

COURT OF APPEALS NEW FILINGS

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

**July 12, 2013 through July 19, 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.**

ARENA (FRANK), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 5/3/13; reversal; leave to appeal granted by Martoche, J., 6/24/13; Rule 500.11 review pending; CRIMES - WITNESSES - DEFENDANT'S RIGHT TO CALL WITNESS - WHETHER SUPREME COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO CALL A WITNESS WHO WOULD HAVE TESTIFIED THAT DEFENDANT ACCUSED THE PROPOSED WITNESS OF INFORMING ON HIM BUT DID NOT ASSAULT OR THREATEN THE WITNESS, WHERE THE PEOPLE'S THEORY OF MOTIVE WAS THAT DEFENDANT BEAT AND FORCIBLY STOLE PROPERTY FROM COMPLAINANT TO RETALIATE FOR COMPLAINANT TELLING THE POLICE THAT DEFENDANT WAS GROWING MARIHUANA AT HIS HOUSE; Supreme Court, Monroe County, convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the first degree, robbery in the second degree and assault in the second degree; App. Div. reversed, and granted a new trial.

BLAKE (ANDREW), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 4/2/13; affirmance; leave to appeal granted by Graffeo, J., 7/3/13;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - WHETHER TRIAL COUNSEL'S FAILURE TO REQUEST AN ADVERSE INFERENCE CHARGE REGARDING DESTROYED EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL;

Supreme Court, New York County, convicted defendant, after a jury trial, of three counts of attempted murder in the second degree, two counts of assault in the first degree, assault in the second degree, two counts of criminal possession of a weapon in the second degree, reckless endangerment in the first degree and bribery in the second degree, and sentenced him to an aggregate term of 25 years; App. Div. affirmed.

DIAZ (SANDRA), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/13/12; affirmance; leave to appeal granted by Read, J., 7/9/13;

CRIMES - CONTROLLED SUBSTANCES - POSSESSION - SUFFICIENCY OF THE EVIDENCE - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE CONTRABAND - WHETHER THE APPELLATE DIVISION ERRED IN RULING THAT THE EVIDENCE ESTABLISHED THE ELEMENTS OF FIRST-DEGREE UNLAWFULLY DEALING WITH A CHILD (PENAL LAW § 260.20[1]) BECAUSE DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT A LARGE AMOUNT OF HEROIN AND DRUG PARAPHERNALIA WERE IN HER APARTMENT, WHERE FOUR CHILDREN UNDER THE AGE OF 18 LIVED; WHETHER PENAL LAW § 260.20(1) IS UNCONSTITUTIONALLY VAGUE FOR FAILING TO GIVE CLEAR NOTICE OF THE PROSCRIBED CONDUCT AND CREATING A RISK OF DISCRIMINATORY ENFORCEMENT;

Supreme Court, New York County, convicted defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree and four counts of unlawfully dealing with a child in the first degree, and sentenced her to concurrent terms of three years of probation; App. Div. affirmed.

GILES v YI:

4<sup>TH</sup> Dept. App. Div. order of 4/26/13; affirmance; leave to appeal granted by App. Div., 6/28/13;

DISCLOSURE - MEDICAL RECORDS AND REPORTS - EXPOSURE TO LEAD-BASED PAINT - WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING PLAINTIFF TO PRODUCE MEDICAL RECORDS LINKING PLAINTIFF'S INJURIES TO HIS EXPOSURE TO LEAD-BASED PAINT;

Supreme Court, Monroe County, granted the motion of defendant Gerald Breen to compel plaintiff to produce certain medical reports, under penalty of preclusion as to the introduction of proof concerning plaintiff's alleged injuries, and denied plaintiff's cross motion for a protective order; App. Div. affirmed.

HAMILTON v MILLER, et al.:

4<sup>TH</sup> Dept. App. Div. order of 5/3/13; affirmance; leave to appeal granted by App. Div., 6/28/13;

DISCLOSURE - MEDICAL RECORDS AND REPORTS - EXPOSURE TO LEAD-BASED PAINT - WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING PLAINTIFF TO PRODUCE MEDICAL RECORDS LINKING PLAINTIFF'S INJURIES TO HIS EXPOSURE TO LEAD-BASED PAINT; EVIDENCE - JUDICIAL NOTICE - ACTION FOR DAMAGES RESULTING FROM EXPOSURE TO LEAD-BASED PAINT - WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S REQUEST FOR IT TO TAKE JUDICIAL NOTICE OF CONGRESSIONAL FINDINGS IN THE RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992 (42 USC 4851);

Supreme Court, Monroe County, (1) granted the motion and cross motion by certain defendants for an order directing plaintiff, among other things, to produce certain medical reports or precluding proof of plaintiff's injuries if plaintiff failed to produce such medical reports; (2) denied plaintiff's cross motion for a protective order and request that the court take judicial notice of 42 USC § 4851; and (3) precluded plaintiff from introducing proof concerning his alleged injuries unless he produced certain medical reports; App. Div. affirmed.

HANSON (PAMELA), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 11/14/12; affirmance; leave to appeal granted by Smith, J., 7/10/13;

CRIMES - APPEAL - ALLEGED DEPRIVATION OF FAIR TRIAL BY SUPREME COURT'S FAILURE TO DISCLOSE AND RESPOND TO TWO JURY NOTES - CPL 330.13 - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT, BECAUSE THE RECORD CONTAINED NO EVIDENCE THAT THE TWO NOTES ACTUALLY WERE RECEIVED BY SUPREME COURT, DEFENDANT'S ARGUMENT REGARDED MATTERS DEHORS THE RECORD AND WAS NOT PROPERLY BEFORE THE APPELLATE DIVISION;

Supreme Court, Kings County, convicted defendant, upon a jury verdict, of murder in the second degree and grand larceny in the fourth degree and imposed sentence; App. Div. affirmed.

HILL (DERRICK), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 4/9/13; affirmance; leave to appeal granted by Graffeo, J., 7/1/13;

CRIMES - RIGHT TO REMAIN SILENT - WHETHER DEFENDANT OPENED DOOR TO TESTIMONY ABOUT HIS DECLINING TO MAKE STATEMENT TO ARRESTING POLICE OFFICER BY ASKING THE ARRESTING OFFICER ON CROSS EXAMINATION A SERIES OF QUESTIONS ELICITING PROOF THAT DEFENDANT HAD BEEN POLITE AND COOPERATIVE WITH POLICE, HAVING AGREED TO TAKE A BREATHALYZER TEST AND VARIOUS FIELD SOBRIETY TESTS - HARMLESS ERROR;

Supreme Court, New York County, convicted defendant, after a jury trial, of driving while intoxicated and driving while ability impaired, and sentenced him to an aggregate of 60 days and 5 years' probation; App. Div. affirmed.

MATTER OF KOZIOL, A SUSPENDED ATTORNEY:

3<sup>RD</sup> Dept. App. Div. order of 6/6/13; suspension of attorney; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether the order appealed from finally determines the proceeding within

ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - SUSPENSION;  
App. Div., among other things, found respondent guilty of  
professional misconduct as charged, and suspended respondent from  
the practice of law for a period of six months.

LOPEZ (TEOFILO), a/k/a LOPEZ (GARCIA) a/k/a GARCIA (ISIDORO),  
PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 10/25/12; dismissal of appeal; leave  
to appeal granted by Smith, J., 7/3/13;

APPEAL - DISMISSAL - TIMELY NOTICE OF APPEAL FILED FOR DEFENDANT  
WHO BECAME A FUGITIVE, WAS TRIED IN ABSENTIA AND CONVICTED IN  
1999 - AFTER DEFENDANT'S CAPTURE, APPELLATE DIVISION DISMISSED  
THE APPEAL FOR FAILURE TO TIMELY PROSECUTE AT A TIME WHEN  
DEFENDANT WAS REPRESENTED BY COUNSEL BUT HAD NOT YET SOUGHT POOR  
PERSON RELIEF AND COUNSEL HAD NOT RECEIVED OR REVIEWED THE RECORD  
- WHETHER APPELLATE DIVISION ABUSED ITS DISCRETION IN DISMISSING  
THE APPEAL;

Supreme Court, New York County, convicted defendant; App. Div.  
granted respondent's motion to dismiss the appeal for failure to  
timely prosecute, and dismissed the appeal.