

COURT OF APPEALS NEW FILINGS

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

November 20, 2015 through November 26, 2015

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.

BOOKER, MATTER OF v ERCOLE, &c., et al.:

3RD Dept. App. Div. order of 10/22/15; denied motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;
CONTEMPT - CIVIL CONTEMPT - CHALLENGE TO APPELLATE DIVISION ORDER DENYING MOTION FOR CIVIL CONTEMPT;
App. Div., among other things, denied a motion for civil contempt.

FLANAGAN (WILLIAM), PEOPLE v:

2ND Dept. App. Div. order of 10/7/15; affirmance; leave to appeal granted by Stein, J., 11/12/15;

CRIMES - OFFICIAL MISCONDUCT - PENAL LAW § 195.00(1) - UNAUTHORIZED EXERCISE OF OFFICIAL FUNCTION - WHETHER AN OFFICIAL MISCONDUCT CHARGE BASED ON ALLEGED MALFEASANCE MUST BE PREMISED ON AN ACT WHICH IS ITSELF UNAUTHORIZED, OR WHETHER THE DEFENDANT'S IMPROPER PURPOSE IN PERFORMING AN OTHERWISE AUTHORIZED ACT SUFFICES TO CONSTITUTE THE CRIME OF OFFICIAL MISCONDUCT; PENAL LAW § 195.00(2) - KNOWINGLY REFRAINING FROM A DUTY IMPOSED BY LAW - WHETHER AN OFFICIAL CONDUCT CHARGE BASED ON NONFEASANCE CAN BE PREMISED ON THE DEFENDANT'S FAILURE TO PERFORM A DISCRETIONARY DUTY; EVIDENCE - HEARSAY - WHETHER STATEMENTS BY CO-CONSPIRATORS ARE ADMISSIBLE ONLY WHEN MADE DURING THE TIME PERIODS INVOLVED IN THE CONSPIRACY;

Supreme Court, Nassau County, convicted defendant, upon a jury verdict, of conspiracy in the sixth degree and two counts of official misconduct, and imposed sentence; App. Div. affirmed.

McLEAN, MATTER OF v NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION:

3RD Dept. App. Div. order of 10/8/15; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - GRIEVANCE PROCEDURES - WHETHER INMATE RULE 130.20 (7 NYCRR 270.2[B][4][ii]), WHICH PROHIBITS INMATES FROM REQUESTING OR SOLICITING GOODS OR SERVICES FROM A BUSINESS OR ANY PERSON OTHER THAN IMMEDIATE FAMILY MEMBERS WITHOUT THE CONSENT AND APPROVAL OF THE FACILITY SUPERINTENDENT OR DESIGNEE, VIOLATES THE FIRST AMENDMENT TO THE US CONSTITUTION, IS UNCONSTITUTIONALLY VAGUE, OR OTHERWISE VIOLATES PRISONER'S CONSTITUTIONAL RIGHTS; WHETHER DENIAL OF PRISONER'S GRIEVANCE CHALLENGING APPLICATION OF RULE 103.20 TO HIM WAS IRRATIONAL, ARBITRARY OR CAPRICIOUS, OR AFFECTED BY AN ERROR OR LAW;

Supreme Court, Albany County, among other things, partially converted petitioner's application, in a proceeding pursuant to CPLR article 78, into an action for a declaratory judgment and declared prison disciplinary rule 103.20 to be constitutional and otherwise dismissed the remainder of the petition, which sought, among other things, an order annulling respondent's grievance determination; App. Div. affirmed.

PENA (MICHAEL), PEOPLE v:

1ST Dept. App. Div. order of 3/26/15; affirmance; leave to appeal granted by Pigott, J., 11/4/15;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - CHALLENGE TO AGGREGATE SENTENCE OF 75 YEARS TO LIFE AS SO DISPROPORTIONATE TO SENTENCES IMPOSED FOR SIMILAR AND GREATER OFFENSES THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT;

Supreme Court, New York County, convicted defendant, after a jury trial, of three counts of predatory sexual assault, and three counts of criminal sexual act in the first degree, and sentenced him to an aggregate term of 75 years to life; App. Div. affirmed.

SMITH (CHARLES), PEOPLE v:

2ND Dept. App. Div. order of 1/28/15; affirmance; leave to appeal granted by Pigott, J., 11/9/15;

CRIMES - ROBBERY - FIRST DEGREE ROBBERY - WHAT CONSTITUTES "DISPLAY" OF FIREARM - WHETHER THE PROSECUTION PRESENTED LEGALLY SUFFICIENT EVIDENCE ESTABLISHING THAT DEFENDANT DISPLAYED WHAT APPEARED TO BE A FIREARM WHILE ATTEMPTING TO COMMIT A ROBBERY; Supreme Court, Queens County, convicted defendant, upon a jury verdict, of attempted robbery in the first degree, and imposed sentence; App. Div. affirmed.

VAZQUEZ, MATTER OF v UNGER et al.:

Supreme Court, Onondaga County order of 1/26/15; dismissal of habeas corpus petition; sua sponte examination whether the appeal is timely taken and whether the only question involved on the appeal is the constitutional validity of a statutory provision; HABEAS CORPUS - WHEN REMEDY AVAILABLE - CHALLENGE TO SUPREME COURT JUDGMENT DISMISSING HABEAS CORPUS PETITION UPON THE GROUND THAT PETITIONER IS NOT ILLEGALLY DETAINED; Supreme Court dismissed petition seeking relief pursuant to CPLR article 70.

ESTATE OF WAGNER, MATTER OF (AARISMAA; WAGNER);

4TH Dept. App. Div. order of 10/20/15; denial of motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right; APPEAL - APPELLATE DIVISION - MOTION TO HOLD SURROGATE IN CONTEMPT OF COURT; App. Div. denied petitioner's motion to hold Surrogate Dennis F. Bender in contempt of court and for other relief.