

COURT OF APPEALS NEW FILINGS

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

April 20, 2012 through April 26, 2012

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.

BARBONI (JAY), PEOPLE v:

4TH Dept. App. Div. order of 12/23/11; affirmance; leave to appeal granted by Ciparick, J., 4/16/12;

CRIMES - MURDER - DEPRAVED INDIFFERENCE MURDER - SUFFICIENCY OF THE EVIDENCE; RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - COUNSEL'S FAILURE TO CHALLENGE PROSPECTIVE JUROR WHO COULD NOT PROMISE TO BE FAIR AND IMPARTIAL AND WAS PURPORTEDLY PREDISPOSED TO CREDIT POLICE TESTIMONY; UNLAWFUL SEARCH AND SEIZURE - WHETHER PHYSICAL EVIDENCE WAS SEIZED IN VIOLATION OF DEFENDANT'S RIGHT TO COUNSEL;

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

CONLON, MATTER OF:

3RD App. Div. order of 3/15/12; denial of motion for, among other things, an order that movant was not disbarred by a prior order; 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;
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDING - MOTION RELATED TO PRIOR DISBARMENT ORDER;
App. Div. denied respondent's motion for an order that respondent was not disbarred by an order of 4/12/99, and for further relief.

CORNELIUS (AUSTIN), PEOPLE v:

1ST Dept. App. Div. order of 11/22/11; modification; leave to appeal granted by Read, J., 4/16/12;
CRIMES - RIGHT OF CONFRONTATION - ADMISSION OF TWO "TRESPASS NOTICES" THAT CONTAINED TESTIMONIAL STATEMENTS BY WITNESSES WHO WERE UNAVAILABLE FOR CROSS-EXAMINATION; CLAIMED IMPROPER ADMISSION OF EVIDENCE UNDER SANDOVAL AND MOLINEUX; CLAIMED DILUTION OF PROSECUTION'S BURDEN OF PROOF;
Supreme Court, New York County convicted defendant, after a jury trial, of burglary in the second degree, and sentenced him, as a second felony offender, to a term of 10 years; App. Div. modified to the extent of reducing the sentence to a term of 7 years.

HANLEY (KIRK), PEOPLE v:

1ST Dept. App. Div. order of 6/28/11; affirmance; leave to appeal granted by Read, J., 4/16/12;
CRIMES - APPEAL - WHETHER DEFENDANT WHO PLEADS GUILTY, BUT DOES NOT WAIVE HIS RIGHT TO APPEAL, FORFEITS HIS RIGHT TO APPELLATE REVIEW OF A CLAIM THAT HIS KIDNAPPING CONVICTION MERGES WITH HIS CONVICTION FOR OTHER OFFENSES;
Supreme Court, New York County convicted defendant, upon his guilty plea, of kidnapping in the second degree, two counts of criminal possession of a weapon in the second degree, and reckless endangerment in the first degree, and sentenced him to concurrent terms of 14 years, 7 years, 7 years and 1 year, respectively; App. Div. affirmed.

MALLORY, &c. v ALLSTATE INSURANCE COMPANY:

2ND Dept. App. Div. order of 12/6/11; affirmance; leave to appeal granted by App. Div., 3/2/12; Rule 500.11 review pending;
INSURANCE - EXCLUSIONS - WHETHER INSURER'S FAILURE TO COMPLY WITH 11 NYCRR 216.6(c) PRECLUDES IT FROM RELYING ON A POLICY EXCLUSION TO DISCLAIM COVERAGE;
Supreme Court, Suffolk County denied plaintiff's motion pursuant to CPLR 3211(b) to dismiss the first, second and third affirmative defenses; App. Div. affirmed.

MUNGO, MATTER OF v BEZIO:

3RD Dept. App. Div. judgment of 3/22/12; confirmation of determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION OF GUILT WITH RESPECT TO VARIOUS CHARGES STEMMING FROM A PHYSICAL ALTERCATION WITH A CORRECTION OFFICER; DUE PROCESS - PRISONER'S ABILITY TO PRESENT WITNESSES - ASSISTANCE TO PRISONER AT HEARING - CLAIMED BIAS OF HEARING OFFICER;

App. Div. confirmed respondent's determination finding petitioner guilty of violating certain prison disciplinary rules, and dismissed the CPLR article 78 petition.

THOMPSON, MATTER OF v FISCHER, et al.:

3RD Dept. App. Div. order of 2/2/12; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PRISONS AND PRISONERS - CALCULATION OF SENTENCE - PRISONER ASSERTS THAT THE MINIMUM SENTENCES FOR TWO MURDER COUNTS SHOULD HAVE BEEN RECALCULATED TO RUN CONCURRENTLY - PENAL LAW § 70.30(1)(b);

Supreme Court, Albany County dismissed petitioner's CPLR article 78 application to review a determination of the Department of Corrections and Community Supervision calculating the length of petitioner's prison sentence; App. Div. affirmed.

SANCHEZ v NATIONAL RAILROAD PASSENGER CORPORATION, et al.:

1ST Dept. App. Div. order of 2/28/12; affirmance with dissents; Rule 500.11 review pending;

EVIDENCE - DOCUMENTARY EVIDENCE - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT UNEQUIVOCAL DOCUMENTARY EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT PLAINTIFF'S ACCIDENT OCCURRED ON A DATE THAT RENDERED HER ACTION TIME-BARRED EVEN THOUGH THE VERIFIED COMPLAINT STATED THAT THE ACCIDENT OCCURRED ON A LATER DATE THAT WOULD MAKE HER ACTION TIMELY - SUMMARY JUDGMENT;

Supreme Court, New York County dismissed the complaint; App. Div. affirmed.

STATE OF NEW YORK, MATTER OF v RICHARD R. (ANONYMOUS):

1ST Dept. App. Div. order of 4/17/12; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE SUPREME COURT PROPERLY EXERCISED ITS DISCRETION IN REJECTING TESTIMONY FROM SEX OFFENDER'S FATHER AT THE FIRST PHASE OF THE MENTAL HYGIENE LAW ARTICLE 10 PROCEEDING BECAUSE SUCH TESTIMONY DID NOT RELATE TO WHETHER SEX OFFENDER HAD A MENTAL ABNORMALITY;

Supreme Court, Bronx County, upon a finding of mental abnormality made after a jury trial, and upon a determination made after a dispositional hearing that appellant is a dangerous sex offender requiring confinement, committed appellant to a secure treatment facility; App. Div. affirmed.

WILLIAMS (TIMOTHY), PEOPLE v:

1ST Dept. App. Div. order of 10/6/11; affirmance; leave to appeal granted by Smith, J., 4/11/12;

CRIMES - JURORS - CPL 310.30 - DISCLOSURE OF CONTENTS OF JURY NOTE TO DEFENSE COUNSEL - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT DEFENDANT DID NOT PROVIDE A RECORD SUFFICIENT TO PERMIT REVIEW OF HIS CLAIM THAT THE COURT DID NOT DISCLOSE THE CONTENTS OF A JURY NOTE TO DEFENSE COUNSEL AND THAT THE RECORD WARRANTS THE INFERENCE THAT DEFENSE COUNSEL WAS APPRISED OF THE CONTENTS OF THE NOTE DURING AN UNRECORDED CONVERSATION - ALLEGED IMPROPER DELEGATION OF A JUDICIAL FUNCTION TO COURT OFFICER; Supreme Court, New York County convicted defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentenced him, as a second felony offender whose prior conviction was a violent felony, to concurrent terms of 7 1/2 years; App. Div. affirmed.