

COURT OF APPEALS NEW FILINGS

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

**November 22, through November 28, 2019**

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.**

BALL (JAMES), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 8/22/19; affirmance with dissents; leave to appeal granted by Curran, J., 10/22/19; Rule 500.11 review pending;

**Grand Jury--Defective Proceeding--Whether County Court properly dismissed the indictment based on the People's failure to instruct the grand jury with respect to justification in defense of premises pursuant to Penal Law Section 35.20(3);** Supreme County Court, Onondaga County, granted defendant's motion to dismiss the indictment; App. Div. affirmed.

BENSON, MATTER OF v NEW YORK STATE BOARD OF PAROLE:

3<sup>RD</sup> Dept. App. Div. order of 10/31/19; confirming determination with two-Justice dissenting; Rule 500.11 review pending;

**Parole--Revocation--Victim Impact Statement--Whether victim impact statements by a murder victim's family members describing ongoing grief that are submitted after the Board of Parole's decision to grant parole constitute substantial evidence supporting the rescission of parole under 9 NYCRR 8002.5;**

App. Div. in a proceeding pursuant to CPLR article 78 (transferred by order of Supreme Court) to review a determination of respondent New York State Board of Parole rescinding petitioner's open parole release date and imposing a hold period of nine months, confirmed determination and dismissed petition.

GIBBS v STATE FARM FIRE AND CASUALTY COMPANY:

4<sup>TH</sup> Dept. App. Div. order of 9/27/19; affirmance; sua sponte examination of whether the orders appealed from finally determine the action and whether a substantial constitutional question is directly involved to support an appeal as of right;

**Motions and Orders;**

Supreme Court, Erie County, denied motion of plaintiff for a stay of all proceedings (order 5/18/18); denied motion of plaintiff for a stay of all proceedings (order 6/21/18) and denied motion of plaintiff to vacate the order dismissing the action (order 10/23/18); App. Div. affirmed.

GOLDBERG, MATTER OF v ELIA &c.:

3<sup>RD</sup> Dept. App. Div. orders of 7/18/19, 9/12/19 and 11/7/19; sua sponte examination of whether the appeal is timely taken and whether the orders appealed from finally determine the proceeding within the meaning of the Constitution;

**Proceeding Against Body or Officer; Dismissal of Petition; Motions and Orders;**

Supreme Court, Albany County, granted respondent's motion to dismiss the petition; App. Div. affirmed, denied motion to reargue and denied motion to correct prejudicial court errors.

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY v VILLAGE OF HERKIMER, et al.:

4<sup>TH</sup> Dept. App. Div. order of 8/22/19; modification with dissents; leave to appeal granted by App. Div., 11/8/19;

**Municipal Corporations--Water Supply--Whether county industrial development agency assented to village supplying water to agency owned property and tenant using that water, thereby giving rise to implied contract for water services between agency and village; application of Village Law § 11-1116 and local regulations.**

Supreme Court, Herkimer County, inter alia, granted that part of the motion of defendant-respondent Village of Herkimer seeking partial summary judgment on the issue of liability on its counterclaim in action No. 1 and granted the petition in action No. 2; App. Div. modified by granting in part the motion of defendant-respondent Village of Herkimer (Village) and respondent John Spanfelner, as Codes Officer for the Village, to dismiss the petition insofar as it sought to prohibit the Village and Spanfelner from enforcing the New York State Uniform Fire Prevention and Building code against plaintiff-petitioner and vacating the second decretal paragraph of the 3/9/18 judgment to the extent that it granted such relief, and by granting judgment in favor of the Village as follows: It is ADJUDGED AND DECLARED that plaintiff Herkimer County Industrial Development Agency is liable to defendant Village of Herkimer for the subject unpaid water rents, and as so modified, affirmed the amended judgment.

IBARGUEN (ERIC), PEOPLE v.:

2<sup>ND</sup> Dept. App. Div. order of 6/26/19; affirmance; leave to appeal granted by Stein, J., 11/7/19;

**Crimes--Unlawful Search and Seizure--Standing--Whether the trial court erred in summarily denying defendant's motion to suppress evidence obtained following police officers' entry and search of the apartment where defendant was arrested when defendant alleged standing based on his status as a social guest; Crimes--Instructions--Whether the trial court's failure to instruct the jury on cross-racial identification constituted reversible error; Whether defendant was deprived of a fair trial by the court's charge regarding flight as consciousness of guilt;**

Supreme Court, Queens County, convicted defendant of criminal sale of a controlled substance in the third degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

KATTIS, MATTER OF v COHEN, &c., et al.:

2<sup>ND</sup> Dept. App. Div. order of 11/6/19; dismissal; sua sponte examination of whether a substantial constitutional question is directly involved to support an appeal as of right;

**Proceeding Against Body or Officer--Dismissal of Petition;**

App. Div., in proceeding pursuant to CPLR article 78 in the nature of prohibition and mandamus, among other things, to prohibit Justices of the Supreme Court, Suffolk and Nassau Counties, from taking further action in criminal actions (Indictment Nos. 1866/16 and 1512/16), among other things, denied the petition and dismissed the proceeding.

WILKINS (WILLIAM A.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 8/22/19; modification with one-Justice dissent; leave to appeal granted by Curran, J., 10/8/19; Rule 500.11 review pending;

**Crimes--Right to be Present at Trial--Whether the absence of defendant from two sidebar conferences with prospective jurors requires reversal; Crimes--Harmless and Prejudicial Error--Whether the trial court's delivery of an instruction, without a request for such an instruction from defendant, that it was to draw no adverse inference from defendant's failure to testify was reversible error; Whether reversal is required because the court sua sponte explained to the jury that the third person at defendant's table was a deputy and referred to defendant's custodial status;**

Supreme Court, Monroe County, convicted defendant, upon a jury verdict, of murder in the second degree, three counts of robbery in the first degree, and two counts of attempted robbery in the first degree; App. Div. modified by directing that the sentence imposed on count one of the indictment shall run concurrently with the consecutive sentences imposed on the remaining counts, and as modified affirmed.