NEW YORK STATE BAR ASSOCIATION

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Your Rights to an Appeal in a Criminal Case in the New York State Courts

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You have a right to appeal your conviction, including your sentence

What is an appeal?

If you believe that any errors were committed in your case, or that your sentence is too harsh, you have the right to ask a higher court (an appellate court) to review the proceedings. This request is called an appeal. You, having asked for the appeal, are called the appellant. The opposing party is known as the respondent.

The appellate court will decide if, because of errors that occurred in the lower court, you should get relief, for example, a new trial, dismissal of the charges or a reduction in the sentence. The appeal is not a new trial. No witnesses are heard in the appellate court, and no new evidence or facts may be brought to the appellate court's attention. Instead, the appeal is based on the "record" made (that is, the transcript of the proceedings, the trial exhibits and the papers submitted) in the lower court.

Bear in mind that the sentence imposed by the lower court will go into effect while the appeal is being considered by the appellate court unless the trial judge or appellate court stays the sentence or a part of it (orders that it not go into effect). The order staying the appeal may include a requirement to post bail.

You can appeal even if you pleaded guilty. But if in addition to pleading guilty you agreed to give up your right to appeal as part of the bargain, the appeal may be dismissed on motion by the prosecutor.

How does the appeal process begin?

The appellate process begins after you are sentenced when you "take an appeal" by sending a "notice of appeal" to the lower court ("filing") and sending it to the District Attorney ("serving"). Generally, notices of appeal are filed with the clerk of the criminal court. If that court does not have a clerk, the notice is filed with the judge. The notice of appeal is a document which informs the other party and the court that you wish to have your conviction reviewed in a particular appellate court. It identifies all parties involved in the case (usually by including the caption) and sets forth the nature of the appeal (for example, an appeal from the judgment of conviction under Ind. No. 0000-10). If you do not file a notice of appeal, you cannot pursue an appeal. The rules of the particular appellate court that reviews the convictions from your lower court may require the service and filing of additional papers with the notice of appeal. You should keep in mind that each appellate court has its own set of rules that you must follow.

You cannot "take an appeal" until you are sentenced, but the appeal will give you the opportunity to discuss

not only your sentence but everything that happened until you were sentenced.

Are there time limits for pursuing an appeal?

You must serve and file your notice of appeal within 30 days after you are sentenced. If you fail to follow this time limit, your appeal most likely will be dismissed. If you were prevented from filing the notice of appeal on time because of improper conduct of a public servant, because of improper conduct or death or disability of your lawyer, or because you could not communicate with your lawyer during the 30 days because you were in prison, you can ask the appellate court for permission to file the notice of appeal late.

How much will an appeal cost?

Typical expenses on an appeal include attorney's fees and the costs of getting the minutes of court appearances. In addition, depending on the rules of the appellate court, you may have to make a copy of a record of the proceedings to send to the court and the respondent. You will also have to make multiple copies of the brief to send to the appellate court and the respondent.

If you think that you cannot afford to pursue an appeal, you may be able to obtain "poor person status" (in forma pauperis), which would mean that you would not have to pay many or all of the costs and fees and might result in a lawyer being appointed to represent you. To get this relief, you must send the appellate court a request for poor person status, including a sworn statement showing your personal worth and sources of income. The appellate court will decide whether you have demonstrated that you are unable to pay some or all of the necessary expenses. Even if you hire an attorney for the appeal, you may be entitled to receive certain benefits of "poor person status," such as a free copy of the transcript, since a decision on poor person status is based on your own financial situation, not that of family or friends.

What happens after a notice of appeal is filed?

Once a notice of appeal is filed, the appellant must begin to assemble the necessary materials to present an effective argument on appeal. The process of getting an appeal into a form so that the facts of the case and arguments for relief can be presented to the appellate court is called "perfecting the appeal."

In preparing for the appeal, you will have to obtain the minutes of the proceedings in the lower court that help explain your arguments and you may also need to reproduce a record of the proceedings in the lower court or portions of the record, depending on the rules of the

appellate court. You will also have to prepare a brief, a document that tells the story of the case and presents your arguments, leading to the conclusion that the appellate court should decide in your favor. Depending on the rules of the appellate court, you will have to serve the transcript and record on the respondent as well as file it with the appellate court. You always have to serve a brief on the respondent and file it with the appellate court. How many copies you must serve and file and when this must be done depends on the rules of the appellate court.

The respondent will almost always file a brief in response to yours arguing that the proceedings in the lower court were correct or that any error should not change the outcome of the case. The respondent may also file additional papers from the record that were not contained in the papers you sent, if he or she believes the appellate court should consider those papers in deciding the case. You have the right to file a brief answering the respondent's brief ("reply brief"), but you do not have to. No further briefs are allowed to be filed with the appellate court.

After all of the briefs have been filed with the appellate court, the next step is either oral argument (an oral presentation before one or more judges from the appellate court) or submission of the case without argument. Oral argument is not required, but is used to provide the parties with the opportunity to focus the court's attention on the strongest elements of their cases. It also allows the parties to answer any questions the judges deciding the appeal may have. If you have an attorney, the attorney will present the oral argument. If you do not, and you are able to come to court, then you can present the oral argument. An appellant who is in prison will not be brought to the appellate court to make or listen to the oral argument.

May the People appeal?

Under certain limited circumstances the People may appeal rulings in your favor, such as when the lower court dismisses the case. In that case, the People are called the appellant and you are called the respondent. As appellant, the People have the same requirements as any other appellant. If the People do serve you with a notice of appeal, it is important that you obtain legal representation for the appeal. You can hire a lawyer or you can ask the appellate court to assign a lawyer. As a respondent, you will not have to worry about preparing the record or getting the transcripts. The appellant will have to send these papers to you as well as its brief.

How is an appeal decided?

After the appellate judges assigned to the case have reviewed the briefs, record and the oral argument, if any, they will decide the appeal, usually in a written paper called an "order and decision." If you are the appellant, the order may affirm, modify or reverse the judgment of conviction, or some combination thereof. If the People are the appellant, the order will affirm, reverse or modify the lower court order that was appealed.

If the appellate court does not affirm what happened in the lower court, it may order additional proceedings in the lower court, such as a hearing or a new trial, or it may reduce the sentence, dismiss the charges, modify the conviction itself, or some combination.

What can you do if you are not successful on the appeal?

If you are dissatisfied with the appellate court's order, you may ask for permission to file an appeal with the Court of Appeals, the highest court in New York. This permission can be granted by an individual judge of the appellate court (if the appellate court was the Appellate Division) or by an individual judge of the Court of Appeals. If one judge denies the application, you may not make another application to any judge. You must ask for permission no later than 30 days after receiving a copy of the order with notice of entry sent to you by respondent, and you can make the request earlier, even before the respondent sends you the order with notice of entry. Permission to file an appeal is granted in only a small fraction of cases. If you receive permission to appeal, then you should hire an attorney or ask the Court of Appeals to assign an attorney to help you through the process.

There are other steps you can take. You have the right to apply for permission to appeal to the United States Supreme Court after permission to appeal to the Court of Appeals has been denied or after the Court of Appeals decides your appeal. Your case may present the kind of issue that can be considered by a lower court in a motion to vacate the conviction under Criminal Procedure Law, section 440.10, or a motion to vacate the sentence under Criminal Procedure Law, section 440.20. And if you have tried all possibilities in the New York State courts, you can apply for relief to a federal district court through a petition for a writ of habeas corpus if your case presents a federal constitutional issue and you satisfy the technical requirements for bringing a case in federal court. These procedures each have their own set of complicated rules contained in statutes and court decisions.

Taking an appeal is a complicated, time-consuming and expensive process, but it can be an effective procedure for correcting errors. This pamphlet, which is based on New York law, is intended to provide general information, not to give advice for particular circumstances. We hope it makes the appellate process, more understandable. However, it cannot substitute for an attorney's advice or for your own careful study of the rules of the courts involved.

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