

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office

July 24 through July 30, 2009

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rule 500.11.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rule 500.23 and direct any questions to the Clerk's Office.

BALLMAN (DANIEL J.), PEOPLE v:

4TH Dept. App. Div. order of 4/24/09; reversal; leave to appeal granted by Lippman, Ch. J., 7/10/09;

CRIMES - PROOF OF PRIOR CONVICTIONS - DRIVING WHILE INTOXICATED (DWI) - WHETHER A PRIOR OUT-OF-STATE CONVICTION FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS COULD BE USED TO ELEVATE DEFENDANT'S DWI TO A FELONY - INTERPRETATION OF 2006 AMENDMENT TO VEHICLE AND TRAFFIC LAW § 1192; DEFENDANT'S SUPPRESSION MOTION - WHETHER POLICE HAD PROBABLE CAUSE TO ARREST DEFENDANT OR KEEP HIM IN CUSTODY - INVESTIGATIVE DETENTION;

Ontario County Court convicted defendant, upon his guilty plea, of driving while intoxicated as a felony; App. Div. reversed, vacated the plea, dismissed count one of the indictment without prejudice to the People to re-present any appropriate charges under that count to another grand jury, reinstated count two of the indictment, and remitted the matter to Ontario County Court for further proceedings on count two of the indictment.

CITY OF NEW YORK, et al. v MAUL &c. (AND ANOTHER PROCEEDING):

1ST Dept. App. Div. order of 2/10/09; affirmance; leave to appeal granted by App. Div., 7/7/09;

PARTIES - PROPER PARTIES - CLASS CERTIFICATION - DEVELOPMENTALLY DISABLED PERSONS IN THE CARE OR CUSTODY OF DEFENDANT NEW YORK CITY ADMINISTRATION FOR CHILDRENS' SERVICES ENTITLED TO SERVICES FROM NEW YORK OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES; MUNICIPAL CORPORATIONS - SERVICES; MOOTNESS; SUMMARY JUDGMENT;

Supreme Court, New York County granted plaintiffs-intervenors' motion for class certification, and denied the motion of defendant New York City Administration for Childrens' Services for partial summary judgment; App. Div. affirmed.

FIELDS v FIELDS:

1ST Dept. App. Div. order of 6/25/09; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether the two-justice dissent at the App. Div. is on a question of law to support an appeal pursuant to CPLR 5601(a);

HUSBAND AND WIFE - EQUITABLE DISTRIBUTION - MARITAL RESIDENCE - WHETHER WIFE IS ENTITLED TO EQUITABLE DISTRIBUTION OF ENHANCED VALUE OF HUSBAND'S INTEREST IN TEN-APARTMENT TOWNHOUSE AND HIS INTEREST IN TOWNHOUSE'S BANK ACCOUNT;

Supreme Court, New York County judgment of divorce; thereafter, the same court awarded defendant wife a money judgment; App. Div. affirmed.

GIBBS v ST. BARNABAS HOSPITAL, et al.:

1ST Dept. App. Div. order of 4/30/09; affirmance; leave to appeal granted by App. Div., 7/14/09; motion to dismiss appeal pending; DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING SUPREME COURT ORDER GRANTING A DEFENDANT'S MOTION TO ENFORCE A CONDITIONAL ORDER OF PRECLUSION TO THE EXTENT OF DIRECTING PLAINTIFF TO PAY \$500 AS COSTS FOR HIS DELAY IN COMPLYING WITH DISCOVERY;

Supreme Court, Bronx County granted motion of defendant Vincas to enforce a conditional order of preclusion to the extent of directing plaintiff to pay \$500 as costs for his delay in complying with discovery; App. Div. affirmed.

GRAVINO (TARA), PEOPLE v:

4TH Dept. App. Div. order of 5/1/09; affirmance; leave to appeal granted by Ciparick, J., 7/22/09;

CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRY - WHETHER DEFENDANT MAY BE ENTITLED TO WITHDRAW HER GUILTY PLEA WHERE SHE WAS NOT ADVISED PRIOR TO HER PLEA AND SENTENCING THAT SHE WOULD BE REQUIRED TO REGISTER AS A SEX OFFENDER; RAPE IN THE THIRD DEGREE; DEFENDANT'S ALLEGED CONFLICT OF INTEREST WITH TRIAL COUNSEL;

Wayne County Court convicted defendant, on her guilty plea, of

rape in the third degree; App. Div. affirmed.

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REGAL CONSTRUCTION CORPORATION, et al. v NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, et al.:

1ST Dept. App. Div. order of 7/14/09; affirmance with dissents; INSURANCE - DUTY TO DEFEND AND INDEMNIFY - ADDITIONAL INSURED COVERAGE - INSURANCE COVERAGE FOR PROJECT MANAGER'S FALL ON FRESHLY PAINTED FLOOR JOIST IN RENOVATION PROJECT AT RIKERS ISLAND; SUMMARY JUDGMENT;

Supreme Court, New York County, among other things, denied plaintiffs' motion for summary judgment, granted defendant National Union Fire Insurance Company's cross motion for summary judgment, and declared that plaintiff The Insurance Corporation of New York is obligated to defend and indemnify defendant URS Corporation in the underlying personal injury action; App. Div. affirmed.

RIVERA (JUAN), PEOPLE v:

1ST Dept. App. Div. order of 3/26/09; denial of application for a writ of error coram nobis; leave to appeal granted by Graffeo, J., 6/1/09; Rule 500.11 review pending;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - CHALLENGE TO APPELLATE DIVISION ORDER DENYING APPLICATION FOR A WRIT OF ERROR CORAM NOBIS WHICH ALLEGED THAT APPELLATE COUNSEL ON DIRECT APPEAL WAS INEFFECTIVE BECAUSE SHE DID NOT SEEK VACATUR OF DEFENDANT'S GUILTY PLEA ON THE BASIS OF PEOPLE v CATU (4 NY3d 252 [2005]), WHICH WAS DECIDED BEFORE COUNSEL FILED DEFENDANT'S BRIEF WITH THE APPELLATE DIVISION;

App. Div. denied application for a writ of error coram nobis.

RODRIGUEZ (EDWIN), PEOPLE v:

1ST Dept. App. Div. order of 3/10/09; affirmance; leave to appeal granted by Read, J., 7/22/09;

CRIMES - SENTENCE - POST-RELEASE SUPERVISION - POWER OF COURT TO RESENTENCE DEFENDANT TO A PERIOD OF POSTRELEASE SUPERVISION AFTER COMPLETION OF HIS PRISON SENTENCE - ALLEGED DOUBLE JEOPARDY AND DUE PROCESS VIOLATIONS - NECESSITY FOR PRESERVATION OF DOUBLE JEOPARDY ARGUMENT - SENTENCING COURT'S DISCRETION NOT TO RESENTENCE DEFENDANT;

Supreme Court, New York County resentenced defendant to a term of 7 years with 5 years' postrelease supervision; App. Div. affirmed.

SCULLY (RANCE), PEOPLE v:

4TH Dept. App. Div. order of 4/24/09; modification; leave to appeal granted by Lippman, Ch. J., 7/10/09;

CRIMES - SEARCH WARRANT - DENIAL OF MOTION TO SUPPRESS GUN RECOVERED FROM DEFENDANT'S PERSON AND DRUGS RECOVERED FROM HIS APARTMENT DURING EXECUTION OF A SEARCH WARRANT FOR THE APARTMENT - WHETHER DEFENDANT HAD STANDING TO CHALLENGE ISSUANCE OF THE SEARCH WARRANT; JURY INSTRUCTIONS - COURT'S SUA SPONTE INSTRUCTION THAT THE JURY WAS NOT TO DRAW A NEGATIVE INFERENCE

IN FINAL JURY CHARGE AN INSTRUCTION REGARDING DEFENDANT'S ABSENCE AT TRIAL; ALLEGEDLY IMPROPER EXPERT TESTIMONY - TESTIMONY BY POLICE OFFICERS THAT, IN THEIR EXPERIENCE, THE AMOUNT OF COCAINE FOUND IN THE APARTMENT WAS CONSISTENT WITH POSSESSION WITH INTENT TO SELL;

Oneida County Court convicted defendant, upon a jury verdict, of criminal possession of a weapon in the fourth degree, criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and unlawful possession of marihuana; App. Div. modified by vacating the sentence imposed for unlawful possession of marihuana, affirmed as so modified and remitted to Oneida County Court for resentencing on count five of the indictment.

