

Sunday, December 31, 2006

Hanging human rights with the hanging of Saddam Hussein.

Here is a chilling New York Times video of Saddam Hussein being led to the noose, and having it fitted around his neck. "Saddam Hussein repeatedly defecated on human rights. However, the test of a government's commitment to human rights is measured by the way it treats its worst offenders." Richard Dicker, director of Human Rights Watch's International Justice Program. "I have railed against capital punishment repeatedly. Capital punishment is barbaric and inhumane. On this video, one is left to wonder whether the executioners were well-trained and well-experienced through none other than Saddam Hussein's former regime or trained by people from that regime. Jon Katz. ADDENDUM: TalkLeft has uploaded a video of the entire hanging of Saddam Hussein. This video is even more chilling and disturbing than the New York Times video. It shows Saddam Hussein being dropped through the floor, shows his face after being executed, and includes audio of celebratory voices. LiveLeak says this hanging video was taken by a cellphone.

Posted by Jon Katz in Jon's news & views at 02:00

Friday, December 29, 2006

Our July 2006 archives.

Underdog will return with new blog material the first week of January 2007. Meanwhile, I invite you to view our archived blog entries, including our July 2006 archives. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Thursday, December 28, 2006

Our August 2006 archives

Underdog will return with new blog material the first week of January 2007. Meanwhile, I invite you to view our archived blog entries, including our August 2006 archives. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Wednesday, December 27, 2006

Our September 2006 archives.

Underdog will return with new blog material the first week of January 2007. Meanwhile, I invite you to view our archived blog entries, including our September 2006 archives. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Tuesday, December 26, 2006

Our October 2006 archives.

Underdog will return with new blog material the first week of January 2007. Meanwhile, I invite you to view our archived blog entries, including our October 2006 archives. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Monday, December 25, 2006

Video of justices discussing Constitutional interpretation /Justices in the public view.

Here is a recent video of United States Supreme Court Justices Breyer and Scalia discussing Constitutional interpretation. Each Supreme Court justice sets his or her own limits on what to discuss in public, where, and for how much money (if for any money), in part taking into consideration the extent to which the justice might be seen as prejudging issues to be presented to the Supreme Court. Late Chief Justice Warren E. Burger apparently was very private, probably too inaccessible to the public, which has a need to understand the workings of this only branch of government comprised exclusively of un-elected members. Longtime Justice Scalia seems to be among one of the most publicly visible and gregarious justices outside of the august surroundings of the Supreme Court. Being in the Washington area for two decades, I have attended several Supreme Court oral arguments, and have briefly met three of the justices. I recount here the ecstasy of meeting the late Justice William Brennan when he received an NACDL award. I have met Justice Ruth Bader Ginsburg at a couple of gatherings. I recount here my 1988 meeting with Justice Antonin Scalia. In 1989, I heard now-Justice/then EEOC Chair Clarence Thomas talk at a quarterly meeting of the American Bar Association's Individual Rights and Responsibilities Section. He was introduced as a likely nominee to the District of Columbia federal Circuit Court. Late Justice Thurgood Marshall resigned two years later, and Justice Thomas replaced him on the Supreme Court after hearings more heated than Robert Bork's. Not long after Justice Thomas was confirmed to the Supreme Court by the twentieth century's narrowest vote, of 52-48, I bumped into Senator Joseph Lieberman in my neighborhood supermarket parking lot, and thanked my former senator for voting against Thomas. He passed on making any comment beyond the statement represented by his vote. One day during the heated controversy over his ultimately-failed Supreme Court nomination, I saw Robert Bork in a car passenger's seat near my law school. I was so stunned to see this man whom I so vehemently wanted off the Supreme Court that I could not think of anything more clever than to ask "How are you?" to which he answered "Fine, fine." Then again, perhaps that was in line with my later practice of t'ai chi, to know the opposition and to keep the opposition within arm's length. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Sunday, December 24, 2006

Calley: "They were all the enemy, they were all to be destroyed, sir."

Read the chilling direct and cross examination of William Calley, and this account of the My Lai courts martial, American commanders are said to have told Desert Storm soldiers "No My Lais." Among the many important lessons of the My Lai massacre for criminal defense lawyers are the following: First, power is at risk for abuse by anyone -- including police, and including criminal defendants who actually committed violent crimes -- and at greater risk of abuse the greater is the power. Second, no matter how vile the alleged crime -- even if one's client actually committed the act -- the criminal defense lawyer must zealously defend the client without reservations. To leave the work to less competent lawyers leaves all sorts of injustices to result, many of which will reverberate far beyond the specific trial and the specific defendant. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Texas prosecutors chat on public e-bulletin board.

Thanks to Grits for Breakfast -- constantly a source of information for our blog -- for making it known not only that the Texas prosecutor's association's chatroom is available to the entire public, but also for pointing to a chilling discussion of the incorrectly narrow, and sometimes uninformed, definition that so many prosecutors have of the Brady/exculpatory evidence that must be revealed to the defense. For any reason that the above-described Brady chat becomes non-public, I have re-posted it here. The problem here is that in too many jurisdictions, prosecutors are given the discretion to self-police themselves about the discovery material they are required to divulge pursuant to governing laws and court orders. That is like having the foxes govern themselves while watching over the henhouse. Many prosecutors are so overloaded with cases that their workload alone can fuel non-disclosure of evidence that they are required to disclose. The prosecutorial discovery disclosure path can become more rotten as it is walked. I write more about prosecutorial disclosure of evidence here, in the Jencks and Brady contexts. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, December 22, 2006

Marks & Katz seeks paralegal and bilingual receptionist.

This is the first time we are announcing job openings on the Underdog Blog, because who better than our readers might know ideal paralegal and bilingual receptionist candidates to assist our ongoing fight for the underdog? Our staff is expanding, and these positions are open immediately. Full details are at <http://markskatz.com/jobs.htm>. Happy holidays to all. Jon Katz.

Posted by Jon Katz in Jon's news & views at 16:00

Teamwork among co-defendants' lawyers.

When dealing with co-defendants' lawyers, I have had experiences running from the very positive to the very negative. The very positive side includes a lengthy four-defendant federal felony trial where all lawyers whose clients did not plead guilty at all times worked together well and got along personally, and never did anything to undermine the others' case. A more negative experience involved a co-defendant's lawyer in a drug felony trial who told me he did not care about the outcome of his client's case because the court would not let him out of the case despite his client's stiffing him on his fee. He anticipated this would be antithetical to my values, but told me his view, nonetheless. Whether or not this attitude affected his performance, the lawyer proceeded to ask the police numerous open-ended, non-controlled cross examination questions that risked eliciting -- but fortunately did not elicit -- damaging answers for my client. Then, there are the co-defendants' lawyers who will not return a phone call once their client has signed a snitch agreement with federal prosecutors. (I criticize the snitch system here). Even a criminal defense colleague with a particularly big heart once told me that there still might come a time when he's not returning my calls if he represents a co-defendant who decides to snitch against my client. Such lawyers have nothing to lose for their clients by just returning the phone call and apologizing for not being able to discuss the case further. What happens if the co-defendant's plea deal falls through, and the co-defendant's lawyer then needs the remaining co-defendants' lawyers' input on strategizing the case? How will that lawyer feel if the response is silence, or a delayed response? My response might be to tell the lawyer that s/he's lucky that I don't believe in penalizing the defendant for the lawyer's previous non-responsiveness. Worse than the unreturned phone call, though, is finding out that the co-defendants' lawyers are ganging up on one's client. Just because a colleague is a criminal defense lawyer does not mean s/he will ever put his or her interests in collegiality ahead of what s/he perceives to be the client's interests. What if the non-responding co-defendant's lawyer is in a community where s/he inevitably will be on future cases with the lawyers whose calls s/he does not return? Refusing to return a co-defendant lawyer's call -- on the basis that one's client will snitch -- is myopic, of no benefit, and not collegial. In his December 17 blog entry, Little Rock lawyer John Wesley Hall details the collegiality among criminal defense lawyers in Arkansas. He talks of a co-defendant's lawyer who called to wish John luck on the remainder of the trial -- after the co-defendant entered a guilty plea mid-trial, and did not testify against John's client. Such small words can go a long way for the remaining defense lawyer, particularly from a colleague who shared the experience fighting the case. Also of note is the willingness of John -- who has shown me kindness and collegiality before -- to say that his client was found guilty. The point is not to give up as a criminal defense lawyer after a guilty verdict, but to fight as skilfully as possible for every client for an acquittal on as many counts as possible, next to fight for the most favorable sentence, and to learn from both the victories and defeats to become a better lawyer. When the criminal defense lawyer fights skilfully and effectively at trial, if the client is found guilty, at least the client knows s/he did not go down without a fight. When a defendant pleads guilty, often in the back of the mind is the question whether the outcome would have been more favorable had the defendant gone to trial. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:30

Madisonville, TX, requires search consent forms.

Until consent searches are outlawed, bravo to the three of five Madisonville, Texas, city council members who passed a law requiring written forms as a prerequisite for "consent" searches. This follows an earlier such order by the Austin, Texas, police chief. The article is here. Thanks to Grits for Breakfast for covering this item. Bravo, also, to the American Civil Liberties Union for continuing to fight to put more teeth into this Madisonville law, including informing people of their right to refuse searches. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Beware snitches.

This follows up on my previous railings against the legalized snitch bribery system. Grits for Breakfast has discussed the topic many times, as well. Here is a disturbingly sobering video about 15% of Hearne, Texas's young black males arrested in 2000 on drug charges made on reliance of the snitch evidence of a "schizophrenic, cocaine-addicted, criminal-turned-informant" who later confirmed he provided fabricated information. Sadly, although the prosecutor dismissed then-pending charges that relied on the informant's information, it refused to help reverse convictions of people who had already entered guilty pleas from such fabricated evidence. These were guilty pleas entered under the real risk of much harsher sentences if wrongfully convicted at trial upon such lies from the informant. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, December 21, 2006

Would marijuana be as big a cash crop if legalized?

Following up on yesterday's blog entry entitled "Marijuana as the nation's biggest cash crop," Hit & Run's Jacob Sullum predicts that the excise tax revenue from legal marijuana would not be very significant, since legalized marijuana will be cheaper than illegal marijuana. As one commenter to Mr. Sullum's posting points out, though, legalization may lead to higher marijuana consumption, which might narrow the annual total revenue gap between sales of legalized marijuana and illegal marijuana. Likely to further narrow this revenue gap will be the production of industrial hemp, which now must be imported from other countries. Jon Katz.

Posted by Jon Katz in Drugs at 06:00

"The annals of criminal law are rife with instances of mistaken identification."

At a bench trial several years ago, a judge emphatically confirmed how much reliance he puts on witnesses who emphatically and -- seemingly credibly -- state "that's the one" who committed the crime. Such an assertion flies in the face of the Supreme Court's logical confirmation 37 years ago that "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." U.S. v. Wade, 388 U.S. 218, 229 (1967). DNA evidence confirms that misidentification too often continues to result in wrongful convictions. For instance, "[a]ccording to the Innocence Project, 183 people nationwide have been exonerated through DNA testing, and eyewitness misidentification was a factor in 75 percent of those wrongful convictions." What to do? We need vigorous and capable criminal defense at every turn, regardless of the defendants' ability to pay. We need to eliminate such abysmally low-paying court-appointed criminal defense systems as Virginia's. We need to refuse to sweep the injustice of misidentification under the rug. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 20, 2006

Marijuana as the nation's biggest cash crop.

Marijuana legalization activist Jon Gettman -- who was part of our expert marijuana cultivation team for our recent medical marijuana victory -- asserts that marijuana is the United States' biggest cash crop. Jon's report is entitled "Marijuana Production in the United States," and is available [here](#) and [here](#). The Los Angeles Times article and video are [here](#). Jon Katz.

Posted by Jon Katz in Drugs at 13:05

Maryland's highest court bars executions, for now.

Yesterday, Maryland became the third state this month -- after California and Florida -- to put temporary brakes on executions. This blog entry provides some information and views on the above-listed story beyond the headline news: Yesterday's court opinion is [here](#). The case is *Vernon Evans, Jr. v. Maryland*, Nos. 107, 123, 124, Sept. Term 2005, ___ Md. _ (2006). The Maryland Court of Appeals' decision rejects all of Mr. Evans' appellate arguments challenging his death sentence except to grant temporary relief against all Maryland executions pending the Maryland legislature's approval -- or, hope springs eternal, refusal to permit executions -- of procedures for executions by lethal injection. Maryland Chief Judge Bell, joined by Judge Green, dissents to the extent that the court majority only grants appellate relief on the narrow ground of enjoining executions until the state legislature has its say about procedures for executions by lethal injection. Maryland currently has five people on death row, which is located in Baltimore's super-maximum security prison. I have visited clients at that prison, none on death row. It is a lifeless place to be, even when just visiting. Of course, none of the many prisons and jails I have visited are pretty places. Mr. Evans has a pending federal court lawsuit, contesting that Maryland's practices and policies for carrying out lethal injections violate the Constitution's prohibition against cruel and unusual punishment. Curiously, the lawsuit supplies a suggested lethal injection method that it purports not to be cruel and unusual, which is to administer an anesthetic other than sodium pentothal that would maintain unconsciousness "while other chemicals cause death, by administering pain killers, by using a less painful paralytic agent, by omitting unnecessary neuromuscular blocking agents, and by requiring appropriate medical safeguards, including the involvement of qualified medical personnel." *Complaint, Evans v. Saar, et al.*, Civ. No. 1:06-cv-00149 (D.Md.). Mr. Evans' federal Complaint, at paragraph 42, claims that the foregoing execution alternatives are "available and would be inexpensive to implement." I certainly hope that Mr. Evans' lawyers -- who include attorneys from one of the area's largest law firms, Wilmer Cutler, who I assume are working pro bono -- are pursuing this litigation as part of a plan to halt Maryland executions, rather than simply providing the state government a roadmap to executing in a manner that will pass Constitutional muster. More information on Mr. Evans's case is [here](#), by people opposed to his execution. This website includes assertions of insufficient evidence that Mr. Evans was the shooter. Under Maryland law, if not proven to the jury beyond a reasonable doubt to have been the shooter, Mr. Evans would not have been eligible for the death penalty. Maryland's new governor has re-affirmed his opposition to the death penalty, but has said that he is still willing to sign death warrants. Fortunately, several states have not bought into this barbaric, inhumane, and unconstitutional system of legalized murder. They are listed [here](#). Jon Katz.

Posted by Jon Katz in Criminal Defense at 09:50

Field sobriety tests: Junk science.

Field sobriety tests (FST's) for drunk driving stops are junk science. Administration of the FST's are often preceded by the following alleged circumstances, as often parroted back in police report Law Enforcement-ese: "Upon approaching the subject, I immediately detected a strong odor of an alcoholic beverage on the subject's breath. The subject had slurred speech and bloodshot and watery eyes. The subject fumbled to find his license and registration. I asked the subject to exit his vehicle so that I could perform standard field sobriety tests." One of the detailed court opinions acknowledging the serious limitations of FST's is *U.S. v. Horn*, 185 F. Supp. 2d 530 (D.Md. 2002). A recent arrest confirming the unreliability of FST's is that of former mayor Marion Barry in May 2006. After a car collision, the police claimed to have smelled alcohol on Mr. Barry's breath, administered field sobriety tests, and claimed he failed them. What happens when he takes a breath test at the police station? The result turns out to be well under the legal limit of 0.08. Many reasons unrelated to alcohol can determine less than perfect performance on field sobriety tests (typically, the junk-science horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one leg stand). The HGN test -- at best for the prosecution -- only shows the presence of alcohol in one's body, but does not show the level of alcohol

present. Horn, 185 F. Supp. 2d 530. People easily can perform poorly on the walk and turn test and one leg stand for such factors as police exaggeration and prevarication, nervousness by the suspect, physical and psychological impairment -- unrelated to alcohol -- that interferes with understanding the instructions for the test and performing the test, poor coordination and poor physical shape, fatigue, poor physical surroundings and conditions, cars whizzing by, and the list goes on. Most people are not practiced nor skilled in doing walk and turns (nine steps forward, pivot, and nine steps back) nor one leg stands (counting the seconds aloud while not putting a foot down nor hopping); these tests are unreliable. Too many judges are too quick to accept the field sobriety test results as sufficient to find probable cause to arrest the suspect and to request a breath or blood alcohol test, and, often, for many judges, to enter a guilty verdict for driving while impaired or under the influence of alcohol. Sometimes we can convince judges that reasonable doubt remains after considering the FST's, including those circumstances recounted above. Here are a few examples. I won a drunk boating case after showing that our client's swaying on the dock could easily have been from the movement felt after getting on land after being in a small boat all day, rather than from alcohol. On another occasion, I convinced a judge that less-than-perfect performance on the FST's -- even after crossing the yellow line more than once -- was not enough to convict. On numerous occasions, I have convinced judges that FST evidence and the other evidence was insufficient to establish a driving under the influence conviction in Maryland, where the judge then convicts of the less serious driving while impaired charge. I talk more here about aggressively defending drunk driving cases. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 02:00

Tuesday, December 19, 2006

Capital punishment: Barbaric and inhumane worldwide, not just in Libya.

Today's death sentence in Libya against five nurses and a doctor from overseas is not the only instance of a barbaric, unjust, and wrongheaded death sentence. Capital punishment is barbaric and inhumane no matter where it is imposed, whether it be in the United States, China, Libya, Iran, Saudi Arabia, or anywhere else. The death penalty system in the United States may be less unfair than in Libya, but it still is grossly unfair, unjust and barbaric in the United States and everywhere else, nevertheless. Jon Katz.

Posted by Jon Katz in Jon's news & views at 18:00

Florida and California suspend legalized murder.

The death penalty is legalized murder. Amnesty International goes one step further, by saying the "death penalty is the most extreme form of torture: it is a cruel, inhuman and degrading treatment, and a violation of the right to life as proclaimed in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)." It should not have taken this week's widely publicized botched execution of Angel Diaz to slow down the execution machine, through a judicial suspension of executions in California, and an executive suspension of executions in Florida. Fortunately, the anti-death penalty momentum is much stronger than when I started working against the death penalty more earnestly with my law school's Amnesty International group. Jon Katz.

Posted by Jon Katz in Criminal Defense at 05:00

Justice Scalia chillingly calls it "sanctimonious criticism of America's death penalty."

In mid-2006, a 5-4 majority of the the United States Supreme Court chillingly upheld Kansas's requirement to issue a death sentence where the jury unanimously finds beyond a reasonable doubt that aggravating and mitigating circumstances for a death sentence are in equipoise, rather than finding that the aggravating circumstances outweigh the mitigating circumstances. *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516 (2006). Justice Scalia -- to whom I presented an anti-death penalty petition in 1988 -- in a chilling concurrence, refers to voices of death penalty abolitionists as "sanctimonious criticism of America's death penalty." *Kansas v. Marsh*, 126 S. Ct. at 2532. Fortunately, the four dissenters stand firmly against such hyperbole that prefers to trust the democratic will over the Bill of Rights' limits on the tyranny of the majority. *Id.* at 2539 and 2541. Thanks to the National Law Journal for printing this responsive open letter to Justice Scalia against the continued execution of innocents that will continue under the Supreme Court's current death penalty jurisprudence. Thanks to Capital Defense Weekly for covering this National Law Journal opinion piece. Jon Katz.

Posted by Jon Katz in Criminal Defense at 03:00

Monday, December 18, 2006

Support current repeal efforts against the Real ID Act/national ID card law.

The 2005 Real ID Act -- which for the first time establishes a national identification card system (beyond social security cards) -- passed Congress in 2005 without hearings nor floor debate, as a rider to unrelated legislation. The time is ripe to urge your federal legislators to repeal the 2005 Real ID Act, now that Senators Akaka and Sununu (a former engineering professor at my undergraduate school) have introduced legislation to curb many of the civil liberties and privacy violations of this bill. Here is the ACLU's page on the bill. Here is more, from the Homeland Stupidity page. Jon Katz.

Posted by Jon Katz in Constitutional Law at 06:00

Police jail man who throws out beverage bottle.

Here is another example that my low confidence in the criminal justice system is not a function of paranoia. Kevin Wilson tossed a soft drink bottle into a trash can soon before or after entering a Houston area Dillard's department store. In return, the police arrested and locked him up for many hours under suspicion of having codeine in the bottle. The two police officers involved have been temporarily reassigned as a result of this incident, which suggests the police had no sufficient basis to believe Mr. Wilson possessed codeine in the soft drink bottle. This item has been underreported thus far, at least as revealed by a google web and news search. Houston Fox Reporter Isiah Carey blogs on the story here, on December 13, 2006. The Houston Fox video story is here. Thanks to Grits for Breakfast for covering this story. Jon Katz.

Posted by Jon Katz in Criminal Defense at 03:00

Sunday, December 17, 2006

Eliminating the hurdles to fighting for social justice.

Many law students dream of working for social justice, but later find themselves sidetracked by mainstream jobs, bills, family-raising, and the fear of rocking the so-called boat by being "too activist". I encourage everyone -- lawyers and non-lawyers alike -- to follow their dreams of fighting for social justice. Numerous hurdles may be encountered along the path, including financial considerations, time limitations, and pressure from family and friends. However, absent reincarnation, each of us only goes around once in life. When a person works and lives according to the person's conscience, the person can lead a happier and more fulfilling life that is truer to the person's real self. Fighting for social justice does not preclude working and living in the mainstream. However, some aspects of the mainstream can go against the tide of social activism. I learned that at my first law firm (1989-91), which recognized lawyers' pro bono obligations, but which eclipsed pro bono work with its mainstream corporate law work. All was not lost, fortunately, because at this law firm I learned many critical lessons of lawyering, client relations, and civil litigation that have benefited me ever since. I next joined the Maryland Public Defender's Office in 1991, anticipating more of an overlap between my social justice idealism and my working life. Such an overlap was partially fulfilled, and may have been even more fulfilled had I joined a public defender office that had more of an us (the criminal defense side) versus them (the rest of the criminal justice system) view. I learned early on that many of my public defender co-workers had no preference for working on the defense side over the prosecution side. One warned me about wearing my heart on my sleeve. Another said he didn't give a f--k if the jury convicted one of his clients so long as he put up a good fight. So, I sought out fellow idealistic criminal defense lawyers, often having to find them miles away at conferences of the National Association of Criminal Defense Lawyers, at the National Criminal Defense College, and at the Trial Lawyers College. At the Trial Lawyers College, I met many first-rate personal injury lawyers, among others. Never before had I given much thought or interest in that area, but also knew that such work could be an important supplement to becoming my own boss and focusing on criminal defense, and to providing further strength in doing jury trials. Ten years ago, to learn this area of law practice, I joined a Washington law firm that focuses on personal injury, tried over fifteen jury trials and numerous bench trials, handled many mediations and arbitrations, negotiated settlements in many cases, and left there two years later finally having no mystery about litigating civil cases. This experience became very important for me in defending libel cases, litigating against the government for First Amendment rights, and defending the Constitution in general in civil court. I finally fully flexed my social justice wings by opening our law firm with Jay Marks in 1998. Nobody at our firm questions us about the work we do. We are our own bosses, answer only to our clients, and have clients coming to us for the work we enjoy most. Fortunately, I did not wait more than two years after law school to get closer to the social justice path. The following event was one of my catalysts in this direction, but certainly not the only catalyst: During my second year at my first law firm (1991), a Capitol police officer threatened me and my co-demonstrator with arrest for carrying anti-war posters without a demonstration permit when the Senate was debating whether to authorize war against Iraq for a Gulf War I. The situation became even more ludicrous when the Capitol police permitting office would only offer a demonstration permit space far to the east of the Capitol building and far away from every Senate member. When I asked why we could not get a permit closer to the peace demonstrators with a premium spot near the Capitol's western steps, the response was that such a closer spot was only available by applying further in advance. I said that our demonstration was spontaneous, in response to a radio news report that same Saturday morning that the debate was in progress, so there was no way for me to know in advance of my desire to demonstrate on that particular day. My argument fell on deaf ears, other than to be told we could ask the other demonstrators if we could join them. The other peace demonstrators told us of a more substantial peace demonstration to start soon at Lafayette Park across the White House. We went there, where a stronger antiwar message was made, and where I started feeling less isolated about my antiwar views and learned that plenty of mainstream people also opposed war at that time. Within two more years, I would have learned that it was not hard to find people who shared and worked for any social justice view that I held. The isolation was broken. This Lafayette Park protest was around my sixth demonstration -- to be followed by a big anti-war march two weekends later -- but the previous demonstrations were much less controversial and less eventful, including marching for animal rights, against the Tiananmen Square massacre, and for Soviet Jews; and joining a pro-choice rally (a controversial topic but without significant conflicts between the opposing sides at the rally). At this Lafayette Park antiwar demonstration, I saw police coming within six feet or closer to demonstrators and photographing them. I asked a police officer if this was meant to intimidate, and he claimed it was just to record the events if anyone broke the law. I did not buy that explanation then, and I do not buy it now. Along the path, I became more activist. I became active with the local ACLU, where I met many lawyers at mainstream law firms who were willing to focus their pro bono attentions on ACLU causes rather than on less controversial matters that might earn their firms more instant dollars (including taking high-profile roles in the mandatory bar). Soon after we opened our law firm, plenty of people already knew, and plenty more soon learned, of our zealotry for social justice. This made it all the more possible to overlap my work

life with my devotion to social justice. Â To those who say it is too hard to find a way to work forÂ social justice in the face of so many perceived hurdles in their lives, I sometimes wondered about this, until I started doing itÂ in full force. For me, it has been like turning up a faucet that has refused to be turned down ever since. Join me. Jon Katz.Â

Posted by Jon Katz in Jon's news & views at 00:00

Friday, December 15, 2006

Why does psychodrama work?

Here is an article about the powerful effect psychodrama can have on lawyers and on their ability to persuade; thanks to TalkLeft for covering this article. This article covers a training session by Don Clarkson, who is my favorite psychodramatist and an amazing psychological counselor in Washington, D.C., and lawyer Jude Basile, whom I know from the Trial Lawyers College. I have been blessed with Don Clarkson's leadership and participation at several case workshops with area attendees of Trial Lawyers College programs. Don is a Radar O'Reilly who gets right to the heart of the matter in helping lawyers prepare for trial. When I seek Don's assistance with a trial, he usually asks early on how I am feeling about the case, my client, my opponent, and the list goes on. As he turns the focus onto me rather than keeping the focus only on the client, I sometimes experience deep emotions, feelings and memories that I did not realize were so strongly present but kept under wraps for so long. The journey can be painful at times. As non-trusting as I am of so many people, I always have put my faith in Don, and he has never let me down. As the journey progresses, Don assures that there is closure by the end. That does not mean automatically that I am not still a pile of emotions at the end of the session, but that I leave the session with greater strength. My hope is that every juror I have will come as close as possible to opening up fully to themselves during the trial and to each other in the jury deliberation room. If I have fully opened myself up about my client and the case before ever meeting the jurors, perhaps the jurors will recognize that, and will be willing to do the same. As much as I wondered whether the Trial Lawyers College was too long (a full month when I went) when we one day ended up cross-examining nursery rhyme characters due to no fact pattern being available (apparently the situation is more organized there now), my eyes were opened up more there than ever before about the deep pain, heartache, and struggles that so many people experience, no matter how well things may seem on the outside, from children molested by family members, to children witnessing a parent cheating before their very eyes, to people experiencing betrayal and the lack of love, to people suffering through their loved ones' pain and disease and death, to people struggling with relationships feeling trapped in the relationship but fearful of changing course or leaving the relationship entirely, and the list goes on. The first week at the Trial Lawyers College included intense psychodrama. I was surprised at what people were ready to reveal to others who had started off as utter and total strangers. Then, I realized that the only thing anybody had to lose in revealing their true selves was the possibility of a genteel and superficial several weeks together. As we revealed ourselves more to each other, we learned to trust one another more. A year later, I asked a fellow TLC attendee what motivated him to get in front of everyone to be a psychodrama protagonist revealing just about the most painful childhood that anyone could imagine. He responded that he was so f'd up that he would have tried anything to fix it, and that the psychodrama helped tremendously, even after years of psychotherapy. Another psychodrama protagonist from the previous year said the psychodrama experience changed her life. Three years later, I was the protagonist for a psychodrama session led by Don Clarkson for a then-upcoming trial for a young man whose life was cut too short while a passenger in a car on the way to his construction job. The experience was very powerful, eye-opening, and gut-wrenching. It was a very effective way for me to better understand my client, his witnesses, and his mother, who was but a teenager when her son was born. It helped me better stand my ground against my two opposing lawyers and the pushing-at-the-edge shenanigans that one of them pulled. As the saying goes, preparing a case for trial makes it more likely to settle, and preparing a case to settle makes it more likely to go to trial. This case ultimately settled after a substantial investment of time by my law firm, and emotions and personal growth. I learned that while I most enjoy defending criminal defendants, some people are stepped on so unjustly and some causes are so important, that I will detour to civil court from time to time. Each person, juror, judge, prosecutor, cop, witness, and everyone has a dormant volcano that might erupt uncontrollably at any time, that might just spew white heat from time to time, that might usually smile and gurgle gentle music, or that might be invisible until one least expects it. We cannot persuade people without getting in touch with their true selves, one-by-one with each person we meet, not in a fashion that scares them off, but with empathy that is willing to listen and talk if the other person is ready to do so and wishes to do so. Martin Buber said that "all real living is meeting." To stay on the superficial level with others is to not be experiencing real living. The article that prompted me to write this blog entry addresses Jude Basile's approach to connecting with jurors, starting with having imaginary conversations with them each morning before trial starts. This takes the focus off of the lawyer and the lawyer's ego and even the lawyer's hat, and helps the lawyer better face, interact with, and engage each juror, no matter how far or close each one may be to agreeing with the lawyer's version of the case and the story(ies) surrounding it. The key is to persuade jurors by relating to them, connecting with them, understanding them, opening up to them, caring about them, being fully real with them, and never by manipulating them, which never works. Jon Katz.

Posted by Jon Katz in Persuasion at 02:00

Thursday, December 14, 2006

Criminal expungements: When available and how to obtain them?

People often ask me about the possibility of expunging or sealing their criminal prosecution records. Expunging or sealing removes the record from public access, but not automatically from court and law enforcement access. Moreover, some people are better off not expunging or sealing their prosecution records, so as to have official dismissal records immediately available for security clearance applications, immigration benefit applications, and various other applications that may necessitate access to the prosecution records. Expungements are generally unavailable for federal cases. In Maryland, Virginia, and Washington, DC, expungement first necessitates a dismissal or acquittal of a criminal case. In Maryland, successfully completed stets and probations before judgment also are eligible for expungement. Of the foregoing three jurisdictions, Maryland is the easiest place to obtain an expungement after going through any necessary waiting periods, and filing the necessary brief applications with a \$30 application fee. Expunging a case entered nolle prosequi requires a three-year waiting period unless the defendant completes a form waiving the right to file a lawsuit relating to the prosecution. Expungements are not available for probations before judgment for drunk driving cases. Expungements ordinarily are granted within a few weeks after the ripe filing of a properly-completed expungement application. The District of Columbia is the hardest of the three jurisdictions for obtaining an expungement (called "sealing" in the District of Columbia), where the defendant is obligated either to show clear and convincing evidence that the defendant was not guilty in the first place, or else to show manifest injustice to deny the sealing. Months can pass before the assigned judge decides whether to grant or deny a motion to seal. Virginia falls between Maryland and the District of Columbia for the difficulty level in obtaining an expungement. In Virginia, the defendant must file a separate civil lawsuit in the Circuit Court seeking an expungement, and get a police record check performed as part of the process. What to do when only some charges in a criminal charging document result in guilty verdicts, and the remaining charges do not? For Maryland, at least, the Court of Appeals recently held that charges from separate and distinct events are not precluded from expungement merely by being on the same charging document as counts that result in guilty verdicts. *Stoddard v. Maryland*, No. 24, Sept. Term 2006, ___ Md. __ (2006). Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 13, 2006

Peter Boyle leaves the planet.

"I get scared when I meet people like Joe," said Peter Boyle soon after being catapulted from an unknown to widespread fame. Boyle as Joe has remained clearly etched into my memory for thirty-five years, capturing the 1970 period of turmoil and upheaval better than any film I know, almost as realistically as the terrifying image of Kim Phuc Phan Thi running from the napalm that had already severely burned her body. I was only nine at the time. Peter Boyle knew the character Joe so well that when it came to the actual shooting of the movie, I was worried that I would do a caricature." Last October, I mentioned some of the artistic greats who inspire my legal work. Peter Boyle certainly ranks among them. Peter Boyle passed away last night at 71. With me, he remains as alive as ever. Jon Katz.

Posted by Jon Katz in Jon's news & views at 18:00

Bigotry in the law; bigotry in courtrooms.

Bigotry exists, and bigots do not automatically set aside their prejudices at the courthouse steps. The roots of bigotry are long and deep, and need to be understood as part of defending our clients in criminal court. In that regard, recently I blogged about a ghetto party hosted and attended by students at the highly-ranked University of Texas Law School and about the rampant presence of Confederate remnants in and around numerous Virginia courthouses without adding such counterbalances as images of Martin Luther King, Jr. I also blogged about a labor organizer who turned around young potential lifelong bigots and who showed them understanding rather than anger after they called his children "white N's". Today's blog entry addresses bigotry in all three jurisdictions where I practice law and past bigotry on the Supreme Court itself. Only after moving to Washington, DC, for law school in 1986 did I learn how closely Washington and Maryland resembled segregationist Virginia right into the second half of the twentieth century. In Washington, DC, during the second half of the twentieth century, segregation was customary, including the segregation of black people to theater balcony seats and in restaurants. After reading Pauli Murray's *Song in a Weary Throat* soon after its 1987 publication, I asked the owner of a longtime pharmacy near my law school about segregation at his own then-existing lunch counter. He told me that he refused to serve black people at his lunch counter into the 1950's. He gave a convenient excuse: "If I served black people, the construction workers across the street would not have eaten at my lunch counter." Fine; put your money where your mouth is and let the construction workers eat elsewhere if they will not eat at an integrated lunch counter. Maryland had rampant segregation right into the early 1960's at the very least. Late Supreme Court Justice Thurgood Marshall grew up in Baltimore and experienced the rabid racism. He attended Howard Law School when the University of Maryland Law School barred black students; now Maryland's international airport is named after him. He attended a segregated public school. In a television interview, he talked of a childhood experience where he could not find a colored-only bathroom in downtown Baltimore when he needed to urinate badly, so he went all the way home, and by that time the urine was running down his leg. Maryland had racially segregated schools until the Supreme Court ruled in 1954 in *Brown v. Board of Education* that public school segregation was unlawful. It appears that Maryland was the first of the segregated states to implement the *Brown* decision. Beyond the school walls, segregation continued in Maryland even after the *Brown* decision. In fact, Robert M. Bell -- the Chief Judge of Maryland's highest court -- was arrested in 1960 and convicted for trespass in a Baltimore restaurant desegregation sit-in. The United States Supreme Court left it up to the Maryland courts to decide whether the intervening change in Maryland's sit-in/trespassing laws would dictate a different result. Unfortunately, the Maryland Court of Appeals said no. *Bell v. Maryland*, 236 Md. 356 (1964). What about racism on the judges' bench? Late Supreme Court Justice Hugo Black belonged to the Ku Klux Klan when a lawyer in Alabama. In a turnaround, on the Supreme Court, he supported equal rights and opposed racial injustice. An earlier Supreme Court Justice, James Clark McReynolds, remained a rabid bigot while on the bench, to the point that he would leave the room when Jewish Justice Louis Brandeis spoke during the justices' conferences. We have a long way to go. Look no further, for instance, than Charlottesville, Virginia's male-only -- previously exclusively white -- Redland club, near the courthouses, where some local lawyers still spend their time. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, December 12, 2006

Supreme Court: Drug trafficking crime is any felony punishable under the Controlled Substances Act.

Our immigration law partner Jay Marks and I constantly fight to minimize adverse immigration law exposure from criminal charges and convictions. On December 5, 2006, the United States Supreme Court provided important guidance in this regard, by holding in an 8-1 decision that automatic deportation of non-citizens is not permitted for a drug conviction that is a felony under state law if it is not a felony under the federal Controlled Substances Act. The case is *Lopez v. Gonzales*, U.S. Supreme Court No. 05-547 (Dec. 5, 2006). I previously blogged here about the October 2006 oral arguments in this quickly-decided case. Here is some good legal analysis from the Immigrant Defense Project of the New York State Defenders Association about the implications of this Lopez case for immigrants, including confirmation that Lopez addresses limits on automatic deportation from drug convictions, rather than on adverse immigration consequences that are not automatic. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, December 11, 2006

When are attorney-client conversations safe from eavesdropping?

Confidentiality of attorney-client communications is critical. However, the risk of eavesdropping is always present. A face-to-face attorney-client meeting is the best way to assure confidentiality; if the lawyer's office might be bugged, the attorney and client can meet in a neutral venue. E-mail is far from private (it can be intercepted between sender and recipient, and can be viewed by people snooping around on the sender's and recipient's computers); cordless phone calls can be intercepted through the radio waves (*Price v. Turner*, 260 F.3d 1144, 1147 (9th Cir. 2001)); and jail calls sometimes are recorded unless a secure line is available and used. Also, snoopers can pick up another phone connected to the same phone number (either from an existing phone set or by attaching a phone to the master phonebox connected to the phone number); phones sometimes are bugged; eavesdroppers may be within earshot (or electronically-enhanced earshot) of a conversation; and snail mail can be intercepted. Sadly, as communication technology has marched forward, so have more sophisticated eavesdropping techniques. If the above eavesdropping scenarios were not bad enough, the FBI has figured out how to convert a cellphone into a roving bug -- apparently without even touching the target cellphone -- that will pick up conversations near the phone. The roving bug focuses not on intercepting phone conversations, but on converting cellphones into bugs themselves. Sometimes the only way to prevent this is not simply to turn off the cellphone, but to remove the battery entirely. Roving bugs are particularly effective with the wildly popular Motorola Razr, as well as Nextel and Samsung cellphones. Recently, a federal judge in New York upheld a search warrant allowing the use of a roving bug. The case is *U.S. v. Tomero*, Crim. No. 1:06-cr-00008-LAK (S.D.N.Y.). See the ZDNet article here and the court opinion here. This Tomero court opinion not only discusses the roving bug technology, but also reveals that the FBI had attached a roving bug even to the cellphone of an attorney for one or more of the defendants. Because the attorney, Peter Peluso, ended up pleading guilty and helped the FBI record conversations with defendants in the case, we may not see a court opinion in this Tomero case about the legality of bugging attorney Peluso's phone, and the test for determining when conversations lose attorney-client confidentiality (particularly where, as here, the attorney was suspected of engaging in conversations to assist the commission of crimes). If this Tomero case gets appealed, the appealing defendants will likely include an argument that a search warrant authorizing a roving bug violates the Fourth Amendment's requirement that a search warrant particularly describe the place to be searched. The Tomero trial court rejects this argument by claiming that the issue is mooted (at least in the Second Circuit) by *U.S. v. Bianco*, 998 F.2d 1112 (2d Cir. 1993), cert. denied, 511 U.S. 1069 (1994). Thanks to a criminal listserv member for posting on this roving bug issue. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, December 10, 2006

First Amendment on public access television.

Public access television apparently is not only for Wayne and Garth. On December 5, fellow lawyer Mark Goldstone and I were interviewed on public access television for a segment about First Amendment free expression defense in civil and criminal cases. The program is Law School for the Public, which is presented by the Montgomery County, Maryland, Bar Association. Our interview will air December 19 at 8:00 a.m. The station is Montgomery Community Television, cable channel 21. I anticipate receiving and uploading the interview in the near future to our website. The interview covered basic First Amendment defense questions, followed by lively responses by Mark and me, speaking in the same free expression fashion that we so passionately defend. Mark has been defending political activists longer than I, and knows the constant battle for activists to exercise their First Amendment rights to free expression in the repeated face of government officials' efforts to trample on and hem in those rights. Soon after our law firm opened in 1998, I was taking up the cause of political activists from the left to the right to many points in between, libel defendants, and members of the adult entertainment industry. It is a dream come true to be earning a living defending criminal defendants and First Amendment clients while doing our share of pro bono work. I have enjoyed collaborating with Mark Goldstone while representing co-criminal defendants in two First Amendment-related cases, defending IMF/World Bank demonstrators in 2000, and brainstorming on other cases. By apparent default rather than by design, the TV studio was dominated by National Lawyers Guild members during the taping. Mark is the longtime chair of the local Guild's demonstration committee. I have remained a member ever since joining the Guild's 2000 defense of anti-globalization demonstrators, despite my vehement opposition to many of the national Guild's knee-jerk official views against Israel. The show's producer, Jim Klimaski, is a longtime Guild activist. The interviewing lawyer is from a mainstream law firm, and is not connected with the Guild. Jim's involvement with the show reassured me that the program would not be some sort of cheerleading party for the mainstream bar, which this segment certainly was not. This was my first time on public access television. I understand that governments sometimes seek the availability of public access stations as part of permitting the operation of cable television companies. This can implicate cable companies' First Amendment rights. I do not know if that is the situation with this particular station. Jay Marks and I frequently provide legal commentary to the print and broadcast news media. A rundown is here. Jon Katz.

Posted by Jon Katz in Jon Katz in the News at 01:00

Friday, December 8, 2006

Police misconduct: Falsified search warrants and beating of arrestees.

As I blogged on November 27 and numerous other times, police power is profound and is constantly at risk of abuse -- from physical abuse to corruption to lying on the witness stand and in police reports and the list goes on -- both because abuse is a risk of great power in anybody's hands, and because the criminal justice system and court rulings do not sufficiently protect against police abuse of power. Nevertheless, if a police officer ever were prosecuted for abuse of power, I would not hesitate to defend the officer in criminal court, no more or less than I would for any other criminal defendant. Every criminal defendant should have access to skilled criminal defense, including police officers.

Moreover, in some jurisdictions police officers will face at least some jurors already prejudiced against police and by any pretrial publicity. The following accounts are about convictions for police use of falsified search warrants and beating of suspects. Whether or not the following particular defendants committed such crimes, I believe that such police abuse is an all-too-common reality. In federal court in New York, Buffalo police officer Sylvestre Acosta was convicted by a jury for, among other things, "depriving others of their constitutional rights in violation of [18 U.S.C.] § 242, by executing search warrants upon the victims' residences, knowing that such warrants were obtained on false information, for the purpose of taking the victims' property without due process of law." *U.S. v. Skinner*, 2005 U.S. Dist. LEXIS 43865 (W.D.N.Y. Apr. 6, 2005); aff'd 2006 U.S. App. LEXIS 29607 (2d Cir. Nov. 30, 2006) (unpublished opinion). Thanks to TalkLeft for covering this item. Last week, the Fourth Circuit affirmed the conviction of a police officer for violating an arrestee's constitutional rights under 18 U.S.C. § 242 to be free from unreasonable force. The prosecution presented evidence that police arrested and beat Lamont Koonce after he tried to flee a traffic stop and then physically resisted arrest. While Mr. Koonce was resisting, Petersburg City, Virginia, police officer Michael Tweedy stomped on Mr. Koonce's head three times, and three additional times when Mr. Koonce continued to resist. After Mr. Koonce had stopped resisting, and when his left wrist already was in a handcuff, officer Tweedy, nevertheless, officer Tweedy kicked Mr. Koonce two to three times on his side, and stomped on his head three times more. By now, Mr. Koonce was motionless. Nevertheless, Michael Perkins -- while off-duty as a Petersburg City police officer -- arrived, and without talking with the officers already there, inflicted a running kick to Mr. Koonce's side and kicked him again with less force. Officer Tweedy then stomped on Mr. Koonce's head two more times. Officer Perkins, who had just assaulted the motionless Koonce, then pulled officer Tweedy away. Not surprisingly, Mr. Koonce suffered life-threatening injuries, including a lung puncture, brain contusions and bleeding, and multiple skull and facial fractures. Mr. Perkins was sentenced to 51 months imprisonment, and the Fourth Circuit affirmed his conviction last week. Officer Tweedy, who was accused of assaulting Mr. Koonce even more severely, entered a guilty plea under the same statute, and received a 108-month sentence. In this instance, there were other police officers present to testify to this police brutality. For every such instance, countless other instances of police brutality involve no witnesses willing to tell the truth. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, December 7, 2006

The Jose Padilla photos

Here are nine photos of how Jose Padilla was treated when still classified as an enemy combatant. In the above photograph, he is being taken to the dentist. The security measures shown in this photo look unnecessary, over-the-top, and just plain wrong, and are among the Bush administration's many wartime actions that I do not agree to be taken in my name as an American citizen. Let the jurors in Mr. Padilla's pending criminal trial see these photos and draw their own conclusions.

Posted by Jon Katz in Criminal Defense at 01:00

When church and state are not separated in the courtroom.

On August 15, 2006, I blogged how my move from Manhattan to the DC area for law school in 1986 brought with it substantial culture shock about being around honors to confederate soldiers and the confederacy all over Virginia. I would see the stars and bars draped on vehicles (usually outside of Northern Virginia, which is closest to Washington, DC); a mural in a Maryland restaurant paying tribute to confederate soldiers singing "Maryland, Oh My Maryland" as they crossed the Potomac into Maryland; the major [Robert E.] Lee Highway/Route 29 going straight to the District of Columbia border; courthouses and government offices closed on [Robert E.] Lee - [Stonewall] Jackson Day; and a confederate soldier statue standing guard over the Loudoun County courthouse (which was restored this year for several thousand dollars) and an engraved portrait of Robert E. Lee in the Culpeper County Circuit Court clerk's office. Something else that makes Virginia stand out for me is the continued use of "so help me [deity]" and bibles for swearing in witnesses and others in some of the courthouse -- although rarely in the Northern Virginia courthouses where I usually practice law -- which I have not seen in the many Maryland and District of Columbia courts where I practice. The First Amendment to the Constitution says that "Congress shall make no law respecting an establishment of religion." I think that this provision is sufficient to banish bibles and "so help me [deity]" from courtroom. Recently, a chief county courthouse clerk in Virginia told me that "so help me [deity]" is mandated by the court rules for swearing in witnesses. My research showed he was incorrect, and I then sent the following message to a Virginia lawyers listserv about other lawyers' experiences with the situation. "Hi, all (or at least to ACLU members, agnostics, atheists and secular humanists)- What's with the use of bibles and the deity's name for swearing in witnesses in various Virginia courts? In _____ District Court, I saw people being sworn in with "so help you [deity], and the clerk of court said the language is in the rules. However, I only found such a reference for swearing in grand jurors, government officeholders, and national guard members. Therefore, I think this clerk is mistaken. Do you have any thoughts? "Also, when I got sworn into the E.D. Va. [federal trial court] in Alexandria before Judge _____, the bailiff smilingly brought me over a leatherbound bible (I'm a vegetarian who tries avoiding leather, and am Jewish, and don't think this was just the Hebrew testament). I told my sponsoring lawyer I didn't say anything about it just so that he'd not be delayed any longer from getting back to the office, and he appreciated that very much. "Do you see 'so help me [deity]' and bibles in the Virginia courts where you practice? Which courts are they? "If the courts are sworn to uphold the Constitution, I'd have more confidence in that if they upheld the First Amendment's mandate of church-state separation." Here is a summary of some of the listserv replies: - In federal court in Richmond, witnesses are presented a bible as part of being sworn in. - In one Northern Virginia court, a now-retired judge would have the jurors swear their oath on one of three bibles. - A Northern Virginia juror in one case refused to swear his oath to a deity, declaring his non-belief in a deity, and his decision not to swear. - This month, before a federal judge with senior status in Alexandria, Virginia, the bailiff brought the half dozen lawyers one bible to put their hands on as they were sworn in together. - It appears that most courtrooms use a variation of the following First Amendment-friendly oath: "Do you swear or affirm that the testimony that you are about to give is the truth?" Old habits sometimes die hard. I hope the use of the bible and the deity's name for court swearings dies soon. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Wednesday, December 6, 2006

PROTECT Act's mandatory sentencing is unconstitutional.

In 2003, Congress passed the PROTECT Act, which is Washingtonese for "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003", as well as a bill title that would make many lawmakers fearful of the public backlash of refusing to vote for a bill with such a title (thus, the same fear by lawmakers of voting against the original version of the PATRIOT Act). The PROTECT Act includes mandatory sentencing provisions for crimes involving certain crimes involving children, sex, and child pornography. 18 U.S.C. § 3553(b)(2). The language of this mandatory sentencing provision follows: "18 U.S.C. § 3553(b)(2) Child crimes and sexual offenses (A) Sentencing In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described." Fortunately, federal courts repeatedly have found this PROTECT Act mandatory sentencing provision to violate the rationale of U.S. v. Booker, 543 U.S. 220 (2005), which prohibits a mandatory -- versus advisory -- application of the federal sentencing guidelines. This week the Fourth Circuit joined in invalidating the mandatory sentencing provisions of the PROTECT Act. The case is U.S. v. Hecht, No. 05-4939 (4th Cir. 2006), and gives a good analysis for invalidating the PROTECT Act's mandatory sentencing provisions, and a good overview of the other circuits that have invalidated those mandatory sentencing provisions. Meanwhile, the Fourth Circuit is willing to reverse sentences that "unreasonably" depart from the federal sentencing guidelines, and in that regard has said: "A sentence that falls within the properly calculated advisory guideline range is entitled to a rebuttable presumption of reasonableness. See, e.g., United States v. Mykytiuk, 415 F.3d 606, 607-08 (7th Cir. 2005). This does not mean, however, that a variance sentence is presumptively unreasonable. Such a ruling would transform an 'effectively advisory' system, Booker, 125 S. Ct. at 757, into an effectively mandatory one. Rather, in reviewing a variance sentence, this court must consider -- in light of the factors enumerated in § 3553(a) and any relevant guideline provisions -- whether the district court acted reasonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance. See id. at 765-66; United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005); cf. United States v. Hairston, 96 F.3d 102, 106-07 (4th Cir. 1996) (noting that both the decision to depart and the extent of departure are subject to review for abuse of discretion). U.S. v. Moreland, 437 F.3d 424, 433-34 (4th Cir. 2006), cert. denied 126 S. Ct. 2054 (2006). Although the above-discussed Moreland decision agreed that a departure below the sentencing guidelines was justified for the defendant, the Fourth Circuit decided that the trial court had departed too much, concluding that "the district court committed 'a clear error of judgment by arriving at a sentence outside the limited range of choice dictated by the facts of the case.' Hawk v. Wing, 433 U.S. F.3d at 631 [8th Cir. 2006] (internal quotation marks omitted)." U.S. v. Moreland, 437 F.3d at 436. Consequently, the injustice of the federal sentencing guidelines -- and the power of the Sentencing Commission's unelected members -- continues. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, December 5, 2006

Police consent searches are not consensual.

Repeatedly, police officers claim that criminal defendants consented to a search, even when the suspect was not advised of the right to refuse the search, and even when it twists the English language to say that consent can result from an armed police officer firmly saying "Please open your trunk" (They probably do not say "Pretty please, would you be willing to consent to open your trunk?"). Because coercion accompanies such searches, they are not consensual, and should be prohibited. Until such searches are prohibited, bravo to the Austin, Texas (of all places) police chief Stan Knee for requiring officers to obtain written consent in addition to verbal permission for searches, and requiring officers to document the reason for their suspicion. Here is one of our own examples of a non-consensual search; happily, the prosecutor ultimately dismissed this marijuana possession case: Our client is checking on a friend's house by invitation while the friend is away. While he is outside, a police officer starts questioning our client, who is black, after allegedly receiving a report from a "concerned citizen" (or was that a bigoted citizen?) about a few suspicious black males in the block. The officer pats down our client allegedly for his safety; I have discussed here that officer safety is not a sufficient reason, by itself, to permit a frisk. Even though the officer feels no possible weapon on our client, he claims to "ask" our client to empty his pockets, being suspicious that the bag he feels in the pocket might contain contraband. Our client empties his pockets, but leaves the bag in the pocket, claims the police officer. The officer says he "asks" our client to remove the bag again, which our client does; some marijuana is in the bag. This is neither a lawful nor consensual search. Whether or not the officer's initial encounter with our client was lawful, and whether or not the weapons patdown was lawful, once the cop found no weapons, it was time to end the encounter. The cop's second "request" for our client to empty his pockets clearly was not consensual where he had refused to empty the bag from his pocket after the officer's first "request" to do so, particularly in the context of the cop's display of authority (arriving with the typical imposing police car with its enhanced bright lights, telling our client to keep his hands out of his pockets, asking for identification, frisking him for weapons, and "asking" him to empty his pockets). I explain to the prosecutor that this marijuana possession prosecution is based on unlawfully seized evidence, and show the prosecutor a letter from the homeowner who invited our client to keep an eye on his house, who takes exception to the arrest, and who is on call as a defense witness. I talk to the police officer, and challenges him about this unlawful search. We return to court after the lunch break, and the prosecutor dismisses the case. I do not know the specific reason for the dismissal, but it was the right thing for the prosecutor to do. This arrest took place in one of the most liberal towns in Maryland when it comes to race relations and social justice. I lived there briefly, and live and work in the county where this case was prosecuted. The county's government leadership is very sensitive about racism. As to social justice, a government cannot automatically conclude that the police and prosecutors will automatically do justice merely by government leaders feeling the will to do justice and merely by concluding a good police chief is in place. If this police behavior can happen where it happened, it can happen anywhere. We need to always keep our guards up about the activities of police and prosecutors. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, December 4, 2006

Videos showing t'ai chi's awesome power.

On November 14, I blogged about the awesome power of applying t'ai chi to my daily life and law practice. The following videos show the amazing power of t'ai chi, as demonstrated by the legendary Cheng Man Ching, who taught the teacher of my t'ai chi teachers, and who modified the t'ai chi yang style form to 37 interconnected postures: [Â - Cheng Man Ching's t'ai chi chuan yang style short form.](#) [Â - Cheng Man Ching, with commentary by Robert W. Smith, who was Professor Cheng's first western student and the teacher of my teachers.](#) [Â - Cheng Man Ching sparring.](#) [Â - More sparring.](#) [Â - Last part of the 37 postures, and additional demonstration.](#) Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Sunday, December 3, 2006

Marks & Katz obtains Maryland medical marijuana sentence on multiple plants.

On December 1, our law firm obtained a medical marijuana sentence in Prince George's County, Maryland, Circuit Court. Soon after Maryland's medical marijuana law went into effect four years ago, the Washington Post contacted and quoted us about the law, and we wrote this detailed published article on the topic. The medical marijuana provision of Maryland's marijuana possession statute states: "(i) In a prosecution for the use or possession of marijuana, the defendant may introduce and the court shall consider as a mitigating factor any evidence of medical necessity. (ii) Notwithstanding paragraph (2) of this subsection, if the court finds that the person used or possessed marijuana because of medical necessity, on conviction of a violation of this section, the maximum penalty that the court may impose on the person is a fine not exceeding \$100." Md. Code, Crim. Law art. 5-601(c)(3). Maryland's medical marijuana law was a compromise between those who wanted to legalize medical marijuana use outright, and those opposed to going that far. Unfortunately, Maryland's medical marijuana law does not immunize defendants using marijuana for medical necessity from a conviction or from prosecution for personal use, but does at least prevent jail or probation after any conviction of such defendants. The law helps reduce -- but still continues -- the politicization of marijuana that has prevented it from being federally approved for medicinal prescription purposes. Maryland's medical marijuana law provides a defense not only against jail for marijuana possession, but also protection of the defendant's right to present evidence of medicinal use to a jury in a prosecution for possession of marijuana with intent to distribute, in order to show that the marijuana was possessed for personal use only. Mounting the best medical marijuana defense will ordinarily be costly, calling for the testimony or written opinion of the defendant's treating physician (or an evaluating physician if the defendant had no personal physician), and sometimes the testimony or written opinion of a medical marijuana expert if the treating physician lacks sufficient knowledge about marijuana's medicinal relevance to the defendant, or refuses to provide a medical marijuana opinion. When Maryland's medical marijuana provision took effect in 2002, the executive director of a Maryland physicians group erroneously advised against physician testimony to support a medical marijuana defense, based on concerns for the federal law's prohibition against physicians recommending marijuana. It sounds like this executive director obtained bad legal advice on the matter, or no legal advice at all. His statement also does not seem to comport with physicians' Hippocratic oath, including the duty to do no harm. When a physician testifies that marijuana use was medically necessary, that does not show that the physician recommended the marijuana nor that the physician will recommend its use to anybody; it just shows that the physician agrees, retrospectively, that the defendant's marijuana use was because of a medical necessity. Moreover, physicians cannot be penalized by federal authorities nor federal law for recommending medicinal marijuana use. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2003). With the foregoing backdrop, here is how we fought this Prince George's County case towards a medical marijuana sentencing victory. This case started with a search of our client's trash bags left outside his house but still on his property. The police obtained a search warrant based, among other things, on a claim of finding some marijuana in one of the trash bags, and obtaining a positive field test for marijuana. Unfortunately, the police intrusion onto my client's property to seize a full trash bag likely would not have won a motion to invalidate the search warrant and the subsequent search. We blogged about this trash search issue here. The suppression motion, instead, would have needed to focus more on arguing an insufficient connection between a small amount of marijuana allegedly found in the trash bag and the house from which the trash bag allegedly came. In executing the search warrant of our client's home, the police found and seized over thirty marijuana plants in a basement grow room. This led to a federal forfeiture action against my client's house -- under the draconian federal asset forfeiture laws -- followed soon thereafter with a state prosecution for felonious marijuana possession. We immediately went to work to prepare a medical marijuana defense to present to the jury at trial -- to show how the marijuana was for personal medical use -- and to present to the prosecution in seeking a plea agreement for misdemeanor marijuana possession, which carries a maximum of one year in jail versus five years for marijuana possession with intent to distribute. We started by obtaining two medical marijuana grow experts, and later added a physician to confirm our client's need to use marijuana as medicine for his severe sleep apnea, which had already been fully diagnosed through an in-depth hospital study of our client as he slept overnight, or at least tried to sleep despite the sleep apnea. Our formidable medical marijuana grow team consisted of (1) Chris Conrad of El Cerrito, California, and (2) Jon Gettman of Lovettsville, Virginia, who is a former national director of the National Association for the Reform of Marijuana Laws. (To date, I have found no marijuana grow experts available for the defense side who do not advocate for marijuana law reform; such experts apparently are all on government payrolls and testify exclusively for the prosecution). Before the date set to argue our motion to suppress evidence and other legal motions, the lawyer for our client's co-defendant and I joined Jon Gettman for a visit to the prosecutor's office, to have one of the lead police officers show us the seized marijuana. Armed with Jon Gettman's and Chris Conrad's review of the seized plants, police reports showing no possible indicia of an intent to sell the marijuana other than its quantity, police photos from the execution of the search warrant, and our client's physician's report confirming

his severe sleep apnea, we provided the prosecutor with our expert report that our client grew so many marijuana plants in order to yield sufficient quantities of his medicinal marijuana. Our expert report confirmed that male and immature marijuana plants do not yield the marijuana buds needed to provide sufficient medicinal marijuana, and that it is quite possible that only a few grams of useable marijuana were seized from our client's home. In my cover letter to the prosecutor that attached our expert report and other information to support a simple marijuana possession plea, I told the prosecutor: "By growing the marijuana himself rather than buying it, [our client] helped assure that his medicinal marijuana was of sufficient quality to medicate himself (this is imperfectly similar to preferring to make a tuna sandwich at home, than to buy it at a greasy spoon with old mayonnaise and soggy bread from the chef's failure to drain out the water or oil from the can first); he avoided the impurities and sometimes dangerous adulteration that can be found in marijuana purchased illicitly on the street (e.g., oregano (which can be dangerous to smoke) or PCP/angel dust (which can be sprayed to offset poor quality marijuana, with the dangerous risks of ingesting PCP, a very dangerous drug); and avoided the dangers of street crime (e.g., robbery, and assisting others to commit the crime of distributing marijuana by his purchase of the marijuana)." I also informed the prosecutor as follows: "Sleep apnea is a medical disorder characterized by frequent interruptions in breathing of up to ten seconds or more during sleep. The condition is associated with numerous physiological disorders, including fatigue, headaches, high blood pressure, irregular heartbeat, heart attack and stroke.' 'Sleep apnea' http://www.norml.org/index.cfm?Group_ID=7016." A major medical study from the University of Illinois at Chicago supports that marijuana (through its active ingredient, which is THC) can provide substantial benefits for treating sleep apnea. David Carley, et al., 'Functional Role for Cannabinoids in Respiratory Stability During Sleep,' Sleep Journal, Vol. 25, Issue 4, at 391-398 (see abstract at <http://www.journalsleep.org/ViewAbstract.aspx?citationid=2104>, which includes a java link to the full article)." On the motions hearing date, the prosecutor offered for our client to plead guilty to simple, misdemeanor marijuana possession, and to dismiss the remaining charges. This was an excellent resolution, in that the chances looked low of suppressing the evidence, low of receiving a jury verdict of anything better than simple marijuana possession, and possible of receiving a jury verdict for possession with intent to distribute marijuana. We set the sentencing date far enough in advance to obtain a written opinion from our medical marijuana expert, David Bearman, MD, of Goleta, California. Dr. Bearman consulted with our client, and reviewed his medical report confirming his severe sleep apnea, our marijuana grow expert report, and the police allegations in the case. Dr. Bearman provided an excellent and detailed written explanation and conclusion that our client had a medical necessity for using marijuana both at present and at the time of the seizure of the marijuana plants. I submitted to the judge in the case a sentencing memorandum attaching our expert reports and other important case information. At sentencing, my main points included the following: - Whether or not we agree with Maryland's medical marijuana law, it mandates a sentence no worse than a \$100 fine for a marijuana possession conviction where the defendant had a medical necessity for using marijuana. - We presented Dr. Bearman's written report, and explained that it was cost-prohibitive for our client to pay Dr. Bearman's additional hourly fees and travel expenses to come to court to testify. We explained that Dr. Bearman's opinions are particularly beneficial to aiding a fair sentencing decision, in part because California physicians have more opportunities to evaluate medical marijuana users firsthand, seeing that California state law allows the use of medical marijuana, even though medicinal use does not prevent federal prosecution versus state prosecution in California. Moreover, as shown in this Washington Post article, local physicians -- unfortunately -- probably are more fearful and reluctant to provide such testimony. - If any case calls for a medical marijuana sentence, this one does. Our client's severe sleep apnea can be life-threatening, and marijuana is highly effective in treating this ailment. - In case a medical marijuana sentence was not given, I presented proof that our client had attended weekly drug education group sessions and had submitted to drug tests that confirmed no more marijuana use. Although I feel marijuana should be legalized and I oppose the years-long drug testing madness, so long as marijuana remains illegal, drug classes and negative drug testing can be a significant benefit at sentencing. The prosecutor in our case opposed a medical marijuana sentence, and underlined that many plants were seized. I responded to the judge that our grow experts found that it is quite possible that only a few grams of useable marijuana were seized from our client's home, and that, this being our client's medicine, it was important for him to err on the side of growing too much than too little medicine. The judge agreed that we had established sufficient grounds for a medical marijuana sentence, and imposed a sentence of a \$100 fine plus court costs of \$145. This was a great and just result for our client, but it remains an injustice that medical marijuana remains criminalized in most of the nation, and that marijuana itself continues to be criminalized. Unfortunately, the benefits of Maryland's medical marijuana law are reduced by the limited financial resources that many criminal defendants will have for presenting such a defense. Our client's medical marijuana sentence was issued upon a showing of insufficient alternatives to marijuana for sleep apnea. Although Marinol -- which is lawful to prescribe -- contains THC, which is also found in marijuana, support for the benefits of marijuana over Marinol is available at www.books.nap.edu/html/marimed/ch4.html. For a defendant arguing for a medical marijuana sentence where many lawful and effective drugs exist for the defendant's ailment, it becomes important to show the extent to which marijuana is superior medicine for such factors as dosage control, its proven reliability to treat the ailment after centuries of marijuana use for many medical problems, and its coming straight from a rather safe plant, as opposed to medicines -- whether synthesized or more natural -- that often bring significant adverse side effects or are not proven to be without the risk of significant adverse side effects. Most marijuana defendants will not have the funds to hire a physician to testify at sentencing. For them, their alternatives are to introduce the physician's medical report at

sentencing, possibly accompanied by a learned treatise that the report is shown to rely upon. For defendants who cannot even afford a physician's written report, they have available some persuasive and scholarly reports on the medical benefits of marijuana. Starting points can include the Drug Policy Alliance (www.dpf.org and www.dpf.org/marijuana/medical/index.cfm), and the National Organization for the Reform of Marijuana Laws (www.norml.org and www.norml.org/index.cfm?Group_ID=3376). Lawyers can get a primer on the medicinal benefits of marijuana by reading *Marijuana: The Forbidden Medicine*, by Harvard Medical School Professor Lester Grinspoon, M.D., and James Bakalar, J.D. (excerpts available at www.rxmarijuana.com). Jon Katz. ADDENDUM: See a list of all our marijuana articles and blog entries here.

Posted by Jon Katz in Drugs at 00:10

Recap of our marijuana articles.

Today's medical marijuana blog entry is one of our many articles and blog entries on marijuana. The others are here:
- Presenting the medical marijuana defense.
- Marijuana: Of opportunistic cops and misguided smokers.
- Drugs and War.
- Only a handful of people receive federally-provided medical marijuana.
- Another reason for legalizing marijuana: UCLA study finds no lung cancer risk.
- Marijuana: Effective medicine for Alzheimer's disease and much more.
- Supporting marijuana legalization on 4/20 and every day.
- Medical marijuana grower Ed Rosenthal gets retrial.
- Waiting to Inhale - The medical marijuana debate.
- North Dakota welcomes industrial hemp production, if only the feds would back off.
- Hemp for victory.
Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, December 1, 2006

More on child pornography defense.

This follows up on my November 27 blog entry on child pornography defense, with more ideas about defending such cases: - On November 30, I updated my original November 27 blog entry with further information about 18 USCS § 3509(m), which became law the middle of this year, which provides that "In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]) shall remain in the care, custody, and control of either the Government or the court." - Earlier this year, an Oklahoma federal judge mandated that in order for a child pornography charge to proceed against a defendant who allegedly accessed websites containing child pornography, the prosecutor would need to submit a proposed approach for the defense to have access to those websites without exposure to prosecution. U.S. v. Shreck, 2006 U.S. Dist. LEXIS 59724 (N.D. Okla. Feb. 8, 2006). Thanks to Lawofcriminaldefense for covering this case. - In August 2006, 445 F. Supp. 2d 152 (D. Mass. 2006), and November 2006, federal trial Judge Nancy Gertner (D. Mass.) placed substantial limits on the presentation of expert testimony about whether actual children appeared in alleged child pornography images -- and limitations on presenting the images themselves -- by requiring the prosecution to show that the images are of real people in the first place. The case is U.S. v. Frabizio, Crim. No. 03-10283 (D. Mass.). For child pornography prosecutions, the prosecution must prove that an image depicts actual children to sustain a conviction. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); U.S. v. Hilton, 386 F.3d 13, 18 (1st Cir. 2004). Judge Gertner's August 2006 order does an excellent job of showing how the technology now exists to make virtual images look staggeringly like real people: "A significant body of literature also indicates that digitally manufactured images may be confused with real photographs. Faculty in the Department of Computer Science at Dartmouth College, for example, have noted 'photorealistic images can be created that are nearly impossible to differentiate from photographic images.' S. Lyu and H. Farid, 'How Realistic is Photorealistic?' 53(2) IEEE Transactions on Signal Processing (2005) (available at <http://www.cs.dartmouth.edu/farid/publications>). n6 Other articles suggest that such virtual image creation can be achieved using current technology and that even 'experts cannot know whether a digital image is real or virtual.' Timothy J. Perla, Attempting to End the Cycle of Virtual Pornography Prohibitions, 83 B.U. L. Rev. 1209, 1216 (2003). See also, A.C. Popescu and H. Farid, 'Exposing Digital Forgeries by Detecting Traces of Re-Sampling,' 53(2) IEEE Transactions on Signal Processing (2005) (available at <http://www.cs.dartmouth.edu/farid/publications>) ("[D]igital images can be easily manipulated and altered. Digital forgeries, often leaving no visual clues of having been tampered with, can be indistinguishable from authentic photographs"); Caught On Camera, NEW SCIENTIST, Sept. 6, 2003 at 5 ('Warnings about the potential for faking digital images are not new. But the proliferation of cheap digital cameras and computers, together with programs for altering photos and editing video footage, is turning that potential into reality. Where once a specialist was needed to alter analogue images, even beginners can now create digital fakes good enough to fool discerning experts.'). But see Susan S. Kreston, Defeating the Virtual Defense in Child Pornography Prosecutions, 4 J. High Tech. L. 49, 62 (2004) ('Creating realistic images of people . . . continues to be very difficult, with the difference between a real picture and one created by a computer, even using today's best technology, being discernable to the human eye.'). Frabizio, 445 F. Supp. 2d at 157-58. The August 2006 Frabizio opinion includes the following three URL's showing excellent examples of manipulated images that look strikingly like real people: "<http://forums.cgsociety.org/showthread.php?t=141461>; (depicting a nude woman in the fetal position); <http://forums.cgsociety.org/showthread.php?t=361465> (showing a remarkable likeness of actress Jennifer Garner); see also <http://forums.cgsociety.org/showthread.php?t=160012>." Frabizio, 445 F. Supp. 2d at 158. Will prosecutors ever be able to meet their burden to show that alleged child pornography is not manipulated imagery? The August 2006 Frabizio opinion answers: "Whether the images in this case are real or virtual cannot be determined based on mere observation, however, even by a photographic expert. More specialized, computer-based knowledge is required to exclude the possibility that the pictures are wholly virtual." Frabizio, 445 F. Supp. 2d at 170. Thanks to Ohio lawyer Dean Boland for blogging on this case. - On November 27, 2006, the Ninth Circuit provided clarification of the meaning of "possession" of child pornography on one's computer: "Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images." U.S. v. Kuchinski, No. 05-30607 (9th Cir. 2006). Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00