

COURT OF APPEALS NEW FILINGS

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

**August 16, 2013 through August 22, 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.**

GILES (DWIGHT), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/22/12; modification; leave to appeal granted by Lippman, Ch.J., 8/6/13;  
CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - WHETHER A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL MAY BE RAISED IN A CPL 330.30 MOTION INSTEAD OF A CPL 440.10 MOTION; SENTENCE - DUE PROCESS CHALLENGE TO SENTENCE PURSUANT TO PERSISTENT FELONY OFFENDER STATUTE (CPL 400.20) - WHETHER DEFENDANT'S SENTENCE WAS IMPERMISSIBLY ENHANCED BEYOND THE OTHERWISE APPLICABLE MAXIMUM TERM BASED ON FACTS FOUND BY THE JUDGE RATHER THAN THE JURY BEYOND A REASONABLE DOUBT;

Supreme Court, New York County convicted defendant, after a jury trial, of attempted burglary in the second degree and criminal possession of burglar's tools, and sentenced him, as a persistent felony offender, to an aggregate term of 20 years to life (9/10/09 judgment), then resentenced defendant, as a persistent felony offender, to a concurrent aggregate term of 20 years to life upon his conviction, after a jury trial, of two counts of criminal possession of stolen property in the fourth degree (1/27/09 judgment); App. Div. modified the judgment of conviction and sentence rendered 9/10/09, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the attempted burglary conviction to a term of 15 years to life, and otherwise affirmed and modified the judgment of resentence rendered 1/27/09, as a matter of discretion in the interest of justice, to the extent of reducing the sentences to concurrent terms of 15 years to life, and otherwise affirmed.

HOERGER, MATTER OF v SPOTA:

2<sup>ND</sup> Dept. App. Div. order of 8/16/13; affirmance with dissents; ELECTIONS - DESIGNATING PETITIONS - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE STATE HAS PREEMPTED THE ISSUE OF TERM LIMITS FOR DISTRICT ATTORNEYS AND, THUS, THAT THE COUNTY OF SUFFOLK LACKED THE POWER TO PLACE A TERM LIMIT ON THE OFFICE OF THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK; Supreme Court, Suffolk County, after a hearing, denied a petition pursuant to Election Law § 16-102 to invalidate petitions designating Thomas J. Spota III as a candidate in a primary election to be held on September 10, 2013, for the nominations of the Democratic, Republican, Conservative and Independence Parties as their candidate for the public office of District Attorney for the County of Suffolk; App. Div. affirmed.

SOLLA, MATTER OF v BERLIN:

1<sup>ST</sup> Dept. App. Div. order of 3/5/13; reversal; leave to appeal granted by App. Div., 8/6/13; STATE - EQUAL ACCESS TO JUSTICE ACT (EAJA) (CPLR ARTICLE 86) - ATTORNEY'S FEES - WHETHER THE EAJA PERMITS THE AWARD OF ATTORNEY'S FEES BASED ON THE "CATALYST THEORY" THAT THE LITIGATION RESULTED IN THE STATE'S VOLUNTARY GRANTING OF THE RELIEF SOUGHT; Supreme Court, New York County, in a hybrid CPLR article 78 and declaratory judgment proceeding, dismissed as moot the petition for an order declaring arbitrary and capricious respondents' failure to comply with a decision after a fair hearing, and denied petitioner's application for counsel fees pursuant to CPLR article 86; App. Div. reversed, granted the application for counsel fees, and remanded for a hearing on the amount of counsel fees to be awarded to petitioner.

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SOTO, JR. (ANSELMO), PEOPLE ex rel. v GONYEA:

6/7/13 order by Justice Eugene M. Fahey; denial of habeas corpus; sua sponte examination whether an appeal lies from an order of an individual App. Div. Justice and whether a substantial constitutional question is directly involved to support the appeal taken as of right;  
HABEAS CORPUS - CHALLENGE TO ORDER OF INDIVIDUAL APPELLATE DIVISION JUSTICE DENYING APPLICATION FOR A WRIT OF HABEAS CORPUS; Justice Eugene M. Fahey denied petitioner's application for a writ of habeas corpus.

TURNER (GENNA A.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 6/14/13; affirmance; leave to appeal granted by Martoche, J., 8/6/13;

CRIMES - SENTENCE - FAILURE TO ADVISE DEFENDANT OF POST-RELEASE SUPERVISION (PRS) BEFORE ENTRY OF GUILTY PLEA - WHETHER THE APPELLATE DIVISION ERRED IN RULING THAT DEFENDANT HAD BEEN INFORMED ABOUT PRS SUFFICIENTLY BEFORE SENTENCE WAS IMPOSED SO THAT SHE WAS REQUIRED TO PRESERVE THE CATU ERROR FOR APPELLATE REVIEW AND THAT, IN ANY EVENT, DEFENDANT WAIVED THE RIGHT TO ASSERT THE CATU ERROR;

County Court, Monroe County, convicted defendant, upon her guilty plea, of attempted murder in the second degree, burglary in the first degree and criminal contempt in the first degree; App. Div. affirmed.

WORD (DIANE), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 9/27/07; denial of motion; sua sponte examination whether a civil appeal as of right pursuant to CPLR 5601(b)(1) lies from an order entered in a criminal case; APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER DENYING DEFENDANT'S MOTION SEEKING LEAVE TO REMAND SUPPRESSION HEARING AND FOR RELATED RELIEF;

App. Div. denied defendant's motion seeking leave to remand suppression hearing and for related relief.