

COURT OF APPEALS NEW FILINGS

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

**March 1, 2013 through March 7, 2013**

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.**

TONYA A., MATTER OF v HAL H.:

1<sup>ST</sup> Dept. App. Div. order of 1/3/13; dismissal; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

PARENT AND CHILD - SUPPORT - CLAIMED FAILURE OF FAMILY COURT TO COMPLY WITH APPELLATE DIVISION DIRECTION ON REMAND; CLAIMED UNCONSTITUTIONALITY OF FAMILY COURT ACT;

Family Court, Bronx County denied respondent's objections to supplemental findings by the Support Magistrate after the App. Div.'s 12/8/09 order concluding that \$342 biweekly is appropriate level of support (11/24/10 order); thereafter, Family Court found respondent in civil contempt for failing to pay child support (4/4/11 order); App. Div., upon petitioner's motion, (1) dismissed respondent's appeals from the 11/24/10 and 4/4/11 Family Court orders and (2) vacated a 7/19/11 order amending a stay granted by an Appellate Division Justice.

AVENI (PAUL), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 10/17/12; modification; leave to appeal granted by Pigott, J., 2/20/13;

CRIMES - CONFESSION - VOLUNTARINESS OF CONFESSION - WHETHER POLICE TACTICS DECEIVING DEFENDANT ABOUT THE VICTIM'S STATUS WERE SO COERCIVE AS TO RENDER DEFENDANT'S CONFESSION INVOLUNTARY; WHETHER DEFENDANT'S CONVICTION OF CERTAIN CRIMES WAS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE;

Supreme Court, Westchester County convicted defendant, upon a jury verdict, of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree, and imposed sentence; App. Div. modified by vacating the convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, vacating the sentences imposed thereon, and dismissing those counts of indictment, and granted that branch of defendant's omnibus motion which was to suppress certain statements made to law enforcement officials.

CARTER (DARNELL), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 11/9/12; grant of reargument and amendment of prior order; leave to appeal granted by Graffeo, J., 2/22/13;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER CONSECUTIVE SENTENCES UNDER PENAL LAW § 70.25(2) WERE PERMISSIBLE WHERE DEFENDANT WAS CONVICTED OF MURDER IN THE SECOND DEGREE AND POSSESSION OF A WEAPON IN THE SECOND DEGREE, AND THE POSSESSION CHARGE DID NOT REQUIRE INTENT AS AN ELEMENT;

Niagara County Court convicted defendant, upon a jury verdict, of two counts of murder in the second degree, two counts of robbery in the first degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree, with the sentence imposed for criminal possession of a weapon in

the second degree to run consecutively to the concurrent sentences imposed for the two counts of murder in the second degree; App. Div. modified by directing that all sentences imposed shall run consecutively and affirmed the judgment as modified; thereafter, App. Div. granted the People's motion for reargument and, upon reargument, amended its prior order by deleting the ordering paragraph and substituting the following ordering paragraph, "It is hereby ORDERED that the judgment so appealed from is affirmed," and by deleting the third paragraph of the memorandum and substituting the following paragraph, "The sentence is not unduly harsh or severe."

MARTINEZ (SELBIN), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/20/12; affirmance; leave to appeal granted by Smith, J., 2/21/13;  
CRIMES - DISCLOSURE - ROSARIO MATERIAL - DEFENDANT'S ENTITLEMENT TO AN ADVERSE INFERENCE CHARGE WHERE A POLICE OFFICER'S HANDWRITTEN NOTES OF HIS INTERVIEW WITH THE COMPLAINANT WERE LOST; INSTRUCTIONS - IDENTIFICATION - WHETHER THE TRIAL COURT IMPERMISSIBLY MARSHALED EVIDENCE AGAINST DEFENDANT THROUGH ITS JURY INSTRUCTION ON IDENTIFICATION;  
Supreme Court, Bronx County convicted defendant, after a jury trial, of attempted robbery in the second degree, and sentenced him, as a second felony offender, to a term of 4 1/2 years; App. Div. affirmed.

M & C BROTHERS, INC. v TORUM, et al.:

3<sup>RD</sup> Dept. App. Div. order of 12/13/12; affirmance; 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;  
JUDGMENTS - DEFAULT JUDGMENT - VACATUR; ATTORNEY - SANCTIONS;  
Supreme Court, Delaware County, among other things, denied defendants' motion to vacate a default judgment and imposed a sanction of \$1,250 against defendants' counsel; App. Div. affirmed.

TOWN OF NORTH HEMPSTEAD, MATTER OF v COUNTY OF NASSAU, et al.:

2<sup>ND</sup> Dept. App. Div. order of 2/13/13; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;  
PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - ALLEGEDLY UNAUTHORIZED AND UNCONSTITUTIONAL AUDIT OF PARK DISTRICT IN TOWN BY COUNTY COMPTROLLER; COMBINED ARTICLE 78 PROCEEDING AND ACTION FOR DECLARATORY JUDGMENT;  
Supreme Court, Nassau County, in a combined CPLR article 78 proceeding and action for declaratory judgment, seeking to prohibit the county and its comptroller from conducting an audit of a certain park district located within the town, denied the petition and dismissed the proceeding; App. Div. affirmed.

RILEY (THOMAS), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. Justice's order of 12/6/12; denial of reargument; sua sponte examination whether any basis exists for an appeal as of right in a criminal matter;

APPEALS - APPELLATE DIVISION - SINGLE APPELLATE DIVISION  
JUSTICE'S DENIAL OF MOTION TO REARGUE DENIAL OF LEAVE TO APPEAL IN A CRIMINAL MATTER;

Supreme Court, Bronx County denied defendant's motion pursuant to CPL 440.20 to set aside the "persistent violent felony offender" adjudication and sentence imposed upon him for his 1997 conviction of manslaughter in the first degree; a single Appellate Division Justice denied defendant's application for permission to reargue that Justice's order denying defendant leave to appeal to the App. Div.

RIVERA (ENRIQUE), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 11/7/12; affirmance; leave to appeal granted by Graffeo, J., 3/1/13;

CRIMES - LESSER INCLUDED OFFENSE - MANSLAUGHTER - WHETHER SUPREME COURT PROPERLY DENIED DEFENDANT'S REQUEST TO CHARGE MANSLAUGHTER IN THE SECOND DEGREE (PENAL LAW § 125.15[1]) AS A LESSER INCLUDED OFFENSE OF MURDER IN THE SECOND DEGREE, UPON THE GROUND THAT THERE WAS NO "REASONABLE VIEW" OF THE EVIDENCE THAT WOULD SUPPORT A FINDING THAT DEFENDANT ACTED RECKLESSLY WHEN HE STABBED THE VICTIM;

Supreme Court, Kings County convicted defendant of manslaughter in the first degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

STONE (ALIAS), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 9/27/12; affirmance; leave to appeal granted by Lippman, Ch.J., 2/21/13;

CRIMES - RIGHT TO REPRESENTATION PRO SE - DEFENDANT COMPETENT TO STAND TRIAL - WHETHER DEFENDANT HAD A MENTAL INCAPACITY SUCH THAT HE COULD NOT REPRESENT HIMSELF AT THE TIME OF TRIAL - WHETHER THE TRIAL COURT PROPERLY PERMITTED DEFENDANT TO PROCEED PRO SE - INDIANA v EDWARDS (554 US 164 [2008]);

Supreme Court, New York County convicted defendant, after a jury trial, of two counts of burglary in the second degree, and sentenced him, as a second felony offender, to concurrent terms of seven years; App. Div. affirmed.

TAYLOR (TALIYAH), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 8/8/12; affirmance; leave to appeal granted by Lippman, Ch.J., 2/25/13;

CRIMES - MURDER - DEPRAVED INDIFFERENCE MURDER - MENS REA - SUFFICIENCY OF THE EVIDENCE THAT DEFENDANT WHO OPERATED A MOTOR VEHICLE AFTER TAKING ECSTASY POSSESSED THE REQUISITE MENS REA FOR DEPRAVED INDIFFERENCE MURDER;

Supreme Court, Richmond County convicted defendant of depraved indifference murder in the second degree, reckless endangerment in the first degree, and operating a motor vehicle while under the influence, upon a jury verdict, and imposed sentence; App. Div. affirmed.