

PRESERVING THE RECORD ON APPEAL

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I. INTRODUCTION:

- ❖ Our appellate courts are increasingly using “waiver” to avoid reaching the merits of defense challenges in criminal cases.
- ❖ While appellate attorneys can and do fail to preserve appellate issues, “waiver” most often begins at the trial level

II. BASIC PRESERVATION PRINCIPLES:

- ❖ **Express disagreement with what the trial court did (or did not do) and the complete grounds for that disagreement by objection, exception, motion, request, or otherwise.**
- ❖ Assert your position in a timely fashion.
- ❖ Assert your position in the form required by the applicable rule or statute.
- ❖ **Constitutionalize your position whenever possible by explicitly asserting both Federal and State constitutional grounds.**
- ❖ Re-assert your position every time the same or a substantially similar issue arises.
- ❖ Make an offer of proof if your evidence is wrongly excluded.
- ❖ Case Note: In *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), the trial attorneys preserved a number of statutory and constitutional errors. While the individual errors may not have warranted a new trial, the Supreme Court held that, when “taken as a whole,” the cumulative preserved errors “deprived defendant of his due process right to a fair trial.” *Id.* at 254, 559 S.E.2d at 768. The Court’s opinion in *Canady* demonstrates the benefit of lodging timely, specific, and frequent objections.

III. PRE-TRIAL:

A. Short-Form Indictments:

- ❖ N.C. Gen. Stat. §§ 15-144, 15-144.1, and 15-144.2 permit short-form indictments in first-degree murder, first-degree rape, and first-degree sexual offense cases. In all cases utilizing such a short-form indictment, as well as any cases where the indictment does not in fact set forth all elements of the offense, you should move to dismiss the indictment on the ground that it violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitutions. *See Jones v. United States*, 526 U.S. 227, 143 L.Ed.2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435 (2000). In capital cases, you should move to strike the death penalty from consideration because no aggravating factors are alleged in the indictment. *See Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556 (2002) (aggravating factors are elements of a capital offense and must be found by the jury).
- ❖ In numerous cases, the Supreme Court of North Carolina has rejected the argument that short-form first-degree murder indictments which do not allege premeditation and deliberation violate *Apprendi*. The Supreme Court recently rejected a challenge to the failure of an indictment to allege aggravating factors in a capital case. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Regardless of the Court's decisions, you should still preserve the issue for federal review.

B. Miscellaneous:

- ❖ If your *ex parte* motion for expert assistance is denied, make sure you get the substance of your motion and the trial judge's order on the record.
- ❖ If you believe that your client's right to presence has been violated by an *ex parte* contact, find a way to have the record reflect that the contact occurred.

IV. COMPLETE RECORDATION:

- ❖ In criminal cases, the trial judge must require the court reporter to record all proceedings *except* non-capital jury selection, opening and closing statements to the jury, and legal arguments of the attorneys. *See* N.C. Gen. Stat. § 15A-1241(a).
- ❖ However, **you should move to have everything recorded under § 15A-1241(b)**. Upon motion, the court reporter "must" record all proceedings. You should also ensure that the court reporter is actually present and recording at all stages of trial.
- ❖ If a bench conference is not recorded, ask the trial judge to reproduce it for the record and ensure that all of your objections are in the record.
- ❖ If something "non-verbal" happens at trial, ask to have the record reflect what happened.
 - ✓ *e.g.*: In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), the trial attorneys should have asked to have the record reflect that the prosecutor pointed a gun at the only African American juror during closing arguments.
 - ✓ *e.g.*: If your client is shackled without the necessary hearing and factual findings, and the jury saw the shackles, ask to have the record reflect that fact.

V. JURY SELECTION:

A. Preserving Your Right to Ask a Question on *Voir Dire*:

- ❖ *e.g.*: In a case involving an interracial crime, you want to ask prospective jurors questions about their views on interracial dating. However, the trial court sustains the State's objections to your questions.
- ❖ N.C. Gen. Stat. § 15-1212(9) provides that “[a] challenge for cause to an individual juror may be made by any party on the ground that the juror . . . [f]or any other cause is unable to render a fair and impartial verdict.” This section allows a statutory challenge for cause based on juror bias and, thus, should give a defendant a statutory right to explore possible sources of bias.
- ❖ In addition, you should try to constitutionalize your right to ask the question. *See, e.g., Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27 (1986) (right to impartial jury under the Fifth, Sixth, and Fourteenth Amendments guarantees a capital defendant accused of interracial crime the right to question prospective jurors about racial bias; violation of right requires death sentence to be vacated).
- ❖ To fully preserve any error based on curtailed defense questioning during *voir dire*, you should submit a written motion listing the questions you want to ask and obtain a ruling on the record. You also need to exhaust your peremptory challenges. *See State v. Fullwood*, 343 N.C. 725, 734-35, 472 S.E.2d 883, 888 (1996).

B. Preserving Your Denied Motion to Excuse for Cause:

- ❖ State clearly and completely the grounds for your challenge for cause. If the trial court denies your challenge, you *must* use a peremptory to excuse that juror unless you have already exhausted all peremptories.
- ❖ In addition, N.C. Gen. Stat. § 15A-1214(h) and (i) require that you then: **(1) exhaust all peremptories; (2) renew your challenge for cause; and (3) have your renewed challenge denied.** *See State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993) (ordering a new trial where defendant satisfied requirements of § 15A-1214(h)); *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992) (same).

C. *Batson* Error:

- ❖ **Establish for the record the races of all prospective jurors:** File a pre-trial motion asking the trial court to ensure that the races of prospective jurors are recorded by (1) the judge inquiring and making findings for the record, or (2) the judge requiring the parties to stipulate to jurors' races as selection proceeds. If the court will not permit any other way, ask each juror to put his or her race on the record orally or by questionnaire.
- ❖ **If you use juror questionnaires, move to have them admitted into evidence and made part of the record.** If the questionnaires are left in your possession, save them for the appellate attorney.

- ❖ Object every time the prosecutor excuses a juror for even arguably racial reasons. *See State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000). If you are prepared to make a *prima facie* showing, ask the trial court for an opportunity to present evidence. The court is required to honor this request. *See State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989).
- ❖ If the trial court declines to find a *prima facie* case, object. If the court asks the prosecutor to offer race-neutral reasons, ask for an opportunity to rebut the prosecutor's showing.
- ❖ Remember that *Batson* applies to gender-based challenges as well!

VI. EVIDENTIARY RULINGS:

- ❖ If you do not make timely and proper objections at trial, erroneous evidentiary rulings will only be reviewed for plain error – an extremely difficult standard to meet. On appeal, the defendant will have to show the error was so fundamental that it denied him a fair trial or had a probable impact on the jury's verdict. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

A. Objecting to the State's Evidence:

- ❖ Make timely objections. *See* N.C. Gen. Stat. § 15A-1446(a); N.C. Gen. Stat. § 8C-1, Rule 103(a)(1). If the prosecutor asks a question that you think is improper or may elicit improper testimony, enter a quick *general* objection. If the trial court invites you to argue the objection or rules against you, you should follow up by stating the *basis* for your objection.
 - ✓ **A defendant's general objection to the State's evidence is ineffective unless there is no proper purpose for which the evidence is admissible.** *See State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994) (burden on defendant to show no proper purpose).
 - ✓ **If evidence is objectionable on more than one ground, every ground must be asserted at the trial level. Failure to assert a specific ground waives that ground on appeal.** *See State v. Moore*, 316 N.C. 328, 334, 341 S.E.2d 733, 737 (1986); N.C. R. App. P. 10(b)(1).
- ❖ If evidence is admissible for a limited purpose, object to its use for all other improper purposes and request a limiting instruction. *See State v. Stager*, 329 N.C. 278, 309-10, 406 S.E.2d 876, 894 (1991). Upon request, the trial court is required to restrict such evidence to its proper scope and to instruct the jury accordingly. *See* N.C. Gen. Stat. § 8C-1, Rule 105.
 - ✓ *e.g.*: If the trial court rules that hearsay statements are admissible for corroboration, ask the trial court to instruct the jury about the permissible uses of that evidence.
 - ✓ If there are portions of the statements that are non-corroborative, specify those portions and ask to have them excised.

- ✓ If there are portions of the statements that are objectionable on other grounds (e.g., inadmissible “other crimes” evidence), specify those portions and ask to have them excised.
- ❖ **When appropriate, constitutionalize your objections.** If a defendant wishes to claim error on appeal under the Federal Constitution as well as state law, the defendant must have raised the constitutional claim when the error occurred at trial. *See State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994); *State v. Skipper*, 337 N.C. 1, 56, 446 S.E.2d 252, 283 (1994).
 - ✓ e.g.: If the trial court excludes your proffered evidence, do not object solely on state law relevance grounds. You should also cite your client’s constitutional due process right to present evidence in his defense.
 - ✓ e.g.: If the State offers hearsay evidence, do not object solely on state law hearsay grounds. You should also cite the Confrontation Clause.
- ❖ Object to any attempts by the prosecutor to admit substantive or impeachment evidence about your client’s post-*Miranda* exercise of his constitutional rights to remain silent and have an attorney present. *See Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91 (1976).
 - ✓ e.g.: If the State offers police testimony that your client refused to talk and asked for his attorney, object.
 - ✓ e.g.: If the State tries to cross-examine your client about his failure to tell certain facts to the police, object.

B. Moving to Strike the State’s Evidence:

- ❖ If the prosecutor’s question was not objectionable (or your objection to the question was overruled), but the witness’ *answer* was improper in form or substance, you must make a timely motion to strike that answer. *See State v. Marine*, 135 N.C. App. 279, 285, 520 S.E.2d 65, 68 (1999).
- ❖ Similarly, if the trial judge sustains your objection but the witness answers anyway, you must make a timely motion to strike the answer. *See State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994); *State v. McAbee*, 120 N.C. App. 674, 685, 463 S.E.2d 281, 286 (1995).

C. Waiving Prior Objections:

- ❖ **If you make a motion *in limine* to exclude certain evidence but then fail to object when the evidence is actually offered and admitted at trial, the issue is *not* preserved for appeal.** *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam); *State v. Wynne*, 329 N.C. 507, 515, 406 S.E.2d 812, 815-16 (1991). Similarly, if your suppression motion is denied, you must renew that motion or object to the evidence when it is introduced at trial to preserve the error. *See State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). You must do this even if the trial judge says you don’t have to. *State v. Goodman*, 149 N.C. App. 57, 66, 560 S.E.2d 196, 203 (2002), *rev’d in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003).

- ❖ **Do NOT rely on N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) to preserve the issue!!!**
Although the Legislature attempted to make things easier by amending Evidence Rule 103(a)(2) to add a second sentence which states that once the trial court makes a definitive ruling admitting or excluding evidence, either at or before trial, there is no need to later renew the objection, do not rely on this rule. The Court of Appeals has held that rule to be unconstitutional because it conflicts with Appellate Rule 10(b)(1). *See State v. Tutt*, --- N.C. App. ---, 615 S.E.2d 688 (2005).
- ❖ **If you initially object but then allow the same or similar evidence to be admitted without objection, the defendant will have waived his right to challenge admission of the evidence on appeal.** *See State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992). You must object each and every time the evidence is admitted.
- ❖ One way to deal with this problem is to enter a standing line objection to the evidence when it is offered at trial. *See* N.C. Gen. Stat. § 15A-1446(d)(9) & (10).
 - ✓ To preserve a line objection, you must ask the trial court's permission to have a standing objection to a particular line of questions. In addition, you should clearly state your grounds for the standing objection. If the court denies your request, object to every question that is asked.
 - ✓ **You cannot make a line objection at the time you lose your motion to suppress or your motion *in limine*; you must object to the evidence at the time it is offered.** *State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000).
 - ✓ If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.
 - *e.g.*: If you have a standing line objection based on relevance and a specific question in that line calls for hearsay, you need to interpose an additional hearsay objection.

D. Making an Offer of Proof:

- ❖ Evidence Rule 103(a)(2) provides that “[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” N.C. Gen. Stat. § 15A-1446(a) provides that “when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence.”
- ❖ Thus, **if the trial court sustains the prosecutor’s objection and precludes you from presenting evidence, making an argument, or asking a question, you must make an offer of proof.**
- ❖ **You should make your offer of proof by actually eliciting testimony from the witness outside the presence of the jury.** It is not enough to rely on the context surrounding the question. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002). Summarizing what the witness would have said also may not be sufficient. *See State v. Long*, 113 N.C. App. 765, 768-69, 440 S.E.2d 576, 578 (1994).

- ❖ If the court does not allow you to make an offer of proof, state: “Defendant wants the record to reflect that we have tried to make an offer of proof.” Also state that the trial court’s failure to allow you to do so violates the defendant’s right to confrontation, to present a defense, and, if applicable, to compulsory process. It is error for the court to prohibit you from making an offer of proof. *State v. Silva*, 304 N.C. 122, 134-36, 282 S.E.2d 449, 457 (1981).
- ❖ If the court tells you to make your offer “later,” the burden is on you to remember and make sure the offer is made.

VII. MOTIONS TO DISMISS:

- ❖ Always move to dismiss at the close of the State’s case. *See* N.C. R. App. P. 10(b)(3).
- ❖ **Always renew your motion to dismiss at the close of all the evidence (even if you only introduce exhibits).** The defendant is barred from raising insufficiency of the evidence on appeal if you fail to do so. *See* N.C. R. App. P. 10(b)(3); *see also State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1446(d)(5)). Furthermore, the appellate courts will not even apply “plain error” analysis if the motion is not renewed. *See State v. Freeman*, 164 N.C. App. 673, 596 S.E.2d 319 (2004) (plain error analysis only applies to jury instructions and evidentiary matters in criminal cases).
- ❖ If you forget to renew your motion to dismiss at the close of all the evidence, you should move to set aside the verdict. The denial of this motion on the basis of insufficient evidence is within the discretion of the trial court and is reviewable on appeal under an abuse of discretion standard. *See State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999).

VIII. CLOSING ARGUMENTS:

- ❖ The filing of a motion *in limine* regarding closing arguments is not sufficient, by itself, to preserve closing argument error. Appellate Rule 10(b)(1) requires that you actually obtain a ruling on the motion from the trial judge. *See State v. Daniels*, 337 N.C. 243, 275-76 n.1, 446 S.E.2d 298, 318 n.1 (1994). In addition, you should renew the motion or object during the prosecutor’s closing argument.
- ❖ Object to any attempts by the prosecutor to argue in closing that your client’s post-*Miranda* exercise of his constitutional rights to silence and counsel support an inference of guilt. *See Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91 (1976).
- ❖ In recent opinions, the Supreme Court of North Carolina has displayed an increasing willingness to find reversible error due to improper closing arguments by prosecutors. Be vigilant to improper arguments and object!

IX. JURY INSTRUCTIONS:

- ❖ Clearly and specifically object to erroneous jury instructions before the jury retires to deliberate. *See* N.C. R. App. P. 10(b)(2); *see also State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1231(d)). If you do not object at trial, instructional errors will only be reviewed for plain error – an extremely difficult standard to meet. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).
- ❖ **Submit all of your proposed jury instructions -- especially special instructions -- in writing.** *See* N.C. Gen. Stat. § 15A-1231(a). Requested instructions that are refused then become a part of the record on appeal by statute. N.C. Gen. Stat. § 15A-1231(d). Then follow along on your copy as the judge instructs the jury. Judges very often make unintentional mistakes while instructing the jury.

X. JURY DELIBERATIONS:

- ❖ Make sure that the timing of jury deliberations is made a part of the record. Lengthy or troubled jury deliberations are an extremely helpful way to show prejudice on appeal.
- ❖ Make sure that all jury notes and other communications between the judge and jury are made a part of the record.

XI. SENTENCING:

- ❖ **Do not stipulate as a matter of course to the prior record level worksheet or to the defendant's prior convictions, especially if they are out-of-state convictions.** The burden is on the prosecution to prove that the defendant's prior convictions exist. N.C. Gen. Stat. § 15A-1340.14(f). If they are out-of-state convictions, the State must prove they are substantially similar to North Carolina convictions or else they must be classified at the lowest punishment level (Class I for felonies, Class 3 for misdemeanors). N.C. Gen. Stat. § 15A-1340.14(e). If you stipulate (or fail to object when asked or agree in any way), the State does not have to prove anything. The issue will most likely be preserved if you "take no position" but the safer position is to object (even if you do not wish to be heard).
- ❖ Errors that occur during sentencing are supposed to be automatically preserved for review. N.C. Gen. Stat. § 15A-1446(18); *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003), *citing State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). However, the Court of Appeals has also held repeatedly that a failure to object to sentencing errors when the defendant has pled guilty waives appellate review of those errors. *See, e.g., State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000). To be safe, always object to errors that occur during the sentencing hearing.
- ❖ In response to the United States Supreme Court decision in *Blakely v. Washington*, our legislature substantially amended the Structured Sentencing Act. Session Law 2005-145,

referred to as the *Blakely* bill, went into effect on June 30, 2005 and applies to prosecutions for all offenses committed on or after that date. It remains to be seen what issues will need to be addressed by the appellate courts with regard to sentencing under the *Blakely* bill. For now, it is prudent to preserve all issues just as you would during a trial. This includes motions to dismiss for failure to prove an aggravating factor beyond a reasonable doubt, objections to evidence, and objections to erroneous jury instructions.

- ❖ Present evidence to support mitigating factors if the evidence was not presented at trial. *E.g.*, Have your client's mom testify about his support system in the community. If the mitigating factors are supported by documentary evidence, ask that the documents be entered into evidence.

XII. GUILTY PLEAS:

- ❖ **The ONLY pretrial motion that you can preserve for appeal is the denial of a motion to suppress.** N.C. Gen. Stat. § 15A-979(b); *State v. Jones*, 161 N.C. App. 60, 62, 588 S.E.2d 5, 7-8, *discretionary review granted on other grounds*, 357 N.C. 660, 589 S.E.2d 882 (2003). **To preserve this error, you must notify the State and the trial court during plea negotiations of your intention to appeal the denial of the motion, or the right to do so is waived by the guilty plea.** *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995). The best way to do this is to put it in writing.

AGGRESSIVE PRESERVATION OF CONSTITUTIONAL CLAIMS

Originally presented at the North Carolina Association of
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THE MOST IMPORTANT PARAGRAPH CONCERNING CONSTITUTIONAL LAW YOU WILL SEE OR HEAR AT THIS CONFERENCE IS THIS:

“We first note that defendant did not raise any constitutional concerns below and is precluded from asserting those arguments for the first time on appeal. See N.C.R. App. P. 10(b)(1). “Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court.” *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L.Ed.2d 1080 (1996).”

State v. Allah, 153 N.C. App. 524, 570 S.E.2d 153 (2002).

I

STRATEGIES FOR PRESERVATION OF CONSTITUTIONAL ISSUES: BE PARANOID

The Main Problem: Evidentiary Objections

1. Watch out – if you don’t object, you got nothing.
2. Watch out – a general objection (i.e. saying “Objection”) is effective to preserve error only if there was NO BASIS AT ALL for the admission of the evidence.
3. Watch out – a specific objection (“Objection, hearsay”) is effective only on the basis stated, so, for example, if the evidence was objectionable for another reason, your client will not be able to argue that reason on appeal. You have to object on every potential basis for objection.
4. Watch out – the logical extension of point #3 is that a specific objection (“Objection, irrelevant and hearsay”) does not automatically preserve the constitutional basis (due

process and confrontation) that common sense tells you is associated with your objection based on evidence rules (relevancy and hearsay) or other state law.

5. You have to get it just right. (“Objection, irrelevant, due process, hearsay, confrontation”) Although you probably would be OK just stating the constitutional ground for the objection, you may hurt your chance with the trial judge understanding what your objection is if you just say, “confrontation” without saying hearsay.
6. The second time you get it right, or maybe even the first time, the judge may yell at you for saying all that in front of the jury.
7. What’s the big deal? **THE STATE ON APPEAL MUST DEMONSTRATE THAT CONSTITUTIONAL ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.** The defendant on appeal must demonstrate that had regular old error not occurred, there is a reasonable possibility of a different result. The difference in prejudice standards can make a difference.
8. Just keep in mind that you have to be superhuman to be a good trial lawyer and you’ll be in the right frame of mind to carry on.

Some Possible Responses

1. You could just let the judge yell while you keep getting it right until he or she tells you to shut up. Probably a bad choice.
2. Instead, try to get some agreement with the judge before the trial starts on how he or she wants you to handle objections, explaining the necessity for making specific objections. If the judge tells you, “You can object, but I don’t want you to make specific objections in front of the jury,” you may feel like you are off the hook and that “objection” gets it done.

Do not count on it. At the first opportunity out of the presence of the jury after objections are overruled, note the difficulty of recreating the basis for your objections, but that as to x, the bases were a and b, as to y, the basis was c, etc, etc, finishing with noting the difficulty of recreating what was going on, and move that the court reporter read his or her notes of the points at which your objections occur so you can state specifically the grounds. If the judge grants this motion, carry through. If the judge declines to do what you ask, you have done what you could.

You should go through this same drill if the judge at any point prohibits you from making specific objections.

You may say, “This is going to piss the judge off and hurt my client.” If you are polite and professional, this may not be so. In fact, the judge may begin to think twice about his or her rulings if you consistently preserve constitutional bases for your objections. The truth is that doing an excellent job as a trial lawyer sometimes may anger unreasonable

judges, and an unreasonable judge is going to hurt your client anyway. Just make sure you preserve constitutional bases to attack unreasonable judicial behavior on appeal.

So what if the judge agrees that you can make specific objections?

Two ways to try to go:

1. Get it right every time, or
2. Ask the judge to give you a quasi line objection, associating the constitutional grounds with an evidentiary basis. The Hearsay – Confrontation pairing is probably the most frequent to occur in evidentiary objections.

If the judge says, “Yeah, every time you say hearsay, I understand that you are asserting a violation of your client’s constitutional right to confront the witness,” I think you are covered. If the judge says no, get it right every time.

Other evidentiary objections (improper expert testimony, irrelevant evidence in general, improper character evidence, improper 404(b) evidence, improper impeachment, general lack of foundation, etc.)? Associate them either in your pretrial agreement or in your objection with due process violations, the general idea being that the admission of such evidence is fundamentally unfair. Say “due process” or “fundamental fairness.”

You may be able to think of more specific constitutional bases for objections.

What do you do to constitutionalize exclusion of evidence you want in?

1. ASK TO MAKE AN OFFER OF PROOF.
2. If the judge won’t let you make an offer of proof, ask permission to summarize what your offer of proof would establish.
 - a. If the judge won’t let you summarize, state that the exclusion of the evidence would violate your client’s constitutional rights
 - i. To confront the state’s evidence,
 - ii. To make a defense, and
 - iii. If the judge won’t let you get someone to court via writ or subpoena, to compulsory process
 - b. If the judge lets you make your offer of proof or summary, and does not have a change of mind, state the same: confront, make a defense, compulsory process.

What do you need to do at trial to preserve a pretrial motion to suppress evidence based on Fourth, Fifth, or Sixth Amendment grounds?

RENEW THE OBJECTION BEFORE THE JURY, OR IT'S WAIVED.

You can say, "Objection, renew previous motion," or "Objection _____th amendment," BUT RENEW THE MOTION.

But, you say, what about the new addition to Evidence Rule 103(a)(2), which is underlined below:

"Offer of proof. - In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

DON'T FALL FOR IT! The Court of Appeals has held that rule to be unconstitutional because it conflicts with Appellate Rule 10(b)(1). *See State v. Tutt*, --- N.C. App. ---, 615 S.E.2d 688 (2005). So, it is ALWAYS necessary to renew the suppression motion before the jury. That means you must object each and every time the evidence which was the subject of the suppression motion is discussed or identified or introduced.

What about guilty pleas following a loss on a motion to suppress?

"[A] defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty. *State v. Reynolds*, 298 N.C. 380, 396-97, 259 S.E.2d 843, 853 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed.2d 795 (1980). The rule in this state is that notice must be specifically given. *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *accord State v. Walden*, 52 N.C. App. 125, 126-27, 278 S.E.2d 265, 266 (1981). After reviewing the entire record in *Tew*, we observe the defendant there repeatedly, and specifically, preserved the right to appeal the suppression motion, by giving notice of intent to appeal prior to entry of the plea."

State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995).

Be paranoid. Put in writing in the plea transcript that you are reserving the right to appeal from the motion to suppress.

II

EXTEND YOUR PRESERVATION PARANOIA TO ALL OBJECTIONS, NOT JUST EVIDENTIARY OBJECTIONS. IN ADDITION TO STATING THE BASIS IN NORTH CAROLINA LAW, STATE THE CONSTITUTIONAL BASIS, IF YOU HAVE ONE, FOR EVERY OBJECTION YOU MAKE TO ANYTHING THAT HAPPENS DURING THE TRIAL, INCLUDING:

Improper comments by the prosecutor in jury selection

Improper cross-examination

Improper closing argument

Failure to give supported lesser-included offenses

Failure to give supported jury instructions

Jury misconduct

Everything