

COURT OF APPEALS NEW FILINGS

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

**April 10, 2015 through April 16, 2015**

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.**

MATTER OF AN ATTORNEY (ANONYMOUS):

4<sup>TH</sup> Dept. App. Div. orders of 9/10/13 and 3/31/15; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;  
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - DISBARMENT - CLAIMED CONSTITUTIONAL VIOLATIONS; WHETHER THE REFEREE'S FINDINGS OF MISCONDUCT, CONFIRMED BY THE APPELLATE DIVISION, ARE SUPPORTED BY THE RECORD;

App. Div. suspended respondent from the practice of law during the pendency of a disciplinary investigation pursuant to 22 NYCRR 1022.20(e); thereafter, the same court granted petitioner's motion for an order confirming the report of the referee except to the extent it sought to confirm factual findings of the referee concerning allegations contained in paragraph 46 of the petition; denied respondent's cross motion to dismiss the charges except that it granted the cross motion to the extent it sought to disaffirm factual findings of the referee concerning allegations contained in paragraph 46 of the petition; ordered that respondent is to be removed from her office as attorney and counselor at law; and ordered respondent to pay restitution to eight clients in the amount of \$28,028.15.

BERRY (ANTHONY), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/6/14; affirmance; leave to appeal granted by Rivera, J., 4/2/15;

CRIMES - UNLAWFULLY DEALING WITH CHILD - ACTIVITY INVOLVING CONTROLLED SUBSTANCE - WHETHER THE CRIME OF UNLAWFULLY DEALING WITH A CHILD UNDER PENAL LAW § 260.20(1) REQUIRES A DEFENDANT TO HAVE A LEGAL DUTY TO THE CHILD;

Supreme Court, New York County, convicted defendant, upon a jury verdict, of three counts of unlawfully dealing with a child in the first degree, and imposed sentence; App. Div. affirmed.

BRIDGEFORTH (JOSEPH), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 7/2/14; affirmance; leave to appeal granted by Rivera, J., 4/2/15;

CRIMES - JURORS - SELECTION OF JURY - BATSON APPLICATION - FAILURE TO SHOW PROSECUTOR'S MISCONDUCT - WHETHER DEFENDANT MET HIS PRIMA FACIE BURDEN OF ESTABLISHING THAT THE PROSECUTOR EXERCISED PEREMPTORY CHALLENGES TO REMOVE PROSPECTIVE JURORS ON THE BASIS OF THEIR MEMBERSHIP IN A CONSTITUTIONALLY COGNIZABLE PROTECTED CLASS; RIGHT TO BE PRESENT AT TRIAL - FAILURE TO REBUT PRESUMPTION OF REGULARITY - WHETHER DEFENDANT WAS DENIED HIS RIGHT TO BE PRESENT AT ALL MATERIAL STAGES OF THE TRIAL;

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

CORTORREAL, MATTER OF v ANNUCCI, &c.:

3<sup>RD</sup> Dept. App. Div. order of 12/18/14; affirmance; leave to appeal granted by Court of Appeals, 4/2/15;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - RIGHT TO PRESENT WITNESSES - WHETHER FURTHER INQUIRY INTO THE REASON FOR A REQUESTED INMATE WITNESS'S REFUSAL TO TESTIFY IS REQUIRED WHERE THE REQUESTED INMATE WITNESS SIGNS A FORM INDICATING, WITHOUT FURTHER EXPLANATION, THAT THE WITNESS DOES NOT WISH TO TESTIFY - MATTER OF BARNES v LEFEVRE (69 NY2d 649 [1986]); WHETHER AND TO WHAT EXTENT A HEARING OFFICER MUST INQUIRE INTO THE CIRCUMSTANCES SURROUNDING A REQUESTED INMATE WITNESS'S REFUSAL TO TESTIFY IN A SECOND ADMINISTRATIVE HEARING ON THE GROUND THAT HE HAD NO KNOWLEDGE OF THE MATTER, WHERE THAT WITNESS SIGNED AN AFFIDAVIT STATING HE WAS COERCED BY AN IDENTIFIED PRISON STAFF PERSON NOT TO TESTIFY IN AN EARLIER, ADMINISTRATIVELY-REVERSED PROCEEDING INVOLVING THE SAME DISCIPLINARY CHARGES, AFTER THAT PROCEEDING TERMINATED AND BEFORE THE SECOND PROCEEDING BEGAN; Supreme Court, Albany County, dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent finding petitioner guilty of violating certain prison disciplinary rules; App. Div. affirmed.

GRECO, MATTER OF v JENKINS:

3<sup>RD</sup> Dept. App. Div. judgment of 4/2/15; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PUBLIC OFFICERS - REMOVAL FROM OFFICE - WHETHER THE APPELLATE DIVISION CORRECTLY DETERMINED THAT RESPONDENT MAYOR AND VILLAGE MANAGER SHOULD BE REMOVED FROM OFFICE PURSUANT TO PUBLIC OFFICERS LAW § 36, DUE TO VARIOUS ACTS THAT, TAKEN TOGETHER, "RISE TO THE LEVEL OF UNSCRUPULOUS CONDUCT OR GROSS DERELICTION OF DUTY OR CONDUCT THAT CONNOTES A PATTERN OF MISCONDUCT AND ABUSE OF AUTHORITY";

App. Div. granted a petition in a proceeding pursuant to Public Officers Law § 36 to remove respondent from the offices of Mayor and Village Manager of the Village of Monticello, and a motion to confirm a Referee's report recommending respondent's removal, denied a cross motion to disconfirm the Referee's report and dismiss the petition, and removed respondent from the public offices of Mayor and village Manager of the Village of Monticello.

KILLON v PARROTTA:

3<sup>RD</sup> Dept. App. Div. order of 2/26/15; modification; sua sponte examination whether (1) the 2/26/15 App. Div. order finally determines the action within the meaning of the Constitution, (2) a substantial constitutional question is directly involved to support an appeal as of right from the 2/26/15 order, and (3) the two-Justice dissent in the 8/30/12 App. Div. order is on a question of law;

TRIAL - VERDICT - SETTING VERDICT ASIDE - ASSAULT AND BATTERY - CHALLENGE TO APPELLATE DIVISION ORDER SETTING ASIDE A JURY VERDICT AND ORDERING A NEW TRIAL ON THE GROUND THAT NO FAIR INTERPRETATION OF THE EVIDENCE SUPPORTED THE CONCLUSION THAT DEFENDANT ACTED IN SELF-DEFENSE; COURTS - LAW OF THE CASE - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO ISSUE A JUSTIFICATION CHARGE AT SECOND TRIAL ON THE GROUND THAT THE APPELLATE DIVISION PREVIOUSLY DETERMINED, BASED ON THE EVIDENCE AT THE FIRST TRIAL, THAT DEFENDANT WAS THE INITIAL AGGRESSOR, WHERE THE EVIDENCE WAS THE SAME AT THE SECOND TRIAL; WHETHER THE TRIAL COURT IN SECOND TRIAL WAS REQUIRED TO GIVE SAME COMPARATIVE FAULT CHARGE IT GAVE DURING FIRST TRIAL; EVIDENCE - WHETHER TESTIMONY THAT DEFENDANT HAD THREATENED TO BEAT HIS EX-WIFE, WHO WAS THEN PLAINTIFF'S FRIEND, WAS ADMISSIBLE TO PROVIDE CONTEXT FOR ASSAULT VICTIM'S "PROVOCATIVE CONDUCT" - NEED FOR CURATIVE INSTRUCTION REGARDING SUCH TESTIMONY;

Supreme Court, Warren County, issued a judgment on a jury verdict in defendant's favor and, thereafter, denied plaintiff's motion to set aside the jury verdict; App. Div. reversed the order and judgment, granted the motion to set aside the jury verdict, and remitted the matter to Supreme Court for a new trial; following a new trial, Supreme Court, among other things, granted plaintiff's motion to set aside the jury verdict on the issue of certain damages and ordered a new trial on such damages, and issued a judgment thereon; App. Div. modified the order and judgment by ordering a new trial on the issues of past and future pain and suffering unless, within 20 days after service of a copy of the App. Div. order, defendant stipulates to increase the awards for past pain and suffering to \$200,000 and for future pain and suffering to \$150,000, in which event the order and judgment, as so modified, are affirmed.

OLIVER, MATTER OF v GROSS:

2<sup>ND</sup> Dept. App. Div. order of 10/29/14; dismissal of appeal; leave to appeal granted by Court of Appeals, 3/31/15; APPEAL - ACADEMIC AND MOOT QUESTIONS - PROCEEDING IN THE NATURE OF PROHIBITION REQUIRING PETITIONER TO FOLLOW TREATMENT PROGRAM AS CONDITION OF RELEASE IN PENDING CRIMINAL PROSECUTION - WHETHER THE APPELLATE DIVISION ABUSED ITS DISCRETION IN REFUSING TO INVOKE THE MOOTNESS DOCTRINE EXCEPTION AND IN DISMISSING THE APPEAL ON THE GROUND THAT PETITIONER COMPLETED THE TREATMENT PROGRAM AND CITY COURT DISMISSED THE UNDERLYING CRIMINAL PROSECUTION; WHETHER A TRIAL COURT, IN RELEASING A CRIMINAL DEFENDANT ON HIS OR HER OWN RECOGNIZANCE, HAS AUTHORITY TO CONDITION SUCH RELEASE ON DEFENDANT'S COOPERATION WITH A COUNTY AGENCY KNOWN AS TREATMENT ALTERNATIVES FOR SAFER COMMUNITIES (TASC) AND HER COMPLIANCE WITH THE TREATMENT RECOMMENDATIONS MADE BY TASC;

Supreme Court, Westchester County, in a CPLR article 78 proceeding in the nature of prohibition to prohibit respondents from requiring petitioner, as a condition of her release in a pending criminal prosecution, to cooperate with the treatment recommendations of the agency known as Treatment Alternatives for Safer Communities, denied the petition and dismissed the proceeding; App. Div. dismissed the appeal as academic.

PENA, MATTER OF v NEW YORK STATE GAMING COMMISSION (AND ANOTHER RELATED PROCEEDING):

3<sup>RD</sup> Dept. App. Div. order of 4/2/15; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; HORSE RACING - REVOCATION OR SUSPENSION OF LICENSE - OWNER AND TRAINER - RESPONDENT'S FAILURE TO RENDER A FINAL DETERMINATION WITHIN 30 DAYS AFTER COMPLETION OF THE ADMINISTRATIVE HEARING - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE 30-DAY TIME LIMIT SET FORTH IN RACING, PARI-MUTUEL WAGERING AND BREEDING LAW § 321 IS DIRECTORY, RATHER THAN MANDATORY, AND THAT DISMISSAL OF THE CHARGES SEEKING REVOCATION OF PETITIONER'S LICENSES AS AN OWNER AND TRAINER WAS NOT WARRANTED IN THE ABSENCE OF SUBSTANTIAL PREJUDICE;

Supreme Court, Schenectady County, partially granted petitioner's application in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, by directing dismissal of the administrative charges against petitioner; thereafter, the same court granted petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to, among other things, enjoin respondent from taking further administrative action against him based on the allegations underlying the administrative charges; App. Div. reversed the judgments and dismissed the petitions.

REYNOLDS (BAASIL), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/8/14; affirmance; leave to appeal granted by Rivera, J., 4/2/15; CRIMES - PLEA OF GUILTY - CONDITIONAL PLEA AGREEMENTS IN WHICH DEFENDANT AGREED TO SUBMIT TO A FURTHER SIX MONTH INCARCERATION PRIOR TO SENTENCING, AMONG OTHER THINGS; OUTLEY HEARING TO DETERMINE VALIDITY OF DEFENDANT'S ARREST - WHETHER JUDGE ERRONEOUSLY APPLIED A PROBABLE CAUSE STANDARD INSTEAD OF DETERMINING WHETHER DEFENDANT'S ARREST WAS THE RESULT OF A FALSE OR MALICIOUS REPORT BY A COMPLAINANT; Supreme Court, New York County, convicted defendant, upon his guilty plea, of criminal possession of a weapon in the third degree and menacing in the second degree, and sentenced him, as a second felony offender, to concurrent terms of two to four years and one year, respectively; App. Div. affirmed.

TONAWANDA SENECA NATION, MATTER OF v NOONAN:

4<sup>TH</sup> Dept. App. Div. judgment of 11/14/14; dismissal of petition;

leave to appeal granted by Court of Appeals, 4/2/15;

PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - CPLR ARTICLE  
78 PROCEEDING BROUGHT IN APPELLATE DIVISION TO PROHIBIT SURROGATE  
FROM EXERCISING JURISDICTION OVER REAL PROPERTY SITUATED WITHIN  
TERRITORY OF INDIAN NATION - WHETHER THE APPELLATE DIVISION  
PROPERLY DETERMINED THAT THE PROCEEDING SHOULD HAVE BEEN  
COMMENCED IN SUPREME COURT;

App. Div. dismissed the CPLR article 78 petition.