Preserving Your Issues: It Is Necessary

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INTRODUCTION

Every one of us at some point in our law school careers heard professors rant and rave about getting objections on the record. Inevitably, we got sick of it. But it turns out, they were right to rant and rave because it doesn't matter how great of issues you have or how wrong the judge was at trial if the issue isn't preserved the appellate courts are not going to rule in your favor. Nine times out of ten, they are just going to say the issue isn't preserved and nothing else. Occasionally, they will say your issue isn't preserved and that even if it was preserved it wouldn't warrant reversal. Very rarely, they will say you have a reversible issue that isn't preserved and too bad. The moral of this introduction: preservation is necessary.

This handout is going to lay out some of the common preservation issues. It is going to start with general preservation issues and then deal with some common issues on specific areas like jury instructions, Rule 404b, Stand-Your-Ground/self defense requests for immunity, motions for judgment of acquittal and new trial, Fourth Amendment suppression, and guilty pleas.

GENERAL PRESERVATION ISSUES

Preservation issues largely begin and end with *Ex parte Coulliette*, 857 So. 2d 793 (Ala. 2003). Generally speaking, *Coulliette* is cited in two places and two places only. First, the Court of Criminal Appeals cites it when your issue wasn't preserved at trial. The second place *Coulliette* is cited is in Rule 32 petitions raising claims of ineffective assistance of trial counsel because trial counsel did not preserve a specific issue for trial. Rule 32 counsel uses *Coulliette* to say that trial counsel was ineffective for not objecting because if counsel had objected, the issue would have been corrected or the issue would have warranted reversal on direct appeal. In short, citing a citation to *Coulliette*—whether in an opinion or a Rule 32 petition—is not a good thing and something to be avoided.

In *Coulliette*, the Alabama Supreme Court made crystal clear that the appellate courts will only address issues preserved at trial:

> "Review on appeal is restricted to questions and issues properly and timely raised at trial." *Newsome v. State,* 570 So. 2d 703, 717 (Ala. Crim. App. 1989). "An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented." *Pate v. State,* 601 So. 2d 210, 213 (Ala. Crim. App. 1992). "'[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof." *McKinney v. State,* 654 So. 2d 95, 99 (Ala. Crim. App. 1995) (citation omitted). "The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." *Ex parte Frith,* 526 So. 2d 880, 882 (Ala. 1987). "The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury." *Ex parte Works,* 640 So.2d 1056, 1058 (Ala.1994).

Id. at 794-97. *Coulliette* spells out the basic requirements for preserving issues. Issues have to be raised at trial in a specific and timely fashion. Objections on specific grounds waive objections on general or specific grounds that are not raised. Objections have to be on the record.

Object on the Record

The basic fact of appeals is that everything begins and ends with the record. A bad trial cannot be fixed on appeal if the issues weren't raised at trial or aren't in the record. Appeals are restricted to the set-in-stone certified record on appeal. If it isn't in the record, the appellate courts will not waste their time with it. *Dotch v. State*, 67 So. 3d 936, 961 (Ala. Crim. App. 2010). They will not "presume error from a silent record" because they are "bound by the record and not by allegations or arguments in brief reciting matters not disclosed by the record." *Id.* That means discussions off the record don't matter; discussions in chambers without the court reporter present and making a record don't matter; discussions in court without a court reporter don't matter. The greatest *Batson* violation in the world is meaningless if jury selection isn't on the record. The most blatant prosecutorial misconduct in history during opening or closing is meaningless if opening or closing isn't on the record. Discussion of evidentiary issues during sidebars where the court reporter isn't taking it down are meaningless. So, make sure it is on the record.

But just because something occurs on the record doesn't preserve it. You have to object. *Craft v. State*, 90 So. 3d 197, 204 (Ala. Crim. App. 2011) Even better, if you know an issue is going to come up file a motion laying out every reason you can think

of for the court to rule in your favor. File it early. That way your arguments can be laid out in the record in detail and you can renew the motion at trial if the court doesn't have a full hearing on the motion. Just don't forget to renew the motion.

Be specific

Objecting is great, but you have to be specific. Jumping up and shouting objection doesn't do much of anything. *Ex parte Parks*, 923 So. 2d 330, 333 (Ala. 2005) ("An objection without specifying a single ground, such as 'I object,' 'objection' or 'we object' is not sufficient to place the trial court in error for overruling the objection."). You have to be specific and offer the grounds for the objection. Want an example? Take a lesson from the great defense lawyer Vincent Gambini:

> I object to this witness being called at this time. We've been given no prior notice he'd testify. No discovery of any tests he's conducted or reports he's prepared. And as the court is aware, the defense is entitled to advance notice of any witness who will testify, particularly those who will give scientific evidence, so that we may properly prepare for cross-examination, as well as give the defense an opportunity to have the witness's reports reviewed by a defense expert, who might then be in a position to contradict the veracity of his conclusions.

Vinny laid out multiple specific grounds for excluding the witness's testimony. Yeah, the judge may look you dead in the eye and say "overruled", but you have laid out multiple grounds for appealing the decision.

The point of objecting with specificity is that it serves to put the trial court on notice of potential problems. *Watson v. State*, 875 So. 2d 330, 332 (Ala. Crim. App. 2003). Because if Vinny had only objected to lack of notice, the rest of the grounds for appeal would have been waived. When you object on a specific ground, you waive any other specific grounds that you could have objected on because the court isn't put on

notice of those grounds. *Id.* Even constitutional issues can be waived. *Ex parte Clemons*, 55 So. 3d 348, 351 (Ala. 2007) ("The rule against raising an issue for the first at the appellate level applies even if the issue raised would present constitutional questions."). Confrontation issues, due process issues, Fourth Amendment issues, and others all have to be raised. The only issues that aren't waived are jurisdictional issues and those are few and far in between.

Be Timely

Every bit as important as objecting specifically is objecting in a timely manner. This means that counsel must object "immediately after the question or questions are asked that are that the grounds made the basis of the motion for the mistrial." *Ex parte Marek*, 556 So. 2d 375, 379 (Ala. 1989). *Marek* dealt with a timely motion for a mistrial, but that motion preserves lesser remedies like standard objections. One place timeliness is an issue is when defense counsel waits for the prosecution to finish its opening before objecting to statements made in the opening. In that case, the motion or objections are not timely and any issues related to those motions or objections are not preserved for appellate review. *Wilson v. State*, 651 So. 2d 1119, 1122 (Ala. Crim. App. 1994).

SPECIFIC PRESERVATION ISSUES:

JURY INSTRUCTIONS

If you ask for a specific jury instruction that you think you are entitled to and the judge declines to give that instruction, you have to object. That objection can take place during the charge conference or before after instructions but before

deliberations begin. *Ex parte Hatfield*, 37 So. 3d 733 (Ala. 2009) (holding that discussion during charge conference regarding requested charges preserved jury instruction issue because the trial court was clearly put on notice of the basis of the objections); *Ex parte Weaver*, 763 So. 2d 982 (1999) (jury instruction issue was preserved due to discussion following the charge but before deliberations began about the proper instructions).

It is important to note that jury instruction issues are treated differently than most other issues when questions arise over whether the issue is preserved. Normally, the magic words—"objection" or "I object"—are required, but not necessarily for jury instruction issues. A number of cases over the years have made clear the key question is whether the trial court was put on notice of the substance of the defendant's arguments based on the record. *See Hatfield*, 37 So. 3d at 737; *Weaver* 763 So. 2d at 986; *Toles v. State*, 854 So. 2d 1171 (Ala. Crim. App. 2002); *Felder v. State*, 593 So. 2d 121 (Ala. Crim. App. 1991). Please object—clearly and on the record—to make sure these kind of arguments don't have to be made, but the lack of a clear objection doesn't foreclose relief on preservation grounds if the record makes clear that counsel put the trial court on notice of the basis of its requested instruction or disagreement with a proposed instruction.

RULE 404(B)

Is there a bigger pain in the backside than the innumerable issues surrounding evidence of prior bad acts? Probably, but it is a recurring issue. Generally, this kind of stuff is very, very bad for your client, otherwise why would the State go through

the trouble of introducing it? But there are ways of fighting Rule 404(b) evidence at trial and on appeal, if the issue is preserved for appellate review. Preserving 404(b) issues is maybe the area where specificity is the most critical because there are so many grounds to fight the evidence on.

Notice

First off, request notice of any and all Rule 404(b) evidence. If notice is requested and the state fails to provide notice, the evidence is inadmissible. The Alabama Supreme Court has explained that failure to provide notice of 404(b) evidence after notice is requested renders the evidence inadmissible. *Ex parte Lawrence*, 776 So. 2d 50 (Ala. 2000). But counsel must request notice before that rule applies. The state is not required to provide notice of the evidence if no motion for notice is made. *Ex parte Davis*, 875 So. 2d 276 (Ala. 2003).

When requested, the state must provide timely reasonable notice. For example, waiting until the defendant has exercised his right to testify and then providing notice was not timely because it compromised the defendant's right to make an inform decision. *Hammond v. State*, 94 So. 3d 418, 423 (Ala. Crim. App. 2012). Moreover, when the state fails to provide timely notice, there is no requirement to show prejudice. *Barrett v. State*, 918 So. 2d 942, 948 (Ala. Crim. App. 2005). "Evidence of prior bad acts of a criminal defendant is presumptively prejudicial to the defendant." *Ex parte Casey*, 889 So. 2d 615, 622 (Ala. 2004) (quoting *Ex parte Cofer*, 440 So. 2d 1121, 1124 (Ala. 1983).

The caveat to rule is that notice is not required when the evidence is part of the res gestae. *Bohannon v. State*, 222 So. 3d 457 (Ala. Crim. App. 2015).

404(b) Evidence is Presumptively Inadmissible

It is important to remember that Rule 404(b) is an exclusionary rule with limited exceptions for admissibility. One of the best discussions of this rule is found in *Horton v. State*, 217 So. 3d 27, 45-48 (Ala. Crim. App. 2016). *Horton* explains that 404(b) evidence is presumptively inadmissible because it is—by its very nature—highly prejudicial. *Id.* at 46 (quoting *Cofer*, 440. So. 2d at 1124).

Rule 404(b) establishes certain exceptions for prior bad act evidence, but just because a piece of evidence or testimony falls within one of the exceptions does mean that the evidence or testimony is admissible. To be admissible, the evidence, and the exception, must be relevant to "a 'real and open issue as to one or more of those "other purposes."'" *Id.* (quoting *Draper v. State*, 886 So. 2d 105, 117 (Ala. Crim. App. 2002)). More than that, the evidence must not only be relevant to that open issue, the evidence "must be reasonably necessary to the state's case, and it must be plain and conclusive." *Id.* (quoting *Bush v. State*, 695 So. 2d 70, 85 (Ala. Crim. App. 1995)); *see also Ex parte Jackson*, 33 So. 3d 1279, 1285-86 (Ala. 2009) ("Finally, even if we were to conclude that evidence of Jackson's capital-murder conviction somehow fell within one of the exceptions in Rule 404(b), Ala. R. Evid., to the general exclusionary rule, the State has not demonstrated that the evidence was reasonably necessary to its case."). As a result, if the only purpose of the evidence is to damage the defendant's character or "arouse the passion, prejudice, or sympathy of the jury," you should

object on these grounds. *See Horton*, 217 So. 3d at 46 (quoting *Bradley v. State*, 557 So. 2d 541, 546 (Ala. Crim. App. 1990)). Hopefully, if the evidence has been admitted over your objection, you've laid the groundwork for an appellate court to overturn the conviction. More on this later.

The Alabama Supreme Court has explained that this evidence is presumptively inadmissible due to the evidence's potential to mislead the jury from the main issues in the case. *Ex parte Drinkard*, 777 So. 2d 295, 296 (Ala. 2000). The general exclusionary rule exists because "the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors. *Cofer*, 440 So. 2d at 1123 (quoting *Gamble*, *McElroy's Alabama Evidence* § 69.01(1) (3d ed. 1977)).

Unlike the vast majority of evidence, the State must be able to justify presenting 404(b) evidence and, according to the Alabama Supreme Court and Court of Criminal Appeals, that is a much tougher hurdle to clear than simply meeting one of the exceptions laid out in Rule 404(b). Because you should have advance notice of Rule 404(b) evidence, it gives you time to address these issues in a motion in limine laying out as many grounds to exclude or limit the evidence as you can. Insist on addressing each piece of the evidence individually when you argue the motion in court. This is where imagination and creativity are huge in explaining why the noticed evidence is not admissible.

Here, these issues are explained in one section, but each of these issue forms a different reason by 404(b) evidence should not be admitted. Each of those issues needs to be address separately for each piece of evidence. All of it is presumptively prejudicial, but different 404(b) evidence may fit different exceptions and address different issues. In a burglary case, 404(b) evidence of prior burglaries to show identity has no relevance if the defendant is on camera or is identified by co-defendants. In that case, there is no open issue of identity.

Limiting Instructions

Assuming 404(b) evidence is admitted at trial, it is critical to ask for a specific instruction limiting telling the jury what they can and cannot consider this evidence for. Will it have an effect? Possibly – and the Alabama appellate courts are aware of it. But if the judge declines to give the instruction or gives a blanket instruction, that is reversible error. In *Ex parte Billups*, the Alabama Supreme Court clarified that in light of *Huddleston v. United States*, 485 U.S. 681 (1988), that the trial court must specifically instruct the jury regarding the permissible uses of 404(b) evidence in the specific case. *Billups*, 86 So. 3d 1079 (Ala. 2010). In *Billups*, the state argued that instructing the jury that 404b evidence could only be used for the listed exceptions in the rule, reciting those exceptions, and informing the jury that the evidence could be used as proof the defendant's character was sufficient. The Alabama Supreme Court disagreed. Even if the evidence was permissible for some of the exceptions, the blanket instruction did not limit the appropriate uses of the evidence.

As mentioned above, the Alabama Supreme Court and the Alabama Court of Criminal Appeals have been fairly kind to defendant-appellants complaining about improper Rule 404(b) evidence on appeal. Check out *Marks v. State,* 94 So. 3d 409 (Ala. Crim. App. 2012) (rape case), *Towles v. State*, 168 So. 3d 124 (Ala. Crim. App. 2013) (capital murder case), *Towles v. State*, 168 So. 3d 133 (Ala. 2014) (same case), and *Penn v. State*, 189 So. 3d 107 (Ala. Crim. App. 2014).

STAND YOUR GROUND/SELF DEFENSE

A common issue arising now is requests for immunity from prosecution under our Stand Your Ground (SYG) or self-defense statute. One can be immune from prosecution if they stood their ground under the provisions of § 13A-3-23, or if they otherwise acted in self-defense (i.e., they couldn't argue SYG, but otherwise acted in line with the former requirements of self-defense). In 2018, the Court of Criminal Appeals ruled that if a request for SYG/self-defense immunity is denied, that ruling must be challenged by a pre-trial petition for a writ of mandamus. *Smith v. State*, 279 So. 3d 1199 (Ala. Crim. App. 2018). If a defendant loses the hearing and proceeds to trial, the issue of immunity is waived and relief will not be granted on direct appeal.

The problem with this is decision is simple: mandamus is a pain and carries a high burden. Judge Kellum wrote a concurring opinion in *Smith* that explained that mandamus may currently be the appropriate method of challenging the denial of SYG/self-defense immunity, but that it should not due to the difficulties of mandamus. Here's the standard that governs mandamus petitions:

> Before a writ of mandamus may issue, the petitioner must show (1) a clear legal right in the petitioner to the relief sought; (2) an imperative duty upon

> the respondent to perform, accompanied by a refusal to do so; (3) no adequate remedy at law; and (4) the properly invoked jurisdiction of the reviewing court. *State v. Williams*, 679 So. 2d 275 (Ala. Crim. App. 1996).

State v. Reynolds, 819 So. 2d 72, 79 (Ala. Crim. App. 1999). Due to those requirements, Judge Kellum encouraged the legislature to amend the code to allow for interlocutory appeal of SYG/self-defense immunity hearings. But for now, any questions regarding SYG/self-defense immunity **must be raised in a petition for mandamus**.

So, for this issue, perhaps "preservation" isn't the right term. But there are a couple of things you need to keep in mind if you have an adverse ruling on your request for immunity in this context. First, you must file a writ of mandamus within "a reasonable time" of the adverse ruling. *See* Rule 21, Ala. R. App. P. The Court has generally construed that provision to allow a defendant to file the petition within 6 weeks – the standard time one has to file a notice of appeal in a criminal case. Second, and related to the first point, you have to append a transcript of the SYG/self-defense hearing to your mandamus petition. If you don't, the Court's going to deny the petition quickly for your failure to provide a complete record to determine if the writ should be issued. Third, consider seeking the immunity well before trial – don't wait until the morning of trial to have a hearing on immunity. If you do, you obviously won't have time to mandamus and won't be able to raise the immunity issue on direct appeal.

GUILTY PLEAS

If your client wants to plead guilty but wants to challenge a specific issue related to his case, you have to specifically preserve the issue and reserve his right to appeal that issue. *Mitchell v. State*, 913 So. 2d 501 (Ala. Crim. App. 2005). Reserving the right to appeal and preserving the issue are two different steps. If you have a suppression hearing, you can preserve the issue for appeal. But if the client then pleads guilty, that preservation means nothing if there is not a specific reservation of the right to appeal that issue. Generally speaking, a plea waives the right to appeal.

In another issue related to guilty pleas, last term the United States Supreme Court ruled that if a defendant wants to appeal following a guilty plea failing to file a notice of appeal constitutes ineffective assistance of counsel even if the defendant did not reserve his right to appeal. *Garza v. Idaho*, 139 S. Ct. 738 (2019).

MOTIONS FOR NEW TRIAL AND ACQUITTAL

Bad news everyone: if you didn't preserve an issue in the heat of the moment during trial, trying to preserve the issue in a motion for new trial doesn't preserve jack. Generally speaking, the only issues that can be preserved in a motion for new trial are claims regarding the weight of the evidence and ineffective of counsel (IAC). More on IAC later, but while I have your attention, don't raise IAC in a motion for new trial unless (a) it's absolutely necessary, and (b) you can raise any and every claim possible. Your client won't have another shot.

Under Rule 20.1, Ala. R. Crim. P., motions for judgment of acquittal are used to preserve sufficiency of the evidence issues. If there are specific issues here, like material variance, then you need to specific address those issues in the motion for

judgment of acquittal. Under Rule 20.3, another motion can be made following the verdict, but all the motion for judgment of acquittal addresses is the sufficiency of the evidence. You can combine a Rule 20 motion for judgment of acquittal with a Rule 24 motion for new trial after sentencing.

Rule 24.1 specifically states that a new trial may be granted for two reasons: (1) weight of the evidence and (2) "any other reason the defendant has not received a fair and impartial trial." Rule 24.1, Ala. R. Crim. P. But do not count on the Court of Criminal Appeals reviewing the vast majority of issues under the second reason. These claims must be very specific and supported.

If you missed an objection at trial, raising the issue in a motion for new trial does not preserve that issue for appeal. *See e.g. Arnold v. State*, 278 So. 3d 1, 6 (Ala. Crim. App. 2017) ("[A] motion for a new trial or a motion for a judgment of acquittal is not sufficient to preserve the issue where no timely objection was made at [trial]."); *Blanton v. State*, 886 So. 2d 850, 876 n. 9 (Ala. Crim. App. 2003) (noting that, absent a timely and sufficient objection at trial, a motion for a new trial does not preserve alleged error for appellate review); *Hamrick v. State*, 548 So. 2d 652, 655 (Ala. Crim. App. 1989) ("The grounds urged for a new trial must ordinarily be preserved at trial by timely and sufficient objections.").

You can always make an argument under Rule 24.1(c)(2) that a new trial should be granted because an error was so great that the court could conclude that the defendant did not receive a fair and impartial trial. But the Court of Criminal Appeals has not bought this back-door attempt to have it address an unpreserved error.

Technically, claims of ineffective assistance of counsel can be raised in a motion for new trial. To preserve claims of ineffective assistance of counsel in a motion for new trial, you must claim the specific manner in which counsel was ineffective, how counsel's actions were deficient under *Strickland v. Washington*, 466 U.S. 688 (1984), and how counsel's actions prejudiced the defendant under *Strickland*. You're going to need to provide (1) verification of your claim in the form of an affidavit or other evidence appended to the motion, or (2) point to evidence in the record. *See Hill v. State,* 675 So. 3d 484 (Ala. Crim. App. 1995). If you meet this burden, you're entitled to an evidentiary hearing on the claims. If any of that is missing, there is not support in the record for a claim of ineffective assistance. General claims are not sufficient. *Young v. State*, 887 So. 2d 320, 322-23 (Ala. Crim. App. 2004). If you don't raise a claim of IAC in a MNT, that claim isn't preserved for appellate review and the Court of Criminal Appeals will not consider it.

It's dangerous to raise IAC claims in a motion for new trial for a myriad of reasons. I'm not saying you should never raise IAC claims in a motion for new trial, but you need to be very careful if you do. The most important consideration is this: do I have everything I need to make sure no stone is left unturned in assessing trial counsel's performance. If you're trial counsel, you certainly shouldn't raise an IAC claim against yourself. (It should go without saying, but defense lawyers do the durnedest things sometimes.) If you do not have a transcript of the trial, you shouldn't raise an IAC claim. If you have evidence the defendant wants you to review and you don't have it/won't have it before the MNT comes due, you shouldn't raise an IAC claim.

Basically, I would tell you not to raise an IAC claim unless (1) you have everything you need to review the entirety of trial counsel's performance, and (2) you have everything you need to present a sufficiently pleaded claim of IAC demonstrating both error and prejudice.

If your client's adamant about you raising an IAC claim in a MNT or on direct appeal, you need to explain to him/her how the claims can be presented in a Rule 32 petition. The Alabama Supreme Court has explained that Rule 32 petitions are generally the proper method for raising ineffective assistance of counsel claims. *Ex parte Ingram*, 675 So. 2d 863 (Ala. 1996). If you're appellate counsel and you/previous counsel didn't present the IAC claim in MNT, you absolutely shouldn't raise it on direct appeal. As mentioned above, the Court of Criminal Appeals won't review the issue. If you raise an unpreserved IAC claim on direct appeal, you might be creating a procedural bar for your client in Rule 32 – the State could raise Rule 32.2(a)(4) – the procedural bar against claims raised on direct appeal – even if the issue wasn't fully considered on the merits on appeal.