>:** When an objection is sustained and the trial court offers a curative instruction, if the objecting party finds the curative instruction insufficient then counsel must object to the sufficiency of the curative charge in order to preserve the issue for appellate review. *See State v. McEachern*, 399 S.C. 125, 146, 731 S.E.2d 604, 615 (Ct. App. 2012); *see also State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("[A]s the law assumes a curative instruction will remedy an error, . . . failure to object to the sufficiency of that charge[] renders the issue waived and unpreserved for appellate review.").

- **A Motion In Limine Is Not A Final Ruling:** 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. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("In most cases, making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.") (internal citations omitted). Trial counsel must make an objection when the evidence is offered at trial and obtain a final ruling at that time.

• **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's exhibit. The failure to proffer excluded evidence prevents consideration of the issue on appeal. *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006). 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.

- **Expert Testimony:** The requirement to proffer excluded testimony applies to excluded expert testimony as well. In *State v. Smith*, 391 S.C. 353, 366, 705 S.E. 491, 498 (Ct. App. 2011), *rev'd on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013), the Court of Appeals found a defendant did not preserve the issue of the trial judge's exclusion of a psychiatrist's testimony that the defendant had a low I.Q. because the psychiatrist was not present at trial and the defendant never offered the testimony into the record.
- ***Voir Dire:*** Where the court refuses to allow individual *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.

[4] In two situations a motion *in limine* may be considered a final ruling, preserving the issue for appellate review, even without a subsequent objection by trial counsel. First, if the motion *in limine* is made "immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." Id. at 642, 541 S.E.2d at 840. Second, when the trial court clearly indicates its ruling is final and not preliminary. *State v. Wiles*, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009) (finding the trial court's ruling on a motion *in limine* was a final ruling because the judge made comments to the jury about the objectionable evidence before any other evidence was admitted). Nevertheless, best practices for preserving an error require trial counsel to make a contemporaneous objection upon the admission of evidence that was previously the subject of a ruling on a motion *in limine*.

[5] The proffer requirement has been relaxed in cases where a defendant is not provided an opportunity to identify an expert and, therefore, cannot proffer the excluded expert testimony. *See State v. Garris*, 394 S.C. 336, 350 n.12, 714 S.E.2d 888, 896 (Ct. App. 2011) (finding an issue of excluded expert testimony preserved, despite the fact the defendant did not proffer an expert's proposed testimony, because the defendant "did not have an expert to proffer, and he was unable to explain what his expert witness' testimony might have been because he did not have one at the time"). Given the general proffer requirement, the best practice is to proffer expert testimony whenever possible.

- **Jury Instructions:**
  - Where the trial judge refuses to give requested jury instructions, the excluded instructions should be marked as a court's exhibit. Trial counsel must be absolutely certain, however, that the entire written 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 must not rely on the written instruction alone. In *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), the South Carolina 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, 472 S.E.2d at 391. 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.
  - When a trial judge gives an improper jury instruction, trial counsel must make an objection to the instruction *after* the judge has given the charge to the jury, even if counsel previously objected to the charge before it was given to the jury. *See* S.C. Code § 17-23-100; *State v. Tucker*, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995); *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985).
  - Thus, in any case in which the trial court excludes evidence, refuses requested jury instructions, or excludes or limits *voir dire*, trial counsel should proffer the excluded evidence, mark any excluded instructions or questions as a court's exhibit, and give a thorough argument on the record recounting the complete grounds in support of the excluded item.

- **Give Specific And Complete Grounds For The Objection:** Objections must be addressed to the trial court in a sufficiently specific manner to bring attention to the exact error. *State v. Dickey*, 380 S.C. 384, 399, 669 S.E.2d 917, 925 (Ct. App. 2008) ("A proper 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 court"), *rev'd on other grounds*, 394 S.C. 491, 716 S.E.2d 97 (2011). Trial counsel must also provide complete grounds for the objection because the grounds for objection at trial limit the grounds on which the trial court's ruling may be appealed. *See State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding that a party may not argue one ground at trial and another on appeal).

[6] *See* ABA Criminal Justice Standards for the Defense Function, Standard 4-1.5 ("At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.").

[7] *See id.*

In non-capital criminal cases, the appellate court consistently follows the South Carolina Supreme Court's lead in strict adherence to the specificity requirement. *See, e.g., State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008) (issue of whether testimony that defendant liked to look at young boys was improper character evidence under S.C. R. Evid. 404 or *State v. Neslon* was procedurally barred where trial counsel objected and used the word "character," but did not specifically mention Rule 404 or the *Nelson* case); *State v. Wimbush*, 347 S.C. 513, 520, 556 S.E.2d 413, 417 (Ct. App. 2001) (issue of whether witness's assertion that defendant was a drug dealer constituted inadmissible character evidence was not preserved where trial counsel objected and stated: "I don't know where this is going. My client is not accused of selling drugs," but never mentioned the words "prior bad acts, Rule 404, *State v. Lyle*, or character evidence").

Case Studies

State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005)

The South Carolina Supreme Court agreed with Johnson that the trial judge erred in applying the moral turpitude standard to determine that his prior convictions were admissible at trial, but found the issue was not preserved for review. Id. at 58, 609 S.E.2d at 523. Although trial counsel *did* object to the admission of the convictions, 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 South Carolina Supreme Court held that the issue regarding the trial court's erroneous 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").

State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (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 South Carolina Supreme Court reversed Stone's first death sentence. *Id.* at 35, 655 S.E.2d 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*, 376 S.C. at 35, 655 S.E.2d at 488. The South Carolina Supreme Court found that this argument was not an "augmentation" of the objection below, but a different line of argument entirely which was not preserved for review. *Id.* at 36, 655 S.E.2d 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 35-36, 655 S.E.2d at 488-89.

• **Give Federal Grounds As Well As State Constitutional Grounds For The Objection:** 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).

Case Studies

State v. Perry, 359 S.C. 646, 649, 598 S.E.2d 723, 725 (Ct. App. 2004)

Trial counsel objected when the court allowed the State to introduce evidence of the defendant's failure to show remorse both before and after her arrest. On appeal, the Court of Appeals noted:

> The 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 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.*

State v. Owens, 378 S.C. 636, 638-39, 664 S.E.2d 80, 81 (2008)

The South Carolina Supreme Court found that trial counsel's hearsay objection to the admission of a list of the defendant's disciplinary infractions from the Department of Corrections did not preserve appellate arguments that admission of the list violated appellant's Confrontation Clause or due process rights.

• **Explain The Basis Of The Objection:** On one occasion, the South Carolina 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. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), *rev'd on other grounds,* 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 300, 531 S.E.2d 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 United States Supreme Court ultimately reversed the *Shafer* court's decision on the merits. *Shafer v. South Carolina*, 532 U.S. 36 (2001). The South Carolina 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.[1]

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, trial counsel for each defendant who wishes to benefit from the same objection must join in the objection on the record in order to preserve the issue for all defendants. *See State v. Lemire*, 406 S.C. 558, 572, 753 S.E.2d 247, 255 (Ct. App. 2013); *State v. Ward*, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007).

- **Directed verdict motions** – trial counsel must renew directed verdict motions at the end of the defendant's case. 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. *State v. Adams*, 332 S.C. 139, 144-45, 504 S.E.2d 124, 126-27 (Ct. App. 1998).

- **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 error that occurs during off-the-record discussions will not be preserved for appellate review. Trial counsel must put everything back on the record after side-bar or in-chambers discussions. *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997).

[8] Moreover, such a ruling is inconsistent with United States 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'").

II. Pre-Trial Issues

A. C & J Limitations on Authorization of Funds in Capital & Juvenile LWOP[2] Cases

- I object that this limitation of funds violates S.C. Code § 16-3-26(c), the defendant's 5th and 14th Amendment rights to due process and a fair trial, and his 8th Amendment right to develop and present evidence during a reliable sentencing proceeding. I further object on the basis of the 6th Amendment right to the assistance of expert services under the Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the 6th Amendment right to effective assistance of counsel, and the South Carolina Constitution, Article 1, Sections 3 and 14.

B. C & J Court's Refusal to Conduct Ex Parte, In Camera Proceedings for Authorization of Funds in Capital & Juvenile LWOP Cases

- I object on the basis that the defendant is entitled to an *ex parte*, in camera determination of his request for funds under S.C. Code § 16-3-26(c). Allowing the State to participate in the funding request violates the defendant's 5th and 14th Amendment due process rights by unfairly providing the State with strategic information to which it is not entitled. It also violates the Equal Protection clause since the defendant only has to reveal this information because he is indigent. I also object on the basis of the South Carolina Constitution, Article 1, Sections 3 and 14.

C. Speedy Trial

- I object that this violates my client's right to a speedy trial under the 6th and 14th Amendments to the United States Constitution and the South Carolina Constitution, Article 1, Section 14.

D. Discovery – State's Failure to Provide

- I object that the State's failure to disclose this evidence violates *Brady v. Maryland*, 373 U.S. 83 (1963), as well as Rule 5 of the South Carolina Rules of Criminal Procedure. It also violates my client's 5th and 14th Amendment right to a fair trial, and his 6th and 14th Amendment right to present a defense and to rebut the State's evidence against him, and the corresponding provisions of the South Carolina Constitution.

[9] Though S.C. Code § 16-3-26(c) explicitly applies to capital murder cases, attorneys litigating juvenile LWOP cases should argue the same funding provisions and procedures apply to juvenile LWOP cases in light of the Supreme Court of South Carolina's determination that juveniles sentenced to LWOP are similar to adults sentenced to death and the Court's further mandate that the procedures used in cases involving juveniles and life without parole sentences should be similar to those used in capital cases. *See Aiken v. Byars*, 410 S.C. 534, 544–45, 765 S.E.2d 572, 577–78 (2014).

E. Discovery – Limit on Defendant's Ability to Obtain Discovery

- I object that limiting the defendant's ability to obtain discovery violates his 5th and 14th Amendment right to a fair trial, his 6th Amendment right to confront the witnesses against him, and his 6th and 14th Amendment right to present a defense, and the corresponding provisions of the South Carolina Constitution.

F. Change of Venue

- I object because the defendant cannot obtain a fair and impartial jury trial, to which he is entitled under the 6th and 14th Amendments, in this venue. I also object on the basis of the South Carolina Constitution, Article 1, Sections 3 and 14.

G. Competency

- I object because conviction of a criminal defendant who is not competent to stand trial violates the due process clause of the 14th Amendment and the South Carolina Constitution, Article 1, Section 3. My client does not meet the test set forth by the South Carolina Supreme Court in *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987) and by the U.S. Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960) (a rational, as well as factual, understanding of the proceedings against him and the ability to consult with his lawyer with a reasonable degree of rational understanding).

H. Conflicts

Note that a conflict issue can be raised at any time. It appears here, however, simply because any potential conflict should be carefully considered pre-trial, if possible.

a. Actual Conflict

- I move to be relieved on the basis that I have an actual conflict of interest because of [X], which will place me in a situation of divided loyalties and violate my client's 6th Amendment right to conflict-free counsel, and the South Carolina Constitution, Article 1, Section 14. I do not have to show prejudice in a case of an actual conflict.

b. Multiple Representation

- I move to be relieved because my representation of both clients would create a conflict of interest that would adversely affect my performance and violate both clients' 6th Amendment rights to conflict-free counsel, and the South Carolina Constitution, Article 1, Section 14.

III. Jury Selection and Juror Misconduct Issues

A. Juror Bias

a. Limitations on Questions About Racial Prejudice

- 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.
- **C** I object on 14th Amendment due process grounds, *Turner v. Murray*, 476 U.S. 28 (1986), my client's 8th Amendment right against arbitrary infliction of the death penalty, and the corresponding provisions of the South Carolina Constitution.

b. Other types of juror bias

- I object to this juror's qualification because of his/her specific bias, which violates my client's 6th and 14th Amendment rights to a fair and impartial jury trial, and the South Carolina Constitution, Article 1, Sections 3 and 14.

B. Improper Exclusion on the Basis of Race

- I object based on *Batson v. Kentucky*, 476 U.S. 79 (1986) and the defendant's 6th and 14th Amendment rights to a fair and impartial jury, as well as the venire members' right to be free from discrimination under the 14th Amendment's Equal Protection clause, and the corresponding provisions of the South Carolina Constitution.

a. Solicitor's pretextual explanation for the strike

- I object that the solicitor's explanations are implausible because (solicitor accepted white juror(s) – give jurors' names, if possible – who gave the same answers or had same background, beliefs, etc.; solicitor asked disparate questions of blacks versus whites; solicitor did not ask questions on the topics alleged as reasons to strike). The solicitor's pretextual explanation naturally gives rise to an inference of discriminatory intent under *Miler-El v. Dretke*, 545 U.S. 231 (2005).

C. Improper Exclusion on the Basis of Gender

- I object pursuant to *JEB v. Alabama*, 511 U.S. 127 (1994), and the defendant's right to a fair and impartial jury of his peers under the 6th and 14th amendments, as well as the venire members' right to be free from discrimination under the Equal Protection Clause, and the corresponding provisions of the South Carolina Constitution.

a. Solicitor's pretextual explanation for the strike

- I object that the solicitor's explanations are implausible because (solicitor accepted male juror(s) – give jurors' names, if possible – who gave the same answers or had same background, beliefs, etc.; solicitor asked disparate questions of men versus women; solicitor did not ask questions on the topics alleged as reasons to strike). The solicitor's pretextual explanation naturally gives rise to an inference of discriminatory intent under *Miler-El v. Dretke*, 545 U.S. 231 (2005).

D. Capital *Voir Dire*

a. Juror not qualified

- **C** I object to this juror's qualification because her beliefs or attitudes on capital punishment would prevent or substantially impair her ability to perform her duties as a juror in accordance with the law under S.C. Code § 16-3-20(E) and the Supreme Court's decision in *Morgan v. Illinois*, 547 U.S. 1134 (2006). Her service as a juror would violate the defendant's 6th, 8th and 14th Amendment rights, and the South Carolina Constitution, Article 1, Sections 3, 14 and 15.

b. Court's limitation on *voir dire*

- **C** 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 6th, 8th and 14th Amendments, and the South Carolina Constitution, Article 1, Sections 3, 14 and 15.

  NOTE – remember to proffer any excluded questions for each potential juror's *voir dire*.

c. Juror improperly excused because weak on death.

- **C** I object to this juror's disqualification because under S.C. Code § 16-3-20(E) a juror may not be excused for cause unless his beliefs against capital punishment would render him unable to return a verdict according to law. Under the Supreme Court's cases, such as *Morgan v. Illinois*, 547 U.S. 1134 (2006) and *Wainwright v. Witt*, 469 U.S. 412 (1985), the standard is whether the juror's views would prevent or substantially impair performance of his duties; religious scruples are not enough.

E. Juror misconduct

- I object/move for a mistrial on the basis that [X's] action constitutes juror misconduct and prejudices my client in violation of his 6th and 14th Amendment rights to a fair and impartial jury trial, and the South Carolina Constitution, Article 1, Sections 3 and 14.
- **C** I object/move for a mistrial on the basis that [X's] action constitutes juror misconduct and prejudices my client in violation of his 6th and 14th Amendment rights to a fair and impartial jury trial, his 8th Amendment right against arbitrary infliction of the death penalty, and the corresponding provisions of the South Carolina Constitution.

IV. The Substantive Admissibility of Evidence

A. Exclusion of Defendant's Evidence

- I object to the exclusion of this evidence because it is admissible under Rule [X] and its exclusion violates the defendant's 6th and 14th Amendment right to present a defense, and the South Carolina Constitution, Article 1, Section 14.
- **C** I object to the exclusion of this evidence because it is admissible under Rule [X] and it's exclusion violates the defendant's 6th and 14th Amendment right 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 8th Amendment right to offer mitigating evidence.

B. Relevance

- I object that this evidence is irrelevant and inadmissible under S.C. R. Evid. 402; its admission violates the defendant's 5th and 14th Amendment right to due process and a fair trial, and the corresponding provisions of the South Carolina Constitution.
- **C** I object that this evidence is irrelevant and inadmissible under S.C. R. Evid. 402; its admission violates the defendant's 5th and 14th Amendment right to due process and a fair trial, his 8th Amendment right against arbitrary infliction of the death penalty, and the corresponding provisions of the South Carolina Constitution.
    - **C** *Note:* For irrelevant evidence in aggravation in capital cases, add that the evidence does not reflect the character of the defendant or the circumstances of the crime.

C. Prejudice, Confusion, Waste of Time

- 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 5th and 14th Amendment right to due process and his 6th and 14th Amendment right to a fair trial, and the South Carolina Constitution, Article 1, Sections 3 and 14.

D. Hearsay

- I object because this question calls for inadmissible hearsay under S.C. R. Evid. 802; its admission violates the defendant's 6th and 14th Amendment right to a fair trial, his 6th Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), and the corresponding provisions of the South Carolina Constitution.
- **C** I object because this evidence is inadmissible hearsay under S.C. R. Evid. 802; its admission violates the defendant's 6th and 14th Amendment rights to a fair trial, his 6th Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), his 8th Amendment right against arbitrary imposition of the death penalty, and the corresponding provisions of the South Carolina Constitution.

E. Statement Issues

a. Confession obtained without required Miranda warning and voluntary waiver of rights.

- I object that this statement is inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), and its admission violates the defendant's 5th, 6th and 14th Amendment rights, and the South Carolina Constitution, Article 1, Sections 3, 12 and 14.

b. Statement inadmissible because taken after defendant invoked his 5th or 6th Amendment right to counsel

- I object that this statement is inadmissible under *Edwards v. Arizona*, 451 U.S. 477 (1981), and its admission violates the defendant's 5th, 6th and 14th Amendment rights, and the South Carolina Constitution, Article 1, Sections 3, 12 and 14.

c. Inadmissible statement of co-defendant

- I object that this statement is inadmissible under *Gray v. Maryland*, 523 U.S. 185 (1998), and its admission violates the defendant's 6th and 14th Amendment right to due process, his 6th Amendment right to confrontation, and the corresponding provisions of the South Carolina Constitution.

d. Statement Involuntary

- I object that this statement is inadmissible because it was involuntary and its admission violates the defendant's 5th and 14th Amendment rights against self-incrimination and due process of law, as well as the South Carolina Constitution, Article 1, Sections 3 and 12.

F. Illegal Search & Seizure

- I object that this evidence is inadmissible under the 4th Amendment, and *Mapp v. Ohio*, 367 U.S. 643 (1961), and the South Carolina Constitution, Article 1, Section 10.

G. Character Evidence, Prior Bad Acts

- Objection. This evidence is inadmissible character evidence under S.C. Rule of Evidence 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 violates my client's 6th and 14th Amendment rights to a fair trial and due process of law, and the corresponding provisions of the South Carolina Constitution.

- Objection. The State may not enter evidence of a crime or prior bad act that is not the subject of conviction without proving the prior crime or bad act by clear and convincing evidence.[3] The State's failure to do so makes this evidence inadmissible and its admission violates S.C. Rule of Evidence 404(b), *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989), and my client's 6th and 14th Amendment rights to a fair trial and due process of the law, and the corresponding provisions of the South Carolina Constitution.

[10] Simply objecting to admission of a prior bad act under SCRE 404 does not preserve an objection to the State's failure to prove the prior unadjudicated bad act by clear and convincing evidence. *State v. King*; 416 S.C. 92, 108, 784 S.E.2d 252, 260 (2016) (citing *State v. Martucci*, 380 S.C. 232, 256-57, 669 S.E.2d 598, 611 (Ct. App. 2008)).

- **C** Objection. This evidence is inadmissible character evidence under S.C. Rule of Evidence 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 violates my client's 6th, 8th and 14th Amendment rights, and the corresponding provisions of the South Carolina Constitution.

H. Victim Impact Evidence

a. Generally Inflammatory Victim Impact Evidence

- **C** I object that this evidence is improper victim impact evidence because it is unduly inflammatory and would render the trial fundamentally unfair in violation of my client's right to due process under the 14th Amendment and the South Carolina Constitution, Article 1, Section 3. It also injects an arbitrary factor into the proceedings in violation of the 8th Amendment and South Carolina Constitution, Article 1, Section 15, and S.C. Code § 16-3-25(C).

b. Victim Impact Evidence Other than "Unique Qualities" of the Victim or "Specific Harm Caused by the Murder"

- **C** I object that this evidence is improper victim impact evidence because it is outside the scope of permissible victim impact evidence, which must be limited to showing the unique qualities of the victim or a specific harm caused by the murder, in violation of my client's right to due process under the 14th Amendment and the South Carolina Constitution, Article 1, Section 3 and *Stone v. State*, ___ S.C. ___, ___S.E.2d ___, 2017 WL 511077 (S.C. 2017). It also injects an arbitrary factor into the proceedings in violation of the 8th Amendment and South Carolina Constitution, Article 1, Section 15, and S.C. Code § 16-3-25(C).

c. Victim Impact Evidence in Juvenile LWOP Cases

- **J** I object that this evidence is improper victim impact evidence because it is unduly prejudicial and would render the sentencing proceeding fundamentally unfair in violation of my client's right to due process under the 14th Amendment and the South Carolina Constitution, Article 1, Section 3. We have previously filed a motion,[4] which was served on the solicitor and sent to Your Honor and which I have marked as Court Exhibit [X], laying out the argument in detail. As we said in our motion, victim impact evidence, if it is allowed at all, should be strictly limited to "a quick glimpse of the life" of the victim and may not include the victims' family members' characterizations and opinions about the crime, the defendant, or the appropriate sentence. *Payne v. Tennessee*, 501 US 808, 822, 830 n.2 (1991).
    - *Note*: A ruling on a motion to limit victim impact evidence *in limine* is NOT sufficient to preserve an objection to victim impact evidence admitted at trial. *See supra* page 6. To preserve the issue for appeal, counsel must contemporaneously object upon the admission of improper victim impact testimony.

[11] Sample motion available at Justice 360.

I. Exclusion of Third Party Guilt Evidence

- I object to the exclusion of this evidence because it is admissible under *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), and its exclusion violates the defendant's 6th and 14th Amendment rights to a fair trial and to put on a defense, and the corresponding provisions of the South Carolina Constitution. The court is not allowed to weigh the strength of the State's evidence under *Holmes v. South Carolina*, 547 U.S. 319 (2006).

V. The Solicitor's Closing Argument

For the most part, this handbook suggests language for appropriate objections to legal issues that we assume you have already correctly identified. There is, however, a myriad of objectionable things that a solicitor could say in closing argument, and each argument may raise a unique combination of suitable objections. Thus, this section lists several broad categories of objectionable arguments, followed by one or two examples taken from past cases. For each category, we provide one or more appropriate objections.

A. Direct or Indirect Comments on Defendant's Right to Remain Silent

EXAMPLE: "And what did we hear from Mr. Defendant? Did he offer any explanation for his actions that night? No. Did you hear him say "I'm sorry" or express remorse?"

- I object that the solicitor's comment was improper and violated the defendant's 5th Amendment right to silence, his 14th Amendment right to due process, and his 6th Amendment right to a fair trial.

B. Future Dangerousness

EXAMPLE: "It will be on your heads if he kills somebody else."

- **C** I object that the solicitor's comment was inflammatory, threatening to the jury, and inherently prejudicial; it violated the defendant's 14th Amendment right to due process and injects an arbitrary factor into the proceedings in violation of the 8th Amendment and S.C. Code § 16-3-25(C).

C. Arguments that Exploit the Solicitor's Position.

a. Arguments that interject the solicitor's personal opinion.

EXAMPLE: "I believe that the death penalty is appropriate for mean and evil people. Such people do not deserve to continue to live with the rest of us, regardless of how confined we can make them. The death penalty is appropriate for those cases."

- **C** I object that the solicitor improperly interjected his personal opinion, and his comment is inflammatory and inherently prejudicial in violation of the 8th and 14th Amendments. It also injects an arbitrary factor in violation of the 8th Amendment and S.C. Code § 16-3-25(C).

b. Arguments that encourage jurors to rely on the solicitor's judgments instead of their own.

EXAMPLE: "I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the death penalty. So, you see, you are not alone in your decision. I have already made that decision. I made that decision months ago. And if I can do it, you can."

- **C** I object on the bases of the 8th and 14th Amendments and S.C. Code § 16-3-25(C) because the solicitor's argument improperly encourages the jury to rely on his own personal opinion, rather than their independent judgment and injects an arbitrary factor into the proceedings.

EXAMPLE: "The State seeks the death penalty only in those cases that are most appropriate. It is reserved for the worst of the worst, and Mr. Defendant was one of those people."

- **C** I object to the solicitor's statement because it improperly suggests that the jury should rely on the State's decision to seek the death penalty as a reason to impose death rather than exercising their own, independent judgment in violation of the 8th and 14th Amendments and S.C. Code § 16-3-25(C).

D. Arguments Outside the Record (Supporting Death Sentence)

EXAMPLE: "You can't put Mr. Defendant in life in prison because he would not give any further thought to the victims. Mr. Defendant could not care less about the victims."

EXAMPLE: "You can get drugs in the penitentiary better than you can out on the street."

EXAMPLE: "A big prison is like a little city, with free food, clothing, shelter, medical attention, TV, contact with loved ones, freedom of movement and a social structure."

EXAMPLE: "I'm going to tell you he was out of bullets, because if he hadn't been, Officer Cram would have been dead. If he still had the gun and still had bullets, do you think he would have surrendered?"

- **C** I object to this argument because it is not based on the evidence in the record and it is inherently prejudicial and violates the 8th and 14th Amendments and S.C. Code § 16-3-25(C).

E. Minimizing the Jury's Role as Decision-Maker (Regarding Death Sentence)

EXAMPLE: "It's a collective reasoning. And it is not intended to be a unilateral decision by one or two jurors. It will be the collective that makes the ultimate decision."

EXAMPLE: "I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the death penalty. So, you see, you are not alone in your decision. I have already made that decision."

EXAMPLE: "Other courts are going to look at your decision and make sure that it was absolutely the right one."

- **C** I object to this argument because it misstates the law and improperly minimizes the jury's role as the decision-maker in this case. It injects an arbitrary factor into these proceedings in violation of the 8th Amendment and S.C. Code § 16-3-25(C), and it violates the defendant's 14th Amendment due process rights.

F. Disparaging the Defendant's Mitigating Evidence, Witnesses or Counsel

EXAMPLE: "Mr. Defendant's evidence was not mitigation. It didn't mitigate anything. It was only designed to make you feel sorry for him and create sympathy. And that is not the reason you decide the appropriate punishment."

EXAMPLE: "The State's case for guilt, once you throw out all of Mr. Defendant's smoke screens and evaluate his perjury that his people put on, his guilt is obvious."

- **C** I object to this argument because it mischaracterizes the evidence, misstates the law, and is designed to inflame the jury's passion or prejudice in violation of the 8th and 14th Amendments and S.C. Code § 16-3-25(C).

G. Do Your Duty; Send a Message Arguments

a. Arguments that it is the jurors' responsibility or duty to follow the prosecutor's instructions rather than exercise their own, independent judgment.

EXAMPLE: "I'm asking for the death penalty. I'm seeking the death penalty, and I expect the death penalty."

EXAMPLE: "Sometimes killing is not only fair and justified, it's right. Sometimes it's your duty. There are times you have to kill in this life and it's the right thing to do."

- **C** I object to this argument because it misstates the law, improperly suggests that it is the jury's duty to impose death, injects the solicitor's personal opinion, and injects an arbitrary factor into the proceedings in violation of the 8th and 14th Amendments and S.C. Code § 16-3-25(C).

b. Arguments that it is the jurors' duty to impose the death penalty to "protect the community" or to "send a message."

EXAMPLE: "You've got to look beyond Mr. Defendant. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the Mr. Defendants of the world, and you have to be willing to look them right in the eye when you do it, that there's a point to which we won't allow you to go. And when you do, prison's too good. It's the death penalty."

EXAMPLE: "I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For what he did? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world?"

- **C** I object to this argument because it misstates the law, improperly suggests that it is the jury's duty to impose death to protect the community, and is designed to inflame passion and prejudice. It injects an arbitrary factor into the proceedings and violates the 8th and 14th Amendments and S.C. Code § 16-3-25(C).

H. Arguments Designed to Inflame the Jury

a. Inflammatory characterizations of the defendant

EXAMPLE: "For what this person did – not this person. I don't even call him a person."

EXAMPLE: "There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society."

b. Put yourself in the victim's shoes arguments

EXAMPLE: "How would you feel if Ms. Victim was your little girl?"

c. Other emotional and/or inflammatory appeals

EXAMPLE: "I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared young soldiers. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do. Well, last July Mr. Victim's face was a pile of goo and his brains were hanging out. You know what to do."

EXAMPLE: In a case involving the murder of the defendant's four-month-old baby, the solicitor broke into tears over a dozen times during his closing argument, ultimately wept continuously in front of the jury, and concluded by producing a black shroud, draping it over the baby's crib, and melodramatically wheeling the crib out of the courtroom in a kind of impromptu funeral procession.

- **C** I object to this statement (or action) because it is inflammatory, calculated to arouse passion and prejudice, and it is inherently prejudicial. It injects an arbitrary factor into the proceedings and violates the 8th and 14th Amendments and S.C. Code § 16-3-25(C).

VI. Common Objections in Juvenile LWOP Sentencing

This section includes objections that may be relevant in many Juvenile LWOP sentencing proceedings, but does not purport to include all possible objections. Motions referenced in the objections below can be obtained by contacting Justice 360.

A. Objection to LWOP as a Constitutional Sentence

- ☒ The defendant submits that a life without parole sentence imposed on any juvenile defendant, including my client, is a disproportionate and cruel and unusual sentence that violates the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. We have previously filed a motion, which was served on the solicitor and sent to Your Honor and which I have marked as Court Exhibit [X], laying out the argument in detail. Briefly, given the "transient nature of youth" and a juvenile's "capacity for change," life without parole is a disproportionate and cruel and unusual sentence. In addition, given the increasing number of states that have abolished life without parole for juvenile offenders, sentencing my client to life without parole violates evolving standards of decency. I realize that neither the Supreme Court of the United States nor the South Carolina Supreme Court has yet said that life without parole is under all circumstances an unconstitutional punishment, but it is the next clear logical extension of existing case law.
- **NOTE: If your client is sentenced to LWOP, then object as follows:** Your Honor the sentence you have imposed is a cruel and unusual and disproportionate punishment that violates the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution.

B. Objection to 30-Year Mandatory Minimum

- ☒ The defendant submits that the thirty year mandatory minimum sentence for murder in S.C. Code § 16-3-20(A), as applied to my client, who was a juvenile at the time of the crime, violates the Eighth Amendment to the United States Constitution, and Article I, Section 15 of the South Carolina Constitution. We have previously filed a motion, which was served on the solicitor and sent to your honor and which I have marked as Court Exhibit [X], laying out the argument in detail. As we said in our motion, recent United States and South Carolina Supreme Court cases establish that juveniles are constitutionally different than adults for sentencing purposes and that any punishment in cases involving juvenile offenders must take those differences into account if it is to be proportional to both the offender and the offense. Accounting for those differences requires recognition of the fact that the penological justifications that support lengthy mandatory minimum sentences for adults do not apply equally to juveniles. Therefore, this Court must not subject [defendant], who was a juvenile at the time of the offense for which he/she is to be sentenced, to the same mandatory minimum sentence as an adult offender.

- **NOTE: If your client is sentenced to LWOP, then object as follows:** Your Honor the sentence you have imposed is a cruel and unusual and disproportionate punishment that violates the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution.

C. Objection to a Sentence that is the Functional Equivalent to LWOP

- **J** Your Honor, any sentence you impose that is the functional equivalent of a life without parole sentence violates the defendant's rights under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. We have previously submitted and marked Vera F. Dolan's actuary study for the record as Court's Exhibit [X]. According to the actuary study, which is based on data provided by the South Carolina Department of Corrections, my client's life expectancy in a South Carolina correctional facility is [calculation of life expectancy from actuary study].[5] Thus any sentence of [X] years or more is the functional equivalent of a life sentence, in violation of the Supreme Court of the United States and South Carolina holdings in *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572, (2014).
- **NOTE: If your client is sentenced to a term of years that exceeds his reasonable life expectancy, then object as follows:** Your Honor, the sentence you have imposed is the functional equivalent of a life without parole sentence and violates the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution and I object to the sentence imposed on that basis.

D. Objection to LWOP for Double Diminished Capacity Defendant (Intellectual Disability)

- **J** The defendant submits that a sentence of life imprisonment without the possibility of parole, as applied to my client who was both a juvenile at the time of the crime and is intellectually disabled, violates the Eighth Amendment to the United States Constitution, and Article I, Section 15 of the South Carolina Constitution. We have previously filed a motion, which was served on the solicitor and sent to Your Honor and which I have marked as Court Exhibit [X], laying out the argument in detail. As we said in our motion, the defendant has twice diminished moral culpability in light of the fact that he was a juvenile (*see Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Aiken v. Byars*, 410 S.C. 534 (2014)) and is intellectually disabled (*see Atkins v. Virginia*, 536 U.S. 304 (2002)). He is thus not among the worst juvenile homicide offenders and should not be subject to the ultimate punishment applicable to juveniles.

[5] The life expectancy of the defendant is calculated by using the actuary study completed by Vera F. Dolan, available from Justice 360. The defendant's age in column A is added to the life expectancy in column I.

- **NOTE: If your intellectually disabled juvenile client is sentenced to LWOP, then object as follows:** Your Honor, the sentence you have imposed violates the Eighth Amendment to the United States Constitution, and Article I, Section 15 of the South Carolina Constitution because the defendant has twice diminished moral culpability.

E. Objection to LWOP for Double Diminished Capacity Defendant (Non-Shooter)

- J The defendant submits that a sentence of life imprisonment without the possibility of parole, as applied to my client who was both a juvenile at the time of the crime and was not the shooter and did not kill, intend to kill or know that a killing would take place, violates the Eighth Amendment to the United States Constitution, and Article I, Section 15 of the South Carolina Constitution. We have previously filed a motion, which was served on the solicitor and sent to Your Honor and which I have marked as Court Exhibit [X], laying out the argument in detail. As we said in our motion, the defendant has twice diminished moral culpability in light of the fact that he was a juvenile (*see Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Aiken v. Byars*, 410 S.C. 534 (2014)) and because he was not the shooter and did not kill, intend to kill, or know that a killing would take place (*see Enmund v. Florida*, 458 U.S. 782 (1982); *State v. Peterson*, 287 S.C. 244 (1985)). He is thus not among the worst juvenile homicide offenders and should not be subject to the ultimate punishment applicable to juveniles.
- **NOTE: If your intellectually disabled juvenile client is sentenced to LWOP, then object as follows:** Your Honor, the sentence you have imposed violates the Eighth Amendment to the United States Constitution, and Article I, Section 15 of the South Carolina Constitution because the defendant has twice diminished moral culpability.

F. Objection to Improper Victim Impact Evidence

- J I object that this evidence is improper victim impact evidence because it is unduly prejudicial and would render the sentencing proceeding fundamentally unfair in violation of my client's right to due process under the 14th Amendment and the South Carolina Constitution, Article 1, Section 3. We have previously filed a motion, which was served on the solicitor and sent to Your Honor and which I have marked as Court Exhibit [X], laying out the argument in detail. As we said in our motion, victim impact evidence, if it is allowed at all, should be strictly limited to "a quick glimpse of the life" of the victim and may not include the victims' family members' characterizations and opinions about the crime, the defendant, or the appropriate sentence. *Payne v. Tennessee*, 501 US 808, 822, 830 n.2 (1991).

- **NOTE:** A ruling on a motion to limit victim impact evidence *in limine* is NOT sufficient to preserve an objection to victim impact evidence admitted at trial. *See supra* page 6. To preserve the issue for appeal, counsel must contemporaneously object upon the admission of improper victim impact testimony.

G. Judge's Failure to Consider Presented Mitigating Evidence

- **J** I object to the Court's failure to meaningfully consider mitigating evidence of [DESCRIBE] under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution, and *Aiken v. Byars*, 410 S.C. 534 (2014). Because a life without parole sentence is the ultimate sanction against a juvenile, courts have recognized the individualized sentencing proceedings in juvenile life without parole cases must give full consideration to any and all relevant evidence in mitigation and this includes "the type of mitigating evidence permitted in death penalty sentencing hearings." *See Aiken v. Byars*, 410 S.C. 534, 544-45 (2014); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

- **NOTE:** A ruling on a motion to limit victim impact evidence *in limine* is NOT sufficient to preserve an objection to victim impact evidence admitted at trial. *See supra* page 6. To preserve the issue for appeal, counsel must contemporaneously object upon the admission of improper victim impact testimony.

H. Judge's Failure to Make Finding of Irreparable Corruption

NOTE: This objection is to be made only after imposition of an LWOP sentence without a factual finding that the juvenile defendant is irreparably corrupt.

- **J** I object to the Court imposing a life without parole sentence without making adequate factual findings under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution, and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). We have presented ample evidence that the defendant's crime "reflects unfortunate yet transient immaturity" as opposed to "irreparable corruption." This Court has not adequately addressed the evidence as demonstrating one or the other and, thus, this Court cannot sentence the defendant to life without parole under *Miller*. Furthermore, any finding of irreparable corruption based on the evidence presented in this sentencing hearing would not be supported by the evidence.

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.

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 & 14th Amendment	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 & Cross-Examination	6th Amendment	Article I, section 14
Assistance of Counsel	6th Amendment	Article I, section 14
Right To Present A Defense	6th Amendment & 14th Amendment due process clause	Article I, section 14
Excessive Bail	8th Amendment	Article I, section 15
Cruel & Unusual Punishment	8th Amendment	Article I, section 15

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