

COURT OF APPEALS NEW FILINGS

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

February 12, 2016 through February 18, 2016

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.

AUSTIN (PETER), PEOPLE v:

1ST Dept. App. Div. order of 12/22/15; affirmance; leave to appeal granted by Gische, J., 2/9/16;

CRIMES - INSTRUCTIONS - ADVERSE INFERENCE CHARGE BASED ON LOSS OF BLOOD EVIDENCE AS A RESULT OF A NATURAL CATASTROPHE - WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING DEFENDANT'S REQUEST FOR A PERMISSIVE ADVERSE INFERENCE CHARGE BASED ON THE UNAVAILABILITY OF BLOOD EVIDENCE AND PROHIBITING DEFENSE COUNSEL FROM COMMENTING ON THE LOST EVIDENCE IN SUMMATION;

Supreme Court, Bronx County, judgment, as amended May 30, 2013, convicting defendant, after a jury trial, of two counts of burglary in the third degree and one count of criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 7 to 14 years; App. Div. affirmed.

CAPERS v PARKSHORE HEALTHCARE, LLC et al.:

2ND Dept. App. Div. order of 10/10/14; dismissal of appeal; sua sponte examination whether appellant is an aggrieved party within the meaning of CPLR 5511; whether a substantial constitutional question is directly involved to support an appeal as of right, and whether any grounds exist to support a direct appeal from the March 12, 2010 Supreme Court order;

APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING APPEAL FROM SUPREME COURT ORDER ON GROUND THAT NONPARTY APPELLANT WAS NOT AGGRIEVED; CHALLENGE TO SEPARATE SUPREME COURT ORDER DISMISSING ACTION AS AGAINST ONE OF THE TWO DEFENDANTS; Supreme Court, Kings County, dismissed the action as against defendant Ruby West and, in a later order, granted defendant Parkshore Healthcare's motion to dismiss for failure to substitute the necessary party after plaintiff's death and nonparty appellant Lola Capers' refusal to be appointed administrator and to continue the action; App. Div. dismissed the appeal from the latter Supreme Court order on the ground that the pro se nonparty appellant did not oppose the motion which resulted in the order, and therefore was not aggrieved by that order, and denied as academic nonparty appellant's motion for poor person relief.

SMITH (RONI), PEOPLE v:

1ST Dept. App. Div. order of 10/15/15; modification; leave to appeal granted by Stein, J., 2/1/16;

CRIMES - SENTENCE - SECOND VIOLENT FELONY OFFENDER - RETROACTIVE APPLICATION OF PEOPLE v CATU (4 NY3d 242 [2005]) - WHETHER A CONVICTION BY GUILTY PLEA WAS OBTAINED IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FEDERAL CONSTITUTION AND THEREFORE COULD NOT BE COUNTED AS A PREDICATE FELONY (see CPL 400.15[7][b]), WHERE THE DEFENDANT WAS NOT ADVISED AT THE TIME OF THE PLEA THAT THE SENTENCE WOULD INCLUDE POSTRELEASE SUPERVISION AND THE PLEA WAS ACCEPTED BEFORE CATU WAS DECIDED - WHETHER DEFENDANT WAS PRECLUDED FROM RELYING ON CATU CHALLENGE TO INVALIDATE THE USE OF THE PRIOR CONVICTION AS A PREDICATE FELONY; Supreme Court, New York County, resentenced defendant, as a first felony offender, to a term of 7 years, with five years' postrelease supervision; App. Div. modified to the extent of reducing the sentence to a term of 6 years, with 5 years' postrelease supervision, and otherwise affirmed.