

COURT OF APPEALS NEW FILINGS

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

July 17, 2014 through July 24, 2014

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.

AVALON GARDENS REHABILITATION AND HEALTH CARE CENTER, LLC, MATTER OF v COMMISSIONER OF LABOR (AND 19 OTHER RELATED PROCEEDINGS):
3RD Dept. App. Div. order of 6/5/14; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right or whether any other basis exists to support an appeal as of right;
UNEMPLOYMENT INSURANCE - CONTRIBUTIONS - WHETHER THE APPELLATE DIVISION CORRECTLY AFFIRMED DECISIONS BY THE UNEMPLOYMENT INSURANCE APPEAL BOARD, WHICH DETERMINED THAT FACILITIES WERE LIABLE FOR UNEMPLOYMENT INSURANCE CONTRIBUTIONS FOR THE THIRD AND FOURTH QUARTERS OF 2006 BASED ON REMUNERATION PAID TO ALL EMPLOYEES AS NEW EMPLOYEES EFFECTIVE JULY 1, 2006;

App. Div. affirmed 20 decisions of the Unemployment Insurance Appeal Board, filed November 15, 2012, which ruled that Avalon Gardens Rehabilitation and Health Center, LLC and others were liable for certain unemployment insurance contributions.

BARKSDALE (ANTHONY), PEOPLE v:

1ST Dept. App. Div. order of 10/15/13; affirmance; leave to appeal granted by Read, J., 7/8/14;
 CRIMES - ARREST - PROBABLE CAUSE - WHETHER THE POLICE HAD AN OBJECTIVE CREDIBLE REASON UNDER STEP ONE OF THE DEBOUR INQUIRY TO APPROACH DEFENDANT AND ASK HIM TO EXPLAIN HIS PRESENCE IN THE LOBBY OF AN APARTMENT BASED UPON THE REPUTATION OF THE AREA AND THE FACT THAT THE BUILDING WAS SO PRONE TO TRESPASSING THAT THE LANDLORD HAD EXECUTED A "TRESPASS AFFIDAVIT" REQUESTING POLICE ASSISTANCE IN REMOVING INTRUDERS FROM THE BUILDING;
 Supreme Court, New York County, convicted defendant of three counts of criminal possession of a weapon in the third degree, and sentenced him, as a second felony offender, to concurrent terms of two to four years; App. Div. affirmed.

BARNES (THOMAS), PEOPLE v:

App. Term, 1ST Dept. order of 7/31/13; affirmance; leave to appeal granted by Read, J., 7/8/14;
 CRIMES - TRESPASSING - WHETHER AN INDIVIDUAL MAY BE PROSECUTED FOR SECOND-DEGREE CRIMINAL TRESPASS IN A PUBLIC HOUSING APARTMENT BUILDING, OR IF SUCH CONDUCT CAN ONLY BE PROSECUTED AS THIRD-DEGREE CRIMINAL TRESPASS; PENAL LAW §§ 140.10(e) AND (f), 140.15(1);
 Criminal Court of the City of New York, New York County, convicted defendant, upon a guilty plea, of criminal trespass in the second degree, and imposed sentence; App. Term affirmed.

DELEON v NEW YORK CITY SANITATION DEPARTMENT, et al.:

1ST Dept. App. Div. order of 4/1/14; modification; leave to appeal granted by App. Div., 7/10/14;
 MOTOR VEHICLES - COLLISION - STREET-SWEEPING VEHICLE NOT HAZARD VEHICLE FOR PURPOSES OF RECKLESS DISREGARD STANDARD - PROXIMATE CAUSE;
 Supreme Court, Bronx County, denied plaintiff's motion for summary judgment on the issue of liability and granted defendants' motion for summary judgment dismissing the complaint; App. Div. modified to deny defendants' motion and otherwise affirmed.

GOLO (ALLY), PEOPLE v:

2ND Dept. App. Div. order of 8/21/13; affirmance; leave to appeal granted by Read, J., 7/8/14;
 CRIMES - SENTENCE - DRUG LAW REFORM ACT OF 2009 - RESENTENCING DENIED BASED ON SUBSTANTIAL JUSTICE - WHETHER TRIAL COURT HAS AUTHORITY TO DENY A MOTION FOR RESENTENCING WITHOUT HOLDING A HEARING;

Supreme Court, Queens County, denied, without a hearing, defendant's motion to be resentenced pursuant to CPL 440.60 upon his conviction of criminal sale of a controlled substance in the third degree, which sentence was originally imposed, upon his plea of guilty, on June 7, 2004; App. Div. affirmed.

HARRIS (DUPREE), PEOPLE v:

2ND Dept. App. Div. order of 5/14/14; affirmance; leave to appeal granted by Miller, J., 7/8/14;

CRIMES - PROOF OF OTHER CRIMES - IN CASE WHERE DEFENDANT WAS CHARGED WITH BRIBING AND TAMPERING WITH THREE WITNESSES TO A HOMICIDE, WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT A DIFFERENT WITNESS TO THE HOMICIDE WAS MURDERED SHORTLY BEFORE THE HOMICIDE TRIAL AND THAT DEFENDANT HAD SOUGHT TO CONTACT HIM;

Supreme Court, Kings County, convicted defendant, after a jury trial, of three counts of bribing a witness, and imposed sentence; App. Div. affirmed.

HAWKINS, MATTER OF v BERLIN &c., et al.:

1ST Dept. App. Div. order of 6/12/14; affirmance with a two-Justice dissent; sua sponte examination whether the two-Justice dissent at the Appellate Division is on a question of law;

SOCIAL SERVICES - PUBLIC ASSISTANCE - WHETHER PETITIONER IS ENTITLED TO DISTRIBUTION OF CHILD SUPPORT ARREARS COLLECTED BY RESPONDENTS TO REIMBURSE PUBLIC ASSISTANCE PROVIDED BY PETITIONER'S HOUSEHOLD DURING A PERIOD WHEN THE CHILD SUPPORT BENEFICIARY WAS NOT PART OF THE HOUSEHOLD; SOCIAL SERVICES LAW § 158(5); WHETHER RESPONDENTS' DETERMINATIONS WERE ARBITRARY AND CAPRICIOUS;

Supreme Court, New York County, denied the CPLR article 78 petition seeking, among other things, to annul respondents' determination that petitioner is not entitled to distribution of certain child support payments collected by respondents, and dismissed the proceeding; App. Div. affirmed.

JURGINS (MARK), PEOPLE v:

1ST Dept. App. Div. order of 6/25/13; affirmance and modification; leave to appeal granted by Rivera, J., 6/24/14;

CRIMES - SENTENCE - SECOND FELONY OFFENDER - EQUIVALENCY OF FOREIGN FELONY CONVICTION - WHETHER A DEFENDANT CAN RAISE A CHALLENGE TO THE EQUIVALENCY OF A FOREIGN FELONY CONVICTION FOR THE FIRST TIME IN A CPL 440.20 MOTION - EQUIVALENCY OF PRIOR WASHINGTON, D.C. CONVICTION FOR ROBBERY UNDER A STATUTE THAT DEFINES ROBBERY TO INCLUDE "STEALTHY SEIZURE OR SNATCHING";

Supreme Court, Bronx County, convicted defendant, upon his guilty plea, of robbery in the first degree, and sentenced him, as a second felony offender, to a term of 25 years; thereafter, the same court denied defendant's CPL 440.20 motion to set aside the sentence; App. Div. affirmed the order denying the CPL 440.20 motion and modified the judgment of conviction to the extent of reducing the sentence to a term of 15 years.

KING (URSELINA), PEOPLE v:

2ND Dept. App. Div. order of 10/23/13; affirmance; leave to

appeal granted by Lippman, Ch.J., 6/27/14;
CRIMES - JURORS - SELECTION OF JURY - WHETHER THE TRIAL COURT
DISCHARGED POTENTIAL JURORS BASED UPON HARDSHIP WITHOUT
CONDUCTING A SUFFICIENT INQUIRY - ALLEGED MODE OF PROCEEDINGS
ERROR; EVIDENCE - THIRD-PARTY CULPABILITY - WHETHER THE TRIAL
COURT PROPERLY PRECLUDED EVIDENCE OF THIRD-PARTY CULPABILITY AS
SPECULATIVE, LACKING IN PROBATIVE VALUE, AND CONSTITUTING
INADMISSIBLE HEARSAY; RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION
- FAILURE TO OBJECT TO ALLEGED PROSECUTORIAL MISCONDUCT DURING
SUMMATION;

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

LOVETT (CLEVELAND), PEOPLE v:

1ST Dept. App. Div. order of 4/3/14; modification; leave to
appeal granted by Freedman, J., 6/19/14; Rule 500.11 review
pending;

CRIMES - SENTENCE - DENIAL OF MOTION FOR RESENTENCING UNDER DRUG
LAW REFORM ACT OF 2004; ILLEGAL SENTENCE - AUTHORITY OF APPELLATE
DIVISION TO REMIT TO SUPREME COURT FOR RESENTENCING ON RECKLESS
ENDANGERMENT IN THE FIRST DEGREE; RIGHT TO COUNSEL - EFFECTIVE
REPRESENTATION - FAILURE TO OBJECT TO JURY INSTRUCTIONS;

Supreme Court, New York County, convicted defendant, after a jury
trial, of criminal possession of a controlled substance in the
first and third degrees and reckless endangerment in the first
degree, and sentenced him to an aggregate term of 27 1/3 years to
life; the same court denied defendants' CPL 440.10 motion to
vacate the judgment upon the ground that his trial counsel was
ineffective and later denied defendant's motion for resentencing
pursuant to the Drug Law Reform Act of 2004; App. Div. (1)
modified the judgment to the extent of vacating the sentence on
the reckless endangerment count and remitting for resentencing
pursuant to CPL 470.10, (2) affirmed the order denying
defendant's CPL 440.10 motion and (3) affirmed the order denying
resentencing.

McLEAN, MATTER OF v FISCHER, &c.:

3RD Dept. App. Div. judgment of 6/26/14; confirming a
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 - CHALLENGE TO
APPELLATE DIVISION JUDGMENT CONFIRMING DETERMINATION FINDING
PETITIONER GUILTY OF VIOLATING CERTAIN PRISON DISCIPLINARY RULES;
App. Div. confirmed respondent's determination finding petitioner
in this CPLR article 78 proceeding guilty of violating certain
prior disciplinary rules.

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McLEAN, MATTER OF v NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION:

Supreme Court, Albany County judgment of 6/25/14; dismissal of
CPLR article 78 petition; sua sponte examination whether the
Supreme Court judgment satisfies the requirements for a direct

appeal as of right under CPLR 5601(b)(2);
PRISONS AND PRISONERS - DISCIPLINE OF INMATES - GRIEVANCE
PROCEDURES - CHALLENGE TO INMATE RULE 103.20 (7 NYCRR
270.2[B][4][ii]), WHICH PROHIBITS INMATES FROM REQUESTING OR
SOLICITING GOODS OR SERVICES FROM A BUSINESS OR ANY PERSON OTHER
THAN IMMEDIATE FAMILY MEMBERS WITHOUT THE CONSENT AND APPROVAL OF
THE FACILITY SUPERINTENDENT OR DESIGNEE;
Supreme court, Albany County dismissed a CPLR article 78 petition
challenging a determination denying his inmate grievance.

OLMOSPEREZ, MATTER OF v EVANS &c.:

3RD Dept. App. Div. order of 2/20/14; affirmance; leave to appeal
granted by Court of Appeals, 6/30/14; Rule 500.11 review pending;
PAROLE - DENIAL - CPLR ARTICLE 78 PROCEEDING TO REVIEW
DETERMINATION OF BOARD OF PAROLE DENYING PETITIONER PAROLE
RELEASE - FAILURE OF PAROLE BOARD TO ISSUE AND PROMULGATE WRITTEN
GUIDELINES PURSUANT TO EXECUTIVE LAW § 259-c(4) TO ASSESS RISKS
AND NEEDS FOR PAROLE DECISIONS BEFORE DETERMINATION MADE IN THIS
CASE;
Supreme Court, Albany County, dismissed petitioner's CPLR article
78 application to review a determination of the Board of Parole
denying petitioner's request for parole release; App. Div.
affirmed.

SANS (MICHAEL), PEOPLE v:

App. Term, 2nd, 11th & 13th Judicial Districts order of 8/30/13;
affirmance; leave to appeal granted by Read, J., 7/8/14;
CRIMES - POSSESSION OF WEAPON - SUFFICIENCY OF ACCUSATORY
INSTRUMENT - MISDEMEANOR COMPLAINT CHARGING CRIMINAL POSSESSION
OF A WEAPON IN THE FOURTH DEGREE BASED UPON DEFENDANT'S
POSSESSION OF A GRAVITY KNIFE - PEOPLE v DREYDEN (15 NY3d 100
[2010]);
Criminal Court of the City of New York, Kings County, convicted
defendant, upon his guilty plea, of criminal possession of a
weapon in the fourth degree; App. Term affirmed.