

## **STARTING AND PERFECTING AN ASSIGNED APPEAL - CRIMINAL**

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### **ASSIGNED APPEAL CHECKLIST – CRIMINAL APPEAL**

- \_\_\_\_\_ AD3 Order of Assignment
- \_\_\_\_\_ Calendar for 60 Days to Perfect / Move for Extension
  - Letter Request for extension of time.
- \_\_\_\_\_ Correspondence to County Clerk
  - Requesting Documents/Transcripts
  - *Rule 800.4 (c)* (Authorizes free copy of documents / transcripts to assigned counsel).
  - *See Sample Letter*
- \_\_\_\_\_ Correspondence to Client
  - Introduction to Appellate Process
  - Potential Issues Client Would Like Considered
  - Provide Opening Memo
  - *See Sample Letter / Opening Memo*
  - Keeping Track of Clients
    - NYS DOCCS Inmate Lookup
    - <http://nysdoccslookup.doccs.ny.gov/>
- \_\_\_\_\_ Receive Documents from County Clerk
  - Application for Release of Pre-Sentence Report
    - *See C.P.L. § 390.50 (2)*
    - *See Sample Affirmation and Order*
- \_\_\_\_\_ Receive Transcripts from County Clerk
- \_\_\_\_\_ Request Exhibits from Prosecution and Trial Counsel
- \_\_\_\_\_ Review Documents / Transcripts for Appellate Issues

\_\_\_\_\_ Correspondence to client

- Summary of Review;
- Potential Appellate Issue;
- Explanation of Potential Risks
  - o *See People v. Hall*, 125 A.D.3d 1095, 1099 n.3 (3<sup>rd</sup> Dept. 2015) (referencing New York State Office of Indigent Legal Services Appellate Standards and Best Practices)
- Preparation of Risk Waiver, if Appropriate

\_\_\_\_\_ Prepare Record on Appeal

- *Rule 800.5 (a)* sets forth form and content

- o CPLR 5531 Statement;
- o Notice(s) of Appeal;
- o Accusatory Instrument(s)
- o Decisions / Orders
- o Relevant Documents / Motions / Exhibits
- o CPLR 5532 Stipulation as to Contents of Record
- o Omit Transcripts from Volume I of Record
  - *See Rule 800.14*
  - Reference Transcripts as Separate Volumes in the Table of Contents
- o Confidential Exhibits
  - Pre-Sentence Report
  - Grand Jury Minutes
  - Submitted in a confidential sealed envelope
    - Referenced in Table of Contents but not included in Record on Appeal
- *Rule 800.14 (g)* authorizes shortened Record on Appeal where only legality / excessiveness of sentence at issue
  - o CPLR 5531 Statement
  - o Notice(s) of Appeal
  - o Accusatory Instrument(s)
  - o Plea Minutes
  - o Sentencing Minutes
- Stipulation / Certification of Record on Appeal
  - o Parties Must Stipulate to Contents of Single Copy of Record.
    - CPLR 5532 Stipulation as to Contents of Record

- *Rule 800.7 (b) Notice*
  - Provides 20 days to make objections / amendments to proposed Record on Appeal.
  - If no response, Record deemed correct
  - May be certified as correct
    - *CPLR 2105*

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#### Preparation of Appendix

- § 800.14 requires use of Appendix in assigned appeals.
- Appendix should contain only those portions of the Record on Appeal which are necessary to consider the questions / issues raised in the appeal. *See CPLR 5528(a)(5)*
- *Rule 800.8 (b)* sets forth form and content requirements
  - Notice of appeal (§ 800.8(b)(1));
  - Judgment, decree or order appealed from (§ 800.8(b)(2));
  - Decision and opinion of the court or agency, and report of a referee, if any (§ 800.8(b)(3));
  - Pleadings, if their sufficiency, content or form is in issue or material (§ 800.8(b)(4));
  - Relevant excerpts from transcripts or testimony or averments in motion papers upon which appellant relies or has reason to believe respondent will rely (§ 800.8(b)(5));
  - Charge to the jury (if applicable) (§ 800.8(b)(6)); and
  - Copies of critical exhibits, including photographs<sup>1</sup>, to the extent practicable (§ 800.8(b)(7))
- Both the CPLR and the Appellate Division rules contemplate that the Appendix should contain materials that the appellant reasonably assumes will be relied upon by the respondent. (*See CPLR 5528(a)(5); § 800.8(b)(5)*). In fact, in the event that a party fails to comply with this requirement, the Third Department's rules authorize a party to move to compel the filing of a further appendix. (*See § 800.8(c)*). Alternatively, both the CPLR and the Appellate Division rules permit the respondent to submit their own appendix along with their respondent's brief. (*See CPLR 5528(b); § 800.8(c)*).

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<sup>1</sup> If the motion papers or exhibits in the proceedings below contained color photographs, the photographs included in the Record / Appendix should be identical color photographs.

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## Preparation of Appellant's Brief

- Later today will hear tips regarding developing issues and writing persuasive briefs.
- *Rule 800.8 (a)* sets forth form and content requirements
  - o Page Limitations
    - Main Brief – 70 Pages
    - Reply Brief – 15 Pages
- Contents
  - o Table of Contents / Appendix Index
  - o Table of Authorities
  - o Preliminary Statement
  - o Question(s) Presented
  - o Statement of Facts
  - o Argument
  - o Conclusion

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## Filing and Service of Appellant's Brief – Appendix / Record on Appeal

- File 7 copies of Brief – Appendix (§ 800.4 (c))
- Single Copy of Record on Appeal (§ 800.4 (b))
- Serve 1 copy of each upon Prosecution and Client.
- *Alternative Methods* (§ 800.4 (b))
  - o File 7 copies of Brief-Appendix with AD3 and serve single copy of Record on Appeal upon Prosecution with request that it be filed with AD3 within 30 days.
  - o File 7 copies of Brief –Appendix with AD3 and serve notice upon each adverse party that the single copy Record on Appeal has been filed in the Appellate Division Clerk's Office.

# **STARTING AND PERFECTING AN ASSIGNED APPEAL - CRIMINAL**

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## **FORMS**

1. Sample Letter to Clerk.
2. Sample Letter to Client.
3. Opening / Informational Memorandum.
4. Attorney Affirmation to Obtain Pre-Sentence Report.
5. Proposed Order Releasing Pre-Sentence Report.
6. Sample Letter to Prosecution
7. Record on Appeal – Rule 800.7 (b) Notice.
8. Record on Appeal – Affirmation of Compliance.
9. Record on Appeal – CPLR 2105 Certification.

[ Date ]

Clerk Address

**RE: People v.** \_\_\_\_\_  
**Appeal No.:** \_\_\_\_\_

Dear \_\_\_\_\_;

Enclosed, please the Appellate Division's Decision and Order, dated \_\_\_\_\_, assigning the undersigned to represent \_\_\_\_\_ in the above-referenced appeal.

At your earliest convenience, please send copies of the following documents:

1. Indictment / Superior Court Information / Violation of Probation Petition;
2. Transcripts of stenographic minutes from each and every proceeding in the above-referenced matter;
3. All demands, motions, responses or any other papers filed on behalf of \_\_\_\_\_ as well as the District Attorney (including any exhibits that may be copied);
4. All decisions rendered by the Court on all applications;
5. Pre-Sentence Report prepared by the Probation Department;
6. Order of Commitment;
7. Notice of Appeal

Thank you for your anticipated attention to this matter. If you have any questions or require additional information, please feel free to contact me at \_\_\_\_\_ or you can e-mail me at \_\_\_\_\_.

Very truly yours,

\_\_\_\_\_

Encl.

cc: Client

[ Date ]

Client Address

**ATTORNEY – CLIENT COMMUNICATION**

**RE: People v.** \_\_\_\_\_  
**Appeal No.:** \_\_\_\_\_

Dear \_\_\_\_\_;

By Order of the Appellate Division – Third Department, I have been assigned to represent you on your appeal from your \_\_\_\_\_ conviction and resulting sentence in the above-referenced matters.

If there are any other indictments for which you were convicted or if you have had and appeals filed on other indictments / convictions, please bring this to my attention as soon as possible. Similarly, it is also extremely important for you to let me know whether or not you were born in the United States. If you were born outside the United States, your conviction could have serious immigration consequences and your appeal may affect your ability to continue to reside in the United States.

Enclosed, please find a memo detailing the appellate process and providing answers to many questions that you may have regarding the process. The memorandum explains the appellate process and what you can expect from this office as your appellate counsel.

At this stage of the proceeding, my job is to obtain the records and transcripts from any proceedings which took place in trial court and to answer any questions that you may have regarding your appeal. In addition to your questions, please feel free to write to me with any issues that you believe may have impacted the underlying proceedings.

We look forward to representing you on your appeal.

Very truly yours,

\_\_\_\_\_

Encl.

## **WHAT IS AN APPEAL?**

An appeal is a review by an appellate court of a prior proceeding before a lower-level court. As it is a review of what previously occurred, an appeal is based solely upon this prior proceeding. For this reason an appellate court cannot receive any new exhibits or hear any new testimony, but must render a decision solely upon the written record of the prior proceedings. This means that for some fact to be raised as part of an issue on appeal, it must appear either within the transcript, or a document filed with the trial court.

The primary focus of an appeal is whether the lower court proceedings were conducted in a manner consistent with the law. If the appellate court, in this case, the Appellate Division, determines the proceedings were conducted in a lawful manner, your judgment of conviction will be affirmed. But if the court determines there was some illegality, your conviction will be reversed and the case will be sent back to the trial court, usually for a retrial. On occasion, the law prohibits further prosecution, and in such case, the charges will be dismissed. In addition, even if the trial proceedings were conducted properly, the Appellate Division has the authority to declare a sentence unduly harsh and severe and to reduce it in the interest of justice.

## **THE APPELLATE COURT**

In New York, there are two levels of appellate courts, the first of which is the Appellate Division of the Supreme Court. The five judges of the Appellate Division panel that will hear your appeal have the authority to reverse your conviction as a matter of law or in the interest of justice. As stated above, they also have the authority to reduce your sentence. If you are unsuccessful before the Appellate Division, we will then ask the Court of Appeals, the highest court in this state, to review your case. But our best chance of success lies with the Appellate Division, as very few cases are accepted for review by the Court of Appeals.

## **THE RECORD IN YOUR CASE**

The written arguments in your case cannot be prepared until an attorney has the opportunity to review the “transcript,” which is the word-for-word record of the prior proceedings in your case. The Appellate Division order assigning the Rural Law Center of New York as your attorney directed the Court Reporter to prepare this record. This often takes a considerable amount of time to prepare, especially if you were convicted after trial. As a result, it is not unusual to experience a lengthy delay from the date the Appellate Division assignment while the transcript of the underlying proceedings is prepared.

Once the transcript is completed, the County Clerk’s Office will provide the Rural Law Center with a copy of the transcript. Unfortunately, the Rural Law Center is only provided one copy of the transcript. Once the Rural Law Center files a brief on your behalf, you may choose to file a pro se supplemental brief. If you choose to do so, you may then contact the Appellate Division Clerk’s Office and request to be provided with the copy of your transcripts.



## **PERFECTING THE APPEAL**

Your appeal is perfected by the filing of the record on appeal and an appellant's brief. Based upon the date the transcript of your case is filed with the Clerk's Office, the Appellate Division will set a deadline by which the Rural Law Center should file your brief. But if, as often happens, your appeal cannot be perfected before this deadline, the Rural Law Center will apply to the court for an extension.

In order to treat each and every client, including you, as fairly as possible, the Rural Law Center works on cases in the order we were assigned by the Appellate Division, from oldest to most recent. For this reason, it is unlikely that an attorney will begin work on your case as soon as your transcript is filed. When the Rural Law Center has completed the briefs for those cases in which the client's conviction occurred before yours, your case will be assigned to the first attorney available. This means that the attorney to whom you are initially assigned to correspond may not be the attorney who will actually read your transcript and prepare your brief. You, of course, can be assured that the attorney actually handling your appeal will thoroughly review your file, which will include all your correspondence.

The appellant's brief will contain a written argument stating the reasons why your judgment of conviction should be reversed or modified and will be based entirely upon the record of the proceedings in the trial court. Thus, as stated above, there can be no mention within the brief of statements, documents or events unless they appear within the record of the proceedings in the trial court.

Following the filing of your brief, the prosecution will prepare its respondent's brief, and argue therein that the judgment of conviction should be affirmed without modification. But the prosecution, like the Rural Law Center, is limited by the record, and thus may not buttress its arguments with reference to documents not previously filed with the trial court.

You will be sent a copy of your brief when it is ready to be filed, and you may then file your own *pro se* supplemental brief. You do not need to request permission of the court to file your own brief, but if you choose to do so it must be filed within forty-five days of the date the Rural Law Center has filed its brief on your behalf. As stated above, if you wish to prepare a *pro se* supplemental brief you can contact the Appellate Division Clerk's Office and request to be provided with a copy of your transcripts.

Once your brief is filed, the Appellate Division will set a date for oral argument or submission of the case. If the court sets a date for submission, a panel of five judges will render a decision based solely upon the written briefs. But if your case is to be argued, your attorney and the prosecutor will be given an opportunity to appear before the panel, and the judges will hear the comments of both counsel and have the opportunity to ask them questions. Unfortunately, in-custody defendants are not transported to Albany for this argument.

## **THE DECISION**

After the judges of the appellate court have read the briefs and heard the oral argument, if granted, they will decide whether your conviction should be affirmed, reversed, or modified in

some way. In most cases, the court renders its decision within six to eight weeks after oral argument or the date scheduled for submission. Once the Rural Law Center receives word of the decision, it will send you a copy of the decision. If your conviction is affirmed, the Rural Law Center will then seek permission to appeal to the Court of Appeals. However, as noted above, the Court of Appeals accepts very few decisions for review and denies the majority of leave applications it considers.

### **CONCLUSION**

So that the Rural Law Center may achieve the best result in your case, you are encouraged to communicate with your attorney in complete candor. But please do not discuss your case with anyone else. For although everything you say or write to your attorney is protected by the attorney-client privilege, this is obviously not the case with anyone outside the Rural Law Center. Thus, if you say something incriminating to a fellow prisoner or guard and then are granted a second trial, the person to whom you made the incriminating comment may be called as a witness against you.

The Rural Law Center takes very seriously its ethical obligation to zealously represent each client to the best of its ability. Thus, even though it can sometimes seem as if the appellate process takes much longer than it should, please remember that just as the Rural Law Center will not rush through another client's case to more quickly get to yours, the Rural Law Center will not speed through your case just to more quickly get to yet another. In fact, the opposite is true. The Rural Law Center puts a premium on quality, and that takes time. As most defendants will only get one appeal, the Rural Law Center feels that it is critical to take the time necessary to do everything legally possible to obtain a favorable result. Be assured that once the Rural Law Center begins work on your appeal, your appeal will have the undivided attention of a very experienced appellate attorney who will bring extensive knowledge and skill to the legal issues your case presents.

STATE OF NEW YORK  
COUNTY COURT

COUNTY OF \_\_\_\_\_

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

\_\_\_\_\_

*Defendant-Appellant,*

**ATTORNEY AFFIRMATION**

**Appeal #** \_\_\_\_\_

\_\_\_\_\_ **County**

**Ind. No.:** \_\_\_\_\_

**Hon.** \_\_\_\_\_

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\_\_\_\_\_, an attorney duly admitted to practice before the  
Courts of the State of New York affirms under penalty of perjury:

1. I am an attorney admitted to practice law before the Courts of the State of New York and have been assigned by the Supreme Court, Appellate Division, Third Judicial Department, to represent \_\_\_\_\_ relative to his appeal in the above-captioned matter.

2. Following a jury trial / guilty plea, \_\_\_\_\_ was convicted of \_\_\_\_\_.

3. C.P.L. § 390.50 (2) provides that pre-sentence reports shall be made available for examination and copying in any appeal from a criminal conviction. Among the potential issues to be addressed in this appeal is whether the sentence imposed upon \_\_\_\_\_ was harsh and excessive.

4. In order to properly represent \_\_\_\_\_ in this matter, a copy of his pre-sentence report is necessary.

5. No previous application for this relief has been made.

WHEREFORE, it is respectfully requested that this Court grant the annexed Order, ex parte, directing the \_\_\_\_\_ County Department of Probation to provide a copy of the pre-sentence report(s) that was prepared in the above-captioned action for my use in the prosecution of the appeal in this matter and that a copy of such report(s) also be made available to the \_\_\_\_\_ County District Attorney, or his representative, as attorney for the respondent in this matter.

DATED: \_\_\_\_\_.

\_\_\_\_\_

STATE OF NEW YORK  
COUNTY COURT

COUNTY OF \_\_\_\_\_

THE PEOPLE OF THE STATE OF NEW YORK,

**Order Granting Release Of  
Pre-Sentence Report**

-against-

\_\_\_\_\_ County

**Ind. No.:** \_\_\_\_\_

\_\_\_\_\_,

**Hon.** \_\_\_\_\_

*Defendant-Appellant,*

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Attorney \_\_\_\_\_, Esq. having been appointed to prosecute an appeal on behalf of the above-named Defendant-Appellant by the Supreme Court, Appellate Division – Third Judicial Department, and

Attorney \_\_\_\_\_, Esq., on behalf of Defendant-Appellant, having duly moved for an Order, pursuant to C.P.L. § 390.50 (2), for the release of the Defendant's pre-sentencing report;

Now, upon all proceedings heretofore had herein and due deliberation having been had on the instant application,

IT IS HEREBY ORDERED that the pre-sentencing report be released to Attorney \_\_\_\_\_, Esq.; and

IT IS HEREBY ORDERED that the pre-sentencing report be kept confidential and the copy of this report be provided only to the Appellate Division – Third Judicial Department and the \_\_\_\_\_ County District Attorney's Office.

DATED:

\_\_\_\_\_, New York

\_\_\_\_\_  
HON. \_\_\_\_\_

ENTER:

August 24, 2015

Hon. \_\_\_\_\_  
\_\_\_\_\_ County District Attorney

**RE: People v.** \_\_\_\_\_  
**Appeal No.:** \_\_\_\_\_

Dear \_\_\_\_\_,

As you may recall, I have been assigned to represent \_\_\_\_\_ with respect to his appeals in the above-referenced matter.

Enclosed for your review, please find a copy the proposed Record on Appeal along with Statement Pursuant to Rule 800.7 (b). Please review the proposed Record and, if acceptable, please execute the Stipulation as to Correctness of Record on Appeal pursuant to CPLR 5532, a copy of which is enclosed, and return to my attention.

Thank you for your attention to this matter. I look forward to working with your office on this matter. If you have any questions or require additional information, please do not hesitate to contact me.

Respectfully submitted,

\_\_\_\_\_

Encl.

NEW YORK STATE SUPREME COURT  
APPELLATE DIVISION – THIRD DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

v. Respondent,

Appeal No.: \_\_\_\_\_

\_\_\_\_\_,  
Appellant.

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**STATEMENT PURSUANT TO RULE 800.7 (b)**

PLEASE TAKE NOTICE that pursuant to section 800.7 (b) of the Rules of the Appellate Division, Third Judicial Department, you are required, within twenty (20) days of the date of this service, to either sign the annexed Stipulation as to the correctness of the attached Record on Appeal or make and serve proposed amendments or objections thereto.

PLEASE TAKE FURTHER NOTICE that upon your failure to comply with said Rule within 20 days of the date of this service, the attached Record on Appeal, certified as correct by Appellant's attorney, shall be deemed correct and will be filed in the Appellate Division, Third Judicial Department with an affirmation certifying the undersigned's compliance with the Rule's requirements and Respondent's noncompliance.

DATED: \_\_\_\_\_.

Yours, Etc.

  
  

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STATE OF NEW YORK : SUPREME COURT  
APPELLATE DIVISION : THIRD DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

**Appeal No.:** \_\_\_\_\_

\_\_\_\_\_,

Appellant.

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**AFFIRMATION**

\_\_\_\_\_, Esq., attorneys for appellant in the above matter, does hereby affirm under penalty of perjury that on \_\_\_\_\_, our office served by Priority Mail upon the attorney for respondent, Hon. \_\_\_\_\_ District Attorney, a Rule 800.7 (b) notice and a copy of the proposed record; that they have complied with all applicable time limitations concerning the record; and that the attorney for respondent has failed to either sign a stipulation or to propose amendments or set forth objections to the record within the time prescribed.

Dated: \_\_\_\_\_  
Albany, NY

Respectfully submitted,

\_\_\_\_\_



STATE OF NEW YORK : SUPREME COURT  
APPELLATE DIVISION : THIRD DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

**Appeal No.:** \_\_\_\_\_

\_\_\_\_\_,

Appellant.

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**CERTIFICATION**

\_\_\_\_\_, Esq., appellate attorney for appellant, does hereby certify pursuant to CPLR 2105, that the foregoing papers constituting the record on appeal have been compared with originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, on file in the \_\_\_\_\_ County Court Clerk's Office.

Dated: \_\_\_\_\_

Albany, NY

Respectfully submitted,

\_\_\_\_\_