

Thursday, May 1, 2008

"Kaleidoscopic, fantastic images surged in on me." Farewell, Albert Hofman

LSD image from DEA's website. Although I have never used LSD, it has had a profound indirect impact on me. Ram Dass --born Richard Alpert -- likely became Ram Dass only because he was booted out of Harvard with Timothy Leary for having conducted LSD experiments in the Sixties, so he had some time on his hands to make his trip to India that is recounted in his essential and tremendously influential Be Here Now. When Ram Dass was giving out LSD in India, trying to make further sense of the drug's interaction with people, he met Bhagavan Das, who wanted in on the acid, and who introduced Ram Dass to being here now, which is a life approach that is so critical to me, and to everyone. Although Owsley "Bear" Stanley may be legendary for his Sixties LSD manufacturing, LSD would not exist without its creator and accidental self-experimenter Albert Hofman, who left the planet on April 29 at 102 in Switzerland. After accidentally absorbing LSD through his skin as a scientist at Sandoz pharmaceuticals, Hofman experienced the following in 1943 from his first intentional LSD intake: "Now, little by little I could begin to enjoy the unprecedented colors and plays of shapes that persisted behind my closed eyes. Kaleidoscopic, fantastic images surged in on me, alternating, variegated, opening and then closing themselves in circles and spirals, exploding in colored fountains, rearranging and hybridizing themselves in constant flux. It was particularly remarkable how every acoustic perception, such as the sound of a door handle or a passing automobile, became transformed into optical perceptions. Every sound generated a vividly changing image, with its own consistent form and color." Hofman writes more about LSD, including meeting with Aldous Huxley, in LSD - My Problem Child (1980). Without LSD, the whole course of the Sixties, its counterculture, and the Deadhead culture would have taken a dramatically different path. Thanks to Jonathan Turley for blogging on Albert Hofman and his passing. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Wednesday, April 30, 2008

"Sir, I have never been to Paterson, New Jersey."

Photo from website of U.S. District Court (W.D. Mi.). Ten years ago, lawyer Michael Tigar told the Washington Post that in interviewing to clerk for Justice William Brennan, Brennan asked Tigar "Did you attend a Communist Party training camp in Paterson, New Jersey?" Tigar responded: "Sir, I have never been to Paterson, New Jersey." On Tigar's cross-country drive to start his 1966 clerkship with Brennan, Brennan cancelled the deal over concerns about Tigar's leftist student activities. In 1990, Brennan admitted he may have overreacted. With only \$10 to his name, instead of getting a useless consolation prize, Tigar got hired by legendary lawyer Edward Bennett Williams. In the summer of 1987, before ever hearing of Michael Tigar, each day I passed by [Edward Bennett] Williams & Connolly, when Brendan Sullivan from that firm represented Oliver North before Congress in the Iran-Contra hearings, on my way to my summer clerkship at the then-named Federal Home Loan Bank Board, during the savings and loan crisis that caught up so many banks regulated by the FHLBB. Williams died the next year, at sixty-eight. Perhaps some of Williams's and Tigar's positive vibes emanating from that building had something to do with my becoming a public defender lawyer four years later and sticking to the criminal defense path today. Although I have found no online videos of Michael Tigar, who is a captivating speaker, I did find this fascinating "how can you represent those people?" Mike Wallace interview of Williams in 1957. (See Wallace chain smoking and promoting filterless Philip Morris cigarettes during his Interview program from various other segments the same year; thanks to Boing Boing for the Wallace Interview archives link.) Certainly it did not hurt Michael Tigar's career and 1966 initial financial straits that he graduated first in his class from Berkeley law school and was its law review's chief editor. That makes him no less of an inspiration to me to focus my career -- including arranging pro bono and low bono time -- on important social justice issues, no matter the cause's popularity or lack thereof. Thanks, Michael Tigar, for your inspiration for me to remain on that path. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, April 29, 2008

Jon Katz seeks experienced legal assistant/paralegal.

Underdog readers, please lend me a hand by spreading the news that our law firm has an immediate opening for an experienced litigation legal assistant/paralegal to work with me for criminal and First Amendment defense. Do you know the right candidate to work just a mile from our nation's capital while fighting for truth, justice, and the Constitutional way? Who better to help us find the right applicant than our Underdog readers? Our office sits across the greenest and most beautiful part of downtown Silver Spring, overlooking Woodside Park and its multi-foot fountain. Blocks away not only is the subway, but also the revitalized downtown (although I prefer the old downtown, with its shaver store/museum, the oldies vinyl music store, and the gun shop) with the Silver Theater as its centerpiece. Even Zippy the Pinhead and creator Bill Griffith -- who has a yen for diners -- visited Silver Spring seven years ago to witness the Tastee Diner's movement from Georgia Avenue to Cameron Street just three blocks from us, to make way for the Discovery Channel building. For the drier part of this blog entry, following is our job announcement for this position. I will shower my eternal gratefulness on the person who directs the right candidate our way: EXPERIENCED LEGAL ASSISTANT/PARALEGAL Silver Spring, MD. Highly-rated criminal defense and Constitutional law partner seeks experienced Legal Assistant/Paralegal to be his right-hand person in fighting for victory for challenging misdemeanors and felonies in numerous courthouses, as well as stimulating civil cases defending the Constitution. This is a rare and fitting opportunity for a take-charge, caring team player who will keep things running smoothly when the criminal defense partner is in court and who is open to learning and advising on providing quality service to clients. The right candidate will have a college degree or the equivalent, a minimum of one-year proven success as a private law firm litigation assistant, smarts and common sense. The recipe for success starts with the acronym COLPP: communication, organization, loyalty, promptness and productivity. We look for results and encourage ordinarily not needing substantial overtime, but also require follow-through to assure that deadlines are met or extended. Excellent performance gets handsomely rewarded through highly attractive compensation, a great workplace with a caring staff, full integration into client projects (including courtroom visits) and a comprehensive benefits package (paid parking/Metro; full vacation/sick leave/holiday pay; and health insurance contributions). We highly value our employees and provide a harmonious and hardworking place to thrive. No foreign language skills are needed. Excellent interpersonal skills and intelligence required. PLEASE APPLY NOW: Please apply in strict confidence by sending, only via e-mail, fax or snail mail (1) a one-page text version of your resume, (2) a one-page persuasive cover letter (designating "Litigation Assistant/Paralegal") that addresses how you meet the foregoing hiring criteria, (3) concise salary history, and (4) relevant references, to fax (301) 495-8815 or jon@markskatz.com. Please refrain from e-mail attachments, phone calls, and e-mail inquiries. For more information, visit www.markskatz.com. Jon Katz.

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

Everyone is my teacher, including Justice Scalia on advocacy.

Photo from website of U.S. District Court (W.D. Mi.). The Dalai Lama wisely said that "everyone is my teacher, starting with my enemy." As much as I often have sharp differences with Supreme Court Justice Antonin Scalia's judging -- see here and here, offset here and here -- he apparently has much that is beneficial to teach with co-author Bryan Garner's *Making Your Case: The Art of Persuading Judges*. That is my initial impression with this ABA Journal article on the book. (Thanks to Scott Greenfield for bringing this ABA Journal link to my attention.) Seeing that Justice Scalia is not known to go easy on lawyers -- no matter the plushness of their law firm's carpets nor whether they are the federal solicitor general or his deputy -- one of the book excerpts that interests me the most is about handling difficult judges: "LEARN HOW TO HANDLE A DIFFICULT JUDGE." You will sometimes encounter a judge whose questions are designed not to obtain enlightenment but to demonstrate to colleagues the weakness of your case. During your exchange with such a questioner, be sure to maintain eye contact. Don't display your discomfort by looking down at some imaginary text whence will come your redemption. Look the judge straight in the eye and continue responding in a professional, firm manner. It's always a mistake to evade questions, but especially so when the question comes from a difficult judge. That judge will persist, and you'll end up spending even more time reasoning with someone who will not be persuaded. Confront the question squarely with your best answer, and try to move on. "Sometimes such a questioner, after you have answered as best you can, will continue to press the same point, even though (indeed, because) you are unable to say anything more. You must devise a polite, nonalienating way to end this exchange, or it will consume much of your argument time. After a decent amount of time has been spent on the point, it would be appropriate to say, 'Your Honor, I cannot respond to your objection with anything other than what I have already said.' A similar problem is presented when a judge's questions about one part of your presentation are so numerous that the time remaining for an important but yet-to-be-addressed portion is growing short. You must

try, politely, to regain control of the subject matter. The court will not take it amiss if, after responding to one question, you continue quickly: 'With the court's permission, I would like to turn now to â€¦' "Whatever else you do when confronted by a hostile and unreasonable judge, don't reply in kind. Don't become hostile yourself; don't display anger, annoyance or impatience. Keep telling yourself that you owe it to your client because you do." Even so, lawyers are entitled to take great delight in the wonderful comeuppances to judicial boorishness that some of their more rash predecessors have devised. Our favorite was also a favorite of Justice Robert H. Jackson. A noted barrister, F.E. Smith, had argued at some length in an English court when the judge leaned over the bench and said: 'I have read your case, Mr. Smith, and I am no wiser than I was when I started.' "To which the barrister replied: 'Possibly not, My Lord, but far better informed.' Smith, who later became a famous judge as the Earl of Birkenhead, could reportedly carry off such snappy rejoinders with impunity. We doubt that, but in any case we don't recommend that you emulate him." Exactly. The court presentation is about the lawyer's client, not the lawyer. If the lawyer can't stand the heat in the courtroom, plenty of other lawyering avenues exist that do not require court appearances. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Monday, April 28, 2008

Praised be brave bloggers. Support their right to voice their views.

Image from Library of Congress's website. Robust protection must be provided to free speech worldwide. That is a message I have been emphasizing and re-emphasizing for decades. Bloggers represent one of the biggest perceived dissident threats to repressive governments -- and all government repress people's rights to one degree or another -- by changing the pre-Internet, pre-computer government censorship model that went beyond jailing dissidents to depriving disfavored publishers of newsprint, printing presses, photocopiers, and publishing licenses; jamming radio broadcasts; and monitoring and jamming dissidents' telephone calls. Even seizing a blogger's computer does not prevent the blogger from blogging at an Internet cafe or a friend's computer, because blogging software ordinarily resides on the Internet and not on one's computer. Thanks to the Committee to Protect Bloggers for keeping readers updated on government harassment, arrests and jailings of bloggers. Following are some recent instances of bloggers being repressed by government authorities; thanks to the Committee to Protect Bloggers for informing me about the following Tibet and Egypt stories:

- In the United States, criminal libel laws continue to be alive in several states. On May 1, 2006, I blogged about Thomas Mink who operates The Howling Pig. The Greeley, Colorado, police seized the computer he used to publish The Howling Pig newsletter, during a criminal libel investigation following a University of North Colorado professor's complaint to the police about his portrayal on the Howling Pig website. To this day, a violation of Colorado's criminal libel law is a felony punishable from twelve to eighteen months. Colorado Revised Statutes 18-1.3-401 and 18-13-105. Colorado's criminal libel statute states: "(1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel. (2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living. (3) Criminal libel is a class 6 felony." C.R.S. 18-13-105. Mr. Mink filed a successful lawsuit to retrieve his computer, and the prosecutors opted not to pursue a prosecution. However, the federal Tenth Circuit prevented him from challenging Colorado's criminal libel statute itself, based on a conclusion that he lacked standing to seek prospective relief against the statute and that the matter was moot. *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007), cert. denied sub nom *Knox v. Mink*, 128 S. Ct. 1122 (2008). The Colorado ACLU's webpage discusses the Howling Pig case up through the May 2007 filing of a petition for a rehearing by Mr. Mink. Although a Lexis and Shepard's search leads to the conclusion that the petition for a rehearing was denied, the Tenth Circuit's PACER online docketing system was down when I checked it yesterday.

- Good news came from Saudi Arabia when leading Saudi blogger Fouad al-Farhan was released recently from being detained since last December 10 without formal criminal charges. I am not aware of any explanation from the Saudi government for releasing him. Early this year, Underdog blogged on Mr. al-Farhan's plight. Congratulations to Mr. al-Farhan on his release. Hopefully the Saudi government will loosen its censorious grip on dissent, and hopefully Mr. al-Farhan will continue his blog without watering it down from fear of further government repression. More on this story is here.

- In Tibet, in a cynical April Fools Day 2008 move, authorities arrested blogger, television broadcaster, singer and intellectual Jamyang Kyi. Based in part on the absence of any Google news updates beyond April 18, it appears that she remains detained. Further links to this story are here and here. Thanks to the Committee to Protect Bloggers for reporting on this story.

- In Egypt, in early 2007, Abdel Kareem Nabil Suleiman became the first Internet-based journalist to be imprisoned (having received a four-year sentence) for inciting hatred of Islam and insulting Egyptian President Hosni Mubarak. Thanks to the Committee to Protect Bloggers for its ongoing reporting on this story.

- Here are a few examples of repression of bloggers in Singapore, whose government has focused for decades on refining repression and whose repressive activities -- including overall censorship and clampdowns on political opposition -- are highlighted all the more by the government's welcoming Singapore's status as a major Asian hub for economic activity and air travel transfers:

-- Reporters Without Borders reported on November 24, 2006: "An activist with the Singapore Democratic Party (SDP), Yap Keng Ho, was sent to prison for ten days by a court on 23 November 2006 after he refused to pay a fine of 2,000 dollars for speaking publicly and posting film on his blog (<http://uncleyap-news.blogspot.com/>) of an illegal rally of his party. He was taken immediately to jail after refusing to pay the fine and said he would go on hunger strike to protest at his imprisonment and to expose the regime's corruption."

-- In 2005, seventeen-year-old blogger Gan Huai Shi pled guilty to sedition in a Singapore court for posting anti-Muslim comments on his blog. An anonymous writer on the Singapore Angle blog wrote last year that Gan Huai Shi "was given [] probation of 24 months largely because his racist sentiments was perceived to have stemmed from unfortunate childhood experiences (his baby brother's death)."

-- In 2006, Singapore authorities dropped a prosecution against a blogger who posted a cartoon of Jesus as a zombie. He faced up to three years in prison had he been convicted. In any event, the authorities apparently forced the blogger to remove the image from his blog.

-- In 2005, a Singapore judge sentenced two bloggers to jail (one for a month and the other for a day) for posting racist

comments about ethnic Malays. The Singapore government-controlled Straits Times's article on the case is here.Â Jon Katz.Â Â ADDENDUM: A close friend once described public complacency as one of the greatest threats to civil liberties. Or course, less complacency should be expected even in the United States as American soldiers and countless others get slaughtered in Iraq, the price even of such essential food staples as rice increases dramatically, oil prices continue jumping, key financial markets teeter (including the American mortgage market), unemployment worsens, and the economy continues on a negative path. Â Â With so many of the foregoing problems and more facing so many people, there might be an inclination to avoid knowing about problems that seem more removed. However, we all live on this world together, and must be concerned about each other. On the censorship front, in addition to the foregoing links, I recommend reading Index on Censorship. For general worldwide human rights updates, Amnesty International apparently continues to do some of the most rigorous reporting (see the U.S. Amnesty link here).

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

Friday, April 25, 2008

Keeping the wonder of the child within.

Â Recently, my wife, 2-year-old boy and I went to a local puppet theater production from part of the Jungle Book. The walking puppeteers and production were very good; fortunately I have not yet had to have a Barney moment with my boy, who does not yet know who that annoying person is in a purple dragon suit and, worse, his entourage. Â My son was mesmerized by the stage action at the puppet theater, proclaiming "Wow!" from time to time, and walking a bit to and fro, not particularly obstructing anyone's view while doing so, because of the step-type seats we sat on. Around ten minutes into the performance, the manager comes in and says either to sit down or leave. It reminds me of the cartoon of the elves hammering together toys, where all but one elf hammers in a ra-ta-ta fashion, but the sole elf as happy as can be hammers in a ra-ta ra-ta fashion, until the other elves stare him down and he conforms to their ra-ta-ta fashion of hammering, and he is no longer a happy elf but an unhappy worker drone. Â Instead of telling my boy to sit down, we left, and had a great time at the nearby park that includes a bridge overlooking all sorts of water mysteries, rock formations and plants. Then he rode his bike around the park. Â My boy also loves YouTube films of fish and water mammals, including the one displayed above. I plan to show him this Rube Golberg-esque video that I just found, too. Â If I ever lose touch with the wonder and fearlessness of the child within me, all I need is to spend some time with my son, who can spend over an hour going up and down elevators without getting tired. Â As I have written before, part of being powerful as a trial lawyer is being fearless. Part of becoming fearless is keeping in touch with the wonder of the child within us. Next time someone tells you you're acting like a child, perhaps it should be taken as a compliment. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Thursday, April 24, 2008

Moore no more - Never Moore.

Â Bill of RightsÂ (From public domain.)Â When the U.S. Supreme Court granted cert in VirginiaÂ v. Moore, _ U.S. _ (April 23, 2008), that did not sound good. Yesterday, five years after the Supreme Court unanimously crushed a great Maryland high court probable cause case like a potato chip, Maryland v. Pringle, 540 U.S. 366 (2003), the Supreme Court unanimously reversed Moore. Â A year ago, I described Moore as follows: In Virginia, unlike in some other states, the police are generally prohibited from arresting for any misdemeanor (Va. CodeÂ Â§ 19.2-74), which prevents a search incident to a non-arrestable misdemeanor.Â Moore v. Commonwealth, 272 Va. 717Â (2006). Consequently, a search finding cocaine incident toÂ an arrest forÂ suspended driving was unlawful,Â because suspendedÂ driving is a non-arrestable misdemeanor, unless, as with all misdemeanors, the defendant refuses to give his or her name and address together with a promise to return to court.Â Consequently, it was necessary to suppressÂ theÂ cocaine seized incident to the decision to arrestÂ the defendantÂ for driving with a suspended license. Cross v. Com., _ Va. App. _ (April 3, 2007).Â Â My initial review of the U.S. Supreme Court's MooreÂ decision raises the following thoughts: Â The Supreme Court will not give any protection under the United States Constitution against the search that Moore suffered. The Supreme Court found nothing in Virginia state law to permit a different outcome. If the Virginia courts wish to pronounce that their state laws do allow such extra protections, it is for said courts to decide and for the federal courts not to intervene. I doubt the Virginia courts will do anything to disturb the Supreme Court's Moore decision, and I doubt that Virginia's legislators will do anything, either. Â MooreÂ leaves states free to provide more protections for individual liberties in their statutes and state constitutions than the protection provided in the federal Constitution. For instance, if Moore involved a search on a purely non-jailable matter and if Virginia law did not provide for arresting a person on a non-jailable matter (I think that Virginia law generally does not permit such arrests, except that Virginia cops routinely arrest for charges of public intoxication), I think Moore would have been decided to the opposite of today's result. Â The Virginia Supreme Courtâ€™s Moore opinion was all the more valuable as an offset to the much harsher overall criminal justice system found in Virginia versus in Maryland. Will Virginia change its laws so that the benefits of the Virginia Supreme Courtâ€™s Moore opinion return? Unlikely, but I hope to be proven wrong. Fortunately, offsetting the sad Moore news are the string of Constitution-friendly opinions last week from Virginiaâ€™s Supreme Court.Â Nothing good comes of SCOTUSâ€™s Moore decision, except perhaps for the following oral argument exchange between Justice Scalia and Virginiaâ€™s deputy solicitor general: Â Thanks to Gideon and SCOTUS Blog for giving a rundown on the January 14 oral arguments (see transcript)Â in this Moore case, and to SCOTUS Blog for having provided a running update on the case. Â Thanks to Gideon for drawing attention to this part of the argument: Â JUSTICE SCALIA: So any Federal employee can go crashing around conducting searches and seizures?Â MR. McCULLOUGH [Virginia Dep. Solicitor General]: So long --Â JUSTICE SCALIA: So long as he has probable cause?Â MR. McCULLOUGH: That's correct.Â JUSTICE SCALIA: That's fantastic.Â (Laughter.)Â JUSTICE SCALIA: Do you really think that?Â 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.Â JUSTICE SCALIA: Or that you are an administrative law judge at the, you know, Bureau of Customs? It doesn't matter?Â MR. McCULLOUGH: I think that's right. That if you have -- if the State --Â JUSTICE SCALIA: What about a janitor? You're a janitor, a federally employed janitor.Â MR. McCULLOUGH: Your Honor --Â JUSTICE SCALIA: His neighbor is growingÂ marijuana, and he's just as offended as a Supreme Court Justice would be. Can he conduct a search?Â MR. McCULLOUGH: I think if he's doing it on behalf of the State, the answer is yes.Â JUSTICE SCALIA: Wow. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, April 23, 2008

Have you been inundated with "undeliverable" emails?

Computer hard drive. (Image from Pacific Northwest Laboratory's website). Starting this past Monday night and running into yesterday morning, I got flooded with a few hundred e-mails -- many from Russia and elsewhere overseas, and many with attachments that I did not open -- proclaiming that e-mails I never sent were undeliverable. I tried setting my webhost's filtering software to reject emails with such titles as undeliverable, postmaster and daemon. Whether or not it was coincidental, the flood reduced to a steady stream and then a trickle. Did any of you experience the same thing? If so, how did you resolve the problem? A colleague who uses the same sitehost as ours told me it happened to him, and that his spam filtering software had to play catch-up to start filtering out such spam e-mail. (For some light diversion, see Monty Python's Spam sketch that gave birth to computer spamology.) Thanks to our sitehost for sending me the following message describing this flood of spam: "I just added an SPF record http://en.wikipedia.org/wiki/Sender_Policy_Framework. It should help." This is a byproduct of spammers called backscattering <http://en.wikipedia.org/wiki/Backscatter>." Spam is a thorny cost of my insistence that spamming be strongly protected by the First Amendment. Jon Katz.

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

When a jailer suffers the justice system's injustices / How prepared should a prosecutor be?

Bill of Rights (From public domain.) When I started practicing criminal defense, I spoke with a very experienced criminal defense lawyer who told me that he had never prosecuted, but expected he would love it if he had such a job; this was a variation on a theme of some former prosecutors who recommended that I precede my criminal defense career by prosecuting, which I refused to do. I take it that only finances got in his way of such work. A former prosecutor, asked what such work was like, said it was one of the easiest jobs he ever had. A private practice lawyer who includes criminal defense work four business days weekly prosecutes misdemeanors once a week for a nearby city; he recently described the work mainly as preparing the cases on the court day, letting the cops issue witness subpoenas, and asking "what happened next?" at trials as a substitute for doing pretrial date case preparation. He seems to enjoy his prosecuting work very much. At first blush, a criminal defense lawyer might want a prosecutor who sees his or her job as easy; if the case will go to trial, the less prepared the prosecutor is for trial, the better it might be for the defendant (unless the prosecutor waits until the trial date to successfully seek a trial date continuance to cover for the unpreparedness). However, I want prosecutors to put in sweat equity to screen cases in advance to determine which cases and counts should be dismissed or reduced, or offered pretrial diversion or an inactivation disposition. I want prosecutors to carefully scrutinize their cases and witnesses to discard the dishonest witnesses and false evidence, and to insist that witnesses stick to the rules of the court, including answering the question asked and only the question asked, rather than trying to do an end-run around the rules of evidence and procedure. I want prosecutors to put in the time necessary to satisfy the letter and spirit of the discovery disclosure rules and the Brady/exculpatory evidence rule, and to return my phone calls seeking case information and seeking to reach evidentiary stipulations for trial, consents to motions to resolve trial calendaring conflicts, and other relief for my clients. I want prosecutors to understand their cases well enough so that I may engage in meaningful settlement negotiations when the stakes are extremely high for my client to go to trial, including when a client is likely to get convicted for a deportable property destruction or unlawful entry case where we might avoid that if the prosecutor will let my client only plead guilty to trespass. Walk into any misdemeanor District Court in highly populated counties around the Washington, D.C., Beltway and beyond, and you often will see packed courtrooms with prosecutors handling dozens of cases for the day in comparison to a private defense lawyer's one or two cases. Something has to give for the prosecutor and judges to get through the day's docket, and one of those things might be an insufficient review of a particular case, unless the prosecutor has done the case review before the court date. On the other hand, the more packed the courtroom, the more favorable a negotiation the prosecutor might offer the defendant, depending of course on the "office policy" of the particular prosecutor's office and the individual prosecutor's own approach within "office policy" and to deviate from time-to-time from office policy. Of course, no matter how much time prosecutors put into cases -- and plenty of prosecutors work substantial hours, despite the some or many who do not -- many will still move forward with cases that should have been dismissed. In Fairfax County, Virginia, Rose Merchant should never have been arrested and prosecuted for falsely impersonating a law enforcement officer, but she was. She should not have had to go through the financial loss and emotional angst of hiring a lawyer, awaiting trial, and being let go from her job when still presumed innocent pretrial, but all that happened. The prosecutor should not have gone forward to trial rather than dismissing Ms. Merchant's case by the trial date, but he did. The judge should have put the brakes to all this nonsense, AND HE DID! Last Thursday, Fairfax, Virginia, District Court Judge Ian M. O'Flaherty declared after hearing evidence from the prosecutor, and before the

prosecution rested: "Ma'am, there's no case here.. This case is dismissed." Ms. Merchant's disposition sheet is here. Â Rose Merchant, the acquitted defendant, was a Prince George's County, Maryland, corrections official before her Fairfax County arrest last February. What did her employer do as a result? Prince George's County fired her at once. What did Ms. Merchant do to deserve being fired for her arrest? Nothing. All she did, according to the Washington Post, was to inform police investigating a report of a car that allegedly ran another car off the road that she worked in corrections, in the context of asking to be spoken to with more courtesy than the police were giving her. How often do police talk disrespectfully even to those not disrespecting the police? All too often. Â Fortunately, Ms. Merchant's encounter with the cops was caught on video and audiotape, to counter any exaggerations by the police about what she may have done to violate any laws, which she did not. By the way, many police often tell inaccuracies from the witness stand not intending to lie, but not intending to reveal, either, any problems of recall or of digesting the events in the first place. Once a cop writes something in his or her report, it is a monumental challenge for the cop to deviate from the report, even when the cop is unsure after all about the report's accuracy; it is the dark side of human nature at work. Â Ms. Merchant's lawyer says she wants her job back with Prince George's County.Â Prince George's County is where I started my criminal defense career; I anticipate that she will be re-hired after her acquittal. If Ms. Merchant is re-hired, hopefully this injustice done to her in Fairfax will benefit Prince George's inmates to have a jail official who understands police and prosecutorial abuse firsthand. When an inmate is unfairly charged with a jail infraction or makes a plausible claim of mistreatment in the jail, hopefully she will listen, andÂ step in for the better. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, April 22, 2008

Do you have any wisdom to share with me?

Some of my greatest teachers have been within arms reach. The key is to know who are those teachers, to be open to new teachings, to have an idea of what teachings might be vital to receive and learn, and to welcome their teachings if they will share them. A great teacher might be the proverbial Yoda: a seemingly obscure character, possibly eccentric (if not downright annoying as was Yoda when he rifled through Luke Skywalker's pack), not the vision at first of a polished human giant, and not seeking any fame nor fortune. Sometimes the best teachings for practicing law and life come from seeking out teachers and their teachings -- sometimes through deep seeking -- rather than waiting for them to come to us and rather than shelling out a fee to hear them speak at a seminar. Ultimately, of course, everyone is my teacher. One of my most essential teachers is Ram Dass. Certainly he already was wildly celebrated when I still was in my single digits. However, not until after finishing law school did I get much sense of him. At a local Vegetarian Society lunch, a very upbeat fellow vegetarian brought up Ram Dass and talked about how Ram Dass once departed from his guru's home base to take care of some business in the city, ate a vegetarian feast, felt some guilt over topping off his luxurious fill with a cookie, and returned to his guru (Neem Karoli Baba) who asked through some apparent sixth sense how Ram Dass enjoyed the cookie. Twelve years later, in 2003, I finally bothered to read Ram Dass's *Be Here Now* in full, as a prelude to experiencing him at an appearance in Washington, D.C. The evening was electric, and when I finally met Ram Dass, ever so briefly, after patiently waiting in line after his talk, his spirit, inspiration, and teachings hit all the more home. Living many years with the aftermath of a severe stroke, he celebrates all the more the living of life without attachment to one's body. In *Still Here*, written subsequent to his stroke, Ram Dass even includes discussion of turning one's last breaths of life into a positive; Gandhi practiced the same, and the Dalai Lama writes of the same. I lost touch with the man who brought Ram Dass front and center to me until seeing his business card on the bulletin board of the local vegan products store. Now he works in real estate. I called him, and found a man as upbeat and optimistic as ever, marrying capitalism with spirituality and compassion. Not long after learning about Ram Dass, I met my now-vital mentor Jun Yasuda, who fasted at Lafayette Park -- just two blocks from my law firm at the time -- fasting on green tea for a month for peace during Gulf War I. She was at once soft-spoken and driven to spread the message and spirit of peace. Take your pick of my blog entries about the profound influence Jun-san continues having on me, and on helping me steer a more peaceful path as I battle in and out of court. Because becoming a better lawyer calls first for becoming a better person, many of my vital trial teachers are not lawyers at all. When it comes to lawyer teachers, though, as I have said many times before, Steve Rench is my most valued trial law teacher, whose name is widely known among criminal defense lawyers, and who, through his own non-flamboyant, non-charismatic demeanor shows lawyers that a great trial lawyer can be taught, rather than just be born. Most recently, just a few weeks ago during a trial lunch break in Washington, D.C., I went to investigate another client's case. As I walked past Chinatown, I saw a wise-looking bearded man wheeling some of his belongings in a cart that city dwellers use to carry their purchases from nearby groceries to their apartments. I at first stereotyped him as possibly homeless, carrying his belongings place to place rather than leaving them at home; how disenchanting that I still do so much stereotyping. Then I saw his face and eyes, and the cart disappeared. I felt compelled to ask him what I do not believe I ever have asked a new person on the street: "Do you have some wisdom to share with me?" Apparently unsurprised at my question, he asked what I was looking for. I told him that I already try to lead a t'ai chi life combined with the peaceful influences of Nipponzan Myohoji Buddhism (while not being a Buddhist myself), but had a feeling that he had more than that to share with me. The man told me he would invite me to a meeting of Science of Spirituality in Takoma Park, which borders on Washington, D.C., and the city where our law firm operates, and is a place where San Francisco hippies will feel about the most comfortable in the Washington area. I at first started putting my guard up, wondering if I would learn that he was speaking of a distasteful cult (of course, the Trial Lawyers College, which I attended, has key hallmarks of a cult). Then again, I had asked if he had any wisdom to share with me, and he had. I never heard back from the man, and it might take some doing for me to find where I wrote his name; perhaps he misplaced my contact information, too. I have not looked into Science of Spirituality other than to browse its website, which includes promotion of vegetarianism and emphasis that leaving one's religious faith is unnecessary for joining the group (then, again, sometimes proselytizing promises are prevarications). Of course, one can learn much good from a person without subscribing to the person's cults or spiritual paths. One of my closest friends who also is a vital teacher is an example of that. In any event, the key is to find our essential teachers, including those who are still on earth, those who have already passed away and left their teachings in written or oral form or through their influence on others, and, most importantly, the teacher within each of ourselves. Do you have any wisdom to share with me? Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, April 21. 2008

In praise of Ernie Lewis.

Photo from website of U.S. District Court (W.D. Mi.).[^] Every criminal defense lawyer should attend the National Criminal Defense College's Trial Practice Institute, known in shorthand as Macon for the[^] program's location. At least when I attended in 1994, competition for each Macon slot was very high[^] among state-level public defender lawyers. The program sought diversity among private practitioners (from whom applications were much fewer than from public defenders), state-level public defenders, federal public defenders, twelve experience levels, and gender. For those not accepted into Macon the first time, I recommend to try, try again, and to attend NCDC's long weekend programs in the interim. Some NCDC applicants get admitted off the waitlist, and it helps for the waitlisted applicant to tell the NCDC if s/he can have the applicant's calendar cleared and a plane ticket in hand if a spot comes open [^] When I attended Macon, my first small-group instructor was Ernie Lewis, covering the initial client interview, where we had separate professional actors playing the roles of a rape defendant, two murder defendants, and a bank robbery defendant, Ernie had the gift of being at once gentle, caring, actively listening and communicating, and persistent for lawyers to "get it right". [^] At Macon, each attendee was assigned one of the foregoing four cases, and worked on the case for all stages of trial preparation. My client was a rape defendant who had a lot of trouble understanding why he was even locked up in jail awaiting trial. With me, he repeated several times his fears about the complainant getting him convicted. The other lawyer defending him at Macon was a woman, and numerous times he told her how pretty she was. I made the .mistake of focusing my client at the outset on preparing him for his upcoming bond hearing rather than listening and responding closely enough to and[^] empathizing with his immediate fears about the complaining witness. I tried it a second time, and found that it would take lengthy and numerous conversations with him to build enough of his trust, where the seminar did not enable enough time to do that. Now back in private practice for nearly a dozen years, controlling my number of clients assists me better in giving clients the time needed to sufficiently and effectively hear and communicate with them, which is a topic that I repeatedly discuss. [^] Macon has a mix of highly charismatic, comical, riveting, and caring instructors, with all of them being highly skilled and experienced. Ernie Lewis's biggest gift that he shares with everyone is his caring and intuitive approach to teaching and sharing. He is the real McCoy; he does not try to act charismatic or hilarious, and is all the more powerful for being his real self. [^] Now, reports Arbitrary and Capricious -- who also had Ernie as an NCDC instructor --[^] Ernie is leaving his post this September 1 as Kentucky's chief public defender. Recently, Ernie said in a news release: [^] "While I have been able to achieve my most significant goals, I remain deeply concerned by the problems that remain.' He said defender caseloads are grossly in excess of national standards, salaries increases are needed for new lawyers, a loan assistance program is needed for public defenders in order to retain them after their initial training period and the department needs a social worker for each office in order to find treatment alternatives for clients. He said next year[^]€™s budget will require the department to cut back on representation of thousands of cases for poor Kentuckians. 'I am profoundly disappointed with the failure of the 2008 General Assembly to fund a constitutionally adequate public defender system,'[^] Lewis said. 'While we have made much progress over the last 12 years, Kentucky continues to fund its indigent defense system at the bottom of the nation.'"[^] Thanks, Ernie, for keeping the fire going in your belly, in a most t'ai chi way.[^] Thank you for sharing that fire with me. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, April 20, 2008

Underdog is two years old / Happy 420

Today, Underdog is two years old. We launched on 4/20/06 with this tribute to 420. Since our 2006 launching, Underdog has blogged every weekday, except for holidays and a few vacation days (sometimes I blog a few articles in advance of vacation days, and pre-program the articles to upload each day I am away). My law partner, Jay Marks, gets in on the act sometimes, and I look forward to more postings from Jay. Our first anniversary blog entry is here. Why do I blog? Through blogging, I keep a valuable diary that helps keep my written and oral pen sharpened, my self-awareness deepened, and my bully pulpit strong. Also, it can be more important to touch one person in the audience in a valuable way than for thousands to receive the message in a much less profound way. My motivation for blogging goes far beyond having a web presence for our law firm, to a thirst to express critical and undiluted messages about justice, and to increase the number of people who will assert their rights with the police so as never to need our criminal defense services in the first place. So many civil liberties need to be won and re-won worldwide. One of the most effective ways for a non-full-time writer or television/radio personality to get out the pro-civil liberties message is through blogging. Imagine, just two decades ago, before Gorbachev took over in the Soviet Union followed by the fall of the Berlin Wall, samizdat dissenting publications in the Soviet Union often got distributed by recipients (risking prosecution) retyping and distributing the publications, when printing presses and photocopiers were scarce, and strictly controlled by the iron-fisted government. Today, except in such places as North Korea, which even bans cellphones, dissenting writings can travel to a much wider audience with lightning speed over the Internet from nearly any country. Consider the high price that such literary greats as Pramoedya Ananta Toer and Vaclav Havel paid for writing and distributing their writings under severely oppressive regimes. When I first visited Indonesia in 1988, the brutal government apparently only kept Pramoedya Ananta Toer -- probably the nation's most famous writer and its greatest potential engine to advance the national and still rather newborn Bahasa Indonesia language to unite a nation that never had been much united before independence -- out of prison (after being in and out of prisons many times before, under the Suharto and Sukarno regimes and by colonial occupiers before that) and away from government executioners and assassins in order to prevent a foreign aid and trade stoppage had Indonesia done otherwise. His books were banned in Indonesia at the time, although some booksellers clandestinely sold them under risk of imprisonment. Speaking on tour when I met him in 1999, Pramoedya was deeply emotional when he said that the Indonesian government's efforts to ban his books was like trying to cut off his life. By that time, and to this day, Pramoedya's writings were much more freely available in Indonesia than when I first visited. Pramoedya went to great lengths to keep his written and oral voice going. For instance, he started his Buru tetralogy orally through a chain of his fellow Buru island prisoners, at the times he was denied pen and paper, only to complete the multi-level mosaic story in book form years later. Sometimes he was able to smuggle out notes "written under adverse conditions". Subsequent to the Prague Spring, before Gorbachev, Vaclav Havel was repeatedly hounded and oppressed for his writings. Index on Censorship once ran an article on Havel showing him smiling and carrying a sack of beer ingredients weighing down his body -- but not his spirit -- at the brewery where he worked. Pramoedya and Havel paid high prices to keep their writing voices heard. I pay a small price if any. Perhaps the only price I pay is to alienate potential clients and others both by my plain messages and often very direct words, but sometimes people come around towards some of my ways of thinking, even if years later, and even if my words only have a small influence on the turnabout. While I understand the benefit of speaking in a diplomatic manner to open listeners' ears, I do that enough in court, and tend to be more direct and unvarnished in our blog, but perhaps not as unvarnished as my brother lawyer Marc Randazza whose blog is among the small handful that I read almost daily. Just as musicians benefit from playing before live audiences and from their feedback, I benefit from blogging before our Underdog audience and from receiving feedback online and on the street. Please keep your feedback coming. Jon Katz. ADDENDUM I - HAPPY 420 Here's our first blog entry: April 20, 2006 Supporting marijuana legalization on 4/20 and every day. In celebration of the annual 4/20 marijuana legalization events, partner Jon Katz appeared on WOXM 98.1 FM (Ocean City, Maryland) to promote the legalization of marijuana for medical, personal, and industrial use. The same evening, Jon spoke on the criminal defense of drug cases at the invitation of the University of Maryland chapter of the National Organization for the Reform of Marijuana Laws, after the screening of Busted. By Jon Katz. ADDENDUM II - HAPPY BIRTHDAY, JUSTICE STEVENS Today, Supreme Court Justice John Paul Stevens turns 88 years old. Justice Stevens is often, but certainly not always, one of the more reliable justices for giving some real offset to at least five of the justices who are more dangerous to civil liberties, those five being Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy.

Posted by Jon Katz in Drugs at 00:00

Friday, April 18, 2008

Some of this week's critical appellate opinions.

Â Â Bill of RightsÂ (From public domain.)Â In addition to my April 17 review of the Supreme Court'sÂ Baze lethal injection case, here is a brief overview of some additional critical criminal appellate decisions from thisÂ week: Â - In *Burgess v. U.S.*, ___ U.S. ___ (April 16, 2008), writing for a unanimous court, Justice Ginsburg affirmatively answered the following question presented: "The question in this case is whether a state drug offense classified as a misdemeanor, but punishable by more than one yearâ€™s imprisonment, is a 'felony drug offense' as that term is used in Â§841(b)(1)(A)." Â - In *Begay v. U.S.* ___ U.S. ___ (April 16, 2008), the United States Supreme Court ruled that "New Mexicoâ€™s crime of 'driving under the influence' falls outside the scope of the Armed Career Criminal Actâ€™s clause (ii) 'violent felony' definition." Â - In *Maryland v. Baby*, ___ Md. ___ (April 16, 2008), Maryland's highest court determined that "post-penetration withdrawal of consent negates initial consent for the purposes of sexual offense crimes and, when coupled with the other elements, may constitute the crime of rape. We also hold, however, that the trial court erred in failing to sufficiently address the juryâ€™s questions on post-penetration withdrawal of consent, and such error was not harmless beyond a reasonable doubt." Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, April 17, 2008

A vote for McCain will further shred civil liberties from the federal courts.

Although I am not fond of Barack Obama and am less fond of Hillary Clinton, I absolutely oppose John McCain. For starters, he will keep the Iraq war going and will disrespect civil liberties more than Obama or Clinton will do. For starters, McCain undoubtedly will tap into the bucket of Bush I and Bush II appointees, who in general are more hostile to civil liberties than those who served under Bill Clinton and Jimmy Carter. Additionally, McCain proudly proclaims he is a conservative, which says more against than for civil liberties. Presidents leave a particularly long legacy on civil liberties through their federal judicial appointments, particularly by their appointments to the Supreme Court. All federal judges are installed for life, unless they are impeached or retire. For the latest example of the severe damage done by presidential federal judicial appointees long after the president leaves office, take a look at yesterday's 7-2 Supreme Court vote in *Baze v. Rees*, ___ U.S. __ (April 16, 2008) rejecting the lethal injection death penalty challenge that arose from the risks that the tri-part lethal injection cocktail is unconstitutionally cruel and unusual for the unseen excruciatingly lengthy pain that it can cause. Who voted in the minority? Only Bill Clinton-appointed Ruth Bader Ginsburg and Bush I-appointed David Souter. The remaining justices, who rejected this death penalty challenge, were all appointed by Republicans, except for Clinton-appointed Stephen Breyer, who tends to support giving substantial regulatory discretion (here, including choosing the method of execution) in the hands of the legislative and executive branches of the government. Although the sky has not yet completely fallen on civil liberties after eight years of reactionary Regan followed by four years of Bush I, the intervening eight years of the Bill Clinton administration (whose judicial appointments were not sufficiently protective of civil liberties, either) will not be enough to prevent severe and accelerated federal judicial damage to the Constitution if McCain becomes president. McCain proudly pronounces his conservative bona fides, which will inevitably lead to his appointing more federal judges hostile to civil liberties than if Obama or Hillary Clinton make the appointments. Certainly, the Senate must approve federal judicial appointments, but even during the Reagan years, the Borking of the Bork nomination took so much energy by his opponents that the Reagan administration was able to regroup with its remaining federal judicial appointments; no Senate vote has kept any subsequent Supreme Court nominee off the bench. Aside from the repeated vacancies at the federal District and Circuit Court level, the next president likely will appoint at least one Supreme Court justice, if not more. Justice John Paul Stevens will be eighty-eight next week and will be nearly ninety-three when the next president leaves office; it is very doubtful that Stevens will stay on the bench as long as that. Ford-appointed Stevens is often, but certainly not always, one of the more reliable justices for giving some real offset to at least five of the justices who are more dangerous to civil liberties, those five being Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy. In any event, even if Obama and Clinton are averting campaign focuses on civil liberties in order to try to be more "electable" against McCain, such downplaying only leaves a bad taste in my mouth and a continuing cynicism about most political candidates and elected officials. Jon Katz ADDENDUM The justices essentially treated this Baze case as being about the Constitutionality of current lethal injection methods, and not the Constitutionality of the death penalty itself. However, it appears that Justice Stevens is the only sitting justice who might be ready to rule the death penalty itself to be unconstitutional. For instance, in his concurring opinion, Justice Stevens proclaims: "I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U. S., at 312 (White, J., concurring). In her dissenting opinion in *Baze*, joined by Justice Souter, at the outset Justice Ginsburg demonstrates how seriously mistaken are the remaining justices who upheld Kentucky's lethal injection approach: "Kentucky's three-drug lethal injection protocol, pancuronium bromide and potassium chloride, would cause a conscious inmate to suffer excruciating pain. Pancuronium bromide paralyzes the lung muscles and results in slow asphyxiation. App. 435, 437, 625. Potassium chloride causes burning and intense pain as it circulates throughout the body. *Id.*, at 348, 427, 444, 600, 626. Use of pancuronium bromide and potassium chloride on a conscious inmate, the plurality recognizes, would be constitutionally unacceptable." Ante, at 14. The constitutionality of Kentucky's protocol therefore turns on whether inmates are adequately anesthetized by the first drug in the protocol, sodium thiopental. Kentucky's system is constitutional, the plurality states, because petitioners have not shown that the risk of an inadequate dose of the first drug is substantial." Ante, at 15. I would not dispose of the case so swiftly given the character of the risk at stake. Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and 2 *BAZE v. REES GINSBURG, J.*, dissenting third drugs. I would vacate and remand with instructions to consider whether Kentucky's omission of those safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain." Further increasing the risk of excruciating pain from lethal injection is the widespread use of people insufficiently trained in medicine to carry out the lethal injections. Justice Alito's concurring opinion in *Baze* demonstrates the widespread rejection among medical associations of the involvement of medical professionals not only in carrying out

lethal injections, but even in seeking to reduce the pain caused by lethal injection. Â In any event, at least five justices, including the dissent,Â made clear that Baze's upholding of the Kentucky protocol does not prevent Constitutional challenges to other states' lethal injection protocols, even though Baze rejects the Constitutional challenge to Kentucky's lethal injection protocol.

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, April 16, 2008

Michael Maggio lives on.

Â On February 10, I wrote about the passing of Michael Maggio, who was one of the people who inspired me to a legal career focusing on social justice. Â Above is a YouTube picture montage of Michael, created by his nephew. ItÂ provides someÂ more of Michael's essence. Jon Katz

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

Tuesday, April 15. 2008

Palfrey. Spitzer. Enough already!

Photo from website of U.S. District Court (W.D. Mi.).
Consenting adults should be able to engage in private sexual conduct without fear of prosecution, including when money exchanges hands for such activity, also known as prostitution. The United States Supreme Court has already recognized the broad hands-off approach the government must take with private consensual adult sexual activity. *Lawrence v. Texas*, 539 U.S. 558 (2003). It is time for the government to back off from and legalize prostitution, not only because that is a logical follow-up to *Lawrence*, but also because the more the government interferes with prostitution, the more the government also will interfere with other activities that are popular with a more widespread part of the population than is prostitution. Except for some enlightened counties in Nevada, prostitution remains criminalized in the United States. Thus we see the ongoing criminal investigation relating to Eliot Spitzer's paid sexual preferences, and the current Deborah Palfrey prosecution in Washington, D.C., federal court. Ms. Palfrey's case is now being deliberated by the jury. Noteworthy are some of the sage comments by presiding Judge James Robertson during the trial, as reported by the Washington Post's Dana Millbank, including: - After the prosecutor asked one of many immunized witness -- one of Ms. Palfrey's former employees -- whether she had sexual intercourse with clients, the prosecutor "pressed on with more humiliating questions until the judge cut him off. 'That's enough,' Robertson said. Minutes later, the dazed woman was helped out of the room." - "You want to make public the names of all the employees?" Robertson asked prosecutor Catherine Connelly. 'Is there no limit to the collateral damage?' Evidently not. [prosecutor] Connelly said the names had to be released. 'Unfortunately.' - "An IRS agent [on April 10] showed the jury photos of [Palfrey's] home -- a mop and cornflakes box in evidence -- and recited Palfrey's sewer bill, electricity payment, car maintenance and check to Office Depot. One juror's eyes closed, and her head dropped. Others yawned. 'I'm not sure why the jury needs to see any of this,' the judge pointed out. 'Waste of time.'" This whole Palfrey trial is a waste of time, and a waste of justice, as are all prostitution prosecutions. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, April 14, 2008

What are your favorite cross examination publications?

Photo from website of U.S. District Court (W.D. Mi.). On a trial lawyers' listserv recently, a member passed on a law student's request for publications for learning effective cross examination in criminal cases. While nothing replaces learning cross examination through live training and in the courtroom, some high quality publications do exist, including Larry Pozner's and Roger Dodd's presentations, videos, and cross examination book. A particularly detailed and beneficial reply to the inquiry for cross examination materials came from Tom Hickman. Tom attended the Trial Lawyers College a few years after I did. He is a former elected chief prosecutor in Carroll County, Maryland, who subsequently went into private practice, and later went on to prosecute international criminal cases in Kosovo, and now is in Kabul, apparently acting as an anti-corruption advisor to the U.S. Attorney General's Office Assistance Section. Tom kindly authorized me to post his reply here about quality cross examination materials: I would stress to the student to try to win every phase of a trial and suggest that there are 4 levels of materials on cross: Video--the best Winning in the Cross-Examination --Spence Mastering the Art of Cross Examination --demonstrations by 11 lawyers 11 kinds of witnesses, narrated by Irving Younger Mastering the Art of Modern Trial Advocacy --Mike Tigar From time to time the New Yorkers and the Californians produce some great stuff and the student should call The New York Bar, The New York State Trial Lawyers Assoc, the Consumer Attorneys of California, the California Bar Assoc Transcripts--second best Terry Nichols (Oklahoma Bombing) is all on internet Irving v. Lipstadt (Holocaust denier) is all on internet State v. Bruno Hauptmann (Lindbergh Kidnapping) is all on internet Lexis --Art of Advocacy Series Cross of Medical Experts, Cross of Non-Medical Experts--many fine lawyers like Luvera and examples Books about Cross --third best Old books found in bookshops, sometimes internet booksellers: Classics of the Courtroom series such as Thomas Murphy's Cross of Dr Carl Binger in the Alger Hiss Case includes transcript Davis Wilentz Cross of Bruno Hauptmann in the Lindbergh Case includes transcript Edward Bennett Williams Cross of Jake Jacobsen in the Connolly Case includes transcript Expert Witness Direct and Cross Examination by Mulligan is super, has F. Lee Baileys crosses in the Dr Carl Coppelino murder cases Books about trial lawyers that discuss Cross--last Examining Witnesses by Tigar Once Upon A Time in Los Angeles, the Life of Earl Rogers, by Trope Anatomy of Cross Examination by Davies Handbook of Cross Examination The Mosaic Art by Ianuzzi Thanks, Tom, for this list. Underdog readers: What are your favorite cross examination materials that are not listed above? Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Sunday, April 13, 2008

Cops and governments: Don't hand over torch security to China-supplied security.

Too often, too many American police run roughshod over people's Constitutional rights. Why, then, did the San Francisco government permit a group of strongarm, China-trained, China-selected men (did sexism permeate the selection process?) to encircle and enforce the non-human Olympic flame's protection during the San Francisco leg of the Olympics torch relay? That just pours acid into the wounds already inflicted on civil liberties by the United States federal, state and local governments. The Sydney Morning Herald reports the blue sports-suited "torch guards" to be "elite members of the paramilitary units that crushed dissent in Tibet, a Shanghai newspaper has disclosed." Australia's The Age newspaper asserts that "the Shanghai-based Labour Daily newspaper, quoting Zhao Si, head of the elite unit, said [the torch guards] were picked in 2007 from the People's Armed Police, China's 660,000-strong paramilitary force that mostly deals with internal security. Thousands of PAP forces are still deployed throughout Tibet and Tibetan regions of western China since monk-led protests on March 10 degenerated into a violent riot in Lhasa on March 14. Pictures of the guards at a swearing-in ceremony, after undergoing special physical, etiquette and language training at the PAP training academy in Beijing, show their official name as 'The Protection Team for the Holy Flame of the 29th Olympic Games.'" Is that true? A holy flame from an atheistic government? Torch bearer Konnie Huq said the "torch guards" in Paris "shouted orders at her and pushed her arm to make her lift the torch higher." In the above-displayed BBC segment on YouTube, Ms. Huq says the "torch guards" also told her when to stop running. Ms. Huq further said that the torch guards "were very robotic, very full on, and actually I noticed them having skirmishes with our own police and the Olympic authorities before our leg of the relay." You can see the torch guards' hands-on control in Paris in the above-displayed BBC report and in this French television channel 2 report. As the Washington Post reports, these "torch guards" from China even pushed around Sebastian Coe, who chairs the Olympic organizing committee for 2012. If the torch guards did that to an Olympics insider, imagine what they have done and will try to do with dissenters. What a public relations blunder by the San Francisco authorities to permit the torch guard's participation in the relay there. San Francisco's government and police leaders only needed to check Google news to see that these torch guards from China -- where human rights have little importance to the government -- had their own decidedly non-civil-liberties-oriented, China-directed agenda; most of the foregoing newslinks already were easily found online before the April 11 San Francisco torch relay. If such a local government as San Francisco's -- which presumably is enlightened in many ways about civil liberties -- can make such a blunder, imagine the extensive snub to civil liberties that occurs daily in smaller localities that have limited interest and limited resources and funds to protect civil liberties. Fortunately, Japan and Australia will limit the "torch guards," where San Francisco did not. Japan's Security Minister opposes letting the torch guards be involved. Australian Prime Minister Kevin Rudd made a more watered-down pronouncement -- but stronger than San Francisco's actions -- that the torch guards generally will stay on a bus, but will be permitted to assist with such tasks as passing the torch (how, and what will be their other permitted tasks?) Kudos to Majora Carter for her simple yet powerful act of pulling and waving a Tibetan flag from her sleeve while carrying the torch during the San Francisco relay. Watch this YouTube video, where Ms. Carter seems to be describing China's torch guards as interfering with her flag waving. Watch further as a cop pushes her into the observing crowd. Did the San Francisco cops push her out by the decision of China's torch guards? (See Ms. Carter's pre-relay statement about the motivation for her Tibetan flag-waving action.) Many opponents of the Olympics torch protests and proposed boycott of all or part of the Olympics, urge that the Olympics should be a non-political event. Tell that to Adolph Hitler, who not only extremely politicized the 1936 Berlin summer Olympics -- including ceremonies highlighting blonde, blue-eyed Germans (part of Hitler's ideal "master race") -- but who directly or through his government also apparently propped up the torch relay and the Olympics five-ring symbol where they previously had little or no significance to the modern Olympics. Fortunately, China's human rights situation is not as bad as Nazi Germany's. Unfortunately, China continually tries to have good enough relations with other nations in order, for instance, to keep up its extremely profitable international trade, without, in return, showing much in progress with its human rights situation. Certainly, the Chinese government has made the Olympics most political. China would love nothing more than to whitewash its brutal current human rights record and past human rights violations. As I said on March 17, about the Olympics in China, those strongly opposed to China's miserable human rights situation need not contribute to China's attempted public relations coup through its Olympics; all that is needed is to turn off the Olympics television coverage and to not attend the stadium events. Jon Katz

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

Friday, April 11. 2008

When a death penalty defendant smears feces on his face, in front of the jury.

Â Photo from website of U.S. District Court (W.D. Mi.).Â The death penalty is a barbaric system thinly masquerading in the United States as something not barbaric. Â A legitimate debate among the most skilled of criminal defense lawyers has taken place before -- and probably still continues and ragesÂ -- about whether refusing to defend capital cases is more justified than defending them. On the one hand, when qualified lawyers refuse to defend capital defendants, the defendants are shortchanged in their criminal defense, but, perhaps, their refusal would reduce the number of death penalty prosecutions and convictions, lest capital sentences be overturned for ineffective assistance of counsel findings later on down the line (of course, the courts have set a high burden for proving ineffective assistance of counsel). On the other hand, when qualified lawyers accept capital defense cases and clients, they help reinforce a system that requires (at least in federal and some state courts) the lead capital defense counsel to be death penalty-qualified, and that assumes a steady stream of lawyers will be available at the going court-appointed rates. Â Three of the lawyers whom I admire the most are tireless courtroom fighters against the death penalty. They are Andrea Lyon, who directs the Center for Justice in Capital Cases;Â Steve Bright, who has long directed theÂ Southern Center for Human Rights in Atlanta, Georgia; and Bryan Stevenson, who long has directed the Equal Justice Initiative in Alabama. Â I admire and thank all quality criminal defense lawyers defending capital cases. Thus far, the only assistance I have provided for such a case isÂ giving a few hours of volunteer work on an appeal of a death sentence in Maryland, duringÂ a law school spring break. Doing death penalty defense requires jumping into it with both feet and the rest of one's body and soul,Â closing up much of the rest of an individual lawyer's law practice through the completion of trial (and finding a way to get new clients after the case is finished).Â I will feel better when I have joined in such defense; if I am unable to make the financial sacrifice to first-chair a capital trial, less time-consuming work is available in death penalty appellate and post conviction litigation, and providing such support for first chair capital trial defenders as mock trial work (I have participated in a psychodrama case workshop for a capital case that resulted in a life rather than a death sentence, but the victory had nothing to do with me). Â Imagine pouring your heart, soul, time, and finances into a death penalty trial, only to have your client reach into his pants while the prosecutor is asking the jury for a death verdict, and smear feces on his face. It calls for turning lemons into lemonade, quickly. Anthony R. Garcia -- who attended the Trial Lawyers College (which includes an annual death penalty defense seminar) after I did --Â represents the man, Paul Wesley Baker, who smeared the feces on his face last week. Anthony said of his client, who suffered severe abuse as a child (and, I will not minimize that he was convicted for sexually assaulting three women and murdering one of them),Â that the feces-smearing "paints a picture that words cannot."Â This just goes to show that even the best lawyers cannot prevent harmful outbursts from their clients. No matter how much the feces-smearing gave defense counsel the opportunity to highlight that the action underlined that the defendant's self respect was barely existent after all the abuse he faced, followed by the prosecutor's asking the jury to let him be exterminated, the jury still entered the deliberation room with the shocking feces-smearing incident fresh on their minds. They voted for a death sentence, and the trial judge will decide at the June 20, 2008, sentencing hearing whether to impose such a sentence.Â Â Unless Mr. Baker puts a stop to it, he still gets the chance to appeal, and to seek habeas corpus relief if unsuccessful on appeal. In the meantime I thank Anthony Garcia for standing up for this man -- no matter how guilty he is, and no matter how heinous the crime for which he was convicted -- and insodoing standing up against the barbaric death penalty system.Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, April 10, 2008

Connecting with our clients, with their fears, and ours.

Rather than Charles Manson causing Alfred Hitchcock the most fear, it was getting stopped by the police for speeding. See Hitchcock at minute 3:38 of this video. Numerous potential criminal clients' first words to me include: "This is my first time seeking a lawyer. I'm not sure what I am supposed to discuss," as if there exists some generic script or information checklist suitable for every lawyer and client and every situation. Perhaps a script is wanted to avoid the unknown of no script, and the fear of what happens once the potential or actual client stops talking and the lawyer gives his or her perspective (or perhaps quotes the lawyer's consultation fee). Deep and active listening through our eyes, ears, and intuition, of course, is critical for us to understand and relate to our clients, so that we may enable them to make informed decisions, so that we may battle powerfully as a team with them, so that we may empower and comfort our clients, and so that we may build trust with them. As we understand our clients better, we are able to better humanize them to judges and juries, thus making it harder for them to do harm to people they can relate to than to those who seem entirely different from the judges and jury members. How can we sufficiently listen to and hear our clients without giving plenty of time and attention to our clients? How do we sufficiently listen to them if we insist on keeping control of the conversation, including how long it lasts and who talks when? How do we sufficiently relate with our clients without getting together in informal surroundings, be it their home (which can help us learn much more about our clients), taking a walk on a warm day, or breaking bread together (and, for our incarcerated clients, once in awhile to visit without any files, and to just talk as two people, rather than as attorney and client)? How can we do that if we do not bill our clients enough money for us to give them the time they need and deserve (except for when we consciously bill pro bono or low bono; in all instances, clients need to receive the same service as if they had paid in full)? How do we explain the importance of devoting and charging for this time to potential clients who want to bargain on our attorney fees (I often tell them that I am sure they can find a lawyer charging less money if they want to pay less than my fee quote)? It is easier to understand our clients' fears that we share with them. I have dealt with so many hundreds of cops and so many dozens of courtrooms and jail visiting area that I have no fear of them in and of themselves. Most of my clients still do, and I need to keep that in mind even when their negative effect on me is minimal, other than to feel an uncomfortable feeling in the pit of my stomach often in relating them to the rampant oppression that they often cause. Cops know how fearful most people are of them, and they take advantage of the situation. Once, a very experienced criminal defense lawyer even told me he was scared when stopped for a moving violation, even though the cop apparently was not acting menacing. A client of mine was all nervous at a license suspension hearing where I advised him that the matter was likely to be dismissed seeing that his court case had been dismissed; when my premonition of dismissal came to fruition, in the hallway, he gave me a bear hug, as if I had done something miraculous that was not miraculous at all; he could now go on with his life, without the fear of the unknown of his case. Who would have known that even Alfred Hitchcock, the master of suspense, was so fearful of even being stopped by a cop for speeding that he refused to drive? In the above-displayed YouTube interview with Tom Snyder at 3:38 minutes, Hitchcock has no explanation for such fears other than cowardice. Perhaps his cowardice led him to make suspense films in the first place; to face his fears. Perhaps that also is why his films are so popular, aside from his cameo appearances near the beginning of each film. During trial, it is particularly critical to stay abreast of our clients' feelings and fears over the unfolding events. Sometimes defendants act out to their own detriment at trial, at times by making outbursts, whether they are intelligible or not. When clients know we are in tune with their feelings and fears, and that we are trying to give them harmony amidst such feelings and fears, they are less likely to act to their detriment. Of course, by hearing and empathizing with our clients' fears, we risk discovering and revisiting some of our own; it is a necessary occupational hazard. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, April 9, 2008

One World / One Dream / Free Tibet!

Â This week at the Golden Gate Bridge, San Francisco.Â Today, the Olympics torch relay approaches in San Francisco, This city isÂ the sole United States location for the relay.Â Demonstrators for human rights in China will be out in force; hopefully all peaceful in the footsteps of GandhiÂ The sign unfurled in the above video from the Golden Gate Bridge reminds me of the sign held in frontÂ of the Chinese Embassy inÂ Washington, D.C. by Gallaudet University Professor Fat C. Lam soon after the 1989 Tiananmen Square massacre. He was standing alone, and I joined him. His sign read "Don't let tyrants sleep." His message is as critical today as it was in 1989 as to human rights violations worldwide, starting with the White House and its constant trampling on civil liberties in the name of counter-terrorism, branching out to Congress when it passes oppressive laws, going to states and municipalities when their police and institutions of control run roughshod over the Constitution, and going to the rest of the world, where no government avoids violating human rights in one way or another. As Nancy Pelosi importantly said, moral authority to stand up for human rights necessitates standing up for said rights in China, and Tibet. Of course, I also expect her to fight for human rights domestically, as well.Â Â Jon Katz.

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

Ooh, ooh that smell... Can you REALLY smell that smell?

Â Bill of RightsÂ (From public domain.)Â On April 8, 2008,Â Virginia's Court of Appeals affirmed a "plain smell/plain feel" search mainly on the basis of the alleged smell of unburnt marijuana confirmed by the feel of a bag of marijuana during a Terry weapons patdown. The case is Bunch v. Va., __Â Va. App. _ (April 8, 2008).Â Â When smoked, marijuana reeks. However, when unburnt, it isÂ difficult to detect, despite the often flippant claims ofÂ police to the contrary.Â Â Have any of you had success arguing the insufficiency of alleged unburnt marijuana smell to permit a search? Have you found any experts beyond Richard Doty, whose article on the topic is here? Has anybody found beneficial supporting unburnt marijuana smellÂ literature in addition to the foregoing Doty article? Jon Katz.
Â ADDENDUM: As many of you recognize, the title of this blog entry is adapted from the Lynyrd Skynyrd song.Â

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, April 8, 2008

Necessity defense prevails in Texas marijuana case.

Image from public domain.Â Congratulations to medical marijuana user (for HIV symptoms) Tim Stevens, for winning his legal necessity defense against a marijuana possession prosecution. The Texas jury took only eleven minutes to deliberate. Â Marijuana is powerfully beneficial medicine. What is more is that it is completely natural, which is why pharmaceutical companies will be opposed to it (anybody can grow this wonderful weed). Â Legalize marijuana now, especially for medicinal use. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:05

Monday, April 7, 2008

Is a great trial lawyer only born, or can one be taught?

Can great trial lawyering be taught, or is one only born with it? When I was a college senior struggling to figure out whether to go to law school or business school (I preferred saving the world with a law degree, but saw a business career as a safer way to financial security), and what to do with my life in either discipline -- rather than taking a tai chi harmonious approach, not having learned tai chi yet -- a close relative panned my consideration of possibly being a trial lawyer. This relative, not a lawyer himself, viewed successful trial lawyers as being successful actors, and said I had not proven myself as an actor (I had barely acted, except for small rolls in a few elementary-school-age plays). By the way, since being real and honest is a key ingredient to being a great trial lawyer, that does differ from when an actor is part of an effort to create a fantasy setting. Fortunately, being driven to reach my goals of making the world a better place through the courtroom, despite the naysayers, I chose law school and became not only a trial lawyer, but a trial lawyer doing the cases I most love to defend. Along the path have been great teachers who have taught me that one need not be born a trial lawyer to be an excellent trial lawyer. Two of my strongest inspirations on that path are Steve Rench and Sunwolf. Steve Rench is a powerhouse of a trial lawyer and human being. On first meeting him, Steve may look like an ordinary mortal. But by the time he opens his mouth, he is an amazing persuader and caring teacher to lawyers who advocate for the underdog. When in a tense situation with an opposing lawyer or difficult judge, I often seek inspiration from Steve, tai chi mega-master Cheng Man Ching, my friend and mentor Jun Yasuda, and my friend and law partner Jay Marks. Steve Rench knows that people -- even if not all -- can learn how to be great trial lawyers. Appearing to be nobody out of the ordinary at first glance, he gives all the more emphasis to his slogan "Dare to be great." Sunwolf gives the inspiration to find our inner magic and power as trial lawyers, and to simplify even the most daunting-seeming task, to make the more difficult parts of the task flow more simply from the simplified approach to the battle. Sunwolf is gentle and loving, not needing to bare any fangs, just as a great baseball pitcher need not bare any fangs, but just needs to deliver great pitching. Gerry Spence is another of my influential trial teachers. Gerry at first comes across as a natural-born trial lawyer. However, he has often revealed his own substantial challenges to becoming a better person and trial lawyer (to become a better lawyer one first must become a better person), and discusses this at length in his autobiography *The Making of a Country Lawyer*, from around 1995, and in many other places. He may have learned more quickly some of the approaches to becoming a great trial lawyer, but still he had to learn. When Gerry teaches how to become a better trial lawyer, at least at the multi-week Trial Lawyers College, which I attended in 1995, Gerry assumes the attendees already know the law and trial technique, and first focuses heavily on enabling the attendees to find out who they really are and what they really want to do with their lives, which means shedding putting money and career as the first priority, shedding keeping up with the Joneses and often leaving the attendee with a pile of emotions that have remain suppressed for too many years. The next step at the Trial Lawyers College is for the attendees to learn how to empower themselves to do justice, so that they can do justice for their clients, even if that means taking tremendous financial and personal risks in doing so, whether that be as small as becoming one's own boss and leading to such bigger steps as refusing certain potential clients, refusing certain bar association appointments and refusing to keep one's mouth shut against injustice and unfairness when doing otherwise clashes with serving justice and with the person's life goals (including such goals as not being an absentee parent or absentee spouse). Next, the Trial Lawyers College moves into integrating the attendees' enhanced self-discovery and empowerment to more fearlessly stand up for their clients in the courtroom and during the stages leading up to the courtroom, even when naysayers claim the lawyer has lost his or her marbles to try a case radically different than anyone in the community has seen before, and even when some actual or potential clients feel compelled to switch to a new lawyer upon proclaiming that the TLC attendee is some kind of cult weirdo, and that the client wants a more "traditional" lawyer. (Some of the focus of the Trial Lawyers College prepares the lawyer for possible approaches to convincing the client to stay with the lawyer, including having a heart-to-heart talk where the lawyer explains how well it has worked for the lawyer to focus on what looks to be the winning approach for the client, rather than just doing things the way all other lawyers in the community do it, lest the wheel never be invented.) Whereas many people try to hide their warts as they seek success, the Trial Lawyers College focuses on coming face-to-face with and understanding our biggest fears and pain, to embrace the pain before sending it on its way, and to be all the more empowered in the process. As Gerry's late close friend -- and my late friend, too -- John Johnson said, it is far more preferable to have a bucket of fresh cow dung than a bucket of beautiful fake flowers, for at least the cow dung bucket holds something real. Juries will relate better to a lawyer in a thrift-store-purchased suit (with Tony Serra being an ultimate example of that) doing his or her best to cross examine an opponent, than a lawyer in a brand new Armani suit with gold cufflinks looking superficially smooth but leaving out any personal reference point to the lawyer's past trials and tribulations. In *The Making of a Country Lawyer*, Gerry Spence acknowledges how he bumbled along in one of his first jury trials, struggling with simple evidentiary issues. Even when he was winning in a later trial, a spectator (a law student or newer lawyer) expressed surprise that instead of Gerry's opening or closing

having the fire of the greatest orator, he started by talking about how he feared making any stumbles that might let his client down. Of course, by sharing such fears with the jury, we look more human, more honest, and more reliable, rather than someone sent over from Hollywood casting, and we release a weight from our shoulders, so that we may proceed to the heart of the battle. Ultimately, a strong trial lawyer will be able to shed and reduce more and more fears, because doing so is empowering, as demonstrated by the following tale I frequently have retold: To be fearless, I take inspiration from t'ai chi master Cheng Man Ching, who spoke of overcoming our fears in terms of imagining that we are practicing t'ai chi while balanced atop a narrow pointed cliff. To not eliminate one's fears while atop the cliff is to guarantee certain death. Eliminating fear also calls for keeping and tempering the fearlessness of a child filled with wonder, and living in the moment, as wonderfully detailed in the following story of the man and the two tigers: A man is chased in the wilderness by two tigers, only to be forced off a cliff, hanging for life from a vine. One tiger waits above and the other waits below for a human meal. Two field mice gnaw away at the vine. The man sees a wild strawberry growing from the side of a cliff, reaches for it, tastes it, and -- with his life hanging in the balance -- thinks of how delicious the strawberry tastes. When one lives in the moment, one fears little if at all. Consequently, becoming a great trial lawyer is a never-ending process, just as is the process of becoming a great t'ai chi practitioner. Similarly, the most awkward-feeling, unsuccessful-feeling person can learn how to reach new and more fearless and self-empowered heights. Trial lawyers have a challenge to help people do that, including with their clients, opponents, judges juries and, most importantly, themselves. Jon Katz. ADDENDUM: Were videos of Steve Rench and Sunwolf available online, I would have posted them in this blog entry. They are not, but I found the above video of Gerry Spence -- the only one I have found online in a real or mock courtroom setting (his voir dire DVD can be ordered here) -- in this instance defending Lee Harvey Oswald against Vincent Bugliosi, who prosecuted Charles Manson, and direct examining apparently the actual person charged with removing John Kennedy's brain during his autopsy. Gerry grew up without opulence, knew a life of being with ordinary people, and still knows how to relate to all people -- regardless of privilege or lack thereof -- to this day without letting his later-earned financial riches cloud that. Watch how he notices the witness's nervousness and reassures him about it. Clearly, witnesses are going to be more open to questioning from lawyers speaking to them with respect and empathy rather than to questioning from lawyers belittling and growling at them (although a tough cross-examination witness sometimes leaves the lawyer little choice than to come down firmly on the witness in order to help the client). As to the witness's testimony in this YouTube video, this video presents the first time I ever have started wondering much more than in passing about whether Lee Harvey Oswald acted alone in killing John F. Kennedy. Why did this witness find no brain to remove in Kennedy's skull? Why does this witness say the military strongly limited what he was permitted to disclose about the autopsy when he still was working with the government? Have any of you looked into this witness's assertions and its implications about whether Oswald did not act alone in killing Kennedy, or whether Oswald even killed Kennedy? ADENDUM II: Previously, I assumed that John F. Kennedy was assassinated by Lee Harvey Oswald, and that he acted alone. When I started hearing about conspiracy theorists who proclaim that Oswald did not act alone, images came to mind of people with a lot of time on their hands and with bad haircuts crisscrossing the nation for pleasure to attend assassination conspiracy conventions and getting on listservs with such handles as DalTex and debating the most minuscule aspects of the grassy knoll. I did not think much about the whole conspiracy discussion, figuring that Kennedy and Oswald are already dead. I understand that larger questions have been raised by conspiracy theorists about whether some people in government arranged Kennedy's assassination. Certainly, as a criminal defense lawyer, I do not think -- without more information in my hands -- that I should conclude at this point that Oswald shot Kennedy, nor that he acted alone. This does not mean that I agree with any conspiracy theorists, but that I have not reached a conclusion yet as to Oswald's role in the assassination. In any event, here are two links that further address the missing brain testimony by Paul O'Connor -- who apparently died in 2006 -- that he addresses in the above-displayed YouTube video: - A 1981 Time magazine article on a two-casket theory, that includes discussion of Paul O'Connor's claims that Kennedy's corpse was missing his brain when Mr. O'Connor examined Kennedy's skull at Bethesda Naval Hospital. - Google book excerpts from The Radical Right and the Murder of John F. Kennedy, which includes a discussion of Paul O'Connor's missing brain assertion.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, April 6, 2008

Our website was temporarily down a few weekend hours.

Our website -- and other websites using our sitehost -- was down on April 5 from around 7:00 a.m. to 11:00 a.m. and on April 6 from around 5:00 p.m. to 8:00 p.m., as was our email during the latter April 6 timeframe. I await word from our sitehost how this happened. I assume it relates to the upgrades being made at the sitehost; however, I wish such lengthy outages would be minimized and shortened, and kept out of such popular surfing times of day. Coming shortly is an April 7 blog entry about learning to become a better trial lawyer. Jon Katz

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

Friday, April 4, 2008

Reporters and misquotes should not be like peas in a pod.

Â Image from Library of Congress's website.Â As I have said previously, journalists are fallible humans, so lawyers should resist the temptation to treat them as confidants. Â One reason to beware of talking with journalists about a client's case is the risk of being misquoted, whether by direct misquote (e.g., the reporter writing that the lawyer said his "client is guilty" when actually the lawyer said his "client is not guilty," or by being quoted out of context (e.g., where the reporter quotes the lawyer as saying "All the suspects are guilty," where the lawyer actually says "All the suspects are guilty except for my client."Â Sometimes a reporter misquotes a lawyer based on what the lawyer says in court, rather than on the basis of an interview, which means that merely declining an on-the-record interview does not automatically protect against misquotes.Â As a for instance, yesterday I was in court for the Westboro Baptist ChurchÂ case, seeking a stay of the enforcement of the \$5 million judgment pending the outcome of my clients' pending appeal. The judge ended up granting the motion as to my clients the Westboro Baptist Church and its pastor Fred Phelps, Sr., after I agreed for a lien to be placed on their respective real property, whereby my clients will retain the right to contest the enforcement of the lien on legal grounds should the defendants lose on appeal. How, then, did a Daily Record reporter (who spoke with me after the hearing, which conversation I kept off the record) get this result so wrong by erroneously reporting that I consented to freeze the church's assets? Perhaps he was listening to the J. Geils band earlier in the morning, and got confused. Â I found the article with this misquote on google news, and left a voice mail with the reporterÂ asking him to correct the error. IÂ confirmed that, the First Amendment zealot that I am, it will remain but a request. Â If this is the worst misquote that I ever experience, I will be fortunate. My favorite conceptual artist, Joseph Kosuth, had a riveting exhibit in the early 1990's entitledÂ "A Play: The Herald Tribune, Kafka and a Quote." The foregoing quote does seem Kafkaesque. Jon Katz.Â ADDENDUM: Later in the day on April 4, the Daily Record met my request to fix this misquote, by changing it online to saying that the judge "eventually obtained consent from Katz, of Marks & Katz LLC in Silver Spring, for the liens, pending appeal." I don't know whether the print version of the newspaper will carry a correction notice.

Posted by Jon Katz in Jon Katz in the News at 00:10

Court permits stop of a dark blue car despite lookout for a tan car.

Bill of RightsÂ (Image from the public domain.)Â During the 2002Â Washington sniper manhunt, too many police abandoned the Fourth Amendment by stopping white truck after white truck, based on erroneous eyewitness tips. However, the now-convicted sniper defendants were found in a non-white sedan. (Less than around a half hour after the last sniper shooting, I arrived at my YMCA destination, where at the same timeÂ the now-convicted sniper defendants apparently were working out at the same gym.)Â Fast forward to 2005. District of Columbia police officers heard a radio call for an armed robbery in the 1300 block of Florida Avenue NE, including a description of the suspects and their car. The radio call described the suspects' vehicle asÂ "a Crown Vic Ford model, tan on the side, black on top with smoked-out windows, year between 94 and 97." (Emphasis added.) U.S. v. Abdus-Price, __ F.3d __ (D.C. Cir., March 11, 2008).Â Around forty minutes later, based on the foregoing radio call, the police stopped the following car within two blocks of the robbery location:Â "Ford Crown Victoria with dark tinted windows, dark blue in color with a white driverâ€™s-side rear door," Defendant Abdus-Price ran away when told he would be patted down, was found with a handgunÂ by a patdown after being apprehended, and got prosecuted and convicted for unlawful possession of a firearm and ammunition by a felon, under 18 U.S.C. Â§ 922(g)(1).Â Surely, the court should have suppressed this car stop, lest all Crown Victoria drivers become victims of police abuse. Moreover, the police stopped Mr. Abdus-Price's car in a low-rent area within two blocks ofÂ the most major route for reaching downtown Washington, D.C., from Baltimore. Consequently, this case outcome has negative implications even for mere tourists coming to town to visit the Lincoln Memorial. Â The United States District Court for the District of Columbia forgave the color disparity, reasoning that the color could have been mistaken in the evening light, and that at least the stopped car, like the description of the suspects car (the description undoubtedly was called in by a purported civilian witness to the alleged crime) had darkened windows. Â It is likely that Mr. Abdus was not even in the car that contained the alleged robbers. The alleged robbery victims were unable to make a positive identification of either Mr. Abdus nor his passenger. But what is such an error between cops and a court? The court affirmed the stop and conviction under Terry v. Ohio, 392 US 1 (1968). Terry is one more tool for police to trample on individual liberties.Â Granted, some similarities existed between the description of the physical appearance of Mr. Abdus and his passenger. However, the cops did not see what the occupants of Mr. Abdus-Price's car looked like until they unlawfully stopped Mr. Abdus's car in the first place. This poorly-decided opinion will only embolden police to make more illegal car stops than they already make. Criminal defense lawyers, for future criminal defense cases,Â at least can hang onto Abdus Price's characterizationÂ of the affair as a slight color

discrepancy (since when can tan be confused with dark blue?).Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, April 3, 2008

Come and listen to a story about a man named Jed .

Do jurors want to be tortured for hours by droning lawyers, witnesses and judges, interspersed with waiting for bench conferences with silence that might be even more excruciating? Or, do they want to be transported into the middle of an interesting story, experiencing the action with their five senses, being part of the action from the actors' different points of view, as riveting as being on the set of *Rashomon*? Which would you prefer? Storytelling is a common way of communicating throughout the day (does one read a news story in the newspaper, or a news drone?), whether it be a story as short as describing an argument between two siblings, or as long as a full-length movie. Storytelling is a way to relate to jurors in a way that makes them feel more at home in an otherwise bone-chilling inhuman-seeming courthouse, filled with portraits of unsmiling judges who previously graced the courthouses' cavernous halls and lonely chambers. Storytelling enables a lawyer to speak like a human, rather than as an automaton-sounding, legalese-speaking lawyer. Skilled storytelling can open the jurors' ears to the storyteller rather than closing their minds to what they may presume to be a shyster lawyer. When done right, a persuasive trial lawyer will tell the case's story throughout the trial, not only through jury selection and opening statement, but through direct and cross examination right through closing. A well-told story will stick in the jurors' memories and vision much better and longer than a droning presentation of various snippets of information and arguments. Telling a story provides an avenue for jurors to put together the pieces of the evidentiary puzzle in a manner favorable to a lawyer's client. Tell your story in the beginning of the trial, and keep telling it in an interesting, interactive, and engaging way. Rare if ever should be the circumstances where a criminal defense lawyer waits until the prosecutor rests to give the defense's opening argument/statement. By then, the jury is seeing the story not through the defense lawyer's eyes; moreover, the opening argument gives the jury the introduction to the defense lawyer's story that needs to follow into examination of witnesses and everything else the lawyer does in the courtroom. Good storytelling gives direction to one's oral presentation, rather than having the speaker wander around in wilderness and fog. It reminds me of the ah-ha I experienced one day over thirty years ago playing improvisational trumpet with a music group. Instead of my focusing merely on sounds and the meaning of the words to the songs, with the trumpet I took my listeners on a storytelling journey, with the trumpet conveying some of the sounds I heard and feelings I felt and sights I saw during that journey -- while conversing back and forth and in tandem through my trumpet along with the other musicians and singers -- the first such journey being like a huge bird in a jungle with rushing skyscraper-height waterfalls, the wind rushing all over the lush greenery, and birds singing all along. Instead, each note more smoothly flowed into the next note, taking me away from focusing so hard on making up music that would work, and having it work more effortlessly. That is how a good story works. It flows, it gives direction to the talk, and it removes the speaker from any fears of talking in front of an audience, and removes the speaker from the temptation to use language with lockstep thesaurus-spitting precision. Such storytelling comes from the heart, rather than having the head filter everything out in an overly-intellectualized or pseudo-intellectualized filter. Storytelling is at the heart of the National Criminal Defense College and the Trial Lawyers College, which I briefly discussed last week. Productive storytelling can help not only lawyers for trial, but all people in working out their lives. For instance, one day I told my friend -- who is an amazing local psychological counselor and psychodramatist -- about the dysfunctions at a previous law firm where I worked. He suggested that one way to get towards harmony was to have a retreat day with a psychodramatist and a storyteller to get everyone communicating towards working beyond the dysfunctions. I may have raised the idea, but left a little over a year later to start our current law firm without the idea going further. It probably is an idea long overdue to offer and pursue at our law firm. If such a retreat/workshop is held, clearly attendance and participation would need to be purely voluntary. Storytelling can be very important for trial lawyers to help themselves, their clients and witnesses become ready to testify and to prepare for the rest of the trial, and to move the case investigation forward (e.g., to get otherwise recalcitrant witnesses to talk, which might start as simply as talking about something entirely unrelated to the case, and drawing out the story (e.g.: "I am riveted by your calm demeanor," (if you dare be anything but honest and real in talking, watch out for the fallout), and see if that draws out the person's story (e.g., "My grandmother was as calm as gently flowing waters. That always stayed with me"). Many other things beyond storytelling can be done to obtain such movement with lawyers and non-lawyers, including eliminating the physical and non-physical divides between the lawyer and the client and other non-lawyers with whom the lawyer speaks (e.g., try sitting next to your client in a visitors' chair in your office, to eliminate the divide created by your desk; tell self-effacing jokes (engaging ones, that is); and be as relaxed and smiling as Gandhi and Mel Brooks all rolled into one). When you let your clients, children, friends, employees, employers, judges (on and off the bench) and everyone else important in your life tell a story -- and when you listen actively to the story -- you empower the storyteller, and the storyteller is relaxed and more expressive knowing that you are in the role of the listener, rather than in the role of the controller and interrupter of the conversation. Ultimately, the speaker will listen back to you. Sometimes a person will feel more encouraged to tell a story by putting it into song or by accompanying the story with the beating of a drum, the strumming of a guitar, or the playing of any other hand instrument, seeing how powerful music is in our lives (and if you

disagree, think of the many times that just one song has filled you with emotion when you least expected it).

Storytelling must not be limited to being a spectator sport. Before going to bed tonight, see what happens when you try riveting storytelling to work out a problem or to get a point across, and when you empower another person to tell a story. Here are some good storytelling links: Art of Advocacy page. Includes some good links. Sunwolf (see her biography here): An amazing woman, storyteller, trial lawyer and teacher, and communications teacher all rolled into one. James Elkins's links on lawyers and storytelling, and everybody and storytelling. "The Art of Storytelling" - By trial lawyer Paul Luvera - National Storytelling Network. California Indian Songs and Stories. A lengthy video giving a view of Indian storytelling. Ira Glass on Storytelling - See all the Ira Glass YouTube videos in the series. This video conveys how no matter how boring the material otherwise might be, the listener can feel s/he's on a train with a destination. The audience can be kept interested by interspersing the story with direct questions (e.g., "Why did it happen?") and indirect questions ("The house was very quiet," which makes the listener ask "Why was the house quiet?"). Storytelling in the classroom - A YouTube video. Every student needs a story that s/he wants to tell. YouTube links to storytelling and children. Tell me a story. Jon Katz. ADDENDUM: To complete the title of this blog entry: Come and listen to a story about a man named Jed A poor mountaineer, barely kept his family fed, Then one day he was shootin at some food, And up through the ground came a bubblin crude. Oil that is, black gold, Texas tea. Well the first thing you know ol Jed's a millionaire, Kinfolk said "Jed move away from there" Said "Californy is the place you ought to be" So they loaded up the truck and moved to Beverly. Hills, that is. Swimmin pools, movie stars. Well now its time to say good by to Jed and all his kin. And they would like to thank you folks fer kindly droppin in. You're all invited back a gain to this locality To have a heapin helpin of their hospitality Hillybilly that is. Set a spell, Take your shoes off.

Posted by Jon Katz in Persuasion at 00:00

Wednesday, April 2, 2008

For the ten thousandth time, don't waive your right to remain silent.

Bill of Rights (Image from the public domain.) Susan Smith apparently would not have been convicted had she not spoken to the police. Mark Castillo smoothed prosecutors' path towards a murder conviction -- unless he successfully argues insanity -- by calling the police this past weekend to tell them he had killed his three children, who lived in the town where my law firm is located. Wilbert Abney, Jr., would have avoided conviction in Virginia of strangling his wife to death in 1978 had he kept his mouth shut with the police; instead, he kept singing like a bird, changing his story all the more damningly each time he realized his previous stories were not coming across as believable. As I have said before, countless people sing again and again to police. It reminds me of the following scorpion story told by Forest Whitaker's Jody in *The Crying Game* (thanks to Robert Yahnke for posting excerpts from this film.): A scorpion wants to cross the river. But he can't swim. He goes to a frog, who can. He asks for a ride. Frog says, "If I give you a ride on my back, you'll go and sting me." The scorpion says, "It won't be in my interest to sting you, since I'll be on your back and we'll both drown." The frog thinks it over and accepts the deal, takes the scorpion on his back, braves the waters, halfway over feels a burning spear in his side, and realizes the scorpion has stung him after all, and as they both sink beneath the waves, the frog cries out: "Why did you sting me, Mr. Scorpion? So now we both will drown!" The scorpion replies, "I can't help it. It's in my nature." Likewise, cops and prosecutors can rely that it continually will be in the nature of countless people, even when properly advised of their right to remain silent (they often are not so advised, and need not be so advised when questioned without being in custody) and not coerced at all into talking (since when is any police encounter completely uncoerced?). Wilbert Abney, Jr.'s wife was strangled to death in 1978. He denied to the police that he was with her near the time of her death. His wife was found to have had sexual intercourse near the time of her death, and semen was found in her body. Mr. Abney denied having had sex with her for a few weeks, due to a gynecological problem he claimed she had. Her homicide case with the police became cold. *Abney v. Virginia*, __ Va. App. __ (March 4, 2008). Mr. Abney did something suspicious, having taken out a life insurance policy on his wife around two months before her death, and then suing the life insurance company for denying a payout to him for her death. In stepped L. Davis, who was having an affair with Mr. Abney at the time of his wife's killing. She provided an affidavit for the civil case of their affair. Years later, DNA testing and matching had advanced by leaps and bounds. The police re-interviewed Mr. Abney, who changed his story to saying he may have had sex with his wife near the time of her death. He later changed his story to saying his wife was strangled during consensual sex during which she asked him to asphyxiate her (which apparently many people -- but likely a minuscule percentage of people -- do practice during consensual sex), whereby she was to tap him on the leg to let him know when to stop. He said he used his belt around her neck, not being able sufficiently to get the desired effect for her with his bare hands. He said that it all backfired when she went limp and dead without tapping him on the leg. He said he previously lied, in conjunction with seeking insurance money. Not surprisingly, a jury convicted Mr. Abney of first degree murder. Reading the gruesome rundown of Ms. Abney's death in this lost criminal appeal in Virginia's intermediate appellate court, it looks clear that Mr. Abney would not have been convicted had he kept his mouth shut. Some might say that society is better served when those guilty of such heinous crimes confess. However, confessions and other forms of tongue-wagging are sought by police for just about all criminal investigations, including for drug cases, where I long have advocated marijuana legalization and heavy decriminalization of all other drugs. The safest bet is for suspects to keep their mouths shut, and also to keep their mouths shut if they are not sure they are suspects. Silence is golden. Failure to remain silent with the cops tastes and smells no better than vomit for the sake of the suspect. This image is gross, but the fallout for the tongue wagger can end up making vomit seem like delicious candy by comparison. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, April 1, 2008

When the spotlight turns to the judge and lawyer who did not foresee a homicide coming.

Bill of Rights (Image from the public domain.) With the help of an attorney, Mark Castillo successfully convinced judges in Montgomery County, Maryland -- where our law firm sits and where I live -- to deny his wife's begging to the court to deny unsupervised visits between Mr. Castillo and their three children. Castillo called the police this past weekend to tell them he had killed all three children at the Baltimore Marriott Inner Harbor hotel where he had taken them. In Maryland, as in so many other states, judges do not serve for life, as opposed to their federal court counterparts. District Court judges must be reappointed every ten years. Circuit Court judges -- who generally handle more serious cases than District Court judges -- must stand for reelection every fifteen years. With their positions not being lifetime seats, how could one expect every Maryland judge to avoid taking actions calculated to assure remaining on the bench through re-appointment and re-election? How will this Mark Castillo front page news not affect at least some judges' future rulings about bond and visitation by those alleged to be powderkegs of violence even if such allegations are not backed up with sufficient facts and sufficiently credible testimony? How does Mr. Castillo's lawyer feel for having helped Mr. Castillo avoid having the court issue an order to only have supervised visits with his children? How would I feel if I were in Mr. Castillo's family lawyer's (as opposed to criminal defense lawyer's) shoes? First, I avoid family law like the plague, with two small exceptions that did not involve being called and harangued at all hours of the day and night by divorce court plaintiffs out for venomous blood against their exes, those exception cases being my past representation of divorced veterans fighting to keep their ex-spouses from sharing in their retirement pay (which involved raising critical Constitutional issues), and my representation of an Indian tribe's interests in assuring an underage tribal member's access to the tribe's financial benefits during the course of his custody litigation (whereby this gave me the opportunity to serve Native Americans, whose rights are near and dear to my heart). Second, the closest I could have come to being in the shoes of Mr. Castillo's family lawyer would have been if I defended him in criminal court by advocating letting him out on pretrial bond. On an intellectual level, I can argue for hours how important it is to justice and to an honest criminal justice system for criminal defense lawyers to fight tooth and nail for their clients, even if the lawyer is convinced that the client is guilty as sin. On a gut level, I believe that too many judges run roughshod on the Constitution by keeping criminal defendants locked up pretrial -- while presumed innocent -- in the name of risk averseness without taking the defendant's liberty interests in sufficient account. Nevertheless, how would I feel if I were the lawyer who successfully convinced Mr. Castillo's judges to allow him unsupervised visits with his children? Assuming Mr. Castillo committed the heinous acts that he allegedly admitted to the police, I probably would feel so terrible that I would seriously consider clearing my calendar for a few weeks and flying to as remote an area as possible (for instance, taking a canoe and tent into the Canadian wilderness) to make sense of this situation that cannot yet -- if ever -- be made sense of. Would I end up changing my law practice based on Mr. Castillo's actions? Probably not. On an intellectual level, such heinous acts seem too infrequent, even though harmful acts (including such non-violent harm as verbally abusing the couple's children as pawns in the breakup) on a lesser scale likely are very common in the divorce court scenario. On an emotional scale, I might, at least at first, more carefully screen my clients. How would I feel if I were defending Mr. Castillo in his pending murder prosecution, for which he faces the possibility of a death penalty trial (who knows whether Mr. Castillo turned himself in hoping that he would get executed, to finish the attempted suicide that he botched)? As I wrote last year, it is not enough intellectually to want to represent criminal defendants. If one's heart is not into helping the client, the client suffers. As an early criminal defense teacher-trial practitioner (who, ironically and sadly, committed suicide less than two years later) admonished: "Love your client. Even if your client smells, love your client, and stick close to your client." Who else will? Idealism may help pave the way to successfully defending criminal defendants, but nothing beats connecting with and caring about them, and developing the skills and experience necessary to successfully fight for them. Although it was but a movie, Joe Pesci in the title role in *My Cousin Vinny* exemplifies that caring is more important than idealism when it comes to criminal defense; otherwise, he would not have won his cousin's murder trial. Does this mean that I would have no feelings for the victim of a crime that I know my client has committed (how often does a lawyer know for sure whether the client has committed the alleged crime?), and that I would not understand the motivation of those wanting to take my client off the streets? No. It does mean, though, that I have not yet identified any type of client or type of crime that I would not defend to the hilt, unless the defendant were alleged to have committed a crime against someone close to me, in which case I would be conflicted out of representing the defendant in the first place. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00