

Friday, August 31, 2007

## Why do we have criminal laws?

Bill of Rights. (From the public domain.) Why do we have criminal laws? To provide power, prestige and money to police, prosecutors, judges, criminal defense lawyers, government contractors, and everyone else earning dollars off of the criminal justice system? To enable the rulers to maintain power, fear and coercion over the ruled, rather than making ours a government run by the consent of the governed? To make people run to the police or to swear out a criminal warrant anytime someone looks cross-eyed at them? To maintain the only society we have known since birth, rather than taking the risk of a better society? To avoid telling friends, family members and acquaintances "No, it is premature and unnecessary to call the police at this moment; we have a chance of defusing, diluting, and solving the conflict ourselves at this time, or just avoiding or leaving it"? As my friend and mentor Jun Yasuda says: "Why is there a prison here? Five hundred years ago there was none. There were only Native Americans living in peace. They had reverence for each other. Now we fear each other. I am here to help people stop fearing each other, and to trust. We need to change the way we think. Putting people in cages is not a solution." As I say, let's not fatten the criminal code. So long as the government continues to deviate from focusing on fairly and effectively prosecuting rape, robbery, and murder -- by instead adding too much focus on prosecuting gambling, prostitution, drug crimes, and a whole host of other less serious crimes -- I will continue to have less confidence in the criminal justice system than if it were otherwise. As is perhaps a part of my unofficial job description in life, I created a mini-firestorm (from two responders, in this instance) recently when I provided some practical suggestions to a listserv member seeking some procedural pointers in a peeping tom civil litigation case, where the cause of action was rather irrelevant to the original inquiry and the guts of my response. I premised my listserv reply as follows: "An irony about my answering your message is that in such a case, I probably only be willing to represent the alleged peeping tom, in part as a visceral reaction to the criminalizing of such behavior - <http://markskatz.com/MarylandArrestLawyers.htm>" Such a comment from me as mild as this -- mild for me at least -- met with the following undiluted reply from a listserv member who has already taken the mainstream path of high-level local bar association officer positions, with my responses in CAPS, and with his final reply in italics: "Jon, I am as big a civil liberties guy as most who say they are, but do you really think it should not be a crime for some pervert to take a picture up my daughter's skirt or down my wife's blouse. This kind of activity makes women, and I guess theoretically some men, feel violated. MY ANSWER TO YOUR MESSAGE IS MAINLY FOUND AT THE FOLLOWING URL THAT'S IN MY ORIGINAL MESSAGE, AND IN THE TV INTERVIEW WITH ME LINKED THERETO: <http://markskatz.com/MarylandArrestLawyers.htm> . If I catch them doing that to my wife or daughter, they better hope they are carrying an unregistered concealed weapon that the police have never found on them because I beat them half to death. I REGRET YOUR DECISION TO RESORT TO SUCH LANGUAGE, PARTICULARLY IF YOUR WORDS ARE NOT MEANT TO BE HYPERBOLIC. Isn't activity that most of society feels is repulsive and intrusive on others and threatens to cause breaches of the public peace for revenge I THINK YOU HAVE JUST DESCRIBED LUNCH COUNTER SIT INS IN THE SOUTH, AND CIVIL RIGHTS MARCHES IN THE SOUTH. NO, I DON'T THINK SUCH ACTIVITIES SHOULD HAVE BEEN CRIMINALIZED. , the exact kind of activity that needs to be criminalized? Jon, I think we pretty much disagree on this subject. I think there is a big difference between engaging in a lunch counter protest, which was criminal activity at the time, as a means of civil disobedience intended to change the law for the good of as class of people and the nation as a whole, and getting your jollies by invading the privacy of others by sticking a camera up their skirts and down their blouses. If you don't think that activity that most of society feels is repulsive and intrusive on others and threatens to cause breaches of the public peace for revenge should be criminalized, what should be? How would you define what should be criminalized? As to the language, you are right. Because the conduct is now illegal, I would refrain from beating the crap out of the pervert and call a cop. . if I could keep my temper in check. In response to my above-responding colleague, I say (1) my opinions at <http://markskatz.com/MarylandArrestLawyers.htm> still explain my viewpoint, (2) the current statutory language on peeping tom activity, upskirting/downblousing, and surveillance activity continues to be unconstitutionally vague and overbroad to enable police to detain and arrest plenty of innocent people doing nothing that is or should be criminal, and (3) I do not think that the repeal of such laws is going to bring on mass rioting; we are not talking about the Frankenstein monster here (nor about his abby normal brain). If the criminal upskirting and downblousing laws stay on the books, what comes next? Arrests of people for oggling others at the beach, snapping pictures of Mardi Gras flashers, taking backside videos of people on an afternoon stroll (the latter videos already are earning commercial income)? Plenty of people probably want to switch any boundary from a reasonable expectation of privacy to protecting one's dignity and desire to be left alone; such a society would mirror what happens when misguided teachers overdiscipline students in grade school (don't get me started about unfair elementary school discipline). Again I ask -- and not merely rhetorically -- why do we have criminal laws? Is it because by overcriminalizing society we can shield ourselves from the most ugly, base, and uncomfortable of human activities, so that we may continue our daily lives as

pleasantly as if we were having the best vacation at a tropical resort? Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, August 30, 2007

### Suppress the evidence when the warrant lacks a substantial basis for finding probable cause.

Â Court of Appeals Judge Lynne A. BattagliaÂ dissents, saying to suppress the evidence when found pursuant to a warrant lacking a substantial basis for finding probable cause. (Image from Maryland State Archives website.)Â If I had a choice of fora in presenting a criminal appeal, I would generally expect my best shot to be in the Maryland Court of Appeals, rather than in theÂ other appellate courts where I am licensed to appear (the District of Columbia, Virginia, and theÂ District of Columbia; theÂ Fourth and District of ColumbiaÂ federal circuits; and the United States Supreme Court). For instance, I was stunned into ecstasy when the Court of Appeals handed me a victory findingÂ that Maryland's double jeopardy common lawÂ precludes a conviction if a trial judge dismisses a criminal prosecution by relying on facts outside the four corners of the criminal charging document.Â However, sometimes people give with one hand and take awayÂ with the other, which is what the Maryland Court ofÂ Appeals did on August 24, in *Patterson v.Â Maryland*, \_\_\_ Md. \_ (Aug. 24, 2007).Â In *Patterson* , Maryland's Court of Appeals agreed that the defendant was prosecuted using evidence seized pursuant to a search warrant that lacked a substantial basis for finding probable cause. Nevertheless -- and sadly and strangely -- a 5-2 court majority decided that: Â "Although we hold that the affidavit, in the present case, lacked a substantial basis to support the issuing judgeâ€™s conclusion that probable cause existed; nonetheless, we hold that the affidavit was substantial enough to warrant application of the good faith exception. Officer Haakâ€™s affidavit was not 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'. [U.S. v. ] Leon, 468 U.S. [897] at 923, 104 S.Ct. at 3421, 82 L.Ed. at 699 [1984]. Therefore, the evidence obtained as a result of the search of Pattersonâ€™s temporary residence was properly admitted."Â Praised be dissentingÂ Judge Lynn Battaglia (a former Maryland United States Attorney, certainly without criminal defense bias), joined by Judge Joseph Murphy, for setting this wrongly-decided case straight: Â "Simply because 'probable cause is a fluid concept,' *Gates*, 462 U.S. at 232, 103 S. Ct. at 2329, 76 L. Ed. 2d at 544, does not mean that police officers "'â€~may [not] properly be charged with knowledge[] that [a] search was unconstitutional under the Fourth Amendment,""â€~ under appropriate circumstances. *Leon*, 468 U.S. at 919, 104 S. Ct. at 3419, 82 L. Ed. 2d at 696, quoting *United States v. Peltier*, 422 U.S. 531, 542, 95 S. Ct. 2313, 2320, 45 L. Ed. 2d 374, 384 (1975). To hold that under the circumstances presented, the police acted in good faith in presenting their warrant application would call into question whether it is even possible for a reviewing court to find an absence of good faith. As then Judge Bell pointed out in his dissenting opinion in *Minor*, 'a reasonably well-trained police officer would not submit an affidavit to a magistrate for a probable cause determination that the officer knows, or should know, does not establish probable cause,' 334 Md. at 727, 641 A.2d at 223 (Bell, J., dissenting), because that hypothetical officer is chargeable with knowledge of what the Fourth Amendment prohibits, subject to its subsequent interpretation in *Gates* and *Leon*. *Id.* at 724-26, 641 A.2d at 222-23. I would hold that, in the case sub judice, Officer Haak knew or should have known that *Patterson* almost certainly possessed neither the weapon nor the accessories referenced in the warrant application and therefore, the good faith exception does not apply. I respectfully dissent."Â In any event, Judge Battaglia's dissent andÂ Judge Clayton Greene, Jr.'s majority opinion in thisÂ *Patterson*Â case are particularly important reads for providing a good overview of the state of the federal and Maryland caselaw applying to stale warrants, the implications of allowingÂ a search so long as it is conducted by the police in good faith, and the exceptions to permitting a search for such good faith. In discussing the good faith doctrine *Patterson*Â stated:Â "The *Leon* Court outlined four situations in which an officerâ€™s reliance on a search warrant would not be reasonable and the good faith exception would not apply:Â '(1) the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officerâ€™s reckless regard for the truth;Â (2) the magistrate wholly abandoned his detached and neutral judicial role;Â (3) the warrant was based on an affidavit that was so lacking in probable cause as to render official belief in its existence entirely unreasonable;Â and (4) the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid.' *Leon* , 468 U.S. at 923, 104 S.Ct. at 3421, 82 L.Ed.2d at 699. As the Supreme Court noted, 'searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.' *Leon* , 468 U.S. at 922, 104 S.Ct. at 3420, 82 L.Ed.2d at 698."Â Unfortunately, if Mr. *Patterson* seeks and obtains certiorari review in the United States Supreme Court, he is likely not only to have his conviction affirmed, but to have a new Supreme Court opinion that shreds the Fourth Amendment all the more. Jon Katz.Â Â

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, August 29, 2007

### If humans input data into a machine, the Confrontation Clause is implicated.

Â Bill of Rights.Â (From the public domain.)Â This month,Â a two-judge majority of the Fourth Circuit decided that an expert witness may testify in criminal court about the machine-generated results of raw data about drugs in a defendant's blood, without necessitating the presence of the technician who operated the machine. The case is *Dwonne A. Washington v. U.S.*, \_ U.S. \_ (August 22, 2007). The majority said that such raw data is generated by a machine rather than by a human, and that information from a machine does not constitute hearsay that would implicate the Sixth Amendment's Confrontation Clause, and, therefore, does not require any Crawford analysis.Â See *Crawford v. Washington*, 541 U.S. 36 (2004) (which bars testimonial evidence from slipping through the hearsay rule).Â To the contrary!, says Judge Michael in his wise dissent. Judge MichaelÂ cites federal Circuit after federal Circuit standing in stark contrast to the Fourth Circuit majority in *Washington* . Judge Michael explains his dissent, in pertinent part:Â "In only one circumstance is a computer-generated assertion not considered the statement of a person: when the assertion is produced without any human assistance or input. In *United States v. Hamilton*, 413 F.3d 1138 (10th Cir. 2005), one of two federal cases relied on by the majority, the Tenth Circuit concluded that the computer-generated header information that accompanied a pornographic image on the internet was not a hearsay statement. 'Of primary importance to this ruling,' however, '[wa]s the uncontroverted fact that the header information was automatically generated by the computer . . . without the assistance or input of a person.' *Id.* at 1142 (emphasis added). Similarly, in *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003), the other federal case cited by the majority, the Third Circuit determined thatÂ theÂ transmission information on a faxed document was not a hearsay statement because it was automatically generated by the fax machine. But see *United States v. Salgado*, 250 F.3d 438 (6th Cir. 2001) (stating that telephone numbers recorded and stored by computer were hearsay statements that were admissible under the business records exception); *United States v. Linn*, 880 F.2d 209 (9th Cir. 1989) (same). "Unlike the header information on a web page or fax, computerized laboratory equipment cannot detect, measure, and record toxin levels in blood samples without the assistance or input of a trained laboratory technician. The toxicology tests on Washington's blood in this case were conducted by technicians at the Armed Forces Institute of Pathology. These technicians undergo extensive training before they are certified to perform the tests. A technician conducting a blood toxicology test must follow a 'step-by-step procedure.' J.A. 48. He must, among other things, calibrate the testing instrument; withdraw the appropriate portion of blood from the larger sample; insert, without contamination, the smaller test sample into the instrument; initiate the test; and monitor the instrument while the test is in progress. Finally, as the record in this case reveals, the technician reviews and annotates the results and signs the report. In light of the significant role that the technician plays in conducting the test and generating accurate results, the results cannot be attributed solely to the machine. As a result, the toxicology test results must be considered statements of the laboratory technicians for both evidentiary and Confrontation Clause purposes.<sup>1</sup> [Footnote] <sup>1</sup>The government does not contend that the test results are not statements. At trial it conceded that the results are hearsay statements, but argued that they are admissible under the business records exception. See Fed. R. Evid. 803(6). "The test results are testimonial statements, notwithstanding the majority's argument to the contrary. The Supreme Court in *Crawford*, rather than specifically defining 'testimonial,' provided examples that constitute the 'core class of "testimonial" statements.' 541 U.S. at 51. Among these are 'pretrial statements that declarants would reasonably expect to be used prosecutorially.' *Id.* The Court further clarified the meaning of 'testimonial' in *Davis v. Washington*, 126 S. Ct. 2266 (2006), stating that courts should also consider the 'primary purpose' of the statement. A statement is not testimonial, for example, if its 'primary purpose . . . is to enable police assistance to meet an ongoing emergency.' *Id.* at 2273. A statement is testimonial, on the other hand, 'when the circumstances objectively indicate . . . that the primary purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 2273-74."Â I hope the defendant in this *Washington* case will seek and obtain en banc review, and that Judge Michaels' reasoning in his dissent will carry the day. Jon Katz.

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

Tuesday, August 28. 2007

### **A colleague admits trading off clients' interests for intended welfare of them all.**

Â Bill of Rights.Â (From the public domain.)Â 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, after giving them an assessment of their chances with an innocent plea versus a guilty plea. Sometimes this approach results in an acquittal, whether unexpected or not. Sometimes it leads prosecutors to soften their negotiating position with me. Sometimes it leads to a prosecutorial dismissal when the prosecutor does not have the necessary witnesses nor evidence available on the trial date. Sometimes it leads the judge to postpone the trial if the day's trial calendar is too booked, only for the prosecutor's necessary witnesses not to appear the next time, which might result in a dismissal of the prosecution. Sometimes clients feel little choice than to plead innocent, when a guilty finding risks a probation violation, deportation, loss of security clearance, and risks to educational and career prospects. Â Recently, I was speaking with a colleague whom I previously assumed was an admirable and effective fighter for his clients. Our talk turned to a court where he appears often, but I do not. He focused on the importance of gaining credibility with judges (and prosecutors, too, I presume) by encouraging clients to plead guilty when they do not seem to have much of a chance to win. He thinks this gets judges to listen closer at bench trials when his clients do plead innocent, and to more acquittals at those bench trials. Â I told this lawyer I was disturbed by such an approach, unless at leastÂ he was telling clients that he wished to trade off that clients' rights so that they all might benefit somehow as a group. I told him that I do not go frequently enough to the court he discussed, for it to help my general universe of clients to advise them to plead guilty merely to gain such "credibility". In fact, one of the benefits of my having a law practice that takes me around the Washington, DC, Beltway and beyond is that I often get a fresher start with judges and prosecutors by them often seeing me on occasion rather than more frequently than that. Â I would like to think that a lawyer builds credibility by showing s/he fights zealously and effectively for each client, always tells the truth, knows the applicable law and how to try a case effectively without wasting time on matters of no beneficial consequence, and does not bare nor use fangs when not needed.Â It is the prosecutor's burden to prove a defendant guilty beyond a reasonable doubt, and not the criminal defense lawyer's burden to do so. Â What are your thoughts and experiences on this topic? Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, August 27, 2007

### **Attorney General Gonzales resigns. Who will replace him?**

Â Bill of Rights.Â (From the public domain.)Â Attorney General Alberto Gonzales resigned this past Friday, butÂ the official announcement was delayed until later today, Monday. Talk about too little too late. Â Gonzales's resignation presents an opportunity for Bush to be persuaded to appoint a replacement who will act more independently from the president than did Gonzales (who did not appear to act very independently at all), will be more forthcoming to the public, and will do more to protect true justice. My complaints about Mr. Gonzales are many.Â Whom would you recommend for the job, both your ideal candidate, and a candidate that might realistically be accepted by Bush? Don't just tell me; please tell Bush. Â U.S. News & World Report (thanks TalkLeft for the link) said on August 24: "The buzz among top Bushies is that beleaguered Attorney General Alberto Gonzales finally plans to depart and will be replaced by Homeland Security Secretary Michael Chertoff." I hope the field of candidates extends beyond Chertoff, and to better people than someone like former Attorney General Richard "Thornburgh Memo" Thornburgh. Even though Chertoff has been exposed to enlightened views of the Constitution, having been a law clerk to the late Supreme Court Justice William Brennan, for two and one-half years he has been drenched in homeland security work, which would not appear to be about hugging the Constitution other than to try to squeeze the breath out of it. It might be better to have a devil we have known as attorney general (were that Thornburgh), rather than a devil from the Homeland Security Department's helm. Â Until Bush names a Gonzales replacement, whose nomination will need Senate confirmation, it appears that the acting attorney general will be Acting Deputy Attorney General Craig S. Morford.Â Â Thanks to my brother First Amendment Lawyers Association member Marc Randazza for sending a listserv message on this news item. Here is Marc's strongly-worded blog entry on the Gonzales news. Â Among theÂ legions of blogsÂ covering this news item are: TalkLeft (here and here), and Michelle Malkin's rightwing blogÂ (I vehemently disagree with Malkin's views, but here she expresses what plenty of far rightwingers probably are thinking about Gonzales and his potential replacement). Jon Katz.Â

Posted by Jon Katz in Constitutional Law at 08:10

### **When recovering addicts talk about their addictions.**

DEA image in the public domain.Â Recently in the supermarket, one of the employees stopped to look at my toddler son. The man -- looking to be in his fifties -- looked carefully at my boy, then laughed, and remarked thatÂ they both had about the same number of teeth. I got a good laugh out of that, ready to share it with my friends who appreciate such humor.Â I figured his tooth problem resulted from eating too much sugary food, not brushing well enough, and not going to the dentist enough. Â The same man came back a few minutes later, and said he lost his teeth from cocaine abuse, proclaiming that he now has been clean for thirty years. He also volunteered that next year he will have qualified forÂ dental insurance that will be able to fill the gaps in his teeth. I told him I am a criminal defense lawyer, and did not realize before that cocaine can cause tooth problems. He rubbed his gums to confirm the risk. Â Once an addicted person starts admitting the addiction, the floodgates seem to open for the recovering addict to publicize his or her addiction far and wide. For instance, a fewÂ years after I graduated from college, aÂ local man one day asked me if I knew he had been a drug addict in college, at one point having done over one hundred hits of acid in one year (or was that two hundred hits?). During the next year or two, he asked me the same question at least two more times, and I replied that he had already told me, and that I was fascinated by his stories of his college drug use; I wonder whether some of his memory had been erased with the acid, or whether he just lost track of the people he had told of his addiction.Â A recovering alcoholic several times told me about the Alcoholics Anonymous meetings he had attended, including multiple meetings during a two-day weekend out of town. He later told me about having faced substantial stress, and hitting the bottle on a subsequent weekend as a result.Â He kept going to the AA meetings.Â Two Maryland drunk driving probation officers told me they were recovering alcoholics, and one told me that each day sober was an accomplishment. At the time, they said the program required that the drunk driving probation agents be recovering alcoholics. Recently, another probation officer told me this is no longer the case. Â A manager at the Second Genesis drug program several years ago told criminal defense lawyers visiting his facility that he was a recovering drug addict, he would not hesitate to inform the law enforcement authorities when any of his program members failed his program, and we should expect our drug addicted clients to lie. Â An alcoholic client of mine -- arrested for drunk driving -- admitted he was an alcoholic, and said he would keep drinking as a way to help deal with his problems. Â These are but a handful ofÂ tales from addicted people and the different ways they address their addictions, running from continuing with their drug of choice, to trying to stop (with varying results), to becoming assistants to law enforcement (apparently thinking such a path is beneficial to people with drug problems). Â To well-represent my clients, I need to know and understand where they are coming from. Many have addictions, including addictions to drugs and alcohol, the Internet,

and sex. Their stories run from the fascinating (including those from members of the marijuana culture) to the disgusting (including those from clients sexually attracted to minors). The lies fly, too, including from the clients who have, but deny, addictions that are at the very root of the criminal prosecutions against them.Â What have been your experiences with addicted people?Â Jon Katz.Â

Posted by Jon Katz in Drugs at 00:00

Sunday, August 26, 2007

### **Every man a king.**

Image from U.S. Senate's website. Assassinated Louisiana governor Huey Long successfully took office with the slogan "Every man a king." Ultimately, he became Louisiana's dictator. Demagogues take many forms, including Huey Long, Tailgunner Joe McCarthy, and Jim Jones. It seems that Huey Long was among the more colorful and likeable of demagogues. Did Long's assassination radically change the course of Constitutional law in the United States? Indiana University law professor Gerard Magliocca thinks so. His detailed law review article on the matter is [here](#) in PDF format (scroll to the bottom and click the Stanford Law School link), together with the article's abstract. Thanks to Legal Theory Blog for posting on this article. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, August 24, 2007

### **Thanks, Assistant Public Defender Brian Jones, for breathing life into the Effective Assistance of Counsel guarantee.**

Bill of Rights. (From the public domain.) Attention all judges: Public defenders are not fungible products that are to be appointed as counsel on Tuesday to handle a trial the same day or the very next day. Praised be rather new Portage County, Ohio, Assistant Public Defender Brian Jones for telling the same to a trial judge, risking jail for it, and being held in contempt with a jail sentence as a result. Praised be Portage County Public Defender Dennis Lager for standing behind the actions of Mr. Jones, whose colleagues bailed him out after he stewed in a jail cell for five hours. Thanks to Arbitrary and Capricious, the NACDL, and everyone else who has been vilifying Municipal Court Judge John Plough's plowing actions against attorney Jones, subsequent to having "threatened another public defender, Robin Bostick, with contempt when they clashed over how much time was necessary to prepare for a case." The stories are many of public defender managers who do not back up their line attorneys in standing up against injustices. The light of day must be shined on them, as well as on the shining actions of Brian Jones and Dennis Lager. It will be an honor to buy them plenty of lagers when I meet them one day. Jon Katz.

Posted by Jon Katz in Criminal Defense at 06:00

### **Cutting and pasting leads to inadmissible computer chats.**

Bill of Rights. (From the public domain.) Your tax dollars pay for a brigade of law enforcement people working online to seek out purchasers and sellers of child pornography, and adults to solicit sexual activity with minors, where the "minors" are actually the cops. Sometimes cops get sloppy, technically inept, or both in saving such online chats onto paper or onto a computer disk. Consequently, this always is a line of analysis for any such criminal defense case, sometimes necessitating a computer forensics expert. Underlining the power of investigating for sloppy, incomplete, doctored, and falsified online chats is U.S. v. Jackson, 488 F. Supp. 2d 866 (D. Neb. May 8, 2007). Jackson describes the cut-and-paste situation as follows, in pertinent part: The court finds the cut-and-paste document is not admissible at trial. First, the burden is on the government to show the document is authentic. United States v. Black, 767 F.2d 1334, 1342 (8th Cir. 1985); Fed. R. Evid. 901(a); United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000). The government must make a foundational showing that the transcript is trustworthy. United States v. Webster, 84 F.3d 1056, 1064 (8th Cir. 1996) (with regard to recording). The government attempts to introduce the editorialized version of the cut-and-paste document. However, the court finds the evidence offered by Peden is credible and supportable. Peden testified about a number of methods that could have been utilized to accurately capture the chats, but none of these methods were used. As set forth above, there are numerous examples of missing data, timing sequences that do not make sense, and editorial information. The court finds that this document does not accurately represent the entire conversations that took place between the defendant and Margritz. The defendant argues that his intent when agreeing to the meeting was to introduce his grandniece to the fourteen-year-old girl. Defendant is entitled to defend on this basis, as it goes to the issue of intent. Defendant alleges that such information was excluded from the cut-and-paste document or from a lost audiotape of a phone conversation between him and Margritz. The court agrees and finds the missing data creates doubt as to the trustworthiness of the document. See, e.g., Webster, 84 F.3d at 1064 (government must show trustworthiness of tape recording). Changes, additions, and deletions have clearly been made to this document, and accordingly, the court finds this document is not authentic as a matter of law. Second, in the alternative, defendant argues that the cut-and-paste document is not admissible as it is not the best evidence. This rule provides an original writing or recording to prove the truth of the contents. Fed. R. Evid. 1002. A computer printout is considered the original if it accurately reflects the data. Fed. R. Evid. 1001(3). The same is true of a duplicate. Fed. R. Evid. 1001(4), 1003. As the court has previously stated, the cut-and-paste document offered by the government is not an accurate original or duplicate, because, as previously noted herein, it does not accurately reflect the entire conversations between the defendant and Margritz. In addition, Margritz changed this document by including his editorial comments. Unlike the cases relied on by the government in its brief, in the case before the court there is expert testimony that the cut-and-paste document has been altered. Accordingly, for these same reasons the court likewise finds the cut-and-paste document inadmissible. In that same regard, the court finds the document is inadmissible under Fed. R. Evid. 1004 (allows for the secondary evidence when original is destroyed). See United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976). It is clear that the proposed document does not accurately reflect the contents of the original. The government relies heavily on United States v. Tank, 200 F.3d 627 (9th Cir. 2000) and United States v. Simpson, 152 F.3d 1241, 1249-50 (10th Cir. 1998) for the proposition that chat room logs are admissible. The court finds the cases relied on by the government to be of little assistance. In both cases, it appears that the actual computer files were offered as evidence, not a cut-and-paste version of the computer files. The court would have no difficulty

admitting evidence which had been saved on the computer and was the actual computer printout. The cut-and-paste document is not a computer record nor is it a computer printout. The government also argues that Margritz can use the cut-and-paste document to refresh his memory at trial. If the court permitted Margritz to use this document to refresh his memory, then defendant would be forced to show how the information contained therein is unreliable. The court is very concerned that on cross-examination the defendant would be forced to have Margritz testify about the cut-and-paste document. That would cause the jurors to speculate that some part of an actual transcript exists. Allowing Margritz to use the document to refresh his memory would allow the government to present this evidence to the jury, albeit indirectly. See *Hall v. American Bakeries Co.*, 873 F.2d 1133, 1136 (8th Cir. 1989). Accordingly, the government will not be permitted to allow Margritz to refresh his memory with the cut-and-paste document. The motion in limine is granted and the cut-and-paste document is excluded for all purposes. Thanks to my brother First Amendment Lawyers Association member Andrew Contiguglia for posting this Jackson case to the First Amendment Lawyers Association's listserv. Thus far, Underdog links to the following three FALA members' blogs: Andrew Contiguglia, Cari Wiggins, and Marc Randazza. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

### **Commercial cutting and pasting: The Gandhi dilution.**

On August 21, I blogged about a powerful commercial that incorporated part of Mahatma Gandhi's April 2, 1947, speech during the Inter-Asian Relations Conference held on April 2, 1947 at New Delhi. In the same blog entry, I provided a link to the full text of the speech. After posting the Gandhi/Telecom Italia blog entry, I closely compared Gandhi's words in the commercial to his unedited speech found on the website of the GandhiServe Foundation, whose website says that it helped in the commercial's design. I have posted the key parts of his speech below, which reveal a sharply-worded discussion of the West's conquests -- and a nonviolent and profound solution thereto -- none of which is conveyed in the commercial, which whites out some of Gandhi's sharpest words in mid-sentence. Below, I have put the words that survived the commercial in capitals and bold next to the words that immediately preceded the commercially-broadcast words, followed by the remainder of his speech: "Don't carry that memory of that carnage beyond the confines of India, but what I want you to understand if you can, that the message of the East, the message of Asia, is not to be learnt through European spectacles, through the Western spectacles, not by imitating the tinsel of the West, the gun-powder of the West, the atom bomb of the West. IF YOU WANT TO GIVE A MESSAGE again to the West, IT MUST BE A MESSAGE OF 'LOVE', IT MUST BE A MESSAGE OF 'TRUTH'. There must be a conquest (clapping), please, please, please. That will interfere with my speech, and that will interfere with your understanding also. I WANT TO CAPTURE YOUR HEARTS and don't want to receive your claps. LET YOUR HEARTS CLAP IN UNISON WITH WHAT I'M SAYING, AND I THINK, I SHALL HAVE FINISHED MY WORK. Therefore, I want you to go away with the thought that Asia has to conquer the West. Then, the question that A FRIEND ASKED YESTERDAY, "DID I BELIEVE IN ONE WORLD?" OF COURSE, I BELIEVE IN ONE WORLD. AND HOW CAN I POSSIBLY DO OTHERWISE when I become an inheritor of the message of love that these great un-conquerable teachers left for us? You can redeliver that message now, in this age of democracy, in the age of awakening of the poorest of the poor, you can redeliver this message with the greatest emphasis. Then you will, you will complete the conquest of the whole of the West, not through vengeance because you have been exploited, and in the exploitation, of course, I want to include Africa, and I hope that when next you meet in India, you will all be, exploited nations of the Earth will meet if by that time there aren't any exploited nations of the Earth. I am so sanguine that if all of you put your hearts together, not merely your heads, but hearts together and understand the secret of the messages of all these wise men of the East have left to us, and if we really become, deserve, are worthy of that great message, then you will easily understand that the conquest of the West will be completed and that conquest will be loved by the West itself. West is today pining for wisdom. West today is in despair of multiplication of atom bombs, because a multiplication of atom bombs means utter destruction, not merely of the West, but it will be a destruction of the world, as if the prophecy of the Bible is going to be fulfilled and there is to be a perfect deluge. Heaven forbid that there be that deluge, and through men's wrongs against himself. It is up to you to deliver the whole world, not merely Asia but deliver the whole world from that wickedness, from that sin. That is the precious heritage your teachers, my teachers have left to us." If the GandhiServe Foundation's full text of the Gandhi speech is accurate, how does Telecom Italia explain its whiteouts of Gandhi's critical words in mid-sentence? Was it merely to keep the commercial to sixty seconds, was it out of concern that leaving in the words would lead many in its Western audience to close their ears, or was there another reason? How does this topic relate to my trial law practice? It is an example of the need to investigate and review evidence in our cases with a tirelessly and unceasingly sharp, critical, and deeply listening eye. Jon Katz.

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

Thursday, August 23, 2007

### **Bush II: Seeking blissful ignorance with demonstrators.**

Bill of Rights. (From the public domain.) Thanks to the American Civil Liberties Union for obtaining and releasing the Bush II administration's heavily redacted manual on how to keep dissenters out of Bush II's sight when he attends events. The ACLU obtained this manual during litigation (since settled) by a couple who refused to cover their anti-Bush II t-shirts during a July 4 speech by him at the West Virginia Capitol. When Bush II leaves the White House for good, will his successor be more enlightened about tolerating dissent and protecting the First Amendment? Jon Katz. ADDENDUM: Thanks to a fellow listserv member for informing me of this story.

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, August 22, 2007

### Mayor Fenty: Protect the First Amendment.

Bill of Rights. (From the public domain.) Washington, D.C., Mayor Adrian Fenty and his hand-picked police chief, Cathy Lanier, have been in office for many months. Having previously served on the D.C. City Council for several years, Mayor Fenty doubtlessly knows that demonstrators of all stripes come to the nation's capital throughout the year, and that the First Amendment protects their demonstration rights. Going hand-in-hand with the right to demonstrate goes the right to put up posters announcing demonstrations. Consequently, supporters of the September 15, 2007, anti-war demonstration have been putting up ANSWER Coalition posters with water-soluble adhesive, seeing that the applicable regulations call for posters on lampposts to be affixed so that they will stay up. The District of Columbia Department of Public Works has hit ANSWER with around \$10,000 in fines for their posters, apparently for putting them up with paste rather than with tape. On ANSWER's behalf, the Partnership for Civil Justice has filed this Complaint on August 20 in the United States District Court for the District of Columbia, alleging, among other things, that the fines violate the First Amendment; the postering regulations are being selectively enforced on a content-based discriminatory manner; and the postering regulations permit political candidates to leave their posters up until the election and anti-crime messages to stay up indefinitely, but unconstitutionally require all other posters to be removed within sixty days. The Complaint also points out that the pasting of the posters fulfills the regulatory requirement to affix the posters to lampposts in a way that they do not come off easily. ANSWER further asserts that the postering regulation places strict liability on the organization listed on the poster, regardless of the organization's involvement with affixing the poster. ANSWER drew Henry Kennedy as its judge, which I anticipate will be an excellent draw if the case does not get dismissed on federal abstention grounds under the Supreme Court's Younger doctrine. *Younger v. Harris*, 401 U.S. (1971). The Younger doctrine holds that "a federal court should not enjoin a pending state proceeding (including an administrative proceeding) that is judicial in nature and involves important state interests." *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1120 (D.C. Cir. 2004) (argued by me against the D.C. government, in part to challenge whether Younger applies to the District of Columbia, since D.C is not one of the fifty states in the union). Considering the language of the foregoing *JMM Corp.* case, I anticipate good chances that the presiding judge will construe the pending postering infraction notices against ANSWER as administrative proceedings covered by the Younger doctrine, in that the only way to challenge the infraction notices is to proceed to an administrative hearing before a District of Columbia administrative law judge. In any event, the District of Columbia's governing postering regulations, which are at CDCR 24-108, do not reference any statutory authority for issuing such regulations. If such statutory authority is absent, this is a fertile line of attack against the regulations. ANSWER's website asserts that the infractions were spurred by questioning about the postering on Fox News. Selective enforcement based on content is but one of ANSWER's strongest arguments, but it seems like a tough nut to crack to prove that DC's fines against the posters were prompted by Fox New broadcasts. Other strong lines of attack in this litigation appear to include attacking the regulations as unconstitutional and as having been passed without sufficient statutory authority, arguing that ANSWER is not automatically responsible for the postering activities of people acting on their own, and arguing that the regulations do not apply to some or all of the postering activities (e.g., the regulations apply to lampposts and their appurtenances, but not to other publicly-owned structures, including telephone poles and phone boxes). Simultaneously, ANSWER will be faced with showing the extent to which pasting -- versus taping -- is used by other postering parties that do not receive postering fines from the District of Columbia government. Jon Katz. ADDENDUM: Thanks to a fellow civil liberties lawyer who e-mailed me about whether any statutory authority exists for this postering regulation. He surmises that this is an old regulation, and that it was issued by the District of Columbia Commissioners pursuant to broad Congressional authority. He says this scenario would constitute statutory authority for the postering regulation.

Posted by Jon Katz in Constitutional Law at 00:02

Tuesday, August 21. 2007

### **Gandhi and persuasion.**

Â From time to time, commercials acknowledge consumers' social conscience. McDonald's, Coca Cola and HandiWipes may not be among such commercial producers, but Telecom Italia is such a marketer. Â Displayed above is a powerful commercial pondering the additional persuasion power that would have been Gandhi's if today's myriad communications technologies were available to him. Of course, before the Internet, iPods, cellphones, Discpeople/Walkpeople, and television, people interacted more often face-to-face. Now, even at coffee shops and other WiFi areas, people are tuned out from those around them and glued to their notebook computer screens; people may have taken more steps behind than steps forward in the communications process. Â Gandhi has long been an inspiration to me for social justice, peace, egalitarianism, and fearlessness in the face of my own mortality.Â However, not of interest to me is theÂ devotion he had to celibacy, even within marriage. Â This Milanese Madison Avenue commercial production enlisted Spike Lee as its director. A sharper, color version is [java-linked here](#). In the commercial, Gandhi is saying: "If you want to give a message it must be a message of â€˜Loveâ€™™, it must be a message of â€˜Truthâ€™™. I want to capture your hearts. Let your hearts clap in unison with what Iâ€™™m saying. A friend asked yesterday, â€˜Did I believe in one world?â€™™ How can I possibly do otherwise, of course I believe in one world." The complete 1947 speech is [here](#). Sadly, ten months later, Gandhi was assassinated. Fortunately, his voice and spirit live on forever as long as humans live on.Â Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, August 20, 2007

### **Circling the battlefield three times.**

Practicing life and law as a harmonious whole. Today's Underdog posting is at once serious and liberating. Some people think I am too serious about life, some think I am not serious enough, and perhaps some think I need to better balance the both. When I let people know me well enough by letting my guard fully down -- which is easy to do with friends, can be dangerous to do with foes, and can be dangerous not to do with juries -- they get a better understanding about how well balanced is my mix of seriousness and humor. Sometimes I suppress some of my seriousness to avoid going into a tailspin of feeling all grey about life and to avoid having judges and juries tune out my message. Sometimes I suppress some of my humor to avoid going the other extreme, with one of my worst nightmares involving laughing uncontrollably during closing argument at trial when remembering through free association a friend's joke that made my soymilk come through my nose; my plan is to neutralize any such possibility by summoning an equally sad or depressing memory. I write more about my approach to humor and seriousness here. Last year, I blogged: "My temptation to feel dread over all the [world's] ongoing injustice is strong, including the dread I often feel in the pit of my stomach as I enter a courthouse with the recognition of all the injustice that has happened there, but needing to remember all the justice that has been done there, too, and that will continue to be done there. Like the protagonists in M\*A\*S\*H, I search out the often bent side of humor to maintain a sane balance. T'ai chi alone won't do it for me." Fortunately, any dread I feel when entering a courthouse disappears rather quickly, as I refocus on the battle at hand. However, I want to feel full balance, full power, and no dread at all in the courthouse, which is my legal battleground. I have come closer to doing so, and this is how: As regular Underdog readers know, I am a non-Buddhist deriving many peaceful and harmonious benefits from Buddhism. As a member of a local Tibetan Buddhist temple suggested to me recently, spiritual truth is spiritual truth, no matter its source nor the path for finding it. Just as nobody has a monopoly on spiritual truth, Duke Ellington asserted that there are only two kinds of music, good and bad. Echoing this view, a friend who pursues a form of karate crystallized and practiced in the Philippines says that with martial arts and everything else, the goal is to receive and follow beneficial teaching and training, no matter the source. Consequently, my path to empowerment is one of millions of possible paths. Buddhism has been a peaceful anchor for me, in part because some of my most peaceful moments have been spent with such Nipponzan Myohoji Buddhists as Rev. Jun Yasuda of Grafton, New York, Rev. Takako Ichikawa of Washington, D.C., Rev. Clare Carter of Leverett, Massachusetts, and Rev. Kato of Leverett. They never suggest that I change my religion, and have a knack for bringing together people of all backgrounds who have a thirst for peace and justice. Jun Yasuda, among others, practices bowing three times, ends prayer sessions with three repetitions of Na Mu Myo Ho Ren Ge Kyo facing the Buddha followed by the same trilogy facing everyone present, and takes her temple visitors for a walk on the surrounding ancient Mohican land, including three clockwise revolutions around the magnificent stupa that apparently is one of the few things that ever has calmed down the otherwise overactive dog of my close friend who lives around fifteen miles away, while leaving burning incense sticks at key parts of the walk. Having asked more than my share of questions to Jun-san, I never asked her about the significance of doing things three times. Perhaps, this Theravada site gives the answer, when discussing doing three prostrations at a Buddhist shrine: "This prostration is made three times, the first time to the Buddha, the second to the Dhamma [also known as dharma, or the Buddha's teachings], and the third to the Noble Sangha," which is defined here as "figures who represent high levels of spiritual attainment who inspire and guide us through both their symbolic example and through visionary experience." Seeing that Jun-san and many others approach all life as sacred, including our enemies, I came up with the idea of trying to get to courthouses and other legal battlefields early enough, from time to time, to do t'ai chi and to circle the battlefield three times, and at least once when less time is available. I tried this for the first time last week at the federal courthouse in Alexandria, where I was scheduled for an initial criminal court appearance. I left home early enough to park a few blocks from the courthouse, and to do t'ai chi at an interesting pedestrian plaza at the nearby Patent and Trademark Office building. Some people gathering before work at a nearby table seemed amused; one of my t'ai chi teachers told me of the benefits to others of practicing t'ai chi before them, including doing so with people staying at hospitals, and I have seen some of the biggest benefits expressed in the reactions of children. After completing the thirty-seven-interconnected-posture t'ai chi practice, I walked to the courthouse, and had a sufficiently light load of just an accordion file, to circle the courthouse, clockwise, three times. This is a circle of around one-third to one-half of a mile, in that the tightest circle goes around the large courthouse, a nearby office complex, the prosecutor's office attached to the courthouse (don't get me started about why the prosecutor's office is exalted right next to the courthouse in such a way that public defender's offices and private criminal defense lawyers' offices are not), and security posts. As I walked, I chanted the odaimoku prayer for peace, composed of the words "Na Mu Myo Ho Ren Ge Kyo" (here being chanted by Rev. Takako Ichikawa, whose temple's website I maintain here). As it turns out, I have Hollywood and literary company chanting Na Mu Myo Ho Ren Ge Kyo, including Tina Turner, and characters in The Simpsons (by Homer), Life in Hell, South Park, Revenge of the Nerds II, and The Exorcist. As I

walked around the courthouse battlefield, my tension and disharmony about this courthouse and the criminal justice/injustice system at the federal and state levels started dissipating. This is not to say that my strong feelings about the criminal justice system changed, but just that I got more relaxed being in a place where often I have felt down knowing about all the injustices being inflicted on people in court buildings. On my first revolution, I ignored the man in the guardbooth for the parking garage underneath the courthouse, not interested in being interrupted by a quizzical reaction. As I passed the guardbooth at the entrance to the prosecutor's office parking garage halfway on the other side, I saw a guard with whom I always have gotten along well, and gave him a friendly wave. As I proceeded to revolutions two and three, I ignored nobody; I imagine that in Buddhism, to ignore anybody is to ignore part of oneself, in that we are all connected in one way or another. By the time I was done, I felt more familiar than ever with this courthouse, and with all other courthouses and battlefields. The judges and everyone else who go in and out of the courthouse are temporary visitors and inhabitants to these buildings and on the planet; my clients and I have at least as much a claim to these buildings as do they. I will not get very far, if at all, showing people my anger and upset over injustices that seem to originate or to be assisted by them, rather than to educate them and to help empower them to come closer to doing the right thing. Getting into greater harmony with my opponents and with judges who do things that appear unjust reminds me what I said in my July 15, 2007, blog entry: "Much more often than not, my simple act of folding a peace crane and handing it with peaceful intentions to another person spreads peace or other forms of happiness to them. I have considered, but thus far declined, handing peace cranes to selected prosecutors and other opponents; then again, consider George Harris's powerful act of placing carnations in the gun barrels of police during a 1967 antiwar demonstration." By now, I cannot think of anything preventing me from handing an opponent a peace crane other than (1) that I only make a few on occasion due to the time to fold a well-made peace crane, and (2) my handing the peace crane may be misconstrued as weakness by me; however, even if that is the response, I am empowered by the very act of doing the same kindness for an opponent as I would do for my closest friend or family member, and any misconstruction of my intentions opens the door to better understanding between me and my opponent, and does not dilute my power. This simple act of performing t'ai chi in view of the battlefield building and then circling the battlefield makes the building seem less alien to me, and gives me a feeling of more harmony and power. None of this is about new age, touchy-feely spiritualism. It is all about the necessity of achieving and maintaining harmony; being fully powerful for myself, my family, my clients, and everyone else; and reaching higher levels of fulfillment and happiness, all without needing to visit a psychological therapist, nor to ingest anything but healthy food and water and to breathe freely and harmoniously. Jon Katz.

Posted by Jon Katz in Persuasion at 00:01

Sunday, August 19, 2007

### **Of Rocky, Joe Jackson, and Muzak**

Image from the public domain. Many times I have blogged (e.g., [here](#) and [here](#)) that great music and musicians inspire me as a trial lawyer. I also have cursed the day Muzak was born, more specifically elevator music, now that Muzak has branched out beyond the elevator. Recently, I got almost so sick to my stomach with elevator music, that I would have gotten off and climbed the stairs -- or else abandoned the building -- had I not merely been going to the seventh floor. My Sunday morning started off in Philadelphia, where I was spending a weekend. I finally got a chance to walk right up to the Philadelphia Museum of Art, where Rocky ran up its steps in the first of the Rocky series, followed by drinking a glass of six raw eggs. I could not pass up a chance to run up the same steps. Earlier this year, I went to an even more exciting part of Philadelphia, just a few blocks further away, to an otherwise ordinary-looking residential block where John Coltrane's home sits. When I got back to my hotel a few blocks away and hit the button to my floor, the doors closed on me like a jail cell, and I almost lost my breakfast, as the speakers piped in an elevator music version of Joe Jackson's "Is She Really Going Out With Him?" I was particularly surprised that Joe Jackson would not have protected all his music from such putrefaction, although my free expression jealousy has no problem that he did not (but my stomach does have such a problem). In any event, when I saw Joe Jackson perform an amazing concert in 1983 at Miami's Knight Center, he seemed too serious about his music to tolerate its being turned into elevator music. In fact, at one point during the concert, he briefly lectured the audience, questioning why people would pay good money for the concert, only to shorten his total performance time on stage with a bunch of "woo woo"-ing. This elevator music torture was perhaps a payback for my doing something as hackneyed as running the Rocky steps. Perhaps it also was payback for the time I strolled upon a storefront Muzak office around seventeen years ago during lunchtime in Washington, DC, and asked for some information about the company. Perhaps sensing my mischievous intent, the person at the front desk introduced me to the manager and general counsel, who inquired whether my interest in Muzak was morbid. I replied that Muzak is here to stay, for better or worse, so I wanted to know more about it. He handed me a brochure and a major magazine article about Muzak's efforts to remake its image beyond elevator music. Of course, elevator music is far from my only musical pet peeve. Another is Phil Collins, no matter his talent and tremendous popularity. About a decade ago, I made the mistake of turning on the television one weekend morning to see Phil Collins being interviewed. He seemed to have a very dry mouth, the same kind I experienced -- accompanied by an extremely queasy stomach -- several Sunday mornings in college after drinking too much the night before. Forever after that, my stomach starts feeling queasy when I hear Phil Collins, making me feel worse than I felt hearing Joe Jackson transformed into elevator music. The only link I can make between these queasy ordeals on the one hand and trial advocacy on the other, is the necessity to be tolerant and patient in preparing for and pursuing trials, dealing with clients, and dealing with all people. Absent such tolerance and patience, a lawyer will be rolling his or her eyes over testimony and evidence that at first blush seems painfully boring or annoying, but which might also contain some gold if only the lawyer would pay attention. Does that mean I should stop switching the station every time Phil Collins comes on? Eating a crate of prunes sounds less unpleasant than listening to Phil Collins. Jon Katz.

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

Friday, August 17, 2007

### Breathing life into the justification defense.

Â Bill of Rights.Â (From the public domain.)Â A convicted felon confronts a handgun being waved in his face. He disarms the gun wielder, and acts as expeditiously as possible to turn the gun over to the police. He has been confronted by Hobson's choices: (1) either seize the handgun and face violating the federal law against felons' possession of firearms, or risk being killed by the gun wielder; and (2) either turn the gun over to the police, who might then seek a prosecution for the convicted felon's possession of the handgun (which is what happened), or risk being discovered keeping the handgun or hiding it. Â Suffering from the maxim that no good deed goes unpunished, John David Mooney is the convicted felon who disarmed a gun wielder, and testified that he moved as expeditiously as possible to turn the gun over to the police. Along the way, and after the police arrested him for possessing the handgun, Mr. Mooney's lawyer mis-advised him that a justification defense was not available to defendants charged in federal court withÂ beingÂ felons in possession of firearms.Â Â Having a reputation for being one of the nation's most conservative federal appellate courts, the United States Court of Appeals for the Fourth Circuit found that a justification defense was available to Mr. Mooney. The court found that Mr. Mooney's attorney provided ineffective assistance of counsel for telling Mr. Mooney that such a defense was not available, and granted Mr. Mooney a retrial. U.S. v. Mooney, \_\_\_ F.3d \_ (4th Cir., Aug. 6, 2007). Â Mr. Mooney was indicted (see the indictment here) and convicted for violating 18 U.S. Code Â§ 922(g)(1), which prohibits "anyone who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" (it is the maximum available imprisonment that matters, not the incarceration term actually received) "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Mr. Mooney was sentenced to the fifteen-year mandatory minimum prison term applicable to those found to have three previous applicable convictions "for a violent felony or a serious drug offense, or both" under 18 U.S. Code Â§ 924(e)(1). Â Subsequent to losing hisÂ pro se attempt to reduce his sentence (see Mr. Mooney's pro se motion here), Mr. Mooney filed a habeas corpus petition alleging ineffective assistance of counsel for his attorney's having told him that a justification defense was not available to him. Â Starkly contrasting Mr. Mooney's trial lawyer's assertion of the unavailability of a justification defense, Mooney points out: "Every circuit to have considered justification as a defense to a prosecution under 18 U.S.C. Â§ 922(g) [which is the statute under which Mr. Mooney was prosecuted] has recognized it. See United States v. Leahy, 473 F.3d 401, 409 (1st Cir. 2007); United States v. Deleveaux, 205 F.3d 1292, 1297 (11th Cir. 2000); United States v. Gomez, 92 F.3d 770, 774-75 (9th Cir. 1996); United States v. Paoello, 951 F.2d 537, 540-41 (3d Cir. 1991); Singleton, 902 F.2d at 472 (6th Cir. 1990); United States v. Vigil, 743 F.2d 751, 756 (10th Cir. 1984); Panter, 688 F.2d at 271 (5th Cir. 1982); United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979)."Â Mooney, \_\_\_ F.3d \_ . Â Remarkably, the Fourth Circuit acknowledged that this Mooney case represents the first time it has applied the justification defense. The court's application in this instance flowed from its following statement: "To recognize, in particular, the justification defense to the felon-in possession offense is not remarkable. 'Common sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life.' United States v. Singleton, 902 F.2d 471, 472 (6th Cir. 1990)." The Court reiterated its four-prong test "for evaluating the merits of a justification defense to a felon-in-possession charge under Â§ 922(g)," which provides that "to be entitled to the defense, a defendant must produce evidence at trial that would allow the fact finder to conclude that he: '(1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) [that there was] a direct causal relationship between the criminal action and the avoidance of the threatened harm.'" [U.S. v. ] Crittendon, 883 F.2d [326] at 330 [(4th Cir. 1989)]; see also [U.S. v. ] Perrin, 45 F.3d [869] at 873-74 [(4th Cir. 1995)].Â Mr. Mooney's victory is all the more remarkable by having been won not by a longtime attorney, but by a recent law school graduate, Meghan Poirier,Â who argued the case just days after graduating law school, and now awaits her bar exam resultsÂ This article about Ms. Poirier's tenacity and passion for her client's causeÂ is inspiring. For any reason the prosecution successfully seeks en banc review of this case by the Fourth Circuit, it will be interesting to see if the military -- which is Ms. Poirier's employer -- will enable her to continue advocating on Mr. Mooney's behalf.Â Jon Katz.Â ADDENDUM: Thanks to a fellow listserv member for bringing to my attention the above-discussed article about John Mooney and his lawyer Meghan Poirier.

Posted by Jon Katz in Criminal Defense at 00:01

Thursday, August 16, 2007

**Stops premised on a mistake of law are generally held to be unconstitutional.**

Bill of Rights. (From the public domain.) To stop a suspect, a cop merely needs to wait for the suspect to drive a car. Just about every driver will violate one or more rules of the road, thus enabling a traffic stop that will hold up in court, whether it be speeding, not making a full stop at a stop sign, and the list goes on. A Montgomery County, Maryland cop told me he usually will follow a car for awhile to catch multiple moving violations, to minimize the risk of getting the stop suppressed. We have too much of a police state already, and such tailing actions add to such a police state. Of course, if a cop follows a driver for a long time (sometimes cops will get right on driver's tails), the driver can get nervous, whether the nervousness is well-founded or unfounded, is in anticipation of a speeding ticket, or is out of uncertainty whether a police stop will result in racist or dishonest actions by the police. If a cop follows a driver long enough, the driver ultimately will arrive at the driver's destination and get out of the car, or will run out of gas; both approaches are particularly cynical and suspect ways for a cop to try to speak with a driver, and hopefully judges will suppress the second type of stop, as well as the first type if the driver pulls to the side of the road out of the hope that the cop will pass by. I throw such police shenanigans back in their faces. If they get behind my car, I keep my speedometer at least one or two miles per hour below the speed limit. By my doing so, the cops cannot stop me for speeding nor for going too slow. I know a criminal defense lawyer who had (and perhaps still has) a bumper sticker saying "Refuse searches." Whenever cops stopped him for speeding, he would say: "You are mistaken. I do not speed, because I expect stops for my bumper sticker if I speed." Sadly, a cop once stopped me on I-95 in North Carolina to "see if you're tired" merely because I was going slower than the flow of traffic but still at or slightly below the speed limit. I told the cop it was ironic that he would stop me, seeing that my slower speed was in response to seeing his car far ahead of me, after having already received a speeding ticket thirty minutes earlier from another North Carolina cop; I said another stop would have just gotten in the way of my getting to my destination. The second North Carolina cop let me go when I challenged him about whether the stop really was his profiling a black car with D.C. tags driving away from D.C. He seemed like he may have been an otherwise nice person under pressure to make such disingenuous stops. He looked embarrassed that I would point out the stop of a black car with D.C. tags. Because I stay at or under the speed limit when cops are behind me, if cops are not following me, their trip will be slower if we are on a one-lane road, unless the cop wishes to risk passing me over a solid yellow road divider. If the officer stops me, I am ready to be peaceful like Gandhi, calmly aggressive and in control like Cheng Man Ch'ing, and sharp as a whistle like Steve Rench. It also helps to soak up the lessons of the Busted video and, for me, to look at the bigger picture of being able to shine the light of day on any wrongful or abusive police stop of me on this Underdog blog. Many cops seem to love pulling alongside drivers at red lights and stop signs, and talking to them through their open windows. I roll up my window in advance and crank on the air conditioning or heating. If I do not notice the cop until s/he already is speaking to me, I will be happy to roll up the window in the cop's mid-sentence. Cops love to try to divide and conquer their suspects. It is easier to stand firm to a cop when one is alone, or when one is fortunate enough to be with a bird of a feather. However, if a driver or other suspect is trying to impress a date, or just does not want to make waves with scared, conformist or police-loving passengers, the driver may be less willing to drive a mile below the speed limit when in front of a police car, to close the window on a talking officer when the cop has not signaled the car to stop, or to refuse to talk to a cop. For courage and reinforcement, watch the Busted video. Today's blogpost was prompted by a recent, sad federal court decision upholding a stop of a suspect where neither the car nor its suspect driver were in violation of any laws to have justified the stop. The case is *U.S. v. Frederick Booker*, \_\_\_ F.3d \_\_ (D.C. Cir. Aug. 10, 2007), which signals cops that professed ignorance of the law can become bliss. In *Booker*, cops mistakenly thought *Booker* was in violation of District of Columbia motor vehicle regulations when they saw a dealer's temporary tags in his front windshield rather than affixed to the front. In reality, as the court confirmed, *Mr. Booker* was in compliance with D.C. law by having an additional dealer tag properly affixed to the rear of the car; D.C. law does not require any dealer tag to be affixed to the front. Before the police could stop *Booker's* car, which initially was driving in the opposite direction from the cops, he got to his destination and got out of the car, which is when the cops told him and his passenger to stop, his passenger ran, and the cops handcuffed him, claiming it was a Terry stop resulting from suspicion of the flight of the passenger (which the passenger had the full right to do in the first place, not having been a proper suspect about potentially mis-affixed tags, and having already been outside the car when the cops approached). When *Booker* responded to the cops that he had no driver's license, they arrested him for violating the jailable law against driving without a license. The cops searched *Booker* and his car incident to arrest (a car is subject to a search incident to arrest, even when the suspect is arrested far from the car), and found marijuana and cash. *Booker* ultimately pled guilty to marijuana possession, leaving open -- as part of his plea agreement -- his right to appeal the search of him and his car. Sadly, the two-judge majority on *Booker's* three-judge appellate panel found that all was honky dory, finding not only that it was reasonable for the cops to have been ignorant of D.C. regulations on the placement of dealer tags, but also allowing that the cops were too distracted and far from the car to notice whether a dealer tag was in fact attached to the

back of the car, even though no such testimony was presented that the police did not see the rear tag (and the dissent countered that the record indicated sufficient opportunity to observe the rear, properly-placed dealer tag). As a result, the majority allowed the initial stop for the cops' incorrect belief that the dealer tag was incorrectly affixed, which thereby allowed the arrest for having no license, and the search that found the drugs and money. Damaged during all this was the Fourth Amendment. (Of course, in retrospect, Booker would have been wise not to have displayed any tags through a window.)

Praised be dissenting Judge Judith Rodgers for having none of the Booker majority's Fourth Amendment-violating charade. In firmly dissenting, Judge Rodgers relies on her following analysis of the relevant caselaw: "Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional." *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (citing *United States v. McDonald*, 453 F.3d 958, 961-62 (7th Cir. 2006); *United States v. Chanthasouvat*, 342 F.3d 1271, 1277-80 (11th Cir. 2003)); see *United States v. Cole*, 444 F.3d 688, 689 (5th Cir. 2006). But see *United States v. Bueno*, 443 F.3d 1017, 1024 (8th Cir. 2006). A stop is lawful despite a mistake of law, however, if an objectively reasonable valid basis for the stop nonetheless exists. See *United States v. Southerland*, 486 F.3d 1355, 1358-59 (D.C. Cir. 2007); see also *United States v. Delfin-Colina*, 464 F.3d 392, 399 (3d Cir. 2006); cf. *United States v. Bookhardt*, 277 F.3d 558, 56 (D.C. Cir. 2002). "Whether a stop is reasonable turns on whether the facts, "viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion" that a traffic violation has occurred." *Southerland*, 486 F.3d at 1359 (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)); see also *United States v. Hill*, 131 F.3d 1056, 1059 (D.C. Cir. 1997). "[S]tops premised on mistakes of fact . . . generally have been held constitutional so long as the mistake is objectively reasonable." *Coplin*, 463 F.3d at 101 (citing *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004); *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000)).

Judge Rodgers concludes in her dissent: "As Booker argued to the district court, and that court ignored, and as he argues on appeal, 'there is no evidence in the record that supports the district court's speculation about the officers' actions,' as neither of the two officers who testified claimed that they or the third officer were "distracted" as they pulled up behind car.' Appellant's Br. at 20; see Tr. Nov. 18, 2003 at 64. 'Neither [did the officers] testify] that they were unable to determine that the rear tag was also a dealer's tag,' *id.*, much less that they were unable to see a rear tag at all. Because the evidence does not support the conclusion that a reasonable officer, particularly one trained to look for stolen cars and fraudulent tags, would not have glanced at the rear of Booker's car or not had an opportunity to do so at any point during the pursuit to determine whether there was a rear tag, the district court erred in denying Booker's motion to suppress the evidence found in the car. Accordingly, I respectfully dissent." It must be difficult at times for dissenting appellate judges to withhold using cutting words against colleagues whom they believe have rendered completely unjust opinions (and the cutting personal words still fly from time-to-time between disagreeing appellate judges). Hopefully Mr. Booker will obtain and win (including with Judge Rodgers' excellent analysis in her current dissent) an en banc review of this unjust Booker opinion. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

### **Will the real Dick Cheney stand up?**

In 1994, Dick Cheney correctly predicted the quagmire that would result from United States troops conquering the Iraqi government and occupying the country. What made him change his view? Oil? Jon Katz.

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

Wednesday, August 15, 2007

### "He understood English just fine the night I arrested him."

Photo from website of U.S. District Court (W.D. Mi.). How on earth can a monolingual cop, judge, or prosecutor -- or even a partially bilingual person -- have a sufficient understanding whether English is sufficiently understood by a person who speaks English as a second language? Such judgments are made all the time, often fatal to criminal defendants speaking English as a second language, for such purposes as judicial decisions whether to suppress their English-language statements, their English-language waiver of the right to refuse a search, their English-language waiver of their right to refuse a blood or breath test in an impaired driving case, and their non-verbal responses to police requests made in English (e.g., to perform field sobriety tests). Too often, I see prosecutors, police and judges being insensitive at worst and uninformed at best about litigants' abilities to speak and understand English as a second language. In one instance, a Virginia District Court judge refused a self-represented Spanish-speaking defendant's court-appointed interpreter request on his initial appearance date, saying "I deny your request for an interpreter. Your English is just fine." The judge had barely spoken to the defendant other than the basics about scheduling, obtaining counsel, and any need for an interpreter, so had insufficient information to reject the interpreter request. There is a huge difference between saying "I want an interpreter" in understandable English, versus understanding a prosecutor's merciless and heartless cross-examination of the defendant on the witness stand. We can all educate prosecutors, police, judges and everyone else of the need to err on the side of approving court-appointed interpreter requests in criminal court. Defendants have little to gain to seek an interpreter if they do not need one, in that the interpreter is at once a facilitator and barrier to communications. Nothing beats fully understanding the language spoken without the need for an interpreter. Beyond relying on court-appointed interpreters, criminal defendants with available funds may sometimes wish to consider hiring retained language experts for efforts to suppress statements made in a defendant's second language, and also to explain verbal and non-verbal cultural and linguistic differences among people from around the globe and even in different regions and cultures in the United States. For instance, I once read about one country where it is common to reveal bad news with a smile, to try to overcome the sadness of the situation. Without such information about a person's cultural background, jurors might conclude that the smiling indicated culpability for a crime, whether for the death of a dog or for numerous other sad occurrences. On this English as a second language topic, the District of Columbia Court of Appeals recently issued an opinion that helps perpetuate harm to defendants who speak little English. The case is *Carlos Torres v. U.S.*, \_\_\_ D.C. App. \_\_ (Aug. 9, 2007). Torres gives trial judges wide discretion to determine whether a defendant was denied any right to have a qualified interpreter present when speaking with the police: "At the time of appellant's second arrest on July 28, the officer admittedly did not give appellant the opportunity to read along in Spanish during the Miranda administration, but that was because Officer Le Blanc already knew him to speak English. At no time on either July 24 or July 28 did appellant appear confused, express a lack of understanding, or request the assistance of a translator or interpreter. Appellant therefore cannot, by any conceivable reading of the facts before us, show that he is 'unable to readily understand oral and written communications in the English language or [to] communicate effectively in the spoken English language. D.C. Code Â§ 2-1901 (4).'" (Granted, at least the District of Columbia has a law, in the first place, providing for the availability of foreign language interpreters. However what good is the law without incisors?) Torres continues: "Nor does the record give us any reason to question the trial court's finding that Officer LeBlanc [who admitted to a twenty-word Spanish vocabulary] was 'very credible' in his assessment of appellant's demonstrated English language skills. Determining whether someone qualifies as a non-English speaker entitled to an interpreter's services may, in some cases, pose a difficult question that turns upon 'a variety of factors,' including that person's 'understanding of the English language, and the complexity of the proceedings, issues, and testimony.' Gonzalez, 697 A.2d [819] at 825 [(D.C. 1997)]. But such a challenging question is not presented here. Moreover, in cases involving similar determinations under the Act, we have held that the trial court should be afforded 'wide discretion' in making its rulings. Id. Because the record contains substantial evidence that appellant was not impaired as a 'non-English speaking person,' we conclude that there was no abuse of the court's discretion." In other words, the District of Columbia Superior Court judge, followed by a three-judge appellate panel, allowed defendant Torres's liberty heavily to rise and fall on the assessment of Mr. Torres's English-speaking ability by a police officer -- who by definition was biased -- who admitted to no more than a rudimentary familiarity with Spanish. This problematic situation must be reversed; the change can only come about through our speaking out and educating others effectively about it, and through our exercising our democratic will. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, August 14, 2007

### Speaking in soundbites - Any other alternative?

Â This is the age of the soundbite. Reagan vastly oversimplified things by proclaiming "Let's make America great again," and proceeded to beat Jimmy Carter with his apparently sincere optimism in such an oversimplification. As much as I opposed Reagan's taking his throne, his "Let's make America great again" slogan hit a chord with millions of Americans, butÂ rang hollowÂ with me.Â Twenty-seven years later, in the above campaign ad, Hillary Clinton proclaims "You're not invisible to me," which likely will resonate with millions once again, and which seems to have more substance than Reagan's campaign slogan, as much as I am not enthralled by any of the presidential candidates. Â I don't want soundbite campaigning. I want more relevant and honest details. Yet, when interviewed by television and radio interviewers, I ordinarily answer each question with a soundbite followed by detail. This way, no matter where the interviewer or editor cuts me off, I end on a high note. I feel like the news industry has helped to dumb down the medium by leaving interviewees feeling little choice than to answer questions with soundbites followed by detail. Â In trial, I usually get to a soundbite early on in opening argument. InÂ a murder trial, I might start off with "That's not what happened. Here's what happened..." In a snitch-riddled trial, I might say "Each snitch is in a dark and bleak hole so deep that the light of day is miles away, and the snitch is surrounded by muck and nasty creatures and hopelessness and loneliness; and the prosecutor's plea offer is the only rope being dangled before the snitch." In a drunk driving trial, I might say "At all times, Jack was standing straight, standing sober, standing innocent." At trial, if one side does not use effective slogans, themes, theories, and word pictures, the other side will, to the detriment of the silent side. The goal of simplifying the case in such a way is to give the jury an approach to finding for one's side through recognizing that doing so is a simple and natural outcome. However, soundbites go nowhere without putting meat on those bones with effective and convincing storytelling where the story is told at all stages of trial. Â Consequently, I harmonize my use of soundbites at trial on the one hand with my heavy aversion to soundbites outside the courtroom by recognizing that proceeding with them can help my client, and that proceeding without themÂ will harm my client. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, August 13. 2007

### **Wills, musicians, and intellectual property.**

Â Image from Library of Congress's website.Â On the first day of property law class, the professor asked how many students had not read their apartment leases. At least one fourth raised their hands. Similarly, how manyÂ of you -- lawyers and non-lawyers -- have wills? Â The topic of wills still strikes me as dry. However, a trial lawyer colleague once told me he likes doing such work, because it helps people with a basic legal need.Â Wills at once serve the needs of the hyper-capitalists and those of more modest means. In that regard, one day I asked a self-professed communist lawyer -- a very likeable person when I get beyond his politics -- how he jibed his communism with his wills practice. He replied that he limits such work to helping people of more modest means. Next time I see him, I may ask if wills have a place in a utopian workers' paradise. I suppose he will respond that once such a dream is achieved, who needs wills?

Â Well-known writer Neil Garman is on a mission for creative people to have wills. He includes a sample will on his blog. While it is important to consult a lawyer for such work, perhaps more people will have wills than not have them when a sample is freely available to them; I give no opinion on the sample, not having read it closely, and not being a wills lawyer, myself.Â Â Mr. GarmanÂ knows of too many instances where creative people do not protect their intellectual property with wills, and he is spreading the gossip of wills to solve the problem. If Joseph Kosuth, Leslie Marmon Silko, R. Crumb, and Ben KatchorÂ came to a wills lawyer for assistance, then a dry-sounding law practice wouldÂ become fascinating in terms of the clients involved. Of course, when a lawyer knowsÂ his or her services are very meaningful and helpful to clients and society, that can transform otherwise dry-seeming work to rewarding work; the same goes for any work in any field. Jon Katz.

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

Sunday, August 12, 2007

### **Welcome to the nation's capital. You're unlawfully arrested.**

Bill of Rights. (From the public domain.) Ever since I defended some anti-globalization demonstrators in Washington, DC, in 2000, I have become more aware of repeated unconstitutional arrests, harassment, and suppression of peaceful demonstrators exercising their Constitutional right to demonstrate against globalization, war, and Bush II's coronations. The problem pre-dates 2000 and extends throughout the United States, including during presidential primary conventions. The August 2, 2007, Washington Post reports how the District of Columbia government has paid substantial taxpayer money for police shredding of the Constitution during the September 2002 anti-war and anti-globalization demonstrations. As the Washington Post reports, plaintiff "Sofiya Goldshteyn, then a George Washington University student from Ukraine, never made it to her work-study job that day. Instead, she said, she endured plastic handcuffs that were too tight, hunger, filthy water, cold concrete floors, strip-searches and fear that she would be deported." Sadly, it appears to be all too common for arrestees in the District of Columbia -- even for very petty criminal charges -- to languish in the Superior Courthouse lockup overnight, at the very least, to go before a magistrate judge the next morning or afternoon to determine pretrial release conditions. Such hearings are held Monday through Saturday; however, if such hearings still are not always held on Sundays, then people arrested Saturday night can languish in the lockup until Monday. I have been to the courthouse lockup, and it is a depressing old place, as is the D.C. jail. Like plaintiff Sofiya Goldshteyn, some of my April 2000 World Bank/IMF protest clients reported that they were kept overnight in the lockup without being fed, even though some did not have their pretrial release hearings until later the next afternoon. Everyone needs to speak out everywhere for protection of everyone's Constitutional rights, including their First Amendment rights; for fair treatment of detained people, and for the renovation and replacement of decrepit lockups, jails and prisons. As the Washington Post article confirms, even plenty of non-demonstrating bystanders were swept into the unlawful arrests that have resulted in this recent million-dollar settlement. Hopefully that is enough to convince you that unlawful arrests and detentions can happen to you and those close to you, and do not only happen to "other people". Please speak up now. Jon Katz.

Posted by Jon Katz in Constitutional Law at 01:00

### **Welcoming our newest legal assistant.**

Believing strongly in rendering praise where praise is due, I welcome and praise my new legal assistant Angela, who joined us in late July. Angela has a bachelor's degree in psychology, excellent work experience, a can-do approach to assisting me and our clients, and a caring heart. Our staff members are a critical part of what our law firm is all about. Right now, we have an opening for a fully bilingual Spanish-English receptionist/junior secretary. If you have recommendations, the posting is here. Jon Katz.

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

Friday, August 10, 2007

### **The Cuban Five's August 20 appellate hearing.**

Photo from website of U.S. District Court (W.D. Mi.). Often the material I post to our blog and website involves information and websites that I wish to have handy for myself or to review in further depth later on. In that regard, I wish to learn more about the situation with the efforts to free Mumia Abu-Jamal from death row, Leonard Peltier from prison, and the Cuban Five from prison. All three sets of prisoners have a large number of supporters, many of whom see them as political prisoners. Most National Lawyers Guild members probably support their causes. My friend and mentor Jun Yasuda has been actively supporting the first two. I know about their cases in the descending order in which I have listed them, and want to know more, certainly beyond what their supporters say. Meanwhile, for those interested, appellate argument in the Cuban Five case will be held on Monday, August 20, 2007, at the United States Court of Appeals for the Eleventh Circuit in Atlanta, with a reception with an interesting assortment of highlighted invitees the night before. The pro-Cuban Five website asserts that the Cuban Five conducted surveillance on private parties hostile to Cuba, and not on any United States government agencies or employees. That is an assertion that I will try to learn more about, as well more about the criminal charges and convicted counts. In the Cuban Five appeal, defendant Antonio Guerrero is defended by Leonard Weinglass (see also here), who has been defending a wide assortment of leftists and anti-government clients dating back to the Chicago Seven trial. I look forward to seeing him advocate one day. The appellate docket in the Cuban Five case is here. Here is the very lengthy 2006 appellate opinion that ruled on the denial of a change of venue and left most or the rest of the appellate issues for later decision. Leonard Weinglass's supplemental brief is here. As always, I welcome your comments on this and all Underdog blogposts. Jon Katz. ADDENDUM: Many hours will be needed to get an independent understanding and opinion of this Cuban Five case, both at the present lengthy appellate level, as well as from the trial level. The 180-page trial docket is here. A final superseding indictment applying to only some of the defendants is here. Here is the verdict sheet finding co-defendant Gerardo Hernandez guilty of all counts submitted to the jury.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, August 9, 2007

### **Trial outlines revisited: Don't go to trial without them.**

Photo from website of U.S. District Court (W.D. Mi.). As I have previously discussed, trial outlines, flowcharts, and idea books are critical in a trial lawyer's arsenal. Take, for example, Virginia's disorderly conduct statute, found verbatim, at long length, and ad nauseum here, at Va. Code Â§ 18.2-415. A trial lawyer's job is to be willing to let the stomach turn while trying to find the road to victory, including reading ad nauseum statutes. In that regard, by carefully sifting out the elements of disorderly conduct in Virginia, one finds buried in the middle of the statute this gem: "However, the conduct prohibited under subdivision A, B or C of this section shall not be deemed to include ... conduct otherwise made punishable under this title." In other words, Virginia's disorderly conduct statute does not cover conduct that is criminalized by other parts of Virginia's criminal code and for which a reasonable juror could convict. *Battle v. Com.*, \_\_\_ Va. App. \_ (July 24, 2007). In the above-discussed regard, Virginia's intermediate appellate court reversed a disorderly conduct conviction, seeing that the defendant's alleged actions of striking another person fell squarely within Virginia's assault statute, which is Va. Code Â§ 18.2-57. *Battle v. Com.*, \_\_\_ Va. App. \_\_\_. Also, Defendant Battle's alleged failure to obey a police officer's order to stop obstructing the free passage of others on the sidewalk fell squarely within Va. Code Â§ 18.2-57. The prosecutor, police or both made the mistake of only charging defendant Battle with disorderly conduct, rather than with assault, obstructing passage of others, or both. Now the prosecutor and police must live with their mistake. Although it might be more dramatic and thrilling to win a case with a jury acquittal, a criminal defendant gets more peace of mind by winning the case earlier than that, including through a motion to dismiss or for judgment of acquittal (called a motion to strike in Virginia) before the case ever gets to the jury room. Defendant Battle's lawyer tried doing that, the trial judge denied the defense lawyer's request, and victory finally came on appeal. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, August 8, 2007

### **Dunkin' Donuts: Repulsive on immigration, but attractive with fair trade espresso beans.**

Where to spend coffee shop dollars? (Image from Bureau of Engraving and Printing's website.) On June 5, 2006, I added a new reason for me to avoid patronizing Dunkin' Donuts -- aside from their many non-vegan and unhealthy menu items: (1) the signs in many Dunkin' Donuts shops proclaim "We follow the law! This company hires lawful workers only" (the signs appear to reply to various customers erroneously concluding that Dunkin' Donuts employees whose first language is not English are in the United States unlawfully), and (2) Dunkin' Donuts is requiring its franchisees "to participate in the [now-voluntary] Basic Pilot Program, which allows employers to verify a worker's [immigration] status using online databases [which often are inaccurate] from the Social Security Administration and the Department of Homeland Security." Boston Globe (May 30, 2006). Just as my blaming Richard Nixon for taping Oval Office conversations was hampered by learning that Johnson introduced Nixon to the White House taping system -- and Nixon was not the original tape rigger there -- now I learn that all of Dunkin' Donuts' espresso coffee beans are being certified as fair trade coffee by TransFair USA. However, just as the revelation about Johnson and taping did not rehabilitate Nixon for me, Dunkin' Donuts' fair trade approach apparently is limited to espresso beans and not the rest of its coffee, and does not appear to solve all the coffee farmers' economic woes, so is not enough for me to overcome its approach to immigration. Nevertheless, hopefully Dunkin' Donuts' fair trade coffee focus will be infectious. Links, blogs and comments on the issue are here, here, here, here, and here. Jon Katz.

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

Tuesday, August 7, 2007

### **When cops sue cops for libel.**

Â The First Amendment and the rest of the Bill of Rights.Â (From the public domain.)Â Talk about a court case involving two of my passions on opposite sides, with allegedly lying cops on one end (a pet peeve of mine if I ever had one)Â and a libel suit against the allegedly lying cops (I strongly oppose libel suits). Add to the mix that this is a lawsuit by cops against cops, making this enough fodder for a dark comedy. The case is Smith v. Danielczyk, \_\_\_ Md. \_ (July 25, 2007). Â Smith confirms that police have qualified -- not absolute -- immunity against libel lawsuits for providing false information in an application for a search warrant or arrest warrant.Â The immunity is lostÂ when the police know the information to be false or recklessly disregard whether the information is false.Â Smith Â confirms the Supreme Court's holding in Imbler v. Pachtman, 424 U.S. 409 (1976) that prosecutors, on the other hand, have absolute immunity from libel lawsuits in seeking an indictment. Â How would I react if a police officer asked me to represent him or her as a defendant in such a libel lawsuit? Even if I knew the defendant had knowingly lied in the search warrant application, I still would accept the representation, at the very least because I oppose libel suits. Jon Katz.

Posted by Jon Katz in First Amendment at 00:05

Monday, August 6, 2007

**Don't force it; listen to your teammates.**

Practicing life and law as a harmonious whole. This past weekend, I walked with my sixteen-month-old son through the park, which included soccer practices in progress. He loves watching live soccer and football, so I pay attention along with him. To a group of junior high school-age players, the coach said, "Don't force it. Listen to your teammates, instead of keeping your head down." I remarked to my son that no team athletic coach had ever given me such beneficial advice. I have mixed feelings about conventional team sports. On the one hand, conventional team sports focus too much on competition between sides, rather than on cooperation among all to achieve a solution and harmony. Always there is a winner and loser, which is a rather extreme result; then, again, that is what trials are about in many ways. Conventional team sports often involve male-only teams. They often invade players' privacy through drug testing. On the other hand, conventional team sports teach players teamwork, patience, and discipline, and help keep people physically and mentally fit. My t'ai chi teacher Len Kennedy teaches "No hurry, no worry." He also asks how we handle change. Do we resist it? Do we deny it? Or, do we do what we are supposed to do, which is to accept the change and work with it? He teaches about practicing the t'ai chi form in unison, as doing otherwise will not get us to tao when practicing in a group, he says. He teaches about using soft energy to push one hundred pounds. This is similar to, and goes beyond, the soccer coach's recent lesson of "Don't force it. Listen to your teammates." Applied to the trial lawyer arena, all this shows the power of practicing t'ai chi in litigation battle. At our best, we do not get all angry, fuming and resistant when a judge throws us an onerous curve ball. Instead, we accept the change, and try to turn it to our best advantage. Jon Katz.

Posted by Jon Katz in Persuasion at 00:06

Sunday, August 5, 2007

### **Transferred intent inapplicable to assault prosecutions - Maryland.**

Photo from website of U.S. District Court (W.D. Mi.).<sup>^</sup> Often, a criminal defense legal argument looks good on paper, but might not fly -- if at all -- until getting to the appellate court. Unfortunately, in the interim, the defendant ordinarily is serving his or her sentence, including jail time if the sentence is worse than probation, pending appeal. <sup>^</sup> On July 3, 2007, Maryland's intermediate appellate court made abundantly clear that transferred intent is not a basis to convict for assault, unless the assault results in death and a homicide conviction. Consequently, if a defendant throws a rock at A without intending harm to B, A ducks, and the rock hits B, the defendant is not guilty of assault on B, so long as B survives, no matter how severe are B's injuries from the thrown rock. However, the defendant still remains eligible for a reckless endangerment conviction. The case is *Pettigrew v. State*, \_\_ Md. App. \_ (July 3, 2007).<sup>^</sup> Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, August 3, 2007

### **Imperfect self defense averts a murder conviction and gets a manslaughter conviction: Maryland.**

Image from Holiston, MA, Police website. In July 2007, Maryland's intermediate appellate court confirmed the definition of imperfect self defense. When the defendant convinces the jury of such a defense, s/he averts a murder conviction and instead gets a voluntary manslaughter conviction. The case is *In re: Julianna B.*, \_\_ Md. App. \_\_ (July 3, 2007). As confirmed by *In re: Julianna B.*, the 1984 *Faulkner* ruling on the subject from Maryland's highest court still holds: "Logically, a defendant who commits a homicide while honestly, though unreasonably, believing that he is threatened with death or serious bodily harm, does not act with malice.... Therefore, as we see it, when evidence is presented showing the defendant's subjective belief that the use of force was necessary to prevent imminent death or serious bodily harm, the defendant is entitled to a proper instruction on imperfect self defense. A proper instruction when such evidence is present would enable the jury to reach one of several verdicts: (1) if the jury concluded the defendant did not have a subjective belief that the use of deadly force was necessary, its verdict would be murder; (2) if the jury concluded that the defendant had a reasonable subjective belief, its verdict would be not guilty; and (3) if the jury concluded that the defendant honestly believed that the use of force was necessary, but that this subjective belief was unreasonable under the circumstances, then its verdict would be guilty of voluntary manslaughter." *State v. Faulkner*, 301 Md. 482, 500-01 (1984). So many times, homicides result from matters going into a totally avoidable tailspin. Often alcohol is the culprit. Sometimes the scenario starts with an impromptu summertime gathering of a few friends or neighbors after a liquor store run, followed by ugly tongues loosened by alcohol, followed by fistfights escalated by adding converted or conventional weapons to the mix. Such situations sadden me, and often make me sick to my stomach, initially. Then, I dig right in, and do all I can to win for my client, whether or not I think my client has any legal or personal culpability. In doing so, I look for all possible defenses, and welcome the availability of imperfect self defense among the many other defenses against criminal accusations. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, August 2, 2007

**Prior sex crimes inadmissible to show propensity for such crimes: Maryland.**

Photo from website of U.S. District Court (W.D. Mi.). On July 31, 2007, Maryland's highest court held that evidence of prior sex crimes is inadmissible at a criminal trial to show propensity for such crimes. However, the court left open the door for legislation to change this prohibition. *Hurst v. State*, \_\_\_ Md. \_ (July 31, 2007): "Contrary to the United States Congress, the [Maryland] General Assembly and this Court have determined that prior sex crimes evidence should not be admitted solely to demonstrate propensity in a trial involving a different complainant. If the Maryland Rule regarding propensity evidence in sex cases should be changed, the change should come from the Legislature or by this Court, sitting in its legislative capacity, exercising its authority to enact Rules of Practice and Procedure and Rules of Evidence. See e.g., *Trump v. State*, 753 A.2d 963, 972 n.43 (Del. 2000) (awaiting study of Federal Rule 413 et seq. by the Permanent Advisory Committee on the Delaware Rules of Evidence to determine what changes, if any, should be included in revising the Delaware Rules, which, in general, have been patterned after the Federal Rules of Evidence)." *Hurst*. Clearly, I do not want such a legislative change. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:05

Wednesday, August 1, 2007

### **In continuing praise of Rex Wingerter.**

Like Gandhi, Rex Wingerter is a peaceful warrior for justice. (Image from public domain). On May 18, 2007, I highly praised Rex Wingerter, after he got suspended from law practice over his federal conviction from a guilty plea to violating 18 U.S.C. § 4 (providing that "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both"). Now, two days after Rex was disbarred in Maryland over his federal conviction, I continue singing his praises just as strongly, and told the Maryland Daily Record as much, on July 30, 2007. The world and the legal community need more selfless and caring people with sharp minds. That continues to be Rex. I am sure that Rex will continue on that path. Thanks, again, Rex for you, for your positive and contagious energy, and for your caring for others. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:11