

Tuesday, July 1. 2008

**When my least favorite justices issue one of my favorite rulings.**

Supreme Court spiral staircase. Generally, it is critical to elect Barack Obama to have less damage done to the Constitution by new federal judicial appointees than the damage that will be wreaked by McCain appointees in such areas as the death penalty, criminal defendants' rights, immigrants' rights, reproductive rights, and free expression. However, one area where McCain appointees likely will do no worse or possibly better than Obama appointees is in an area generally more near and dear to Republicans' hearts than Democrats': defining the reach of Second Amendment rights. In fact, four justices whom I have never wanted on the Supreme Court were in the majority in last Thursday's Heller decision confirming that the right to bear arms is an individual right rather than merely a collective right. Said justices all are appointees of Reagan, Bush I and Bush II: Justices Scalia, Thomas, Alito, and Roberts (C.J.). The fifth justice in the Heller majority is Reagan-appointed Justice Kennedy. I still recommend Obama as the lesser of the evils as compared to McCain, including for judicial appointments, even though McCain's appointees are more likely to interpret Heller more expansively than Obama's appointees. For such prosecutions as possessing firearms in the course of a drug felony, though, Republican appointees are unlikely to be any more favorable to defendants than Democratic appointees. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, June 30, 2008

### **Heller's limited reach outside the home.**

Image from the Government Printing Office's website. As I walked to the District of Columbia Superior Court last Thursday, I felt a huge air of glee from a fellow criminal defense lawyer walking the opposite way. "Justice is coming at 10:00 a.m.," he exulted. Later that morning, in the courthouse, another colleague who defends many clients in handgun cases happily told me that the Supreme Court that morning had affirmed the United States Court of Appeals ruling invalidating the District of Columbia's virtual blanket ban on the possession of an operable handgun in one's home. Longtime Underdog readers know I agree with the result in the Supreme Court. *District of Columbia v. Heller*, \_\_\_ U.S. \_\_ (June 26, 2008). As to Heller's effect beyond handgun possession in one's home, I posted my following view on a local criminal defense lawyer's listserv: Several listserv members suggest that Heller invalidates D.C. Code Â§ 22-4504 concerning possessing unregistered firearms and unregistered ammunition. I hope that would be the case. However, doesn't Heller only automatically invalidate prosecutions for possessing handguns in one's home, and give the most immediate ammunition to attack prosecutions for transporting handguns between the gun shop, the home, the repair shop, and the shooting range, when all such activities are for the purpose of having a safely and properly operated handgun in one's home? After all, Heller's majority opinion says "We affirm the judgment of the Court of Appeals" after the court's summation paragraph (three paragraphs from the end) proclaims: "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *D.C. v. Heller*, \_\_\_ U.S. \_\_ (June 26, 2008) (emphasis added). Because the Supreme Court affirms the judgment of the Court of Appeals, here is what the Court of Appeals concluded: "For the foregoing reasons, the judgment of the district court is reversed and the case is remanded. Since there are no material questions of fact in dispute, the district court is ordered to grant summary judgment to Heller consistent with the prayer for relief contained in appellants' complaint." *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007), affirmed sub nom *District of Columbia v. Heller*, \_\_\_ U.S. \_\_ (2008). What, then, did the original summary judgment motion seek? "Appellants, six residents of the District, challenge D.C. Code Â§ 7-2502.02(a)(4), which generally bars the registration of handguns (with an exception for retired D.C. police officers); D.C. Code Â§ 22-4504, which prohibits carrying a pistol without a license, insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home; and D.C. Code Â§ 7-2507.02, requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device." *Parker v. District of Columbia*, 478 F.3d at 373 (emphasis added). Consequently, although Heller provides language to support providing Second Amendment rights beyond the home, I think the case only automatically invalidates prosecutions for possessing handguns in one's home, and gives the most immediate ammunition to attack prosecutions for transporting handguns between the gun shop, the home, the repair shop, and the shooting range, when all such activities are for the purpose of having a safely and properly operated handgun in one's home. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:30

### **It's my client. I can cry if I want.**

Photo from website of U.S. District Court (W.D. Mi.). Many trial lawyers do their best to keep a stiff upper lip, to keep their hearts off their sleeves, and certainly to avoid getting misty-eyed in court even if that requires asking for a short recess to come back with dry eyes. Sure, crying in the courtroom can be risky for a lawyer. By the same token, I agree with Gerry Spence, who says: "Real persons cry...It is all right, indeed, it is imperative, that we be who we are in or out of court." Gerry Spence, *Win Your Case* at 161. When a lawyer's tears are genuine -- certainly that can be the case when a death penalty opponent argues in closing to spare his or her client from execution -- how can a judge order the lawyer not to cry, not to be real? A prosecutor in Ohio has asked a court to ban defense lawyer tears in the courtroom of a death penalty trial. I certainly disagree with the request, for the above-stated reasons. Moreover, what is good for the goose is good for the gander; if defense lawyers are banned from crying in the courtroom, then the ban should also apply to prosecutors, their witnesses, and murder victims' family members during the sentencing phase of capital cases. Jon Katz. ADDENDUM I: Thanks to a fellow listserv member for posting the article on this matter. ADDENDUM II: The title of this blog entry is inspired by the 1965 Animals song.

Posted by Jon Katz in Criminal Defense at 00:10

Sunday, June 29, 2008

### **More on defending drunk driving in Virginia.**

Image from Virginia Forestry Dept's website. In Virginia and Washington, D.C., the law says that drivers in those states impliedly consent to have their blood alcohol levels tested if the police have sufficient grounds for seeking such tests. In that regard, here are important relevant Virginia statutory provisions and appellate opinions: - In Virginia, "Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he is arrested for violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or of a similar ordinance within three hours of the alleged offense." Va. Code § 18.2-268.2 (A). - The certificate of analysis for the blood alcohol test is inadmissible if the technician's certification was expired at the time of the analysis. However, that does not automatically prevent an erroneous certificate of analysis admission to rise to the level of harmless error. *Brooks v. Newport News*, 224 Va. 311, 315, 295 S.E.2d 801(1982). - The burden is on the prosecution to prove a defendant was intoxicated while he was operating his truck, not for the defendant to show that Defendant became intoxicated after leaving his or her parked vehicle. *Overbee v. Commonwealth*, 227 Va. 238, 244, 315 S.E.2d 242 (1984), - In Virginia, the certificate for breath analysis is inadmissible at trial if the test was performed over three hours from the defendant's previous driving experience. - *Overbee v. Commonwealth*, Va. Code § 18.2-268.2 (A), 227 Va. 238, 243. Jon Katz.

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

Friday, June 27, 2008

**Four cops and thirty-seven postures.**

Â T'ai chi is about being as still as a mountain and powerful as a rushing river, and not about karate kicks. Â Perhaps someone(s) who has had enough of my t'ai chi blogposts is playing a joke on me. Yesterday, June 26, I drove to National Airport in Virginia (I refuse to use the former president's name in the title; it was National Airport long before he took his throne at 1600 Pennsylvania Avenue and installed people who would have had ketchup fulfill one of the vegetable servings in the daily school lunch program.Â My mission: To pickupÂ a Nipponzan Myohoji nun and another activist arriving from Japan to join the Longest Walkers.Â Ordinary this mission was not. Â The arriving flight was delayed forty minutes, so I decided to do what I often do to kill time in airports (and sometimes while waiting for the subway to return me from court in D.C. to my office), which was to practice t'ai chi. It made all the more sense to do so, because I had not practiced it yet that day, and it is more important to practice for a few minutes every day, than to skip two days and practice a full hour on the third day. Each day of t'ai chi practice is akin to inserting at least one page into an annual book that totals three hundred sixty-five pages by the end of the year. Â I found a sparsely traveled section of the arrival area, and did two rounds of the thirty-seven posture t'ai chi chuan yang style short form, as developed by t'ai chi megamaster Cheng Man Ch'ing, and as demonstrated flawlessly hereÂ by the Professor. Â Perhaps partly because I have a long way to go before doing t'ai chi even one percent as well as Cheng Man Ch'ing, and perhaps just because t'ai chi is very new to many people, I get reactions running from amusement and people lampooning my moves with pages from Karate Kid, to intrigued people -- often children -- who sometimes are willing to try practicing along with me. One day practicing in the beautiful park across from our office, a Chinese woman applauded as I did the t'ai chi form, and then showed me the results of years of her own practice of what looked like something similar to t'ai chi or another form. Â Perhaps one of the amused or stunned people contributed to the police coming up to me as follows. After practicing t'ai chi, I go to the men's room, and as I am starting my standing relief, a cop is near the entrance and says, "I want to talk with you when you're done." My initial reaction to myself is "F--kin' cop. Hassling me even as I am going about such private business." Outwardly and then inwardly, though, I return to t'ai chi harmoniousness and balance. Â After washing my hands, and leaving the men's room, the cop is standing right outside the exit, and offers his name and his hand to shake. Who in their right mind offers to shake the hand of a stranger who's just left the men's room? Poppy on Seinfeld is but one member of a huge fraternity of men who do not put their hands under the sink before leaving the men's room. The Japanese custom of bowing over handshaking begins sounding highly preferable, unless one has a bad back. Curiously, the other two, and then three, cops watching the potential t'ai chi terrorist do not offer to shake my hand, whether for hygienic, strategic or good-cop/bad-cop purposes. Â The followingÂ transpires: Â Cop: My name is officer H\_\_\_\_\_. You match the description of someone reported doing karate kicks. I just want to hear your side of the story. (Pause.) Please stand over here, so you don't block people's way. Â JK: The criminal defense lawyer in me says not to answer. My other side says maybe to do so Â Cop: It will be best for you to answer. Â JK: Am I free to leave (as I fish my business card out of my pocket to try to get him off my back, which sometimes can backfire)?Â Cop: No. You're being detained right now. Take your hands out of your pockets. You have a cellphone. (A non sequitur for fellow Zippy the Pinhead fans from a cop decidedly not wearing a muu-muu.) Â Cop (continuing): Can I see some I.D.? Â JK: No. (Fortunately,Â *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004), supports no requirement to show cops a photo identification ifÂ one is notÂ stopped while driving.)Â Cop: No? (Feigning surprise or in actual surprise.)Â JK: Here (I hand him my business card that I already had fished out, but was not required to give. Giving a cop one's photo identification makes it easier for the cop to delay the person longer by running an open warrant check and not giving the identification back right away.)Â Cop: What is your date of birth? Â JK: April 1, 1963. (I give it to him. It is already on our Martindale-Hubbell listing linked to our website listed on our business card). Â Cop No. 2 (playing the good cop role): Excuse me sir. Would you mind stepping over here? (Another choreography direction from the cops while I am not free to leave.) All we want to know is what you were doing if you are willing to tell us. Â JK: (Do I stay silent, which I tell others to do when they are suspects, or do I wear the hybrid hat of a criminal defense lawyer who stands up to cops all the time for my clients, and someone wanting to be there when my visitors arrive at the gate (how often do cops try to divide and conquer like that?)) It's the Chinese martial art of t'ai chi. I hadn't gotten around to doing it yet today. Â Cop No. 2:Â (Already nodding her head knowingly before I finish talking). I thought so. Â JK: Am I free to leave? (One of the Busted video's most essential lines.)Â Cop No. 2: Yes. Â My visitors arrive four minutes later, before I even have a chance to fish out my welcome sign, a practice that is the stuff of so many comedy scenes. Â Less than an hour later, I am in Lafayette Park across the street from the White House with my visitors, who want to chant the Odaimoku prayer for peace, and then include me for continued chanting clockwise around the president's palace. After that, I tell a veteran Lafayette Park peace demonstrator about the foregoing incident, and he seems to be looking at me like I have just fallen off the vegetable truck. I say: "You probably get hassled all the time by the Park Police like that." "All the time," he replies, regretting that this is the case. Â What lawful right did cop no. 1 have to tell me I was being detained? None. This was not a validÂ TerryÂ stop --Â Terry v. Ohio, 392 US 1 (1968) -- even though the

Terry's abortion of justice only requires reasonable suspicion to believe that criminal activity is afoot to briefly detain a suspect to ask questions (which questions need not be answered, aside from questions about identity, as addressed in *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004)). What crime might be afoot? Disorderly conduct (the catchall darling of cops, and a part of the unholy arrest triumvirate of disorderly conduct, assault on a police officer, and resisting arrest)? Hardly, and if my actions might have been reasonably suspected as disorderly, what is the difference whether it was my "forgiven" t'ai chi or possibly unforgiven karate kicks (by the way, t'ai chi only involves one circular kick, and three slow extended kicks, as shown by Cheng Man Ch'ing here)? Was there reasonable suspicion concerning the Virginia abortion of a law of intoxicated in public, which cops seem to think gives them a freebee to search incident to arrest for such a charge? My last tippie was but a sip many moons ago. Do the Airports Authority's regulations claim to permit cops to do Terry stops without satisfying Terry. I doubt it, but plan to check. Why, then, was I stopped by a cop with three onlooking cops focused on me rather than on less petty suspected crime (perhaps this was my inadvertent gift towards my goal of decriminalizing drugs by taking the cops away from looking out for possible drug dealers)? Was it just to mollify the so-called civilian complainant? Was it an effort to take control of someone not conforming to the usual bored approach to waiting in airports? Was it a result of post-September 11 hysteria? Were some of the four cops receiving on the job training? Did it arise from the cops' failure to distinguish between the increase of people's rights as they proceed from awaiting clearance by customs and immigration authorities to going through security for arrival at the airport departing gates to being in the arrival area, as I was? Is it mimicry by cops of District of Columbia mayor Adrian Fenty's unconstitutional criminal checkpoints? Is it because cops do not want to see anybody displaying the hallmarks of lethal force (I have not come anywhere near making my t'ai chi lethal) and martial arts other than themselves? Is it a bunch of cops with too much time on their hands? Is it a bunch of cops out of touch with the truism that the police are a necessary evil that present the real risk of pulling us further into a police state rather than closer in the arms of the many civil libertarian goals championed in the Constitution and Declaration of Independence? Will I continue practicing t'ai chi in airports, empty subway platforms, outside courts, in parks, and in my own backyard? Absolutely. Join me? Jon Katz.

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

Thursday, June 26, 2008

**Winning, rather than TRYING to win.**

The powerhouse of John Johnson and Gerry Spence (Aug. 1995, Thunderhead Ranch) Â Gerry Spence hits it on the head when focusing on the need to win by winning, not by TRYING to win.Â Thanks to some fellow listserv members for bringing this article to my attention. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Wednesday, June 25, 2008

**Why the death penalty for whales, cows, chickens, and lobsters?**

Of Greenpeace, the hunted, and the hunters. Previously, I avoided getting on a vegetarian soapbox. However, I modified that to blogging on the topic while minimizing saying anything to a dining companion who eats steak (even though I am deeply pained by the slaughter of the cow that is killed for the steak, and even when, like last night, the multiple steak eaters are otherwise compassionate fellow criminal defense lawyers), unless I am responding to taunting for being a vegetarian. I have become more vocal against slaughtering animals for food and clothing -- and against testing them for such unnecessary purposes as cosmetics safety (by the way, is it not more reliable to test a medicine or cosmetic on a human rather than a non-human mammal with a different chromosomal and overall biological setup, and is there any practical or moral justification to do any vivisection at all?) -- because, at its heart, I am deeply pained by the rampant mistreatment of animals that is so rampant that too many ordinarily compassionate people are numbed to the cruelty; I am fed up with the meat industry's meat-promoting happy face; and I am convinced that each person who stops eating meat will experience dramatically better health and will contribute to lower food prices and reduced health care costs and health insurance costs, and will contribute to an improved environment and a society where fewer humans will wreak violence against other humans and non-human animals. The International Whaling Commission has been meeting in Chile, where apparently talk is the talk of the day, rather than much action, other than Chile's commendable declaration this week -- apparently a reaffirmation -- that the nation bans whale slaughter.

Why stop at protecting whales against slaughter? Do people focus so much against whaling in order to prevent the extinction of at-risk whale species? Or, do people also oppose whaling based on whales being so highly intelligent and loveable? If the latter holds true, why draw the line at whales? Intelligence is witnessed in many other mammals, too, including the dolphins that get caught up fatally in tuna-catching nets. Why draw the line at mammals, then? Do birds not display high intelligence, for instance in finding their way to a specific warm location in the winter, and back to a specific location in the summer? Why draw the line at birds? Do fish not share many of the same qualities as humans? They have hearts, livers, kidneys, brains, and gonads. Is it okay, then, to eat shellfish, which do not flap around in desperation when removed from the water? The typical way to cook lobsters and crabs is to burn them alive; what did they do to deserve that? Many anti-vegetarians then ask: Why draw the line at land and sea animals? Why not just stop eating all plants and animals, thus leaving nothing else to eat? Few people are going to allow themselves to die for such a theory. Of course, I recognize that even if it is assumed that plants feel no pain nor awareness at being alive and being killed, insects are killed in the process of raising and harvesting plant food, and, as a vegetarian, I do not believe in eating insects, either. My best answer, then, is for food consumption to be focused on a harm reduction approach, so as to reduce the harm not only to the living things being killed for human food consumption, but also to reduce mistreatment of workers who ultimately bring food to the market, to reduce environmental degradation from food production (including fecal waste and methane/flatulence pollution from livestock), to reduce the harm caused by pesticides and chemical fertilizers and genetic plant modification, and to reverse the elimination of animal habitats that result from making way for livestock and growing fields. Protecting whales, then, is but an important start on the road to giving more protection to all land, air and water animals. Justifiably, much has been said and written about the possibility of no painless method for executing humans, let alone the mental torture involved in awaiting an inevitable execution. Why stop there? Why think for a moment that a dinner of animals is not the product of suffering during the animal's short life, suffering while seeing and feeling and hearing fellow animals being slaughtered, and knowing that this will be the witnessing animal's fate in just a few moments, and suffering at the moment of slaughter? I ask a favor to all meat eaters: Before you eat your next piece of meat, poultry or fish, please give a name to the animal from which this flesh came, whether it be Bob, Carole, Ted, Alice or anyone else. If you are eating a hamburger, sausage, or hot dog, it may be a good idea to give the meat several names, as hamburgers and sausages are a convenient way for the meat industry to gather up the scraps from the meatcutting machines. The more we give a name, face, heart, and soul to the humans and non-human animals upon whom we cause suffering, I am convinced we will reduce the suffering.

Jon Katz. ADDENDUM I: Back to whales, yesterday's Australian newspaper reports that "Japan says it is misunderstood, denies the 1000 whales it hunts each year for scientific purposes despite a 1986 moratorium are making it to the dinner table, and says it is also in favour of conservation." Either that is an untruth, or else the Japanese fish markets are obtaining whales for food some other way. As I wrote last January: "In 1999, a wonderful family living several miles from central Tokyo hosted me for a few days, which was a great way to experience how regular Japanese folks live. One morning, the son took me to Tokyo's equivalent of New York's South Street Seaport, teeming with wall-to-wall freshly-caught fish. Already a strict vegetarian, I hesitated about even going in the first place, but if this is the fate of countless fish -- I ate my huge share of fish and meat before becoming vegetarian -- I decided to witness part of that fate. "Not only were fish there. Several minutes into our tour of the huge building akin to an airplane hangar, I saw a multi-pound slab of whale corpse. My host confirmed it was what I thought it was, and I started feeling plenty more down than I already was around all the dead fish. Our host was at

once concerned about my feelings and hoping to reassure me that all was okay, that this is a deep-rooted part of Japanese culture to eat slaughtered whales." ADDENDUM II: Here are some of my past writings on vegetarianism and animal rights; Karma and your plate; How to reduce hunger and eating costs, and slash methane and fecal pollution? Of Greenpeace, the hunted, and the hunters. ADDENDUM III: Here are some links to Japanese government writings about whaling: - "We believe it is not appropriate to lightly condemn the behaviors of others as bad, barbarous or primitive, or rather there should be an attitude of respect for the cultures and habits of different cultures." - Whaling promoters have their own lobby, which is the World Council of Whalers. - The Japanese embassy in New Zealand proclaims: "Much has been learnt about the whales [from Japan's whale research program], for instance, it has been found that they consume three to five times the amount of marine living resources than are caught for human consumption. The research also showed that contaminant levels in Antarctic minke whales are very low." What justifies killing whales to obtain such statistics? ADDENDUM IV: Concerned about going hungry or unhealthy by trying vegetarianism and veganism? Now is the most convenient, healthful, and delicious time to eat vegetarian. It is hard to make the transition alone. Check out your nearby vegetarian society and PETA for an easier and more socially enjoyable way to reduce and eliminate meat consumption. Also, check out my vegetarian links.

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

### **Where to check speedometer calibration.**

Thanks to a fellow listserv member for providing the following list of Northern Virginia businesses where one may obtain a speedometer calibration check. I tend to recommend such checks for clients accused of jailable reckless driving based on excessive speed; I write on reckless driving defense here; following is a list of places to get speedometer calibration checked: M&M Collision 3165 Campbell Drive Fairfax VA 22031 (703) 591-9601 Advanced Auto Tech 7075 Newington Rd. PO BOX 970 Newington VA 22122 (703) 339-5500 fax 0475 Ron's Mobile Services Cars & Trucks, Inc. 1412 S. 28th St. #5 Arlington VA 22206 (703) 980-3911 Precision Tune Auto Care (only up to 70 mph) 9883 Lee Hwy. Fairfax VA 22030 (703) 359-2800 fax 385-7064 Bill's Auto Service & Discount Tire Center 98 Hardees Dr. Manassas Park, VA 20111 (703) 368-2200 (Next to Sheetz off Rt. 28) Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, June 24, 2008

**Seeing everyone as part of the same whole.**

At first I was going to blog today about some recent key appellate decisions. One of the reasons I started this blog was to have extra motivation to read and index such opinions. At the same time, this blog has motivated me to write about and to get closer to greater strength through total calmness, so that will be my detour for today's blog entry.

Although I have far to go in reaching total calmness, I keep getting closer to it day by day, kind of like a recovering ball of intensity for whom each day of calmness is an achievement. In many ways, I had to discover calmness. Calmness did not appear to be a priority commodity as I grew up, except when public school teachers told me and other students to stay seated, still, and quiet (and often bored). In grade school, I focused on having a quick mind when my ballfield prowess often left much to be desired (although I took quickly to lacrosse, and did alright in tennis and basketball when I focused on them). My peers often played the dozens in one way or another, which was made popular by George Carlin (I send him all good karma on his departure from the planet). Playing the dozens is not calmness. Life progressed, and for years I did not feel I could let my guard down, when considering all the shysters, bigots, bullies and violent people that I was convinced surrounded me, without even needing to smoke marijuana for paranoia value. Interspersed in all this was an increased interest by many people in calmness -- something that has been highly valued for centuries in much of Asia, but which perhaps got too forsaken in plenty other parts of the world as the industrial revolution and communications revolution shrunk the globe and made many people demand more and more ever more quickly, with many willing to fulfill such demands (enter FedEx, for instance). The Beatles dabbled in calm during their time with the Maharishi Mahesh Yogi of transcendental meditation fame; John Lennon, though, eventually panned him as but a mere mortal, at best. George Harrison continued focusing on a spiritual journey. That journey need not be religious; as the Dalai Lama agrees, atheists, too, can reach calm. Regardless of the Maharishi Mahesh Yogi's strengths and weaknesses, the transcendental meditation rage reached full bloom in the 1970's, which decade finished when I was sixteen. I learned meditation through Herbert Benson's Relaxation Response book; meditation is best done regularly than dabbled into, and I dabbled, until finding the moving meditation of t'ai chi. Ironically, I met my best teacher for relaxation and peacefulness -- Jun Yasuda, whom I write more about here and in many other parts of this blog -- during a time of war in 1991, when countless people were suffering their heads being blown off and all other sorts of violence to them, their children, and others close to them, the levels of which continue today in Iraq, Afghanistan, and throughout the rest of the world.

One night in the middle of last week, I got a phone call from Jun-san, speaking with her for the first time in about a year. She is on the Longest Walk with Dennis Banks, and will arrive in the Washington, D.C., area around two Mondays from now. Jun-san remains calmness and peacefulness personified. I might have gone decades without meeting Jun-san, or never meeting her, which would have required me to work all the harder at reaching the levels of peace and calmness that I now feel.

Still a block to my achieving greater peace and calmness is my struggle to see and internalize everyone as part of the peaceful Buddha, without seeing some of them as carbuncles on the Buddha's backside. Maybe it would be easier to take this view if I were a Buddhist and grew up a Buddhist, neither of which apply to me, and figured out how to see all of us as interconnected without my seeing the carbuncles. Maybe it would be easier if I placed less value on joking about carbuncles and less fear about being bored when just being calm and peaceful rather than out and about in my thinking and experiencing. Now, I try all the more to see and summon the Buddha nature in others. Because it sometimes can be a challenge to do that with the driver of an eighteen wheeler tailgating me and wildly flashing headlights when already I am in the righthand lane if the highway, I also turn to doing that with people who do not come across as immediate threats to my staying alive for one more day. Then, I move to the level of trying to do it with cops and prosecutors and opposing witnesses and judges when I feel disappointed in the lack of justice being dispensed by the judge. Critically, of course, I must do that with my jurors. Of course, the trucker tailgating me and blasting the horn at me is not calm, either, and seeks peace in some way. Also seeking peace are the cop who plants evidence, the prosecutor who thinks nothing of letting a presumed innocent defendant rot in a jail cell for months until the trial goes forward, and a judge who renders a guilty verdict when reasonable doubt spills over the courtroom floors. Will these folks contribute more towards harmony if we bare our fangs at them, or if we offer them gestures of peace? Consequently, I need to go to the center of the fire and share calm with the very people who seem to urinate the most in the eyes of justice and fairness, and to do it without my getting scorched or charred in that fire. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, June 23, 2008

### **Bogus electronic grand jury subpoenas; audio recordings of trials.**

Photo from website of U.S. District Court (W.D. Mi.). Here are two important items from the United States Courts website: - The federal courts website reports instances of bogus grand jury subpoenas being sent to some people by e-mail. The federal courts do not deliver such subpoenas by e-mail, and the bogus e-mails may include harmful links. I do not know how old this information is, but it underlines the importance of being vigilant of the many e-mail frauds out there, and the many viruses that invade computers by opening e-mailed attachments from unreliable sources. - Lawyers, judges, and witnesses have less anonymity in the courtroom than ever. Some courtrooms videotape trial proceedings. Audiotaped proceedings are ubiquitous (but not in such courts as the Virginia state-level district courts, which requires parties to hire their own court reporter to have a certified record of the district court proceedings). In some federal trial and bankruptcy courts, audiotaped proceedings can be obtained online from PACER (here is PACER's link). We are now in a world where almost nothing we say or do outside of our home is private. Cameras are ubiquitous in retail establishments, at highway overpasses, at the national mall, and the privacy-loss list goes on. It all makes it sound quaint that I opted against being videotaped for my first-year law school moot court competition in 1987 merely because none of the parties had opted for videotaping in advance of the competition date. Now, it is always showtime when I leave my home, and lawyers do not have a privacy argument to stand on when in the courtroom; lawyers who do not want such scrutiny are free to negotiate contracts, arrange trusts and estates, draft laws, and do other non-litigation work. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Sunday, June 22, 2008

### **Suit filed against D.C.'s unconstitutional crime checkpoints.**

Â Bill of RightsÂ (From public domain.)Â This entry follows up on my June 5, 2008Â blog entryÂ about the District of Columbia's unconstitutional police crime checkpoints, Â Â Thank you toÂ the Partnership for Civil Justice for filing a class actionÂ injunction action this past Friday against the checkpoints. The Complaint for this injunction action is here. The memorandum of law supporting the injunction motion is here. The case is Caneisha Mills, et al. v. District of Columbia (D.D.C. Civ. No. \_\_\_\_). Â Check out the work being done by the Partnership for Civil Justice, which describes itself as follows: "The Partnership for Civil JusticeÂ is a public interest legal organization based in Washington, DC that handles a broad range of complex constitutional rights litigation matters including First Amendment litigation, employment and public accommodation discrimination cases, economic justice issues and defense of targeted communities and political organizations and activists." I met PCJ's founding lawyers Mara Verheyden-Hilliard and Carl Messineo when preparing to defendÂ April 16, 2000, IMF/World Bank protestors. Another lawyer who was at PCJ is Zachary Wolfe, who subsequently founded the Peoples Law Resource Center in Washington, D.C.Â Thanks, also, to PCJ for having filed a lawsuit to invalidate the District of Columbia's unconstitutional political postering regulations, which lawsuit I blogged about here. ANSWERÂ v.Â D.C.Â (D.D.C. Civ. No. 1:07-cv-01495-HHK). The lawsuit stems from fines issued against people postering for the September 15, 2007 antiwar demonstration,Â which I attended for the pre-demonstration activity.Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Friday, June 20, 2008

### **The Supreme Ultimate**

Â Â Many times I have written about t'ai chi's benefits to the practice of life and law. T'ai chi master Cheng Man Ch'ing called this martial art the Supreme Ultimate. Here are some relevant links: Â - Cheng Man Ch'ing teaches a sensing hands class.Â Â - T'ai chi's 37 postures on video. Â - List of the 37 postures. Â Â - Cheng Man Ch'ing discussing t'ai chi. Â - Reading list. Â - Cheng Man Ch'ing fencing. Â - Acupuncture,Â acupressure, andÂ redirecting theÂ chi.Â Â Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Thursday, June 19, 2008

**Visit our expanded and constantly updated legal links.**

Â Computer hard drive. (Image from Pacific Northwest Laboratory's website).Â Our legal links webpage is an eight-year work in progress. Our blog and blogroll are a two-year work in progress. I hope they are a benefit to you. Â The latest update to our legal links page is an addition of a military criminal defense section and a Native American law section. They are both areas of law that interest me very much, and that seem to be under-studied. I am interested in military criminal defense generally because I am interested in just about all criminal defense, and also because the topic includes the treatment of prisoners of war and alleged enemy combatants, and the military death penalty system. For Native American law, my interests include learning more about the sovereign rights being exercised and fought for by Native Americans, the right to use peyote and all other drugs forÂ sacramentalÂ purposes, and the Native American court systems -- particularly the criminal justice system. Â I welcome all your suggestions for additions and other improvements to our links page and to the rest of our website and blog.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, June 18, 2008

### **Resist the Martha Stewart syndrome.**

Photo from website of U.S. District Court (W.D. Mi.).  
Martha Stewart went to prison not for violating any securities laws, but on a conviction for lying to federal investigators about insider securities trading. What would have happened if she had asserted her Fifth Amendment right to remain silent with investigators? A thing of beauty would have happened, because it rarely helps a person's criminal case to waive the Fifth (except for federal snitching, I mean debriefing, sessions, which should not be done without a qualified criminal defense lawyer and a written agreement governing the debriefing), and it even more rarely helps to waive the Fifth outside the presence of one's lawyer. Convicted sniper co-defendant Lee Boyd Malvo comes to mind, who clearly would have been counseled by his Maryland lawyers to stay mum with the cops, but who spilled the beans to the cops after arriving in Virginia and probably receiving the red carpet treatment to any restaurant food, soda pop, DVD, or stereo system that suited his fancy. Even too many suspected lawyers overlook the necessity of worshipping at the altar of the Fifth Amendment. One of them is David Safavian, whose liberty went into a tailspin when -- as a General Services Administration official -- he accepted a partial Scotland golf outing junket from his good friend and subsequently convicted Jack Abramoff, and then allegedly fudged to investigators the share of expenses for which he paid. It seems he spoke to investigators without a lawyer, at least in the beginning. What is the worst thing that might have happened if Safavian had stayed silent? Maybe he would have lost his job; maybe not. Still, he should not have been wagging his tongue without the assistance of a competent criminal defense lawyer. Congratulations to Mr. Safavian for getting all his counts reversed on June 17 in his federal prosecution alleging concealing material facts and "making false statements in violation of 18 U.S.C. § 1001(a)(1) and one count of obstructing justice in violation of 18 U.S.C. § 1505." U.S. v. Safavian, \_\_\_ F.3d \_\_ (D.C. Cir. June 17, 2008). The written opinion does a better job than I can about how he won the reversal. Congratulations, also, on getting the sentence stayed pending appeal. Had Mr. Safavian only remained silent, that would have been bliss. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, June 17, 2008

**Praised by Singaporean dissidents.**

From Library of Congress's website. Singapore is a fascinating place. Certainly, the government for decades has sought an overly-antiseptic and censoring city nation, while jailing dissidents, caning convicts, and executing people for possessing as little as 1.2 pounds of marijuana (with my having snapped a photo of some smiling customs officials under a banner near the Malaysian border proclaiming the death penalty for drug trafficking). Knowing all of that, still I spent a few days there after the bar exam in 1989, as an international air travel hub on my way to a much more colorful and fascinating time in Thailand, starting with an inexpensive Bangkok guesthouse located alongside corrugated rooftop homes near Kao San Road, and followed by a northern trek that included everyone pushing an overloaded converted pickup truck out of the mud numerous times on day one, followed by joining some singing moonshine-drinking revelers at the tailend of a wedding celebration in a tribal village. I got a slight peak on the inside of Singaporean society while spending some time with a friend who had just relocated there and staying as a guest at the home of his brother -- who described himself as conservative -- and spending time with some of the family members going about their daily activities. Part of what makes Singapore so fascinating is its overlapping Chinese, Malay and Indian influences found in such a small geographic area. I write more about my visit to Singapore in the last several paragraphs here, including my surreal midnight arrival at a near-empty airport luggage carousel area with unsmiling machine-gun toting security offset by nobody asking about the contents of my baggage, and my possibly even more surreal experience meeting a fellow diner at a vegetarian Indian restaurant who thought he was paying me a high compliment by likening me to a young Richard Nixon with his new legal career ahead. My time in Singapore was all the more interesting by having gotten off the beaten path several times. Fortunately, Singapore is not the monolithic lockstep place that many of its rulers have sought. Numerous Singaporean dissidents are willing to speak out, and to do so in a vibrant, fearless, calm, intelligent and apparently effective way, as detailed further below. As much as civil liberties remain under assault in the United States -- with it being essential constantly to refight and re-win previous civil liberties victories -- plenty of dissident actions that would get little if any suppression in the United States routinely get suppressed in Singapore. Here are some recent examples of inspirational dissident activity in Singapore: - On May 17, 2008, dissidents screened One Nation Under [Lee Kuan] Yee, without first submitting it to Singapore's ubiquitous censors. Kudos to those who produced the film, the dissidents who screened the film, and Singapore's Peninsular-Excelsior Hotel for allowing the film's screening (although I suspect the hotel did not recognize the implications of the screening or the screening itself). - Here and here is a March 15, 2008, attempt to proceed with a rights march in Singapore. - Gopalan Nair is a lawyer who grew up in Singapore, dissents openly from its government, and practices law in the United States, where he obtained citizenship. He has intentionally blogged himself into being brought into court on pending criminal libel charges relating to Lee Kuan Yew, who previously governed Singapore in authoritarian fashion, and still participates in the running of the government. - A longtime Singaporean dissident is Francis Seow, who went into self-exile many years ago. - The Singapore Democratic Party is active with numerous of the current protests. If you visit Singapore, please let me know. I wonder how much else of the nation has changed after my last visit there nineteen years ago. Jon Katz.

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

Monday, June 16, 2008

**Revolting images and double jeopardy issues swirl around Judge Kozinski's mistried obscenity case.**

Photo from website of U.S. District Court (W.D. Mi.).<sup>1</sup> The Ira Isaacs obscenity prosecution is the latest federal case -- other than<sup>2</sup> my own federal cases -- that I have reviewed on PACER. The information I found there provides factual information -- some linked below -- concerning Judge Alex Kozinski's recusal and mistrial orders from June 13, and about the prosecutors' allegations of the "beyond-disgusting" contents of the alleged obscenity involved in the prosecution. <sup>3</sup> In July 2007, a federal grand jury in<sup>4</sup> Los Angeles<sup>5</sup> rubber-stamped, I mean returned an indictment against Ira Isaacs for alleged importation of obscenity for sale or distribution, transportation of obscene material, and improper recordkeeping to show that all actors in sexually explicit videos were over eighteen years old at the time of production. <sup>6</sup> Trial commenced on June 9, 2008, with jury selection, which was completed on June 10, 2008. <sup>7</sup> During the parties' opening statements on June 11, the media reported that presiding trial judge Alex Kozinski (also recently elevated to the chief judgeship of the U.S. Court of Appeals for the Ninth Circuit) had sexually explicit images at his alex.kozinski.com Internet site. Blogger Eugene Volokh -- a friend and former law clerk of Judge Kozinski -- has an admittedly biased overview about those images here. <sup>8</sup> Judge Kozinski adjourned trial proceedings on June 11<sup>9</sup> to determine how he would handle his presiding over an obscenity trial when his own sexual image scandal broke out during opening statements. Two days later, on June 13, 2008 -- apparently sua sponte, although he said he would entertain any motions by the parties to remove him from the case (Judge Kozinski<sup>10</sup> apparently was a good pick for the defense, for his<sup>11</sup> reportedly strong stance on many First Amendment rights)<sup>12</sup> --<sup>13</sup> Judge Kozinski issued an order stating: "In light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial. I recuse myself from further participation in the case and will ask the chief judge of the district court to reassign it to another judge." On the same date, the Central District of California's chief judge issued an order stating: "A mistrial having been declared by the transferee judge, and the transferee judge having recused himself, it is ordered that in accordance with the usual transfer procedures of this Court, this case is returned to the calendar of Judge George H. King for all further proceedings."<sup>14</sup> The final docket entry as of the start of business on June 16, 2008 is an order from<sup>15</sup> newly-assigned Judge George King, setting the trial for<sup>16</sup> June 30, 2008.<sup>17</sup> <sup>18</sup> On some lawyer listservs has been a discussion about why Judge Kozinski's recusal necessitated a mistrial, rather than having a new judge resume the trial midstream. One or more listserv commenters suggested that the governing procedural rules allow the replacement of the judge without a mistrial -- certainly, any new judge would be able to come up to speed with the trial proceedings by reading transcripts from the three days of trial proceedings -- and that avoiding a mistrial would have avoided the possibility of a dismissal on double jeopardy grounds. By now, the mistrial cannot be reversed. The jury presumably has been excused and thus released from any order not to read or listen to news about the case; then again, which potential new jury members will not have heard of this case that has by now received so much press?<sup>19</sup> In the Ninth Circuit, at least, "[j]eopardy attaches after the jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35, 57 L. Ed. 2d 24, 98 S. Ct. 2156 (1978); *United States v. Jaramillo*, 745 F.2d 1245, 1247 (9th Cir. 1984), cert. denied, 471 U.S. 1066, (1985). After jeopardy attaches, the court's declaration of a mistrial - over the defendant's objection does not bar retrial where the mistrial was declared because of 'manifest necessity.' *Thomas v. Municipal Court of Antelope Valley J.D.*, 878 F.2d 285, 287 (9th Cir. 1989) (citing *Washington*, 434 U.S. at 505)." *U.S. v. Sammaripa*, 55 F.3d 433, 434 (9th Cir. 1995).<sup>20</sup> <sup>21</sup> Here, one argument for "manifest necessity" might be that a new judge would need time to get up to speed with the trial, and that such delay in doing so would consequently necessitate starting anew rather than having a group of antsy jurors waiting for Godot. <sup>22</sup> No matter which jury Mr. Isaacs gets, he will have a likely monumental battle for the prosecuted material not to be found obscene. His own lawyer, Roger Diamond, said in opening that the prosecuted films are "pretty revolting."<sup>23</sup> As much as I<sup>24</sup> oppose Mr. Isaacs' prosecution and all obscenity prosecutions on First Amendment grounds, my stomach contents still threatened to violently erupt as I read the prosecutor's proffered description of the films.<sup>25</sup> (WARNING: The prosecutor's description of the films<sup>26</sup> -- found near the end of this document<sup>27</sup> -- is beyond disgusting to include the deeply upsetting.) There is no reason to expect that Mr. Isaacs' jurors will react more mildly than I, particularly after they see the actual films, unless the prosecutor's description of the material is an exaggeration. <sup>28</sup> For those interested, I have uploaded the following key court filings in this Isaacs prosecution:<sup>29</sup> The indictment; case docket; defendant's motion to dismiss; defendant's motion to require translation of the films to English; joint pretrial memorandum<sup>30</sup> containing the parties' motions and legal memoranda; the prosecutor's trial memorandum; defendant's proposed jury voir dire;<sup>31</sup> prosecutor's proposed jury questionnaire<sup>32</sup> (WARNING: The prosecutor's description of the films<sup>33</sup> -- found near the end of the prosecutor's proposed jury questionnaire<sup>34</sup> -- is beyond disgusting to include the deeply upsetting);<sup>35</sup> prosecutor's proposed jury voir dire;<sup>36</sup> defendant's proposed jury instructions<sup>37</sup> disputed by the prosecutor; the prosecution's exhibit list; joint verdict sheet; and Judge Kozinski's recusal order.<sup>38</sup> As much as I am revolted by the descriptions of the films being prosecuted in Mr. Isaacs case, on First Amendment grounds I wish him victory in his case. Jon Katz. <sup>39</sup> ADDENDUM: A fellow blogger suggested I give my view of whether Judge Kozinski's decision to declare a mistrial was truly manifest necessity

or personal choice/convenience. Â The Ninth Circuit caselaw on manifest necessity in the context of mistrials and double jeopardy rights -- see, e.g., U.S. v. Sammaripa, 55 F.3d 433, 434 (9th Cir. 1995). -- speaks about the timeline when the necessity manifested itself, and that manifest necessity will not overcomeÂ dismissal for a double jeopardy violation if a mistrial could have been declared before jeopardy attached. Here, any necessity arguably manifested itself before Judge Kozinski got assigned to the trial, as discussed below. Â Eugene Volokh does a good job putting Judge Kozinski's alleged involvement with sexually explicit images into perspective. (Also, some people have already been discussing Judge Kozinski's possible copyright infringement exposure for the uploading of some MP3's to his Internet site.) Being an appellate judge, it probably is more understandable why Judge Kozinski decided to recuse himself and to return to appellate work. Were he a full-time trial judge, it would have been harder for the judge to determine which cases to recuse himself from and which not to recuse himself from. Â As the defendant's lawyer, armed with the information I currently have, I probably would not have wanted his recusal, and certainly would have filed an objection to the mistrial, to preserve double jeopardy arguments. Â As much as I dislike self-censorship, I suggest that a mess of the current magnitude should have been reasonably foreseeable by Judge Kozinski over his uploading sexually explicit images to the Internet. Of all trials to take as a supplement to his appellate judging, it is surprising that Judge Kozinski would have taken this one. Once he accepted this case, had he stayed in the case after the current scandal over his uploaded sexual images, the jury might have needed to be sequestered in a hotel to be shielded from the heavy case publicity. I assume that the jury was not told of the possible need for such sequestration, and that sequestration could have disrupted focused and fair (fair to whom, though?) jury proceedings significantly. I do not take issue with the judge's recusal; I do question his decision to accept the case in the first place rather than to stick with appellate judging. Â Because the mistrial could have been avoided had Judge Kozinski stayed out of the trial courtroom in the first place, arguably he declared manifest necessity too late.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, June 15, 2008

### **Practicing law in the black.**

Image from Library of Congress's website. Critical to practicing law is placing clients ahead of money. To do the opposite likely will result in less income for a lawyer, or else in income not sufficiently or properly earned. Fortunately, many lawyers believe in the importance of doing good for society on the road to doing well; staying committed to social justice while practicing law; doing pro bono and low bono work; and helping others (including competitors) rise along with the lawyer, rather than stepping on their throats and heads in the process. The Community Legal Resource Networks is a living example of focusing the practice of law on doing good while doing well. In Maryland, this approach is seen in the Civil Justice Network, which originated at the University of Maryland Law School. When law is practiced in the foregoing way, the concept of the law firm as a business that needs to be run efficiently and competitively becomes less distasteful than if the idea were to make money at all costs no matter the endeavor. In that spirit, below are some ideas and idea sources for self-employed lawyers and all other small business owners to run profitable and rewarding businesses: Praised be Foonberg. Lawyer Jay Foonberg remains an indispensable adviser and cheerleader for lawyers to be successful as solo and small practitioners, as I discuss here. The E-Myth: A fellow Trial Lawyers College attendee recommends the E-Myth Revisited: Why Most Small Businesses Don't Work and What to Do About It, by Michael R. Gerber. Many of you may already have heard of Michael Gerber and his E-Myth philosophy that appears to be keeping him busy with books, seminars, and consulting; numerous other people write along E-Myth lines. I have just started reading the foregoing book, so will learn how much of his words and promotion make sense rather than any Tony Robbins-type overhype mixed in. Dealing with the IRS. The same lawyer who recommends E-Myth Revisited also recommends Don't Let The IRS Destroy Your Small Business: Seventy-Six Mistakes To Avoid. At first blush, finding ways to reduce tax payments sounds like a favorite topic of right wingers and rabid capitalists. On the other hand, federal and state taxes are a big expense for businesses. At the very least, businesses need to have sound financial and accounting practices and controls, to protect their assets from theft and other loss, to sail through any IRS audit, and to pass credit reviews by vendors and lenders. Taking some pages from Sun Tzu. When buying E-Myth Revisited, I came across and bought Gary Gagliardi's Sun Tzu's The Art of War for the Business Warrior, in which the author juxtaposes each page of The Art of War with some excellent related tips for entrepreneurs. Some of the book's advice also applies well to battling litigation opponents, seeing that the Art of War is about competition in the first place. BlackBerry Freeware. A busy trial lawyer needs access to email and other computer technology both in the office and on the road. I recently bought a BlackBerry, and have found some of the following freeware and other useful links: - The BlackBerry freeware page. In addition to freeware, this site includes some useful email addresses for organizing information. - Mobile file manager software; spreadsheet; document file viewer; BlackBerry utilities; RSS reader, to review blogs; media player; software from Gwhiz; New York Times in BlackBerry-compatible format; expense tracking; ringtones; games, for a change of pace; and EBook reader. - For pay, here is MS Word and Excel-compatible software for BlackBerries. Thanks to everyone who has shared their experience and knowledge with me over the years for running a law firm that is at once compassionate, successful, and rewarding. Jon Katz.

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

Friday, June 13, 2008

**Immigration risks from criminal cases.**

Â Bill of RightsÂ (From public domain.)Â The National Immigration Project's website has some good links for criminal defense lawyers to review a client's negative immigration exposure. Thanks to a fellow listserv member for providing the foregoing link.Â Two of my past articles on this topic are here and here. The foregoing links are only starting points. Nothing beats obtaining a relevant case reveiw from an immigration law expert experienced in advising about the immigration exposure from a particular conviction or sentence, Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, June 12, 2008

### **Should I get a Blackberry or iPhone?**

Computer hard drive. (Image from Pacific Northwest Laboratory's website). Checking email only at the office has become too inefficient, to the point of offsetting the bliss of not having email to deal with when away from my wired computer. Therefore, having read some of the articles comparing the BlackBerry and iPhone, I seek Underdog readers' input before making a final decision. Please recommend one of the two phones (and any particular models of the two) for my following modest needs: Good phone reception and sound. Good speakerphone and good headset, for talking and driving. Efficient management and summary review of email, including a way quickly to dispose of spam, and including the option to filter email into separate mailboxes (e.g., directing listserv messages to the listserv box, and bcc messages to a low priority box). I will want to receive email sent to my main email address ([jon@markskatz.com](mailto:jon@markskatz.com)), and will want still to review the same emails on my desktop PC computer. Such PalmPilot-type features as calendaring, To Do lists, hourly billing software (or at least Excel), backup between the phone's data and my PC computer, and enough memory to download articles to read. Large enough Internet screen that includes the opportunity to read pdf documents. Long usage capacity before needing to recharge the battery. Heavy duty enough to withstand falls (or, at least, good insurance coverage against falls, and a good non-leather protective case that is on the phone while I use it). I do not need entertainment features on the phone; I understand that music and videos are a strong suit for iPhones. Thanks for your input. Jon Katz.

**ADDENDUM I:** Some of the articles I have read that compare the two phones are here, here, here (recommends the BlackBerry for emailing), and here (DrunkenComputing's recommendation of the BlackBerry for durability, email, syncing with the Desktop, and accessibility for Verizon cell contracts, which I have).

**ADDENDUM II:** Thanks to the numerous people who replied by email to my foregoing inquiry. After speaking with a fellow member of the National Association of Criminal Defense Lawyers -- who highly recommended the BlackBerry Curve -- I bought the Curve last night. The Curve will serve my main purposes. When comparing such devices, keep in mind that the BlackBerry has no software to read PDF files (update: I got it to read a pdf email attachments, slowly; I will double check if it will read a pdf link on a website), nor to run Excel- and Word- type programs. It is not as efficient and helpful as a Palm-type device. For separate charges, a Curve owner can purchase the foregoing software, as well as hardware to take videos, charge the Curve in one's ashtray, have removeable memory, and have hands-free access beyond the speakerphone. On top of that, to avoid damage from dropping the unit, monthly insurance may be advisable (after checking the deductible and other limitations on the insurance benefits). Thanks again to those who advised me on my purchase.

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

### **Maintaining calm in the eye of the storm.**

Some people seek calm by avoiding conflict. I seek to use calm to harmonize conflict to the advantage of me and my client. By applying the principles of t'ai chi to my law practice, I do my best neither to chase an opponent's power nor to hide from it, but to use my opponent's power and energy to the best of my advantage, by doing my best to anticipate the opponent's strategy and attack, to give the opponent nothing to push against, to find the opponent's weaknesses, and to neutralize the opponent. Related to this approach of neither chasing nor hiding from an opponent, t'ai chi master Benjamin Pang Jeng Lo (pictured here, second from the top) once said: "Normally we think that if [our opponent] has 100 pounds of force or power, I better have 150. But then if I get 150 pounds of force, he may have accumulated more himself. Or there'll be somebody else with more. So next time it will be my 150 against his 200. Then I'll need to go to 250 and still, there'll always be somebody with more than me. So I need to reverse my approach. I need to take my own power down to 0. Then there's no chasing or spiraling. Nothing can change. If he has 100, I have 0. If he has 150, I have 0. If he has 200, I still have 0, on and on, whatever he has, I'm always beneath it, it doesn't change or affect me. I'm not chasing his attributes, or competing, or catching up, or exceeding him. That's Taijiquan. A student of Sun Tzu reaches the same destination by taking the following path: "Sun Tzu's ideal military leader is calm in the midst of chaos, being able to even appear chaotic to deceive his enemy. The ultimate skill is separating oneself from the stresses of everyday life. Thus, a strong leader's response does not correlate and follow with the stimulus, which in effect, is quite impressive to his or her people and to the competition. With this ability, one can think clearly without influences corrupting the process in bringing about the best solution. He or she has inner peace in a world of perpetual turbulence. How many times do you find yourself so wrapped up in present worries, you can't seem to think clearly, and that the decision was made based primarily from the tension?" Fortunately, like myself, plenty of other lawyers seek calmness not out of any new age, bead-wearing philosophy of life, but out of a realization that this is the only sensible path, and is a necessary path. In Washington, DC, on a regular basis a contemplative law group meets. Similar gatherings take place in other parts of the nation, as well.

Â One lawyer who has inspired me with his holistic approach to law practice is Michael Dolich. He is a fellow attendee of the Trial Lawyers College, and I became intrigued to follow his spiritual travels on the TLC's listserv, and to talk with him about his approach to life. Ultimately, Michael left the law and found a way to incorporate his holistic approach to his new path of baking professionally. As Michael tells it, "You might not know I used to be a trial lawyer; 10 years I was in the courtroom. I still shake inside a bit when I say 'used to be' before that word 'lawyer;' but I am much more comfortable with that concept now. I liked the law practice with its constant intellectual feeding and occasional intense courtroom dramas which always moved me beyond my comfort zone and challenged me. But something always seemed missing; and for many years I didnâ€™t understand what it was. Now I understand that I need to work with my hands and on my feet; at least part of my working time." For me, I use my hands and feet literally when practicing t'ai chi every day, and figuratively, by incorporating the t'ai chi principles and practices involved inÂ pushing hands, protective kicking, and sparring, into my law practice. Â Describing the teacher of the teacher of my two t'ai chi teachers, an Australian teacher says: "As one famous taiji teacher (Cheng Man-ching) once put it, drawing on the Taoist image of the soft overcoming the hard, water and air are amongst the softest of Nature's elements, yet massed wind (cyclone) or water (tidal wave) can overcome the hardest thing! The taiji practitioner if properly trained is able to harness or access realms of psychophysical energy (qi) unavailable through mere muscular exertion. Another leading taiji exponent (Bruce Kamir Francis) once compared the power capable of being generated by the internal versus the external arts to that of the atomic energy of Quantum physics that results from splitting the atom, as compared to Newtonian, mechanical energy."Â Robert W. SmithÂ -- who studied with Cheng Man-ching, and who taught my two t'ai chi teachers -- talked of Professor Cheng being the softest of the soft who directed his chi through the concrete, to make pushing the Professor little different than pushing concrete, that is, if a person were able to find anything to push in the first place when sparring with Professor Cheng, rather than feeling no differently than pushing a ghost.Â Â Some people do sitting meditation to achieve calm. I prefer the meditation involved in the internal martial art movements of t'ai chi. As Cheng Man-ching once said, doing yoga might relax a person, but it is t'ai chi that makes a person ready to neutralize the opponent at any time, and it helps me be calm in the eye of the storm.Â Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Wednesday, June 11, 2008

### **Virginia Court of Appeals finds no First Amendment violation with online solicitation of minors law.**

Bill of Rights (From public domain.) On June 10, 2008, Virginia's Court of Appeals found no First Amendment infirmity with the law prohibiting soliciting sexual activity with a minor. *Podracky v. Com.*, \_\_\_ Va. App. \_ (June 10, 2008). The court also emphasized that such a crime can take place even if the "minor" turns out to be an undercover cop. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:30

### **The Longest Walk**

Longest Walkers meet police in Columbus. In my office is an American Indian Movement emblem, and at home is my AIM t-shirt. I became all the more interested in the movement after reading Dennis Banks's autobiography *Ojibwa Warrior*, and then meeting him in 2006 at the conclusion of the Sacred Run. We are both friends of Jun Yasuda, who joined Dennis from California when he went "underground to the Onondaga Reservation in New York" after California's Jerry Brown -- who refused to extradite Dennis to South Dakota concerning criminal charges over the Wounded Knee event -- left the governor's office. 1978 saw the Longest Walk, which is described by the 2008 Longest Walk page as "a peaceful, spiritual effort to educate the public about Native American rights and the Native way of life. Native American Treaty Rights under the U.S. Constitution are to be honored as the supreme law of the land." The 3,600 mile walk was successful in its purpose: to gather enough support to halt proposed legislation abrogating Indian treaties with the U.S. government." Thirty years later is a new Longest Walk, with the following purpose: "We walk with the message: All Life is Sacred, Save Mother Earth." "We shall walk for the Seventh Generation, for our youth, for peace, for justice, for healing of Mother Earth, for the healing of our people suffering from diabetes, heart conditions, alcoholism, drug addiction, and other diseases. "Through the elements of the seasons, we shall walk through the rain, snow, over mountains, high winds, through the heat and cold, nothing shall deter us from completing our mission: All Life is Sacred, Protect Sacred Sites. "Let those who doubt, hear our pledge. Let those who believe, join our ranks. As we walk the final miles, by our side will be elders, families, children, people of all races, from many walks of life, the old and the new America. All Life is Sacred, Clean Up Mother Earth." As the Longest Walk winds down, a signing ceremony of the Sovereignty Declaration of One Nation will be held in Greenbelt, Maryland on July 8,9, 2008, at Greenbelt Park. The announcement of this signing ceremony says that "many Elders and Nations from around the world will be present." The same website alleges unjust harassment by police in Columbus. Above is YouTube footage. Finally, I recently updated Nipponzan Myohoji's local website to announce the welcoming of the Longest Walkers on July 12 at the conclusion of the walk. If you go, let me know you are there. What does this blog entry have to do with my law practice? It is about never giving up in the face of adversity, and focusing on victory through hard work, patience, and time. Jon Katz.

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

Tuesday, June 10, 2008

**Fourth Circuit sends terrorism case back for resentencing.**

Bill of Rights (From public domain.) In this post-Rita, Gall and Kimbrough world, the Fourth Circuit recently reversed the thirty-year sentence of a terrorism convict as too lenient, and seemed to call for the trial judge to look more closely at the sentencing guidelines before deciding whether to depart from them. *U.S. v. Abu-Ali*, \_\_\_ F.3d \_\_\_ (June 6, 2008). Although the Supreme Court has made the federal sentencing guidelines voluntary, the guidelines seem to be here to stay, at least for the time being. In reversing the sentencing of Abu Ali, the Fourth Circuit's two-judge panel majority said: "Given the gravity of Abu Ali's offense, and the district court's erroneous application of 18 U.S.C. § 3553(a)(6), we have seen nothing to justify a variance of the degree imposed here. It bears reminding that this is not some mere doctrinal dispute of surpassing abstraction. At some point, the debate risks becoming wholly divorced from the broader reality: that the defendant sought to destabilize our government and to shake it to its core. To this day, he wishes he had succeeded. Not only that, but the defendant gave no discernable thought to the personal loss and heartache that would have been suffered by untold hundreds or thousands of victims, spouses, children, parents, and friends had his plans come to fruition. This is a fact that any sentencing system, not just the United States Sentencing Guidelines, would take into account. It is not too much to ask that a sentencing proceeding not lose sight of the immensity and scale of wanton harm that was and remains Abu Ali's plain and clear intention. Based on the foregoing circumstances of this case, we find the district court's significant downward deviation not to be justified. Thus, the sentence imposed must be vacated. While we of course leave the sentencing function to the able offices of the trial court on remand, we trust that any sentence imposed will reflect the full gravity of the situation before us." Stay tuned. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

**Maryland substantially amends criminal discovery rules.**

Image from Maryland State Archives. To those practicing criminal defense in Maryland: Generally effective July 1, 2008 (see the Court of Appeals' implementing Order), the District Court and Circuit Court will have significantly updated discovery rules, as designated in the following links to Maryland Rules 4-262, 4-263, and 4-301. The Court of Appeals' order implementing the foregoing amended discovery rules provides that said amendments will be effective for "all actions commenced on or after July 1, 2008, and insofar as practicable, to all actions then pending." Among the foregoing rules changes that are particularly noteworthy, the rules governing jury trial demands from District Court will take the following two tracks, pursuant to Md. Rule 4-301(c): Defendants will only get the benefit of the more extensive Circuit Court discovery rules by filing a written jury trial demand at least fifteen days before the scheduled trial date, unless ordered by the court or agreed by the parties to file the demand during a shorter time frame. All other jury trial demands from District Court will be governed by the District Court criminal discovery rules. Based on the foregoing discovery rule amendments, it is important for criminal defense lawyers to update their Maryland discovery request language in consonance with the rules changes. For pending District Court criminal discovery requests that do not already track the discovery rule amendments, it ordinarily will be advisable to file amended discovery requests that track the new rules. For pending Circuit Court cases, the same approach generally will be advisable; however, because the Circuit Court discovery rules impose substantially extra discovery disclosures for the defense, any amended discovery requests by the defense in Circuit Court might need to be specially tailored to the particular case, rather than being in boilerplate language. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, June 9, 2008

### **In praise of Tod Mikuriya.**

As I became more knowledgeable over the years about the marijuana legalization movement, from time to time I would hear about Tod Mikuriya, M.D. As the May 29, 2007, New York Times tells it, Mikuriya "was an architect of Proposition 215, the state ballot measure that in 1996 made it legal for California doctors to recommend marijuana for seriously ill patients. He was also a founder of the California Cannabis Research Medical Group and its offshoot, the Society of Cannabis Clinicians." The above-referenced New York Times article is Dr. Mikuriya's obituary, one of the many I miss in the course of each year. Only two months earlier, I linked to his webpage supporting the rescheduling of marijuana to make it available for medicinal use. It seems better late than never to sing Dr. Mikuriya's praises after his departure from this planet. His good karma will continue for a long time, and certainly infects me in the most positive of ways. A belated thanks to Tod Mikuriya. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Sunday, June 8, 2008

**The tighter job market, and eliminating me, me, me & I, I, I.**

Â Image from Library of Congress's website.Â The job market is tightening for all jobs, including law jobs. When applying for jobs before and during law school, I often felt that plenty of employers were non-feeling and too unfair. Now that I am on the hiring end, I feel that many qualified candidates are not getting their point across succinctly and persuasively enough to get a job interview and to be hired, and that many underqualified candidates do not appear underqualified at first blush, thus calling for careful screening by employers of job candidates (although I do not support going as far as doing drug testing and privacy-violative background checks). Here is some food for thought, in case some of it has not already been bandied about ad nauseum, and is of any benefit to job seekers and employers: Â - Your job application needs to speak to your audience. I receive legions of applications that read all about "me, me, me" and say little about "you, you, you." Certainly a job applicant is trying to fulfill his or her career and financial needs. However, it is tough for an employer to offer a job interview to an applicant who does not show why s/he wants to help make the employer's entity a success. Â - Your job application should be fully responsive to the job posting. If the job posting asks for salary history and references, either provide the information, or else acknowledge the request and offer to provide that information if an interview is held. Acknowledging the information request shows that you are less likely to ignore assignments at work and that you care enough about the potential job to tailor your application to that job. Â - If the job posting requests that a resume be no longer than one or two pages, do not ignore the request. The quicker that a resume and cover letter get to the persuasive point, the better. Â - A cover letter and resume should be marketing tools. A cover letter should not be omitted, and it should specifically addressÂ the position being applied for, why the applicant wants the position, and why the applicant will be a good fit for the position. With computer technology as advanced as it is, it is a good idea to tailor one's resume to the position applied for. Â - Employers' focus runs anywhere from zeroing in on pure merit on paper to personally knowing the applicant or those close to the applicant. A job seeker is well advised toÂ make an effort to meet potential employers through such activities asÂ joining relevant professional associations and getting involved with them;Â and finding employers at places and times where they will have time to speak (e.g., career fairs, and, with trial lawyers, in court). Â - Employers such as I ordinarily wish to screen an applicant by phone before blocking out time in a busy day for an interview. Consider whether your outgoing voice message conveys the impression you want to convey to potential employers. If it is hard for you to sound upbeat that the employer has called, consider thanking the employer for the call, emphasizing that you very much look forward to speaking, and explaining that you are in the middle of something that would make it better for you to arrange another time in the near future to speak. Â - For the interview, arrive on time and in sufficient time to arrive relaxed, spend at least one half hour getting relevant information about the employer online or elsewhere (and visualizing how you and the employer can make this job a harmonious fit for you both), and be ready to show the employer your best self in handling ordinary and curveball situations. My law firm, for instance, is a fast-paced workplace that requires shifting gears throughout the day; I look for that ability when I interview applicants. Â - Welcome all tough questions as a gift that show what is on the interviewer's mind. Unless the interviewer is a sadist or has been assigned an unwanted interviewing obligation, the interviewer wants to help him or her and the hiring organization maximize benefit and minimize risk in hiring. As unfair or fair as the hiring process might seem to be, the interviewer has little if any reason to focus on anything but trying to succeed in hiring the best candidate for the job at the available compensation rate. Â - At the interview, listen actively, and respond to what is being asked. No matter how stressful the interviewing process might be, this is an opportunity to show the employer your ability to deal with difficult situations in an ordinary work day. Â - Sadly, racism, sexism and other ugly and unfair bias still permeate society and, therefore, affect the labor market. If such bias arises in the job application, interview, and workplace process, it should not be ignored. The bias might be directed towards the candidate, about other people, or even by the interviewee; none of this should be ignored. Everyone must stand up against such views and behavior. Â - Employers prefer to hire people who are psyched about working for them. Good job performance is tougher to achieve by people who are miserable at their jobs. This does not mean that job seekers should lower their job goals. It does mean, at least, that job seekers can try to do their best to increase their interest level in a job that they prefer to be a backup option in seeking better opportunities. One book that can be beneficial here is the Dalai Lama's *The Art of Happiness At Work*.Â - Know and acknowledge your relevant strengths and weaknesses. I ask interviewees to tell me both, and not to candy-coat their relevant weaknesses. At minimum, when I offer a job to an applicant, I make clear that the applicant is expected to perform at the level set clearly by me in the application and interviewing process unless the applicant has expressed any problem doing so. Everyone has days where performance might fall short;Â however, I can only accommodate such problems if an employee tells me there is such a problem.Â Employers must be educated about laws protecting employees and job applicants concerning disabilities, pregnancy and family leave, and all other legally protected accommodations. Â - Employers: The employer-employee relationship is a two-way street. Paying employees does not give you an indentured servant. At the very minimum, the golden rule applies: Do unto others as you would have them do unto you. Further, although effective employees need to listen wellÂ and exercise a sufficient

amount of good judgment and independence, the employer needs to sufficiently train employees, to remove the mystery about what is needed to succeed at the job, and to positively nurture and motivate employees to succeed. Furthermore, be honest about the position for which you are hiring. Every job has warts, and job applicants should be informed of them, including but not limited to any expectations to work long hours at short notice at times, and any possibility of switching the job description at times. - Employees: As much as plenty of energy and time and devotion are needed to land and succeed at a job, always be ready to stand up for what is right, just, and fair if your employer or anybody at your job is urinating on justice and fairness. On the one hand, this might risk your job. On the other hand, if you speak up effectively, calmly, and diplomatically, you might come to the attention of others at your organization or other organizations who will want to hire you for such qualities. Jon Katz.

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

Friday, June 6, 2008

### **Jury convicts Max Hardcore.**

Â Bill of RightsÂ (From public domain.)Â On June 3, 2008, I blogged about the Paul Little/Max Hardcore federal obscenity trial that was then underway. Â Sadly, on June 5,Â the jury convicted Mr. Little on ten counts of distributing obscenity online and by snail mail. Jury deliberations were emotional. The foreperson told the judge on the same day of the guilty verdict: "Emotions were very high ... It would be great if we could take a break now." Was the jury unconstitutionallyÂ pressured by the judge into reaching a unanimous verdict? Â In his closing argument, defense lawyer Jeffrey Douglas tried obtaining an acquittal by arguing that the allegedly obscene material has political value. He argued thatÂ "the politically incorrect depiction and relationship with women ... is the actual evidence of serious political value." A work cannot be obscene unless the work, when "taken as a whole, lacks serious literary, artistic, political, or scientific value."Â Miller v. California, 413 U.S. 15 (1973).Â Max Hardcore's videos apparently include scenes that seriously demean women, and include urination and vomiting. The defense tried depicting Max Hardcore as a fictitious character in the tradition ofÂ Archie Bunker and Homer Simpson. Defense lawyer Jeffrey Douglas argued that "Low-brow entertainment has serious value ... This prosecution is wrong. This prosecution stinks."Â This prosecution of Paul Little does stink, starting with the stinking up of the First Amendment caused by all obscenity arrests and prosecutions. Â Now, the defense will prepare for a separate sentencing hearing and for appeal. Thanks to the defense team for its ongoing fight for justice. Jon Katz.Â ADDENDUM: Thanks to a fellow listserv member for informing me of this sad verdict.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, June 5, 2008

**DC Atty General: "I'm not worried about the constitutionality" of Mayor's state of emergency.**

Bill of Rights (From public domain.) Giddiness seemed to run wide over Adrian Fenty's ascension to the District of Columbia mayoral throne two years ago at age thirty-five. He apparently made good at knocking on more voters' doors than his competition, had the energy to get his daily work done and still run for miles weekly, and learned valuable work ethic lessons from his parents who took a risk at opening an ultimately thriving running store. Of course, civil liberties violations often are caused by well-meaning people. That truism arrived like a sledgehammer this week, when mayor Fenty gave police chief Cathy Lanier carte blanche to authorize ten-day "Neighborhood Safety Zones" where, according to mayor Fenty's June 4, 2008, news release, "public safety checks will be established along the main thoroughfares of the established neighborhoods. Anyone driving into a designated area may be asked to show valid identification with a home address in that neighborhood, or to provide an explanation for entering the NSZ, such as attending church, a doctor's appointment or visiting friends or relatives. Pedestrians will not be subject to the public safety checks... Initiatives such as the Neighborhood Safety Zones have been accepted by federal courts as a legitimate law enforcement practice in keeping with the Constitution's Fourth Amendment. The constitutionality of the NSZ initiative has been reviewed by the D.C. Office of the Attorney General." Mayor Fenty: "Just because courts let government actions pass Constitutional muster does not make the actions wise or right. Courts are not charged with only allowing wise or beneficial laws. For instance, in dissenting from the Supreme Court's ruling invalidating Connecticut's law criminalizing providing contraception even to married couples, as well as advising them about it, Justice Stewart, joined by Justice Black, confirmed: "I think this is an uncommonly silly law... But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do." *Griswold v. Connecticut*, 381 U.S. 479 (1965) (emphasis added). (Aside: As the PBS website recounts about the foregoing *Griswold v. Connecticut* case: "Estelle Griswold, the executive director of Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, doctor and professor at Yale Medical School, were arrested and found guilty as accessories to providing illegal contraception. They were fined \$100 each. Griswold and Buxton appealed to the Supreme Court of Errors of Connecticut, claiming that the law violated the U.S. Constitution. The Connecticut court upheld the conviction, and Griswold and Buxton appealed to the U.S. Supreme Court, which reviewed the case in 1965." Such unenlightenment was going on in my natal state even after my birth. I am pleased that my father grew up on a street with the same name as the petitioner, Griswold Drive in West Hartford.) The Examiner newspaper quotes D.C.'s interim attorney general Peter Nickles as saying: "This is a very targeted program that has been used in other cities... I'm not worried about the constitutionality of it." Fortunately, even a D.C. city councilmember who tentatively supports this neighborhood safety zone approach said "he worried about D.C. 'moving towards a police state.' Worried about moving to a police state? With this neighborhood safety zone plan, the District of Columbia will already be a police state. The Washington Post gives background to the situation: "The 'Neighborhood Safety Zones' program announced this morning is a response to a triple slaying in Trinidad at 4 a.m. Friday, and other recent violence. In the 5th police district, which includes Trinidad, 22 people have been killed so far this year, one more than in all of 2007." The Washington Post further reports: "Police will search cars if they feel they have probable cause to do so. Drivers who don't cooperate with the request to produce identification or who object to being refused entrance to the block could face arrest for failing to obey police." Fortunately, the Supreme Court's 2004 decision in *Hiibel v. Sixth Judicial District Court of Nevada* prohibits arrests for identification refusal (and leaves open the door to prohibit cops from requiring anything more than one's name, versus one's photo identification and address, unless the person is driving a car) except where police have reasonable suspicion to believe the suspect has committed a crime. (See Mr. Hiibel's Constitutional rights being shredded here.) Clearly, reasonable suspicion will not arise merely for driving into a police-designated neighborhood. Also, people have a right to object to police activity under the First Amendment; unfortunately, too many courts have allowed disorderly conduct laws to erode the First Amendment, making that a route for police to arrest people, for example, who yell at the cops that they're jackasses for taking actions that create a police state. More fundamentally, I believe that it is clearly unconstitutional to stop all cars entering neighborhoods targeted by the cops in this "neighborhood safety zone" program, particularly where the cops will require identification and will prohibit entrance to the neighborhood if the police are not satisfied with the visitor's explanation for their visit. It is bad enough that courts permit cops to establish "sobriety checkpoints" to enable them to stop every passing car (I was a victim of such a checkpoint in D.C.'s Georgetown neighborhood); unlike the neighborhood safety zone plan, at least the sobriety checkpoints do not involve requiring identification nor prohibition against drivers continuing on their way (unless they get arrested for drunk driving). Certainly, Washington, D.C., was no civil liberties paradise even before the mayor's "neighborhood safety zone" plan. For instance, since the mid-1990's, D.C.'s anti-loitering law permits the police chief to establish drug-free zones where merely walking with one or more other people can lead to police hassling. The D.C. police department's own website proclaims: "It is illegal for members of a group to continue to congregate on public space in the Drug Free Zone after

being instructed to disperse. Failure to obey the officer's instruction will result in arrest without a second warning. This holds true if they regroup and continue to congregate in any public space within the boundaries of the Drug Free Zone. Any person who violates the act shall, upon conviction, be subject to a fine of up to \$300, imprisonment for up to 180 days, or both." Yes, the District of Columbia has seen a huge number of homicides since last weekend. Unfortunately, mayor Fenty's "neighborhood safety zone" plan adds to the violence by aiming at the heart of the Bill of Rights. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, June 4, 2008

**Exclude defendant's refusal to consent to a search.**

Bill of Rights (From public domain.) A suspect's right to refuse a search is as sacred as a suspect's right to refuse to talk with the police. Therefore, such refusal by a criminal defendant should generally be excluded at trial. Whether or not the refusal follows advice from cops about the right to refuse, the jury is not permitted to consider the refusal for purposes of inferring any guilt. *Sampson v. Nevada*, 122 P.3d 1255, 121 Nev. Adv. Rep. 80 (2005). The Nevada Supreme Court in 2005 confirmed that the federal courts are in agreement as follows concerning evidence of a refusal to consent to a warrantless search as evidence of guilt: The Fifth Circuit, when determining that it was constitutional error for a trial court to permit the prosecutor to comment or present testimony on a defendant's refusal to consent to a warrantless search to support an inference of guilt, pointed out that all of the circuit courts that have addressed this issue have determined that a defendant's refusal to consent to a warrantless search may not be used as evidence of guilt. *U.S. v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002) (citing *U.S. v. Moreno*, 233 F.3d 937, 940-41 (7th Cir. 2000); *U.S. v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *U.S. v. Thame*, 846 F.2d 200, 205-08 (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1351-52 (9th Cir. 1978)). At least two other state courts agree with this analysis. See *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *Mackey v. State*, 234 Ga. App. 554, 507 S.E.2d 482, 484 (Ga. Ct. App. 1998). *Sampson v. Nevada*, 122 P.3d 1255, 1261 n.8 *Sampson* provides good arguments for putting a defendant's refusal to consent to a warrantless search on par with refusing to talk with the cops, for purposes of keeping the refusal from jurors' ears: Courts addressing this issue recognize that there are similarities between exercising Fourth Amendment rights and exercising other constitutional rights, and they determine that it is improper for the State to effectively punish a defendant for asserting her constitutional rights. 10 [Citing *United States v. Thame*, 846 F.2d 200, 206-07 (3d Cir. 1988), cert. denied, 488 U.S. 928 (1988); and *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. ).] One court has stated, "Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing." [Citing *Prescott*, id.] *Sampson v. Nevada*, 122 P.3d 1255, 1261. The foregoing *Sampson* and *Prescott* decisions permit a judge to give a curative instruction -- rather than to declare a mistrial -- when evidence comes in of the defendant's refusal to submit to a consensual search: This court has previously addressed references made during trial to a defendant's exercise of her Fifth Amendment rights, and in *Morris v. State*, 12 we set forth the test to determine whether such a comment results in reversible error. In *Morris*, we held that references to a defendant's exercise of her Fifth Amendment rights are harmless beyond a reasonable doubt and do not require reversal of a conviction if, "(1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there is overwhelming evidence of guilt." 13 Today we adopt this test for comments on a defendant's exercise of Fourth Amendment rights. Thus, where there is only a mere passing reference, without more, to an accused's invocation of Fourth Amendment rights, there is harmless error. *Sampson v. Nevada*, 122 P.3d at 1262. Consequently, a motion in limine often will be advisable to head off testimony about such refusal. Jon Katz ADDENDUM: Armed with the foregoing caselaw, how does a defendant exclude evidence of a defendant's refusal to submit to field sobriety tests in a drunk driving case? In such states as Maryland that consider field sobriety tests to constitute warrantless searches -- *Blasi v. State*, 167 Md. App. 483, 893 A.2d 1152, cert. denied, 393 Md. 245, 900 A.2d 751 (2006) (discussed here) -- such refusal should be excluded from evidence, because refusal to submit to warrantless searches is not admissible for considering consciousness of guilt. *Sampson v. Nevada*, 122 P.3d at 1261-62.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, June 3, 2008

**Max Hardcore's obscenity trial underway.**

Â Bill of RightsÂ (From public domain.)Â On June 4, 2007, I blogged about Paul Little's (a.k.a. Max Hardcore) obscenity prosecution in Tampa federal court, and said, among other things: Â "The feds' latest effort to go after the more shocking variety of adult material is its May 17, 2007, indictment of Paul F. Little, who goes by the screen name Max Hardcore. I met Max Hardcore ever so briefly at the 2001 Free Speech Coalition annual awards event, too briefly to get any added understanding of him. However, I surmise that he produces the type of material that he produces to satisfy a market demand; otherwise, one would expect he would have shifted gears after all these years."Â Paul Little's obscenity prosecution started last Monday, May 27, 2008; thanks to a fellow listserv member for alerting me of that. Little and co-defendant Max World Entertainment are defended by a lineup of fellow First Amendment Lawyers Association members, including Jeffrey Douglas and Lou Sirkin. Jeff and Lou are among FALA officers and past officers who made me feel all the more welcome when I joined the FALA over seven years ago, and for that I always will be grateful. Â With prosecutions involving alleged visual obscenity can come very explicit images for the jury to view, and Little's jury apparently is seeing such images. Howard Bashman at How Appealing links to some of the news stories of the trial's play-by-play. Last Thursday and Friday, the defense orally moved for a mistrial, over such judicial actions as the judge's refusal to question a juror who sent a note asking about the possibility of viewing fewer hours of sexually explicit material, which reduced viewing would fly in the face of the Miller doctrine's requirement that, inter alia, the jury determine "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, and (3)Â whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15 (1973). The trial judge is Susan C. Bucklew; curiously, Judge Bucklew is a Bill Clinton appointee, which seems reduces the opportunity to claim that she is in bed with the Bush II administration and its resurrection of obscenity prosecutions after the Clinton administration brought few if any obscenity prosecutions, but prosecuted alleged child pornography with a vengeance, which child pornography prosecutorial zeal continues with the Bush II administration. Â Here are some of the relevant court filings in the Little prosecution: Â - The current case docket. Â - Prosecution's motion to limit defense expert testimony, attachingÂ an exhibit that includes the expert's resume,Â concerning sexual deviancy, apparently as part of a defense effort to establish a favorable community standard against which to judge the allegedly obscene material. Miller v. California, 413 U.S. 15. (At issue in the trial also will be how to define the applicable community standard, both geographically and otherwise. Id.)Â - Defendants' opposition to the prosecution's motions concerning expert testimony and other evidence, attaching the defendant's exhibit listing some comparable sexually explicit material apparently available to the purported applicable community for which the jury will be required to determine a community standard. Miller v. California, 413 U.S. 15.Â I believe that obscenity prosecutions are impermissible under the First Amendment. For that reason alone, I wish the defendants a victory.Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, June 2, 2008

### **Congratulations, Gerry Spence and Geoffrey Fieger!**

The powerhouse of John Johnson and Gerry Spence (Aug. 1995, Thunderhead Ranch) Â I owe a lot to Gerry Spence. On the one hand, my guru of gurus Steve Rensch was the paramount motivator for my attending the Trial Lawyers College. On the other hand, Gerry is the yin to Steve's yang, completing an essential whole. Among the many things I have learned from Steve is thatÂ one does not need to be born with charisma to be a great trial lawyer. Among the many things I learned from Gerry is thatÂ evenÂ those whoÂ come across as powerhouses onlyÂ get that way byÂ becoming their most powerful real selves and by finding and embracing their pain and fears before sending them on their way.Â Â Gerry also has a knack for assembling people together who will benefit tremendously from it. Among those he has assembled to my benefit are the late, great trial consultant and superhuman John Johnson; psychodrama and trial consulting master Don Clarkson; my Trial Lawyers College friend and roommateÂ Bob Hilliard, who encouraged me by example to take the leap to higher quantum levels of personal and professional success; and acting and trial powerhouse Josh Karton. Also in the assemblage has been Gerry himself. As much as so many people want a piece of Gerry, when I got a chance to walk with him and some others in the early morning hours or to sit with him at the chow hall, he spoke directly to me, as real as could be. Â Good karma returned Gerry's way as he won a full acquittal for his client Geoffrey Fieger todayÂ for this trial that he told the jury would be his last.Â Fieger and his law partner Vernon Johnson were accused of violating federal campaign contribution limits in donating overÂ \$100,000 to John Edwardsâ€™ 2004 presidential race. Yes, other lawyers were on the defense teams for the two defendants. As I understand it, though, Gerry took the lead. Â Several play-by-plays of the trial were posted on the Trial Lawyers College listserv. The one that grabbed me the most was the description of Gerry as approaching the jury rail for each cross examination, gliding his hand along the length of the rail, and strumming it with his fingers at the end, both as perhaps a good luck tap and also as a way to draw the jurors into him and to eliminate any physical barriers between Gerry and the jury. Â Apparently under new federal court rules, ordered trial transcripts will be posted to PACER after ninety days. I imagine that plenty of people will wish to order the transcript, and that it will consequently be posted on PACER. Here are some of the key documents filed in the case: Â - The lengthy case docket. Â - The superseding indictment.Â - Fieger's motion in limine. Â - Prosecution's motion in limine, including concerning jury nullification arguments. Â - Fieger's denied motion to transfer trial, after jury questionnaire responses showed how many potential jurors passionately dislike Fieger. Â - Fieger's denied motion to dismiss the prosecution for violations of the jury selection and service act. - Joint jury questionnaire. Â - Fieger's proposed jury voir dire. Â - Fieger's proposed jury instruction on burden of proof. Â How often do jurors hug acquitted defendants? See just that happening here between Fieger and a juror. Gerry and Fieger apparently are close friends, and hugging -- both literally and figuratively -- permeates the Trial Lawyers College. Â Congratulations, Gerry and the defendants, on this victory! Jon Katz

Posted by Jon Katz in Criminal Defense at 19:01

### **Speedy trial clock should continue after bad faith non-prejudicial dismissal.**

Â Bill of RightsÂ (From public domain.)Â In some courthouses, it is hit or miss whether the prosecutor will be ready for trial on the trial date. In other courthouses, it is unusual for the prosecutor not to be prepared to proceed forward on the trial date. In some jurisdictions, prosecutors anticipate that they will ordinarily receive great leeway for obtaining trial postponements, which feeds into a habit of not assuring that the prosecutor is ready for trial and has all his or her witnesses lined up. Â Some prosecutors like to fall back on seeking a non-prejudicial case dismissal when their trial continuance motion is denied, to enable the prosecutor to recharge the case. My response is that, under such circumstances, the speedy trial clock should continue running, lest the non-prejudicial dismissal become a cynical end-run around a denial of a postponement motion. Maryland's highest court generally agrees. Maryland v. Price, 385 Md. 261, 868 A.2d 252 (2005). Â What is the situation where you practice criminal defense? Are prosecutors automatically able to obtain non-prejudicial case dismissals? Do court opinions and court practice throw obstacles in front of prosecutorial efforts to turn such dismissals into end-runs around denials of trial postponements? Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

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