CHAPTER 9

APPEALING YOUR CONVICTION OR SENTENCE*

A. Introduction

This Chapter explains how you can get your conviction undone or your sentence reduced if something was done incorrectly at your trial or hearing. To do so, you "appeal" to an "appellate court," which has the power to overrule a lower court's decision. You, as the "appellant," get the chance to argue that the trial court's judgment against you was wrong because of harmful legal errors that occurred in deciding your case.[1]

This Chapter deals specifically with the laws of New York State. If you have been convicted or sentenced in a federal court or in another state's court, your appeal will be governed by federal law or by the law of that other state and so you should use your prison's law library to find information about the law that applies to your appeal. Even if New York law does not apply to your appeal, however, you may find it useful to read this Chapter for important background information about appeals in general.

For your appeal, you should get a lawyer to assist you as soon as possible. The Constitution guarantees that you can have a lawyer for your appeal, even if you can't pay for one.[2] You must act quickly because there are time limits for filing an appeal. These time limits are strictly enforced, and are therefore very important. Once they expire, it may be impossible for an appellate court to consider your appeal, *even if* your appeal would otherwise have been successful. See Part B(1) for information about time limits.

You should make sure you have a lawyer because, among other reasons, many issues that could win your appeal are difficult to recognize by yourself. Because of the time limits, appealing by yourself is risky: you may lose the chance to raise an issue before you learn enough to even notice it. See Part C(1) for information on how you can get a lawyer.

Part A of this Chapter (the part you are reading now) is the introduction. Part B discusses limitations on your right to appeal, including time limits and restrictions that apply if you pleaded guilty. Part C describes what you can do before you appeal or while your appeal is pending, including how to get a lawyer and how to request release on bail. Part D explains what an appellate court can do when it considers your appeal. Part E explains how to actually file papers for your appeal. Part F discusses the possibility of continuing your appeal if the first appellate court decides against you.[3] Part G explains what you can do if your appellate lawyer is not providing "effective assistance of appellate counsel." Part H is a brief conclusion.

At the end of this Chapter, Appendix A helps you figure out where you should file your appeal. Appendix B provides sample papers for appeals, including papers needed to get a lawyer without cost, to get released on bail pending appeal, and to get an extension of time to file your appeal. These forms

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1. A judgment means your conviction (the entry of a guilty plea or a guilty verdict) and your sentence. *See* N.Y. CRIM. PROC. LAW § 1.20(13))–(15) (McKinney 2009).

2. *See* Douglas v. California, 372 U.S. 353, 356–358, 83 S. Ct. 814, 816–817, 9 L. Ed. 2d 811, 815–817 (1963) (establishing that the Constitution requires the state to pay for a lawyer for a defendant who cannot afford one for his first appeal). *See also* Halbert v. Michigan, 545 U.S. 605, 605, 125 S. Ct. 2582, 2583, 162 L. Ed. 2d 552, 556 (2005) (explaining that, assuming state law allows for any criminal appeal at all, the *Douglas* right applies to a first appeal even if the appeal requires permission under state law, but does not apply to second appeals that require permission).

3. *See* Melvin Bressler et al., *Appeals in Criminal Cases*, in New York Criminal Practice Handbook 651, 651 (Lawrence N. Gray ed., 2d ed. 1998 & Supp. 2007). Bressler has been an important resource in the writing of this Chapter of the *JLM*. We strongly recommend it for a detailed, chronological discussion of the criminal appellate process in New York State.

are only samples: you or your lawyer must write your own versions of these papers. Ideally, you should read the entire Chapter before you file any papers. If you file papers incorrectly or just tear these papers out of the book and send them to a court, the court may ignore them and you may lose your chance to appeal.

Finally, before starting your appeal, you should be realistic about your chances of winning an appeal. Very few criminal appeals are granted in the end. However, if you think a mistake was made in your case, or something else went wrong, you should always do what you can. It is possible you may succeed.

B. Limits on Your Right to Appeal

When deciding whether you should appeal, you should first determine whether there are any limits on your right to do so. This is an important first step because you may have already lost all or part of your right to appeal. You could have waived (given up) or forfeited (lost) your right to appeal in several ways. For example, if you pleaded guilty, you might have agreed to waive your right to appeal as part of a plea bargain. A plea bargain takes place when the prosecutor and the accused negotiate a resolution of the case subject to court approval, without a trial.[4] Even if you did not waive your right to appeal, your right to appeal may be limited if you missed certain deadlines or failed to raise certain objections in the trial court. Also, based on which court convicted or sentenced you, and what specifically your conviction or sentence was, you may only be able to file your appeal with certain courts.

This Part will help you to identify if there are any potential limits on your right to appeal. If limits on your right to appeal exist, this Part will also help you determine whether it is possible for you to get your right to appeal reinstated (to get it back).

If you're unsure whether an appeal is possible for you, you should promptly go ahead and file your notice of appeal and get a lawyer anyway. Your appeal may be denied in the end, or you or your appellate lawyer may choose not to continue the appeal, but you'll be no worse off—and if you *are* eligible to appeal, waiting may cause you to lose your chance.

1. Time Limits

The general rule is that you will lose your right to appeal if you wait too long after your sentencing to file a notice of appeal. To preserve your right to appeal, you must file two copies of a notice of appeal with the clerk of your trial court within thirty days of the date you were sentenced.[5] You must count thirty days from your *original* sentencing, even if you were re-sentenced later. However, if you were re-sentenced after the deadline to appeal passes, then you may count from the date of the new sentence, but only if you want to appeal that new sentence.[6] Within the same thirty-day period, you must also serve a copy of the notice of appeal on the District Attorney of the county in which your trial was held.[7] See Part E for information on preparing and filing your papers. This thirty-day period is a critical period, and you have a constitutional right to counsel during this time.[8] **THESE TIME LIMITS ARE EXTREMELY IMPORTANT.**

If you don't file a notice of appeal within thirty days, you usually lose your right to appeal entirely. However, you may be able to recover your right to appeal by filing a motion for a time extension.[9] Your

4. For more information on waiving your right to an appeal as a result of entering into a plea bargain, see Chapter 40 of the *JLM.*

5. N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2009 & Supp. 2012).

6. N.Y. CRIM. PROC. LAW § 450.30(3) (McKinney 2009 & Supp. 2012).

7. N.Y. CRIM. PROC. LAW § 460.10(1)(b) (McKinney 2009 & Supp. 2012).

8. *See* People v. Montgomery, 24 N.Y.2d 130, 133, 247 N.E.2d 130, 133, 299 N.Y.S.2d 156, 160 (1969) ("It is apparent that the 30-day period in which an appeal must be docketed is a critical time for the defendant. It cannot be successfully argued that an indigent defendant does not have the right to counsel at this stage of his proceedings.").

9. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012). The extension may be for no more than 30 days, counting from the date of the decision to grant the extension.

motion for a time extension must be within *one year* of the original deadline for filing a notice of appeal.[10] In addition, you must show that there was "excusable neglect or good cause" as to why you missed your deadline.[11] Exactly what "excusable neglect or good cause" actually means is different depending on what state you are in.

Here are some examples of what some courts around the country have decided are "excusable neglect or good cause":

(1) Your lawyer abandoned you and failed to tell both you and the court that he is no longer your lawyer;[12]
(2) Your lawyer cannot find you because you've been moved around different prisons;[13]
(3) You tell your lawyer you want to appeal, but your lawyer does not file the right papers and appeal on your behalf;[14]
(4) Your lawyer fails to communicate with you at all during the window when you are supposed to file your appeal.[15]

Under New York State law, the following exceptions have been recognized to allow filing an appeal after the deadline: [16]

(1) A public servant behaved improperly (for example, if a prosecutor intentionally acted to prevent your good-faith efforts to file on time from succeeding[17]);
(2) Your lawyer behaved improperly, died, or became disabled (examples of improper conduct include your lawyer's failure to inform you in writing of your right to appeal,[18]

10. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012). Although this one-year time limit for making a motion for an extension of time cannot be extended, an appellate court might decide not to enforce the one-year time limit in extremely rare circumstances. *See* People v. Thomas, 47 N.Y.2d 37, 42–43, 389 N.E.2d 1094, 1096, 416 N.Y.S.2d 573, 575–576 (1979) (holding that, in the interest of justice, the district attorney could not enforce the one-year time limit to file a 460.30 motion when the defendant had made an honest effort to appeal within the appropriate time limit, and action by the district attorney had contributed to the failure of the defendant's timely attempt to appeal).

11. FED. R. APP. P. 4(b)(4). *But see* Espinal v. State, 159 Misc. 2d 1051, 1054–1057, 607 N.Y.S.2d 1008, 1010–1012 (Ct. Cl. 1993) (Court of Claims held that in New York, the statutes governing filing and service of the papers initiating Court of Claims actions "do not approximate" FED. R. APP. P. 4, because the New York legislature had enacted enough procedures to protect incarcerated *pro se* litigants. The "mailbox" filing rule, in which a filing is deemed timely if deposited if the inmate deposits the filing in institution's internal mailing system on time, was rejected.).

12. *See* Maples v. Thomas, 565 U.S. 266, 283, 132 S. Ct. 912, 924, 181 L. Ed. 2d 807 (2012) (granting defendant habeas corpus relief where defense counsels had both quit the law firm representing the defendant and forgot to inform the court and the defendant that they were no longer able to represent him).

13. *See* United States v. Smith, 60 F.3d 595, 596 (9th Cir. 1995) (granting an extension of time where the defendant and his lawyer "attempted to contact each other regarding whether to file a notice of appeal, but that it was difficult . . . [because the defendant] was moved to prisons in different states three times during the period immediately following entry of the judgment.").

14. *See* Kent v. United States, 423 F.2d 1050, 1051 (5th Cir. 1970) (granting an extension of time where the defendant "desired an appeal and made this desire known to counsel and counsel declined to take and prosecute the appeal").

15. *See* Corral v. United States, 498 F.3d 470, 475 (7th Cir. 2007) (granting an extension of time where even though defendant did not want to appeal at first but counsel had not been discharged, court never gave counsel permission to withdraw, counsel did not return phone calls made by defendant's wife during appeal period requesting assistance, and defendant's phone calls to counsel made during the appeal period from prison were blocked).

16. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012).

17. *See, e.g.*, People v. Johnson, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987) (allowing an appeal after the deadline because defendant's prior, timely attempts to appeal had been prevented by actions of the state).

18. *See* People v. Nunez, 178 A.D.2d 1029, 1029, 578 N.Y.S.2d 780, 781 (4th Dept. 1991) (granting extension of time to appeal because defense counsel failed to provide defendant with written notice of right to appeal).

failure to inform you of your right to apply for leave to appeal as a poor person,[19] and failure to start your appeal after being informed of your desire to appeal[20]); or

(3) You were unable to communicate with your lawyer about whether to appeal before the filing deadline had passed. To win an extension based on an inability to communicate with your lawyer, the inability to communicate must have been (a) because you were in prison and (b) through no fault of your attorney's or of your own (meaning that this was not because you or your attorney made a mistake).[21]

Unless you can satisfy both of these requirements—specifically, (1) making your motion for an extension within one year after your original thirty days to appeal has passed and (2) showing you missed your original deadline to appeal due to one or more of the three allowable factors—then you will not be granted a time extension. However, if more than a year and 30 days have passed, and your claim involves your attorney's unreasonable failure to file an appeal, you can file a "writ of error *coram nobis*"[22]with the Appellate Division to claim ineffective assistance of counsel, as described in Part G(3) of this Chapter.[23] This is different from a 460.30 motion for a time extension, which is discussed below.

If you think that you may satisfy these requirements, then you should send your motion for a time extension to the appropriate appellate court.[24] See Form B-5 in Appendix B of this Chapter for an example of a motion for time extension, and see Appendix A of this Chapter to figure out which court you should send your motion to. The motion must be in writing and must contain a sworn statement of the facts that make you eligible for a time extension. Additionally, you must also notify the District Attorney in your jurisdiction of your motion so that the District Attorney can file papers opposing your motion.[25]

If there are questions about the facts underlying your request for an extension—for example, whether you were really unable to communicate with your lawyer or simply did not do so—the appellate court may order the trial court to hold a hearing on these issues.[26] Once the facts are clarified and resolved, or if there were no factual questions to begin with, the appellate court will rule on your motion for an extension, and either grant or deny it.

If the appellate court grants you a time extension, it will give you no more than thirty days from the day of its decision to file your appeal.[27] If an intermediate appellate court denies your motion for an extension, you may appeal that denial only if both (1) the intermediate appellate court states that it based its decision solely on the law without finding facts, and (2) a judge on the Court of Appeals gives you permission to appeal.[28] Additionally, you may not appeal a decision denying an extension if your appeal would always have required permission of the same court that denied the extension (that is, if the appeal was not of right but rather required permission of the court. In short, if you cannot get

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19. *See* People v. Lord, 181 A.D.2d 1076, 1076, 582 N.Y.S.2d 305, 305 (4th Dep't. 1992) (granting extension of time to appeal where defense counsel, among other mistakes, gave defendant "improper advice concerning the manner of applying for leave to appeal as a poor person").

20. *See* People v. Lord, 181 A.D.2d 1076, 1076, 582 N.Y.S.2d 305, 306 (4th Dep't. 1992) (granting extension of time to appeal where defense counsel, among other mistakes, had failed to carry out defendant's request to appeal).

21. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012).

22. A writ of error *coram nobis* is an order by an appeals court demanding that the lower court consider facts which might have changed the outcome of the lower court case if known at the time of trial. *Coram nobis* is a Latin term meaning the "error before us." *See* Error Coram Nobis, Black's Law Dictionary (10th ed. 2014).

23. *See* People v. Watson, 49 A.D.3d 570, 570, 853 N.Y.S.2d 581, 581 (2008) (stating that "the proper procedure for addressing" a claim of ineffective counsel "is an application of a writ of error coram nobis addressed to this Court").

24. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012). *See* Form B-5 in Appendix B of this Chapter for a sample notice of a motion for extension of time.

25. N.Y. CRIM. PROC. LAW § 460.30(2) (McKinney 2009 & Supp. 2012).

26. N.Y. CRIM. PROC. LAW § 460.30(5) (McKinney 2009 & Supp. 2012).

27. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012).

28. N.Y. Crim. Proc. Law § 460.30(6) (McKinney 2009 & Supp. 2012).

an extension without the approval of the court that denied your motion, you cannot appeal them denying your motion for extension of time.).[29]

2. Plea Agreements[30]

If you pleaded guilty, your right to appeal is limited in certain ways. If you pleaded guilty as part of a plea bargain or negotiated sentence, you automatically forfeited (lost) your right to appeal certain matters. This is true even if your plea agreement does not say so. Moreover, many plea agreements contain terms in which you waive (give up) the right to appeal even more matters, which would be listed in the agreement. The next two subsections explain these limits on your right to appeal.

Be aware that if you successfully appeal from a guilty plea, you will still have to face all the original charges against you. If you then negotiate a new plea agreement, or if you go to trial and are convicted, your new sentence could actually be *worse* than the sentence you received under your earlier plea. Thus, unless you have already received the worst possible sentence, there is some risk involved in appealing a guilty plea.

(a) Rights Automatically Forfeited by Your Guilty Plea

If you pleaded guilty, you automatically forfeited the right to appeal many types of errors, even if your plea agreement does not specify them.[31] You can plead guilty to many different things. You may plead guilty to the entire charge/indictment. If you have been charged with only one crime, you may plead guilty only to a lesser included offense (*defined in glossary*). This requires the consent of the court and the District Attorney. If you have been charged with two or more offenses, you may: (1) plead guilty to one or more but not all of the offenses charged, or (2) plead guilty to a lesser included offense corresponding to any of the offenses charged, or (3) plead guilty for any combination of the offenses charged and their corresponding lesser included offenses.[32] In general, by pleading guilty, you give up

29. *See* People v. Nealy, 82 N.Y.2d 773, 773, 624 N.E.2d 175, 176, 603 N.Y.S.2d 991 (1993) (holding that defendant may not appeal the appellate division's denial of an extension of time to request permission to appeal to that appellate division).

30. For more information on entering into plea bargains, see Chapter 40 of the *JLM*.

31. *See generally* N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2009 & Supp. 2012); People v. Hansen, 95 N.Y.2d 227, 231 n.3, 738 N.E.2d 773, 776 n.3, 715 N.Y.S.2d 369, 372 n.3 (2000) (listing claims that are forfeited by guilty plea); People v. Gerber, 182 A.D.2d 252, 259–260, 589 N.Y.S.2d 171, 174–175 (2d Dept. 1992) (listing claims that are forfeited by guilty plea).

32. N.Y. CRIM. PROC. LAW § 220.10(4)(a)–(c) (McKinney 2009 & Supp. 2012).)

the right to argue the factual issue of guilt.[33] Additionally, you give up the right to raise problems with discovery or other pretrial matters.[34] You may not appeal the following issues if you pleaded guilty:

(1) The insufficiency of the evidence before the grand jury;[35]
(2) The insufficiency of instructions given to the grand jury;[36]
(3) The refusal of the trial court to try you separately from a co-defendant;[37]
(4) The denial of your right to a jury trial;[38]
(5) The denial of your right of confrontation;[39]
(6) The suppression of evidence, if you pleaded without obtaining an explicit ruling on this;[40]
(7) The limits on your privilege against self-incrimination;[41]
(8) The expiration of a statute of limitation (a time limit for bringing charges);[42]
(9) The lack of a factual basis for a plea to a lesser charge;[43]
(10) The absence of counsel during certain proceedings; and[44]
(11) Your *statutory* (as opposed to constitutional) right to a speedy trial.[45]

By pleading guilty, however, you did not forfeit your entire right to appeal. Generally, you still have the right to appeal about the following errors (and others[46]):

(1) You were denied your *constitutional* right to a speedy trial,[47]
(2) You were charged in violation of your *constitutional* right against double jeopardy,[48]
(3) You were not competent to stand trial,[49]
(4) The statute under which you were convicted is unconstitutional,[50]
(5) Your sentence was illegal,[51]
(6) Your plea was not voluntary or knowing,[52]
(7) Jurisdiction was not proper in the trial court,[53]
(8) Your conviction was based entirely upon evidence the prosecutor knew was false,[54]
(9) You were improperly denied a motion to suppress evidence,[55] or
(10) The trial court based your sentence on an improper determination of your prior-felon status.[56]

Even though you did not automatically give up your right to appeal the issues listed above by pleading guilty, you may have given up the right to appeal these issues by other means. You could

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33. *See* People v. Garcia, 216 A.D.2d 36, 36–37, 627 N.Y.S.2d 666, 667 (1st Dept. 1995) ("By pleading guilty, the defendant has waived his right to litigate the issue of his guilt.").

34. *See* People v. Berezansky, 229 A.D.2d 768, 771, 646 N.Y.S.2d 574, 577 (3d Dep't. 1996) (holding that a defendant who waives indictment and pleads guilty "waives all discovery and all other pretrial and trial matters.").

35. *See* People v. Caleca, 273 A.D.2d 476, 476, 711 N.Y.S.2d 743, 744 (2d Dept. 2000) ("By pleading guilty, the defendant waived his claim that the evidence submitted to the Grand Jury was not sufficient to support the indictment.").

36. *See* People v. Palo, 299 A.D.2d 871, 871, 749 N.Y.S.2d 452, 452 (4th Dept. 2002) ("The contention of defendant that the prosecutor improperly instructed the grand jury does not survive his plea of guilty.").

37. *See* People v. Shepphard, 177 A.D.2d 668, 668, 576 N.Y.S.2d 368, 368 (2d Dept. 1991) ("The defendant's plea of guilty constituted a waiver of the right to seek appellate review of the denial of his severance motion").

38. *See* People v. Walls, 129 A.D.2d 751, 751, 514 N.Y.S.2d 513, 513 (2d Dept. 1987) (holding that a guilty plea waives the right to appeal issues relating to both the right to a jury trial and the right to confront witnesses); *see also* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("[A] guilty plea signals defendant's 'intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including . . . the right to trial by jury.'" (quoting People v. Lynn, 28 N.Y.2d 196, 201–202, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78) (1971))).

39. *See* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("[A] guilty plea signals defendant's 'intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including the right to confrontation.'" (quoting People v. Lynn, 28 N.Y.2d 196, 201–202, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78) (1971))); *see also* People v. Pacherille, 25 N.Y.3d 1021, 1023, 32 N.E.3d 393, 394, 10 N.Y.S.3d 178, 179 (2015).

40. *See* People v. Smith, 304 A.D.2d 677, 677, 757 N.Y.S.2d 491, 491 (2d Dep't. 2003) ("By pleading guilty before making a motion to suppress evidence . . . the defendant waived her claim").

41. *See* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("[A] guilty plea signals defendant's 'intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including … the privilege against self-incrimination.'" (quoting People v. Lynn, 28 N.Y.2d 196, 201–202, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78) (1971))).

42. *See* People v. Parilla, 8 N.Y.3d 654, 659, 870 N.E.2d 142, 145, 838 N.Y.S.2d 824, 827 (2007) (holding that a guilty plea waives the right to a statute of limitations defense).

43. *See* People v. Clairborne, 29 N.Y.2d 950, 951, 280 N.E.2d 366, 367, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed.").

44. *See* People v. Reiblein, 200 A.D.2d 281, 283, 613 N.Y.S.2d 789, 790 (3d Dept. 1994), *appeal denied*, 84 N.Y.2d 831, 641 N.E.2d 172, 617 N.Y.S.2d 151 (3d Dep't. 1994) (holding that, by pleading guilty, defendant waived right to appeal on the grounds that defense counsel was not present at psychiatric interview).

45. *See* People v. Smith, 272 A.D.2d 679, 681, 708 N.Y.S.2d 485, 487 (3d Dept. 2000) ("By pleading guilty, defendant waived appellate review of his statutory right to a speedy trial."); *see generally* N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2009 & Supp. 2012). A statutory right is a right created by an ordinary law passed by the legislature. A constitutional right is a right guaranteed by the state or federal constitution. Courts are usually less willing to decide that constitutional rights—which are often more fundamental and important—have been waived.

46. *See* N.Y. CRIM. PROC. LAW § 220.10 nn.241–97 (McKinney 2009) (notes of decision discussing waivers resulting from guilty plea),; N.Y. CRIM. PROC. LAW § 470.15 n.18 (McKinney 2009 & Supp. 2015) (note of decision discussing preservation of issues on appeal),); N.Y. CRIM. PROC. LAW § 710.70 n.69 (McKinney 2009 & Supp. 2015) (note of decision discussing waiver of right to appeal following a guilty plea). *See also* People v. Hansen, 95 N.Y.2d 227, 230–31, 738 N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000) (describing the issues that survive a guilty plea, such as jurisdictional matters).

47. *See* People v. Campbell, 97 N.Y.2d 532, 535, 769 N.E.2d 1288, 1289, 743 N.Y.S.2d 396, 397–398 (2002) (noting that the constitutionally protected right to a speedy trial is required for a fundamentally fair trial and to protect the integrity of criminal proceedings, and therefore cannot be waived); People v. Smith, 272 A.D.2d 679, 681, 708 N.Y.S.2d 485, 487 (3d Dept. 2000) ("[D]efendant's right to raise his constitutional right to a speedy trial survives both his guilty plea and the waiver of his right to appeal.") (citations omitted);."); People v. Hansen, 95 N.Y.2d 227, 230–31 n.2, 738 N.E.2d 773, 776 n.2, 715 N.Y.S.2d 369, 372 n.2 (2000) (listing speedy trial right among constitutional claims that survive a guilty plea).

48. *See* Menna v. New York, 423 U.S. 61, 62–63, 96 S. Ct. 241, 242, 46 L. Ed. 195, 197–98 (1975) (holding that a guilty plea does not waive a claim that the charges amounted to unconstitutional double jeopardy); People v. Prescott, 66 N.Y.2d 216, 218, 220–221, 486 N.E.2d 813, 814–816, 495 N.Y.S.2d 955, 956–958 (1985) (holding that a defendant's constitutional double jeopardy claim survives a guilty plea and may be raised for the first time on appeal). But note that you may not raise your *statutory* right against double jeopardy under § 40.20 of the New York Criminal Procedure Law if you have pleaded guilty. *See* People v. Prescott, 66 N.Y.2d 216, 219–220, 486 N.E.2d 813, 815, 495 N.Y.S.2d 955, 957 (1985) (holding that a guilty plea results in forfeiture of statutory double jeopardy claim, even if presented to the court prior to the plea); *see also* People v. Gray, 300 A.D.2d 696, 697, 752 N.Y.S.2d 731, 733 (2d Dep't. 2002) (holding that a constitutional double jeopardy claim survives a guilty plea but that a statutory claim does not).

49. *See* People v. Lopez, 6 N.Y.3d 248, 255, 844 N.E.2d 1145, 1148, 811 N.Y.S.2d 623, 626 (2006) (noting that a "challenge to a defendant's competency . . . ."" is not waived by pleading guilty and waiving the right to appeal); People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S. 46, 50 (1992) (noting the same); People v. Armlin, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975) (holding that a guilty plea does not waive right to a mandated competency hearing); People v. Bennefield, 306 A.D.2d 911, 911, 761 N.Y.S.2d 906, 907 (4th Dept. 2003) (noting that "issues relating to defendant's competency survive" a guilty plea and a waiver of a right to appeal).

"Competency to stand trial" is a technical phrase that means the defendant is able to stand trial because he understands the charges against him, the severity of the charges, the potential punishments that he can be sentenced to if found guilty, the proceedings that are occurring, and is capable of assisting in his own defense. *See* Competency, *Black's Law Dictionary* (10th ed. 2014).

50. *See* Gesicki v. Oswald, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971), *aff'd*, 406 U.S. 913, 92 S. Ct. 1773, 32 L. Ed. 2d 113 (1972) (holding that a guilty plea does not waive the right to contest the constitutionality of the statute under which a defendant was convicted); *see also* People v. Lee, 58 N.Y.2d 491, 493, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983) ("A defendant by a plea of guilty does not forfeit the right on appeal from the conviction to challenge the constitutionality of the statute under which he was convicted.").

51. *See* People v. Lopez, 6 N.Y.3d 248, 255–56, 844 N.E.2d 1145, 1148–1149, 811 N.Y.S.2d 623, 626–627 (2006) (noting that, while a claim challenging the legality of a sentence cannot be waived by a guilty plea, explicit

have specifically given up (waived) your right to appeal in your plea agreement or you may have given up your right to appeal by failing to preserve the issues at trial (that is, failing to object when the mistakes were first made). Waiver and preservation are discussed in Part B(2)(b) and Part B(3) of this Chapter, respectively.

(b) Rights You Waive by Agreement

In addition to pleading guilty, you may also have agreed to waive your right to appeal as part of a plea bargain or negotiated sentence.[57] If your plea included an agreement to waive your right to appeal,

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waiver of the right to appeal *does* waive the right to appeal on the basis of the severity of the agreed-upon sentence); People v. Seaberg, 74 N.Y.2d 1, 9, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 972 (1989) (finding that a claim challenging the legality of the sentence cannot be waived by a guilty plea). For an example of a clearly illegal sentence, *see* People v. Williams, 14 N.Y.3d 198, 212–13, 925 N.E.2d 878, 886–887, 899 N.Y.S.2d 76, 84–85 (2010) (holding that a determinate sentence that did not include mandatory post-release supervision, as was required by applicable statutory law, was illegal).

52. *See* People v. Catu, 4. N.Y.3d 242, 244–245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005) (reversing conviction on the basis that guilty plea was not "voluntary and intelligent" since defendant was not told he would be subject to post-release supervision); People v. Gerber, 182 A.D.2d 252, 261, 589 N.Y.S.2d 171, 176 (2d Dept. 1992) ("[A] defendant who pleads guilty is entitled to raise appellate contentions regarding … the voluntary and knowing nature of his plea . . . ."). *See also JLM*, Chapter 9, Part D(1)–(2) for guilty pleas or plea agreements that do not meet constitutional requirements of "knowing, voluntary, and intelligent." You can argue involuntariness on direct appeal if the involuntariness is apparent on the record and you moved to withdraw your plea before sentencing. *See* People v. Brown, 14 N.Y.3d 113, 897 N.Y.S.2d 674 (2010) (withdrawing a guilty plea for involuntariness where the defendant made the plea under duress because the plea bargain granted him a furlough to see his seriously ill child and his previous requests to visit his child had been previously denied). If you did not move to withdraw, courts may refuse to consider the issue as "unpreserved." See Part B(3) of this Chapter for more on the preservation requirement. There is an important exception to this requirement: if something in the plea allocution shows that you did not understand what you were pleading guilty to, and the court did not ask any questions to make sure, you can argue on appeal that the plea was not knowing and voluntary, even though you did not move to withdraw it. People v. McNair, 13 N.Y.3d 821, 822–823, 920 N.E.2d 929, 930, 892 N.Y.S.2d 822, 823 (2009) (holding that trial court must ask further questions where defendant's remarks "cast significant doubt" on guilt). If the involuntariness has to do with matters outside the record, such as ineffectiveness of trial counsel, file a 440.10 motion instead of an appeal. For information on Article 440 appeals, see JLM, Chapter 20.

53. *See* People v. Konieczny, 2 N.Y.3d 569, 573, 813 N.E.2d 626, 628, 780 N.Y.S.2d 546, 548 (2004) (recognizing that jurisdictional issues survive a guilty plea and are exceptions to the forfeiture rule); People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("A guilty plea does not forfeit the right to raise a jurisdictional defect . . .").

54. *See* People v. Pelchat, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984) (finding that a defendant who pleaded guilty was allowed to challenge a conviction when the prosecutor knowingly based the charges on false evidence); People v. Whitehurst, 291 A.D.2d 83, 88, 737 N.Y.S.2d 152, 156 (3d Dept. 2002) (recognizing that a defendant does not waive right to bring "a challenge based upon a guilty plea to an accusatory instrument which is void because of the prosecutor's knowledge that the only evidence to support it is false" (quoting People v. Pelchat, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984))).

55. *See* N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 2009); N.Y. CRIM. PROC. LAW § 710.70 nn. 14, 69 (McKinney 2009.) A motion to suppress is "a request that the court prohibit the introduction of illegally obtained evidence at a criminal trial." *Motion to Suppress*, BLACK'S LAW DICTIONARY (10th ed. 2014).

56. *See* People v. Lacend, 140 A.D.2d 243, 244, 528 N.Y.S.2d 832, 833 (1st Dep't. 1988) (modifying status of defendant, who had pleaded guilty, from predicate violent felon to predicate felon and remanding for re-sentencing).

57. A waiver generally covers any aspect of a case that does not fall within certain exceptions. For example, you may have waived and given up the right to appeal your conviction on the grounds that your lawyer failed to raise certain defenses. *See* People v. Parilla, 8 N.Y.3d 654, 659–660, 870 N.E.2d 142, 145–146, 838 N.Y.S.2d 824, 827–828 (2007) (holding that a waiver of the right to appeal as part of a plea agreement prevented the defendant from raising the issue of a statute of limitations defense on appeal). For information on how other states address the issue of waivers by agreement, see Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. 127, 135–46 (1995).

you still have several options. First, you may claim your waiver was invalid. A waiver is considered invalid if you did not knowingly, intelligently, and voluntarily agree to waive your right to appeal.[58]

Second, there are some claims that can never be waived by plea agreement because they are considered very important to society. This means that even if you waived your right to appeal in a plea

58. *See* People v. Seaberg, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026–1027, 543 N.Y.S.2d 968, 972–973 (1989) ("A waiver, to be enforceable, must not only be voluntary but also knowing and intelligent."). A waiver is not voluntary, knowing, and intelligent (and therefore is not valid) if the trial record does not demonstrate that the trial court made certain that the defendant understood the meaning of the waiver before agreeing to it. *See* People v. Billingslea, 6 N.Y.3d 248, 257, 844 N.E.2d 1145, 1149–1150, 811 N.Y.S.2d 623, 627–628 (2006) (holding that trial court's statement that "when you plead guilty you waive your right of appeal" was not sufficient for the waiver to be knowing since the court did not explain that the defendant was agreeing to waive rights beyond those that are automatically forfeited by any guilty plea). However, a waiver that is adequately explained in writing and signed by the defendant may be valid even if the trial court does not fully explain the terms of the waiver to the defendant. *See* People v. Ramos, 7 N.Y.3d 737, 738, 853 N.E.2d 222, 222, 819 N.Y.S.2d 853, 853 (2006) (holding that the trial record established that the "defendant knowingly, intelligently and voluntarily waived his right to appeal" based on a written waiver agreement, even if the trial court's explanation to the defendant was unclear). *See also JLM*, Chapter 9, Part D(1)–(2) for guilty pleas or plea agreements that do not meet constitutional requirements of "knowing, voluntary, and intelligent."

agreement or as part of a negotiated sentence, you still have a right to appeal certain types of claims.[59] These claims include:

(1) a challenge to a death sentence,[60]
(2) a claim that you were denied your constitutional right to a speedy trial,[61]
(3) a challenge to the legality of court-imposed sentences,[62]
(4) a challenge to the constitutionality of the statute outlawing the conduct to which you pleaded guilty,[63]
(5) a claim regarding your competency to stand trial,[64] or
(6) a claim that ineffective assistance of counsel affected the voluntariness of your guilty plea.[65]

Please note that there may be other claims that society has a strong interest in, including double jeopardy as you were informed of the potential maximum sentence.[66] Finally, while you cannot waive

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59. *See* People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (noting that there are "several categories of appellate claims that may not be waived because of a larger societal interest in their correct resolution."). *See generally* Preiser, McKinney Practice Commentary, N.Y. CRIM. PROC. LAW § 450.10 at 160–164 (2005); Donnino, Preiser, McKinney Supplemental Practice Commentaries, N.Y. CRIM. PROC. LAW § 450.10 at 80–83 (2015) (Supplemental Practice Commentaries).

60. N.Y. CRIM. PROC. LAW § 470.30(2) (McKinney 2009) ("Whenever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals.").

61. *See* People v. Wright, 119 A.D.3d 972, 974, 989 N.Y.S.2d 180, 182 (2014) (concluding that the practice of conditioning a plea on a waiver of the constitutional right to a speedy trial was "inherently coercive"); People v. Blakley, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461 (1974) (holding where a plea is attempted based on a waiver of the constitutional right to a speedy trial, the plea must be vacated); People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (holding that a waiver of right to appeal does not prevent appeals based on denial of a defendant's constitutional right to a speedy trial).

62. *See* People v. Francabandera, 33 N.Y.2d 429, 434 n.2, 310 N.E.2d 292, 294 n.2, 354 N.Y.S.2d 609, 612 n.2 (1974) (noting that the legality of a sentence is always appealable after a guilty plea); see also People v Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (listing the legality of a sentence as among the issues that remain appealable even where a defendant attempts waiver). The right to appeal the legality of a sentence includes the right to appeal an unreasonable delay in sentencing. People v. Campbell, 97 N.Y.2d 532, 533, 769 N.E.2d 1288, 1288, 743 N.Y.S.2d 396, 396 (2002) (holding that a general waiver of the right to appeal does not waive a claim of "unreasonable delay in sentencing" as the claim challenges the legality of the sentence).

63. *See* People v. Lee, 58 N.Y.2d 491, 493–494, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418–419 (1983) (holding defendant's guilty plea did not forfeit his ability to challenge the constitutionality of the statute under which he was convicted); People v. Beaumont, 299 A.D.2d 657, 659, 749 N.Y.S.2d 612, 614 (3d Dept. 2002) (noting that the defendant's right to appeal the constitutionality of the statute under which he was convicted survived his valid waiver of his right to appeal but finding that the defendant did not preserve the issue by raising it at trial).

64. *See* People v. Armlin, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975) (holding that defendant's guilty plea did not waive rights to competency proceedings, and that the issue can be raised on appeal). See People v. Armstrong, 49 A.D.3d 960, 960, 853 N.Y.S.2d 219, 220 (3d Dept. 2008) (holding that a guilty plea does not provide a ground to waive the requirement for a competency examination as required by statute by two psychiatric examiners once ordered by court.) See People v. Green, 75 N.Y.2d 902, 908–909, 554 N.Y.S.2d 821, 825, 553 N.E.2d 1331, 1335 (1990) (holding that a defendant may not waive the right to challenge his competency to stand trial because these rights are recognized as a matter of fairness to the accused).

65. *See* People v. Johnson, 288 A.D.2d 501, 502, 732 N.Y.S.2d 137, 138 (3d Dept. 2001) (stating that "to the extent that a claim of ineffective assistance of counsel impacts on the voluntariness of a defendant's guilty plea, the claim survives a waiver of the right to appeal …" but noting that the "claim must ordinarily be preserved by a motion to withdraw the plea or a motion to vacate the judgment of conviction") (citations omitted).

66. For example, in People v. Allen, the Court of Appeals held that a defendant may expressly waive the right to appeal a constitutional double jeopardy ruling in a plea bargain. The defendant in that case pleaded guilty just before the start of a second trial after a mistrial had been declared during the first trial. When he later attempted to appeal his conviction, the Court of Appeals ruled that he had validly waived the right to a double jeopardy defense in his plea bargain. The court determined that society's interest in the right to a double jeopardy defense was not as strong as, for example, its interest in the right to a speedy trial. Therefore, while you cannot

your right to challenge an illegal sentence, you can waive your right to challenge your sentence as too harsh or excessive.[67] This applies as long as you were informed of the potential maximum sentence and even if your plea agreement did not contain the promise of a specific sentence.[68]

3. Failure to Protest (the "Preservation Requirement")

Appellate courts generally are not willing to decide questions that the trial court had no chance to consider. Therefore, an error usually must be "preserved" by pointing it out to the trial court at a time when the trial court had the opportunity to fix it. This applies whether you pleaded guilty or not.

To preserve a legal error for appellate review, you (or more likely your lawyer) generally must have objected to the mistake when it occurred or at a later time when the trial court still had the chance to correct the error.[69] In other words, you usually are not allowed to raise an issue for the first time on appeal. Instead, you must have raised the issue at your trial so that the trial court could have addressed it before it became a problem. By doing so, you have "saved" this objection in the record, notifying the appellate court that you pointed out the error when it occurred.

In general, you must have identified the specific legal basis for your objection at trial in order to preserve the error for appellate review.[70] In other words, it is not enough to have objected without explaining at the time of the objection why you were objecting. However, an appellate court will also review an error on legal grounds that you did not specify at trial if the trial court expressly decided the particular issue in response to an objection by a party.[71] You may also have preserved errors for

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waive the right to a speedy trial, you can waive the right to a double jeopardy defense if you agree to do so in your plea bargain. People v. Allen, 86 N.Y.2d 599, 603, 658 N.E.2d 1012, 1015, 635 N.Y.S.2d 139, 142 (1995); *see also* Preiser, McKinney Practice Commentaries, N.Y. CRIM. PROC. LAW § 220.10 (2009). The Court of Appeals later held that the right to appeal a constitutional double jeopardy ruling may be waived as part of a general waiver of the right to appeal even if the waiver agreement does not specifically state that the right to appeal on the basis of double jeopardy is being waived. People v. Muniz, 91 N.Y.2d 570, 575, 696 N.E.2d 182, 186, 673 N.Y.S.2d 358, 362 (1998) (finding that there is "no principled basis upon which to conclude that a defendant cannot impliedly waive a claim of double jeopardy . . ." when the waiver agreement allows the defendant to appeal from all non-waivable aspects of the case).

67. *See* People v. Espino, 279 A.D.2d 798, 799, 718 N.Y.S.2d 729, 730 (3d Dept. 2001) (noting a defendant may waive the right to appeal a sentence as harsh and excessive but never the right to appeal the legality of a sentence).

68. *See* People v. Hidalgo, 91 N.Y.2d 733, 737, 698 N.E.2d 46, 48, 675 N.Y.S.2d 327, 329 (1998) (finding that a defendant's general waiver of the right to appeal prevented her from appealing her sentence as harsh and excessive).

69. If you make no protest, the intermediate appellate court cannot review the error as a "question of law." N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009). But, an appellate court nonetheless may decide to review the error "in the interest of justice." N.Y. CRIM. PROC. LAW § 470.15(6)(a) (McKinney 2009). The "in the interest of justice" exception to the preservation requirement is discussed in Part (b) of this Section.

70. *See* People v. Hawkins, 11 N.Y.3d 484, 492, 900 N.E.2d 946, 950, 872 N.Y.S.2d 395, 399 (2008) (holding that a motion must be "specifically directed" at the error to preserve it); People v. Dien, 77 N.Y.2d 885, 886, 571 N.E.2d 69, 70, 568 N.Y.S.2d 899, 900 (1991) (holding that because the defendant made only a general objection, he failed to preserve his argument for appellate review); People v. Rivera, 73 N.Y.2d 941, 942, 537 N.E.2d 618, 618, 540 N.Y.S.2d 233, 233 (1989) (holding that defendant's general objection did not preserve his argument for appellate review). *But see* People v. Vidal, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889, 309 N.Y.S.2d 336, 340 (1970) (finding an exception to the rule that a general objection is insufficient to preserve an argument for appellative review and holding that "[i]f the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient.").

71. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009) (a question is preserved "if in response [sic] to a protest by a party, the [trial] court expressly decided the question raised on appeal"). *See* People v. Johnson, 144 A.D.2d 490, 491, 534 N.Y.S.2d 207, 209 (2d Dept. 1988) (holding that an issue was preserved even without objection because the trial court expressly decided the question raised by the appeal); *see generally* Preiser, Practice Commentaries, Book 11A, N.Y. Crim. Proc. Law § 470.05 (McKinney 2009) (summarizing New York Criminal Procedure Law § 470.05, which explains when an appeal will be allowed).

review on appeal through a request, rather than an objection.[72] This means that if you asked the judge for a particular ruling or instruction but he refused, you may challenge the trial court's refusal even if you did not formally object. [73] However, if you want to challenge an error in the ruling or instruction that the trial court chose to give instead of your instruction, you must have objected.[74] In any event, the issue must have been brought to the trial court's attention.[75]

(a) Errors Not Subject to the Preservation Requirement

If you did not object to an error at your trial and the court did not consider the specific issue, an appellate court will usually refuse to consider the error on appeal. But, you may still be able to appeal if the error deals with a fundamental aspect of the fairness of your trial. Errors like this fall into two categories: errors reviewed "in the interest of justice" and errors that disrupt the "mode of proceedings."

Any unpreserved error may be reviewed in the interest of justice by New York's Appellate Division courts (the intermediate appellate courts).[76] Thus, if something happened that was so unfair that it may have affected your conviction, but it was not objected to or otherwise preserved, you can still argue that the Appellate Division should consider it in the interest of justice. That is, even if the error you wish to appeal is generally subject to the preservation requirement, you may ask an Appellate Division

72. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009). *See also* People v. Leisner, 73 N.Y.2d 140, 147, 535 N.E.2d 647, 650, 538 N.Y.S.2d 517, 520 (1989) (holding that a trial court's failure to give the jury the requested jury instruction was an error preserved for appellate review since there was no "clear intent" by the defense to abandon the request).

73. "Instruction" refers to what the judge tells the jury it should or should not consider as well as what questions the jury must answer when it is deciding the verdict in your case.

74. *See* People v. Narayan, 54 N.Y.2d 106, 112–113, 429 N.E.2d 123, 125, 444 N.Y.S.2d 604, 606 (1981) (holding that where the defense requested to speak to his client on the second day of an order that prohibited such conversation, but had not made the same request on the first day, only the refusal on the second day is preserved for appeal because of that request, not the order itself or its application to the first day). If the trial court grants the instruction that you (or your lawyer) requested but makes a mistake or otherwise gives an instruction different than the instruction that you requested, this error is not preserved for appeal unless you objected to it. *See* People v. Whalen, 59 N.Y.2d 273, 280, 451 N.E.2d 212, 215, 464 N.Y.S.2d 454, 457 (1983) ("Inasmuch as defendant's request was initially granted and his comments after the charge did not alert the [t]rial [j]udge to the error so as to afford an opportunity to correct himself, defendant must be deemed to have waived any objection to the alibi instruction.").

75. *See* Gary Muldoon, Handling a Criminal Case in New York § 18:188 (2015). This requirement applies to appeals brought by the prosecution too. *See* People v. Santiago, 80 N.Y.2d 916, 917, 602 N.E.2d 1118, 1118, 589 N.Y.S.2d 302, 303 (1992).

76. N.Y. CRIM. PROC. LAW § 470.15(3)(c), (6)(a) (McKinney 2009). *See, e.g.*, People v. Jones, 81 A.D.2d 22, 42, 440 N.Y.S.2d 248, 261 (2d Dept. 1981) (saying "the failure to adequately preserve an issue in this manner would not, however, preclude our court from reviewing the matter in a proper case '[a]s a matter of discretion in the interest of justice'") (internal citation omitted), People v. DeRennzio, 25 A.D.2d 652, 653, 268 N.Y.S.2d 542, 543 (1st Dept. 1966) (saying "[w]e recognize our right to reverse in the interests of justice."). *But see* People v. Morris, 111 A.D.2d 414, 414, 489 N.Y.S.2d 610, 611 (2d Dept. 1985) (saying "our interests of justice powers do not authorize review of issues waived by a plea of guilty") (internal quotations and citations omitted).

court to consider your appeal.[77] Note that if you did not preserve an issue, an appellate court may review it, but is not required to do so.[78]

The Court of Appeals (the highest court), by contrast, is limited by the New York State Constitution and can only review "questions of law."[79] This means that an issue must have been preserved by objection.[80] But errors that disrupt the organization of the court or the mode of proceedings are treated as questions of law even without preservation by objection. So, if the error you wish to appeal falls into the limited class of errors that affect the organization of the court or the mode of proceedings, you can appeal even if you did not preserve the error or agreed at trial to accept the

77. N.Y. CRIM. PROC. LAW § 470.15(3)(c), (6)(a) (McKinney 2009).

78. *Compare* People v. Benton, 196 A.D.2d 755, 756, 601 N.Y.S.2d 918, 919 (1st Dept. 1993) (exercising court's judgment to review an incorrect decision that classified the defendant as a second violent felony offender), with People v. Walton, 309 A.D.2d 956, 957, 766 N.Y.S.2d 93, 94 (2d Dept. 2003) (declining to review defendant's unpreserved claim that he had been wrongly deemed a second violent felony offender). *See also* People v. Gray, 86 N.Y.2d 10, 19–20, 22, 652 N.E.2d 919, 921–923, 629 N.Y.S.2d 173, 175–177 (1995) (holding that a claim of legal insufficiency of the evidence must be preserved for review as a "question of law," but noting that an intermediate appellate court may decide to review such a claim "in the interest of justice" even if it was not preserved). *See generally* Preiser, Practice Commentaries, Book 11A, N.Y. CRIM. PROC. LAW § 470.05 (McKinney 2009).
If a court declines to hear your non-preserved claims, one strategy is to include them in an ineffective assistance claim. For guidance on how to make this type of claim, see Chapter 12, Part B of the *JLM*.

79. N.Y. CONST. art. VI, § 3(a) ("The jurisdiction of the court of appeals shall be limited to the review of questions of law [subject to certain exceptions].").

80. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009) ("For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered.").

error.[81] These errors are considered so fundamental that they are not subject to the preservation requirement at all.

In either situation, successful appeals are generally based on a violation of trial procedure rules or a violation of your "fundamental constitutional rights."[82] Errors that can be raised for the first time on appeal include the following scenarios:

(1) You were tried twice for the same offense in violation of your rights against double jeopardy guaranteed by the New York State or U.S. Constitutions[83] (this protection does not apply to rights against double jeopardy provided by statute rather than a constitution);[84]
(2) You were deprived of your right to a lawyer; [85]
(3) You were deprived of your right to be present at an important stage of the trial[86] or other important court proceedings;[87]
(4) Your lawyer was not told of the contents of a note the judge received from the jury before the judge answered the jury's questions;[88]
(5) You were deprived of your right to have your trial supervised by a judge;[89] or
(6) Your sentence, or the way in which it was determined, was illegal.[90]

(b) Errors Subject to the Preservation Requirement

Errors that do not fall into the categories that were presented in Section (a) above will not be reviewed by the appellate court unless it was preserved in the trial court.[91] Errors that will only be reviewed when preserved at the trial court include:

(1) You want to withdraw a guilty plea or want the judgment of conviction vacated;[92]
(2) A challenge to the constitutionality of a statute;[93]
(3) Deprivation of your right to confront a witness;[94]
(4) Admissibility of evidence;[95]
(5) Comments or conduct of counsel, or of the court;[96]
(6) Severance or joint trials. A joint trial occurs when only one trial is held but the case involves more than one defendant. A severance allows a defendant to be tried separately from the other defendants in the case on one or more counts.;[97]
(7) Jurisdiction and venue. Jurisdiction is the state and court that the case is in, while venue is the county.;[98]
(8) Jury selection;[99] or
(9) Excessive or harsh sentences.[100]

Note that because most errors are not preserved for appeal, this is an incomplete and partial list. You should assume that an error will be subject to the preservation requirement, and needs to be raised at trial in order to be argued on appeal.

4. Which Courts Will Consider Your Appeal

If you decide to appeal, you must submit your appeal to the correct court in order for it to be considered. There are two types of courts to which appeals can be made: (1) an intermediate appellate

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81. *See* People v. Mehmedi, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (holding that a violation of defendant's right to be present at all material stages of the trial was automatically preserved for appeal even though defendant did not make an objection at trial and "even though counsel may have consented to the procedure"); People v. Patterson, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976), *aff'd*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) ("A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law.").

82. The general rule is that even violations of constitutional rights must be preserved. *See* People v. Kelly, 5 N.Y.3d 116, 119–120, 832 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005) ("[I]n a very narrow category of cases, we have recognized so-called 'mode of proceedings' errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted."); People v. Gray, 86 N.Y.2d 10, 19–22, 652 N.E.2d 919, 921–923, 629 N.Y.S.2d 173, 175–177 (1995) (holding that an objection is necessary for a constitutional error to be reviewed as a matter of law unless the error is among the very narrow class of "mode of proceedings" errors); People v. Voliton, 83 N.Y.2d 192, 195–196, 630 N.E.2d 641, 643, 608 N.Y.S.2d 945, 947 (1994) (declining to review

on appeal a defendant's constitutional challenge to a seizure by the police because the issue was not preserved and did not "impair the essential validity of the criminal proceedings"); Ulster County Court. v. Allen, 442 U.S. 140, 151 n.10, 99 S. Ct. 2213, 2221, n.10, 60 L. Ed. 2d 777, 788 n.10 (1979) (quoting People v. McLucas, 15 N.Y.2d 167, 172, 204 N.E.2d 846, 848, 256 N.Y.S.2d 799, 802 (1965)) ("[T]he New York Court of Appeals has developed an exception to the State's contemporaneous-objection policy that allows review of unobjected-to errors that affect 'a fundamental constitutional right.'").

83. U.S. CONST. amend. V; N.Y. CONST. art. I, § 6; *see* People v. Prescott, 66 N.Y.2d 216, 219, 486 N.E.2d 813, 814, 495 N.Y.S.2d 955, 956 (1985) (holding that a claim of double jeopardy can be raised for the first time on appeal because it is a "fundamental principle of our legal system that a defendant may not be twice placed in jeopardy for the same offense"); People v. Michael, 48 N.Y.2d 1, 7, 394 N.E.2d 1134, 1137, 420 N.Y.S.2d 371, 374 (1979) (*per curiam*) (holding that a defendant's constitutional double jeopardy claim presents a question of law reviewable on appeal despite the defendant's failure to raise the claim in the trial court). However, a claim of double jeopardy cannot be raised on appeal if the circumstances surrounding the defendant's failure to object amounted to a waiver of the right to appeal on double jeopardy grounds, or if the defendant has waived the right to appeal by a waiver agreement. *See* People v. Muniz, 91 N.Y.2d 570, 574, 696 N.E.2d 182, 185, 673 N.Y.S.2d 358, 361 (1998) (holding that a claim of constitutional double jeopardy may validly be waived by a defendant); People v. Michallow, 201 A.D.2d 915, 916, 607 N.Y.S.2d 781, 783 (4th Dept. 1994) (noting that constitutional double jeopardy protections are "so fundamental that they are preserved despite the failure to raise them" by objecting, but holding that defendant's active participation in discussions relating to the court's declaration of a mistrial was implied consent to the mistrial and thus a waiver of her right against double jeopardy). For a discussion on waiver of the right to appeal, including waiver of the right to appeal a claim of double jeopardy, see Part (B)(2) of this Chapter.

84. *See* People v. Biggs, 1 N.Y.3d 225, 231, 803 N.E.2d 370, 374, 771 N.Y.S.2d 49, 53 (2003) (stating that unlike state and federal constitutional double jeopardy claims, which are reviewable even if not preserved at the trial court level, an unpreserved statutory double jeopardy claim is not reviewable).

85. For you to raise this claim for the first time on appeal, you have to show that your trial court record on its own makes it clear that you were deprived of your right to a lawyer. *See* People v. McLean, 15 N.Y.3d 117, 121, 931 N.E.2d 520, 522, 905 N.Y.S.2d 536, 538 (2010) (holding that a defendant may make a deprivation-of-counsel claim for the first time on appeal only where the trial court record makes it completely clear that the defendant was deprived of a lawyer); People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (finding a valid deprivation-of-counsel claim when police questioned the defendant, without counsel present, the morning after a lawyer had visited him in prison).

86. *See* People v. Mehmedi, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (affirming reversal of defendant's conviction on the basis that instructions were given to the jury in defendant's absence, even though defendant's trial counsel did not object to defendant's being absent); see also People v. Kelly, 11 A.D.3d 133, 142–143, 781 N.Y.S.2d 75, 84 (1st Dept. 2004), *aff'd*, 5 N.Y.3d 116, 832 N.E.2d 1179, 799 N.Y.S.2d 763 (2005) (acknowledging that a violation of the right of a defendant to be present at the material stages of the trial is preserved for appellate review even without an objection, but finding that defendant's right to be present had not been violated).

87. *See* People v. McAdams, 22 A.D.3d 885, 885–886, 802 N.Y.S.2d 531, 532 (3d Dept. 2005) (finding that a denial of defendant's right to be present at sidebar conferences with potential jurors, including one conference about possible juror bias, constitutes a denial of defendant's right to be present at a material stage of the proceeding and is a reversible error on appeal even though defendant did not object at trial). You may, however, waive your right to be present if you knowingly, voluntarily, and intelligently make the waiver. *See* People v. Keen, 94 N.Y.2d 533, 538–539, 728 N.E.2d 979, 982, 707 N.Y.S.2d 380, 383 (2000) (holding that defendant's waiver of his right to be present for certain court proceedings was effective); People v. Williams, 92 N.Y.2d 993, 996, 706 N.E.2d 1187, 1189, 684 N.Y.S.2d 163, 165 (1998) ("The right to be present during sidebar questioning of prospective jurors on matters of bias or prejudice may be waived by a voluntary, knowing, and intelligent choice.") (citation omitted); People v. Antommarchi, 80 N.Y.2d 247, 250, 604 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992) (holding that a defendant has a right to be present at sidebar questioning of jurors when the questioning explores prospective jurors' backgrounds and relates to their ability to weigh the evidence objectively, but not when questioning relates to physical impairment, family obligations, or work commitment); People v. Dokes, 659, 595 N.E.2d 836, 838, 584 N.Y.S.2d 761, 763 (1992) (finding that a defendant's statutory right to be present at trial includes the right to be present during the selection of the jury, the introduction of evidence, the closing argument of counsel, and the court's charge to the jury).

88. *See* People v. Tabb, 13 N.Y.3d 852, 853, 920 N.E.2d 90, 90, 891 N.Y.S.2d 686, 686 (2009) (reversing conviction because the absence of any record that the judge showed a jury note to the defense was a mode of proceedings error); People v. O'Rama, 78 N.Y.2d 270, 276–280, 579 N.E.2d 189, 192–194, 574 N.Y.S.2d 159, 162–164 (1991) (holding that court's failure to read a jury note to defense counsel before giving the jury a charge was

reviewable by Court of Appeals "notwithstanding that defense counsel did not object to the court's procedure until after the supplementary charge had been given"); People v. Kisoon, 23 A.D.3d 18, 22–23, 801 N.Y.S.2d 69, 72 (2d Dept. 2005) (holding court's failure to give defendant's attorney a complete reading of jury's question was preserved for appellate review even without an objection at trial); *but see* People v. Williams, 38 A.D.3d 429, 430–431, 833 N.Y.S.2d 29, 30–31 (1st Dept. 2007) (holding that where judge talked to jury foreperson to tell her he would address her question when defendant, counsel, and jury were all present, this conversation was not significant and would not have required input from the defense attorney, and thus that error was not preserved since it was not objected to by the defense).

89. *See* People v. Ahmed, 66 N.Y.2d 307, 311–312, 487 N.E.2d 894, 896–897, 496 N.Y.S.2d 984, 986–987 (1985) (reversing defendant's conviction where the trial judge had, with defendant's consent, been absent for part of the jury deliberations, leaving a law clerk to answer two questions from jurors). *Cf.* People v. Hernandez, 94 N.Y.2d 552, 556, 729 N.E.2d 691, 693–694, 708 N.Y.S.2d 34, 36–37 (2000) (holding that the fact that the judge was not in the courtroom during a mechanical readback of trial testimony does not constitute a violation of the defendant's right to judge supervision of trial).

90. *See* People v. Samms, 95 N.Y.2d 52, 55–56, 731 N.E.2d 1118, 1120–1121, 710 N.Y.S.2d 310, 312–313 (2000) (discussing which illegal sentence claims can be raised for the first time on appeal); People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (noting that among the "appellate claims that may not be waived" are "challenges to the legality of court-imposed sentences"); note, however, that this applies to sentences that are illegal (that is, not allowed by law) and not merely harsh or excessive, which are within the legal sentence that the trial court was allowed to impose). *See* Part D(2) of this Chapter for a discussion of the difference between illegal and excessive sentences. Also, note that a claim that the verdict is against the "weight of the evidence" is a question of law that does not need to be preserved in order to be raised on appeal. *See* People v. Roman, 217 A.D.2d 431, 431, 629 N.Y.S.2d 744, 745 (1st Dept. 1995) (finding that an appellate claim that the verdict was against the weight of the evidence need not have been raised before the trial court because a trial court has no authority to make a decision on this type of claim); People v. Bleakley, 69 N.Y.2d 490, 493–495, 508 N.E.2d 672, 674–675, 515 N.Y.S.2d 761, 762–763 (1987) (describing "weight of the evidence" analysis).

91. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009).

92. *See* People v. Douglas, 38 A.D.3d 1063, 1063, 831 N.Y.S.2d 585, 586 (3d Dept. 2007) (holding that defendant could not challenge the validity or voluntariness of his guilty plea because the issues were unpreserved for review since he did not move to withdraw the plea or vacate the judgment); People v. Tuper, 256 A.D.2d 636, 636, 681 N.Y.S.2d 808, 809 (3d Dept. 1998) (holding that defendant could not contend his guilty plea should not have been accepted because he had neither moved to withdraw the plea before sentencing nor moved to vacate the judgment after conviction).

93. *See* People v. Davidson, 98 N.Y.2d 738, 739, 780 N.E.2d 972, 972–973, 751 N.Y.S.2d 161, 161–162 (2002) (holding that defendant's constitutional challenge to loitering statute was not properly preserved because it was raised for the first time on motion to set aside verdict); People v. Navas, 114 A.D.2d 425, 426, 494 N.Y.S.2d 141, 142 (2d Dept. 1985) (holding that the defendant's constitutional challenge to the second violent felony offender statute was not preserved for appellate review because it was not raised prior to sentencing).

94. *See* People v. Hickman, 60 A.D.3d 865, 866, 875 N.Y.S.2d 530, 531–532 (2d Dept. 2009) (finding that defendant could not raise the issue of Sixth Amendment right of confrontation on appeal when he failed to move to strike witness' testimony at trial); People v. Mack, 14 A.D.3d 517, 517, 787 N.Y.S.2d 397, 398 (2d Dept. 2005) (holding that issue of right to confrontation could not be raised on appeal because defendant did not specify confrontation rights as the grounds for objecting to witness testimony and motion for a mistrial).

95. *See* People v. Meeks, 56 A.D.3d 800, 801, 868 N.Y.S.2d 287, 288 (2d Dept. 2008) ("The defendant's contention that the Supreme Court erred in admitting into evidence three photographs of the victim's injuries is partially unpreserved for appellate review, as the defendant did not object to the admission of the first and third photographs."); People v. Metellus, 54 A.D.3d 601, 602, 864 N.Y.S.2d 408, 409 (1st Dept. 2008) (holding that defendant could not raise claim of constitutional right to introduction of extrinsic evidence because such a right was never raised at trial).

96. *See* People v. West, 86 A.D.3d 583, 584, 926 N.Y.S.2d 659, 661 (2d Dept. 2011) (holding that defendant could not make argument on appeal that prosecutor's remarks during summation were improper and deprived him of a fair trial because defendant did not object during trial or made unspecified, general objections); People v. Bey, 71 A.D.3d 1156, 1157, 898 N.Y.S.2d 189, 190 (2d Dept. 2010) (same); People v. Davenport, 38 A.D.3d 1064, 1066, 831 N.Y.S.2d 587, 589 (3d Dept. 2007) (ruling that objection to trial judge's caustic remarks as showing bias was not preserved because objection was not made at trial); People v. Maxam,

court[101] or (2) the Court of Appeals of the State of New York, which is the highest state court.[102] In most cases, you will need to file an appeal with an intermediate appellate court before the Court of Appeals will consider hearing your case. If you have been sentenced to death, however, you have the right to appeal directly to the Court of Appeals without having to go through an intermediate appellate court.[103]

Note that there are many intermediate appellate courts, so unless you are appealing directly to the Court of Appeals, you need to figure out appellate court is the right one for your case. This will depend on where you were convicted.[104] For example, if you were convicted of a felony in a New York Supreme Court, you must appeal to the appellate division of the department in which you were convicted.[105] Appendix A at the end of this Chapter can help you figure out where to file your appeal.

You will also need to figure out if you need permission to file your appeal. In general, you do not need permission if you are appealing: (1) the trial court's judgment against you,[106] (2) your sentence,[107]

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301 A.D.2d 791, 793, 753 N.Y.S.2d 599, 601 (3d Dept. 2003) (finding that defendant's argument that court was biased and should have recused itself was unpreserved for review because never raised at trial).

97. *See* People v. Walker, 71 N.Y.2d 1018, 1020, 525 N.E.2d 748, 749, 530 N.Y.S.2d 103, 103 (1988) (holding that defendant's request for severance was not preserved for appeal when made before first trial that resulted in a mistrial, but not the second, subsequent trial); People v. Ahmr, 22 A.D.3d 593, 594, 804 N.Y.S.2d 331, 333 (2d Dept. 2005) ("The defendant failed to preserve for appellate review his contention that the Supreme Court erroneously denied the severance motion of a codefendant, since he did not join in the codefendant's motion nor did he made any such motion on his own behalf.").

98. *See* People v. Rote, 28 A.D.3d 868, 869, 812 N.Y.S.2d 191, 192 (3d Dept. 2006) (finding that defendant had not preserved for review the argument that his failure to enter a plea deprived the court of personal jurisdiction); People v. Cornell, 17 A.D.3d 1010, 1011, 794 N.Y.S.2d 226, 227 (4th Dept. 2005) (holding that, by not moving to dismiss or get a jury charge for improper venue on the count of rape that occurred in a different county, defendant did not preserve the issue for review).

99. *See* People v. Hicks, 6 N.Y.3d 737, 739, 843 N.E.2d 1136, 1138, 810 N.Y.S.2d 396, 398 (2005) (holding that defendant could not challenge juror's qualification to serve nor the adequacy of the court's questioning because no objection was made at trial); People v. Jones, 11 A.D.3d 902, 903, 782 N.Y.S. 2d 322, 323 (4th Dept. 2004) (finding that defendant's argument of prosecutorial misconduct from comments during *voir dire* was unpreserved for appellate review).

100. *See* People v. Stokes, 28 A.D.3d 592, 592, 813 N.Y.S.2d 503, 503 (2d Dept. 2006) ("The defendant's contention that the sentencing court should have adjudicated him a youthful offender is unpreserved for appellate review, since he failed to object or to move to withdraw his plea on this ground."); People v. Jones, 136 A.D.2d 740, 740–41, 524 N.Y.S.2d 79, 81 (2d Dept. 1988) (holding that defendant failed to preserve the argument that he was entitled to receive the benefit of the lesser sentence of sexual misconduct instead of rape in the first degree by not raising it at trial).

101. *See generally* N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2009). An intermediate appellate court is any court that hears appeals other than the Court of Appeals. There are two kinds of intermediate appellate courts: the appellate division and the appellate term. The appellate terms are created by the appellate divisions to also hear appeals and ease the workloads of the appellate division. Appellate terms are located in the First and Second Departments only. For a diagram of New York's courts, see the inside back cover of the *JLM*.

102. *See generally* N.Y. CONST. art. VI. New York is somewhat unusual in that its highest court is not called the "Supreme Court." (In fact, a "supreme court" is a type of trial court in New York.) For a diagram of New York's courts, see the inside back cover of the *JLM*.

103. N.Y. CRIM. PROC. LAW § 450.70(1) (McKinney 2009).

104. N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2009).

105. N.Y. CRIM. PROC. LAW § 450.60(1) (McKinney 2009).

106. N.Y. CRIM. PROC. LAW § 450.10(1) (McKinney 2009). Though a trial court may make many orders and rulings during your trial, you generally cannot appeal these rulings until there is a final judgment. *See*, *e.g.*, People v. Boyd, 91 A.D.2d 1045, 1046, 458 N.Y.S.2d 643, 644 (2d Dept. 1983) (holding that any objection to an intermediate order denying a motion to suppress evidence is reviewable only on an appeal from judgment); People v. Pollock, 67 A.D.2d 608, 608, 412 N.Y.S.2d 12, 12 (1st Dept. 1979), *aff'd*, 50 N.Y.2d 547, 550, 407 N.E.2d 472, 473, 429 N.Y.S.2d 628, 629 (1980) (stating no separate appeal is available for an order denying a motion to set aside a verdict).

107. N.Y. CRIM. PROC. LAW § 450.10(2) (McKinney 2009). Note that the statute says it excludes appeals of

or (3) an order granting the District Attorney's motion under Section 440.40 of the Criminal Procedure Law to set aside your sentence to impose a longer sentence.[108] This is because New York law grants everyone the *right* to appeal these decisions to an intermediate appellate court.

For other challenges, however, you may need to get permission before you file an appeal. For example, if you have already made a motion to vacate your judgment under Section 440.10 of the New York Criminal Procedure Law or a motion to set aside your sentence under Section 440.20, and the court has denied your motion, you will need to ask the court for permission to appeal the court's denial.[109] Note that if you need to ask for permission to appeal, this means that a court may decline to consider your appeal, whereas a court *must* consider your appeal if you have the right to appeal on that issue.

If an intermediate appellate court reviews your case and makes a decision, and you are unsatisfied with the decision, you may ask for permission to appeal the decision to the Court of Appeals. However, you do not have a *right* to appeal an appellate court's decision to the Court of Appeals. Note that the Court of Appeals will only consider one application for permission to appeal per case, including applications addressed to a justice of the appellate division.[110] If the Court of Appeals decides to hear your case, it will issue a certificate of leave to appeal.[111] Part F explains this process in more detail.

Finally, keep in mind that filing an appeal is not the only way to challenge your conviction or your sentence. You may be able to file a motion to vacate the judgment against you[112] or to set aside your sentence.[113] Such a motion, called an Article 440 motion, can be filed before, after, or at the same time as an appeal. A motion differs from an appeal in that an appeal must be based only on matters already on the record (things that were said in trial court or in papers previously given to the trial court). A motion, on the other hand, involves matters not on the record, such as advice your attorney gave you or evidence that was never brought up in court. Thus, when the record from your trial does not contain the necessary facts for a court to decide the issue that you want to raise, you should file an Article 440

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allegedly excessive sentences if you agreed to the sentence as part of a plea bargain. But the Court of Appeals decided that this part of the statute is unconstitutional because the legislature does not have the power to prevent the appellate division from hearing these appeals. *See* People v. Pollenz, 67 N.Y.2d 264, 270, 493 N.E.2d 541, 543, 502 N.Y.S.2d 417, 419 (1986) (holding that the legislature could not prohibit the appellate division from hearing appeals based on excessive sentences). § 450.10(2) of the New York Criminal Procedure Law may still be applicable in cases where the intermediate appellate court is an appellate term. *See* Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2009). Note also that, though the statute itself may not prevent an appeal of an allegedly excessive sentence, you may have voluntarily waived your right to appeal your sentence or conviction as part of a plea or negotiated sentence. For more information, see Part B(2) of this Chapter.

108. N.Y. CRIM. PROC. LAW § 450.10(4) (McKinney 2009).

109. *See* N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2009). If you obtain permission, you can appeal a sentence that you could not otherwise appeal under § 450.10(1) and (2) of the New York Criminal Procedure Law. You can also appeal the denial of your § 440 motion to vacate a judgment or set aside a sentence. See Form B-2 in Appendix B at the end of this Chapter for a sample application for permission to appeal. You may make only one such application, so do so carefully. The procedure for requesting leave to appeal under § 460.15 varies depending on which intermediate court you are applying to. N.Y. CRIM. PROC. LAW § 460.15(2) (McKinney 2009). *See generally* N.Y. COMP. CODES R. & REGS. tit. 22, § 640.1(c) (2020), N.Y. COMP. CODES R. & REGS. tit. 22, §§ 731.1(c), 732.1 (2020) (describing these procedures).

110. *See* People v. Liner, 70 N.Y.2d 945, 945, 519 N.E.2d 619, 619, 524 N.Y.S.2d 673, 673 (1988) (dismissing appeal made by defendant's lawyer on ground that court could not hear appeal after defendant had already made *pro se* application for appeal to the appellate division); People v. Nelson, 55 N.Y.2d 743, 743, 431 N.E.2d 640, 640–41, 447 N.Y.S.2d 155, 155–56 (1981) (dismissing appellate division's grant of permission to appeal while prior application was pending in Court of Appeals).

111. *See* N.Y. CRIM. PROC. LAW § 460.20 (McKinney 2009); *see also* N.Y. CRIM. PROC. LAW § 450.90 (McKinney 2009) (providing for taking an appeal after a certificate granting leave to appeal has been issued). If you are appealing an appellate division's order, a judge from the same department of the appellate division may grant you a certificate of leave to appeal before the Court of Appeals. N.Y. CRIM. PROC. LAW § 460.20(2)(a) (McKinney 2009).

112. *See* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2009).

113. *See* N.Y. CRIM. PROC. LAW § 440.20 (McKinney 2009).

motion.[114] For a more detailed description of when you can file an Article 440 motion and which claims you may raise in an Article 440 motion, see Chapter 20 of the *JLM*.

C. What You Can Ask the Courts to Do *Before* Your Appeal is Heard

Before an appellate court hears your appeal, you can ask the court system to help you with several things, including finding a lawyer and getting a transcript of your trial. You can also ask the appellate court to stay your judgment and release you on bail. This part discusses each of these things in more detail.

1. Getting a Lawyer

You have a constitutional right to a lawyer on direct appeal.[115] This means if you cannot afford a lawyer, upon request, the appellate court will appoint a lawyer to represent you at no cost.[116] Your right to a lawyer applies when you or the government appeals a trial court's final judgment. When you were sentenced, your lawyer was supposed to advise you of the following: that you can appeal, how to appeal, and how to get a new lawyer for your appeal. Your lawyer should also have asked you if you wanted to appeal. If you said yes, he also should have filed the initial paperwork for you.[117] To get a lawyer for your appeal, you will need to show proof that you do not have enough money to hire an attorney and pay the expenses of your appeal.[118] Appendix B provides samples of the papers you should file to make this request.

If you decide that you do not want a lawyer to represent you on appeal, you may be able to prepare your appeal and appear in court on your own. This is called appearing "*pro se*." Note, however, that you do *not* have a constitutional right to represent yourself on appeal—the court may choose not to allow you to represent yourself.[119]

2. Requesting a Transcript

You can ask the trial court to provide you with a free transcript of your trial. In addition, you may ask for permission to appeal on "the original record." You should do this if your appeal will be based

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114. *See* People v. Harris, 109 A.D.2d 351, 353, 491 N.Y.S.2d 678, 682 (2d Dept. 1985) (explaining that an Article 440 motion is designed to "inform a court of facts not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the judgment.").

115. Anders v. California, 386 U.S. 738, 741–744, 87 S. Ct. 1396, 1398–1400; 18 L. Ed. 2d 493, 496–497 (1967) (holding that an indigent person has the right to appellate representation); Douglas v. California, 372 U.S. 353, 357–358, 83 S. Ct. 814, 816–817; 9 L. Ed. 2d 811, 814–815 (1963) (holding that the 14th Amendment requires states to provide indigent persons representation on their appeals as of right); People v. Garcia, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) ("[O]n a People's appeal, a defendant has the right to appellate counsel of defendant's choice and the right to seek appointment of counsel upon proof of indigency.").

116. Usually the court will appoint a new lawyer on appeal. *See, e.g.*, People v. Rhodes, 245 A.D.2d 844, 845, 666 N.Y.S.2d 355, 356–357 (3d Dept. 1997) ("Concluding that it is necessary that independent counsel take a fresh look at this proceeding so as to assess whether any non-frivolous issues, including a claim of ineffective assistance in connection with the representation of defendant before the sentencing court, should be raised, we hereby relieve defense counsel of this assignment.").

117. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 606.5(b), 671.3(a), 821.2(a) (2020).

118. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 671.5 (2020); *see generally* People v. West, 100 N.Y.2d 23, 28, 789 N.E.2d 615, 619, 759 N.Y.S.2d 437, 441 (2003) (holding that "[r]equiring a defendant to apply for legal representation and providing instructions on how to do so" is constitutionally acceptable without providing counsel to assist in that application).

119. *See* Martinez v. Court of Appeal of California, 528 U.S. 152, 163, 120 S. Ct. 684, 692, 145 L. Ed. 2d 597, 607 (2000) ("Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*.").

on something that happened at trial or a hearing. If the trial court grants this request, the appellate court and the prosecution will be given copies of the record.[120]

3. Requesting a Stay

After filing and serving notice of your appeal, you can request a judge to "stay" your judgment. A stay delays or interrupts the carrying out of your sentence until after your appeal. If you are appealing a death sentence, or a judgment including a death sentence, filing a notice of appeal automatically stays the carrying out of your sentence.[121] Note that you may file only one stay application after filing a notice of appeal, so prepare your application carefully.[122]

If you decide to apply for a stay, you will need to figure out which court to ask for the stay. This will depend on which court tried and sentenced you and which court will hear your appeal. For example, if you are appealing to an appellate division from the judgment of a supreme court, you may apply for a stay from any appellate division or supreme court judge in the county where the judgment was entered.[123] *See* Appendix A at the end of this Chapter for help selecting the right court.

4. Requesting Release from Jail

While you are waiting for your appeal to be heard, you can request for a judge to release you on bail or on your own "recognizance." To be released on your own recognizance means that a court will permit you to leave jail on the condition that you will appear in court whenever your attendance is required, and that you will comply with the orders and processes of the court.[124]

You do not have a right to bail or recognizance while waiting for appeal.[125] But, depending on your offense, a judge may be able to grant your request for bail or recognizance. In many cases, a judge has discretion to determine whether to release you. This means that the law does not require that the judge keep you in custody or release you, and you may not appeal the judge's decision on this matter.[126] However, there are some cases where the judge does not have this discretion and the law alone determines whether you must be held in custody.[127] For example, if you were convicted of a Class A

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120. *See* Appendix B-3 of this Chapter for sample papers to request free trial transcripts and copies of the record.

121. N.Y. CRIM. PROC. LAW § 460.40(1) (McKinney 2009).

122. N.Y. CRIM. PROC. LAW § 460.50(3) (McKinney 2009).

123. N.Y. CRIM. PROC. LAW § 460.50(2)(a) (McKinney 2009).

124. N.Y. CRIM. PROC. LAW § 510.40(2) (McKinney 2009). To determine which court can grant your application for a stay, *see* N.Y. CRIM. PROC. LAW § 460.50(2) (McKinney 2009).

125. Numerous cases have indicated that you do not have a right to bail or recognizance after having been convicted. *See*, *e.g.*, Gold v. Shapiro, 62 A.D.2d 62, 65, 403 N.Y.S.2d 906, 907 (2d Dep't. 1978), *aff'd*, 45 N.Y.2d 849, 850 382 N.E.2d 767, 410 N.Y.S.2d 68, 68 (1978) ("[T]here is no constitutional right to bail after conviction."); *see also* People v. Hinspeter, 190 Misc.2d 614, 617, 740 N.Y.S.2d 591, 593, (Sup. Ct. Westchester County 2002). You do have the constitutional right to ensure that the court does not exercise its discretion unreasonably or arbitrarily and that bail is not excessive. U.S. CONST. amend. VIII; N.Y. Const. art. 1, § 5; *see also* Finetti v. Harris, 609 F.2d 594, 595 (2d Cir. 1979) ("Only if there is no rational basis in the record to support the denial of bail [pending appeal] may there be a violation of a state prisoner's constitutional rights.").

126. *See generally* Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 460.50 (McKinney 2009); *see also* United States *ex rel.* Siegal v. Follette, 290 F. Supp. 636, 638 (S.D.N.Y. 1968) (stating that New York law "permits [a judge] to grant or deny bail in his discretion after weighing the facts he considers significant"). Although an order denying bail is not appealable, it may be reviewed on habeas corpus grounds. For more information, see Chapter 21 of the *JLM*, "State Habeas Corpus."

127. N.Y. CRIM. PROC. LAW §§ 510.30(1), 530.10 (McKinney 2009) (explaining when a court is required to order bail or recognizance and when it may do so at its discretion). Bail must not violate the New York state constitution's restriction on excessive bail. *See* People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 33, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 184 (1973) (citing N.Y. CONST. art. I, § 5); People ex rel. Shapiro v. Keeper of City Prison, 290 N.Y. 393, 398, 49 N.E.2d 498, 500 (1943)) ("Our State Constitution does not decree a right to bail, but merely proscribes 'excessive bail.'").

felony, a judge could not release you because the law requires you to be held in custody for that type of offense.[128]

If your offense does not automatically require you to be held in custody, a judge will consider the following factors, among others, to decide whether to grant your request for release:[129]

(1) Your character, reputation, habits, and mental condition;
(2) Your employment and financial resources;
(3) Your family ties and length of residence in the community;
(4) Your criminal record, if any;
(5) Your previous record as a juvenile delinquent or youth offender, if any;
(6) Your previous record of responding to court appearances when required; and, above all,
(7) The likelihood that the judgment against you will be reversed on appeal.

A judge may refuse to release you on bail if he thinks an appellate court is unlikely to reverse the judgment against you.[130] Therefore, when you submit a request for bail, you should include a brief statement that explains your appellate claims and demonstrates that there is a reasonable possibility of reversal.

In general, you should petition for bail if there is any chance it will be granted. If you are released on bail, it will be easier to prepare your appeal than if you are held in jail. Keep in mind, though, that the amount of bail may be more than you can afford. Additionally, note that you will not receive credit for time served during the time that you are out on bail.

Note also that if you are released on bail while your appeal is pending, the order releasing you will expire if your appeal is not "perfected" within 120 days after the order is given.[131] Generally, to perfect an appeal you must deliver a specified number of copies of the trial record and your brief to the appellate court and the opposing party.[132] If your appeal is not perfected within 120 days, you should request a time extension to file an appeal, explicitly asking the court to extend the 120-day period.[133]

D. What You Can Ask the Court to Do in Your Appeal

In an appeal, you ask the appellate court to correct the trial court's judgment. The appellate court will make one of three decisions. First, it might "reverse" the trial court's judgment, which means it declares the entire judgment invalid. Second, it might "affirm" the trial court's judgment, which means it upholds the entire judgment. Finally, it might "modify" the trial court's judgment, which means it reverses part of the judgment and affirms another part of the judgment.[134] If the appellate court reverses or modifies the judgment, it will also take some action to correct the judgment, such as reducing your sentence or dismissing your indictment.[135]

Sometimes the appellate court might determine that it does not have enough information to decide your appeal right away. If this happens, the appellate court may suspend your appeal and send the matter to a lower court for additional proceedings.[136] This means that the appellate court will not

128. N.Y. CRIM. PROC. LAW § 530.50 (McKinney 2009).

129. N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 2009).

130. N.Y. CRIM. PROC. LAW § 510.30(2)(b) (McKinney 2009).

131. N.Y. CRIM. PROC. LAW § 460.50(4) (McKinney 2009). Under this statute, an order granting release will expire if your appeal has "not been brought to argument in or submitted to the intermediate appellate court" within 120 days. Courts have interpreted this statute to mean that such an order will expire if your appeal is not perfected within 120 days. *See, e.g.*, People v. Higgins, 177 A.D.2d 1052, 1052, 578 N.Y.S.2d 70, 71 (4th Dept. 1991) (stating that defendant "bore the burden of surrendering himself after the 120-day stay expired before his appeal was perfected").

132. *See* Part E(3) of this Chapter for information on perfecting your appeal.

133. N.Y. CRIM. PROC. LAW § 460.50(4) (McKinney 2009). The intermediate appellate court itself must grant the extension, regardless of who issued the order. *See* Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 460.50 (McKinney 2009).

134. *See* N.Y. CRIM. PROC. LAW § 470.15(2) (McKinney 2009).

135. *See* N.Y. CRIM. PROC. LAW § 470.20 (McKinney 2009).

136. This process is called "remitting." *See, e.g.*, People v. Hasenflue, 24 A.D.3d 1017, 1018, 806 N.Y.S.2d

decide whether to affirm, modify, or reverse the judgment until the lower court has held another hearing.

An intermediate appellate court must base its decision to reverse or modify the trial court's judgment on one of three things (or some combination of them): the law, the facts, or the "interest of justice."[137]

1. Appealing Your Conviction

If you appeal your conviction "on the law," you will argue that legal errors in the trial deprived you of a fair trial or that the evidence used to convict you was legally insufficient. If you appeal your conviction "on the facts," you will argue that your conviction was against the weight of the evidence.

(a) "On the Law"

You can ask an appellate court to reverse the judgment "on the law" on the basis of: (1) legal errors that deprived you of a fair trial, or (2) legally insufficient evidence to support your conviction.[138]

You may seek reversal on the law on grounds of legal errors that deprived you of a fair trial. In order to seek a reversal on the law due to legal errors, you must have properly preserved these errors for review, unless the error you are appealing is one that is not subject to the preservation requirement, as explained above in Section B(3). Some categories of legal errors that may support reversal include: (1) erroneous evidentiary rulings,[139] (2) prosecutor's misconduct,[140] (3) improper jury instructions,[141] or (4) improper influence on the jury.[142] For example, in People v. Brown, the court's judgment was reversed because a juror conducted an experiment outside of court to evaluate testimony, which was an improper influence on the jury.[143] The witness claimed to have viewed the incident through the driver's van window, so the juror tested the visibility of her own (similar) van and told the jury she "could see that [the crime] was plausible."[144] Note that there are many other potential legal errors, and spotting them requires thorough familiarity with relevant bodies of law, including evidence law,

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766, 768 (3d Dept. 2005) (withholding decision and sending matter back to trial court to look at the defendant's competency to stand trial); People v. Britt, 231 A.D.2d 581, 583, 647 N.Y.S.2d 527, 529 (2d Dept. 1996) (sending matter back for trial court to make clear whether trial court followed the proper three-step procedure to make sure preemptory strikes, which are used to keep certain people off of a jury, were not used to keep people off the jury because of their race).

137. *See* N.Y. CRIM. PROC. LAW § 470.15(3) (McKinney 2009).

138. Note, however, that "on the law" reversals are not limited to these two instances. *See* N.Y. CRIM. PROC. LAW § 470.15(4) (McKinney 2009) (noting "upon the law" determinations "include, but are not limited to," these bases).

139. *See*, *e.g.*, People v. Boughton, 70 N.Y.2d 854, 855, 517 N.E.2d 1340, 1341, 523 N.Y.S.2d 454, 455 (1987) (reversing conviction because trial judge wrongly allowed prosecutor to introduce confession without giving sufficient notice); People v. Reilly, 19 A.D.3d 736, 737–738, 796 N.Y.S.2d 726, 727–728 (3d Dept. 2005) (ordering new trial because judge allowed evidence that was very prejudicial but not very probative, meaning the evidence was not useful for deciding the verdict fairly).

140. *See*, *e.g.*, People v. Collins, 12 A.D.3d 33, 42, 784 N.Y.S.2d 489, 496 (1st Dept. 2004) (ordering new trial because prosecutor's concluding remarks deprived defendant of a fair trial).

141. *See*, *e.g.*, Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106, 110 (1965) (reversing conviction because judge improperly commented during jury instructions on defendant's decision not to testify); People v. Goldblatt, 98 A.D. 3d 817, 822, 950 N.Y.S.2d 210, 215–216, (3d Dept. 2012) (reversing conviction because court did not properly instruct the jury "as to what was required to find that defendant was recklessly driving his automobile."); People v. Richardson, 234 A.D.2d 952, 952, 652 N.Y.S.2d 173, 174 (4th Dept. 1996) (reversing conviction because court did not give proper instructions as required by statute.).

142. *See, e.g.*, Parker v. Gladden, 385 U.S. 363, 363–365, 87 S. Ct. 468, 470, 17 L. Ed. 2d 420, 422 (1966) (reversing conviction where bailiff made statements to jurors that defendant was a wicked and guilty person, because this behavior violated the 6th Amendment); People v. Stanley, 87 N.Y.2d 1000, 1001, 665 N.E.2d 190, 191, 642 N.Y.S.2d 620, 621 (1996) (reversing conviction because jurors visited crime scene and conducted an experiment in order to evaluate a witness' credibility and so became "unsworn witnesses" themselves).

143. People v. Brown, 48 N.Y.2d 388, 394–395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979).

144. People v. Brown, 48 N.Y.2d 388, 394–395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979).

criminal procedure, and state and federal constitutional law. It is not possible for this Chapter or the *JLM* to discuss every possible error. This is a big reason that you should get a lawyer for your appeal: even if you do legal research beyond the *JLM*, you will likely not be able to learn enough law in time to notice errors and present them to the court as effectively as an appellate lawyer could. *See* Section C(1) above for how to get a lawyer.

If the appellate court does reverse your judgment because of legal errors, the court must order a new trial on the counts of the original indictment.[145] You cannot be retried, however, on (1) counts dismissed on appeal or in a post-judgment order, or (2) counts or offenses of which you were effectively acquitted. For example, if you were charged with first-degree murder, but convicted only of second-degree murder, you would be considered acquitted of first-degree murder. This means that you could be retried only for second-degree murder.[146]

You may also seek reversal on the law on grounds of legal insufficiency. Legal insufficiency means that the evidence presented by the prosecution was not enough (not sufficient) to prove all the necessary elements of the crime for which you were convicted.[147] For example, in order to convict a defendant of driving while intoxicated, the prosecution must prove both that the defendant was drunk and that he was driving a car. If the prosecution did not introduce any evidence that the defendant was driving a car, the evidence would be insufficient. In determining whether the evidence presented is legally sufficient, the appellate court will weigh whether any valid reasoning or inferences could lead a rational person to the conclusion that the jury reached, viewing the evidence in the light most favorable to the prosecution.[148] Note that showing that evidence is legally insufficient is different from showing a verdict to be against the weight of the evidence, which is discussed in Subsection (b) below.

Like any legal error, a claim of legal insufficiency must be preserved for it to be reviewed on appeal[149] or else it may only be reviewed "in the interest of justice" by the Appellate Division.[150] (See Part B(3) of this Chapter for more on the preservation requirement.) If a court grants your appeal by finding legal insufficiency, the court must dismiss those counts of your indictment that the court determines to be supported by legally insufficient evidence.[151] The Double Jeopardy Clause of the Fifth Amendment[152] prohibits the prosecution from retrying any count that has been dismissed for legal insufficiency.[153] Thus, if the appellate court reverses every count in your indictment for legal

145. N.Y. CRIM. PROC. LAW § 470.20(1) (McKinney 2009).

146. *See*, *e.g.*, People v. Graham, 36 N.Y.2d 633, 639, 331 N.E.2d 673, 677, 370 N.Y.S.2d 888, 894 (1975) (holding that defendant could not be retried for murder in the second degree after the appellate division reduced the conviction to manslaughter in the first degree).

147. *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.15(4) (2009).

148. *See* People v. Taylor, 94 N.Y.2d 910, 911–912, 729 N.E.2d 337, 337–338, 707 N.Y.S.2d 618, 618–619 (2000) (stating that "whether inferences of guilt could be rationally drawn" from the evidence is the standard for evaluating sufficiency of the evidence).

149. When the prosecution rested, the defense should have moved for a dismissal and stated exactly why the prosecution's case was legally insufficient. *See* People v. Hawkins, 11 N.Y.3d 484, 493, 900 N.E.2d 946, 951, 872 N.Y.S.2d 395, 400 (2008) (holding that a general objection that prosecution failed to prove its case does not preserve the issue of whether evidence was legally sufficient to support a particular element).

150. In fact, some courts have said that evaluating legal insufficiency is "necessarily" part of weighing evidence, which Appellate Division courts routinely do. Thus, a claim of legal insufficiency may succeed even if the issue was not preserved, if the claim is presented as the verdict being against the weight of the evidence. *See, e.g.,* People v. Scott, 67 A.D.3d 1052, 1054, 889 N.Y.S.2d 279, 281 (3d Dept. 2009) ("[W]e will necessarily consider [legal insufficiency] in reviewing the weight of the evidence[.]"); People v. Loomis, 56 A.D.3d 1046, 1046–1047, 867 N.Y.S.2d 772, 773 (3d Dept. 2008) (considering sufficiency of evidence, although not preserved, while considering weight of evidence). Furthermore, if a defendant requests, "the Appellate Division must conduct a weight of the evidence review." People v. Danielson, 9 N.Y.3d 342, 348, 880 N.E.2d 1, 4, 849 N.Y.S.2d 480, 484 (2007).

151. N.Y. CRIM. PROC. LAW §§ 470.20(2), (3) (McKinney 2009).

152. U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

153. *See* McDaniel v. Brown, 558 U.S. 120, 131, 130 S. Ct. 665, 672, 175 L. Ed. 2d 582, 589 (2010); Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150–2151, 57 L. Ed. 2d 1, 14 (1978) (finding that if a court finds

insufficiency, you will be set free. By contrast, if the reversal is due to an error in the trial, and not because of legal insufficiency, double jeopardy will not apply and you may be retried for the same crime.[154]

An appellate court may modify a judgment by dismissing one or more counts based on legal insufficiency, but affirming other counts for which there was legally sufficient evidence. In this situation, the appellate court has two options: (1) it can either affirm the sentence that the trial court imposed for the counts that were not dismissed[155] or, (2) it can "remand" (send the case back to the trial court) for re-sentencing.[156]

An appellate court may also modify the judgment to change your conviction to a "lesser included offense."[157] A lesser included offense exists when no one could possibly commit the greater crime without, by the same conduct, committing the lesser offense.[158] Petit larceny, for example, is a lesser included offense of third-degree robbery because petit larceny is stealing property[159] and third-degree robbery is stealing property through the use of force[160] or threat of force.[161] Since both offenses require you to steal property, you cannot commit third-degree robbery without also committing petit larceny. Thus, if an appellate court concludes that the prosecutor failed to prove that you used force, your robbery conviction is legally insufficient. However, if the prosecutor did prove that you stole property, the appellate court may change your conviction to petit larceny without holding a new trial. If the appellate court determines that the evidence proved a lesser included offense, the court will send you back to the trial court for re-sentencing,[162] unless you have already served the maximum sentence possible for the lesser crime.[163]

(b) "On the Facts"

You can ask an appellate court for reversal "on the facts" by arguing that your guilty verdict was against the weight of the evidence.[164] In other words, the appellate court can reverse a case if it finds that the evidence was not strong enough to convict the person originally. In evaluating the weight of the evidence, an intermediate appellate court must determine whether a jury could reasonably have acquitted you based on the information it had. If the appellate court concludes that a jury could reasonably have acquitted you, the court must weigh the evidence used at trial to be sure the jury gave the evidence the weight it deserved. If the appellate court then decides that the jury did not give the evidence proper weight, the court may set aside the jury's guilty verdict.[165] For instance, as you recall

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evidence legally insufficient, there must be a judgment of acquittal under the Double Jeopardy Clause).

154. *See* Lockhart v. Nelson, 488 U.S. 33, 40–42, 109 S. Ct. 285, 291, 10 L. Ed. 2d 265, 273–274 (1988) (holding that the Double Jeopardy Clause does not prohibit retrying a case overturned for improper sentencing unless the sum of the evidence was insufficient to sustain a guilty verdict); *see generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.20(1) (McKinney 2009).

155. N.Y. CRIM. PROC. LAW § 470.20(3) (McKinney 2009).

156. N.Y. CRIM. PROC. LAW § 470.20(3) (McKinney 2009).

157. N.Y. CRIM. PROC. LAW § 470.15(2)(a) (McKinney 2009).

158. N.Y. Crim. Proc. Law § 1.20(37) (McKinney 2009).

159. N.Y. PENAL LAW § 155.25 (McKinney 2009).

160. N.Y. PENAL LAW § 160.05 (McKinney 2009).

161. *See* People v. Rychel, 284 A.D.2d 662, 663, 728 N.Y.S.2d 211, 213 (3d Dept. 2001) (holding evidence legally sufficient for third-degree robbery where evidence established that force was threatened); People v. Smith, 278 A.D. 2d 75, 75, 718 N.Y.S.2d 305, 305 (1st Dep't. 2000) (holding evidence legally sufficient for third-degree robbery where evidence established that force was threatened through "relatively polite behavior").

162. N.Y. CRIM. PROC. LAW § 470.20(4) (McKinney 2009).

163. *See* People v. McBride, 248 A.D.2d 641, 642, 669 N.Y.S.2d 952, 952 (2d Dept. 1998) (holding that there is no need to remand for re-sentencing since defendant had already served the maximum sentence for the reduced offense).

164. N.Y. CRIM. PROC. LAW § 470.15(5) (McKinney 2009).

165. *See* People v. Bailey, 94 A.D.3d 904, 904–905, 942 N.Y.S.2d 165, 167–168 (2d Dept. 2012) (holding that the attempted murder in the second degree conviction must be set aside because it was against the weight of the evidence).

from the example above, evidence of drunk driving is not enough if the prosecution did not introduce any evidence that the defendant was driving a car. If a prosecution witness had said that she saw the defendant driving a car, but this was the only evidence and there were strong reasons to not believe the witness, then the verdict would likely be against the weight of the evidence—there is some evidence, but the jury weighed it incorrectly.

Only the Appellate Division can review a weight of the evidence claim. In doing so, it sits as "a thirteenth juror."[166] In contrast, neither the trial court nor the Court of Appeals can review weight of the evidence or make its own decision about whether a witness was credible.[167] A "weight of the evidence" claim does not need to have been preserved at trial,[168] but you should raise it clearly on appeal to be sure that the Appellate Division will consider it.

If the appellate court sets aside your verdict as "against the weight of the trial evidence," the appellate court must dismiss the charge against you.[169] According to New York law, you cannot be prosecuted again on the same charge.[170] Thus, if the court sets aside all of the charges against you as "against the weight of the evidence," the court will order your release from custody. If one or more, but not all, of the charges against you are dismissed as against the weight of the evidence, the court may modify the judgment as described above in Part D(1)(a).

2. Appealing Your Sentence

You can appeal your sentence on the ground that the sentence is either: (1) unlawful or (2) unduly harsh or excessive.[171]

(a) Unlawful Sentence

A sentence is invalid as a matter of law when its terms are not authorized by statute or when the sentencing court considers inappropriate factors, like whether you decided to exercise certain rights.

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166. People v. Danielson, 9 N.Y.3d 342, 348–349, 880 N.E.2d 1, 5, 849 N.Y.S.2d 480, 484 (2007) (noting that weight of the evidence review essentially requires the court to sit as a thirteenth juror and decide which facts were proven at trial).

167. There are very rare exceptions to this rule. One is that if the witness is so unreliable that it would not be fair for the jury to believe what he is saying. In this case, the court says the witness is "incredible as a matter of law." People v. Heath, 214 A.D.2d 519, 520–521, 625 N.Y.S.2d 540, 541 (1st Dept. 1995) ("The arresting officer's testimony that he observed defendant exchanging a 2–inch glass vial with a dark top, from a distance of approximately 74 feet, from a moving patrol car, after dark, is, in our view, contrary to common experience and, as such, was incredible as a matter of law and did not support the verdict."); *see, e.g.*, People v. Foster, 64 N.Y.2d 1144, 1147–1148, 480 N.E.2d 340, 342, 490 N.Y.S.2d 726, 728 (1985) (finding the evidence insufficient to establish one defendant's guilt beyond a reasonable doubt by testimony from a witness who is either morally or mentally irresponsible); People v. Quinones, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 197 (1st Dept. 1978) (rejecting as a matter of law police officer testimony that strongly appeared to have been fabricated to conceal constitutional violations). Another exception is if the witness himself might be credible, but he is the only witness, and his testimony contradicts itself. *See* People v. Delamota 18 N.Y.3d 107, 114–115, 960 N.E.2d 383, 387–389, 936 N.Y.S.2d 614, 618–619, 2011 N.Y. Slip Op. 08225, 4–5 (2011) (discussing how courts have treated this standard since the 1970s).

168. *See* People v. Danielson, 9 N.Y.3d 342, 349–350, 880 N.E.2d 1, 5–6, 849 N.Y.S.2d 480, 484–485 (2007) (noting that a court must consider whether there is evidence that the elements of a crime have been satisfied when weighing the sufficiency of the evidence, even without the issue having been preserved at trial).

169. N.Y. CRIM. PROC. LAW § 470.20(5) (McKinney 2009).

170. The prosecution cannot retry any count that was reversed because it was against the weight of the evidence. N.Y. CRIM. PROC. LAW. § 470.20(5) (McKinney 2009). This is based solely upon New York statute and *not* on constitutional protection from double jeopardy. *See* Tibbs v. Florida, 457 U.S. 31, 32, 102 S. Ct. 2211, 2213, 72 L. Ed. 2d 652, 655 (1982) (holding that the Double Jeopardy Clause of the Constitution does not bar the retrial of an accused when an earlier conviction was reversed based on the weight, as opposed to the sufficiency, of the evidence); People v. Romero, 7 N.Y.3d 633, 644 n.2, 859 N.E.2d 902, 909 n.2, 826 N.Y.S.2d 163, 170 (2006) (explaining that, in New York, "our Legislature has erected a statutory bar preventing a defendant from being retried after a conviction is reversed based on the weight of the evidence").

171. N.Y. CRIM. PROC. LAW § 450.30(1) (McKinney 2009). You may be able to appeal your sentence on the ground that the sentence is unduly harsh or excessive even if you negotiated your sentence in exchange for a

For example, a sentence of thirty years for first-degree assault, a class B violent felony, is unlawful, since the maximum penalty allowed for a class B violent felony is twenty-five years.[172] A sentence may also be unlawful if it is based on an incorrect determination that you had a prior conviction,[173] or if your sentences were improperly ordered to run consecutively (one after the other), instead of concurrently (at the same time).[174] A sentence is also illegal if it constitutes "cruel and unusual" punishment.[175]

(b) Unduly Harsh or Excessive Sentence

A sentence is excessive if the law allows the sentence, but is unfair based on the facts of your case.[176] An appellate court may take into account, for example, the circumstances of your crime, the probability of your rehabilitation, your background, and your criminal record.[177] You may appeal your sentence as unduly harsh if anything over the minimum legal sentence was imposed. A court may also consider whether the sentences you received are to run consecutively (one after the other) or concurrently (at the same time). Even if the appellate court rejects all of your arguments regarding

guilty plea. *See* People v. Pollenz, 67 N.Y.2d 264, 267–268, 493 N.E.2d 541, 542, 502 N.Y.S.2d 417, 418 (1986) (holding that Art. Six, § 4(k) of the New York Constitution prohibits the legislature from limiting the appellate division's jurisdiction by prohibiting appeals on the issue of excessive sentences); *see also* N.Y. CRIM. PROC. LAW § 470.15(6)(b) (McKinney 2009) (providing that an appellate court may use its discretion to reverse or modify a sentence as unduly harsh or severe). *See* Part D(1) of this Chapter for a discussion of possible waiver of your right to appeal the issue of whether your sentence was unduly harsh or excessive.

172. N.Y. PENAL LAW § 70.02(3)(a) (McKinney 2009).

173. *See* People v. Cabassa, 186 Misc. 2d 200, 213, 717 N.Y.S.2d 487, 496–497 (Sup. Ct. N.Y. County 2000) (holding that there must be a resentencing proceeding where a previous federal conviction that was voided under constitutional grounds was considered in the sentencing, although the underlying facts of the federal case may be considered); People *ex rel.* Furia v. Zelker, 70 Misc. 2d 167, 169, 332 N.Y.S.2d 310, 311 (Sup. Ct. Dutchess County 1971) (finding that where defendant's 1959 conviction had been set aside before he was convicted on this offense in 1966, the fact that he was convicted again in 1970 for the 1959 crime did not make him a "multiple felony offender" in 1966); People v. Foster, 57 N.Y.S.2d 737, 738 (Sup. Ct. Cayuga County 1945) (finding a sentence unlawful because it had been increased to reflect a prior felony, although no prior felony had been included in the indictment).

174. *See*, *e.g.*, N.Y. PENAL LAW § 70.25(2)(g) (McKinney 2009) (requiring that certain sentences run concurrently). The Constitution does not prevent a trial judge (instead of a jury) from deciding whether facts exist that require a consecutive sentence. Oregon v. Ice, 555 U.S. 160, 163–165, 129 S. Ct. 711, 714–715, 172 L. Ed. 2d 517, 522 (2009) (holding that Oregon's system—which, like New York's, generally requires concurrent sentences for multiple convictions at the same time unless certain factors exists—is constitutional even though judges rather than juries decide whether those factors exist).

175. *See* U.S. CONST. amend. VIII; People v. Diaz, 179 Misc. 2d 946, 956–957, 686 N.Y.S.2d 595, 601–602 (Sup. Ct. N.Y. County 1999) (holding that defendant's sentence of 15 years to life was "grossly disproportionate" as applied to him and therefore constituted "cruel and unusual punishment," and re-sentencing defendant to 10 years to life).

176. When an appellate court decides whether a sentence is excessive or unduly harsh, it is said to be exercising its "in the interest of justice" jurisdiction. N.Y. CRIM. PROC. LAW § 470.15(6)(b) (McKinney 2009). See Part B(3)(a) of this Chapter for a discussion of "in the interest of justice" jurisdiction.

177. *See*, *e.g.*, People v. Yanus, 13 A.D.3d 804, 805, 786 N.Y.S.2d 264, 265 (stating the court considered the nature of the crime, the investigation report, and defendant's following arrests and found no abuse of discretion in sentencing), People v. Sieber, 26 A.D.3d 535, 536, 809 N.Y.S.2d 613, 614 (3d Dept 2006) (upholding a sentence as well within the discretion given the defendants failure to accept responsibility for the offense), People v. Bankowski, 204 A.D.2d 802, 803, 611 N.Y.S.2d 712, 713–714 (3d Dept. 1994) (holding that the harshest available sentence for manslaughter and drunk driving was not excessive where the defendant had a prior conviction for drunk driving); People v. Pugh, 194 A.D.2d 863, 865, 599 N.Y.S.2d 317, 319 (3d Dept. 1993) (holding that the defendant's full and intentional participation in brutally violent crimes made the sentence appropriate, even though the defendant was young and did not have any previous criminal record).

errors that occurred during your trial, it may use its "in the interest of justice" discretion to order your sentences to run concurrently instead of consecutively.[178]

An intermediate appellate court may substitute its own discretion for that of the trial court in reviewing and modifying your sentence.[179] If an intermediate appellate court decides to change your sentence because it is unduly harsh or excessive, then the court itself must impose some lawful lesser sentence.[180] If this happens, the court changes only your sentence and the rest of the judgment (your conviction) is otherwise affirmed.[181]

In a death sentence appeal, the Court of Appeals must focus upon the individual circumstances of your case in determining whether your sentence is unjust.[182] Under New York law, the Court of Appeals is required to consider the potential influence of the jury's passion or prejudice (including race-based prejudice) upon your sentence, the penalty imposed in similar cases, and the weight of the evidence in support of your sentence.[183] An appellate court has three options when it reviews a death penalty sentence: (1) it can affirm the death sentence, (2) it can remand the case for re-sentencing with the possibility of the death sentence, or (3) it can remand the case for re-sentencing without the possibility of a death sentence.[184]

Although these appellate procedures for death penalty cases are still valid, there is currently no constitutionally valid death penalty statute on the books in New York.[185] This means that there will not be any death penalty appeals in New York in the near future.

3. Types of Errors

When appealing your conviction (see Part D(1)) or your sentence (see Part D(2)), you argue that the trial court allowed errors to take place. Some errors are considered so serious that they are always enough to justify the reversal of your judgment without the need to prove how they harmed you. Other errors have the potential to be serious enough to warrant reversal, but they do not necessarily justify reversal. The court analyzes these errors under the "harmless error test." This means that the court will not reverse or modify a judgment if the error is harmless. The court will decide that an error is

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178. *See*, *e.g.*, People v. Evans, 212 A.D.2d 626, 627, 623 N.Y.S.2d 4, 6 (2d Dept. 1995) (modifying a sentence in which the defendant would serve four terms of "25 years to life" consecutively to a sentence in which the defendant could serve the four terms concurrently); People v. Quinitchett, 210 A.D.2d 438, 439, 620 N.Y.S.2d 430, 431 (2d Dep't. 1994) (modifying a sentence in which the defendant would serve three terms of "25 years to life" consecutively to a sentence in which the defendant could serve the three terms concurrently).

179. *See* People v. Wiggins, 24 A.D.3d 263, 263, 806 N.Y.S.2d 496, 497 (1st Dept. 2005) (reducing sentence on appeal as a matter of discretion in the interest of justice); People v. Delgado, 80 N.Y.2d 780, 783, 599 N.E.2d 675, 676, 587 N.Y.S.2d 271, 272 (1992) (noting that "[a]n intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe" and that the court could exercise this power "if the interest of justice warrants, without deference to the sentencing court"); *see also* N.Y. CRIM. PROC. LAW. § 470.15(6)(b) (McKinney 2009). *But see* People v. Hoyle, 211 A.D.2d 973, 975, 621 N.Y.S.2d 756, 759 (3d Dept. 1995) (refusing to modify the sentence because the lower court did not abuse its discretion in sentencing defendant).

180. N.Y. CRIM. PROC. LAW § 470.20(6) (McKinney 2009).

181. N.Y. CRIM. PROC. LAW § 470.15(2)(c) (McKinney 20109).

182. *See* Gregg v. Georgia, 428 U.S. 153,155, 96 S. Ct. 2909, 2935, 49 L. Ed. 859, 887 (1976) (observing that concerns that a court might impose the death penalty in an "arbitrary and capricious manner" are "best met by a system . . . [in] which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information").

183. N.Y. CRIM. PROC. LAW § 470.30(3) (McKinney 20109).

184. N.Y. CRIM. PROC. LAW § 470.30(5) (McKinney 20109).

185. *See* People v. LaValle, 3 N.Y.3d 88, 99, 817 N.E.2d 341, 344, 783 N.Y.S.2d, 485, 488 (2004) (holding that the current New York death penalty statute is unconstitutional); *see also* People v. Taylor, 9 N.Y.3d 129, 155–156, 878 N.E.2d 969, 984, 848 N.Y.S.2d 554, 568 (2007) (vacating the sentence of the last incarcerated person on death row in New York); Alan Feuer, *Death Penalty Is Thrown Out in Wendy's Killings*, N.Y. TIMES (Oct. 23, 2007), *available at* https://www.nytimes.com/2007/10/23/nyregion/23cnd-death.html (last visited Feb. 22, 2019) (noting that John Taylor, the defendant in the last cited case, "was the last remaining inmate on New York State's death row").

harmless if the court believes you would have received the same conviction and/or sentence even if the error had not occurred.

Note that to appeal on the basis of most of these errors, even those that are always considered harmful when your appeal is evaluated, you must have "preserved" the error by objecting at trial. Some errors are not subject to this requirement, however. For information about the preservation requirement, see Part B(3).

(a) Errors That Are Always "Harmful"

Some errors are considered so harmful that their occurrence always means that you were denied a fair trial and are entitled to a new one. These errors have such a significant effect that they are themselves enough to justify reversal of your conviction.[186] For example, errors in which the court

186. *See generally* Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, N.Y. Crim. Proc. Law § 470.05 (2009).

misstates the prosecution's burden of proof on an issue should result in reversal.[187] Other examples of errors justifying reversal include:

(1) You were deprived of your right to counsel,[188] which includes a denial of your right to a lawyer of your choosing,[189] or if you were represented only by a person pretending to be a lawyer;[190]
(2) You chose to represent yourself at trial but the court failed to inform you of the dangers of proceeding without a lawyer;[191]
(3) You were denied your right to represent yourself;[192]
(4) Your judge was biased;[193]
(5) Your judge gave an incorrect instruction about reasonable doubt to the jury, in violation of your Fifth and Sixth Amendment rights;[194]
(6) Your judge gave an instruction to the jury that defined two alternative reasons for conviction, one of which was legally erroneous, and the appellate court now cannot say with absolute certainty that the jury based its verdict on legally correct reasoning;[195]
(7) You were denied your right to be present at certain stages of the trial;[196]
(8) The prosecutor wrongly excluded potential jurors on the basis of their race or sex;[197]
(9) A juror was improperly removed from the jury;[198]
(10) Your judge was absent during part of your trial;[199]
(11) During the selection of jurors, your judge improperly denied your claim that a juror should not be included in the jury, and this refusal was based on the judge's incorrect conclusion that you or your lawyer were discriminating on the basis of race or gender;[200] or
(12) During the selection of jurors, your judge improperly denied your claim that a juror should not be included because the juror expressed doubt about his or her ability to decide the

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187. *See* People v. McLaughlin, 80 N.Y.2d 466, 471–472, 606 N.E.2d 1357, 1359–1360, 591 N.Y.S.2d 966, 968-9969 (1992) (reversing convictions on counts for which the judge gave an erroneous charge to the jury).

188. *See* Gideon v. Wainwright, 372 U.S. 335, 339–343, 83 S. Ct. 792, 794–796, 9 L. Ed. 2d 799, 802–804, (1963) (reversing conviction because defendant was not appointed counsel); People v. Hilliard, 73 N.Y.2d 584, 586–587, 540 N.E.2d 702, 702–703, 542 N.Y.S.2d 507, 507–508 (1989) (reversing conviction because trial court did not allow defendant to contact his attorney for thirty days following his arraignment, and stating that it does not matter whether this affected the outcome). In contrast to denial of effective assistance of counsel at trial, harmless error analysis *is* applicable to denial of effective counsel at a pre-indictment preliminary hearing. *See* People v. Wicks, 76 N.Y.2d 128, 133, 556 N.E.2d 409, 411, 556 N.Y.S.2d 970, 972 (1990) (holding that the deprivation of a defendant's right to counsel at a hearing to determine whether the defendant could be held over for action by the grand jury is subject to harmless error analysis); People v. Wardlaw, 18 A.D.3d 106, 112, 794 N.Y.S.2d 524, 529 (4th Dept. 2005) (holding that the deprivation of a defendant's right to counsel at a pretrial suppression hearing is subject to constitutional harmless error analysis).

189. *See* Powell v. Alabama, 287 U.S. 45, 52–53, 53 S. Ct. 55, 58, 77 L. Ed. 158, 162 (1932) (reversing conviction because, among other reasons, defendants were appointed lawyers before being given an opportunity to hire their own); People v. Knowles, 88 N.Y.2d 763, 768–769, 673 N.E.2d 902, 905–906, 650 N.Y.S.2d 617, 620–621 (1996) (overturning conviction because retained lawyer was not permitted to take part in defense trial); People v. Arroyave, 49 N.Y.2d 264, 270–273, 401 N.E.2d 393, 396–398, 425 N.Y.S.2d 282, 285–288 (1980) (remanding to the trial court for a hearing regarding whether the department of corrections unconstitutionally prevented the defendant from retaining the counsel of his choice by failing to deliver the lawyer's letter in a timely manner).

190. *See* People v. Felder, 47 N.Y.2d 287, 291, 391 N.E.2d 1274, 1275, 418 N.Y.S.2d 295, 296 (1979) (holding that the conviction of a defendant who had been represented by a non-lawyer pretending to be a lawyer "must be set aside without regard to whether [defendant] was individually prejudiced by such representation"). However, not every instance in which a person who is not licensed to practice law participates as a lawyer for the defendant will require automatic reversal. *See* People v. Jacobs, 6 N.Y.3d 188, 190, 844 N.E.2d 1126, 1127, 811 N.Y.S.2d 604, 605 (2005) (holding that where one of defendant's two-person defense team was a non-lawyer pretending to be a lawyer, reversal was not appropriate unless defendant was actually harmed); People v. Kieser, 79 N.Y.2d 936, 937–938, 591 N.E.2d 1174, 1175, 582 N.Y.S.2d 988, 989 (1992) (holding that where defendant is represented by a lawyer who is temporarily not entitled to practice law for some "technical" reason, such as failure to pay bar dues, reversal is not appropriate unless defendant was harmed).

191. *See* People v. Arroyo, 98 N.Y.2d 101, 103–104, 772 N.E.2d 1154, 1156, 745 N.Y.S.2d 796, 798 (2002) (reversing a conviction because the trial court allowed defendant to represent himself without adequate inquiry into defendant's understanding of the choice).

192. *See* Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581–582 (1975) (holding that refusal to let a "literate, competent, and understanding" defendant represent himself violated the 6th and 14th Amendments). However, the U.S. Supreme Court has held that a court has the discretion to deny the request if the defendant is found to lack competence to represent himself, and it can force an incompetent defendant to accept the aid of a lawyer. *See* Indiana v. Edwards, 554 U.S. 164, 178, 128 S. Ct. 2379, 2388, 171 L. Ed. 2d 345, 357 (2008) ("[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial … but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves").

193. *See* Tumey v. Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749, 754 (1927) (holding that trial under a judge with a personal financial interest in the defendant's conviction violated defendant's 14th Amendment rights).

194. *See* Sullivan v. Louisiana, 508 U.S. 275, 278–282, 113 S. Ct. 2078, 2081–2083, 124 L. Ed. 2d 182, 188–191 (1993) (holding that constitutionally-deficient reasonable doubt instruction required reversal).

195. *See* Griffin v. United States, 502 U.S. 46, 52–55, 112 S.Ct. 466, 470–472, 116 L. Ed. 2d 371, 378–380 (1991) (summarizing precedent stating that a verdict must be set aside if it could have been decided on multiple grounds and one of the possible grounds was unconstitutional or illegal); People v. Martinez, 83 N.Y.2d 26, 35, 628 N.E.2d 1320, 1325, 607 N.Y.S.2d 610, 615 (1993) (reversing because judge told the jury it could return a guilty verdict based on either of two theories, one of which was illegal, and the jury did not say which theory it used to reach the guilty verdict).

196. *See*, *e.g.*, People v. Antommarchi, 80 N.Y.2d 247, 249—250, 604 N.E.2d 95, 96–97, 590 N.Y.S.2d 33, 34–35 (1992) (reversing because defendant was not present at bench conferences with jury candidates regarding their ability to weigh evidence objectively and to hear evidence impartially); People v. Dokes, 79 N.Y.2d 656, 660–662, 595 N.E.2d 836, 839–840, 584 N.Y.S.2d 761, 764–765 (1992) (reversing because defendant was not present at hearing about impeaching him with prior acts).

197. *See* Batson v. Kentucky, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d. 69, 79 (1986) (holding that challenging potential jurors on the basis of race violates the defendant's equal protection rights); *see also* Snyder v. Louisiana, 552 U.S. 472, 476–486, 128 S. Ct. 1203, 1207–1212, 170 L. Ed. 2d 175, 180–186 (2008) (granting a new trial because the prosecutor had improperly excluded black jurors in a case where the defendant was black, and noting that a close examination of why the prosecutor excluded jurors was necessary where racial motives were not acknowledged). The 14th Amendment prohibits discrimination in jury selection on the basis of gender as well as race. *See* J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 129, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89, 97 (1994) (stating that gender discrimination by the state violates Equal Protection Clause). The law no longer requires that you be a member of the same group as the wrongfully excluded jurors for the error to be considered fundamental. *See* Powers v. Ohio, 499 U.S. 400, 416, 111 S. Ct. 1364, 1373–1374, 113 L. Ed. 2d 411, 429 (1991) (reversing conviction of white defendant because black jurors were improperly not selected for the jury).

198. *See*, *e.g.*, People v. Anderson, 70 N.Y.2d 729, 730–731, 514 N.E.2d 377, 377–378, 519 N.Y.S.2d 957, 957–958 (1987) (reversing conviction because trial court did not conduct proper inquiry before discharging a juror, and noting that such an error is not subject to harmless error analysis); People v. Jones, 210 A.D.2d 430, 431, 620 N.Y.S.2d 124, 125 (2d Dept. 1994) (holding same).

199. *See* People v. Ahmed, 66 N.Y.2d 307, 311–312, 487 N.E. 2d 894, 896, 496 N.Y.S.2d 984, 986 (1985) (reversing conviction because absence of judge during jury deliberations violated defendant's right to jury trial).

200. *See* People v. Richie, 217 A.D.2d 84, 89, 635 N.Y.S.2d 263, 267 (2d Dept. 1995) ("The explanations based on crime-victim status, familial relationship to a correction officer, or prior jury service are not 'pretextual on their face' and are not 'implausible', 'silly', or 'superstitious'. That there was less than complete uniformity in the application of these factors does not establish that these factors were pretextual" (citations omitted).).

case fairly, and you or your lawyer eventually used up all of your challenges to the jury composition.[201]

Note that the questions of whether the harmless error test applies (as opposed to automatic reversal) and what standard to apply are issues evolving on both the state and federal levels.[202] This means that you should research what law applies to your case.

(b) Errors That May be "Harmless"

If the error that occurred in your proceedings was not necessarily enough to warrant reversal of your judgment, the court will examine the error to the harmless error test. Once the court decides that the error occurred, it must decide if the error harmed you. If the court finds that your conviction had an error but the error did not impact your conviction (you would have been convicted and sentenced in the same way even if the error had not happened), then it will find that the error was "harmless." The specific test that New York appellate courts apply to determine whether an error is harmless depends on whether the error is a constitutional or non-constitutional error.

A non-constitutional legal error does not violate rights guaranteed by the U.S. Constitution or the New York State Constitution. Rather, these types of errors generally violate rights guaranteed by state statutes or common law. A non-constitutional legal error is harmful if (1) there was not overwhelming proof of your guilt at trial (apart from any wrongly admitted evidence) *and* (2) there is a "significant probability" that the jury would have acquitted you had it not been for the error.[203]

For example, the trial judge may improperly examine a witness (for instance, by asking a witness questions in a way that gives the jury an impression that the judge does not find the witness to be credible or trustworthy).[204] If the appellate court holds that the trial judge improperly examined a witness, it will use the harmless error test to determine if your judgment should be modified or reversed. In general, the stronger the evidence against you, the more likely a court will find a non-constitutional error harmless (and therefore affirm the judgment against you).[205]

A constitutional error is a legal error that violates rights guaranteed by the U.S. Constitution or the New York State Constitution. Appellate courts apply a standard that is more favorable to the

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201. *See* People v. Johnson, 94 N.Y.2d 600, 614–615, 730 N.E.2d 932, 939–940, 709 N.Y.S.2d 134, 141–142 (2000) (reversing conviction because trial court failed to either excuse or demand unconditional assurances from jurors who openly admitted that they doubted whether they could be fair in the case); People v. Johnson, 17 N.Y.3d 752, 753, 952 N.E.2d 1008, 1009, 929 N.Y.S.2d 16, 17 (2011) (reversing conviction because trial court failed to follow up with questioning after a juror expressed uncertainty about her ability to fairly consider a major issue in the case); People v. Giuliani, 47 Misc. 3d 31, 33, 6 N.Y.S.3d 382, 385 (2d Dept., 9th & 10th Jud. Dists. 2014) (reversing trial court's refusal to excuse juror, thus requiring the defendant to use his last peremptory strike, who admitted that she could not decide a DWI case without relying on her professional knowledge as a nurse); People v. Russell, 116 A.D.3d 1090, 1093–1094, 983 N.Y.S.2d 105, 108–109 (2014) (holding that failure to make further inquiries into jurors who had shared inability to be unbiased required new trial).

202. For example, in 1991, the U.S. Supreme Court ruled that the harmless error test applies to the admission of coerced confessions. *See* Arizona v. Fulminante, 499 U.S. 279, 311–312, 111 S. Ct. 1246, 1265–1266, 113 L. Ed. 2d 302, 332–333 (1991). This was a change in the previous standard, in which admission of a coerced confession was always considered harmful. *See* Payne v. Arkansas, 356 U.S. 560, 568, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975, 981 (1958). Although many of the cases cited in this Section are New York state cases, you should be aware that federal cases (such as cases decided by the Supreme Court and the Second Circuit) may apply to you.

203. *See* People v. Ayala, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) (alteration in original) (citing People v. Crimmins, 36 N.Y.2d 230, 242, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222 (1975)) ("[T]he standard for nonconstitutional error, which is governed solely by State law, requires reversal if the properly admitted evidence was not 'overwhelming' *and* there is a 'significant probability ... that the jury would have acquitted the defendant had it not been for the error or errors which occurred.'").

204. *See* People v. Mendez, 225 A.D.2d 1051, 1051–1052, 639 N.Y.S.2d 219, 219–220 (4th Dept. 1996) (granting defendant a new trial because the trial judge skeptically questioned a defense witness).

205. *See* People v. Kello, 96 N.Y.2d 740, 743–744, 746 N.E.2d 166, 166–168, 723 N.Y.S.2d 111, 112–114 (2001) (holding that there was no significant probability that entering the excluded 911 tapes into evidence at trial would have led to the defendant's acquittal given the testimony offered at trial, and therefore finding the error harmless).

defendant when reviewing constitutional errors than they do when reviewing statutory errors. In general, a constitutional error is harmful unless there is no reasonable possibility that the error might have contributed to your conviction (as in the error is harmless beyond a reasonable doubt).[206]

E. Preparing Your Papers for Your Appeal

1. What and Where to File

This Part will help you determine what papers you need to file and how to file them.

If you have a right to appeal and are appealing "as a matter of right,"[207] you must file two copies of a written notice of appeal with the clerk of the court where you were sentenced.[208] You must also serve a copy of your notice of appeal upon, or give a copy to, the district attorney of the county where your trial court is located.[209] The notice of appeal should state the following information: (1) your name; (2) your desire to appeal; (3) the court to which you plan to appeal; (4) a description of the judgment, sentence, or order you wish to appeal; and (5) your indictment number or your docket number if your proceedings occurred in the criminal court.[210] If your notice of appeal contains mistakes in the description of the judgment, sentence, or order to be appealed, the appellate court may, in the interest of justice, excuse your mistakes and treat your notice as valid.[211] However, you should try to make your legal papers as correct as possible.

If you are challenging a decision for which there is no right to appeal without permission—for example, a trial court's denial of your Article 440.10 or Article 440.20 motion—you must first seek permission to appeal. To do this, you must file an application for a certificate granting leave (permission) to appeal in the intermediate appellate court.[212] If you do not file the application and simply appeal without permission, the court will not consider your appeal, and by the time the problem comes to light it might be too late to get permission. If your application is granted, the court will issue a certificate to you granting leave (permission) to appeal. You must file both this certificate and a notice of appeal with your trial court within fifteen days.[213] If the appeal is from a local criminal court and a court stenographer or reporter did not record your proceedings, you may submit an affidavit of

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206. *See* Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710–711 (1967) (noting that on appeal the prosecution must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" for a conviction to be sustained despite a constitutional error); *see also* People v. Ayala, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) ("Constitutional error… must lead to reversal unless there is no reasonable possibility that the error might have contributed to the conviction."). The harmless error test for constitutional errors in habeas corpus proceedings is different from the standard in direct appeals. *See JLM*, Chapter 13, "Federal Habeus Corpus" on federal habeas corpus proceedings and *JLM*, Chapter 21, "State Habeus Corpus: Florida, New York, and Michigan" on New York State habeas corpus proceedings.

207. *See* Part B(4) of this Chapter, which explains when you have a right to appeal without asking permission.

208. *See* N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2009). This section applies to appeals as a matter of right to an intermediate appellate court or directly to the Court of Appeals. If there is no clerk of the trial court, you must file one copy of your notice of appeal with the judge of the trial court and a second copy with the clerk of the appellate court to which you plan to appeal. *See* N.Y. CRIM. PROC. LAW § 460.10(2) (McKinney 2009). If a transcript of your trial was not made because there was no court reporter at your trial, you may file an affidavit of errors with the trial court instead of a notice of appeal. If you file a notice of appeal, you must also file an affidavit of errors within thirty days of filing your notice of appeal. *See* N.Y. CRIM. PROC. LAW § 460.10(3) (McKinney 2009). See Part E(2) of this Chapter for deadlines for filing.

209. *See* N.Y. CRIM. PROC. LAW § 460.10(1)(b), (3)(b) (McKinney 2009).

210. See Forms B-1, B-2, and B-3 in Appendix B of this Chapter.

211. *See* N.Y. CRIM. PROC. LAW § 460.10(6) (McKinney 2009).

212. *See* N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009 & Supp. 2009) (describing procedure for seeking leave to appeal to an intermediate court). See also Appendix B, Form B-2, for a sample application for a certificate granting leave to appeal. Note, each appellate division has its own rules for applying for a certificate. See *JLM*, Chapter 20, for information on 440 motions.

213. *See* N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2009).

errors in place of the notice of appeal. Please note that these procedures apply to appeals by permission to the intermediate appellate court (usually the appellate division). For information on seeking permission from the Court of Appeals, see Part F.

In either case, once you have filed a notice of appeal, you should order copies of the trial transcript from the court reporter. You will need copies of the transcript to "perfect your appeal."[214] You will generally need to pay a fee when you order copies of the transcript. If you cannot afford the transcripts, you may request that the appellate court give you a free transcript, or request to appeal on the original record. To do either, you must send the appellate court: (1) a letter stating your request, and (2) an affidavit (a sworn statement witnessed by a notary public) setting forth your request, the amount and sources of your income, and facts showing that you are unable to pay the relevant expenses.[215] This affidavit to proceed as a poor person on appeal, or for partial poor person relief, is called an "*in forma pauperis* affidavit." You should also send copies of the letter and affidavit to the district attorney of the county where your trial court is located. Appendix B of this Chapter explains exactly how to fill out poor person's papers. The same procedure can be used to ask the court to appoint a lawyer for you if you cannot afford one.

2. When to File

If your appeal is a matter of right, you must file and serve your notice of appeal within thirty days of your sentencing date.[216] If you want to appeal, you should file even if you are unsure of the details of your appeal. Filing does not force you to complete your appeal, but if you do not file you will probably lose your right to appeal when the thirty-day deadline passes. You can get a lawyer to help you with the rest of your appeal. *See* Part C(1) above for how to get a lawyer.

If your appeal is a matter of right and you are appealing directly to the Court of Appeals, the deadline for filing your notice of appeal is the same as for an appeal as of right to an intermediate appellate court. Also, you must file and serve your jurisdictional statement, that is, why you are able to appeal to a given court, within ten days of filing your notice of appeal.

If you must seek permission to appeal, an application for a certificate granting leave to appeal to an intermediate appellate court must be filed within thirty days after you or your lawyer at trial received a copy of the order or judgment you wish to appeal.[217] If the court gives you a certificate granting permission to appeal, you must file the certificate and notice of appeal within fifteen days from the time the court created the certificate.[218]

3. How to Perfect Your Appeal

In addition to filing a notice of appeal, you must "perfect" your appeal.[219] Generally, to perfect an appeal, you must deliver a specified number of copies of the trial record and your brief to the appellate court and to the opposing party. The exact steps necessary to perfect an appeal vary in each appellate

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214. See Part E(3) of this Chapter on how to perfect an appeal.

215. Under the rules of the four appellate divisions, the procedure for seeking relief as a poor person in criminal appeals is the same as that in civil cases. For an explanation of this procedure, see N.Y. C.P.L.R. 1101 (MCKINNEY 2009). *See also* Anders v. California, 386 U.S. 738, 741, 87 S. Ct. 1396, 1398, 18 L. Ed. 2d 493, 496 (1967) (holding that an indigent person has the right to appellate representation equal to that of a nonindigent person); Douglas v. California, 372 U.S. 353, 355, 83 S. Ct. 814, 815–816, 9 L. Ed. 2d 811, 813–814 (1963) (holding that the 14th Amendment requires states to provide indigent persons representation on their appeals as of right); People v. Garcia, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) ("[O]n a People's appeal, a defendant has the right to appellate counsel of defendant's choice and the right to seek appointment of counsel upon proof of indigency.").

216. *See* N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2009). If you file the notice, but fail to serve a copy on the district attorney within the 30-day period, the appellate court may allow you to serve the notice after the deadline, provided that you have a good reason. *See* N.Y. CRIM. PROC. LAW § 460.10(6) (McKinney 2009).

217. *See* N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009).

218. *See* N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2009).

219. *See generally* N.Y. CRIM. PROC. LAW § 460.70 (McKinney 2009).

court. For details, you should consult the rules of the appellate division or appellate term to which you are appealing.[220]

4. How to Prepare for Your Appeal

Once you have properly taken your appeal, you or your lawyer will need to review the record and begin to prepare a brief. The brief is a legal memorandum, which is a paper that informs the appellate court of the facts of your case, identifies the trial court's errors, and explains why these errors require the appellate court to reverse or modify your conviction or sentence.[221] The brief is "served upon" or officially given to the court and your opponent (the prosecution). If your lawyer prepares the brief, you should read a copy to be sure that it contains all the arguments that you believe the appeals court should consider in deciding your case.

If you have been assigned a lawyer, you do not have the right to insist that the lawyer include arguments in the brief that your lawyer believes should not be presented to the appellate court.[222] You may, however, request permission to file a *pro se* supplemental brief (an additional brief of your own) to raise issues your lawyer left out of the original brief. The appellate court will likely (but not necessarily) accept your *pro se* brief, provided that you request to file it in a timely fashion, usually by writing for permission to the appellate court where your appeal will be heard, and provided you specifically identify in your request the issues that you intend to raise in the *pro se* brief. You must request this permission in writing within thirty days of the date that your attorney files the brief. You should make sure that your request is not too late or too general.[223] The rules for when you must file your request can be found in the rules of the court to which you are appealing.[224]

In response to your brief, your opponent (the prosecution) will almost certainly file a brief that argues that the trial court's judgment should stand. After the appellate court receives your opponent's brief, it will set a calendar date for oral argument.[225] After your opponent files his brief, you also have the right to file a reply brief within a few days. A reply brief gives you the opportunity to point out factual errors in the respondent's brief, or to mention relevant court decisions that have been issued since you submitted your initial brief. You are not allowed to raise new issues in your reply.[226]

In an oral argument, your lawyer has about fifteen minutes to discuss the merits of your appeal directly with the appellate court.[227] The purpose of the oral argument is to focus the judges' attention

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220. See Appendix A of this Chapter to determine where you should direct your appeal. See generally N.Y. COMP. CODES R. & REGS. tit. 22, §§ 600.9, .11 (2020) for 1st Dept. Appellate Division; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 640.3, .5, .6(b) (2020) for 1st Dept. Appellate Term; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 670.9–.11 (2020) for 2d Dept. Appellate Division; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 731.1, .4(c) (2020) for 2d Dept. Appellate Term; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 850.1, .5, .9, .11 (2020) for 3d Dept. Appellate Division; N.Y. COMP. CODES R. & REGS. Tit. 22 § 1000.1, .7–.9, .11 (2020) for 4th Dept. Appellate Division.

221. Part B of Chapter 6 of the *JLM* describes briefs (memorandum of law) and other legal papers in more detail.

222. *See* Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993 (1983) (holding that a defendant does not have the right to insist that his lawyer raise every possible argument that has some merit); People v. White, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (holding same).

223. *See* People v. White, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (holding that while it would be "better practice" for appellate courts to accept timely supplemental *pro se* briefs, the denial of an application to accept a *pro se* brief is within the court's discretion).

224. In the second department of the appellate division, for example, if you want to file a *pro se* brief, you must do so within 30 days from the date your attorney filed her brief. For more information about the rules of the court to which you are applying, see *JLM*, Chapter 5.

225. Some appeals may take place without oral argument. Check the rules of the appellate court to which your appeal is directed. *See* N.Y. CRIM. PROC. LAW § 460.80 (McKinney 2009).

226. *See, e.g.*, State Farm Fire & Cas. Co. v. LiMauro, 103 A.D.2d 514, 521, 481 N.Y.S.2d 90, 95 (2d Dept. 1984) ("It is beyond cavil that raising a new substantive issue of law for the first time in a reply brief is improper...."); *see also* JONATHAN M. PURVER & LAWRENCE E. TAYLOR, HANDLING CRIMINAL APPEALS § 128.12 (1960), Westlaw HANDCRIMAPP (database updated Mar. 2018) ("[T]he petitioner-appellant must not raise new issues in the reply brief.").

227. The rules of the individual appellate courts set the amount of time allowed for oral argument. *See* N.Y.

on important points of your case and answer any questions or doubts they have about your claims. You should discuss with your lawyer any particular points that you would like emphasized in oral argument, since it is your lawyer's final chance to convince the appellate court to rule in your favor. In some cases, you and your lawyer may decide that it is best not to argue your case orally. For example, your lawyer may believe an oral argument will add little to the arguments presented in your written brief. Keep in mind that there are risks involved in such a decision. In some cases, the court may consider waiving the oral argument as an admission that your case is weak. An oral argument also provides an important chance to clarify and expand on issues raised in your brief. You and your lawyer should consider the matter carefully before making a decision on how to proceed.

Appellate court judges will decide your case after they read the briefs and hear the oral argument. The court may or may not explain in writing the reasons for its decision.[228] Keep in mind that the whole process—from the time you file a notice of your appeal to the date the judges hand down their decision—is very time consuming and may be subject to delays. Despite the strict time limits for starting an appeal, the entire process can take several years to conclude. Each step may take several months—including gathering the necessary documents, preparing the brief, obtaining the respondent's brief, getting a calendar date, and, finally, waiting for a decision.

Throughout your appeal, you should take an active role even if you have a lawyer. This includes communicating frequently with your lawyer, suggesting issues for your lawyer to include in your briefs, and requesting copies of documents relating to your appeal.

F. Continuing Your Appeal

If your first appeal is not successful, you may be able to pursue your claim in a higher court or by an alternative procedure. This Part discusses how you can take an appeal that has been denied by an intermediate appellate court to the Court of Appeals. It also discusses alternatives that you may consider if the Court of Appeals denies your appeal.

If the intermediate appellate court denies your appeal, you may continue pursuing your claim by appealing the intermediate appellate court's order to New York's highest court, the Court of Appeals. You can appeal an intermediate appellate court decision affirming or modifying a trial court decision against you only if: (1) the decision is based on the law alone or (2) the remedy ordered is illegal. Unlike the intermediate appellate courts, the Court of Appeals cannot vacate a conviction solely on the basis that the evidence does not sufficiently support the facts.

Keep in mind that you do not have a right to appeal an intermediate appellate court decision to the Court of Appeals; you may do so only if you obtain a certificate granting leave (permission) to appeal.[229] You must apply for this certificate within **thirty days** after you are served with the appellate court order that you wish to appeal.[230] **THIS THIRTY-DAY TIME LIMIT IS EXTREMELY IMPORTANT.** You may seek permission to continue your appeal if the appellate court affirms the trial court judgment, sentence, or order against you, or if you are dissatisfied with the appellate court's modification of the judgment, sentence, or order.[231]

The specific procedure for obtaining permission to appeal depends upon the particular intermediate appellate court from which you are appealing. If you are appealing from any court other than the appellate division, you must seek permission from a judge of the Court of Appeals. However, if you are appealing from a decision of the appellate division, you may request a certificate of leave to

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CRIM. PROC. LAW § 460.80 (McKinney 2009).

228. The practice of affirming a decision without a written explanation (known as "summary affirmance") has been criticized by lawyers, but appellate courts sometimes do it nonetheless. *See* 21 C.J.S. *Courts* § 232, Westlaw (database updated Feb. 2019) (noting that "no more may be read into the court's action [in affirming a lower court decision without opinion] than is essential to sustain that judgment").

229. *See* N.Y. CRIM. PROC. LAW § 450.90(1) (McKinney 2009). Form B-2 in Appendix B is a sample application for a certificate granting leave to appeal.

230. *See* N.Y. CRIM. PROC. LAW § 460.10(5)(a) (McKinney 2009).

231. *See* N.Y. CRIM. PROC. LAW § 450.90(1) (McKinney 2009).

appeal from either a judge of the Court of Appeals or a justice of the appellate division in the same department that handed down the decision that you are appealing.[232] Many appellate division judges are hesitant to grant leave to appeal, however, because they know that the Court of Appeals likes to decide for itself what cases it will hear. You can file only one application, so you may wish to seek a certificate directly from the Court of Appeals. However, if an appellate division judge dissented from the majority in your case, you may decide to apply to that judge for a certificate of leave to appeal instead of going directly to a judge of the Court of Appeals. In sum, you must get permission to file another appeal. The permission must come from a judge in the appellate division of the Court of Appeals your case was heard in. You may choose to submit the request for permission to file an appeal directly to a judge you think will grant it to you. Or if you are unsure if any particular judge will give you permission, you may file for permission to appeal from the Court of Appeals generally.

To request a certificate from a judge of the Court of Appeals, you must send an application to the clerk of the Court of Appeals. The application should be addressed to the chief judge, who will appoint one judge of the Court of Appeals to consider your application.[233] Your application must include copies of the appellate briefs filed by you (or your lawyer) and by the prosecution, the appellate division decision, any other relevant documents you will rely upon, and a letter explaining why your case needs further review. You must also include relevant transcripts that demonstrate that your appeal is based on a question of law (which usually requires that you preserved the right to appeal when the error was made).[234] Further review might be considered appropriate if your case presents a novel issue of law (that is, an issue that the court has never decided before), if the lower court did not follow established precedent, or if the appellate divisions differ in their approaches to the issue involved. For an example of an application to the Court of Appeals, see Form B-2 in Appendix B at the end of this Chapter. If the judge grants your application and issues a certificate, your appeal is taken. You may proceed to prepare your brief and oral argument.

If the Court of Appeals denies permission to appeal, but you think you have "extraordinary and compelling reasons" for them to reconsider that denial, you may contest their decision. To do so, serve a request for reconsideration on the District Attorney, then send that same request and proof of its service on the District Attorney to the clerk of the court within thirty days of the issuance of the certificate denying permission. Your application will be reassigned to the same judge who originally ruled on it.[235] Be aware that very few cases heard at the intermediate level reach the Court of Appeals.[236]

If the Court of Appeals hears your appeal, it will affirm, reverse, or modify the intermediate appellate court order.[237] If it reverses or modifies the intermediate appellate court, it will also take or direct the appellate court to take some appropriate corrective action.[238]

If the Court of Appeals does not hear your appeal, or if it hears your appeal but rules against you, you may still have other opportunities for relief. First, if your case involves issues of federal law,[239]

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232. *See* N.Y. CRIM. PROC. LAW § 460.20(2)(a) (McKinney 2009). If you are appealing from the decision of an intermediate appellate court other than the appellate division (i.e. the appellate term), you must request the certificate from a judge of the Court of Appeals. *See* N.Y. CRIM. PROC. LAW § 460.20(2)(b) (McKinney 2009).

233. *See* N.Y. CRIM. PROC. LAW § 460.20(3)(b) (McKinney 2009).

234. *See generally* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20 (2013).

235. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20(d) (2013).

236. In 2017, the Court of Appeals decided 62 criminal appeals. *See* JOHN P. ASIELLO, N.Y. COURT OF APPEALS, 2017 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 5 (2017), *available at* https://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2017.pdf (last visited Feb. 4, 2019); *see also* N.Y. Crim. Proc. Law § 450.90 practice cmts. (McKinney 2009) (discussing appellant's hurdles to reaching appeals court).

237. *See* N.Y. CRIM. PROC. LAW § 470.35(3) (McKinney 2009).

238. *See* N.Y. CRIM. PROC. LAW § 470.40(1) (McKinney 2009).

239. For example, violations of the U.S. Constitution present issues of federal law. *See* 28 U.S.C. § 1331 (2012).

you can apply for a writ of certiorari.[240] This would allow you a final appeal on those federal issues to the United States Supreme Court, but the Supreme Court very rarely grants such permission.[241] Second, in certain circumstances, you may seek to challenge your conviction or sentence through a different post-conviction proceeding, such as an Article 440 motion, a petition for state habeas corpus, or a petition for federal habeas corpus. See *JLM* Chapters 20, 21, and 13, respectively, for explanations of these remedies.

G. Three Options for Dealing with Ineffective Assistance of Appellate Counsel

When you appeal your conviction, you have the right to effective assistance from your appellate lawyer.[242] This Part addresses what to do if you believe that your appointed attorney is not raising all the issues that should be pursued on appeal or is otherwise failing to represent you appropriately. Note that you also have a right to receive effective assistance from your trial lawyer, and if you did not receive effective assistance at your trial this could itself be grounds for appeal. For information about effective assistance from your trial lawyer, see *JLM* Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

This Part will discuss three particular strategies that may be valuable for you: (1) responding to an *Anders* brief submitted by your attorney, (2) filing supplemental briefs along with those of your attorney, and (3) applying for a writ of error *coram nobis* for relief from ineffective counsel.

1. *Anders* Briefs

You may encounter a situation in which the attorney appointed for your criminal appeal asks the court for permission to withdraw from your case by filing a motion known as an "*Anders* brief." An attorney files an *Anders* brief if she or he reviews your case and decides, that there are no non-frivolous, or substantial and important, claims you could make on appeal. However, in the *Anders* brief your attorney must reference the trial record and identify any issues that are supported by legal authority and arguable if the case is appealed.[243] After reviewing the *Anders* brief, a court will grant

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240. The Supreme Court has rules governing petitions for writs of certiorari. *See* SUP. CT. R. 12–16. A writ of certiorari is a petition requesting that the Supreme Court review a lower court's decision. Supreme Court Rules 12–16 outline the steps of requesting a writ of certiorari. Rule 12 outlines how many copies of a petition must be filed, steps for notifying people involved, and the timeline and steps for the Clerk to certify and transmit the record. Rule 13 outlines the timeline for filing a writ of certiorari after a judgment from a lower court or denial of a request for discretionary review. Rule 14 outlines what a writ of certiorari must contain, including items such as a short and clear question, a short and clear set of facts, a list of all people or groups involved, and a date of the judgment or order. Rule 15 outlines the opposing person's or group's right to submit a brief stating why a writ of certiorari should not be granted, the contents of such a brief, and the timeline for filing this brief. Rule 16 outlines the Court's procedures for granting or denying the petition.

241. From October 1, 2016, through September 30, 2017, just 29 petitions for certiorari were granted (that is, had a hearing in the Supreme Court) in criminal cases, and 1,360 were denied or dismissed. That is a success rate below 3%. *See Judicial Business 2017,* U.S. COURTS, tbl. B-2, *available* at https://www.uscourts.gov/sites/default/files/jb_b2_0930.2017.pdf (last visited Feb. 4, 2019).

242. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (holding that fairness of the appellate process requires that a defendant receive more than nominal representation from counsel); Douglas v. California, 372 U.S. 353, 357, 83 S. Ct. 814, 816, 9 L. Ed. 2d 811, 814–16 (1963) (holding that the state requirement that requires indigent defendants to make a preliminary showing of merit prior to assignment of appellate counsel was unconstitutional).

243. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (holding that "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal."). *But see* Smith v. Robbins, 528 U.S. 259, 272, 120 S. Ct 746, 756–57, 145 L. Ed. 2d 756, 771–72 (2000) (holding that states may adopt procedures that differ from that described in *Anders*, so long as the underlying goal of adequate appellate review required by the 14th Amendment is met). However, "the procedures adopted by New York courts closely parallel and are clearly modeled upon the procedure set forth by the Supreme Court in *Anders*." People v. Stokes, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.S.2d 217, 219 (2001) (describing the procedures for *Anders* briefs that New York courts have adopted and holding that the *Anders* brief filed by assigned counsel was insufficient because it did

your attorney's request to withdraw from handling your appeal if it determines that your attorney has fulfilled the obligation to thoroughly examine the trial record for arguably appealable issues. If the court agrees that there are not any non-frivolous claims you could make on appeal, it will affirm the lower court's judgment that you are trying to appeal and dismiss your appeal. But, if the court concludes there *are* non-frivolous claims on which you could base an appeal (whether or not it thinks you will actually prevail), the court will appoint you a new attorney to help with your appeal.[244]

The fact that your attorney files an *Anders* brief does not in itself constitute ineffective assistance of counsel.[245] However, your attorney's duty in the matter of your appeal is to be an "active advocate," and his or her *Anders* brief must be more than a simple assertion that there are not any non-frivolous claims that you could make on appeal. It must show that your attorney made an independent and thoughtful examination of the record for the purposes of your appeal.[246] You may disagree with your attorney over whether certain issues of your case should be appealed. Your attorney must raise all issues that, in his or her professional judgment, have arguable merit, but he is not obligated to raise every non-frivolous issue you request.[247]

If you believe that there are non-frivolous issues that should be pursued on appeal, but your attorney refuses to do so and instead files an *Anders* brief, you will generally have the opportunity to file a *pro se* supplemental brief on any issues you believe to have merit (deserving consideration by the court).[248] You should review the rules of the court to which you are appealing to determine whether you must first apply for permission to submit your brief and whether there are any criteria the court may have set out for the format of your brief. Your attorney is required to inform you of the fact that he has filed an *Anders* brief that will likely result in an affirmation of your conviction, and he must also inform you of your right to file a *pro se* supplemental brief.[249] Your attorney must also provide you with a copy of the brief.[250]

You should file a supplemental brief or else you may waive other rights unrelated to your direct appeal. If you do not file your own brief in response to your attorney's *Anders* brief, you could be prevented from successfully pursuing habeas relief on issues that could have been raised on appeal, including ineffective assistance of counsel. For example, to obtain federal habeas relief, a petitioner

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not adequately advocate available non-frivolous arguments on defendant's behalf).

244. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (describing appointed attorneys' duties to handle appeals); *see also* People v. Stokes, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.2d 217, 219 (2001) (describing procedures New York courts have adopted for *Anders* briefs and holding that the *Anders* brief filed by assigned counsel was insufficient because it did not adequately present available non-frivolous arguments).

245. McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 444, 108 S. Ct. 1895, 1904–05, 100 L. Ed. 2d 440, 456–57 (1988) (upholding constitutionality of a state requirement that when counsel filed a no-merit brief, he must include an explanation of why an issue lacked merit); *see also* Anim v. United States, 2013 U.S. Dist. LEXIS 113462, at *18–19, 2013 WL 4056211, at *7 (S.D.N.Y. Aug. 12, 2013) (holding the "filing of an *Anders* brief does not in itself constitute ineffective assistance of counsel").

246. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1386, 1400, 18 L. Ed. 2d. 493, 498 (1967) (stating that if after a conscientious review of the case, counsel finds it to be frivolous, he may request permission to withdraw along with "a brief referring to anything in the record that might arguably support the appeal").

247. Jones v. Barnes, 463 U.S. 745, 751–54, 103 S. Ct. 3308, 3312–14, 77 L. Ed. 2d 987, 993–95 (1983) (holding that appellate counsel fulfilled duty of representing client to the best of his ability even though counsel did not raise every non-frivolous issue).

248. United States v. Gomez-Perez, 215 F.3d 315, 320 (2d Cir. 2000) (stating that "[i]f counsel subsequently determines that an *Anders* brief is appropriate and thereafter files such a brief, this Court must …. . . afford the defendant an opportunity to raise pro se any issues he feels merit discussion.") (*citing* Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967)).

249. United States v. Gomez-Perez, 215 F.3d 315, 321 n.2 (2d Cir. 2000) (stating that an attorney should "adhere to standard procedure by including with his *Anders* brief an affidavit certifying" that he has informed his client of the filing of the brief, which will likely result in the affirmance of the client's conviction).

250. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (stating that "[a] copy of counsel's brief should be furnished" to the defendant).

must exhaust state remedies and show that his constitutional rights were violated.[251] If you do not raise issues in a *pro se* brief, a court may find that you did not exhaust state remedies and stop you from bringing a federal habeas petition.[252] Further, where your attorney has submitted an *Anders* brief rejecting issues in your supplemental brief as frivolous, New York courts may assign new counsel for your appeal.[253]

Finally, note that *Anders* is only binding law in federal court.[254] That being said, citing *Anders* in state appeals is only persuasive since state courts must follow an *Anders*-like analysis to ensure that your Fourteenth Amendment rights are upheld and since New York's procedures "closely parallel" *Anders*.[255]

2. Filing Supplemental Briefs

Though you do not have an absolute right to file briefs to supplement the arguments made by your appeals attorney in his or her brief, many appellate courts allow you to do so.[256] You should first apply to the court to which you are appealing for permission to file. Permission will usually be granted if you request permission within thirty days of the date your appeals attorney has filed his or her brief AND you specifically identify the issues you intend to raise in the *pro se* brief. You should consult the specific Department's rules and regulations for what your request should include.[257] It is important to follow the timeliness and specificity requirements, because if you do not, the court will likely deny permission to file.

3. Applying for Writ of Error *Coram Nobis*

If you want to challenge an appellate court's affirmation of your conviction on the grounds that you received ineffective assistance of appellate counsel, you may do so by filing a writ of error *coram nobis*.[258] A writ of error *coram nobis* is a way to challenge your conviction because of fundamental

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251. *See JLM* Chapter 13, "Federal Habeas Corpus," for more information on federal habeas and exhaustion.

252. *See* Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993) ("In order to raise a claim that could have been raised on direct appeal, a § 2255 petitioner must show cause for failing to raise the claim at the appropriate time and prejudice from the alleged error.").

253. *See*, *e.g.*, People v. Pertillar, 15 A.D.3d 679, 679–80, 789 N.Y.S.2d 921, 922 (2d Dept. 2005) (relieving attorney who had filed *Anders* brief and assigning new counsel to represent defendant on appeal).

254. Smith v. Robbins, 528 U.S. 259, 265, 120 S. Ct 746, 753, 145 L. Ed. 2d 756, 767 (2000) (holding that states may adopt procedures that differ from those described in *Anders*, so long as the underlying goal of adequate appellate review required by the 14th Amendment is met).

255. *See* People v. Stokes, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.S.2d 217, 219 (2001) (noting that the "procedures adopted by New York courts closely parallel and are clearly modeled upon the procedure set forth by the Supreme Court in *Anders*.").

256. *See* People v. White, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (finding while it would be "better practice" for appellate courts to accept timely supplemental *pro se* briefs, courts can decline to accept them).

257. For more information about the rules of the court to which you are applying, see *JLM* Chapter 5, "Choosing a Court and a Lawsuit: An Overview of the Options".

258. People v. Bachert, 69 N.Y.2d 593, 594, 509 N.E.2d 318, 319, 516 N.Y.S.2d 623, 624 (1987) (holding claims of ineffective assistance of counsel in the intermediate appellate court will be determined through the writ of error *coram nobis*).

errors at trial or on appeal. For example, you can use a writ of error *coram nobis* if your appellate lawyer failed to prosecute an appeal or to raise all issues effectively.[259]

You should direct the petition to the appellate division "where the allegedly deficient representation occurred."[260] Note, if you wish to challenge your conviction's affirmance, or upholding by the appellate court, because of ineffective assistance of appellate counsel in New York state, the only way to do so is a writ of error *coram nobis*. You may not challenge it with a motion to vacate judgment under New York Criminal Procedure Law Section 440.10.[261] If your petition is granted, the appellate court may allow you (most likely with a new lawyer) to re-argue your original appeal.[262] If your petition is denied, you may appeal that decision to the Court of Appeals.[263]

A form for writs of error *coram nobis* can be found in Appendix B-7. In the *coram nobis* brief, you must explain the particular actions your appellate counsel took and the actions you believe your attorney should have taken. Your statements—both of the facts and arguments—should be as clear and specific as possible. Also, be sure to look up and review the rules of the particular jurisdiction for additional deadlines and requirements that you must follow. Note that you also have the right to effective assistance from your trial lawyer. For information about how to challenge your trial lawyer's assistance, see *JLM* Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel".

H. Conclusion

If you believe a harmful error occurred at your hearing or trial, you may be able to appeal and have the error corrected. The first step in this process is determining whether your appeal is prevented by time, plea agreements, failure to protest, or various other reasons. If your appeal is not prevented and you are eligible to appeal, you should begin the process and get a lawyer. You have the right to a lawyer, and without one you risk making a mistake that will waste your limited opportunity to appeal. Next, your lawyer or you will need to decide the specific legal basis for your appeal and file the correct appeals papers at the proper times to the right court. The appeals process can feel overwhelming and complicated, but by following the steps in this Chapter, you should be able to appeal your conviction.

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259. People v. Forsythe, 105 A.D.3d 1430, 1430, 964 N.Y.S.2d 363, 364 (4th Dept. 2013) (granting motion for writ of error *coram nobis* where defendant had not been represented, nor informed of his right to be represented, on the People's appeal); People v. Shegog, 23 A.D.3d 1158, 1158, 807 N.Y.S.2d 764, 764–765 (4th Dept. 2005) (granting motion for writ of error *coram nobis* where the court found merit in defendant's contention that "counsel failed to raise an issue on direct appeal that would have resulted in reversal"); People v. Bachert, 69 N.Y.2d 593, 598, 509 N.E.2d 318, 321, 516 N.Y.S.2d 623, 626 (1987) ("[A] motion for a writ of error *coram nobis* lies where it was asserted that a court-appointed lawyer failed to prosecute an appeal") (*citing* People v. De Renzzio, 14 N.Y.2d 732, 199 N.E.2d 172, 250 N.Y.S.2d 76 (1964)).

260. People v. Bachert, 69 N.Y.2d 593, 599, 509 N.E.2d 318, 322, 516 N.Y.S.2d 623, 627 (1987) ("[T]he natural venue for *coram nobis* review of ineffective assistance of appellate counsel claims is in the appellate tribunal where the allegedly deficient representation occurred.").

261. People v. Bachert, 69 N.Y.2d 593, 595–596, 509 N.E.2d 318, 319, 516 N.Y.S.2d 623, 624 (1987) ("[A] common-law *coram nobis* proceeding brought in the proper appellate court is the only available and appropriate procedure and forum to review a claim of ineffective assistance of appellate counsel.").

262. People v. Walton, 40 A.D.3d 1258, 1259, 836 N.Y.S.2d 442, 443 (3d Dept. 2007) (granting *coram nobis* relief in part and reinstating defendant's appeal as to certain issues).

263. People v. Stultz, 2 N.Y.3d 277, 281-85, 810 N.E.2d 883, 885–86, 778 N.Y.S.2d 431, 433–34 (2004) (explaining that an intermediate appellate court's decision regarding a petition for a writ of error *coram nobis* may be appealed to the Court of Appeals and defining the Court of Appeal's "meaningful representation" standard of review for such an appeal).

APPENDIX A

THE COURT TO WHICH YOU SHOULD APPEAL

Please also refer to the inside back cover of the *JLM*, which shows the structure of the New York court system.

Crime	Court Where You Were Convicted[264]	Court Where Appeal May be Heard
Misdemeanor	Local criminal court outside New York City	County court of the county where you were convicted; or the Appellate Term of the New York State Supreme Court in the Second, Third, or Fourth Departments, if the appellate division of that department so directs.[265]
Misdemeanor	New York City Criminal Court in New York or Bronx Counties	Appellate Term for the New York State Supreme Court of the First Department.
Misdemeanor	New York City Criminal Court in Kings, Queens, or Richmond Counties	Appellate Term for the New York State Supreme Court of the Second Judicial Department.
Misdemeanor	County court	Appellate division of the department where you were convicted; or the Appellate Term of the New York State Supreme Court in the Second, Third, or Fourth Departments, if the appellate division of the department so directs.
Felony	County court	Appellate division of the department where you were convicted.
Any Offense	New York State Supreme Court	Appellate division of the department where you were convicted.

264. This is also the court where you file your notice of appeal.

265. N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2005). The Appellate Division of the Second Department

APPENDIX B

SAMPLE PAPERS FOR A CRIMINAL APPEAL[266]

This Appendix contains the following materials:

B-1. Notice of Appeal as of Right to an Intermediate Appellate Court[267] from a Superior Court[268] Judgment, Sentence, Judgment and Sentence, or Order
B-2. Notice of Application for a Certificate Granting Leave to Appeal to an Intermediate Appellate Court or to the Court of Appeals
B-3. Papers Needed to Obtain the Services of a Lawyer Without Cost on Appeal, or Other Poor Person Relief
  a. Notice of Motion to Proceed as a Poor Person
  b. Affidavit in Support of Motion to Proceed as a Poor Person on Appeal
B-4. Papers Needed to Get Release on Bail Pending Appeal
  a. Notice of Motion for Recognizance or Bail Pending Appeal
  b. Affidavit in Support of Motion for Recognizance or Bail Pending Appeal
B-5. Notice of Motion for Extension of Time in Which to Take an Appeal Pursuant to New York Criminal Procedure Law Section 460.30
B-6. Affidavit in Support of Motion for Extension of Time to Take Appeal
B-7 Petition for Writ of Error *Coram Nobis*

DO NOT TEAR THESE FORMS OUT OF THE *JLM*. If you simply tear these papers out of the *JLM* and send them to the court, the court will ignore the papers. Write your own versions of these forms, and fill them out according to the facts of your particular case. The endnotes following the sample documents tell you how to fill in the necessary information. Consult Parts A through F of this Chapter and Chapter 6 of the *JLM*, "An Introduction to Legal Documents," for assistance in preparing your case. The name and address of the court to which you should send these papers are contained in Appendices I and II of the *JLM*.

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does direct certain classes of cases to the appellate term. Rules of the Second Department that discuss this matter may be found in McKinney's New York Rules of Court. *See* N.Y. CRIM. PROC. LAW § 730.1 (McKinney 2005); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 730.1 (2020).

266. These forms are based in part upon McKinney's Forms, a useful resource providing sample forms for almost any action you may wish to bring. The samples we have provided are broad and general, while the McKinney's Forms are specific and correspond to the statute underlying your action. *See generally* 18B West's McKinney's Forms Criminal Procedure Law §§ 450–70 (2015).

267. New York law uses the term "intermediate appellate court" to refer to the appellate courts in each county that decide the defendant's first appeal. These courts are the appellate division and the appellate term.

268. New York law uses the general term "superior court" to include both the supreme court and certain county courts in different counties that have jurisdiction over both felonies and misdemeanors.

B-1. NOTICE OF APPEAL AS OF RIGHT TO AN INTERMEDIATE APPELLATE COURT FROM A SUPERIOR COURT JUDGMENT, SENTENCE, JUDGMENT AND SENTENCE, OR ORDER

Supreme Court of the State of New York
County of _____
----------x

The People of the State of New York,	:	
Plaintiffs,	:	Notice of Appeal
	:	
- against -	:	Indictment No. _____
	:	
_____,	:	
Defendant.	:	

----------x

PLEASE TAKE NOTICE, that defendant, _____, hereby appeals pursuant to section 450.10, subdivision (1), of the Criminal Procedure Law of the State of New York to the Appellate Division of the Supreme Court, _____ Judicial Department, from the _____, _____ judgment made and entered by Hon. _____, convicting [him/her] of the class ____ felony of _____ and that this appeal is taken from said judgment and from each and every part thereof and every intermediate order made therein.

Dated: _____, New York
_____

_____
Attorney for Defendant

_____ Street
_____ New York
Telephone Number: _____

To: Hon. _____
District Attorney |

_____ County
_____ Street
_____ , New York
Clerk

Supreme Court of the State of New York

_____County
_____ Street
_____, New York

B-2. NOTICE OF APPLICATION FOR A CERTIFICATE GRANTING LEAVE TO APPEAL TO AN INTERMEDIATE APPELLATE COURT OR TO THE COURT OF APPEALS

Court of Appeals of the State of New York

The People of the State of New York, Plaintiffs-Respondents,	:	Notice of Application
- against -	:	Indictment No. _____
Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that upon the annexed affidavit, the above named defendant-appellant makes application to _____ to determine the application hereby made for a certificate, pursuant to section 460.20 of the Criminal Procedure Law of the State of New York, certifying that this case involves a question of law that ought to be reviewed by the Court of Appeals and granting leave to appeal to the Court of Appeals from __[date]_____, _[year]_ order of the Appellate Division _____ Judicial Department which affirmed the ___[date]__, _[year]_, Supreme Court, _____ County, judgment convicting defendant of the class _____ felony of _____ and sentencing defendant to an indeterminate term of imprisonment at _____.

Dated:_____
_____

_____
Attorney for Defendant-Appellant
[Address and phone number]

To: Clerk
Court of Appeals of the State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York

To: [Name of District Attorney]
District Attorney, [name of county] County
[PO Address][269]

269. Fill in the name and address of the District Attorney of the county in which you were tried. Include this information on both the copy you are sending to the District Attorney and on the two copies you are sending to the trial court, so that the clerk of the trial court will know that you have notified the District Attorney. *See* Appendix III of the *JLM* for a list of addresses of New York district attorneys.

B-3. PAPERS NEEDED TO OBTAIN THE SERVICES OF A LAWYER WITHOUT COST ON APPEAL, OR OTHER POOR PERSON RELIEF

These papers will allow you to obtain a free copy of the trial transcript, as well as a lawyer. Remember that these papers (like all in this Chapter) are for an appeal under the law of New York State. They are not the correct papers to file if you are filing a poor person's action in federal court or in another state's court.

a. Notice of Motion to Proceed as a Poor Person

Supreme Court of the State of New York,
Appellate Division,

_____ Judicial Department

The People of the State of New York, Plaintiffs-Respondents,	:	Notice of Motion to Proceed As a Poor Person Upon Appeal
- against -	:	
	:	Indictment No. _____
_____, Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that upon the affidavit of _____, sworn to on the _____ day of _____, _____, a motion pursuant to New York Civil Practice Law and Rules 1101 will be made at a term of this court, for an order permitting defendant-appellant to prosecute this appeal from the judgment entered in this action on the _____ day of _____, _____ as a poor person, directing that [he/she] be furnished a copy of the stenographic transcript of the trial of this action without fee, and granting permission to appeal on the original record, upon the ground that said defendant-appellant has insufficient income and property to enable [him/her] to pay the costs, fees, and expenses to prosecute said appeal, and for such other and further relief as this Court may deem just and proper.

Dated:_____ _____
_____

_____
Defendant-Appellant

To: _____
District Attorney
[Address]

- or -

Clerk
Appellate Division, ____ Judicial Department
[Address]

b. Affidavit in Support of Motion to Proceed as a Poor Person on Appeal

Supreme Court of the State of New York
Appellate Division,

_____ Judicial Department

_____	:	
Defendant-Appellant,	:	Affidavit in Support of
	:	Motion to Proceed as a
- against -	:	Poor Person Upon Appeal
	:	
The People of the State of New York	:	Indictment No. _____
Plaintiffs-Respondent.	:	

State of New York
County of _____

_____, being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned case, and I make this affidavit in support of the attached motion to proceed *in forma pauperis*.

2. I am presently in the custody of the Superintendent of _____ at _____ pursuant to a judgment of the Supreme Court of the State of New York, _____ County, rendered on _____, _____, convicting me of _____, in the _____ degree, and sentencing me to _____ years' imprisonment.

3. A notice of appeal pursuant to pursuant to [section 450.10, subdivision (1) – or subdivision (2) – of the Criminal Procedure Law of the State of New York] was served upon attorney for plaintiff-respondent, on *[date of service of notice of appeal]*, and that notice was filed in the office of the Clerk of the County of *[name of county]* on *[date of filing of notice of appeal]*.

3. I am unable because of my indigence to pay the costs, fees, and expenses necessary to prosecute this appeal. I am currently incarcerated and am earning $_____ per week in income. I own $_____ worth of property. No other person has a beneficial interest in the outcome of this appeal.

4. During the trial I was represented by _____.

5. I believe in good faith that I am entitled to the relief that I am seeking in this case.

WHEREFORE, I respectfully ask for an order permitting me to prosecute this appeal as a poor person and that I be furnished with the stenographic transcript of this action without fee and that I

be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

_____
Defendant-Appellant

Sworn to before me
this _____ day of _____, _____

_____
Notary Public

B-4. PAPERS NEEDED TO GET RELEASE ON BAIL PENDING APPEAL

a. Notice of Motion for Recognizance or Bail Pending Appeal

Supreme Court of the State of New York

_____ Judicial Department

----------x

The People of the State of New York	:	
Plaintiffs-Respondents,	:	Motion for
	:	Recognizance or Bail
- against -	:	
	:	Indictment No. _____
_____	:	
Defendant-Appellant.	:	

----------x

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____ sworn to on the _____ day of _____, ____ and upon all proceedings in this case, a motion pursuant to section 510.20 of the Criminal Procedure Law of the State of New York is made to this Court for an order revoking the order committing _____ to the custody of the _____ and releasing me in my own recognizance or on bail, on the grounds set forth in the annexed affidavit, and for such other and further relief as to the court may seem just and proper.

Dated:_____

_____

_____

Defendant-Appellant

To: _____

District Attorney
[Address]

- or -

Clerk
Appellate Division, ____ Judicial Department
[Address]

b. Affidavit in Support of Motion for Recognizance or Bail Pending Appeal

Supreme Court of the State of New York
_____ Judicial Department

The People of the State of New York Plaintiffs-Respondents, - against - _____ Defendant-Appellant.	: : : : : : :	Affidavit in Support of Motion for Recognizance or Bail Pending Appeal Indictment No. _____

State of New York
County of _____

_____ being duly sworn, deposes and says:

1. I am the defendant-appellant above named and I make this affidavit in support of the annexed notice of motion.

2. On the _____ day of _____, _____, I was convicted of _____ in the _____ degree (Judge _____) and I am presently in the custody of the Superintendent of _____ at _____ pursuant to the judgment and sentence in the case.

3. I am now appealing my conviction of _____, and I filed a Notice of Appeal on _____, _____.

4. I believe that the facts of my case warrant the issuance of an order securing my release on bail in my own recognizance:
_____
_____.

5. Deponent believes that the appeal herein has great merit and that there is a reasonable possibility of ultimate reversal of the judgment of conviction appealed from. The reasons why said judgment of conviction should be reversed are:
_____
_____.

6. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully pray that an order be entered revoking the order committing me to the custody of _____ and releasing me in my own recognizance or on bail, together with such other and further relief as this court may deem proper and just.

_____

Sworn to before me
this _____ day of _____, _____

_____
Notary Public

B-5. NOTICE OF MOTION FOR EXTENSION OF TIME IN WHICH TO TAKE AN APPEAL PURSUANT TO NEW YORK CRIMINAL PROCEDURE LAW § 460.30

Supreme Court of the State of New York
Appellate Division _____ Department

----------x

The People of the State of New York	:	
Plaintiffs-Respondents,	:	Notice of Motion For
	:	Extension of Time to
	:	Appeal Pursuant to
- against -	:	CPL § 460.30
	:	
_____	:	Indictment No. _____
Defendant-Appellant.	:	

----------x

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____ sworn to on the _____ day of _____, _____, and upon all the proceedings in this case, a motion pursuant to section 460.30 of the Criminal Procedure Law of the State of New York is made to this Court for an order reinstating the time for taking an appeal from the [judgment/sentence/order] imposed by the Supreme Court of the County of _____ rendered on the _____ day of _____, _____ upon conviction of the above named defendant of the crime of _____, in the _____ degree upon the ground that said defendant's failure to file a notice of appeal in timely fashion resulted from _____
_____, and for such other and further relief as the Court may deem just and proper.

Dated:_____
_____

_____
Defendant-Appellant

To: Hon. _____
District Attorney
[Address]

Clerk
_____Appellate Division
_____Judicial Department
[Address]

B-6. AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO TAKE APPEAL

Supreme Court of the State of New York
Appellate Division _____ Department

The People of the State of New York Plaintiffs-Respondents, - against - _____ Defendant-Appellant.	: : : : : : : :	Affidavit in Support of Motion for Extension of Time to Appeal Pursuant to CPL § 460.30 Indictment No. _____

_____, being duly sworn, deposes and says:

That I am the defendant herein and submit this affidavit in support of my application for leave to serve a notice of appeal within thirty days after the granting of an order permitting me to file pursuant to Section 460.30 of the Criminal Procedure Law of the State of New York.

On _____, _____, I was convicted of _____ in the _____ degree. (Trial Judge _____.) I received a sentence of _____ years on _____, _____. (Judge _____.)

I desire to take an appeal to this Court from that conviction and sentence, but have failed to file a Notice of Appeal within the prescribed thirty-day period. That period expired on the [date of expiration of period. I failed to file my Notice of Appeal within thirty days because:

_____
_____.

WHEREFORE, I respectfully urge this Court to extend the time within which a notice of appeal may be served and filed pursuant to section 460.30 of the Criminal Procedure Law of the State of New York and issue an order granting this application permitting me to serve and file a notice of appeal within thirty days from the date of said order and for such other relief as this Court may deem just and proper.

_____
Defendant-Appellant[270]

Sworn to before me
this _____ day of _____, _____.

_____
Notary Public

[270]. Do not sign until the notary is present.

B-7. PETITION FOR WRIT OF ERROR *CORAM NOBIS*

Supreme Court of the State of New York
Appellate Division _____ Department

----------x

The People of the State of New York, Plaintiffs-Respondents,	:	Petition for Writ of Error Coram Nobis
- against -	:	Indictment No. _____
_____, Defendant-Petitioner:	:	

----------x

PLEASE TAKE NOTICE that above-named defendant-petitioner hereby moves the court for an issuance of a writ of error *coram nobis* on the ground that defendant-petitioner was convicted of _____ in _____ on _____, and appealed to this court which affirmed his conviction and that the representation of _____, defendant-petitioner's attorney on appeal, was ineffective according to the standards of representation set out in the Sixth Amendment of the United States Constitution.

The representation afforded to defendant-petitioner was defective in the following ways: _____.

This motion is made and based on this petition and the affidavit of defendant-petitioner, and on the appellate briefs and the Appellate Division decision, copies of which are attached and served, and on the pleadings, papers, records, and files of this action.

Defendant-petitioner requests assignment of new appellate counsel for assistance in presentation of the writ moved for herein.

Dated:_____

_____
Defendant-Appellant
[Address and phone number]

To:
Clerk
Supreme Court of the State of New York
Appellate Division, ___ Department