

COURT OF APPEALS NEW FILINGS

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

**August 8, 2014 through August 14, 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.**

PEOPLE ex rel. BOURLAYE T. v CONNOLLY &c.:

2<sup>ND</sup> Dept. App. Div. order of 7/16/14; affirmance; sua sponte examination of whether the appeal is moot and whether a substantial constitutional question is directly involved to support an appeal as of right;  
CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - DENIAL OF WRIT OF HABEAS CORPUS - WHETHER PETITIONER IS A "DETAINED SEX OFFENDER" AS DEFINED IN MENTAL HYGIENE LAW § 10.03(g) (5) AND THUS THE PROPER SUBJECT OF A PETITION FOR CIVIL MANAGEMENT WHERE PETITIONER WAS ON "IMMIGRATION PAROLE" AWAITING DEPORTATION BY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AND SERVING A PERIOD OF

PAROLE SUPERVISED BY THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION WHEN, WITHOUT COMMITTING A PAROLE VIOLATION, HE WAS ARRESTED AND TRANSPORTED BACK TO A STATE CORRECTIONAL FACILITY, AND THE MENTAL HYGIENE LAW ARTICLE 10 PROCEEDING WAS NOT COMMENCED UNTIL AFTER PETITIONER'S REINCARCERATION;

Supreme Court, Dutchess County, denied the petition for a writ of habeas corpus, without a hearing, and dismissed the proceeding; App. Div. affirmed.

CALDAVADO a/k/a CALDERARO (ALMA), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 4/16/14; affirmance; leave to appeal granted by Graffeo, J., 8/7/14;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - WHETHER DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HER CPL 440.10 MOTION ASSERTING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN LIGHT OF GROWING BODY OF MEDICAL EVIDENCE, NOT INTRODUCED AT TRIAL, SUGGESTING THAT "SHAKEN BABY SYNDROME" CAN BE EXPLAINED BY A MEDICAL CONDITION UNRELATED TO PHYSICAL TREATMENT OF THE CHILD;

Supreme Court, Queens County, denied, without a hearing, defendant's CPL 440.10 motion to vacate a 4/1/09 judgment of the same court convicting defendant, upon a jury verdict, of assault in the first degree and endangering the welfare of a child and imposing sentence; App. Div. affirmed.

NEW YORK CITY ASBESTOS LITIGATION, MATTER OF (DUMMIT, &c. v A.W. CHESTERTON, et al.):

1<sup>ST</sup> Dept. App. Div. order of 7/3/14; affirmance;

NEGLIGENCE - PROXIMATE CAUSE - WHETHER DEFENDANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW DUE TO PLAINTIFF'S FAILURE TO PRODUCE EVIDENCE THAT DEFENDANT MANUFACTURED OR PLACED INTO THE STREAM OF COMMERCE ANY OF THE ASBESTOS-CONTAINING MATERIALS TO WHICH THE DECEDENT WAS EXPOSED - LIABILITY FOR FAILURE TO WARN OF ASBESTOS DANGER FOR PRODUCTS DEFENDANT DID NOT MANUFACTURE, SELL OR DISTRIBUTE; JOINT AND SEVERAL LIABILITY AND ALLOCATION OF FAULT; JURY INSTRUCTIONS;

Supreme Court, New York County, after a jury trial, awarded plaintiff Dummit damages in the principal sum of \$4,438,318.87; App. Div. affirmed.

HARDY (PETTIS), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 3/13/14; affirmance; leave to appeal granted by Lippman, Ch.J., 7/28/14;

CRIMES - INSTRUCTIONS - WHETHER THE TRIAL COURT PROPERLY DECLINED TO GIVE THE JURY A CIRCUMSTANTIAL EVIDENCE CHARGE ON THE BASIS THAT THERE WAS BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE OF DEFENDANT'S GUILT; TRIAL - MISTRIAL - DENIAL OF MISTRIAL MOTIONS - WHETHER THE TRIAL COURT ERRED IN GIVING SUPPLEMENTAL CHARGES TO ENCOURAGE THE JURY TO REACH A VERDICT IN RESPONSE TO TWO NOTES

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FROM THE JURY INDICATING DEADLOCK, WHERE THE TRIAL WAS RELATIVELY

UNCOMPLICATED AND THE JURY DELIBERATIONS WERE LENGTHY; EVIDENCE - WHETHER THE TRIAL COURT IMPROPERLY ADMITTED TESTIMONY OF TWO PROSECUTION WITNESSES NARRATING SURVEILLANCE VIDEOTAPES; Supreme Court, New York County, convicted defendant, after a jury trial, of four counts of grand larceny in the fourth degree and one count of petit larceny, and sentenced him, as a second felony offender, to an aggregate term of two to four years; App. Div. affirmed.

MARSHALL (KAITY), PEOPLE v:

App. Term for 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts 2/7/14 order; affirmance; leave to appeal granted by Pigott, J., 7/21/14; CRIMES - IDENTIFICATION OF DEFENDANT - TRIAL COURT HELD LIMITED HEARING TO DETERMINE WHETHER THE SINGLE PHOTO IDENTIFICATION PROCEDURE THAT THE PEOPLE CONDUCTED WITH THE COMPLAINING WITNESS OVER A YEAR AFTER THE INCIDENT WAS PERMISSIBLE AS "TRIAL PREPARATION" - PRE-WADE HEARING PURSUANT TO PEOPLE v HERNER (85 NY2d 877 [1995]); DUE PROCESS;

Criminal Court of the City of New York, Kings County, convicted defendant, after a nonjury trial, of attempted assault in the third degree, attempted criminal possession of a weapon in the fourth degree, menacing in the third degree, and harassment in the second degree; App. Term affirmed.

SEAN R., &c. v BMW OF NORTH AMERICA, LLC, et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/6/14; affirmance; Rule 500.11 review pending;

EVIDENCE - SCIENTIFIC EVIDENCE - FAILURE OF SCIENTIFIC LITERATURE TO SUPPORT EXPERT'S PROFFERED THEORY - WHETHER THE TESTIMONY OF PLAINTIFF'S EXPERTS, WHO THEORIZED THAT EXPOSURE TO GASOLINE FUMES CAUSED PLAINTIFF'S BIRTH DEFECTS, WAS PROPERLY PRECLUDED WHERE THE MEDICAL LITERATURE SHOWED THAT SOME CONSTITUENT CHEMICALS CONTAINED IN GASOLINE CAN LEAD TO BIRTH DEFECTS, NOT THAT EXPOSURE TO GASOLINE VAPORS CAN CAUSE SUCH DEFECTS;

Supreme Court, New York County, denied plaintiff's motion for reargument or renewal of the 12/21/12 order granting defendant's motion to preclude the testimony of two of plaintiff's expert witnesses; App. Div. deemed Supreme Court's 3/6/14 order to have granted renewal and adhered to the 2/21/12 order affirmed.

WALKER (CHRISTOPHER E.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 2/7/14; affirmance; leave to appeal granted by Lippman, Ch.J., 7/30/14;

CRIMES - JUSTIFICATION - PROPER JURY CHARGE - WHETHER THE PATTERN JURY INSTRUCTION ON THE "INITIAL AGGRESSOR EXCEPTION" TO THE JUSTIFICATION DEFENSE MISSTATES THE APPLICABLE LAW WHERE THE DEFENDANT CLAIMS HE USED FORCE TO SHIELD ANOTHER PERSON FROM ATTACK IN AN ONGOING ALTERCATION;

Supreme Court, Monroe County, convicted defendant, upon a jury verdict, of manslaughter in the first degree; App. Div. affirmed.