PRESERVING THE RECORD ON APPEAL IN DELINQUENCY CASES

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(edited version of "Preserving the Record on Appeal," Originally Presented in 2001 by
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I. INTRODUCTION:

- Our appellate courts often use "waiver" to avoid reaching the merits of appeals
- "Waiver" most often begins at the trial level.

II. BASIC PRESERVATION PRINCIPLES:

- **Anticipate the potential legal issues in your case!!!** For suggestions on how to prepare for objections and to preserve the record see: http://www.ncids.org/Juvenile%20Defender/Training%20Seminars/2007%20Juvenile%20Defender%20Conference/PreservingtheRecord-Mickenberg.pdf
- **Express disagreement with what the trial court did (or did not do) and state the 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/renew your objection, every time the same or a substantially similar issue arises.
- Obtain a ruling on your request, motion, or objection. If the judge says he or she will rule "later," make sure that he or she does so.
- 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

- File motions, in writing. For example:
  - Discovery motions.
  - Motions to suppress.
  - Motion for bill of particulars – e.g., client is charged with sexual assault and the petition does not allege what act or the dates when it occurred.
  - Motions for expert assistance (see below).
  - Competency – hearing should be on the record and if client is found competent, object to finding of capacity at end of hearing AND AGAIN at adjudication. *In re: Pope*, 151 N.C. App. 117 (2002). (issue waived b/c counsel didn't obkject after the hearing or at the adjudicatory hearing, even though attorney had filed motion alleging incapacity).
- 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.
- Make sure that hearings on pre-trial motions are on the record.

IV. GUILTY PLEAS:

- **The ONLY pretrial motion that you can preserve for appeal after a guilty plea is the denial of a motion to suppress.** N.C. Gen. Stat. § 15A-979(b); *State v. Smith*, --- N.C. App. ---, 668 S.E.2d 612, 614, *disc. review denied*, No. 534P08, 2009 N.C. LEXIS 764 (N.C. August 27, 2009). **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. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 192 (2001).
- Announce the conditional nature of the admission on the record before the admission is entered and include this in the written transcript of admission.
- The juvenile code does not explicitly address this issue and but our Supreme Court has recognized a juvenile's right to appeal the denial of a motion to suppress following an admission: *In re J.D.B.*, 363 N.C. 664, 686 S.E.2d 135 (2009).

V. COMPLETE RECORDATION:

- Make sure that everything relevant is recorded. 7B-2410 provides that adjudicatory, dispositional, probable cause and transfer hearings shall be recorded. The statute states that the court "may order that other hearings be recorded." If you want a hearing recorded that you think would not otherwise be recorded, request it, on the record.

- ❖ 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.

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); N.C. R. App. P. 10(b)(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 if your objection to a question is overruled and it later becomes apparent that the testimony is inadmissible) but the witness' *answer* was improper in form or substance, you must make a timely motion to strike that answer. *See State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975); *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 specifically 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) in 2003 to add a second sentence that 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. Rule 103(a)(2) has been held to be invalid because it conflicts with Appellate Rule 10(b)(1) which has been consistently interpreted to provide that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal unless the defendant renews the objection during trial. *See State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007).

- **If you initially object but then allow the same or similar evidence to be admitted later without objection, the issue is not preserved for appeal.** *See State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992). Likewise, you waive appellate review if you fail to object at the time the testimony is first admitted, even if you object when the same or similar evidence is later admitted. *See State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000). **Bottom line:** 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); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 22, at 92 (Michie Co., 6th ed. 2004) (discussing waiver and the status of line objections in North Carolina).
  - ✓ To preserve a line objection, you must ask the trial court's permission to have a standing objection to a particular line of questions. *See, e.g., State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996). 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.** *See 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.** For further discussion of this topic, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 18, at 70 (Michie Co., 6th ed. 2004).
- **You should make your offer of proof by actually filing the documentary exhibit or by eliciting testimony from the witness.** 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: "The Juvenile 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 juvenile's constitutional rights 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 to make sure that the offer is made.

VII. MOTIONS TO DISMISS:

- Always move to dismiss at the close of the State's case. *See* N.C. Gen. Stat. 15-173; N.C. Gen. Stat. § 15A-1227.
- **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 review the error using the "plain error" standard of review 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, after the verdict you should move to dismiss based on the insufficiency of the evidence or move to set aside the verdict as contrary to the weight of the evidence. *See* N.C. Gen. Stat. § 15A-1414(b). These motions are addressed to the discretion of the trial court and are reviewable on appeal under an abuse of discretion standard. *See State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999); *State v. Batts*, 303 N.C. 155, 277 S.E.2d 385 (1981).

VIII. CLOSING ARGUMENTS:

- Always object to improper arguments. Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error.

IX. DISPOSITION:

- Errors that occur during sentencing are supposed to be automatically preserved for review. *See* N.C. Gen. Stat. § 15A-1446(d)(18); *State v. McQueen*, 181 N.C. App. 417, 639 S.E.2d 139 (2007), *appeal dismissed and disc. review denied*, 361 N.C. 365, 646 S.E.2d 535 (2007); *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 repeatedly found that a defendant waives appellate review of a sentencing error

when he or she fails to object. *See, e.g.*, *State v. Black*, --- N.C. App. ---, 678 S.E.2d 689 (2009) (right to appellate review of constitutional issue was waived because defendant failed to raise it at the sentencing hearing); *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000) (issue regarding sufficiency of the evidence to support the finding of aggravating factors was not properly before the Court because defendant did not object during the sentencing hearing). **To be safe, always object to errors that occur during the dispositional hearing.**

X. HOW TO APPEAL:

- Right to appeal from final order. G.S. 7B-2602.
- **Must appeal from dispositional order following adjudication, even if it's only the adjudication you're appealing!!! An adjudicatory order is not final under the statute.** *See In re A.L.*, 166 NC App. 267 (2004) (appeal dismissed for lack of jurisdiction because notice of appeal only referenced adjudication).
- **Always enter notice of appeal from both adjudication and disposition.**
- **Notice of Appeal must be given orally, at time of hearing, or within writing within 10 days after order of entry. Note: TEN DAYS. Best practice is to file in writing even if you've given oral notice of appeal.**
- If no dispositional order is entered within 60 days after the entry of the adjudicatory order, an adjudication may be appealed by written notice of appeal within 70 days of adjudication. GS. 7B-2602.
- **The juvenile (or the juvenile's attorney) or the juvenile's parent, guardian, or custodian can appeal.** G.S. 7B-2604.
- Transfer order MUST be appealed to superior court immediately in order to preserve issue for appellate review. G.S. 7B-2603(a).
- Let the clerk know if there are court dates other than that of the adjudication and disposition which need to be transcribed. (E.g., a motion to suppress). Ask the clerk to put these dates on the Appellate Entries.
- Call the Office of the Appellate Defender, (919) 560-3334 if you have questions about how to appeal, how to preserve the record, or if you a judge or clerk is hampering your client's appeal by requiring parental notification or permission and/or by not timely submitting the Appellate Entries to OAD.