

COURT OF APPEALS NEW FILINGS

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

**May 21 through May 27, 2010**

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.**

DAVIS (MAKEDA), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 1/5/10; reversal with dissents; leave to appeal granted by Catterson, J., 5/18/10; Rule 500.11 review pending;

GRAND JURY - RESUBMISSION OF CHARGES - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT RESUBMISSION OF DEFENDANT'S CASE TO A SECOND GRAND JURY WITHOUT LEAVE OF COURT VIOLATED CPL 190.75 AND REQUIRED DISMISSAL OF THE INDICTMENT;

Supreme Court, New York County convicted defendant of two counts of assault in the first degree and assault in the second degree, and sentenced her to an aggregate term of 9 1/2 years; App. Div. reversed and dismissed the indictment with leave to the People to apply for an order permitting resubmission of the charges to another grand jury.

DUHS (MICHAEL), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 8/25/09; affirmance; leave to appeal granted by Jones, J., 5/19/10;  
CRIMES - EVIDENCE - HEARSAY EVIDENCE - CHALLENGE TO APPELLATE DIVISION RULING THAT STATEMENT CHILD MADE TO EMERGENCY ROOM PHYSICIAN FELL WITHIN A HEARSAY EXCEPTION BECAUSE IT WAS RELEVANT TO THE CHILD'S DIAGNOSIS AND TREATMENT; RIGHT OF CONFRONTATION - WHETHER STATEMENT CHILD MADE TO EMERGENCY ROOM PHYSICIAN WAS TESTIMONIAL IN NATURE SO THAT ITS ADMISSION INTO EVIDENCE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM;  
Supreme Court, Richmond County convicted defendant, upon a jury verdict, of assault in the first degree and endangering the welfare of a child, and imposed sentence; App. Div. affirmed.

FELICIANO (LUIS), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 11/19/09; denial of writ of error coram nobis; leave to appeal granted by Pigott, J., 4/9/10;  
APPEAL - EFFECTIVENESS OF APPELLATE COUNSEL - APPLICATION FOR WRIT OF ERROR CORAM NOBIS - CLAIMED FAILURE OF APPELLATE COUNSEL TO ARGUE ON DIRECT APPEAL THAT COUNSEL AT THE PROBATION VIOLATION HEARING WAS INEFFECTIVE;  
App. Div. denied application for writ of error coram nobis.

SCOTT (STEVEN), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 11/5/09; affirmance; leave to appeal granted by Jones, J., 5/19/10;  
CRIMES - JURORS - DISCHARGE OF JUROR - WHETHER TRIAL COURT ERRED IN DISCHARGING A SWORN JUROR FOR CAUSE WHERE THE PROSECUTOR POSED QUESTION TO PROSPECTIVE JURORS ABOUT ABSENCE OF DNA EVIDENCE IN THE CASE AND THE SUBJECT JUROR, ONLY AFTER BEING SWORN, ADVISED THE COURT THAT THE PROSECUTION SHOULD OFFER DNA EVIDENCE TO SUPPORT THE RAPE CHARGE; SELECTION OF JURY - DENIAL OF DEFENDANT'S CHALLENGE TO JUROR WHO REPORTED THAT ONE OF THE PROSECUTORS HAD REPRESENTED HER INFANT SON 13 OR 14 YEAR EARLIER;  
EVIDENCE - VICTIM'S PRIOR SEXUAL CONDUCT - TRIAL COURT'S REFUSAL TO APPLY THE INTEREST OF JUSTICE EXCEPTION TO THE RAPE SHIELD LAW (CPL 60.42[5]) - ALLEGED VIOLATION OF DEFENDANT'S RIGHTS TO CONFRONT WITNESSES AGAINST HIM AND PRESENT A DEFENSE;  
Saratoga County Court convicted defendant of rape in the second degree and three counts of endangering the welfare of a child;  
App. Div. affirmed.

STEPTER (KENNETH), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/12/09; affirmance; leave to appeal granted by Jones, J., 5/19/10; Rule 500.11 review pending;  
CRIMES - SENTENCE - SECOND FELONY OFFENDER - WHETHER DEFENDANT'S NORTH CAROLINA CONVICTION SATISFIES THE REQUIREMENTS OF PENAL LAW § 70.06 - WHETHER DEFENDANT WAS REQUIRED TO PRESERVE ARGUMENT FOR APPELLATE REVIEW; ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING; CLAIM THAT SENTENCE VIOLATED APPRENDI v NEW JERSEY (530 US 466);

Supreme Court, New York County convicted defendant, upon his guilty plea, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the second degree, and sentenced him, as a second felony drug offender, to concurrent terms of 8 years; App. Div. affirmed.

ST. LOUIS v TOWN OF NORTH ELBA, et al.:

3<sup>RD</sup> Dept. App. Div. order of 2/18/10; affirmance; leave to appeal granted by App. Div., 5/17/10;

LABOR - SAFE PLACE TO WORK - CAUSE OF ACTION PURSUANT TO LABOR LAW § 241(6) - WHETHER 12 NYCRR 23-9.4, WHICH REFERS TO POWER SHOVELS AND BACKHOES, APPLIES TO A FRONT-END LOADER - HEAVY EQUIPMENT USED FOR MATERIAL HOISTING RATHER THAN MATERIAL HANDLING;

Supreme Court, Essex County denied defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

VALDEZ &c., et al. v CITY OF NEW YORK, et al.:

1<sup>ST</sup> Dept. App. Div. order of 4/29/10; reversal with dissents; MUNICIPAL CORPORATIONS - TORT LIABILITY - SPECIAL RELATIONSHIP - POLICE - WHETHER WOMAN WITH ORDER OF PROTECTION, WHO ADVISED POLICE ABOUT VIOLATION OF ORDER AND WAS TOLD TO GO HOME INSTEAD OF TO HER MOTHER'S HOUSE, BECAUSE OFFENDER WOULD BE ARRESTED IMMEDIATELY, HAS A SPECIAL RELATIONSHIP WITH THE CITY SUFFICIENT TO SUPPORT AWARD FOR DAMAGES AFTER OFFENDER SHOT HER;

Supreme Court, Bronx County awarded plaintiff and her two infant children damages for pain and suffering; App. Div. reversed, vacated the verdict and dismissed the complaint.

WINDSOR, MATTER OF v STATE OF NEW YORK, et al.

Supreme Court order of 3/7/10; sua sponte examination whether any jurisdictional basis exists to support this direct appeal as of right from a Supreme Court order;

CONTRACTS - CHALLENGE TO SUPREME COURT ORDER DISMISSING PETITION/COMPLAINT TO SET ASIDE LEASE AGREEMENT FOR OPERATION OF BOAT EXCURSIONS UNDER NIAGARA FALLS AND IN THE NIAGARA RIVER - STATUTE OF LIMITATIONS;

Supreme Court, Albany County, among other things, dismissed the petition and complaint.