

Sunday, August 31, 2008

Stephanie Tubbs Jones departs the planet.

^ People rarely die. Even after their heart stops beating, something about them usually keeps influencing the living and future generations^ in some small or big way, whether or not that influence is a good one. Someone like Stephanie Tubbs Jones did not have the capacity to die, but she did leave the planet on August 19, of a^ ruptured brain aneurysm that happened the day before. Joe Biden suffered the same injury two decades ago, but recovered. ^ In late July 2005 on a plane returning to Maryland from depositions of federal employees^ in Cleveland, I met Stephanie Tubbs Jones^ sitting next to me. Before I knew she was^ a member of Congress -- I still carry strong presumptions against politicians, and, to boot, she previously prosecuted and judged^ -- I was impressed by how genuinely (as it appeared to me) and effectively she engaged so many of the passengers boarding the plane. They were her constituents. I do not know what pet political issue I raised with her -- possibly opposition to the criminal sentencing guidelines and mandatory minimum sentences, the general overall unfairness of the criminal justice system, marijuana legalization, or drug decriminalization -- but she was happy to have an engaging and meaningful conversation on the topic that I chose. ^ Stephanie was genuinely upbeat about life and people. She told me that when she would conduct wedding ceremonies, she would recite the Indian wedding prayer. This prayer means so much to me that I spoke it to my wife at^ our wedding. For that alone, I very much appreciate Stephanie. ^ Stephanie was only thirteen years older than I^ when she passed. I send my condolences and best karma to her survivors, including her son^ Mervyn Jones,^ II. Jon Katz.

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

Friday, August 29, 2008

The limits on libel suits.

Â Bill of Rights.Â (From the public domain.)Â Â Earlier this month, the Fourth Circuit affirmed summary judgment for the defendants in a libel case against a radio announcer (and his company) who had brusquely uncomplimentary words about the company's actions in IraqÂ while on contract at Abu Ghraib for such actions as conducting interrogations on behalf of the United States government.Â Â Caci Premier Tech., Inc. v. Rhodes, 2008 U.S. App. LEXIS 16576 (4th Cir.,Â Aug. 5, 2008).Â In affirming summary judgment, theÂ Fourth Circuit said: "To survive summary judgment, CACI must have forecast clear and convincing evidence that Rhodes made the statement with a high degree of subjective awareness of its probable falsity. In light of the evidence suggesting CACI's involvement in other abuses at Abu Ghraib and the credible sources identifying a contractor as the perpetrator of the child rape, the record does not support a finding, by clear and convincing evidence, that Rhodes levied the accusation recklessly. It is the absence of sufficient evidence of Rhodes's state of mind, and not any testament to the actual veracity or justifiability of her statement, that makes summary judgment appropriate here."Â Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Thursday, August 28, 2008

When Miranda does and does not come to the rescue.

Â Â Bill of Rights.Â (From the public domain.)Â Â Many of my clients complain that the police never read them their rights. I wish the police always had that obligation when questioning a person, but that is not the situation. Generally, the police must advise a suspect of his or her Miranda rights if the suspect is in custody; if not, the failure to so advise is grounds for suppressing the defendant's statements to the police. Â Following are a few key court opinions that address Â - Once Miranda rights are invoked, they remain invoked until the in-custody suspect initiates communication. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981). This is even the situation when the suspect is a convict who demands an attorney's presence during questioning, the case goes cold, and police return to question the suspect in the same prison system from which s/he has never been released. Shatzer v. Maryland, __ Md. __ (Aug. 26, 2008).Â - The trial judge in the Lee Boyd Malvo sniper prosecution initiated inÂ Fairfax County, Virginia, ruled that the Sixth Amendment right to counsel is offense-specific, and cannot be invoked by one's attorney for future criminal charges that have not yet been filed. For that reason alone, said Virginia trial judge ruled that Mr. Malvo's Miranda rights in Virginia state court could not be asserted by his Maryland federal court-appointed lawyers. As the newspapers confirmed, Malvo wagged his tongue so much that he guaranteed himself the conviction and life without parole sentence that he received. Commonwealth of Virginia v. Malvo, 2003 Va. Cir. LEXIS 188, 63 Va. Cir. 22 (2003).Â - Miranda rights need not be automatically given to those present in a house being searched pursuant to a warrant. The Ninth Circuit recently said that "several factors are relevant to whether the circumstances of [the defendant's] interrogation effected a police dominated atmosphere: (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made." U.S. v. Craighead, __ F.3d __ (9th Cir. Aug. 21, 2008). Â Craighead further observed: "If a reasonable person is interrogated inside his own home and is told he is 'free o leave,' where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. An interrogation conducted within the suspect's home is not per se custodial. See Beckwith v. United States, 425 U.S. 341,Â 342-43, 347 (1976). On the contrary, courts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature. United States v. Ritchie, 35 F.3d 1477, 1485 (10th Cir. 1994); 2 Wayne R. LaFave, Criminal Procedure Â§ 6.6(e) (3d ed. 2007)."Â . U.S. v. Craighead, __ F.3d __. Thanks to Scott Greenfield for discussing this Craighead case. Â - Unless a state's constitution is more protective than the federal Constitution, a police officer's questioning after a traffic violation stop generally does not, at the early stages, trigger a need to give Miranda warnings, because the stop and initial questioning, by themselves, do not put the suspect in custody that would require the MirandaÂ warnings. Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984); McAvoy v. State, 314 Md. 509, 551 A.2d 875 (1989). Â What to do with the many times courts do not require Miranda rights? For starters, how about if each of us puts slogans on our cars, t-shirts and front doors proclaiming "Say no to police questioning and police searches." No means no. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, August 27, 2008

Keep the spotlight on convention protestors' rights.

Â Bill of Rights.Â (From the public domain.)Â Â Today's blogpost follows up on yesterday's entry insisting on protecting demonstrators' rights at the Democratic and Republican presidential conventions. Here are some useful links for assessing and responding to the protest issue in Denver:Â - Added to my blogroll is this admittedly biased blog devoted to coverage of demonstrations and the police at the major party presidential conventions. Thanks to TalkLeft for bringing it to my attention. Â - Here is a gruesome place set up for police to process arrested demonstrators. The ACLU blog discusses the detention center here. Â - This YouTube page claims to show dozens of clips of recent demonstration activity and police responseÂ in Denver. Â - PoliceÂ public relations Groupthink gaffesÂ often comes when they arrest reporters covering the action.Â Thanks to TalkLeft for covering this story. Â - See Wolf BlitzerÂ editorialize in favor of strong security while saying little to nothing about demonstrators' First Amendment and criminal defense rights, offset by his colleagues somewhat counterbalancing Blitzer, and including ominous footage from the 1968 Chicago Democratic Convention. Did 1968 failed Democratic presidential candidate Hubert Humphrey lift even a finger or a word to stop the police abuse inside and outside the Chicago convention site? If not, would he have reversed his narrow loss to Nixon had he stood up firmly, vocally,Â and effectivelyÂ against the police abuse, thus perhaps obtaining more support from those who favored Robert Kennedy and Eugene McCarthy for president? Then again, the Vietnam War was then raging, which presented a huge challenge for him to obtain more than grudging support from strongly antiwar Democrats, while he served as Vice President under Johnson who kept the Big bloody Muddy going. Jon KatzÂ ADDENDUM: Scott Greenfield weighed in on the protestor matter on August 28.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, August 26, 2008

Obama and McCain: Protect the convention demonstrators' rights.

An August 26, 2008, video of demonstrators in Denver, including the police blocking the exit of hundreds of people on a city block (near the last third of the video), including plenty of non-demonstrators who just happened to be present. Where was the mainstream media when this was happening? In recent years, no matter who runs for the Tweedledum/Tweedledee Democratic/Republican tickets, the presidential nomination conventions, campaign stops, and inaugural coronations are surrounded by assaults on the First Amendment right to demonstrate. (If you disagree with the brothers Tweedledum/Tweedledee reference, are Obama and McCain more materially the same than they are different? Yes, I am voting for Obama to have a less oppressive and less militaristic government than McCain would bring and maintain, but Obama will heavily support business as usual with the military-industrial-government complex; the failed and oppressive drug war that runs roughshod on the Constitution; the legalized murder of the capital punishment system; the oppressiveness of the PATRIOT Act, and countless other government assaults on civil liberties and democracy. Does the two-party-dominated system sufficiently support a truly democratic and just society? I think not.) Typically, and currently in Denver, convention demonstrators are kept blocks away from the convention site, nullifying the very purpose of their demonstrations. The same is sure to happen at the Republican convention. Also typically, presidential coronations, I mean inaugurations, lately have been examples of Soviet-style clampdowns on protestors and well-choreographed sanitized inaugural parades. Certainly official clampdowns on and intimidation of demonstrators in the United States go far beyond presidential politics. As I have witnessed firsthand, police have a repeated habit of taking repeated close-up photos and videos of demonstrators at large demonstrations against presidential policies in Washington, D.C.; the police purport merely to be gathering evidence, but I have trouble believing that their actions are not also calculated to intimidate. During the April 16, 2000, weekend anti-World Bank/IMF protests, when I spent an entire Saturday defending arrested demonstrators at their bond hearings in the District of Columbia Superior Court, on my way to the nearby federal courthouse, I challenged a couple of police officers on an eerily mainly deserted street whether there was any purpose for their being dressed all in black with boots other than to intimidate; they did not answer. On the Friday late afternoon after the September 11, 2001, massacres, I saw military vehicles rolling down K Street a few blocks from my law school (granted, probably not intended to intimidate demonstrators, but a reminder of how much the United States is not safe from martial law government and martial law tactics). In the early Nineties on one of the many protest weekends -- most weekends in Washington are booked with one or many demonstrations, running from tame flag-waving events to strong opposition to one or many government policies and actions -- I saw a fatigue-wearing soldier on the street corner in front of the Treasury Department. During the September 2007 anti-Gulf War II demonstration in Lafayette Park, I saw cops not only at the ready to use force if ordered to do so, but also roaming in the crowd of peaceful demonstrators on the road that for years always has been closed to traffic in front of the presidential palace. On July 14, 2008, I wrote about the public indifference -- but likely complicity if not downright participation -- ordinarily shown by presidential candidates and other high-profile politicians towards First Amendment violations against demonstrators protesting those politicians. Do McCain and Obama approve of such clampdowns? Will they voice their opinion on this matter, whatever are their opinions? Will they speak out for greater protection of demonstrators at their conventions, campaign stops, inauguration, and beyond? I am not holding my breath, including because their very discussion of the issue acknowledges the severe problem, and, in their silence, perhaps they hope the issue will stay off most voters' radars. Do not let them do it. Jon Katz. ADDENDUM: Thanks to a fellow listserv member for posting the above-displayed video.

Posted by Jon Katz in First Amendment at 08:00

Monday, August 25, 2008

When the prosecution indicts, and then indicts again.

Â Bill of Rights.Â (From the public domain.)Â Â What should a criminal defense lawyer do when his or her client is caught with a bunch of drugs, unlawful weapons, and other contraband, but the prosecutor only files criminal charges on the drugs? On the one hand, resolving the drug case might make the other potential charges go away by keeping attention away from the other possible charges. On the other hand, the defendant might become the victim of successive indictments. A crystal ball would come in handy here. Â Â prosecutor is not automatically required by the Fifth Amendment's double jeopardy clause to indict all at once for crimes discovered on the same date against the same defendant arising from the same operative facts. Maryland's highest court made this clear today in reversing a trial judge's dismissal of a felony prosecution where the defendant had already been convicted on a drug charge relating to the same search that turned up the weapons that were later prosecuted in court and which became the subject of the trial court's reversal. Colonel Preston Long v. Maryland, __ Md. __ (Aug. 25, 2008). Â This situation underlines the importance for criminal defense lawyers to decide whether to include or exclude uncharged criminal conduct in plea negotiations. On the one hand the uncharged conduct may go out of sight and out of mind if not mentioned. On the other hand, because the uncharged criminal conduct may not go away, the client needs to be involved in the decision whether to stay silent on the uncharged conduct in any guilty plea negotiations. Why, though, would a prosecutorÂ remain silentÂ about uncharged criminal conduct during guilty plea negotiations, as opposed to dangling them in front of the defense lawyer in an effort to try to persuade the defendant to enter a guilty plea? Â Jon KatzÂ Â ADDENDUM: Guilty plea negotiations are part of the harsh reality of criminal defense. One side of me dislikes guilty pleas very much. However, a criminal defense lawyer is obligated to do as much good and as little harm for a client as possible, always coming from a position of strength. For instance, if I can get a misdemeanor disorderly conductÂ guilty plea agreement from a client caught redhanded setting a building on fire, that might just be a big defense victory.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, August 24, 2008

From protecting drug addicts to sealing criminal records.

Â Â Image from Library of Congress's website.Â Here are some useful links that are destinedÂ forÂ addition to my links page. Â Â - British Columbia's Supreme Court gives protections against drug laws to drug-addicted people. PHS Community Services Society v. Attorney General of Canada,Â 2008 BCSC 661 (decided May 2008). Â - An excellent sample Freedom of Information Act request letter, from the American Civil Liberties Union. Â -Â The District of Columbia's Criminal Record Sealing Act of 2006. The D.C. Public Defender Service has a free information packet with sample motions for those wishing to file pro se, by calling or visiting PDS.Â For sealing in jurisdictions bordering D.C.,Â Maryland's expungement application processÂ isÂ the simplest, generally requiring the completion of two triplicate one page forms. Virginia's sealing procedure requires filing an entirely new lawsuit for such relief. An attorney should be consulted before applying to seal or expunge criminal records, particularly by peopleÂ who are not United States citizens and who need to have their criminal records reviewed periodically for such matters as security clearances. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Friday, August 22, 2008

Why travel a thousand miles to learn to be more real?

Â In the middle of the then-four week Trial Lawyers College in its second year, I asked myself: "I have come all the way to a ranch in Wyoming miles from the nearest paved road to learn that the essence to being a great trial lawyer is being my same real self in all situations, loving myself and others, not giving up my power to others, and crawling under the hide of those I am trying to persuade, represent, and battle? Could I not have just had that written in pamphlet or book form for me to read?" My doubts continued: "Why are we cross-examining nursery rhyme characters? If I am taking a month of my life here, can we not at least have good pre-printed fact patterns to work from?" By comparison, I immediately was taken the previous summer by the two-week National Criminal Defense College in Georgia. The program was already years in the making and polishing, and it was an accomplishment even to be admitted among the high number of applicants. All fact patterns were well-done and assembled well in advance. Each day we would handle another phase of trial preparation and execution (including client interviews, jury selection, opening, direct exam, cross exam, jury instructions, and closing). At the end of the afternoon, one of the instructing lawyers often would dazzle us in doing a demonstration of what we had just practiced earlier in the day, with the most amazing performances having been demonstrated by SunWolf incorporating a discussion of reasonable doubt into voir dire, talking to the jury as if she were in the box right with them; Lisa Wayne, doing a first-person closing of a winning battered spouse murder case; and Joe Johnson cross examining an expert witness after reeling him into Joe's realm and having him in the palm of his hand to the point of having the expert ready to return a hearty handshake after Joe had substantially diminished his direct testimony. Near the top of those performances was John Delgado, who direct-examined his murder client leading him as smoothly as if he were cross-examining, while pointing his finger at the villains who pressured a false confession, and motioning to the angels with his hand palm-down. There also was cross-examination master Larry Pozner, who at once controls witnesses by adding one new fact at a time to each question if needed, but is still able to do so in a conversational story-telling way that makes witnesses prefer to cooperate with him rather than having him turn one simple question into ten, until the witness succumbs. Ed Mallett demonstrated by example how a true gentleman can effectively enter an objection while doing it politely (to overcome any perceived rudeness of having interrupted the opponent). CrÃme de la crÃme came from Andrea Lyon, who did the opening for the battered spouse defense, making it feel like I was in the very house at the very moment when the defendant's husband would abuse his wife for the very last time. Still on the high of the well-organized National Criminal Defense College, I continued trying to make sense of the Trial Lawyers College, which still was in its infancy. As I eventually came to realize, though, both programs have been essential for me. The NCDC focuses on skills, telling a persuasive and coherent story throughout the trial, and being completely committed to and courageous for our clients. The Trial Lawyers College assumes that participants already have the basic skills to try a case, recognizes that each person is only as good a trial lawyer as s/he is a person, and works on simultaneously developing each participant into a better person and trial lawyer. One participant who ended up taking very much to the Trial Lawyers College described it early on as the Mind F_ck, because few people are accustomed to being thrown into a group of four dozen strangers in the beautiful middle of nowhere being rewarded for baring our souls and warts, and being chastised for hiding and candy-coating them. Early on, participants were revealing painful pasts, and pasts and presents of being sexually molested repeatedly by a relative; struggling with low self confidence; coming from dysfunctional families and alcoholism; and the list goes on. It took some time for me to figure out why people would be willing to bare their souls so willingly. One soul-barer told me: "I was so f_cked up at the time, that I would have told my story to anybody." Another told me that his life was changed by doing a psychodrama session on day two in front of the rest of the group. And there I was, waiting a very long time to reveal my warts and being careful whom I revealed them to. I did not much like the possibility of being miserable among a bunch of strangers thinking down on me if I revealed my true self. The opposite took hold, though. I recognized that my problems were pretty small compared to many others, that others would share their feces and pearls of experience with me if I shared mine with them, and that I had found a group of people with whom I could bond and enjoy eliminating the veneers and the cocktail party talk. The more we opened up to each other, the more we bonded, to the point that I can call just about any Trial Lawyers College attendee from any year and get right to a real conversation that skips the cocktail party small talk. When I returned from the Wyoming ranch, I all the more sought out kindred spirits who were not afraid of revealing their true selves versus their Madison Avenue public relations self, who were not afraid to take risks in life and to be true to themselves and their values, and who were not afraid to be real. Did I really need to travel a thousand miles away to learn all this? Yes. The lessons learned there are easy to understand but take long, concerted, and often painful effort to internalize, realize and follow. By learning and applying these lessons full-time in the middle of nowhere among supportive people, I "got it" by the end of the four weeks, and still am getting it. What is all this hype about being real? Consider this. Who will you trust more if you are a juror? A lawyer who comes into the courtroom wearing the fanciest suit and tie who is all polished with every spoken word and every choreographed and pre-scripted step, or the lawyer who looks unremarkable but talks to the jury, witnesses and judge the same way s/he

would talk to his or her best friends, without a bunch of notes intervening, and with a heart that cares not only about the lawyer's client, but also about everyone else in the courtroom, and who does not try to hide warts -- aside from needing to keep out damaging testimony through evidentiary and procedural rules -- but instead acknowledges them and persuasively puts them into perspective with the rest of the lawyer's case?Â Jon Katz

Posted by Jon Katz in Persuasion at 00:10

Thursday, August 21, 2008

Putting the brakes on disorderly conduct prosecutions.

Â Bill of Rights.Â (From the public domain.)Â Â Too often, police arrest for disorderly conduct when they cannot think of any other crimes to charge. That is beyond unjust. Â Fortunately, the Oregon Supreme Court recently put some strong limits on disorderly conduct prosecutions where a suspect allegedly tailgated another car, and called out some choice words to passersby, all over around a five-minute period. Oregon v. William Johnson, ___ P.3d _ (Oregon August 14, 2008). Oregon's Supreme Court relied on Oregon's version of the First Amendment in reaching its decision, so it is not clear aboutÂ the extent to whichÂ a similar victory canÂ beÂ achievedÂ in other states.Â Â Jon KatzÂ ADDENDUM:Â Thanks to the person who sent me this Oregon v. William JohnsonÂ case.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, August 20, 2008

Red lights, dogs and the Fourth Circuit.

Â Bill of Rights.Â (From the public domain.)Â Â Police love when suspects driveÂ cars. The driver is bound to violate one traffic law or another, thus justifying aÂ policeÂ stop of the car, and an attempt to reveal criminal activity afoot.Â Police also love to bring "drug" dogs to attempt a justification to search the vehicle. However, a drug dog sniff is only allowed during the time reasonably needed to issue a moving violation citation. If no dogs are available in such a short time, the cops need to manufacture, I mean try to find, reasonable suspicion to prolong the car stop to get a drug sniffing dog's presence.Â What, however, justifies the cops to hold onto a red-light running violation suspect for thirty minutes?Â Read this Fourth Circuit opinion that allowed such a lengthy detention based on claimed reasonable articulable suspicion that the court said allowed the police to detain the defendant longer than needed toÂ write a moving violation ticketÂ (running a red light).Â U.S. v. Branch, __ F.3d. __ (Fourth Cir., August 20, 2008).Â Fortunately, the dissent in Â U.S. v. Branch is strongly-worded enough in order to help make headway in getting an en banc review of this case. Meanwhile, if in Virginia, caveat emptor, to say the least. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, August 19, 2008

Dissidents suffer as Beijing Olympics dazzle.

Image from NASA's website. And now we interrupt the Beijing Olympics with this important public service human rights message: Life is not all fun and games for Chinese dissidents during the Olympics. For instance, within the last few days, blogger Zhou Zola Shuguang has been placed under town arrest. As Reporters Without Borders reported on August 15, 2008: "Zola alerted his contacts via the microblogging service Twitter: '16:02 (Beijing time): They have forced me to get into their car. I want my family to be able to confirm what has happened today (...) I am all right, I am in their car and I have the impression that I am being kidnapped.' '17:31 (Beijing time): They have asked me to stay in Meitanba. If I go to Beijing, they will come and get me.' Aged 27, Zola keeps a blog in which he often writes about matters that have been hushed up by the authorities." More on this story also is at the Committee to Protect Bloggers' site. Zhou Shuguang is having a cakewalk with the Chinese authorities, when compared to Beijing human rights activist and blogger Zeng Jinyan and her baby daughter, who, according to ABC online "have been missing since August 7th. Zeng has been under house arrest for months." More on this story is at the Committee to Protect Bloggers' site and in the Associated Press online. That concludes this public service message. Will you now return to the Olympics as if all in China were the Disneyland that the Chinese government so desperately wishes to portray? Jon Katz

Posted by Jon Katz in Persuasion at 00:10

Plame and Wilson lose on appeal against Libby and company.

Bill of Rights (From the public domain.) For awhile, the Valerie Plame/Joe Wilson/Scooter Libby story went on the backburner. Then, in late July 2008, Robert Novak -- whose column blowing Plame's CIA cover led to the prosecution and conviction of Libby -- hit a pedestrian and kept driving, followed by an announcement shortly thereafter of his malignant brain cancer and retirement. A Not long thereafter, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit voted 2-1 (Judges Sentelle and Henderson affirming and Judge Rodgers concurring in part and dissenting in part) to uphold the dismissal of Plame's and Wilson's lawsuit against Libby and company over damages allegedly caused by the revelation of Plame's covert CIA status. *Wilson, et al., v. Libby, et al., ___ F.3d _ (D.C. Cir., Aug. 12, 2008)*. Plame and Wilson's suit seeks damages for Constitutional violations under *Webster Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)*, which is a case governing private party lawsuits against federal officials for Constitutional violations. In affirming the dismissal of Plame's and Wilson's lawsuit, the Court of Appeals stated: "We have discretion in some circumstances to create a remedy against federal officials for constitutional violations, but we must decline to exercise that discretion where 'special factors counsel[] hesitation' in doing so. See *Bivens, 403 U.S. at 396*; *Spagnola v. Mathis, 859 F.2d 223, 226 (D.C. Cir. 1988)* (en banc). In *Bivens*, the Court implied a remedy where there were no "special factors counselling hesitation in the absence of affirmative action by Congress" that required 'the judiciary [to] decline to exercise its discretion in favor of creating damages remedies against federal officials." *Spagnola, 859 F.2d at 226* (quoting *Bivens, 403 U.S. at 396*)." Here, the Court of Appeals found that the Privacy Act provided a remedial scheme for Plame and Wilson that precluded a *Bivens* action. The D.C. Circuit further declared: "Litigation of the Wilsons' allegations would inevitably require an inquiry into 'classified information that may undermine ongoing covert operations.' See *Tenet, 544 U.S. at 11*. The amended complaint alleges that the disclosure of Valerie Plame Wilson's identity 'impaired . . . her ability to carry out her duties at the CIA,' *Am. Compl. ¶ 43*, increased the risk of violence to her and her family, *id. at ¶ 42*, and subjected her to treatment different from that given other similarly situated agents, *id. at ¶ 51-52*. We certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents. In cases involving covert espionage agreements, '[t]he state secrets privilege and the more frequent use of in camera judicial proceedings simply cannot provide the absolute protection [the Court] found necessary in enunciating the Totten rule.' *Tenet, 544 U.S. at 11*. Here, although *Totten* does not bar the suit, the concerns justifying the *Totten* doctrine provide further support for our decision that a *Bivens* cause of action is not warranted." Responding to the majority, Judge Rogers wrapped it up as follows: "In conclusion, the court's decision is not the product of the application of the *Bivens* doctrine to appellants' claims as *Wilkie* directs, 127 S. Ct. at 2598. It is rather the result of the refusal to acknowledge precedent that *Bivens* is a remedial doctrine and absent special factors applies where Congress created statutory protection for some persons in some circumstances but did not address the type of constitutional claims alleged by Mr. Wilson and in part by Ms. Wilson. The disclosure concerns identified by the court as counselling hesitation are either unfounded or premature because there has been no discovery or presentation by the Wilsons to the district court of how they will attempt to prove their claims. Contrary to separation of powers, then, the court effectively cedes to Congress the judiciary's defined role to decide issues arising under the Constitution,

despite the fact that the Privacy Act neither is nor purports to be a universal bar to all constitutional relief related to the release of agency records. Accordingly, I concur in Parts II and III.B of the court's opinion, and in the judgment regarding Ms. Wilson's equal protection and due process property claims, but I respectfully dissent from the affirmance of the dismissal of Mr. Wilson's First and Fifth Amendment claims against each appellee and Ms. Wilson's due process state-endangerment claims (except against appellee Armitage), and would leave to the district court to address in the first instance appellees' defenses of immunity, see, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Davis*, 442 U.S. at 249; *Butera*, 235 F.3d at 646." Judge Rogers' partial dissent/partial concurrence provides very strong arguments to increase the chances of en banc review by the entire District of Columbia Circuit over the very critical issue of when to permit and not permit a Bivens action to proceed forward. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Monday, August 18, 2008

The plight of pro se defendants.

Â Bill of Rights.Â (From the public domain.)Â Â One day I asked a prosecutor if she feels any discomfort going against unrepresented criminal defendants, most of whom are not poor enough to qualify for court-appointed counsel but for whom the financial struggle is too great or impossible to hire a lawyer, and some of whom are dilatory in obtaining a court-appointed or private lawyer. Â She said she feels no discomfort, because she offers all defendants the same guilty plea offers, whether or not represented by a lawyer. Assuming the truth ofÂ her assertion, for argument's sake, what happens after she conveysÂ the initialÂ guilty plea offer? A capable criminal defense lawyer will advise the client whether to reject the plea offer, accept it, or return with a counteroffer, and how to time and express any reply.Â How will the pro se defendant respond? If the case goes to trial, will the pro se defendant represent himself or herself anywhere near as capably as an experienced trial lawyer? Also, the pro se defendant effectively loses the right to remain silent throughout trial. Â How do prosecutors respond to a counteroffer from a skilled trial lawyer versus from a pro se defendant (and, for that matter, versus a lawyer who is green or about whom the prosecutor knows nothing)? Negotiations are about hedgebetting. Prosecutors have fewerÂ bets to hedgeÂ with unrepresented defendants, whom, by definition, are on weaker ground than if they had a qualified lawyer. Â A case in point came recently whenÂ I walked into misdemeanor court, and the prosecutor cheerfully offered for my client to plead guilty to a lesser but still jailable and collateral-risk laden offense. I asked which witnesses were present, and none were. During the break, the prosecutor said the arresting officer in the case was on his way, and urged that his guilty plea offer was the way to go. Probably having had much more time to know my one case versus the prosecutor's two dozen cases, I told the prosecutor that even if the cop arrived, he still had a weak case because of A, B and C, and I said I would not recommend that my client plead guilty to any jailable offenses. The prosecutor ended up dismissing my case later in the day.Â How would a pro se defendant have handled the foregoing scenario, and how would the prosecutor have responded? WouldÂ theÂ pro se defendant have known whether this was a courthouse and case where ordinarily the defendant can get away with waiting for prosecution witnesses to show up before deciding whether to accept a guilty plea offer?Â Would the prosecutor have told the pro se defendant that the plea offer would be off the table upon the cop's arrival? Would the prosecutor have emphasized the jail risks faced by the pro se defendant byÂ going to trial when the plea offer involved no executed jail request from the prosecutor? Would the prosecutor have argued that the pro se defendant was entering dangerous, uncharted territory to take a case to trial without a lawyer? Â How do we ameliorate the plight of pro se defendants? One way is to assure that quality court-appointed/ public defender counsel is made available to indigent defendants, and that truly needy defendants are not barred by guidelines or unfair or uneven application thereof that misses them. What do about defendants who are not poor enough to obtain indigent defense counsel but will struggle mightily to pay for a lawyer -- after paying for rent, transportation, children's needs, groceries, and other essentials -- or will not be able to obtain the funds at all? As to the former category of criminal defendant, at least in the past, the Maryland criminal defense bar used to have members who agreed to be part of a "gray panel" that offered reduced rates to such people; such a practice needs to continue. Have indigent defense lawyer application guidelines kept up with today's economic realities of expensive rates for qualified criminal defense lawyers and high prices for gas, food, and other essentials? Should publicÂ funds be made available to provide partial subsidies to people who are borderline eligible to obtain indigent defense counsel but do not qualify? Awhile ago, I wrote this piece about the struggles that most ordinary-income people face in paying for quality legal representation. Â Of course, probably we always will also see a handful of pro se criminal defendants who would not obtain counsel even if they qualified for indigent defense counsel. All criminal defendants have the right to choose their own counsel, including to proceed with self-representation. Caveat emptor. Jon Katz.

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

Sunday, August 17, 2008

Praised be the freedom of public photography.

Â Bill of Rights.Â (From the public domain.)Â Â Congratulations to Philip-Lorca diCorcia for having obtained the dismissal last March of a lawsuit seeking damages for his having photographed the plaintiff when both were on Manhattan sidewalks. This New York Times article gives a detailed rundown.Â Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Friday, August 15, 2008

How can a proper Terry patdown find crack cocaine?

Â Bill of Rights.Â (From the public domain.)Â Â Recently during a suppression hearing in a drug case, the police officer testified that controlled dangerous substances fell to the ground from my client's pantsÂ as the cop conducted a patdown for weapons, on the cop's claimed belief that this was a valid Terry stop. Â During cross examination at the suppression hearing, I asked the cop to show how my client was frisked, by putting me into the role of the client, which gave the judge a good bellylaugh as he proclaimed that I would be responsible for anyÂ contraband found duringÂ the cop's patdown of me in court. This so-called patdown demonstration revealed the very manipulation that is prohibited with TerryÂ patdowns. The judge later indicated he tended to agree with me that the cop had demonstrated an unlawful TerryÂ patdown, but the judge had concluded that the officer had probable cause to search based on the alleged odor of unburnt marijuana (I join the argument here that unburnt marijuana ordinarily is too hard to distinguish from lawful substances). Probable cause does in fact permit squeezing and sliding of suspected contraband, but a Terry stop does not allow that. Â About the limits of a TerryÂ frisk, in *Minnesota v. Dickerson*, 508 U.S. 366, 378Â (1993), the Supreme CourtÂ upheld the suppression of the drugs seized from Mr. Dickerson's pocket, the Supreme CourtÂ explained: "Where, as here, 'an officer who is executing a valid search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' *Texas v. Brown*, 460 U.S. at 748 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained noÂ weapon was unrelated to 'the sole justification of the search [under Terry:] . . . the protection of the police officer and others nearby.' 392 U.S. at 29. It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize,Â Â see *id.* at 26, and that we have condemned in subsequent cases. See *Michigan v. Long*, 463 U.S. at 1049, n.14; *Sibron*, 392 U.S. at 65-66."Â Â *Dickerson*, 508 U.S. at 378.Â How, then,Â can a proper TerryÂ frisk -- which is not permitted toÂ involve manipulation, sliding or squeezing -- determine the presence of crack cocaine in one's pocket? If the crack rock is the typical small one-dose size, it sounds particularly farfetched. Nevertheless, in one Virginia criminal case,Â a police officer claimed to have felt apparent crack cocaine in Mr. Dickerson's pocket during a TerryÂ patdown. The trial judge refused to suppress, and so did Virginia's intermediate appellate court, the Court of Appeals. See *Bandy v. Virginia*, _ Va. App. _ (August 12, 2008). Something sounds seriously wrong here, and I hope the defense seeks appellate relief.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Thursday, August 14, 2008

Virginia inmate released on new non-biological evidence.

Â Bill of Rights.Â (From the public domain.)Â Â A prison inmate's case does not become quiet merely because of a conviction and a lost appeal.Â Many inmates next seek post conviction relief, whether the term of art for such relief applications is habeas corpus, coram nobis, or any other phrase. Many inmates file their own post conviction petitions, sometimes drafted by other inmates, sometimes handwritten, and sometimes assembled with typewriters where computers are unavailable. Many inmates send letters to judges seeking relief. Some write for assistance to me and other lawyers they do not know, but few contact me back after I quote an hourly retainer fee for an initial visit to discuss their case, when it appears to be a matter I might be willing to defend. Â A knee-jerk reaction of many judges and legislators focused on keeping down the cost of running the judicial branch -- rather than in dispensing true justice -- might be to clamp down on the avenues of post conviction relief. In fact, such clampdowns already exist in such terms as severely short federal deadlines for filing habeas corpus petitions, with numerous states imposing their own deadlines, as well. Â Many inmates at the post conviction stage feel very desperate, seeing this stage as a final hope for freedom, after having lost at the trial court stage, and the appellate stage if an appeal has been filed (people who plead guilty often do not seek or obtain appellate relief). A criminal defense lawyer handling such a case should be ready for some of theirÂ clientsÂ to grasp at straws and anything else to try to pull themselves up from the often excruciating toll of prison on their freedom, dignity, and loss of time andÂ lifeÂ outside prison walls. Sometimes I wonder how many inmates file post conviction petitions partly as an effort to see the outside world for a few hours during the ride to and back from the courthouse hearing the case; it is a legitimate desire. Â I have defended many post conviction cases over the years, most of them in Maryland, and some in the District of Columbia, where post conviction matters ordinarily must be raised and resolved before the completion of the appellate stage. Fortunately, I have won many post conviction cases, but have lost more than I have won. Often the victories have come from insufficient advice of rights to the defendant at guilty plea hearings. In numerous other victories, the defense lawyer did not object to materially erroneous jury instructions. Some post conviction victories come in the form of getting an illegal sentence corrected, including where a court misapplies mandatory minimum sentencing calculations.Â In one instance, a victory came from my presenting a witness whom the trial lawyer did not contact nor present, whose testimony could have avoided my client's murder conviction through showing a self defense shooting against an armed decedent.Â A post conviction victory does not automatically mean release from prison, where a retrial is the applicable relief.Â Nevertheless, prison release is theÂ relief obtained by Darrell Copeland, under Virginia's somewhat new law that providesÂ inmates the opportunity toÂ present newly-discovered non-biological evidence of innocence, following on the heels of older laws that permit the presentation of DNA evidence to seek reversal of convictions. Â Darrell Copeland was convicted in Virginia for a 2006 handgun possession offense, for which he received a five-year prison sentence. Later analysis of the alleged handgun revealed it to beÂ a replica pistol that could not be operated as a firearm. Mr. Copeland is the first inmate to be released from prison under this law permitting the issuance of a Writ of Actual Innocence involving non-biological evidence. As reported by the Washington Post, "Virginia had long barred the introduction of new evidence more than three weeks after sentencing." Â Although Maryland is no liberal cakewalk for criminal defendants, Virginia is even less so. In that context, it appears noteworthy that Virginia's attorney general supported the result. His spokesperson mentioned that when serving in Virginia's legislature, Attorney General Bob McDonnell supported the legislation that led to Mr. Copeland's release. Â The law under which Mr. Copeland is being released reads as follows: Â "Â§ 19.2-327.10.Â Issuance of writ of actual innocence based on nonbiological evidence.Â Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. Only one such writ based upon such conviction may be filed by a petitioner. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with Â§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter." Â Unfortunately for Mr. Copeland, his release will not be to fresh air, but instead will be to serve a pending federal sentence. Â Congratulations and thanks to public defender lawyer Kathleen A. Ortiz for fighting for and obtaining this victory, andÂ in such a relatively quick timeframe at that.Â Jon Katz

Posted by Jon Katz at 00:00

Wednesday, August 13, 2008

There are no secrets?

Â Yin YangÂ On a rainy September morning a dozen years ago, with a few days left between leaving my public defender post to return to private practice, I pondered which way to drive for a mini-vacation. "Where do I want to visit that I have not yet visited?", I asked. Then, IÂ rememberedÂ Jun Yasuda's telling me five yearsÂ before about being in the process of building a peace pagoda, and that her teacher said it is a mereÂ structure if she asks for help. Jun-san has the magnetism for people to offer to drive her hundreds of miles, but somehow I was still made of copper when told of the monumental volunteer pagoda build. Â Through divine coincidences, I tracked down Jun-san's phone number through the local temple of her Buddhist order, which I discovered in my midst for the first time that morning. Through another divine coincidence, she answered the phone, even though Jun-san spends months total each year in other states and countries spreading the message of peace. Early in our conversation, she told me it was Gandhi's birthday, and invited me to stay at the temple, where I ended up sleeping for two nights on a loft overlooking the altar, with my loftmates beingÂ wasps slowly tracing the window frame in the cold weather. Â My full day there in upstate Grafton, New York,Â was occupied by waking at 5:00 a.m. for morning prayers chanting the Odaimoku andÂ voicing excerpts from theÂ Lotus Sutra, eating toast done atop the wood-burning stove, buying material to insulate theÂ cabin-typeÂ temple for the winter, stacking wood, eating miso and rice for lunch, napping off a late night arrival, stapling insulation to the temple, taking an amazing wood-burning traditional Japanese bath after getting there in the frigid night, praying before dinner, eating more miso and rice for dinner, and going to bed early to startÂ the next 5:00 a.m. with prayers. Â Â The next morning during breakfast, I was surprised to find myself eating alone with Jun-san, when the day before she had so many visitors, bringing breakfast items, helping build the new temple, and joining for evening prayers and dinner. It was as if Jun-san had asked them to give time for me to learn some lessons, but I doubt such deliberateness had taken hold. Â Ever since I first met Jun-san during her one-month fast for peace across from the White House during Gulf War I, I was drawn to her peaceful essence, when I felt so much imbalance over world turmoil, rampant domestic and global human rights violations, and frustration with not feeling I was giving much of a net benefit to society while helping financial institutions and transportation companies line their pockets through litigation and federal regulatory work. Â Now I had my chance to learn how she had reached such calm whileÂ focused daily on reducing people's suffering, through prayer, through peace walks, and throughÂ spreading her infectious peacefulness. I asked many questions, perhaps too many. I recognized front and center what I had already realized peripherally,Â that much of people's dissatisfaction with life comes from their desires, and that many of those desires, particularly expectations of others, can be shed. I recognized all the more how much my problems pale in comparison to those who struggle daily to provide their families enough nutrition, and to have them clothed and housed. Â I learned about melting away so many of the layers of my then utter terror of my inevitable death. On the one hand, I could not automatically internalize Jun-san's view that life and death are artificial boundaries. Certainly life continues when others die, so in that respect it may be an artificial boundary. On the other hand, I recognized all the more how my fear of death was so closely connected with my being self-centered, my over-attachment to my body, and my lack of enough internal peace and balance. Â Two hours later, it was time to depart. Jun-san bowed three times as I drove away, and her peaceful karma spread to me all the more.Â Around one or two weekends later, I visited the local temple that is part of Jun-san's Nipponzan Myohoji order, bringing oranges for the altar. Brother Shiomi-san opened the door, and ultimately invited me inside, apparently while trying to figure out what made me tick. We prayed the Odaimoku for a few minutes. When I told him I had visited Jun-san and was wondering if I could visit sometimes for prayers, he permitted me one weekly weekend visit. Â He then said he would be unable to teach me about Buddhism. When I last saw Jun-san this past June, she told me how her order is one of action, praying for peace, walking hundreds of miles spreading that message, and not spending years to get ordained. In fact, Jun-san was ordained when she had not even applied for that path.Â Her teacherÂ "threw her a yellow robe, saying, 'Jun, hurry up.'" Â I offered Shiomi-sanÂ to help cut the grass from time to time. During a gathering two years later to celebrate Shiomi-san's transition back to Japan, he looked at me and laughed, saying something in Japanese. Someone translated, saying he tried making sense of a lawyer offering to cut the grass. For me, it was the least I could have done to show my gratitude to Jun-san, and I do not see any honest work as beneath me. Â What is the secret to winning trials, and what does any of this have to do with offering a septuagenarian priest to cut his temple's grass? Are there any secrets beyond finding, tapping into, and applying the vast reserves of strength and ability within each of us, supplemented by welcoming the teachings from everyone and everything around us? Are they really secrets, or is it more a matter of knowing the roadmap to winning, and finding a way to apply the roadmap and to improve upon it? Is it any different than my t'ai chi teacher Len Kennedy's view that the principles of t'ai chi are simple to learn but profound to apply. Is it any different from knowing how to slim down and actually doing it? Â Wolfe Lowenthal's biography of t'ai chi legend Cheng Man Ch'ing is entitled *There are No Secrets*. Pete Gately aptly describes this concept: "Lowenthal tells how Professor Cheng maintained that there were no secrets in Tai Chi Chuan, but would then add, 'But if there were a secret it is [that the hands do not move when doing push hands].' Thus secrets are not really

secret, but are readily available information, open things, but things that tend to pass unnoticed. Take the above example of the hands not moving. It seems, on the surface, to be an absurd statement; we all know that the hands move in Tai Chi. They move as we do, roll-back, push, press, single-whip. We may think the hands move in every move we make. Well, maybe - but we shouldn't make them move at all. All movement in Tai Chi should begin with the waist turning, all movement should start at the Dan-Tien. Nothing moves without being initiated by the movement of the waist; then, if the waist turns, the hands turn. The legs do not step unless the movement is initiated by the waist, so all movement comes from the Dan-Tien." "Secrets" by Bill Gately (emphasis added). In the same vein, there probably are not any secrets to winning trials, but there are skill sets to learn, revelations to find, new levels of caring to attain for clients, more fearlessness to gain, more internal and external journeys to take, more joy to experience on the path, more ego to shed, more willingness to collaborate with other lawyers and non-lawyers in seeking the path to victory, and more of the tapping of the joy, fearlessness, and giggling of the child within. My trio on this path is the overlapping lessons and practices from the Trial Lawyers College, t'ai chi, and the peace and harmony experienced even when walking into the eye of the storm as exemplified by Jun Yasuda. I am also helped along the path when imagining at various difficult times in court that I am accompanied by different combinations of SunWolf, Steve Rench, Jun Yasuda and Cheng Man Ch'ing. My path also is helped through my daily writing, when I often expect to go in one direction, and then often take a very different path and often reach a different destination, including with this blog entry, when I initially was going to comment more briefly than this in reply to Bobby Frederick's invitation to discuss the secrets to winning trials against all odds. Much self-revelation and self-discovery come my way through the writing process. One thing is for sure. Do not waste time listening to how important to winning are the colors of your clothes, the model of your car, or the cut of your hairstyle. Tony Serra exemplifies that it's not how you dress, but how you persuade. Jon Katz

ADDENDUM I: Gerry Spence's recent blogging on winning trials sparked an interest in some other bloggers to cover the topic, including Gideon, Mark Bennett, and Scott Greenfield. ADDENDUM II: Here is the full relevant excerpt from Wolfe Lowenthal's above-referenced discussion in Gateway to the Miraculous of Cheng Man Ching's assertion that t'ai chi involves no secrets: "There are no secrets in the Tai Chi Chuan that I am teaching you," said Professor Cheng, "but if there were a secret, it is that the mind moves the hands." Sometimes he would say, "There are no secrets in this Tai Chi Chuan, but if there was a secret, it is that the hands don't move." This was yet another one of those times when I initially thought he was contradicting himself, only to realize later that in both cases he was saying the same thing: "The hands don't move" and "The mind moves the hands" are the same and the secret of our Tai Chi Chuan. "The hands don't move." It is rather the mind, or more precisely the idea that directs the waist to produce the movement. The energy only emerges from the hands, which move from the waist like spokes on the hub of a wheel. "The waist is the commander," it says in the Tai Chi classics, and the hands should submit totally to the command of the waist - never moving independently."

Posted by Jon Katz in Criminal Defense at 00:15

Tuesday, August 12. 2008

Olympics at the price of human rights.

Image from NASA's website. The Olympics always is political, ranging from nations wanting to shine a light on their Madison Avenue public relations face to nations wanting to whitewash unspeakable brutality. The brutal and virulently racist nazi regime had its day in the sun with the 1936 Berlin Olympics, which at least was offset by the victorious track performance of Jesse Owens, an African American competitor who returned, ironically, to a deeply racist and segregationist United States, which during World War II -- during the fight against the racist nazi regime -- would continue with a racially segregated military. Now with its day in the Olympics sun is China, whose government is extremely brutal, but not on the same level as Germany during the nazis, and apparently without the racism. I have written several times about China's deliberate and rampant human rights violations and its efforts to carefully choreograph a Disney-ized Olympics. The real human rights face of China is not only gross human rights-violative business as usual, but also increased harassment of dissidents in order to try to present a Chinese Neverland, censorship of foreign journalists covering the Olympics, and the deep complicity of Google, Yahoo, and Microsoft in censoring the Internet in China and helping rat out dissidents to Chinese authorities, who then have their human-rights-violative ways with the dissidents. . Have you been watching the Olympics? If so, how has your enjoyment of the Olympics been affected, or not, by the brutal reality of its government's ongoing and severe human rights violations? Jon Katz

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

Monday, August 11, 2008

How to get relief for an overly aggressive police home search?

Â Bill of Rights.Â (From the public domain.)Â Â How does one obtain real relief against an overly aggressive police search? Â On August 7, I blogged about such an extremely overaggressive police search in Berwyn, Maryland. However, attorney David Rocah of the American Civil Liberties Union says: "the damages are too low to make it worthwhile to spend the time in court" on a lawsuit against the police for such an overly aggressive search. Â The same article from the Washington ExaminerÂ (apparently related to the San Francisco Examiner) quotes me about the frequency of guilty pleas versus innocent pleas leading to fewer court challenges against such searches. I intended to be speaking in terms of the higher percentage of guilty pleas over not-guilty pleas where the defendant is left to choose between one and the other, and not in terms of cases that get dismissed and consensually inactivated. In any event, fortunately this story continues to spread among members of the public. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, August 10, 2008

Isaac Hayes departs the planet.

Â Isaac Hayes conducting "Theme from Shaft."Â Isaac Hayes's voice was commanding and well-suited to the theme from Shaft. I remember when the film's soundtrack was released in 1971, but only remember the title theme. Two decades later I saw the film itself, which hardly measured up to Hayes's theme song. Â On August 10, Isaac Hayes departed the planet. As much as I prefer to pay tribute to people before they leave the planet, I am behind on doing so. Thanks, Isaac Hayes, for you. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:15

View "Busted" today.

Â Â For over two years, I have prominently featured the Busted video on every page of Underdog, while promoting donations to the film's non-profitÂ producer,Â FlexYourRights.org. Â Busted features prominently in my Know Your Rights admonition to everyone. Recently, I even found myself parroting one of Busted's key and very precious mantra's when briefly and unconstitutionally detained for being a suspected airport t'ai chi terrorist: "Officer, am I free to leave?"Â Â Flex Your Rights has paid me the compliment of inviting and adding me to its advisory board. It remains a true honor to continue to collaborate with Flex Your Rights' Scott Morgan and Steve Silverman, with whom I have had the pleasure of appearing before audiences replacing fiction with fact about dealing with the police. Â If you have not yet viewed Busted, I urge you to view it today. You can see it free on YouTube and can order a DVD to pass out. If you have already viewed Busted, clearly you know how groundbreaking and critical is this video; please share the Busted YouTube link with your friends -- and enemies -- today. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, August 8, 2008

Hamdan's lawyers, judge and jury as models for their counterparts.

Â Bill of Rights.Â (From the public domain.)Â Â Salim Ahmed Hamdan has had an eventful ride through various tribunals. He won a criticalÂ Supreme Court challenge of the military commission system in 2006. He went to trial recently at the United States' military base in Guantanamo, Cuba, on terrorism charges.Â An all-military member jury acquitted him of terrorism conspiracy, and convicted him of the less serious charge of material support for terrorism.Â Although Mr. Hamdan could still have been sentenced to up to life in prison, the jury decided on a sentence of five and one-half years incarceration, which has already been heavily eaten up by the sixty-one months credit for the time he has been detained to date. Â Not only is the sentence stunning, but so is the New York Times report of the very amiable connection forged between Mr. Hamdan and his military trial judge: "During pretrial proceedings, Mr. Hamdan, a father of two daughters in Yemen, and the judge, a career Navy lawyer, had regularly exchanged smiles and, on occasion, chats. Before he left the bench, Judge Allred said a few parting words to the man he had gotten to know in a most unusual way. 'Mr. Hamdan,' Judge Allred said, 'I hope the day comes that you are able to return to your wife and daughters and your country.' 'Inshallah,' Mr. Hamdan said in Arabic, before an interpreter gave the English translation of 'God willing.' 'Inshallah,' Judge Allred responded."Â Why did the trial judge "hope" Mr. Hamdan would be reunited with his family in Yemen? Aside from any hassles that Yemen's government might give Mr. Hamdan if he returns, there is no telling whether the Bush Administration will try to manufacture a reason to keep Mr. Hamdan detained beyond his 5 1/2 year sentence. Â Did Mr. Hamdan obtain such a relatively positive trial result because of fair written procedures for such trials, or despite such procedures? I expect the answer is the latter. I understand that his trial involved fewer protections than criminal defendants receive in civilian criminal courts in the United States. Aside from the prosecutors' problems trying to turn Mr. Hamdan into much more than a driver and bodyguard for Osama bin Laden, he appears to have had a very talented, dedicated, and caring defense team. which includes lawyers from the corporate law firm of Perkins Coie -- which defended Mr. Hamdan at the government's invitationÂ -- and Hamdan's lawyer Charles D. Swift, who started with Mr. Hamdan when a military lawyer, was booted out of the military after winning for Hamdan in the Supreme Court, and now is an Emory law professor. Â Mr. Hamdan also had a courageous jury and judge. Whether or not the jury was wise to convict at all, tens if not hundreds of millions of worldwide eyes were on this judge and jury, and they seemed to act independently of that, and independently of any fears of being sanctioned by their superiors one way or another, just as was Charles Swift for so successfully defending Mr. Hamdan. Â May Mr. Hamdan's defense team, judge and jury be a beacon and inspiration to their counterparts in all other tribunals to do the right thing in criminal cases, no matter the personal, professional, or financial cost.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, August 7, 2008

Prince George's police shoot dogs first; ask questions later.

Â Bill of Rights.Â (From the public domain.)Â Â On July 29, the lives of Cheye Calvo andÂ Trinity Tomsic were turned upside down and inside out. Their dogs fared worse, having been shot dead after Prince George's County, Maryland police stormed the couple's home without knocking, immediately shooting dead the apparently gentle-breed dogs. Â Prince George's County is where I started my criminal defense career, with the county Public Defender's Office in 1991. It is a fascinating county that swallows up the northeast quadrant of the Capital Beltway. It has many wide-open and farmland spaces to the south, urban-type areas closer to the Washington, D.C., border, a very enjoyable new harborside convention center and entertainment complex across the Potomac from Alexandria, great kayaking and canoeing at Piscataway Creek, homes that are much more affordable than the neighboring Montgomery County where I live, apparently the state's second most active criminal court dockets just after Baltimore's, andÂ a deep andÂ painful history of racismÂ in thisÂ county whichÂ today has a majority ofÂ African-American residents. Â Do police have a tendency toÂ mistreat more heavily those they think are disempowered? Does that help explain why members of the Prince George's County police stormed the home of the mayor of the tiny city of Berwyn Heights (not knowing he was the mayor, and not believing him when he told them as much), stormed the home without knocking even though their warrant was not of the no-knock variety, shot the couple's two dogs dead on the spot, and held the mayor in his underwear for two hours during the search? Â Did this story come to light with such lightning speed and breadth only because a mayor was involved? Sadly -- apart from police entering without knocking on a no-knock warrant -- such actions are repeated daily by police who execute search warrants, often terrorizing the occupants with SWAT-team garb and tactics (right down to cuffing the occupants and pointing guns at them), leaving searched homes looking like tornadoes hit them, with drawers and trash cans removed and dumped out, and sometimes destroying front doors by entering with battering rams. So much for the land of the free and home of the brave; such searches require no more than a judge's signature on a warrant application that usually starts with several hackneyed pages detailing the police applicant's claimed qualifications for seeking a search warrant, and often followed by sleep-inducing minute details about the events leading up to the warrant application. In Maryland,Â judgesÂ are available twenty-four hours a day to sign such warrants. The quicker they sign the warrant, the sooner they can get back to sleep if it is after hours, and back to their other tasks if it is daylight. Do all judges always read and question such warrant applications as thoroughly as they should? Â In this instance, the warrant was issued because of the discovery of a package of over thirty pounds of marijuana destined for the mayor's home, apparently as part of a scam by drug traffickers to choose innocent people's addresses for intercepting such packages in order to remove an investigative trail to the real culprits. As of August 8, even though two suspects were caught, the Prince George's County police still resisted ruling out Mr. Calvo and Ms. Tomsic as suspects. Â Of course, if I had my way of marijuana legalization and heavy drug decriminalization, such wasteful and abusive use of police resources would not have taken place. Instead, members of the Prince George's County police rushed with such fury and force that they did not even bother to alert Berwyn Heights's own small police force of its pending search. On the one hand, no mayor or other government official should get more favorable police treatment than anybody else. On the other hand, dollars to donuts, the Prince George's police heads will now require more careful investigation of the backgrounds of those whose homes they search, and might even require alerting the local police in the county's numerous small and larger cities that have their own police forces. Â If there is a silver lining here, it is that such common police tactics have been brought to the light of day, and that a small city's victim-mayor may become more sensitive to the need for his own police force to be extra careful in protecting not only people's Constitutional rights, but their dignity as well. Jon Katz.Â Â

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, August 6, 2008

Calling the dogs means a detention.

Â Bill of Rights.Â (From the public domain.)Â Â Praised be Virginia's intermediate appellate court for generally finding that a detention takes place once a police officer tells a person that s/he is having a drug dog come to search the suspect's vehicle. Â In *Middlebrooks v. Virginia*, __ Va. App. __ (August 5, 2008), a police officer found Middlebrooks urinating in public, and searched him by consent and found nothing incriminating. Middlebrooks told the police that the nearby vehicle was his "people's car", but the police later learned through a motor vehicle records check that the car belonged to him. Armed with this so-called "lie" about the car's ownership, the frequent drug activity in the park area, and Middlebrooks's eventually hanging out in the car, a police officer returned and asked Middlebrooks for permission to search the car, which Middlebrooks refused. (It is curious that Middlebrooks consented to have his person searched and not his car. Was it because he knew that only his car would turn up contraband (a significant amount of marijuana) and not his person)? Kudos to the cop for at least being honest that Middlebrooks refused a search, at first. Kudos for Middlebrooks's knowing his right to refuse the search.)Â When Middlebrooks refused the car search, the cop told him heÂ would have the car sniffed by a drug dog.Â The cop then asked if he would find any drugs inside, and Middlebrooks admitted to the presence of marijuana in the car and its location. Â Fortunately, the Virginia Court of Appeals determined that telling Mr. Middlebrooks of the coming of the drug dog amounted to a TerryÂ stop, which requires reasonable articulable suspicion,Â sinceÂ a reasonable person would not have felt free to leave at that point. The appellate court found no reasonable articulable suspicion, and found under the Exclusionary Rule that Mr. Middlebrooks's eventual admission to the presence and location of the marijuana (and the seizure of the marijuana) required suppression. Â Life sometimes is fair, and sometimes more than fair. Unfortunately, so many court opinions run afoul of theÂ Bill of Rights that Middlebrooks is a cause for celebration, particularly considering that the Virginia Court of Appeals is far from a bastion of wooly-headed liberals. Â What will happen to Middlebrooks on appeal? Will a majority of the Virginia Supreme Court or United States Supreme Court find a way to say that no seizure took place in Middlebrooks? I expect that the prosecution will appeal this case and that the Virginia Supreme Court will grant an appeal of this case. However,Â is there any split among various courts to lead the United StatesÂ Supreme Court even to grant certiorari review?Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, August 5, 2008

Reality is no obstacle.

Â Chick Corea with Return to Forever's reunion concert, Columbia, Maryland (August 4, 2008). Copyright Jon Katz, P.C.
Â Â The amazing SunWolf proclaims that "Reality is no obstacle," which at first blush might seem fanciful, but when examined more closely makes perfect sense when considering that many competing would-be realities are usually involved in a criminal case, and jurors and judges have various ways of deciding what is reality and how to handle that reality, sometimes including convicting the utterly innocent and acquitting the clearly guilty. Â Â At its worst, reality can be as stifling as a stench-filled outhouse in the boiling hot humidity, as depressing as a diner with rancid food and grimy walls, and as fatal as a plane crash. At its best, reality is an amazing thing. Â Â The great thing about music and art is the ability to transcend,Â alter, and re-perceiveÂ reality. See how many times a person loses one's blues through great music or other performing arts, for instance. WhenÂ a trial lawyerÂ is in touch with theÂ wonder of great music and other great performing arts, s/he can translate that into more dynamic and effective trial performance, rather than droning on and on and on and on and on and on in court. Â Â No musician is more infectious to me in that spirit than Chick Corea. Chick Corea is the most infectious to me when performing with his 1970's Return to Forever lineup with Stanley Clarke, Al Di Meola and Lenny White. To say the quartet todayÂ is as magical as ever is an understatement. I am still wondering whether I was dreaming last night to have experienced the Maryland leg of their first reunion concert tour in a quarter century, at least starting into their third song, and lasting into their seventh or eighth and last (which might be akin to it usually being best to catch the second or third set of a jazz club performance),Â ending at the 11:00 hour whenÂ noise rules permit no more music-making at the open-air Merriweather Post Pavillion.Â Â Â On the one hand, the band did not play any new compositions. On the other hand, the four delivered amazing interpretations and variations on their original themes. The band's most magical piece is the one that requires no wires: Romantic Warrior. Its song title most relevant to criminal defense is the "Duel of the Jester and the Tyrant." What an approach to defanging the tyrant. Â Â Â The band picked up where it left off in the late seventies as if three decades had never intervened. Imagine working as closely, harmoniously, and compellingly as that with our own clients and witnesses. Imagine infecting our clients, witnesses, judges and juriesÂ with that magic. Then, imagine bridging that imagination into reality.Â Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, August 4, 2008

Hard labor after penning "[Stalin-] Man with the mustache"

Â Â Image from Library of Congress's website. Indonesia had Pramoedya Ananta Toer courageously to write truth about the nation he so loved, despite the hounding,Â harassment, and lengthy total years of imprisonment from successive dictatorships. Â Aleksandr Solzhenitsyn served a similar role in Russia, and I say Russia rather than the Soviet Union or Russian Empire, because Solzhenitsyn was very much the Russian nationalist. Â Where Pramoedya was a soft-spoken, self-effacing man who got persecuted for his carefully-penned prose, Aleksandr SolzhenitsynÂ was blunt, opinionated and insistent, and a masterful writer. His eight-year prison sentence starting at the end of World War II followed his penning a letter to a friend referencing Stalin as the "man with a mustache."Â Stalin ruled, imprisoned, rang up Soviet-bloc dictators in the middle of the night, and shot people before the days of public relations advisors who urge leaders to gain some popularity by poking some fun at themselves. Â Solzhenitsyn's imprisonment in the Gulag that is masterfully fictionalized in *One Day in the Life of Ivan Denisovich* followed his vocal dismissiveness towards a prison superior at a Club Fed sort of prison where scientific intellectuals worked in rather freewheelingÂ think-tank style to develop ideas and inventions for the emerging Soviet superpower. Â Solzhenitsyn lived a long life, finally realized his dream to return to and die inÂ his homeland from which he was forcibly exiled by the Brezhnev regime, and passed away on August 3. Â He was not big on democracy, decried the state of American society when in Vermont during his exile and said too few Americans are willing to die for their beliefs (and he certainly was willing to do so, himself), and believed the United States withdrew too quickly from Vietnam. In other words, he spoke his mind, as everyone should have the protected right to do, no matter how vehemently we agree or disagree with their views. Â He was for me a critical face of the struggle against government censorship by white-out, confiscation of printing presses and copiers and newsprint, coercion, co-optation, imprisonment, torture, and execution, no matter the government, whether Communist, right-wing, or our very own United States (which censors in more subtle ways than the messiness of torture and execution). Â His struggle to be free to speak his mind is a struggle that must constantly be fought and re-fought, and won and re-won. Solzhenitsyn may be physically dead, but his unyielding spirit, fight and drive for the freedom to dissent openly, directly, and without varnish must live on. Otherwise, everyone will suffer dearly. Jon Katz.Â

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

Sunday, August 3, 2008

Practicing non-anger.

Yin Yang Practicing non-anger is easier said than done, but is fully essential to being powerful (and healthy) as a person and persuasive trial lawyer. One approach I try to use in staying consistently calm and not angry is in focusing on how everyone ultimately is interconnected. Those who reach such a view from a deeply-held religious perspective -- which I do not, still remaining an agnostic who is into Judaism and Buddhism nonetheless -- might have an easier time sticking to the view than I do. In any event, the more we see that we are interconnected, the less we will be tempted to cause disharmony to others and the more we will want to help everyone rise as we rise, and not to try to pull them into a ditch even if we find ourselves in one. Yesterday, I was leaving the Barnes & Noble with my two-year-old son. We were in a true state of bliss. For over an hour, he got his fill playing with Thomas trains (you try having children and avoiding America's crass commercialism and its many suburban, mindnumbing pockets), and then moving to dancing to the rhythms of books that play tunes to the touch of a button, while we interacted together alternatively with my reading Ernest Gaines's *A Lesson Before Dying* (not exactly light reading or viewing (see here, too), but among the many great books I have still yet to discover and read). We rode the elevator up and down, which is like a carnival ride for him. We left as we arrived, with him riding his tricycle. As we drove off, a pedestrian was waiting to cross the parking lot where the law gave me the right of way, but where I waved him in front of me just as I appreciate others doing the same for me, and just as I believe strongly in returning manifold the kindnesses others have shown me over the decades. I then started thinking about how I could transfer that feeling of goodwill to every waking and sleeping hour and to everyone with whom I interact. I realized that if I could see a part of me in every other person, that would help me want to support their well-being all the more. If that is too abstract an approach for me, then I can also try to see a part of my loved ones and closest friends in every other person. If that still is too abstract to me, I can leave room for the possibility that this is a person who shares some of my deepest core beliefs, values, interests, feelings, and passions, and has done, is doing, or will do some great things to benefit many people. Alternatively, I need to leave room that this person might some day become a close friend or confidante to me, may already be a close friend or confidante to a person who already is close to me, or may be someone who has or will help me or someone close to me in profound ways, whether it be as a teacher, someone who helps others medically or psychologically or spiritually, or someone who helps in innumerable other ways. By turning to such a visualization, then I can step back in a more non-selfish way, to see the person as precious in and of himself or herself, no matter how much the person seems to be devoid of caring or feeling or unselfishness, and capable of doing immediate and serious harm. Certainly, some of my criminal defense clients not only are accused of doing heinous and despicable acts, but some of them have in fact committed such acts. Consequently, I best be ready to care about everyone -- even my apparently worst enemy -- or how else will I be able to care about such clients, beyond the abstract concept of knowing that I protect everyone's Constitutional rights every time I successfully defend a criminal defense client? Moreover, I must find a way to care about each client, because if I do not, why will the judge, jury, or prosecutor care? This is all easier to write about on a Sunday when I am not being bombarded with court battles, phone calls, humdinger arguments in opposing counsels' court filings, staff needs, and a slew of other demands on my time, and sometimes on my patience and calmness. This is easier to write about when I am not dealing with people who do not care -- or at least do not seem to care -- about truth, about covering each others' backs, or about true justice. As I do so many times, I can summon up the calming voice and caring of my friend and mentor Jun Yasuda when the day gets chaotic and when I deal with seemingly hostile and dangerous prosecutors, cops and opposing civilian witnesses, but she acknowledges that even she gets angry at times. Consequently, each day that passes with me staying calm in the face of challenges to my becoming angry, is an accomplishment, sort of like the accomplishment an alcoholic reaches upon finishing another day sober. It is folly to believe one can act out in anger and then have that anger just disappear. If somebody sees me being angry and does not know the context of that anger, the person might think I am being a hothead, a nutball, a whackjob, or worse. If my son sees me acting out in anger, it does not give him harmony, and does not help him learn by example to achieve a life of non-anger. If I lose my cool, my client can suffer. Conversely, when I live with non-anger, even some of my opponents may wish to work more harmoniously with me, as some of them try to absorb the good karma of the non-anger and harmony. Living a life of non-anger is not a new-age, namby-pamby ideal for me. It is a necessity that I did not recognize sufficiently until I was well into adulthood. I have no other choice, nor do you. Jon Katz. ADDENDUM: Thanks to David Tarrell for his posting on non-anger, including words of wisdom from Fred Rogers, of all people.

Posted by Jon Katz in Persuasion at 00:00

Friday, August 1, 2008

"The Execution Team will insert a large bore intravenous channel into the appropriate vein."

1961 saw the last military execution in the United States. Now, George Bush, II, has broken that execution-free period in the military by approving the execution of Ronald A. Gray. Presidential approval is required to proceed with a military execution. Mr. Gray entered a guilty plea in state court to several rapes and murders; the crimes to which he admitted make the stomach turn and heave for days. Although his state court sentence involved consecutive life sentences, the military nevertheless proceeded with a trial(s), apparently based on the same criminal conduct to which he pled in state court; this sounds like a variation on the theme or the actual theme of the separate sovereigns doctrine. He was convicted at the military trial and sentenced to death. The above-listed title for this blog entry comes straight from the Army's 2006 procedures for military executions. Jumping off the pages of those guidelines is the disconnect between the dispassionate technocratic language and the state-run legalized murder that is the death penalty. Thanks to the Courts Martial blog ([here](#) and [here](#)) for posting on this story, as well as the CAAF blog ([here](#) and [here](#)). Here is the Washington Post article on the case. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00