

## TOP 12 PRESERVATION TIPS

|   | Proceeding     | If this happens . . .                                                                                  | . . . this is how to preserve the issue for appeal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|---|----------------|--------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | Plea           | Your client is pleading guilty, but you want to preserve challenge to priors.                          | <p>Make record that you are preserving right to challenge priors at plea by providing clear notice.</p> <p>Need court approval and consent of State per V.R.Cr.P. 11(a)(3). Rule requires stating basis of challenge.</p> <p><i>“Notwithstanding [defendant’s] guilty plea, [defendant] hereby provides clear notice on the record of his intent to challenge his predicate conviction of [identify conviction(s) by crime and docket no.] in a subsequent post-conviction relief motion. The basis of the challenge is [be vague if necessary].”</i></p> |
| 2 | Jury Selection | Court denies your “for cause” challenge                                                                | <p>Make record that you would have used another peremptory if you had one (issue can only be preserved if you use all peremptories).</p> <p><i>“I have exhausted all of my peremptory challenges, but there is another juror I would like to challenge. But for the court’s erroneous denial of my prior “for cause” challenge to Juror A [provide name and number], I would be able to challenge Juror B [provide name and number].”</i></p>                                                                                                             |
| 3 | Pre-trial      | Court denies your “in limine” motion to exclude certain evidence.                                      | <p>Renew the objection when the evidence is offered at trial.</p> <p><i>“I object to the admission of this evidence for all of the reasons set forth in my [date] motion in limine: the testimony is inadmissible because A, B, and C.”</i></p>                                                                                                                                                                                                                                                                                                           |
| 4 | Trial          | You move to exclude evidence on the grounds that it is inadmissible, and the court denies your motion. | <p>Argue that the admission of the evidence still violates Rule 403. This argument must be made independently.</p> <p><i>“Even if the evidence is otherwise admissible, it should be excluded under V.R.E. 403 because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.”</i></p>                                                                                                                                                                                      |
| 5 | Trial          | State attempts to introduce audio or video exhibit into evidence.                                      | <p>Object on the ground that the State did not lay a proper foundation.</p> <p>Pictorial Testimony Theory: <i>“The State failed to authenticate the [video/photo] because the witness has not testified that it is a fair and accurate representation of the subject matter based on the witness’s personal observations.”</i></p>                                                                                                                                                                                                                        |

|    |                 |                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|----|-----------------|------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    |                 |                                                                                    | Silent Witness Theory: <i>“The State failed to produce sufficient foundational evidence to identify the circumstances under which the [photo/video] was taken and the reliability of the reproduction process, as required under State v. Hiltl, 2021 VT 60, ¶ 29.”</i>                                                                                                                                                                                                                                            |
| 6  | Trial           | Something improper happens, you object, and the court sustains your objection.     | Strategy decision, but consider requesting a curative charge (and/or a mistrial).<br><br><i>“I am requesting that the court deliver a curative instruction explicitly directing the jurors to disregard the witness’s last remark.”</i>                                                                                                                                                                                                                                                                            |
| 7  | Trial           | State’s evidence is insufficient to prove one or more elements of a charged crime. | At the close of the State’s case, make an independent Rule 29 argument as to every element where the evidence was insufficient.<br><br><i>“Here, even when viewed in the light most favorable to the State, there was insufficient evidence establishing that [discuss first challenged element]. Furthermore, there was insufficient evidence that [discuss second challenged element].”</i> Etc.<br><br>*If you put on evidence, you <b>MUST</b> renew motion at close of evidence or within 14 days of verdict. |
| 8  | Trial           | Court’s final jury instructions are improper or incomplete.                        | Make clear request/objection at charge conference.<br><br>If final charge differs from what court said it would do at charge conference, object before jury retires. V.R.Cr.P. 30(c).<br><br>See page 3, “Jury Instructions to Consider.”                                                                                                                                                                                                                                                                          |
| 9  | Trial           | Prosecutor makes improper remarks during summation.                                | Object in real time, identifying problem.<br><br>See page 4, “Potential Objections to the Prosecutor’s Closing Statement.”                                                                                                                                                                                                                                                                                                                                                                                         |
| 10 | Post-verdict    | Cumulative effect of trial issues amounts to a miscarriage of justice              | File motion for a new trial, identifying all issues and why, cumulatively, a new trial is necessary. V.R.Cr.P. 33.                                                                                                                                                                                                                                                                                                                                                                                                 |
| 11 | Sentencing      | PSI recommends or court imposes unnecessary probation condition.                   | If PSI recommends probation conditions, written objections must be filed 7 days prior to sentencing. If the court imposes conditions not noticed in the PSI, make specific objections at sentencing.<br><br><i>“Condition [X] is [not reasonably related to the offense or to the history and characteristics of the defendant/not reasonably necessary to ensure the defendant will lead a law-abiding life/unduly restrictive in violation of due process/etc.]”</i>                                             |
| 12 | Post-sentencing | Client is convicted after trial.                                                   | File timely notice of appeal after sentencing (always). See pages 5-6, “Checklist for Appeals.”                                                                                                                                                                                                                                                                                                                                                                                                                    |

## JURY INSTRUCTIONS TO CONSIDER<sup>1</sup>

### Always Important

- ☐ **Criminal information is not evidence** (do not be influenced by fact of charge)
- ☐ **Presumption of innocence** (presumption stays with defendant, is itself evidence)
- ☐ **Proof beyond a reasonable doubt** (State must prove guilt beyond RD, definition of RD)
- ☐ **Proof of essential elements** (State must prove each element beyond RD)
- ☐ **Jury deliberations** (general unanimity requirement, consult with each other, etc.)

### Important if Relevant to Your Case

- ☐ **Evidence of flight** (does not raise any presumption of guilt and has “very limited value”)
- ☐ **Prior bad acts** (can’t consider prior conduct as proof that he committed charged conduct)
- ☐ **Defendant’s out-of-court statements** (do not consider unless you find them voluntary)
- ☐ **Defendant not testifying** (do not hold against him)
- ☐ **Evidence of criminal convictions** (can be used only to evaluate credibility)
- ☐ **Child witnesses** (do not give more weight because of natural sympathy for child)
- ☐ **Hung jury** (don’t surrender your honest opinion because of the opinions of others)
- ☐ **Specific intent** (conscious objective of accomplishing specific result, not accident)
- ☐ **Unanimity** (if different acts alleged for one offense, must be unanimous as to which act)
- ☐ **Self-defense; Burden of proof of self-defense** (State must disprove beyond RD); **Self-defense (use of deadly force)**; **Defense of property** (defendant NG if acting in lawful defense of property); and **other defenses**.
- ☐ **Affirmative defense – burden of proof** (defense must prove by preponderance)
- ☐ **Accomplice testimony** (must be viewed with caution)
- ☐ **Cross-examination concerning character or reputation** (if State cross-examines defendant’s character witness, you may consider cross-exam only to evaluate credibility)
- ☐ **Hearsay of child (V.R.E. 804(a))** (how to evaluate child’s out-of-court statements)

### Also, FYI

- ☐ **Separate counts** (each count is separate offense, consider each count separately)
- ☐ **Multiple defendants** (consider evidence as to each defendant separately)
- ☐ **Evidence** (what evidence is, including that testimony stricken is not evidence)
- ☐ **Statements by attorneys** (are not evidence)
- ☐ **Number of witnesses** (that one side called more witnesses is not important)
- ☐ **Police witnesses** (evaluate the same as any other witness)
- ☐ **Expert witnesses** (you may accept all, part, or none of the expert’s testimony)

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<sup>1</sup> This partial list of useful instructions is intended to supplement your regular practice for proposing jury instructions. We have included embedded links to the Vermont Model CJI, but CJI instructions are not court-sanctioned, they are sometimes incorrect, and you should conduct independent legal research – and/or consult with the Appellate Division – regarding the precise language of any given charge.

## POTENTIAL OBJECTIONS TO THE PROSECUTOR'S CLOSING STATEMENT

- **“Objection – vouching.”**
  - The prosecutor may not express his or her personal view as to the truth or falsity of any testimony or evidence.
  - *Examples:*
    - “He’s telling the truth.”
    - “I submit to you that her testimony was credible.”
    - “The complainant was candid and forthcoming.”
    - “She told you exactly how it happened.”
    - “The officer wouldn’t risk his job to lie for this case.”
    - “The defendant is lying.”
    - “The witness came in here and provided truthful evidence about what happened.”
    - “The complainant’s testimony lines up, it has the ring of truth.”
    - “His DNA was on that gun. Period.”
- **“Objection – emotional appeal.”**
  - The prosecutor may not improperly appeal to the jurors’ emotions.
  - *Examples:*
    - “The complainant was brave to come forward. Don’t let her down.”
    - “This case is about a drunk driver putting all of our lives at risk.”
    - “Find him guilty and send a message to the community that this behavior will not be tolerated.”
    - “Put yourself in the complainant’s shoes and imagine how you would have felt.”
- **“Objection – burden shifting.”**
  - The prosecutor may not suggest that the defendant has the burden to prove himself innocent.
  - *For example:* “The defense has not offered any reason why this child would come forward and make such a disturbing allegation.”
- **“Objection – denigrating the defense.”**
- **“Objection – misusing evidence admitted for a limited purpose.”**
- **“Objection – mischaracterizing the evidence.”**
- **“Objection – mischaracterizing the defense.”**
- **“Objection – going beyond the evidence.”**
- **“Objection – improper comment on the defendant’s silence.”**

## CHECKLIST FOR APPEALS

### Appeals of Final Judgments:

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#### 1. Notice of Appeal –

- ☐ File in the lower court within 30 days after judgment or order, (which means the sentence in a criminal case, not the verdict, and the disposition order in CHINS, TPR and delinquency cases, not the merits adjudication). The 30 day period is stayed by the timely filing of certain post-sentence motions, including (but not limited to) motions for judgment of acquittal, for new trial on any ground other than newly discovered evidence, and in arrest of judgment. The time to file the notice to appeal starts to run from the date of the order ruling on such motions.
- ☐ Counsel or Appellant must sign the notice of appeal
- ☐ Identify decision by name, date, and docket number
- ☐ Send courtesy copy in Odyssey to: [supremecourt@vtcourts.gov](mailto:supremecourt@vtcourts.gov)
- ☐ Serve opposing counsel
- ☐ Courtesy copy to appellant's counsel
- [https://www.vermontjudiciary.org/sites/default/files/documents/800-00005\\_2.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/800-00005_2.pdf) (form notice of appeal)

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#### 2. Waiver of Filing Fee if not submitted in underlying docket

- ☐ File in the lower court at time of filing the Notice of Appeal (note: waiver not required in CHINS/TPR appeals)
- <https://www.vermontjudiciary.org/self-help/application-waive-filing-fees-and-service-costs>

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#### 3. Transcript order for all hearing dates – filed within 14

- days of the assignment of the supreme court docket number
- ☐ Submit form to eScribers (check box at top of form to indicate order is in connection with an appeal)
  - <https://www.escribers.net/vtorder.php> (form)
  - <https://www.vermontjudiciary.org/transcripts> (instructions)

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#### 4. Docketing Statement – filed within 14 days of the assignment of the supreme court docket number

- ☐ File in the Supreme Court
- ☐ Serve opposing counsel
- ☐ Courtesy copy to appellant's counsel
- [https://www.vermontjudiciary.org/sites/default/files/documents/800-00006\\_1.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/800-00006_1.pdf) (form docketing statement)

## **Interlocutory and Collateral Order Appeals:**

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1. **Motion for Permission to Appeal** – filed within 14 days of order. If the motion is granted, the parties and the trial court must wait for the Supreme Court to confirm that it accepts the interlocutory appeal.
    - ☐ File in the lower court
    - ☐ Serve opposing counsel
    - ☐ Courtesy copy to appellant's counsel
  
  2. **Renewed Motion for Permission to Appeal** (if first motion is denied by lower court) – filed within 14 days of the order denying the motion
    - ☐ File in the Supreme Court
    - ☐ Serve opposing counsel
    - ☐ Courtesy copy to lower court and appellant's counsel
  
  3. **Transcript order for all hearing dates** – filed only after the supreme court accepts the interlocutory appeal. Filed within 14 days of receiving this confirmation.
    - ☐ Submit form to eScribers (check box at top of form to indicate order is in connection with an appeal)
      - <https://www.escribers.net/vtorder.php>
      - <https://www.vermontjudiciary.org/transcripts>
  
  4. **Docketing Statement** – filed only after the Supreme Court accepts the interlocutory appeal. Filed within 14 days of receiving this confirmation.
    - ☐ File in the Supreme Court
    - ☐ Serve opposing counsel
    - ☐ Courtesy copy to appellant's counsel
      - [https://www.vermontjudiciary.org/sites/default/files/documents/800-00006\\_1.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/800-00006_1.pdf)
  
  5. **Waiver of Filing Fee** if not submitted in underlying docket
    - ☐ File in the lower court at time of filing the Notice of Appeal (note: waiver not required in CHINS/TPR appeals)
      - <https://www.vermontjudiciary.org/self-help/application-waive-filing-fees-and-service-costs>