CRIMINAL

DECISION OF THE WEEK

People v Davis, 5/16/18 – **ALTERNATE JUROR DELIBERATED / NEW TRIAL**
During a trial on attempted burglary and another charge, an alternate juror briefly participated in deliberations with 11 sworn jurors, while the 12th sworn juror was absent from the jury room. Queens County Supreme Court questioned the jurors about their ability to disregard the prior deliberations; denied a motion for a mistrial; and instructed the reconstituted jury that deliberations were to start "fresh, anew, ab initio, from the beginning." The Second Department reversed. By statute, once the jury has retired to deliberate, alternate jurors who are not discharged must not discuss the case with deliberating jurors. The defendant was deprived of his state constitutional right to a trial by a jury of 12. A new trial was ordered. Appellate Advocates (Alan Chevat and David Greenberg, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03539.htm

FIRST DEPARTMENT

People v Espinal, 5/17/18 – **SUPPRESSION / NO PRIVACY IN LOCKED COMMON AREA**
After lawfully arresting the defendant outside of the New Jersey apartment where he was staying and obtaining a key, the police used the key to enter a common area of the building through a locked door. The defendant argued that he had an expectation of privacy in that area. New York County Supreme Court denied suppression. The defendant was convicted of first-degree robbery and other charges following a jury trial. The First Department rejected his argument that New Jersey law applied to the suppression issue. Such issues are generally governed by the law of the forum, and New York had a paramount interest in the application of its laws to this case. *See generally People v Benson*, 88 AD2d 229. Under New York law, at least where common areas are used primarily for ingress and egress, a locked outer door does not create a valid expectation of privacy. General access to common areas negates an expectation of privacy for an individual resident, except in unusual circumstances—such as where the areas are shared for eating and bathing.
http://nycourts.gov/reporter/3dseries/2018/2018_03613.htm

People v Delgado, 5/15/18 – **SPEEDY TRIAL / LINEUP PROCEDURE / AFFIRMANCE**
There was a 3½-year delay between the defendant's arrest and the indictment on robbery charges because the People chose to defer prosecution when the victim left the country. Bronx County Supreme Court denied the defendant's constitutional speedy trial motion. The First Department sustained the ruling. The reviewing court acknowledged that the delay was substantial, and the People failed to provide an adequate reason for a significant portion of it. However, the home invasion robbery was very serious, the defendant was not incarcerated during the relevant period, and he failed to show prejudice. Further, the delay was not so egregious as to warrant dismissal regardless of specific prejudice. The defendant also raised issues about the lineup. The victim's husband did not witness the crime, but he

suspected the defendant and provided some of the information leading to his arrest. That husband translated the pre-lineup instructions into Arabic for the victim, who had a limited command of English. The procedure was "far from ideal, and should have been avoided." But the lineup was not unduly suggestive, the appellate court concluded, noting that the husband was not present during the identification procedure, and it appeared unlikely that he could have coached the victim in advance of her identification.
http://nycourts.gov/reporter/3dseries/2018/2018_03483.htm

SECOND DEPARTMENT

People v Santos, 5/16/18 – **DOUBLE JEOPARDY VIOLATION / COUNT DISMISSED**
A Nassau County trial ended in the defendant's conviction of murder and a weapon possession count (machete) and his acquittal of another weapon possession count (knife). The Second Department reversed and ordered a new trial. At the retrial, the defendant was again convicted of murder, as well as the charge relating to the knife, and acquitted of the charge involving the machete. The appellate court held that the conviction based on the knife possession violated the constitutional prohibition against double jeopardy and thus had to be dismissed. Leon Tracy represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03552.htm

People v Hungria, 5/16/18 – **NO ADVICE ON REMOVAL / 440 HEARING ORDERED**
The defendant was a lawful resident of the United States who emigrated from the Dominican Republic in 1996. In 2014, he was convicted of certain drug crimes based on a negotiated plea. Thereafter, pursuant to CPL 440.10, the defendant sought to vacate the conviction on the ground of ineffective assistance of counsel in failing to advise him about deportation consequences of a guilty plea to aggravated felonies. Nassau County Supreme Court denied the motion without a hearing. That was error. The defendant had sufficiently alleged that counsel failed to fully inform him that a guilty plea exposed him to mandatory removal and that he could have rationally rejected the plea offer if properly advised. The challenged order was reversed, and the matter was remitted for a hearing. Gary Schoer represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03545.htm

People v Davis, 5/16/18 – **NO SUPPRESSION / OFFICER'S QUESTION INNOCUOUS**
The defendant was indicted in Suffolk County for an armed robbery that resulted in the death of one victim and injury to three others. Prior to trial, he sought to suppress a statement he made to the arresting detective while being transported to the police station and before being Mirandized. The defendant initiated a conversation by asking the detective why he had been arrested, and the detective responded, "murder." The defendant then asked, "when this murder supposedly happened," to which the detective replied, "Christmas Day ... the previous year." The defendant said that he did not get involved in murders, that was not his M.O. He was just "involved in drugs and getting money." When the detective asked the defendant if he had a job, he responded, "no, I just get money." The hearing court denied suppression of this final statement, and the jury found the defendant guilty of murder and assault. The Second Department agreed with the defendant that his

statement, "no, I just get money," was not spontaneous; it was made in direct response to a question about whether he had a job. However, that question was innocuous—not the functional equivalent of an interrogation—and was not likely to elicit an incriminating response. Not every comment by police in response to an inquiry by a defendant constitutes interrogation merely because it is followed by an incriminating statement. Thus, suppression was properly denied.
http://nycourts.gov/reporter/3dseries/2018/2018_03538.htm

THIRD DEPARTMENT

People v Stein, 5/17/18 – **DOUBLE JEOPARDY VIOLATION / COUNT DISMISSED**
In Sullivan County, the defendant pleaded guilty to possession of a sexual performance by a child (three counts) and other crimes. The Third Department held that consecutive sentences for the sexual performance convictions were not authorized. The People failed to establish—through the indictment or facts adduced during the allocution—that the defendant came into possession of the images at separate and distinct times. Cliff Gordon represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03566.htm

FAMILY

SECOND DEPARTMENT

Greco v Greco, 5/16/18 – **MAINTENANCE / THREE YEARS WAY TOO SHORT**
The parties were married in 1999 and had two children. Based upon the wife's psychiatric condition, the husband had full custody of the children. After a trial on financial issues, Nassau County Supreme Court awarded the wife $4,500 in monthly maintenance for a period of three years. On appeal, she challenged both the amount and duration. The First Department found that the amount was proper based on an equitable distribution award and the absence of child-rearing duties. However, the period was inadequate, given the wife's psychiatric condition and inability to be self-supporting for the foreseeable future. The appellate court directed that she would receive maintenance until she remarried or cohabitated; either party died; she began to draw Social Security benefits; or she reached the age of 67 or such age as would qualify her for full Social Security benefits—whichever occurred first. Maintenance would then continue, but in the amount of $2,000. In addition, the husband was directed to pay for her health insurance premiums. Neal Futerfas represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03510.htm

Matter of Weiss v Weiss, 5/16/18 – **GRANDMOTHER / STANDING ERROR / VISITATION**
In Orange County, the maternal grandmother filed a custody petition right before the local Social Services agency initiated proceedings to terminate the mother's parental rights and free the child for adoption. After terminating the mother's rights, Family Court dismissed

the grandmother's custody petition, as well as her visitation application. The Second Department ruled that, while Family Court erred in finding that the grandmother lacked standing to seek custody, the trial court had properly concluded that the child's best interests would be best served by living with the foster parents. Regarding visitation, the reviewing court reached a different conclusion. Even after parental rights have been terminated and a child has been freed for adoption, a grandparent may seek visitation. Equitable circumstances conferred standing on this grandmother to seek such relief, in that she had developed a relationship with the child early in her life and had repeatedly sought to continue that relationship. Visitation would benefit the child, who had enjoyed consistent and positive visitation with the grandparent. The matter was remitted, for further proceedings before a different judge, to determine appropriate visitation. John Virdone represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03532.htm

Matter of Veras v Padilla, 5/16/18 – **AUNT / STANDING QUESTION / EXPEDITED HEARING**
The mother had sole custody of three children. After she died, the children moved to live with the maternal aunt, who filed a custody petition. The father also sought custody. Queens County Family Court dismissed the aunt's petition based on a lack of standing. The AFC informed the appellate court that, during the pendency of the appeal, Family Ct Act article 10 proceedings had been commenced against the father, the children had been removed from his care, and he had been incarcerated. Although the new allegations were dehors the record, pursuant to *Matter of Michael B.*, 80 NY2d 299, they were properly considered to the extent that they indicated that the record was no longer sufficient to resolve the custody question. The matter was remitted for an expedited hearing; a determination as to whether the aunt had standing based on extraordinary circumstances; and, if so, a decision on the merits. Steven Forbes represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03530.htm

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