

Friday, June 29, 2007

### **Don't let government surveillance interfere with joining the National Lawyers Guild.**

What made presidents so fearful of giving J. Edgar Hoover the axe? (Image from Library of Congress.) In 1990, I took out a subscription to High Times magazine in protest over a federal prosecutor's subpoenaing the magazine's advertiser records -- as reported by Index on Censorship -- in an apparent effort to clamp down on hydroponic sellers and customers, and various other suspected marijuana-related vendors. In 1988, I became a student member of the National Lawyers Guild, and renewed my membership a dozen years later when working with the group to defend anti-IMF/World Bank protesters. Had I not already joined back then, I would have joined today -- despite my fierce disagreements with the group (see here and here) -- in part over this week's New York Times report about how extensive was the FBI's undercover surveillance of the group under J. Edgar Hoover, to the tune of at least 400,000 pages of documents accumulated through the FBI's investigations and research. (How Hoover and his ilk kept track of so many pages before the age of the personal computer is beyond me). In the meantime, I retain hope that I will find enough like-minded lawyers to start a new organization that will pursue the best traditions of the Guild, but will cut out its excess of knee-jerk and one-sided support of anti-Israel campaigns, its general reluctance to give First Amendment legal and demonstration support for anyone other than "progressives", and its willingness to curb free expression rights if that will serve the remainder of its "progressive" agenda (e.g.. with its siding against the First Amendment in the Supreme Court's case involving greater punishment for burning crosses than for burning other items). Until such a new organization is created, the Guild fills a critical void with a nationwide stable of courageous -- and often very likeable and fascinating -- lawyers and legal workers who do not join the Guild to burnish their resumes, but join with a strong, and usually fierce, devotion to justice as they define it (even though my sense of justice is not going on a mission to North Korea without at least confirming to the North Korean government that the visitors still have strong reservations about the nation's human rights abuses). Even now, long after J. Edgar Hoover is gone from the FBI's helm, Guild Executive Director Heidi Boghosian probably is not farfetched when saying: "We work with the assumption that everything we do is being monitored by the government... Unfortunately, we've become used to surveillance." Such surveillance amounts to a waste of tax dollars and government resources, and government's urination on the Constitution. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:15

Thursday, June 28, 2007

### **Speaking of Trane and finding Trane.**

John Coltrane Society, to the right of Trane's house in Philadelphia, where he lived, composed and played music in the 1950's after leaving the military. Copyright Jon Katz; taken May 2007. Same place, different photographer. From the National Park Service's website. In 1995, I spent over four weeks at the Trial Lawyers College with the amazing John Johnson, who was hugging personified. When John Johnson left the planet in early 1996, he hugged me in a dream the same evening I learned of his passing. The next evening, his belief in the power of hugging followed me as I accepted a homeless woman's requests for a couple of hugs on a snowy evening after I bought her dinner, when before I may not have accepted the hug request of any stranger. It carried into the next day, when for the first time I met my now close friend Trudy Morse when I went to pray for John. She is a hugging friend I met after the passing of another hugging friend. Shortly afterward, I spoke with another Trial Lawyers College participant about how I had gone mainly from being a non-hugger to all this hugging after John Johnson passed; that is not to say that I have gone the opposite route, either. He suggested that all this might have happened because I finally had opened myself to receiving the hugs. So I had. My Trial Lawyers College experience helped me take a much more realistically optimistic approach to my life and growth versus my previously much more bleak and cynical outlook on life that was heavily informed by the daily injustice I saw -- and still see -- inflicted on criminal defendants and on other people. I write more here about achieving a more harmonized approach to life, not out of embracing any new age concept, but out of necessity. As I opened myself up to a more spiritual (but mostly non-religious) and harmonious life, I started paying more attention to those on a similar path, including jazz legend John Coltrane, whose life was cut short by cancer in 1967 at the age of forty. During the last year, I have paid more attention to John Coltrane than ever, after first experiencing him thirty years ago when I became a certified jazz fanatic. I learned that my college music teacher Lewis Porter later wrote John Coltrane: His Life and Music. I have yet to experience the in-depth studies and transcriptions of Trane's music by Andrew White, an accomplished jazz saxophonist himself who lives in Washington, DC, and whom I met five years ago. Trane holds the fascination of many others, including this Trane blogger, this Trane researcher, and the members of Saint John Coltrane African Orthodox Church. (This Church is not such a farfetched concept when considering the deep spirituality of Trane, who wrote "A Love Supreme" out of that spirituality.) In this context, was it mere coincidence that last month I happened upon Trane's Philadelphia home? On the way back from a great re-adventure in Massachusetts and New Hampshire -- where, among other things, I visited Jack Kerouac's childhood town, Lowell, Massachusetts, for the first time -- my wife, son and I spent an afternoon in Philadelphia. This time, instead of visiting the usual downtown areas not far from Independence Hall, we varied our route. After visiting the Philadelphia Museum of Art, for the first time, where Rocky made his famous run up the many steps, we drove further north, ultimately arriving at an unexpected jewel. Serendipitously, I had found John Coltrane's house -- pictured above -- where he lived, composed and played music in the 1950's after leaving the military. More details about the house are here. This was late on a Saturday afternoon, when I saw a man leave the Coltrane Cultural Society house, which appeared to be in the process of renovation. The man estimated that the Cultural Society building should be open soon to the public. Trane's house remains occupied by one or more family members, but I saw none that day. I soaked in the better picture this gave of Trane's persona, and took some pictures. As I have blogged before, the significance of Trane to my law practice is the inspiration he gives me towards excellence through pouring my heart into what I do. Also, as I have said here: In the sterile, windowless, and often chilling surroundings of a courtroom, the imagination is needed to make the place come alive for justice. I like to replace the framed paintings of unsmiling judges and the appearance of armed police with the antics of R. Crumb, the juxtapositions of Joseph Kosuth, and the endless imagination of Santana Miyazaki. I like to replace the unsettling sound of clicking handcuffs and slamming celldoors with the sounds of Dizzy Gillespie's be-bop, John Coltrane's Love Supreme, Van Morrison's "Moondance", and Cecil Taylor being Cecil Taylor. Finally, love played a big part in Trane's life, to the point that he entitled one of his greatest masterpieces A Love Supreme. Love is a very big theme at the Trial Lawyers College, too, including the importance of loving our clients, loving our loved ones, and loving ourselves. The concept often got watered down for me at the Trial Lawyers College as many people said "I love you" so often to so many people to the point that the phrase seemed to start losing its significance; on the other hand, universal brotherly and sisterly love certainly will make this world a much better place. It was particularly fitting that the two people I love the most were with me on this adventure. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

Wednesday, June 27, 2007

### **Supreme Court permits appellate courts to presume reasonableness of sentences within the Sentencing Guidelines.**

Image from Bureau of Prisons' website. On June 21, 2007, the Supreme Court permitted appellate courts to presume the reasonableness of federal sentences imposed within the Sentencing Guidelines. *Rita v. U.S.*, \_\_\_ U.S. \_\_ (June 21, 2007). Although *Rita* still enables defendants to try to overcome such a presumption of a reasonable sentence, the opinion likely will make sentencing judges all the less likely to depart below the sentencing guidelines in circuits that prohibit "unreasonable" sentencing guidelines departures. Concurring, Justice Scalia, joined by Justice Thomas, laments that *Rita* does not sufficiently resolve the interplay between *U.S. v. Booker*, 543 U.S. 220 (2005) (prohibiting a mandatory application of the federal sentencing guidelines) and the extent to which judges, rather than juries, may make their own factual findings in the sentencing process. Justice Scalia writes: "The Court's decision today leaves unexplained why the mandatory Guidelines were unconstitutional, but the Court-created substantive-review system that contains the same potential for Sixth Amendment violation is not. It is irresponsible to leave this patent inconsistency hanging in the air, threatening in the future yet another major revision of Guidelines practices to which the district courts and courts of appeals will have to adjust. Procedural review would lay the matter to rest, comporting with both parts of the *Booker* opinion and achieving the maximum degree of sentencing uniformity on the basis of judge-found facts that the Constitution permits." The sole dissenter, Justice Souter, rejects giving any presumption of reasonableness to a sentence imposed within the sentencing guidelines, in part because doing so will lead to a self-fulfilling prophecy of trial judges ordinarily taking the safe route by sentencing within the guidelines, rather than imposing a sentence outside the guidelines (whether below or above the guidelines) only to face the risk of being reversed on appeal, thus leading to the necessity of a new sentencing proceeding. Justice Souter offers Congress the opportunity to go back to the drawing board with sentencing guidelines: "If Congress has not had a change of heart about the value of a Guidelines system, it can reenact the Guidelines law to give it the same binding force it originally had, but with provision for jury, not judicial, determination of any fact necessary for a sentence within an upper Guidelines subrange." Without enough clarity or detail, *Rita* discusses the province of the jury, under the Sixth Amendment, and the judge for finding facts that will inform the sentence ultimately reached in a criminal case. In that regard, Justice Souter's dissent provides a helpful and short overview of Supreme Court cases addressing the size and extent of unanimity required from a jury: "A very general overview of the course of decisions over the past eight years may help to put today's holding in perspective. Members of a criminal jury are guaranteed to be impartial residents of the State and district of the crime, but the Sixth Amendment right to trial by jury otherwise relies on history for details, and the practical instincts of judges and legislators for implementation in the courts. Litigation has, for example, worked through issues of size, see *Ballew v. Georgia*, 435 U. S. 223 (1978) (prohibiting five person state juries but allowing juries of six), and unanimity, see *Apodaca v. Oregon*, 406 U. S. 404 (1972) (allowing nonunanimous juries in state criminal trials); *Burch v. Louisiana*, 441 U. S. 130 (1979) (prohibiting nonunanimous six-person juries). Such decisions go to what William James would have called the 'cash-value' of the Constitution's guarantee. See W. James, *Pragmatism: A New Name for Some Old Ways of Thinking* 200 (1st ed. 1907)." In any event, sentencing requires as much aggressive battle by defendants as seeking acquittals. Perhaps some defendants will feel as if they are throwing in the trial towel to be prepared for sentencing, but to do otherwise is to throw in the towel for any sentencing battle. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:05

Tuesday, June 26. 2007

**More set for execution in Iraq by hanging and in the U.S. by injection.**

Death penalty: Always unjust. Iraq's government mimics Saddam Hussein's all too much in the capital punishment department, particularly in the swiftness of appellate rubber stamps and the swiftness of the execution thereafter. Today's Iraq continues Saddam Hussein's practice of hanging as the preferred execution method, with three high-level Hussein officials having received death sentences recently. Last January, Hussein's half brother was decapitated when hanged. Last March, Saddam Hussein's former vice president -- Taha Yassin Ramadan -- was hanged even though his trial court ordered a life sentence. The appellate judges who reviewed the case ordered a resentencing, saying the original sentence was too lenient, and he was swiftly hanged thereafter. Iraq can always try to deflect attention to its barbaric death penalty machine by looking eastward to China. For instance, here is a snippet of Congressional testimony by the Bush Administration -- far from a human rights stalwart -- about China's completely barbaric death penalty and organ harvesting practices: "The Department of State is also aware of reports that it cannot independently confirm, of other, even more egregious practices, such as removing organs from still-living prisoners, and scheduling executions to accommodate the need for particular organs. In addition, there are compelling first-hand reports that doctors, in violation of medical ethics codes, have performed medical procedures to prepare condemned prisoners for execution and organ removal. As former Assistant Secretary John Shattuck testified before this committee in 1998, our concern about the abhorrent practice of removing organs from executed prisoners without consent is compounded by our concerns about the lack of due process. According to Amnesty International there were 1,263 confirmed executions in 1999; according to another report 800 prisoners were executed in May 2001 alone as the government conducted another "strike hard" campaign against crime. A high court nominally reviews all death sentences, but as our Country Report on Human Rights Practices points out, and as a recent New York Times article graphically described, the time between arrest and execution is often days or even hours. Some prisoners are taken directly from the courtroom to the execution grounds. Appeals of sentences consistently result in confirmation of sentence." Last year, Stephen Wigmore of the British Transplantation Society said that: "The weight of evidence has accumulated to a point over the last few months where it's really incontrovertible in our opinion" that China continued to harvest the organs of executed people. The United States continues to be the only Western industrialized nation to execute people. Three executions are scheduled today, alone, in Texas, Oklahoma, and Georgia. These three people and the three above-listed condemned former Hussein officials were convicted of committing heinous murderous acts. To the extent they committed such horrendous crimes, their crimes should not be minimized. However, when people are sentenced to death, the focus gets shifted away from the defendant's criminal actions to the utter injustice and brutality of the death penalty, which amounts to state-sanctioned murder. Texas continues taking the lead for executions, taking credit for all but one of June's executions thus far, as follows: June 6 Michael Griffith (Texas); 15 Michael Lambert (Indiana); 20 Lionell Rodriguez (Texas); 21 Gilberto Reyes (Texas); and 22 Calvin Shuler (S.C.). As much as I did not want to live in Washington, DC, so as not to suffer no voting representation on Capitol Hill, at least D.C. is one of the jurisdictions that has no state-level death penalty. For those considering moving to non-death penalty states, they are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. Please patronize these states (and D.C.) for your vacation, business, and residential needs, to send sales tax dollars their way in appreciation for their refusal to adopt capital punishment. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:15

Monday, June 25, 2007

### **Pain in the pants plaintiff loses. Justice is served, but late.**

Image from public domain. Three cheers for today's victory of the Washington, DC, family-owned dry cleaner over the administrative law judge who pursued a frivolous pro se multimillion dollar lawsuit for his allegedly missing pair of pants. Click the following hyperlinks to find the Superior Court's detailed opinion and accompanying order, as well as today's Washington Post article. Now left to be seen is whether (1) plaintiff Roy Pearson will have his expired high-paying judging job renewed and (2) the dry cleaner will prevail in its pending efforts to obtain monetary sanctions and attorney's fees against Mr. Pearson. Congratulations to the dry cleaner and its lawyers. Jon Katz. ADDENDUM I: Click here if you wish to donate to the dry cleaner's legal defense fund. If the dry cleaner's lawyers bill anything close to what their previous large corporate law firms billed hourly, the dry cleaners must have a hefty legal bill. ADDENDUM II: While trying to google about the state of pants-gate plaintiff Roy Pearson's bid to continue as a D.C. administrative law judge, I came across this blog entry strongly supporting plaintiff Pearson. Consider the source of such a blogview; just last week the same blogger decided that if the dry cleaner's owners were not ethnic minorities, they would have given Mr. Pearson better service. At first I was reluctant to dignify such views by linking to them; however, if anybody holds such reprehensible views, perhaps it is better to shine the light of day on such views. ADDENDUM III: According to the Examiner, plaintiff Pearson's boss did an about-face and recommended that Pearson not be returned to another administrative law judge term. The position pays well, at over \$100,000 annually. As I blogged earlier this month, even with my First Amendment zealotry, I have difficulty seeing how the First Amendment precludes the D.C. government from considering this lawsuit as to his ALJ renewal bid, because the lawsuit directly relates to Mr. Pearson's ability as an ALJ to exercise sound judicial temperament, discretion and fairness over decisions impacting litigants. ALJ work is no mere ministerial task, but instead requires careful, wise, and just adjudication. Mr. Pearson's lawsuit and reported testimony and demeanor at his pants trial demonstrate that he is not fit to be an ALJ, and that any litigant appearing before him (should his ALJ position be renewed) should move for his recusal.

Posted by Jon Katz in Jon's news & views at 13:20

### **Bong Hits decision provides roadmap to silence student drug reform advocacy.**

The First Amendment and the rest of the Bill of Rights. (From the public domain.) As I have repeatedly said, your vote for president will leave an indelible mark on the Supreme Court's composition and its protection or non-protection of individual liberties. Today, in the Bong Hits 4 Jesus case (covered by my April 2, 2007, blog entry) the United States Supreme Court wrote public schools a roadmap to silence speech seen as advocating illegal drug use, even when the message is intended to advocate for drug policy reform. The case is *Morse v. Frederick*, \_\_\_ U.S. \_\_ (June 25, 2007). Morse's solid five-justice majority (Chief Justice Roberts joined by Justices Scalia, Kennedy, Thomas, and Alito) gives public schools an effective green light not only to exempt students from advocating drug use, but from expressing a whole host of messages deemed (deemed by whom?) to be disruptive to the academic mission. Considering the vagueness of the "Bong Hits 4 Jesus" banner at issue in this case (does it promote smoking from bongs, promote making marijuana legal, or promote vague banners?), public school principals likely will feel emboldened to silence pro-drug reform messages on and off school premises, even where the activities are as mild as wearing t-shirts and buttons for NORML and the Drug Policy Alliance, let alone to establish a school NORML chapter or to submit a pro-drug reform opinion article or letter to the school newspaper, and let alone to wear a t-shirt with a marijuana leaf, even though the marijuana plant has proven industrial uses that were advocated in the past by the United States government. Will public schools go as far as banning Coca Cola/Coke machines and t-shirts -- and drinking Coke at school-sponsored events -- considering that this brand name was initiated when Coca Cola indeed included cocaine as a key ingredient, and when considering that "coke" remains the street name for cocaine? Bad court decisions about students' rights, like this First Amendment-violative Morse decision, challenge my support of the public school system. Morse certainly fails to teach students the value and meaning of the First Amendment; rather Morse damages and undermines the First Amendment. Jon Katz. ADDENDUM: Marty Lederman at *ScotusBlog* suggests that Morse "is a very limited holding -- essentially limited to the drug context. The Alito concurrence, joined by Kennedy, is controlling." As much as I wish Morse's reach will be strictly limited, I think the lower courts and public school officials will see Morse as confirming and even enabling the expansion of substantial authority of public schools to limit student speech going beyond advocacy of drug use, including when one considers the very vagueness of the "Bong Hits 4 Jesus" banner involved in this case.

Posted by Jon Katz in Constitutional Law at 11:25

Sunday, June 24, 2007

**Military lawyer courageously reveals sham system for classifying enemy combatants in Guantanamo.**

This photo at Guantanamo's Camp Delta prison is the least whitewashed of those at this Defense Department Guantanamo photo webpage. Enlarge this photo only on an empty stomach. One day, a public defender lawyer told me he wanted to keep his job rather than make waves. Much was available to speak out about, with the unreasonably high caseloads, insufficient support staff help, and numerous judges who felt public defender lawyers -- as opposed to private practitioners -- should be at their beck and call, and the list goes on, including issues affecting all retained and public defender criminal defense lawyers and their clients. Every practicing lawyer faces the possibility one day -- sometimes at great personal, career and financial risk -- of choosing whether to blow the whistle pursuant to governing ethics rules, personal ethics rules, or both, or staying silent in contravention of such rules. Sadly, too many lawyers remain silent when it is time to speak out. Happily, the stories are many of public defender lawyers, private criminal defense lawyers, and even prosecutors who stick their necks out to do what is right. Praised be military lawyer Stephen Abraham -- now a lieutenant colonel in the Army Reserves -- for risking his military career by courageously stepping forward and providing this affidavit revealing that the Guantanamo enemy combatant review process was a sham during the period he was involved with such reviews from September 11, 2004 to March 9, 2005. (To see the affidavit, scroll to page eight of this SCOTUSblog-posted Reply to Opposition to the Petition for a Rehearing filed by the petitioners in *Khaled A.F. Al Odah, et al. v. U.S.*, U.S. Supreme Court Petition No. 06-1196.) At one point, Mr. Abraham was assigned to a Combatant Status Review Tribunal. However, after his panel refused to classify a Guantanamo inmate as an enemy combatant, he was not assigned to serve on another Combatant Status Review Tribunal; of course not, seeing that he previously refused to rubber-stamp an enemy combatant classification request. This story is covered by the Washington Post and ScotusBlog. On the one hand, Mr. Abraham's affidavit only covers a time period that is now over two years old. On the other hand, it appears that most military lawyers are too fearful to step forward with information about the enemy combatant review process. They should step forward, now. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:15

Friday, June 22, 2007

### "I like when you swear."

In the end, the best fight for and alongside the client comes from fighting to harmonize the client's situation. Plenty of people think I am intense (I prefer to call it passionate), as much as I endeavor to be a t'ai chi peaceful warrior. I address this more here. Sometimes a client will freak out when my honest answer -- I only give honest answers, or else no answer at all -- about my assessment of their case is not as rosy as they want to hear. In the instances where I then win their case or get a result within the framework they hoped for, sometimes I will heartily congratulate them and say "You have survived the roller coaster of Katz" or "Perhaps watching me at work is like watching sausages being made; the sausage may be delicious (if it's a vegetarian sausage, at least) but you don't want to witness the disgusting sausage-making process." Recently, I obtained a dismissal -- on the trial date -- for a client who very much deserved a dismissal. The case made him very anxious. As we both relished the dismissal after leaving the courthouse, I complained about the "f---ing persecutor" (I've been calling many of them persecutors for years, although often less jocularly than a public defender lawyer using that moniker longer than I) for not bothering telling me our case, which was set for trial, would be dismissed when I asked how many witnesses he had (whereby he answered "one"), and then having him tell the judge just ten minutes later that our case was being dismissed. I apologized to my client for swearing -- which I often have much fun doing with my law partner, Jay, after hours when we're the only ones left at the office, as part of keeping our humor engines running, from the sophomoric and buffoonish to the more ready for prime time. My client reminded me that he didn't mind, and that it put him at ease when I inadvertently did the same thing in my office the first time we met. In response to being told that in my office, I said: "I need to write a sticky note to figure out which visitors will be put at ease with four-letter words." At my first law firm -- my favorite partner, from whom I learned much and who encouraged my path to success -- swore often, ordinarily getting a big laugh, and never directing it at or about anyone. I first heard legends of his swearing, but months passed without me hearing a swear from him, until we were talking about a case, and the four-letter words rolled off his tongue. I felt I had graduated to gain his confidence, on a much lesser level than Caine waiting seemingly forever to be invited into the Shaolin temple. The idea is not to swear for the purpose of putting people at ease. The idea, for me, is to let my guard down with my allies and clients, because I like it when I can let my guard down safely, and because it can put others at ease and have them trust me better, at least when I do not go over the edge with it all. My guard is up more in court, where I have never sworn or said "persecutor" on the record (although I wonder if such a slip of the tongue is merely waiting to happen); however, the jury will trust a lawyer more who lets his or her guard down while being ready with sufficient firepower. Many people stereotype lawyers as taking themselves too seriously, feeling too self important, and being aloof. Many lawyers are this way; or perhaps many law professors are the worst offenders. I remind people, though, that before I became a lawyer, I was a human being, and that I continue being so. I have no interest in being a self-important lawyer, but to be a lawyer to fight for what I believe to be right, including helping ordinary people against the uneven and too often abused power of government, police and prosecutors, and big corporations. In Latin America, many refer to lawyers as "doctor" -- a law degree is a juris doctor -- but I am not so sure this always is meant as a sign of respect as much as for creating a distance from those lawyers perceived to have actively or passively contributed to the rampant historical human rights violations and judicial corruption in many Latin American countries. Fortunately, Jay and I took the opposite approach, by making ourselves very approachable to all people early on. For instance, on our 1998-2000 weekly Spanish-language radio show "Legalmente Hablando: Donde su causa es nuestra causa" ("Legally Speaking, where your cause is our cause"), I quickly became referred to as "gato" or "gatito", the Spanish word for cat, kitten, or Katz, my last name. It is easier to approach a little cat than a doctor. Jay has never needed a nickname, because people automatically see he is a teddy bear. Recently on a trial lawyers listserv, some personal injury lawyers were bemoaning how some cheesy advertising lawyers were sucking clients away from them. Then, in the middle of this spirited discussion -- where I mainly responded with my views in this "don't touch that dial" blog entry -- someone pointed out that a reason many injury victims call advertising lawyers who act silly or even greedy while engaging the audience, is that such lawyers have demonstrated they do not take themselves too seriously. I understand that many people are scared to be contacting a lawyer for the first time; in their time of need, many may feel out of sorts knocking on a lawyer's proverbial mahogany doors. Fortunately, a lawyer need not act like a buffoon to connect with clients and others. The lawyer just needs to be real, to shed his or her armor, and to give from the heart. In the lawyer's office, this is easier to do. It must also be done in the courtroom, where, instead of wearing a suit of armor, the lawyer should be ready to use the power of chi in battling to harmonize the situation for the client. Jon Katz.

Posted by Jon Katz in Persuasion at 00:15

Thursday, June 21, 2007

### **Unrepresented defendants: Beware of prosecutors and cops bearing tidings.**

To deal with prosecutors without a lawyer is like dealing with wayang shadow puppets; all will remain shrouded in mystery. (Permission for image republication given by its creator). This follows up on yesterday's blog entry to beware of prosecutors bearing gifts. To unrepresented defendants, I also say beware of prosecutors and cops bearing tidings. Here is an example. Recently, I went to a nearby Virginia District Court for a hearing to schedule my client's trial, with the entire procedure taking ninety seconds at most. When I went in the hall to ask the prosecutor a question, he was speaking with an unrepresented defendant. I could not help myself from overhearing their conversation. From what I could tell, it appeared the defendant only was present for a scheduling hearing, as was I. If not, this certainly was not his trial date. The defendant apparently was anxious to get his case "over with," which is a common sentiment by many of my clients of all different backgrounds. However, when a criminal defendant rushes to get things over with -- without sufficient preparation for battle -- sometimes the nightmare has just begun. In this instance, the defendant looked anxious to receive a guilty plea deal, even while acknowledging a previous theft-related conviction. The prosecutor conveyed combined elements of honesty and smoothness. The prosecutor confirmed that he could not advise the defendant in the way a lawyer could. Yet, he seemed persuasive by his very appearance of being low-key, approachable, and listening. He added to the defendant: "I don't know if the same offer will be extended to you if you wait until the next court date." Fewer than one minute passed, when the defendant shook the prosecutor's hand, saying "We have a deal." I sincerely hope that, in the interim, the defendant refused, after all, to plead guilty without a lawyer. One day, I asked a prosecutor about disparities between guilty plea and disposition deals offered to unrepresented defendants versus to represented defendants. She insisted they get the same thing. Her assertion may have been one percent true, at best. Perhaps she generally made the same initial guilty plea offer to both represented and unrepresented defendants. The missing piece of the puzzle is about the extent to which unrepresented defendants accept plea offers that are not wise to accept and would not be recommended by a qualified attorney; and the extent to which a skilled lawyer, as opposed to an unrepresented defendant, can convince the prosecutor to start softening the prosecutor's settlement offer. Sometimes police join the act to try to convince defendants to take an imprudent guilty plea course of action. Sometimes it is as simple and harmful as a police officer promising to let the judge know the defendant was cooperative with the cop, and to estimate the judge will "just give probation." If not as many defendants were so "cooperative" with police, fewer of them would be criminally charged, convicted, or harshly sentenced in the first place. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, June 20, 2007

### **Diversion: Beware of prosecutors bearing gifts.**

Photo from website of U.S. District Court (W.D. Mi.). Many potential clients with no prior convictions ask me about diversion for numerous misdemeanor charges running from shoplifting to marijuana possession to soliciting prostitution. My response ordinarily is to beware prosecutors bearing gifts. When a prosecutor and criminal defendant agree to do diversion, the defendant is "diverted" to satisfy certain conditions to get the defendant's case inactivated or dismissed. A whole host of conditions might be involved for obtaining diversion, which might include, but not be limited to, community service, general good behavior, paying restitution, not picking up new criminal charges, drug or alcohol education, and a series of negative drug tests (I oppose the nation's rampant drug testing madness). Some potential clients tell me that other lawyers sometimes suggest they save their money and go to court on their own to go into diversion, or that other lawyers have mapped out a plan to enter diversion. I am curious about whether any lawyers make such a suggestion, as opposed to (1) responding to sticker shock at the lawyer's fee by saying that the defendant always has the option of representing himself or herself (which summonses the maxim that one who goes to court without a lawyer has a fool for a client) or (2) reducing such sticker shock by offering to charge a lower fee if the defendant decides in advance to seek diversion, seeing that less lawyer time might be needed to assist with diversion than to prepare for and go to trial. In any event, I strongly believe that (1) a criminal defendant (other than for non-jailable traffic moving violations) always should go to court with a lawyer, lest, at the very least, the defendant get hoodwinked by the prosecutor, police or both about diversion or any other matter, and (2) diversion should not be accepted any earlier than need be, unless some risk exists that diversion might not be available the longer the defendant waits. (However, I often advise clients to take risks on when to accept or not accept this and other disposition offers.) Here is an example of the risks of going to criminal court without a lawyer, even when diversion seems a shoe-in to the defendant. Recently, I obtained colleague Debra Saltz's permission (and very much appreciate the permission) to post her useful and practical article (originally appearing in the Maryland Criminal Defense Attorneys Association's newsletter in 2006) that addresses each Maryland county's diversion programs, as well as such programs in the District of Columbia. The list is outdated concerning drunk driving cases in the District of Columbia, where the diversion cutoff now ordinarily is a 0.15 blood alcohol test rather than 0.20. In that regard, recently I spoke with a District of Columbia assistant attorney general who prosecutes drunk driving cases all the time and seems very above board, even though I often disagree with her, as is common between me and all prosecutors. About drunk driving diversion, she told me that even where the blood alcohol test is below 0.15, sometimes, depending on the circumstances, diversion still will not be offered to defendants with a blood alcohol test result below 0.15. In the District of Columbia, diversion never seems to be a shoe-in. Here are two examples of the risk of seeking or accepting diversion rather than seeking an outright acquittal or dismissal of one's case. First, in Maryland and Virginia District Court -- which courts handle misdemeanors and designated lower-level felonies -- settlement and plea offers often do not begin in earnest until the trial date. Consequently, and ordinarily, if the prosecutor does not have available the necessary witnesses and evidence (learn how to know whether to rely on a prosecutor's word on the availability of witnesses and evidence) on the trial date to prove the criminal charges, no reason ordinarily exists to accept diversion or any other disposition offer (other than an outright dismissal or inactivation of the case) absent a real risk that the prosecutor will obtain a postponement at which the witnesses and evidence likely will be present or a real risk that the necessary witnesses and evidence will come walking through the door, after all, on the trial date. Second, even where a prosecutor optimistically packages an offered disposition as diversion, numerous unforeseen direct and collateral risks can still be involved. For instance, diversion often means keeping the prosecution merely in a suspended pending status until the prosecutor or court agree that diversion has been successfully completed. Having a pending criminal charge might delay or harm certain immigration scenarios (e.g., delays in processing or granting immigration applications or delays, at the very least, being re-admitted to the United States when a non-United States citizen has a pending criminal charge). Those maintaining or seeking security clearances should also check the effect of diversion on their desired security clearance status or applications. Worse, sometimes a defendant thinks s/he merely is entering "diversion" when the disposition will be read by some or many as a finding of guilt or brings greater risk of a guilty finding if the defendant later is deemed to have failed the conditions for obtaining such a disposition. For instance, in Virginia, accepting the so-called first-time offender program for marijuana possession will be treated as a guilty finding by the immigration authorities, and the defendant's Virginia driver's license (and Virginia driving privileges for out-of-state drivers) will be suspended for six months whereby the defendant will need to petition the court for permission to drive with narrowly-defined restricted driving privileges. Sometimes, I suggest that a client do his or her own diversion program, in the hopes of obtaining significant relief from the prosecutor or judge. For instance, on my advice before the trial date, a Virginia marijuana possession defendant who is not a citizen entered a drug education program together with providing weekly negative drug tests. His immigration status would have been severely harmed with a guilty finding or entry into Virginia's so-called first offender drug possession program. After going back and forth several times with the prosecutor, I convinced her that our mutual goals had been overlapped by

my client's drug education and urine testing efforts. We obtained a mutual continuance of the trial date for my client to complete his drug education program (which he did) and then to dismiss the case. Sometimes a criminal defense lawyer is wise to seek diversion, and sometimes must do a lot of convincing to obtain a diversion agreement from the prosecutor. In an instance where the prosecutor ordinarily would not have agreed to a dismissal for community service (where my client had a prior jailable conviction), I successfully upped the ante by offering for my client to complete one hundred hours of community service, where the norm was not to require more than twenty-five hours. In an instance of alleged employee theft in a county that does not offer diversion for employee theft, my client followed my advice, pretrial, to do substantial community service and to have cash available to pay restitution for the allegedly stolen goods. As anticipated, the prosecutor flat-out refused diversion. However, in talking with the complainant retailer's loss prevention manager witness, I learned that he had pressing business elsewhere. With the loss prevention manager's agreement, I tried to convince the prosecutor to accommodate the witness's schedule, seeing that the courtroom was so packed that a trial likely would take a few hours to commence. My client's completed community service, cash in hand, or both, helped tip the scales in our favor. The prosecutor refused to call the disposition one of diversion, but instead said she was accommodating the prosecution witness; no matter what it was called, we walked out of court with a dismissal. Moving across the Potomac to Virginia, prosecutors in the Old Dominion (although much has changed in Virginia for the better, it still remains a death penalty capital, the former cradle of the Confederacy, and a longtime perpetrator of Jim Crow) will sometimes offer a disposition of a stipulation to sufficient facts or a suspended imposition of sentence, and focus to the defendant about getting the case dismissed for successful completion of the conditions for such dispositions. However, immigration authorities consider a suspended imposition of sentence to be a guilty disposition. Also, a finding of facts sufficient for a guilty finding sometimes might appear on the record as an admission or finding of guilt, and, even if not, might risk the immigration authorities seeing it as a guilty disposition. Moreover, if a defendant is deemed not to have fulfilled the conditions for the foregoing dispositions, the defendant will be sentenced without a trial, and a guilty verdict will be on the defendant's permanent record, unless the defendant successfully appeals the conviction. Beyond the foregoing discussion, sometimes defendants will have only one opportunity in a lifetime to complete a diversion program. This is another reason to seek an outright dismissal of charges rather than first running to the arms of a diversion disposition. Nothing guarantees that a defendant will not in the future be charged with a new crime, whether or not the prosecution involves the wrong suspect or a wrongheaded law (e.g., the marijuana prohibition laws). Obtaining quality legal representation can pose a critical financial burden for a criminal defendant who does not qualify for public defender or court-appointed attorney assistance. At the same time, however, to go into court alone against an experienced prosecutor -- who sometimes double- and triple- teams defense lawyers and defendants with police and other prosecutors -- risks too much to lose, even if diversion might be available. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:20

Tuesday, June 19, 2007

### **Supreme Court confirms car passengers' Fourth Amendment rights.**

The Bill of Rights. (From the public domain.) On June 18, 2007, the United States Supreme Court unanimously held that arrested car passengers -- not just drivers -- have standing to challenge the legality of the car stop. The Fourth Amendment kicks in at the time of the stop of the car -- rather than needing to await a formal arrest -- because a Fourth Amendment seizure generally takes place at the time the police stop the car in which the passenger is riding. The case is *Brendlin v. California*, \_\_\_ U.S. \_ (June 18, 2007). In the course of addressing the Supreme Court's relevant precedents, *Brendlin* confirms that the Court previously ruled that a car's driver is seized when police effectuate a traffic stop. As to passengers, *Brendlin* adds: "[A]lthough we have not, until today, squarely answered the question whether a passenger is also seized [by a police traffic stop], we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver." *Brendlin* notes that its conclusion that car passengers have Fourth Amendment standing to challenge a car stop "comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question." Nothing beats a clear Supreme Court ruling to show a trial judge to get the right Fourth Amendment ruling for a defendant. Jon Katz.

Posted by Jon Katz in Criminal Defense at 02:00

### **CT Post update: Here is our published photo.**

Camera image from U.S. Geological Survey website. This is a brief update to our June 17, 2007 blog entry on the Connecticut Post's coverage of our law firm. Subsequently, we obtained the newspaper's permission to upload the print version of the article, which is here and continues here. Included is a joint photo of me and my law partner Jay Marks, the first one taken in many years. We are overdue to take and upload more photos of us and our staff to our website. Jon Katz.

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

Monday, June 18, 2007

### **Will even overseas "pornography" producers face execution in Iran?**

Death penalty: Always unjust. Last Wednesday, Iran's parliament approved, 148-5, a law qualifying producers, directors, camerapeople and actors of moving "pornographic" images for the death penalty. Thanks to a fellow lawyers' listserv member for bringing this sad story to my attention. I would like to know the names of the five legislators who voted against the measure, and wish a majority of parliament had taken their lead. I also wonder if the legislation limits itself to acts taken on Iranian soil, rather than for any material available on the Internet, even if produced and uploaded elsewhere. Finally, I am interested in knowing how the legislation defines pornography; in the United States, pornography is not a legal term of art, except when used in conjunction with prohibitions against child pornography. The bill will not become law without approval from the Guardian Council, the conservative-dominated body that determines whether legislation is consistent with the constitution and Islamic law. If luck will have it, hopefully that Council will be persuaded by the five legislators who voted against the legislation. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:15

Sunday, June 17, 2007

**Marks & Katz in the CT Post about fighting for justice.**

Â Â Last Monday, the Washington, DC, reporter for the Connecticut Post visited my law partner Jay Marks to discuss his immigration law work, and expanded the interview to cover my criminal and Constitutional defense work, and the genesis and progression of our nine-year-old law firm. Â The resulting article was published on the front page of today's Sunday Post. The Connecticut Post is published in Bridgeport, where Jay and I were born in the same hospital three months apart; we grew up together one town away.Â Concerning the September 11 attacks, Jay rightfully told the reporter: "People who did these terrible things to us were not immigrants but terrorists." Â About practicing with Jay, I told the reporter: "We get very little resistance when we want to lower our fees for someone, work pro bono or take on a controversial client. And we inspire each other. The practice of law is about serving your client, not about making money." Â It's nice getting our message for justice to a wide media audience.Â Jon Katz.

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

Friday, June 15, 2007

### **"Beneath the Underdog": Jazzmaster Charles Mingus decrying racism.**

Â In 1988 waiting for my Securities Law class to start, I learned that the woman sitting next to me was named Fara Faubus. I mentioned to her Charles Mingus's masterful song "Fables of Faubus," indicting Arkansas governor Orval Faubus's promotion of segregation, including his failed 1957 effort to use National Guard troops to prevent integrating Central High School.Â As it turned out, Fara was Orval's granddaughter, to which I responded that "he was not a very nice man."Â She did not seem bothered by my comment, although I cannot be sure. In any event, in my fewÂ brief conversations with Fara --Â which never addressed any politics -- she seemed likeable, and certainlyÂ was not responsible for the devastating segregationist actions of her grandfather.Â Subsequently,Â I learned that her father, Farrell, was Orval's only child, and had died twelve years earlier, in 1976, from a drug overdose. She had endured much, to say the least. Â Wikipedia -- hardly a pillar of reliability -- provides possibly the most in-depth online account of Orval, including his father's being jailed at the start of World War I for his very active socialist politics, Orval's own efforts to increase taxes to fund social programs, and Orval's possible motivation by amorality -- rather than by a strong personal interest --Â to promote segregation so that he could be re-elected. Of course, I have heard the saw time and time again about people doing racist things more to get by and get along than out of any personal racist agenda, from the late Supreme Court Justice Black's membership in the Ku Klux Klan to be able to practice law profitably in Alabama, to hotels keeping out African-Americans and Jews lest they lose bigoted customers, to the pharmacy owner near my law school who admitted he prohibited African-Americans from his lunch counter through the Fifties (and Sixties?) lest the workers across the street eat their sandwiches elsewhere. Such realpolitik is shameful. Â The victim of so much rampant racism, jazz great Charles Mingus brought the struggle against it to the forefront through various activities, includingÂ his music, his autobiography *Beneath the Underdog*Â (see excerpts here), and sometimes talking about it head-on to his live music audiences in mid-performance. (See this fascinating piece on jazz and racism, including Dizzy Gillespie's eventual acknowledgment that he misperceived that Louis Armstrong had kowtowed to racism, as opposed to paving the road against segregation). Â "Fables of Faubus" is a powerful and haunting tune both in its composition and performance. When it was originally released in 1959, Mingus's Columbia Records label refused to have the song include its controversial lyrics. Fortunately, Mingus got that reversed just a year later. The original recorded Ah-Um version of "Fables of Faubus"Â is availableÂ for online playbackÂ here; and a lengthier version is here.Â Racism remains all too alive and well in the United States and the rest of the world. It was even more alive and well when I was born in 1963. I have been obsessed against racism for decades.Â It took many years for me to learn not only that it is more effective to react firmly yet in control when someone makes a racist comment in front of me (rather than blowing up at them, which I have done many times), and even more years to learn how to put that into practice. Â Since a few weeks ago, my cellphone ringer plays Mingus playing "Fables of Faubus," reminding me notÂ just of great jazz, but of the never-ending struggleÂ against racism and for justice.Â Jon Katz.

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

Thursday, June 14, 2007

**Simultaneous pains in the pants in Washington, DC, and Louisiana.**

Â Image from public domain. Â What is it about pants that created the following bizarre behavior in Washington, DC, and in Broussard, Louisiana? Â By now, millions know about Roy Pearson's trial that commenced this weekÂ on his frivolous multimillion dollarÂ lawsuit against a Washington, D.C., family-owned dry cleaner for his allegedly missing pair of pants. The dry cleaner's owners claim they found the pants, but Mr. Pearson denied they were his. ThenÂ he rejected a settlement offer of several thousands of dollars over pants worth much less. Â Mr. Pearson awaits word whether his expired term as an administrative law judge ("ALJ") (serving the executive branchÂ of the D.C. city government, and not the judicial branch)Â will be renewed. Even if Mr. Pearson has a right in his private capacity to file such a lawsuit, does his First Amendment right to free expression preclude the D.C. government from considering Mr. Pearson's frivolous trouser lawsuit in determining whether to renew his position as an administrative law judge? Â This First Amendment issue gives me only initial cause for pause on the foregoing question. Were Mr. Pearson a government employee who merely was handling ministerial tasks (e.g., drafting procurement contracts for the government), I think the First Amendment would come into play and would favor not considering his trouser lawsuit in determining whether to keep him in his government job, because little to no nexus would exist between the frivolous lawsuit and daily contract drafting. Â However, even with my First Amendment zealotry, I have difficulty seeing how the First Amendment precludes the D.C. government from considering this lawsuit as to his ALJ renewal bid, because the lawsuit directly relates to Mr. Pearson's ability as an ALJ to exercise sound judicial temperament, discretion and fairness over decisions impacting litigants. ALJ work is no mere ministerial task, but instead requires careful, wise, and just adjudication. Mr. Pearson's lawsuit and reported testimony and demeanor at his pants trial demonstrate that he is not fit to be an ALJ, and that any litigant appearing before him (should his ALJ position be renewed) should move for his recusal. Â Were Mr. Pearson not seeking to renew his ALJ position nor any other government position of significant authority and power, I would not advocate putting his motives, character, and judgment under as strong a microscope. However, he apparently asked to continue as an ALJ, and, by doing so, he has crawled under the microscope of his own volition.Â Â Mr. Pearson has some simultaneous company in bizarre pants behavior. Surely with more important things to do, Broussard, Louisiana's Town Council nevertheless found time this week to draft and pass an ordinance providing up to six months in jail and a \$500 fine for wearing pants below undergarments or so as to reveal plumber's butt. The town's mayor plans to sign the bill into law. Â One only needs to visit a local beach to see that much more is revealed there than with even the most sagging baggy or low-rise pants. Moreover, First Amendment protections should get this Broussard ordinance stricken. Although the First Amendment might not carry the day against indecent exposure statutes against revealing unclothed genitals, the Broussard pants ordinance deals more with fashion (whether in good or poor taste) free expression to show some undergarments or not, and to show some butt cleavage or not. What is next in Broussard? A prohibition against revealing breast cleavage or bras through outergarments?Â At least the Broussard pants ordinance would not pass in nearby New Orleans (two hours away), the very epicenter of free-for-all activity, particularly on Mardi Gras.Â Jon Katz.

Posted by Jon Katz in Jon's news &amp; views at 00:30

Wednesday, June 13, 2007

### **Welcome out of prison, Tony Serra!**

Â J. Tony Serra. Sketch placed in public domain by the artist, Paulette Frankel. Â Tony Serra is a fascinating and very skilled person and lawyer. He fights for justice for the sake of justice.Â HeÂ buys his suits used and wears them until they are threadbare, drives cheap used cars that are nothing to look at, charges little money and has little of it (because he helps serve equal justice by doing plenty of low bono and pro bono work), and has reveled for four decades in fighting on the side of justice. Tony's limited interest in material goods and comforts goes back to when his mother would giveÂ herÂ children material with beautiful colors as holiday gifts, so they could groove on the art and the colors, rather than on materialist gift-giving.Â He is a true role model for practicing law to serve justice and to shun letting money get in the way. Â Unlike many other big-name criminal defense lawyers, Tony does not seem to appear frequently at lawyer seminars, although I imagine he is frequently invited.Â Therefore, now that he is out of prison since earlier this year for his tax evasion conviction, I have resolved to find out where he is trying cases and to set aside time to fly to see him in action and to learn from him. IÂ plan to ask Tony directly where he will be trying cases, butÂ if you know where he will be -- in court,Â giving seminar presentations, or appearing anywhere else -- please let me know. Â Tony is back in action. Here he is giving a press conference concerning his defense of Zachary Running Wolf, who Tony presents as having been overcharged in criminal court for fighting to save trees from "development" destruction. Here is a May 31, 2007, update on Mr. Running Wolf's case. Â Tony inspires me with his ability to view his opponents as enemies while earning their respect. He echoes many of my own views when saying: Â â€œTo litigate properly in an adversarial system, one must postulate an enemy,â€• [Tony] says. â€œNarcs are my enemies, informants are my enemies, overzealous, brutal police officers are my enemies. Prosecutors especially are my enemies because so many of them are sick and twisted people who abuse their positions. Mostly they become cynical and contemptuous over time, but the worst are the â€˜true believers,â€™ because they feel theyâ€™re entitled to go to any lengths to put somebody away.â€• (From "The Believer Behind Bars," SanFran.com).Â To heck with the claim that the best advocate can do just as well arguing any side of an issue. When a lawyer fights for the side for which s/he is passionate, caringÂ and has venom, the quality of the fight and advocacy will be all the better. This does not preclude respecting our opponents as people, as we must for many reasons, including that they are fellow humans. Â Many aspects of practicing criminal defense are exhilarating. However, the work is not without such necessary drudgery as sifting through multiple pages of sometimes boring discovery sectionsÂ to pan for gold, going through legislative reports to find an escape hatch from conviction,Â and evenÂ getting a client file fully organized so that any document can be accessed within seconds at trial. While slugging it out in the pits, I get extra energy, inspirationÂ and venom knowing that role models like Tony Serra are out there. Â Thanks, Tony, for your ongoing inspiration.Â Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:10

Tuesday, June 12, 2007

**Much ado about Paris?**

Hotel (not a Hilton) image from Library of Congress. The news media too often ill-advisedly overfocus on sensational stories that do not merit more than passing attention. For that reason, alone, I was inclined not to blog about Paris Hilton's recent probation violation sentence and its aftermath. However, considering all the sensationalism over the Paris Hilton probation violation story, I thought I would provide a realistic brief perspective after someone suggested to me -- apparently quite seriously, after Ms. Hilton's transfer last week to home detention by the sheriff and before the judge sent her back to jail -- that Hilton hotels be boycotted. As I understand it, Paris Hilton originally was sentenced to probation for reckless driving allegedly related to alcohol consumption. Recently, she was sentenced to jail for forty-five days for violating probation, after being picked up for driving on a suspended license. As with many high-profile celebrities in Ms. Hilton's jail, the jail arranged for her to serve her sentence in a section of the facility that is separate from the general inmate population. Soon after Ms. Hilton entered the jail, the sheriff transferred her to home detention for largely unspecified psychological issues. Last Friday, the sentencing judge said he had not authorized the transfer to home detention, and ordered her back to jail. Last Saturday, Ms. Hilton said she decided not to appeal her return to jail. Many criminal defendants feel relief at receiving sentences that involve no immediate jail time, which describes Ms. Hilton's original reckless driving sentence. However, once that relief is out of the way, defendants often must satisfy a wide range of probation conditions to avoid being incarcerated. Such conditions might include keeping appointments with probation agents, providing negative drug tests, maintaining full-time employment or education, entering and successfully completing alcohol and drug education and treatment programs, and not violating further laws. I have defended a tremendous number of clients accused of probation violations. Where I practice law, judges are permitted wide latitude in sentencing for probation violations, just as they are given wide latitude in issuing original sentences for criminal cases. Courts handle such a huge number of criminal cases that defendants and their lawyers must work hard to be treated as human beings rather than as numbers and statistics by those in the criminal justice system. For better or worse, Paris Hilton's situation puts a human face on the hundreds of thousands of criminal defendants annually appearing in misdemeanor courts in the United States. Unlike countless criminal defendants, Ms. Hilton did not need to struggle to obtain the funds to pay a criminal defense lawyer, nor fear the loss of her job (nor of her housing and car for not meeting loan payments as a result of any loss of work from incarceration) from this court case. However, she did deal with -- and publicly acknowledge early on -- her fear of being locked up. Like so many defendants ordered locked up, she focused heavily on avoiding and minimizing such a fate. Did Ms. Hilton feel she was above most other people when she allegedly drove suspended? Many people do the same; in this instance, it was curious that she did so when she had plenty of money available to hire a driver at a moment's notice. Was Ms. Hilton trying to get special treatment for her celebrity status? Perhaps. Whether or not she did, a common denominator among many criminal defendants is to use the resources at their disposal to try to minimize the harm against them in criminal court and in the incarceration system. Did she feel her privileged status had been overlooked, when she called out to her mother in open court when ordered returned to jail? Perhaps. She probably also called out to her mother as one of the only people other than her lawyers who demonstrated they truly cared about her (and not about her celebrity status), particularly in the midst of the media feeding frenzy on her case. Each human and celebrity is different and reacts to incarceration differently. Whether or not Martha Stewart was masking fear or just anticipated that her designated prison term would be manageable, she apparently handled her recent incarceration with external acceptance, external poise, and (externally) full and cheerful accessibility to other inmates. However, I doubt many people enter or continue incarceration with no fear at all. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

Monday, June 11, 2007

**Close Guantanamo prison.**

Â Colin Powell. Photo from State Department's website. Â Many times I have decried the Guantanamo prisons.  
Â Congratulations to Bush II's first secretary of state Colin Powell for expressing his agreement with me. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, June 10, 2007

### **Inmates must stop slipping through the cracks.**

Image from Bureau of Prisons' website. On April 10, 2006, I wrote about a Prince George's County, Maryland, misdemeanor drug inmate who had slipped through the cracks, having been left jailed pretrial for many months without having his case proceed beyond postponements. Unfortunately, inmates seem to slip through such cracks all too often. Not too long ago, a story surfaced that a mentally handicapped person was discovered as due for release from the District of Columbia jail only a substantial time after his required release date. Last week, the Washington Post wrote about two Prince William County, Virginia, misdemeanor inmates who were kept in jail beyond the date ordered for their release. A common thread in the above three scenarios is inmates with a communications gap, whether a language gap (in the case of the Maryland and Virginia inmates) or an inability to be assertive, in the instance of the D.C. jail inmate. Another common thread is that all the courthouses and jails involved in the above-listed scenarios are dealing with a tremendous number of criminal defendants and inmates, making such mistakes more likely. How to reduce such mistakes? One way is to reduce the crushing weight of court dockets and jail inmates by substantially decriminalizing drugs. Another way is to assure sufficient access to qualified interpreters. An additional way is for courthouses and jails sufficiently to hire and train personnel to assure that the jails know when a jail sentence has ended or a judge has ordered a sentence terminated, and to assure that such release dates and release orders are meticulously followed. Jon Katz.

Posted by Jon Katz in Criminal Defense at 02:00

### **Underdog readers: What's on your mind?**

Dear Underdog readers: Thanks for your visits to Underdog. Our readership has been constantly increasing, according to our site statistics software. Some of you give feedback in the courthouse, and others through e-mail and postings to our comments section. Please keep your feedback coming. When the feeling moves you, please post a comment to our blog, or leave me an e-mail at [jon@markskatz.com](mailto:jon@markskatz.com). Today's blog entry is an open thread to post comments on anything that has or has not been covered by Underdog. Have a great weekend. Jon Katz.

Posted by Jon Katz at 00:00

Friday, June 8, 2007

**Ansel Adams decried WWII Japanese-American internment; then there was Dr. Seuss.**

Tom Kobayashi, Manzanar Relocation Center, California 1943. Photographed by Ansel Adams. From Library of Congress website. The United States has a shameful history of racism and sexism, including official racism and sexism. The list is long, and includes gross violence and racism against Native Americans, Africans and African-Americans (including slavery), ethnic Japanese (including forced relocation to concentration camps during World War II), and the list goes on; denial of voting rights to women and African-Americans; the maintenance of lily white all-male juries in many jurisdictions; and the list goes on. Voting six to three, the Supreme Court allowed president Roosevelt to continue with the World War II concentration camps for Japanese-Americans. *Korematsu v. U.S.*, 323 U.S. 214 (1944). Defendant Fred Korematsu was convicted to five years of probation for avoiding president Roosevelt's executive order sending Japanese-Americans to concentration camps. Curiously, a PBS report suggests that his actions were less for any political convictions than to avoid being separated from his girlfriend. Forty years after his conviction, Fred Korematsu got his conviction overturned by a federal trial court through a writ of *coram nobis*. The trial court determined that the Supreme Court's 1944 decision against him likely would have been different had the Court known that the Army had altered evidence to exaggerate claims of the threat of spying and disloyalty by Japanese-Americans. Fortunately, people beyond the legal community (the American Civil Liberties Union represented Mr. Korematsu before the Supreme Court) cried out against the Japanese-American concentration camps. One of them was renowned photographer Ansel Adams. In 1943, Mr. Adams took extensive striking photos at Manzanar Relocation Center in California; some of the photos are shown here, here, here, and here. He said: "The purpose of my work was to show how these people, suffering under a great injustice, and loss of property, businesses and professions, had overcome the sense of defeat and despair [sic] by building for themselves a vital community in an arid (but magnificent) environment. All in all, I think this Manzanar Collection is an important historical document, and I trust it can be put to good use." Forty-six years later, in 1988, the United States apologized for the concentration camps through the Civil Liberties Act. In a 1993 apology letter, President Clinton acknowledged that the concentration camp internment took place involved "racial prejudice, wartime hysteria, and a lack of political leadership." Eight years later, the Bush II administration, with Congressional complicity and participation, unleashed a massive post-September 11 assault on civil liberties (including the PATRIOT Act, violations of basic rights of Guantanamo inmates and other terror suspects, unconstitutional spying, suspected passenger lists, and the list goes on), with Moslems being rampantly and unconstitutionally profiled for investigation. On the flip side, I am trying to learn Theodor Geisel's/Dr. Seuss's views on Japanese-American internment and on Japanese people in general during World War II. A start for my ongoing efforts to answer this question include the following: this Volokh discussion thread; this view on Japan Probe; this Dr. Seuss illustration of Japanese-Americans; and this discussion of his expressions against prejudice. Beyond Dr. Seuss and Ansel Adams, worthwhile to this whole issue is the website of the National Japanese American Memorial Foundation. The memorial itself is just about two blocks north of the Capitol building, on a triangular plot bounded by Louisiana Avenue, New Jersey Avenue and D Street NW. I have visited the memorial, and recommend that visitors to Washington include it on their agendas. Jon Katz.

Posted by Jon Katz in Jon's news &amp; views at 06:10

Thursday, June 7, 2007

### **Strike the Amazing Kreskin from any jury pool.**

Speaking of magic, Houdini was a legend. (Image from Library of Congress website). In the mid-1970's, mentalist Amazing Kreskin was a mainstay of late Saturday night television. Kreskin seems to walk the line between saying he is a professional magician but that he also has psychic powers beyond intuition, deduction, and trickery. Two months ago, wise lawyer(s), the judge or both struck Kreskin from a murder trial jury pool, for which Kreskin was "tremendously DISAPPOINTED and FRUSTRATED!" As talented and likeable as Kreskin may be, let him serve on a mock jury if he wishes. By Kreskin's own admission: "If chosen to sit on the jury, I was prepared to share with my fellow jurors, my thoughts and impressions of those testifying on the stand and point out who was lying and who was telling the truth." Talk about an unfair jury verdict if any jurors had actually followed Kreskin's "psychic" determinations of witness credibility. Particularly considering how famous and often-believed Kreskin is, at least with those who watched 1970's late night television, he would have poisoned jury deliberations. In any event, I take a particular interest in such skilled magicians as Kreskin, particularly since I used to regularly practice and sometimes perform magic on a smaller scale. I mainly did such basic magic as making all the aces rise to the top of the deck, turning table sugar into candy, and restoring coins and plastic after driving nails through them. My past experience performing magic and music before live audiences helped prepare me for being comfortable before and engaging audiences -- judges and juries -- for trials. Jon Katz.

Posted by Jon Katz in Jon's news & views at 06:00

Wednesday, June 6, 2007

**The power of maintaining consistent non-anger and reaching calm harmony.**

Â Yin Yang.Â Practicing life and law as a harmonious whole. Ten years ago, I flew to Dubois, Wyoming, for the Trial Lawyers College Reunion at the Thunderhead Ranch. After dinner, we got together at the big barn to start the transition towards re-focusing on the lessons of the TLC and away from the daily hustle-bustle that challenges doing so. One exercise was to break into groups of three and actively and deeply to engage each other in discussion about our feelings, struggles, and accomplishments in life (in life as a whole, not just in our professions). In my trio was a man I knew well and another I had just met. Two years before, the man I knew well confronted me with the following within about a week of meeting me: He felt disconnected from me because I reminded him of a nemesis of his, some lawyer from Boston; he hunted his whole life and I was a vegetarian for ethical reasons; he thought I was more of a chameleon than someone who showed his true colors right away (that was a curious observation when I was trying to make sense of being thrown together with four dozen experienced trial lawyers in the middle of nowhere and away even from cellphone reception for five weeks; in any event, by now I do not think anybody would get such a misimpression). Now, two years later, the hunting lawyer told me he finally understood me better, and saw me as a sea of calm. Although calmness has long been a goal of mine, it too often has been an elusive goal that has too often been trumped by my preoccupation with injustice, although the Dalai Lama has shown by example that calmness is possible and even necessary even in extremely trying circumstances. I chuckled at this hunting lawyer's misperception about my calmness, and told him that it was easy for me to be calm hundreds of miles away from opponents, judges, work, and other things that challenged my calm. As I have said before, an angry litigator is a weakened litigator, just as an angry competitor is a weakened competitor. Consequently, it is critical that I focus on achieving harmony and calm harmony. I have written many times about reaching a calm and harmonious life, including here, here, here, and here. What do I do to achieve this calm harmony? When at my best, I practice daily t'ai chi, and apply t'ai chi principles to every aspect of my daily life. I hold the Dalai Lama as a role model for maintaining calm, non-anger, and non-violence -- even towards those who wish me harm -- when he has experienced the pain from decades of violence and other human rights violations against his Tibetan sisters and brothers. I look up to Claude AnShin Thomas, who became a mendicant Buddhist monk years after killing hundreds of people in Vietnam. He still gets angry, but now accepts the feeling, tries to dissipate it by focusing on his breath and on the sound of a bell that he carries. I also look up to my most key trial law teacher, Steve Rench, who is calmness personified, and who has helped show me that neither charisma, pizzazz, nor innate trial ability are prerequisites to becoming a great trial lawyer. Finally, and seriously, I look up to Frank Zappa, who apparently cursed the rampant mediocrity found in society, but did not let it debilitate him from being anything but mediocre himself. Also, Frank Zappa is an important example for me of how it is possible to be a caring and nurturing parent without surrendering to mainstream society, American Idol, America's Top 40, and Barney. A critical gap for me to bridge is the calmness I feel interacting with birds of a feather on the one hand (and in solitary moments), and, on the other hand, maintaining that same level of calmness when battling my worst enemy, appearing before a difficult judge, or even coping with highway drivers willing to put me in the hospital when only seeming to care about getting to their destination as fast as possible. I did not learn strong skills at maintaining calm at all times until I started studying and practicing t'ai chi thirteen years ago. Growing up, nobody showed me (or else I just did not hear nor heed them enough) that it was cool to walk away from a fight, whether it be a fistfight in the schoolyard or a game of heartless dozens. Additionally, I did not feel like I was living in surroundings all that mellow until after I started practicing t'ai chi. Consequently, while learning to reach and maintain calm and harmony, I have had to undo thirty-one years of insufficient calm and harmony. Sometimes, maintaining daily calm in the face of so much adversity (or, at least, the perception of adversity) is akin to being a recovering alcoholic who looks at each day of sobriety as an accomplishment. Clearly, reaching full calm requires keeping the calm throughout the day and in all instances. One cannot successfully turn on the calm faucet and then the anger faucet. Once the anger faucet is opened, it stays on and builds up with a fury. On the other hand, anger should not be bottled up inside, as Claude AnShin Thomas so successfully demonstrates by accepting the feeling of anger and trying to dissipate it by focusing on his breath and on the sound of a bell that he carries. (Other people may need to verbalize their anger; this should be done as calmly as possible, with "I" statements rather than with finger-pointing "you" statements). Everything and everyone are ultimately connected. The more I live calmness, show caring to others, productively deal with anger, and inject sincere and balanced humor into my words and actions (lest people mistake my calmness for aloofness), the more all of those qualities are contagious. My calmness does not show I have backed down from my strongly-held beliefs and passions. In fact, anger and tension weaken me and make me less powerful in pursuing my passions, my life and my work. Likewise, an opponent who has lost control, who is in a mad rage, and whose neck vein is popping, is weak, and is positioned to be defeated all the more. Years ago, I put much more currency in human excellence and social justice than in gentleness and calmness. By now, though, I know that the human heart and soul and calmness are inextricably intertwined for achieving true human excellence and social justice. Jon Katz.

Posted by Jon Katz in Persuasion at 06:00

Tuesday, June 5, 2007

### **Justice Scalia's daughter pleads guilty to drinking and driving.**

Justice Scalia (r) meets U.S. House member Phil Gingrey (l). (From Phil Gingrey's Congressional website). Â This follows up on my February 16, 2007, blog entry about the drinking and driving arrest of one of Justice Scalia's daughters. I said then, and say now, the only silver lining in this misdemeanor prosecution against Ann S. Banaszewski is to make criminal arrests and prosecutions more real -- rather than simply abstract -- for Justice Scalia and his colleagues.Â Last week, Ms. Banaszewski entered a guilty plea to drinking and driving. She was sentenced to eighteen monthsÂ probation, 140 hours of community service, and counseling (probably involving a group alcohol education class, which are commonly required for clients convicted of driving under the influence in the jurisdictions where I practice). She received an automatic six-month driver license suspension for refusing to take a breath test. Â As to the automatic license suspension, here is a discussion of the sanctions availableÂ for a breath test refusal in the jurisdictions where I practice.Â Jon Katz.

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

Monday, June 4, 2007

**Feds prosecute Max Hardcore for obscenity.**

The Bill of Rights. (From the public domain.) Until George Bush I was voted out of office, the federal government spiritedly prosecuted obscenity, often leading to long prison terms. The Clinton administration did an about face and barely initiated any new obscenity cases, preferring to focus on child pornography and adults seeking sex with minors. George Bush II's administration continued on a similar path, but ultimately started pursuing adult obscenity prosecutions, ultimately creating an anti-obscenity unit in mid-2005. The Bush II administration's renewal of obscenity prosecutions appears to have been driven, at least in part, by a desire to satisfy its supporters in the moral conservative camp, and perhaps also as a backlash against the Supreme Court's 2002 ban on prosecution of virtual child pornography, where the actors appear to be minors but are not. By now, sexually explicit videos are so widespread (on the Internet, in ordinary video stores, and on mainstream hotels' pay-per-view) and have been so widely viewed that prosecutors will have a tougher time obtaining obscenity convictions under the Supreme Court's following Miller obscenity test. Under Miller, a jury must affirmatively answer the following three questions before finding guilt for obscenity: (1) whether the material depicts patently offensive representations or descriptions of "ultimate sexual acts, normal or perverted, actual or simulated" or "masturbation, excretory functions, and lewd exhibition of the genitals;" (2) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15 (1973). Concerning the first prong, fewer people today than ever will be offended by explicit depictions of mainstream consensual sexual activity. Similarly, with the second prong, fewer people today will find that such explicit depictions of mainstream consensual sexual activity appeals to the "prurient interest," where the Supreme Court has defined prurience as "that which appeals to a shameful or morbid interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 (1985). As to Miller's third prong, plenty of jurors will believe that explicit depictions of mainstream consensual sexual activity have serious value in that such material can enhance marital relationships. Perhaps to try to get around the problem of obtaining obscenity convictions for material depicting mainstream consensual sexual activity, federal prosecutors have included a focus on material on the shocking edges, including those from Extreme Associates, while also taking risks (and particularly unconstitutional measures) with trying to prosecute mere words, as horrifying as those words may be, under the obscenity laws. The feds' latest effort to go after the more shocking variety of adult material is its May 17, 2007, indictment of Paul F. Little, who goes by the screen name Max Hardcore. I met Max Hardcore ever so briefly at the 2001 Free Speech Coalition annual awards event, too briefly to get any added understanding of him. However, I surmise that he produces the type of material that he produces to satisfy a market demand; otherwise, one would expect he would have shifted gears after all these years. As is common, the indictment not only seeks to convict Max Hardcore, but also seeks to forfeit his assets. Producers of more mainstream explicit adult material should recognize that the same First Amendment being damaged by the prosecution of Max Hardcore is the same one that is supposed to be protecting their own activities. Click here to see the brief comments about this prosecution from Max Hardcore's lawyer Jeff Douglas, with whom I have enjoyed interacting through the Free Speech Coalition and our activity with the First Amendment Lawyers Association. Jon Katz. ADDENDUM. Now that Max Hardcore's indictment was unsealed on May 31, his case docket became available online through PACER on June 4. His case is U.S. v. Paul F. Little and Max World Entertainment, Inc., U.S. Dist. Ct. (M.D. Fl.) Crim. No. 8:07-cr-00170-SCB. Here is the current case docket as of June 4, 2007. Thanks to a lawyers listerv member for posting a newslink on this prosecution.

Posted by Jon Katz in Criminal Defense at 06:20

Sunday, June 3, 2007

### **D.C. Circuit stays finalization of decision overturning handgun ban.**

Image from the Government Printing Office's website. Last March, the United States Court of Appeals for the District of Columbia Circuit overturned the District's blanket handgun ban. (See my further discussion here). On May 8, 2007, the Court of Appeals denied a rehearing or reconsideration of the case before the full court. Since then, on May 24, 2007, the D.C. Circuit granted the District of Columbia's May 15, 2007, unopposed motion to stay the issuance of its mandate in the case, pending the District of Columbia's possible filing of a certiorari petition for the Supreme Court to review the case. The mandate will finalize and effectuate the court's opinion overturning the District of Columbia's blanket handgun ban. The D.C. Circuit overturned the District of Columbia's handgun ban by a 2-1 decision, with Judges Silberman and Griffith in the majority, and Judge Henderson dissenting. The same three judges unanimously granted the District of Columbia's unopposed motion to stay the issuance of its mandate in the case. Senior Circuit Judge Silberman added his own two cents to the granting of the stay motion as follows: "Although the District's motion for stay only indicates it 'may' petition for certiorari, since appellants did not object, I assume it is understood that the District intends to petition for review in the Supreme Court. If it did not so intend, in my view, it would be inappropriate for it to have sought the stay. *Boim v. Quranic Literacy Institute*, 297 F.3d 542, 543-44 (7th Cir. 2002) (Rovner, J.)." Thanks to SCOTUS for covering the mandate stay issue in this case that may lead the Supreme Court to address individual Second Amendment rights more directly than ever before. Jon Katz.

Posted by Jon Katz at 23:00

Friday, June 1, 2007

### **Thanks to Foonberg**

Law practice management guru Jay Foonberg. A less sexy part of our law practice is managing and promoting our law firm. However, I much prefer managing our law firm and being our own bosses than the opposite. Additionally, I like the quality control that we can deliver by being our firm's chief managers. One benefit of having a solo or small law firm is the ability to streamline and simplify the firm's daily administration more easily than would be the case for a larger law firm. My law partner Jay Marks and I can make quick and even high-dollar decisions in as little as a phone call when larger law firms would need more time just to assemble together all their voting partners. Jay Foonberg (shown on YouTube above) is a great cheerleader for lawyers being their own bosses and making practice management a friend rather than an enemy. Jay's website tells all about his books and appearances on law practice management, and discusses such diversions as marathoning on multiple continents and legal advice for buying co-ownership of jet rights. Since Foonberg first published his classic *How to Start and Build a Law Practice*, technological and practical advancements have made it more economical than ever for lawyers to run solo and small law firms, rather than needing to rely on the more extensive resources of a larger law firm. A lawyer without a staff can even get dictation and transcription done by companies that handle the work by phone. (See here for my blog entry on the legal work outsourcing trend.) Solo and small firm practitioners have many opportunities to bond together with other small firm practitioners. Among them are the ABA-sponsored Solosez group, such regional organizations as Maryland's Civil Justice Network, numerous voluntary lawyer organizations, and a large number of listservs. The legal organizations with which I participate are listed here under the heading **STAYING ON TOP OF LEARNING AND BRAINSTORMING**. Thanks to Jay Foonberg for his boundless optimism and practical advice. Jon Katz.

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