

Sunday, June 1, 2008

**Don Fiedler departs the planet.**

Â In 1990, I took out a subscription to High Times magazine in protest over a federal prosecutor's subpoenaing the magazine's advertiser records -- as reported by Index on Censorship -- in an apparent effort to clamp down on hydroponic sellers and customers, and various other suspected marijuana-related vendors. I wrote to then-attorney general Dick Thornburgh about my protest, and cc'd it to High Times; I received a reply from neither. Shortly thereafter, I saw an article about the National Organization for the Reform of Marijuana Laws, including a big picture of its then-Executive Director Donald Fiedler. I then met Don in the flesh at the April 1990 Earth Day in Washington, DC, where, among other things, he was showing people items made of hemp. I was floored; I had not yet hobnobbed with those in the marijuana legalization movement, something that would change within a few months. Don and I met for lunch a few months later, after I wrote him a letter offering NORML pro bono help; this was before the days of e-mail. I next saw Don in January 1991, when, during the second weekend anti-Gulf War I march, he was marching with NORML t-shirts for sale that read "HEMP FOR OIL, NOT BLOOD." I called up Don not long after, and told him of my desire to switch to criminal defense from my 25-lawyer corporate law firm, where I did litigation and regulatory work for financial institutions and transportation companies. Since he knew I did not want to prosecute, he recommended starting with a public defender office or opening my own firm, since salaried job openings for private blue collar criminal defense lawyers without criminal defense experience was a tough nut to crack. Within a few months after that, I had joined the Maryland Public Defender's Office, which was a critical move for me. Don continued encouraging me along the path. He sponsored my application to the National Association of Criminal Defense Lawyers. He strongly recommended the National Criminal Defense College, which I discuss here. NCDC's Trial Practice Institute's admission standards were tough for public defender lawyers. I attended in 1994. Fortunately, Don was one of my Macon instructors, for closing argument. He was at once gentle in tone of voice but firm in his belief that criminal defense lawyers have an obligation to pour our hearts, souls, and guts out for our clients for every stage of representation, including trial; I agree. He became one of my key role models for excellence in criminal defense. He was a skilled trial lawyer and actor; he would present one-man Clarence Darrow shows, which unfortunately I never caught. I did not see much of Don after the NCDC. I did not go to as many NACDL meetings, save for the 1999 meeting in Washington, D.C. On May 30, after getting out from the D.C. Superior Court in the morning, I visited NORML founder Keith Stroup for my first visit to NORML's headquarters in Washington, D.C. after my 1990 visit with Don. I started telling him how I got my first full introduction to NORML through Don. Keith then told me the news I missed from a backlog of unread listserv messages for the NORML Legal Committee: Don passed away on May 15. He was sixty-five, just twenty years older than I. The sadness continues. Don's friend Ralph Smith puts it well: "Don was always the champion of the underdog. . . He believed marijuana helped people cope with illness and life's problems." Don's fellow Omaha lawyer, and blogger, Dave Tarrell also captures Don: "I don't know if I've ever met a kinder soul. I was once told that although Don gave away a scholarship to the NCDC every year, that people shouldn't take this as a sign that he could afford it. In fact, the person told me that Don would simply give away his money if asked." A picture of Don is here. Click the picture for an enlargement. Don still lives on for me, which is why I started this blog entry about his life, before telling of his passing. Don's passing leaves a great void. Thanks, Don, for you, and for encouraging me along the path. Jon Katz. ADDENDUM: Don's obituary says: "In lieu of flowers, Memorials to National Criminal Defense College, c/o Mercer Law School, Macon, GA, 31207."

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

Friday, May 30, 2008

### **The importance of identifying dangerous jurors.**

Â How many times do we meet people with twisted if not dangerous ways of looking at life and processing information? Some sue the government to stop directing neurotransmissions at their brain functioning. Others are convinced the FBI and CIA are tailing them, even when doing so would be a complete waste of the FBI's and CIA's time. Others are racist. I meet all such people and more merely through potential clients who contact me. Â One aspect of picking a jury is to get a sense of which jurors will have twisted and dangerous ways of processing information. Some may seem totally normal at first blush, until they start talking, so every potential juror should be asked at least one open-ended question, to get them to talk. Some will talk the talk very well. One thing is certain: Well-done lawyer-run voir dire/jury selection is more effective in weeding out such people than judge-directed jury selection (unless the lawyer wants to risk keeping them on the jury, in an attempt for a mistrial). Â It is remarkable how otherwise intelligent and clear-headed people will follow monstrous people and monstrous paths, from the followers of Hitler to the followers of Jim Jones to the followers of David Koresh, and the list goes on. Consequently, good questions for juryÂ questionnaires, if questionnaires are permitted,Â or else voir direÂ -- and hopefully answered honestly -- will be inquiries about potential jurors' free-time activities, the books they read, the organizations to which they belong and pay money, and the people they admire and interact with. Potential jurors do not need to admire monstrous people to merit being stricken from the jury panel; for instance, plenty of Lyndon LaRouche supporters are swarming around (I think LaRouche is twisted, not monstrous). Â The above-posted video -- an interview with a member of the fictitious Spinal Tap band, taken from National Geographic's YouTube page -- does a good job at satirizing and identifying the type of twisted logic and illogic that many people have. Â If there is one thing that might get through to judges -- including at the various bar association shindigs and meetings where much backslapping takes place and too little effort to make the judging and lawyering system more just -- it is to keep promoting lawyer-run voir dire to them. Every time I have a jury trial before a judge whose custom is to ask the voir dire questions himself or herself, I ask for lawyer-directed voir dire. Even when that request is denied, the judge still might give me some leeway in asking follow-up questions to some jurors during voir dire.Â Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Thursday, May 29, 2008

### **When convicted felons are nearby guns and drugs.**

Â Bill of RightsÂ (From public domain.)Â When convicted felons are around guns and unlawful drugs, they risk exposure to substantial incarceration time. Lewis D. McCarson learned that when federal marshals came to his girlfriend's home with an arrest warrant for him. U.S. v. McCarson, 2008 U.S. App. LEXIS 11234 (D.C. Cir. May 27, 2008). Other than the arrest warrant, all went well for McCarson until he told the marshals that he wanted to wearÂ his black pants, coat, and shoes on his way out the door. The marshals went to the bedroom for those articles of clothing, and claim they then saw a bag of marijuana and a handgun in plain view and cocaine by the time they further opened the drawer to retrieve the handgun. Â One lesson learned here: McCarson's apparel request to the marshals boomeranged back with the rank smell of feces. Because the marshals had an arrest warrant but no search warrant, one is left to wonder whether they would have bothered doing anything to find the gun and drugs had McCarson just agreed to leave the home in his underwear. Had this been Mr. McCarson's home, clearly a search beyond his lunge and grasp would have been impermissible where the police only had an arrest warrant but no search warrant. Chimel v. Cal., 395 U.S. 752 (1969).Â Lesson two learned in U.S. v. McCarson: An arrest warrant allows the cops to enter a home other than the suspect's when the police have reason to believe that the suspect will be found there. Although contraband found pursuant to the execution of the arrest warrant may be inadmissibleÂ against the homeowner if the home is not the suspect's (but will the homeowner obtain such suppression if the contraband is in plain view near where the suspect is found, as opposed to being found pursuant toÂ a searchÂ in the area within theÂ suspect's lunge and grasp?), that is the homeowner's right. Furthermore,Â if the Court finds the suspect has no standing to contest the search, that ends the suppression analysis. Â Lesson three learned from this case: Prior convictions open a Pandora's box to enable courts to permit jurors to know about those convictions to counter potential defense arguments of ignorance of any crime when prior convictions show activity in consonance with the currently-charged crime.Â As an aside, the appellate panel that decided Mr. McCarson's case heard my First Amendment appeal two business days after it heard Mr. McCarson's appeal on May 9. My appeal is still pending. Jon Katz. Â ADDENDUM: Thanks to a fellow listserv member for posting on Mr. McCarson's case.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, May 28, 2008

**When acquitted conduct is considered for federal sentencing.**

Â Bill of RightsÂ (From public domain.)Â Last December 2007's GallÂ and KimbroughÂ opinions from the U.S. Supreme Court raise questions about whether it any longer is legitimate for sentencing courts to consider acquitted conduct in setting a sentence. Â In an unpublished opinion from March 21, 2008, the Fourth Circuit reversed a sentencing that refused to consider acquitted conduct, and held that the standard at sentencing is whether a crime can be proven by a preponderance of the evidence, even if the conduct was acquitted under the beyond a reasonable doubt standard. U.S. v. Ibanga, Crim. No. 06-4738 (4th Cir. March 21, 2008). Â Thanks to bloggers Dan Berman and Scott Greenfield for discussing the Supreme Court's denial of cert. on the foregoing issue here and here. Until the Supremes review this issue on cert., it is necessary to know how one's circuit has or will handle this issue post-Gall and Kimbrough. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:05

Tuesday, May 27, 2008

**What will come of the Viacom v. YouTube suit?**

Computer hard drive. (Image from Pacific Northwest Laboratory's website). Even my most well-heeled litigation clients set a ceiling on the money they are willing to spend for litigation fees and expenses. One thing that interests me in the pending Viacom, et al. v. YouTube, et al. (S.D.N.Y. 1:07-cv-02103) copyright infringement litigation is the higher quantum of litigation funds being spent by those litigants than by my litigation clients and the extent to which those funds are being spent wisely or not. Ordinarily, a huge publicly-traded corporation will hire a heavily-staffed law firm or team of lawyers to pursue its high-stakes civil litigation, in part out of anticipation that the opponent will do the same and in part because the selected law firm may already be doing a big chunk of the corporation's legal work. A critical challenge is for those corporations to justify the resulting huge litigation price tags to shareholders. Litigants hiring my law firm know that on the one hand my price tag will not need to cover huge overhead expenses, but that on the other hand if a big team of lawyers and assistants is needed, they either will need to look elsewhere or have me as part of a team of lawyers from more than one law firm. YouTube.com makes available not only the opportunity for subscribers to upload home videos to the Internet, but to upload pretty much any video to the Internet. YouTube apparently is diligent in removing video uploads when the owner of the copied material claims copyright infringement. However, YouTube apparently does not remove such videos before receiving a complaint. (On the flip side, it seems that YouTube has a more proactive system to prevent nudity from reaching web viewers, which makes one wonder whether YouTube has software to check for nudity or has someone checking each video before it can be uploaded, and the extent to which YouTube has the capacity to block copyrighted works more proactively, while it is clear that nudity is easier to spot on the screen than a copyright violation.) Last year, Viacom and co-plaintiffs sued YouTube for its involvement in having copyright-infringed works uploaded to YouTube. After various back-and-forth procedural moves, YouTube filed its Answer to the now-amended Complaint last Friday, which is over fourteen months after the lawsuit was filed. This blog entry is meant briefly to introduce this litigation and to provide some of the following links. So many millions of people and businesses download and upload at YouTube -- and set up their own webpages there -- that the results of this litigation might have a tremendous impact on them. Here are some links relevant to this Viacom v. YouTube lawsuit: - Here is the Associated Press's May 27, 2008, overview of the case. - Amended Complaint and 1800-page exhibit thereto, listing over 17,000 allegedly infringed copyrighted works that were uploaded to and available on YouTube. - Defendants' Answer to the Amended Complaint. - The case docket. - Larry Dignan at ZDNet has been covering this litigation since its inception. His views of the lawsuit are fully unvarnished: "Google [which now owns YouTube] stands for all that enables the Internet. Viacom is evil -- or at least misguided." A huge gap exists between evil and misguided, of course. Jon Katz ADDENDUM: In a related development, this website covers the Football Association Premier League, Ltd., et al. v. YouTube, et al. (S.D.N.Y. 07-civ.-3582) class action lawsuit that is listed as a related case to the foregoing Viacom v. YouTube lawsuit, and was filed two months thereafter. The two cases have some material overlap. Here are some of the key filings in the Football Association civil action: - The case docket; Amended Complaint; Answer to the Amended Complaint; and Order appointing interim class counsel.

Posted by Jon Katz in First Amendment at 00:00

Monday, May 26, 2008

### **What does Memorial Day mean?**

Image from website of the White House Commission on the National Moment of Remembrance. Last year on Memorial Day, I posted the following piece on the topic. I agree with the posting as much today as last year.

Intervening since the 2007 Memorial Day was my father's fiftieth West Point reunion yesterday, which I attended with my wife and boy. Unlike the forty-fifth reunion, this time I was checked for my identification twice, and told (not asked) to pop open my trunk; were I there for any other reason, I would have opted to leave rather than to experience such an invasion of my privacy. In one of the buildings, I saw a poster with Ulysses Grant, Robert E. Lee, Douglas MacArthur and Dwight Eisenhower, proclaiming something along the lines of: "We don't just teach military history here, but have taught many who have made such history." I hope no pride was intended here about Robert E. Lee. Around one hundred of my father's over five hundred classmates have died; some through their military assignments -- numerous went to Vietnam, for instance -- and others not. Without exception, my father's classmates have seemed to be decent people. However, that does not diminish my following views: Today is Memorial Day, which is a holiday for memorializing America's soldiers who died in wars. However, the bigger focus of the holiday seems to be long weekend vacations, parades, and retail sales. I have said plenty about the military. Mainly, I believe the United States needs an effective military. However, I also believe that the military-industrial-government complex is dangerously overgrown; that the United States has been too trigger-happy with the military and that effective diplomacy needs to be given more opportunity; and that violence begets violence, and, even though I am not a full pacifist, that Gandhi and many other pacifists' messages are important to take to heart and are often very powerful and effective. I also believe that the United States military has been the source of too many severe abuses, atrocities, and imperialist expansion -- whether originating from the lower ranks, the highest echelons, or somewhere in between; and that the United States government repeatedly has used war -- and by now terrorism, as well -- as an excuse to stymie civil liberties. Using effective diplomacy and hemming in military excess is not impossible. Although I take it that America's military, military budget, and nuclear arsenal continued growing under his watch, Jimmy Carter "was thankful that although my profession was that of a military man - commander in chief of the armed forces, prepared to defend my nation with maximum force if I had to - I was able to go through my entire term in office without firing a bullet, dropping a bomb or launching a missile." (Esquire, January 2005). (Many Americans at the time preferred the cowboy mentality of Ronald Reagan, who defeated Carter in an Electoral College landslide. Carter's full quote is: "The hostage crisis lasted almost a year. Most of my political advisers were urging me to launch an attack against Iran. I could have, in effect, destroyed Iran with one strike. And it would have been politically popular to do so. But in the process, I would have also killed thousands of innocent Iranians. And it would have undoubtedly resulted in the execution of our hostages... My family tied me back to the human element in the most important international, diplomatic and military decisions I had to make. And in the end, I was thankful that although my profession was that of a military man - commander in chief of the armed forces, prepared to defend my nation with maximum force if I had to - I was able to go through my entire term in office without firing a bullet, dropping a bomb or launching a missile."). In short, Memorial Day should not be a day blindly to glorify the military, military service, or soldiers. Instead, it should be a time to humanize soldiers and to recognize the sacrifices they have made while maintaining a realistic and critical assessment of American militarism; recognizing the serious tradeoffs involved in using and threatening military force; and recognizing that soldiers are humans including those who will commit horrid atrocities and others who will try to stop the atrocities. Jon Katz.

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

Friday, May 23, 2008

### **Defending criminal copyright infringement cases.**

Computer hard drive. (Image from Pacific Northwest Laboratory's website). According to a posting at lawyer Allan Ellis's website, the United States Sentencing Commission reports that 94% of federal criminal cases result in guilty pleas. This week, my client and I bucked that trend by proceeding to a jury trial in Alexandria, Virginia, federal court for alleged criminal copyright infringement. Wired's blog describes my trial as the first federal trial for online criminal copyright infringement that primarily involved music; that does not mean that others have not entered guilty pleas for such accusations, because they have. For this trial, I had the pleasure of working with a top-notch computer forensics expert, with whom I previously worked for child pornography defense. The technology is too involved to proceed without such an expert for advice and possible testimony. As it happens, only two weeks before our trial began, the Fourth Circuit addressed the method for valuing allegedly infringed copyrighted material for criminal prosecutions. *U.S. v. Armstead*, \_\_\_ F.3d \_\_ (May 6, 2008). In pertinent part, the court said: "[T]he government proffered evidence that the "suggested retail price" of each of the DVDs sold by Armstead was between \$25 and \$30 per copy, but the district court excluded that evidence precisely because it was only suggested, and not actual. This was error, however, because the suggested retail price was relevant to determine a "face value" or "par value" that would be especially relevant to determining prerelease retail value. Indeed, the House Report that accompanied the bill for [18 U.S.C.] § 2319 explicitly noted that for unreleased movies, courts could look at suggested retail prices. H.R. Rep. No. 102-997, at 6-7. And since there would be evidence of both face value (had the court properly allowed it) and market value, the higher would be applicable in determining the threshold amount for a felony conviction under § 2319(b)(1). The relevance of valuing allegedly infringed copyrighted material is addressed in the criminal copyright infringement statute at 18 U.S.C. § 2319, whose text is here. If you are a lawyer who is defending or has defended such cases -- or if you know of such lawyers -- please let me know. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00



Wednesday, May 21, 2008

## **Does the First Amendment prohibit convictions for juxtaposing lawful images of children with adult sexual images?**

Â Bill of RightsÂ (From public domain.)Â NOTE: The following blog entry was written before the awful May 19 Supreme Court decision in *U.S. v. Williams*Â (May 19, 2008).Â This blog entry follows up on my previous discussionsÂ of child pornography defense here and here. Â Â With the current state of First Amendment caselaw relating to child pornography, it is not immediately clear that Ronald Jay McFadden will get his recent child pornography conviction overturned. Mr. McFadden was convicted for child pornography possession despite his defense attorney's claim against a conviction on the basis that the conviction arose from Mr. McFadden's juxtaposition of sexually explicit adult images alongside images of children -- including nude images, apparentlyÂ -- which images his attorney claims were copied from such legitimate sources as medical publications. He faces up to life in prison based on his prior criminal convictions. Because preventing psychological and physical harm to children has been a part of the Supreme Court's justification for limiting First Amendment protection for child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), one is left to wonder whether the appellate courts will overturn Mr. McFadden's conviction when consideringÂ the psychological harm that can be caused to the children depicted in his photographic juxtapositions. Â If Mr. McFadden's conviction is permitted to stand, this will point out a problem in the courts' carving out a First Amendment exception in permitting child pornography prosecutions in the first place for the possession and distribution of such images, as opposed to convictions for procuring, photographing and videotaping children for child pornography. Through child pornographyÂ images provided in discovery by prosecutors in some of my clients' cases, I have seen child pornography images that leave me wondering about the depths to which some humans will sink.Â However, I do not see how courts can stay true to the text of the First Amendment by permitting convictions for possession and distribution of child pornography -- as opposed to procuring, photographing and videotaping children for child pornography -- without first having the Constitution amended. Each time appellate courts narrow a plain reading of the First Amendment, such narrowing becomes fodder to narrow even some of the most cherished avenues of expression, including peaceful demonstrations at presidential conventions. If recent history is any guide, we can expect to see police and local governments requiring demonstrators to stand far away from the Democratic and Republican presidential conventions -- thus preventing their message from getting to their target audience of convention attendees -- and we might not see courts doing much to rectify the situation. Â Thanks to Kathleen Bergin at First Amendment Law Prof Blog for writing about this McFadden child pornography prosecution, which is reported in this news article. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, May 20, 2008

**Your vote for president will affect the Supreme Court's tilts for decades to come.**

Â Bill of RightsÂ (From public domain.)Â On May 19, 2008, the United States Supreme Court affirmed a conviction involving the mere promoting of child pornography, as opposed to the possession or distribution of such material, even if no child pornography is behind the promotion. Â Who voted in the five-justice majority in this U.S. v. WilliamsÂ (May 19, 2008) case? All appointees of Reagan, BushÂ I and Bush II (Justice Scalia joined by Justices Kennedy, Thomas, and Alito, and Chief Justice Roberts). Who voted in the concurrence, refusing to weaken the First Amendment as much as did the majority? A Ford and Clinton appointee (Justice Stevens joined by Justice Breyer). Who took the just route by dissenting? A Bush I appointee and a Clinton appointee (Justice Souter joined by Justice Ginsburg). Â Want to slip further into the dark ages with the Supreme Court? Then vote McCain. The First Amendment? What First Amendment?Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:10

Monday, May 19, 2008

**Bloggging by Google senior copyright counsel.**

Computer hard drive. (Image from Pacific Northwest Laboratory's website).  
Our blogroll grows by around one new blog every three to six weeks. One of our most recent blogroll additions is William Patry's Copyright blog. Patry is a senior copyright counsel at Google, which gives him a very informed angle from which to blog. Among my favorite blog entries of William Patry is his discussion of the origins of the phrase "A dwarf standing on the shoulders of a giant can see farther than the giant himself." Jon Katz.

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

Sunday, May 18, 2008

**Reverberations of a step and a drum.**

Â Where did I get on this calmness kick that I discuss in my May 16 blog entry? It predates my t'ai chi practice to reach to the late 1970's, when meditation was already highly popular in the United States. I learned meditation through Herbert Benson's Relaxation ResponseÂ book. Calmness did not come overnight, but a calmer approach took hold. Â In 1991, I met my friend and teacher Jun Yasuda, as she fasted for thirty days on green tea, drumming for peace in Iraq. Bush I subsequently selected a date to end the war, which was the same date that Jun-san hadÂ had pre-selected to end her fast. Although I took this coincidence as a coincidence, when I mentioned it to Jun-san, she gave me a knowing smile. Â I learned by the time I started practicing t'ai chi in 1994 that a peaceful life is a powerful life, as I detail here. Jun YasudaÂ truly is peacefulness personified.Â Â Shown in the above YouTube video -- thanks to the video's creator, Tom Kearns --Â is Jun-san's peace pagoda and templeÂ off the beaten path of Grafton, New York, where I visited for a crossroadsÂ two-day visit in 1996 (experience more of her essence in this photo montage). It wasÂ a crossroads visit, because it gave me the first chance to be with Jun-san for more than just a few minutes, and during this time I asked many questions about how she reached the peaceful path, and learned Jun-san's Buddhist philosophy of death -- which is that death is only an artificial concept, as death is an essential part of life -- which helped me substantially progress from an utter fear of death toÂ being more calm about its inevitability.Â Â In April 2005, I joined Jun Yasuda and other peace walkers camped out on the floor of a church social hall as a prelude to driving the next early morning from Charlottesville, Virginia, to Falls Church, Virginia, for a multi-mile leg of the seven-weekÂ International Peace Walk to Stop the Bombs.Â During the two-hours that I drove a few peace walkers to Falls Church, I had a long conversation with Jun-san, including my many questions about her near absolutist or absolutist approach to peace. For instance, I asked Jun-san what she would have done if she lived in the 1940's and bumped into Hitler, since I knew her response would not have mirrored my response of shooting him dead first and asking questions later. Whether or not I agreed, Jun-san explained that everyone has several personalities including good parts of their personalities; she mentioned Hitler's having been a painter. Jun-san would have asked Hitler why he was so angry. She said she might have started by offering him a massage, looking at it as soothing the soul of a savage beast, I suppose.Â Â On our walk, which covered many miles that I had only driven before, we stopped at the Iwo Jima memorial across from my old apartment building in Arlington, Virginia, the Vietnam Veterans Memorial, and Lafayette Park across the White House, where I first met Jun-san. At each place, if I recall correctly, Jun-san lit incense sticks, apparently to sanctify the activity, and led everyone in a respectful repetitious drumming prayer of the Odaimoku -- Na Mu Myo Ho Ren Ge Kyo, which graces myÂ license plate in acronym form. Jun-san treats everyone with the same respect. Â It took me a long time to pick up on the benefit of all the miles of peace walking Jun-san does each year. At first, I thought Jun-san might be more effective if she obtained a public relations team to promote her for speeches, web appearances and book publications in the successful manner of the Dalai Lama. I believe the Dalai Lama's approach to spreading his message of internal and external peace is very beneficial. Jun-san's approach is to spread her message without much technology, by walking hundreds of miles annually, chanting and drumming the odaimoku nearly every step of the way. Â When Jun-san was doing a days-long dry fast, with just one drink at the midpoint, in 2000 for MumiaÂ Abu JamalÂ on or near his prison grounds, an interviewer asked her on day five of her fast, in her very cold tent, how she expected to influence many people by doing her actionÂ so far from the nearest city and often with few people seeing her other than the prison workers. Jun-san responded: "Numbers don't matter. What matters is your commitment to peace. Gandhi was just one person, and he did very simple things. He walked to the ocean [in protest of a British monopoly on salt]. He fasted. He was one person. But he was very conscientious. We should be too. Think of one person fasting outside the White House. That act has spiritual power. More, maybe, than bigÂ numbers." This is a very powerful message. Â Jun-san and the other members of her Nipponzan Myohoji order collaborate with other groups -- involving other religions and interests -- with the goal of peace. In 1977, Jun-san joined the American Indian Movement's Longest Walk, which is described as follows at <http://www.dharmawalk.org/fujii.htm> :Â Â In 1977, the Order put this [outreach to other groups] into practice by joining the Longest Walk for Native American survival. [Nichidatsu] Fujii [founder of Nipponzan MyOhoji] found the basis for a deep relationship with the Indian people. As he told Dennis Banks, "The daily life of your people is supported by religious faith . . . a way life identical to that of Buddhism." Â Banks had encountered the drums many years before. As a member of the armed forces in 1956, Banks was on guard as the Order joined farmers and students to halt construction of an air base near Tokyo, "The Japanese police beat many of the Buddhist disciples." he later recalled. "As I watched in horror I could not realize the strength of their prayers and the weakness of our weapons. Twenty-two years later, we met again at D-Q University [in California]. Only then did I realize the strength of [Fujii's] spirituality and I knew that his prayers would outlast the weapons of war."Â Fujii's work with Native Americans continued to grow through numerous walks and actions. A Buddhist temple was established at D-Q, a Native American controlled school where Banks served as chancellor. When he left the state, a Nipponzan Myohoji nun, Jun Yasuda, traveled with him. Banks pointed to the Order as an example of what religious respect could mean. The Sangha, he explained, had

not come to convert him to Buddhism, or to tell Indians how to do things, but to offer their support in times of danger. They had stayed constant through their own prayers and practices. The cross-country Longest Walk was a highly empowering event for Native Americans, and is well-detailed in Dennis Banks's autobiography *Ojibwa Warrior*. (A new Longest Walk to Washington, D.C., is now in progress; information on the walk and on how to provide financial and other support is [here](#).) Such long distance walking is among the things the Longest Walkers had in common with the Nipponzan Myohoji folks. The next time I see Jun-san, I will ask her if she feels she is adding peacefulness to every bit of land she walks on while chanting the Odaimoku. I expect her answer will be yes. Jon Katz.

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

Friday, May 16, 2008

### **Addressing adversity like a t'ai chi teacher.**

Â A big dichotomy can exist between the devotion to being calm, and actually being calm. Although I do not know if it is true, a well-known peace proponent whom I respect very much claims that Gandhi, the very would-be pillar of calmness, was a tyrant to his wife. (Did he do so in a calm tone of voice, if there is such a possibility?)Â One day at a Trial Lawyers College reunion ten years ago, one of the attendees told me: "Jon, it took awhile for me to identify with you. You are a vegetarian, and I hunt. By now, I admire you as a sea of calm."Â I responded: "You have much still to know about me. It is easy for me to be calm while here on vacation in the beautiful Wyoming mountains, with not an opponent in sight." Â Yet calm I must be, and calm we must all be. Many times I have obsessed over whether calmness is a sign of weakness or of being an automaton humanoid. Then I think of my friend and mentor Jun Yasuda, who is calmness personified even when being physically attacked when peacefully demonstrating for peace (her response will be "Why are you angry?" rather than escalating the violence) and even when the government throws roadblocks in her path (including telling her how to set up the plumbing in her temple, merely because it is open to the public). Â The late Vic CrawfordÂ was about the only person who could have convinced me to start practicing t'ai chi when I did. He did so merely by letting me know in passing that he practiced it, answering any questions I had about t'ai chi, and just being. Vic was a brash, hard-fighting trial lawyer who incorporated t'ai chi into his life without making any effort to proselytize for it. Three years after I first met Vic, I askedÂ his advice for learning t'ai chi. Vic sent me some brochures about classes given by Ellen and Len Kennedy, (who became my teachers) and some other local instructors (lawyers Vic and Len inspired me to start and stay on the t'ai chi path now for over thirteen years). He attached a note foreseeing amazing doors that were about to be opened through learning t'ai chi; what an understatement.Â Â Recently, I revisited the critical question I often revisit: How to apply calmness to an employee even in the most trying situation (for instance, if a new staff member mistakenly tells a caller we don't handle felony cases (which we do, of course) and the caller hires the lawyer across the street for his marijuana grow defense). First, in responding to such trying situations, it is important to remember some of our own worst messups, whether based on inattention, stress, depression, disinterest, inability, or anything else. Then, for me, it is critical to stay in, or return to, full t'ai chi mode, where tension always weakens and calmness always strengthens. Next, in addressing the problem with my employee, it is critical to approach the matter as my t'ai chi teachers do in showing me how to improve, which my teachers call "corrections", which is a positive and patient approach geared towards improving absent of any lecturing, berating or tension. My t'ai chi teacher does not tell me "for the thousandth time, stop holding your arm so high when in the wardoff posture," but instead comes over and either points calmly to my wardoff arm or gently moves it to the better position (or,Â if it is master Ben Lo, he mightÂ playfully throw one off balance by pushing theÂ lower back of a practitioner who does not sink into his or her steps; as Ben says "No pain, no gain/No burn, no earn."). Â Â Of course, different than the employer who can suffer harm to clients and finances when an employee makes a big error, the t'ai chi teacher suffers no loss other than training time to have a student who makes multiple errors. The great t'ai chi teacher recognizes, of course, that every student of every subject has his or her own pace for learning, and that sometimes the slowestÂ learner becomes the most skilled practitioner.Â In any event, there is no sufficient alternative to the foregoing approach for addressing employees when they make mistakes, or even when they intentionally neglect their obligations. What good comes out of any other approach? For instance, motivation by fear ultimately weakens the employee, the employer, and the entire organization; fearÂ weakens rather than strengthens.Â T'ai chi megamaster Cheng Man Ching -- who taught the teacher of my t'ai chi teachers -- exhorted t'ai chi practitioners to be ready to invest in lossÂ on the way to victory. Certainly, approaching serious adversity with employees and others with total calmness may prolong loss in the short run (for instance, some employees may think their mistake could not have been all that bad if the employer responded calmly), but in the long run, this is the most powerful and beneficial approach. In reality, no other alternative exists to the calm t'ai chi approach, and no exceptions exist to this approach. Even for people who are committed to such an approach, overnight change is unlikely. Of course, t'ai chi involves striving for constant improvement, rather than expecting that it will come at the snap of the fingers. Â The fighting part of t'ai chi is to be used with our opponents, not with our employees, co-workers, friends, and allies. Even when t'ai chi battle is necessary with opponents, calmness is critical at all stages, no matter how fierce or potentially lethal the battle. The goal of t'ai chi battle is to harmonize a problem; for me, in doing t'ai chi battle, if any damage is going to come to the opponent, I want to cause no more damage to the opponentÂ than necessary to get to harmony. Â Theoretically, it should be less stressful to deal with problems from employees than problems from opponents. However, we know that we generally can escape from our opponents by just walking away, whereas employees are within yards of our desks. Calmness remains the only answer. Â As to opponents, disarming them often requires putting our own arms aside, too, at least at first. For instance, recently I went up against a prosecutor who refused to budge to reach a drunk driving plea deal that would not involve his recommendation of executed jail time. I figured no harm would be done, and possibly a benefit, if we took a detour to something else to discuss of mutual interest, so we talked about our criminal law practices, which was interesting for us both, as much as I

still see prosecuting as mainly a darkside practice. Then I came back to our plea negotiations, and with a few new developments that took place, we reached a no-executed jail deal. Before starting practicing criminal defense seventeen years ago, I would have thought such an amiable discussion between opposing lawyers distasteful. However, I know that we are all interconnected as human beings; when we treat our opponents as full human beings -- even through gestures as small as engaging in mutually interesting discussions about such pastimes as long distance biking -- rather than as evil personified, we help motivate and empower them to be the best human beings they can be, or at least to approach that. Everyone wants to be treated with respect and dignity, rather than to be expected to urinate in the eye of justice and good. When we recognize that everyone has within them the seeds of goodness and evil, then it is easier to hold out hope that even our most vicious and heartless-seeming opponents can experience a turnaround. For my purposes, t'ai chi is an essential ingredient for putting the foregoing goals into practice. Mediator Tammy Lenski's Conflict Zen blog provides excellent ideas for reaching such goals for those who do and do not practice t'ai chi. What do you do to reach calmness in a state of stress or conflict? Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Thursday, May 15. 2008

**In New York, it's Geoffrey Holder; in D.C. it's Douglas Ginsburg.**

Imagine Geoffrey Holder, with his commanding voice, arguing before Judge Douglas Ginsburg. I have lived in two celebrity towns: Manhattan and Washington, D.C. In Manhattan, I'd pass Lou Jacobi as he dropped off dry cleaning, Geoffrey Holder (see him in the YouTube video above) on a cold weekend afternoon in Greenwich Village, and Madeline Kahn in the audience waiting to see Linda Hunt and Wally Shawn onstage. In Washington, D.C., the celebrities more often are political figures. A few months before he resigned, I saw Nixon enter the same hotel where Reagan was shot seven years later. Not long after he purportedly overdosed in the eye of the Iran-Contra storm, I saw Robert MacFarlane, Jr., from the opposite direction on 20th St., NW; with a nod, he broke my surprised look focused on how he symbolized a presidency I strongly opposed, while recognizing the common human denominator that his overdose represented. Near the same time, two blocks from my law school, I saw Robert Bork taking up almost the entire front of a small car in which he was driven, shortly before his doomed Supreme Court nomination got under way; stunned to see the man I wanted bounced out of the Senate confirmation room, I surprised myself to ask "How are you?," which received a high-pitched "Fine, fine." Three days before Gulf War II started, I saw Carl Bernstein taking a stroll at the national Mall. He seemed happy to be recognized; I wanted to show him my thanks by leaving things at my gaze. Soon after the Senate bounced Bork, Reagan nominated a forty-one-year-old Douglas Ginsburg to the Supreme Court. His nomination fizzled within days after his admission that he had smoked marijuana while a law school professor. Since then, Judge Ginsburg has remained a judge on the United States Court of Appeals for the District of Columbia. I appeared before him, Judge Kavanaugh, and Judge Brown two days ago, arguing to strike down the Defense Department's First Amendment-violative regulations prohibiting military base newspapers from carrying my client's ads challenging the Bush II administration's military policies. When I learned Judge Ginsburg would be on my panel, I was intrigued that this man who had fifteen minutes of national fame over his Supreme Court nomination would be presiding. When he sat in the center seat at the bench, I took a double take, wondering if it perhaps it was a different Judge Ginsburg; over twenty years has intervened. Judge Ginsburg does not come across as a stoner; he comes across as a conformist who would be prized by Reagan as a judicial appointee were it not for his marijuana smoking background. Of course, when Judge Ginsburg was a Harvard law professor from 1975 to 1983, often it was more non-conformist to refuse to join others for a toke than to do otherwise; able to count on one hand the times I have toked, I know how much easier it would have been for me to have joined in more often. Now we have a presidential candidate, Obama, whose autobiography admits to having snorted blow/cocaine in his much younger years, apparently feeling lost in the ocean without a lifesaver. Had Judge Ginsburg been a Democratic appointee, his marijuana past may have seemed just quaint. The marijuana legalization movement has its share of Republicans, often libertarian-leaning, including the late William F. Buckley and the late Milton Friedman. The late Nixon appointee and conservative William Rehnquist may have found natural back pain relief and avoided his earlier dependency on the overly potent Placidyl had he used medicinal marijuana instead. As is common, I was allotted only ten minutes to argue before this appellate court panel. This expensive courtroom in the courthouse's new wing was as august as they come, with reading prohibited even for lawyers waiting their turn to argue. Had I passed Judge Ginsburg in the hall, I would have bit my tongue to ask my burning question: "What led you to smoke marijuana? To treat orthopedic pain? To enjoy an alternative to a cocktail? To enjoy the communal experience of sharing the herb?" It is a better question to ask someone who will not be deciding my client's case. Ironically perhaps, marijuana was a theme of my appeal before Judge Ginsburg and the rest of this panel, through my argument about the soundness of federal trial judge Paul Friedman's 2004 ruling in *ACLU v. Mineta*, 319 F.Supp.2d 69 (D.D.C. 2004), that the D.C. area Metropolitan Area Transit Authority unconstitutionally prohibited pro-marijuana advertisements in subway stations, where WMATA's decision was based on federal legislation prohibiting such advertisements in transit systems. As I have said many times, if all alcohol drinkers enjoyed marijuana instead, the world would be a much more peaceful and mellow place. Amsterdam anyone? Jon Katz

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

Wednesday, May 14, 2008

**Supremes: Constitutional for lawyers to agree to magistrate judge jury selection.**

Supreme Court spiral staircase. On May 12, 2008, the United States Supreme Court affirmed a conviction where the defendant's lawyer agreed to magistrate judge-run jury selection, even though the defendant was not asked directly on the record whether he so consented. *Gonzalez v. U.S.*, \_\_\_ U.S. \_ (May 12, 2008). This case is worth reading both for the majority opinion and for Justice Thomas's dissent, in which he insists that defendants -- not their lawyers -- personally have the opportunity to say aye or nay on the record about having a magistrate judge conduct jury selection. As much as I did not want Justice Thomas to join the Supreme Court and still feel the same way, I thank him for his dissent in *Gonzalez*. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, May 13, 2008

**State's Attorney Ruark pleads guilty to driving under the influence.**

Photo from website of U.S. District Court (W.D. Mi.).  
On February 25, 2008, I wrote: "Wicomico County, Maryland, State's Attorney Davis Ruark said of his arrest from last Friday, which involved an alleged 0.15 blood alcohol content reading: "I am human ... We are all human and we are subject to make mistakes and when you make a mistake you learn from it and you don't do it again. And this will never happen again." While Mr. Ruark remains in office, I hope he practices as his above quote preaches, and urge all other prosecutors, police, and judges to do the same." On February 26, I wrote more about the case here.  
On May 12, 2008, Davis Ruark pled guilty to driving under the influence and received a guilty verdict rather than the probation before judgment disposition that Maryland defendants often seek when convicted for the first time for driving under the influence. (See a courtroom eyewitness's account here.) He received a one-year probation period and no executed jail time. Although some law and order folks might argue that Mr. Ruark's misdemeanor conviction in this case makes him unfit to continue in office, I hope that his experience in this case will make him more empathetic to the plight of criminal defendants. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, May 12, 2008

**Interstate commerce has its limits in criminal law.**

Â Bill of RightsÂ (From public domain.)Â Â Praised be Orlando federal judge Gregory Presnell for delineating the limits of federal jurisdiction in criminal prosecutions, in finding the federal sex offender statute unconstitutional when it comes to criminalizingÂ the failure to register with a state agency as a sex offender. Thanks to a fellow listserv member for bringing this PowersÂ opinion to my attention. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Friday, May 9, 2008

### **Stop police abuse now by shrinking the criminal justice system, disciplining cops, and maintaining compassion for them.**

Â Bill of RightsÂ (From public domain.)Â Praised be the inventors of videocameras, right into today's generation of lightweight, small, inexpensive digital cameras. Without such cameras, more rogue cops would get away with lying that a suspect's face got rearranged merely because "he struggled with the cuffs, lost balance, and landed on the tip of my boot, then bounced off the tip of my boot onto my fist, and, by some strange happenstance, this got repeated seventy-three times until he finally landed nose-first on the pavement below. Having eaten some greasy finger food earlier, I was unable to catch him to break his fall. We then processed him and took him to the hospital." Â Praised be the Fox news videographer who last Monday captured and released footage of Philadelphia cops beating three crime suspects who do not appear to be resisting nor fighting back. The story is here, and the video is here. This video joins the many other police beating videos I have posted on Underdog. Â Are there good cops? Yes. Are there too many bad cops? Yes. How do we get more good cops and fewer bad cops? It will not happen until the criminal justice system is tremendously shrunk at all levels through reducing the number ofÂ cops, prosecutors, judges, jailers, probation and parole agents, and pretrial services staff. Then, the cream of the crop can be hired, and resources won't be overly-thinned to sufficiently train, supervise, pay, promote, and remove them as necessary. How best to shrink the criminal justice system? As I have said so many times, it is as simple as legalizing marijuana, prostitution, and gambling; heavily decriminalizing all other drugs; and focusing drug prosecutions more on drug treatment (notÂ drug brainwashing, but helping peopleÂ kick the habit)Â than on jailing. Of course, as the Washington Post reports, fiscal tightness can also shrink the criminal justice system, as seen by the early release of thousands of inmates nationwide to alleviate government budget crunches. Â On a related note, as a criminal defense lawyer, it is particularly necessary for me to treat each cop -- and everyone else -- on his or her individual merits as a human, even if I strongly believe the cop is one who strays into beating suspects, planting drugs onÂ suspects, and lying in court. For one thing, my suspicions may not be correct or may be exaggerated. For another thing, cops, being humans, are more willing to speak to a genuinelyÂ understanding, informalÂ and open ear than to an accusatory finger. For a final thing, even the most atrocious humans -- within certain limits -- can become better people, and I wish to contribute to such a vital development. Â The importance of holding out hope that even rogues will reverse their damaging ways is highlighted byÂ the following Buddhist story, whether or not fable, and unfortunately with sexist themes: A holy man is minding his own business praying in nature when a prince arrives to conduct some business nearby and his several wives take a walk and find the holy man. The women are taken by this holy man and circle around him to try to learn from him; the holy man continues about his own business no different than when the women arrived. The prince returns, and in a rage seeing his wives with another man (no matter how innocent the scene), unsheathes his sword and cuts off one of the holy man's feet. The holy man starts praying for the prince, and proclaims that the prince has the capacity to become a buddha. The prince proceeds to cut off more of the holy man's limbs, and the holy man continues praying for the prince's capacity to become a buddha. The prince kills the holy man, and, sometime afterwards, becomes one of Buddha Shakyamuni's righthand people. I think I found this story in Ringu Tulku's Daring Steps Toward Fearlessness: The Three Vehicles of BuddhismÂ (Snow Lion Publications, 2005). Â I certainly would not have been praying for the foregoing prince if he were attacking me or someone nearby, but this also reminds me of my friend and mentorÂ Jun Yasuda of Grafton, New York, who is a longtime peace activist and nun with the Nipponzan Myohoji Buddhists. She once told me about the day she joined a gathering supporting the land rights of native people in Canada. At some point, an opponent of the demonstration rushed towards Jun-san and some other demonstrators swinging a metal pipe. Jun-san expected she would die. Instead of protecting herself, Jun-san prayed for the attacker, because he and all human life are sacred to her. Jun-san did not flee or fight in fear, because she has resigned herself that she will die one day anyway, and she sees death as just another part of life. Somehow, the attacker's pipe never hurt anyone, and he was subdued (clearly not by Jun-san).Â I know from personal experience that people can change from rotten to good. I have done plenty of rotten things myself during my life, exemplified, perhaps, by my practice several times in summer camp at eight years old of throwing an annoying fellow camper's sandwiches into the woods. At the time I rationalized that I was doing a public service; I was just being rotten. Still a question mark for me is the extent to which my mistreatment of other people and animals (through eating the latter) did or did not draw me more quickly and closely to human rights and social justice work. Â In any event, as much as I am better able now than ever before to compassionately approach cops, prosecutors, and other opponents to try to have them help my client in one way or another -- whether that be getting more from the cop on the witness stand, or a better disposition offer from a prosecutor, for instance -- this does not diminish whatsoever my insistence that too many rogue cops and prosecutors are out there, and they must be stopped in their tracks, now. Jon Katz.Â ADDENDUM: Thanks, Jonathan Turley, for writing on this Philadelphia police beating story and providing the YouTube link (which later was yanked from YouTube purportedly for copyright reasons). .

Posted by Jon Katz in Criminal Defense at 00:10

**If you want to reach me, please refrain from bcc.**

Â Image from Library of Congress's website.Â Lately, I have been inundated with a few hundred daily spam emails that do not list my email as the recipient. Such emails get filtered to a box that I have no choice but to empty daily without reviewing the messages. That is too many emails to wade through. Â Previously, I would ask people not to send me mass emailings unless I am listed as a bcc party, lest I become the victim of reply-all messages. Now, I still do not want my e-address listed on the first, but I will not be reading the latter, either.Â In short, I continue being a victim of the same spam for which I support robust First Amendment protection. Spammers: why alienate one of the people whoÂ supports your rights to robust spamming?Â Jon Katz.

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

Thursday, May 8, 2008

**The risks of refusing a test that should be fully refusable.**

Bill of Rights (From public domain.) Field sobriety tests are junk science administered by cops who have no expertise to administer them, because junk science precludes having expertise. See how poorly is the performance when asking even a fully sober and awake person to follow unfamiliar instructions for standing on one leg for a count of thirty and walking heel to toe ("don't miss heel to toe") nine times and pivoting correctly on the way back. If a person has even had a glass of wine two hours ago and is somewhat tired, s/he will be between a rock and a hard place to take or not take the field sobriety tests in the following states that Virginia's intermediate appellate court has joined for considering the results of field sobriety tests for determining probable cause to arrest for violating drunk driving laws.

In *Jones v. Com.*, \_\_ Va. App. \_\_ (May 7, 2008), Virginia's Court of Appeals upheld a thirty-day jail sentence for unreasonable refusal to take a breathalyzer test, where the defendant had previous drunk driving convictions, and allowed consideration of the defendant's refusal to take the field sobriety tests for the probable cause determination. Moreover, the court was silent about the cop's repeated requests for field sobriety tests, which sounds like such test requests were demands rather than the simple requests they should have been (just as cops are not permitted to demand that a person submit to a "consent" search; they may only request it). In reaching this conclusion, Jones detailed the situation in the following states that permit consideration of refusal to perform field sobriety tests, Jones at n.4: See, e.g., *State v. Ferm*, 7 P.3d 193, 197 (Haw. Ct. App. 2000) (affirming conviction when officer arrested appellant for DUI based on his "impaired demeanor, the smell of alcohol on his breath and his refusal to undergo a field sobriety test"); *State v. Sanchez*, 36 P.3d 446, 449-50 (N.M. Ct. App. 2001) (holding that, while refusal to perform field sobriety tests would not, standing alone, provide probable cause, it is a legitimate factor in the probable cause determination). Far more courts have decided the analogous issue of whether refusal to perform field sobriety tests may be used as substantive evidence to establish intoxication in criminal trials. See, e.g., *Longley v. State*, 776 P.2d 339, 345 (Alaska Ct. App. 1989) (holding evidence admissible because "[a] refusal to take the [breath] test is . . . probative of guilt . . ."); *Johnson v. State*, 987 S.W.2d 694, 698 (Ark. 1999) ("The refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendant's fear of the results of the test and the consciousness of guilt."); *State v. Taylor*, 648 So. 2d 701, 704 (Fla. 1995) (Appellant's "refusal [to take field sobriety tests] is relevant to show consciousness of guilt."); *People v. Johnson*, 819 N.E.2d 1233, 1237 (Ill. App. Ct. 2004) (Refusal evidence is admissible because "[t]he trier of fact can infer that a defendant refused to submit to the test because it would confirm that he was driving under the influence.); cf. *State v. Mellett*, 642 N.W.2d 779, 786-89 (Minn. Ct. App. 2002) (refusal evidence admissible; no Fifth Amendment violation); *State v. Hoenscheid*, 374 N.W.2d 128, 129 (S.D. 1985) (refusal evidence admissible; no Fifth Amendment violation); *Seattle v. Stalsbrot*, 978 P.2d 1059, 1061 (Wash. 1999) (refusal evidence admissible; no Fifth Amendment violation); but see *Commonwealth v. Grenier*, 695 N.E.2d 1075, 1078-79 (Mass. App. Ct. 1998) (holding that refusal evidence is inadmissible on the issue of intoxication based on state constitutional grounds).

*Jones v. Com.*, \_\_ Va. App. \_\_ (May 7, 2008), I hope Jones files and wins a petition for appeal to Virginia's Supreme Court in this case. Jon Katz ADDENDUM: Thanks to a lawyers' listserv member for bringing this Jones case to my attention.

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

Wednesday, May 7, 2008

**"There is never any end. There are always new sounds to imagine."**

Â Sketch by John Iorio Â Not long ago, a burnt-out appearing lawyer expressed cynical surprise that I continue getting a big charge out of fighting for criminal clients. He said something along the lines that after practicing over ten years, I will see what he means; at the time, I was approaching fifteen years of criminal defense practice. Criminal defense practice is not for everybody, but it is definitely for me. Â Helping keep me rearing to go each day are the often boundless possibilities for obtaining justice for clients -- often with inspiration from great visual and performing artists --Â and the deep caring I feel for my clients. Among artists, none have inspired my criminal defense practice more than John Coltrane. Â Trane once said: "There is never any end. There are always new sounds to imagine; new feelings to get at. And always, there is the need to keep purifying these feelings and sounds so that we can really see what we've discovered in its pure state. So that we can see more and more clearly what we are. In that way, we can give to those who listen the essence, the best of what we are. But to do that at each stage, we have to keep on cleaning the mirror." Â Similarly with criminal defense practice, no two clients nor cases are alike. There are always new possibilities to visualize and apply for fighting for justice. Always there is room for improvement, in a never-ending process forward. Â What does Trane mean about needing to "keep on cleaning the mirror?" I suppose he means that we need to see ourselves not only for who we are, but also how others perceive us, where we have come from, where we are headed, and where we might change where we are headed. Â John Iorio is a fellow Trane fan and fellow creator. His above-displayed recent sketch of Trane captures the man's essence, even though John and I both were too young when Trane died in 1967 to have experienced him live. He and I benefit, of course, from the vibrations of Trane, who said: "One thought can produce a million vibrations."Â Jon Katz

Posted by Jon Katz in Persuasion at 00:10

Tuesday, May 6, 2008

### **Thanks, Mildred and Richard Loving.**

Bill of Rights (From public domain.) Growing up in southern Connecticut, I recoiled in horror over the blatant, violent, and rampant racism that overtook so much of the South right into the 1960's. Confronting such a reality made me also recognize all the more the substantial extent of racism right in my Northeast United States backyard -- and, sadly, even my local backyard -- without the South's then-recent Jim Crow laws. Mildred and Richard Loving were a low-key counterpoint to my numerous strongly-worded responses over time to people saying words that at best have been racially insensitive, with some speakers admitting their racism outright, and with most of them denying being racist and sometimes trotting out that one of their best friends is this or that race or religion. Appropriately surnamed, Mildred and Richard Loving were in love and wanted to marry, having no Jim Crow-busting agenda beyond that. However, as an interracial married couple in 1958 Virginia, they were prosecuted and convicted for violating the state's law criminalizing interracial marriage (with the case having moved so quickly, apparently to get released from pretrial detention, that it seems doubtful that they even had a lawyer when entering their guilty pleas). As the New York Times reports, the Loving's sentencing judge "Judge Leon M. Bazile, in language Chief Justice Warren would recall, said that if God had meant for whites and blacks to mix, he would have not placed them on different continents. Judge Bazile reminded the defendants that 'as long as you live you will be known as a felon.'" In 1967, the Lovings overturned Virginia's marriage miscegenation law out of the ballpark with a unanimous United States Supreme Court. The racist judge Bazile died less than a month before the case was argued before the Supreme Court, which decided the case in two months flat. In overturning the Loving's conviction, Chief Justice Earl Warren declared: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving v. Virginia*, 388 U.S. 1 (1967). Only eight years after this Supreme Court victory, Richard Loving died in a car accident. Last Friday, Mildred Loving passed away at sixty-eight. These two apparently otherwise very private people became permanent public figures through their last name, which will remain synonymous with smashing racism not only with interracial marriage but as another nail in the coffin of Jim Crow. As an aside, one of the Loving's two Supreme Court lawyers, obtained through the American Civil Liberties Union, was the now-retired Philip J. Hirschkop, just around two years out of law school when he argued the case, with lawyer Bernard Cohen arguing in rebuttal. Read this colorful account of this lawyer who is very colorful, to say the least, and who has apparently never shied away from defending the most controversial of clients. What a counterpoint: the salty-tongued Phil Hirschkop representing the low-key Lovings. Perhaps it was yin and yang; perhaps not. Thanks, Mildred and Richard Loving, for staying true to yourselves, and for having stepped out of the shadows of anonymity to advance this essential fight against racism and for justice. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Monday, May 5, 2008

**Horan's county bar tribute was not in my name, and never will be.**

Â Bill of RightsÂ (From public domain.)Â When a criminal defense lawyer whom I highly respect and admire became the president of a Northern Virginia county bar association, I asked myself "why?". Why get involved in overseeing tributes to retiring judges merely because they are judges, tributes to lawyers merely because they are lawyers, and bench-bar dances to congratulate lawyers and judges all the more merely because they are lawyers and judges? Or, did this lawyer find a Doug HenningÂ secret to overhaul the bar association to the image of the Virginia Association of Criminal Defense Lawyers or the American Civil Liberties Union?Â I imagine the above-mentioned county bar association does more than arranging events and programs to congratulate lawyers and judges merely for being lawyers and judges. However, I was none too pleased when I learned earlier this year that another Northern Virginia bar association, to which I belong -- the Fairfax County Bar Association -- took it upon itself to have a big dinner earlier this year honoring the outgoing elected prosecutor Robert Horan, Jr. This was not in my name, andÂ IÂ plan to inquire how Mr.Â Horan was designated for the honor in the first place, and whether any dissent was registered before the event went forward. Â I have nothing against Robert Horan as a person versus as a recent former elected prosecutor. However, I do not think that it was justified for the Fairfax County Bar Association to have honored him. For instance, under Mr. Horan's watch -- at least during the ten years that I have been dealing with prosecutors from his office -- his prosecutorsÂ generally stuck close to Virginia'sÂ unfairly restrictive discovery rules, and this seems to continue under the current chief Fairfax County prosecutor. Some Virginia county prosecutors' offices provide discovery beyond such restrictions; that not only helps reduce the unfairness of Virginia's criminal discovery rules, but also assists defendants in making an informed decision whether to settle a criminal case through a guilty plea. Â In any event, the Fairfax Bar Association's honor of Robert Horan, Jr., was not in my name; nor, of course, was it in my clients' names. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, May 4, 2008

**How to reduce hunger and eating costs, and slash methane and fecal pollution?**

For food-producing animals, life is no picnic, and usually is incredibly short. (Image from USDA's website.) The global food price crisis is real and worsening. Many factors certainly contribute to the crisis, including rising energy costs (if only the globe's runaway appetite for fossil fuels could be tamed dramatically). What would happen to global food prices if everyone stopped eating land animals and their milk and egg products? Instead, the inefficient livestock-producing system will be cut out of the nutrition-providing process. Instead, humans will get their nutrition in an incredibly more efficient and inexpensive process, straight from plants, and not just from roots and berries but from an endless list of delicious exotic and ordinary fruits, nuts, seeds, vegetables, beans, tubers, and their countless simple recipes. An acre of land used to grow grain for livestock provides dramatically less human nutrition than using the acre to grow food plants for humans. What will happen to the environment if everyone stops eating land animals and their milk and egg products? Gone will be the tons of fecal pollution and choking methane produced by the legions of factory-farmed animals, the vast majority of whom are bred to deliver lunch and dinner to people's plates. Gone will be the enormous waste of water to irrigate land used to feed non-human animals, rather than using the water to irrigate fields for plants to be eaten directly by humans. Gone will be the wasted fossil fuels used to raise farm animals. What does all of this have to do with my law practice? A critical focus of my law practice is on social justice. Slaughtering animals for people's unnecessary flesh cravings is not justice for animals. The constant slaughtering and eating of animals numbs too many people about violence, and makes too many people more able and willing to perpetrate violence against other humans; it becomes a matter of cross-species violence. Eating meat contributes to world hunger by increasing the demand for land for livestock, rather than keeping food prices lower -- through supply and demand -- by eliminating the huge money and pollution expense of raising cattle, pigs and poultry. How hard is it to become a vegetarian? For me it took three years of concerted effort eating lower and lower on the food chain, until one day at an Italian restaurant, as a pesco-vegetarian (a misnomer), I resolved that I could not, after all, order pasta with marinara and shrimp, after having spent time with so many amazing and feeling fish at the aquarium a mile away. I became a vegan thirteen years later, to do my share in reducing the number of mistreated and captive animals who often find themselves slaughtered for human food, pet food, and leather after they stop producing enough milk and eggs, let alone the male chickens who are not spared their lives to produce eggs, because nobody yet has found a way for males to produce eggs. I no longer wear leather. Even if most people are unable or unwilling to become vegetarian, world hunger and food prices still will dramatically fall if people will drastically reduce their consumption of meat, fowl, milk, milk products and eggs. There has never been an easier, more healthful, or more delicious time to live vegetarian; even supermarket aisles have infinitely more vegetarian choices than even five years ago. Restaurants have more vegetarian options than ever before. See how you feel about your health, your annual physical exam, the environment, and world hunger after making such a change in your eating choices. You may never turn back. Jon Katz.

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

Friday, May 2, 2008

**Deborah Jean Palfrey: It should not have ended this way. Not the time for a media feeding frenzy.**

Å Å Awaiting federal sentencing for her prostitution ring conviction, Deborah Jean Palfrey took her life this week. Å On the one hand, Ms. Palfrey's suicide brings to mind how rampant is suicide in society, and how much Å desperation contributes to it. Ms. Palfrey previously said she would not do a day in prison; and her suicide ended up being likely the only way to avoid it. Å How did I learn of Ms. Palfrey's suicide? Certainly not the way I wanted: Through an undiplomatic Å television camera and microphone sticking in my face. Having left the District of Columbia Superior Court yesterday afternoon, I was on the phone talking about a sex-related criminal case, minding my own business. I have not even closed my cellphone on my completed conversation when a local television reporter says something along the lines of "I heard you speaking about a sex case. I was wondering if I could ask you some questions." By now the camera is running, and I say I'm not ready to speak on the record, thinking he wants to talk about my own clients' sex-related cases. The camera still looks on, and the reporter is still holding the mike. The reporter persists, apparently wanting to ask about various aspects of criminal procedure at the Superior Court, and I say I will not be speaking on the record about that, either, because I do not go to Superior Court often enough -- versus Maryland and Virginia courts, as the District of Columbia courts have the hugest Beltway Å percentage of defendants obtaining court-appointed counsel Å -- Å so he'll do better to speak to a lawyer who goes there more Å regularly. Å The camera still runs, and the reporter still holds the microphone, and says he wants to talk about Deborah Jean Palfrey, who he tells me killed herself. Ah, the First Amendment, before which I worship and for which I defend against government and court suppression and punishment of even the most vile and offensive speech. How close I came to telling the reporter "Ms. Palfrey's passing should not be a media feeding frenzy. Why should I be asked to be told on-camera about her death and be asked to comment on the spot after learning of this sad news?" Instead, already programmed through some of the most trying courtroom exchanges to do battle, I decide to take my battle for justice to the news camera once again. Å The reporter asks my reaction to this sad news. I say something along the lines of: "This is sad, and never should have happened. Ms. Palfrey never should have been prosecuted, because prostitution needs to be legalized, as does marijuana and gambling. Only by doing that and by Å heavily decriminalizing drugs can we have a fair criminal justice system." The reporter keeps probing; probing for what? For me to say she had it coming to her (which she had not)? To see if any of my clients ever have committed suicide (none have)? To see if I would lash out at the prosecution, after the reporter mentioned the possibility that her prosecution cost over one million dollars? Å THIS IS NOT AUTHENTIC JOURNALISM. Perhaps this is but a failed attempt at infotainment. This is pandering to try to get television ratings, and to charge advertisers more money based on those ratings. This is an effort to make the commercial television news merely an interval separating the commercials without which commercial television would never exist. Is this paragraph hyperbole? If it is, I still haven't come down from such feelings after yesterday's interview. Å THIS INAUTHENTIC JOURNALISM DID NOT STOP THERE. The reporter then tells me he wants a shot of me as I go on my way, and the cameraperson asks me to wait as he changes positions to get a better angle. At this point, I don't have any other beef with the cameraperson, and I let him get his camera angle. Å WHAT IS JOURNALISTIC ABOUT VIDEOTAPING ME WALKING TO THE SUBWAY? Not having any television at home other than a DVD player -- how sweet it is -- I do not know if the interview ran, nor whether -- as I suspect -- the walking segment was spliced before the interview segment; I have had it done before. This brand of television reporting is far from limited to this reporter and cameraperson. Å It all reminds me of the sadly comical section from the great Joan Didion's essential White Album, where Ms. Didion recounts how the actress Nancy Reagan cooperated with a camera crew at the California governor's mansion the same way she would have done for a movie or theater director, along the lines of: "Would you like me to turn to the left after I come into the doorway, and check my phone messages?" Å Ms. Palfrey's life, plight and death should not be trivialized, should not be made into the butt of late night television jokes or light water cooler chatter, and should not be swept under the rug. She died after being put through a trial that was unjust: unjust because prostitution should be legal (it does not need to be made illegal to address the socio-economic oppression that leads plenty, but certainly not all, people to choose such work; there are other effective ways to address such oppression); unjust because police and prosecutors have enough rape, robbery and murder cases to address, and should not be wasting tax dollars and resources on prostitution cases; Å unjust because so much money and court resources were so unjustly wasted on the case; Å and unjust because so many immunized prosecution witnesses were outed as former prostitutes allegedly serving Ms. Palfrey and her clients. Å At the very least, praised be Ms. Palfrey's judge, James Robertson, who asked the prosecution: "You want to make public the names of all the employees? ... Is there no limit to the collateral damage?" Proceeding in this very human vein, Judge Robertson refused the prosecution's insistent request to revoke her bond, lest she flee pending sentencing (flee where, in this day and age where governments and police investigation agencies seem even to know when and where we go to the toilet, let alone where to find us if we miss a court date?). Thanks, judge, for giving Ms. Palfrey a chance to spend time with her mother after her guilty verdict, and to spend time away from the cameras and away from gawking eyes in the jail. Å Yes, let us examine and discuss Ms. Palfrey's case, life Å and death, and why she

killed herself. Let us do so with compassion for Ms. Palfrey, and with an eye to eliminate prostitution prosecutions and other unjust prosecutions once and for all.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

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