

## 7.6: The Appeals Process, Standard of Review, and Appellate Decisions

### The Appeals Process

The government cannot appeal a jury's decision by **acquitting** the defendant, or finding the defendant not guilty. Thus, most criminal appeals involve defendants who have been found guilty at trial. The government may appeal a court's pretrial ruling in a criminal matter before the case is tried, for example a decision to suppress evidence obtained in a police search. This is called an **interlocutory appeal**. Although the defendant is permitted to appeal after entering a guilty plea, the only basis for his or her appeal is to challenge the sentence given. When the defendant appeals, he or she is now referred to as the **appellant**, and the State is the **appellee**. (Note that often the court will use the words **petitioner** and **respondent**. The petitioner is the party who lost in the last court who is petitioning the next level court for review; the respondent is the party who won in the last court). In routine appeals, the primary function of appellate courts is to review the record to discern if errors were made by the trial court before, during, or after the trial. No trial is perfect, so the goal is to ensure there was a fair, albeit imperfect, trial. Accordingly, the appellate courts review for **fundamental, prejudicial or plain error**. Appellate courts will reverse the conviction and possibly send the case back for a new trial when they find that trial errors affected the outcome of the case. A lower court's judgment will not be reversed unless the appellant can show that some prejudice resulted from the error and that the outcome of the trial or sentence would have been different if there had been no error. By reviewing for error and then writing opinions that become case law, appellate courts perform dual functions in the criminal process: error correction and lawmaking.

Appellate judges generally sit in panels of three judges. They read the **appellant's brief** (a written document filed by the appellant), the **reply brief** (a written document filed by the the appellee), and any other written work submitted by the parties or **friend of the court amicus curiae briefs**. Amicus curiae are individuals or groups who have an interest in the case or some sort of expertise but are not parties to the case. The appellate panel will generally listen to very short oral arguments, generally twenty minutes or less, by the parties' attorneys. During these oral arguments, it is common for the appellate judges to interrupt and ask the attorneys questions about their positions. The judges will then consider the briefs and arguments and the panel will then meet and deliberate and decide based on majority rule. If the appellate court finds that no error was committed at trial, it will **affirm** the decision, but if it finds there was an error that deprived the losing party of a fair trial, it may issue an **order of reversal**. When the case is reversed, in most instances, the court simply will require a new trial during which the error will not be repeated. This is called a **remand**. In some cases, however, the order of reversal might include a direction to dismiss the case completely, for example when the appellate court concludes that the defendant's behavior does not constitute a crime under the law in that state. When reading an opinion, also known as decisions, from an appellate court, you can tell the **procedural history** of a case (i.e., a roadmap of where the case has been: what happened at trial, what happened as the case was appealed up from the various appellate courts).

### Standards of Review

You have just learned that one function of the appellate courts is to review the trial record and see if there is a prejudicial or fundamental error. Appellate courts do not consider each error in isolation, but instead, they look at the cumulative effect of all the errors during the whole trial. Appellate court judges must sometimes let a decision of a lower court stand, even if they personally don't agree with it. Sports enthusiasts are familiar with the use of instant/video replay, and it provides us a good analogy. Officials in football, for example, will make a call, a ruling on the field, immediately after a play is made. This decision, when challenged, will be reviewed, and the decision will be upheld unless there is "incontrovertible evidence" that the call was wrong. When dealing with appeals, how much deference to show the lower court is the essence of **the standard of review**. Sometimes the appellate courts will give great deference to the trial court's decision, and sometimes the appellate courts will give no deference to the trial court's decision. How much deference to give is based on what the trial court was deciding—was it a question of fact, a question of law, or a mixed question of law and fact.

The appellate court will allow a trial court's decision about a factual matter to stand unless the court clearly got it wrong. The appellate court reasons that the judge and jury were in the courtroom listening to and watching the demeanor of the witnesses and examining the physical evidence. They are in a much better position to determine the credibility of the evidence. Thus, the appellate court will not overturn findings of fact unless it is firmly convinced that a mistake has been made and that the trial court's decision is clearly erroneous or "arbitrary and capricious." The arbitrary and capricious standard means the trial court's decision was completely unreasonable and it had no rational connection between the facts found and the decision made. The lower courts finding will be overturned only if it is completely implausible in light of all of the evidence. One court noted, "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." <sup>[1]</sup>

Sometimes the law requires, or at the parties' request, that a trial judge or jury make a special finding of fact. Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations that are better made by the trial judge sitting in the courtroom listening to the evidence and observing the demeanor of the witnesses. It is not enough that the appellate court may have weighed the evidence and reached a different conclusion unless the decision was clearly erroneous, the appellate court will defer to the trial judge.

Trial judges often make discretionary rulings., for example, whether to allow a party's request for a continuance or to allow a party to amend its pleadings or file documents late. In these **matters of discretion**, the appellate court will only overturn the trial judge if they find such a decision was an abuse of discretion. The lower court's judgment will be termed an **abuse of discretion** only if the judge failed to exercise sound, reasonable, and legal decision-making skills. A trial court abuses its discretion, for example, when: it does not apply the correct law, erroneously interprets a law, rests its decision on a clearly inaccurate view of the law, rests its decision on a clearly erroneous finding of a material fact, or rules in a completely irrational manner. Abuse of discretion exists when the record contains no evidence to support the trial court's decision.

When it comes to questions of law, the appellate courts employ a different standard of review called **de novo review**. De novo review allows the appellate court to use its own judgment about whether the trial court correctly applied the law. Appellate courts give little or no deference to the trial court's determinations and may substitute its own judgment on questions of law. Questions of law include interpretation of statutes or contracts, the constitutionality of a statute, the interpretation of rules of criminal and civil procedure. Trial courts presume that laws are valid and do not violate the constitution, and the burden of proving otherwise falls on the defendant. Trial courts sometimes get it wrong. De novo review allows the court to use its own judgment about whether the court correctly applied the law. Appellate judges are perhaps in a better position to decide what the law is as the trial judge since they are not faced with the fast-pace of the trial and have time to research and reflect.

Sometimes the trial court must resolve a question in a case that presents both factual and legal issues. For example, if police stop and question a suspect, there are legal questions, such as whether the police had reasonable suspicion for the stop or whether the questioning constituted an "interrogation", and factual questions, such as whether police read the suspect the required warnings. Mixed questions of law and fact are generally reviewed *de novo*. However, factual findings underlying the lower court's ruling are reviewed for clear error. Thus, if the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error.

In reviewing the trial court record, the appellate court may discover an error that parties failed to complain about. Generally, appellate courts will not correct errors that aren't complained about, but this is not the case when they come upon **plain error**. Plain error exists "[w]hen a trial court makes an error that is so obvious and substantial that the appellate court should address it, even though the parties failed to object to the error at the time it was made." <sup>[2]</sup> If the appellate court determines that the error was evident, obvious, clear and materially prejudiced a substantial right (meaning that it was likely that the mistake affected the outcome of the case below in a significant way), the court may correct the error. Usually, the court will not correct plain error unless it led to a miscarriage of justice.

The selection of the appropriate standard of review depends on the context. For example, the de novo standard applies when issues of law tend to dominate in the lower court's decision. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters tend to dominate or control the court's decision. The controlling standard of review may determine the outcome of the case. Sometimes the appellate court can substitute its judgment for that of the trial court and overturn a holding it does not agree with, but other times, it must uphold the lower court's decision even if it would have decided differently.

### Appellate Decisions

In most appeals filed in the intermediate courts of appeal, the appellate panel will rule but not write a supporting document called a **written opinion** stating why it ruled as it did. Instead, the appellate panel will **affirm** the lower court's decision **without an opinion** (colloquially referred to as an AWOP). Sometimes, however, appellate court judges will support their decisions with a written opinion stating why the panel decided as it did and its reasons for **affirming** (upholding) or **reversing** (overturning) the lower court's decision. The position and decision by the majority of the panel (or the entire court when it is a supreme court case), is, not surprisingly, called the **majority opinion**. Appellate court judges frequently disagree with one another, and a judge may want to issue a written opinion stating why he or she has a different opinion than the one expressed in the majority opinion. If a particular judge agrees with the result reached in the majority opinion but not the reasoning, he or she may write a separate **concurring opinion**. If a judge disagrees with the result and votes against the majority's decision, he or she will write a **dissenting opinion**. Sometimes opinions are unsigned, and these are referred to as **per curiam** opinions. Finally, if not enough justices agree

on the result for the same reason, a **plurality opinion** will be written. A plurality opinion controls only the case currently being decided by the court and does not establish a precedent which judges in later similar cases must follow.

---

1. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). ↩
  2. ([http://www.law.cornell.edu/wex/plain\\_error](http://www.law.cornell.edu/wex/plain_error).) ↩
- 

This page titled [7.6: The Appeals Process, Standard of Review, and Appellate Decisions](#) is shared under a [CC BY-SA](#) license and was authored, remixed, and/or curated by [Alison S. Burke, David Carter, Brian Fedorek, Tiffany Morey, Lore Rutz-Burri, & Shanell Sanchez](#) ([OpenOregon](#)) .

- [7.6: The Appeals Process, Standard of Review, and Appellate Decisions](#) by Alison S. Burke, David Carter, Brian Fedorek, Tiffany Morey, Lore Rutz-Burri, & Shanell Sanchez is licensed [CC BY-SA 4.0](#).