

Thursday, March 1, 2007

### **Support the Flex Your Rights Foundation.**

Watch this video before you see another cop. Yesterday, I met for the first time Steve Silverman and Scott Morgan from Flex Your Rights, which produces the above Busted video. Steve, Scott, and Flex Your Rights are class acts, and so is their Busted video, which provides an excellent overview for levelling the playing field with cops, who are trained to convince people to waive their rights to remain silent and to refuse searches. I believe so strongly in the Busted video, that it has been prominently featured on this blog ever since I obtained FlexYourRights' authorization to do so. Our law firm donates financially to Flex Your Rights' indispensable work teaching people how to know and assert their civil liberties, and I encourage you to do the same. You don't even need to consider it a donation, because they have great products available for each donation. I recommend all three products at their online store: the excellent Busted video, the excellent companion -- of sorts -- Beat the Heat manual by Katya Komisaruk (whom I first met in 2000 when training to defend April 16 anti-globalization activists); and their t-shirts refusing searches and demanding to see search warrants. Steve and Scott are a one-of-a-kind powerhouse spreading the practical how-to gospel for flexing our Constitutional rights. Their organization merits your financial gifts for them to keep spreading the good word. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, February 28, 2007

### **Opposing the drug war is mainstream.**

LEAP's compelling video against drug prohibition. Opposing the drug war is mainstream. For instance, such organizations as the Drug Policy Alliance present a reasoned counter-message of harm reduction, backed up by supporters from a wide range of the social establishment, including such board members and honorary board members as former Federal Reserve Chair Paul Volker, George Soros, former police chief Joseph McNamara, federal Judge Robert Sweet, Walter Cronkite, and two medical doctors from prestigious institutions. A few years ago, some former high-level police officers got into the act, and formed Law Enforcement Against [Drug] Prohibition. Above is one of the group's compelling videos. On the economic conservative side, Milton Friedman underlined at the 1991 annual Drug Policy Foundation conference that the drug war is a huge socialist enterprise, which helps explain why so many economic conservatives want to downsize or eliminate the drug war. More on Mr. Friedman's views are here. Opposing the drug war is not only for leftists, and never has been. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Tuesday, February 27, 2007

**Scalia on Terry searches.**

Terry wrongfully tramples on civil liberties. Justice Scalia recognizes Terry's flaws in permitting a frisk before an arrest. (Image from FBI's website). In the Dickerson case discussed in today's previous blog entry, Justice Scalia criticized the reasoning of Terry for allowing a Terry frisk in the first place, as follows: "I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. Sometimes, of course, the temporary detention of a suspicious character would be elevated to a full custodial arrest on probable cause -- as, for instance, when a suspect was unable to provide a sufficient accounting of himself. [Editorial: The last sentence is very troubling, particularly when considering that any suspect has a right to remain silent under the Fifth Amendment and a right to refuse searches under the Fourth Amendment; the assertion of such rights cannot contribute to probable cause to detain or search.] At that point, it is clear that the common law would permit not just a protective 'frisk,' but a full physical search incident to the arrest. When, however, the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect. See Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 324 (1942) ('At common law, if a watchman came upon a suspiciously acting nightwalker, he might arrest him and then search him for weapons, but he had no right to search before arrest'); Williams, *Police Detention and Arrest Privileges* -- England, 51 J. Crim. L., C. & P. S. 413, 418 (1960) ('Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority . . .'). I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity -- which is described as follows in a police manual: "Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject." J. Moynahan, *Police Searching Procedures* 7 (1963) (citations omitted)." *Minnesota v. Dickerson*, 508 U.S. 366, 381-82 (Scalia, J., concurring). Too many judges, lawyers and cops accept Terry as the gospel, and often misconstrue Terry to defendants' detriment. In that context, Justice Scalia's criticism of Terry's analysis is all the more important to have at the ready. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

**Plain feel searches: Ripe for challenge.**

*Terry v. Ohio*, 392 US 1 (1968), is one more tool for police to trample on the Fourth Amendment right against unreasonable searches and seizures. *Minnesota v. Dickerson*, 508 U.S. 366 (1993), opens the door for cops using "plain feel" to pull non-weapon items from people's pockets during Terry frisks, on probable cause that the item is contraband. (Image from public domain). In 1993, the United States Supreme Court opened the door for cops using "plain feel" to pull non-weapon items (rather than just suspected weapons) from people's pockets during Terry frisks (392 US 1 (1968)), on probable cause that the item is contraband. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Fortunately, the Supreme Court agreed that the seizure of crack cocaine from Mr. Dickerson violated his Fourth Amendment rights in the foregoing case, since the cop, during a Terry frisk, recognized that the lump in his clothing "was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon." *Minnesota v. Dickerson*, 508 U.S. at 378. In upholding the suppression of the drugs seized from Mr. Dickerson's pocket, the Supreme Court explained: "Where, as here, 'an officer who is executing a valid search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' *Texas v. Brown*, 460 U.S. at 748 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to 'the sole justification of the search [under Terry:] . . . the protection of the police officer and others nearby.' 392 U.S. at 29. It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize, see *id.* at 26, and that we have condemned in subsequent cases. See *Michigan v. Long*, 463 U.S. at 1049, n.14; *Sibron*, 392 U.S. at 65-66." *Dickerson*, 508 U.S. at 378. In 1996, Maryland's highest court gave judges some additional things to consider in determining whether a drug seizure during a Terry frisk meets *Dickerson's* strict requirements that the seizure not take place with any feeling beyond a frisk required for seeking weapons, and that the seizure be upon probable cause: "To be sure, Officer Ottey's testimony provided a general

description of his experience in conducting drug searches. It did not disclose, however, the number of times Officer Ottey had identified crack cocaine through a layer of clothing during previous pat-down searches or describe how crack cocaine feels to the touch. That testimony, thus, did not tend to explain how Officer Ottey was able to identify crack cocaine by touch; it did not shed any light on the reliability of his opinion in that regard. In fact, aside from the opinion, the only other evidence of the officer's tactile acuity was his affirmative response to the question whether, in the past, he had found crack cocaine on defendants while patting them down."The State also elicited from Officer Ottey testimony regarding how crack cocaine typically is packaged, but, having done so, did not further attempt to connect that testimony to the search in question. In short, Officer Ottey's suppression hearing testimony that it was immediately apparent to him that what he felt was crack cocaine was nothing more than a conclusion and, as such, could be rejected. L. McLain, Maryland Evidence § 705.1. n10. After hearing Officer Ottey's testimony, the motions judge described Officer Ottey's level of certainty as a 'suspicion' and commented, 'It could be many things there that could give that same sense of touch. That's the troubling aspect of it.' It is clear, therefore, that the motions judge was not convinced that this difficult identification was justified on the basis of the evidence before him." Jones v. State, 343 Md. 448, 464-65 (1996). The foregoing discussion in Jones v. State also applies to Fourth Amendment reviews beyond Terry frisks, including such situations as my client who was acquitted because the trial judge ultimately agreed that the cop who stopped him for having a dead taillight did not have sufficient information late at night to have formed probable cause that the two grams of material in a package on the floor was marijuana. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, February 26, 2007

### **Caught in disbelief over an acquittal.**

A drug possession conviction requires probable cause to seize the alleged drugs; proof that the seized item constitutes illegal drugs; and a proof beyond a reasonable doubt of knowledge, dominion and control over the alleged drugs. (Image from public domain.) When I started doing criminal defense over fifteen years ago, many lawyers with more criminal defense experience than I told me that most criminal defendants have committed one or more of the criminal counts against them, most will be found guilty (particularly in federal criminal cases), and most will lie to their lawyers. Nevertheless, the more I interacted with successful criminal defense persuaders -- and the more I won cases where the cards initially seemed stacked against my clients -- the more I felt that the acquittal ratio could be increased through a devotion by all criminal defense lawyers to keep learning, practicing, improving, and transcending local and national groupthink, rather than accepting any status quo. Sunwolf implores that "Reality is no obstacle," and that is not farfetched. John D. Delgado shows lawyers not to fear any reality of the case, to the point of being willing to ask the defendant right off the bat at trial, if s/he testifies, the question all the jurors want to know: "Did you do it?" Lisa Monet Wayne has shown lawyers how to overcome their fears of going to trial in difficult cases, and to turn the cases' facts into their own (including reducing a prosecution of possession with intent to distribute a few grams of cocaine to a reminder that a diner sugar packet weighs but one gram). It is important for the criminal defense lawyer -- at trial -- to erase a belief in the client's guilt and to have a compelling story showing why the client is innocent. Sometimes reaching that compelling story comes from remembering how the criminal defense lawyer first reacted to the criminal charges, and how the lawyer arrived at a conviction that the prosecution's evidence is shaky at best. Finally, the more a lawyer expects the client to lie to the lawyer and to the judge and jury, the more that will become a self-fulfilling prophecy. Asking a client to trust his or her lawyer enough to tell the lawyer the truth is a tall order, in part because the client usually does not know the lawyer from Adam when the representation begins. The lawyer must earn that trust, and convince the client that all confidential information from the client will be kept confidential unless the client authorizes the lawyer to reveal the information. When the resources are available, sometimes a skilled trial or psychological consultant's assistance will be needed to get to the root of any tendency by the client to lie, and to draw out honesty. Sometimes the client will be more truthful when the lawyer shares some relevant and even sensitive and painful personal information about the lawyer. Once the lawyer shows confidence in the client -- combined with giving the client confidence in the lawyer and in the lawyer's skills, experience, and fearlessness -- the client will be more willing to plead innocent when the lawyer so advises, despite the rampant fear of so many criminal defendants about entering innocent pleas. A few days ago, a client accepted my advice to plead innocent to a marijuana possession charge. A few colleagues who frequently appear in this particular Virginia District courthouse warned me about my supposedly low potential of winning this case, where the police officer stopped my client's car for a burned-out taillight, claimed to have seen my client reaching behind him as the officer approached the car, and claimed to have seen a green leafy substance in a bag on the rear floorboard in the direction where my client reached, containing "suspected marijuana". Our case theory was that possession was absent, due to a failure of the evidence to prove beyond a reasonable doubt that our client exercised knowledge, dominion and control over what turned out to be under two grams of marijuana, which is not enough to roll more than two regular-sized marijuana cigarettes/joints. My primary ground for suppressing the marijuana was that no cop has sufficient vision late at night in the rain to have any idea about the contents of the bag purportedly containing such a small quantity of marijuana. Our trial was held before a Virginia District Court judge, because in Virginia misdemeanors (offenses jailable for no more than one year) must be tried in District Court without a jury before a de novo jury trial is available. Va. Const. Art. I, § 8; McCormick v. Virginia Beach, 5 Va. App. 369 (1987) (confirming the jury trial right for all de novo criminal appeals to a Virginia Circuit Court, as opposed to the federal Constitution's limit of the jury trial right to petty offenses). The United States Supreme Court has upheld the Constitutionality of two-tiered state systems that require a bench trial before a de novo appeal may proceed by jury. Ludwig v. Massachusetts, 427 U.S. 618 (1976), as has the Virginia Supreme Court in Manns v. Commonwealth, 213 Va. 322 (1972). The judge initially denied my motion to suppress the marijuana, despite my arguments that included the cop's not even bringing the alleged marijuana and packaging with him to court, for the judge to reach his own conclusions about the officer's ability to have probable cause that he saw marijuana. Providing the judge the bag and the alleged marijuana would have let the judge see for himself that the officer actually seized the item first before having sufficient information to know the item was marijuana. The judge refused to keep out the drug analysis report (I subpoenaed and questioned the chemist) despite my arguments about the failure to establish chain of custody, the inadmissible hearsay in the chain of custody report, and failure to produce the alleged marijuana into evidence. During my closing argument, I reincorporated by reference all my previous arguments at trial. I then focused on the failure of the prosecutor to prove beyond a reasonable doubt that my client had possession -- i.e., knowledge, dominion and control -- over the marijuana. Drew v. Com., 230 Va. 471 (1986). However, I did not get far into my closing argument before the judge stopped me in my tracks. I recognized that something good probably was coming down the pike,

because judges are forbidden from finding guilt without providing sufficient opportunity for the defense to present a closing argument (although I once saw a Maryland judge violate this rule, only for him accidentally to have said "not guilty" rather than "guilty" and to have conceded that once those words "not guilty" passed his lips, he never could summon them back). The judge said that although he believed this was my client's marijuana, he did not believe that the police officer had sufficient grounds late at night to know this was marijuana (which I argued in the first place). As the judge was talking, I told my client he had won, and shook his hand. My client was in disbelief. Once the judge finished talking, my client was still caught in disbelief. Therefore, I said to my client: "We have won, and you have been found not guilty. Let's get out of here." The last thing we needed was to stick around for the judge to have said that he was changing his mind. Last month, I blogged about how I managed to continue practicing criminal defense in an unjust system. Such victories as this certainly make it easier to do so. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:15

Sunday, February 25, 2007

### **Getting to yes with North Korea**

T'ai chi helps the negotiator to listen, and to push effectively without being pushy. (From the public domain, showing the single whip position of yang style t'ai chi.) Sixteen years ago, a seasoned and able civil rights lawyer told me about the importance for a litigator to have strong negotiation skills, and not just strong courtroom skills. In that regard, he talked about the importance of knowing what the other side wants. Those words are second nature to me by now, but at that time, with no more than two court appearances under my belt (an asylum hearing and a deportation hearing in immigration court), those words rang like a new message. Knowing what the other side wants is a true art, and requires being able to quiet one's mind, so that the negotiator may hear the other side through the opponent's words, through actions, between the lines, and through anticipating the other side's next moves, as would a master chess player or t'ai chi master. I have written about negotiation skills and strategy here, here, and here. Recent testimony to the importance of patient and skilled negotiating comes from this month's breakthrough in China in the nuclear arms negotiations with North Korea. All is not yet solved, and distrust remains between North Korea and the United States, but they apparently have been investing the time to get to yes. Sometimes, successful negotiating requires one or more mediators or negotiating parties. In this instance, China's participation may have played a pivotal role. As the New York Times reports: "'If they renege on this,' said one senior Bush administration official, who would not speak on the record because the deal had yet to be signed, 'they are sticking their fingers into the eyes of the Chinese.'" I am very interested to know the extent to which internal debates took place in the Bush Administration (and in the North Korean government, if any government officials there feel permitted to debate without the potential penalty of prison or worse) about the extent to use diplomacy rather than baring and even using fangs. I am also interested in knowing the extent to which the deal with North Korea was reached through skilled negotiation or more mediocre negotiation skills and strategy. Then again, maybe North Korea's very possession of nuclear weapons made the United States more willing to spend time negotiating than was the situation with Saddam Hussein's Iraq, which had no nuclear weapons when Gulf War II started. A colleague once said that lawyers at one of the prosecutors' offices that I frequently deal with have in the past (and possibly in the present) been trained that their plea discussions are offers -- apparently sometimes of the take-it-or-leave-it kind -- rather than plea "negotiations". However, even with that office, sometimes only after the dust has settled by the courtroom being cleared of most of the docket for my trial to start, on several occasions I have negotiated favorable settlements through negotiating on goals rather than positions. For me, a critical ingredient to successful negotiations is the willingness to agree to disagree, rather than ranting and raving about the unreasonableness of the other side's proposals and positions. With North Korea and the United States, that must not have been easy at all. In any event, for litigation, a case is more likely to settle (sometimes with a result better than a guilty finding, in criminal cases) when the lawyer fully prepares the case to go to trial, and the opposite is true when the lawyer has only prepared the case to be negotiated. Sometimes such full trial preparation wears the opponent down, to help open the doors to a negotiated result. For litigation, the purpose of negotiation should not be any fear of going to trial, but instead an effort by both sides to hedge their bets. Time, patience, intuition, empathy, deep listening, flexibility, selflessness (to a point), and substantial firepower are among the critical ingredients of successful negotiations in litigation. Jon Katz.

Posted by Jon Katz in Persuasion at 00:30

Friday, February 23, 2007

### **Maryland's highest court gives too much detention power to searching police.**

Chief Judge Bell is Brown's sole dissenter. The United States Supreme Court has not decided the extent to which the police may seize non-residents visiting a home being searched by police pursuant to a valid search warrant. However, on February 7, 2007, the Maryland Court of Appeals provided police a green light to seize such visitors at least to make some initial inquiries. *Brown v. State*, \_\_\_ Md. \_\_ (Feb. 7, 2007). As a result, Maryland's highest court upheld the conviction of such a visitor whom the police seized, asked if he had any weapons or drugs (hopefully he was Mirandized, but Brown is silent on that (*Cotton v. State*, 386 Md. 249, cert. denied, 126 S. Ct. 212 (2005) requires such Mirandizing for such a seizure)), and heard him reply that he had one-quarter pound of marijuana in his waist. Brown relies heavily on *Cotton v. State*, 386 Md. 249, cert. denied, 126 S. Ct. 212 (2005), which states: "In executing a warrant such as that issued here, the police for a premises known to be an open-air drug market where the police are likely to encounter people who may well be dangerous, they are entitled, for their own safety and that of other persons, to take command of the situation and, except for persons who clearly are unconnected with any criminal activity and who clearly present no potential danger, essentially immobilize everyone until, acting with reasonable expedition, they know what they are confronting. It really cannot be otherwise." The three-judge Cotton dissent -- with former Maryland United States Attorney Battaglia writing -- insisted: "It is disingenuous to assert that the danger posed to police under such circumstances was of such magnitude as to warrant the detention of all persons merely present in some capacity on the premises. Surely, the overwhelming number of officers on the small property dispelled any such need to engage in a wholesale detention. In light of the overwhelming number of officers at the scene and the diminutive size of the property, the Majority cannot in good faith argue that the threat to police outweighed Cotton's interest in being free from a warrantless seizure." Now, in the subsequent Brown decision, Judge Battaglia and Judge Greene -- both who dissented in Cotton -- joined in the judgment only, without standing by the court's reasoning. Their silence makes it unclear whether they joined the judgment merely by considering Cotton to be controlling stare decisis. Kudos to Chief Judge Bell for dissenting (sadly, the sole dissenter), stating in full: "I adhere to the views expressed in the dissenting opinion in *Cotton v. State*, 386 Md. 249, 872 A.2d 87 (2005)." Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:15

Thursday, February 22, 2007

### **Chain of custody revisited.**

The Defendant in *Jones v. State* unsuccessfully challenged chain of custody of DNA evidence. (Image from NASA's website). Several times, I have won drug possession trials in Maryland by successfully challenging the prosecutor's failure to establish that the drugs tested by the testifying chemist were the same items seized by the police. A recent appellate case provides an overview of Maryland chain of custody law: "The proponent of a particular tangible item of evidence must establish its 'chain of custody,' i.e., must 'account for its handling from the time it was seized until it is offered into evidence.' *Lester v. State*, 82 Md. App. 391, 394, 571 A.2d 897 (1990). 'The circumstances surrounding [the] safekeeping [of the item of evidence during that time] need only be proven as a reasonable probability . . . and in most instances is established . . . by responsible parties who can negate a possibility of "tampering" . . . and thus preclude a likelihood that the thing's condition was changed.' *Wagner v. State*, 160 Md. App. 531, 552, 864 A.2d 1037 (2005) (citing *Best v. State*, 79 Md. App. 241, 250, 556 A.2d 701, cert denied, 317 Md. 70, 562 A.2d 718 (1989))." *Jones v. State*, \_\_\_ Md. App. \_\_\_, 2007 Md. App. LEXIS 8 (Jan. 30, 2007). Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

### **More evidence on marijuana's benefit as pain medicine.**

Marijuana remains federally banned for prescription purposes, while doctors remain free to administer cocaine and morphine for medicinal use. (The image's copyright holder permits its reposting for any purpose). Marijuana is medicine, as confirmed by many studies. In February 2007, an additional study was added to the arsenal of proof of marijuana's medicinal benefits. A peer-reviewed article in *Neurology* concludes that: "Smoked cannabis was well tolerated and effectively relieved chronic neuropathic pain from HIV-associated sensory neuropathy. The findings are comparable to oral drugs used for chronic neuropathic pain." *Americans for Safe Access* discusses the study here and here. Jon Katz.

Posted by Jon Katz in Drugs at 00:15

Wednesday, February 21, 2007

### **Flex Your Rights' ongoing discussion of Barry Cooper's video.**

Drug dog image from the NIH's website. FlexYourRights has an ongoing discussion of Barry Cooper's Never Get Busted video here. I have written about Never Get Busted here and here. Following is a February 20 posting I placed on the FlexYourRights site on this topic: Barry Cooper says he terrorized families as a cop. On this thread, Barry Cooper has said: "An asshole cop like I was and the majority of cops WILL SEARCH YOUR CAR WHEN GIVEN A REFUSAL!!!" <http://www.flexyourrights.org/cooper#comment-1778>. "[M]y family and I were terrorized by law enforcement just as I use to terrorize families when I was a cop." <http://www.flexyourrights.org/cooper#comment-1791>. After admitting to the above two egregious practices when he was a police officer, Mr. Cooper says "Please view [buy] my dvd." <http://www.flexyourrights.org/cooper#comment-1791>. I applaud Mr. Cooper for admitting to such past police behavior. However, I feel all the more uncomfortable buying his DVD with his above-listed admissions, without hearing from him (e.g., on his website, and without being implored to buy his video for his explanation for such behavior) why he acted that way as a cop, what made him recognize such behavior was wrong, and what he is doing and will do (beyond selling his DVD) to try to persuade cops -- from rookies to the most experienced cops -- to encourage them not to act that way. I feel so strongly about this, because police misconduct is rampant (<http://markskatz.com/blog2/serendipity/archives/129-Police-misconduct-Falsified-search-warrants-and-beating-of-arrestees..html>), and too many of my clients suffer from it. Such misconduct will not stop or abate enough until everybody insists on and achieves a radical and positive overhaul of policing and police hiring/ training/supervision/discipline; and a radical and positive overhaul of the criminal justice system (including heavily decriminalizing drugs (and legalizing marijuana, at the very least), eliminating mandatory minimum sentences, and eliminating criminal penalties for activities as minor as prostitution). To justice for all. Jon.Jon Katz.

Posted by Jon Katz in Drugs at 02:00

### **On Valentine's Day, 11th Circuit upholds ban on selling sexual devices.**

Supreme Court Justice Anthony Kennedy penned the superb Lawrence v. Texas opinion, but the Eleventh Circuit interpreted Lawrence too narrowly. The United States suffers from a severely bipolar relationship with sex. On the one hand, the 1960's and 1970's unleashed revolutionary sexual liberation, and the pendulum continues swinging in that direction on balance. On the other hand, Puritanism continues to invade sexual mores in America. Sexual devices have become commonplace, but Alabama and some other states criminalize their sale and production. On Valentine's Day of this year, the United States Court of Appeals for the Eleventh Circuit upheld this sexual device sale ban as Constitutional. The Eleventh Circuit distinguished the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), which overturns the 1986 Supreme Court case that upheld a law criminalizing private sodomy by consenting adults. The Eleventh Circuit says that Lawrence protects private behavior, but that the Alabama law prohibits commercial public behavior. However, by upholding this Alabama ban on the sale of sexual devices, the Eleventh Circuit has effectively deprived people of their right under Lawrence to have access to such products and to use such products. Consequently, under Lawrence, the ban indeed is unconstitutional. Fortunately, as detailed here, some courts have banned sexual device bans. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:30

Tuesday, February 20, 2007

### **Our military law practice.**

Pentagon (From National Reconnaissance Office's website). Washingtonian magazine includes me in its most recent listing of the area's top military lawyers. My litigation work involving the military has involved defending military members in criminal court (including addressing the landmines that a conviction might have on their security clearances and careers), defending civilians arrested on military grounds, suing the military, and defending critics of the military. The common thread that leads me to do such work is my commitment to defending all people accused of crimes and defending the Constitution. Lawyers dealing with military issues come from a variety of viewpoints, including such birds of a feather as a former fellow member of the local ACLU board of directors who is a dean among military lawyers, and a fellow Washington-area lawyer who for many more years than I has fought for civil rights causes. My clients in the military area are quite varied, including active and retired military members who are fully pro-military, people with Constitutional lawsuits against the military (see here and here) whether or not they are pro-military, and those opposing the military outright (see here and here). In one of our most recent bits of military news, for over three years, I have been litigating with Atlanta lawyer David Bederman to overturn the Uniformed Services Former Spouses' Protection Act (USFSPA). Last week, David filed a superb certiorari petition seeking Supreme Court review of this law that permits divorce courts to treat veterans' retired pay as divisible marital property. This litigation involves numerous critical Constitutional issues. The case is *Adkins, et al. v. Gates*, U.S. Supreme Court cert. petition No. 06-1132. I have written numerous times about military issues, including blog entries found here and here. Jon Katz.

Posted by Jon Katz in Constitutional Law at 01:00

Monday, February 19, 2007

### **Trouble in my natal state: Teacher wrongfully convicted over sexual Internet pop-ups.**

(Image from Energy Information Agency's website). In public school, a mean sport often was to hassle substitute teachers. That all seems like child's play compared to the trial of Connecticut substitute teacher Julie Amero, with a conviction over enabling students to see sexy Internet photos that may very well have appeared on screen through pop-up ads that had nothing to do with the substitute nor with any websites intentionally visited. The prosecutor failed to provide information to rule out that the images arose due to such pop-up ads, which means that this case should have been dismissed without ever going to a jury. Bless Sunbelt Software for stepping in to try to undo this unjust mess. As Sunbelt Software's president said: "This was a Windows 98 SE machine with IE 5 and an expired antivirus subscription," Eckelberry said. "It hadn't been updated since August, and there was no anti-spyware, no pop-up protection, no firewall and no content filters. Regardless of whatever happened, this machine was a machine that should not have been on the Internet." Of all people, how should a substitute teacher have known that her classroom had a computer that should never have been turned on in the first place, if she was going to avoid a prosecution? The incident took place at Kelly Middle School in Norwich. The principal, Scott Fain, said he was surprised that Ms. Amero was prosecuted, but also said "We've never had a problem with pop-ups before or since." One could say the same thing about a group of people playing Russian roulette; the same bullet that kills the loser will not have harmed those who preceded or followed the decedent. Pop-up ads are widespread, including sexual pop-ups. In Ms. Amero's case, she contends that a hairstyle site was visited by students, leading to sexual pop-up screens; this is entirely plausible. Moreover, I very much hope that the non-duplication of this incident is due to the school's finally installing software against spyware and pop-up screens. More troubling is this juror Mark Steinmetz's comment after the guilty verdict: "So many kids noticed this going on," Steinmetz said. "It was truly uncalled for. I would not want my child in her classroom. All she had to do was throw a coat over it or unplug it. We figured even if there were pop-ups, would you sit there?" Since when is it a crime not to throw a coat over a computer showing sexual images that one did not cause to be placed there in the first place? If Americans are so concerned about the quality of public school education, people should think twice about chilling teachers from walking into the classroom in the first place with such outrageous prosecutions and convictions as this one. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:30

### **Folk Songs of the Far Right.**

Turn on your speakers to the upside-down world of Bush's war launched on non-existent Iraqi nuclear weapons, and followed with NSA domestic spying. (Image posted pursuant to GNU Free Documentation License.) Thanks to a fellow National Lawyers Guild member for posting this link to "Folk Songs of the Far Right." The biting satire includes "Papa's Got a Brand New Baghdad." and "NSA Surprise" (or should that be called "Deja Vu All Over Again"?). Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:15

Sunday, February 18, 2007

### **Everyone is my teacher.**

The Dalai Lama said: "Tolerance can be learned only from an enemy; it cannot be learned from your guru." (Image from the public domain). If a trial lawyer wants the jury to judge the lawyer's client fairly, the trial lawyer needs to judge the jury fairly, preferably by being non-judgmental in the first place, except to the extent that judgment calls are required in selecting and arguing to a jury. This reminds me of the following instances of people judging entire geographic cultures, and the importance that a trial lawyer avoid doing so. A few days ago, I met a fellow customer at the health food store, talking about the Blood Diamond movie. I heard a New England twang, and she told me she moved to the Washington, DC, area five years ago from Rhode Island. She said that the East Coast has intellectuals, but she did not see the Washington area as part of the East Coast. This, she said, is the South. She did not like this area much, and hoped to move back to Rhode Island. Seventeen years ago, I met a fellow vegetarian and progressive lawyer. He wanted out of Washington, DC, and to move to the San Francisco area. One of the factors affecting his decision was seeing on the subway one morning a Republican (I think he wore a Republican button) reading the Washington Post, and looking self-satisfied in that period of George Bush I. This vegetarian lawyer took and passed the California bar, packed up his belongings, and started a new life outside San Francisco. I bumped into him in Washington eleven years later. He was very satisfied with his transition to California. Eighteen years ago, I met a support staff member at my first law firm who grew up in Texas. I mentioned that this is the farthest south I ever had lived, and that I could not imagine feeling comfortable living any farther south. For her, this was the farthest north she had ever lived, and she could not imagine feeling comfortable living any farther north. Over fifteen years ago, I became a criminal defense lawyer. I moved from a white collar civil corporate law firm world, working out of a fancy office suite where the most austerity I saw in a workday would come during a visit to a drab government agency office, or seeing the many homeless people on the street. At that law firm, three more senior associate lawyers on separate occasions misguidedly referred to criminal defendants as scum; as much as I felt discomfort working with people harboring such feelings, they were amplifying the views of many others in society. When I made my dream of criminal defense come true, first with the Maryland Public Defender's Office, I jumped into a rough-and-tumble world where I finally got out of my now-windowless office all the time for court, jail visits, and offsite investigation and trial preparation. By this time, it was critical not to delay any longer in living my life with the full understanding that everyone is my teacher -- both friend and foe, and everyone in between -- from clients, to support staff and supervisors, to colleagues on the same side, to judges, to prosecutors, to cops, to adversarial and supporting witnesses, to personal friends, to family members, to those living and working around me, and everyone else. I also learned the magic mirror lesson that jurors and judges are unlikely to trust and feel comfortable with a lawyer any more than the lawyer trusts and feels comfortable with the jurors and judges. Consequently, Will Rogers probably would have been a great trial lawyer, because he claimed to have liked everyone. An important goal, then, for a trial lawyer is to learn to listen deeply to, connect with, and engage with the people around the lawyer, and not to move to the West Coast, Mars, or silence to avoid them. In doing so, the lawyer will shed stereotypes, become more tolerant of others, recognize how interconnected we all are, probably feel more at harmony with the people living and working in the lawyer's community, and ultimately be more successful for the lawyer's clients and as a person. Moreover, when a trial lawyer connects successfully with jurors, the jurors might be all the more ready to connect and engage with one another during jury deliberations despite any of their outward differences. For a trial lawyer to move to the West Coast to escape Republicans is to enhance disconnect with jurors rather than connecting with them. Furthermore, as the Dalai Lama confirmed, "everyone is my teacher, starting with my enemy." If I move to a place where everyone seems to be more like me (unless it is an inward move to change myself to recognize how much I am similar to people who initially seem much different than I), not only will I feel imbalanced being without more of a variety of people and their thoughts and feelings, but I will be deprived of their teachings and lessons, and my clients will be deprived accordingly. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Friday, February 16, 2007

### **Author of reversal of Chicago Seven conviction passes.**

Thomas E. Fairchild penned the reversal of the Chicago Seven conviction, and ran against Joseph McCarthy. (Image from Wisconsin court system's website). Even though I was in the single digits at the time, the Sixties counterculture and many people influenced by it heavily influenced me to care deeply about justice, to question authority, and to advocate erring on the side of protecting people's right to do their own thing over creating a genteel society. The Chicago Seven arrest and trial exemplifies much of what the Sixties counterculture was all about and the tug-of-war between those for and against the established power structure, during a period where plenty of establishment people and organizations were vocally fed up with the Vietnam War, leading to plenty more establishment people being fed up with Nixon (but not enough to keep him out of office in the first place) and Watergate. The two most flamboyant defendants in the Chicago Seven trial (in addition to the eighth defendant, Bobby Seale) were the late Abbie Hoffman -- who remained a rabble rouser until his final days -- and the late Jerry Rubin, who by the 1980's stopped being a radical and embraced the business world wholeheartedly. Hoffman wrote and published *Steal This Book* in 1971. Eleven years later, I walked into a used bookstore in Cambridge, Massachusetts, and asked for *Steal This Book*. The man in the back room heard me, and said: "Funny you should request it, because it was in my hand at the time you asked for it. Here." I asked the price. He said, "Steal it." So I did. On February 12, 2007, another pivotal figure in the Chicago Seven trial passed. Former United States Court of Appeals (7th Cir.) Judge Thomas E. Fairchild died at 94. He penned the 1972 opinion reversing the Chicago Seven conviction. He ran, unsuccessfully, against horror and Senator Joseph McCarthy. President Johnson appointed Fairchild to the United States Court of Appeals in 1966. Who presided at the Chicago Seven trial? None other than Julius Hoffman, a former law partner of Chicago boss-mayor Richard Daley, whose city hosted the 1968 Democratic convention during which the Chicago Seven were arrested. Fascinating information on the Chicago Seven trial is here. Jon Katz.

Posted by Jon Katz in Criminal Defense at 02:00

### **Justice Scalia's daughter arrested for driving under the influence.**

Justice Scalia (r) meets U.S. House member Phil Gingrey (l). (From Phil Gingrey's Congressional website). Justice Scalia is a curious Supreme Court justice. He is solidly in the court's conservative four-justice wing that also includes Chief Justice Roberts and Justices Alito and Thomas. On occasion -- still too rare in my view -- he departs from the law-and-order stereotype and pens a majority opinion or dissent highly favorable to individual liberties, saying the Constitution leads to no other result than the one he has reached. I have written about Justice Scalia here, here, here, here, and here. This week, Justice Scalia's daughter Ann S. Banaszewski was arrested at or near a McDonald's for allegedly driving under the influence of alcohol. The drunk driving laws are unfair, at least in that all states that I know of automatically criminalize driving with a blood alcohol content of 0.08 or more, even though a very small amount of alcohol can cause such a reading. Therefore, the drunk driving laws criminalize what should not automatically be criminal, namely a 0.08 blood alcohol content. I write more about drunk driving defense here. The police are not disclosing much information about Ms. Banaszewski's arrest other than to confirm that she is charged with driving under the influence and child endangerment for having three small children in her van at the time she was stopped. The only silver lining in all this is to make criminal arrests and prosecutions more real -- rather than simply abstract -- for Justice Scalia and his colleagues. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 01:00

Thursday, February 15, 2007

### **Libby and Cheney will not testify. How will the defense explain that in closing argument?**

Dick Cheney and Scooter Libby will not testify at trial. (Image from the public domain). Now that Scooter Libby's trial will be without the testimony of Mr. Libby and Dick Cheney, his lawyer is left to explain to the jury in closing argument why he came up short with evidence to back up his opening statement's claim that Mr. Libby's mis-statements to law enforcement were due to poor memory rather than any intentional mis-statement. In this and all criminal trials in the United States, the prosecution has the burden to prove a defendant's guilt beyond a reasonable doubt, and a defendant's silence at trial is not permitted to be used against the defendant. That is not to say, though, that jurors, being human, will always follow such rules to a tee. A question now arises whether any jurors will penalize Mr. Libby for the gap between (1) his counsel, in opening statement, asserting that Mr. Libby had a terrible memory that contributed to his mis-statements to law enforcement, and that he had been thrown under the bus by the Bush Administration (if indeed the latter assertion was made in the opening statement) and (2) the apparent substantial lack of evidence to prove those assertions without at least having the testimony of Mr. Libby. In hindsight, should the Libby defense have promised at the opening statement stage to provide such compelling defense evidence? First, had the defense reserved making an opening statement until the prosecution rested, the defense team might not have made such promises. However, ordinarily it is best for the defense to give an opening statement immediately after the prosecution gives an opening statement, in order to give the jury an alternative and persuasive framework against the prosecution's theory of the case. Second, ordinarily, the defense should put some real teeth into its opening statement, rather than just talk about such general ideas as the prosecution's burden to prove the case beyond a reasonable doubt. I say real teeth, as opposed to promising more than the defense might realistically be able to reasonably deliver. As I already have said, as much as I want Bush out of office, I will be more than happy to see Mr. Libby acquitted. His indictment accuses him of lying to law enforcement and the grand jury investigating how and when Valerie Plame's CIA employment status got leaked to the press. So long as the criminal justice system remains as unjust as it has long been, it will be difficult for me to want to see convictions for such alleged crimes. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

Wednesday, February 14, 2007

### **Marijuana - Let it grow for research.**

Image from public domain. Three years ago, WMAL radio interviewed me opposite a doctor from the Office of National Drug Policy, about Maryland's then-newly effective law capping marijuana possession penalties at a \$100 fine plus court costs upon presentation of proof that it was for medical necessity. After the interview, a radio caller urged banning medical marijuana until studies sufficiently cleared it for safety. Aside from the absence of evidence that moderate marijuana smoking causes health problems any more serious than drinking alcohol (and probably less serious), another problem with such a position is that the federal government has consistently and severely limited the availability of lawfully grown marijuana to enable further research into the effectiveness and safety of medical marijuana. In fact, the United States government has only permitted the University of Mississippi to grow marijuana for clinical research. One more clinical marijuana grower will be added to the list if the Drug Enforcement Administration accepts the advisory ruling from February 12, 2007, of DEA Administrative Law Judge Mary Ellen Bittner (the full seventy-page ruling is [here](#)). ALJ Bittner determined that an insufficient supply of marijuana for medical research exists, and recommended the approval of the application of University of Massachusetts Professor Lyle E. Craker to grow such marijuana. Background on Professor Craker's effort to grow marijuana for research is [here](#) at the site for the Multidisciplinary Association for Psychedelic Studies. (Scroll to the bottom of MAPS' homepage for Dean Chamberlain's colorful portrait's of psychedelic pioneers.) The ball is now in the DEA's court about how to respond to ALJ Bittner's ruling. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Tuesday, February 13, 2007

**Beware Barry Cooper's "Never Get Busted" video, part II.**

Â The NIH's caption to this drug dog photo is enough to turn the stomach: "Nice to nose you: Flyer, NIH's only certified drug-sniffer, serves on the K-9 team along with 10 bomb-sniffers. A dog's nasal cavities contain over 220 million olfactory receptors; the human version has 5 million." (Image from the NIH's website).Â Originally, I was inclined not to comment further on Barry Cooper's "Never Get Busted" video without seeing the video first. (See my original blogpost here).Â However, after having read the following two blogs about Mr. Cooper's video, I did not wish to wait to see the video before addressing the following two issues here, particularly after having contacted and heard back from Mr. Cooper (as reprinted below) on these two issues: Â - FlexYourRights reviewed the video, and shares my deep concern -- dissent, actually -- about Mr. Cooper's recommending rampant waiver of people's right to refuse a police "consent" search. Mr. Cooper's purported interest is in showing people how to conceal drug crimes, whereas my interest is in helping people know and exercise their Constitutional rights, whether or not they have anything to hide. Â A person may be risking more than s/he realizes when consenting to a police search. I believe it is all too common for people in a car to throw their drugs and weapons (if they have any) into another passenger's or driver's area of the car when a traffic stop takes place. No matter how innocent the car's driver may be, consenting to a search risks the police finding contraband that someone else secretly left there. Â I start off by saying just say know concerning your rights in dealing with the police, and by saying that nothing beats the advice of a qualified criminal defense lawyer concerning one's specific situation in dealing with law enforcement. For that reason, our webpages are informational only, are not advice, and do not provide black-letter approaches for dealing with the police. In any event, FlexYourRights has encouraged Mr. Cooper to remove his blanket recommendation to consent to police searches, and I agree. Mr. Cooper does not, as re-printed below. Â - Blogger and marijuana rights activist Loretta Nall at her blog of the same name shows she has an axe to grind with Mr. Cooper after having reviewed his video. Likewise, Mr. Cooper's e-mail to me, re-printed below, shows he also has an axe to grind with Ms. Nall. My preference is not to help re-air their axes, but I do not know how to do that without remaining silent on their messages, because I do not believe in providing their comment excerpts in a censored format.Â In any event, Ms. Nall makes a good point in showing that her video hardly got sent in a plain brown wrapper, seeing that "NeverGetBusted.com" is prominently displayed on the return address. With confidentiality as lax as that, who knows if Mr. Cooper truly will do his best to protect his customers' confidentiality? I raise this out of a concern for all his customers' confidentiality, whether or not they are involved in drug activity, seeing that an innocent buyer of his video -- just like the drug using/selling buyer of his video -- has no interest in a knock on the door from narcs investigating the reasons for the person's subscribing to the video in the first place. Â Finally, below and uncut is my February 12 e-mail exchange with Mr. Cooper, starting with his reply, followed by my original message: Â From: info@nevergetbusted.com [mailto:info@nevergetbusted.com] Sent: Monday, February 12, 2007 3:30 PM To: Jon Katz Subject: Re: Concerning confidentiality of mailing Jon, Being an attorney I can understand why you disagree with my Consent to Search recommendation.Â My attorney, Bobby Mims, a very successful criminal defense attorney said it best when he stated... "Barry is trying to keep people from going to the courtroom. He is not preparing people for the courtroom." Based on my experience and hundreds of other law enforcement, when a person refuses consent, cops go crazy searching.Â It is a good idea to give consent if one has a small amount hidden really well.Â I stand by what I say because it is the truth.Â Your way works for you because you are an attorney and cops are afraid of you.Â If the general public does as you suggest in you email, they will get searched harder and longer.Â Please view the dvd and don't listen to Loretta. Make your own judgement.Â If you think my dvd is worthless as a mad woman suggested then email me and I will give you your money back. She has another agenda and it is not about helping people it is about attacking me.Â She feels she must attack me to cover herself for all the horrible things she said about me months ago.Â HER REVIEW OF THE DVD IS THE ONLY NEGATIVE REVIEW WE HAVE RECIEVED.Â This should tell you something if you are a reasonable person.Â Below is my response to the NEVERGETBUSTED label on the packaging. We are eblasting all our customers this today:Â I am soooooo sorry about the return address on your order saying "NEVER GET BUSTED."Â My dvd is manufactured and mailed by a fulfillment company in Illinois.Â I am in Texas.Â They made the mistake and I quickly corrected the problem.Â Future orders will say "Barry and Candi Promotions."Â To our surprise, mainstream America is ordering the dvd more than the counter culture so maybe one day NEVERGETBUSTED will seem normal to everybody.Â I do care about your privacy and am very sorry this happened.Â Please forgive me, I fixed the problem.Â Barry, CEO/NeverGetBusted, The Most Trusted Name in Anti-Prohibition.Â Thanks for your interest.Â Barry Â Quoting Jon Katz jon@markskatz.com:Â Dear Mr. Cooper: Â Having read the reviews of your video at FlexYour Rights's and Loretta Nall's sites (I have not purchased it myself), I comment as follows: Â - I share FlexYourRights' strong disagreement with giving a blanket recommendation for people to consent to police searches. (As I wrote on our website before the D.C. sniper suspects were arrested: "My own script when the police want a consent search is "No. I won't tell you why I'm refusing. I won't tell you why I'm refusing to tell you why I'm refusing. Am I free to leave?"") Â - Ms. Nall's site says her video of Never Get

Busted included "NeverGetBusted.com" in the return address, which seems to be inconsistent with your FAQ page's following assertion: "Q. How are the orders packed for shipment? A. The orders are packaged very discreetly in a plain packaging envelope. No logos or images!" Is Ms. Nall's foregoing assertion correct? If so, how does this jibe with your foregoing FAQ quote? For full disclosure, I blogged about your tape in early January, here: <http://markskatz.com/blog2/serendipity/archives/208-Beware-Barry-Coopers-Never-Get-Busted-video...html>. If you reply, I will treat your response as being on the record unless you request otherwise. Thanks. Jon. Jon Katz.

Posted by Jon Katz in Drugs at 01:00

Monday, February 12, 2007

### **Of Reagan, ketchup and vegetables**

Available through Creative Commons Attribution ShareAlike 2.5. As I said in my August 10 blog entry, "I refuse to use the former president's [Reagan's] name in the title [of the airport in Arlington, Virginia]; it was National Airport long before he took his throne at 1600 Pennsylvania Avenue and installed people who'd have had ketchup fulfill one of the vegetable servings in the daily school lunch program." Now an update to Reagan-ketchup-vegetable-gate: Leave it to Cecil Adams's "Straight Dope" to show that absent an act of Congress, the ketchup mess may never have taken place. Pour it on, Cecil. Jon Katz. NOTE: Not all posts by me reflect the views of my law partner Jay Marks, which is particularly true of my negative comments about Ronald Reagan. As I have stated elsewhere on our website, despite our differing political paths -- where I got disenchanted early on by the political establishment, and got involved with such civil rights activities as Amnesty International and the American Civil Liberties Union, and where Jay took to Republican-related political activities -- Jay and I learned many years ago that we share much in common about our vision of serving justice through the practice of law.

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

Sunday, February 11, 2007

### **"What is that address!" he shouted. "Give me that address!"**

Flannery O'Connor lived in an ordinary place while writing extraordinary prose, sometimes about the grotesque. (Image from a Voice of America article). Storytelling is a critical part of persuasion, so long as the storyteller engages and persuades the decisionmaker, rather than boring and irritating the listener. The amazing Sunwolf makes that fully clear. No storyteller has whipped together fiction as riveting and real-seeming to me as Flannery O'Connor in *Wise Blood*, including the above-quoted chilling shout from Hazel Motes to Enoch in this tale that thoroughly weaves in the grotesque. Bringing Flannery O'Connor all the more to life are this recent New York Times travelogue, this website of the O'Connor-promoting Andalusia Foundation, and this website of the Flannery O'Connor Childhood Home Foundation. I have described some of my other favorite stories and storytellers here. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

### **Taking the leap to being my own boss.**

Rather than pursuing an experimental marketing plan of putting my father's enlarged West Point photo on one side and Marx's picture on the other, I went into partnership with another Marks, one much more skilled and excellent, and very much a non-Marxist. (Photo from the public domain). For many years before law school, I dreamed of being my own boss. Nine years passed after law school before I took the leap with my law partner, Jay Marks. Lawyers tend to become their own bosses for one or more of the following reasons: being the master of their own domain; controlling the quality of work performed and the types of cases accepted (and rejected); higher income potential (with higher risk, as well); answering to clients and not to employers; and having insufficient legal job prospects. My motivation for becoming my own boss came from the first two factors, as well as a preference for having more control over my own financial destiny, including not only leaving the world of employers deciding my income, but also entering further into the world of providing pro bono and low bono work at my discretion, without others objecting. Taking the leap to self employment felt -- and still feels -- more empowering and exciting than fearsome. This feeling of optimism was enhanced by joining forces with Jay, rather than hanging my own shingle all by myself. From the very beginning, we have worked together as a yin-yang harmonious whole. Awhile before I knew Jay was interested in having his own law firm, my father asked me about my plan for obtaining clients. I told him that my ideas included enlarging his West Point graduation picture, and putting the same-sized picture of Karl Marx on the other revolving side, so that I could flip the image over depending on the potential client visiting my office. Not only did I never follow up with that, I am not a cheerleader for the military, nor a fan of Marx. Although I did not know it when we opened our firm in 1998, the Internet has been one of the numerous sources of many of our clients -- in addition to recommendations from lawyers, non-lawyers and former and current clients -- through such cyber-corners as our website, which we launched in 1999; the numerous online news articles covering the legal views of me and Jay; and our interaction on various lawyers' e-mail listservs. We spend little money on traditional advertising, and our website and blog costs are limited, since we do most of the Internet work in-house, supplemented with the technical know-how and technology of Daytona Networks. Among the most important inspirations for me finally to have become my own boss was my experience at the Trial Lawyers College, where most of the attendees ran their own law firms as solo and small firm practitioners, and where many of them cheered me on to do the same. With Jay, my Trial Lawyers College connections, fellow zealous criminal defense lawyers, and numerous other kindred spirits and kindred organizations, I always feel empowered and never alone.

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

Friday, February 9, 2007

**Maryland appellate lawyers on camera.**

Â (Image available for public re-use, as described here).Â Â Â Since late 2006, Maryland's highest court has been videotaping oral arguments, and posting them to the court's website. Here, one will see a rather congenial court (a court whose rulings I often have praised, and often cursed) -- as opposed to theÂ much higher pressure ofÂ U.S. Supreme CourtÂ oral arguments --Â the judges' red robes, an occasional Maryland twang, and a certain level of informality in line with theÂ state's smaller legal community as compared with the legal communities inÂ Washington, DC, and the most populous states.Â Â I have argued before this and other state and federal appellate courts. Both times before the Maryland Court of Appeals -- once arguing before the judges and another time arguing as amicus co-counsel -- I hit home runs with my respective legal teams. In *State of Maryland v. Taylor, et al.*, 371 Md. 617, 810 A.2d 964 (2002) -- argued after an excellent brainstorming session with the present chief Public Defender who argued the consolidated case and two of her colleagues -- the Court of Appeals handed down a landmark double jeopardy victory to our clients, which says that Maryland common law on double jeopardy prohibits a trial from going forward if a trial judge previously dismisses the case by relying upon facts outside the four corners of the criminal charging document. This is a particularly smashing victory in that it is counter-intuitive to theÂ general concept that jeopardy does not attach until the first prosecution witness starts testifying at trial. At oral argument in this case, the judges were as respectful as I have seen them with other parties. Â I served as co-amicus counsel inÂ *Pack Shack v. Howard County, Maryland*, 377 Md. 55, 832 A.2d 170 (2003). In *Pack Shack*, the Maryland Court of AppealsÂ rejected Howard County's backdoor attempt to keep out adult entertainment businesses through its ordinance that left a minuscule number of sites available to locateÂ current and future adult businesses. Â Fellow First Amendment lawyer David Wasserman was critical in bringing me up to speed on First Amendment law relating to adult entertainment zoning and licensing, before I went on to challenge numerous other laws aimed at curbing adult entertainment.Â The amicus briefÂ we authored grabbed the court's attention that the challenged ordinance unconstitutionally required the disclosure of the identities of too many owners and financially interested parties in proposed and existing adult businesses. Our amicus brief was the only filingÂ to address this issue head on, to the point that the concurring opinion found that the "clearest statement of this issue is located in the Amicus brief filed by [our client] Free Speech Coalition of the District of Columbia, Maryland and Virginia."Â As an aside, the first time I visited the *Pack Shack* video store was after this Court of Appeals victory. On my way from the nearby county courthouse, I decided to see this store that was the subject of such a strong First Amendment victory. Like many of the store's competitors, it looked rather drab (aside from the contents of its merchandise). I went up the clerk behind the plexiglass window on that slow morning, and told him how happy I was that the store won its right in court to stay open. He was totallyÂ uninterested, told me he had no idea what I was talking about, and returned to his business. Just as it should be,Â a court victory preserving the First Amendment status quo, even if that includesÂ a drab store and a non-plussed front desk clerk.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, February 8, 2007

**Abolish the death penalty.**

Death penalty: Always unjust. Following up on our February 6 posting, Texas executed James Jackson yesterday, February 7. This is the fourth execution of the year in Texas, which has cornered the market for this year's executions, after having carried out nearly half of last year's fifty-three executions in the United States. Since the Supreme Court enabled executions to resume in 1976, over 1060 people have been executed in the United States. A disproportionately high number of people executed are not white (over 40%). The death penalty machine has favored executing those who have killed white people, at the rate of eighty-one percent. These and other statistics are available on the website of the National Coalition to Abolish the Death Penalty. The death penalty is racist in effect, and too riddled with racism in intent, starting with America's shameful history of racism that does not automatically stop at the door to the jury deliberation room. The prosecution, overall, is better-funded than the defense side for litigating death penalty cases from the trial stage to the habeas corpus stage. Such defense is so expensive that few defendants have their own funds to hire competent counsel, and rely on government-funded and volunteer counsel. While many excellent strides have been made to improve the availability of quality death penalty defense representation, there remains a long way to go, including at the habeas corpus stage (see here, too). The death penalty system is staggeringly expensive, without being much of a deterrent, if any. Fortunately, the death penalty abolition movement has grown and has continued to chip away at the death penalty machine, and many qualified lawyers -- often from some of the nation's largest and establishment-entrenched corporate law firms -- have heeded the American Bar Association's call to volunteer for death penalty defense work. I will close here with gratitude to the many skilled and dedicated lawyers -- many too unsung, and many at substantial financial sacrifice -- who toil away in the pits, one capital defense client at a time. Their list is long, and I name here three who are among my best role models from that group: The first such lawyer I met was Steve Bright, who has long directed the Southern Center for Human Rights in Atlanta, Georgia. I first met Steve in 1991 at a reception at the American Civil Liberties Union's Washington, DC, legislative office after a death penalty oral argument. I was chomping at the bit to move beyond my first law firm -- which at least indirectly helped people by representing housing finance concerns, among other clients -- to do more enlightened work. When I asked Steve if he knew of any enlightened for-profit law firms, he said no, but then pointed me to an enlightened local three-lawyer private law firm lawyer -- who is now a D.C. Superior Court judge along with his former partner. I later also spoke with his law partner, who encouraged me to get out there and try cases. I joined the Maryland Public Defender's Office three months later, and thank lawyers like Steve for inspiring me to take the leap and initial paycut on my path to being a criminal defense lawyer. Also at this reception was Bryan Stevenson, the Executive Director of the Equal Justice Initiative of Alabama. He is kindness and devotion personified. Once asked by an interviewer what he would do if he lived to see the death penalty abolished, Steve thought he might focus on playing music. I look forward to his getting that opportunity. Around 1993, I was floored by the amazing Andrea Lyon, and was floored again the next year when, at the National Criminal Defense College, she did a first-person opening argument for a murder defendant claiming to have been a battered spouse. None of her many capital defense clients ever received a death penalty verdict. When people ask me how can I defend "those people", the example of Andrea Lyon provides the natural answer. Jon Katz.

Posted by Jon Katz in Criminal Defense at 05:00

**Supreme Court confirms juries' critical role with sentencing-related facts.**

Justice Ruth Bader Ginsburg wrote the majority opinion in *Cunningham v. California*. (Image from Library of Congress website). In January, the Supreme Court further confirmed juries' critical role in determining sentencing-related facts. The case is *Cunningham v. California*, \_\_\_ U.S. \_\_\_, 2007 U.S. LEXIS 1324 (Jan. 22, 2007). Under *Cunningham* enhanced sentences are improper if based on judicial factfinding rather than on jury factfinding reached beyond a reasonable doubt (at least where a jury trial is available in the first place): "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham*, slip op. at 17. In the *Cunningham* six-justice majority upholding the Sixth Amendment right to a jury trial are Chief Justice Roberts and Justices Stevens, Scalia, Souter, Thomas and Ginsburg. Thanks particularly to the conservative Justices Roberts, Scalia and Thomas for being true to the Sixth Amendment, as well as to Justices Stevens, Souter and Ginsburg. The dissenters are Justices Alito, Kennedy, and Breyer. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

**Mistrial declared in refusal to deploy to Iraq.**

Following up on our February 5 posting about Ehren Watada's court martial for his refusal to deploy to Iraq, today the judge declared a mistrial. It appears that Mr. Watada's lawyer arranged to plead not guilty on an agreed statement of facts. Lt. Col. John Head, the presiding judge, declared the mistrial after the defense would not have Mr. Watada answer the judge's questions about what this news article calls "potential inconsistencies with a 'stipulation of fact' that Watada agreed to before the trial began." More details are in this Associated Press article. It now appears either that the case will proceed without an agreed stipulation of facts, with a new agreed stipulation of facts, or with Mr. Watada's finally agreeing to answer the judge's questions to assure Mr. Watada is knowingly and understandingly agreeing to the stipulation, which would seem to amount to his waiver of his right to contest each and every fact alleged by the prosecutor. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, February 7, 2007

### **Sixth Circuit upholds the First Amendment.**

The First Amendment is not limited to genteel speech. (From the public domain).Â Government officials serve at the pleasure of the voters, and not the other way around. Consequently, the majority of a three-judge federal Sixth Circuit panel reinstated Thomas Leonard's First and Fourth Amendment lawsuit against police officer Stephen Robinson for unlawfully arresting Mr. Leonard for saying "god damn" during the citizen forum at a township council meeting. The case is a worthwhile read both for the First Amendment principles covered therein and for the discussion of governing disorderly conduct jurisprudence. The Sixth Circuit's February 2, 2007, opinion is here. Jon Katz.

Posted by Jon Katz in Criminal Defense at 02:00

Tuesday, February 6, 2007

**Boston cops and prosecutors throw a cream pie in their faces.**

Here is what apparently caused the Boston hubbub. This video comes from the website of one of the two men who put up the message boards. During the four years that I studied and worked in and around Boston through 1985, I got to know many of its highways, bridges, and neighborhoods. Even in that context, I am left scratching my head why Boston police and prosecutors have turned to the criminal law to address First Amended-protected speech involving promotion of a television show, no matter how tasteless was the promotion and no matter how much fear and expense the promotion caused. Last week, fear ran rampant in Boston from signboards for a television show promotion, with many worrying that these were terrorist devices. Even if the fear of many was legitimate -- and such hysteria did not strike other cities where the signboards were placed, possibly because the signboards were placed in more suspicious places in Boston, or perhaps they were not -- the prosecution of the two who placed the signboards is not. The pair apparently is being prosecuted for violating Massachusetts's hoax device law, which provides as follows: Ann. Laws of Mass. GL ch. 266, § 102A1/2. Possession of Hoax Device. "(a) Whoever possesses, transports, uses or places or causes another to knowingly or unknowingly possess, transport, use or place any hoax device or hoax substance with the intent to cause anxiety, unrest, fear or personal discomfort to any person or group of persons shall be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than five years or by a fine of not more than \$5,000, or by both such fine and imprisonment." (b) For the purposes of this section, the term "hoax device" shall mean any device that would cause a person reasonably to believe that such device is an infernal machine. For the purposes of this section, the term "infernal machine" shall mean any device for endangering life or doing unusual damage to property, or both, by fire or explosion, whether or not contrived to ignite or explode automatically. For the purposes of this section, the words "hoax substance" shall mean any substance that would cause a person reasonably to believe that such substance is a harmful chemical or biological agent, a poison, a harmful radioactive substance or any other substance for causing serious bodily injury, endangering life or doing unusual damage to property, or both." (c) This section shall not apply to any law enforcement or public safety officer acting in the lawful discharge of official duties." (d) The court shall, after a conviction, conduct a hearing to ascertain the extent of costs incurred, damages and financial loss suffered by local, county or state public safety agencies and the amount of property damage caused as a result of the violation of this section. A person found guilty of violating this section shall, in all cases, upon conviction, in addition to any other punishment, be ordered to make restitution to the local, county or state government for any costs incurred, damages and financial loss sustained as a result of the commission of the offense. Restitution shall be imposed in addition to incarceration or fine; however, the court shall consider the defendant's present and future ability to pay in its determinations regarding a fine. In determining the amount, time and method of payment of restitution, the court shall consider the financial resources of the defendant and the burden restitution will impose on the defendant." The foregoing criminal law is limited to using devices that could reasonably be seen as explosive or capable of causing fire, and that are possessed or used with the intent to cause fear. The police and prosecutors are overreaching to use such a law against people who at worst were involved in a television show promotion that may have been in bad taste. (After writing this last sentence, I watched the above video, which I consider to be very entertaining and not in bad taste). The last time I checked, the First Amendment protects bad taste, as it should, but that also means we are forever saddled with Muzak. Jon Katz. **ADDENDUM I** By the afternoon of February 5, 2007, Turner Broadcasting and the Massachusetts attorney general reached a \$2 million settlement to avert any civil or criminal liability against Turner Broadcasting and the marketing company involved in the promotion that gave rise to this incident. However, separate from this \$2 million settlement is the status of the two gentlemen being prosecuted for placing the signboards in various locations in and around Boston. The state attorney general's office continues discussions with their attorneys. A robust First Amendment comes at a high price, and it appears that the Massachusetts government has been trying to pass along that price in contravention of the First Amendment. **ADDENDUM II** The two men who posted the signboards are being prosecuted not only for violating Massachusetts's hoax device law, but also for disorderly conduct. The Constitution is more valuable than gentility. However, courts repeatedly permit disorderly conduct convictions to enforce gentility and public obedience to police and other official powers.

Posted by Jon Katz in Criminal Defense at 02:00

**New York, New York, a hell of a town.**

A gritty Manhattan street scene, before the mall-ification of Manhattan accompanied by mushroomed police stops and random subway searches. (Image from the public domain). When I lived in Manhattan for a year before starting law school in 1986, the subways did not suffer from post-September 11 random searches, Times Square was a gritty Times

Square as opposed to the outdoor shopping mall that it looks like today, and Giuliani had not yet swept homeless people out of Penn Station to present an illusion that New York City's homeless problem is better than it really is. Fast forward to today, when New York City police are stopping five times as many people as they were just five years ago, with half of those people being Black, as reported by the New York Times. Throw into the mix the 2006 New York City police killing of Sean Bell, the 1999 New York City police murder of Amadou Diallo, and the 1997 New York City police torture of Abner Louima. Outside New York City, many justice court judges in numerous smaller town pockets continue to regularly violate the Constitution. New York's slick advertising campaigns will not sweep this unresolved pattern of abuse of individual rights under the rug. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

### **Stop James Jackson's execution scheduled for February 7.**

Death penalty: Always unjust. The Texas government plans to execute James Jackson on February 7. The details are here. This page enables you to communicate your opposition directly. However, with time being of the essence, I recommend calling Texas's governor and other relevant authorities urging them not to execute Mr. Jackson. Of course, my goal here is to stop all executions, not just Mr. Jackson's. For accurate updates on other executions scheduled for this month, please visit the website of the National Coalition to Abolish the Death Penalty. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, February 5, 2007

**"We have been stripped of every defense," says Watada's court martial lawyer.**

Historical Court Martial room at Fort Scott. Today, Ehren Watada's court martial begins, for his refusal to deploy to Iraq, and for conduct allegedly unbecoming an officer for his alleged statements against Gulf War II. Mr. Watada offered to go to Afghanistan, instead, and refused conscientious objector status. Mr. Watada's trial judge has refused Mr. Watada's request to address the illegality of the Iraq war, and First Amendment protection of his statements for which he is being prosecuted. Regarding the judge's rulings, Watada's civilian lawyer said: "We have been stripped of every defense." "This is a disciplinary system, not a justice system. Otherwise, we would have been entitled to defend ourselves." Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

**"I must have because they found a glove there."**

The Fifth Amendment to the Bill of Rights prohibits a re-trial after an acquittal, unless the Separate Sovereigns doctrine allows otherwise. (From the public domain). The New York Times obtained a partial six-page transcript claimed by a person involved in the O.J. Simpson-Judith Regan never-broadcast interview to have been culled from four hours of filmed interview. Although Mr. Simpson has claimed that If I Did It was entirely hypothetical, why would his interview have included the following chilling memory lapse? "At one point during the interview, Mr. Simpson says: 'As things got heated, I just remember Nicole fell and hurt herself. And this guy kind of got into a karate thing.' It was then, he says, that 'I remember I grabbed the knife.' Later, asked about whether he had taken off a glove before handling the knife, Mr. Simpson says, 'You know, I had no conscious memory of doing that, but obviously I must have because they found a glove there.' Three main possibilities would seem to explain Mr. Simpson's discussing the murder in the first person and including a memory lapse (if, in fact, the New York Times obtained an authentic transcript and faithfully described it): he committed the murders and/or he wanted to increase sales of the book and/or he has no shame. As an aside, around 1984 I saw Mr. Simpson walking down a busy commercial street in Los Angeles. Some people were calling out to him, and he responded very affably, rather than withdrawing from the constant fame and recognition, as many celebrities do. The murder took place ten years later. In any event, Mr. Simpson is protected under the Fifth Amendment to the Constitution from being re-tried criminally for the murders of Nicole Brown Simpson and Ronald Goldman, and I agree fully with this Double Jeopardy protection. A civil jury found he committed the murders, and he still has a \$33.5 million civil court judgment against him. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, February 4, 2007

### **Pursuing the not guilty plea.**

DeKalb County, Indiana, Courthouse. (Republication permission granted by photographer Michael Walter). "Not guilty" is a phrase too many criminal defendants fear. As each year passes, it is easier for me to convince a client to plead not guilty, since the client knows I have years of experience and gut feelings to back up such recommendations. Last week, my client hit the bullseye by agreeing to plead not guilty to a drunk driving charge. Here is the case overview from the beginning: A police officer arrives at a car accident scene, sees our client there (not inside any car) among others, questions him, decides he was driving one of the two cars in the accident, and ultimately arrests him for drunk driving. Last week, we go to court, tell the prosecutor our client rejects her offer to plead guilty to drunk driving, and proceed to trial. I make some legal arguments and objections about efforts to show my client was a driver during the collision. Around fifteen minutes into trial, the judge calls me and the prosecutor back to his office. After the police officer has already testified that my client said "he hit her," the judge asks if the prosecutor is going to have any further information to present to show our client was driving. The prosecutor has no further information to present, at least not as of this time. The judge advises the parties to try to "work out" the case. So as not to give the judge a chance to change his mind about the weakness of the prosecutor's case -- and I see a real risk that the judge will change his mind -- I convince the prosecutor to agree for my client to pay a fine for negligent driving, which is one of the least serious of Maryland's traffic laws. It carries no jail exposure and one point off one's license (three points if there is a collision). The judge gives a probation before judgment, which means no points will be assessed against our client. Obtaining this victory required staying in court all morning and into the afternoon for our trial to start. Most misdemeanor courts handle trials last, so I schedule my calendar accordingly. Jon Katz.

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

Friday, February 2, 2007

**What I saw at the Libby trial.**

Â Â Is Scooter Libby the pawn of Dick Cheney? (From the public domain). Â This follows up on my January 31, 2007, blog entry on the Scooter Libby trial. Having finished court early on February 1, I visited the overflow large-screen video viewing room for some of Scooter Libby's trial at the nearby federal court. I did not catch any testimony, but instead watched arguments over the admissibility of statements to the press by former White House press secretary Scott McClennan, as part of the prosecution's efforts to counter Libby's contention that some of the president's people were trying to make him a scapegoat, or to throw him under the bus as his lawyer phrased it. Â During that brief forty-five minutes, I experienced nothing earth-shattering. The lead lawyers looked competent; the prosecutor looked like he had some ants in his pants at some points in addressing the judge -- and it was not in reaction to the judge's giving him a hard time, because the judge was not doing that -- but I have no basis of comparison to his demeanor during the rest of this case or elsewhere. In any event, the goal of winning a case is persuasion; so long as occasional ants in the pants do not interfere with persuasion, then it is not an issue. Â Mr. Libby has lawyers from several large corporate law firms defending him, according to the case docket. Unless his lawyers are working pro bono or low bono, his legal bill is huge and mounting. Hourly rates of partners at such law firms often are at \$500 or more. Sometimes less is more; this case does not seem to be complex enough to require so many people at the defense table. Even with his more complex case, O.J. Simpson probably won his criminal murder trial despite having had so many lawyers rather than because of it. In any event, even though I am far from fond of the Bush Administration, I am rooting for Libby to win. This prosecution focuses on his alleged lies about when he learned Valerie Plame was a CIA agent. Â In any event, as much as I want Bush out of office, I will be more than happy to see Mr. Libby acquitted. His indictment accuses him of lying to law enforcement and the grand jury investigating how and when Valerie Plame's CIA employment status got leaked to the press. I have uploaded the indictment here. So long as the criminal justice system remains as unjust as it has long been, it will be difficult for me to want to see convictions for such alleged crimes. Even if I conclude that Mr. Libby did tell any or all such lies, I still will feel the same. Â In any event, it is curious that Mr. Libby decided to testify before the grand jury. All court witnesses have the option to take the Fifth Amendment, unless their testimony is fully immunized. Similarly, he had no obligation to talk with law enforcement. In any event, what is done is done. Â Back to the ongoing Libby trial, for anybody wishing to attend, it is on the sixth floor of the District of Columbia federal courthouse. Camera phones must be checked at the entrance (which is better than the Alexandria federal courthouse, which prohibits all cellphones and palm pilots). The security people tell visitors to remove everything from their pockets before entering a bizarre pod-like area, where they must raise up their hands to be body-scanned. (I have not asked if the scanner leaves any of one's anatomy to the imagination; the security personnel claim the scanner is safe and emits no x-rays, but then again, some doctors in the 1950's claimed health benefits of tobacco). Â The trial may be viewed in the trial courtroom or in the adjacent overflow viewing room that has a big-screen four-view monitor. People may not enter or exit the main courtroom when proceedings are taking place. I was unable to get a seat in the main courtroom -- although I visited the main courtroom during a break -- because all but two rows had "reserved" or press signs there. However, an employee of the court told me in the hallway that she would try to assure that people knew that five rows were available to the public. The only reporter I recognized was NPR's Nina Totenberg. Â Meanwhile, here is Valerie Plame's and Joseph Wilson's federal civil Complaint against Libby, Rove and Cheney. Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, February 1, 2007

**Marijuana is medicine, and can even reverse munchies.**

Image from public domain. Marijuana is medicine. GW Pharmaceuticals is among the business world members confirming as much. Now, ironically, the plant that brought us munchies (and, thus, vital relief to chemotherapy patients who otherwise have trouble wanting to eat and keeping food down) has been re-processed so as to curb appetites in the pursuit of weight loss. As GW Pharmaceuticals' Managing Director Justin Gover tells it: "The cannabis plant has 70 different cannabinoids in it, and each has a different affect on the body." "Some can stimulate your appetite, and some in the same plant can suppress your appetite. It is amazing both scientifically and commercially." More important than helping weight loss, GW Pharmaceuticals also produces the cannabis-based Sativex, which reduces spasticity in multiple sclerosis patients. With all the strong evidence about marijuana's medicinal benefits and with a Democratic-controlled Congress, now is a particularly good time to push for further reform of marijuana both on the medical and recreational use levels. Jon Katz.

Posted by Jon Katz in Drugs at 00:00