QUESTIONS AND ANSWERS
ABOUT YOUR APPEAL AND YOUR LAWYER

A Guide Prepared by the Office of the Appellate Defender

1. *WHO IS MY LAWYER?*

Your lawyer's name is on the notice that came with this guide. The Office of the Appellate Defender assigned this lawyer to your case. The Office of the Appellate Defender is also known as "OAD." OAD provides lawyers for people in North Carolina who can't afford to hire a lawyer for their appeals. Your lawyer may work for OAD, or may have a private practice. The Appellate Defender only allows qualified lawyers to handle appeals. **You may have to pay for having a court-appointed lawyer for your appeal. You should carefully read all of this document, and especially Question 9 on page 7 ("How much will my appeal cost?").**

2. *HOW CAN I CONTACT MY* LAWYER*?*

Your lawyer's mailing address, telephone number, and email address are on the notice that came with this guide. The best way to contact your lawyer is by mail. You should write to your lawyer if you have questions about your case. You should also write to your lawyer about anything that you think went wrong or was unfair about your case. Your friends or family also may have questions they want to ask your lawyer about your case. When you write to your lawyer, you should say whether it is okay for your lawyer to talk to friends or family about your case. **You should also make sure that your lawyer always has your current address so he or she can contact you to ask you questions or send you documents. THIS IS VERY, VERY IMPORTANT. If you are not in custody and you move, or if you are in custody and are released, you must immediately contact your lawyer to let him or her know how to contact you at your new address. Your lawyer may need to get your permission to appeal to a higher court if your first appeal doesn't win. If your lawyer needs your permission to appeal to a higher court but can't contact you, he or she can't help you any more.**

3. *WHEN WILL MY LAWYER CONTACT ME?*

The steps in your appeal are explained in detail under Question 5 ("What Will My Lawyer Do For Me?"). Your lawyer will write to you when:

1. He or she is appointed to represent you.
2. The record on appeal is filed.
3. Your brief is filed.
4. The other side's brief is filed.
5. An oral argument date is set, if the Court has an oral argument.
6. A reply brief is filed, if the Court does not have an oral argument.
7. The Court decides your case.
8. You write with questions or concerns.

Your lawyer probably does not live and work close to you. It is very difficult for your lawyer to visit you in person. Such visits usually would not help your appeal because the appeal is only about what was said and done at your trial; this is explained in more detail under the next question. Your lawyer will visit you if he or she needs additional information from you. This does not happen often.

4. *WHAT IS AN APPEAL?*

An appeal is not a new trial. In an appeal, you do not have a chance to show a new judge or a new jury different evidence or even the same evidence.

It may help you understand appeals to think of a trial like a football game. The judge is like a referee. An appeal is like playing a video of the game and looking for places where a referee made bad calls. The bad calls sometimes don't really make a difference about who won. Sometimes, however, the referees' bad calls might decide the game.

Your appeal is about whether the judge at your trial made mistakes and about whether the mistakes probably helped the other side win. Your lawyer is looking for ways to persuade a higher court that the judge made such serious mistakes that you did not get a fair trial and should get a new trial or some other different outcome in your case. Another way of saying this is to say that the judge's "errors" were "prejudicial." Almost always, however, a trial lawyer has to let the judge know during the trial that the judge made a mistake for that mistake to be part of the appeal. Appeal courts don't like to give new trials for something the judge didn't have a chance to change because no one complained about it during the trial.

Of course, your appeal is not as simple as looking at a video, and it is certainly not part of a game. It is probably the most important thing in the world to you. However, thinking of the judge like a referee and an appeal like looking for the referee's mistakes may help you better understand what is happening in your appeal.

5. *WHAT WILL MY LAWYER DO FOR ME?*

Your lawyer has one job in your case – to represent you on your appeal in the North Carolina courts. There are two courts in North Carolina that decide appeals. The first is the North Carolina Court of Appeals. The second is the Supreme Court of North Carolina. The Supreme Court is above the Court of Appeals and can change decisions the Court of Appeals makes. If you received a death sentence, your appeal goes directly to the Supreme Court. All other cases start in the Court of Appeals. After the Court of Appeals decides a case, the Supreme Court may decide to review it.

Your appeal will follow these steps:

A. Record preparation. The "record on appeal" or "record" is a booklet that has in it all the papers the appeals court needs to have to understand what happened in your case. To prepare the record, your lawyer will get copies of all papers filed in District or Superior Court. Your lawyer also will get a transcript of the trial or the hearing in your case. A transcript is a written record of everything the witnesses, the judge, and the lawyers said in the courtroom. Unless your trial lawyer asked that all parts of the trial be recorded, some parts probably were not recorded (jury selection if you had a jury trial, for example). The transcript will not include those parts. It may take several months to get the transcript. It can take longer if the trial or hearing was long, or if it was recorded on tape, or if your case was heard in a county where court is very busy. Your lawyer can't advise you about your appeal until he or she has read the transcript.

Once your lawyer has all the papers, the next step is to study them for possible legal errors or mistakes. For example, a common legal mistake in a jury trial involves evidence that the judge let the jury hear or evidence that the judge would not let the jury hear. Another example is a mistake in the way the judge instructed the jury. Your lawyer will make a list of these possible mistakes in the record. This list is called the "assignments of error." An example of an assignment of error might look like this:

> 2. The trial court committed prejudicial error by overruling the defendant's objection to the testimony of Jane Jones concerning what Sally Smith told her about firearms in the house, because this testimony was inadmissible hearsay and violated Evidence Rule 802. T pp 15, line 18.

Your lawyer will send you a copy of the assignments of error when the record is prepared. There may be many assignments of error or only one or two. The number depends on the length of your trial or hearing, and on the specific facts of your case.

Remember that your lawyer is looking only for legal errors in your trial. Your lawyer is not looking for places where a witness made a mistake or got the facts wrong about what happened. For example, your lawyer can't argue in your appeal that a witness lied to the jury about something important. In our system, trial judges and juries get to decide who told the truth in court and what the true facts are. As long as the evidence the judge or jury heard was proper, the appeals courts have to go by whatever the judge or jury decided about the facts. The appeals court won't change fact decisions.

Also, your appeal probably won't be about mistakes made by your trial lawyer. When a lawyer makes an unreasonable mistake in a trial and that mistake probably made a difference in how the trial came out, the lawyer's unreasonable mistake is called "ineffective assistance of counsel," or "IAC." It is almost always impossible for an appeals court to decide whether or not what a lawyer did was IAC. The appeals court does not know why the lawyer did what he or she did, and what difference it would have made if the lawyer had handled things differently. If what the lawyer did was part of a reasonable plan, the court probably won't find IAC, even though the plan did not work like the lawyer wanted it to. Evidence about why a lawyer did or did not do something and about what difference it made is almost never found in the transcript or the court papers. Evidence about a lawyer's decisions has to come from new witnesses or other new evidence, like the lawyer testifying about why he or she did or did not do something. Your appeal lawyer can't call witnesses or introduce new evidence about IAC (or anything else). The only evidence that counts in an appeal is the evidence that the judge or jury heard (or that the judge refused to listen to or let the jury consider).

If new evidence is discovered in your case, or if your trial lawyer made mistakes, these problems can sometimes be handled in a procedure called a "Motion for Appropriate Relief" or "MAR." An MAR may be filed during an appeal, but this does not happen often. Your appeal lawyer can't file an MAR without permission from the Appellate Defender. MARs are filed during an appeal only in very unusual cases.

After your lawyer has completed the record, he or she must send it to the lawyer for the other side. The lawyer for the other side has a chance to look at the record and ask for changes. Usually, both sides agree on what should be in the record. If both sides can't agree, the trial judge decides what papers are included or taken out. This process is called "settling the record."

B. Briefing. After the record is settled, it is filed in the appeals court. Next, your lawyer writes your brief and files it with the same court. The brief is another booklet, but this one has arguments written by your lawyer telling the appeals court about mistakes in your case, and asking the appeals court for some form of "relief" for you. Depending on the kind of mistake in your case, the "relief" might be a new trial or a new sentencing hearing. In a few cases, your lawyer will ask the appeals court to completely throw out your conviction or completely throw out a juvenile court order about your children. This would happen if the appeals court decided that there was not enough evidence at trial to support the judge or jury's decision. All of this depends on the specific facts of your particular case.

The arguments in your brief will discuss assignments of error listed in the record. Don't be surprised if many of the assignments of error from the record are not argued in the brief. Your lawyer will choose only the assignments of error that give you the best chance for a good result in your appeal. Arguing a weak point may weaken the whole brief.

After your lawyer files your brief, the other side has a chance to file a brief. The other side may argue that no mistakes were made in your case. The other side usually also argues that any mistakes were "harmless," or not bad enough to require any relief.

C. Oral argument or reply brief. After both sides file briefs, the Court of Appeals decides whether or not to schedule your case for oral argument. This argument is open to the public, but if you are in jail or in prison, you do not have the right to attend the argument. No witnesses will testify and no evidence will be presented at the argument. Instead, your lawyer will tell the judges why you should get relief in your case. The lawyer on the other side will argue why you should not get relief. In a criminal case, the lawyer for the other side will be from the Attorney General's Office. In a juvenile case, it will be the lawyer from the Department of Social Services and perhaps the Guardian ad Litem's lawyer.

There are fifteen judges on the Court of Appeals. Their courthouse is in Raleigh. Each case is decided by a group of three judges called a "panel." When lawyers talk about the "Court of Appeals" deciding a case, they really mean a panel of three Court of Appeals judges.

The Court of Appeals often decides not to hear oral argument to decide the case. This is not a bad sign. It just means that the judges believe they can make their decision using the briefs and the record. If the Court decides not to hear oral argument in your case, your lawyer has a chance to write a reply brief to answer arguments the other side made in its brief.

D. Decision. After oral argument, or after the Court of Appeals decides that there will be no oral argument, the Court will file a written decision. This is called the "opinion" in your case. It usually takes several months after the oral argument or the reply brief for the Court to file its opinion.

E. Further appeal after the decision of the Court of Appeals.

1. *Appeal from a dissenting opinion.*

If all three judges can't agree on a decision in your case, the one who does not agree writes a separate opinion called a "dissent." If one judge votes for your side, and two vote against you, you have lost the appeal in the

Court of Appeals, but you can appeal to the Supreme Court of North Carolina. If two vote for your side, and one votes against you, the other side can appeal. Either way, this appeal is only about the issue that the judges of the Court of Appeals couldn't all agree on.

If either side appeals to the Supreme Court based on a dissent in the Court of Appeals, both sides will file new briefs. After that, the Supreme Court will hear oral argument, which they have in every case. The Supreme Court is also located in Raleigh. There are seven judges, called "justices," of the Supreme Court. The Supreme Court can overrule any decision in the Court of Appeals. This means that whether you win or lose your appeal in the Court of Appeals, the Supreme Court could change what the Court of Appeals decided.

2. *Discretionary review.*

Even if there is no dissent in the Court of Appeals, either side can still ask the Supreme Court to review your case. The request for review is called a "Petition for Discretionary Review," or "PDR." The PDR is a short document. It tells the Supreme Court that the Court of Appeals made a mistake, and asks the Supreme Court to fix the mistake. The Supreme Court usually does not review decisions of the Court of Appeals when there is no dissent. Your lawyer may decide that there is no chance that the Supreme Court will review your case. If so, your lawyer will tell you that he or she believes that a PDR would be pointless. Your lawyer then will tell you the deadline for filing a PDR if you want to do so yourself, or if family or friends want to hire a different lawyer to file it.

If you win in the Court of Appeals and the other side files a PDR, your lawyer may file a short response. Your lawyer would tell the Supreme Court that the Court of Appeals was right, and there is no mistake for the Supreme Court to fix. If either side files a PDR and the Supreme Court grants it, the case will continue with briefing, argument, and decision in the Supreme Court just as if there had been a dissent in the Court of Appeals.

F. <u>What your lawyer can't do for you.</u>

Your appellate lawyer can't represent you in a bond hearing. Judges almost never give a person an active sentence and then grant an appeal bond. Your lawyer can't help you get moved closer to home. Transfers between prisons are handled solely by the Department of Correction. If you want to be moved, you must talk to your warden or program manager. Finally, your appellate lawyer can't help you get work release. Again, your lawyer was appointed to do one thing – to represent you on your appeal.

On the other hand, if you have a <u>serious</u> problem with health or safety in jail or prison, you should contact your lawyer and North Carolina Prisoner Legal Services, Inc. ("NCPLS") and tell them about it. NCPLS is a group of lawyers that investigates unsafe conditions and serious mistreatment in jails and prisons. Their address is North Carolina Prisoner Legal Services, Inc., P.O. Box 25397, Raleigh, North Carolina, 27611. Your lawyer cannot sue the prison and cannot help you with minor problems, but can help make NCPLS aware of serious problems you are having.

6. *HOW LONG WILL MY APPEAL TAKE?*

As you can see, there are many steps in your appeal. After your lawyer is assigned to your case, it may take as long as eighteen months to complete all those steps. It takes time to do the work right at each step. Your lawyer will work as quickly as possible, but can't do much to speed things up.

Preparing the record usually takes at least four to six months, depending on how long it takes to get your transcript. Briefing usually takes another three or four months, and sometimes longer. Next, the Court of Appeals may take six months or longer to decide whether there will be oral argument in the case. The Court usually decides cases within two to six months after oral argument, but there is no deadline. If the Supreme Court reviews your case, your appeal of course will take more time. Briefing and argument in the Supreme Court usually takes an additional four to six months. Like the Court of Appeals, the Supreme Court has no deadline for deciding cases.

7. *WHAT SHOULD I DO WHILE I'M WAITING?*

Be patient. Your lawyer knows that you do not like to wait. Your lawyer also has a duty to tell you what is happening with your case. Write to your lawyer when you have questions, and give enough time for him or her to answer. Almost all lawyers try to respond promptly to reasonable questions from their clients. If you try for a long time to contact your lawyer and get no answer, please write to the Appellate Defender. The address is Office of the Appellate Defender, 123 W. Main Street, Suite 500, Durham, N.C., 27701.

No matter how long your appeal takes, do not write to the Court of Appeals or the Supreme Court for information. The judges of the appeals courts don't like anyone trying to influence them or to speed them up. You can't help your case by contacting the courts. Instead, you may hurt your chances on appeal. Write to your lawyer if you feel that something is wrong or that your case has been forgotten.

Also, during your appeal you should not talk to anyone about your case except your lawyer. If you are in prison or jail, do not talk about your case with other inmates. If officers want to talk to you about your case, tell them to contact your lawyer, ask to be taken back to your cellblock or workplace, and remain silent.

If you are in custody or are on probation, stay out of trouble. Any new charges against you, any probation problems, and any disciplinary proceedings can hurt you in the future.

After an adjudication of abuse, neglect, or dependency, part of your case probably will continue in District Court during the appeal. You must discuss your situation with your District Court lawyer. It may help you to cooperate with the Department of Social Services, but every case is different. Only you and your District Court lawyer can decide what to do after talking about all your options.

8. *CAN I GET COPIES OF MY FILE?*

Your lawyer will send you a copy of the assignments of error when the record is finished, and a copy of every brief that is filed in your case. As soon as the Court decides your case, your lawyer also will send you a copy of the written opinion. You will not have to pay for any of these documents.

However, your lawyer needs to use the court papers and transcript to prepare your appeal. After your appeal is over, he or she will send you the transcript for free. In most cases, your lawyer will not have a copy of the discovery materials your trial lawyer may have received. Your appellate lawyer will not be able to provide you with these discovery materials. If you need any documents from your appellate lawyer before your appeal is over, you will have to pay your lawyer - in advance - for copying and mailing. Your lawyer will tell you how much this will cost.

9. *HOW MUCH WILL MY APPEAL COST?*

You do not have to pay for your lawyer at the beginning of your appeal. However, your lawyer's work is not free. Unless you win all of the issues your lawyer argues in the appellate courts, a document called a lien will be filed against you in trial court. The lien tells how much the state government paid your lawyer to work on your appeal. Currently, that amount is $65.00 per hour. When the government files a lien in your case, it means you owe the government the amount of money it paid your lawyer. The lien lasts for at least ten years. The state can collect the money you owe for your appeal. Usually, the money comes from your state income tax refunds or work release earnings.

After studying the record in your case, your lawyer may tell you that there is no good reason to appeal and suggest that you withdraw your appeal so that you don't run up a bigger debt for no good reason. For example, probation revocations and guilty plea cases are very hard to win on appeal just because they don't often have issues your lawyer can use to get you some kind of relief. You don't have to follow your lawyer's advice to withdraw your appeal, but you should think carefully about the decision.

On the other hand, your lawyer may tell you that it is a good idea to continue your appeal, even if you have a short sentence and may be released before the appeal is over. If you have a good chance of winning your appeal, it may help you in the future. For example, if the appeals court reverses a conviction, that charge can be taken off your record. These decisions depend on the specific facts of your case. You should ask your lawyer as many questions as you need to so you can make the right choice about withdrawing your appeal or keeping it going.

10. *WHAT HAPPENS IF I LOSE MY APPEAL?*

If you lose your appeal, your lawyer's work for you is over. However, you should know about three other procedures that may be available to you. Your appointed appeal lawyer is not able to work on these procedures. Each of these three procedures has complicated rules to follow.

1. **Certiorari to the United States Supreme Court.** In some cases, there are important issues about violations of the United States Constitution. It is possible to try to raise these issues in the United States Supreme Court. The document to raise these issues is called a Petition for Writ of Certiorari. It works like a PDR in the North Carolina courts. The U.S. Supreme Court does not have to review your case, and almost never will. As with a PDR, family or friends could hire a lawyer to do this work, but it is extremely unlikely that the Court would review your case.

2. **Motion for Appropriate Relief.** As discussed above under Question 4, if you were convicted of a crime and there is new evidence that was not available during your trial, or if your trial lawyer made mistakes, or if there are other legal issues in your case that could not have been raised in your appeal, you can file a Motion for Appropriate Relief ("MAR") in the Superior Court where you were convicted. This stage of a criminal case is called "post-conviction." It is very difficult to win in post-conviction.

If you lose your appeal and think that you have grounds for an MAR, you should write a letter to North Carolina Prisoner Legal Services, Inc. ("NCPLS"). The address is: North Carolina Prisoner Legal Services, Inc., P.O. Box 25397, Raleigh, North Carolina, 27611. NCPLS is a group of lawyers who may be able to help defendants

with MARs. NCPLS also investigates serious problems of unsafe conditions and mistreatment in prisons. You could file an MAR yourself, but you should always ask NCPLS for help first. The rules for MARs are very tricky. You can destroy all hope in your case if you file an MAR that breaks any of these rules. If NCPLS believes you could win an MAR, it may decide to represent you. If NCPLS does not take your case, it will send you a detailed manual about the MAR rules, along with a set of forms that will help you file an MAR yourself.

NCPLS gets many requests for help. Be patient if you contact them. NCPLS will not even consider filing an MAR before your appeal has been decided.

3. **Writ of Habeas Corpus.** If your conviction violates the United States Constitution, you can petition the United States District Court for a Writ of Habeas Corpus. This procedure is even more complicated than filing an MAR. Again, you should write to NCPLS before trying to file anything on your own.

11. *WHAT IF I HAVE PROBLEMS WITH MY LAWYER?*

Part of the Appellate Defender's job is to make sure that appointed lawyers are doing an excellent job on appeals. However, the Appellate Defender can't remove a lawyer from a particular case once that lawyer is assigned to it. Only the Court of Appeals or a trial court judge can remove a lawyer from an appeal. If that happens, the Appellate Defender will appoint a new lawyer. Your lawyer will not be removed just because you disagree with what the lawyer has done. Your lawyer has to use his or her judgment, experience, and training to argue the case the way that is most likely to win. Also, please remember that it is part of your lawyer's job to be honest with you. This may mean that your lawyer has to give you bad news about facts or legal issues you thought might help you.

The Appellate Defender won't know the specific facts of your case and won't be able to answer questions about it. You should write to your lawyer whenever you have questions about your appeal. If you try for a long time to contact your lawyer and get no answer, then write to the Appellate Defender.

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This Guide probably has not answered every question you have about your case. You should ask your lawyer any other questions you have about your appeal. You have a right to ask your lawyers these questions and to get a reply in a reasonable time. Please understand, however, that your lawyer has other clients, so give him or her three or four weeks to respond to your letters.

Good luck with your appeal.