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Federal Criminal Appeal Primer

A direct appeal is a creature of statute. (*See* 18 U.S.C. §§ 3732, 3742.) The appeal is the first way in which a federal criminal defendant, who has been convicted of a crime, either after a guilty plea or a trial, may challenge a conviction or sentence. A defendant's conviction is not final until it has been affirmed on direct appeal.

An appeal is a review by a court of appeals of the trial court proceedings to see that the proceedings were carried out according to law. The review by the court is based entirely upon the record of the trial court proceedings, including the reporter's transcripts, which are the verbatim transcript of oral proceedings. The appellate court does not hold a new trial or accept new evidence. The attorneys present most of their arguments in writing and the defendant, who is known as the "appellant," does not appear before the court. The attorneys appear briefly and orally argue the case in many appeals, but not all.

Who is entitled to a direct appeal?

Every defendant convicted after a trial or guilty plea is entitled to a direct appeal. If defendants are indigent, they are entitled to appeal without the payment of a filing fee (in forma pauperis), to a free copy of the reporter's transcript (the verbatim account of in-court proceedings), and are entitled to the appointment of counsel to represent them on appeal. (*See* 18 U.S.C. § 3006A, 28 U.S.C. § 753(g).)

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What issues can be raised on appeal?

The appellate court does not decide whether a defendant is guilty or innocent. The question before the court of appeals is whether there were one or more legal errors that affected the verdict. If these legal mistakes are important enough, then the case is sent back to the trial court, usually for a retrial. Less frequently, where the law prohibits further prosecution, a case will be reversed with directions to dismiss it. If the legal mistakes only concerned a sentence, the defendant may be entitled to resentencing.

Many issues may be raised on direct appeal, such as arguments that the defendant should not have been convicted because the evidence does not support the verdict or because evidence was improperly admitted or excluded. A judge's pretrial and trial rulings also can be raised on appeal. Other issues for appeal include problems with jury voir dire, such as when a prosecutor exercises peremptory challenges based on race, or when the district court improperly refuses to excuse a biased juror. Issues regarding the correctness of a defendant's sentence also may be raised on direct appeal.

Because the court of appeals does not consider evidence not presented to the district court, claims that require outside record support cannot be presented on direct appeal. (*United States v. Quintero-Barraza*, 78 F.3d 1344, 1347 (9th Cir. 1995), *cert. denied*, 519 U.S. 848 (1996).) The best example of such a claim is ineffective assistance of counsel, which in most cases cannot be presented on direct appeal. (*See United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994).) However, other claims, such as the discovery of new evidence, prosecutorial misconduct involving the withholding of exculpatory evidence, or juror misconduct, also may need to be presented outside of a direct appeal if the facts supporting those claims are not contained within the trial and pretrial record or require additional investigation and discovery.

Unfortunately, even when defendants can establish that the district court committed legal error, their conviction will not be reversed unless the error was prejudicial. If the error is harmless, i.e., one that does not affect the outcome of the case, the error will not result in reversal of the conviction or the sentence. Constitutional errors usually result in reversal unless the government can prove beyond a reasonable doubt that the error was harmless. Nonconstitutional errors only result in reversal if it is reasonably probable that the error affected the verdict. In short, "no harm, no foul."

How does a sentencing appeal differ from an appeal of underlying conviction?

Sentencing appeals are slightly different from the appeals of underlying convictions. A sentence imposed under the U.S. Sentencing Guidelines usually may be challenged on direct appeal. However, if the guideline sentence was imposed pursuant to a plea agreement in which the defendant and the government agreed on the appropriate sentence, an individual may appeal only if the sentence imposed is greater than sentence set forth in the agreement. (18 U.S.C. § 3742(c)(1).) If a defendant requests a downward departure from the sentencing guidelines and the district court decides *not* to depart downward, that decision is not appealable unless the judge mistakenly believes he lacks the power or authority to depart. (18 U.S.C. § 3742(a).) Under other circumstances, the appellate court reviews a district court's decision *to* depart downward or upward from the sentencing guidelines for an abuse of discretion.

What are some of the obstacles a defendant may encounter in litigating an appeal?

Waiver of particular issues. Appellate courts must address the question whether an argument presented on appeal was properly raised in the district court. The defendant's attorney must give the district court the opportunity to rule on the issue first, usually by making a timely objection. Frequently, if a timely objection was not made, the appeals court will conclude that the issue has been waived. If an issue was waived in the lower court, an appeals court will grant relief on the issue only if it finds "plain error." Plain error is defined as an error that is "clear" or "obvious," and that affects the defendant's substantial rights. (*Olano v. United States*, 507 U.S. 725 (1993).) An error affecting a defendant's substantial rights is one that affects the outcome of the proceedings. The effect of the plain error rule is that even if a defendant raises a valid legal issue on appeal, the court will rarely grant relief if the issue was not first raised in the district court in compliance with the applicable rules.

Section 2255 motions allow new evidence.

Standard of review. Appellate courts give varying degrees of deference to the decision of the district court, depending on the type of legal argument presented. If the issue is purely legal, for example, whether the district court correctly instructed the jury, or presents a mixed question of law and fact, such as whether a police officer had reasonable suspicion to stop an individual, the appellate court will review the argument independently. (*See United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999).) In other words, the court of appeals will not defer to the district court's ruling. (*See Lake Mohave Boat Owners Ass'n v. National Park Serv.*, 138 F.3d 759, 762 (9th Cir. 1998).)

If the legal argument challenges a finding of fact made by the district court, such as whether the defendant held a managerial role in the offense or whether a police officer testified truthfully, the court of appeals will review the finding of fact for clear error. Clear error means a definite and firm conviction that a mistake has been committed. (*United States v. Murdoch*, 98 F.3d 472, 475 (9th Cir. 1996).) This is a significantly deferential standard. (*Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992).)

Finally, some legal arguments are reviewed for abuse of discretion. An abuse of discretion is found only when a lower court's ruling is not within the range of decisions a reasonable judge could have made under the circumstances. (*Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).) An example of a ruling reviewed for abuse of discretion is the trial court's denial of a continuance.

How does a direct appeal differ from a section 2255 motion?

One of the most significant differences between a direct appeal and a section 2255 motion is that direct appeals are decided based on the district court record as it exists as of the time the notice of appeal is filed. Section 2255 motions offer defendants the opportunity to present the court with new evidence. However, unlike in a direct appeal, not all issues may be raised in a section 2255 motion. Section 2255 motions may only be used to raise jurisdictional, constitutional, or other fundamental errors. Because a section 2255 motion cannot be used for all legal challenges, even when a defendant has a claim that requires extra-record support, it is generally not a good idea to forgo a direct appeal and proceed directly to a section 2255 motion. (For more information, *see A 2255 Primer* at www.alanellis.com/html/pub/pub.html.)

How and where do you file an appeal?

An appeal is started by the filing of a notice of appeal with the clerk of the court in which the case was tried within 10 days after the district court enters the judgment of conviction, *or* within 10 days after the government files a notice of appeal. (FED. R. APP. P. 4(b)(1)(A).) A notice of appeal may be filed immediate-

ly after sentencing, even if the judgment has not yet issued. (FED. R. APP. P. 4(b)(2), 4(b)(3)(B).)

The 10-day time limit is mandatory and jurisdictional. (*Browder v. Director*, 434 U.S. 257 (1978).) However, within the 30 days after the 10-day period has expired, a defendant may move for leave to file a late notice of appeal based on excusable neglect. (FED. R. APP. P. 4(b)(4).) Such a motion is filed with the district court. The denial of a motion for leave to file a late appeal is itself a final appealable order.

After filing the notice of appeal, the record must be prepared. The record on appeal consists of the reporter's transcripts (the word-for-word record of all proceedings before, during, and after trial), and the clerk's records (composed of written pleadings such as motions, court orders, and jury instructions).

Do any special rules apply to appeals?

Rule 4(b) of the Federal Rules of Appellate Procedure addresses the procedure for filing a notice of appeal. Rule 3 addresses what information must be contained in the notice of appeal. The appendix to the rules contains a sample form for the notice of appeal.

How long will it take?

The court of appeals sets a briefing schedule for the appeal shortly after the notice of appeal is filed. This includes a date by which the appellant must order the reporter's transcripts, and a due date for the opening brief. Frequently, the reporter's transcripts are not prepared on time, and briefing schedules are continued because of court reporter delays. In addition, sometimes attorneys find it necessary to obtain an extension of time.

Most appeals take from one year to 18 months from the filing of the notice of appeal to the issuance of a decision. However, in certain complicated cases, appeals have been known to take several years to resolve.

What are the briefs?

The appellant's brief is a written argument stating the reasons why the trial court's decision should be reversed. Again, the brief is limited to the record and cannot contain arguments that are based on statements, documents, or events that are not included in the record or the sentencing. The brief contains the defendant's reasons why the conviction should be reversed, or the sentence lowered, together with the factual and legal authorities in support. The law requires that an appellate court view the facts in the light most favorable toward the party which prevailed. Thus, except in limited circumstances, the evidence will be viewed most favorably to the prosecution.

Following the filing of the opening brief, the prosecution prepares its answering brief. The assistant U.S. attorney (AUSA) assigned to the case has 30 days to prepare and file a brief. In many cases, the AUSA will ask for and be given extra time to file the brief. The prosecution's brief also must be based solely on the record, but its arguments support the trial court's actions.

What is oral argument?

Once all the briefs in the case are filed, the appellate court may set a date for oral argument. On that date, the AUSA and defense counsel appear before the judges of the court of appeals and argue the case. The defendant will not be brought to court for the oral argument. The court does not hear any new evidence nor from any witnesses. Not all cases are set for oral argument. Some are decided by the court of appeals only on the written briefs. These are usually cases in which the case presents simple issues that involve clearly established law. (*See* FED. R. APP. P. 34(2).)

How is the appeal decided?

After the court of appeals judges read the briefs and hear oral argument (if there was oral argument), they decide whether the case should be affirmed, reversed, or the judgment modified. Once their decision is reached, a judge is assigned the case to write an opinion stating the court's decision and the reasons for it. An opinion may be expected anywhere from 30 days to six months after oral argument. Usually, a decision is issued between 30 days and three months.

Can a defendant give up the right to appeal?

Although every criminal defendant has a right to an appeal, the right to appeal may be waived. Many government attorneys insist upon a waiver of the right to appeal pursuant to a plea agreement under which the defendant pleads guilty in exchange for some promises or concessions from the government. Waivers of the right to appeal are enforceable if they are voluntary and knowing. The Federal Rules of Criminal Procedure require a court to specifically advise defendants that they are waiving a right to appeal at the time they plead guilty. (*See* FED. R. CRIM. P. 11(c)(6).)

A waiver of the right to appeal does not waive everything. Generally, if the government breaches a plea agreement, the defendant may still appeal. (*See United States v. Bowe*, 257 F.3d 336 (4th Cir. 2001).) Additionally, many courts have held that a waiver of the right to appeal contained in a plea agreement does not waive claims of ineffective assistance of counsel. (*E.g.*, *United*

States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995).) Sometimes, waivers of the right to appeal permit appeals in limited circumstances, such as when the district court departs upward from the sentencing guidelines. In order to determine whether a waiver of the right to appeal is enforceable, a defense lawyer must carefully examine the plea agreement and the circumstances surrounding the guilty plea and the sentencing.

What happens if the defendant wins?

When a defendant prevails on appeal, it does not usually mean that a judgment of "not guilty" will replace the guilty verdict and the person will be set free, although this is possible and does occasionally happen. More often, the defendant obtains more modest, although significant relief, such as a new trial or resentencing.

Winning doesn't mean the person will be set free.

Even if the defendant "wins" on appeal, the government can and may file a petition for rehearing with the three-judge panel of the court of appeals that decided the case or, alternatively, with the entire court of appeals en banc. (*See* FED. R. APP. P. 35, 40.) A petition for rehearing must be filed within 14 days after entry of judgment, but an extension of time may be requested. (FED. R. APP. P. 40(a)(1).) Generally, a petition for rehearing seeks to persuade the panel that its decision was wrong because the decision overlooked a significant point of law or fact. (FED. R. APP. P. 40(a)(2).) Rehearing en banc is reserved for significant legal issues, involving situations where the court of appeals's decision is "necessary to secure or maintain the uniformity of the court's decisions," or where the proceeding involves a "question of exceptional importance." (FED. R. APP. P. 35(a)(1) & (2).) If the petition for rehearing or rehearing en banc is denied, the government may file a petition seeking further review (a petition for certiorari) in the Supreme Court. (S. CT. R. 10, 12, 13.)

What happens if the defendant loses?

If the appellant loses the appeal or does not prevail on one or more issues, he or she may file a petition for rehearing with the three-judge panel of the court of appeals that decided the case or, with the entire court of appeals en banc. (*See supra*, at 7; FED. R. APP. P. 35, 40.) If this petition is denied, the appellant may file a petition for review (petition for certiorari) in the Supreme Court. However, the Supreme Court rarely grants such a petition. (S. CT. R. 10.)

Unfortunately, the chances of obtaining relief in a criminal appeal are low. Appellants in criminal cases received some measure of success in only 5.7 percent of cases decided on the merits by all 12 federal circuit courts of appeals for the 12-month period ending September 30, 2001. The Seventh Circuit had the highest rate of reversal (8.3 percent) with the Second Circuit having the lowest rate of reversal (1.2 percent). These statistics were provided by the Administrative Office of the United States Courts. ■