

Thursday, January 31, 2008

Cops can't play fast and loose with Miranda.

Â Bill of Rights.Â (From the public domain.)Â Miranda warnings are required when "a reasonable man in the suspect's position would have understood his situation" to be one of custody. *Berkemer v. McCarty*, 468 U.S. 420, 422 (1984). To determine whether a reasonable person would have understood the situation to have been one of custody, a court must review the totality of the circumstances. *U.S. v. Colonna*, 2007 U.S. App. LEXIS 29403 (4th Cir. Va. Dec. 20, 2007).Â Cops often are successful in getting suspects to talk by interviewing and interrogating them before formally arresting them and advising them of their right to remain silent under Miranda. I wonder how many suspects mistakenly believe -- having learned about Miranda from movies and television -- that their pre-arrest pre-Miranda statements somehow will not be admissible in court. Â If cops want to be truly wily about Miranda, they might try to make the suspect believe s/he is not free to leave (when the suspect leaves, the cops have no statement from the suspect), but then claim in court through the prosecutor that Miranda warnings were not needed because of an absence of an arrest yet. In *Colonna*, supra, the cops told a child pornography suspect that he was not under arrest, but acted with so many of the hallmarks of a detention as to have required the Miranda warnings that they did not give. *Colonna* describes the circumstances surrounding his interrogation by the police as follows: Â "The district court found that Colonna was awakened by armed agents and guarded by agents until the search and interview concluded. The home was inundated with approximately 24 officers who gave Colonna and his family members instructions; that is, they told them where to sit and restricted their access to the home. Colonna did not voluntarily request to speak with Agent Kahn. Instead, Agent Kahn requested that Colonna accompany him to a FBI vehicle to answer questions, wherein a full-fledged interrogation took place. Agent Kahn questioned Colonna for almost three hours, albeit with breaks. But, even during these breaks, Colonna was constantly guarded. Although Colonna was not placed under formal arrest, he was told twice that lying to a federal agent was a federal offense. And, at no time was he given Miranda warnings or informed that he was free to leave. The district court found that "given the totality of the circumstances, a reasonable person would have believed that his freedom was curtailed." (J.A. 297.) But, according to the district court, because Agent Kahn specifically told Colonna he was not under arrest and did not, in the end, arrest him for two years, a custodial interrogation did not take place. While we find no error in the district court's findings of fact, we do take issue with the district court treating Agent Kahn's statement to Colonna that he was not under arrest as the dispositive fact in its determination of custody. Indeed, there is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is "not under arrest" is sufficient to end the inquiry into whether the suspect was 'in custody' during an interrogation. See *Davis v. Allsbrook*, 778 F.2d 168, 171-72 (4th Cir. 1985) ('Though informing a suspect that he is not under arrest is one factor frequently considered to show lack of custody, it is not a talismanic factor'). Rather, we have held that the 'ultimate inquiry' looks to the totality of the circumstances to determine whether they indicate an individual's freedom of action is curtailed to a degree associated with formal arrest." *U.S. v. Colonna*, 2007 U.S. App. LEXIS 29403 Â Congratulations to Mr. Colonna and his lawyers for this appellate victory. However, I hazard a guess that Mr. Colonna's prison sentence was not stayed pending his appeal, which blunts the sweetness of his victory. Jon Katz.Â ADDENDUM: Thanks to Fourth Circuit Blog for covering this story.

Posted by Jon Katz in Criminal Defense at 19:00

Wednesday, January 30, 2008

Karma and your plate.

Caveat emptor: This Humane Society video (full version available [here](#)) is very upsetting, and may be best to watch on an empty stomach. Ordinarily shunning the vegetarian soapbox, sometimes I make exceptions. Today's blog entry is meant more to talk about persuading through good karma, and through increasing good karma through our relationship with food. One of my greatest inspirations for receiving and spreading good karma -- and thus good persuasion for our trial clients -- is my law partner Jay Marks. Like Ray Romano and Jerry Seinfeld, almost everyone likes Jay. He has no big ego, no hidden agenda, and no pretenses. He genuinely likes people, takes time from busy days for them, and cares about them. He is a meat eater, so is an example that one needs not be a vegetarian to be a great human. As a relative who's a pescovegetarian (a misnomer) has told me over the years, "It's not what goes into your mouth, but what comes out of it." Fair enough. Nevertheless, we are all interconnected -- all humans and non-human animals -- so it helps me to know about the karma connection between me and those around me, including how happy or miserable are their lives. Consider my veganism, for instance; that does not automatically avoid the supermarket shelves including fruits and vegetables that have been picked by mistreated migrant workers. It is worth paying more to a food distributing source that focuses on harm reduction to its workers, the environment (of course, meat production causes much more pollution and world hunger than plant food production), and to injustice in general. Were I still a meat eater, I would have similar concerns about the treatment of the animals arriving on my plate, and the workers raising, slaughtering, butchering, and selling them. In that regard, this week comes a report of the Humane Society's revelation (see the news release) that one of the nation's major meat distributors -- including for the national school lunch program -- repeatedly violated laws against abuse of cows ready for slaughter. As the Washington Post reports: "Video footage being released today shows workers at a California slaughterhouse delivering repeated electric shocks to cows too sick or weak to stand on their own; drivers using forklifts to roll the 'downer' cows on the ground in efforts to get them to stand up for inspection; and even a veterinary version of waterboarding in which high-intensity water sprays are shot up animals' noses -- all violations of state and federal laws designed to prevent animal cruelty and to keep unhealthy animals, such as those with mad cow disease, out of the food supply." Not for queasy stomachs -- but essential to watch to know the reality of it all -- is the Humane Society's video of this investigation into mistreatment of cows at the slaughterhouse, shown above. As animal rights activist and lawyer Roger Galvin is characterized as saying in 1987, just two years before I finally met him at an animal rights rally in Washington, D.C.: "Mr. Galvin, now a specialist in animal-rights cases, pointed out that rights in this country have been gradually extended to formerly disenfranchised groups, like blacks and women. 'The next step is to go beyond the species barrier to other species who are sentient and thinking creatures,' he said." Thanks, Roger and Jay, for the great karma. Jon Katz.

Posted by Jon Katz in Persuasion at 19:20

Tuesday, January 29, 2008

D.C. employees waste time ferreting out erotic website surfers.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). With employee Internet access came another way for employees (and employers) to waste time, where the traditional method before inexpensive cellphones and widespread web access was too many personal calls, too many smoke breaks, and MS solitaire. (Our law firm's approach is to require full time and attention to staffmembers' work, and not allowing personal surfing, email, and phone time to be included as payable time on staff timesheets, except for when it's done during payable break time.) Speaking of wasted employee time, one is left to wonder how many thousands of District of Columbia government employee hours are being spent ferreting out employees wasting worktime surfing erotic websites. Last week, D.C. Mayor Adrian Fenty very publicly announced the firing of nine government employees found to have heavily visited "pornographic" websites, and ongoing policing efforts to include firing and lesser sanctions. Unfortunately, in firing employees for wasting time surfing erotic websites -- rather than doing so for wasting time surfing any website (including the ever-popular EBay, Amway, and Safeway) -- Mayor Fenty is treading the dangerous path of defining the indefinable. It appears that no court has defined pornography, because it cannot be done. The Supreme Court has been unable to sufficiently define obscenity, because it is cannot be done. The federal and state legislatures have tried -- underline tried -- to define child pornography, with the Supreme Court setting limits on that definition just six years ago. Pornography remains legally indefinable. In 2006, the Second Circuit astutely observed how a parole board's broad definition of pornography would cover "a photograph of Michelangelo's David or a lingerie catalog." *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006). The news reports on the nine fired D.C. websurfers of erotic pages show that Fenty and his webpolice are relying on WebSense software to define pornography. That is dangerous, not only because pornography is indefinable, but also because WebSense has a particularly nonsensical definition of such material. The Washington Examiner reports that "pornography, as defined by WebSense includes sites that display full or partial nudity in a sexual context, that show erotica or sexual paraphernalia, that support sex-oriented businesses, or that depict [consequently, it appears that Mayor Fenty is clamping down on erotic text, and not only on erotic images] or graphically describe sexual acts." Who knows if the reporter got that right, or was fed inaccurate information, considering that my careful review of WebSense's website found no definition of "pornography", but instead found this entirely imprecise definition of "adult" material: "Adult humor [was not Bob Hope an adult dispensing humor?], erotic stories [is Romeo and Juliet not an erotic story?], cartoons [are some elegant Valentine's day images not erotic?] and animation or erotic chat; Adult products [is Preparation-H not an adult product?] including sex toys, CD-ROMs and videos [what is an adult video? - One by Dr. Weil, for instance?]; Child Pornography; Depictions or images of sexual acts [do not some of the greatest pieces of literature describe sexual acts, including Romeo and Juliet?], including sadism, bestiality or any form of fetish; Sexually exploitative [exploit is a rather overbroad term to use here; for instance, in capitalism and communism, those in power exploit those not in power] or sexually violent text or graphics; Sexually oriented or erotic full or partial nudity [does this not describe plenty of pages in Cosmopolitan, beer advertisements, and movie ads?]." With such an unworkable definition of pornography and adult material, how on earth can WebSense software developers and the software itself be accurate about what is and is not pornography? It cannot be done. It appears that only recently did D.C. turn to WebSense software to filter out so-called pornographic websites in the first place. Of course, installing webfiltering software can hinder government employees from reaching such "legitimate" sites as our law firm's. The Fenty administration's own news release on this story reveals that this whole websurfing crackdown is content-based on erotic material, rather than being focused on wasted government employee websurfing time, thus implicating the First Amendment. Fenty's firings of the websurfers of erotic sites was executed after an investigation began just last month, hasty, and ill-advised. Haste makes waste and, in this instance, poor decision. ADDENDUM I: Thanks to a fellow listserv member for bringing this story to my attention through this City Paper blog entry. ADDENDUM II: The website of WebSense -- which sells D.C. its websurfer tracking software -- has a press release claiming: "More men than women view online pornography at work. Whether it was by accident or on purpose, 16 percent of men who access the internet at work said they had visited a porn site while at work, while only 8 percent of women had done so. Of those that admitted to viewing pornography sites at work, 6 percent of the men and 5 percent of the women admitted it was intentional." Moving beyond the reality that each person has his or her unique definition of pornography, this points out that mayor Fenty's government will have a never-ending task to ferret out surfers of erotic sites, unless he switches to a focus on people who waste worktime on all websites, regardless of the content. Alternatively, those whose jobs do not require web access can have their computers and passwords unplugged from Internet access. ADDENDUM III: If mayor Fenty has a concern about sexual harassment in clamping down on "pornographic" websurfing, his news release is silent on the matter. Eliminating erotic websurfing barely begins to deal with sexual harassment, and Fenty's current erotic webpolicing barely overlaps with a comprehensive and effective approach against sexual harassment.

Posted by Jon Katz in Constitutional Law at 19:00

Monday, January 28, 2008

Please write to Karzai, et al. to release Sayed Perwiz Kambakhsh.

Â Here is a grossly underreported story from last week that calls for immediate action, by writing to Afghan president Karzai to release Sayed Perwiz Kambakhsh. Read on.Â No matter the heavy defeats against the Taliban after September 11, 2001, its members probably are nodding in approval over the recent blasphemy death sentenceÂ orderedÂ by a northern Afghanistan court against journalist Sayed Perwiz Kambakhsh. Fortunately, Mr. Kambakhsh has the opportunity to appeal. Unfortunately, he apparently will stay imprisoned during the appellate process. Fortunately, his death sentence probably will be overturned somehow, even if it takes Afghan president Karzai to do it. Of course, one is left to wonder whether any overturning of the death sentence will have more to do with wanting to please the UnitedÂ States -- which has poured billions of dollars and countless killed and wounded soldiers (many of whom, of course, have killed andÂ wounded, themselves -- how bloody and nasty war is (and how much does war numb people to such a singular death sentence as this one?), and I mean it)Â into its years-long military adventure in Afghanistan -- than anything else, and whether any overturning of Mr. Kambakhsh's death sentence will be accompanied by a full release from prison and a full reversal of his conviction. Â This blasphemy death sentence is not limited to the whims of the sentencing judge(s) (the trial apparently was secret, so I do not yet know how many judges were involved). Some or many Moslem clerics apparently pushed for this result. Provincial attorney generalÂ Hafizullah Khaliqyar supported the death sentence, and said the trial was conductedÂ in a "very Islamic way." BBC News reports that the "court also threatened to arrest any reporters who protested against Kambakhsh's sentence."Â Thanks to Jonathan Turley -- who writes one of my favorite blogs -- for bringing this story to my attention, and for listing these news story links here and here that I used in writing this blog entry.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 19:00

Of hats and cleavage in courtrooms.

Â Bill of Rights.Â (From the public domain.)Â This month, two judges went overboard to enforce decorum in court so as to be counterproductive in their apparent attempts to protect the way the public perceives the courts .Â In Washington state in mid-January 2008, District Court JudgeÂ Holly Hollenbeck told a cancer patient to remove her hat in court, even though she explained the hat was to cover her hair loss from cancer treatment. Fortunately, the judge did anÂ about-face and eliminated the no-hat rule in his courtrooms, but only after experiencing a backlash of public opinion against the improvident refusal for the cancer patient to wear a hat in the courtroom. Â Next, on the East Coast last week, Rowan County District Court Judge Kevin Eddinger found a lawyer in contempt for having read Maxim in his courtroom, saying:Â "The contemnor's (Paris) conduct interrupted the proceedings of the court and impaired the respect due its authority. In addition, the contemnor's actions were grossly inappropriate, patently offensive, and violative of Rule 12 of the General Rules of Practice. Courtroom staff, law enforcement, members of the Bar and the general public shall be able to conduct courtroom business in an atmosphere free of the display of offensive material as demonstrated by the contemnor, thus necessitating this action."Â Aside from any First Amendment concerns here -- for instance, the judge's reference to "patently offensive" seems misplaced, especially since that phrase applies to the Miller definition of obscenity, which definition clearly does not cover Maxim -- particularly disturbing is that Judge Eddinger apparently gave no warning for the Maxim-reading lawyer to cease and desist, nor any guidelines about what reading material is permitted in the judge's courtroom. Maxim isÂ a male-targeted magazine that shows neither full nudity nor fully-bared breasts, and which has plenty of non-sexual articles and photos. Whether orÂ not MaximÂ is as sexist as Hooters restaurants in intent and effect does not justify such discipline against the lawyer. Â Where will Judge Eddinger draw the line in his courtroom on contumacious images? Will he find parties in contempt who show up in court showing as much cleavage as some of the Maxim models? Will he sanction non-lawyer (and lawyer) visitors perusing the Sports Illustrated swimsuit issue? Will he find parties in contempt for wearing shorts to court?Â I hope that Judge Eddinger follows the path of Washington state's Judge Hollenbeck, by reversing his improvident MaximÂ contempt order.Â Jon Katz. Â ADDENDUM:Â Thanks to Paul Luvera for blogging on the hats off story. Thanks to WSJ for blogging on the MaximÂ contempt order.

Posted by Jon Katz in Constitutional Law at 00:00

Sunday, January 27, 2008

Suharto is dead: Don't whitewash his brutality.

Indonesia's wayang shadow plays reflect many of the mysteries and complexities of Indonesian culture. Nevertheless, Suharto's decades-long brutality is a reality, and no mystery at all. Former decades-long brutal Indonesian dictator Suharto died today. In 1982, I was introduced to Indonesian politics and history through the deeply disturbing film *Year of Living Dangerously*, which focused on the events surrounding the bloody 1965 coup in Indonesia; I followed up by visiting the country, learning some of the basic language, and learning much more about the nation's actual history, politics, and culture. *Year of Living Dangerously* was shot in Australia and the Philippines, which was ironic seeing that the brutal Filipino dictator Marcos was fully in power at the time. The film also intrigued me very much by highlighting such rich aspects of Indonesia's culture as the wayang puppet play tradition. The film introduced me to Linda Hunt, who delivered a stellar performance three years later as the scary Kissinger-loving character in *Aunt Dan and Lemon*. It also continued my interest in Mel Gibson, shortly after *Mad Max* and long before his 2006 bigoted tirade after his traffic arrest. Sigourney Weaver, who also starred in *Year of Living Dangerously*, at some point pursued human rights defense (whether or not influenced to do so by the film) by joining the board of the Lawyers Committee for Human Rights (by today renamed Human Rights First), where she still sits on its board. In 1989, I attended an LCHR event supporting survivor Li Lu and other Chinese democracy movement leaders, where I met both Mr. Lu and Ms. Weaver. In 1949, Indonesia gained independence from the Netherlands, which apparently ruled Indonesia with full ruthlessness, there to stake out its colonial interests and to reap (or is that rape?) its natural resources. Indonesia's independence created such challenges as uniting the nation of several thousand inhabited islands whose people had previously identified themselves with their regions rather than with any nation (which had just been born), and moving to have all citizens learn and speak the unifying Indonesian language where so many people only spoke other Malay-based dialects. After four Indonesian generals were assassinated in the mid-1960's, military man Suharto maneuvered himself to the top and the toppling of founding president Sukarno, who apparently remained under house arrest until he died a few years later. A bloodbath followed with executions apparently of hundreds of thousands of suspected government opponents, including actual and suspected communists. Suharto's government ultimately seized and annexed East Timor (in 1975, with the green light from Ford and Kissinger) and western Papua New Guinea (naming it Irian Jaya), leaving Suharto's government often occupied trying brutally to crush independence efforts not only in East Timor and Irian Jaya, but also in Aceh province, as well. As only a for instance, in 1991, Suharto's soldiers fired on thousands of unarmed people in East Timor, killing over two hundred fifty, with Democracy Now's Amy Goodman there and only being saved -- after being beaten along with her colleague -- after insisting she was a United States citizen. Suharto continued relying on trying to control the population through executions and fear, including -- through Suharto's admission in his 1991 autobiography *My Thoughts, Words and Deeds* -- summary executions of suspected thieves often followed by leaving their corpses on the streets as a warning to others (without any court trial, imagine the number of wrongful conclusions of who had committed theft, and whether the only witness to the alleged "theft" was a shopowner, soldier, or cop with a vendetta against the executed person). Suharto remained in power through such approaches as permitting his cronies and government officials to fatten their income with bribes (which led me to look for the most inexperienced-looking customs officer on my arrival at the Jakarta airport, whom I annoyed with mentioning that I had forgotten to clean my underwear strewn on the top of my suitcase, to the point that the exasperated official waved me along almost as soon as I had arrived), enabling the middle class to earn a solid living, and paying much more than lipservice to raising the standard of living of the poor (although a huge percentage of the poor continued living in highly abject misery, and employers had a field day hiring dirt-cheap manual labor with few real legal protections for workers). However, in the late 1990's the Indonesian economy collapsed, which left no reason for people to refrain from taking to the streets (unfortunately, often with extremer violence, which often was religious- and race-based against Christians and ethnic Chinese). Suharto stepped down from power (a panel of judges said he was too ill to stand trial, but one wonders whether those judges benefited from Suharto's rampant corruption), and avoided prosecution while many around him got prosecuted, including one of his sons who was convicted of directing the assassination of a judge and served five years of his sentence. When I arrived in Indonesia in 1988, and during my entire stay there -- where I visited Jakarta, Jogjakarta, Bandung, and Bali -- I did not witness firsthand any human rights violations, which either meant that the government was shrewd about not violating rights as openly as that, or that I had just missed it. I do recall a shopkeeper one day asking me how I liked Indonesia, which was his mistake, because I answered honestly that I loved much of the nature and culture, but not the government's human rights violations (and I could have added my disdain for the ongoing historical brutal racism in society, including against ethnic Chinese). He replied in a hushed tone: "We don't discuss that." Well, if you don't discuss it, don't ask my views. Interestingly, I found myself in a bird sanctuary outside Jakarta one day wearing my Amnesty International 1986 "Conspiracy of Hope" concert t-shirt. I had not done it intending to make any political statement, but it was just one of my favorite t-shirts. No secret police officer appeared to confront me about the

t-shirt, which I wore for the rest of the day. Â Certainly, Indonesia has a tremendously vibrant culture (and amazing food, including for vegetarians), including the arts, music, and interactions among people; and some extraordinary nature, to the extent not already destroyed by pollution and reckless "development", removal of natural resources, and squeezing out oil for valuable exports. Unfortunately, Suharto (and Sukarno before him, as I understand)Â censored, across the board, the late Pramoedya Ananta Toer, who apparently was Indonesia's greatest writer of theÂ twentiethÂ century into the twenty-first. I met Pramoedya in 1999, and write about himÂ here.Â Â Â Â My obsession about present and historical human rights violations in the United States, Indonesia, and worldwide -- which led to my activism with Amnesty International in college and law school, followed by working with the American Civil Liberties Union thereafter -- helped feed my drive to go to law school and to try to do my part to stop such violations. When other lawyers from time-to-time ribÂ me for practicing law for any reason other than their overarching goal of lining pockets with money, I easily remember why I became a lawyer in the first place. Â As people google Suharto after his death, I hope this blog entry helps avoid amnesia about his brutality and any whitewashing of hisÂ obituary or biography.Â Jon Katz.

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

Friday, January 25, 2008

Of Greenpeace, the hunted, and the hunters.

Â In 1999, a wonderful family living several miles from central Tokyo hosted me for a few days, which was a great alternative to being among tourists in a hotel and away from where regular Japanese folks live. One morning, the son took me to Tokyo's equivalent of New York's South Street Seaport, teeming with wall-to-wall freshly-caught fish. Already a strict vegetarian, I hesitated about even going in the first place, but if this is the fate of countless fish -- I ate my huge share of fish and meat before becoming vegetarian -- I decided to witness part of that fate. Â Not only were fish there. Several minutes into our tour of the huge building akin to an airplane hangar, I saw a multi-pound slab of whale corpse. My host confirmed it was what I thought it was, and I started feeling plenty more down than I already was around all the dead fish. Â Our host was at once concerned about my feelings and hoping to reassure me that all was okay, that this is a deep-rooted part of Japanese culture to eat slaughtered whales. Â As an aside, I would not be surprised if plenty of restaurants prepare whale meat in a very tasty fashion with some delicious side dishes -- Japan has plenty of excellent cuisine, including the vegetarian kind -- at least if the diner does not know that a whale is on the plate. Â Particularly as I watch the above Greenpeace video showing activists trying to prevent Japanese whalers from harming their prey, I wonder if the whale meat that I saw at the Tokyo fish market resulted from so-called "scientific" whale slaughters for which Japan rightfully receives so much international heat. Â Granted, I do not draw the line at being opposed to eating whales and humans, as I explain here. While I do not know enough about Greenpeace to know if I agree with everything they do, to date I am not aware of anything I oppose about Greenpeace except to the extent that any of their actions risk the lives and safety of the people they are trying to stop from harming animals and the rest of the environment. In Baltimore a few years ago at Fells Point, I happened upon one of Greenpeace's docked Rainbow Warrior boats -- this one not all that big -- to which visitors were invited. Greenpeace has been able to attract not only volunteers, but enough funding to pay specialists in their field to go on their missions, including the crew of this ship, some of whom were chopping, slicing and dicing vegetables for their dinner. Â The pure-seeming drive of Greenpeace inspires me in my law practice to keep on fighting, and to see victories around the corner even on days when clients suffer crushing defeats. Jon Katz.

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

Thursday, January 24, 2008

International extraditions: To be fought tooth and nail.

Â Bill of Rights.Â (From the public domain.)Â International extradition defenseÂ seems to be an area that most criminal defense lawyers have either not handled at all, or very little. I learned this after being hired for such a case a few months ago, and learning that one of my favorite and most experienced local criminal defense lawyers -- whom I asked about appearing forÂ my client in the event of a scheduling conflict for aÂ bond proceeding -- told me he had not done much in the area. Â My client was arrested in Northern Virginia at the request of his native country, which had him tried, convicted and sentenced in absentia. I arrived at the courthouse for my client's first substantive hearing, where his court-appointed lawyer whom I was replacing did not see why my client would not just consent to be extradited, seeing that he already had an in absentia conviction abroad. Â Although criminal defense lawyers might routinely advise clients to waive a challenge to be extradited to another state within the United States -- where the defenses against extradition are often limited to whether the detainee is the one being sought, and whether the proceedings in the other state are legitimate -- they should not do so with international extradition defense, where plenty more defenses often are available. Â In our instance, we were faced with fighting for a bondÂ (the Bail Reform Act does not apply to extradition cases, and bail was denied to our client, in part because the judge determined that our client was a particularly high flight risk, seeing that he already had been convicted and sentenced to prison in absentia). We also were faced withÂ convincing the court to delay the extradition hearing long enough for a lawyer in our client's native country to seek a court ruling there to correct calculation errors in the overseas court's records, so as to prove that our client was arrested too late after his overseas sentencing to be eligible for extradition. We were in the United States District Court for the Eastern District of Virginia, which has a well-earned nickname of "The Rocket Docket", where the right to a speedy trial often works against criminal defendants for moving along with such breakneck speed as to deprive defendants of sufficient time to prepare a defense (courts sometimes counter that the right to a speedy trial is not just a defendant's right, but the public's right, as well). Once bond was denied, we also needed to convince our client that it was better to stay in pre-trial detention while waiting for an extradition hearing, than to speed things up before we could obtain a favorable ruling abroad as to his in absentia conviction. Â International extradition is not an area to delve into without coming completely up to speed with the subject. I turned for advice to a lawyer in a neighboring state who has substantial experience with such cases, and was blessed by working with an excellent federal public defender lawyer representing my client's co-defendant in this extradition matter who was tried and sentenced in absentia along with my client for the same alleged offense. Â Among the reasons for fighting international extradition are these: By avoiding extradition, a person may obtain liberty more quickly and might avoid the harsher prison conditions faced in plenty of countries worldwide. Being extradited can tear the defendant away from his or her family and livelihood in the United States. If the defendant is not a United States citizen, the doors back to the United States may be closed or very difficult to pry open on attempting to return; more rights often are afforded immigrants on United States soil against deportation than the rights afforded people trying to enter the United States who are considered by authorities as excludable. Â One of our biggest strategic victories was convincing the judge (with the consent of the prosecutor, which often helps particularlyÂ in this courthouse)Â to hold a bond hearing far enough in advance for us to file persuasive arguments with the benefit of more information about the challenge concerning the court records in our client's overseas conviction. Another victory was convincing the judge (with the consent of the prosecutor) to set the matter in forÂ a status hearing several weeks later, rather than setting the matter in for an extradition hearing yet. Â I walked into the status hearing ready to do my best to convince the judge to set another status hearing in a month or more, or else an extradition hearing several months down the line, while my client's overseas lawyer sought relief from an initial denial to correct the record concerning the date when the statute of limitations ran for my client to have to serve any prison time at all on his overseas conviction. Instead, the prosecutor told me he was dismissing the case. Happily stunned, I asked if he was joking me, but this prosecutor seems to be cut more from the cloth of a decades-long prosecutor not swayed much or at all by political passions, and whom I never saw crack a joke before. Wonderfully, he and the State Department lawyer on the case applied themselves and did their homework to conclude that the case needed to be dismissed, because they determined the State Department would not extradite our client where, as here, they learned that my client's native country would decline to give him a retrial where he had been convicted and sentenced in absentia. Rather than our needing to make similar arguments at an extradition hearing, the prosecution beat us to the punch, and kept in place the above-described favorable State Department policy.Â I am more than overjoyed at this result, and only regret that my client needed to spend even one day in jailÂ and even one dollar on this extradition matter. Â Many more issues are involved with this and other extradition matters (extradition can also involve efforts against extradition back to the United States and against extradition from one overseas country to another), includingÂ challenging the existence, legitimacy, and interpretation of extradition treaties; appealing to public policy interests of United States government officials; and showing courts that even the most basic of procedural protections will be denied to the extradition defendant, whether or not the extradition defendant has already been convicted abroad, versus whether an overseas trial date is pending. Jon

Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 23, 2008

Who is Maryland's 2007 legal newsmaker?

À À Image from Library of Congress's website.À Recently I learned that a legal affairs writer suggested, on the MarylandÀ Daily Record's blog, that I might have been among Maryland's top 2007 legal newsmakers in terms of havingÀ "the greatest impact â€" positive or negative â€" on Maryland law or the Maryland legal community", for my defense of the First Amendment in Snyder v. Phelps, et al. In this litigation, and as detailed here, IÀ defendedÀ the Westboro Baptist Church and its pastorÀ against counts of defamation (count dismissed on summary judgment), intentional infliction of emotional distress and invasion of privacy for church members' very strong messages (quite the understatement) while picketing on a street in Westminster, Maryland,À before the funeral proceedings for a soldier killed in Iraq.À À I did not know how much of a grain of salt to take with the suggestion that I might be one of Maryland's top 2007 legal newsmakers. On the one hand, the rigor of the list is brought into question by theÀ writer's inclusion of Paul Minnich alongside my name, even though it was two of his co-counsel who were the onlyÀ lawyers at trial for the plaintiff and at the depositions; perhaps mistaken identity took hold, possibly all the more from the parties having been subjected to a gag order throughout the trial. On the other hand, I am more than happy for the recognition, to the extent that it recognizes my ongoing fight for robust First Amendment rights, so that perhaps others will be influenced to join the same fight. The irony is not lost on me that during my fight for the First Amendment in this case, all lawyers were gagged from speaking with the press about the case, untilÀ after the jury returned its verdict. Jon Katz.À ADDENDUM - Pending before the Maryland federal trial court in the Westboro Baptist case are timely-filed post-trial defense motions including a motion to reduce the jury verdict, and a motion to stay the judgment pending appeal.

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

Tuesday, January 22, 2008

Negotiating in the t'ai chi moment.

Â Yin YangÂ T'ai chi works not only for trial battle, but also for negotiating an alternative to having a trial. Â The great thing about being fully prepared for trial is that it makes one not only ready to do better at trial, but also to do a better job in negotiations. The maxim remains true that by preparing cases to negotiate they are more likely to go to trial, and by preparing cases for trial, they are more likely to be resolved by negotiation. Â For instance, it is a sunny Friday afternoon, and I drive up for trialÂ to a rural Virginia county courthouse that I have never visited before (so I check in advance about the prosecutor and judge from a local lawyer). The prosecutor gives me a friendly greeting, and suggests that, this being Friday afternoon, I make a reasonable disposition proposal. My client is charged with drunk driving and reckless driving, and will have his commercial drivers license suspended if convicted of drunk driving, and any Virginia suspension period for reckless (the judge has the option to suspend up to six months for reckless) will carry over to his commercial drivers license. The prosecutor insists that DWI be part of any negotiation. I talk with the arresting police officer, and recognize that my client has a small chance at best of beating DWI at trial. I explain to the prosecutor why my client needs to go to trial unless we enter a guilty plea involving no DWI conviction and no suspended driving. The prosecutor agrees to a guilty plea to reckless driving only, the judge goes along with it, and everyone is out of the courthouse less than one hour after the afternoon session began. The result meets the prosecutor's goal of finishing court early on a sunny Friday afternoon, and the client's goal of keeping his commercial driver's license intactÂ and serving no jail time (in fact, he is not even put on probation). Â Several weeks later, another client and I arrive at one of the more crowded Maryland courthouses for trial. He is accused of drunk driving. The arresting officer shows up, but not the breath technician, whose presence we timely demanded many weeks before. After talking to the police officer, it appears our client -- even without the breath technician's presence -- has a very good chance of losing on the driving while impaired charge (a lesser included offense of driving under the influence) at the very least. The police officer is more than happy to talk, and it turns out that he has no problem with any level of leniency offered by the prosecutor. I wait awhile to speak with the prosecutor, who is dealing with a long line of witnesses, lawyers, and unrepresented defendants. When the proceedings resume, the judge makes clear, in so many words, that he wants to move the large docket along. After that happens, I go up to the prosecutor nonchalantly, who offers for my client to plead guilty to a jailable offense. I point out that the breath technician is not available, and counter with a proposed disposition only involving an admission to two non-jailable moving violations. The prosecutor thinks about it, and ultimately agrees. We benefit from a combination of an absent breath technician whose presence we demanded, and the presence of a judge who wants to move the docket along. Â In both of the above instances, not only were we successful in obtaining such excellent negotiated results, but we truly were going to go to trial if the prosecutor did not remove the drunk driving counts from the plea negotiations. In both cases,Â I chewed the fat amiably withÂ the prosecutors and copsÂ (that I can do; breaking bread with them is another question).Â We got to yes by focusing on the overlapping goals of both sides, by doing it in a way that was non-confrontational and that made clear that nobody on the other side would lose face, and by our being in the t'ai chi moment. Nothing ventured, nothing gained. Jon Katz.

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

Monday, January 21, 2008

Happy Birthday, Martin Luther King, Jr.

Â Martin Luther King, Jr., presented his immortal "I Have a Dream" speech when I was just four months old. When he was shot dead on April 4, 1968, I was only five years old, and he was only thirty-nine.Â I have been very positively influenced by the nonviolent path in fighting for social justice from Gandhi and Martin Luther King, How did they take up and stay on the nonviolent path? For both, their deeply-held religious beliefs helped them on that path. For Gandhi -- writes Radhika Rao --he was also influenced by the non-violence of his mother and of Tolstoy, and the civil disobedienceÂ message ofÂ Rousseau. Martin Luther King, Jr., was heavily influenced by Gandhi's non-violent path, starting with Mordecai Johnson's discussion of Gandhi at King's college. Ironically, hanging in King's office was a picture of Gandhi; both were assassinated. Â On non-violence, King said: Â "The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy. Instead of diminishing evil, it multiplies it. Through violence you may murder the liar, but you cannot murder the lie, nor establish the truth. Through violence you murder the hater, but you do not murder hate. In fact, violence merely increases hate.... Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars. Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that." Â In overcoming violence, we have a very long way to go.Â Happy birthday, Martin Luther King, Jr., and thanks. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:05

Sadly, Underdog's comments feature now is moderated.

For the first time in the thirteen months that Underdog has appeared in blog software format,Â our blog has received a comment that I decided to remove. The comment was a scurrilous attack on Martin Luther King, Jr., and posted a webpage that went straight to a very graphic video of two people engaged in sexual activity. Â I do not welcome the role of moderating comments and trackbacks to this blog; at the same time, I do not wish to be spending extra vigilance looking for comments that might need to be removed from our blog. Fortunately, aside from comments caught by our spam filter, this is the first time in thirteen months that I have removed a comment. Ordinarily, I do not expect more than a half-day delay in approving comments, so please keep them coming.Â Jon Katz.

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

Friday, January 18. 2008

Send in the clones: Human embryos finally cloned.

Chart from NIH's National Human Genome Research Institute. Now, more than ever, when will the human how-to-clone chart be issued? Perhaps I should temporarily change this blog's title to "Send in the Clones". This week has had a dizzying succession of breakthrough cloning news, starting with the FDA's greenlight to the safety of eating cloned meat and milk, followed by the revelation that cloned cow genes probably are already in grocery aisles, and finally followed yesterday, by the revelation of the purportedly first successful cloning of mature human embryos. Here is the article by the human-cloning scientists, from yesterday's Stem Cells journal. My only problem at this point with the cloning of human embryos is not the embryo cloning in and of itself, but the likely inevitability that people will go one step further to try to implant cloned human embryos in women's uteruses (just like with the now completely common in vitro fertilization technique), only to result in fatal birth defects, and pain for people born from cloned embryos. Stephen King lurks around the corner. Jon Katz.

Posted by Jon Katz in Jon's news & views at 01:00

The camera never blinks.

As much as I worship at the altar of the First Amendment, that does not automatically justify worshipping journalists. (Image from the public domain.) Last year, I spoke on a criminal continuing legal education panel where a lawyer who had a high-profile case said "No publicity is bad publicity." Think again. Journalists are humans, and should not be treated as confidants; fortunately, with some reporters, one's guard does not need to be skyhigh, but caution needs to be used with unknown reporters, even when they come from exalted news organizations. Over time, I have experienced the real value of never hesitating to say with a smile to journalists: "Off the record", "I will not be commenting on that right now, because...", "You should seek a different interviewee, because my opinion does not match the viewpoint you seek," and "You appear to be trying to get an inaccurate soundbite from me through seeking a yes or no answer to a convoluted question." Substantial self control often is needed to decline the publicity (not all publicity is good publicity, including for one's client) of being on television or radio, or in print. In dealing with the press, less is more; it is wiser to selectively choose which interviews to accept, even if no interview requests will ever follow the declined interview invitation. How does one keep "no comment" off the record? Once a journalist described me on television as having "failed to return phone calls" on the story, even though the two phone calls were virtually back-to-back just a few hours before the story aired on television. I have had a print journalist agree to keep a conversation off the record, but then write that he asked me a particular question that I declined to answer. One morning, very irritated at a judge's procedural ruling and leaving court to meet my secretary on a time-sensitive matter during a court recess, I overlooked how much the camera never blinks, as I firmly but diplomatically (I hope the segment aired) asked the reporter waiting at the courthouse steps to step back, because he was getting right into my face when I was on my way to a meeting, with my client alongside me. The better approach would have been for me to have prepared my client for this possibility, to have greeted the reporter, and to have more smoothly told him I would love to talk, that I had an appointment to get to, and that I would let him know if I would have any comment later on if he would provide me his phone number. Also, for the rest of the day, I took a side exit from the courthouse. What to do when reaching a journalist's voice mail or email with the intention of making no comment, but to at least give the courtesy of showing the reporter is not being blown off? One reporter told me by email that "off the record" is a request that a reporter need not honor unless the reporter affirmatively says the request is being honored. Consequently, when I call back a reporter and reach his or her voice mail or email, if I want my reply off the record, I might say: "Please keep this reply off the record. If you do not, I do not know how I will be able to leave responsive voice mails and emails to journalists in the future. When I say off the record, that includes not even disclosing that I responded and would not comment." A reporter from a prominent legal publication once emailed back that he would honor my off-the-record request, which included the latter emailed verbiage. However, over one month later, the reporter told me that his colleagues and publication's ethics committee said he could and must say I declined to comment. The reporter explained that balanced reporting requires letting readers know which parties involved in the story were contacted, and whether they did or did not reply (but what if the phone call is made to the party just an hour before the story runs? -- I never see articles give that context) or whether they would not comment. I reminded the reporter that he long ago agreed to honor my off-the-record request. The reporter still insisted he would say I declined to comment. Then I took a page from policereportpassivevoicespeak, and suggested he instead say something to the effect that: "Efforts to obtain comment from Jon Katz were unsuccessful." The reporter agreed. Such passive-voice verbiage may not get high marks from an English teacher, but suits me just fine. Jon Katz.

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

Thursday, January 17, 2008

Sons of Bulls from Brazil already in the grocery aisle.

How-to-clone chart, compliments of NIH's National Human Genome Research Institute. When will the human how-to-clone chart be issued? Responding to my cloned meat and milk blog entry yesterday, an acquaintance from Iowa, a farm state, wondered whether the prospect of cloned hamburgers was fanciful, considering the high expense of cloning. Before I was able to reply to him that the motivation might be high to produce clones to breed high quality meat and milk breeders, yesterday's Washington Post beat me to it: "At least one Kansas cattle producer also disclosed yesterday that he has openly sold semen from prize-winning clones to many U.S. meat producers in the past few years, and that he is certain he is not alone... 'This is a fairy tale that this technology is not being used and is not already in the food chain,' said Donald Coover, a Galesburg cattleman and veterinarian who has a specialty cattle semen business. 'Anyone who tells you otherwise either doesn't know what they're talking about, or they're not being honest.'" David Faber, who is president of one of the nation's two main cloning companies, also admitted that clones' descendants are going to lunch and dinner tables: "For now, Faber said, his company is targeting its cloning techniques at a small market of farmers raising elite breeding stock, what he calls 'the rock stars of the barnyard,' not those producing animals destined for the grocery store. 'Cloning is for breeding, not eating,' he said. 'We are making sons and daughters, semen and embryos, not meat and milk.'" As to humans, if one day it becomes possible to clone them, one market might be for selling designer sperm and ova for artificial insemination and in vitro fertilization (thus making it possible to have offspring with all their DNA from clones). As of now, many attempts at livestock cloning still end in fatal birth defects. The birth defects alone make cloning sound ghoulish, whether the cloning is of humans or non-human animals. Jon Katz.

Posted by Jon Katz in Jon's news & views at 01:00

Do not Pringle-ize Moore, part two.

Bill of Rights (From the public domain.) On November 19, 2007, I wrote: In early 2006, the clouds parted, and the Virginia Supreme Court blessed criminal suspects with Moore v. Commonwealth, 272 Va. 717 (2006). Moore provides that the issuance of a criminal summons does not permit a police search. This is a particularly significant holding, when considering that summonses most commonly commence misdemeanor prosecutions in Virginia. Unfortunately, rather than leaving well enough alone, the United States Supreme Court granted certiorari review in Moore. Hopefully the Supreme Court will leave Moore unharmed, unlike the damage done in Maryland v. Pringle, 540 U.S. 366 (2003), which reversed an excellent Fourth Amendment decision by Maryland's Court of Appeals, as if crushing the Court of Appeals' Pringle decision like a potato chip. Thanks to Gideon and SCOTUS Blog for giving a rundown on the January 14 oral arguments (see transcript) in this Moore case, and to SCOTUS Blog for having provided a running update on the case. Thanks to Gideon for drawing attention to this part of the argument: JUSTICE SCALIA: So any Federal employee can go crashing around conducting searches and seizures? MR. McCULLOUGH [Virginia Dep. Solicitor General]: So long -- JUSTICE SCALIA: So long as he has probable cause? MR. McCULLOUGH: That's correct. JUSTICE SCALIA: That's fantastic. (Laughter.) JUSTICE SCALIA: Do you really think that? MR. McCULLOUGH: I think if there is State action, it doesn't matter that you're wearing a badge or that you've gone through the police academy. JUSTICE SCALIA: Or that you are an administrative law judge at the, you know, Bureau of Customs? It doesn't matter? MR. McCULLOUGH: I think that's right. That if you have -- if the State -- JUSTICE SCALIA: What about a janitor? You're a janitor, a federally employed janitor. MR. McCULLOUGH: Your Honor -- JUSTICE SCALIA: His neighbor is growing marijuana, and he's just as offended as a Supreme Court Justice would be. Can he conduct a search? MR. McCULLOUGH: I think if he's doing it on behalf of the State, the answer is yes. JUSTICE SCALIA: Wow. Although Justice Scalia would not be on the bench if I had my choice, kudos to him for the above-quoted part of the oral argument. Once again, do not Pringle-ize Moore. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 16, 2008

Is it safe? Eating cloned and living cloned.

How-to-clone chart, compliments of NIH's National Human Genome Research Institute. When will the human how-to-clone chart be issued? The United States Food and Drug Administration this week cleared cloned beef, milk, chickens, eggs, bacon, gelatine (you get the picture) as safe for human consumption. Although the current expense of cloning is too high to sell animal meat from cloned animals in the supermarket (cloning apparently costs in the neighborhood of \$16,000 for the first cloned lamb and \$10,000 for those cloned in the same session), that does not negate the cloning of animals destined to breed super-animals for perfectly tender steak, oceans of delicious milk, and mountains of gourmet eggs with the yolks bakers prize. If the eating of cloned animal products is safe -- and the jury should still be out on that -- what is it like to live cloned? Do brain defects, physical defects, disease and other sickness attend being cloned? Unless such risks can be ruled out, why allow cloning, including when it comes to cloning humans? The current literature seems conclusive that cloning cows is simple enough, so cloning humans would appear to be just as simple, at least when removing any moral or ethical hesitations, which should be substantial hesitations. How would a human feel about being a clone or the descendant of a cloned human? What about if the human had dozens of identical clones from various age ranges and generations (hello, Boys from Brazil, or, in the FDA's scenario, bulls and hamburgers from Brazil). If humans are cloned, will that create a new type of discrimination -- anti-clone discrimination? Will people hesitate to date cloned humans and their descendants and to procreate with them? Decades from now, how will it feel for lawyers to walk into court and say "good morning, your honor" to a cloned judge. Where do I stand on all this as a lawyer? My concerns are both about the health of the cloned animal (and those producing the clones) and the health of those eating the clones and their offspring, including ethical and moral concerns. I am a vegan, so my eating will not be affected much by this, except when some cloned butter is slipped into the restaurant vegetables that are represented as sauteed in olive oil. On the other hand, most people are neither vegan nor vegetarian, and will be directly affected by animal cloning. The whole concept of having cloned humans and non-human animals is very chilling to me. For the sake of the welfare of would-be cloned animals and their descendants, to begin with, I am inclined to oppose permitting cloning. However, it is not as easy as that for me, because I am not one automatically to embrace new government bans, because the existence and enforcement of those bans can include draconian actions and results -- including criminal enforcement -- that sometimes or often times are worse than the problem they seek to prevent in the first place. In any event, as with bovine growth hormone/rGBH, no scientific test will be able to distinguish cloned animals and their milk and meat from the non-cloned versions. Eerie, indeed, to say the least. Maybe this will make vegetarianism a more popular option; maybe. Jon Katz. ADDENDUM I: After writing this entry, I read this basic fact sheet from the NIH's National Human Genome Research Institute. It raises questions about the possibility of successfully cloning primates (which category includes humans). This makes it all the more scary to consider that people are out there who are willing to try to clone humans, and the results may be more freakish and ghoulish than imaginable. It is not clear whether the fact sheet's following statement is outdated: "Reproductive cloning is a very inefficient technique and most cloned animal embryos cannot develop into healthy individuals. For instance, Dolly was the only clone to be born live out of a total of 277 cloned embryos. This very low efficiency, combined with safety concerns, presents a serious obstacle to the application of reproductive cloning." (Emphasis added.) ADDENDUM II: Following are information and commentary relating to this entry: - The FDA's full pdf report (released this week) greenlighting the safety of clone-eating. Here is the non-pdf version. - Here is CNN's coverage of the FDA report. - Such corporations as Monsanto patent genetic engineering of food (already in the food supply -- yuck at the very least), and likely will seek to patent approaches to animal cloning. Thanks to Zelig Golden for writing on this. - The FDA generally cleared milk and meat cloning in late 2006. - The Competitive Enterprise Institute supports permitting milk and meat cloning. - Hello, Dolly. Dolly-the-sheep's cloner gets license to clone human embryos for research. - A 1997 article ponders whether to allow to clone any animals. - "Is it safe?" asked Laurence Olivier as the Nazi dentist in Marathon Man, and who played a Nazi hunter in Boys from Brazil.

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

Tuesday, January 15, 2008

Praised be marijuana legalization activists.

Activist Jack Herer's pipe invention. In 1990, I took out a subscription to High Times magazine in protest over a federal prosecutor's subpoenaing the magazine's advertiser records -- as reported by Index on Censorship -- in an apparent effort to clamp down on hydroponic sellers and customers, and various other suspected marijuana-related vendors. That set an unstoppable ball in motion for me. In those pre-Internet times, High Times introduced me to Don Fiedler, who was then the national director of the National Organization for the Reform of Marijuana Laws, and who later gave me tips for plotting my successful strategy to switch to criminal defense from corporate litigation and regulatory work; such optimistic crusaders for cannabis justice as the colorful Jack Herer and Lone Reefer; and Ed Rosenthal, who was persecuted recently for cultivating medical marijuana for sick people. Around late 1990, I attended part of the annual NORML conference, in Washington, D.C., which was a much smaller event than today. I was mesmerized by Paul Krassner's talking about Abbie Hoffman, and got belly laughs from his jokes; learned that Hunter Thompson's no-show was Hunter Thompson being Hunter Thompson; and felt less isolated when, unknowingly, I was a few months away from leaving the life of corporate law to defending indigent clients with the Maryland Public Defender's Office. Not long thereafter, I attended a pro-pot rally in Lafayette Park, not too long before Gulf War I started. There, I was captivated by Jack Herer of The Emperor Wears No Clothes fame. Whether or not some of Jack's claims were unsubstantiated about marijuana being the planet-saving plant, his optimism was infectious, and I caught on to his discussion about marijuana enabling medical users to regulate dosage by stopping at the point where they feel relief. When I bought Jack's Emperor Wears No Clothes, he autographed it below a message saying: "Jon- Start from page one, and teach it to the world. Nobody can beat a fact. Love, Jack." On my way back from the rally, by subway, I bumped into a law school classmate who asked where I was coming from. When I told him about the pro-pot rally, he said: "Do you know I prosecute such cases." I replied: "I know. It breaks my heart." I rummaged through the items I had gotten from the rally, and gave him a "No Narcs" sticker; his wife laughed. A few years ago, he left the darkside to do criminal defense. Some of my most enjoyable clients are my marijuana defense clients, at least the ones who actually use, rather than those dragnetted into something they did not do. If all alcohol drinkers switched to marijuana, this would be a much more peaceful and non-violent planet. I felt inspired to write this blog entry after stumbling upon the above-shown video of Jack Herer's pipe invention. The pipe is intriguing, and nicely-designed, too. Over the years, the marijuana legalization movement has made significant inroads towards legalizing medical marijuana and reducing the penalties for simple marijuana possession. It is entirely inaccurate to view the marijuana legalization movement as a bunch of stoners not to be taken seriously; moreover, many marijuana users are far from stereotypical stoners (including emeritus Harvard Medical School Professor Lester Grinspoon and Cosmos co-author Ann Druyan). By now, the marijuana legalization and drug reform movements have gone very mainstream, to include many people, like myself, who do not even use illegal drugs. Legalize it. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Monday, January 14, 2008

Climbing all the more stratospherically after a plastic sax replaces a stolen one.

Ornette Coleman performing in 2007. Â Music legend Ornette Coleman has always played the music he likes to play, even when that has meant a smaller audience, fewer well-paid gigs, and even the theft of his sax by perturbed audience members.Â Early in hisÂ career, one or more apparently disgruntled audience members stole Coleman's saxophone. In a great example of the lesson of dealing with change from my t'ai chi teacher Len Kennedy -- who urges accepting rather than fighting change -- Coleman got together the money to buy a new sax, which was primarily made of plastic. Instead of gettingÂ upset at the lack of more metal in his sax, ColemanÂ learned, appreciated, and worked with the new sound produced by the plastic parts of his sax.Â Like jazz legend Cecil Taylor (whom I experienced performing at the Library of Congress in 1999, followed by joining several of his friends (I tagged along with our mutual friend Trudy Morse) for amazing talk in his hotel room), ColemanÂ believes in transcending theÂ traditional strictures of musical form, to interact with his fellow musicians and to convey his own musical meaning. He plays in the moment, which is what trial lawyers must do to be the most effective and persuasive. Â Ornette Coleman has been uncompromising in sticking to musical excellence as he sees it. Ultimately, through all his sweat, toil, and financial struggles at sticking to his musical convictions, recognition increasingly caughtÂ up with him over the years, including a Pulitzer prize, and prominent coverage in the December 2007 issue of Rolling StoneÂ that features Led Zeppelin on the cover (which coverage I have incorporated into this blog entry). Â Â Of course, although Coleman -- being an artist -- was able to refuse to please his audiences over the years (other than to give his art his all, as he defined it) and to focus on the music that pleased him, trial lawyers are of no use if they do not do their best to serve their clients and persuade judges and jurors. An overlap between Coleman and me remains that I focus on taking clients whose causes fit in with what is important and stimulating to me, and continue remaining energized by my work through focusing on work that has meaning to me, rather than seeking to have a law practice that fits others' notions of the path a lawyer should take, and their notions of how a lawyer should conform. That is a wonderful part ofÂ being my own boss. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Friday, January 11, 2008

Holding breath technicians and their machines to the fire.

Image from National Institute of Standards & Technology. When administered properly, blood tests are more accurate than breath tests in determining a person's blood alcohol content (BAC). Nevertheless, in the state courts where I practice, police ordinarily choose the breath test over the blood test. The breath test may save time and money over the blood test (and remove the need for the testimony at trial of the people who drew and analyzed the blood, and remove challenges by the defense about the chain of custody and handling of the blood sample between the time periods that the blood is drawn and analyzed). However, hanging in the balance is the defendant's liberty, which deserves giving the defendant a choice between a blood and breath test (the defendant should have the option, for instance, if s/he reacts adversely to needles or learns that the alcohol analysis will be quicker by blowing into a machine at the police station rather than being transported to a hospital to have a medical technician draw blood). In any event, a few battlegrounds are level and fair. Until legislators and courts fix the unfair state of affairs over laws prohibiting driving with a 0.08 BAC or higher together with permitting breath tests that are insufficiently accurate, criminal defense lawyers, as always, are left with the available playing cards and rules. In that regard, as I blogged on January 8, I recently went into a Virginia court where I overcame the risk of a five-day mandatory jail sentence for an alleged BAC over 0.16 by arguing reasonable doubt whether the BAC at the time of the breath test was higher than at the time of driving; on November 8, 2007, I blogged about how the BAC can rise as the alcohol absorbs into one's bloodstream. In another instance, the documentation about the Intoxylizer 5000 breathalyzer machine for another client (the key is to obtain such documentation by subpoena, written request or both, as needed) facing a mandatory minimum for a BAC over 0.15, showed that the Intoxylizer 5000 had been repaired prior to being used on my client, without having been recalibrated. Since my client was likely to be found guilty of drunk driving even without the breath test results and to get jail for having a DWI conviction on an arrest that took place only about two weeks later, we got a very good result in convincing the prosecutor to a DWI plea involving a suspended sentence only at a doubled length from what is ordinarily offered in that courthouse to people without other convictions and with lower BAC's. It also helped in that instance that we had a hired forensic toxicologist to show the prosecutor our firepower to convince the judge to keep out the breath testing results. As with all criminal defense, a key in defending drunk driving cases is to take every opportunity to use the governing rules and evidence to the defendant's advantage. Although Virginia law provides such escape routes for prosecutors as only requiring "substantial compliance" with the administrative rules governing BAC tests, no such escape hatch exists in Maryland. In any event, no matter where one defends a drunk driving case, two of the several technical defenses in such cases include determining whether the suspect's oral cavity was sufficiently monitored for at least twenty minutes to be free of foreign substances, and whether the breath or blood sample was taken within the statutorily or regulatorily mandated time period (in Maryland the time period is two hours for a breath test, and in Virginia the time period was extended a few years ago to three hours). In Maryland, it is essential to go to court with a current copy of the state toxicologist's manual for administering BAC tests. I will provide a free copy to anybody who asks (until I arrange to have it scanned onto this website). Even better is to have a certified copy, which can be obtained by sending a \$40 check made payable to DHMH-OCME, and sent to Barry Levine, Ph.D., Toxicologist, Office of the Chief Medical Examiner, 111 Penn Street, Baltimore, Maryland 21201. By now in Maryland, I have obtained full or partial victories a few times on the toxicologist's direction to assure that the oral cavity is free of foreign substances for at least twenty minutes before the test. In one instance, with the help of a forensic toxicologist, we convinced the judge that the twenty minute observation must be performed by the breath technician and not the arresting officer (who, in that instance, was not certified as a breath technician; also, in Maryland the arresting officer may not administer a breath test). As a result, our client was convicted of the less serious charge of driving while impaired rather than the more serious charge of driving under the influence, and the judge gave him a probation before judgment (which avoided points off his license). In another instance, our client was stopped after allegedly driving over the dividing yellow line. The cop testified that he observed our client had not put anything in his mouth (how was the cop able to observe this while still keeping his eyes on the road while transporting our client to the station?) and the breath technician confirmed the same (a warm belch or regurgitation can also lead to an inaccurate Intoxylizer result), but the prosecutor's witnesses did not establish that my client was not at any time out of the site of both the cop and the breath technician before taking the test (e.g., to go to the bathroom, or for the cop to do the same). The judge kept out the breath test results, and found my client not guilty. In a more recent incident, the testimony of the arresting officer and breath technician showed no testimony by the arresting officer about an empty oral cavity and the breath technician's testimony of observing my client for nineteen minutes. I successfully argued to keep out the results by arguing close but no cigar. I drew the judge's attention to Md. Cts. & Jud. Proc. Code sect. 10-304, which requires breath technicians to have received training in the use of the Intoxylizer 5000 in a training program approved by the toxicologist under the Postmortem Examiners Commission. I then argued that, as a consequence, Intoxylizer 5000 results are only admissible when the state

toxicologist's training manual is followed. Because the training manual mandates a twenty-minute observation, twenty minutes means twenty minutes, and anything less is unreliable. The prosecutor and I went back and forth with the judge on this, but ultimately the judge agreed not to admit the BAC results. Once again, instead of being found guilty of DUI, the judge found my client guilty of the lesser offence of DWI, and gave him a probation before judgment on the DWI. Of course, none of these great results can happen without being fully prepared for trial and fully able to try a case. Particularly with bench trials, judges often want counsel to "move it along" so that the full docket can be handled. The more that the defense lawyer streamlines such trials -- without prejudice to the client -- the more the judge will listen to the lawyer, so that the lawyer has a chance to win. Jon Katz.

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

Thursday, January 10, 2008

What justifies a prosecutor telling a witness to withhold documents from a defense lawyer?

Photo from website of U.S. District Court (W.D. Mi.). One day while waiting for court to start, I approached the chemist in my client's drug possession case. He said he would talk to me only if the prosecutor was present. Once I got the three of us together, he opened his file, and started to give me its contents to review. However, the prosecutor advised: "You do not need to give that [particular document] to him." I suggested that the prosecutor rethink what he just said, but he stood firm. I told him I felt his comment ran afoul of the applicable lawyers' professional conduct rule. The prosecutor expressed his irritation at my making such a suggestion. The chemist finally showed me the withheld document, which was of no help to me other than to know that he had no other documents in his file. At trial, whether or not the prosecutor was distracted by my earlier challenge about the rules of professional conduct, I proceeded to win the trial at a stage where I little expected to do so. The judge overruled my objection to the stop of my client's car, despite my argument that no evidence had been presented about the cop's speedometer calibration nor about sufficient procedures for pacing my client's car to ascertain it was exceeding the speed limit. For whatever reason, revisiting his victory over my motion to suppress the stop, the prosecutor proceeded to ask the cop questions to show that he had made a good stop, and I thoroughly enjoyed the cop's confirming that it was a new car and had not yet been calibrated, and the judge's sustaining all my objections to all further calibration questions (since I suppose the judge did not feel that one can assume that a car's speedometer is properly calibrated when it leaves the factory assembly line, and he did not see subsequent calibration as admissible). Frustrated by all my sustained objections on this line of questioning, the prosecutor rested, I moved for judgment of acquittal, the judge granted it, and my client and I immediately proceeded to the court clerk's office to file an application to expunge the case from his record. Of course, a lawyer should tread carefully in suggesting to an opponent that his or her actions violate any professional conduct rules. The governing professional conduct rules address that. It should be proper to tell an opposing lawyer that his or her behavior is not in harmony with the professional conduct rules, when there is a good faith basis to do so and when the intention is to seek compliance with those rules for the benefit of a client. However, lawyers should proceed with caution and in compliance with the professional conduct rules before threatening to report a professional conduct violation to the ethics authorities. (I strongly believe in confronting an opponent directly, have never filed a grievance about any lawyer, and hope not to do so in the future.) In the foregoing scenario with the prosecutor and chemist, my comments to the prosecutor had nothing to do with wanting to throw him off balance for trial, as opposed to getting the document I wanted. In Maryland, at least, I think a reasonable reading of the professional conduct rules (I found no other relevant provision in the law) prohibits prosecutors from doing anything to prevent cops from giving information to criminal defense lawyers, based on Md. R. Prof. Conduct 3.4(f), which provides that "A lawyer shall not ... (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." I say this even though Maryland criminal discovery rules apply both to material in the hands of prosecutors and police. Virginia's parallel rule seems to prohibit a lawyer from asking any non-client to withhold information in a criminal case: "A lawyer shall not ... [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Va. R. Prof. Conduct 3.4(h) (emphasis added). Note 4 to the foregoing provision states: "The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. See also Rule 4.2." To what extent does the foregoing Virginia professional conduct rule clash with the grossly limited discovery available in Virginia criminal District Court under Va. Sup. Ct. Rule 7C:5? In some counties, including Fairfax, judges' discovery orders (yes, not only is Virginia District Court criminal discovery practically non-existent, but a Defendant ordinarily must move in advance of the trial date for a discovery order even to obtain it, aside from Brady/exculpatory evidence, which must always be provided) allow prosecutors to provide the discovery orally thirty minutes before trial (if they mean 30 minutes before the court's scheduled trial time versus the time the case is called for trial, the thirty minute rule is not being honored very often in places like Fairfax). Often, huge court dockets combined with frequent police officer reluctance to talk to anybody but prosecutors, lead to the oral discovery coming only from an overworked prosecutor who has not enough time to assure that all required discovery, particularly Brady evidence, is provided to defense lawyers. (By the way, I view video recordings from police cruisers to be Brady/exculpatory evidence, at least in drunk driving cases, because inevitably some of the video will show some positive coordination to counterbalance claims of poor performance on field sobriety tests; yet, I have not yet had a Virginia prosecutor volunteer whether a video exists (I end up needing to inquire; I wonder whether some don't even ask the cops about videos), even though cops have videos in at least one county where I regularly appear.) In Virginia, prosecutors might have more leeway than do Maryland prosecutors with telling

police what they should or should not tell defense lawyers, because in Virginia, police often are considered agents of the Commonwealth for purposes of discovery: "[Where an agency is involved in the investigation or prosecution of a particular criminal case, agency employees become agents of the Commonwealth for purposes of Rule 3A:11 and must be considered a party to the action for purposes of Rule 3A:12." *Ramirez v. Commonwealth*, 20 Va. App. 292, 296-97, 456 S.E.2d 531 (1995). This same court case re-emphasizes the nauseating Virginia rule that: "'There is no general constitutional right to discovery in a criminal case.' *Spencer v. Commonwealth*, 238 Va. 295, 303, 384 S.E.2d 785, 791 (1989), cert. denied, 493 U.S. 1093 (1990) (citations omitted). [Va. S. Ct.] Rule 3A:11 provides for limited pretrial discovery by a defendant in a felony case. *Hackman v. Commonwealth*, 220 Va. 710, 713-14, 261 S.E.2d 555, 558 (1980)." *Id.* at 294-95. As a related aside, the foregoing rule leads Virginia judges again and again to refuse to issue document subpoenas (judges must issue them) for cops. For drunk driving cases, sometimes I have successfully argued that the foregoing exemption should not apply to alcohol breath testing technicians, in that their role is solely ministerial and not investigatory, and to have the rule apply to breath testing technicians could encourage cops to do all their scientific analyses in-house to prevent forensic-related subpoenas from being issued. Back to Maryland. Many of the busier Maryland District Courts make it wise sometimes for criminal defense lawyers to go to trial by fire, at least in terms of not phoning the prosecutor or opposing witnesses until the trial date lest the case alert the prosecutor to have all the necessary witnesses present. The upside of such an approach is to increase the chances that the case will be dismissed for the non-appearance of witnesses; the downside is that some cases are too sensitive or require too much advance preparation not to talk to the prosecutor or witnesses in advance. In any event, in a recent misdemeanor case where I took the approach of not contacting the prosecutor or cop before trial (but I did file a timely discovery request), on the trial date the prosecutor asked if I wanted to see the cop's discovery, and I answered yes. However, as the cop started flipping through his documents, the prosecutor said: "You don't need to give that to him; those are your personal notes." Rather than bothering saying anything about the professional conduct rules generally prohibiting lawyers from telling witnesses to withhold information from opponents, I said: "If you're not going to give me the officer's notes, it will just irritate the judge during trial to know that the delay in my reviewing the documents is because you waited until before I cross-examine the officer to provide me the information." (More on the applicable Jencks law (and its absence in Virginia) is here.) Admittedly, I had not done much to help save the prosecutor's face, by saying this right in front of the cop, and the prosecutor said he was done providing me for discovery (for the moment only, it turned out). In any event, for similar reasons to those in the beginning of this blog entry, I do not know how the prosecutor's telling the cop not to give me his notes comported with the governing professional conduct rules. All this is not automatically to say that I do not have disputes with certain aspects of the professional conduct rules, including some of the lawyer marketing rules that run afoul of the First Amendment. However, I think justice is disserved very much when prosecutors go telling anybody but employees of their prosecutor's office (and I am not including cops in that definition) not to talk with or to provide certain information to criminal defense lawyers. I welcome your thoughts on this topic, as I do with all my blog entries. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 9, 2008

Filing more than timely is cheaper than the needles-and-pins alternative.

Photo from website of U.S. District Court (W.D. Mi.). Some courts are more merciless than others in treating certain court filing deadlines as jurisdictional with no wiggle room whatsoever. Consequently, the best thing to do when meeting court filing deadlines that are jurisdictional or possibly jurisdictional is to overcover risk (let alone any court filing deadline whatsoever, unless a timely extension motion is filed that is likely to win) by correctly calculating the deadline early on (beware counterintuitive results), and by filing well in advance of the filing deadline. The last thing one needs is to have a filing deadline missed because of problems with mail, weather, sudden illness or death in the lawyer's family, couriers, unexpected court closings (e.g., Virginia's Lee-Jackson day -- memories of the confederacy) or even a lawyer filing a document personally only to miss the deadline by being stopped for speeding or by a car accident along the way. Sometimes a lawyer has no control over missing a court filing deadline. For instance, sometimes a client does not come to a lawyer for help until the deadline has passed. If that happens, it would seem prudent for the lawyer to put in writing to the client and the file that the lawyer was only hired after the possible deadline passed. Why is a blog entry even needed on this topic? Apparently missed filing deadlines are so common (see the addenda below) that the Supreme Court took up the matter during this term, and issued an unfavorable opinion for those missing the deadline for filing monetary claims against the United States (in this instance, a property loss claim). *John R. Sand & Gravel v. U.S.*, *U.S.* (Jan 8, 2008). Granted that Justices Stevens and Ginsburg dissented, but that is small comfort for the losing party, nor the huge attorneys' fees likely paid for this case to wend its way from the Court of Federal Claims to the U.S. Court of Appeals (Fed. Cir.) to the Supreme Court (where huge time and effort is needed to file a persuasive cert. petition, where the Supreme Court only considers one to two percent of cases presented to it) followed by tremendous time to draft meticulously and persuasively-written and argued briefs, and more time to practice oral arguments moot-court style to make a tough job of Supreme Court oral argument come across at once as effortless, fully credible, fully flexible, and fully persuasive. Curiously, the federal government's lawyers did not preserve the statute of limitations argument in this *John R. Sand & Gravel v. U.S.*, case, and instead succeeded on the merits in the Court of Federal Claims. On the losing party's appeal to the Federal Circuit, an amicus/friend of the court mentioned the matter to the Federal Circuit, and the Federal Circuit decided it had the responsibility to address the issue sua sponte/without request of the parties, and decided in favor of the federal government. The Supreme Court did the same. Jon Katz.

ADDENDUM I: Last fall, one of the nation's largest corporate law firms, Morrison & Foerster, lost its motion for leave to file a late attorney's fee motion, where the late filing could have been avoided had the law firm dispatched its courier more than forty-five minutes before the court's closing time, which was not done. *Toshiba American Information Systems v. New England Technology, Inc.* (C.D. Ca. Nov. 14, 2007). Curiously, it does not appear that electronic motions filing is available at the federal court where the problem took place. Had such electronic filing been available, this late filing likely would not have occurred in the first place. Second, in such a highly populated area of California as this, sending a courier so late in the day danced too much on the edge of risk.

ADDENDUM II: Here is an update to another Supreme Court filing deadline matter that I blogged about over one year ago. In that instance, a veteran Supreme Court litigator for Northwest Airlines mistakenly thought his ninety-day deadline for filing a certiorari petition with the court started April 17, 2006 (when it actually started April 13), and filed his cert. petition ninety days after April 17. Someone at the Supreme Court learned that April 13 was the date of the lower court's order that was the subject of the appeal, making the cert. petition four days late. Northwest immediately filed a motion to accept the petition out of time, in *Petition No. 06M7, Northwest Airlines, Inc., Petitioner, v. Spirit Airlines, Inc.* On October 2, 2006, the Supreme Court denied Northwest's motion. A silver lining in this otherwise sad story for Northwest's lawyer is the collegial action of former solicitors general Charles Fried (for Reagan) and Seth Waxman (for Clinton) accepting the Northwest lawyer's request for an amicus brief from them, which they filed jointly. Fried did not bill a penny for this effort, and underlined the importance of collegiality among lawyers, and the existence of such collegiality among Supreme Court advocates.

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, January 8, 2008

You want a trial? I'll go to trial/ Plus, beating the Intoxylizer 5000.

Photo from website of U.S. District Court (W.D. Mi.). When I joined the Maryland Public Defender's Office in 1991, all bright-eyed and bushy-tailed to fight the good fight, it turned out that my survival instincts -- developed all the more since early childhood by growing up among plenty of peers who were more inclined to be nasty than warm (and I spoke my share of verbal taunts, too) -- and sharpened tongue often would serve me better than only relying on my boundless optimism at leaving a corporate law firm to spend my fulltime doing good. Early on in my criminal defense/public defender career, one morning in the courthouse I bumped into an opposing prosecutor, greeted him, and told him I wanted to arrange in advance to see the drugs seized in one of my clients' cases. He went false-ballistic, ranting and raving: "You want a trial? I'll go to trial." So much for having opponents proceed in the spirit of Begin and Sadat in agreeing to disagree. Such silliness, to say the least, does not stop with criminal cases; some of the most petty and unpleasant lawyers I have dealt with have been opponents in civil cases. Sometimes it is because money is at stake; sometimes it is because government lawyers' bosses are breathing down their backs. Sometimes it is habit. In one instance several years back, I represented a car collision victim and objected several times to some fully-objectionable and prejudicial deposition questions. Several times that I did so, my opponent would change from her sweetish-side (off the battlefield, that is) saccharine self to getting all bent out of shape that I would dare to interrupt her with an objection, insisting that I justify my objection. I made clear to her that the purpose of the deposition was not for her to intimidate my client by seeing me and her get into a rumble, and invited her to have closed-door discussions away from my client any time she was inclined to rant rather than simply and diplomatically to ask me the basis for any of my objections. That, for the most part, took the edge off my opponent in front of my client. Then, the silliness sometimes originates not from the opposing lawyer, but from "office policy" Recently, I went to court with a client charged with driving in Virginia with a blood alcohol content (BAC) of 0.16, which carries a mandatory and non-suspendable five days in jail where the BAC when driving is at least 0.15. I suggested to the prosecutor a guilty plea in exchange for removing the allegation of a BAC at 0.15 or over (I would have been less inclined even to advise that type of plea to my client if the law did not have any mandatory minimum jail sentence provision) and to agree to a suspended sentence, seeing that my client was likely going to lose on DWI for his often uncoordinated actions after being stopped for a clear moving violation where I likely would not win a motion to suppress. The prosecutor told me about some "office policy" that made such a plea deal not possible. In this courthouse as in most where I go, trials get called last, and sometimes there seems insufficient rhyme nor reason about which trial gets started before the others scheduled for the same courtroom on the same day. Mine was the last. Not expecting any success in suppressing the stop and arrest of my client, I focused on trying to keep out the breath test results, in part by arguing, unsuccessfully, that the evidence was insufficient to show that the following Virginia Administrative Code provision had been followed: "The person to be tested shall be observed for at least 20 minutes prior to collection of the breath specimen, during which period the person must not have ingested fluids, regurgitated, vomited, eaten, or smoked. Should any of these actions occur, an additional 20-minute observation period must be performed." 6VAC20-190-110. Moving onto plan B, on cross examination I focused the police officer on the positive aspects of my client's behavior, including that he remained standing -- not falling -- at all times after the officer told him to get out of his car, was eventually able to hold his leg up for the one leg stand, and made no unusual actions along the lines of urinating on himself. I then locked in the officer from his criminal summons to admit that he stopped my client more than two hours before his breath test was taken. I also locked him in that he had taken my client's preliminary breath test on the roadside and that he did not record the result ;he was unable to confirm or deny that the PBT was lower than the BAC result at the jail. I argued to the judge in closing that there was reasonable doubt whether my client's BAC at the time of driving was lower than the 0.16 at the time he blew into the Intoxylizer 5000 at the police station, in that perhaps his bloodstream was absorbing the alcohol more during the two-hour gap between the stop of his car and the breath test at the jail. I argued that caselaw shows that the question in DWI cases is about the BAC at the time of driving, not at the time of taking the breathalyzer test. The judge agreed with my reasonable doubt argument about whether the BAC at the time of driving was 0.15 or higher at the time of driving. This argument was hardly a shoe-in. Particularly without an expert witness in the Intoxylizer 5000 (some of my clients invest in one, but most do not, and we had none at this trial), I do not think all judges will accept the concept that the BAC can rise over a two hour period, rather than dissipate. Consequently, instead of getting a five-day mandatory minimum in jail had my client entered a guilty plea, we left the courthouse with a thirty-day suspended sentence. Back to the title of this blog entry: "You want a trial? I'll go to trial." Sometimes prosecutors and cops huff and puff against criminal defense lawyers who advise their clients to go to trial rather than to plead guilty. Such huffing and puffing ignores that it is the prosecutor's exclusive burden to try to prove a defendant guilty beyond a reasonable doubt, and not a defendant's burden to fall on his or her own sword. Moreover, a lawyer has an obligation to assist the defendant in making an informed decision whether to go to trial or not, and then to honor the client's decision. Winning at trial continues to be a rush. Jon Katz.

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

Monday, January 7, 2008

These are a few of my favorite blawgs.

When John Coltrane started playing his interpretation of "My Favorite Things" in 1960, no visions of Von Trapps entered the stage. Through lists named "œmemes," in later 2007 various blawgers listed their favorite ten blawgs, which amounted to tagging each listed blawger to post a top ten list. Thanks to Scott Greenfield and Jamie Spencer for having included me on their lists of ten favorite blawgs. I have carefully crafted my blogroll to cover blogs that are of interest and (with a few exceptions) post regularly, except that I have listed prosecutors' and judges' blogs no matter how often they post and no matter how interesting are their posts, in order to understand them better.

Consequently, I feel I am not doing justice to numerous excellent blogs that have not reached my following top ten list, which I list in alphabetical order below:

- Abolish the Death Penalty " Presented by the National Coalition to Abolish the Death Penalty. The time has come.
- Abolitionist: Animal Rights " The time has come.
- Capital Defense Weekly (renamed Capital Case Review) " Nothing beats having capital defenders around to help recharge everyone's batteries. Andrea Lyon is one of my favorite capital defenders; she does not have a blog.
- Gideon the Public Defender " Gideon slugs it out in the pits in my natal state.
- Innocence Project " Barry Scheck -" with whom I have spoken at several criminal defense lawyers' conferences -- will always have a special place in my heart. He is a powerhouse without a huge ego.
- Marc Randazza's Legal Satyricon - Florida First Amendment lawyer who blogs expletives more often than I, because, like I, he often gets fed up with all the times that other people urinate on others' rights. My further praise of Marc is here.
- SCOTUS Blog " Includes Supreme Court junkies writing on Supreme Court news and analysis from the critical to the more peripheral.
- Sentencing Law and Policy " Essential reading for criminal defense lawyers.
- Simple Justice " Scott blogs an average of four times a day, compared to my average one daily blog. I read his blog daily.
- Jonathan Turley " Churning out several daily on-point blawg entries, usually about the day's legal news. He joined my law school's faculty too late, after I graduated.
- Passion first and foremost drives the foregoing blogs to keep going strong, even with SCOTUS Blog, which is sponsored by a huge corporate law firm. Thanks to everyone who makes these blogs possible. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, January 6, 2008

Praised be Stinky Cheese Man, Lao Tzu, and Lewis Porter.

Â Â Image from Library of Congress's website.Â Growing up, I did not have cable television, iPods, or YouTube competing with my reading time. Particularly when I was a public defender lawyer (literacy problems make a person less attractive to employers), I have had my share of clients who read and write well below their age level. Â Reading is power. If the story is true, Mao knew that, and -- according to a high school social studies teacher -- arranged for his marching revolutionary soldiers each to have a different Chinese character on his back. By switching the marching positions of the soldiers periodically, the story goes, after many months the soldiers became more literate, having learned the characters painted on the backs of their fellow soldiers ahead of them. Â In elementary school, my favorite reading material was Mad Magazine, Mad books, and comics of the horror, mystery, and strange variety. Today, one of my favorite children's writers is Dav Pilkey, the reclusive writer of the irreverent and often gross Captain UnderpantsÂ series. Also intriguing to me is Stinky Cheese Man and Other Fairly Stupid TalesÂ by Jon Scieszka and Lane Smith. My twenty-one-month-old son's favorite is The Monster Who Ate My Peas, which at a toddler's level might just be a hilarious story of a putrid monster who eats children's disgusting dinner food for them at increasingly heavy prices ("Give me your dog, and I'll eat your peas" becomes too high a price for the story's hero),Â and at another level introduces themÂ to the real world ofÂ amoralÂ Eddie Haskell.Â It goes without saying that people will read more when they find material that fascinates them. Enter the Library of Congress's first Ambassador for Young People's Literature -- none other than Stinky Cheese Man's Jon Scieszka, who recognizes this truism thusly: "Parents and teachers ... need to help boysÂ [Scieszka believes boys have a lower interest in reading because of the typeÂ ofÂ reading material thrust on them] 'expand their notion of what reading is' by encouraging them to read 'nonfiction, science fiction, graphic novels' or whatever it takes to interest them. 'They want to read about wrestling and cars,' he said, but the message they get is, 'Oh, no, you have to readÂ Little House on the Prairie.'"Â One problem some children might have in learning to love to read is that, after all their required school reading and other school assignments, they may see more reading as drudgery rather than as a joy. This makes it all the more important for them to find writings they love. Sometimes a greater interest in reading is sparked by having friends with whom to discuss particular mutually inspiring writings.Â Â As for me, we recently installed a huge bookcase in our home, and have filled it with great volumes that have been sitting around and that we have acquired at a more accelerated rate from new and used bookstores. My personal shelves include books by Ram Dass, books by and about American Indians, Poe's complete writings, French-language writers from Louisiana and Canada, the Dalai Lama's writings, and other Buddhism books. Currently, I am focusing on Liu Yutan'sÂ extraordinary book from the 1940's entitled The Wisdom of Lao Tse, whose Taoism is closely connected to the t'ai chi that I regularly practice. Â AÂ recent arrival is John Coltrane: His Life and Music, by my college band director and jazz scholar Lewis PorterÂ (with a good general webpage, online jazz musician encyclopedia, interesting YouTube entriesÂ and MySpace pages here and here).Â Porter's ColtraneÂ volume has been available for nine years, but I only recently learned of it as my fascination with Coltrane snowballed during the past year. Porter has also written a volume on Lester YoungÂ and numerous other jazz volumes. Â What does this blog entry have to do with the practice of trial law? For me, I have read so much dry and unenlivened, but often essential,Â writing -- including opinions from courts and other tribunals, discovery from opponents, and reports and volumes by experts in their fields -- that many times I found myself winding down part of the evening with watching some television during the four years that I had cable television (but no more cable for me and very minimal television watching now (as opposed to an occasional DVD), fortunately, and just a small-screen television with poor reception now), figuring that my eyes were too exhausted to read. As t'ai chi master Cheng Man Ching said, if you are tired, take a nap or go to sleep. Otherwise, no reason exists for me to feel too tired to read, unless the reading material does not grab me. All work and no play makes me a dull lawyer; when not spending time with my family, friends, and the outdoors, stimulating reading is a great way to spend found free time. Â Some of my favorite writers and writings are listed here. What are your favorites? Jon Katz.

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

Friday, January 4, 2008

Of hypodermic needles and guns in Washington, D.C.

Image from National Drug Intelligence Center's site. The District of Columbia government got it right -- and so did Congress when it got out of the way -- in approving and funding a needle exchange program to reduce the spread of HIV by illegal drug users who would otherwise share needles with which to inject themselves. The D.C. government got it wrong when it gutted the Second Amendment long ago to even prohibit possessing a handgun in one's home. (As much as I recommend that people voluntarily disarm and remain unarmed, the Second Amendment means nothing if the government prohibits gun ownership.) In the same day, January 3, the Washington Post reported as follows on both of the above topics: D.C.'s needle exchange program is in full swing. As the Post reports: "The District will invest \$650,000 in needle exchange programs to combat the spread of HIV-AIDS in the wake of Congress's decision to end a ban on the city's use of public money for such efforts, D.C. officials said yesterday." In the same week, the D.C. government, through acting D.C. attorney general Peter Nickles (see Underdog's posting of the recent resignation of former attorney general Linda Singer) fired Alan Morrison as the city's lead advocate to argue to the Supreme Court to reinstate D.C.'s gun ban. Replacing Morrison is former Clinton acting solicitor general Walter E. Dellinger. Seeing that I want D.C. to lose in the Supreme Court, I have no problem with this probably silly midstream shakeup, which possibly is more about attorney general Peter Nickles wishing to have a Mayor Fenty/Peter Nickles loyalist than to assure having the best advocate appear before the Supreme Court. However, were I still a D.C. resident, I would wonder if such a shakeup were bringing unnecessarily extra financial expenses to the D.C. treasury. Curiously, both acting attorney general Nickles and gun ban lead advocate Dellinger hail from big establishment D.C. law firms. On the other hand, the now-gone D.C. attorney general Linda Singer and fired gun ban advocate Morrison hail from public interest organizations, with Linda Singer as former executive director of the Appleseed Foundation, and with Morrison having spent over three decades at Public Citizen. Morrison is a seasoned Supreme Court advocate, and has a knack for making friends with those whose politics he disagrees with, including Justice Scalia, who is a favorite for barbs from so-called progressives. As much as public interest organizations and big D.C. law firms interact very much (with the public interest groups providing interesting cases for the firms to attract and retain lawyers to get pro bono time), I wonder how much Nickles felt that Morrison was a wild card, not having subscribed to using his intellect at a corporate law firm. In any event, kudos to the D.C. government for supporting safe and legal needle exchanges. As to the gun ban case, I look forward to the Supreme Court's inserting teeth into the Second Amendment. Jon Katz. **ADDENDUM:** By supporting needle exchange programs, I do not mean at all to glorify intravenous drug use. This came all the more to light a few years ago as I took a wrong walking turn in Vancouver's Chinatown to visit a huge Buddhist temple, only to find myself walking towards an open-air heroin shooting gallery, which I assumed was a government-sanctioned location for shooting up, or perhaps just a needle exchange location. Right in front of me was a crazed-looking man who stabbed a syringe into his palm. I got out of there as soon as I could, lest he then try to stab me, whether in an attempt to rob me or just from being crazed. So, if you go to Vancouver's Chinatown, watch out for this area, which I think is right next to a big library.

Posted by Jon Katz in Constitutional Law at 00:30

Obama wins caucus, but should beware likening trial lawyering as antithetical to public service. Kudos to Kucinich.

Bill of Rights (From public domain.) Clearly, Barack Obama's below-discussed trial lawyer comment did not prevent him from leading the Iowa Democratic caucus by 8% over Edwards and 9% over Clinton. I think that Edwards' and Obama's strong lead over Clinton will lead Democrats in other states to see this as a primary worth participating in, and, for the time being, to see this more as a three-way primary among the foregoing candidates, rather than as an Obama-Clinton primary. Regardless of what I think about Kucinich's other views -- about which I do not know enough -- I am pleased that he brought to the forefront, through his campaigning, the critical need to reverse course from the nation's militaristic madness; I am also pleased that he became a poster-person of sorts for veganism, which has been my lifestyle for six years. Now to the heart of this blog entry. "That's why I didn't become a trial lawyer," Obama told the Newton audience -- a clear dig at Edwards, who made millions in the courtroom. Perhaps Mr. Obama has never tried a case. If he had done so, he would know that the moniker of trial lawyers goes far beyond wealthy plaintiff's personal injury lawyers (of course, to get wealthy through trials, they need to know how to capably try a case), to include public defenders, prosecutors (bite my tongue), and civil rights lawyers (how does civil rights case law get made if the cases do not commence at the trial level?). Alternatively, perhaps Mr. Obama is being disingenuous and is trying to play into the hands of voters who do not like lawyers. However, where do the anti-lawyer folks stop? The Sixth Amendment to the Constitution guarantees criminal defendants the right to an effective lawyer; unless the defendant's

case results in a dismissal or guilty plea, the case is going to trial, and requires a skilled trial lawyer to represent the defendant. Due process calls for permitting civil litigants to have the right to a lawyer, too (otherwise, how would a libel defendant have a leg to stand on if sued through the lawyers for Coca Cola, for instance?). Shakespeare's Henry VI, Act IV, Scene II, includes the famous urging: "The first thing we do, let's kill all the lawyers," which is apparently about one of the approaches tyrants can try to take for consolidating power. We do not need any tyrant sitting in the White House taking away people's right to retain effective trial lawyers. How many voters does Obama wish to alienate with his foregoing comment? Jon Katz. ADDENDUM I: Thanks to the several fellow trial lawyer listserv members for bringing this Obama story to my attention. ABC News's Political Punch blog has commentary and comments on this story. The December 31, 2007, Washington Post Trail blog reports that: "In one of his standard riffs, [Barack] Obama asserts that his career choices -- community organizer, civil rights lawyer, elected official -- underscores his commitment to public service and to bringing about political and social change. He always mentions the lucrative job offers he turned down, but today he added a new line.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, January 3, 2008

Controversial (in New Jersey, at least) Super Lawyers adds Jon Katz to its Maryland criminal defense lawyers list.

Â This posting follows up on my November 30, 2007, discussion of the highly subjective nature of lawyer rankings on the one hand, but my welcoming recognition in rankings and the media, nevertheless. The Washington, D.C., area, is an incredibly competitive market for providing legal services. Such free publicity helps us avoid spending much on marketing, and to focus our time on serving our clients and our revenue on quality support staff. In that regard, Super Lawyers recently added me to its Maryland criminal defense attorneys list. Fewer than fifty other Maryland criminal defense lawyers also are on the list, plus seventeen more for drunk driving and white collar criminal defense (which I also handle). Super Lawyers seeks advertising revenue from its ranked lawyers for display ads; our firm has never paid Super Lawyers a dime, so we have no display ad. Concerning the Maryland listing, Super Lawyers explains: "Maryland Super Lawyers is published in January in a special advertising section in Baltimore magazine, which reaches 194,000 readers, and in Maryland Super Lawyers magazine, which is delivered to more than 25,000 readers, including Maryland lawyers, the lead corporate counsel of Russell 3000 companies and the ABA-approved law school libraries. Super Lawyers names the top 5 percent of Maryland lawyers, as chosen by their peers and through the independent research of Law & Politics. 2007 Maryland Super Lawyers based on the survey of more than 21,000 attorneys across the state." Super Lawyers' selection process does not sound very rigorous. Scott at Simple Justice heavily pans the Super Lawyers list and the AVVO list. Flying in the face of the First Amendment, in mid-2006, the Committee on Attorney Advertising appointed by the New Jersey Supreme Court, concluded in its Advertising Opinion 39 that: "[A]dvertisements describing attorneys as 'Super Lawyers,' 'Best Lawyers in America,' or similar comparative titles, violate the prohibition against advertisements that are inherently comparative in nature, RPC [Rule of Professional Conduct] 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2)." The latest developments that I could find on this New Jersey matter are from mid-2007, as follows in reverse chronological order. If you have more recent information, please send it my way: - Law.com provided an update on the then-pending court controversy on June 19, 2007. - The Federal Trade Commission filed an amicus/friend-of-the-court brief opposing Opinion 39, and providing a useful chart on how the different states treat comparative lawyer advertising. This is particularly noteworthy when considering that the FTC is not always a friend of the First Amendment, including its active role to regulate cigarette advertisements (with Congress banning cigarette television commercials in 1970). - Curiously, an official May 2007 announcement from the New Jersey State Bar Association mentioned that its new treasurer had been included in the Super Lawyers list. - In January 2007, the Maryland Daily Record reported that the large Venable law firm decided not to be included in that year's Maryland Super Lawyers list: "The [New Jersey] ethics panel decision is, of course, not binding on lawyers in other states, but Venable decided it 'should be given some consideration,' firm counsel G. Stewart Webb Jr. said. New Jersey's lawyer advertising rules are based on the model rules followed by other states, he pointed out. 'We basically decided prudence dictated we should not participate in the survey while the issues were still out there,' Webb said." Even though a final court decision on New Jersey Advertising Opinion 39 still seems pending, ten months later, on November 29, 2007, Venable issued a press release entitled "14 Venable Lawyers Named to Washingtonian Magazine's 2007 List of D.C.-Area's Top Attorneys," which is a list that has included me twice in a row since 2004. It does not appear that touting a Washingtonian top lawyer listing would be any more permissible under Opinion 39 than touting a Super Lawyer or Best Lawyer listing. Is this a matter of changed policy at Venable, or a case of one hand not following or controlling what the other hand is doing? - Super Lawyers' online position on the matter is here. - Commentary and information from 2006 on New Jersey Advertising Opinion 39 follows, in chronological order: - Law.com provided extensive coverage of the story on July 25, 2006. - The Associated Press reported in August 2006 that the New Jersey Supreme Court stayed Advertising Opinion 39 pending litigation over the matter. - On August 1, 2006, Law.com provided information about the lawyers hired by Super Lawyers and the Best Lawyers directories against Advertising Opinion 39. - On September 15, 2006, the New York Times covered the story. - On November 17, 2006, Law.com reported on the New Jersey Attorney General's backing Opinion 39, but also supporting flexibility on lawyer advertising. - So it goes. Jon Katz.

Posted by Jon Katz in Jon Katz in the News at 00:30

Wednesday, January 2, 2008

Free Fouad al-Farhan

This video covers the detention of some Saudi dissidents, including blogger Fouad al-Farhan. The Internet and blogosphere are quite the challenge to repressive governments. Before the days of the Internet, government censors could be very efficient squelching expression by banning periodicals, refusing publication permits and access to newspaper and newsprint, and seizing publication equipment and offices. Today, people can blog from any Internet-attached computer, which renders rather meaningless a governmental seizure of a blogger's computer. Now more unable to censor bloggers through pre-publication limits, government censors may turn more often to such post-publication sanctions as arrests, civil and criminal court lawsuits, and elimination of the allegedly offending URL. The Committee to Protect Bloggers covers some of this post-publication repression. Saudi blogger Fouad al-Farhan was arrested December 10, and remains detained, after blogging in favor of more civil liberties in Saudi Arabia and against recent political detentions there. Mr. al-Farhan's arrest is not surprising, but still should be opposed. Pleasantly surprising, though, is that his blog remains available and active to this day; I figure the server for his blog is located outside Saudi Arabia, and that this was intended by Mr. al-Farhan. In late December 2007, Mr. al-Farhan's supporters set up a bilingual Arabic-English blog to support his release. More about Mr. al-Farhan's plight is here. Although his supporters' website does not seem to provide suggestions on how to help, I suppose a good start is to visit his supporters' blog, so that Saudi authorities will see the site's visitor statistics shown on the lower right section of the page. I also suggest sending respectfully but firmly-worded letters and e-mails to your country's ambassador from Saudi Arabia and to King Abdullah (who, for instance, last week reversed a harsh court sentence against a rape victim -- see the December 17 Underdog blog) urging Mr. al-Farhan's immediate release, and the end to harassment for his stating his political views on his blog and elsewhere. Here are some addresses for appealing to the Saudi government for Mr. al-Farhan's release: King Abdullah, c/o Ministry of Foreign Affairs, Nasseriya Street, Riyadh 11124, Tel: 406 7777 / 441 6836, Fax: 403 0159. You might also contact the Saudi ambassador to your country. The contact information in the United States is: Prince Bandar bin Sultan bin Abdulaziz Royal Embassy of Saudi Arabia 601 New Hampshire Avenue, NW Washington, DC 20037 Main Number: (202) 342-3800 Information/Press Office: (202) 337-4076 e-mail: info@saudiembassy.net. Free Fouad al-Farhan. Jon Katz.

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

Tuesday, January 1, 2008

Breakfast of champions.

Â Â This cop took seized marijuana, shared it with his wife in baked brownies, and did not get prosecuted.Â Lawmakers, cops, and prosecutors: It is time to learn a lesson from this, by legalizing marijuana, and by cutting some slack to non-cop suspects, too.Â Jon Katz.

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