

Friday, October 31, 2008

Halloween treats galore today from Virginia's Supreme Court.

Image from Virginia Forestry Dept's website. Halloween treats came before sundown today with the following favorable criminal rulings from Virginia's Supreme Court, which issues opinions around every six weeks:

- Virginia's Supreme Court reversed a rape conviction where not more than a scintilla of evidence supported a jury instruction that the jury could consider the defendant's departure from the alleged victim's home, where Defendant claimed consensual sexual activity and where the evidence showed the Defendant's departure complied with the complainant's telling him to leave. A retrial is required, because the erroneous jury instruction was not harmless error: "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. . . . If so, or if one is left in grave doubt, the conviction cannot stand.' Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731 (2001) (omissions in original) (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946))..."
- Turman v. Virginia. - When cops ask if any drugs, weapons, guns, or nuclear devices are in the car, stay silent, or else ask if you are free to leave. If you do not follow that admonition, pursue a Miranda challenge. Here, Defendant Hasan drove a car matching a robbery lookout. In 2005 in Dixon, the Virginia Supreme Court said that handcuffing by itself does not automatically require Miranda warnings, nor does placing the suspect in a police car without anything more. In Mr. Hasan's case, the Supreme Court confirmed: "However, several factors not present in Dixon distinguish this case. For example, the defendant in Dixon did not face drawn weapons or a readily available K-9 unit, and at the time of the custodial interrogation, only one trooper was interacting with the defendant. See id. at 37-38, 613 S.E.2d at 399-400. In contrast, Hasan was confronted during questioning with both drawn guns and a K-9 unit close by, and was surrounded by a 'cone' consisting of multiple officers." With the foregoing factors present, Mr. Hasan confirmed the presence of a handgun in his car. The Virginia Supreme Court granted Mr. Hasan a retrial, where he had entered a guilty plea conditioned on his right to a retrial upon beating his suppression issue on appeal. Hasan v. Virginia.
- Mere presence in a drug-filled house does not automatically make one guilty of being a principal in the second degree. However, if the house is raided, you are likely to be dragnetted with everyone else, only possibly to benefit from the relief of this Brickhouse decision if the jury acquits you, but you may end up pleading guilty in advance to hedge your bets, as so many innocent people do. Brickhouse v. Virginia.
- Judges cannot in 2006 interpret their words from 2005 any more harshly than they did in 2005. Consequently, probationer Valerie White's first-time drug offender disposition could not be revoked where her alleged violation of the general good behavior probation condition succeeded the time period that the judge had originally set for being of general good behavior, and where the judge never said otherwise on the record. White v. Virginia.
- You must remember this: A peeling inspection sticker without more is just a peeling inspection sticker. Thus, the traffic stop of Matthew Moore was unconstitutional, as was, by extension, the search that found drugs and a handgun in the car. Congratulations, Mr. Moore. Moore v. Virginia.
- Tipping the scales against an anonymous tipper. The Virginia Supreme Court overturned the stop of Joseph Harris's car --which led to a drunk driving conviction -- on an anonymous tip, for the following primary grounds: "In this case, the anonymous tip included the following information: Joseph Harris, described as wearing a striped shirt, was intoxicated and driving a green Altima with a partial license plate number of 'Y8066,' southward in the 3400 block of Meadowbridge Road. The informant in this case was not known to the police nor did he or she personally appear before a police officer. Thus, the informant was not subjecting himself or herself to possible arrest if the information provided to the dispatcher proved false. See Code Â§ 18.2-461. In other words, the informant was not placing his or her credibility at risk and could 'lie with impunity.' J.L., 529 U.S. at 275 (Kennedy, J., concurring). The informant provided information available to any observer, whether a concerned citizen, prankster, or someone with a grudge against Harris. See Jackson, 267 Va. at 679, 594 S.E.2d at 602. The tip received by Officer Picard failed to include predictions about Harris' future behavior. Thus, the anonymous tip, in this case, lacked sufficient information to demonstrate the informant's credibility and basis of knowledge. Such an anonymous tip cannot, of itself, establish the requisite quantum of suspicion for an investigative stop. "When viewed in the context of the anonymous tip, Harris's act of slowing his car at an intersection, or of slowing before stopping at a red traffic signal, did not indicate that he was involved in the criminal act of operating a motor vehicle under the influence of alcohol. Driving to the side of the road and stopping may be subjectively viewed as unusual, but that conduct was insufficient to corroborate the criminal activity alleged in the anonymous tip. See Barrett, 250 Va. at 248, 462 S.E.2d at 112. Therefore, we hold that Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and that, therefore, Harris was stopped in violation of his rights under the Fourth Amendment. Thus, the circuit court erred in denying Harris's motion to suppress." Harris v. Virginia.

Thanks to the Virginia Supreme Court justices who voted with the majorities in the foregoing decisions from today.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, October 30, 2008

Wherever I go, Big Brother follows.

Â Bill of RightsÂ (From public domain.)Â In 1981, I started college a few miles outside of Boston. I very much enjoyed the subway system. Barely two stations were designed alike. Some stations had elevated platforms to get on the trains, and at least one other station had the opposite engineering. Some stretches of tracks went underground, and others aboveground. I always got a kick out of reading some of the station names, including Alewife, Mattapan, and Shawmut. Â In 1985, I started a year of work in the belly of the capitalist beast.Â It was the first time in my life that I daily rubbed elbows with as vast a cross section of people, most of them running from fascinating to interesting on lesser levels. Fed up with over two months of train commuting from what seemed like my middle-of-nowhere hometown, I signed a lease for a shoebox single residence occupancy apartment at the corner of Lexington and 23rd Street. I think Paul SchaefferÂ lived there, or at least I saw he found an opportunity early one Saturday eveningÂ to eat a slice of cheesy pizza at Zips's on the ground floor of my eventual apartment building. Â After signing my lease -- wondering why I had just agreed to pay over \$500 for the privilege of having my knees almost touch the wall when sitting on the toilet in a kitchenless tiny dormsize apartment -- I went to catch a subway train uptown. A man calmly walked onto the tracks, and calmly waited for the next train to arrive, facing his impending suicide. I freaked. I told the tokenbooth clerk what was happening, and sheÂ barely acknowledged me, as ifÂ I had just escaped from one of Bellevue Hospital's padded rooms. I bolted out of the station, selfishly trying to avoid hearing this man's screams, feeling powerless to convince him to leave the rails. I saw a nearby cop car -- before I had become so cynical of cops -- and told them. They also looked at me like I was nuts, perhaps nuts that I cared enough to tell them, or nuts to think I could change anything, or nuts that I had not just minded my own business and stayed there to be in the midst of a man flattened out by a subway train. After a business trip took me away from the neighborhood for six weeks, I returned and asked a different tokenbooth clerk what happened to the man. She said he was taken to a hospital's psychiatric ward; or was that a subsequent manÂ who had descended to the rails to await a gruesome death? Â Seven months later, I was returning to my apartment during rush hour. Two or three people jammed themselves onto the subway car with a full-sized couch. That was preferable to what came two months thereafter, when my friend and I ran to the next subway car, after we realized that the reeking odor overcoming us was vomit saturating a standing rider's beard. Sophomorically insensitive, we laughed our heads off about it after our escape. Â Then I came to Washington, D.C. in 1986 for law school. The subway cars were free of graffiti, had nobody standing by the door drenched in puke, and had nobody shoving large furniture items onto the subway, which would have been caught by the stationmanagers in the first place. Each subway station and subway car looked pretty much immaculately the same as the next one. Each underground stop choked its visitors in huge slabs of curved concrete. Whatever Washington's subway system's planners had in mind, the system then, as now, reflected the excessive facelessness and heartlessness of the surrounding overgrown government bureaucracy. Â In October 1999 I was hopping on the subway in the shadow of the World Trade Center. Two years later, murderers decimated the towers. Earlier that year I met with a prosecutor in the Pentagon to review discovery pending a trial date; to this day, I do not know if the murderous September 11 plane hit that part of the Pentagon. Â On my first post-September 11 trip to Manhattan, Grand Central Station had been transformed into a police state, with cops carrying the same sort of scary submachine guns that I thought were reserved for such other places as Singapore's Changi airport under that city-state's tyrannical government. Then, the New York City government added random searches of subway users. The Boston subway and bus lines did the same, at least during the 2004 Democratic national convention.Â Apparently not wanting to be on the sidelines, the Washington Area Metropolitan Transit Authority has gotten in on the act, not only on the subway line, but on busses, too. Such intrusions make the puke smell on a New York subway car in 1986 and the urine stench in a Boston subway walkway in 1983 seem like child'splay. Â And what about my two-year-old boy, who loves the subway and all other trains, andÂ who darts towards the nearest subway elevator and escalator to take a ride? What kind of lesson to himÂ is the garrison state that the subway system has become, other than a lesson of fear? How can I expect not to upset him tremendously if I explain that if we do not exercise our right to privacy we will lose it, and then refuse to enter the subway system? Were mine a life lived alone, it would be very easy to avoid the subway and buses. Many will find little financial choice to avoid the Metro system, considering how much less expensive it is to ride Metro than to own or drive a car. Â What nerve does the WMATA have to impose such a drastic change as random subway and busÂ searches, apparently with no notice or comment period for the public to put in its two cents in advance? Now that the public knows of this privacy-violating development, who will stand up against it? Â Thanks certainly go to my friends at Flex Your Rights -- the producers of the Busted video visually linked to every page of this blog --Â who yesterday afternoon were involved inÂ pursuing aÂ demonstration in Dupont Circle against the random searches (see the flyers they ask people to help hand out concerning the searches). Thanks also to Flex Your Rights for posting a webpage onÂ your rights in refusing D.C. Metro random searches, which looks right on target, except thatÂ as to FYR's recommendation about not giving one's name orÂ identityÂ to the cops, the Supreme Court'sÂ HiibelÂ case makes clear the Catch-22 of refusing at least to give the cops one's name, in the event a court later determines the cops

had reasonable suspicion to suspect the person was committing a crime. However, one would hope that no court will find the existence of reasonable police suspicion when the person merely leaves to avoid a random subway or bus search. My search of Metro's website and Google indicates that Metro never instituted a public notice and comment period before announcing the random search program. That is foul in a society that purportedly has government governing at the consent of the governed, and where Congress, federal agencies, and the states where Metro runs (D.C., Maryland and Virginia) ordinarily provide the public notice and comment opportunities for proposed legislation. Billions of tax dollars get poured into the Metro system. Why should my tax dollars go into a system that blatantly violates the Fourth Amendment and privacy with random searches? Metro's website has an overly brief FAQ page (and just about nothing else on its website) about the random search approach, which claims the program is Constitutional based on the Second Circuit's denial in *MacWade v. Kelly*, 460 F.3d 260 (2006), of a challenge to the New York City subway's random search program and an unreported ruling from the U.S. District Court in Massachusetts, on a challenge to Boston's subway and bus search program during the 2004 Democratic presidential convention (did the bad karma of the failure of John Kerry and his campaign to stand up against such searches feed into his electoral loss?). *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, 2004 U.S. Dist. LEXIS 14345 (D. Mass. July 28, 2004) (unreported). However, the foregoing rulings are from outside jurisdictions, and are therefore not controlling on the courts where the D.C.-area Metro runs. Finally, the D.C.-area Metro search program includes buses, which *MacWade* does not involve, and which *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.* only involved during the few days of a presidential convention. Such a distinction might at least lead to a court victory against random Metro bus searches, and hopefully a wider victory than that. I have offered assistance to my local ACLU for a court challenge. The ACLU probably will find no shortage of qualified pro bono attorneys for such a lawsuit, and the local affiliate already has an excellent crop of in-house lawyers. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, October 29, 2008

When is Gideon openly disrespected?

Â On October 8, 2008, I blogged about the Maryland Public Defender's Office's cessation of funding for private lawyers to represent indigent defendants who have to be defended by non-public defender lawyers due to conflicts of interest with the office's existing clients. Â No matter how bad the foregoing situation sounds, I just learned that countless indigent criminal defendants in Native American tribal courts are not provided lawyers, due to lack of funding -- except that more funding can be found in areas with wealthier tribes -- and a claim that the partial sovereignty granted to such courts means that somehow criminal defendants in tribal courts cannot benefit from the full panoply of rights established by the United States Supreme Court to protect criminal defendants. .Â Â Â Of course, as I frequently have said in other contexts, the foregoing indigent defense problems in Native American tribal courts can be heavily ameliorated, by legalizing marijuana, heavily decriminalizing all other drugs, legalizing gambling, and legalizing prostitution.Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, October 28, 2008

Virginia's limits on relief for bypassed preliminary hearings.

Photo from website of U.S. District Court (W.D. Mi.). Today, October 28, a split Virginia Court of Appeals put firm limits on criminal defendants' possibility of obtaining judicial relief where a preliminary hearing has not been held. Wright v. Virginia (Oct. 18, 2008). Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 27, 2008

We are all related.

When googling for some further information on t'ai chi master Cheng Man Ch'ing, I happened upon an intriguing blog entitled Native American Taoist. The site's blogmaster is Thunderhands, who answered a blog comment about his Cheng Man Ch'ing posting with the closing phrase "Mitakuye Oyasin". This being the first time hearing the phrase, I researched further to learn that it is Lakota for "all my relations" and, by extension, "we are all related." I e-mailed Thunderhands my thanks for his blog and for his railroad illustrations; trains and elevators are my son's favorite machines. He replied to my inquiry about the phrase: "Mitakuye Oyasin is Lakota and it means all my relations, including all living things. Winged creatures, two legged's, four legged's, crawling, reptiles. etc. Of course yes we are all related, we are all one, but live in a delusion that we stop at our skin." That would throw out the window my being able to make an exception for the way I approach and talk about cops, prosecutors, and probation agents. Interestingly, a person named Atuschaaw maintains a blog entitled with the same phrase, Mitakuye Oyasin. Learning about Mitakuye Oyasin reminded me of Baba-Kundi Ma'at-Shambhala, an inspirational man I met last year at the Whole Foods parking lot. As it turns out, two months ago, he started a blog entitled Essence Blogeshere, which frequently amplifies on Mitakuye Oyasin, without saying the phrase. Mitakuye Oyasin. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Sunday, October 26, 2008

Learning one cookie at a time.

Some people reach ecstasy by seeing their favorite band live, as have I, when experiencing such superhumans as Return to Forever, Dizzy Gillespie, and Cat Anderson. Yesterday, I reached ecstasy by interacting more directly than ever with t'ai chi Master Ben Lo. Frequent readers of this blog know that I believe strongly in applying the principles of t'ai chi to the practice of law and to the rest of my life, and that two lawyers inspired me most to practice t'ai chi. Curiously, Master Lo -- who focuses his students on the power of being mindfully relaxed and soft -- playfully tells me that lawyers and salespeople tend to be stiff. Maybe he thinks their minds are subject to too much intellectual clutter. Wishing to hear this megamaster rather than debating him, I did not bother suggesting that such stereotypes do not work, in part considering that all lawyers were non-lawyers at some point in their lives. Yesterday was my fourth class with Master Lo since 1995. Master Lo visits the District of Columbia area from his California home around once or more annually. He started off the weekend session by asking why people came to the class. One attendee said she was there to learn t'ai chi from him. His ultimate response as we proceeded was that it is easy to learn about t'ai chi, but much more difficult to apply it. He then proceeded to emphasize the importance of learning t'ai chi at one's own pace, while he pushes students into his teaching realm of "no burn, no earn/no pain, no gain," or, as his teacher Cheng Man Ch'ing once pointed out to his students while on a walk that they have plenty of time in the future to rest (gesturing towards a cemetery) but that much is left to be done while on this Earth. Master Lo emphasizes that a student is best to proceed to the next level when s/he is ready for it. He analogizes it to distributing cookies to a hungry person. The hungry person gets more out of the cookie by being given one at first before moving onto the next one; giving the person the whole bag of cookies will just oversaturate the situation. Similarly, Master Lo asks whether one learns best by learning one new language, or by dabbling in several without going into full depth. In this spirit of going one cookie at a time, Master Lo first had the fifty attendees -- all required to have completed the t'ai chi form study -- proceed through the full thirty-seven-posture t'ai chi form, and then proceeded the rest of the morning to focus on t'ai chi's five principles: relax and sink the body and mind, keep the body upright (and do not arch the back), turn from the waist, separate the weight as in yin and yang, and keep the wrists and fingers softly unbent. Master Lo next focused on the first third of the t'ai chi form. First, he had us stand at the beginning position, with our feet parallel to each other. He gave correction pointers to everyone, which took several minutes as everyone remained in that posture; he advised me to bend my arms slightly more. Each time all one's weight was supposed to be on the practitioner's bent leg, he told everyone to check to assure that the empty leg was indeed empty by lifting it one centimeter without leaning the body; that is easier said than done. Standing for a long time in the beginning posture is not too hard. However, Master Lo then had all of us hold the first push hands posture, and did not get to me until a few minutes into it. He advised me to sink my waist further towards the ground, which would not have been as uncomfortable when we started holding the posture a few minutes before. As Master Lo says: "No burn, no earn. No pain, no gain" and "My name is Ben Lo, as in bend low." Master Lo included a focus on the Lifting Hands movement, which can be performed in the smallest of spaces, whether standing or sitting, and even with one hand as the other holds a telephone; and which is very beneficial for those whose knees prevent them from performing the demanding knee-bending of t'ai chi that might look easy but, when performed properly, requires keeping the remaining leg completely empty. The t'ai chi chuan Yang style short form might have thirty-seven designated postures (which are actually guideposts to fluid movements that my teacher Len Kennedy described as holding a silk thread that will break if one moves too slowly or too quickly), but it has many more movements than that. For instance, as Master Lo demonstrated, in Lifting Hands alone, the hands go through five movements from beginning to end. Why did Master Lo decide to study t'ai chi? Decades ago, he was very sick, and visited a traditional Chinese medicine doctor in his native Taiwan when other form(s) of medicine failed. The Chinese medicine doctor gave him a prescription that did not work, and the doctor responded that Master Lo must be in particularly poor health, because this particular prescription ordinarily was very effective. The doctor advised Master Lo to exercise at a time when he had difficulty even walking across a room. The doctor recommended t'ai chi, and offered to teach him. The doctor was a demanding t'ai chi teacher, and within a few months, Master Lo's health had improved to the point that he no longer needed medicine. The doctor had come to Taiwan around 1949 from the mainland due to the Communist takeover there. People would come far and wide to study t'ai chi with this doctor. Master Lo had not originally known the doctor's fame as a t'ai chi teacher, who was none other than megamaster Professor Cheng Man Ch'ing, who taught the teacher of my two main t'ai chi teachers. I asked Master Lo whether I will face any obstacles to achieving in t'ai chi if I do not yet believe in the presence of chi or the tan tien, which purportedly holds the chi in the abdominal area. He responded with a demonstration, telling me to face him with my feet parallel; he repeated that they still were till not parallel and to line them up with the gym's wooden boards. He told me to place my palm in the area near his navel (which is near the tan tien's purported location) and to push him. The first time, he made his body limp, and I pushed him easily. He next made his body stiff; having done very little push hands practice (instead doing daily t'ai chi form practice, when not falling behind), and standing face-to-face with a man I look up to as if he

were atop Mount Everest, at first I did not push too hard, so he told me to push harder, and he was easily pushed. Finally, he made his body actively relaxed, putting his mind into his tan tien; not only could I not push him, but one thousand heavyweights combined probably could not have. Next, he easily pushed me; I have a long way to go. Master Lo later proceeded a similar pushing exercise with his extended arm with two other attendees. They easily pushed his arm when it was limp and when it was stiff. However, when he actively relaxed his arm and put his mind into his arm, no amount of force could move it. Master Lo told of one of his students who arranged for him to teach the student's students one day, and asked if Master Lo might be able to discuss anything new, rather than repeating what he always would repeat before, which probably included to relax and to practice. He replied that this will be easy to do once the students are able to apply what he had previously taught them. The end of the morning session arrived, and I had already taken up half of my family day, which is every Saturday, so, sadly, I had to leave. Before departing, I told Master Lo how much he had helped me over the years, as he has done for countless thousands of others directly or through their teachers who have studied with him. This was the point when he talked about lawyers and stiffness. I gave him my law firm's pen, which contains the t'ai chi symbol enveloping the scales of justice, and told him how I try applying t'ai chi to my practice of law. When I told Master Lo that, time permitting in the morning, I sometimes circle the courthouse where I am scheduled and conclude with t'ai chi, he asked if some people think I am crazy I told him of my temporary police detention last June, when I was a suspected t'ai chi terrorist. He suggested that I not practice t'ai chi in airports. In any event, the late David Chen -- who established his own local t'ai chi school after studying with Master Lo's local student Arnold Lee -- has a photo on his own website also practicing airport t'ai chi. How else to kill time dealing with airplane delays? Master Lo then left me with advice that I do not recall hearing before from anyone: Practice t'ai chi in the morning and in the evening. Before, I thought that once a day was the bare necessary minimum. This morning, I went to the deck in the back of our home, and practiced t'ai chi before starting my day. I felt the results of the muscular burn from holding postures the morning before, and simultaneously felt more physical power from practicing t'ai chi than ever before. Master Lo looks, talks, and acts much more youthful and healthful than his eighty-one years. Although this cell camera picture is overexposed, it gives some visual essence of the man. Thank you, Ben Lo, for you. Jon Katz. ADDENDUM: The weekend Ben Lo event was organized in large or full part by Joanne Chang, who is David Chen's widow. With proceeds going to construction of the David Chen Memorial Tai Chi Court in Maryland's Cabin John Regional Park, Joanne is selling David's posthumously-published *When Yin Meets Yang*. I very much recommend this bilingual English-Chinese book that communicates the essence of t'ai chi both in words and in David's accomplished art. The prefaces by Joanne and Master Lo, alone, are very inspirational. Joanne talks of David's t'ai chi progression to the point that he would enjoy t'ai chi harmony even when doing housework, and getting to the point where he could open heavy commercial building doors without using force from his arms. When he passed, David -- here is a tribute page to him -- had been practicing t'ai chi for only one more year than my current fourteen years, but had already reached quantum levels of achievement. As Master Lo writes in his preface: "David's tireless hours of practice, his instinctive comprehension and his abilities naturally led to him to acquire his Taijiquan skills at an accelerated pace. . . I believed that David would be a key member for developing the Taiji community for future generations." Finally, for t'ai chi practitioners, here are Wolfe Lowenthal's t'ai chi reading list, his partial list of t'ai chi teachers from the Cheng Man Ch'ing lineage, and my t'ai chi links.

Posted by Jon Katz in Persuasion at 00:00

Friday, October 24, 2008

Emphatic advocacy

Photo from website of U.S. District Court (W.D. Mi.).
Imagine if the late Ernie Kovacs attended law school and somehow was put under and followed the misimpression to speak and write in monotone. Then, imagine if Ernie Kovacs were a lawyer, and injected all his vim, vigor, vitality, and humor into his written and oral words. He would be a tough act to follow. In that context, it is a delight to upload and link here -- with the author's permission -- to a very emphatic, fast-paced, grabbing federal sentencing memorandum by Los Angeles criminal defense lawyer David J.P. Kaloyanides. Whether or not a judge agrees with his sentencing memorandum, it is bound to grab his audience as his advocacy piece moves forward in a similar attention-getting vein as watching the original M*A*S*H movie, as it draws the audience into a cohesive and clearly-developing story. Kaloyanides's sentencing memorandum unveils the very sham of the drug war and the draconian federal drug felony prosecution and sentencing system. Are you considering being a prosecutor? Other than using that as an attempted career stepping stone or a way to have one of the highest-paying federal attorney jobs, why do it? Prosecutors and would-be prosecutors, feel free to answer anonymously if you wish.
Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, October 23, 2008

Earning a good living without focus groups: It can be done.

Â Â In the summer of 1971, at the age of eight, I learned two indispensable things. First, I learned about Mad Magazine, which I read and subscribed to religiously for many years, and whose offices I got a tour of three years later, mesmerized as Associate Editor Jerry DeFucio led me downÂ hallways filled with amazing art, drawers filled with such priceless gems as the originalÂ Godfather cover artwork, and Bill Gaines's office with a papier-mÂchÂ© King Kong ready to burst in through the window; andÂ as Sergio Aragones inked original drawings for me on the inside covers of his books. Second, I learned how to fold my eyelids inside out, which I can still do today. Â How does this connect with the practice of law? First, theÂ most effective and fearless fight -- be it in or out of the courtroom -- is accomplished by maintaining the wonder and fearlessness and never-ending joyful self-discoveryÂ of a child. Second, people will be more riveted to your courtroom presentation if you remain real without constantly dwelling on your law office's financial bottom-line, just as Mad under the late William Gaines never bothered surveying its reader demographics but still earned a bundle in the process, while doing things as outrageous as bringing the staff to Haiti to visit the magazine's sole subscriber to convince him to renew his subscription. Third, you can be successful without being co-opted by people and issues you do not want to be co-opted by, just as the William Gaines gang refused advertising, lest that water down Mad's satirical sharpness (today, post-Gaines,Â Mad is riddled with advertising and its previous sharp pen is much less sharp). Â Now is the time, before you turn in for the evening, to summon the fearless and wondrous child within you. Go ahead. Throw water balloons out your window (just not in anybody's direction); make milk come out of your friend's nose; goÂ on a roadtrip until sunrise. How did that feel?Â Â Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Wednesday, October 22, 2008

A quality interpreter needs to know much more than language fluency.

Â Bill of RightsÂ (From public domain.)Â Too often, people think that full bilingualism is enough to do sufficient interpreter work. Wrong, especially when it comes to the fast pace and rough-and-tumble of interpreting during a trial. Â Next time a judge questions why passing an interpreterÂ certification test is not good enough, show the judge this article, at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/13/AR2008101302419.html>. Jon Katz.

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

Tuesday, October 21, 2008

Work as play/ Play as work.

Â Â For fewer than two years between leaving the Maryland Public Defender's Office and becoming my own boss, I worked at a civil trial law firm. I learned many good things there. However, I realized that I would be able to spread my wings the farthest by being my own boss. Without a boss, no longer did anyone urge me to wear my suit jacket when meeting with clients, nor to work in a gray-feeling and cramped building with an uncomfortable winter draft whirling through my basement townhouse office for months on end; that is not what I am about. Employers, take heed: Such unnecessary formalities and physical discomfort do not make for the highest performing staff. Before we even had furniture delivered to my duo practice with Jay Marks, we already had potential clients coming through our doors. It was August 1998, and I was energized, and am all the more energized as the positive karma continues flowing. All that was needed was to leave behind the fear of having to succeed without a duplicated weekly paycheck. How to enjoy practicing criminal defense when my clients typically are in varying degrees of disharmony? I welcome the challenge to help return harmony to them. It can be as small as a recent misdemeanor trial date when my client was tremendously nervous about the unknowns of his case. Before our case was called, a Mr. Price's case was called, for some sort of non-jailable moving violation. The judge completed Mr. Price's case almost as quickly as it has started. I wrote a large note on my legal pad to my client: "Does Mr. Price hang out with Bob Barker?" For a brief moment, my client was caught up in juxtapositional laughter, briefly forgetting his fears. Ultimately, the prosecutor dismissed the case. A year ago, a client had a District Court trial scheduled in extreme Western Maryland. He took the train from home a few states away and inquired about our driving there together. I agreed so long as he got a hotel close to my home so that I would not be waiting for Godot at some desolate uncertain meeting place. We had a blast during our over two hour drive each way. My client is a fascinating person, is an artist to boot, and shares my strong support for a world with much less war, more justice and human rights, and the elimination of a police state mentality and reality. Beyond me was why the prosecutor had me and my client drive all the way out there to tell me what he already knew, which was his plan to dismiss the case after I had made efforts before the trial date to obtain a dismissal. With the case dismissed, my client and I took in a walk around the interesting downtown surrounded by mountains and waterways, near the railroad tracks. On the drive back, we stopped at an unusual grocery store that included a strangely-named British dessert in a can, and we tried to make heads or tails of it. A year later, we bumped into each other at the September 2007 prelude to a peace march that assembled across the presidential palace and caught up with each other. Last month I learned that Arnold Toynbee had excellently described the foregoing interactions with myself, and with my clients: "The supreme accomplishment is to blur the line between work and play." Employers, take note. Employees, take note. Thanks, Mike Garofalo, for focusing on the need to keep play in work. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Monday, October 20, 2008

Should fingerprint evidence be banned from court?

Â Bill of RightsÂ (From public domain.)Â Should fingerprint evidence be banned from criminal trials? Yes, says Maryland public defender lawyer Patrick Kent, who also is a forensic expert. Â Last May, Kent said that DNA evidence is scientific, but that fingerprint analysis is an art that is tooÂ filled with error to permit fingerprint testimony at trial. Mr. Kent says that fingerprint analysis has "never been tested... It's never been shown to be accurate. They don't even have a standard way that they do fingerprint comparisons." Kent's foregoing assertion in a CBS interview follows last October 2007's refusalÂ by a Maryland trial judgeÂ in this lengthy written opinion to allow partial fingerprints into a murder trial. Â Last October 2007, fellow blogger Scott Greenfield discussed the unreliability of fingerprints in criminal cases. Â Fingerprint problems with law enforcement continue, most recently with innocent people in Los Angeles being wrongfully convicted based on botched fingerprint analyses. Thankfully,Â prosecutors no longerÂ canÂ be sure that their fingerprint evidence will be relied upon at trial.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, October 19, 2008

Announcing our branch office in Fairfax County, Virginia.

For many years, I have been defending about as many criminal cases in Virginia as in Maryland. In Virginia, I defend more criminal cases in Fairfax County than anywhere else in the commonwealth. Most of the counties where I practice in Virginia are a close drive to my office and home. However, many potential and actual Virginia clients would prefer the convenience of my having a Virginia office. Furthermore, some are on pretrial release that confines them to Virginia. Consequently, I researched shared office suite options, and selected a good one with full-time reception service in a nice office building with free parking in Tysons Corner in Fairfax County, Virginia. My Silver Spring, Maryland, office will continue to be my principal office. Here is the location of my new Virginia office: Jon Katz, P.C., 1420 Spring Hill Road, Suite 600, Tysons Corner/ McLean, Fairfax County, Virginia 22102, (703) 917-6626. Speaking of Virginia law practice, I understand that some D.C.-licensed lawyers toy with the idea of obtaining nothing more than a Virginia address in an effort to obtain a Virginia bar license without taking the Virginia bar exam. However, my reading of the governing legal provisions is that such reciprocity is only available to those who will be practicing full-time in Virginia. Therefore, I went to the trouble of preparing for and taking the Virginia bar exam twelve years ago, simultaneously handling a full trial litigation docket. After a long day of litigation work, I would plow through my home study course's audiotapes and workbooks, do practice essays that were evaluated by the course's owner and director, and then go back to work the next day. I am happy I went to the trouble of taking and passing the Virginia bar exam. I get many interesting cases and clients there. Unfortunately, Virginia's criminal justice system overall is the most draconian of all three states where I practice. In Virginia, for instance, Jencks material (statements of opposing witnesses) is generally not available in criminal cases; limited discovery is available for criminal cases, particularly in District Court; and a criminal defendant facing no more than one year in jail is forced to pursue a non-jury trial, and, only if convicted may the defendant then appeal for a jury trial de novo after such a conviction and sentencing. Handgun law is one area where Virginia criminal law is more favorable than the law in neighboring Maryland and the District of Columbia; Virginia breathes more life into the Second Amendment than the other two states. Also, Virginia law permits jury voir dire, which is tough to obtain in Maryland and Washington, D.C. Jon Katz.

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

Friday, October 17, 2008

Obama and McCain on Civil Liberties: More like Tweedledum and Tweedledee?

Â Bill of RightsÂ (From public domain.)Â Had Ralph Nader not run for president in 2000, Al Gore would have beaten George Bush, II. Nader knew he would not win the presidency, but also had a powerful message that most Democratic and Republican candidates and officeholders are more fundamentally alike than they are different, maintaining most of the status quo of the government-military-industrial complex. The only way to break out of the underdemocratic -- if not downright undemocratic -- two-party system is to risk electoral victories by the worst major candidates on the road to a truly multi-party system. Anger by anti-Bushies towards Nader is misplaced; a huge percentage of people alienated by the two-party system will risk having a terrible candidate elected before allowing themselves to be co-opted to the same old money-/machine-politics. As Nader's running mate Matt Gonzalez asks, "What do they [the Republicans and Democrats] have to do to lose your vote?"Â How different are McCain and Obama on the First Amendment? Doubtlessly, a president Obama will appoint federal judges who collectively willÂ urinate in the eye of civil liberties less than the judges appointed by a president McCain. However, Obama and McCain recently had a chance to vote for the First Amendment, but instead did the opposite, when Congress unanimously passed a law (the Protect our Children Act of 2008) last Monday that not only willÂ enable more spying on legitimate Internet and e-mail use during the government's anything-goesÂ fight against child pornography, but which promises hefty fines up to six figures against Internet service providers who do not rat to the government with their suspicions of child pornography running through their cyberwaves. Obama co-sponsored and his running mate Biden sponsored an earlier version of the legislation from last year, and opponent McCain sponsored and Hillary Clinton co-sponsored the version that passed lastÂ Monday.Â Neither the Democrats nor Republicans have a monopoly on urinatingÂ onÂ the First Amendment and the rest of the Bill of Rights.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, October 16, 2008

Criminal juries may not make up the governing law.

Â Bill of RightsÂ (From public domain.)Â Around fourteen years ago, at the post conviction/habeas corpus stage, I won a retrial in a Maryland trial court for a man convictedÂ of burglary for breaking into his grandmother's house with the intent to rape her, and of raping her. I then defended my client for the retrial; and ultimately reachedÂ a guilty plea agreement involving a plea to the rape count, a dismissal of the remaining count, and no prosecutorial opposition to a release from further executed incarceration time. On the day my client entered a guilty plea anew, the judge released him from any further prison time, without requiring probation.Â Â Without question, if my client committed the crime for which he was convicted, it was heinous beyond heinous.Â At the same time, the circumstances that led to his jury conviction and countless thousands of other Maryland convictions flew in the face of theÂ most basic federal Constitutional rightÂ not to be convicted without a jury finding of proof of guiltÂ beyond a reasonable doubt. Â Â Specifically, before 1980, countless Maryland judges (including the judge who presided at my foregoing client'sÂ original trial)Â -- if not all of them --Â advised juries in criminal casesÂ that the judges' instructions to the jury about the law were purely advisory and that the juries were free to disregard said instructions, on the basis of the following provision of the Maryland Declaration of Rights: "Art. 23. In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."Â Read literally, the foregoing Article 23 could cut both ways. It could lead a jury to convict a defendant in contravention of the obligation under the federal Constitution that no conviction take place without proof beyond a reasonable doubt. On the flip side, read literally, Article 23 could embolden a jury to acquit/exercise jury nullificationÂ even if it concluded a crime had been committed. Keep in mind that Maryland has a particularly long and deepÂ history of racism and segregation, thus having enabled juries all the more under Article 23 to convict based onÂ non-white status alone and to acquit white people who committed crimes against non-white people. Keep in mind further that at least right up to the 1920's (if not later), women had no right to serve on juries in Maryland. As to non-whites serving on juries, who knowsÂ when Maryland courts stopped excluding them through the front doorÂ and back door (it seems that the U.S. Supreme Court may have waited until 1935 in the Scottsboro Men case (why did evenÂ Chief Justice Hughes referÂ to them as "boys", in the opening paragraph of the 1935 opinion, no less?) to prohibit systematic exclusion of non-whites from juries)?Â Â Not until the early 1980's did Maryland's highest court put full brakes on judges' telling jurors that they could disregard the judges' instructions on the law. *Stevenson v. Maryland*, 289 Md. 167, 423 A.2d 558 (1980); *Montgomery v. Maryland*, 292 Md. 84, 437 A.2d 654 (1981). Â Consequently, at the habeas corpus/post conviction stage, is a Maryland convict entitled to a new trial if his or her jury was advised that it was free to disregard the judge's instructions on the law? A prosecutor might reply that the issue has been waived if the defendant did not enter a timely objection to the jury instruction at the time it was given. The defendant could reply that defense counsel was ineffective under the Constitution's Sixth and Fourteenth Amendments for failing to object to the jury instruction. The prosecutor might then reply that the defense counsel's not objecting was not ineffective if the trial took place before the foregoing early 1980's *Stevenson*Â and *Montgomery* cases were available to cue the trial lawyer to object. The defense might reply that those early 1980's cases retroactively changed the application of Article 23 of Maryland's Declaration of Rights, thus entitling the defendant to a retrial.Â Judges considering such a question would likely wonder about the floodgates to retrials that would be opened by agreeing with the latter argument (with plenty of witnesses long-dead by now). Of course, such a concern should not enter the decisionmaking process of a judge. Â On October 15, 2008, a 4-3 majority of Maryland's highest court closed any such possible floodgate-opening by determining that *Stevenson*Â and *Montgomery* merely clarified the law, and did not change it, thus foreclosing the possibility of any retroactivity. Praised be Judges Eldridge, Bell, and Battaglia for dissenting. *Maryland v. Adams*, ___ Md. __ (Oct. 15, 2008). Â As to my client convicted of raping his grandmother, to my best recollection, he was convicted before the foregoing *Stevenson* and *Montgomery* opinions were issued. Neither the prosecutor nor post conviction hearing judge called me on that. I was not as fortunate in another county with the same post-conviction argument about a conviction rendered pre-*Stevenson* and *Montgomery*. Without judicial or gubernatorial intervention, my latter client will live out the rest of his days in prison, convicted unconstitutionally of robbery and felony murder,Â due to aÂ gross violation of his rights by the trial judge having advised the jury that it was free to disregardÂ his jury instructions. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, October 15, 2008

Finding points of commonality with opponents.

It is human nature to avoid unpleasant people and to seek out pleasant ones. That is why I avoid Barney and am transfixed by the Dalai Lama. No matter how much I myself could not stomach prosecuting or being a cop, I have to deal daily with those serving such functions. Consequently, in trying to persuade cops, prosecutors, judges, juries, and opposing witnesses, I try to find points of commonality between me and them that set aside the professional role and humanize me, them, and my clients. I have a good friend whom I first met when we were public defender lawyers fifteen years ago. He is like a kindly Hawkeye who cared about his criminal defense clients. He can turn a lunch at a diner into an Ernie Kovacs extravaganza. One day we acted like sophomoric hyenas jumping up and down on our desks, chairs, and floor performing our own a capella air guitar version of Led Zep's 1970 song "Whole Lotta Love." Then my friend moved many states away, with a job not only on the opposite side, but with a prosecutor's death penalty appellate division, fighting to keep the state's death chamber doors wide open. I do not think he chose the new job out of any ideology. My friend invited me to read a brief he had written, and later asked what I thought of it. When I replied that I had not read it, he asked why. I told my friend that I still considered him a friend, with our friendship having started before he started advocating for executions, but that I doubted it would have been easy for me to have become his friend if I first met him now, and that I felt no comfort reading his brief. I feel more comfortable that his prosecutorial appellate work no longer includes death penalty cases. How did I remain friends with this man who ultimately worked hard to keep executing people, when I expect it would be hard for me to start a friendship with such a person if I first meet such a person when s/he already is doing such work? Part of the answer goes back to people's inclination to gravitate to those they find pleasant and those they find unpleasant. The death penalty is beyond unpleasant for me, to the point that it will take substantially extra effort for me to be willing to deal with death penalty prosecutors beyond their death penalty advocacy hats. Yet, I recognize that if I am going to persuade them, I still need to try to find points of commonality with them. With my friend who spent some time arguing death penalty appeals for the prosecution, he was already beyond humanized in my mind and being, and appeared to be engaged in a hopefully temporary aberration. I still struggled with having a friend doing such work. Consequently, I try to find genuine points of commonality with those I try to persuade, without forcing it, but by recognizing that we are all interconnected. Being a father helps me find that commonality more easily. Who knows if my two year old boy one day will become a prosecutor, a cop, or a Phil Collins groupie? Then again, that will not foreclose his option to switch any of those roles later on. More immediately if my son becomes friends with any children of such folks, am I going to refuse to go into their homes or to invite them to mine (but what does that say about my advice never to voluntarily let a cop into your home unless you are reporting a crime)? A few years ago, I spoke with a lobbyist for the adult entertainment industry who talked about finding points of commonality with legislators by saying: "Let me help you ease your burden on this piece of legislation with the experience and knowledge I have gained." Only so many hours exist in a day and a week, and such an offer is very non-confrontational and non-pushy, letting the offeree use or not use the help. Often criminal defense lawyers walk into court with many fewer cases than the prosecutor. If the prosecutor can trust the criminal defense lawyer not to think of nor broadcast him or her as an incompetent, ineffective fool, the prosecutor might admit that s/he has not yet seen the criminal charging documents, the relevant statute, nor certain evidence. If I have such information, I will gladly give the first two items to the prosecutor, and there is plenty of evidence I will give, too, if the prosecutor will easily obtain it from the police. The prosecutor may see me as helping to lighten a heavy day's load of work. Then I might have the prosecutor's attuned ear more than the prosecutor who maintains a thick coat of armor and does everything to hide his or her vulnerability and need even to see the charging document and relevant statute, and scowls that the defendant is scum and "I admire you for being able to do such work, because I could not." When I visit a county that I do not frequently visit, some prosecutors and cops see me as an interesting curiosity, a change of pace from the usual gang of lawyers they deal with, particularly in some of the smaller counties where sometimes there is some more time to chew the tofu. That provides an opportunity to find points of genuine commonality to assist the persuasion process. Some clients think they need a lawyer who will go into the ring growling, baring fangs, and showing fresh blood on the fingernails. Other clients feel uncomfortable seeing their lawyers yuck it up with cops and prosecutors who are trying to get them convicted and locked up. I respond to my clients that the goal is neither to seek to draw blood that does not need to be drawn for the client's benefit, nor for me to find a new friend for happy hour. Instead, the goal is to harmonize my client's problem to my client's best advantage; if this can be done without harming the other side, wonderful; if this can only be done by seriously (and at all time ethically) damaging the other side, so be it. To reach that harmony, it is best that the prosecutors and cops be no further than arms length from me -- at least figuratively -- so that I may have a better understanding and anticipation of their plan of attack and of their strengths and weaknesses. Once an opponent gets farther away than arms length is when they can be at their most dangerous. My goal is to win through a path similar to tai chi pushing hands/sensing hands, and meanwhile to give the opponent little to push against as I seek to redirect the prosecutor with his or her own energy in the direction most

advantageous to my client. Jon Katz

Posted by Jon Katz in Persuasion at 00:01

Tuesday, October 14, 2008

Can lies be turned on and off?

Bill of Rights (From public domain.) Once a liar always a liar? How many jurors except cops from that maxim when the cop's lie is designed to elicit a confession to a crime? Last week, the District of Columbia Court of Appeals affirmed a conviction following a most egregious police lie to obtain a confession, but warned that the police tactics presented a close call. *Brisbon and Wonson v. U.S.*, __ A.2d. __ (D.C. Oct. 9, 2008). After a killing following shooter(s) firing into a crowd of people, police arrested Ronald Brisbon in neighboring Prince George's County, Maryland, obtained his agreement to be driven to the District of Columbia on his open arrest warrant for the case (rather than contesting extradition), and engaged in idle chatter while providing him a hamburger and driving him to the District of Columbia. Police kept Mr. Brisbon for many hours. He ultimately waived his Miranda rights (do not do that). They told him some truthful information about evidence they found at his home. Then came the cops' lies, as the court relates: "The detectives then began interrogating Brisbon, and, during the first fifteen minutes, Brisbon denied everything. Detective Irving told him that they had searched the house where Brisbon lived with his mother and grandmother and that the police recovered drugs and a shotgun out of his grandmother's house -- which was true -- and that his grandmother had got upset and was rushed to the hospital and that his mother was placed under arrest -- which was false. According to the detectives, Brisbon dropped his head and was quiet for a few seconds, then admitted that he did it, saying that he did not want anyone else to get in trouble. Detectives Irving and Credle insisted that Brisbon give them all of the details of the crime, because a blanket confession would not convince them that he had told the truth. The detectives denied promising Brisbon that confessing would aid his mother or grandmother. The interrogation continued for two hours, until, at around 9:30 p.m., Brisbon consented to a videotaped confession." Brisbon. The Court avoided determining whether Brisbon's confession was voluntary by instead deciding that the admission of his confession into evidence was harmless as to Brisbon: "We recognize that the question of voluntariness in this case is a close one, however, and do not decide it, because we can conclude beyond a reasonable doubt that even if the confession should have been suppressed, its admission was harmless. See *Arizona v. Fulminante*, 499 U.S. 279, 285 (1990) (admission of involuntary confession is trial error subject to harmless error analysis)." Brisbon. Brisbon proceeds to reverse the conviction against Brisbon's co-defendant, Wonson, where the trial court could easily have solved the problem by granting Wonson's rejected motion to sever his trial from Brisbon's. The D.C. Court of Appeals makes clear that Wonson's Constitutional rights were not violated by the playing of Brisbon's confession to the jury with redactions as to Wonson's criminal involvement, because Brisbon waived his Fifth Amendment right to remain silent and proceeded to testify that his confession was coerced and untruthful, and that Wonson had nothing to do with the crime. In making such a conclusion, the Court of Appeals quoted from the Supreme Court: "[W]here a co-defendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Nelson v. O'Neil*, 402 U.S. 622, 629 (1971)." Brisbon. Over Wonson's objection, the prosecution responded by playing Brisbon's unredacted confession, which implicated Wonson, where otherwise the evidence against Wonson was circumstantial. Based on the playing of Brisbon's unredacted confession, the Court of Appeals reversed Wonson's conviction, unable to find harmless error from this Constitutional violation. The Court of Appeals affirmed Brisbon's conviction, though. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 13, 2008

When a judge stops being an impartial adjudicator.

Â Bill of RightsÂ (From public domain.)Â When I started working as a public defender lawyer in 1991, I observed about fifteen minutes of a felony jury trial being presided over by a then-longtime sitting judge. I was astounded to see the judge -- in front of the jury -- silently and emphatically mouthing words, apparentlyÂ to coach the prosecutor during the prosecutor's cross examination, without any objection from defense counsel.Â I could not tell what the judge was saying, so perhaps the jury could not, either. However, the judge's actions clearly could have made the jury thing the judge was on the prosecutor's side. This was an older courtroom where the proceedings were only recorded by a court reporter's stenographic machine; there was no videocamera to record the judge's improper and silent actions. Â A few years later, I was questioning a witness in a civil litigation deposition when my opposing counsel entered several objections in a nasty tone of voice, and nearly screeched "GO AHEAD!" to try to cut me off from objecting to what I asserted was improper commentary to be presented by himÂ in front of his deponent client. However, when I read the deposition transcript, none of the opposing lawyer's nastiness shined through; he seemed like a master of avoiding a record of his nastiness, although I make it a practice to insist that the court reporter save the audiotaped proceedings for me to prevent such an escape. Â Thankfully, more courtrooms today are equipped with audiotaping to monitor judges' actions (although Virginia District Courts have no recordation of proceedings unless a party hires a court reporter). Sometimes judges' words alone show they have gone beyond the pale of providing a fair trial. Two such cases are last week's Antwan Derrell Smith v. MarylandÂ case and the eternally shocking John Howard Johnson v. Maryland case from 1999. Â In Antwan Derrell Smith v. Maryland, __ Md. App. __, 2008 Md. App. LEXIS 128(Oct. 6, 2008), the trial judge inÂ a murder case interjectedÂ suaÂ sponte with what the appellant counted to have been 125 questions of prosecution witnesses. Â Â Here is a prime example of the trial judge's interjections and his reply to objections thereto: Â THE COURT: Wait. Sir, that's the time that's recorded as to an incident occurring and I suspect that this might have occurred later than that incident. Is there any way you can double check to make sure exactly what time you encountered the car? Like, for example, when you got your central complaint number from the Dispatcher? You may be giving me an earlier time, is what I'm suggesting. Can you look it up?THE WITNESS:Â Â I would have to go back to the police station and look at the CAD inform ation, but I think the time that was used is the time the actual complaint num ber was pulled, sir.THE COURT: But if the complaint number was pulled because of something that happened earlier that evening, is there a way that you can reconstruct exactly what time it was that you stopped this vehicle?THE WITNESS: No, sir.Â [The defense objects to the trial judge's interjections as favoring sides and as removing the judge from the role of an impartial adjudicator.Â TheÂ judge replies:]Â THE COURT: Thank you. I don't believe that clarifying this issue shows a preference for the State. I think it's mutual. My twenty years of experience tell me that if there's some ambiguity in the times, we're going to get peppered with notes from the jury long after the witnesses are capable of testifying, so we cannot create side issues or extend the length of the trial (inaudible) by having witness [sic] explain what's obvious to every lawyer and every policeman, but it's not obvious to the people that don't work in the field how dispatch numbers are obtained, in terms of timing. It will prevent the jury from going off on a tangent. Thank you.Â Maryland's intermediate appellate court reversed Mr. Smith's conviction, but insodoing confirmed that judges have wide latitude to interject questions to witnesses so long as it is not done with the appearance of bias for either side:Â "[W]e distill the following principles regarding judicial intervention in the examination of witnesses. (1) The primary purpose of judicial interrogation of witnesses is to clarify matters elicited on direct or cross examination. (2) Judicial interference in the examination of witnesses should be limited and it is preferable for the trial judge to err on the side of abstention from intervention in the case. (3) Although the number of questions posed by the trial judge exceeds those normally asked by a trial judge, the sheer number, standing alone, is not determinative of whether reversal is warranted. (4) It is preferable for the presiding judge to afford counsel the opportunity to elicit relevant and material testimony prior to interceding. (5) Continued inquisitorialÂ Â participation in the questioning of witnesses runs afoul of the court's role as impartial arbiter, whether such questions are proper or improper, when they tend to influence the jury regarding the court's view of the testimony and evidence. (6) The most egregious manner of intervention is the trial court's personal injection of its views and/or attitude toward witnesses or parties or their theory of the case through intimidation, threatening, sarcasm, derision or expressions of disbelief, irrespective of the frequency or the point in time during or at the conclusion of direct or cross-examination of counsel. (7) If the direct and cross-examination of counsel is woefully inadequate, requiring extensive supplementation thereof, the preferred procedure is for the court to summons both counsel to the bench or in chambers and suggest how it wishes to proceed. (8) Greater latitude is granted to a trial judge based on the complexity of a case. Cardin v. State, 73 Md. App. 200, 232-33, 533 A.2d 928 (1987); Pearlstein v. State, 76 Md. App. 507, 515-16, 547 A.2d 645 (1988)." Antwan Derrell Smith v. Maryland.Â Maryland's Court of Special Appeals found the trial judge's questioning required reversal of Mr. Smith's conviction for the following reason: Â "The trial of a defendant must not only be fair -- it must give every appearance of being fair. Scott v. State, 289 Md. 647, 655, 426 A.2d 923 (1981) (emphasis added). As we have stated previously, trial court questioning 'should be achieved expeditiously . . . if at all, for a

protracted examination has a tendency to convey to a jury a judge's opinion as to the facts or the credibility of the witnesses.' Bell, 48 Md. App. at 678. The trial court's persistent questioning here, however well-intentioned, risked suggesting to the jury that the trial court wanted to elicit facts that fit into a distinct timeline that favored the State's case. As we mentioned, supra, the trial court's conduct, to be sure, in no way involved threatening, condescension, sarcasm, derision or visible disbelief of a witness' testimony. See *Vandegrift*, 237 Md. at 310-11; *Brown*, 220 Md. at 39. The court's interrogation was, however, acutely suggestive, coercive and manipulative. Neither Officer Goodwin nor Detective Bealefeld were evasive or equivocal witnesses, c.f. *Pearlstein*, 76 Md. App. at 515, and the trial court's protracted examination of both of these witnesses occurred before completion of direct and cross-examination. Moreover, the narrative and directive nature of the questions had the potential to divert testimony or sway the jury. Accordingly, we hold that, under the circumstances, the trial court abused its discretion in conducting the questioning of Officer Goodwin and Detective Bealefeld and, therefore, risked the appearance of partiality on the part of the court." *Antwan Derrell Smith v. Maryland*. In the above-discussed Smith case, the appellate opinion shows the defense attorneys always to have been non-confrontational with the trial judge in objecting and expressing their frustration with his improper and excessive intervention in the examination of witnesses. Fourteen years ago, a much more animated continuation of a long-running feud between a Baltimore City trial judge (who has been off the bench for a long time now) and a seasoned criminal defense lawyer played itself out before the jury's eyes, complete with the judge's not only finding the lawyer in summary criminal contempt of court several times in front of the jury, but even going as far as having him handcuffed and locked up in front of the jury (after having previously done the same to him out of the jury's view in the same trial). Fortunately, Maryland's highest court decried the trial judge's actions in no uncertain terms, and reversed the conviction, but only after Maryland's Court of Special Appeals had apparently affirmed the conviction. *John Howard Johnson v. Maryland*, 352 Md. 374, 722 A.2d 873 (1999). If the foregoing Johnson case were merely fictitious, it would make for pathetically dark comedy (and I lay the responsibility on the trial judge, even though the defense lawyer could have protected his client no worse had he toned down his language, as difficult as it probably was for him to have summoned a lower-key approach), including the following verbal duels between the defense lawyer and judge: [DEFENSE COUNSEL]: You want to take over the case? If you try the case for me ... you will lose it... [DEFENSE COUNSEL]: Judge, there's an extra chair down here if ... [DEFENSE COUNSEL]: Now, Mr. Jason, would you come to the jury box without pointing the gun at the jury and demonstrate --THE COURT: Maybe they'd like to point it at you as well as us. Come on, . . . let's not go back and forth.[DEFENSE COUNSEL]: You are unbelievable, Judge. Can I hold you in contempt of Court? *John Howard Johnson v. Maryland*, 352 Md. 374. I take it that the defense counsel previously had filed an unsuccessful motion(s) to have this trial judge recused from all his trials. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, October 12, 2008

We will be open Columbus Day

Â FYI, our law firm will be open on Columbus Day, October 13. Â The only reason thus far that I have identified to justify closing on Columbus Day is to give my staff a well-deserved day off. Other than that, I do not agree with the holiday, particularly when no federal holiday exists to remember the Native Americans who suffered tremendously from the lengthy brutal and unjust treatment that followed over the years and centuries after Columbus's arrival in the Western Hemisphere.Â Â Â As I understand it, Columbus was not even the first European explorer to find the Western Hemisphere. Perhaps all that was different about Columbus is that his arrival there led in rapid sequence to land grabs and dominationÂ in the hemisphere primarily by Great Britain, Spain, Portugal, and France. Jon Katz.

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

Friday, October 10, 2008

Why plead guilty when pleading innocent is not much more risky?

Photo from website of U.S. District Court (W.D. Mi.). Most people in my neck of the woods go to court without a lawyer for non-jailable criminal matters. However, even non-jailable convictions can come back to haunt people. For instance, a conviction for possessing a pot pipe is deportable for non-U.S. citizens, with no exceptions that I know of. Those with security clearances will also want to watch out. Moreover, today's non-jailable conviction can lead to harsher sentences for any future convictions. This week, I had two trials for non-jailable criminal matters. The first trial was in Virginia, for making a loaded handgun recklessly available for the use of a minor under fourteen years old. We lost the trial, but my client has the option to appeal for a de novo Circuit Court bench trial. Consequently, the District Court trial was a dry run to be all the more prepared for what the prosecutor and cops will do at any retrial on appeal. The trial also gave me a chance to have my first trial against this particular county prosecutor. My second non-jailable trial this week was a Maryland marijuana pot pipe prosecution. In Maryland, a first-time drug paraphernalia conviction is punishable only by a fine up to \$500 and court costs of under \$100. However, I had one judge several months ago who was convinced he had the authority to place my client on supervised probation for first-time drug paraphernalia possession, and to order drug treatment, in apparent consideration that he had not ordered my client to pay the full statutory maximum fine. The judge disregarded my insistence that my client refused to agree to probation and would pay the maximum fine instead. We successfully appealed. In any event, a second-time drug paraphernalia possession in Maryland carries up to two years in jail. That is enough reason to hire counsel for one's first paraphernalia possession charge. In this week's drug paraphernalia trial, I lost my motion to suppress the stop of my client's car. Over my objection, the stopping police officer claimed my client's speed was excessive and testified to the results of his speedometer pace of my client's car, even though the officer did not have his speedometer calibration documentation with him. I lost my motion to suppress the search of my client's car, even though the judge's basis for allowing the search seemed only to have been on testimony of a "faint" odor of marijuana coming from my client's car. One officer testified that he found a pipe and cigarette butt in my client's car. The prosecutor then told the judge he had no further questions for his last of three witnesses, and moved into evidence a bag containing the pipe and cigarette butt, and a chemist's report saying the pipe had not been tested and a confirmation of marijuana in the cigarette butt. As I always do, I went to the trouble of having the court and the prosecution receive my timely demand that no chemist report come into evidence without the testimony of the drug chemist. I was hired in the nick of time to meet the five-day filing deadline for such a demand. When the prosecutor showed me the consolidated exhibit, I told him: "Please follow the law by removing the chemist's report, because I filed the chemist demand on time, five days before trial." Instead, the prosecutor proceeded to tell the judge he thought my deadline for filing the chemist demand was fifteen days, under the prosecutor's reasoning that five days was not sufficient notice to the prosecutor to obtain the chemist's presence. I replied: "Judge, here is the statutory provision showing a five-day filing deadline. The legislature has spoken." The judge then agreed that the deadline was five days, and that he was granting my motion. I then said I was making a motion for judgment of acquittal. The judge replied that he had already granted it, which is curious, because he did not give the prosecutor a chance to argue against such a motion before acquitting my client. It was an acquittal nonetheless in a trial that had not been going my way until then. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, October 9, 2008

We are closed today for Yom Kippur.

Â Today is Yom Kippur, the Jewish day of atonement, when I will continue my three decades-long practice of a completely dry fast from sundown last night to sundown tonight; focusing on harmony withÂ others,Â nature, and myself;Â and focusing on continuing to improve daily in treating my fellow humans and other living things justly, caringly, and kindly, including a continuation of my two decades of strict vegetarianism. Â Â Â OurÂ law firm will be closed today, and will reopen tomorrow on October 10,Â to serve you.Â Jon Katz.

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

Wednesday, October 8, 2008

When indigent criminal defense funding dries up, shrink the criminal justice system.

Clarence Gideon. Two weeks before I was born, the United States Supreme Court mandated that the states provide lawyers to indigent criminal defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). (Listen to the later-to-be, short-lived Justice Abe Fortas -- when he was a name partner at one of Washington's still most highly-regarded huge corporate law firms -- arguing for inmate Clarence Gideon who beat all odds by obtaining the rare right to Supreme Court review after having filed a pro se petition for writ of certiorari. It is remarkable to hear the justices barely interrupt Mr. Fortas for a very long time, while still handing him a unanimous victory.) The National Legal Aid and Defender Association asserts that: "The right to counsel is the most fundamental procedural safeguard to assure a fair trial in which the government and the accused stand equal before the law. Unfortunately, there is pervasive evidence that Gideon's constitutional promise is not being fulfilled in many states and counties around the country. Some fail to provide adequate funds, standards, training and staffing for public defender offices. Other areas do not have public defender offices and instead contract with the lowest bidder to provide representation for defendants who cannot afford lawyers. There are even jurisdictions where some defendants are not provided with lawyers, even though the Constitution requires it." Two weeks ago, Maryland Public Defender Nancy Forster announced that her office will no longer provide funding for private lawyers to represent indigent defendants whom the Public Defender's Office cannot represent due to conflicts of interest arising from the office's representation of their co-defendants. This move follows a request from the state's budget office for the Public Defender's Office to find a way to cut \$1.3 million from its already underfunded budget. (Of course, the legal system should insulate public defender offices from such pressure from the same executive branch that is involved in prosecuting public defender clients. Moreover, I am dumbfounded why the Maryland Public Defender's Office (and others around the country) have letterheads and, with Maryland, a website that prominently list the governor, no differently than any state agency. Of course, there is an entirely different issue about jurisdictions where chief public defenders run for their office (campaigning under the slogan "Vote for me, and I will save taxpayer money by underfunding my office"?).) Beforehand in Maryland, all indigent defense funding flowed through the Public Defender's Office, where I worked from 1991 to 1996. I understand that one or more previous chief Maryland Public Defenders took the same approach of ceasing funding for private conflict attorneys due to underfunding, only to have the state government cough up more money, which is not to say that the new funding was always sufficient to effectively defend Maryland's indigent criminal defendants. I have previously handled a few such conflict cases, not for the money (which is low even at the now-increased \$50 hourly rate, ordinarily with a low maximum fee cap), but because of the deep importance of continuing to help level the playing field for indigent criminal defendants versus those who can afford lawyers (but still leaving plenty of criminal defendants who do not qualify under the public defender guidelines but who are too poor to hire qualified private counsel.) Last Friday, Robert M. Bell, who is the chief judge of Maryland's highest court, expressed his concern about this indigent funding crisis, in this letter to Maryland's governor and the heads of both chambers of its legislature. A Judge Bell and everyone else, I have an additional proposal for solving this indigent defense funding crisis: As I have said again and again, we will have a much less expensive and higher quality criminal justice system -- including on the indigent and non-indigent criminal defense side -- once we radically shrink and reform the criminal justice system into one that legalizes marijuana, prostitution, and gambling; that heavily decriminalizes all other drugs; and that sharpens the teeth of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. Until such radical reform takes place, we will continue to have a criminal justice system that is grossly unjust, antithetical to a free and democratic society, broken down, overly expensive, and overly socialistic. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, October 7, 2008

Max Hardcore sentenced for obscenity conviction.

Photo from website of U.S. District Court (W.D. Mi.). What is obscenity? Nobody knows until the jury rules, because obscenity cannot be sufficiently defined. A jury across the courthouse hallway might even reach an opposite conclusion. Therefore, the Supreme Court's obligatory Miller obscenity test gives little First Amendment protection. The Miller doctrine requires 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) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15 (1973). If one self-censors to avoid the personal and financial cost of defending against an obscenity prosecution, the First Amendment is dishonored and battered. If one does not self-censor and is prosecuted for obscenity, the First Amendment also is dishonored and battered. Do not think for a moment that obscenity prosecutions will be limited only to such over-the-edge videos as those from Extreme Associates and Max Hardcore, both having branded themselves for rough and often degrading sex. Prosecutors focus on such extreme sexual material to avoid acquittals from jurors seeing images found on hotel pay-per-view, and to fly under the radar of a larger public outcry against such prosecutions, as prosecutors move closer and closer to prosecute films that depict sex that is little different than the activities of millions of married couples. Last week, Paul Little, who uses the stage name Max Hardcore, was sentenced to forty-six months in prison -- the bottom of the advisory federal sentencing guidelines (disclaimer: the links in this paragraph go to Adult Video News, which includes photos of suggestively-clad women) -- for his obscenity conviction after a jury trial last June 2008. I previously blogged about the case here (scroll down below the entry for today's blogpost). As defense team lawyer and class act Louis Sirkin told AVN, Max's previous drunk driving conviction bumped him from a level one criminal history to a level two criminal history, and thus increased his sentencing guidelines. This is among the reasons I warn my clients against jumping too quickly at pleading guilty to any crime. Here are some documents related to Max Hardcore's conviction and sentencing: - The court's denial of a new trial, which has a particularly noteworthy discussion of an allegation relating to a juror note that the judge allegedly failed to promptly disclose to the parties: The third instance of jury irregularity cited by Defendants occurred on the final day of jury deliberations, when a juror wrote a note to the Court requesting to speak to the Court because she had been fired from her job the night before. Defendants fault the Court for not speaking with the juror until after a verdict was reached in the case and for not notifying the parties of the note. Defendants argue that these failures prejudiced the Defendants. The Court disagrees. The note stated the following: "I wanted to know if I could speak to you regarding a matter that happened last night. When I got home from jury duty I received a phone call from my employer that he know [sic] longer wanted me to work for him. I feel it is because I have been on this jury. He tried to make other reasons for the termination but [illegible] of the things he said I know it was because of this. I was asked to call Ryan Barrack, an attorney in Clearwater who I will be meeting with. I was hoping we could talk about this." (Doc. No. 168, Exh. A.) As an initial matter, the Court notes that the juror did not ask to speak to the court immediately as Defendants suggest. The Court decided to wait until after the jury concluded its deliberations to speak with the juror, as the note concerned matters unrelated to the case and was purely a personal matter relating to the juror. Defendants seem to argue that had the Court spoken to the juror before a verdict was reached, the Court would have had to excuse the juror from jury service and declare a mistrial. This argument is wholly speculative. After the jury's verdict was published to the Court, each juror was polled as to whether the verdict as published was their verdict. Significantly, each juror including the juror in question said that the verdict as published was their verdict. The Court finds that Defendants have not shown that any of the above jury irregularities resulted in any prejudice to them or constituted a violation of their Sixth Amendment rights. It will be particularly interesting and important to see how the foregoing issue gets resolved on appeal. - The prosecution's sentencing memorandum. - Defendant's response to prosecutor's sentencing memorandum. Take note how the response tries to isolate the sentencing to activities in the Middle District of Florida. - The court's judgment against Hardcore. Finally, Tampa Bay Online relates the following exchange between Hardcore and the judge at sentencing: Hardcore said: "It just seems a very high price to pay, I think ... and I ask you to understand how much I've suffered." However, according to the news report, the judge was "unimpressed with Little's [Hardcore's] apologies, noting he had given interviews in which he ridiculed the charges against him. 'He was flip throughout the entire trial,' she said. 'He wasn't apologetic, as far as I can tell, until this morning.'" The article continues that Hardcore attorney James Benjamin "argued that the videos were not sadomasochistic. 'Urine and vomit, our argument is, isn't sadistic or masochistic.'" The judge replied: "'What about humiliation?' That, Benjamin replied, isn't in the legal definition of sadomasochistic. 'Clearly, there seemed to be pain,' [the judge] said. That was acting, Benjamin said. 'The person that was involved in the conduct sat [in court] with a smile on her face and wrote your honor a letter saying, 'Judge, this was a beautiful part of my life.'" "I don't even think this is a close call," the judge said. The videos portrayed 'sadistic conduct. This is clearly degrading, clearly humiliating and intended to be so.'" Hardcore lawyer Jeff Douglas said that before the jury ruled the prosecuted videos to be

obscene,Â Hardcore had "no way of knowing the activity he was engaged in was criminal."Â Now the case will be appealed. Thanks to Max Hardcore's defense lawyers -- allÂ fellow FALA members -- including those listed above, for fighting on his behalf and against the unconstitutional obscenity laws.Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 6, 2008

Mu: The power of nothingness.

The Chinese script for the character "mu," which means nothing. Why are so many intricate brush strokes needed to convey nothing? (The copyright was relinquished by this animated symbol's creator. The symbol also is available here.) At first blush -- at least from a traditional Western perspective -- irony would be apparent in the concept that nothingness can be powerful. However, I already know about the t'ai chi power of emptying one's mind, emptying one's leg as if a person is only standing on the remaining substantial leg, and not chasing the opponent's strength and energy. I also know about the power of being in trial with no baggage and to handle what is immediately at hand, in the now -- in the zone as my brother lawyer Mark Bennett calls it -- and being at once relaxed and powerful to take on any opportunity, apparent threat, or otherwise stressful situation. Furthermore, I know the power of overcoming fear by redefining life as being here now, with no coming nor going, no chasing nor being chased, no increase nor decrease, with a goal towards no fear even of injury and death, but instead being here now. Around fifteen years ago in the video store, my attention was drawn to Wim Wenders' Tokyo-ga. Seven years earlier, I spent two weeks in Tokyo on business, at once fascinated by the Buddhist and Shinto aspects of the culture and at the same time very clueless about the two. I focused instead on arriving early each morning at the bank I was auditing with my small team from Wall Street's Irving Trust Company that owned the bank, and spending some evening and weekend free time taking in the sights and sounds of the country. Nine years ago, I returned to Japan, this time on vacation, having started grooving on Nichiren Buddhism, and finding a Nipponzan Myohoji Nichiren temple in Osaka only after making several inquiries and finally being driven there by a man from the small market where I had bought some grapefruits for the temple, after having stayed for two days in Tokyo with a very kind and interesting family that follows the Nipponzan Myohoji path. Tokyo-ga is Wenders' tribute to, search for, and immersion in giant filmmaker Yasujiro Ozu (see one of his clips.) How curious that as I unsuccessfully did a YouTube search for the Wenders film that includes a botched-from-the-beginning store robbery by a man who has just been forced out of his home, I instead found a scene from Tokyo-ga that visits Ozu's gravesite. Instead of saying Ozu's name, his headstone has the above-displayed symbol "mu" (see this photo of his headstone, too), which I understand can be defined -- perhaps very imperfectly defined -- as "nothing". Here are clips from Tokyo-ga, in serial order: one, two, three, four, five, six, seven, eight, nine, and ten. What did Ozu mean by having his headstone say "mu"? Was this how he viewed the afterlife? As nothing? Was it a stunt to keep people thinking even after he departed this world? Was he a Buddhist, seeing that at least the Lotus Sutra -- which is particularly followed by Nichiren Buddhists -- focuses heavily on nothingness, including no attachment to one's body or ego, and no attachment to the suffering inherent with birth, sickness, old age and death? (See this essay on one of the people who was apparently instrumental in driving the foregoing updated 1971 translation of the threefold Lotus Sutra.) The senses of cinema webpage says: "Whilst in China during his war service, Ozu asked a Chinese monk to paint the character 'mu' for him (an abstract concept loosely meaning 'void' or 'nothingness'). Ozu died painfully on his sixtieth birthday in 1963 of cancer and his tombstone in the temple of Engaku in Kita-Kamakura bears the inscription 'mu' from the monk's painting that he had kept all his life." Using "mu" on the Western side is Douglas Hofstadter, in Gödel, Escher, Bach. What to do with all this mu? We can learn much from it. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Sunday, October 5, 2008

Rock Lobster

At the Trial Lawyers College, singing was encouraged and was everywhere, some of it good, some of it mediocre at best, and some of it drowning out the rest of the conversation too much. A good point was made that by doing more singing, we are better at getting our words and arguments not only past our lips, but in a full voice that carries the message where it needs to go. The passion of singing needs to translate into the passion of speaking in court. One of my favorite songs is the B-52s "Rock Lobster". The song's words do not seem to have much of a meaning. However, the song very much captures the time period, the type of music that was emerging and continuing for several years, and a way of dancing that took little else than hopping around. It was a late Seventies remake of the late Fifties' "Shout" by the Isley Brothers, at least with the parallels to everyone getting down to the ground at the respective commands of "A little bit softer now" and "Down, down, down" followed by "A little bit louder now" and, with "Rock Lobster" an increase in the music volume. Each song moves very much ahead, rather than meandering about. Unlike most of the top music hits, I never got tired of "Rock Lobster". "Rock Lobster" now is over thirty years old. For better or worse, the band went from a much more gritty and somewhat off-key early version (the off-key part possibly was intentional, considering that this was just a month before releasing their first album) followed by much tighter versions. Here are some video links to the song's performance: 1978 in Atlanta (where Fred Schneider reminds the crowd that servers work for tips); another early version; this polished version that looks made for MTV; and this version two decades after the first performance. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Friday, October 3, 2008

Poll the jury.

Photo from website of U.S. District Court (W.D. Mi.). Before going to trial with or without a jury, it is critical to have a good trial checklist. For jury trials, a critical part of that checklist is to have the jury polled in the event of an adverse jury verdict. Every criminal defendant has the right to require that s/he not be convicted unless his or her request is fulfilled to have each juror asked if the foreperson's verdict is the individual juror's verdict. See, e.g., *Maloney v. Maryland*, 17 Md. App. 609, 304 A.2d 260 (1973). Last year, fellow Trial Lawyers College attendee Mark Bennett wrote of a mistrial that would have been missed without a polled jury: "This morning the Houston Chronicle had an article about a health care fraud jury trial in federal court in which, when the jury came back with a guilty verdict, defense lawyer Joel Androphy ... asked that the jury be polled. Judge Werlein polled the jury, and one woman said, 'That's not my verdict.' Joel moved for a mistrial, which was granted. The accused will get another trial - not right away, probably, but, as Percy Foreman used to say, a continuance is as good as an acquittal, for as long as it lasts." Commenting on Mark's posting, another fellow Trial Lawyers College attendee, David Tarrell, added this mini-victory from a jury polling: "[T]he lawyer asked for it, a juror hesitated and then said 'No, that's not my verdict.' The defendant, who was obviously not cuffed during the trial, was now in handcuffs awaiting the verdict. The judge then sent the jury back and when they came back out, their verdict was unanimous to convict. The defense lawyer's motion for a mistrial was overruled by the judge, but it was a 'slam dunk' on appeal, given the juror's hesitation and the fact that she changed her mind only upon seeing the man cuffed between 2 deputies. It's a lesson I'll never forget, but I don't think it's requested often enough." Why would a lawyer not have a jury polled in a criminal case? Yesterday, Maryland's intermediate appellate court affirmed a conviction where the defendant alleged inconsistent jury verdicts (the Court of Special Appeals found no inconsistency) where he was convicted of child abuse but acquitted on assault and fourth degree sex offense counts. At least from the way the appellate court recounts the entry of the jury verdict, no jury polling was requested (although the Deputy Clerk continued the practice of inserting archaic language into the proceeding: "Ladies and Gentlemen of the Jury, harken to your verdict as the Court hath recordeth it. Your Foreman sayeth."): In our case, the appellant clearly did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency in its verdicts. The entire exchange as the jury came back into the courtroom was as follows: THE DEPUTY CLERK: Ladies and Gentlemen of the Jury, are you agreed of your verdict? THE JURY: Yes, we are. THE DEPUTY CLERK: Who shall say for you? THE JURY: Foreman. THE DEPUTY CLERK: Mr. Foreman, how do you find in the Criminal Trial 05-0520X, State of Maryland versus Darren Joseph Tate, Count One: Do you find the Defendant not guilty or guilty of child abuse by a family member? THE FOREMAN: Guilty. THE DEPUTY CLERK: Count Two: Do you find the Defendant not guilty or guilty of fourth degree sexual offense? THE FOREMAN: Not guilty. THE DEPUTY CLERK: Count Three: Do you find the Defendant not guilty or guilty of second degree assault? THE FOREMAN: Not guilty. THE DEPUTY CLERK: Ladies and Gentlemen of the Jury, harken to your verdict as the Court hath recordeth it. Your Foreman sayeth, in Criminal Trial 05-0520X, the Defendant is guilty of child abuse by a family member, not guilty of child abuse or fourth degree sexual offense and not guilty of second degree assault. And so say you all? THE JURY: Yes. THE COURT: Thank you very, very much, Ladies and Gentlemen. Have a nice evening. We won't call you again for three more years. Thank you. THE JURY: Thank you. THE COURT: Anyone need a ride to their car or anything? A JUROR: Is the shuttle still running. It's 6:00 o'clock. THE BAILIFF: It runs until 7:00. A JUROR: Okay. THE COURT: Thank you very much. Court is going to order a Presentence Investigation. I'll schedule this for sentencing on December the 30th. *Tate v. Maryland*, ___ Md. App. __ (Oct. 2, 2008). Writing for Tate's unanimous three-judge panel, Judge Charles E. Moylan, Jr. underlined: "In our case, the appellant clearly did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency in its verdicts." Clearly, Judge Moylan could not have meant that defendant Tate risked being convicted on either of the two counts for which the jury had acquitted him. After all, it is "settled that once the trier of fact in a criminal case, whether it be the jury or the judge, intentionally renders a verdict of 'not guilty,' the verdict is final and the defendant cannot later be retried on or found guilty of the same charge. And, contrary to one of the arguments advanced by the State in the present case, it is not necessary that final judgment be entered on the docket." *Pugh v. Maryland*, 271 Md. 701, 706, 319 A.2d 542 (1974). Perhaps Judge Moylan meant that the only way for defendant Tate to have set up a sufficient inconsistent verdict argument would have been to have waived his right to the final verdict, and to have given the jury a chance to re-deliberate. Do you know of any good reason not to poll a jury that returns a guilty verdict? Jon Katz ADDENDUM: I posted this blog entry to two criminal defense lawyers' listservs, asking if anyone knows of any reason not to poll a jury. Around five answered, and none gave a good reason not to poll the jury, except for the one respondent who said the only reason is to stop hearing the word "guilty". Thanks to those who responded, including the respondent drawing attention to the following Supreme Court case on the double jeopardy issue discussed in this blog entry: *Smith v. Massachusetts*, 543 U.S. 462 (2005).

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, October 2, 2008

"I want to refer to non-Latino Spanish-speaking lawyers."

Reality so often is more pathetic than fiction. Yesterday, I was talking with a woman on the way down the courthouse elevator. She works in the courthouse, and we spoke in Spanish, her native tongue; I do not have as much of a throughout-the-day chance to speak Spanish now that I am no longer with my former law partner, whose Spanish is impeccable and whose practice heavily involves the language. This woman said she was happy to meet an additional Spanish-speaking lawyer (my Spanish is intermediate, bolstered by a quarter century of practice), because some people sometimes ask her for names of such lawyers. Then came the often uncomfortable question: "Where are you from?" Some just want to know where I grew up. Others actually want to know my ethnic and/or religious background. Once when asked that question, the follow-up was: "Are you American or Jewish?" as if the two are mutually exclusive. The questioner had sold me a bottle of water at a New Orleans airport newsstand, pre-Katrina, and I stormed out labeling her out loud "Stupid! Stupid!", which was hardly in sync with my goal of a t'ai chi life twenty-four hours a day. To this woman on the elevator, I answered "Connecticut, and now in the Washington area a long time." She replied: "So, you are not born abroad?" JK: "That's right." She responded: "Good. I don't want to refer people to lawyers from Latin America [yet she was born a Spanish speaker]. They take advantage of their own." JK: "I've heard enough. Your words make no sense. Have a nice day." (Moreover, who can speak Spanish better than a native-born Spanish speaker?) Sadly, bigotry remains alive and thriving among too many people, even sometimes by people against their own ethnic group. Perhaps more sadly, too many people do not stand up to such attitudes. What to do about it? When many years ago I complained to a very selfless and capable public interest lawyer/leader/giant about ongoing rampant bigotry, he replied: "That is why we pursue housing discrimination and employment discrimination lawsuits." However, successful discrimination lawsuits alone will not solve the problem. People who express bigoted attitudes need to be addressed one-by-one, if they have the capacity to listen to reasoning. Addressing bigots can make waves. Make waves if that is the only way to address them. Do not just sit safely in the middle of a boat hoping it does not rock, only to hit a huge rock that tears apart your boat and sinks it anyway. How do you handle such situations? Jon Katz.

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

Wednesday, October 1, 2008

The dragnet of drug arrests.

DEA image in the public domain. In college, on-campus drug use -- and sometimes drug sales, apparently -- ran rampant. I would sometimes be right in the room or in the dorm hallway as others smoked pot or, in one instance, snorted cocaine. If I did not want to be a hermit, it was hard to avoid being with people who smoked pot; this was the early Eighties, and both pot and beer were very popular (and also unlawful for those under twenty-one to purchase). This also having been the Eighties, for small quantities of drugs, drug enforcement, criminal penalties, and collateral consequences were less harsh. Welcome to 2008, where few politicians and prosecutors have enough backbone to support legalizing marijuana, heavily decriminalizing all other drugs, and reducing the penalties for drugs, except that I credit those lawmakers and prosecutors who are at least willing to put some first-time drug cases (I only know of marijuana cases) into diversion to give a chance to avoid convictions, and to enable no convictions or less serious convictions for people who use marijuana for medical necessity. Back to my college experience being around people smoking marijuana, By merely being next to these people -- not even touching nor ingesting the substances -- I was risking arrest, prosecution, and possible conviction, because a drug possession conviction requires nothing more than proof beyond a reasonable doubt that the defendant possessed (defined as knowledge, dominion and control over the drugs) drugs (the prosecutor has the burden to prove the substance was the alleged controlled dangerous substance, ordinarily by bringing in the chemist if any drugs are left and seized). I could have testified until I was blue in the face that I had nothing to do with the drugs, but if I was not believed by the judge or jury, I would have been convicted. Fortunately, neither I nor the others around me were busted for drug possession. So-called controlled dangerous substances remain illegal, often with harsh penalties and tough collateral consequences for convictions, including risks to student financial aid, government security clearances, and risks to immigration status. If anyone needs a reminder about the risks of being a bystander when drugs are possessed, used or sold, just read this September 9, 2008, opinion from Virginia's Court of Appeals finding sufficient evidence to convict a woman for possessing methamphetamines and marijuana with the intent to distribute by having been present in the house where her fiance sold the items. *Dunn v. Virginia*, __ Va. App. __ (Sept. 9, 2008). The evidence may have been sufficient to prosecute Ms. Dunn for simple possession of the substances -- including where a small amount of methamphetamines was found in her jewelry or personal bag -- but the concept of allowing a conviction for intent to distribute just because she knows her fiance is distributing should be a sobering wake-up call to otherwise innocent people who hang around with people possessing or distributing drugs. Curiously, after a three-judge Virginia Court of Appeals panel ruled in Ms. Dunn's favor (by as little as a 2-1 vote), only one judge dissented in this en banc opinion. Query: What made the remaining judge(s) in Ms. Dunn's favor change their minds? It will be a boring world if people choose to avoid arrests by only associating with people as bland as Neil Sedaka, Lawrence Welk, and Pat Sajak hosting Wheel of Fortune. That may be enough of a good reason for legalizing marijuana and heavily decriminalizing all other drugs. Jon Katz.

Posted by Jon Katz in Drugs at 00:00