

SUPREME COURT OF LOUISIANA

No. 97-KA-1771

STATE OF LOUISIANA

VERSUS

JEFFREY FROST

**ON APPEAL FROM THE 19TH JUDICIAL DISTRICT,
PARISH OF EAST BATON ROUGE,
HONORABLE BONNIE P. JACKSON, JUDGE**

Kimball, Justice, additionally concurring

I concur in the result reached by the majority in this case but write separately because I believe this Court should revisit the issue of whether the contemporaneous objection rule should apply to the penalty phase of a capital trial as well as to the guilt phase. In *State v. Smith*, 87-KA-0649, 554 So.2d 676, 678 (La. 1989), we stated “[i]n a case involving capital punishment anything less than this court’s careful consideration of the entire record for possible prejudicial error would not afford an adequate remedy by due process of law and justice.” Thus, in *Smith*, we expressly expanded our review of capital cases to examination of the entire record for possible *prejudicial* error, nullifying the legislative pronouncement in Louisiana Code of Criminal Procedure Article 841(A) requiring a contemporaneous objection.

The Louisiana Constitution of 1974, Article I, Section 20, Louisiana Code of Criminal Procedure Article 905.9, and Supreme Court Rule 28, mandate that this Court review every capital sentence to determine if it is constitutionally excessive by examining the record for evidence of passion, prejudice, or arbitrary factors which may have contributed to the sentence of death. If an error was committed below, of such magnitude that either the verdict or the sentencing decision was affected, it would be remedied upon this Court’s mandatory direct review. In light of these provisions, the “expansion” of our review in *Smith, supra*, 87-KA-0649, 554 So.2d 676, was unnecessary and was properly overruled by *State v. Taylor*, 93-KA-2201, 669 So.2d 364, 369 (La. 1996), wherein we stated “[t]his Court’s scope of review in capital cases will be limited to alleged errors occurring during the guilt phase that are contemporaneously

objected to, and alleged errors occurring during the sentencing phase, whether objected to or not.”

I see no benefit nor logic to imposing the contemporaneous objection rule in one of the two phases of the capital trial and not in the other. Full reimposition of the contemporaneous objection rule to both phases of the capital trial would in no way jeopardize the fundamental fairness of the trial process as any error occurring below that injected passion, prejudice, or an arbitrary factor into the decision would be ferreted out upon our already stringent direct review. Accordingly, I would extend *Taylor, supra*, 93-KA-2201, 669 So.2d at 369, to the penalty phase as well, imposing a uniform contemporaneous objection rule consistent with the legislative mandate of Louisiana Code of Criminal Procedure Article 841(A).