Monday, April 30. 2007

Lucy van Pelt lurks in Cary, Illinois / Stephen King on the Virginia Tech murderer.

Â Image from National Park Service's website.Â Lucy van Pelt repeatedly egged on Charlie Brown to kick the football she held, with CharlieÂ each timeÂ being foolish enough to hold out hope that once and for all she would not pull the ball away, only to fall on his back each time. Â That fiction was replaced last week by Orwellian fact when straight-A Cary-Grove, Illinois,Â High School student Allen Lee -- with no history of mental illness -- dutifully followed his teacher's instructionÂ to "write whatever comes to your mind. Do not judge or censor what you are writing,"Â with the first few lines and last lineÂ of Mr. Lee's writing (here is his essay and his commentary on it) resembling a page from Stephen King, or one of his twisted characters. Â What was Mr. Lee's reward for following his teacher's instructions not to censor his writing? He ended up beingÂ prosecuted criminally with disorderly conductÂ (specifically, two counts of disorderly conduct). Also, on Monday, April 30, the school board will discuss possible disciplinary action against Mr. Lee. To boot, the Marines will no longer accept Mr. Lee's previously-anticipated October 2007 entry, not at least pending the outcome of his disorderly conduct prosecution. Someone(s) at Mr. Lee's school apparently wanted to have their cake (have Mr. Lee follow his teacher's instructions to a T) and eat it, too (upon regretting the assignment to Mr. Lee in this post-Virginia-Tech-massacre atmosphere, make Mr. Lee the scapegoat for the teacher's assignment, with a criminal prosecution). Â The Illinois code's disorderly conduct provision thatÂ most closely applies toÂ Mr. Lee's situation does not appear to apply to him: "A person commits disorderly conduct when he knowingly ... [d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace."Â 720 ILCS 5/26-1(a)(1)Â Â (emphasis added). This disorderly conductÂ provision is a Class C misdemeanor, which carriesÂ up to thirty days incarceration. 730 ILCS 5/5-8-3.Â The statute is unconstitutionally vague and overbroad for its coverage of doing "any act in such an unreasonable manner". Moreover,Â a person cannot be found guilty under the statute unless one provokes "a breach of the peace," which would have been absent here, where Mr.Â Lee merelyÂ fully followedÂ the instructions of his creative writing teacher.Â To prosecute Mr. Lee for his essay would also violate the First Amendment. Mr. Lee asserts he was writing fiction as to the violent passages of hisÂ essay, and the contents of his essay support that assertion. To permit Mr. Lee to be prosecuted for his essay would permit Stephen King to be prosecuted for many of his murderousÂ tales that very well could give graphic ideas to murderers, includingÂ Skeleton Crew's (1985)Â "Cain Rose Up" (written when Mr. King was in college), about a murderous college student on a campus shooting spree, which sounds frighteningly familiar after the Virginia Tech murders.Â In fact, in commenting on the Virginia Tech murders, Mr. King said: "'Certainly in this sensitized day and age, my own college writing would have raised red flags, and I'm certain someone would have tabbed me as mentally ill because of them." Â Although the Supreme Court permitsÂ many more First Amendment limitations on school grounds than off, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260Â (1988), (1) such limitations on in-school speech do not reduce Mr. Lee's First Amendment defenses against his disorderly conduct prosecution (and the First Amendment, by itself, should prevent this prosecution), and (2) for the foregoing reasons, he simply should not be disciplined for his essay.Â Â Jon Katz.Â ADDENDUM: This blog entry was substantially updated on April 30, 2007, at 8:30 a.m. (EST).

Posted by Jon Katz in Criminal Defense at 08:15

A kiss is just a kiss... unless it's in public in India.

India map reprinted under GNU Free Documentation License.Â No matter how rampant is the injustice in the United States criminal justice system, the situation ordinarily is worse abroad. Following is an example from India. Â Film stars Richard Gere andÂ Shilpa Shetty have arrest warrants against them for alleged obscenity, after he hugged and kissed her repeatedly on the cheek, in a poor recreation of sorts from the Shall We Dance movie in which he starred. The maximum possible penalty is three months in jail. The video is here, including shouts of approval from the audience.Â It is one thing for people to insist on maintaining the centuries-long general custom against public displays of romantic expression in India. It is quite another to prosecute Gere and Shetty for obscenity. Â Richard Gere kissed Shilpa Shetty at an AIDS awareness event before four thousand truckers. Being mobile, truckers are a key source of the nationwide epidemic spread of HIV/AIDS in India. A Harvard AIDS Review report says that: "The truckers' practice of hiring sex workers en route stems not only from the extended periods of separation from their wives, but also from the prevalent myth that spending long hours behind the truck's engine heats up the body. Many truckers believe they can rid themselves of this harmful heat by having frequent sex."Â One Time magazine reporter, originally from India, pointed out that a smaller city magistrate issued the arrest warrants, doubts the arrest warrants will be served on Gere and Shetty (how he knows that, I do not know), andÂ anticipatesÂ this whole affair will blow over soon enough. Although some demonstrators have been burning Richard Gere's figure in effigy, it appears that plenty of establishment people oppose the obscenity prosecution, includingÂ the Indian Express.Â Richard Gere is not likely to stay out of India to avoid being

served any arrest warrant, seeing that he frequently visits the Dalai Lama at his exile base in Dharamsala, India. Ms. Shetty is India-based both professionally and personally, and will not be staying out of the country, either. Jon Katz.

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

Sunday, April 29. 2007

That's right, folks. Don't touch that dial.

Â Years ago, law firm practice and marketing for many lawyers became a business like any other. (Image from U.S. Postal Service's website).Â Today, even many large corporate law firms pursue aggressive, public advertising campaigns. Not long after I was assaulted by low-grade ads by a personal injury lawyerÂ at the Albuquerque airport a dozen years ago, I saw a dignified yet very public poster-size adÂ at National AirportÂ by a large corporate law firm that pays some of the biggest starting salaries for new lawyers coming from top law schools with the most polished grade transcripts and law review credentials.Â Â Then came the Internet, and yellow page salespeople began to sweat that plenty of advertisers would recognize that many Internet users would not even want a bulky yellow pages at home; so they added online yellow page listings to their shtick. Â In 2002, a lawyer named Robin Ficker -- whom I have frequently seen in local courts, and who wouldÂ heckle opponents of the then-named Washington Bullets from hisÂ season's seatÂ -- won a well-deserved First Amendment victory against a Maryland law severely limiting when lawyers could start sending direct-mail solicitations to criminal defendants. Ficker v. Curran, 119 F.3d 1150 (4th Cir. 2002). This opened up the floodgates for lawyers in Maryland and other states in the federal Fourth Circuit to send out direct mail to criminal defendantsÂ not long after the ink has dried on criminalÂ charging documents.Â Â My law partner Jay and I have managed to limit our marketing primarily to keeping active in the legal and non-legal communities, our frequent media appearances, and our web presence.Â We have avoided direct mailing, broadcast advertising (other than the weekend legal radio show we previously hosted), and large marketing budgets.Â Nevertheless, as a First Amendment zealot, I have always supported erring on the side of providing too much free expression protection for lawyer advertising -- and all other advertising --Â than too little. Â Many members of the public probably look askance atÂ the ads hereÂ (thanks to TNCLS for the link), here, and hereÂ (and another one I saw while in Norfolk to take the bar exam, with currency falling from the sky) that have appeared for Lowell "The Hammer" Stanley's firm.Â Lowell's websiteÂ -- I know and like him from the Trial Lawyers CollegeÂ -- includes coverage of his advertising approach.Â His ads seem mild compared to this oneÂ and othersÂ from Jim "The Hammer" ShapiroÂ in Rochester. Â The First Amendment being the First Amendment, it goes without saying that I firmly dissented when the District of Columbia Trial Lawyers Association got behind a somewhat weak law against lawyers' use of runners to find personal injury clients. The approach of many of the runners apparently was to monitor police radio runs, go to accident scenes, and offer a ride to the hospital (sometimes followed by a ride to the runners' lawyer's office), sometimes in a luxury vehicle to go in style. I know and like a lawyer whose law firm has frequently used runners, and also know and very much like one of the lawyers who spearheaded the DCTLA's anti-runner effort.Â It has been a hot button issue.Â Â Another side of lawyer marketing is one that consumers rarely know about, involving lawyers marketing to other lawyers. Where I practice law, the governing professional responsibility rulesÂ do not permit fee splits with referring lawyers without the referring lawyer's only taking a fee commensurate with the work s/he has put into the case, or if the client consents to the fee-splitting arrangement in writing and if the referring lawyer shares responsibility over the case. Â In any event, some lawyers market their claimed referral arsenal with a vengeance, often seeking hefty percentages running as high as one-third of the attorney fee. Many calls also originate from people claiming to be lawyers or from firms (but not law firms) looking to refer cases in the geographic area of theÂ lawyer they are calling, onlyÂ forÂ the caller to reveal much later in the call that the referrals would be from peopleÂ responding to generic ads (and perhaps outrageous ads, too) on late-night television, or that "exclusive" geographic areas are being sold on marketing websites. We have rejected all such cold calls, and the caller's purpose usually becomes obvious early in the phone call. Â I have heard the theme that established and establishmentÂ lawyers can easily push for clampdowns on lawyer advertising, because they already have established reputations or can communicate their services in alternative ways to potential business clients (e.g., by speaking at their conferences and getting articles into their professional journals), as opposed to the absence of such communications avenues forÂ criminal defense, personal injury and divorce lawyers.Â Curiously, in that regard,Â last year, the New Jersey Supreme Court's Committee on Attorney Advertising issued its ethics opinion number 39 barringÂ lawyers "from advertising they are in the 'Best Lawyers' or 'Super Lawyers' rankings and participating in the voting for such honors." Such a ban -- clearly in violation of the First Amendment -- certainly would affect lawyers from huge corporate white shoe operations to the smallest ofÂ firms. The ban was stayed pending state Supreme Court review. More articles on the ban are hereÂ and here.Â I have not found any developments on this stayed ban since this January 2007Â article. Â How much money and time do lawyers need to spend on marketing rather than on spreading their reputation through delivering excellent service to clients while looking out for the public interest at every turn (including providing pro bono publico services, and working for a fairer and higher quality justice and judicial system)? Some lawyers' names are so big that they do not need to do much marketing. On the other hand, I know a very capable and respected localÂ criminal defense lawyer in practice for fourteen years who publicly and unabashedly says that direct mail is a key way for him to assure he can earn a living.Â I doubt that he is alone in that view.Â On the other hand, as with all people marketing their services, not all lawyers stop their marketing at the lineÂ between earning a decent

living and an opulent one, and many lawyers (likeÂ those in many other professions) find themselves saddled withÂ larger overheads and loans to satisfy as they earn more income, as well as feeling the need to make and save as much money as possible today, lest the well dry up later. Â In any event, any lawyer who does any marketing needs to keep abreast of governing ethics rules and bar counsel actions affecting marketing, even if the lawyer is intent on challenging marketing limitations that trample on the First Amendment.Â Moreover, if lawyers ignore assaulting consumers' sensibilities with their marketing, the backlashÂ will boomerang to all lawyers.Â Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:05

Friday, April 27. 2007

Gerry Spence: Persuasion master.

Â For the first time, I have found an online video of Gerry Spence, here.Â I have interacted several times with Gerry through the Trial Lawyers College. He has very positively influenced my growth as a person and as a lawyer. Â Watch how Gerry paints powerful and persuasive word pictures in this video. He encourages lawyers to be their most persuasive by discovering and applying their own selves, their own realness, and their own magic, combined with fully understanding their opponents and the people they are trying to persuade. In other words, the goal is not for a lawyer to be another Gerry Spence, but to bring the lawyer's own power front and center, and to put up with the struggle and pain that almost inevitably go along with the process of harnessing the power of the Velveteen Rabbit. Jon Katz.

Posted by Jon Katz in Persuasion at 01:01

30 contempt days in jail for public defender fighting in the pits.

Instead of being allowed to fight to keep her client out of handcuffs, criminal defense lawyer Sherri Johnson instead was cuffed herself by the presiding judge. (Image from National Park Service's website). Â Earlier this year, a Georgia juvenile public defender lawyer was sentenced to thirty days in jail for contempt of court arising from her contesting the limitations placed by the judge on her cross examination of a cop. This story has been making its rounds, including byÂ Capital Defense Weekly and Gideon.Â Unfortunately, the Georgia Court of Appeals affirmed the lawyer's conviction, but not without a fight from three of its justices. In re Jefferson, 2007 Ga. App. LEXIS 391 (March 30, 2007). Hopefully Ms. Jefferson has appealed and will win before the Georgia Supreme Court. Â This dissent found as a matter of law that Ms. Jefferson's comments to the trial judge were not contumacious, and I agree. Here is the sum and substance of Ms. Jefferson's comments in question, quoted directly from the majority opinion of the Georgia Court of Appeals: Â "During the delinquency hearing, the prosecution sought to prove that B. W. had supplied the handgun used in the shooting and had encouraged the shooter to fire the handgun at the victim. As part of her examination of the law enforcement officer who had investigated the shooting, Jefferson attempted to question the officer about certain statements made to him by the alleged shooter, who had not yet testified. The prosecution objected on hearsay grounds, and the juvenile court sustained the objection. The juvenile court went on to suggest that in order to avoid the hearsay problem, Jefferson should first call the alleged shooter to the stand and question him about the statement, and then recall the investigating officer and question him about any inconsistencies in the shooter's statement. In response, Jefferson requested that she instead be permitted to continue questioning the officer about the shooter's statement and then call the shooter himself, rather than vice versa. When the juvenile court said thatÂ he would not allow her to proceed in that manner, Jefferson objected by stating, '[T]hat's a gross interference with the way that I can represent my client, Your Honor.'"Later during the examination, the officer testified that B. W. had told the shooter to fire the handgun and had 'egged it on.' Jefferson then asked, 'Can you show me in the shooter's statement where he told you that [B. W.] said shoot him?' The officer responded that '[i]t's not in the shooter's statement.' When Jefferson started to follow up on the officer's response, the prosecution objected on hearsay grounds to any testimony about what the shooter said or did not say to the officer. The juvenile court then ruled that he would give no probative value to any hearsay contained in the officer's testimony; after further discussion, the court also held that the police officer's report was inadmissible. The juvenile court then reiterated its ruling: 'I've already overruled your proffer of [the police officer's] report and also your efforts to get [the officer] to testify about his conversation with [the shooter].' When Jefferson continued to resist, the court commented that '[w]hat you're doing now isÂ making a closing argument,' and said that it 'had heard enough on this issue.' Jefferson then protested: 'I just find the Court is biased in its view. You say that you're not prejudging the case but it seems to me like you've made up your mind and any and everything that I do to effectively defend my client I'm being rebutted.'" In re Jefferson, 2007 Ga. App. LEXIS 391 (emphasis added).Â It is hard enough to be defending a client's liberty in the heat of battle than to be looking over one's shoulder about whether a non-contumacious comment will land the criminal defense lawyer in the same jail that s/he's trying to keep the client out of. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:02

Thursday, April 26. 2007

Recent Maryland criminal appellate opinions.

The Bill of Rights. (From the public domain.)Â Here is a rundown of some recent Maryland appellate decisions: Â A criminal charging document may nameÂ and physically describe aÂ John Doe victim where the victim's nameÂ is not known. Edmund v. State, __ Md. _ (April 17, 2007).Â Police may detain a person whose home is being searched, at least if the person is no more than twenty or thirty feet from the home. Williamson v. State, __ Md. _ (April 13, 2007). Â Almost hitting another vehicle is not legal grounds to stop the offending car, absent sufficiently stated reasonable articulable suspicion for negligent or reckless driving. Lewis v. Maryland, __ Md. _ (April 12, 2007).Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:20

A facially defective warrant amounts to no warrant at all.

The Bill of Rights. (From the public domain.)Â This follows up on my April 24 and 25 discussions of searches and search warrants. In 2004, the Supreme Court (1) confirmed that a facially invalid search warrant means the search was warrantless and (2) applied the same standard as would be applied where a warrant had never been sought nor obtained in the first place (in this instance, the Supreme Court invalidated the real property search conducted pursuant to this facially invalid warrant). Groh v. Ramirez, 540 U.S. 551, 563 (2004). Â In Groh, although the application for the search warrant specified the items to be searched and seized, the four corners of the warrant itself were silent on that matter. thus making the warrant facially and effectively invalid. Groh, 540 U.S. at 563. A search warrant application is completed and signed by a law enforcement officer and then submitted to a judicial officer with a proposed search warrant.Â The search warrantÂ application is separate and distinct from the warrant itself, which is signed by a judicial officer after reviewing the warrant application and taking any testimony (if at all)Â beyond the contents of the warrant application. Consequently, the Supreme Court held that the warrant in Groh was facially invalid.Â Dissenting JusticesÂ Thomas, joined by Justice Scalia, argued that even without a valid warrant, the search in Groh was lawful as having been a reasonable search. Groh, 540 U.S. at 577 (Thomas, J., dissenting). Fortunately, the opposite view prevailed. This is another example of why our votes for president are so critical, because the president decides whom to nominate to fill Supreme Court vacancies, which are lifetime positions.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, April 25. 2007

Recent Virginia Supreme Court opinions

Image from Virginia Forestry Dept's website.Â Virginia's Supreme Court releases a package of appellate opinions about every seven to eight weeks. Following is an overview of some of the court's recent key criminal decisions: Â - A passenger's possession of a bottle of illegal drugs -- without more evidence than that -- is insufficient for convicting the driver of joint possession of those drugs. Â Jordan v. Com., __ Va. _ (April 20, 2007). Â -Â A defendant's unauthorized retrieval of property seized by police does not constitute obstruction of justice, nor does physical resistance to being escorted by the police to and from the magistrate's office.Â Â Jordan v. Com., _ Va. _ (April 20, 2007).Â Â - "Penal statutes, however, must be construed 'in favor of a citizenâ€™s liberty.'" "Moreover, an accused cannot be punished unless his or her case falls â€œ'plainly and unmistakably within the statute.'â€• Washington v. Com., __ Va. _ (April 20, 2007). In this case, when the defendant was insisting on being transported immediately back to the jail from the courthouse, he told a deputy sheriff: "'[F]--- you. I will kill you, too.'â€• Â The Virginia Supreme Court reversed the Virginia Court of Appeal's affirmation of Washington's conviction for felonious obstruction of justice, because the prosecutor "presented no proof that, at the time Washington made the threatening statement, Deputy Bailey was engaged in the discharge of any duty 'relating to a violation of or conspiracy to violate' one of the felony offenses listed in that subsection."Â - "Here, because the improper evidence of other crimes was presented during the guilt phase of Youngâ€™s criminal trial, notin his sentencing proceeding, the remedy of a new sentencing proceeding afforded by Code Â§ 19.2-295.1 is inapplicable. Accordingly, we hold that the Court of Appeals erred in ordering that Youngâ€™s case be remanded solely for a new sentencing proceeding. Â "For these reasons, we will reverse the Court of Appealsâ€™ judgment and remand the case to the Court of Appeals for furtherremand to the circuit court for a new trial on the robbery indictment, if the Commonwealth be so advised." Leon v. Com., _ Va. _ (April 20, 2007). Â - The death penalty machine is alive and well in Virginia. In this affirmed murder for hire death penalty appeal, Virginia's Supreme Court listsÂ its precedents rejecting various challenges to Virginia's death penalty. Teleguz v. Com., _ Va. _ (April 20, 2007), slip op. at 15.Â - "[L]icensed clinical social workers who are authorized to diagnose mental disorders by statute in appropriate circumstances, may render expert testimony regarding such diagnoses. However, it remains incumbent upon the trial court to determine whether a particular licensed clinical social worker has the skill, knowledge, and experience regarding the pertinent subject matter to qualify as an expert." Conley v. Com., __ Va.Â _ (April 20, 2007). Jon Katz.

Posted by Jon Katz in Criminal Defense at 05:10

Recent Virginia Court of Appeals decisions.

Image from Virginia Forestry Dept's website.Â The Court of Appeals is Virginia's intermediate appellate court (not to be confused with Maryland's Court of Appeals being that state's highest court). Â Here is an overview of some recent key criminal decisions from the Virginia Court of Appeals: Â - Whither Boykin in District Court? This month, Virginia's Court of Appeals confirmed -- as required by the Supreme Court in Boykin v. Alabama, 395 U.S. 238 (1969) -- that â€œ'to withstand scrutiny on appeal, the record must contain an "affirmative showing" that the guilty plea was entered voluntarily and intelligently.' Hill [v. Com.), 47 Va. App. at 674, 626, S.E.2d at 463 [2006]." Cross v. Com., __ Va. _ (April 3, 2007).Â How does this four-decade-old mandatory rule jibe with just about ever Virginia District Court where I have appeared, where routinely judges (1) do not make any inquiry about whether the defendant is voluntarily and intelligently entering a guilty plea, and (2) ordinarily just ask the defense lawyer how the defendant will be proceeding?Â - Virginia's drunk driving Va. Code Â§ 18.2-266Â provides the basis for a permissive inference "'that the blood alcohol concentration while driving was the same as indicated by the results of the subsequent test.' Davis, 8 Va. App. at 300, 381 S.E.2d at 16."Â Yap v. Com., __ Va. App. _ (April 24, 2007). Yap appears to clarify that the above-quoted language from Davis, 8 Va. App. at 300, refers to a permissive inference, and not a rebuttable presumption.Â - Factors in distinguishing between possession with intent to distribute drugs and simple possession of drugs are discussed in Harper v. Com. __ Va. App. _ (April 10, 2007). Â - A nod,Â a search, and a robbery conviction. (Or, the perversion of "A Coke and a smile.") A majority of a debating Court of Appeals upheld the search of Defendant's closed backpack thatÂ turned up the smoking gun -- or in this instance, the smoking cellphone -- that connected him to a robbery to which heÂ entered a guilty plea on theÂ condition that the plea would be withdrawn if heÂ beat hisÂ suppression motion on appeal. Glenn v. Com. _ Va. App. _ (March 20, 2007). In Glenn , the defendant's grandfather -- who was unable to speak -- gave police consent to search his home with nothing more than a nod of the head together with a shake of the head to indicate the defendant did not pay rent to be there. (A vision comes to mind of the slow head-nodding and head-shaking coming from the headless ghost of Christmas Future in A Christmas Carol, and the outcome of Glenn is no less eerie and chilling). Â Based on this one nod, the Court of Appeals found that the police were permitted to search defendant's closed

backpack, without even making further inquiry about its ownership. I hope this case will go to Virginia's Supreme Court and be reversed there. Â Glenn addresses a search of closed containersÂ pursuant to the homeowner's consent, as opposed to such a case as California v. Acevedo, 500 U.S. 565 (1991), where the Supreme Court said: "The police may search an automobile and the containers within it [regardless of who may own the containers] where they have probable cause to believe contraband or evidence is contained." Acevedo, 500 U.S. at 580.Â - Drug chemist reports may be admissible in evidence where the chemist testifies, even when the chemist has no independent recollection of the particular drug test. Bell v. Com., _ Va. App. _ (April 17, 2007). In Bell, theÂ drug certificate of analysis was inadmissible without the chemist's testimony, because theÂ courtÂ and prosecutor sent the certificate of analysis to the defense lawyer beyond the timeÂ deadline for admitting the certificate withoutÂ live testimony from the chemist. Â Left undiscussed in BellÂ is the extent to which the certificate of analysis is admissible when offered into evidence by the prosecution, where (1) the certificate of analysis is requested by andÂ timely delivered to the defendant, (2) the defendant issues a subpoena for the chemist to testify, or otherwise demands that the chemist testify, and (3) the chemist has not yet presented testimony. If Virginia followed the District of Columbia's recent ruling in Thomas v. United States, 914 A.2d 1 (D.C. 2006) (discussed here), which analyzesÂ Crawford v. Washington, 541 U.S. 36 (2004) (which bars testimonial evidence from slipping through the hearsay rule), the foregoing circumstances would preclude the admission of the certificate of analysis into evidence without the chemist's testimony preceding the offer of the certificate into evidence. Â - A knife similar to a bowie knife may qualify as a concealed weapon. Gilliam v. Com., __ Va. App. _ (April 10, 2007). Gilliam not only provides detailed guidance for what qualifies as a concealed weapon, but even includes a picture of the knife and sheath involved in the instant case. Â - Unfortunate Brady/exculpatory evidenceÂ decision will encourage prosecutors to err on the side of disclosing too little pretrial discovery than too much. Garnett v. Com.Â __ Va. App. _ (April 10, 2007), provides dueling en banc judicial views about the type of evidence that constitutes exculpatory material that must be provided to the defense pretrial. Unfortunately, in this instance, the crabbed view of the definition of exculpatory evidence prevails. Â - Search incident to misdemeanor generally is impermissible. In Virginia, unlike in some other states, the police are generally prohibited from arresting for any misdemeanor (Va. CodeÂ Â§ 19.2-74), which prevents a search incident to to a non-arrestable misdemeanor.Â Moore v. Commonwealth, 272 Va. 717Â (2006). Consequently, a search finding cocaine incident toÂ an arrest forÂ suspended driving was unlawful,Â because suspendedÂ driving is a non-arrestable misdemeanor, unless, as with all misdemeanors, the defendant refuses to give his or her name and address together with a promise to return to court.Â Consequently, it was necessary to suppressÂ theÂ cocaine seized incident to the decision to arrestÂ the defendantÂ for driving with a suspended license. Cross v. Com., __ Va. App. _ (April 3, 2007).Â Â - Law governing variances between indictment and evidence presented. Evidence at a forged signature trial need not prove a bank account owner's identity, because the victim is the bank rather than the bank account holder. Stokes v. Com. _ Va. _ (March 13, 2007).Â Stokes addresses the difference between a fatal and non-fatal variance between the indictment and the evidence presented at trial:"As this Court held in Traish v. Commonwealth, 36 Va. App. 114, 549 S.E.2d 5 (2001): 'It is true that a variance between the allegations of an indictment and proof of the crime may be â€œfatal,â€• and â€œthe offense as charged must be proved." A variance is fatal, however, only when the proof is different from and irrelevant to the crime defined in the indictment and is, therefore, insufficient to prove the commission of the crime charged. 36 Va. App. at 134-35, 549 S.E.2d at 15 (quoting Hawks v. Commonwealth, 228 Va. 244, 247, 321 S.E.2d 650, 651-52 (1984)).'" Stokes , slip op. at 3.Â - WhenÂ business records contain multiple levels of hearsay. In the foregoing Stokes case, Stokes v. Com. _ Va. _ (March 13, 2007).Â the defendant forged the signature of Mr. Tucker, who passed away before the trial date. Over defendant's objection, and under the business records exception to the hearsay rule, the trial court admitted into evidence Mr. Tucker's affidavits of forgery. The Court of Appeals affirmed, without at all discussing the prohibitionÂ against the admission of testimonial hearsay at a criminal trial. Crawford v. Washington, 541 U.S. 36 (2004). Â How on earth the affidavits of forgery are not inadmissible testimonial hearsayÂ is beyond me. Moreover, the business records exception to the hearsay rule requires examining each level of hearsay for admissibility into evidence. With the affidavits of forgery, any notation that Mr. Tucker's appearance at the bank represented the first level of hearsay, but his claim that the withdrawals from his account (which were attributed to the defendant) were fraudulent represented the second level of hearsay. Stokes is silent about the need to examine each level of hearsay when a document is offered into evidence under the business records exception to the hearsay rule.Â Jon Katz.

Posted by Jon Katz in First Amendment at 04:58

One's home as one's castle, Part II.

The Bill of Rights. (From the public domain.)Â This follows up on yesterday's blog entry about warrantless searches. While writing yesterday's blog entry, I saw that, in his dissenting opinion in Hudson ,Â Justice Breyer last year compiled a list of "decisions from 1914 to present requiring suppression of evidence seized (or remanding for lower court to make suppression determination) in a private home following an illegal arrest or search." Hudson v. Michigan, __ U.S. _, 126 S. Ct. 2159, 2185Â (2006). Here is the list: Â "1. Weeks v. United States, 232 U. S. 383 (1914) (warrantless search); 2. Amos v. United States, 255 U. S. 313 (1921) (warrantless arrest and search); 3. Agnello v. United States, 269 U. S. 20 (1925) (warrantless search); 4. Byars v. United States, 273 U. S. 28 (1927) (invalid warrant); 5. United States v.

Berkeness, 275 U. S. 149 (1927) (invalid warrant; insufficient affidavit); 6.Â Taylor v. United States, 286 U. S. 1 (1932) (warrantless search); 7. Grau v. United States, 287 U. S. 124 (1932) (invalid warrant; insufficient affidavit); 8. Nathanson v. United States, 290 U. S. 41 (1933) (invalid warrant; insufficient affidavit); 9. McDonald v. United States, 335 U. S. 451 (1948) (warrantless arrest and search); 10. Kremen v. United States, 353 U. S. 346 (1957) (per curiam) (warrantless search); 11. Elkins v. United States, 364 U. S. 206 (1960) (search beyond scope of warrant); 12. Silverman v. United States, 365 U. S. 505 (1961) (warrantless use of electronic device); 13. Chapman v. United States, 365 U. S. 610 (1961) (warrantless search); 14. Mapp v. Ohio, 367 U. S. 643 (1961) (warrantless search); 15. Wong Sun v. United States, 371 U. S. 471 (1963) (warrantless search and arrest); 16. Fahy v. Connecticut, 375 U. S. 85 (1963) (warrantless search); 17. Aguilar v. Texas, 378 U. S. 108 (1964) (invalid warrant; insufficient affidavit); 18. Stanford v. Texas, 379 U. S. 476 (1965) (invalid warrant; particularity defect); 19. James v. Louisiana, 382 U. S. 36 (1965) (per curiam) (warrantless search); 20. Riggan v. Virginia, 384 U. S. 152 (1966) (per curiam) (invalid warrant; insufficient affidavit); 21. Bumper v. North Carolina, 391 U. S. 543 (1968) (lack of valid consent to search); 22. Recznik v. City of Lorain, 393 U. S. 166 (1968) (per curiam) (warrantless search); 23. Chimel v. California, 395 U. S. 752 (1969) (invalid search incident to arrest); 24. Von Cleef v. New Jersey, 395 U. S. 814 (1969) (per curiam) (invalid search incident to arrest); 25. Shipley v. California, 395 U. S. 818 (1969) (per curiam) (invalid search incident to arrest)Â "26. Vale v. Louisiana, 399 U. S. 30 (1970) (invalid search incident to arrest); 27. Connally v. Georgia, 429 U. S. 245 (1977) (per curiam) (invalid warrant; magistrate judge not neutral); 28. Michigan v. Tyler, 436 U. S. 499 (1978) (warrantless search); 29. Mincey v. Arizona, 437 U. S. 385 (1978) (warrantless search); 30. Franks v. Delaware, 438 U. S. 154 (1978) (invalid warrant; obtained through perjury); 31. Payton v. New York, 445 U. S. 573 (1980) (warrantless arrest); 32. Steagald v. United States, 451 U. S. 204 (1981) (warrantless search); 33. Michigan v. Clifford, 464 U. S. 287 (1984) (warrantless search); 34. Welsh v. Wisconsin, 466 U. S. 740 (1984) (warrantless entry into home without exigent circumstances); 35. Thompson v. Louisiana, 469 U. S. 17 (1984) (per curiam) (warrantless search); 36. Arizona v. Hicks, 480 U. S. 321 (1987) (unreasonable search); 37. Minnesota v. Olson, 495 U. S. 91 (1990) (warrantless entry into home); 38. Flippo v. West Virginia, 528 U. S. 11 (1999) (per curiam) (warrantless search); 39. Kyllo v. United States, 533 U. S. 27 (2001) (warrantless use of heat-imaging technology); 40. Kirk v. Louisiana, 536 U. S. 635 (2002) (per curiam) (warrantless arrest and search); 41. Kaupp v. Texas, 538 U. S. 626 (2003) (per curiam)(warrantless search)."Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:25

More bad news for federal firearms defendants.

Image from the Government Printing Office's website.Â On April 18, 2007, the Supreme Court affirmed a fifteen-year federal mandatory minimum sentence under the Armed Career Criminal Act (ACCA) -- the federal system has no parole -- for being a felon in possession of a firearm, with three qualifying predicate violent felony convictions. James v. U.S., __ U.S. _ (April 18, 2007).Â A five-justice majority determined that attempted burglary qualified as a violent felony convictionÂ that would be counted towards the fifteen-year mandatory minimum prison sentence. Why? Because, says the Supreme Court majority, (1)Â the applicable Florida attempted burglary statute requires an overt act towards committing a burglary rather than just mere preparation, and (2) the Florida crime of attempted burglary, therefore, "falls within the ACCA's residual provision for crimes that 'otherwise involv[e] conduct that presents a serious potential risk of physical injury to another.' 18 U.S.C. Â§ 924(e)(2)(B)(ii)." James v. U.S., __ U.S. _ . Serious? Serious as in "serious effort to win the lottery?" Legislators should be left to do the serious work of sufficiently defining crimes that form the basis of mandatory minimum prison sentences, rather than leaving courts with the work to determine applicable residual predicate crimes. Â Note that this case is another example that the Supreme Court's four most conservative justices will sometimes depart from each other on criminal law issues. In James , conservative Justice Alito wrote the majority opinion, joined by conservative Chief Justice Roberts, also joined by Justices Breyer (no surprise, considering how much he supports the governmental regulatory function), Kennedy, and Souter (who often votes with the court's more liberal Justices Ginsburg, Stevens and Breyer). Â Conservative Justice Scalia -- joined by Justices Stevens and Ginsburg -- penned a stinging dissent (as many of his dissents are), saying "The problem with the Courtâ€™s approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc." James (Scalia, J., dissenting). Conservative Justice Thomas insisted that ApprendiÂ prohibits courts, rather than juries, from determining the crimes that fit within the ACCA's residual clause: Â "For the reasons set forth in my opinion concurring in part and concurring in the judgment in Shepard v. United States, 544 U. S. 13, 27 (2005), I believe that â€œ[t]he constitutional infirmity of Â§924(e)(1) as applied to [James] makes todayâ€™s decision an unnecessary exercise.â€• Apprendi v. New Jersey, 530 U. S. 466 (2000), and its progeny prohibit judges from â€œmak[ing] a finding that raises [a defendantâ€™s] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant.â€• United States v. Booker, 543 U. S. 220, 317â€“318 (2005) (THOMAS, J., dissenting in part). Yet that is precisely what the Armed Career Criminal Act, 18 U. S. C. Â§924(e) (2000 ed. and Supp. IV), permits in this case." James Â (Thomas, J., dissenting).Â This James case points out how draconian is the federal sentencing and prosecutionÂ system, which cages countless presumed-innocent defendants pretrial, and warehouses countlessÂ convicted defendants for such lengthy time periods that too many federal criminal defendants see pleading guilty and snitching often as the only way around draconian mandatory minimum sentences and sentencing guidelines.

Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, April 24. 2007

Homes as castles and cars as downhill skateboards.

Image from National Institute of Standards & Technology. Â United States courts generally treat one's home as the closest thing to one's castle, by makingÂ limited exceptions for warrantless home searches. (On the other hand, search warrants ordinarily are too easy for police officers to obtain, with the honesty of warrant applications generally taken by judicial officers at face value; fortunately,Â defendants are permittedÂ to challenge warrants at suppression hearings and on appeal). Â In relation to private homes, cars tend to be afforded no more privacy thanÂ a skateboard headed downhill, with car drivers being oppressed byÂ the Supreme Court's unholy triumvirate of Whren v. U.S., 517 U.S. 806 (1996), Atwater v. Lago Vista, 532 U.S. 318 (2001),Â and New York v. Belton,Â 453 U.S. 454 (1981) -- all detailed below --Â together with exposure to invasive field sobriety checkpoints,Â hassling drunk driving investigations even for a faint odor of alcohol consumed long beforehand, lengthy moving violation stops while the cop presumably checks one's license for open warrants and the car for any stolen vehicle report (sometimes with a drug dog sniff thrown in, to boot), and an almost inevitable search of the car and its occupants for even the slightest alleged whiff of the smell of smoked marijuana.Â Under Whren, the police may stop a car under the pretext of a moving violation, even when the cops' intention is to investigate the violation of drug lawsÂ or other criminal laws that have nothing to do with speeding and other moving violations. Unfortunately, WhrenÂ will encourage police prevarication about moving violations to justify car stops. At hearings to suppress car stops, judges ordinarily will believe the cop more than the testifying defendant, at minimum figuring the cop has less at stake to want to lie than the defendant (which I vehemently dispute). Furthermore, even ifÂ a suppression hearing judgeÂ finds neither the cop nor the defense witnesses any less credible than the other, the judge still may find that where credibility is in equipoise, that does not eliminate probable cause or reasonable suspicion to stop the car (for instance, a judge may find that a police officer can haveÂ reasonable suspicion to believe that a car's tintingÂ exceeds the legal limit even if the defendant provesÂ that the tinting did not exceed the legal limit (at least where the tinting comes close to the legal limit)). Â UnderÂ Atwater, the Constitution does not preclude police from arresting and taking a person into custody for committing a non-jailable traffic offense (for instance, an unlawful U-turn). (Fortunately, the law in such states as Virginia prohibits such arrests for non-jailable moving violations). AtwaterÂ will encourage more pretextual car stopsÂ under Whren, in order to give police the opportunity to arrest people forÂ non-jailable traffic violations, and to search both the arresteeÂ and the arrestee's car incident to arrest.Â Illinois v. Rodriguez, 497 U.S. 177, 186Â (1990) (permitting warrantless searches incident to arrest); Belton,Â 453 U.S. 454 (permitting warrantless car passenger compartment searches incident to arrest). Alternatively, after making a lawful car stop, a police officer may be able toÂ conduct a car inventory search if the police officer determines that the car is not current on mandatory inspections, if the driver does not have a current license, or if nobody is able to drive the car away immediately (for instance, if the officer arrests the driver under Atwater). Â Fortunately, drivers and passengers do not automatically lose all rights by being stopped in cars. For instance, see here (our rights page) and hereÂ (Flex Your Rights' Busted video). Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:15

Bumping into neocons.

Â Washington's no place to live or work if you're going to lose your lunch every time you pass by a neocon. (Image from White House's website).Â With Paul Wolfowitz much in the news over allegedly using his World Bank leadership for improper favoritism for his companion, here is a brief overview of myÂ short interactions withÂ Mr. Wolfowitz, and my avoidance of his fellow neoconservative Dick Cheney. Â I twice bumped into Paul Wolfowitz at the Bethesda YMCA around 2000, before he returned to government with the Bush II administration. He was a gentleman and a good listener, even after I told him that I let my prejudice against Reagan flow to him when he served under that administration. He did not seem bothered by my view, and was happy to tell me of his own, includingÂ how much he supported Reagan policy in the Philippines (during which timeframe?).Â I did notÂ know at the time that Bush II would win the presidency, and would make WolfowitzÂ such a key player inÂ Gulf War II. Â Â Four years later, I attended the 2004 National Rifle Association convention in Pittsburgh, to figure out where the NRA fit with my strong support for robust Second Amendment protection, and to get a closeup view of firearms and firearms trends, seeing that part of my criminal defense practice includes weapons defense. I left the meeting recognizing more than ever how much the NRA loves a presidential administration (Bush II) that I do not, and how much the NRA promotes hunting, when I am an eighteen-year vegetarian for ethical reasons. Cheney was the keynote speakerÂ prior to the main dinner event, so I vacated the conventionÂ center, not wanting toÂ have anything to do with him.Â Two years later, Cheney accidentally shot Harry Whittington while hunting. I joined the NRA prior to this convention, asked the group to stop soliciting me for a membership renewal, and did not renew. Â I first relocated to Washington in 1986Â during a presidential administration

with which I deeply dissented. Now, twenty years later, the situation is at least as bad.Â Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:05

Monday, April 23. 2007

When state constitutions grant more rights than the federal constitution.

The Bill of Rights. (From the public domain.)Â Numerous state supreme courts provide broader civil liberties protections than does the United States Constitution. A case in point is last month's phenomenal Vermont Supreme Court ruling generally requiring a warrant to search a car subsequent to a lawful arrest of the driver, absent exigent circumstances. Vermont v. Bauder, 2007 VT 16 (March 16, 2007). Â Relying on Article 11 of Vermont's Constitution -- which it says provides broader rights than the Fourth Amendment to the United States Constitution -- the Vermont Supreme Court declined to follow the U.S. Supreme Court's ruling in New York v. Belton, 453 U.S. 454Â (1981), which holds thatÂ "when a policeman has made a lawful custodial arrest of the occupant of an automobile, n2 he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S.Â at 460. Â Thanks toÂ Flex Your RightsÂ for reporting on this case on its website.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 03:15

From Tiananmen Square to the capitalist road.

Â Image from Bureau of Engraving and Printing's website.Â On June 3, 1989, I was about to go to sleep before going to my younger brother's high school graduation the next morning. The television news reported on the Tiananmen Square massacre that had taken place. The news reports were just coming in, and apparently in the process of being clarified and detailed. Having no Internet for getting more information, I went to bed with a sick feeling in the pit of my stomach. Â The next morning I watched the news to learn how massive, extreme and brutal had been the massacre. I felt even sicker. Â I saw Norman Mailer at the graduation, and thanked him for sharing his writing with the world. I could have talked to him about the massacre, but felt relief enough that he was there. Â I returned to Washington, DC, where I was preparing for the bar exam. After lunch with two law school friends, we passed by the Chinese embassy, where I saw a lone demonstrator standing before the lady liberty statue that had been standing in a park near the embassy. I asked the driving friend to let me off there, because I decided to join the lone protestor. They advised caution about getting into trouble. What trouble was I supposed to fear, demonstrating peacefully so shortly after the massacre? Â The lone demonstrator was originally from China, and a local college professor in the United States. (Addendum:Â Â After receiving my request for permission to identify this professor, he gave me the go-ahead. He is Gallaudet University Math Department Chair Fat C. Lam.) His sign read "Don't let tyrants sleep." I stood with him; I forget if I made a sign, and if I did, it would only have been on the legal pad I had with me. The Secret Service uniformed officer told me he supported our message, but that he would arrest me if I entered the embassy building to express my grievances. I stayed around an hour or longer with the lone demonstrator. Â Out of my deep sadness over the Tiananmen massacre came hope from learning that such Tiananmen leaders as Li Lu had escaped safely, and exhilaration at meeting Mr. Lu at a 1989 Washington, DC, reception sponsored by the Lawyers Committee for Human Rights (now called Human Rights First). The following June 1990, I joined a long massacre anniversary demonstration march supporting the Tiananmen Square activists, which ended, appropriately, before the Chinese embassy. Â Even with the intervening explosion of the Internet and capitalism in China, the government there has managed to continue to keep a tight grip over dissent subsequent to the Tiananmen Square massacre. Whether or not the Tiananmen activists are biding their time until the iron is hot for them to re-enter the political arena in China, or just enjoying the capitalist opportunities in the world, I recently obtained the following updates on Tiananmen leaders Li Liu and Shen Tong:Â Li Lu obtained multiple degrees fromÂ Columbia University, and became an investment professional. Shen Tong became a high-tech capitalist, who now visits China to sell his software products; his sister believes he is not fixated on making big money. Â Hopefully the spark of hope,Â optimism and human rights keeps LiÂ Lu, Shen Tong, and the other surviving Tiananmen Square activistsÂ ready to turn in their business suits -- at least temporarily, when the iron isÂ hotÂ -- to push further for more democracy and individual libertiesÂ in China.Â Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:20

Sunday, April 22. 2007

Double jeopardy rights prevent retrial after mistrial for mistaken belief of no court jurisdiction.

The Bill of Rights' Fifth Amendment prohibits people "subject for the same offense to be twice put in jeopardy of life or limb."Â (Image from the public domain.)Â Double jeopardy rights prohibit judgesÂ sitting in criminal courtÂ from declaring mistrials over defendants' objections and then retrying the defendant where the mistrial arises from the mistaken belief that the court had no jurisdiction over the matter or the defendant. Â In Sanchez v. U.S., __ A.2d _ (D.C. April 5, 2007), the trial court declared a mistrial over defense counsel's objection, mistakenly concluding that the court had no jurisdiction over the defendant, based on an indictment that the judge thought was defective. The District of Columbia Court of Appeals ruled that the trial court did have jurisdiction over the defendant without needing to declare a mistrial. Consequently, Defendant's double jeopardy rights were violated, and a retrial was impermissible, even though defense counsel mistakenly agreed that the trial court had no jurisdiction over the original trial.Â Â My ears always listen for double jeopardy issues. Four years ago, our law firm won a joint landmark double jeopardy victory with now-chief Public Defender Nancy Forster inÂ State of Maryland v. Taylor, et al.,Â 371 Md. 617, 810 A.2d 964 (2002). Full details on that double jeopardy victory are here. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, April 20. 2007

A pot pipe victory in time for 4/20.

Image from public domain.Â In yet another example of the importance of pleading innocent when the risks of doing so are no greater than entering a guilty plea, on April 19, 2007, we won our client's drug paraphernalia case. Here are some details: Â The police stop our client for allegedly failing to stop at a stop sign. The stopping cop "conveniently" has a drug sniffing dog with him. When our client's license is being checked for outstanding arrest warrants, the cop walks the dog around the car, and the dog allegedly alerts to drugs by sitting down (or did he sit down just by having been tired at 8:00 p.m.?)Â The judge rejects my motion to suppress the stop of the car and the search following an allegedly positive dog alert. Â After closing arguments, the judge hands down a not guilty verdict, agreeing with our portrayal of our client's car (starting with cross examination) as messy, and the pot pipe as having been found beneath a container lid that was closed, and this being a circumstance where the smell of marijuana and any admissions by our client are absent. Applying the required possession definition (knowledge, dominion and control), the judge agrees that knowledge of theÂ pot pipe's presenceÂ was not proven against our client, in part seeing he was borrowing the car from someone else, and there was no showing how long Defendant was in possession of the car. Â Coming just a day before 4/20, this victory could not have arrived at a better time.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:15

Underdog is a year old.

Â Â Today is Underdog Blog's first anniversary. Many blogs start tentatively but soon peter out. Ours is here to stay, and, with only four exceptions,Â has published every weekday since April 20, 2006. My articles on blogging are here and here. Â Our Underdog title comes not from the forty-year-old cartoon characterÂ (today's drug war madness might have exposed him to prosecution for possessing his secret energy pills), but because we immediately move to level the playing field in fighting against the government and other large entities. The underdog concept stuck with me after one of my favorite trial law teachers,Â Steve Rench, spoke of his satisfaction fighting for the underdog.Â Â Â Â Â The Internet has profoundly weakened the grasp of the New York Times and other major periodicals, the major book publishers, and the major booksellers on the distribution of the written word. I feel empowered to get my ideas instantly and directly to the public through our blog and website. Â Sadly, too many great writers -- of course, the Internet and blogosphere run the full gamut from great writing to abysmal writing -- have had theirÂ voices squelched including,Â in more recent times, Pramoedya Ananta ToerÂ byÂ the Sukarno and Suharto regimes and beyond, Vaclav Havel before the communist regime fell, and Alexandr Solzhenitsyn under the Soviet regime. Index on CensorshipÂ regularly reports on writers who are still censored to this day. . I became obsessed with free speech from the time my eighth grade social studies teacher made freedom the year's focus of study, leading into my work with Amnesty International in college, my subsequent subscriptions to Index on Censorship, my active involvment with the American Civil Liberties Union, and my defense of free speech at the political, libel defense, and adult entertainment levels. Â Some people will go to extraordinary lengths to overcome censorship. The late legendary -- and constantly censored -- author Pramoedya Ananta ToerÂ started his Buru tetralogy orally through a chain ofÂ his fellow Buru island prisoners,Â when he was denied pen and paper, only to write the story in book form years later. Sometimes he was able to smuggle out notes "'written under adverse conditions.'"Â When I finally met Mr. Toer in 1999, his writings still were officially banned in his native Indonesia -- and the ban on some of his books had not been officially lifted by the time of his passing in 2006. Â Speaking on tour in 1999, Mr. Toer was deeply emotional when he said that the Indonesian government's efforts to ban his books was like trying to cut off his life. When my turn came at this event to have my book signed, I tried to speak briefly with Mr. ToerÂ in my limited Indonesian; his preferred languages were Indonesian and Dutch. I did not get much more of a response than a polite "yah".Â I later found a news article underlining that Mr. Toer's hearing was so profoundly impaired by an ear infection caused by a soldier's hitting him in the head with a rifle butt, that he referred most inquiries to his indispensible editor Joesoef Isak, whom I also met that evening.Â This man who had suffered so many injustices during his life was profoundly respectful to everyone when I met him, and had clearly retained his dignity despite all the indignities he had suffered.Â As to Vaclav Havel, I was stunned with glee at how quickly he had transformed from a constantly suppressed and houndedÂ author to an uncensored political leader in Czechoslovakia (one who appointed Frank Zappa -- who was a firm censorship opponent -- an unofficial cultural attachÃ©). (That is not to say that I automatically expected to agree with all of Havel's politics -- I do not know of any such government official yet --Â but that I was ecstatic that he had broken free of his suppression). Shortly after Havel assumed political leadership,Â I had received my Index on Censorship t-shirt with Samuel Beckett's likeness on one side and Havel's on the other, Beckett having written his "Catastrophe" play for Havel in 1982. One of the first times I wore the shirt, I ran past the Czech embassy near Rock Creek Park,Â and called over to one of the employees standing outside (possibly security, and

possibly a holdover from the Communist period) to happily display the t-shirt. (As it happened, the Czech embassy and Indonesian ambassador's residence sat one hundred yards apart on Tilden Street, and one hundred yards in the other direction from the Indonesian ambassador's residence has satÂ the Kuwaiti embassy, with all those buildings being on one of my favorite long-distance running routes (the street has one of the area's best running hills and parallels a branch into Rock Creek Park), but where I felt dread during Gulf War IÂ with my opposition to that war as, at the very least, having been launched with gross prematurity andÂ gross limitations onÂ journalists' movements in the Gulf.) Â In other words, my motiviation for blogging goes far beyond having a web presence for our law firm, to a thirst to express critical messages about justice, to increase the number of people who will assert their rights with the police so as never to need our criminal defense services, and to keep my mind and pen sharpened for written and oral advocacy.Â Jon Katz.Â

Posted by Jon Katz in Jon's news & views at 00:05

Happy 4/20

Image from public domain.Â April 20 has become a significant dateÂ to focus on the need to legalize marijuana. I have frequently blogged in favor of marijuana legalization, and have touted marijuana's medicinal benefits that necessitate its being legalized for medicinal use.Â Over the years, theÂ marijuana legalization movement has made significant inroads towards legalizing medical marijuana andÂ reducing the penalties for simple marijuana possession.Â It is entirely inaccurate to view the marijuana legalization movement as a bunch of stoners not to be taken seriously; moreover, many marijuana users are far from stereotypical stoners (including emeritus Harvard Medical School Professor Lester Grinspoon and Cosmos co-authoerÂ Ann Druyan). By now, the marijuana legalization and drugÂ reform movements have gone very mainstream, to include many people, like myself, who do not even use illegal drugs.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Thursday, April 19. 2007

Supreme Court upholds partial birth abortion ban.

The Bill of Rights. (From the public domain.)Â Yesterday, the Supreme Court upheld the partial birth abortion ban in Gonzales v. Carhart, __ U.S. _ (April 18, 2007). Â Abortion remains one of the most contentious Constitutional issues in the United States. This Gonzales case has implications far beyond abortion, including the extent to which the Bill of Rights will be read to broadly or narrowly protect individual liberties, the extent to which statutes will be limited or stricken for vagueness and overbreadth, and the extent to which the change in the Supreme Court's composition will alter the outcome of critical Constitutional decisions. As to the Supreme Court's changed composition through the additions of Chief Justice Roberts and Justice Alito -- and the departures of Chief Justice Rehnquist (through his death) and Justice O'Connor --Â if Justice O'Connor were still on the Court, the outcome in this 5-4 decision may very well have been the opposite.Â Keep Supreme Court nominations in mind when voting in the upcoming presidential primaries and final election.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 02:00

The importance of pleading innocent.

The only way to know if a defendant will win is to go to trial. (ImageÂ from website of U.S. District Court (W.D. Mi.)).Â This month yielded another example of why it is critical to go to trial when the outcome from an innocent plea is not likely to be any worse than the outcome from a guilty plea. Â The cops found a handgun in our client's parked car, and we entered a not guilty plea. I was ready with a flowchart to try to beat this case. Little did I expect that the prosecutor would help so much for us to win. Â At the outset of the trial, on direct examination, the prosecutor asked the arresting officer when the incident took place, and he said January 20, 2007. The prosecutor asked if he was sure it wasnâ€™t in January 20, 2006. He said no. The prosecutor said â€œI enter the matter nolle prosequi [a dismissal] for an incorrect date on the charging document.â€• Â The prosecutor did not exercise hisÂ option to ask the judge to permit a correction to the date on the charging document, even though I have seen prosecutors routinely succeed with date amendment requests many times over my objectionÂ (although there is a stronger argument against such amendments in mid-trial rather than before trial begins).Â If the prosecutor, instead, planned, to recharge the case against our client with a new and corrected charging document, that would not have worked, because jeopardyÂ had already attached through the presentation of testimony from the first witness. Consequently, no further prosecution is permitted. U.S. Const. Amend. V; see alsoÂ Â Maryland v. Taylor, et al., 371 Md. 617, 810 A.2d 964 (2002) (a landmark Maryland double jeopardy victory obtained by Maryland's current Public Defender and our law firm). Â As an aside, while I waited for our case toÂ be called, a colleague was curious about why I wanted to take this case to trial. He seemed to think I was a curiosity that I advise my clients to go to trial when the likely outcome of an innocent plea seems no worse than the outcome from a guilty plea. When I e-mailed him about our victory in this case, he responded: "Congratulations on your victory!Â It will make me re-think my client's options more carefully in the future."Â Â A lawyer and the client ordinarily must wait longer in the courtroom to go to trial than to plead guilty. I approach every case with the expectation to go to trial, and set aside the time accordingly both pretrial and in court. For any reason my client pleads guilty, the goal is to do so from a position of strength. Some prosecutors know I go to trial so frequently that they ask me if I even want to hear their plea offer. To this day, the exhilaration of winning in this and all cases is as strong as when I won my first criminal trial over fifteen years ago. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 01:00

Wednesday, April 18. 2007

Kindergarten-gate

Avon Park, Florida, cops cuffed a kindergartner's biceps together, because her wrists were too small. (Image from National Park Service's website). Â When I was in kindergarten in 1968, misbehavior was remedied no more firmly than with a lecture,Â standing in the corner a few minutes, or both. Â Â In Avon Park, Florida -- and who knows where else? -- times they have changed (or perhaps stayed the same in that neck of the woods). On March 28, Avon Park police arrested a kindergartner who was crying and wailing, by handcuffing her biceps together. The cops booked and fingerprinted her, and charged herÂ with the juvenile offenses ofÂ assault, resisting a cop, and disruption of school function. The criminal complaint sworn out by the police is here. Â Some kind of civics lesson that was for the students. Why did the teachers and school administrators not make more of an effort toÂ defuse the problem of a child crying and wailing -- which I imagine is common for many kindergartners separated from their parents while at school -- rather than escalating the situation by calling in gun-toting cops and getting the child all the more upset? Such an approach -- refraining from calling in the cops --Â would have involved a greater investment of time and effortÂ in the short term,Â but would haveÂ beenÂ aÂ much better learning and nurturing experience for the student, her peers, and the school district'sÂ employees and administrators.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, April 17. 2007

The Virginia Tech tragedy.

Firearms are no friend of mine. (Image from the Government Printing Office's website.)Â Virginia Tech is 270 miles southwest from me. Fourteen years ago, I stayed in a motel nearby there on the way home; the town seemed unremarkable. Â Yesterday's tragic events were repeatedly recounted on the news as I left a deposition in Kansas City, waited for Godot for my connecting flight from St. Louis to Baltimore, and checked the news on my cellphone. Â My initial inclination was to limit this blog entry to express my horror over yesterday's violence at Virginia Tech and to express my sympathy to the shooting victims and their loved ones. Â However, expecting that this incident will be used in quick order for many people to advocate tighter security at academic institutions and tighter gun control, I offer these brief thoughts: Â - The shooter(s) apparently are dead, and nothing suggests any cohorts of the shooter(s) exist who would return to the campus to do more violence. Therefore, this is the time to slow the train to judgment and action. There is time for the tragedy to be investigated, and hopefully the investigation will be skillful, professional, accurate, and without bias. Â - When the media andÂ public focus heavy, days-long attention to this and other record-breaking incidents of violence, that will influence future mass murderers to try to get into the record books. Certainly, people want to make at least some sense of yesterday's insanity, in part by figuring out what motivated the shooter(s), so I do not expect this story to leave the headlines for several days, at least. Â - All human life is sacred, and we must act accordingly whether a tragedy victim is caught up in a mass murder or in an event that does not reach the headlines. Â - The American criminal justice system is overcriminalized. The most powerful way to reduce violence in society is for each person to reach out to others in need. Otherwise, rampant violence will continue, and convicting and jailing people for violent crimes will just be a band-aid that barely covers the wound, and that does little to prevent new wounds. Jon Katz.

Posted by Jon Katz in Jon's news & views at 05:00

Police need a warrant to open locked containers.

The Bill of Rights. (From the public domain.)Â Last month, Wyoming's Supreme Court confirmed that police need a search warrant to open locked containers, even when contraband (in this instance, some marijuana and marijuana paraphernalia) are found nearby. Fenton v. Wyoming, 2007 WY 51 (March 23, 2007). Â In Fenton , the police were allowed into the defendant's trailer when they were inquiring about a stolen car. In plain view of the police was a small amount of marijuana and marijuana paraphernalia. Nearby the marijuana was a locked box, which the police helped themselves to open with keys they found in the trailer. Â Fenton concluded that sufficient probable cause existed to obtain a search warrant to open the lockbox involved in this case. Rightfully, FentonÂ refused to make the defendant suffer for the police failure to seek a search warrant. Â Of course, the defendant would never have been in this pickle had nobody invited the police into the trailer in the first place. Know your rights. Â Thanks toÂ Flex Your RightsÂ for reporting on this case on its website.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:15

Monday, April 16. 2007

Gouging inmates to call their families.

Absent extreme circumstances, nothing justifies shutting off inmates from the outside world.Â (Image from Bureau of Prisons' website).Â Every month, one of the largest chunks of our law firm's phone bill is for calls from inmates seeking our services, awaiting trials, or in the appellate process. Â The huge fees billed for inmate collect calls seem to be without rhyme or reason. Some -- if not all -- state governments apparently earn a hefty profit from the collect call overbilling. Â Families of inmates take a huge hit in the wallet from these overpriced collect phone calls. Many inmates -- even ones presumed innocent and awaiting trials -- are shipped to jails and prisons far from their families and lawyersÂ (repeatedly to other states, in the case of federal convicts) and far from the courthouses handling their cases. The vast majority of inmates will eventually be released from incarceration. Allowing them more affordable contact with their families is a critical safety valve for making a smoother transition back to the street, and even for making prisons and jails more manageable for jailers, because happier inmates are more manageable inmates. Â In New York, the Center for Constitutional Rights has filed suit over this inmate collect call price gouging. Credit goes to new York Governor Eliot Spitzer, who, effectiveÂ the beginning ofÂ April, eliminated the requirement for MCI and Verizon to pay a whopping 57% of its profitsÂ to the New York state government. Here is additional commentary on inmate phone-gate. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Sunday, April 15. 2007

Non-citizen criminal defendants need to know immigration consequences.

Â The Statue of Liberty is worth little if immigrants' rights are not vigorously protected.Â NOTE: Thanks to our immigration law partnerÂ extraordinaire Jay Marks for reviewingÂ and commenting on my following article on adverse immigration exposure from criminal cases. IÂ submitted the article for publication in the next bimonthly newsletter of the Maryland Criminal Defense Attorneys Association. I chair the MCDAA's Immigration Law Committee, with the goal of encouraging criminal defense lawyers and everyone else to know and reduce the negative immigration consequences from criminal prosecutions.Â Â This article weaves new information and ideas with past writings I have posted in disparate parts of our website and blog. TheÂ immigration consequences of criminal convictionsÂ present a spider's web of counterintuition, mysteries wrapped in enigmas, and too much injustice.Â Kafka could not have written a more chilling tale. Â Â Immigration Law and Criminal Court: Fertile ground for fatal collisions. Â By Jonathan L. KatzÂ Criminal defense lawyers constantly need to address their clientsâ€™ immigration risks from criminal cases. However, immigration law, policy, and procedure are so overgrown, fickle, complex, often impractical, often oppressive and unjust, and often without sense that not enough hours in the day exist to catch up without practicing immigration law full-time.Â Â A few good initial tips for addressing immigration issues in criminal court are in my â€œProtecting Immigrants in Criminal Courtâ€• article that was published in the November/December 2003 MCDAA newsletter. The article is available at http://markskatz.com/CriminalAttorneys.htm.Â Â This article will address a few recent immigration issues affecting criminal defendants and some issues that are ever-present.Â Â AIDING AND ABETTING THEFT IS DEPORTABLEÂ In January 17, 2007, the Supreme Court held that aiding and abetting theft is deportable. Alberto Gonzales v. Duenas-Alvarez, ___U.S. __, 127 S. Ct. 815 (Jan. 17, 2007).Â Â Â ThisÂ Duenas-Alvarez decision is particularly troubling in that aiding and abetting convictions often visit the innocent who just happened to be near stolen property. For instance, in Maryland, it is a crime to be in a car with knowledge that it is stolen, Md. Crim. Code Â§ 7-203, and the police routinely arrest every occupant of a stolen car. Â Â A DRUG TRAFFICKING CRIME IS ANY FELONY PUNISHABLE UNDER THE FEDERAL CONTROLLED SUBSTANCES ACTÂ In December 2006, the Supreme Court held in an 8-1 decision that automatic deportation of non-citizensÂ is not permitted for a drug conviction that is a felony under state law if it is not a felony under theÂ federal Controlled Substances Act. Lopez v. Gonzales, __ U.S. _, 127 S. Ct. 625 (Dec. 5, 2006).Â Â Â The Immigrant Defense Project of the New York State Defenders Association has posted a good online legal analysis about this Lopez case at http://www.nysda.org/idp/webPages/LvGPressroom.htm. The analysis confirms that Lopez applies only to automatic deportation from drug convictions. Consequently, a non-citizen convicted of a drug crime is not automatically out of harmâ€™s way from the numerous non-automatic negative immigration implications from convictions merely if the conviction is not a felony under theÂ federal Controlled Substances Act. Â BEWARE EXPUNGING CRIMINAL RECORDS OF NON-CITIZENSIf a criminal defendant is not a United States citizen, usually a criminal record expungement should not be sought. A criminal record expungement only shields the record from public access, so immigration authorities will still have access to information about expunged criminal cases.Â Â Immigration authorities often will want to see court records confirming a caseâ€™s disposition. Therefore, non-citizens ordinarily should avoid seeking expungements, but they are also well advised to obtain multiple certified copies of favorable criminal case dispositions in the event that the courtâ€™s file eventually becomes lost or destroyed. Â HANDLING IMMIGRATION DETAINERSImmigration and Customs Enforcement (ICE) often lodges immigration detainers against people jailed pretrial. Sometimes ICE fails to file charging documents along with the detainers, which can become a basis for invalidating the immigration detainer. Â In any event, a two-prong integrated attack should be mounted when a criminal defendant is both being held on a criminal court bond and on an ICE detainer. Beware paying the criminal court bond if no chance exists to release the defendant from the immigration detainer. Otherwise, the defendant will not earn incarceration credit while held only on an immigration detainer, and may be transferred to a detention facility farther from the county jail. Â At the same time, it is a mistake automatically to advise a defendant not to pay a criminal court bond merely when an immigration detainer exists. The best approach is to consult with an immigration lawyer on the chances and approach for striking the immigration detainer or obtaining an affordable bond with the immigration authorities. Â WHEN THE FEDS GO LOOKING FOR UNAUTHORIZED WORKERSFederal authorities have been making well-publicized workplace raids seeking people unauthorized to work and live in the United States. Such raids raise legal exposure not only for the workers, but also for their employers. Â By meticulously adhering to the I-9 law that requires employers to obtain work authorization proof when employment starts (as much as this amounts to forced deputization of private employers by the federal government), employers can reduce exposure to penalties for hiring unauthorized workers even if the worker has presented the employer with false or forged documents that look regular on their face. Â SILENCE IS GOLDENWith raids and all other contacts with authorities, people need to know that they have the right under the Fifth Amendment and other applicable laws to refuse to state their immigration status. Unfortunately, police, pretrial services employees and probation personnel repeatedly ask defendants their immigration status. A natural human tendency is to provide such information at least to people working

for the court system. This state of affairs makes it all the more important for lawyers to accompany their non-citizen clients to initial probation intake meetings and to interviews for presentence investigation reports. Â LACKING A SOCIAL SECURITY NUMBER IS NOT THE END OF THE WORLDUnfortunately, many undocumented people (a phrase preferable to â€œillegal alienâ€•) commit crimes involving lying and identity theft that are not necessary in the first place to obtain bank accounts and to conduct other daily affairs. Â Fraudulent social security numbers and false identifications are in rampant supply, and are rampantly purchased. Let alone criminal exposure, the immigration consequences for going down such a path can be very serious. Â The temptation by undocumented people to provide false information to motor vehicle administration authorities can be strong and must, of course, be avoided. Furthermore, people should beware using international driversâ€™ licenses in the United States if actually living full-time in the United States. Â Undocumented people need to know that even when asked for a social security number, some acceptable alternatives to social security numbers may be available. For instance, some banks, lenders, and other businesses will accept a tax identification number in place of a social security number. One does not need to be in the United States lawfully in order to obtain a tax identification number from the Internal Revenue Service. Â Similarly, undocumented people should not avoid paying taxes merely for not having a social security number. In fact, the payment of taxes (and payment of back taxes) often is an important factor in obtaining immigration benefits from the government. Â BEWARE NOTARIESIn many countries, becoming a notary is an accomplishment backed up by significant education, and involves providing law-related services. People need to know that being a notary in the United States means nothing other than that the notary paid for a notary license and was not found to have had any convictions for theft or crimes of moral turpitude. Negligence (or worse) of a notary or anybody else in providing incorrect factual information in draft applications for immigration benefits can end up seriously harming the non-citizen who signs but does not correct the application, thinking s/he is in good hands with the notary.Â CARRY YOUR IMMIGRATION LAWYERâ€™S CELL NUMBERNothing beats consulting a qualified immigration lawyer well in advance about any immigration risks from a criminal case. Better yet is to have immediate access to an immigration lawyer on the court date, in case any unexpected guilty plea offers are made that were not contemplated by the immigration lawyer (e.g., to convert a spousal assault charge to a property destruction plea, which could still involve negative immigration implications). Â CONCLUSIONImmigration laws, practice and procedure become more complex and overwrought by the month. One blink can miss out on critical immigration law changes that might have a lasting and material impact on the life not only of a non-citizen criminal defendant, but on the defendantâ€™s family, as well. These landmines can be minimized through close teamwork between criminal defense and immigration lawyers. Â Jon Katz is the criminal defense partner at Silver Springâ€™s Marks & Katz, LLC. He is the chair of the MCDAAâ€™s Immigration Committee, and welcomes Â new committee members and ideas for defending non-citizens. Jon Katz.

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

Friday, April 13. 2007

The inspiration of Frank Zappa.

Zappa was infinitely more than his trademark facial hair. (Image from the House of Representatives website, of all places). Â Â Why does Frank Zappa inspire me as a trial lawyer? One reason is that he was a musical and creative genius, which means all the more to me in relation to my amateur music experiences that started thirty-four years ago. Another is that he did not fear what others thought of him; he was the real McCoy. The ultimate reason is that he rejected mediocrity, did not try to pass off mediocrity as accomplishment, and insisted on excellence from himself. He and music were inextricably intertwined. Â Last July, I blogged about the inspiration I derive from both Frank Zappa and Daniel Schorr, who became unusual and good friends to the point that in his on-air eulogy of Zappa, Schorr seemed to understand him better than plenty of people who were diehard Zappa fans. Â Although I never became a front-and-center Zappa music fan -- and bought only two of his music selections (both amazing -- Overnight Sensation and Blue Note's reissuance of Jean-Luc Ponty playing Zappa's music (including such titles as "King Kong" and "America Drinks and Goes Home") -- Â I jumped at the opportunity to see him perform in Boston in 1984. Always full of surprises, one of his surprises this time -- or perhaps a message that Zappa's talents and self went well beyond singing and playing instruments -- was that he said not a word, sang not a lyric, and played not a note. Instead, he conducted a very talented band as a very talented composer. I later learned that Zappa "wrote out his own scores, at enormous expense, and preferred to conduct them himself."Â Zappa was born in Baltimore (where fellow envelope-pushers Edgar Allen Poe and John Waters spent substantial time), and somehow inspired the symphony bearing the city's nameÂ not only to perform his The Perfect Stranger a week after Zappa's passing, but also to play it twice to the same audience: "The BSO seemed to do a yeoman job with The Perfect Stranger, however, running through its wacky polyrhythms and whirling unison xylophone bits in fine style. But when the final gong sounded and everyone clapped Zinman looked unsatisfied. 'Do you want to hear that again?' he asked the audience. The Meyerhoff crowd that night was an odd mix of well-dressed symphony seasoners and long-haired latter-day freaks wearing crusty old Mothers T-shirts; they all seemed mystified at the question. But Zinman returned to the podium and started the whole crazy thing over again, from the top."Â Just as conductor Zinman decided to try to make sense of Zappa in such an otherwise rather conformist milieu, and just as Zappa settled for nothing but excellence,Â I continue to try to make sense of a criminal justice system that too often oppresses but sometimes liberates, to my clients' best advantage.Â Jon Katz.Â

Posted by Jon Katz in Jon's news & views at 00:45

Thursday, April 12. 2007

When people say that law practice is all about making money.

Â Â Image from Bureau of Engraving and Printing's website.Â After I started law school, Ralph Nader warned about Â the seduction of abandoning our ideals in exchange for having hundred dollar bills stuffed in our pockets by corporate law firms and other corporate interests.Â (Image from Bureau of Engraving and Printing's website.)Â Every once in awhile, people tell me how paramount is moneymaking in one's life.Â A close high schoolÂ friend, who never lacked money, urged me in 1985Â -- during my first job after college at a major commercial bank, when I told him of the strong discomfort I felt working in the belly of the capitalist beast while human rights violations ran rampant worldwide (including in Argentina, where the bank maintained a branch) -- to make as much money as I could. I hadn't spoken with him much before about social justice issues -- having fallen out of much contact during college -- so did not know if this underlined who we both were for a long time, or who we had each become. Â After taking the bar exam, I travelled for a few weeks in Southeast Asia, experiencing a combination of natural beauty in many places and vibrant cultures on the one hand and oppressive dictatorships, poverty and social injustice on the other. One evening, I visited the Kuala Lumpur home of two students I knew while at law school. The father -- who became wealthy through the export-import trade -- asked what I thought about Malaysia, and I told him of the many delights I found, tempered by the human rights situation. He asked me to keep my voice down about human rights, in case the neighbors heard me through the window (which was unlikely unlessÂ aÂ spy had been posted on the large yard). He tried to bring me back to earthÂ through thinking I would agree with his view that life is all about making money. I told him the concept of putting money above all else made no sense to me. Â My own interests in moneymaking were less about buying luxuries, and more about having enough financial freedom so as not to feel enslaved by my work (the phrase "golden handcuffs" comes to mind) and to enjoy the outdoors, travel, and the arts more than collecting possessions. Particularly from my human rights work in college, I feel it necessary to be willing to make financial sacrifices to protect social justice and to live a harmonious life that does as little harm to others as possible. Â I feel that people focused on moneymaking as the main goal in life should do so outside the law, so that the practice of law may help reduce human misery, rather than fostering or exacerbating it. However, not all of my fellow lawyers feel the same. One colleague proudly proclaimed a few years ago: "The law practice is all about making money, isn't it?" Â Earlier this month, in criminal court, I expressed surprise to a colleague that my client was not in the courthouse lockup, even though I had requested his presence for a critical hearing. The lawyer told me that I take my work too seriously, that it was just fine to waive my client's appearance in court (I beg to differ), and that our work is all about making money. I told him that my approach to practicing law -- while I bill significantly for my services -- isÂ to care about my clients and to seek justice for them. He asked me if lawyers are obliged to care so much for their clients. He was serious. Â The pressures to make money are perhaps greater today than ever. Housing prices (although we are now in more of a buyer's market than a year ago), college tuition, health care costs, and gas prices have far outpaced inflation and average cost of living increases. My view remains, though, that the law practice is not the place to pursue money interests at the expense of protecting social justice.Â Lawyers are artificially protected from competition by laws prohibiting the unauthorized practice of law, which, I believe, obligates lawyers all the more to uphold social justice. I believe that people should go outside the legal profession to have a singular focus on making money (and that nobody should make money at the expense of justice). Jon Katz.

Posted by Jon Katz in Jon's news & views at 01:15

The legal technicality called the Constitution.

The Bill of Rights: Far from a technicality. (From the public domain).Â The phrase is often heard: "S/he won the criminal case on a technicality." However, often the technicality is no technicality at all, but a victory based on the Bill of Rights. Without the Bill of Rights, and without the enforcement of the Bill of Rights, the United States would be a much different and much scarier place. Â Nevertheless, since many potential jurors probably have winced numerous times about people winning court cases on such "technicalities", I want to know about those views, and I want to help convince people of the necessity of preserving, protecting, and enforcing the Bill of Rights. Â InÂ addition toÂ the criminal arena -- where many people get angry over defense victories arising from theÂ suppression of unlawfully obtained evidence -- many people also disagree with applying First Amendment protection to adult entertainment. However, seeing that adult entertainment involves expression (whether or not such expression is popular -- and the adult entertainment industry is a multi-billion dollar industry), and that the First Amendment exists to protect expression, then adult entertainment is entitled to First Amendment protection. Â Recently, a commenterÂ on another blog called our law firm sleazy over our First Amendment defense of adult entertainment: Â â€œ'How is nude dancing considered â€œconstitutionally protected speech?â€• Sometimes, I feel so stupid for not understanding this stuff.'Â "Thatâ€™s OK, _____, not many others understand this either. I guess that shakinâ€™ your moneymaker is considered an 'artistic expression'."More info here,

from a rather sleazy law firm that specializes in defending clients from the adult industryâ€¦lawyersâ€¦sheesh . . . htttp://www.markskatz.com/kandyland.htm. To each his (or her) own."Â Never have IÂ thought the Constitution and the defense of the ConstitutionÂ could be sleazy. In fact, I worship at the altar of the Constitution. Â Moreover, I very much agree with the following words of cultural anthropologist Judith Lynne Hanna, who lives the next town from me and whom I know well: "'[T]he 20th century placed the fully nude body into "high art" theater dance â€" and moved exotic dance towards the mainstream.' . . . Â "'[N]ude dancing in any kind of performance both reflects and configures a societyâ€™s attitudes toward the body and its presentation.'Â "'Nudity in exotic dance communicates messages of freedom, independence, gender equality, acceptance of the body, modernity, historical tension between how the body was revealed in the past and is revealed now, empowerment, a break with social norms and challenge to the status quo.'"Â Having visited many exotic/nude dance clubs since taking on adult entertainment clients (to best understand and represent a client, a lawyer needs to walk in the client's shoesÂ -- I am not exaggerating one bit), my own preconceived notions (from just one visit to such a club before starting adult entertainment defense)Â of strip clubs as sleazy places heavily populated by depressed and lonely people, a bunch of sexist perverts, or both, with perhaps some clubs still run by mobsters, were substantially altered by meeting many truly decent and often likeable club owners, managers, employees, and dancers, and by the true dance ability of many of the dancers, including many with such limber bodies and skillful dance moves as to show that many such dancers have been well trained beyond a mere focus on nude dancing. Â It is a shame to think that so many people would try to suppress the First Amendment to prevent people from appearing on stage in the same wardrobe they wore when born. Jon Katz.

Posted by Jon Katz in First Amendment at 01:05

Wednesday, April 11. 2007

Florynce Kennedy: "If you're not living on the edge, then you're taking up space."

Achieving social justice often calls for partnership amongÂ litigators and non-litigators.Â (Republication permission granted to the public by photographer Michael Walter).Â Recently, I learned aboutÂ the late Florynce Kennedy, a radical lawyer who once said:Â "Sweetie ... if you're not living on the edge, then you're taking up space." I can only imagine what she would have said to a lawyer unwilling to do anything but draft commercial real estate contracts and trust documents for rich people. Among Ms. Kennedy's notable clients was Scum ManifestoÂ author Valerie Solanas, who in 1968 shot and nearly killed Andy WarholÂ and reported it to a traffic police officer the same day. Â William Kunstler was another radical lawyer who drew my attention several years ago. Like myself, he started out practicing mainstream civil law (in his case, small business and family law). Bill Kunstler inspired me with his maintaining a balance of humor while fighting for justice. For instance, he would bring coffee and donuts to the Jewish Defense League members who would protest outside his office for his representation of El Sayyid Nosair. During summers in upstate New York, he sent his daughters to a summer camp run by conservative Christians, seeing that it did not seem to cause any problems for his daughters (who perhaps littered the camp with progressive radical tracts and rants).Â Tony Serra is another radical lawyer who has drawn my attention. His courtroom skills are legendary. I hope to see him in action after he is released from jail on his conviction for tax evasion. More about Tony is here and here.Â Â Any radicalism I have -- if it could be called that -- pales in comparison to the radicalism of the foregoing lawyers. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:45

Don Imus: Meet Michael Richards, Mel Gibson, Andrew Young, and George Allen.

TheÂ First AmendmentÂ should keep the FCC out of Imus-gate.Â (From the public domain.)Â Don Imus gets added to the long list of celebrities -- a list so long that I cannot keep up with it -- making outrageously insensitive comments about race, ethnicity, and gender. News coverage and commentaryÂ on Imus's pathetic comments is hereÂ and here. Â Â I have not examined the story of Imus's bigoted commentsÂ closely enough to get a sense of the extent to which his radio network fired him out of any fear of any backlash from the Federal Communications Commission than to takeÂ a principled stand against such comments. Â Imus-gate presents a clash between my rabid anti-racist views and my free expression zealousness. It is not even easy for me to reconcile that clash byÂ drawing a line between private entities penalizing their private employees for bigoted actions and wordsÂ versus govenment getting involved, because drawing such a line would prevent employees of private companies from suing them for unlawful discrimination.
SuchÂ employment discriminationÂ lawsuitsÂ are permitted because of government-made laws enforced by government-run courts.Â I address this clash in the criminal court context here. At minimum, I oppose the FCC getting involved with such matters. Jon Katz.Â Â ADDENDUM: May 3, 2007: CNN reports that Imus's contract with CBS called for him to be irreverent and controversial, and that he plans to file a lawsuit for breach of his contract. Pathetically and ironically, it is possible that Imus's pathetic comments were partly driven by his very desire to honor his contract.

Posted by Jon Katz in Jon's news & views at 00:20

Tuesday, April 10. 2007

The drug war quagmire.

The Bill of RightsÂ is a victim of the drug wars. (From the public domain.)Â Decades ago, the Smothers Brothers lamentedÂ the "Big Muddy" that was the Vietnam war. The Vietnam war, like Gulf War II, was relativelyÂ easy for the United States government to enter, but infinitely more difficult (at least politically) to leave. Â The same goes for the drug wars, particularly after the government has wasted so many billions of dollars while trampling on so many lives.Â Recently, Drug War Rant observed about the drug wars: "[I]t took very little effort to finish the job and America was drug-free by 1995. No longer needed, the drug war infrastructure was dismantled, and the soldiers returned home... or not." Â Don't miss this government-sponsored 1985 anti-drug music video posted by Drug War Rant, in which such celebrities as Whitney Houston, Herb Alpert (he was famous at some point), and Casey KasemÂ were convinced to sing Nancy Reagan's oversimplified "just say no" message, while remaining silent about the beating that countless people and the Bill of Rights have unjustly suffered from the drug wars.Â Instead of "Just say no", Just Say Know.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:15

Monday, April 9. 2007

"If marijuana were a new discovery rather than a well-known substance carrying cultural and political baggage, it would be hailed as a wonder drug."

Image from public domain.Â Emeritus Harvard Medical School Professor Lester Grinspoon started out in the 1960's to document marijuana's harm, only to discover the opposite. Last month, he confirmed: "If marijuana were a new discovery rather than a well-known substance carrying cultural and political baggage, it would be hailed as a wonder drug." Â In this short article, Dr. Grinspoon details the extraordinary and critical medical benefits of marijuana. However, the federal government and most states ban marijuana for medicinal use. Please speak out toÂ your lawmakers and government officials to eliminate the medical marijuana ban.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Sunday, April 8. 2007

Field sobriety testing amounts to a search.

Cops are on the constant lookout for making drunk driving arrests. (Image from National Institute of Standards & Technology). Â Last year, the Maryland Court of Special Appeals determined that field sobriety testing amounts to a search requiring reasonable articulable suspicion to proceed with such tests in drunk driving cases. Blasi v. State,Â 167 Md. App. 483, 893 A.2d 1152, cert. denied, 393 Md. 245, 900 A.2d 751 (2006). The Court said: Â "[T]he administration of field sobriety tests by a police officer during a valid traffic stop intrude into an area of an individual's reasonable expectation of privacy because: (1) the process of conducting field sobriety tests exposes certain aspects of an individual not otherwise observable by the public; and (2) the information disclosed by the field sobriety tests may reveal private facts about an individual's physical or psychological condition. Therefore, we hold that the administration of field sobriety tests by a police officer during a valid traffic stop constitutes a search within the meaning of the Fourth Amendment to the U.S. Constitution." Blasi,Â 167 Md. App. at 505.Â Â BlasiÂ is important for showing judges -- and police and prosecutors -- that field sobriety tests are anything but consensual police-suspect encounters, and that evidence of the tests' administration and results must be suppressed absent reasonable articulable suspicion of a violation of the drinking and driving laws. Jon Katz.

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

Friday, April 6. 2007

What makes one a hippie lawyer?

The peace symbol went far beyond hippies. Gerald Holtom designed the symbol in 1958, and the Campaign for Nuclear Disarmament adopted the symbol for its logo.Â A fellow National Lawyers Guild member has selected the intriguing URL of www.hippielawyer.com. Hippielawyer is Alan Graf. He lives on a commune of sortsÂ in western Tennessee. Â Although I do not consider myself a hippie, the hippie era -- which fully emerged when I was in my single digits -- has influenced me significantly, including the importance of doing your own thing. Among my many influences from the hippie era are the Chicago Seven trial; Ram Dass and his heavily influentialÂ Be Here Now (if "be here now" were applied by all people, the world would be a much better and more peaceful place); Bhagavan Das, who introduced Ram Dass to being here now; and Jack Kerouac, whose On the Road approach to life and writings heavily influenced the hippie movement. Jon Katz.

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

R. Crumb illustrates this "Busted" aid.

An arrest is but an arrest, and is not a conviction. Know your rights. (Image from FBI's website).Â Another resource on dealing with the cops and prosecutors is Busted!: Drug War Survival Skills (From the buy to the bust to begging for mercy). This book (here is its Amazon listing) is written by criminal defense lawyer M. Chris FabricantÂ and illustrated by underground comix legend R. Crumb, whose artwork very much drew my attention to this book which I have not yet read. Because I have not yet read the book, this blog entry is neither a recommendation for the book nor the opposite. (Another product with the "busted" word in its title is ex-narc Barry Cooper's video; my latest dissent about Mr. Cooper's videoÂ is here). Â As prominently featured on Mr. Fabricant's website for the book,Â reviews run the gamut from praise from Stop the Drug War to this honorary scathing by Paul Costiglio of the Partnership for a Drug-Free America: "If read by teens it would give them a sense they can continue toÂ [do dope]Â and say, 'I don't have to lead a drug-free life, I can lead a jail-free life.'"Â Â My favorite resources for the layperson to review before seeing the next cop are:Â our own website;Â BustedÂ by http://FlexYourRights.com;Â and theÂ Beat the Heat manual by Katya Komisaruk. I welcome your suggestions for additions to this list. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:45

"We will not be driven by fear into an age of unreason."

Edwward R. Murrow (From the public domain). Â Edward R. Murrow took on Senator Joseph McCarthy. In many respects, McCarthy was just a prelude to today's Constitution-shredding in the name of fighting terror. Â In standing up to Mr. McCarthy, Mr. Murrow said: "We must not confuse dissent with disloyalty. We must remember always that accusation is not proof and that conviction depends upon evidence and due process of law. We will not walk in fear, one of another. We will not be driven by fear into an age of unreason, if we dig deep in our history and our doctrine, and remember that we are not descended from fearful men -- not from men who feared to write, to speak, to associate and to defend causes that were, for the moment, unpopular.Â "This is no time for men who oppose Senator McCarthy's methods to keep silent, or for those who approve. We can deny our heritage and our history, but we cannot escape responsibility for the result. There is no way for a citizen of a republic to abdicate his responsibilities. As a nation we have come into our full inheritance at a tender age. We proclaim ourselves, as indeed we are, the defenders of freedom, wherever it continues to exist in the world, but we cannot defend freedom abroad by deserting it at home.Â "The actions of the junior Senator from Wisconsin have caused alarm and dismay amongst our allies abroad, and given considerable comfort to our enemies. And whose fault is that? Not really his. He didn't create this situation of fear; he merely exploited it -- and rather successfully. Cassius was right. 'The fault, dear Brutus, is not in our stars, but in ourselves.'"Â Good night, and good luck. Jon Katz.Â ADDENDUM: After writing this blog entry, I saw the online movie trailer to Good Night and Good LuckÂ -- which I wanted to see when it first came out, but did not -- and sawÂ that it prominently features the above quote.

Posted by Jon Katz in Constitutional Law at 00:15

Thursday, April 5. 2007

Meeting Julian Bond in a sea of suits.

Around the D.C. Beltway, suits abound.Â (Image from Library of Congress.)Â During a 1987 Amnesty International meeting at my law school, one of the AI officers jokingly warned about one member's beneficialÂ comments, because the speaker was wearing a suit. John Lennon railed against the suit-wearers running the record company issuing Beatles music. In 1991, during the second anti-Gulf War I weekend march in Washington, I watched a brilliantly-choreographed, eerie and ominousÂ procession of silent papier-mache-headed men in black suits, white shirts and black ties periodically and in unison spinning hand-held oversized new-year-style noisemakers (while bowing), under a "New World Order" banner. Marching along with me was a close friend, who remarkedÂ that a "suit"Â often is usedÂ negatively toÂ refer to a member of "the establishment."Â Â At the time, in 1991, I was yearning to meet more like-minded lawyers devoted to fighting for social justice, wearing suits only so as not to obscure their social justice message, rather than as a message of celebrating the status quo or any classism.Â I am no fan of suits, even though I wear themÂ to court. Â In this context, I met longtime civil rights activistÂ Julian BondÂ in a sea of suitsÂ at last week's annual local ACLU fundraiser. Also being honored there were lawyers from Covington & Burling -- among the most establishment of the establishment law firms -- who ably vindicated the rights of several people wrongfully arrested, detained, and hogtied by District of Columbia policeÂ in violation of their First Amendment rights and civil libertiesÂ during a 2002 anti-World Bank demonstration. This was among several lawsuits filed over the mass arrests. Â This was the second time I met Julian Bond, the first time having been around eighteen years ago when passing him on a downtown Washington street.Â Mr. Bond was active from the outset with theÂ Student Nonviolent Coordinating Committee in the early Sixties.Â In the United States Supreme Court, he succeeded in reversing a decision by a Georgia House of Representatives committee refusing to seat him. The refusal came over a SNCC statement against the Vietnam war, which Bond endorsed with this amplification: "'I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever.'" "'I'm not taking a stand against stopping World Communism, and I'm not taking a stand in favor of the Viet Cong. What I'm saying that is, first, that I don't believe in that war. That particular war. I'm against all war. I'm against that war in particular, and I don't think people ought to participate in it. Because I'm against war, I'm against the draft. I think that other countries in the World get along without a draft -- England is one -- and I don't see why we couldn't, too.'" Bond v. Floyd, 385 U.S. 116, 124 (1966). Â Mr. Bond was honored in the midst of Gulf War II and the anti-terror war, which have been used by Bush IIÂ to justify legions of incursions on our civil liberties. Julian Bond's courage to stand up against war in 1965 hopefully will inspire those who today stand up against the many injustices surrounding Bush II's current wars. Â As to my fixation over the inundation of suits around the Washington Beltway, in some respects the question comes down to "Who's co-opting whom?" Ralph Nader has worn them -- and filed them --Â and seems no more watered down for it. Jon Katz.

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

Weird Al will sue you.

Â How many jurors go to court with "I'll Sue You" in their heads?Â (Republication permission granted to all by photographer Michael Walter).Â Here's Weird Al Yankovic'sÂ "I'll Sue You" video that has been making its rounds. This laughable videoÂ amplifies the disgust many feel over litigiousness in America (but that feeling seems to focus on civil rather than criminal lawsuits), to the point that worthy litigants often suffer jury backlash over the situation. Jon Katz.

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

Wednesday, April 4. 2007

Recent notable appellate opinions.

The Bill of Rights. (From the public domain.)Â Here are some recent notable appellate opinions:Â 1. D.C. v. Marc Jones, No. 06-CV-23 (D.C., March 29, 2007) - Conferring absolute immunity on ex-mayor Anthony Williams in a libel suit for having said that the plaintiff had been placed on administrative leave for improper fundraising.Â 2. Although not a new case, Maryland v. Pringle, 540 U.S. 366 (2003), confirms that the â€œsubstance of all the definitions of probable cause is a reasonable ground for belief of guilt.â€•Â 3. Fausto Ediburto Solorzano v. Maryland, Court of Appeals 2006 Term, No. 93. Confirms that ambiguities in guilty plea agreements must be resolved in favor of the defendant.Â 4. Garrison Thomas v. State of Maryland, Court of Appeals 2006 Term, No. 59. Affirms conviction where the jury was informed that the defendant originally physically struggled against a blood test ordered by a search warrant in conjunction with a murder investigation. The Court said: "Simply because there is a possibility that there exists some innocent, or alternate, explanation for the conduct does not mean that the proffered evidence is per se inadmissible. If it was the position of petitioner that he feared needles, or that the drawing of blood violated some religious belief he held, or any other innocent e xplanation for his con duct, it was incumbent upon him to generate that issue. He had the opportunity at trial to offer alternative theories explaining his resistance to the blood test." So much for the Fifth Amendment right to remain silent.Â 5. Maurice Galen Hunter v. Maryland, Court of Appeals 2006 Term, No. 63. Holds that a retrial may be necessary when the prosecutor repeatedly asks the defendant (after the defendant waives the right to remain silent) whether certainÂ prosecution witnessesÂ are lying.Â 6. Thompson v. Maryland, 393 Md. 291 (2006). Grants retrial, because the trial court impropertly gave the jury a flight instruction, even though defendant could have been running from cops to conceal drugs on him, rather than fleeing as a result of involvement in a recent robbery attempt. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:45

When tax dollars pay for wrongful police spying, intimidation, and unlawful arrests.

The Bill of Rights.Â (From the public domain.)Â When I was in high school, I saw a button saying "Fairfield Cops are Tops." However, police power is profound and is constantly at risk of abuse. Being human, police are fallible. Â Police misconduct -- which remains rampant -- will not stop or abate enough until everybody insists on and achieves a radical and positive overhaul of policing andÂ police hiring, training, supervision, and discipline; and a radical and positive overhaul of the criminal justice system, including heavily decriminalizing drugs (and legalizing marijuana), eliminating mandatory minimum sentences, and eliminating criminal penalties for activities as minor as prostitution. Â Here is some recent information about police abuse of power: Â - The April 3, 2007, Washington Post reports: "A secret FBI intelligence unit helped detain a group of war protesters in a downtown Washington parking garage in April 2002 and interrogated some of them on videotape about their political and religious beliefs, newly uncovered documents and interviews show." This is my own backyard being discussed in this article, which makes this hit all the more home. Â - On March 24, 2007, the Associated Press reported: "Undercover New York police officers traveled around the United States and to Europe to observe activists who planned to protest at the 2004 Republican National Convention â€" including hundreds who showed no sign of illegal intent, a newspaper reported." Read more about police abuse during andÂ leading up toÂ presidential party conventions here,Â here, and here. Â The list goes on endlessly about police abuse of power, often with the blessings and direction from government executives, from huge demonstration-free zones outside presidential conventions (and during presidential inaugurations)Â to unconstitutional racial and religious profiling at airports and on airplanes to driving and walking while black arrests. Â Police and the government are supposed to serve the governed, and not the other way around. This abusive state of affairs will not change unless the people insist on changeÂ loudly, in large numbers, persuasively, and persistently.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:15

Tuesday, April 3. 2007

Limits on canine searches.

Drug dog image from the NIH's website.Â A canine search by policeÂ sometimes is invalid simply because too much time elapses for the canine to arrive. Maryland v. Paul Andrew Mason, Jr.Â , Sept. Term 2006, No. 1661Â (Md. App., March 27, 2007)Â This Mason caseÂ addresses "how long a person may be detained following a valid traffic stop in order to process the traffic stop," which in this case was a traffic stop made with the intention to carry out a drug investigation. Whren v. United States, 517 U.S. 806 (1996) (generally permitting police to make otherwise lawful traffic stops even if the purpose of the stop goes beyond enforcing traffic laws). Â Maryland's' Court of Special Appeals affirmed the trial court's suppression of a canine search of defendant's car, due a 25-minute delay in stopping the car and the arrival of the drug-sniffing canine. The Court said: Â "We must never lose sight of our starting point that warrantless searches and seizures, including the ongoing seizure of a person at the curbside, are presumptively unreasonable and that the burden is on the State to rebut that presumption and persuade the suppression hearing judge otherwise. It is not the judge's job to devise the best strategy and to research the supporting law on behalf of the State in order to persuade himself. The judge is not the prosecutor's law clerk. To do those things is the State's burden, not the judge's burden.Â "In determining the reasonableness of a period of detention, at least two critical findings of fact must be made. One involves measuring the duration of the detention. How much time elapsed from the initial stop of the appellee until the K-9 alert on the vehicle? The State's best version of the evidence established that detention as one lasting about 10 minutes. The appellee's best version of the evidence established it as one lasting between 23 and 25 minutes. Because the appellee was the prevailing party, we accept as established truth the fact that the detention lasted for 25 minutes. Any de novo determination we may be called upon to make will be based, as a matter of course, on that fact. Another necessary finding of fact is that of how diligently the stopping officer worked in processing the traffic warning. If Officer Tringler was proceeding with due diligence to write and to issue the traffic warning, the length of the detention was, by definition, reasonable. If, on the other hand, Office Tringler was stalling in order to facilitate the arrival of the K-9 dog, the length of the detention was, by definition, unreasonable. Whether Officer Tringler was or was not stalling is not something that can be established, as a matter of law. It is something that must be found, as a matter of fact, from the totality of the circumstances." Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:30

When courts ban Internet access to convicted sex offenders.

Computer hard drive. (Image from Pacific Northwest Laboratory's website).Â Criminal courts often will ban or severely limit Internet access to convicted sex offenders. Attorney Dean Boland addresses here various courts' split on this issue. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, April 2. 2007

"Bong Hits 4 Jesus": Strange bedfellows justifiably rally behind the First Amendment.

The First Amendment and the rest of the Bill of Rights.Â (From the public domain.)Â Around six years ago, I learned about the Foundation for Individual Rights in Education. It is an indispensible and phenomenal organization that stands up for students and professors against such unjust academic administrative oppression of expression as the ultimately reversed 1989 probation of a student at Tufts (my undergrad alma mater) for distributing an offensive, abhorrent, and sophomoric t-shirt with fifteen alleged reasons why beer was better than women at Tufts. At the time, I immediately wrote Tufts' dean of student affairs about my revulsion over this curtailment of this student's free expression rights, only to receive a trite -- but polite (so as to avoid being offensive to me, of course, where a student had been disciplined for being offensive) -- reply asserting that reasonable time, place and manner restrictions on expression were acceptable, and hoping that I still was happy I attended Tufts (which I was and still am, it having been a critical mind, humor and experience-expanding watershed where students and professors of all sorts of viewpoint stripes could honestly discuss and debate their views (or just hike the White Mountains without discussing their political views) and then drink beer together (or do both at the same time), which is why I was so saddened that this beer t-shirt discipline had ever taken place). I was delighted to later learn that the FIRE was on the same page with me on this t-shirt matter. Â I proudly answered the FIRE's call in representing past American University student Ben Wetmore -- a political conservative (as was my law partner Jay Marks in many ways when he attended the same campus as an undergrad and law student) who was wrongfully physically manhandled for videotaping Tipper Gore's on-campus speech and later hauled before a kangaroo campus disciplinary Star Chamber court. Although I did not share most of Mr. Wetmore's politics, I strongly believe he was on the side of the angels in his disciplinary hearing, and certainly had my own antipathy -- shared with Frank Zappa -- against Tipper GoreÂ and company for trying to censor music (despite her denials of censorship, which she politely conveyed to me in response to my 1987 letter of protest to her).Â Â Â Â A few months before hooking me up with Ben Wetmore, the FIREÂ linked me with then-professor Sami Al-Arian to advise himÂ on his Constitutional claims after he was suspended from the University of South Florida, after the university experienced substantial heat following Mr. Al-Arian's appearance on the O'Reilly Factor. Once again, my views about Mr. Al-Arian's politics were irrelevant to his unjustÂ suspension and subsequent firing over his appearance on theÂ O'Reilly Factor. (As an aside, a few years later, going opposite O'Reilly, I stood up for Mr. Al-Arian's criminal defense rights against a retrial after a mistrial on most counts against him). Â I soon recognized that the FIRE probably received as much -- or more -- financial and other support from political and religiousÂ conservatives than anybody else, because they so often were the targets of campus censorship. The only thing that kept me from losing my breakfast over finally being in the same room with Ed "porn censor" Meese as he talked in favor of the FIRE'sÂ agenda at the National Press Club a few years ago was that Meese no longer had any offical political power, and that he was counter-balanced by the ACLU's Nadine Strossen, whoÂ confirmed that she and Meese were able to find common ground in support of the FIREÂ as fellow board members of the organization. Â Flash forward to 2002, when high school student Joseph Frederick unfurled a "Bong Hits 4 Jesus" banner on a public sidewalk as the Olympic torch approached during its Juneau, Alaska, leg. Instead of the school's respecting Mr. Frederick's right to make such a First-Amendment-protected statement (off campus at that), the school principal Deborah Morse insisted he and his associates lower the banner. Mr. Frederick refused and rightly asserted his First Amendment free expression rights. Ms. Morse grabbed and crumpled the banner and suspended Mr. Frederick from school for ten days. Mr. Frederick sued principal Morse for money damages for violating his First Amendment rights, and the United States Court of Appeals for the Ninth Circuit upheld his right to do so. Â On March 19, 2007, the United States Supreme Court heard this "Bong Hits 4 Jesus" case, formally known asÂ Morse v. Frederick,Â No. 06-278. The oral argument transcript is here. The briefs are here for the principal parties and the many amicus parties. Check back hereÂ for any future release of the audiotaped oral argument. (The Supreme Court forbids videotaped arguments). Â Notably and understandably, the Christian Legal Society and the ordinarily conservative Rutherford Institute and American Center for Law and Justice filed amicus briefs supporting student Frederick's side, because an adverse ruling against Mr. FrederickÂ will harm the future rightÂ of students toÂ exercise expression supporting views near and dear to the latter organizations' hearts. At first blush, Mr. Frederick and his counsel, the American Civil Liberties Union, may seem like strange bedfellows with such organizations, but they all have recognized that robust First Amendment protections for students and everyone else is critical to the ACLU's broad First Amendment protection interests and the interests of the other organizations listed here against government officials not favorably disposed to their agendas. Â Â Speaking of Star Chambers (or Starr Chambers in this instance), former Bush IÂ Solicitor General Kenneth Starr argued before the Supreme Court against Mr. Frederick, making an effort to exclude student drug advocacy from First Amendment protection. So much for teaching students about everyone's right to seek legislative changes to and judicial limitations on current laws. Â By the way, the day after the "Bong Hits for Jesus" case was heard, Slate posted this articleÂ about substantial official religious support for legalizing medical marijuana. In other words,Â although hisÂ using Jesus's name on his banner likely offendedÂ many people, Mr. Frederick was addressing a

serious issue, in that the federal and state governments should stop banning marijuana and should stop politicizing the use of marijuana as medicine. Jon Katz.Â ADDENDUM: Last month, the principal at Wilton (Connecticut)Â High School, which is but a few miles from where I grew up and attended public school, cancelled a student play about Iraq entitled "Voices in Conflict." Hopefully the Supreme Court's Morse v. Frederick decision will minimize such autocratic and unconstitutional censorship authority in public schools.

Posted by Jon Katz in First Amendment at 02:00

Sunday, April 1. 2007

Following the lessons of Lao Tzu.

Lao Tzu, the purported author of the Tao te ching. (Image from the public domain).Â One day while leading us in t'ai chi practice, my teacher Len Kennedy -- who is one of the two lawyers who inspired me to practice t'ai chi -- told us that the only way to reach tao while practicing t'ai chi together is to move in unison. Â Similarly, reaching victory for our clients calls for harmonious teamwork. One of my favorite clients recently paid homage to the team that he quickly joined on the road to his phenomenal victory. I post his following message because of what he says about the teamwork of our staff, my law partner Jay Marks, and our expert witnesses:Â Â In my case Jon Katz produced results that only he could achieve. His amount of preparation and research clearly made a huge difference. He took the fight to the prosecutor from the first moment he was retained, keeping his foot on the prosecutor's neck the entire case, from bail to discovery to sentencing.Â Â I was facing 5 years in prison, and the loss of my job and home.Â My house was raided at 4am by 15 law enforcement officers. They found a Â bedroom converted into a grow room with a few dozen marijuana plants. The state went before a grand jury and indicted me on 5 countsÂ including intent to distribute, and manufacturing marijuana.Â Â It was time to get laywered up. I did a lot research, Jon Katz's name kept coming up. He was highly recommended by NORML. I had seen him on the O'Reilly Factor, and was impressed with his ability to deflect O'Reilly's constant stream of nonsense and stay on point. I knew it would take a courageous attorney to mount my defense. The moment I spoke with Jon I knew he was the right man for the job. Â Here are some of the things that Jon Katz did for me. With the teamwork of Jon and his law partner Jay Marks, I never spent a minute in jail. In fact I was never arrested, handcuffed or fingerprinted. The authorities set my bail at $100,000.00. Jon and Jay had it reduced to zero.Â Â After Jon filed numerous legal motions, added our top-notch marijuana grow experts to our team, and went to work with our experts, the prosecutor agreed to drop all the charges in exchange for a plea to simple misdemeanor marijuana possession, with a request for probation.Â Â With the help of a medical doctor, Jon convinced the judge to fine me $100 under the state's medical marijuana law, with no jail time or probation.Â Â That was not good enough for Jon. He insisted I go back before the judge. He filed a motion to convert the guilty verdict to a result of probation with no probation time. In late March 2007, the state argued that Jon and I had already made a mockery of the system and the judge should deny the motion. The judge then handed Jon his last victory in my case and had it converted from a guilty to probation with no probation time. Because of Jon Katz's representation I sit here a free man afforded a second chance. I am sure without Jon Katz I would either be in a cell somewhere or pissing in a jar at a probation officers office.Â Thanks Jon, Jay and Staff.Â You are quite simply the best.Â Â [Thanks back at you, for giving us the chance to fight along with youÂ for your victory, and to savor the end result.]Â Jon Katz.

Posted by Jon Katz in Jon's news & views at 02:45

Courts may not ban probationers' possession of "pornography".

The First Amendment and the rest of the Bill of Rights.Â (From the public domain.)Â Pornography is not a clearly-defined legal term of art. Consequently, due to the First Amendment, courts may not ban probationers from possessing pornography (as opposed to "child pornography" and obscenity, both of which are defined in more detail (even though ill-defined) in the law books). U.S.Â v. Loy, 237 F.3d 251 (3d Cir.Â 2001); accord, U.S. v. Guagliardo, 278 F.3d 868 (9th Cir. 2002), cert. denied, 537 U.S. 1004 (2002): Â "[A]lthough the scope of the term 'obscenity' has been exhaustively examined (and even the term 'indecency' has been given a specific definition by the FCC, see FCC v. Pacifica Found., 438 U.S. 726, 731-32, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978)), the term 'pornography', unmoored from any particular statute, has never received a precise legal definition from the Supreme Court or any other federal court of appeals, and remains undefined in the federal code." U.S.Â v. Loy, 237 F.3d at 263. Â Thanks to a fellow criminal defense listserv member for posting these cases. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00