

Wednesday, December 31, 2008

Nonviolence starts with each of us.

Millions have been repeating "Happy New Year" this week. Millions make resolutions for the new year, so often not kept. A worthy resolution that can be started immediately is nonviolence. Let this be the first of all days that people no longer hit their children, their significant others, nor anyone else. Reducing the eating of land and sea animals reduces violence, as does the reduction of buying and wearing leather and fur. The hunting of animals and the catching of fish needs to stop. Let this be an era where people insist that their governments rein in militarism, end capital punishment, and rein in police violence, including tasing, shooting, beating, and police dog attacks. I am not a complete pacifist, but I believe that violence begets violence, and that non-violence starts with each of us, right this moment. Please join me now. Jon Katz. ADDENDUM: Originally, I was going to focus this blog entry on the horrors and risks of nuclear war. In that regard, I include this link to the passionate and expletive-filled presentation of the late musician and bandleader Sun Ra -- who claimed to have come from another planet -- who admonished: "If they push that button, you can kiss your ass* goodbye." Sun Ra's "Nuclear War" performance preceded the fall of the Soviet Union, but is at least as timely today as ever.

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

Tuesday, December 30, 2008

Forfeiting confrontation rights through wrongdoing.

Â Bill of RightsÂ (From public domain.)Â Last June, the United States Supreme Court determined that Crawford v. Washington, 541 U.S. 36 (2004) strictly limits prosecutors' abilityÂ to present to the jury a homicide victim's testimonial hearsay, even though the victim could have testified at trial had his or her killing not been procured. Giles v. California,Â __ U.S. __, 128 S. Ct. 2678 (June 25, 2008). Â Two weeks ago, the D.C. Court of Appeals underlined that, underÂ GilesÂ , a criminal defendant only forfeits his or her Sixth Amendment confrontation rights if the defendant procured the witness's unavailability for the purpose of preventing the witness from testifying. Roberson v. U.S., __ A.2d __ (D.C. Dec. 18, 2008). In Roberson, although the D.C. Court of Appeals called it a close call, the appellate court determined that the trial court had not abused its discretion by finding by a preponderance of the evidence that defendant Roberson had arranged for someone to kill Mr. Lee to prevent Mr. Lee from giving eyewitness testimony to Roberson's presence during the shooting death of Donnell Simms. Consequently, the Court of Appeals left undisturbed the trial court's determination that Roberson had waived his right to confront Lee, due to forfeiture of that right by wrongdoing. As a result, the prosecutor was permitted to present Mr. Lee's testimony to the grand jury and information he provided the police. Â Due to Roberson's trial lawyer's failure to raise a hearsay objection to the following testimony considered outside the jury's presence, RobersonÂ declines to address whether Crawford prohibits a trial court's consideration of testimonial hearsay in determining whether forfeiture by wrongdoing had been committed by the defendant. Roberson's trial lawyer had no apparent disadvantage to raising such an objection, because no jury was present to hold such objections against Roberson. Hopefully criminal defense lawyers will always raise timelyÂ objections when faced with similar testimonial hearsay presented outside the jury's presence. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, December 29, 2008

Freddie Hubbard departs the planet.

Freddie Hubbard at the Messina Jazz Festival with Elvin Jones, McCoy Tyner, Reggie Workman, and Sonny Fortune. In 1980, I bought and started wearing out Freddie Hubbard's album Red Clay with my turntable needle, before the days of DVD players. The local jazzplaying radio station WPFW today announced that Freddie passed away. Indystar.com says it happened today, related to complications from a heart attack late last month. He was seventy. Freddie Hubbard was a major force in jazz trumpet. He blew me away when I experienced him live at the late Jonathan Swift's nightclub in Cambridge, Massachusetts, a quarter century ago, when he proclaimed that he was not going to be playing any more crossover "sh*t". Freddie was great both as the lead musician and as a team member, including with VSOP, Herbie Hancock, Chick Corea, and Woody Shaw. As I have said many times, jazz music inspires me tremendously in my trial work, including the improvisation involved, the self-demand for excellence by jazz greats, and the mind-boggling envelope pushing of so many of them. Thanks, Freddie, for you. Jon Katz.

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

Sunday, December 28, 2008

Does waiting tables make one a better trial lawyer?

Å Å The closest I came to waiting tables was working as a pantry assistant in the kitchen of my old summer camp, making orange juice and bug juice with a garden hose and metal oar, moving food on hand trucks and flat trucks, shoving my hand in innumerable chickens to pull out the gizzard packets (in my pre-vegetarian days), and making sandwiches for the nighttime on duty staff. Å I ran into many colorful kitchen characters. Some of them were pleasant, some the opposite, and most in between. I saw things that underlined why to think twice about eating in restaurants. For instance, when I mentioned to a kitchen supervisor with decades in the food service industry that I wasn't sure whether the chopped liver was still fresh enough for sandwiches for the late-night staff, he scooped his big bare unwashed finger into the yuckbowl, stuck it in his mouth as if it were chocolate, and proclaimed: "That will sharpen your pencil, but I have no one to write to!" In retrospect, I might have asked whether I was still within the state health code to make sandwiches from the now-fingerswirled yuck bowl. Who would have eaten them in the first place, though? Å A fellow criminal defense lawyer once observed that prosecutors are not born; they are hatched at the age of twenty-five, with a law degree in one hand, and no real world experience. That might be overly simplistic, but any lawyer runs such a risk if s/he travels a path of a financially-privileged life (not all law students come from such privilege, of course), rarely getting the hands and fingernails dirty, living in the social bubble of a college campus, going straight to law schools that mainly focus on the head zone rather than the heart zone, working summers in the rarefied environments of corporate law firms, talking and writing lawstudentspeak, and competing for grades and law review to avoid having one's law school years seem all for naught. How many real humans live that way? Å Waiting tables seems to be a good way to make one a better trial lawyer. Waiters and waitresses (collectively, "waiters") face customer complaints all the time. Will the waiter learn to diffuse such situations with empathy and humor and to let customer problems roll off the back? Å At least some do. Waiters often find themselves in between customers and chefs, and trial lawyers often find themselves between clients and judges, clients and prosecutors, and clients and opposing witnesses. Å Rather than following the common path of going straight to law school from college, future law students might be wiser to spend at least a year rubbing elbows with a much wider cross section of people than are found on college and law school campuses. I probably would have gone nuts going straight to law school from college, from one Neverland to a new Neverland. In any event, I had not taken the LSAT on time to enter law school right from college, and took a job for one-year as a financial auditor with the Irving Trust Company in the belly of the Wall Street capitalist beast. I winced many times at the unapologetic and very open racially insensitive comments of too many of my colleagues, spoken not only at the frequent happy hours; that underlined future risks to come with racism in jury panels, judges, and the rest of the people I would soon deal with as a lawyer. Although my intention was to get experience, pay, and fun during the year between college and law school, I benefited very much that year rubbing elbows with a much larger cross section of people than I had ever dealt with before on a daily basis, from clerical workers who never would enter college to high-level capitalist managers. Å In my first semester of law school, I had a torts professor who seemed to have lived a life very far from the country club set. He felt that the way to make good trial lawyers was to simulate hardscrabble courtroom experiences; he spoke of the importance of thinking quickly on one's feet. He would have students play the roles of judges, witnesses, and lawyers. He had me cross examine a doctor, played by him, to underline the conspiracy of silence that he said previously existed before plenty of physicians agreed to testify as paid expert witnesses for injured plaintiffs in medical negligence cases. At one point during the cross examination, I caught the professor-witness say "Up yours" and give me the finger. The class had a good laugh, and I was not sure how much that was motivated by his frustration with my filtering my participation too much from my head in this exercise rather than shooting more from the hip, or if it was more to stay in the role of the difficult doctor being cross examined. Å I visited the professor the same day, because I knew I was to remain on deck the next day to complete this theme of our torts class. When I told him I was not sure whether the bird-flipping was merely him keeping in character as the opposing physician witness, or something beyond that, he told me he would go easy on me the next day. I told him I was not looking to get off easy, but to be treated fairly. Whatever this professor's strengths and weaknesses, I decided he was worth another try the next year for his evidence class. Of all my law school professors, he seemed to have more trial experience than any of them, and that certainly enhanced my law school learning. Å The indefatigable blawger Scott Greenfield has written several times that law students are disserved by law professors who treat them with kid gloves, because that does not reflect the real world of practicing law. Certainly, law professors should not have a license to be tyrants, nor to act on sexism or racism, nor to act or grade unfairly otherwise. That does not mean that a good law professor molly-coddles. Å Not long after graduating law school, I read an interview with my torts law professor, who died earlier this year. When he started teaching law school in the 1960's, more students had hides like a rhinoceros (I think he said many had significant work experience already), but he found that the hides thinned over time with newer law students. When facing difficult judges -- and even the best lawyers cannot completely avoid judges being difficult with them -- a critical starting point is for the lawyer to have a thick skin, not an insensitive skin, but a thick skin with a very caring heart. The lawyer is not in

the courtroom for his or her own benefit, but to fight for justice for the client.Â

Posted by Jon Katz in Persuasion at 00:00

Friday, December 26, 2008

The pathetic one-way street of no trespassing signs.

Â Bill of RightsÂ (From public domain.)Â If a civilian walks or drives pastÂ NO TRESPASSING signs, s/he can get arrested, searched "incident to arrest", brought before a judicial officer to have a bond set, and prosecuted for trespassing. The suspect can be prosecuted even if s/he is illiterate, does not understand English, has bad eyesight, or does not see the NO TRESPASSING sign because it is dark and the sign is not illuminated; the defendant will be permitted to raise such a defense, and the arresting cop may testify or testify that the defendant confirmed s/he saw the sign (while collapsing chronology about whether the defendant said s/he saw the sign only when the cop pointed it out, and obscuring whether the defendant said s/he could read or understand the language on the sign, and whether its lettering was obscured by the dark, by tree branches, or by years of wear on the sign). In many jurisdictions, the maximum possible penalty for trespassing is too short (not more than 180 days) so as to preclude the right to a jury trial, which is a travesty of justice, because no person should be subjected to conviction of a jailable crime without the right to a jury trial. Â If a cop knowingly passes no trespassing signsÂ in Maryland to investigate a crime, s/he can get a free pass. I complained about this last March when Maryland'sÂ Court of Special Appeals gave its blessings to such behavior, and I complain about it now all the more loudly now that Maryland's highest court yesterday affirmed. *James Desmond Jones v. Md.*, __ Md. __ (Dec. 23, 2008). Adding salt to this wound to the Fourth Amendment, this week's Jones opinion permits cops to persistently knock (read "bang" or even "pounding as if with aÂ battering ram"?)Â on the door of one's home for minutes on end, without running afoul of the Fourth Amendment. Â Â Maryland's Court of Appeals reasons that the house's occupants have as much of an option to refuse to come to the door with such persistent police knocking/banging as when a solicitor comes to the door. But wait, if the Court of Appeals is saying that no trespassing signs are of no use with the police, what type of confusing -- at best -- message does this send about whether the house's occupants can then tell the cops to get the hell off their property, which is permitted against solicitors (and the very act of the solicitor coming on the property posted for no trespassing gives the occupant an immediate right to call the cops on the solicitor without the occupants first saying a word to the solicitor)? If the occupants tell the cops to scram and the cops don't scram, since when should the occupants expect they will be successful in calling the cops to get the visiting cops to scram? If solicitors keep banging on the house door and the occupants call the cops, the cops might arrest the solicitors for disturbing the peace; the same will not happen to cops who bang on the door.Â *James Desmond Jones v. Md.*Â Â And what about cops who bang on the door and yell "Open the f--kin' door, or we'll mess you up good, and haul your ass to jail" and then lie that they politely knocked on the door for a few moments and politely asked to speak with the occupants?Â Â Excuse me while I get a bucket and hurl. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 24, 2008

When the jury has no alternates.

Photo from website of U.S. District Court (W.D. Mi.). Why would a prosecutor and judge not try to have alternate members on a criminal jury? Certainly a criminal defense lawyer might not raise the issue, in order to have a chance -- if a juror were stricken -- for a mistrial to get a better jury, to move settlement negotiations further, or to have the advantage of better knowing the opponent's strategy and evidence on retrial. Steven Powell was accused of several counts of third degree sex offense, and proceeded to trial in a Maryland Circuit Court. Nobody sought alternate jurors. Soon after Mr. Powell's jury was selected and sworn, and before opening statements, one of the jurors informed the judge that he knew Mr. Powell. The juror said he was concerned that he could not be a fair and impartial juror, so the judge struck the juror, leaving eleven jurors in a state that guarantees criminal defendants a twelve-person jury. *Powell v. Maryland*, __ Md. __ (Dec. 15, 2008). Powell's attorney declined to proceed with an eleven-member jury. At the time, it seems that the remaining potential jurors were in the courtroom and had not been dismissed, and the judge decided to proceed to select a replacement juror from the remaining potential jurors. Powell's lawyer objected, but did not move for a mistrial. Had Powell made such a motion, he would likely not have had a good argument against a retrial. The parties proceeded to select a replacement juror, but the judge refused to permit the parties to exercise peremptory strikes against any of the original eleven jury members. *Powell v. Maryland* Maryland's intermediate appellate court affirmed Mr. Powell's conviction, and said that by not moving for a mistrial, Mr. Powell waived making his complaints about seating the replacement juror. Six of the seven judges of Maryland's highest court last week reversed Mr. Powell's conviction, finding no obligation for the defendant to make a mistrial motion to protect that right. Here, defense counsel said "[t]his is going to be a mistrial" after refusing to proceed with an eleven-member jury, but he did not make a motion for a mistrial, but that was neither here nor there for the outcome before the Court of Appeals. Concurring in the result, Judge Murphy said that a mistrial for choosing from the remaining jury pool should only have been granted if the defendant had moved for a mistrial. Judge Murphy concurred in the reversal of Powell's conviction due to the trial judge's refusal to permit any peremptory strikes to be used against the original twelve jurors during the selection of the replacement jurors. How would your state's law have handled Mr. Powell's jury situation? Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, December 23, 2008

Unseamly pants lawsuit kicked in its appellate seat.

Image from public domain. Â Roy Pearson flushed his \$100,000 administrative law judge job down the toilet over his widely and justifiably lampooned multi-million dollar lawsuit against a dry cleaner that allegedly misplaced his pants. Â Last Thursday, the D.C. Court of Appeals affirmed his trial loss against the dry cleaner. The appellate opinion reveals that Pearson mishandled his pro se case by missing the ten-day deadline for demanding a jury trial, which he was never able to get reversed by the trial judge. Â Out of the deep pain that Pearson's lawsuit caused the small businesspeople he sued in this litigation came the gift of providing sufficient information to have him removed from his administrative law judge position. Congratulations to the Chungs, who are the appellees and ultimate trial and appellate victors.Â Jon Katz

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

Monday, December 22, 2008

Why did Felt blow the whistle on Nixon?

Â United States Constitution (From public domain.)Â How selfish or not was the late W. Mark Felt'sÂ motivation to helpÂ the Washington Post's Bob Woodward and Carl Bernstein blow the lid off the Watergate coverup right up to Nixon, to the point that Nixon was forced to resign lest he be removed from office by impeachment? Â On National Public Radio this pastÂ weekend, Daniel Schorr -- who apparently was on Nixon's enemies list -- boiled Felt's motivation to two things: First, Felt -- who took three decades to admitÂ he was the Deep Throat informer -- wanted to preserve the integrity of the Federal Bureau of Investigation. Second, Felt had been passed over by Nixon to succeed J. Edgar Hoover as head of the FBI. Â Schorr's first point is tempered by Felt's 1980 conviction while Carter was president -- if he were indeed guilty -- for approving illegal "black bag" break-ins of the homes of suspected Weather Underground members, for which Reagan pardoned him five months later while the case was on appeal. Schorr says Nixon long suspected Felt of being Deep Throat, and NPR reports that Nixon supported Reagan's pardon of Felt. Â If Felt approved such break-ins without judicial search warrants, did he do so on the orders or urgingÂ of a higher-up, or was this just business as usual at the time at the FBI that Felt was not going to stop? Was Felt a carbon copy of J. Edgar Hoover, who was no great friend of civil liberties, and did he just want to maintain FBI independence from the White House? In any event, this man who was convicted of one break-in helped blow the lid off a more monumental break-in. Â Most likely because the radio segment was so brief, Daniel Schorr did not elaborate on how Felt was motivated by Nixon's not having him replace J. Edgar Hoover. Was FeltÂ paying back Nixon? Was he in so much pain from not being elevated to the FBI's directorship that he was willing for Nixon to experience the profound pain that Nixon ended up experiencing? Would Felt haveÂ felt more loyalty to Nixon had he been made FBI director? Felt left the FBI in 1973, so his insider information ended or fizzled there. Â Regardless of Felt's motivation, he did the nation a great service by revealing the cover-up to Woodward and Bernstein. However, we must remember that few battles for justice are between the extremes of black and white and pure good and pure evil. Power will be abused in and out of government as long as people have power. Moreover, too many Americans seem to thirst for a powerful America just to have a powerful America. Â In the foregoing context, Ronald Reagan's overly-simplistic 1980 campaign message of making America great again rang strongly with many Americans who did not want to see America surrender any more wars after Vietnam and did not want to see presidents like Jimmy Carter restrain the military from very violently addressing such international "embarrassments" as the taking and lengthy keeping of American hostages in Iran. Probably in a proverbial game of chicken, the Iranian leaders recognized that Reagan was trigger-happy enough to invade Iran and possibly drop a nuclear bomb or more thereÂ if the hostage crisis were not dropped post-haste, which led to the Iran-Contra abuse and solidification of presidential power, but Reagan was into his final term once everyone knew about Iran-Contra. Â George Bush I took over after Reagan, probably less from his own qualities than the robotic failure of Mike Dukakis to connect with the American people, as exemplified by his failure to even say during a debate who his heroes were. Of course, Quayle said his grandmother was his hero, because he underlined she taught him that you can achieve anything you resolve to achieve; how non-profound a reason to choose a hero. Of course, the nagging question remains of where was George Bush I during the Iran-Contra scandal. Â Then came Clinton, who did not seem to be such a power-hungry paranoid as Nixon nor a Rambo Reagan. However, Clinton for the most part continued the status quo of the military-government-industrial complex. Then came Bush II, who used September 11 as an excuse to run roughshod over the Constitution, along with the excessive number of Congressmembers who let him do it. And he still got re-elected in 2004; then again, his opponent John Kerry did not do much to connect with voters. Â Now comes Obama, who spoke loudly and amorphously of "change" during his campaign, and who has named a slew of establishment people to cabinet posts and other high-level posts who do not seem yet to offer much beneficial change from what the Bill Clinton administration offered. Like Bill Clinton, Obama is a lawyer and very bright, and probably well understands Constitutional law. How much will Obama protect the Constitution, including the Bill of Rights as it applies to everyone, including criminal defendants? Â Unfortunately, until the economy heals much further, too many people are going to see civil liberties as luxuries that can take a back seat to the economy. However, anytime that civil liberties are permitted to be weakened, it takes much more struggle to revive them than the heavy lifting it already takes to expand and keep them going. . Â Watergate made clear the absence of limits to the possible and actual abuses of governmental power, but by no means spelled an end to such abuses. The successes in reversing the Watergate nightmare will be of little use if we do not constantly, effectively, and thoroughly scrutinize the actions and abuses of power of everyone in government, from executives to their underlings, to legislators, to judges, and to the cops on the street, prosecutors in court, and jailers in the overpopulation of the nation's detention facilities. Â For those, like I, who believe they are on the side of the angels fighting in court for criminal defendants, that client-by-client approach by itself will not secure civil liberties; constant vigilance over government actions outside the courthouses is also critical. Jon KatzÂ ADDENDUM: A quality video of Nixon's resignation speech apparently is not on YouTube, but can be found here. Dan Aykroyd could not have delivered a more surreal performance than Nixon during this video of final studio preparation for his resignation

speech.

Posted by Jon Katz in Constitutional Law at 00:00

Sunday, December 21, 2008

Mark Helm departs the planet.

At forty-five, I still tend to feel invincible, unless I am killed by an accident, a natural disaster, warfare, or deadly assault. However, as each year passes, more people I know pass away. I know people in their late eighties and nineties, who have outlived the vast majority of their chronological contemporaries. Last week, Mark Helm passed away. He attended the Trial Lawyers College in 2004, which was nine years after I did. He was only thirty-eight. I never met Mark, and do not think we interacted on the Trial Lawyers College's listserv or otherwise. I wish I had met him. From what I understand, Mark was a criminal defense lawyer who defended his clients to the hilt, and was able to be hilarious outside of court (and perhaps in court at the right times, for all I know) when fighting in the pits for justice. Mark's website talks of the way he defended his clients, which ideally describes the level of representation that all criminal defendants should receive: "I make every attempt to get to know my clients and fight for them as a friend, brother or sister. I do not fight for a name, a cause, or a case number. I fight for a person I care for often someone that has been forgotten, ignored, and passed by. I often fight for someone that has been kicked so many times and so many ways, it is heroic they chose to fight another day. I fight for people with dreams, often unrealized, because they never had a chance, never were given a chance but, they keep going and do the best they can." "I believe everyone deserves to have someone in their corner. I feel privileged and fortunate to be able to help, defend, and support others on a daily basis. I aggressively defend and protect people the way I would like to be treated if I were accused of a crime. I never forget if the cards had been dealt differently, our roles may have been reversed and consequently, I do everything within my power to protect and defend the people I represent." If I am not mistaken, I did not know about Mark because he had the modesty not to be tooting his own horn all the time, but instead focused on defending his clients. Think of all the wonderful people we do not meet nor spend time with because we let ourselves get sucked into the daily grind of work, sleep, a personal calendars and beer. Not only does it enrich our own lives to make time for such people, but it also speaks loudly to them how much we think of them. Thanks, Mark, for your inspiration. My thoughts are with you and your family. Jon Katz

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

Friday, December 19, 2008

Feds issue updated 18 U.S.C. 2257 recordkeeping regulations.

18 U.S.C. 2257 recordkeeping regulations (From the public domain.) On December 2, I blogged that updated 18 U.S.C. 2257 recordkeeping regulations aimed against child pornography were coming around the corner. The aim is overbroad, censorious, and not precise. In any event, the regulations were issued yesterday by the Justice Department and are here. Thanks to some listserv members for posting on the new regulations. My uploaded link to these regulations comes straight from the online Federal Register. I discussed the proposed regulation update here. The introduction to the updated 18 U.S.C. 2257 rules says: "This rule finalizes two proposed rules and amends the record-keeping, labeling, and inspection requirements to account for changes in the underlying statute made by Congress in enacting the Adam Walsh Child Protection and Safety Act of 2006." The rule takes effect on Inauguration Day 2009. The introduction to the rules further states: "Compliance date: The requirements of this rule apply to producers of visual depictions of the lascivious exhibition of the genitals or pubic area of a person and producers of simulated sexually explicit conduct as of March 18, 2009." The Supreme Court's most key recent ruling on child pornography prosecutions is *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In 2001, I became the founding president of the Free Speech Coalition affiliate for the District of Columbia, Maryland and Virginia, and for many years have defended the First Amendment rights and sometimes criminal defense rights of adult video stores, strip clubs, online providers, and individuals in the field. The FSC is the main trade association for the adult entertainment industry, particularly for the recorded and print image side of the business. However, I have made my disagreement clear from the beginning that I disagree with and refuse to participate with the Free Speech Coalition's support of child pornography prosecutions, considering that the First Amendment applies even to the possession and distribution (as opposed to creation) of child pornography, even while I acknowledge that this area includes some of the most upsetting violations and images imaginable and beyond imagination. The FSC's child pornography policy might make good business sense, but the First Amendment must come first. I plan to review and comment on the updated 18 U.S.C. 2257 regulations in the near future. Jon Katz

Posted by Jon Katz in First Amendment at 00:00

SuperLawyers renews me on its list.

Jonathan L. Katz only 5% selected each year visit superlawyers.com For whatever it is worth, Super Lawyers has renewed me in its 2009 list of Maryland criminal lawyers. Super Lawyers' selection process does not sound very rigorous. Scott at Simple Justice has heavily panned the Super Lawyers list and the AVVO list. He reported turning down Super Lawyers' invitation. I wrote about the list last January. The publication promotes paid listings for those rated on its page. I have not paid them a dime, but I did accept Super Lawyers' invitation to be listed. The list I would very much like to be added to is the vegan criminal defense lawyers' list, if one is created. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, December 18, 2008

Persuading Twitterers, their opposites, and those in between.

Â Â Image from Library of Congress's website.Â A twenty-two year old recently pondered about how inconvenient life must have been before the days of Google. Ah, yes, the days before personal computers, DVDs and CDs, touch-tone phones, cassette tapes, eight-track tapes, widespread color television, widespread black and white television, and 45/33 RPM vinyl music albums.Â The days were wonderful before rampant drug testing even to play in the high school symphonic band, before metal detectors at schoolhouse entrances, and before the epidemic of unjust and overly harsh mandatory minimum prison sentencesÂ for drug crimes. We take the bitter with the sweet. Â I reminded this twenty-two year old that Al Gore had not yet invented the Internet throughout my years of public school, college and law school. Frank Zappa long ago warned about the commercial slime oozing out from your TV sets. How many take heed of that sensible warning, now receiving custom-made commercial messages every time they accept cookies to log onto FaceBook, MySpace, YouTube, Amazon, and Twitter? Â In 1984, Orwell wrote of the erosion of language, and the elimination and twisting of words, by a sinister government. Now, it happens every day with cellphone text messages (to the point that many people let their voiceboxesÂ get full, in favor of texting), instant messaging, BlackBerries/IPods/Treos and online message boards. What ever happened to opening a book, and communicating with pen to paper? Â The foregoing is the reality with which trial lawyers must persuade judges and juries, and communicate with their clients and witnesses. At the same time, there is a small minority of people who do not touch the Internet and do not even have email addresses, and an even smaller minority who refuse to learn. Â Long before the Internet came about, yogi Baba Hari Dass went silent and communicated by a chalkboard hung around his neck. Such communication helped Baba-ji free himself from excessive verbal and written noise so he could focus on living the yoga life. This is very much the opposite of sending multiple daily text McMessages from a cellphone followed by McTwitter (limited to 140 characters, which is shorter thanÂ many limericks and haikus foundÂ inÂ public toilet stalls) followed by FaceBook (which invites members to say what they're doing at the moment, with many responses less interesting and inspiring than that the typer is contemplating one's own bellybutton lint). If the Internet and cellphone lines get jammed in the Washington, D.C., metropolitan areaÂ from the millions celebrating Obama's inauguration, how many people will suffer from withdrawal symptoms? Â The world in the past moved forward without computers, and can continue doing so if it had to happen again. Starting today, see what happens if you swear off text messaging, Twitter, MySpace, and FaceBook for one week. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Wednesday, December 17, 2008

Shoes blues.

Nikita providing further fodder for Mad Magazine. Â Shoe-throwing is a traditional insult in some parts of the world. Had reporter Muntadhar al-Zaidi not thrown his shoes at George Bush, II, on December 14, millions of people would still have been in the dark about such a tradition. Â Had then-Soviet premier Nikita Khrushchev not banged his shoe on his desk (was he banging a spare shoe brought for such occasions?) in October 1960 at the United NationsÂ during the PhilippineÂ delegate's accusation that the Soviet Union was swallowing up Eastern Europe, perhaps the delegate's compatriot Imelda Marcos would not later have been bitten by a shoe bug. Â As to my shoes, they are all vegan. Â The National Lawyers Guild -- with which I have had a long love-tinge relationship, as detailedÂ here, here and hereÂ -- has stuck its shoe in its mouth by issuing a news release in which its Executive Director, who is very likeable and apparently an effective peace broker, proclaims: "With that single brave act, Mr. al-Zaidi has inspired the Guild to transform one country's negative symbol into a gesture of goodwill." At least the news release encourages people to donate shoes to the needy. Â The video of the shoe-throwing incident shows Mr. al-Zaidi aiming at least one of his shoes at Mr. Bush. That is a violent act. As with so many Guild statements, the Guild's failure to dissent from the shoe-throwing is not in my name. Violence is violence; violence begets violence; and violence must end now, starting with each of us. Â Certainly, journalists are in a unique position to get dissenting messages to otherwise communication-sheltered world leaders. However, they need not do so violently, as exemplified by Wenyi Wang's April 2006 White House shout-out to the Chinese president with a modest but passionate insistence that human rights be protected in China. Jon Katz. Â ADDENDUM: Thanks to my Eastern European politics professor Sarah Meiklejohn TerryÂ for telling the story of the shoe-banging Khrushchev,Â in 1983.

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

Tuesday, December 16, 2008

Prosecution: Fail to authenticate video at own risk.

Photo from website of U.S. District Court (W.D. Mi.). Some may say a picture is worth a thousand words, but first the picture must be authenticated to come into evidence at trial. Rory Washington went to trial for attempted first degree murder in Baltimore, Maryland. Over his lawyer's objection, the prosecutor introduced into evidence a compilation of security camera video shoots at the bar where the attempted murder allegedly took place. The prosecutor proceeded in closing and rebuttal argument to rely heavily on the video. Maryland's intermediate appellate court held that the trial court abused its discretion in admitting the videotape and still photographs into evidence, but affirmed on a claim that the error was harmless. *Washington v. State*, 179 Md. App. 32, 943 A.2d 704 (2006). Praised be a unanimous Maryland Court of Appeals for reversing the conviction, saying: "The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath. Without suggesting that manipulation or distortion occurred in this case, we reiterate that it is the proponent's burden to establish that the videotape and photographs represent what they purport to portray. The State did not do so here. Mr. Kim, the owner of the bar, testified that he did not know how to transfer the data from the surveillance system to portable discs. He hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format. Mr. Kim did not testify as to the subsequent editing process and testified only that the surveillance cameras operated 'almost hands-free' and recorded constantly. Detective Vila's testimony also failed to authenticate the video. He testified that he saw the footage only after it had been edited by the technician. We hold that the trial court erred in admitting the videotape and still photographs without first requiring an adequate foundation to support a finding that the matter in question is what the State claimed it to be." *Washington v. Maryland*, ___ Md. __ (Dec. 12, 2008). Concerning harmless error review, Maryland's high court stated: "The standard in Maryland for evaluating harmless error was set forth by this Court in *Dorsey* [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of "whether erroneously admitted or excluded" may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976). The standard remains unchanged today. See *Lee v. State*, 405 Md. 148, 174, 950 A.2d 125, 140 (2008); *State v. Baby*, 404 Md. 220, 265, 946 A.2d 463, 489 (2008); *Bellamy v. State*, 403 Md. 308, 332, 941 A.2d 1107, 1121 (2008); *State v. Logan*, 394 Md. 378, 388, 906 A.2d 374, 380 (2006); *Clemons v. State*, 392 Md. 339, 372, 896 A.2d 1059, 1078-79 (2006). The Court of Appeals continued: "Without the videotape, the State's identification of petitioner as the shooter would have rested primarily on the testimony of Mr. Wright, a witness who had declined on several occasions pretrial to identify petitioner as the shooter. Although it was a jury determination as to the credibility of Mr. Wright's explanation for why he did not identify petitioner as the shooter before the trial, the videotape, relied upon so heavily by the State, under these circumstances, was not harmless beyond a reasonable doubt." Congratulations to Rory Washington for his appellate victory. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, December 15, 2008

MD: If the handle fits the eye, you must acquit the guy.

7u Photo from website of U.S. District Court (W.D. Mi.). In some courthouses in Maryland, prosecutors often offer a plea deal involving a not guilty plea on an agreed statement of facts rather than a straight-out guilty plea. This approach often seems to be more a form of habit than anything else to which judges, prosecutors and defense lawyers are accustomed, and this approach gives defendants an opportunity to move for judgement of acquittal based on insufficient evidence, and to appeal if the trial judge determines that the evidence is sufficient to convict. If a defendant wants to settle his or her criminal case, a not guilty on an agreed statement of facts is preferable to a straight-out guilty plea, because if the judge grants a motion for judgment of acquittal on the stipulated facts, the defendant is acquitted. Matthew Polk learned the benefit of such a plea -- versus a straight-out guilty plea -- two weeks ago. He entered a not guilty plea on an agreed statement of facts on an allegation of possessing a concealed dangerous weapon, a knife. The trial judge denied his motion for judgment of acquittal, but Maryland's intermediate appellate court reversed his conviction, finding that the knife was not concealed, because its handle was visible to the cop involved. Polk v. Maryland, ___ Md. App. __ (Dec. 3, 2008). As to the unusual language in the court's opinion, that is par for the course of the author, retired judge Charles E. Moylan, Jr. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

Bloggng prosecutor announces own firing.

On the Objection blog, anonymous blogger Gspeezy last Thursday announced his or her firing as a prosecutor, apparently in Washington state. S/he did not say the reason. Since early 2008, Gspeezy blogged anonymously not to protect his or her identity, but, s/he wrote, for such reasons as acknowledging the rights of those against whom s/he litigated. Therefore, it seems his or her boss knew his or her blogging identity. Gspeezy's blog does not show one way or another whether his or her blog impacted Gspeezy's job termination. Underlining how important it is to find the humanity in our opponents and not just our allies, Gspeezy's blog revealed a rocky year of plenty of days filled with boredom, job frustration, treading water to catch up with work obligations, getting his or her personal life organized, and an announcement two months ago incorrectly anticipating a long suspension of blog entries. Ironically, I learned of Gspeezy's job termination not long after learning about the Objection blog and about its author's job termination. Not many prosecutor blogs exist, and they are one way for me to get a better understanding of my opponents. If you have any prosecutor blogs to suggest adding to my blogroll, please send me the URL. Jon Katz.

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

Sunday, December 14, 2008

Maryland death penalty panel says abolish it.

Â Last Friday, the Maryland Commission on Capital Punishment issued its final report to the General Assembly, recommending the abolition of the death penalty, saying:Â â€œFor all of these reasons -- to eliminate racial and jurisdictional bias, to reduce unnecessary costs, to lessen the misery that capital cases force victims of family members to endure, to eliminate the risk that an innocent person can be convicted -- the Commission strongly recommends that capital punishment be abolished in Maryland.â€• Â Report at 24.Â Â With tax revenue being tighter than ever, not only is death penalty abolition the only humane choice, but it also is the fiscally responsible choice. Huge monetary sums get pumped into courts, prosecutors, and court-appointed-counsel for death penalty cases. Â Thanks to Gideon for posting on this story.Â Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 20:00

The hell of captivity.

My two-year-old son loves the aquarium store down the street. With the aquarium and zoo, I do not ask my boy to consider whether the mistreatment and suffering of captive water and land animals would change his mind about visiting these places, particularly not at such a young age. As he gets older, he will decide for himself how to address such issues. Â Recently at the aquarium, we visited the reptile room. I was at first looking with fascination at a dragon lizardÂ in a dry glass tank all alone. I then saw that this dragon lizard was clawing at the side of the tank in the direction of the adjacent tank that had two smaller dragon lizards. The larger lizard looked so anxious for companionship that it was not ready to recognize that it would not get to be with the other two lizards without the help of an aquarium employee. Â Doesn't the foregoing scenario helpÂ illustrate the plight of prisoners? Sure, they interact with other prisoners. However, in prison they must watch their back at all times. If they learn a family member died, they probably steel their exterior lest they be labeled and targeted as weak. if they break down crying in front of other inmates over the news (at least that was a real risk related by a juvenile inmate in television interview many years ago). When family members and significant others visit, if they are lucky not to be separated by plexiglass, the guards might permit prisoners to hug them hello and goodbye, but that is it. Most inmates probably cannot rely on their significant others to maintain sexual fidelity to them. Prisons can be suffocating hells. Â Many or most people must know how much prisons are hells to want to radically overhaul and shrink the criminal justice system so as to make them less hellish and to have fewer people there. In the meantime, as I blogged last year,Â healing must continue, both inside and outside jails and prisons.Â You can make a difference in providing compassion and more humanity for inmates, who consist of people still presumed innocent and awaiting trial, and those already convicted. After all, accumulated feathers still sink the boat. Every little bit helps, and every larger step helps all the more, including getting on the backs of your lawmakers and the other government powers that be; spreading the word of justice for prisoners and criminal defendants to your family, friends and acquaintances; and visiting inmates, giving them moral support, andÂ even offering to provide them classes in your areas of strength, beÂ it academic, creative, supportive, or otherwise. . Â The Human Kindness Foundation has an excellent webpageÂ about how to easily arrange to visit with inmates and what to do with the visits, and sends thisÂ messageÂ about whatÂ you can do to help inmates.Â In this spirit of helping inmates, Vipassana meditation teachers have gained access to inmates in such places asÂ SeattleÂ -- since at least 2001 -- to help their healing and harmonization process. Hopefully, jails and prisons nationwide will welcome such programs, both for their inmates and for the jailers. Â Â Â Vipassana meditation program workedÂ at India's heavily crowded Tihar jail, which likely is more of a hell-hole physically than American jails and prisons. The initiative -- see the video clip here -- was led by longtime law enforcement official Kiran Bedi, who will hopefully give courage to law enforcement officials and jailers to avoid making prisons mere warehouses, but places where inmates are helped to transcend the hell of prison so that when they are released they may move forward and so that they may keep hold of a feeling of humanity before release. Ms. Bedi recounts her prison reform work in It's Always Possible. Â Before the year ends, please reach out to and humanize a prisoner, through a visit or a letter at the very least. It will do both of you good. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, December 12, 2008

How racist is the judicial and criminal justice system?

A fellow criminal defense lawyer has over the years been an active local leader in the National Lawyers Guild and the American Civil Liberties Union. Over the years, I have felt strong dissonance over remaining a Guild member, but have stayed for the reasons expressed here, here and here. My points of departure with the ACLU -- which I have belonged to for over two decades -- are fewer and less deep. Unfortunately, if I leave the Guild, no sufficient alternative lawyers group exists to fill the void, so I stay, for now. I asked the above-mentioned lawyer what motivates his decision to be so active in the Guild rather than remaining satisfied with the ACLU, which stands up for the rights of all regardless of political viewpoint, whereas the Guild focuses overarchingly on so-called progressives (which is one of my points of departure with the Guild). Without missing a beat, this rather calm-speaking lawyer declared either: "Because the system is racist" or "Because the court system is racist". Either way, racism still runs too rampant in society, including in the court system and criminal justice system, including racism running through judges, jurors, prosecutors, cops, trial witnesses, jailers, and court personnel. I suppose, then, that this lawyer, like I, would not stomach nor accept prosecuting. What is your view about how racist are the judicial and criminal justice systems, and how can we eliminate it, or at least radically diminish it if the racism cannot be entirely excised? Jon Katz.

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

Thursday, December 11, 2008

Sentencing, ex post facto, and conspiracy lifespans.

A critical part of practicing criminal defense anywhere is to advise clients of their sentencing exposure. In the jurisdictions that have sentencing guidelines, lawyers must know and understand them thoroughly and apply them well, in addition to all statutory sentencing provisions. It is not easy advising a client to plead guilty for a crime that the client did not commit (but for which s/he will likely lose at trial), that should not be criminalized in the first place, or that will likely involve a sentence that is far harsher than what is fair. However, a lawyer is obligated to help a criminal defense client reduce the harm on him or her. If the only way a lawyer can do that is to avoid practicing criminal defense, then so be it. In that context, today's blog entry addresses last week's very important two-to-one federal sentencing opinion from the District of Columbia Circuit: *U.S. v. Peter Turner*, ___ F.3d __ (D.C. Cir., Dec. 5, 2008). A jury convicted appellant Turner of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and bribery, in violation of 18 U.S.C. § 201(b). The D.C. Circuit summarizes Mr. Turner's sentencing conundrum as follows: "A sentencing court, applying the Sentencing Guidelines, must 'use the Guidelines Manual in effect on the date that the defendant is sentenced' unless the court determines that this would violate the Ex Post Facto Clause of the Constitution, U.S. CONST. art. I, § 9, in which case the court 'shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.' U.S. SENTENCING GUIDELINES MANUAL § 1B1.11. The Ex Post Facto Clause bars the retroactive application of 'enactments which . . . increase the punishment for a crime after its commission.' *Garner v. Jones*, 529 U.S. 244, 249 (2000). When Turner received his share of the proceeds of Vester Mayo's life insurance policy in 2001, the Guidelines set the base offense level for conspiracy to defraud the United States at 10. A 2004 amendment to the Guidelines increased the base offense level for his crime to 14. This was the base level in the 2006 Guidelines the district court used when sentencing Turner in September 2007 to 33 months' imprisonment. As Turner sees it, the district court violated the Ex Post Facto Clause by applying the later edition of the Guidelines and thereby increasing his Guideline range from 21-27 months to 33-41 months." Maj. Op. at 3-4. In favorably resolving Turner's appeal of his sentence, the D.C. Circuit resolves the following four questions: 1. Does the Constitution's Ex Post Facto Clause still apply to sentencing guidelines now that such guidelines are merely advisory? The D.C. Circuit answers yes, despite the Seventh Circuit's opposite conclusion in *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), based on the by-now purely advisory nature of sentencing guidelines. Maj. Op. at 9. 2. Seeing that the Ex Post Facto Clause still applies to sentencing guidelines, for a conspiracy, is a sentencing court permitted to use the Sentencing Guidelines in effect at the end of the conspiracy, even if said guidelines are harsher than versions that existed earlier in the conspiracy? The D.C. Circuit answers yes. 3. Because Turner's co-defendant -- several years after any conspiracy activity -- lied to federal investigators in order to conceal the conspiracy, for sentencing purposes, did the conspiracy thus continue right through the date of such lying by Turner's co-defendant? The D.C. Circuit answers no. 4. What is Turner's relief? He will be resentenced using the more favorable Sentencing Guidelines manual in effect several years earlier at the time of the last conspiratorial act. Strongly dissenting on the third and fourth issues above is Judge David S. Tatel. Although I have not tracked Judge Tatel's record in criminal cases, he has some background showing experience caring about the downtrodden and disenfranchised, through having served as Director of the National Lawyers' Committee for Civil Rights Under Law from 1972 to 1974. While in private law practice at Hogan & Hartson, Judge Tatel also was General Counsel to the then-nascent Legal Services Corporation from 1975 to 1976, before Reagan tried to de-fang the agency. In pertinent part, and with more than apparent reluctance to being bound in the following way by the Supreme Court's decision in *Forman v. United States*, 361 U.S. 416, 423-24 (1960), overruled on other grounds by *Burks v. United States*, 437 U.S. 1 (1978), dissenting Judge Tatel writes: "Dismissing *Forman's* relevance, this court concludes that the case before us must fall in the Grunewald line of cases because 'the only possible way to find an agreement between Turner and Andrews to conceal their conspiracy is to infer its existence.' Maj. Op. at 8. Perhaps the court means that proving a subsidiary conspiracy to conceal the principal criminal conspiracy after the latter realizes its objectives requires direct evidence of an agreement to conceal that is lacking here. If so, I agree, but *Forman's* holding and Grunewald's reasoning require that we answer a second question: whether the concealment could continue the principal conspiracy itself by furthering its very objectives. Sidestepping this question, my colleagues observe that the tax evasion conspiracy in *Forman* continued because the 'essence' of tax evasion is concealment, Maj. Op. at 6-7 (quoting *Forman*, 361 U.S. at 420), without considering whether the 'essence' of the conspiracy here could amount to concealment as well. I believe the answer to that question is yes. Just as 'the "essence of [a] conspiracy" to evade taxes [is] concealing income,' Maj. Op. at 6-7 (quoting *Forman*, 361 U.S. at 420), the essence of the conspiracy here is concealing the identity of the rightful beneficiary of federal insurance proceeds." Diss. Op. at 3-4. The Turner majority responds to Judge Tatel's dissent as follows: "In trying to squeeze this case into the *Forman* framework, the dissent asserts that the 'essence' of the conspiracy here was concealing the 'rightful' beneficiary's identity. That is an exceedingly odd formulation. One would have thought that the 'essence' or main objective was getting hold of the

insurance proceeds. Of course Turner and Andrews wanted to avoid detection, and of course, after Turner got the money, disclosure of the 'rightful' beneficiary would have done him and Andrews in. But extending the life of a conspiracy on that basis is exactly what the Supreme Court refused to do in Grunewald and Lutwak and Krulewitch. All the dissent has managed in so many words is to restate the same theory those decisions reject." Maj. op at 7, n.2. Â Hopefully en banc reconsideration will not be sought and obtained by the prosecution in Turner. Meanwhile,Â do judges in your jurisdictions applyÂ the Ex Post Facto Clause to sentencing guidelines?Â To what extent do your jurisdictions agree or disagree with Judge Tatel's dissent in Turner?Â

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 10, 2008

Human rights now!

Â Today and every December 10 is Human Rights Day, renewing life into the sixty-year-oldÂ Universal Declaration of Human Rights. Â Human rights violations run too rampant to just observe human rights day once a year. Daily, government officials, soldiers and police worldwide torture people, execute within and without the judicial system, and jail people because of their political beliefs, or racial, ethnic or religious status. In the United States, too many cops, judges, prosecutors, and jurors treat the Constitution as a nuisance in the way of their getting their job done. Too many cops love tasersÂ and have tremendous trouble keeping them holstered. Human rights violations come in many additional forms, of course. Â Too many people stay silent in the face of human rights violations until their own human rights are violated. They stay silent so as not to make waves, and so as not to cause problems with their jobs, for their family members, and for themselves. However, if you wait to speak up until your own rights are immediately threatened (they already are), that is too late. Silence is the voice of complicity; do not stay silent. Â The above-displayed video to shut down Guantanamo at first blush might seem outdated seeing that Barack Obama pledged to close Guantanamo anyway. However, the American government's human rights violations in the name of an anti-terror war, an anti-drug war, and an anti-crime warÂ go well beyond Guantanamo. For instance, what will Obama do about Ali Saleh Kahlah al-Marri, a Qatari national whom the United States government has incarcerated without charge nor trial in a military brig inside the United States? The Supreme Court recently agreed to hear al-Marri's challenge of his detention. Obama will have to decide what position the government takes in the Supreme Court in al-Marri v. United States. Â Before you go to bed tonight, do your own part to strengthen human rights, even if it is as little as emailing and talking to your friends, family, and acquaintances about Human Rights Day, and writing at least one letter or email to a government official domestically or abroad to insist that human rights be protected now and forever. Jon Katz.

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

Tuesday, December 9, 2008

If James Earl Jones were a trial lawyer.

Â Well before he gave voice to Darth Vader, James Earle Jones paid homage to children with two incredible performances, one of the alphabet and the other of the first ten numbers, on Sesame Street. Â Jones is so captivating an actor and speaker that he entertains fully when doing nothing more than the alphabet. That is a gift that would serve him well as a trial lawyer. Â Many people have voices that would get them kicked off any screen test. That does not prevent them from spinning magic in the courtroom by offsetting ordinary or otherwise annoying voices with realness, passion and caring. In any event, if the speaker does not enunciate well enough, the message to the judge and jury will be weakened. Â "Luke, I am your father, with a vital message: A, B, C, D..." Â Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, December 8, 2008

Club Ah v. Club Blah.

Photo from website of U.S. District Court (W.D. Mi.). An essential focus at the Trial Lawyers College is to replace verbal legalese droning at trial with painting word images, telling persuasive stories by re-enacting events, and talking from the first-person perspective of non-lawyers involved in the drama. Last week, I went to a nearby courthouse remembering last week's advice to me from local t'ai chi teacher Warren Connor, which was to focus all the more on my centering now that I know the t'ai chi principles. My client was wrongly accused of assaulting a man in a bar, with my client's fists and a knife, causing superficial wounds. I knew we had a good chance of winning, but also knew that if we lost, the knife part of the attack probably would have enhanced the sentence. Fortunately, by the time of trial, I had already ramped up my fourteen years of t'ai chi practice from a few times a week to twice a day for six weeks until forever without fail, on the advice of t'ai chi megamaster Ben Lo. I have felt much more healthy spiritually and physically by having increased my t'ai chi practice. This is extremely imperfectly akin to t'ai chi master Cheng Man Ch'ing, who took up the martial art when very sick, recovered, stopped doing t'ai chi because he had reached recovery, got sick again, and reversed the sickness once and for all by returning to regular t'ai chi practice the rest of his life. As I went to court for this assault trial, I relaxed, sank, and centered myself and my mind to my tan t'ien, which is the part of the abdominal area where the chi is stored, say my t'ai chi teachers and theirs. By doing this centering, I felt more relaxed and in control of my situation, knowing that any negative situation and negative energy can be harmonized and neutralized, and that this can best be done by applying the five t'ai chi principles simultaneously at all times, those principles being relaxing and sinking into the ground and into one's seat when sitting, keeping the body upright as if the head is suspended from the heavens, keeping the weight balanced and separated as in yin and yang, turning always with the waist (which is near the tan t'ien) as the commander, and keeping the wrists softly unbent. Now centered, I was ready to add the storytelling and word pictures to the trial, essentially with the following focus and approach: - The prosecutor focused on proving an assault and getting the knife used for the assault into evidence. I did not deny the assault nor the severity of the assault. For unanswered reasons, the bouncers or off-duty cops at the bar let the assailant go rather than holding onto him for the cops to arrive. Our defense was that our client was not present. My client and his roommate testified they were across the street at "Club Ah", whereas the assault took place nearly a mile down the street at "Club Blah." Neither ever frequented "Club Blah" because the club is worse than blah. My client's roommate and stepfather testified to my client's utter peacefulness, and that he never had a knife like the one found at the club. My client's stepfather has a security clearance, which removed any possibility that he would risk his security clearance with perjured testimony. - The prosecutor tried showing that the complainant's identification of my client as the assailant was airtight, including his having chosen my client's picture from a photo array. I focused on the complainant's absolute unfamiliarity with my client, his name, and his face before the assault, and his having gotten my client's name from an acquaintance (that information got in over my objection in the first place) and then having found his picture on Facebook (ah, the pitfalls of posting public photos to Facebook). I also focused on how the complainant told the cops the assailant had a full beard, but then backpeddled at trial to try to show that my client's scraggly, slow-growth whiskers never longer than a five-o'clock shadow could qualify for the phrase "full beard." - By closing argument time, I wrapped up our version of the story with the following additional themes and images: -- As the prosecutor closed with attempted word logic about how the assault clearly happened and about how the complainant's identification of my client had been proven beyond a reasonable doubt, I started thinking about a song or titles that might clinch our version of events, versus focusing on SODDI (some other dude did it). One answer was "Moment's Notice", here performed by Trane. The other title that came to mind was Tell Me a Story, which is a modification from Tillie Olsen's Tell me a Riddle. Of course, the latter title was apt on its own, because the trial was about the riddle of whodunit? The actual assailant still remains at large. -- In the t'ai chi moment, I realized that it might be most effective to show the judge what happened (this was a bench trial, with the option of appealing for a whole new trial by jury in the event of a conviction), rather than merely telling him. Consequently, I took the acting role of the assailant and the complainant as follows: ASSAILANT: (Rushing and shouting towards the complainant) You stole my jacket, Mr. C_____. COMPLAINANT: No, I didn't. ASSAILANT: Yes, you did. COMPLAINANT: Ow! (Drops to ground, writhing in pain from having been punched and stabbed.) BACK IN CHARACTER AS MYSELF: A moment's notice. That's the only notice Mr. C_____'s first instinct is self-preservation, not getting a detailed rundown of his assailant's appearance. Why would my client leave the Nirvana of Club Ah on a cold December night to go to the hell of Club Blah in search of a sweatshirt stolen or lost two months earlier, particularly when he and his roommate have always avoided Club Blah like the plague? After the prosecutor completed his rebuttal closing, the judge gave his verbal findings of fact and conclusions of law, including referencing my argument about how quickly the whole assault happened. The judge -- who post-verdict told me he enjoyed my theatrics, but did not say how persuasive he found them -- expressed sadness over the harsh assault. He found the defense witnesses credible and reasonable doubt that my client was the assailant. Numerous of my acquitted client's friends burst into

loud applause. As I motioned a suggestion to them to take their applause outside the courthouse, my thoughts transferred from "Moment's Notice" to "Bright Moments". If only all courtroom moments could be as sweet. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, December 7, 2008

"For me, knowledge is happiness."

Bitches Brew— Creating and performing great music and delivering persuasive trial performance can look effortless, but they demand ceaseless practice, passion, inspiration and focus. This is a reason that music deeply inspires my trial law practice. Moreover, having played music onstage from 1972 through 1982, I became comfortable more quickly on the courtroom stage, while still cognizant of the stagefright challenging so many of my clients and their witnesses. — I learned music through trumpet playing. Although Dizzy Gillespie remains for me the great master trumpeter who was the next bridge after Roy Eldridge from Louis Armstrong, Woody Shaw was more accessible to me, in part by being closer in age, and also through having taken the time to strike up a conversation with me before he started a 1983 performance on a jazzboat in Boston Harbor, and then having talked further with me after the first set. I asked— Woody which model horn— he played. He handed me his Yamaha, and I did— my best to act nonchalant handling what at that moment was the most priceless and fragile material— item.— Six years later, Woody tragically died just short of the age I am now. John Coltrane died just short of 41. Today I learned that Woody was a fellow t'ai chi practitioner whose music was very much influenced by the martial art; his t'ai chi is discussed in this article and displayed in a photo here. — I took quickly to jazz music, in part because the musicians cannot get away with merely reading a script. Improvisation ordinarily is essential, which means mastering the instrument, being in the moment, and conversing through music with one's™s co-musicians and the audience. The same happens in trial, with the added critical element being the need to protect the liberty of one's™s client. — Miles Davis was a great trumpeter who took the jazz path, showed how easy the jazz path is not, and stumbled seriously at certain critical points along the way. 1975 was the first time — I experienced Miles, performing in Newport,— as— 49.— His playing sounded lousy. Miles's official website says: "In 1976, a combination of bad health, cocaine use, and lack of inspiration caused Miles to go into a 5-year retirement." Around ten years later, Miles looked like musical royalty walking with a golden cane while with his then-wife Cicely Tyson just a few rows in front of us at a Broadway musical. Miles's earlier music inspires me most, and his later discussions of music and life inspire me nearly as much. What I heard of his music in the 1980's and thereafter did not enthuse me much, including his playing of Cindy Lauper songs. On the other hand, he played at one or more points with Chaka Khan, whose "Feel for You" gets my legs moving every time. — What did Miles mean when, on Sixty Minutes a year before his death, in response to whether he was happy, he replied: "For me, knowledge is happiness"? He learned, performed, and taught much;— I doubt Miles meant that knowledge in its narrow sense, by itself,— was enough for him. He hardly seemed to be as easy to please as that. Perhaps he was talking about the kind of knowledge that contributes tremendously to self-discovery, self-improvement, and transcending the humdrum that often accompanies many daily activities on Earth. — One thing I do know about great music is that it helps me feel I am traveling through time, stratospheres, and human and physical obstacles. Moreover, great music entertains and inspires me to entertain in a persuasive and sincere way in court. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Friday, December 5, 2008

The obscenity of Richard Nixon and Warren Burger discussing obscenity ex parte.

Â Bill of RightsÂ (From public domain.)Â Before getting disbarred over his role in the Watergate coverup, Richard Nixon was a lawyer. While president he was still a licensed lawyer.Â Litigating attorneysÂ are generally prohibited under governing ethics rulesÂ from communicating ex parte with judges about their pending litigation. Nixon was the ultimate boss of all federal lawyers, so it would not have been kosher for him to talk with judges about litigation likely to come before them, including obscenity. Â Â Rules or no rules, it is an outrage against justice to learn from recently-released Nixon White House tapes that Nixon and then-Chief Justice Warren Burger (placed on the Supreme Court after Nixon nominated him)Â discussed and commiserated on the landmark Miller v. California obscenity case in a one-on-one phone call. Listen to the tape (which is the second segment on this Olbermann video) and retch.Â Thanks to a listserv member for this Olbermann link, which includes some additional Nixon tape footage.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, December 4, 2008

"How do you have time to blog?"

Â Â Image from Library of Congress's website.Â Lately, several lawyers have pondered about my finding time to blog. My response is: Do you take time daily to eat, brush your teeth, and get dressed? Do you take the time to read court opinions, expand your persuasion abilities, and self-reflect? Can you write well and quickly directly onto the keyboard without needing to use a pen first? If so, there is time to blog, especially after eliminating wasted time on television, instant messaging, websurfing and listservs.Â Â My days start and endÂ with a round of t'ai chi. In the middle come spending some morning moments with my family before heading out to fight for my clients, handling work at my office, andÂ spending time with my family in the evening. Â I spend an average of fifteen to twenty minutes daily blogging. When I come across an idea or court case to blog about, I save the idea to my BlackBerry. By the time I start writing, the framework of the blog entry has already grown in my head, so it then just becomes a matter of putting my thoughts onto the keyboard. Sometimes I type a few blog entries in advance, and save them in draft form until I am ready to release them into cyberspace. My blog software lets me program blog entries to be released for a pre-designated day. This way, although my blog entries come out daily, I amÂ not blogging daily. Â To some, like I, writingÂ is as essential as breathing. The late great Pramoedya Ananta Toer wasÂ was deeply emotional when he said in 1999 that the Indonesian government's decades-long effort to ban his books was like trying to cut off his life. Writing was so vital to Pramoedya that he told his masterpiece Buru tetralogy orally through a chain of prisoners on Buru prison island during the time he was denied pen and paper. Past issues of Index on Censorship show the risks writers repeatedly have taken against censorious governments to keep their written voice going, including getting their writings smuggled to other countries, to be published and finally read. Â By now, Underdog gets several hundred visitors daily, on top of additional daily readers viewing archived Underdog entries. The world remains more unjust and brutal than the opposite. Accumulated feathers can sink the boat of injustice and inhumanity. At the very least, my blogging is hopefully part of those accumulated feathers. Â So I blog to get on a bully pulpit for justice, and to discuss court opinions and persuasion approaches from an angle of fighting for justice daily. Â My brother lawyer and blogger Marc Randazza has pointed out how quality bloggers often are among the busiest people, and says of his own blogging:Â "I have very little time on my hands. I make time to blog.Â It also helps that I am an insomniac." Whether or not Marc jests about insomnia, I blog without it. Â Asking meÂ how I have time to blog is like asking how I have time to eat.Â Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Wednesday, December 3, 2008

Googling jurors/Jurors FaceBooking.

Prosecutors have easier access to the criminal records of potential jurors and witnesses than criminal defense lawyers. Both sides, however, have similar access to search non-password-protected Internet pages for information on them, from Google to FaceBook. If available, it is essential to obtain the jury list in advance of a trial date and to seek the jurors' criminal records and online information at that time. This is not an exercise in paying respects to people's privacy -- although FaceBook is hardly private -- but in determining whether jurors will be fair to a criminal defendant, determining whether jurors will stay away from communications during trial that could get them and the defendant in hot water, and having more ammunition to respond to prosecutors' responses to challenges under Batson of racially motivated juror strikes. Thanks to Gideon for referencing Anne Reed's article on this topic. Jon Katz"

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, December 2, 2008

Section 2257 madness.

18 U.S. Code Â§ 2257 generally requires producers of sexually explicit material to prove the actors are not minors. Coming around the corner apparently will soon be updated Â§ 2257 regulations from the Justice Department. More about this matter is here. Thanks to fellow listserv members for forwarding the above-displayed information. Jon Katz.

Posted by Jon Katz in First Amendment at 00:10

Party on, Wayne

Winter professional holiday party invitations are coming from left and right. Some of the parties are interesting, but some are less exciting than the tax-deductible one Rick Moranis planned in Ghostbusters. One holiday party that will be both entertaining and good for social justice is the December 9 party in Baltimore by Civil Justice Network. Civil Justice Network is a public interest group that has found a way to involve small and solo law practitioners simultaneously to do good and well. The party will be in Baltimore City, which is a John Watersesque city of non-stop entertainment any time of year, including in such places as Hampden and Fells Point. As I have learned from CJ, everyone is invited to the party: Non-lawyers and lawyers; those litigating on our side and against us; and everyone else. Here is the invitation. I look forward to seeing you there. Jon Katz.

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

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