

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**April 3 through April 9, 2009**

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.

**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.**

ALEMANY (MIGUEL), PEOPLE &c.:

1<sup>ST</sup> Dept. App. Div. order of 11/16/08; modification and affirmance; leave to appeal granted by Court of Appeals, 3/26/09; CRIMES AND CRIMINAL PROCEDURE - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - CONSIDERATION OF THE UNCERTAINTY OF DEFENDANT'S LIVING SITUATION; Supreme Court, New York County adjudicated defendant a level two sex offender pursuant to SORA; App. Div. modified to the extent of reducing the classification to that of a level one sex offender and otherwise affirmed.

ALLEN (GREGORY), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 7/15/08; affirmance; leave to appeal granted by Graffeo, J., 3/23/09;

CRIMES AND CRIMINAL PROCEDURE - IDENTIFICATION OF DEFENDANT - EXPERT TESTIMONY ON RELIABILITY OF EYEWITNESS IDENTIFICATIONS - PEOPLE v LEGRAND (8 NY3d 449); CLAIMED UNDULY SUGGESTIVE LINEUP; CLAIMED ERROR IN JURY INSTRUCTIONS; BATSON CHALLENGE TO JURY CHALLENGES BY PROSECUTION;

Supreme Court, Queens County convicted defendant of two counts of robbery in the first degree, two counts of attempted robbery in the first degree, robbery in the second degree and three counts of attempted robbery in the second degree; App. Div. affirmed.

COLON (DANNY), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 10/28/08; affirmance; leave to appeal granted by Pigott, J., 3/20/09;

CRIMES AND CRIMINAL PROCEDURE - DISCLOSURE - FAILURE TO DISCLOSE EXCULPATORY MATERIAL - ALLEGED BRADY VIOLATIONS - PROSECUTOR'S FAILURE TO DISCLOSE (1) THAT A KEY WITNESS HAD BEEN GIVEN BENEFITS NOT EXPLICITLY BARGAINED FOR IN AN AGREEMENT IN EXCHANGE FOR HIS TESTIMONY AND (2) NOTES FROM INTERVIEWS OF TWO WITNESSES WHO IMPLICATED PEOPLE OTHER THAN DEFENDANT AS BEING THE PERPETRATORS OF THE CRIME - HARMLESS ERROR - PEOPLE'S DUTY TO DISCLOSE BRADY AND ROSARIO MATERIAL IN DEPARTMENT OF PROBATION'S POSSESSION; ALLEGED PROSECUTORIAL MISCONDUCT;

Supreme Court, New York County denied defendant's CPL 440.10 motion to vacate the judgment convicting him, after a jury trial, of murder in the second degree and related crimes; App. Div. affirmed.

GEBBIE, MATTER OF v MAMMINA, et al.:

2<sup>ND</sup> Dept. App. Div. order of 12/2/08; reversal; leave to appeal granted by Court of Appeals, 3/31/09; Rule 500.11 review pending; MUNICIPAL CORPORATIONS - ZONING - VARIANCE - CONSIDERATION OF ABSENCE OF COMMUNITY OPPOSITION TO ISSUANCE OF VARIANCE - WHETHER THE APPELLATE DIVISION IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE BOARD OF ZONING APPEALS OF THE TOWN OF NORTH HEMPSTEAD (ZBA) AND ERRONEOUSLY DETERMINED THAT THE ZBA'S DETERMINATION LACKED A RATIONAL BASIS AND WAS ARBITRARY AND CAPRICIOUS;

Supreme Court, Nassau County denied a CPLR article 78 petition challenging the ZBA's determination denying the petitioner's application for certain area variances, and dismissed the proceeding; App. Div. reversed, granted the petition, annulled the determination and remitted the matter to the ZBA for the issuance of the requested variances.

GOMEZ, MATTER OF v KELLY, et al.:

1<sup>ST</sup> Dept. App. Div. judgment of 10/2/08; modification; leave to appeal granted by Court of Appeals, 3/26/09; Rule 500.11 review pending;

CIVIL SERVICE - POLICE - DISCIPLINE OF POLICE - PENALTY VACATED AS "EXCESSIVE IN LIGHT OF MITIGATING CIRCUMSTANCES" - CONSIDERATION OF MILITARY SERVICE AS A MITIGATING FACTOR; App. Div. modified a determination of respondent Police Commissioner finding petitioner guilty of five departmental charges of misconduct and imposing a one-year dismissal probation and 30-day vacation forfeiture to the extent of vacating the penalty and remitting to respondent for the imposition of an appropriate lesser penalty, and otherwise disposed of the CPLR article 78 proceeding by confirming the remainder of the determination.

OCHOA (MARK), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 12/18/08; affirmance; leave to appeal granted by Freedman, J., 2/24/09; CRIMES AND CRIMINAL PROCEDURE - WITNESSES - PRIOR CONSISTENT STATEMENT - CLAIMED IMPROPER BOLSTERING OF WITNESS TESTIMONY; RIGHT TO BE PRESENT AT MATERIAL STAGE OF PROCEEDINGS - JUDGE'S COMMUNICATION WITH JUROR; Supreme Court, Bronx County convicted defendant of robbery in the second degree; App. Div. affirmed.

ORTIZ (ANTHONY), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 10/28/08; affirmance; leave to appeal granted by Pigott, J., 3/20/09; CRIMES AND CRIMINAL PROCEDURE - DISCLOSURE - FAILURE TO DISCLOSE EXCULPATORY MATERIAL - ALLEGED BRADY VIOLATIONS - PROSECUTOR'S FAILURE TO DISCLOSE (1) THAT A KEY WITNESS HAD BEEN GIVEN BENEFITS NOT EXPLICITLY BARGAINED FOR IN AN AGREEMENT IN EXCHANGE FOR HIS TESTIMONY AND (2) NOTES FROM INTERVIEWS OF TWO WITNESSES WHO IMPLICATED PEOPLE OTHER THAN DEFENDANT AS BEING THE PERPETRATORS OF THE CRIME - HARMLESS ERROR; Supreme Court, New York County denied defendant's CPL 440.10 motion to vacate the judgment convicting him, after a jury trial, of murder in the second degree and related crimes; App. Div. affirmed.

SALM v MOSES:

1<sup>ST</sup> Dept. App. Div. order of 12/18/08; affirmance; leave to appeal granted by Court of Appeals, 3/31/09; WITNESSES - EXPERT WITNESS - WHETHER THE APPELLATE DIVISION CORRECTLY DETERMINED THAT "THE TRIAL COURT PROPERLY LIMITED THE SCOPE OF CROSS-EXAMINATION OF DEFENDANT'S EXPERT BY PRECLUDING INQUIRY INTO THE FACT THAT HE AND DEFENDANT WERE INSUREDS AND SHAREHOLDERS IN THE SAME DENTAL MALPRACTICE INSURANCE COMPANY"; Supreme Court, New York County judgment after a jury verdict in

WADLER v CITY OF NEW YORK:

1<sup>ST</sup> Dept. App. Div. order of 12/18/08; affirmance; leave to appeal granted by Court of Appeals, 3/31/09;  
MUNICIPAL CORPORATIONS - TORT LIABILITY - POLICE - WHETHER FIREFIGHTER'S RULE BARS PLAINTIFF'S COMMON-LAW NEGLIGENCE CLAIM; Supreme Court, New York County denied plaintiff's motion for summary judgment on the issue of liability and granted defendants' cross motion to dismiss the complaint; App. Div. affirmed.

WECHSLER v WECHSLER:

1<sup>ST</sup> Dept. App. Div. order of 10/21/08; modification and affirmance; leave to appeal granted by App. Div., 3/24/09; sua sponte examination whether the October 21, 2008 App. Div. order grants a "new trial or hearing" within the meaning of CPLR 5601(c) and, if so, whether the App. Div. had the power to grant leave to appeal on a certified question pursuant to CPLR 5602(b)(1);  
HUSBAND AND WIFE - EQUITABLE DISTRIBUTION - VALUATION OF ASSETS - WHETHER VALUE OF CLOSELY-HELD CORPORATION'S ASSETS SHOULD BE REDUCED BY THE FULL AMOUNT OF THE EMBEDDED TAXES THAT WOULD BE PAYABLE AS A RESULT OF A HYPOTHETICAL SALE ON THE VALUATION DATE; Supreme Court, New York County judgment that, among other things, equitably distributed the parties' marital property; App. Div. modified in various respects, otherwise affirmed and remanded to Supreme Court for (1) a hearing to determine which securities in a closely-held business the husband sold, what he did with the proceeds, what costs he incurred selling and reinvesting the securities and the amount of the resulting credit to which he is entitled against the distributive award and, following that hearing and a determination of the amount of the credit, (2) entry of an amended judgment consistent with the Appellate Division's 10/21/08 opinion.

WELLS, MATTER OF v CARRO:

1<sup>ST</sup> Dept. App. Div. judgment of 3/17/09; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;  
PROCEEDING AGAINST BODY OR OFFICER - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING A CPLR ARTICLE 78 PETITION "TO REVIEW DETERMINATION DENYING MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS";  
App. Div. denied petitioner's application for an order pursuant to CPLR article 78 and dismissed the CPLR article 78 petition.