

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
July 31 through August 6, 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.

ALVAREZ, MATTER OF v NEW YORK STATE DIVISION OF PAROLE, et al.:
3RD Dept. App. Div. order of 6/18/09; dismissal; sua sponte examination whether any jurisdictional basis exists to support an appeal as of right;
PAROLE - CPLR ARTICLE 78 PROCEEDING TO REVIEW DETERMINATION DENYING PAROLE; APPEAL - REAPPEARANCE OF APPELLANT BEFORE PAROLE BOARD AFTER APPEAL FILED - DISMISSAL OF APPEAL - MOOTNESS;
Supreme Court, Chemung County dismissed petitioner's CPLR article 78 application to review a determination of the Board of Parole denying petitioner's request for parole release; App. Div. dismissed appeal as moot.

BARKLEE REALTY COMPANY, LLC et al. v BLOOMBERG, et al.:

1ST Dept. App. Div. order of 6/9/09; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING A SUPREME COURT JUDGMENT DENYING A CPLR ARTICLE 78 PETITION SEEKING, AMONG OTHER THINGS, TO VACATE RESPONDENT NEW YORK CITY ENVIRONMENTAL CONTROL BOARD'S REJECTION OF PETITIONERS' ADMINISTRATIVE APPEAL FROM A DECISION THAT IMPOSED FINES FOR THEIR FAILURE TO CERTIFY THE CORRECTION OF VIOLATIONS NOTICED BY RESPONDENT NEW YORK CITY FIRE DEPARTMENT - ALLEGED VIOLATION OF APPELLANTS' DUE PROCESS RIGHTS; Supreme Court, New York County denied a CPLR article 78 petition seeking, among other things, to vacate respondent Environmental Control Board's rejection of petitioner's appeal and dismissing the proceeding; App. Div. affirmed.

DREYDEN (JAMES), PEOPLE v:

App. Term 2nd, 11th & 13th Judicial Districts order of 3/9/09; affirmance; leave to appeal granted by Read, J., 7/22/09; CRIMES - ACCUSATORY INSTRUMENT - WHETHER A MISDEMEANOR COMPLAINT CHARGING DEFENDANT WITH CRIMINAL POSSESSION OF A GRAVITY KNIFE IS LEGALLY SUFFICIENT - PENAL LAW § 265.01(1); Criminal Court of the City of New York, Kings County convicted defendant, upon his guilty plea, of criminal possession of a weapon in the fourth degree; App. Term affirmed.

ELLSWORTH (ROBERT W.), PEOPLE v:

4TH Dept. App. Div. order of 2/6/09; affirmance; leave to appeal granted by Lippman, Ch. J.; 7/24/09; CRIMES - PLEA OF GUILTY - DEFENDANT NOT ADVISED AT TIME OF HIS GUILTY PLEA THAT A CONDITION OF HIS 10-YEAR PROBATIONARY TERM WAS THAT HE COULD NOT HAVE CONTACT WITH ANY CHILD UNDER THE AGE OF 18 (INCLUDING HIS OWN MINOR CHILDREN LIVING IN HIS HOUSEHOLD) WHERE THE VICTIM WAS NOT A MEMBER OF HIS HOUSEHOLD; WHETHER PLEA MAY BE VACATED; Chautauqua County Court convicted defendant, upon his guilty plea, of course of sexual conduct against a child in the second degree; App. Div. affirmed.

FALZONE, MATTER OF v NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY:

4TH Dept. App. Div. order of 7/2/09; reversal with dissents; Rule 500.11 review pending; ARBITRATION - CONFIRMING OR VACATING AWARD - WHETHER THE ARBITRATOR EXCEEDED HIS POWER OR RENDERED AN IRRATIONAL AWARD BY NOT GIVING PRECLUSIVE EFFECT TO A PRIOR ARBITRATION AWARD BETWEEN THE PARTIES - PUBLIC POLICY FAVORING FINALITY OF AWARD;

Supreme Court, Erie County granted claimant's motion, in a proceeding pursuant to CPLR article 75, to vacate an arbitration award, and vacated the award; App. Div. reversed, denied the motion and confirmed the arbitration award.

GUARDINO (ANTHONY), PEOPLE v:

1ST Dept. App. Div. order of 5/21/09; affirmance; leave to appeal granted by Catterson, J., 7/28/09;

CRIMES - JURORS - SELECTION OF JURY - DENIAL OF DEFENDANT'S APPLICATION PURSUANT TO BATSON v KENTUCKY (476 US 79) - WHETHER DEFENDANT MADE A PRIMA FACIE SHOWING OF DISCRIMINATION BASED UPON THE PEOPLE'S PEREMPTORY CHALLENGE OF FOUR OF SIX BLACK FEMALE PROSPECTIVE JURORS;

Supreme Court, New York County convicted defendant, after a jury trial, of enterprise corruption, combination in restraint of trade and competition in violation of General Business Law §§ 340 and 341, 13 counts of bribe receiving by a labor official, six counts of grand larceny in the third degree and one count of grand larceny in the fourth degree, and sentenced him to an aggregate term of 6 to 18 years; App. Div. affirmed.

KING (BRIAN S.), PEOPLE v:

Genesee County Court order of 3/27/09; affirmance; leave to appeal granted by Ciparick, J., 7/13/09;

CRIMES - SUPPRESSION HEARING - TRIAL COURT DENIED SUPPRESSION OF THE RESULTS OF SOBRIETY TEST GIVEN TO DEFENDANT WHEN HIS MOTORCYCLE WAS STOPPED IN CONNECTION WITH THE STOP OF ANOTHER BIKER WHO HAD A BURNED OUT TAILLIGHT AND APPEARED INTOXICATED; Batavia Town Court denied defendant's motion to suppress evidence; County Court affirmed.

MCLEAN (SAMUEL), PEOPLE v:

3RD Dept. App. Div. order of 2/26/09; affirmance; leave to appeal granted by Lippman, Ch. J., 7/23/09;

CRIMES - RIGHT TO COUNSEL - WHETHER DEFENDANT'S RIGHT TO COUNSEL ATTACHED IN 2003 IN CONNECTION WITH ROBBERY CHARGES SUCH THAT HIS QUESTIONING BY POLICE OUTSIDE THE PRESENCE OF COUNSEL IN 2006 IN A MURDER INVESTIGATION WAS IMPROPER; SUPPRESSION OF INCULPATORY STATEMENT;

Schenectady County Court convicted defendant, upon his guilty plea, of two counts of murder in the second degree, three counts of attempted robbery in the first degree, three counts of criminal possession of a weapon in the second degree, six counts of criminal possession of a weapon in the third degree, conspiracy in the fourth degree and criminal mischief in the third degree; App. Div. affirmed.

MITCHELL (SCOTT), PEOPLE v:

3RD Dept. App. Div. order of 5/7/09; affirmance; leave to appeal granted by Ciparick, J., 7/22/09;

CRIMES - VACATUR OF JUDGMENT OF CONVICTION - WHETHER THE TRANSFER OF DEFENDANT'S PROBATION SUPERVISION TO ANOTHER COUNTY WITHIN NEW YORK STATE, PURSUANT TO CPL 410.80(1) AND 410.80(2), DIVESTS THE ORIGINAL TRIAL/SENTENCING COURT OF JURISDICTION TO HEAR THE DEFENDANT'S CPL 440 MOTION TO SET ASIDE THE UNDERLYING CONVICTION AND SENTENCE;

Essex County Court denied defendant's motion pursuant to CPL 440.10 and 440.20 to vacate the judgment convicting him of the crimes of driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the second degree and to set aside the sentence, without a hearing; App Div. affirmed.

