

Monday, December 1, 2008

Unusual judge heckled Mukasey the night he collapsed.

Eleven days ago, Washington state Supreme Court justice Richard Sanders shouted "Tyrant" to outgoing Attorney General Michael Mukasey after Mukasey allegedly drew laughter at a Federalist Society meeting when he underlined that the last time he checked, Al Qaeda was not a signatory to the Geneva Conventions. (The Federalist Society video does not appear to have picked up laughter, so either the laughter was just filtered out before the speech hit the Federalist Society's screen, it was not as loud as Justice Sanders asserts, or the truth lies somewhere in between.) Justice Sanders insists he left Mukasey's speech long before he collapsed, which is a curious assertion if the Federalist Society's video (omitting the collapse) is correct that the Geneva Conventions comments came at the last ten minutes of Mukasey's speech. In any event, the story raises a few issues and facts, including the following:

- As much as I am not fond of Barack Obama's choice of Eric Holder to be attorney general, the video of Mukasey's speech shows him to be a key cheerleader for Bush II's disregard for affording basic legal protections to alleged terrorists. The nation will be better off when Mukasey leaves office along with Bush II on January 20, 2009.
- The Federalist Society is a very influential networking group for those wanting Republican presidents to appoint them to positions on the bench and in the Justice Department.
- Federalist Society gatherings draw numerous (if not many more) Supreme Court justices, lower federal court judges, and state court judges.
- By his presence at the November 20 Federalist Society meeting and apparent involvement with previous Federalist Society activities (through a Google search), Justice Sanders apparently is a Federalist Society member. Will the Federalist Society try to purge him over his heckling, or does the society wish to portray itself as welcoming such a range of differing thoughts?
- By his own account, Justice Sanders took the Washington state Supreme Court bench in 1995 by election and has gotten re-elected every six years since then.
- Justice Sanders is outspoken, and has his own website.
- Justice Sanders filed a cert. petition to the United States Supreme Court after having been disciplined after his visit with inmates at a prison for those convicted of sexual offenses. By silence in Scotus Blog and Google, it seems the petition was denied.

Do any of you have further information on Justice Sanders? Have you argued before him or otherwise met or observed him in action? Jon Katz

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

Friday, November 28, 2008

Page number one, number two, or number three?

Underdog readers, lend me an eye or two. I have found a webdesigner to update my clunky self-created static webdesign circa 1999. After the designer sent me the first design, I asked about arranging for black typeface and putting in pictures of me and my staff, maybe with a slideshow, as well as automatic dropdown boxes. The sitehost working with the designer responded with this second design. The text and photographs in these two designs are just samples. I have not before circulated the second design, which I like better than the first. Responses to the first design, have been generally positive. However, one person said the first design looks like most other lawyers' websites and lacks a focal point. Another person said the feel of the first design is so cold that she would not want to hire such a lawyer. As a counterpoint, another person said he'd want a criminal lawyer showing such an image. I like the idea of a focal point, as would Chagall, but what should be the focal point? Enough of what I think. I seek your feedback, unvarnished and merciless. Thanks. Jon Katz

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

Thursday, November 27, 2008

Thanksgiving is bloodied by turkey corpses.

Regardless of their party affiliation, presidents each year "pardon" a turkey, only to leave 48 millions more for "Thanksgiving" slaughter. Does the title of this blog entry sound harsh? Would it sound harsh or even overexaggerated to turkeys? Would I prefer such harsh words to the massacre (should we read that as "murder"?) inflicted worldwide on billions of innocent mammals, birds, and fish each year, to satisfy the cravings of human diners? Would you be eating meat today if you were shown and told in advance since infancy what you were really eating and how the animals are slaughtered, including the blood, guts, and untold suffering? Is it anything but advertising euphemism that meatsellers cloak animal corpses in such code words as hot dogs, hamburgers, pork, beef, bologna, sausage, bacon, ham, meatballs, and meatloaf? Soon after graduating college in 1985, I could no longer resolve all the toil I had spent advocating for human rights while chomping on burgers, chicken, and tuna fish. I responded modestly by cutting out all red meat, to distance myself further from my relatives in the so-called meat food chain. Three months later, I was at the Carnegie Deli, and ate a corned beef sandwich -- one of the most delicious meat items in the world for me of all time, and a scent that still made me swoon before retching on my last visit there this year -- figuring (rationalizing may be more like it) that I already came across as peculiar to many, so why add to the perception of peculiarity? I finished off the corpse in no time, with the most delicious rye bread, pickles, and fries on the side. Meat-eating continued nagging at me. However, that did not stop me from increasing my array of meat and fish eating the following spring while on a dream business trip in Hong Kong and Japan, where for the first time in over six years I let pork and shellfish pass my lips, and indulged in sukiyaki made of prized Kobe beef. A year later, I finally swore off red meat for good. Cravings kept me with red meat that long. A year after that, I learned how disgustingly gelatin is made. Completely grossed out, I then cut off all land animals from my plate. Two months later, I went to the Baltimore aquarium, followed by a visit to Little Italy for dinner. I felt ill at the thought of ordering marinara and shrimp, after having spent time with so many amazing and feeling fish at the aquarium a mile away. I later learned that it is not only lobster, crabs and shrimp that face the most gruesome of boiled/steamed-alive fish deaths, as I watched a fish being scaled alive at a Chinese supermarket, to be told by its buyer that chicken also is more delicious by plucking the feathers when the chicken is alive. That was twenty years ago. I have never eaten meat fish or fowl again. Seven years ago, I cut eggs and milk from my diet. Egg-producing chickens and milk-producing cows get slaughtered for meat after they stop producing; their relatives who are not raised to produce eggs and milk get slaughtered earlier. Too many food-raised land animals are treated horrifically during their terribly short lives, including the calves who are slaughtered as babies for prized veal, after struggling in tiny cages in the dark without their mothers, iron or milk, to obtain the tender pink flesh prized by chefs and restaurant food critics. How does that bad karma not get transferred to the meat that is eaten? Human executions are excruciatingly painful, despite litigation geared to reduce the pain. No similar efforts are made to minimize the physical and psychological suffering of animals, as they are led to slaughter first seeing and hearing their brother and sister animals slaughtered before their very eyes. Unlike humans executed in American death chambers, food animals are methodically beheaded, stabbed, and killed otherwise. See this gruesome video giving a brief meeting of your meat. More videos are here. Even if most people are unwilling to become vegetarian, world hunger and food prices will still dramatically fall if people drastically reduce their consumption of meat, fowl, milk products and eggs. There has never been an easier, more healthful, or more delicious time to live vegetarian; even supermarket aisles have infinitely more vegetarian choices than just five years ago. Restaurants have more vegetarian options than ever before, including Burger King and Subway with their veggie burgers (may not be vegan, though, but it is a start). See how you feel about your health, your annual physical exam, the environment, the animals around you, and world hunger after making such a change in your eating choices. You may never turn back. For many years I kept my vegetarianism mostly to myself, figuring that everyone should be able to do their own thing. They may, including my own thing to speak up for the animals who cannot speak up for themselves. Happy Thanksgiving? Happy for whom? Jon Katz.

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

Wednesday, November 26, 2008

The junk science of breath testing: All the more unfavorable to black people and women?

Image from National Institute of Standards & Technology. Perhaps Connecticut DWI defense lawyer James O. Ruane overstates the matter by calling the Intoxilyzer 5000 KKK in a box. Certainly, breath testing for blood alcohol content is an oppressive junk science system that is perpetuated by court rulings that stand logic, truth, and the Constitution on their heads. Ruane makes the case for why the Intoxilyzer 5000 is more likely to give a falsely high BAC reading for black people. Ruane's expert witness Dr. Michael Hlastala says the same problem affects women who take the test. Thanks to Gideon for posting on this issue. Jay Ruane graciously e-mailed me his memorandum of law in this case, giving the green light for me to upload the filing. His legal memorandum references an attachment containing testimony of expert witness Hlastala. I did not receive that attachment. The memorandum addresses Dr. Hlastala's previous testimony as follows: "Dr. Hlastala has testified in Connecticut that the Intoxilyzer 5000 is biased against African Americans in that the lung capacity of the African American male is approximately 3% smaller than the Caucasian. This testimony is attached hereto as Exhibit A. Because of the physiologically smaller capacity an African American arrestee must expel a greater fraction of his lung capacity, the Intoxilyzer 5000 results are inflated by a factor of 3%. Moreover, the issue of racial bias rises to the fore in the use of the Intoxilyzer 5000. Dr. Hlastala opined that the distorting effect based on race was 3%. (T2B, p37) While at first sight this might appear to be de minimis, State should not countenance racial discrimination in any degree whatsoever." The foregoing use of the phrase "de minimis" raises all sorts of questions, which hopefully will be answered in favor of the defense. Jon Katz.

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

Tuesday, November 25, 2008

Lying cops exist.

Â Bill of RightsÂ (From public domain.)To say that no cops lie is to say that people do not grow old or die. As I have asked before, how on earth does one lie less by wearing a police badge? Am I the only one who believes that the vast majority of people lie frequently, and go well beyond so-called white lies? If that is true, then there is no reason to believe that cops are any more honest than those in the general population.Â Thanks to John Wesley Hall for posting a recent Chicago Tribune articleÂ that covers the testimony of former police officer Richard Droniuk in a police corruptoin trial.Â The Tribune recounts Droniuk testiifying,Â among other things, thatÂ "Officers carried a little crack cocaine to plant on suspects when searches came up empty and stole cash from drug dealers during raids and traffic stops. They also routinely paid informants, falsified reports, lied in court and even kicked back cash to a judge for pushing through a bogus warrant, Droniuk testified Wednesday in federal court."Â When a criminal defendant claims the cops planted drugs on him or her, do not be so quick to consider the defendant a liar.Â Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Monday, November 24, 2008

Barack Obama as Samuel Beckett in "Waiting for the Change"

Â Â Bill of RightsÂ (From public domain.)Â Waiting for GodotÂ is a masterpiece play by Samuel Beckett, about two men in inertia waiting for some being named Godot who has made no promise to arrive. The play is a precursor of sorts to Neil Young's "Wonderin", about a stalker -- I mean heartbroken man -- who is so heartbroken that he is in denial that the object of his love will never return to town. Â It now seems that Barack Obama is not only a fan of Waiting for Godot, but that he also has tried to cast us as unwilling participants waiting for what will not arrive. Change at the Justice Department's helm? Then, why did Obama name Eric Holder, who with the Clinton administration took the easy approach to seek to lock up people, rather than to find a way out of a criminal justice system that by now overburdens cash-strapped governments and that apparently ensnares at least one percent of the American population?Â Change in the State Department? Then why did Obama name Hillary Clinton, who has never distanced herself from the policies of Bill Clinton, which included bombing -- or clearly giving the green light to NATO forces to bombÂ -- the Serbian state television headquarters during the United States' fighting against Serbia, which did not create any warm and fuzzy feeling about how committed he was to protecting free speech and free press in the United States. Â I have an idea, Mr. Obama. Just change your mind, and go back to the drawing board with your picks for Attorney General andÂ Secretary of State. For Attorney General, I suggest considering Laurence Tribe, Nadine Strossen, and Arthur Spitzer. For Secretary of State, I suggest considering Jimmy CarterÂ or Dennis Kucinich, despite their many flaws.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:10

When a corporation responds with silence to a racial slur.

Image from NASA's website. Â As Johnny Cash sang, "bad news travels like wildfire, good news travels slow ."Â The Journeys shoe retailer apparently disagrees with Mr. Cash's sage lyrics; or else has weak, incompetent, or non-existentÂ public relations advisors; or else discovered that the following problem arose in higher corporate echelons than as merely an aberration at just one retail store unit. It seems beyond dispute that on October 17, 2008, at Journeys' store number 1166 in Overland Park, Kansas, an African-American man returned a pair of athletic shoes to Journeys for a refund after having found a better price, only to then receive, along with his refund, a return receipt saying "DUMB N----R" under theÂ section for "CUST".Â The newscast on this incident is here, and the printed story is here. Â Over a month after this incident, the videoÂ of the event was forwardedÂ this past FridayÂ to a national trial lawyers email listserv that I am on. Not knowing anything else about the matter at that time, I visited Journeys' website only to find absolute silence there on the matter. Consequently, this past Friday, I sent the following online message to Journeys: "To Journeys- I would have thought that yourÂ website would have had an immediate explanation for the "dumb N----r" receipt referenced in this story: <http://www.kmbc.com/video/17768384/index.html>." On November 23, I received the following canned reply from Journeys' owner GenescoÂ (including the quotation marks, for inexplicable reasons): Â From: Journeys Product [mailto:JourneysProduct@genesco.com] Sent: Sunday, November 23, 2008 2:46 PMTo: jon@katzjustice.comSubject: Re: Journeys User CommentsÂ Â CORPORATE STATEMENTÂ Â "While we are continuing to investigate this incident, it now appears that anÂ employee in one of our stores entered highly inappropriate statements in a form used to process a merchandise return.Â Needless to say, such an act was not authorized by Journeys, and will not be tolerated.Â This employee has been terminated.Â At Journeys, we pride ourselves on valuing and respecting every customer.Â We are shocked and sickened that a former associate could be responsible for an act so out of keeping with our culture and our values.Â We profoundly regret this incident."Â Â Who is handling Journeys' public relations? Elmer Fudd? Who else could be the company's public relations people when the foregoing email reply parrots back the very same statement issued by Genesco over thirty days ago? At least ABC news online last month reported that the customer's motherÂ "said they have gotten apologies from both the store's company and the mall managers. She also said that she knew of no other similar incidents but that she believes that most people never look at their receipts."Â Â Apologies are easy to make. It takes more effort toÂ explain how the snafu was not prevented in the first place, why the snafu completely violates the company's core values and training (or else why the company waited until now to fix the problem) implement effectiveÂ safeguards for such incidents not to be repeated and to let the public know of those safeguards. Â HaveÂ Genesco's lawyers mis-advised the company to remain silent on the matter beyond the foregoing by-now tired and rather empty written statement? That would sound like bad advice. The cat is out of the bag, and the company's ongoing silence isÂ not going to re-bag the cat. Â If Journeys is not going to try to get a handle on the story, the blogosphere has already stepped into theÂ fray with a slew of blogposts on the scandal. Â Never underestimate the influence of the blogosphere. Â Â ADDENDUM: November 25, 2008. Did intention, inattention, poor judgment or a combination of the three lead Journeys' owner Genesco to bury its online apology on this matter? Journeys' websiteÂ remains silent on the matter. Owner Genesco nested an apology into its media links, rather

than including the matter on the news section of its frontpage or anywhere else in its front webpage. At least Genesco goes into further explanatory detail than the above-listed lame corporate statement. The online apology says that, previous to this incident, an employee bypassed the company's computerized refund system by inputting a fictitious phone number and the racial slur. Genesco asserts said employee was terminated on other grounds before the current incident. The receipt that led to the above-described Internet onslaught, says Genesco, was generated by a different employee who input a fictitious phone number to generate the refund, thus automatically having the slur reprinted; that employee, says Genesco, was terminated for bypassing the company's refund rules. Genesco claims it is working technologically to prevent employees from bypassing the computer system. However, technology does not teach racial sensitivity. At best, technology can only foreclose a technological route to communicate racist views. Jon Katz.

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

Sunday, November 23, 2008

When a new generation arises early Saturday to fight the drug war.

Â Bill of RightsÂ (From public domain.)Â A marijuana defense client one day suggested I not clump all frequent marijuana users as stereotypical laidback potheads. Knowing that frequent potsmokers come in all different shapes and flavors, I used the stereotype in an effort to figure out why my frequent-potsmoking client was so highstrung.Â Of course, he would have been more highstrung had he not been a marijuana smoker; this was his medicine. Â Are legalization efforts for medicinal and recreational marijuana moving more slowly because of stereotypes of potheads of the variety of Cheech and Chong in Up in Smoke? (What do you think of this clip?) I would hope not. For one thing plenty of medicinal and recreational potsmokers smash such stereotypes. For another thing, even if every potsmoker matched such a stereotype, that would be much preferable to the violence and other damage caused by so many people who abuse alcohol. Â Helping further to smash such stereotypes were the approximately 150 to 200 peopleÂ who appeared before 10:00 a.m. yesterday morning for the second day of the tenth national conference of Students for Sensible Drug Policy at the University of Maryland. When I was in college, it was tough to get me anywhere that early on a Saturday morning. Â I only got to stay at the conference less than two hours, because I was with my young son. However, for a boy as active as he is, I was taken at how attentive he was to the events, for the first half hour. The speakers I heard addressed matters that I mainly had heard before, but these were important talking points for the attendees to know for spreading the word of drug policy reform. Â At the conference, I met and re-met the following folks: Â I re-spoke with Kris Krane, who heads the SSDP. Catch Kris here, debunking any value in parents forcing drug tests on their children. Â First and foremost, for the first time I met fellow blogger Pete Guither of DrugWarRant. Yesterday, Pete entered some blog entries about the SSDP conference as events unfolded. His drive from Illinois to Maryland was slowed by accidents and snow in western Maryland. but he made it. I would have liked to have talked to Pete longer than exchanging some pleasantries, but I was due back home. Speaking of blogs, check out the SSDP's Dare Generation Diary. Â I met Drug Policy Alliance Executive Director Ethan Nadelman, who is a very good spokesperson for drug policy reform. Â I again bumped into Kevin Zeese, who heads Common Sense for Drug Policy. Kevin co-founded the then-named Drug Policy Foundation. Â I also again bumped into my business neighbor Eric Sterling, who heads the Criminal Justice Policy Foundation. Â As an entertainment bonus, I met late-night infomercial huckster Matthew Lesko, who never leaves home without a custom-made suit laden with question marks. It seems that his son is involved in the SSDP.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Friday, November 21, 2008

You must remember best; a breast is just a breast; the fine's a nasty fine.

If Virginia's "Virtus" can bare a breast on the state seal, why cannot Janet Jackson do the same, penalty-free, during the Super Bowl halftime? See more here. Friends, opponents, and Obama, lend me some justice. On the beaches of France, Italy and beyond, countless women exercise the same right that men have to bare their breasts. If women have to cover their breasts in public, then men should have the same obligation. Why does such an obsession remain among so many Americans to suppress breasts? Perhaps there would be fewer people having sexual hangups and committing sexual assault if America's rampant official prudery were thrown out the window, including removal of anti-breast laws, obscenity laws, anti-prostitution laws, and laws suffocating the ability of strip clubs and adult video stores to operate. As to a recent development in this arena, do not let the Federal Communications Commission get away with wasting our tax dollars, justice, and common sense to seek Supreme Court review of the Third Circuit's magnificent July 2008 reversal of a half million dollar FCC fine against CBS for Janet Jackson's exposure of her right breast for nine-sixteenths of a second during the Super Bowl until CBS cut the image. (Had she exposed both breasts, would the fine have been doubled?) Barack Obama did not seem to speak much, if at all, about First Amendment protection during the campaign. However, he did talk repeatedly about change. Mr. Obama, it is time to change the decades long tradition of FCC censorship and prudery. Alternatively, if women were polled about the laws mandating covering their breasts in public and fining broadcasters for their exposure during times that children are awake, how would they vote? Barack Obama's transition team is reviewing which executive orders from the Bush Administration (and from administrations previous to that, too?) to scrap. While the transition team is at it, time is beyond ripe for Obama to completely overhaul FCC censorship and to push to change statutes that enable such censorship in the first place. Now also is the time for Obama's team to push to eliminate the obscenity laws while they are at it. Barack Obama: Let us see such good change. Jon Katz ADDENDUM: Thanks to SCOTUS for blogging on the FCC's cert. petition in the Janet Jackson fine case. Thanks to Herman Hupfeld for inspiring the title of today's blog entry.

Posted by Jon Katz in First Amendment at 00:00

Thursday, November 20, 2008

Waiting for Melendez: The Confrontation Clause Revisited.

Â Bill of RightsÂ (From public domain.)Â Sometimes theÂ United States Supreme Court does true justice for criminal defendants. *Miranda v. Arizona*Â remains the best protection from the CourtÂ for suppressing coerced statements. *U.S. v. Booker*Â and its progeny led more judges to sentence below sentencing guidelines and prevented appellateÂ courts from changing such departures. *Crawford v. Washington*Â put stronger teeth into the Sixth Amendment right to confront the witnesses against a criminal defendant, so long as testimonial evidence is involved. Â Being only four years old, *Crawford* spells a radical overruling of the 1980Â *Ohio v. Roberts*Â case that took an overly-crabbed view of the Confrontation Clause. Because *Crawford* is so relatively new, and because it departs so radically from what judges and the vast majority of lawyers learned in law school, judges must not only be educated about *Crawford*, but also divested of any temptation to do mental gymnastics to issue rulings more crabbed than *Crawford* dictates. Â *Crawford* only gives cursory direction about the difference between testimonial evidence -- which receives *Crawford*'s protection -- and non-testimonial evidence, which does not receive *Crawford*'s protection. With oral arguments on November 10, 2008, theÂ United States Supreme CourtÂ further visited the meaning of "testimonial evidence" inÂ *Melendez-Diaz v. Massachusetts*Â (Supreme Court No. 07-591), which challenges a Massachusetts appellate decision that drug certificates of analysis "are akin to a business or official record, and therefore, would not be subject to the holding in the *Crawford* case."Â Even pre-*Crawford*, I have obtained many successes defending against Maryland state drug prosecutions, based on Maryland's statutory law keeping drug certificates of analysis out of evidence if the defense files a demand for the chemist's testimony at least five days before trial and if the chemist does not appear at trial. The neighboring District of Columbia Court of Appeals views drug certificates of analysis as containing testimonial evidence under *Crawford*. The Virginia Supreme Court acknowledges the latter view in *Thomas v. U.S.*, 914 A.2d 1, 20Â (D.C. Cir. 2006), but rejects it. *Magruder v. Virginia*, 275 Va. 283 (2008). Nevertheless, the latter *Magruder* case gives the defendant the right to have the chemist testify, but does not seem to make clear whether such a right may be exercised merely by filing a demand for the chemist's presence at trial, versus requiring the defendant to take the responsibility of having the chemist subpoenaed to court. Â Hopefully the Supreme Court's decision in *Melendez*Â will breathe more expansive life into *Crawford*. Considering the 7-2 vote in *Crawford*, with the seven-justice majority still sitting on the Supreme Court and the remaining two gone from the Court -- the Court should be expected to give *Crawford* stare decisis effect. Further supporting thatÂ the Supreme Court will not retreat from *Crawford* is *Davis v. Washington*, 547 U.S. 813 (2006), where an 8-1 majority of the currently sitting justices reversed a conviction obtained after the introduction of evidence from a police interview of an alleged crime victim after the crime already had occurredÂ (but also where all nine justices affirmed a conviction obtained after introduction of evidence of a 911 caller's identification of the defendant as committing the reported crime that was then in progress). However, the foregoing considerations do notÂ answer whether the Court will reverse the Massachusetts appellate court's decision in *Melendez* that drug certificates of analysis do not constitute testimonial evidence, and, therefore, fall outside the protections of *Crawford*. Â Massachusetts' attorney general's officeÂ wants the justices to worry that a Supreme Court victory for *Melendez* will causeÂ drug chemists to spend more time traveling to and being in court than testing alleged drugs. However, such concerns should not trump the Confrontation Clause. Nothing in the Constitution mandates the insane drug war that drains cash-strapped governments' coffers, so the drug war cannot be permitted to trump the Constitution, even though too many judges permit that to happen with the Fourth Amendment.Â Besides, as I repeatedly have urged, we need to legalize marijuana now and heavily decriminalize all other drugs. Following such an approach will reduce the number of drug prosecutions, and will thusly reduce the need to have so many tax-paid drug chemists in the first place. Â Here are some useful links in the *Melendez* case: SCOTUS Blog's links in the case; transcript of the Supreme Court oral argument; SCOTUS Blog's coverage of the *Melendez* oral arguments; including Justice Scalia's questions favoringÂ *Melendez*'s argument that certificates of drug analyses constitute testimonial evidence; *Melendez*'s brief; and Massachusetts' brief.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, November 19, 2008

The illusion of "I want to get it over with" / Giving clients the confidence to be more patient than that.

Â Â When someone says "I want to get it over with," is the person doing nothing but merely chasing after an illusion? Â Let us consider the ultimate effort to get it over with: suicide. My Â spiritual guru and friend Jun Yasuda told me that one day a man walked up to her teacher, the late Â Nichidatsu Fujii Guruji, and proclaimed that he was going to kill himself. Perhaps against the advice of those at suicide helplines, Fujii Guruji laughed, and said something along the lines of: "You think it is that easy to get away from your problems?" Of course, Fujii Guruji and Jun-san believe in reincarnation. I did not learn whether this man ultimately decided not to kill himself; because of their belief in reincarnation, I do not know how much that question mattered to Jun-san and Fujii Guruji. Â Whatever the inclination might be for people to confess their suicidal plans to Â Nipponzan Myohoji clergy, on a separate occasion, a man approached Jun-san, telling her his plan to kill himself. Her verbal reaction was along the lines of: "Great. If you are going to kill yourself, you will no longer need food, so you might as well fast." He did fast, and he returned to Jun-san telling her that during his fast he decided not to kill himself after all. Â We are so cluttered up with excess junk, psychologically, physically, and spiritually. When a person fasts -- and the fast can be enhanced by Â a vacation from Â the Internet; phone; all other technology driven by electricity, batteries, and petroleum; Â and Â newspapers -- s/he has no choice but to slow down due to the reduced physical energy caused by the fast. With such slowing down comes the opportunity to empty the excess mind junk Â and spiritual Â junk. Competing with the benefit of slowing down is the tug-of-war often presented to -- but avoidable by -- trial lawyers with the constant demands to drive to Â all sorts of court appearances (and then often to wait and wait in court); Â to visit clients in jail and to meet with them in the office and offsite; Â to meet merciless court filing deadlines for motions, opposing motions, and appellate briefs; and to investigate and prepare for clients' cases, while still meeting the demands of the lawyer's personal life. Â The trial lawyer's time and personal challenges are well capture by my late friend John Johnson in his poem "A Meeting with Mother Earth," including this line: Â "The life of lawyering is filled with noise and turmoil. Peace is hard to find - even in seeking after justice. Modern mankind runs amok in anxious pursuit of an elusive technological happiness..." Â No matter how much stagefright a lawyer might have about a case -- and it is critical for lawyers to adjust their lives and relationships with the world and themselves to diminish those fears -- a criminal defense lawyer's client is likely to be more fearful than that. The more the lawyer earns the client's trust, confidence, and comfort, the more the lawyer will help not only to reduce the client's fears, but to help the client make decisions from a position of strength, patience, and full willingness to share all ideas, concerns, questions and fears with the lawyer. For a lawyer to reach such a quantum level with his or her client, nothing substitutes for spending quality time with the client, Â with the lawyer listening empathetically, actively, respectfully, Â and deeply, and responding empathetically and Â with the best and directly gentle of bedside manners while seeing the Â client as the lawyer's equal. Investing such time Â and energy is a commodity that too many lawyers fear investing, lest they have insufficient time left to do their other work and to earn a living. However, nobody ever said that being a criminal defense lawyer is an easy ticket to financial stability. Moreover, the lawyer who puts clients ahead of money will earn more money or other good fortune Â in the end than the lawyer who does the opposite. A key approach to earning a client's trust, confidence, and comfort is for the lawyer to admit his or her own weaknesses, concerns, and fears. Otherwise, the client will know the lawyer is hiding something, and will worry that the lawyer is hiding something more monumental than it is. Yes, opening up with clients in this way may lead the client to bolt to another attorney, or to need extra time to get the client to center. However, there really is no other good choice for the lawyer. This approach is different than the lawyer saying s/he feels like a loser or is a loser. It can start with just saying to the client something as simple as: "Because I have rarely been before this judge, I am going to talk with the lawyer over there -- who appears before this judge all the time -- to get that lawyer's thoughts on the approach I am inclined to suggest to you." If my client responds that s/he wants to reschedule the case to get a lawyer who knows what the hell s/he's doing, I might respond: "If you think you will be better served by a lawyer who knows this judge better than I, that is fine. Then again, if your case is postponed, you may have a different judge. It will take just one minute for me to get the information I need about the judge." Such a response keeps me on my client's side, so that the client does not get distracted about whether I am battling my client. Sometimes the client's stated doubts and questions come with more desperate-sounding words and a more shrill tone of voice. Remember, the client is not there for the lawyer, even though it is nice when a client shows some caring for the lawyer. The client is in disharmony and possibly some or much pain, and does not care who helps him or her dig out of a hole, just as long as the client has confidence that the lawyer will dig the client out of the hole, or at least get the client closer to a view of the sun. Â A lawyer should not presume to know how the client defines his or her hole, and the image of getting towards the exit from the hole. For some clients, the path may be to seek an acquittal. For others, the path may be to minimize the exposure to incarceration as much as possible. For others, the path might be to reduce the collateral fallout of the case on one's personal life, career, or immigration status. As simple as it may sound, a lawyer will not know what his or her client wants unless the lawyer gives the client trust, confidence and comfort in the lawyer to fully open up to the lawyer, and unless the client knows that the lawyer will

listen with full focus, with full empathy, with full clarity and understanding, and without any scolding, berating, or demeaning. For a lawyer to reach such a result, nothing substitutes for giving the client time and full attention, holding all phone calls, and, if the client is jailed, to get the most quiet, confidential, and comfortable meeting space available for as long as needed. Nobody said, either, that the lawyer and client cannot intersperse the conversation with such diversions as humor, playing Nerf basketball, or going for a walk on a beautiful day, and sometimes just taking time out for a few hours on a weekend morning or afternoon, or after hours, just to get to know each other more on a personal level without needing to discuss the case. A lawyer cannot obtain the full trust, comfort and confidence with a client if the lawyer does not try to do the same with everyone. That is not to suggest spending two hours extra with a cabdriver to hear the person's misery and woes. It does mean that if the lawyer yells his or her head off at the Internet company for passing the lawyer from one customer service representative to the next without returning the Internet connection, that negative energy will carry itself into the lawyer's dealings with the client, and the results will not be good. If I had a dollar for every time that a client told me "I want to get it over with," I would be able to take several years sabbatical canoeing, hiking, and playing in the magnificent wilderness. Getting it over with is an illusion, of course. If getting it over with amounts to a guilty plea for no jail that day, the danger looms of jail for any future probation violation, for a more severe sentence for any future convictions, and for extra hassling from any cops who happen upon the person and learn of his or her criminal record. In order for the lawyer effectively to paint for the client a picture of the illusion of getting it over with, the lawyer must start from the very beginning of the lawyer-client relationship, by earning the client's trust, confidence and comfort. This cannot be sufficiently achieved by meeting the client for the first time in the hallways of the courthouse on the trial date, which sometimes was an occupational hazard when I defended clients in misdemeanor court as a public defender lawyer. Recently, a client called me and insisted that I just tell the prosecutor that my client accepts the plea offer in a misdemeanor case, after he long before seemed to have accepted my recommendation that the case outcome was unlikely to be any worse by first coming to court and pleading guilty if the prosecutor turned out to have the necessary witnesses and evidence available to win the case, and if the client did not want to risk a trial. I suggested that my client come visit me, because such a decision is too grave to make merely through a phone call. By that time, my client and I had spent substantial quality time together, so he agreed first to come to my office, where we were able to focus on each other without the clutter of traffic, passing people, and cellphones ringing off the hook. He finally agreed to wait to go to court before deciding whether to plead innocent or guilty. On the court date, my client's first inclination was to plead guilty, but I encouraged him to wait for me to see which prosecution witnesses were actually available, because many of my cases get dismissed when essential prosecution witnesses do not show up in court. I reminded my client that the flat fee he paid me meant that my most profitable approach would be to finish with court as early as possible, but that my ethical duty was to try to get him the best result. I ultimately tracked down the prosecutors' witnesses, spoke with them, and learned they all had time for trial that day and that they would be credible witnesses to the judge (the alleged offense did not permit the right to a jury trial). Armed with this information, my client still entered a guilty plea, but this way he came from a position of strength of knowledge, and he received the best possible sentence available to a defendant convicted of such an offense. Once a client's case finishes in court, the matter might seem over for the lawyer, but the case continues for the rest of the client's life. When the client knows s/he came to court from a position of strength and continued with that strength, the client can get his or her life back to harmony more quickly. When the client insists "I want to get it over with," the client likely also is challenging the lawyer to reaffirm and underline the lawyer's commitment to the client and ability to achieve and maintain the necessary strength to represent the client, and the client perhaps is vocally challenging his or her ability to invest in the commodity of time and labor. Like the man who first threatened suicide but then changed his mind after fasting, the client who wants "just to get it over with" needs first to empty the clutter in his mind and spirit. Jon Katz

Posted by Jon Katz in Persuasion at 00:15

As Underdog as it ever was.

Greenland dog image available for public use here. Ken Lammers and Scott Greenfield recently commented on the dropping of Underdog from my blog's title line. I selected the Underdog moniker for this blog's 2006 maiden voyage, to capture the essence not only of me, my clients, and my criminal and Constitutional defense work, but also the immigration law work of my then-law partner Jay Marks. The moniker -- originally inspired by my hero and amazing teacher Steve Rench -- still fits, so I have returned the Underdog title to its rightful place on this blog's masthead. As to the title of this blog entry, thanks for the Talking Heads' inspiration for it. Jon Katz.

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

Tuesday, November 18, 2008

Marijuana is great medicine .

Image from public domain. Marijuana is great medicine. It is natural and green, and lacks the very undesirable side effects of so many other medicines, including anti-depressants. It can be ingested in brownies and cookies, to avoid being smoked. Pharmaceutical companies have no financial interest in having marijuana legalized, because if it becomes legal, people can grow their own quality marijuana weed. Here are some good links I recently found by medical professionals that detail the medicinal benefits of marijuana: - Taped interview with Donald Abrams, M.D., on medical marijuana. "Short Term Effects of Cannabinoids in HIV Infection." This title relates to a study that is outlined here at the website for the Multidisciplinary Association for Psychedelic Studies. More details on the study are here. "Cannabis in painful HIV-associated sensory neuropathy." This is an abstract. The full text is available by subscription here. Marijuana, the AIDS Wasting Syndrome, and the U.S. Government: Letter to the editor for New England Journal of Medicine. "Medical marijuana and the Supreme Court." Here is a link to an article suggesting possible dangers from marijuana, but advocating further study. - "Adverse effects of medical cannabinoids: a systematic review." The report says, in part: "Short-term use of existing medical cannabinoids appeared to increase the risk of nonserious adverse events. The risks associated with long-term use were poorly characterized in published clinical trials and observational studies. High-quality trials of long-term exposure are required to further characterize safety issues related to the use of medical cannabinoids." Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Monday, November 17, 2008

We seek a part-time legal assistant.

Imagine not just reading our Underdog blog, but working at Underdog's central headquarters. I humbly ask Underdog's readers to send the finest candidates our way to fill an additional part-time legal assistant position. Full details about the position are here. Our office is less than a mile from our nation's capital. It does not get any better than this for those seeking such work. Thanks for those who spread the word of this job opening at our law firm. Jon Katz.

Posted by Jon Katz in Jon's news & views at 18:00

A nasty thing happened on the way to the forum.

Bill of Rights (From public domain.) When I was born in 1963, the Cold War raged, the Cuban Missile Crisis had diminished from its flashpoint only six months earlier, and the Hollywood movie studios' pathetic capitulation to the House Un-American Activities Committee ("HUAC") had unraveled starting around six years earlier and accelerating at rapid speed in 1960 with Kirk Douglas's insistence that Universal Studios name blacklisted Dalton Trumbo as the screenwriter of Douglas's Spartacus film production. Clearly, the 1954 censure of Communist witchhunter Senator Joe McCarthy had not stopped the blacklisting train. As Arthur Miller's 1953 *Crucible* shows, out of fear, society constantly engages in witchhunts and the suspension of others' basic rights in an effort to mollify those fears. We see it today with the United States government's campaigns against terrorism and illegal drugs. We saw it with the Communist witchhunts and before that with the United States government's World War II imprisonment of those with Japanese ancestry for no other reason than their Japanese ancestry. Eight months before McCarthy's censure, Senator Estes Kefauver and associates even went as far as skewering horror comics. No time period is immune from such governmental madness. We must stand up to it at all times, even when the price of doing so is high. Why did the Hollywood film studios banish those who were thought to have been Communists at some time and those who refused to name names before the HUAC? Was it a fear that doing otherwise would have invited further government censorship? Was it the same kind of fear that led the Hollywood movie studios to institute the movie ratings system? Hollywood blacklisting started in earnest in 1947 with the HUAC hearing of the so-called "Hollywood Ten", all of whom at first refused to testify, and got prison sentences as a result. During the more than ten years that followed, blacklisted screenwriters were able to continue working under pseudonyms and by paying people to front as the writers of the material. Actors and actresses, however, could not be helped by pseudonyms and fronts. Some moved to Europe to escape the blacklists. Multitalented actor Zero Mostel, for instance, was blacklisted in the 1950's, and returned in the 1960's with a triumphant vengeance with stellar performances in the film *A Funny Thing Happened on the Way to the Forum* and *Fiddler on the Roof*. Some articles say he painted while blacklisted. Painting apparently was his first love. (As an aside, Mostel was friends with -- and apparently shared a painting studio at one time with -- my late great uncle and talented painter Alex Redein; I learned of this only after both had passed.) The wounds inflicted on the victims of Hollywood's blacklists were re-opened with the Oscar's very controversial lifetime achievement award in 1997 to Elia Kazan, who named names to the HUAC. Sadly, the United States Supreme Court, in the late 1950's, affirmed the conviction of a subpoena recipient for refusing to answer HUAC's questions. No case seems to have overturned that opinion. *Barenblatt v. Crowley*, 360 U.S. 109 (1959). Moving beyond the entertainment world, in 1951, the United States Supreme Court upheld a conviction under the Smith Act for efforts to activate a Communist party in the United States. *Dennis v. U.S.*, 341 U.S. 494 (1951). The parallels are striking with the federal government's current relentless prosecutions of those allegedly involved in peripherally assisting organizations advocating terrorism. As the Constitution continues being shredded, how much will you stick your neck out for what you believe is right, anytime the government tries to urinate on people's basic rights? Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Friday, November 14. 2008

Applying t'ai chi to trial lawyering.

Â Â INTRODUCTION When I told t'ai chi Master BenÂ Lo that, time permittingÂ in the morning,Â 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. Of course, practicing t'ai chi is anything but crazy. It is the Supreme Ultimate. Â The editor of a state criminal defense lawyers association newsletterÂ recently solicited articles. In the ongoing spirit of my applying t'ai chi to criminal defense and everything else I do, I submitted the following article that incorporates material from my previous blog entries with some additional ideas and realizations: Â MAINTAINING CALM IN THE EYE OF THE STORMÂ Â Consider being in trial against the most underhanded prosecutor you have ever battled against or, perhaps worse, a prosecutor with a reputation for fairness acting the complete opposite. Add to that a judge who merely wants to move the case along, even if that means only allowing the span of a lunch hour to review a mountain of Jencks material. Complete the picture with a bunch of lying witnesses fingering the wrong person, your client. Â Â What is the most powerful way to approach such a state of injustice? Critical ingredients are calm, non-anger, and fearlessness. To go to battle in a state of mental and physical limpness will amount to a limp performance. To go to battle tense, stiff, or angry will give the opponent a huge area of the defense to push against and to topple, and will close off the channels of energy and strength. To be mindfully calm, on the other hand, gives the opponent nothing to push against, and gives one tremendous strength. Â Â In the West, for too long the power of calmness has been underrated, perhaps as a hallmark of laziness, weakness, and the antithesis of non-stop capitalism. The transcendental meditation craze that particularly flourished in the 1970sÂ helped make calmness a normal goal. Today, yoga is widely embraced as a way to reach calm. Over a decade ago, I chose the tai chi path. Â Â Soon after joining the Maryland Criminal Defense Attorneys Association in 1991, I met the late Victor Crawford, who had a law office in Rockville. By then, he had been practicing the Chinese internal martial art of tai chi for many years. Vic was no touchy-feely, wooly-headed new-ager, which intrigued me all the more about what drew him to tai chi. Curiously, one of Vic's main teachers did not fit that mold either; he is Robert Smith, who, while working with the CIA in Taiwan in the 1950sÂ became the first Western student of a legendary tai chi master named Cheng Man Ch'ing. Eventually, at my request, Vic gave me the names of some local tai chi teachers, with a note that I was about to embark on a journey that would open amazing doors. The doors tai chi opened were many. For trial battle, tai chi has provided me the best anchor for powerful calmness that I have found. Â Â Â At first glance, t'ai chi might look like overly-simple slow-moving calisthenics for those who do not want to, or cannot, break a sweat. In reality, this martial art involves slow movements, a soft body, and an emptied mind on the one hand, and mindfulness, strength, and quick reflexes on the other, which all are critical to effective trial battle. The physical movements of tai chi better prepare practitioners to be calm and powerful at all times. Tai chi is suitable both to make strong people stronger and to reverse weakness in the unhealthy. Â Â When applying t'ai chi to trial work, the practitioner neither chases an opponent's power nor hides from it. Instead, the practitioner uses the opponent's power and energy to the best advantage, while seeking to sense the opponent's strategy and planned attack, to give the opponent nothing to push against, to find the opponent's weaknesses, and to neutralize the opponent. This fighting aspect of tai chi is called pushing hands, or, better still, sensing hands, because the idea is to keep the opponent close enough to be able to sense the opponent's strategy, next move, strengths and weaknesses. The phrase sensing hands also is more apt than pushing hands, because the most accomplished tai chi practitioner uses mind energy over physical energy to win a battle. Â Â Â Assisting in sensing the opponent's strengths, weaknesses and strategy is to remember that all people are interconnected and seek to minimize pain and to manage their fears. A Western-developed approach utilizing this realization is psychodrama, which is a powerful method developed by psychotherapist Jacob Moreno to apply roleplaying, reverse roleplaying, and deep introspection to resolving conflicts and to figuratively crawl under the hide of one's opponent and others. Psychodrama is heavily incorporated into the Trial Lawyers College in Dubois, Wyoming, and local attendees of the TLC sometimes gather to apply psychodramatic techniques to prepare for trial, sometimes with the assistance of Don Clarkson, a local psychological therapist who is one of the premiere practitioners of psychodrama. Â Â Â Related to the approach of neither chasing nor hiding from an opponent, t'ai chi master Benjamin Pang Jeng Lo once said: "Normally we think that if [our opponent] has 100 pounds of force or power, I better have 150. But then if I get 150 pounds of force, he may have accumulated more himself. Or there'll be somebody else with more. So next time it will be my 150 against his 200. Then I'll need to go to 250. . . and still, there's always going to be somebody with more than me. So I need to reverse my approach. I need to take my own power down to 0. Then there's no chasing or spiraling. Nothing can change. If he has 100, I have 0. If he has 150, I have 0. If he has 200, I still have 0, on and on, whatever he has, I'm always beneath it, it doesn't change or affect me. I'm not chasing his attributes, or competing, or catching up, or exceeding him. That's Taijiquan.â•" <http://www.rimtaiji.com/BenLoTeaching.htm>. Â Â A student of the famous Sun Tzu reaches the same destination through

the following path: "Sun Tzu's ideal military leader is calm in the midst of chaos, being able to even appear chaotic to deceive his enemy. The ultimate skill is separating oneself from the stresses of everyday life. Thus, a strong leader's response does not correlate and follow with the stimulus, which in effect, is quite impressive to his or her people and to the competition. With this ability, one can think clearly without influences corrupting the process in bringing about the best solution. He or she has inner peace in a world of perpetual turbulence. How many times do you find yourself so wrapped up in present worries, you can't seem to think clearly, and that the decision was made based primarily from the tension?" — "The Sun Tzu Way." • <http://sonshi.com/sun-tzu-way.html>. — — An essential ingredient to reaching calm is to overcome one's fears. Tai chi master Cheng Man Ching spoke of tempering our fears in terms of imagining that we are practicing t'ai chi while balanced atop a narrow pointed cliff. To not eliminate one's fears while atop the cliff is to guarantee certain death. Eliminating fear also calls for keeping and tempering the fearlessness of a child filled with wonder and living in the moment, as detailed in the Zen story of the man and the two tigers: A man is chased in the wilderness by two tigers, only to be forced off a cliff, hanging for life from a vine. One tiger waits above and the other waits below for a human meal. Two field mice gnaw away at the vine. The man sees a wild strawberry growing from the side of a cliff, reaches for it, tastes it, and -- with his life hanging in the balance -- thinks of how delicious the strawberry tastes. — — This power of being in the moment -- and finding and savoring the nearby wild strawberries during even the most trying times — — has no substitute. Ironically, those who welcome battling in the eye of the storm have the best opportunity to reach a state of calm. Nothing tests one's ability to reach calm more than the most dangerous situations. — — The extraordinary power of t'ai chi for our daily battles is accurately captured by an Australian tai chi practitioner, who says: "As one famous taiji teacher (Cheng Man-ching) once put it, drawing on the Taoist image of the soft overcoming the hard, water and air are amongst the softest of Nature's elements, yet massed wind (cyclone) or water (tidal wave) can overcome the hardest thing! The taiji practitioner if properly trained is able to harness or access realms of psychophysical energy (qi) unavailable through mere muscular exertion. Another leading taiji exponent (Bruce Kamir Francis) once compared the power capable of being generated by the internal versus the external arts to that of the atomic energy of Quantum physics that results from splitting the atom, as compared to Newtonian, mechanical energy." http://www.fwbo.org.au/toowoomba/tai_chi_chuan.html. — — — When approaching trial battle with a tai chi angle, the goal is not to beat the other side. Instead, the goal is to harmonize an imbalanced situation for the client. If the opposing side can be spared harm during the harmonization process, that is all for the good. If the harmonization necessitates inflicting severe damage on the other side, figuratively, the lawyer needs either to be ready to inflict such damage if need be and within the rules of professional conduct, or to leave the battle to a replacement lawyer. — — The concept of applying tai chi calmness and strength to trial battle is not at all a fanciful intellectual leap. At the initial level, tai chi is a physical exercise geared towards strong calmness and physical health. As one progresses with tai chi — — which is a form of Chinese boxing -- the physical exercise becomes a way to harmonize and strengthen one's mind and spirit to be ready for any challenge and to keep one's wits even when the proverbial unfed vicious tiger is lunging at the practitioner. In fact, one key tai chi move is called — — "embrace tiger, return [the tiger] to mountain." — — One cannot fully and successfully know and battle adversity without first embracing it, rather than fleeing it. — — A huge gap exists between knowing how to be powerfully, patiently and fearlessly calm on the one hand, and executing those principles on the other. The best way to reach the state of powerful calmness is to practice constantly and to reach a state of mindful relaxation throughout the day, night, week, and years. — — BIBLIOGRAPHY The following resources expand upon the themes of this article: — — — "Being a Tai Chi Bear in an Otherwise Stressful Court," • Jon Katz. <http://tinyurl.com/5tdb2n>. — — "Tai chi and the five integrities," • Kenneth van Sickel. <http://tinyurl.com/5k9akj>. — — Tai chi video: <http://tinyurl.com/6ct7p4>. — — Tai chi links from a Maryland tai chi school: <http://wuweitaichi.com/links.htm>. — — Overview of psychodrama: <http://tinyurl.com/5kusgg>. — — Jon Katz. — —

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, November 13, 2008

When cops speak Spanglish to a non-English speaker.

Photo from website of U.S. District Court (W.D. Mi.). Too many monolingual people seem to think that if they speak louder or repetitively that ultimately they will be understood by a person who does not speak the speaker's language. Too many people think that if a person understands such phrases as "Do you speak English" or "Fire, fire" that this means the person speaks the tens of thousands of other words and phrases needed to have a sufficient command of the English language. Nothing beats struggling with learning a second language to understand how hard it is for others to learn English, including figuring out how to conjugate verbs in the past, present and future tenses, struggling to understand native speakers who talk a mile a minute, and memorizing and pronouncing a jumble of strange-sounding words. It seems that the vast majority of Americans stop studying another language once such study is no longer required for obtaining a degree or for strengthening a college application; yet plenty of the same people want to surmise that it is easy for others to learn English as a second language. When I have a non-English speaking client, I ordinarily arrange for a witness to come to court to testify about my client's limited English, in order to challenge any assertion by the prosecutor that my client understood the English being spoken to him or her. Recently, I won a license suspension hearing related to a drunk driving charge, on the basis that Maryland's convoluted and lengthy advice of rights form for taking the breathalyzer test was either not translated at all into Spanish, or that a Spanglish speaker struggled to tell my client the words on the advice of rights form. See below for further details on that hearing. In my experience, cops use a hit-or-miss approach to try to communicate with people who speak little to no English. Some police forces have some fully fluent people available to help, but then I argue that the absence of such interpreters' court testimony makes the interpretation inadmissible hearsay evidence. Some judges let prosecutors get away with asking cops "Did he appear to understand you" and "Did he tell you he did not understand you or needed help interpreting your English?" Where I practice law, a huge percentage of native Spanish speakers come from countries where the cops constantly and often brutally trample on people's rights, and do not serve the interests of ordinary people. (Hmm, that also describes too many cops in the United States.) Silence from people coming from such countries does not necessarily mean the English is understood, but instead can be a self-preservation technique. Being human, judges need to be educated about the nuances falling between the scale of a person who speaks fifty to five hundred English words in order to achieve basic survival on the one hand, and a person who arrives in the United States below the age of ten and soaks up English like a sponge. A huge percentage of people fall within the first half of that range of English-speaking ability. Moreover, most people are better able to speak a second language in an understandable fashion than to understand what is being said to them. People speak the words they understand, but the listener does not necessarily know all the words s/he hears in a second language. With that backdrop, here is an outline of questions I asked my client on the road to victory in my recent license suspension hearing related to a drunk driving arrest: - Where were you born? - At work, what language does your boss speak? (Here the answer was that the boss speaks English. Instead of saying "Oh, sh_t" to myself, I followed up with: "How are you able to understand your boss's English at work?" Answer: "A co-worker interprets for me.") - Have you formally studied English? Answer: No. My work eats up too much time to do that. - How much English do you know? Answer: Very little. - Where did you learn English? Answer: Mostly from television. - Have you known me since the time I first represented you around five years ago for a car accident case? - What language do you and I always speak in? Answer: Spanish. - Who spoke Spanish to you on the night of your arrest? Answer: Only a man who spoke over the phone to me in Spanish and English while I was at the police station. - Nobody spoke Spanish to you on the highway? Answer: No. - Did he say why he was not speaking only in Spanish? Answer: No. - How understandable was his Spanish? Answer: Only half understandable. - I am showing you the advice of rights form. Is that your signature? - Did anybody provide you a printed Spanish translation of the advice of rights form? Answer: No. - Are you able to read Spanish? Answer: Yes. (This was a good place to end this chapter of the direct examination.) The administrative law judge followed up with some questions. (The government doesn't bother sending a representative to the hearing.): - Mr. U___, before your lawyer arrived, do you remember my calling out your name in the hallway and your responding in English "My lawyer is coming"? And, do you remember when I asked for your temporary license, you started removing it from your pocket before the interpreter translated what I said? I objected to any evidence or consideration of any events that took place outside the hearing room. That was overruled. I argued to the judge the huge difference between knowing such basic English survival words and phrases as those my client understood on the one hand, and the convoluted words and phrases in the advice of rights form. - Mr. U___, how much did you drink that night? (On redirect, my client showed his few drinks were spread out over time, and the blood alcohol result supported that, to counter any notion that alcohol clouded my client's recollection about the telephone Spanglish speaker.) After I made my arguments, the judge proceeded to rule against me. About the advice of rights form, he said that the form is so convoluted and lengthy that plenty of inebriated people will not understand it, and plenty with basic intelligence will not understand it. The judge said that the form was interpreted to my client, and said that was that. Here is where I said to myself "Oh, sh_t. Think fast." So I said: "Oops, I messed up." This drew the judge's

interest. Have you ever noticed how much people want to help you when you say "I have a problem" or "I messed up" instead of saying "Will you come over here and help me"? I told the judge that I had missed sufficiently showing that the interpretation was in bad Spanglish. I underlined that any attempted translation of the advice of rights form was by an unknown person with unknown ability and qualifications in Spanish (other than that it was so poor that the speaker used plenty of English), and with unknown Spanish education. For all we know, maybe the Spanglish speaker grew up in a household with parents who spoke only a smattering of Spanish. I said that even if, for argument's sake, a person does not have an absolute right to understand the advice of rights form, s/he has a right to have an advice form in a language the suspect understands. To do otherwise is a violation of the Equal Protection clause of the Constitution's Fourteenth Amendment, and makes second class citizens out of those who do not speak English as a first language. Such arguments can be particularly effective in Maryland, where government officials generally want to be seen as inclusivists. I added that the government has the burden in this hearing, and presented nothing to overcome my evidence and arguments. After I presented more testimony at the judge's invitation, the judge finally agreed that the government had not met its burden about language. He said he could have called the cop to see what the cop had to say about the Spanglish speaker, but was not going to. Besides, how would a monolingual cop know anything about the language qualifications of the anonymous Spanglish speaker? The judge said my client had testified credibly, and that his demeanor showed he did not comprehend most of the judge's English. Of course, it would have been best for me to have presented all the foregoing arguments before the judge first ruled. On the other hand, the main thrust of my further arguments was to counter the judge's original mis-recollection that the phone Spanglish speaker somehow had spoken only in Spanish. In criminal court, often the defendant will assert his or her Constitutional right to remain silent. The defense lawyer can always try to convince the judge to let the defendant testify only about language comprehension matters and nothing more, but language comprehension issues ordinarily will be intertwined with other material issues. In Virginia, the caselaw says that once a defendant takes the witness stand at trial, s/he is fair game for cross-examination questions beyond the scope of direct examination. In any event, we need to start outside the courtroom to educate judges, prosecutors, juror, cops, and everyone else about comprehension issues for those who speak English as a second language. It can start with responding effectively, rather than with silence, when a cop, prosecutor, or judge laughs or makes a snide out-of-court remark about a person's "foreign" accent or ability to understand English. Jon Katz.

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

Wednesday, November 12, 2008

"When you are fatigued, do t'ai chi."

Â Â My t'ai chi teacher Len Kennedy once said: "When you are fatigued, do t'ai chi." On another occasion, I learned the following from Len: Internally, during one of "those meetings," the t'ai chi practitioner does t'ai chi, through relaxing and sinking into one's chair or into the ground if standing;Â by relaxing actively through being fully aware of what is happening around the t'ai chi practitioner without getting sucked into nonsense; and by emptying the mind and body of stress and wasted energy in order to deal with the matter at hand.Â Len Kennedy learned t'ai chi from Robert W. Smith, who was t'ai chi megamaster Cheng Man Ch'ing's first Western student. Recently, I found this response to nihilism from Professor Cheng, as recounted by Fred Lehrman: Â "I remember sitting one morning several years ago with Professor Cheng and several students in the Asian Library at Columbia University. The Club of Rome Report had just been released by MIT, and one of the students had bought in a clipping from the New York Times outlining the hopelessness of solving the compounded problems posed by overpopulation, food shortage, energy resource depletion, atmospheric pollution, radioactive waste, etc. The student was quite upset, and asked professor Cheng what he thought of the situation, and how we could get out of it. The Taiji master turned the question around and asked the questioner what his ideas were. The student gave his answer, and sat expectantly, awaiting correction from the Sage. Instead, Professor Cheng turned to another student at the table, and asked, 'What do you think about what he said?' This continued until each student had commented on the others ideas, and it was clear that the subject had been exhausted. There was really no way to solve the problem. Professor Cheng went back to reading his book.Â "After a pause, the first student, more upset than ever, asked again for some word from the teacher. Professor Cheng leaned forward, and put his book down next to the cup of hot tea which had just been refilled for him. 'What will happen to the world? I donâ€™t know. Look at this vapor; it comes from the tea, it goes into the air, and right about here' Â he pointed in the air Â "you donâ€™t see it anymore. Where does it go?' He sat quietly for a moment while we pondered the empty space left after the world had destroyed itself. 'Donâ€™t worry about it,' he said, 'Nothing gets lost.'" Â Read the rest of Fred Lehrman's powerful essay here. Â Such lessons from Cheng Man Ch'ing keep me inspired to practice t'ai chi, doing the form morning and night without fail, and applying the t'ai chi principles to everything I do. Tea anyone?Â Jon Katz.Â Â Â ADDENDUM: (January 18, 2009) Currently, the above links to chengmanching.com, unfortunately, redirect only to the page to sell videos. The videos probably are great, but I hope the essays that were on the website will be returned. Here is an alternative link to Fred Lehrman's above excellent essay.

Posted by Jon Katz in Persuasion at 00:00

Tuesday, November 11. 2008

Jon Gettman on Marijuana

Â Â Image from public domain.Â A wonderful fringe benefit of my marijuana defense work has involved meetingÂ key playersÂ who bring sense toÂ overcomeÂ so much of the nonsense of anti-marijuana crusaders. In addition to meetingÂ such playersÂ through NORML annual meetings,Â I have worked withÂ marijuana smell expert Richard Doty, and marijuana grow experts Chris Conrad and Jon Gettman. I have met medical marijuana M.D. Lester Grinspoon by phone, which was a real trip, as his was one of the first names I learned of in the ongoing movement to legalize marijuana. It has also been an honor to know NORML founder Keith Stroup and the late Don Fiedler, who was both a great criminal defense lawyer and past NORML national director. Â Teaming with marijuana cultivation experts Chris Conrad and Jon Gettman, I won a Maryland medical marijuana sentence of just a fine followed by a probation before judgment (which means my client has no conviction in the case) on a prosecution for over thirty marijuana plants. Â In addition to being a marijuana grow expert, Jon Gettman is a former NORML national director. Jon and I spoke recently, and he graciously permitted me to upload his 2002 article with Virginia caselaw to beat intent to distribute prosecutions in favor of simple possession convictions, which carry drastically lower sentencing exposure. Jon. who lives in Lovettsville, Virginia,Â also provided me his updated resume. Check out his webpage entitled DrugScience.org. Â Thanks, Jon, Chris, Keith, Don, Lester, Richard, and the rest of you who have poured your heart and souls into replacing myth with facts about marijuana. Jon Katz.Â

Posted by Jon Katz in Drugs at 00:00

Monday, November 10, 2008

To hell with annotations.

Photo from website of U.S. District Court (W.D. Mi.). When I started law school in 1986, my legal research class included researching weighty tomes with such titles as Supreme Court Digest, F.2d Digest, and A.2d Digest, which used key numbers to find various categories and subcategories of the law. It was part of what made law school unpleasant, to say the least. Next the instructor showed us how Lexis online legal research could shorten the time and tomes for obtaining the same legal research answer. However, at the time, Lexis was only available by dialup hookup; Al Gore had not yet discovered the Internet for legal research purposes. Moreover, at the time, Lexis was an expensive drug to use at a private law firm, so the digests still came in handy. I learned from those digests, annotations to statutes, the American Jurisprudence encyclopedia and other legal encyclopedias (including Corpus Juris Secundum) that the summaries of court cases found therein often were incorrect, or else were not always very precise nor applicable to the legal issue at hand. Most current judges probably learned to do legal research in a similar fashion, because flat-fee Internet-based legal research did not come into being until around ten years ago, and most judges probably began law school more than ten years ago. My legal research instructor -- a bit of an overly intense person, but overall a caring and good educator -- for good reason admonished to rely on case descriptions in legal digests and statutory annotations at one's own peril. He said to review the actual court opinion being referenced, and I have always taken that approach. However, in the heat of trial battle, unless the judge has an online legal research terminal in front of him or her at the bench -- which is the case in federal courts and many state courts, but apparently not in the misdemeanor/District Courts in Maryland and Virginia where I often practice -- sometimes statutory annotations are all that is available to the lawyers and judge at trial, unless the judge affords the lawyers a break to get online themselves or to call their colleagues and assistants to do the research at the office. In the above context, ten days ago, I experienced dark comedy as a prosecutor kept referring the trial judge to the state annotated code's explanatory note about the amendment to a statute that was a basis of one of my evidentiary objections. Here, (1) the statutory language was clear on its face to the issue being argued, (2) the explanatory note apparently was written by the publisher of the code and not by any entity legislative body, and (3) even if the explanatory note was written by an entity of a legislative body (e.g., the committee that drafted the update to the statute), plain language in a statute cannot be trumped by the interpretation of some legislative committee engaged in legislative history mental gymnastics. In any event, the judge rejected the prosecutor's arguments and we moved on. Criminal pattern jury instructions where I practice include references to caselaw in explaining the language of the instruction, and in warning when to be cautious about using a particular instruction. In Maryland, appellate and trial judges generally seem to give tremendous respect to the drafters of the criminal and civil pattern jury instructions. On the one hand, the drafters seem to include some very capable minds and dedicated people, but they are only human, and their work cannot cover every single scenario that might arise at trial. In the District of Columbia, as well, it appears that a committee of lawyers puts substantial time into the criminal pattern jury instructions, and includes commentary with case references. However, when Maurice Lee went to trial for an alleged 2002 murder, the trial judge refused to give the jury an instruction on mitigating circumstances as to second degree murder where neither party had requested that the jury be afforded the option to convict Mr. Lee on the lesser offense of voluntary manslaughter. Last week, the D.C. Court of Appeals reversed Mr. Lee's second degree murder conviction, finding that the judge erred by refusing to instruct on mitigating circumstances. *Lee v. U.S.*, ___ A.2d ___ (D.C., Nov. 6, 2008). *Lee* says that the trial judge was unintentionally hoodwinked by out-of-date commentary to the then-existing pattern jury instruction: "Regrettably, the *Bostick* decision has never made its way into the lengthy Redbook commentary accompanying the standard instructions on murder and manslaughter. As a result, the trial judge was influenced here by language in the commentary that appears to condition the need to instruct on mitigating circumstances on the presence in the case of a lesser included offense instruction on manslaughter. But *Bostick* rejected that proposition and is indistinguishable from this case, because here, as there, the refusal to instruct on mitigating circumstances denied the defendant the proper legal framework within which to have the jury evaluate the evidence of heat of passion caused by adequate provocation. See *Bostick*, 605 A.2d at 918 n.8 (reversing because the jury had not been given a full instruction on provocation, including the requisite burden of proof on the government)." *Lee v. U.S.* Moral of the story: Annotations to legal codes and caselaw, and commentaries to jury instructions cannot meet the value of finding, reviewing, and Shepardizing court opinions. To do otherwise will place criminal defendants' liberty in unacceptable jeopardy. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, November 9, 2008

The tight economy demands a smaller criminal justice system.

Image from Bureau of Engraving and Printing's website. What are the United States' largest socialist programs? This year's nearly trillion dollar bailout of AIG and other financial institutions is one. The social security system is another. Certainly, the criminal justice system is a major socialist enterprise, as well, which helps explain why so many economic conservatives want to downsize or eliminate the drug war. In these belt-tightening times, the criminal justice system is particularly overgrown. The system needs to be shrunk substantially, in large part through legalizing marijuana, gambling and prostitution, and by heavily decriminalizing all other drugs. Drug prosecutions occupy a huge chunk of court, police, and prosecutorial time, so marijuana legalization and heavy drug decriminalization already will help to heavily shrink the nation's criminal justice system. How expensive is the criminal justice system? As the ACLU blog points out on November 7, 2008: The introduction to "Smart on Crime: Recommendations for the Next Administration and Congress" -- produced by an organization that includes the ACLU -- "ends with a prescient reminder that during these very challenging economic times, there are critical cost savings that can come from reforming a system that incarcerates 2.3 million people (that's more than 1 out of every 100 adults in the U.S.) at a staggering cost of more than \$60 billion per year." The ACLU blog quotes as follows from the foregoing "Smart on Crime" study: At a time when the nation is facing its worst economic crisis since the Great Depression, it is essential to review the cost of the criminal justice system to all Americans. Such a review should not only account for the cost in terms of dollars and cents, but also in terms of human lives and capital, which are our nation's most valuable resource. On the indigent defense side alone, public defender offices are so overburdened with criminal defense cases that seven such offices have been turning away many people who otherwise would be qualified for their services. Consequently, the criminal justice system must be substantially shrunk. Jon Katz

Posted by Jon Katz in Drugs at 00:00

Friday, November 7, 2008

Blue skies, smiling at me.

Â Â During my first summer in law school, working in the regulations and legislation division of a federal agency, I mentioned my interest in becoming a litigator. One of the staff attorneys -- who had paralegaled at the ACLU, which was one of the places I wanted to work -- exclaimed: "Don't you know that is the legal path that causes the most ulcers?" Â Ulcers shmucers, I reasoned. I went to law school intent on learning better how to fight for civil liberties, and preferred -- and still do -- an ulcer doing work I enjoy than havingÂ a less meaningful life without stress. Â Â Of course, ultimately I found the path to being calm even in the eye of the most virulent trial storm, as I describe here. Before reaching that path, though, many times in my first two years of practicing criminal defense I would walk into the courthouse feeling my heart sink to my stomach, obsessed over how much injustice was being done every minute in any courthouse I walked into. Ultimately, I reversed that view to seeing every visit to court as an opportunity to add more justice to the world and to reverse all the world's injustices, although the opposite view still tugs at me. Â Ironically, I probably would not have found this path of calm in the eye of the storm had I not met the eye of the storm so many times as a trial lawyer fighting tooth and nail for my clients' liberty. Â Too many people lose touch with the child within them as they get farther away chronologically from childhood. Look at the adults to whom children gravitate at holiday gatherings, at weddings and other big celebrations, and on boring shopping trips with their parents, and you are bound to see adults very much in touch with the positive child within.Â The division between work and play needs to be dissolved, for each living moment to be part of a harmonious, powerfulÂ and enjoyable whole. Â Two people who bridge the gap between work and play, and adulthood and childhood are the late Ella Fitzgerald and Thich Nhat Hanh. Who else but Ella could have elevated "A Tisket A Tasket"Â from a droning kindergarten-required song to the masterpiece seen in this video, and even more so when I experienced Ella and Oscar Peterson separately on stage on a magical summer evening in 1982? The only thing better would have been for Thich Nhat Hanh to haveÂ joined them onstage. Â A few years ago, I found the following passage from Thich Nhat Hanh, which brought me all the more closer to living and lawyering fearlessly and in the moment: Â Contemplation on No-Coming and No-GoingBy Thich Nhat Hanh This body is not meI am not limited by this body.I am life without boundariesI have never been born,And I have never died. Look at the ocean and the sky filled with stars,Manifestations from my wondrous mind.Since before time, I have been free Birth and death are only doors through which we passSacred thresholds on our journeyBirth and death are a game of hide and seek. So laugh with me,Hold my hand,Let us say goodbyeSay goodbye to meet again soon.We meet todayWe will meet again tomorrowWe meet at the source every moment. We meet each other in all forms of life. Â Thich Nhat Hanh, Chanting and Recitation from Plum Village. Page 188. Â In the above-displayed video, Thich Nhat Hanh talks of being mindful, happy and in the moment with each passing second. Not only is such an approach essential, but, when applied, it helps one concentrate on the task at hand, even if the person prefers being elsewhere in time, place, health, and experience. Many talk of time management, but overly thinking about the future in an effort to manage time will boomerang against the time manager if s/he cannot be here now. Â A big challenge to keeping work as play is to transcend the feeling of imprisonment being in a stuffy, windowless, courtroom where one cannot even enliven the experience with an I-Pod. Then again, before the days of electronics, electricity and batteries, people found a way to do that without I-Pods, and I will endeavor to do the same. Â As the week comes to a close, I have posted the above videos. The first video presents Ella Fitzgerald in Berlin singing Berlin's "Blue Skies". The second videoÂ presents Thich Nhat Hanh bringing the benefits of mindfulness/being in the moment, to life. Thanks to a listserv member for the link to the latter video. Jon KatzÂ Â ADDENDUM: After posting the forgoing blog entry, I finally listened to the rest of theÂ above clip of Ella Fitzgerald to see that the song is actually "On a Clear Day" after Ella starts off with the first line of "Blue Skies". I found no close rendition of "Blue Skies". Here is one by Willie Nelson.

Posted by Jon Katz in Persuasion at 00:00

Thursday, November 6, 2008

Who let Lucy van Pelt into the CIA?

From National Archives website. Â Lucy van Pelt consistently invited Charlie Brown to kick a football. She held it to be kicked, but then would withdraw the ball. Â Similarly, a few times recently, the National Security Archive complained in federal court that Lucy van Pelt -- I mean the CIA -- had unlawfully refused its request to be classified as a representative of the news media under the federal Freedom of Information Act, seeing that such representatives only need to pay for duplication costs of FOIA-requested documents, rather than needing to pay any fees to process the FOIA request. 5 U.S.C. Â§ 552(a)(4)(A). Each time that the National Security Archive complained, the CIA would respond to the court with an apology, saying that such aÂ classification should not be denied to the National Security Archive. Then, with the federal court's back barely turned, the CIA would repeat its actions of refusing to grant news media representative status to the National Security Archive, and the tango continued, until November 4, 2008, when U.S. District Judge Gladys Kessler put the brakes on such nonsense from the CIA, and ordered that it be stopped. Â Curiously Judge Kessler's opinion does not give a definition of "representative of the news media," because the parties agreed that the National Security Archive does so qualify. National Security Archive v. CIA. _ F.Supp.2d (D. D.C. Nov. 4, 2008).Â In any event, hopefully the Bush II administration's contempt for the FOIA will not spill intoÂ Barack Obama's presidency.Â Jon Katz.Â

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, November 5, 2008

Do not let government force television to dumb itself down to a child's level.

Â Bill of RightsÂ (From public domain.)Â Why listen to government/FCC-censored broadcast radio and television when we have the choice to listen to satellite and online radio and to watch cable television? Â Why listen to broadcast radio and television when the FCC might still get upheld in court for heavily fining a station for broadcasting Allen Ginsberg's Howl masterpiece during prime time, or even a fleeting expletive by a winner at an awards ceremony or a successful player in a sporting event? Â Yesterday's Supreme CourtÂ oral argument in the F.C.C. v. Fox TelevisionÂ broadcast indecency case gives insight into such justices as Chief Justice Roberts and Justice Scalia, who seem to have no problem with heavy F.C.C. fines for the use of the words f_ck and sh_t during primetime on broadcast television. Justice Ginsburg showed skepticism about permitting the F.C.C. to skewer the use of such words in such a blanket fashion, and Justice Stevens underlined how silly it is to be punishing mere words so harshly. Â Of course, you need not wait for the Supreme Court to decide this case. You always can insist that your U.S. Congressmembers insert First Amendment teeth to replace the F.C.C.'s constant urination on First Amendment rights by looking for sh_t and f_ck words all over the place on the taxpayers' backs. Will youÂ make such a move?Â Jon Katz.Â

Posted by Jon Katz in First Amendment at 00:00

Tuesday, November 4, 2008

McCain has remained silent on Palin's attack on the right to remain silent.

"Al-Qaida terrorists still plot to inflict catastrophic harm on America ... [Barack Obama is] worried that someone won't read them their rights." Sarah Palin at the Republican National Convention (Sept. 3, 2008). "As much as I am not thrilled about Barack Obama -- and I am not thrilled at all about John McCain -- McCain blundered abysmally never to have rejected Palin's above-quoted mis-hyperbole about the essential right of detained criminal suspects to be read their rights to remain silent and to an attorney. Palin's RNC convention speech was scripted, with no impromptu words, and it is doubtful that Palin's above quote got approved without McCain's okay. Remember your own rights today on Election Day: You have the right to vote with your Diebold election machine or dimpled chad producer, to tell Palin and McCain what you think about their trying to score political points through their lampooning Barack Obama as more for protecting criminal suspects' decades-long rooted rights than they will ever be." Jon Katz.

Posted by Jon Katz in Constitutional Law at 01:00

The polls are open, so we are, too.

Even though Maryland courts and government offices apparently are closed for Election Day, we will be open today. Remember to vote early and often. Jon Katz.

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

Monday, November 3, 2008

Why I am voting for Obama, and why I am inspired by Nader.

As I rise early on October 4, 2008, to get to the polls on the way to court, I will still be kicking myself for my own role, through inaction, in our having a two-party-dominated underdemocratic/barely democratic Tweedledum-Tweedledee political system. The tealeaves do not show that Obama will be any better a president than Bill Clinton was, and I was not overly fond of Bill, who maintained a government that was overly militaristic, overly-prosecutorial, and insufficiently protective of civil liberties. I voted for Bill Clinton, as I now vote for Barack Obama, as a less scary alternative to the other major party's opponent. Just as with George Bush, II, a president McCain will feel an obligation to pay further homage to the party's morally conservative (an oxymoron) right wing, beyond his blunder of naming the woefully inexperienced, incapable Sarah Palin, who will be less of a friend to civil liberties than will John McCain. The most lasting damage of a McCain presidency will be his lifetime appointments to the Supreme Court, and his dozens more annual lifetime judicial appointments to the lower appellate and federal trial courts. The next president will likely fill one to three vacancies for the Supreme Court. Justice John Paul Stevens -- Ford-appointed but today comparatively one of the Court's strongest friends of civil liberties -- is eighty-eight, and will be nearly ninety-three when the next president leaves office; it is very doubtful that Stevens will stay on the bench as long as that. Justice Ruth Bader Ginsburg is seventy-five and will be seventy-nine when the next president leaves office. Justice David Souter on the one hand is only sixty-nine, but on the other hand is reportedly antsy to return to New Hampshire. If you are not scared yet, consider this for post-Halloween terror: The three youngest justices are three of the four most rightwing on civil liberties issues, those being Justice Clarence Thomas, 60, Justice Samuel Alito, 58, and Chief Justice John Roberts, 53. That is no typo; Chief Justice Roberts is rightwing, 53, and will be at the Supreme Court's helm a few more decades. The final member of the Supreme Court's rightwing quartet is Justice Antonin Scalia, who is only 72, loves his job, and shows no signs of going anywhere for at least two more presidencies. Even though Chief Justice Roberts may be a mensch off the bench, and has even been known personally to pass out Halloween candy to trick-or-treaters, that does not change the severe damage that he and the other Supreme Court rightwingers inflict on the Constitution each month. A president McCain likely will nominate someone no less conservative than the Supreme Court's current right-wingers. If you think we currently have too many abysmal Supreme Court opinions, just wait and see what will happen if a president McCain names Justice Stevens's replacement after eight years of Bush, II, nominations to the federal courts. Election Day is your opportunity to mobilize against further right-wing lifetime federal judicial nominations, not only to the Supreme Court, but to the lower federal appellate courts and trial courts, too, which apparently number in at least the dozens each year. Sooner rather than later, of course, we need to break free from the two-party dominated system that overtakes the nation's psyche to the point that one wonders whether schoolchildren realize that the nation's political system is not limited to two parties. As Nader's running mate Matt Gonzalez asks, "What do they [the Republicans and Democrats] have to do to lose your vote?" 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 woefully underdemocratic two-party system is to risk electoral victories by the worst major candidates on the road to a truly multi-party system. Jon Katz.

Posted by Jon Katz in Constitutional Law at 20:00

Same court; two actors; two different appeal bond results.

Photo from website of U.S. District Court (W.D. Mi.). Wesley Snipes and Paul Little (a.k.a. Max Hardcore) both are actors -- very different actors, at that -- with pending federal criminal appeals from the Middle District of Florida. Their similarities end there both with the types of convictions involved (Snipes for a tax conviction and Hardcore for an obscenity conviction), the lengths of their sentences (Snipes possibly for a shorter period than the time to argue and decide his appeal, and Hardcore for nearly four years), and their abilities to make movies pending appeal (Snipes yes; Hardcore, no, because his appeal bond motion was denied). Curiously, Wesley Snipes's judge granted him an appeal bond after determining that his appellate issues are not particularly strong, but are not frivolous. Conversely, in denying an appeal bond to Max Hardcore, his trial judge wrote: "The Court does not find it likely that this Circuit will afford Defendant relief based on the Court's ruling here, as it is this Circuit's precedent that necessitated it. In addition, even if the appeals Court were to grant relief on this ground, it would only affect Counts I-V, the sentence for which runs concurrent to the sentence imposed for Counts VI-X. Therefore, Defendant will be unable to obtain the relief listed in § 3143 required for a stay of his sentence on this matter." Here are relevant documents concerning the appeal bond litigation in the cases of Snipes and Hardcore: - Max Hardcore: Order denying appeal bond. Amended

appeal bond motion. Â Wesley Snipes: Order granting appeal bond.Â Appeal bond motionÂ (a good motion for all practitioners' reference). Prosecution's opposition to an appeal bond. Snipes'sÂ reply to the prosecution's opposition to an appeal bond. Â Also, see my previous blogpostings on Max Hardcore's case, andÂ Ellen Podgor's recent listing of some white collar criminal appellants who have and have not been granted appeal bonds. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, November 2, 2008

Learning at the zoo.

^ ^ Zoos keep captive animals for the entertainment of humans. Yes, some zoos may have a higher educational and preservationist purpose. However, if attendees' entertainment motivation for going to zoos were eliminated, few would be visiting zoos, and many of those on display would no longer be put on display. ^ Nevertheless, my 2 1/2 year-old-son loves the zoo, and I admit having enjoyed myself immensely with him at the National Zoo for many hours today. One day he will know about the animal rights movement's opposition to zoos and circuses and make up his own mind. ^ Our primary motivation for driving to the zoo today was to visit the apes. All of the apes there exemplify the essential life and lawyering approach of being here now, as lived and taught by such philosophical giants as Bhagavan Das^ and Ram Dass, and as exemplified in the following story: ^ "A man is chased in the wilderness by two tigers, only to be forced off a cliff, hanging for life from a vine. One tiger waits above and the other waits below for a human meal. Two field mice gnaw away at the vine. The man sees a wild strawberry growing from the side of a cliff, reaches for it, tastes it, and -- with his life hanging in the balance -- thinks of how delicious the strawberry tastes."^ Here is another being here now story from the same websource: "A Japanese warrior was captured by his enemies and thrown into prison. That night he was unable to sleep because he feared that the next day he would be interrogated, tortured, and executed. Then the words of his Zen master came to him, 'Tomorrow is not real. It is an illusion. The only reality is now.' Heeding these words, the warrior became peaceful and fell asleep."^ As the apes moved about above our heads effortlessly along ropes, as they ate and drank, and as they sat in the moment, they were being here now, as was my son, who was moving forwards in the moment.^ Jon Katz.

Posted by Jon Katz in Persuasion at 00:00