

COURT OF APPEALS NEW FILINGS

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

September 17 through September 23, 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.

DePONCEAU, MATTER OF v STATE OF NEW YORK:

3RD Dept. App. Div. order of 7/16/10; dismissal of appeal; sua sponte examination whether a substantial constitutional question is directly involved or any jurisdictional basis otherwise exists for an appeal as of right;

APPEAL - APPELLATE DIVISION - DISMISSAL OF APPEAL;

Court of Claims granted the State's motion to dismiss the claim and dismissed the claim; App. Div. denied claimant's motion for extension of time to perfect the appeal and dismissed the appeal.

FREEMAN (JOHN), PEOPLE v:

2ND Dept. App. Div. order of 6/1/10; modification; leave to appeal granted by Ciparick, J., 9/2/10;
CRIMES - ROBBERY - WHETHER STUN GUN USED REPEATEDLY ON ROBBERY VICTIM WAS A "DANGEROUS INSTRUMENT" (PENAL LAW § 160.15[3]); PROOF OF INJURY BASED ONLY ON VICTIM'S TESTIMONY;
Supreme Court, Queens County convicted defendant, upon a jury verdict, of robbery in the first degree, two counts of robbery in the second degree and criminal possession of a weapon in the fourth degree, and imposed sentence; App. Div. modified by vacating the conviction of robbery in the first degree, in violation of Penal Law § 160.15(3), as charged in count one of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment.

GREENBERG, TRAGER & HERBST, LLP v HSBC BANK USA et al.:

1ST Dept. App. Div. order of 5/20/10; affirmance; leave to appeal granted by Court of Appeals, 9/16/10;
BANKS AND BANKING - COUNTERFEITED BANK CHECK DEPOSITED BY PLAINTIFF LAW FIRM - COLLECTING BANK INVOKED RIGHT TO CHARGE BACK SUM TO PAYOR BANK AFTER ALLEGEDLY ADVISING LAW FIRM THAT CHECK HAD "CLEARED"; UNIFORM COMMERCIAL CODE; DISMISSAL OF LAW FIRM'S ACTION AGAINST BANKS;
Supreme Court, New York County (4/28/09 order) granted defendant HSBC's motion for summary judgment and dismissed the complaint as to HSBC, and (4/24/09 order) granted defendant Citibank's motion for summary judgment and dismissed the complaint as to Citibank; App. Div. affirmed both Supreme Court orders.

HALL (MICHAEL), PEOPLE v:

2ND Dept. App. Div. order of 6/1/10; modification; leave to appeal granted by Ciparick, J., 9/2/10;
CRIMES - ROBBERY - WHETHER STUN GUN USED REPEATEDLY ON ROBBERY VICTIM WAS A "DANGEROUS INSTRUMENT" (PENAL LAW 160.15[3]); PROOF OF INJURY BASED ONLY ON VICTIM'S TESTIMONY;
Supreme Court, Queens County convicted defendant of robbery in the first degree, two counts of robbery in the second degree, and criminal possession of a weapon in the fourth degree, and imposed sentence; App. Div. modified by vacating the conviction of robbery in the first degree, in violation of Penal Law § 160.15(3), as charged in count one of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment.

McINTOSH (FAYOLA), PEOPLE v:

1ST Dept. App. Div. order of 5/27/10; reversal; leave to appeal granted by Pigott, J., 8/23/10;
GRAND JURY - RESUBMISSION OF CHARGES - WHETHER THE PEOPLE ARE REQUIRED TO OBTAIN COURT AUTHORIZATION UNDER CPL 190.75 TO PRESENT THE CASE TO A DIFFERENT GRAND JURY WHERE THE PEOPLE WITHDREW THE CASE PRESENTED TO A FIRST GRAND JURY DUE TO WITNESS UNAVAILABILITY;

Supreme Court, New York County convicted defendant, after a jury trial, of assault in the second degree and sentenced her, as a second felony offender, to a term of 5 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.

RATAJCZAK v YOONESSI, et al.:

Supreme Court, Erie County order of 8/11/10; dismissal of motion; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether there is a jurisdictional predicate for a direct appeal pursuant to CPLR 5601(b)(2) or any other jurisdictional predicate for an appeal as of right;

ACTIONS - MOTION MADE IN SUPREME COURT SEEKING RELIEF REGARDING APPEAL IN WHICH APPELLANT'S MOTION TO VACATE ORDER DISMISSING APPEAL DENIED AND APPELLATE DIVISION PROHIBITED APPELLANT FROM FILING ANY FURTHER MOTIONS IN THE APPEAL;

Supreme Court dismissed as moot defendants' motion to settle the record on appeal and for an order compelling disclosure regarding the appeal.

SANTIAGO (EDWIN), PEOPLE v:

1ST Dept. App. Div. order of 5/6/10; affirmance; leave to appeal granted by Moskowitz, J., 9/7/10;

CRIMES - IDENTIFICATION OF DEFENDANT - EXPERT TESTIMONY ON RELIABILITY OF EYEWITNESS IDENTIFICATIONS - WHETHER MULTIPLE EYEWITNESS IDENTIFICATIONS CAN CORROBORATE EACH OTHER; REQUESTED SUPPRESSION OF LINE-UP IDENTIFICATION DUE TO DISPARITY IN LOOKS OF THE STAND-INS;

Supreme Court, New York County, after a jury trial, convicted defendant of assault in the first degree; App. Div. affirmed.

TOWN OF WATERFORD, MATTER OF v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION:

3RD Dept. App. Div. order of 8/12/10; modification with dissents; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution;

RECORDS - FREEDOM OF INFORMATION LAW (FOIL) - EXEMPTIONS - WHETHER FOIL'S DEFINITION OF "AGENCY" LIMITS THE APPLICATION OF THE INTER-AGENCY/INTRA-AGENCY EXEMPTION TO COMMUNICATIONS WITHIN AND BETWEEN STATE AND MUNICIPAL GOVERNMENTAL AGENCIES AND PRECLUDES ITS APPLICATION TO COMMUNICATIONS BETWEEN STATE AND FEDERAL GOVERNMENTAL AGENCIES;

Supreme Court, Albany County partially granted petitioner's application, in a CPLR article 78 proceeding, to annul a determination of respondent partially denying petitioner's FOIL requests, and otherwise dismissed the petition; App. Div. modified by reversing so much of the judgment as (1) granted that part of petitioner's application for disclosure of certain records as not falling within the inter-agency/intra-agency exemption, and (2) dismissed that part of petitioner's

the entirety of Records 242 and 243; granted the petition to the extent of disclosing said records; and remitted the matter to Supreme Court for further proceedings not inconsistent with the Court's decision.

WILLIAMS, MATTER OF v CONNELL et al.:

4TH Dept. App. Div. order of 3/19/10; confirmed determination; sua sponte examination whether there is any jurisdictional basis for an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSIONER'S DETERMINATION THAT PETITIONER HAD VIOLATED VARIOUS INMATE RULES; CLAIMED DUE PROCESS VIOLATIONS;

App. Div. confirmed determination of respondent Connell, after a Tier II hearing, that petitioner had violated various inmate rules, and dismissed the petition.

WORLD TRADE CENTER BOMBING LITIGATION, MATTER OF (STEERING COMMITTEE v THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY):

Supreme Court judgment of 1/20/10, bringing up for review App. Div. order of 4/29/08; affirmance; leave to appeal granted by Court of Appeals, 9/16/10;

NEGLIGENCE - WHETHER PORT AUTHORITY IS ENTITLED TO GOVERNMENTAL IMMUNITY FROM NEGLIGENCE CLAIMS ARISING OUT OF THE TERRORIST TRUCK BOMBING OF THE WORLD TRADE CENTER; MAINTENANCE OF PREMISES - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT THE JURY COULD HAVE FAIRLY CONCLUDED THAT THE PORT AUTHORITY WAS NEGLIGENT IN FAILING TO MAINTAIN ITS PARKING GARAGE IN A REASONABLY SAFE CONDITION AND THAT THIS NEGLIGENCE WAS A SUBSTANTIAL CAUSE OF THE BOMBING; APPORTIONMENT OF LIABILITY AMONG JOINT TORTFEASORS - JURY DETERMINATION THAT PORT AUTHORITY WAS 68% LIABLE AND TERRORISTS WERE 32% LIABLE FOR PERSONAL AND ECONOMIC INJURIES RESULTING FROM THE BOMBING;

Supreme Court, New York County denied defendant's motion to set aside a jury verdict finding, among other things, defendant negligent in meeting its proprietary obligation to maintain the World Trade Center's underground parking garage in reasonably safe condition; App. Div. affirmed; Supreme Court awarded damages to plaintiff Antonia Ruiz.