

COURT OF APPEALS NEW FILINGS

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

June 18 through June 24, 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.

ABREU, MATTER OF v BEZIO:

3RD Dept. App. Div. judgment of 3/25/10; confirming administrative determination; sua sponte examination whether any jurisdictional basis exists to support an appeal as of right; PRISONS AND PRISONERS - DISCIPLINE OF INMATES - CHALLENGE TO APPELLATE DIVISION ORDER CONFIRMING SO MUCH OF A DETERMINATION OF THE COMMISSIONER OF CORRECTIONAL SERVICES AS FOUND PETITIONER GUILTY OF VIOLATING A PRISON DISCIPLINARY RULE PROHIBITING HARASSMENT;
App. Div. confirmed a determination that, among other things, found petitioner guilty of violating a prison disciplinary rule prohibiting harassment.

ABREU, MATTER OF v HOGAN:

3RD Dept. App. Div. order of 4/1/10; modification; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right; PRISONS AND PRISONERS - DISCIPLINE OF INMATES - CPLR ARTICLE 78 PROCEEDING - FOUR-MONTH STATUTE OF LIMITATIONS - SUFFICIENCY OF PLEADINGS (CPLR 3013);

Supreme Court, Albany County granted respondents' motion to dismiss the CPLR article 78 petition; App. Div. modified by reversing so much of the judgment as granted respondents' motion dismissing that portion of the petition challenging the unavailability of a sex offender program at petitioner's facility, denying respondents' motion to that extent, remitting to Supreme Court to permit respondents to serve an answer within 15 days of the date of the decision, and affirmed as so modified.

ABREU v HUTCHINGS et al.:

3RD Dept. App. Div. order of 3/11/10; modification; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right; COSTS - POOR PERSONS - DENIAL OF POOR PERSON APPLICATION WHERE PLAINTIFF FAILED TO FILE AN ATTORNEY'S CERTIFICATION OF MERIT AS SUPREME COURT DIRECTED HIM TO DO;

Supreme Court, Chemung County dismissed plaintiff's complaint for failure to file an attorney's certification of merit pursuant to CPLR 1101(b); App. Div. modified by reversing so much of the order as dismissed the complaint, remitted to Supreme Court for further proceedings not inconsistent with the court's decision and affirmed as so modified.

ALBERGOTTI (ALLEN), PEOPLE v:

1ST Dept. App. Div. order of 4/1/10; modification; leave to appeal granted by Pigott, J., 6/10/10;

CRIMES - SENTENCE - PLEA AGREEMENT - WHETHER SENTENCING COURT CONDUCTED A "SUFFICIENT INQUIRY" INTO WHETHER THE PLEA AGREEMENT HAD BEEN BREACHED (PEOPLE v OUTLEY, 80 NY2d 703, 713); DUE PROCESS; PRESERVATION;

Supreme Court, New York County convicted defendant of forgery in the second degree and sentenced him, as a second felony offender, to a term of 2 1/2 to 5 years; App. Div. modified to the extent of reducing the mandatory surcharge and crime victim assistance fee from \$300 and \$25 to \$250 and \$20 respectively, and otherwise affirmed.

ALONSO (ROBERT and EMILIA), PEOPLE v:

2ND Dept. App. Div. order of 2/16/10; dismissal of appeal; leave to appeal granted by Smith, J., 6/10/10;

CRIMES - APPEAL - WHETHER THE APPELLATE DIVISION HAD JURISDICTION OVER THE PEOPLE'S APPEAL FROM A SUPREME COURT ORDER DISMISSING INDICTMENTS FOR THE ALLEGED VIOLATION OF BRADY v MARYLAND (373 US 83);

Supreme Court, Westchester County granted defendant's oral application to dismiss indictments with prejudice on the ground that the People had violated their obligation to disclose exculpatory evidence pursuant to Brady v Maryland (373 US 83); App. Div. dismissed People's appeal on the ground that "[a]n order imposing sanctions pursuant to CPL 240.70(1) is not appealable under CPL 450.20."

AYALA (ANDRES), PEOPLE v:

4TH Dept. App. Div. order of 4/30/10; affirmance; sua sponte examination whether there is any jurisdictional basis for an appeal as of right;
CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) (CORRECTION LAW ART. 6-C) - CLAIMED DUE PROCESS VIOLATIONS IN ASSESSMENT OF RISK LEVEL;
Erie County Court adjudicated defendant a level one risk under the Sex Offender Registration Act (Correction Law article 6-C); App. Div. affirmed.

BENSTON (MAURICE), PEOPLE v:

1ST Dept. App. Div. order of 2/16/10; affirmance; leave to appeal granted by Lippman, Ch.J., 6/9/10;
CRIMES - EVIDENCE - MEDICAL RECORDS - WHETHER THE TRIAL COURT ERRED, AFTER REDACTING PORTIONS OF COMPLAINANT'S HOSPITAL RECORDS, IN ALLOWING LIMITED REFERENCES CONCERNING "DOMESTIC VIOLENCE INVOLVING A FORMER BOYFRIEND" TO REMAIN IN THOSE RECORDS AS PART OF THE "DIAGNOSIS"; MEDICAL RECORDS EXCEPTION TO HEARSAY RULE; TRIAL COURT'S LIMITATION OF IMPEACHMENT OF COMPLAINANT'S TESTIMONY; DUE PROCESS;
Supreme Court, Bronx County convicted defendant of assault in the second degree, attempted assault in the second degree, criminal possession of a weapon in the fourth degree, four counts of criminal contempt in the first degree, two counts of criminal contempt in the second degree, intimidating a victim or witness in the third degree, aggravated harassment in the second degree and harassment in the second degree, and sentenced him, as a second felony offender, to an aggregate term of 5 1/2 years; App. Div. affirmed.

BRANNON (ERNEST), PEOPLE v:

1ST Dept. App. Div. order of 3/17/09; affirmance; leave to appeal granted by Read, J., 6/15/10;
CRIMES - UNLAWFUL SEARCH AND SEIZURE - WHETHER POLICE LACKED REASONABLE SUSPICION TO BELIEVE THAT OBSERVED OUTLINE OF KNIFE IN DEFENDANT'S PANTS POCKET WAS A GRAVITY KNIFE; SUPPRESSION MOTION;
Supreme Court, New York County convicted defendant of criminal possession of a weapon in the third degree and sentenced him, as a second felony offender, to a term of 2 to 4 years; App. Div. affirmed.

CENTRO EMPRESARIAL CEMPRESA S.A. et al. v AMERICA MOVIL S.A.B. de C.V., et al.:

1ST Dept. App. Div. order of 6/3/10; reversal with dissents; RELEASE - SCOPE OF RELEASE - BINDING NATURE - RELEASE ALLEGEDLY INDUCED BY FRAUD - CHALLENGE TO APPELLATE DIVISION RULING THAT GENERAL RELEASE BARS PLAINTIFFS' VARIOUS CAUSES OF ACTION FOR FRAUD AND BREACH OF CONTRACT; Supreme Court, New York County denied defendants' motion to dismiss the complaint; App. Div. reversed, granted defendants' motion and directed the Clerk to enter judgment in defendants' favor dismissing the complaint.

GRAHAM, PEOPLE ex rel. v WALSH:

Justice Carni order of 2/5/10; denial of writ of habeas corpus; HABEAS CORPUS - AVAILABILITY OF RELIEF - CHALLENGE TO AN ORDER OF AN INDIVIDUAL APPELLATE DIVISION JUSTICE DENYING PETITION FOR A WRIT OF HABEAS CORPUS; Justice Carni denied petition for a writ of habeas corpus.

GRIMM, MATTER OF v NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL:

1ST Dept. App. Div. order of 9/24/09; affirmance with dissents; LANDLORD AND TENANT - RENT REGULATION - RENT REGULATION REFORM ACT OF 1997 (L. 1997, ch 116) - WHETHER APPELLATE DIVISION ERRED IN HOLDING THAT RESPONDENT DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL (DHCR) "ACTED ARBITRARILY, CAPRICIOUSLY AND IN DISREGARD OF ITS OBLIGATION IN FAILING TO CONSIDER WHETHER THE RENT CHARGED TO PETITIONER WAS UNLAWFUL, AND THUS WHETHER ESTABLISHING A RENTAL RATE BASED ON THE [THORNTON v BARON (5 NY3d 175)] FORMULA WAS APPROPRIATE" IN LIGHT OF THE LANDLORD'S PURPORTED FRAUD AND ATTEMPT TO CIRCUMVENT THE RENT STABILIZATION LAW, EVEN THOUGH MORE THAN FOUR YEARS PASSED BEFORE THE RENT OVERCHARGE COMPLAINT WAS FILED - APPLICABILITY OF FOUR-YEAR STATUTE OF LIMITATIONS IN RENT STABILIZATION LAW § 26-516; Supreme Court, New York County vacated respondent DHCR's 2/21/07 determination denying petitioner's rent overcharge complaint and remanding the matter to DHCR to consider whether the registration statement for petitioner's apartment on the base date was reliable; App. Div. affirmed.

MARTIN (ROY), PEOPLE v, a/k/a MARTIN (REALITY):

2ND Dept. App. Div. order of 3/16/10; affirmance; leave to appeal granted by Graffeo, J., 6/15/10; CRIMES - RIGHT TO PUBLIC TRIAL - CLOSURE OF COURTROOM - TRIAL COURT EXCLUDED DEFENDANT'S FATHER FROM THE COURTROOM DURING THE JURY VOIR DIRE DUE TO LACK OF SPACE; TRIAL COURT'S RESPONSE TO JUROR QUESTION;

Supreme Court, Kings County convicted defendant of criminal possession of a controlled substance in the third degree and imposed sentence; App. Div. affirmed.

MELLENDEZ (PEDRO), PEOPLE v:

1ST Dept. App. Div. order of 3/18/10; affirmance; leave to appeal granted by Pigott, J., 6/10/10;

CRIMES - JURORS - JURY INSTRUCTIONS - WHETHER TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY CONCERNING THE BURDEN OF PROOF ON AN ALIBI DEFENSE; PROSECUTOR'S "BURDEN-SHIFTING" REMARKS IN SUMMATION; PRESERVATION;

Supreme Court, Bronx County convicted defendant of burglary in the second degree and sentenced him to a term of 7 years; App. Div. affirmed.

SWEEPER (BRUCE), PEOPLE v:

1ST Dept. App. Div. order of 3/4/10; affirmance; leave to appeal granted by Pigott, J., 6/15/10; Rule 500.11 review pending;

CRIMES - JURORS - SELECTION OF JURY - BATSON CHALLENGE TO PEOPLE'S USE OF PEREMPTORY CHALLENGES TO REMOVE THE ONLY TWO AFRICAN-AMERICAN WOMEN PROSPECTIVE JURORS; ALLEGED VIOLATION OF CPL 710.30; CLAIM THAT COURT'S SENTENCING OF DEFENDANT AS A PERSISTENT VIOLENT FELONY OFFENDER VIOLATED DEFENDANT'S RIGHTS TO A JURY TRIAL;

Supreme Court, New York County convicted defendant of robbery in the first degree and petit larceny, and sentenced him, as a persistent violent felony offender, to an aggregate term of 20 years to life; App. Div. affirmed.