

COURT OF APPEALS NEW FILINGS

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

August 5 through August 11, 2011

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. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

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.

CAJIGAS (NORMAN), PEOPLE v:

1ST Dept. App. Div. order of 3/17/11; affirmance; leave to appeal granted by Smith, J., 8/3/11;

CRIMES - BURGLARY - ATTEMPT - SUFFICIENCY OF THE EVIDENCE OF CRIMINAL INTENT - WHETHER AN INTENT TO COMMIT AN ACT THAT WOULD BE INNOCUOUS IF AN ORDER OF PROTECTION DID NOT PROHIBIT IT CAN SATISFY THE "INTENT TO COMMIT A CRIME THEREIN" ELEMENT OF BURGLARY;

Supreme Court, New York County convicted defendant, after a jury trial, of attempted burglary in the second degree and three counts of criminal contempt in the first degree, and sentenced him, as a second violent felony offender, to an aggregate term of 6 1/2 to 8 years; App. Div. affirmed.

HARBATKIN, MATTER OF v NEW YORK CITY DEPARTMENT OF RECORDS AND INFORMATION SERVICES, et al.:

1ST Dept. App. Div. order of 5/31/11; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; DISCLOSURE - FREEDOM OF INFORMATION LAW (FOIL) - PROCEEDING PURSUANT TO CPLR ARTICLE 78 AND PUBLIC OFFICERS LAW §§ 84-90 FOR UNRESTRICTED ACCESS TO HISTORICAL RECORDS CONCERNING AN INVESTIGATION OF COMMUNIST ACTIVITY IN NEW YORK CITY SCHOOLS FROM 1930'S TO 1960'S; ALLEGED FIRST AMENDMENT VIOLATIONS IN REDACTING RECORDS FOR PERSONAL PRIVACY CONCERNS OF INTERVIEWED PUBLIC SCHOOL TEACHERS;

Supreme Court, New York County denied the FOIL petition for a judgment compelling respondent to grant unrestricted access to records related to the Board of Education's "anti-Communist investigation"; App. Div. affirmed.

HOLSTEIN v COMMUNITY GENERAL HOSPITAL OF GREATER SYRACUSE:

4TH Dept. App. Div. order of 7/1/11; affirmance with dissents; sua sponte examination whether two-justice dissent at App. Div. is on a question of law;

JURY - POLLING OF JURY - WHETHER A NEW TRIAL IS WARRANTED BASED ON THE TRIAL COURT'S FAILURE TO POLL THE JURY AFTER REQUEST BY DEFENDANT - WHETHER TRIAL COURT'S RESPONSE TO JURY POLL REQUEST WAS EQUIVOCAL - WAIVER; PHYSICIANS AND SURGEONS - MEDICAL MALPRACTICE ACTION;

Supreme Court, Onondaga County, upon a jury verdict, awarded plaintiff the principal sum of \$1,690,000; App. Div. affirmed.

HOLUBAR, MATTER OF v O'CONNOR, &c., et al.:

2ND Dept. App. Div. order of 5/24/11; denial of petition; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - MANDAMUS - WHEN REMEDY AVAILABLE;

App. Div. denied a CPLR article 78 petition in the nature of prohibition, among other things, to prohibit a Supreme Court Justice from conducting any proceedings in an action entitled Holubar v Holubar (Index No. 2083/08), and in the nature of mandamus, among other things, to compel that Supreme Court Justice to execute written orders or "so order transcripts" and to recommence a 2009 contempt proceeding against Michele Holubar.

LEONARD (LEO), PEOPLE v:

3RD Dept. App. Div. order of 4/7/11; affirmance; leave to appeal granted by Pigott, J., 8/4/11;

CRIMES - KIDNAPPING - SUFFICIENCY OF EVIDENCE - AFFIRMATIVE DEFENSE IF DEFENDANT WAS A RELATIVE OF THE PERSON ABDUCTED AND HIS "SOLE PURPOSE WAS TO ASSUME CONTROL OF SUCH PERSON" (PENAL LAW § 135.30) - FATHER REFUSING TO HAND OVER HIS DAUGHTER IN STAND-OFF WITH POLICE;

Supreme Court, Ulster County, upon a jury verdict, convicted defendant of kidnapping in the second degree, two counts of criminal possession of a weapon in the third degree, endangering the welfare of a child and burglary in the second degree; App. Div. affirmed.

MANKO v LENOX HILL HOSPITAL:

2ND Dept. App. Div. order of 5/10/11; denial of motion; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

APPEAL - APPELLATE DIVISION - DENIAL OF MOTION TO VACATE PRIOR APPELLATE DIVISION ORDER DISMISSING APPEALS;

App. Div. denied appellant's motion, in effect, to recall and vacate so much of a decision and order on motion of the Appellate Division dated 2/8/11 as dismissed appeals from two orders of Supreme Court, Kings County, dated 5/15/09 and 8/14/09, and two other Supreme Court orders both dated 8/14/09, for failure to timely perfect; to reinstate the appeals; and to enlarge the time to perfect the appeals.

MATOS (ZAHIRA), PEOPLE v:

1ST Dept. App. Div. order of 4/19/11; affirmance; leave to appeal granted by Lippman, Ch.J., 7/28/11;

CRIMES - MURDER - DEPRAVED INDIFFERENCE MURDER - SUFFICIENCY OF EVIDENCE - DEFENDANT'S FAILURE TO SEEK EMERGENCY MEDICAL TREATMENT FOR HER TWO-YEAR-OLD SON AFTER THE CHILD WAS BEATEN BY DEFENDANT'S DOMESTIC PARTNER; WITNESSES - EXPERT WITNESS - TESTIMONY ON ABUSIVE DOMESTIC RELATIONSHIP NOT ADMITTED AS IRRELEVANT AND POTENTIALLY MISLEADING - HARMLESS ERROR; CLAIM THAT INDICTMENT, WHICH ENCOMPASSED A TWO-MONTH TIME PERIOD, DID NOT PROVIDE DEFENDANT WITH PROPER NOTICE OF THE PROSECUTION'S THEORY OF THE CASE; GRAND JURY - WHETHER THE INDICTMENT WAS DEFECTIVE BECAUSE THE GRAND JURY WAS INSTRUCTED UNDER THE REGISTER STANDARD PREVIOUSLY APPLICABLE TO DEPRAVED INDIFFERENCE MURDER CHARGES; WHETHER DEFENDANT'S STATEMENTS TO POLICE AND PHYSICAL EVIDENCE SEIZED FROM HER APARTMENT SHOULD HAVE BEEN SUPPRESSED;

Supreme Court, New York County convicted defendant, after a jury trial, of murder in the second degree and two counts of endangering the welfare of a child, and sentenced her to an aggregate term of 20 years to life; App. Div. affirmed.

McKENZIE (DONYELL J.), PEOPLE v:

4TH Dept. App. Div. order of 2/10/11; affirmance; leave to appeal granted by Smith, J., 8/2/11;

CRIMES - MURDER - EXTREME EMOTIONAL DISTURBANCE - WHETHER THE TRIAL COURT PROPERLY REFUSED DEFENDANT'S REQUEST TO CHARGE THE AFFIRMATIVE DEFENSE OF EXTREME EMOTIONAL DISTURBANCE;

Monroe County Court convicted defendant, upon a jury verdict, of murder in the second degree; App. Div. affirmed.

ROSSI, PEOPLE ex rel. v BEZIO:

3RD Dept. App. Div. order of 7/18/11; denial of application; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS; App. Div., among other things, denied petitioner's application for habeas corpus relief.

STEPHENSON, &c., et al. v THE CITY OF NEW YORK:

1ST Dept. App. Div. order of 6/16/11; reversal with dissents; SCHOOLS - STUDENTS - INJURY TO STUDENT - WHETHER SCHOOL DEFENDANTS ARE LIABLE FOR NEGLIGENTLY FAILING TO PREVENT ONE STUDENT FROM ASSAULTING ANOTHER STUDENT OFF SCHOOL GROUNDS TWO DAYS AFTER THE TWO STUDENTS WERE IN A FIGHT AT THE SCHOOL DURING SCHOOL HOURS - LIABILITY FOR FAILING TO NOTIFY INJURED STUDENT'S MOTHER OF FIGHT AT SCHOOL; Supreme Court, Bronx County denied defendant's motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for summary judgment on the issue of liability; App. Div. reversed, granted defendants' motion, denied plaintiffs' cross motion and directed the Clerk to enter judgment dismissing the complaint.

WILLIAMS (LEROY), PEOPLE v:

1ST Dept. App. Div. order of 5/31/11; affirmance; leave to appeal granted by Ciparick, J., 7/27/11; CRIMES - SENTENCE - POST-RELEASE SUPERVISION (PRS) - PRS IMPOSED IN JUDGMENT OF RESENTENCE - WHETHER ADDITION OF PRS EXTENDS EXPIRATION DATE OF ORDER OF PROTECTION ISSUED AS PART OF ORIGINAL SENTENCE - CPL 530.13(4); Supreme Court, Bronx County resentenced defendant to a term of 13 years, with 3 years' post-release supervision and an order of protection; App. Div. affirmed.

WRIGHT (LEDARRIUS), PEOPLE v:

1ST Dept. App. Div. order of 6/21/11; affirmance; leave to appeal granted by Tom, J., 7/21/11; CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER CONSECUTIVE SENTENCES WERE ILLEGAL UNDER PENAL LAW § 70.25(2) - CONVICTIONS FOR FIRST-DEGREE MURDER AND SECOND-DEGREE CRIMINAL POSSESSION OF A WEAPON - DEFENDANT CLAIMS TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES BECAUSE HE ACTED WITH SINGULAR INTENT DURING ONE CRIMINAL TRANSACTION; Supreme Court, New York County, upon a jury verdict, convicted defendant of murder in the first degree and criminal possession of a weapon in the second degree, and sentenced him to consecutive terms of 25 years to life and 15 years; App. Div. affirmed.