

Sunday, February 1, 2009

The secret taping did not begin with Nixon.

One thing that made me fond of vehemently disliking Nixon starting in the early 1970s was his non-stop or near non-stop secret audiotapings of conversations from the Oval Office. Then, several years ago, I learned his two Democratic predecessors were frequent secret audiotapers, and that Lyndon Johnson showed Nixon the taping system at some point between Nixon's 1968 electoral victory and taking office. Recently, I learned that all this secret taping started with Franklin Delano Roosevelt, and continued uninterrupted straight through Nixon. In any event, on January 31, 2009, the New York Times addressed a controversy among historians about some allegedly material errors in Stanley Kutler's 1995 creation and compilation of transcripts from the Nixon White House tapes, in terms of alleged omissions and failure to designate when at least one conversation between John Dean and Nixon ended and started up again. The controversy brings into question about whether Dean was more culpable than previously generally thought by Watergate historians. If this much error can result from transcripts apparently carefully arranged by a historian given access to the Nixon White House tapes, imagine how many human errors are made in failing to accurately portray allegedly criminal acts observed by a cop. Jurors need to know this. Jon Katz

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

Friday, January 30, 2009

Horton hears a who: What about mice and rats?

Whether or not one agrees with PETA's message -- and I agree with PETA's advocacy of vegetarianism and boycotting of circuses that use non-human animals (Cirque de Soleil apparently only uses human animals, for instance) -- the group has developed a knack for persuasive videos. Persuasion is essential in trial advocacy, which makes me take notice all the more. Here is PETA's racy video rejected for Super Bowl ad-time that gives a fresh perspective on vegetables and a reminder that cutting out meat and increasing exercise and overall health beats Viagra any day. Above is a catchy video that forces people to think twice and hopefully a million times before ever using a glue trap against mice or rats again. They are very social and feeling beings, and caring at that, according to this PETA video. They do not intentionally annoy people. Yet, they are specifically exempted from the Animal Welfare Act, 7 U.S.C. § 2131, et seq. More specifically, in the Animal Welfare Act: "The term 'animal' means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber." 7 U.S.C. § 2132(g) (emphasis added). The foregoing definitional jumble seems to be the product of battle by opposing and competing lobbyists and advocates. Exempting mice and rats from the Animal Welfare Act, says PETA, exempts 95 percent of animals used in experimentation, which remains rampant. On this point, the American Psychological Association seems to elevate animal experimentation over animal compassion. Whether or not the anti-abortion movement has adopted Horton Hears a Who as a propaganda darling -- and I support choice while hoping that education, funding, widespread availability of birth control, and economic opportunities will reduce the annual abortion rate -- Dr. Seuss's Horton makes a critical point that I translate to "A being's a being, no matter how small," including mice, rats, squirrels, quails, sardines, hens, pigs, tuna, salmon, turkeys, cows, and the list goes on. Congratulations to PETA for finding such persuasive message delivery. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Thursday, January 29, 2009

Being out of the U.S. does not automatically prevent challenging asset forfeiture action.

Image from Bureau of Engraving and Printing's website. Doesn't the United States government have better things to do than to be prosecuting gambling? Would the government be chasing after gambling operations if the prospect did not exist to obtain forfeiture of the alleged gambling operations' money and to obtain unpaid taxes? Greed clearly is not limited to the private sector, particularly when one includes greed for power in the mix. Moreover, government officials and cops gain more job security when they increase government revenue through seizing assets for forfeiture and obtaining fines from private citizens. Praised be a unanimous panel of the D.C. Circuit for at least holding that the government is ineligible to win a civil asset forfeiture challenge at the summary judgment stage on the mere claim that the asset owner is disentitled to the funds by having intentionally evaded the parallel criminal prosecution by remaining outside the United States. *U.S. v. \$6,976,934.65 Plus Interest*, ___ F.3d _ (D.C. Cir., Jan. 27, 2009). (What an intriguing case name, which will be referenced hereonin as *U.S.v.\$PI*.) That is to say, the trial court must make its own careful factual finding about such evasion. *U.S. v. \$PI* interprets 28 U.S.C. Â§ 2466, which provides as follows: "Â§ 2466. Fugitive disentitlement. (a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person-- (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution-- (A) purposely leaves the jurisdiction of the United States; (B) declines to enter or reenter the United States to submit to its jurisdiction; or (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction. (b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies. (Added April 25, 2000, P.L. 106-185, Â§ 14(a), 114 Stat. 219; Oct. 26, 2001, P.L. 107-56, Title III, Subtitle A, Â§ 322, 115 Stat. 315.) (As amended Jan. 5, 2006, P.L. 109-162, Title XI, Subtitle C, Â§ 1171(c), 119 Stat. 3123; March 9, 2006, P.L. 109-177, Title IV, Â§ 406(a)(1), 120 Stat. 244.) Here, the United States government, sought the forfeiture of nearly \$7 million allegedly laundered from money "earned through an unlawful offshore Internet gambling enterprise." *U.S. v. \$PI*. (And what type of detergent was used for the alleged laundering? Tide? Wisk? Seventh Generation?) The corporation that filed suit to recover the money was principally owned by former United States citizen William Scott, who the government alleged to have been evading prosecution in his related criminal case. The D.C. Circuit foreclosed summary judgment on the disentitlement statute, based on its following language in *U.S. v. \$PI*: "But as *Soulbury* [the corporation whose assets were seized by the U.S. government] points out, the video [of William Scott, that is in evidence] also suggests that Scott did not wish to reenter the United States regardless of any pending criminal charges. Scott told the reporter interviewing him: 'I don't mind not going back to the States. There are a few of us that are . . . that are under the same restrictions that would like to go back to the States. Myself, that's fine.' the fifth estate: *The Big Gamble*, supra. The district court made no finding as to what, if anything, this comment reveals about Scott's reasons for remaining outside the United States. But a court considering summary judgment must draw 'all reasonable evidentiary inferences' in favor of the nonmoving party. *Toney v. Bergland*, 645 F.2d 1063, 1066 (D.C. Cir. 1981). Under this standard, Scott's statement is sufficient to raise a genuine issue of fact whether he declined to reenter the country in order to avoid criminal prosecution under the 1998 or 2005 charges." Congratulations to William Scott for this victory against summary judgment. Stay tuned to whether he ever gets brought to court for prosecution on his pending federal criminal charges. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 28, 2009

Supreme Court further entrenches Terry v. Ohio.

Terry v. Ohio wrongfully tramples on civil liberties. (Image from FBI's website). The United States is far from a truly free nation; nor are any other nations. Light a flame in a dried-out forest, and soon an uncontrollable inferno will rage beyond the control of the firesetter. Establish an overgrown criminal "justice" system that even outlaws marijuana, prostitution and gambling, and then try to rein it in. Just try, when over one million people rely on their livelihoods from receiving their pay from the criminal justice system, including judges, all other courthouse personnel, prosecutors, criminal defense lawyers, cops, and jailers; and when so many local economies rely on the local prisons for their tax base and for customers of local businesses. Adding to the lack of enough true freedom in the United States is the rest of the oppressive national security state comprised of the overgrown military, the CIA and all other intelligence agencies, and the FBI. Anybody who is all bright-eyed and bushy-tailed that all is honky dory with personal freedom in America needs a bucket of ice water dumped on him or her to wake up. When conservative Supreme Court chief justice Roberts wants to dispel any notion that Terry v. Ohio, 392 U.S. 1 (1968) (allowing police stops and frisks for nothing more than reasonable articulable suspicion (make that prevarications working backwards from unlawful searches, by too many cops)), will ever be weakened in our lifetime, who better to assign the task of writing the latest Terry-strengthening/Fourth Amendment-weakening opinion than Justice Ruth Bader Ginsburg, who is generally on the Court's comparatively liberal wing for Fourth Amendment issues, and who full well knows the ACLU vision of the Fourth Amendment from her tenure with that essential civil liberties organization? On January 26, 2009, writing for a unanimous Supreme Court, Justice Ginsburg confirmed the constitutionality for all passengers to be seized for as long as the driver of a car lawfully stopped for a moving violation (unless the driver is then arrested, in which case the passengers may leave if they are not going to be arrested), in order to protect officer safety. Arizona v. Johnson, ___ U.S. ___ (Jan. 26, 2009). Consequently, the first condition for a Terry stop and frisk is met by the lawful stop of a vehicle for a moving violation and the temporary seizure of the vehicle's occupants "pending inquiry into a vehicular violation." Johnson. Then, all the police need is reasonable, articulable suspicion that the suspect is armed and dangerous to pat the suspect for weapons. Johnson. Here, a police officer asked passenger Johnson to get out of a car stopped for a moving violation, to gather "intelligence" about the Crips gang, based on Johnson's saying he was from Eloy, Arizona, which the cop knew was "home to a Crips gang." Johnson accepts, at least for sake of argument, that the police officer had reasonable, articulable suspicion to patdown Johnson for weapons after he got out of the car, which the cop claimed was done for "safety". Johnson does the disservice of teaching a simple-to-understand but unjust rule (passengers in a car lawfully stopped for a moving violation are lawfully seized, and then may be patted down for weapons upon reasonable articulable police suspicion that they are armed and dangerous) that not only invites police abuse, but encourages it. Under Whren v. U.S., 517 U.S. 806 (1996), the police may stop a car under the pretext of a moving violation, even when the cop's motivation is to investigate the violation of drug laws or other criminal laws that have nothing to do with speeding and other moving violations. Unfortunately, Whren already encourages police prevarication about moving violations to justify car stops, and Johnson solidifies the grounds for such prevarication. And what if the police stop is motivated for driving while Black? Where will the stopped suspect get in challenging a driving while Black stop so long as the judge believes that the cop (and too few judges give careful enough examination to cops' credibility at suppression motions hearings) witnessed a moving violation? Let's face it, if a cop wants to find a lawful way to stop a car, s/he will find it or else instigate an unlawful stop that will pass muster in court (how many times have you experienced a cop tailgating you, trying to draw a foul by your speeding up to avoid being rear-ended?), unless the driver is one of the rare drivers who never accelerates even two miles over the speed limit, even when going down a steep hill? With the latter type of driver, the police can at least get a chance to approach and try to talk to the driver merely by following the driver until he or she arrives at his or her destination or runs out of gas. Tai chi teaches me to be calm, but as I write today's blog entry, I am trying very hard not to get my blood boiling. Jon Katz.

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

Tuesday, January 27, 2009

The inseparability of knowledge, technique, and fighting strength.

Â Yin YangÂ T'ai chi works for trial battle and beyond, Â A fellow otherwise accomplished criminal defense lawyer recently tookÂ issue with the inclusionÂ in a state criminal defense association newsletterÂ of my recent article on applying t'ai chi principles to trial battleÂ without seeing other articles dealing with the written law and non-t'ai chi trial technique in that issue. Â Granted, many years before I started studying and practicing t'ai chi in 1994, I was very skeptical of this internal martial art, which at first was exemplified to me by videos of people whoÂ looked of average fitness, at best, practicing t'ai chi very slowly together in the early morning hours, followed by Peter Wang's A Great Wall, which included a character whoÂ performed daily t'ai chi and expelled flatus as a climax,Â apparently as a way of expelling negative elements in the body. Fortunately my form of t'ai chi omits the flatus, which would not sit well for the indoor classes, but I digress.Â Â As made clear at the Trial Lawyers College, all the legal knowledge and technique in the world is worth little without simultaneously or preliminarily developing the trial lawyer as a person. Consequently, being a great trial lawyer is impossible without the three essential legs to the stool ofÂ knowledge, technique, and fighting strength. Fighting strength first and foremost comes from discovering who the trial lawyer really is, and developing that realness to its full potential, together with knowing how to fight, because criminal trial preparation, motions argument and presentation, andÂ trials can get very bloody, figuratively. For me, nothing beats the relaxation, exercise, and fighting techniques of t'ai chi to be a better trial fighter.Â The related lessons from Sun Tzu's The Art of WarÂ are also very helpful. Â If experienced and accomplished criminal defense lawyers sincerely wish to see their peers rise as they rise, they should welcome, and not shun, those who explore and apply new ways to win. Let the trio flourish of legal knowledge, trial technique, and fighting strength. Jon Katz.Â ADDENDUM: Many of my writings about the interplay between t'ai chi and trial battle are here.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, January 26, 2009

RNC demonstrators win.

Â Bill of Rights.Â (From the public domain.)Â A few days ago, a Ramsey County, MN, trial judge dismissed a prosecution for insufficient evidence against protestors who demonstrated during the 2008 Republican National Convention. The defendants were charged with obstructing the legal process, disorderly conduct, unlawful assembly and blocking traffic. Â The LaCrosse, Minnesota TribuneÂ reports that St. Paul City Attorney John ChoiÂ asserted thatÂ "by wearing masks and working together,Â the protestors presented some evidentiary problems for prosecutors." Representing the defendants, lawyer Jordan Kushner -- whom I know well from the 1994 National Criminal Defense College Trial Practice Institute -- saidÂ the case "'showcased how police had no basis for the vast majority of arrests made during the RNC.'â€• Â Online information on this case is thin. If you have further information, please send it my way, or else please post it as a comment to today's blog entry. Jon Katz.Â Â ADDENDUM: On September 1, 2008, I blogged about the Ramsey County, MN,Â sheriff's raids on alleged anarchists. On September 4, 2008, Democracy Now aired this lengthy report on "some of the nearly 300 people detained over the past few days [who] include medics, legal observers, journalists and anyone considered to be a protester."

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, January 25, 2009

Living and sweating it out when death is an inevitability.

The Chinese script for the character "mu," which means nothing. See more on mu, life and death here. (The copyright was relinquished by this animated symbol's creator. The symbol also is available here.) On death, Woody Allen asked: "I keep wondering if there is an afterlife, and if there is, will they be able to break a twenty?" My own death seemed somewhat abstract to me until, at nineteen years old, a close relative was diagnosed with cancer. In addition to dealing with that transition, I started dwelling more on my own finite life. Today, I'd probably laugh if I overheard myself at nineteen obsessing so much on my own mortality; for one of many things, I had many more years ahead of me at nineteen than I do now at forty-five. A frequent question I have had is what motivates hard workers to work so hard if life is finite. Some might answer that they do not see life as finite, whether because they believe in an afterlife or because they view life as extending beyond just one person to embrace other sentient beings other than themselves. The answers to this question are many. As to how I deal with my own mortality, I try my best to follow Ram Dass's simple message to Be Here Now, which, like so many key ingredients to a successful life is simple to understand but often elusive to achieve, particularly when being here now seems also to call for some provisions for tomorrow, if even that is just to assure for enough fuel to get to the next destination. I have also drawn comfort from lessons about facing the very moment of death from Ram Dass and the Dalai Lama, who talk about putting ourselves in the most positive mindset as we approach our final breath. Similarly, Gandhi said on the morning of his assassination: "If someone fires bullets at me and I die without a groan and with God's name on my lips, then you should tell the world that here was a real Mahatma..." As to how to make the best out of my finite life, I am very much influenced by the scene in Walk the Line where the record producer who finds Cash's early samples too uninspiring, implores Cash to perform the song he would sing at death's door with this being his last chance to get out his message and feeling. Similarly, I am struck by a YouTube video I saw (which is not handy to me at the moment) where people comforting an apparently terminally ill patient encourage him to take the next breath as if it were his last. Once again, it is about making the most of now, or Being Here Now. Part of making the best of today's life is not to be terrified of the inevitable mortal end. To that end, Thich Nhat Hanh said in Chanting and Recitation from Plum Village (page 188): "Birth and death are only doors through which we pass/Sacred thresholds on our journey/Birth and death are a game of hide and seek." Does the finiteness of each person's life justify not getting out of bed in the morning and living a life of nihilism? No. Each of us is here for a purpose, and must give back to others and try to leave the earth in no worse shape -- and hopefully better shape -- for future generations. I was inspired to write about all this not out of a desire to proselytize for any religion but from being reminded of the very incredible lives and world contributions that so many giants have made, including the greatest jazz musicians many of whom died rather young. They include John Coltrane, who died at forty from a liver ailment and Charlie Parker, who died at thirty-five from bleeding peptic ulcers, lobar pneumonia or both. Imagine if John Coltrane and Charlie Parker had lived longer in good health. Dizzy Gillespie is an example of a powerhouse at a young age who rose by further quantum leaps to near-impossible heights right into his seventh decade. How does all of this tie in with my life as a trial lawyer? Trial lawyering presents many stressful situations that require harmonizing the situation powerfully for the client's benefit. Once I can face down death and find joy in life at every turn, much of the rest should be easy, including the hard work on the road to victory at trial and any other challenge. In that regard, t'ai chi master Cheng Man Ching spoke of overcoming our fears in terms of imagining that we are practicing t'ai chi (or are engaged in trial battle, for that matter) 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 wonderfully detailed in the following 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. That wild strawberry follows me everywhere. Jon Katz.

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

Thomas departs the planet.

Thomas: "I don't like unnecessary suffering." In August 1986, I came to George Washington Law School after a year working at a Wall Street bank, where I learned that I would need to seek much more deeply and widely if I were going find fellow Amnesty International and ACLU enthusiasts in the belly of the capitalist beast. Five years before my arrival at law school, William Thomas (apparently also named William Thomas Hellenback at one point) had already been a longtime peace demonstrator across from the White House, five blocks from my law school. I would bump into

Thomas, as his friends called him, from time to time, sometimes on the way to my first law firm two blocks east of the White House, sometimes elsewhere in Washington, and sometimes at gatherings of social justice and peace activists.
 [^](#) Less than five years after my arrival in Washington, D.C., Gulf War I started. I felt tremendous imbalance working at a corporate law firm where I heard nothing said about the war other than support for the war or yellow ribbons. I took to spending a few minutes for lunchtimes at Lafayette Park across the White House each week, to connect with those constantly protesting and drumming for peace. Thomas was among those drummers, and it appears that the White House's occupants could hear the drums, no matter how thick their protective windows.
 [^](#) I last saw Thomas in downtown D.C. last November. Two days ago, I learned that he died on January 23.
 [^](#) By his very presence for twenty-seven years demonstrating daily for peace across the White House, Thomas, along with fellow decades-long protestor Concepcion Picciotto, [^](#) etched the critical message of peace in the minds of millions of visitors to the White House, conservatively. Thanks, Thomas, for spreading that message, and for you. Jon Katz [^](#) ADDENDUM: Although it was not planned this way, I [^](#) have posted three articles related to death in [^](#) the last [^](#) seven days. In any event, on January 24, with my son, I went to visit Lafayette Park to pay my respects to Thomas and to his fellow peace protestor Concepcion Picciotto. Thomas's widow is Ellen Thomas. [^](#) Some of the [^](#) bleachers and reviewing stands still remained standing in front of the White House from the inaugural parade, which means that Concepcion has been without a prime demonstration spot for many days. I found her at a spot north of the bleachers and on the western half of the park.
 [^](#) Here are some links about Thomas's life and passing:
 [^](#) - March 20, 2009 (12:00 noon) will be Thomas's memorial service date, at Lafayette Park. More information on the memorial and Thomas's passing is here.
 [^](#) - Click here for more on Thomas's passing.
 [^](#) - U.S. v. William Thomas and Ellen Thomas, [^](#) [^](#) 864 F.2d 188 (D.C. Cir. 1988) (Kenneth Starr, J.) (upholding prosecution of William Thomas and Ellen Thomas for violating park regulations against unauthorized sleeping in the national parks). [^](#)

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

Friday, January 23, 2009

Judges: Why reveal indictments to the jury?

Â Bill of Rights.Â (From the public domain.)Â Criminal jury trial are fast-paced events that risk all sorts of appealable errors. While it is nice to have good appellate issues to argue in the event of a conviction, it is nicer to prevent the errors in the first place. Â For whatever reason, it seems too many judges have a penchant to disclose indictments to juries, even when those indictments include damning allegations that might not even be proven at trial, or might ultimately be dropped by the prosecution before the jury begins deliberations. Chauncey L. Coleman's judge revealed to his potential jurorsÂ that one of the counts was for being a felon in possession of a handgun, even though the parties already had stipulated to his having had an applicable felony at the time of the alleged crime. Praised by the D.C. Circuit for finding such a judicial disclosure to be reversible error, even though the defense did not object when it was disclosed. U.S. v. Coleman, __ F.3d __ (D.C. Cir., Jan. 16, 2009). Â En banc review may be all the less in the cards here when considering that one of the three unanimous judges on the Coleman appellate panel was Douglas Ginsburg, whom Ronald Reagan found to have been conservative enough to be fit for an ultimately-aborted Supreme Court nomination. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, January 22, 2009

Scrutinize jury instructions with a fine-tooth comb.

Â Bill of Rights.Â (From the public domain.)Â In jurisdictions where the judge instructs the jury on the law before closing trial arguments are made, it is tempting for lawyers to focus on putting the finishing touches to their closing arguments while the judge instructs the jury. However, as demonstrated byÂ *Wheeler v. U.S.*, 930 A.2d 232 (D.C. 2007), it is critical to listen to and timely object toÂ the judge's jury instructions like an eagle hawk. Otherwise, a faulty jury instruction will not be preserved for appeal, and the defendant will suffer.Â Cesar Sarausad II was blessed with a team of tenacious trial and appellate lawyer challenging, among other things, a faulty jury instruction concerning criminal accomplice liability. *Waddington v. Sarausad*, ___ U.S. _ (Jan. 21, 2009). The Washington State trial and appellate courts rejected his argument that the accomplice liability jury instruction in this murder case was unconstitutionally unambiguous. Sarausad's lawyers then took his case to the federal courts with a habeas corpus petition. He struck gold with the federal trial court, which ordered habeas corpus relief for ambiguous jury instruction on accomplice liability. He struck gold again before the Ninth Circuit on the same issue. Unfortunately, the Supreme Court granted certiorari reviewÂ and reversed, saying that the instruction was not ambiguous enough to receive habeas corpus relief, even though the jury had to ask three times about the instruction. Â This gist of the Sarausad majority opinion appears to be found in footnote 7: "On federal habeas review, this Courtâ€™s inquiry is limited to whether the state court violated clearly established federal law when it held that the jury applied the correct standard, in light of the answers given to its questions. See 28 U.S.C. Â§2254(d)(1). On that issue, the state court was not objectively unreasonable; the juryâ€™s questions were answered in a manner previously approved by this Court, and they consistently referred the jury to the correct standard for accomplice liability in Washington." . Â Praised be Justice David Souter for dissenting, and Justices John Paul Stevens and Ruth Bader Ginsburg for joining his dissent. First, the dissent insists that Washington's accomplice statute is so ambiguous -- as underlined by Washington appellate courts' efforts to divine the statute's meaning -- that the jury instruction on accomplice is not saved merely because it parrots back an ambiguous statute. Second, Justice Souter says the majority is unrealistic (or did he find this the closest he was willing to come to alleging judicial whitewashing?) in finding that even if the jury instruction was inadequate, that the jurors still applied the "correct view of the state law." Â In any event, Sarausad does not preclude success with habeas corpus actions that attack jury instructions. Instead, Sarausad emphasizes the importance of demonstrating and persuading how the record is devoid of reliable evidence that the jury applied the correct view of the law when faulty jury instructions have in fact been issued by the trial judge, and to show how the jury instruction is constitutionally faulty in the first place. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 21, 2009

Giddiness over Obama does not justify lowering vigilance on social justice.

Â Â Bill of Rights.Â (From the public domain.)Â Even I felt some giddiness hearing Obama start his inaugural address yesterday. The nightmare of Bush and Cheney was behind us, and hopefully Obama would not repeat any of that nightmare; hope springs eternal.Â A day after celebrating Martin Luther King, Jr.'s birthday, we got a big birthday gift of realizing King's dream more than ever. For at least four years, we will see no judicial nominations at the horrific levels of Justice Scalia, Justice Thomas, Justice Alito, and Chief Justice Roberts (whose nomination Obama voted against).Â Whether more by intention or omission, while fighting for critical aspects of social justice, Obama will perpetuate substantialÂ injuries in other areas of social justice, including criminal defendants' rights. I have heard Obama say nothing to show that he willÂ helpÂ makeÂ the criminal justice system more just. His appointment of Eric Holder as attorney general puts in place an establishment past prosecutor and judge who was Bill Clinton's number two at the Justice Department; that does not suggest any change between the Obama and Clinton administrations on criminal justice issues. Â From a realpolitik perspective, civil libertarians and social justice activists may not get better White House occupants than Obama and Clinton for at least a good while. At least Clinton's administration appointed so many ACLU and Amnesty International types that this made it easier for social justice activists to be truly heard and understood by his administration; I wait to see if Obama will do the same. From the local ACLU affiliate board on which I sat when Clinton took office, four then-current and recent board members were appointed, as the head of the Justice Department's Environmental division (Lois Schiffer), Education DepartmentÂ general counsel (Judith Winston), post-Mapplethorpegate general counsel to the National Endowment for theÂ Arts (Karen Christensen), and FCCÂ Director of the Office of Legislative and Intergovernmental Affairs (Judith L. Harris, who is married to Norman J. Ornstein of the American Enterprise Institute). From Amnesty International, Clinton brought John Shattuck to be deputy secretary of state for human rights. To the Supreme Court, Clinton nominated Ruth Bader Ginsburg, a co-founder of the ACLU's Women's Rights ProjectÂ in 1972. (As an aside, the ACLU's webpage recounts: "One of only nine women at Harvard Law School in 1956, Ginsburg and her female classmates were asked by the dean why they were occupying seats that would otherwise be filled by men." Let that dean eat his words topped with bird droppings.)Â Not long after Jimmy Carter took office -- and people can debate whether this helped further undo Carter's image along with the scandals surrounding his brother Billy and others around himÂ more than helping social justice -- marijuana legalization activists even got what then probably was their closest shot with the White House to getting marijuana closer to legalization. Based on Patrick Anderson's writings in *High in America*, on the one hand, Keith Stroup (whom I know and like very much) of the National Organization for the Reform of Marijuana laws was able toÂ put together a party in late 1977 attended by Carter's top drug advisor Peter Bourne and other influential government people. However, those prospects became less bright after news leaked of Bourne'sÂ having snorted cocaine at the party. Â It can be interesting to challenge politicians and political candidates on legalizing marijuana, heavily decriminalizing all other drugs, and eliminating mandatory minimum sentencing. In the early nineties,Â a fellow civil libertarian once decried the police state in Washington, D.C. to one of the more social justice-minded city council members, who suggested a ride-on with the police to see why the council member had more watered-down views than this civil libertarian's complaint. One 1990 weekend afternoon, former D.C. police chief Maurice T. Turner stood at a streetcorner in Cleveland Park, asking for my vote. I told him of my issues with the criminal justice system, and he responded: "You do the crime, you do the time." But what about innocents, those violating laws that should not be on the books (marijuana, for instance) or should be heavily decriminalized (all other drugs, for instance) in the first place,Â and all others whoÂ are harassed, searched and arrested;Â police actions that focus harassment, stops and searches on racial minorities and disenfranchised people; and race-based and socio-economic-based decisions by police, prosecutors, jurors, judges, jailers, parole officials, and probation agentsÂ on whom to arrest, what crimes to charge, what bonds and pre-release conditions to impose, what verdict to render, what sentences to seek (including the death penalty), what sentence to impose, how to handle alleged probation and parole violations, who to parole and when, which prisons to make available, and what conditions to impose at the prison? I told former chief Turner that he would not get my vote if his best response was the overly-simplistic and flawedÂ "If you do the crime, you do the time."Â Not long after meeting Maurice Turner, I attended a meet and greet at a National Lawyers Guild member's (or member type's) home, with then U.S. Congressman and now-Senator Bernie Sanders -- Burlington, Vermont's previous socialist mayor -- still wondering whether I would ever meet a politician for whom I would want to campaign or donate. I am still wondering. Bernie's answer to my question about marijuana legalization makes me wonder whether Obama is of a similar bent. Sanders first told me that the marijuana legalization issue was not important enough to focus attention on when such weightier issues as health care, the economy and education demand attention. I would not let go of my question, so I asked: "Mr. Sanders, if marijuana legalization comes up for a vote on the House floor tomorrow, how will you vote?" I give him credit for answering honestly, but not for his answer, which was that considering that there are people selling marijuana to children, he will not support its legalization. (Well, Bernie, I suppose you want to return to alcohol prohibition, too, then?). In any event,

does Obama feel that many of my darling criminal justice issues are too much of a luxury (they are not) to focus on while he works to fix the economy, close Guantanamo and withdraw from Iraq? As I have said again and again, governments and taxpayers will be in a much smaller financial pickle and tax-revenue pickle by shrinking the criminal justice system through legalizing marijuana, prostitution and gambling; heavily decriminalizing all other drugs; eliminating mandatory minimum sentencing; and abolishing the death penalty. I do give Obama's crew credit for at least letting people air their grievances on the transition team's webpages (and notice how quickly the White House website transitioned to Obama's presidency yesterday, which webpage I hope will continue to let people air their grievances to that page's visitors), including:

- Posting the concerns about racism in the criminal justice and prison system, from the National Association of Blacks in Criminal Justice.
- Posting the concerns of the UCFW against workplace immigration enforcement raids.
- Having a citizens briefing book allowing people to air their opinions and grievances and to invite voting in agreement or disagreement with those postings, including this posting favoring marijuana legalization.

In sum, as you applaud Obama's arrival and Bush's departure, it is essential to keep as vigilant and active as ever for social justice. Jon Katz

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

Tuesday, January 20, 2009

Of Gingrich, Don King, and the meaning of MLK Day.

Demonstrators for Guantanamo's immediate closure, near the Nipponzan Myohoji temple in D.C. welcome Obama's approaching southbound motorcade on January 19. (Photo courtesy of Nancy Mancias, one of the members of the Hundred Days campaign to close Guantanamo now.) Tomorrow will be the sixth presidential inauguration since I landed in Washington, D.C., for law school in 1986. I stayed away from Bush I and II's inaugurations, vehemently opposed to both. I worked through Clinton's two inaugurations rather than attending, non-plussed that much by the man, except for being happy for seeing Bush I gone. I do not hold open the likelihood that Obama will deliver better performance than Bill Clinton, at least not for criminal defendants. I foresee him perpetuating the draconian federal prosecutorial system that puts so many unjustly behind bars for too long, where the criminal justice system would be more fair, more accurate and much less expensive if marijuana were legalized, all other drugs were heavily decriminalized, and if mandatory minimum sentences were eliminated. With yesterday's overlap of the birthday of my hero Martin Luther King, Jr., with today's inauguration that fortunately brings the nation closer to being a color-blind society, I decided personally to check out some of the long weekend's activities. Here is an overview:

- The weekend started in bizarre fashion, when I spotted Newt Gingrich on Saturday afternoon at the Tysons II shopping mall in McLean Virginia, at first fading into the woodwork in a sportsteam jacket. I decided not to say anything to him, figuring that he is not in a position to harm anyone any longer.
- On Saturday night, I attended an inauguration party that to my pleasure had more the hallmarks of a tightly-packed, music-too-loud, alcohol and soft drinks overwhelming snacks party reminiscent of many held by students at my college, except that most people were wearing evening or business clothes. This was at a group house in Washington, D.C., and I was invited by a great civil libertarian whose daily job is in that arena, and who sympathized with my approach that I was coming for the people there -- including fellow civil liberties activists -- rather than for Obama. The party got so crowded and loud that I returned home after an hour.
- On Sunday afternoon, my wife, son and I took the subway to the Farragut West stop, to experience the Inaugural concert at the Lincoln Memorial, which is where Martin Luther King, Jr., delivered his "I Have a Dream" speech in 1963. We made the decision at the spur of the moment, so arrived too late to be permitted into the fenced-in area. On our way from the subway station, we saw not only cops keeping roads closed to vehicles, but soldiers in fatigues standing next to military vehicles. I was not about to tell my son that I was leaving so as to avoid the discomfort of this martial presentation, although I appreciate that no firearms other than handguns were displayed. As we got to Constitution Avenue near 18th Street, N.W., we heard U2 playing "In the Name of Love". It was a rush to hear U2 again and at this time. At the conclusion of the event, Obama spoke. As much as I do not hold open hope that Obama will do any better than Bill Clinton when it comes to criminal defendants, during his speech, I felt an energy in the crowd about the end of a dark era during Bush II's time in the White House, and the beginning of possibilities to reverse the devastated economy, switch courses in Iraq and Guantanamo (but Obama has stated a dedication to reinforce fighting power in Afghanistan), and smash racism by tremendous leaps. Here is a photo near the Washington Monument near the end of the concert. We let the huge exiting crowds for the subway die down by walking to a nearby hotel for a snack, where the highlight was seeing Don King, happily obliging those enjoying his presence and asking for photos with him.
- On Monday, I drove to the D.C. Superior Court for a client's bond hearing. The police had several streets closed east of Fifth Street, N.W., north of the courthouse, and south of Chinatown. Nothing else seemed unusual about the area other than extra police presence and signs for cars to vamoose by 3:00 p.m. from street parking, plus several soldiers in fatigues around one mile up the street in front of a major AIDS/HIV campaign.
- At lunchtime, I drove to the D.C. temple of the peace-promoting Nipponzan Myohoji Buddhists, a few miles up the street from the White House. In addition to the local nun, two nuns and two monks were in town from Massachusetts and upstate New York to pray for peace during the inauguration. In the early morning today, they will walk and drum for peace to the swearing-in site/Capitol building several miles away. The Nipponzan Myohoji nuns and monks inspire me to stay on a peaceful path while remaining aggressive in fighting for justice.
- When I arrived, a motorcycle cop was nearby, waiting for Obama's return to D.C. from visiting the nearby Walter Reed military hospital, Obama had the opportunity to see the temple's huge prayer for peace, on gravestone material, both on the way to and back from Walter Reed. On Obama's way back, several protesters who have been liquid-fasting for nine days demanding Guantanamo's immediate closure were already waiting for Obama with demonstration signs.
- On Monday evening, I followed the Nipponzan Myohoji folks to the packed "Rebirthing King, Rebirthing America" program at the All Souls Unitarian church down the street. presented by the Olive Branch Interfaith Peace Partnership. Check out the list of inspiring speakers here. McCain supporters probably would not have been comfortable in the room. The mood was not one of swallowing Obama's actions hook, line and sinker, but to see the possibilities of motivating him to do the right thing, to a point. Among those in the audience, once again, were the demonstrators demanding Guantanamo's immediate closure. The fight for social justice must continue.

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

Monday, January 19, 2009

The artificial boundary between life and death

Â The Chinese script for the character "mu," which means nothing.Â A friend who is getting on in years recently said that death is unacceptable. Here is my excerpted reply: Here are some things I have written about death over the years, for whatever it is worth to you, and in case it will help give you more harmony about the mortality of you and everyone else: -Â Â Â Â Â Woody Allen on death: "I keep wondering if there is an afterlife, and if there is, will they be able to break a twenty?"Â Â Â -Â Â Â Â Â "It's an unnerving thought that we may be the living universe's supreme achievement and its worst nightmare simultaneously."Â Bill Bryson, *A Short History of Nearly Everything*.Â -Â Â Â Â Â "Tomorrow is not real. It is an illusion. The only reality is now."Â From Zen in Martial Arts.Â Â Â Â Â -Â Â Â Â Â "If someone fires bullets at me and I die without a groan and with God's name on my lips, then you should tell the world that here was a real Mahatma..." Gandhi on the morning of his assassination. Â Â Â -Â Â Â Â Â "He Ram, He Ram" - Ghandi's last words, praying to the deity.Â Â Â -Â Â Â Â Â Certainly life continues when others die, so in that respect death may be an artificial boundary. I have recognized all the more how my fear of death is Â so closely connected with my being self-centered, my over-attachment to my body, and my lack of enough internal peace and balance.-Â Â Â Â Â "Death is our greatest challenge as well as our greatest spiritual opportunity. By cultivating mindfulness, we can prepare ourselves for this final passage by allowing nature, rather than Ego, to guide us."Â"Ram Dass, *Still Here* (2001).Â Â - Zoketsu Norman Fischer said: "In Buddhist funeral services we always say, in true reality there is no coming no going no increase no decrease no birth and no death. This is a deep expression of our gratitude for existence as it is, our knowing that life in order to be life is always full of death, and death, in order to be death, is always full of life."Â -Â Â Â Â Â From Fred Lehman:Â "I remember sitting one morning several years ago with Professor Cheng [Man Châ€™ing] 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 _____ I found aÂ scene fromÂ Wim Wenders's *Tokyo-ga* that visits late film director Yasujiro Ozu's gravesite.Â Instead of saying Ozu's name,Â his headstoneÂ has the symbol "mu" (see this photo of his headstone, too), which I understand can be defined -- perhaps veryÂ imperfectly defined -- as "nothing". Â What did Ozu mean by having his headstone say "mu"? The senses of cinema webpage says: "Whilst in China during his war service, Ozu asked a Chinese monk to paint the character 'mu' for him (an abstract concept loosely meaning 'void' or 'nothingness'). Ozu died painfully on his sixtieth birthday in 1963 of cancer and his tombstone in the temple of Engaku in Kita-Kamakura bears the inscription 'mu' from the monk's painting that he had kept all his life."Â _____ Â -Â Â Â Â Â Contemplation on No-Coming and No-Going
By Thich Nhat Hanh
This body is not mel am not limited by this body.
I am life without boundaries
I 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 pass
Sacred thresholds on our journey
Birth and death are a game of hide and seek
So laugh with me,
Hold my hand,
Let us say goodbye
Say goodbye to meet again soon.
We meet today
We will meet again tomorrow
We meet at the source every moment. We meet each other in all forms of life.
Thich Nhat Hanh, *Chanting and Recitation from Plum Village*. Page 188.Â Â Â Â Â

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

Praised be Martin Luther King, Jr.

Â Martin Luther King, Jr., presented his immortal "I Have a Dream" speech when I was just four months old. When he was shot dead on April 4, 1968, I was only five years old, and he was only thirty-nine.Â I have been very positively influenced by the nonviolent path in fighting for social justice from Gandhi and Martin Luther King, How did they take up

and stay on the nonviolent path? For both, their deeply-held religious beliefs helped them on that path. For Gandhi -- writes Radhika Rao --he was also influenced by the non-violence of his mother and of Tolstoy, and the civil disobedience message of Rousseau. Martin Luther King, Jr., was heavily influenced by Gandhi's non-violent path, starting with Mordecai Johnson's discussion of Gandhi at King's college. Ironically, hanging in King's office was a picture of Gandhi; both were assassinated. On non-violence, King said: "The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy. Instead of diminishing evil, it multiplies it. Through violence you may murder the liar, but you cannot murder the lie, nor establish the truth. Through violence you murder the hater, but you do not murder hate. In fact, violence merely increases hate.... Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars. Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that." In overcoming violence, we have a very long way to go. Happy birthday, Martin Luther King, Jr., and thanks again and again. Jon Katz.

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

Sunday, January 18, 2009

Living t'ai chi daily.

Â Lao Tzu, the purported author of the Tao te ching. Taoism is closely connected with t'ai chi principles.Â (Image from the public domain). Â Today's blog entry contains further ideas and linksÂ concerning t'ai chi, which heavily influences the way I practice law and life: Â - Yesterday morning was the first time I joined the weekly Saturday morning outdoor t'ai chi practice at the nearby Cabin John Park in Maryland; I previously would sometimes join the practices in Glen Echo Park and in McLean, Virginia, but they do not involve t'ai chi push hands/boxing. T'ai chi fighting is a form of Chinese boxing, which is different than Muhammed Ali's sport, in that t'ai chi is an internal martial artÂ focused on reaching strength through keeping the mind, body and spirit as soft as water and wind, but as powerful as a tidal wave and tornado.Â Â The small t'ai chi gathering on this frigid day morning at Cabin John Park was amazing, because two excellent teachers from t'ai chi master Cheng Man Ch'ing's lineageÂ showed and practiced push hands with me, which I had barely been taught before, and which I last practiced over six years ago after less than a handful of times. Â One of the participants talked of doing push hands by focusing on the principles and movements of the 37-posture t'ai chi form, and by imagining a sphere around myself. This practitioner also taught that as long as I maintain a sphere against my opponent, I can successfully defend myself. However, it also is essential for me to keep physical contact at all times between my arms or hands and the opponent's body; that is how I can deeply sense the opponent's next move and how I can minimize damage from the opponent's attack. Therefore, the sphere is not a complete physical buffer from the opponent, but gives me control over a conflict even whenÂ part of the opponent's body is insideÂ my sphere. Â Success in t'ai chi push hands involves listening with all senses to anticipate the opponent's moves; yielding to the opponent's attack without backing away, by rooting one's chi into the ground,Â bending low enough to be in a sitting posture,Â and turning from the waist; staying relaxed, sinking the weight into the leg that is best to be weighted at that moment, turning the waist sometimes as slowly as dripping water to give the opponent nothing to push, keeping the hand(s) on the opponent as the opponent tries to push, finding the opponent off balance or the opponent's center of gravity forÂ pushing the opponent, and never standing upwards from bending down in that raising the body helps the opponent push the fighter. My first opponent showed me the consequences of my physically backing off from being pushed by continuing to stick to me and push me; the idea is not to resist the push with force, but to relax and sink into the ground as part of the defense.Â The entire experience was wonderful, and I look forward to returning to this Saturday morning session many times. Â Certainly, the above lessons can be applied for success with all conflict, both in one's personal life, in the practice of law, and in court. Â - Here is a brief biographical essay of lateÂ t'ai chi master Professor Cheng Man Ch'ing, who taught my t'ai chi teachers' teacher, by his late disciple and interpreter Tam Gibbs. Here isÂ a timeline of the Professor's life. Â - Here is an on-again/off-again blog from the Cheng Man Ch'ing biography project. Â - Here is an interesting, dormant Chang Man Ch'ing blog. Â - Here is a link to teachers from Cheng Man Ch'ing's lineage. Â - Here are links to Cheng Man Ch'ing's own students. Â - Cheng Man Ch'ing's student Ken Van Sickle has some fascinating things to say about the Professor and himself. Â - Here is a link to a Washington, D.C., student of Cheng Man Ch'ing's senior student Ben Lo. Â - Cheng Man Ch'ing was already accomplished in Chinese medicine before starting his t'ai chi studies with the great Yang Cheng-fu. He believed in the benefits of t'ai chi for preventing the need for a physician's intervention in the first place. Here is an interesting link to the Jung Tao school of classical Chinese medicine in North Carolina. Â - Taoism is closely connected to t'ai chi.Â The Native American Taoist blog is written Roger Gilbert, whoseÂ Native American name isÂ Thunderhands(Waki ya nape). Recently, Thunderhands wrote: "Without thought, without dependence on what you know, show me your truth right now! Too late! You were cut three times before you saw one pass of the blade. Stop thinking! The sword is slicing through the air. If you look at the keen blade glistening, you are dead. The Zen way is to take no thought for what action to take nor to meditate over the danger. Movement is then natural fluid. Whoosh! You are gone beyond danger. -Vernon Kitabu Turner / Roshi." I generally agree with Thunderhands, as long as the mind is involved in all this; I speak of mindfulness, rather than overthinking. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Friday, January 16, 2009

Secret U.S. court takes four months to release opinion permitting secret warrantless searches in the name of national security.

Â Bill of Rights.Â (From the public domain.)Â Â One day when I appeared in the U.S. District Court in D.C. before a judge who also is on the FISA trial-level court, I was dying to ask the judge about thatÂ thirty-year-old court, but knew that at best my questions would receive no answers, whether or not with a glare. Â This week, we got a further glimpse of the workings of the secret U.S. Foreign Intelligence court system, through the release of a redacted August 22, 2008, opinion from the U.S. Foreign Intelligence Surveillance Court of Review, which acts as an appellate court over the trial level U.S. Foreign Intelligence Surveillance Court. This appellate case is so full of redactions that even its case title is redacted: In Re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act. Â In Re Directives confirms a foreign intelligence exception to the Fourth Amendment, and permits the Bush II administration's rogue and rampant use of warrantless domestic governmentalÂ infiltration intoÂ emails and other communications believed to include participants from outside the United States. Â On the one hand, it is better that the opinion was made public than kept secret. On the other hand, why did it take just one week shy of five months to release the opinion? Â TheÂ Cold War national security police state mentality remains all too alive in the United States.Â Jon Katz.Â ADDENDUM: Related to today's blog entry, check out Secrecy News, EPIC's FISA page, and FAS's FISA overview,Â

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, January 15, 2009

Judges: The Exclusionary Rule must even cover the countless police errors resulting from an overgrown criminal justice system.

Supreme Court spiral staircase. To my knowledge, when they were lawyers, no current Supreme Court justice prosecuted nor defended criminal cases in trial court, and none of them were police. Probably with few or no exceptions, the sitting justices' law clerks are chosen not for previous law clerking experience with trial prosecutors or defense lawyers, but primarily for having high law school grades, coming from law schools and colleges that have the toughest criteria for grades and LSAT/SAT scores, having law review experience, and having clerked for a federal appellate judge. Have any sitting justices ever visited a jail, beyond the public relations tours, but instead walked the empty hallways of a jail, feeling the often stifling and lonely smells and sensations of being there, and to talk to an individual inmate in the often tiny visiting rooms, where the prisoner thereafter emerges to be strip searched to assure the lawyer has not passed the inmate any drugs, weapons, candy, or any other contraband? Have any of them sat through a criminal trial? I hope so. The ruling elite, including judges, tend to have high opinions generally of police. The police patrol the neighborhoods in which they live and work. They provide armed escort protection to judges. They provide armed courtroom and courthouse security. The police propaganda machines in the United States have long infiltrated the schools -- probably at least as far back as the schooldays of the three youngest justices (Roberts, Alito, and Thomas) -- where students from the youngest ages are forced into assemblies to sit on the floor and remain quiet while uniformed police present a fairy tale picture of the complete good of cops as "your friends" (unless, for instance, the cop is racist and the student is of a race that the cop distastes), the complete bad of "criminals" (even of those convicted after driving with two beers in the belly, or for carrying but one marijuana cigarette are bad criminals?). Which schools counterbalance such Madison Avenue-style police incantations with visits from the ACLU and criminal defense lawyers to talk about the right to remain silent with the police, to refuse searches, to turn in rogue cops, to learn all other Constitutional rights to assert with cops and in the courts; and about such police atrocities as the 2006 police killing of Sean Bell, the 1999 police murder of Amadou Diallo, and the 1997 police torture of Abner Louima (and such police brutality is not geographically limited to New York, despite the New York location of the foregoing horrific examples of police abuse)? My younger brother once came home from school with a "Fairfield Cops are Tops" button, but no "I love the Bill of Rights" button, because no such buttons entered the school. Although the sitting Supreme Court justices are too old to have been further propagandized by the D.A.R.E. program, all their law clerks are young enough to have been so propagandized, without memories of the days when barely any schools had metal detectors or urine-drug testing even to play in the marching band. Even when Supreme Court law clerks do not submit drafts for portions of Supreme Court opinions, they are part of the justices' reality. Who else do justices confide in about pending cases other than each other and their law clerks? Even the most brilliant and knowledgeable judge cannot sufficiently conceive of what the criminal justice system really is without having been there again and again in the pits of the criminal trial courts, the jails, and alleged crime scenes. It is scary to have justices with so little connection to the real criminal justice system, making pronouncements on the Fourth Amendment when they have been so removed from the daily realities of the effects of their Fourth Amendment pronouncements that often live on for years and decades. The solution to the foregoing conundrums is not to mandate that Supreme Court justices have more experience in the criminal justice system -- and I particularly am not interested in adding more justices from the prosecutorial darkside -- but to shrink the criminal justice system so that the system can be more manageably and clearly understood by the justices in the first place and so that justices will be less concerned about making rulings that might let so-called "bad guys" go, particularly when a shrunken criminal justice system will create fewer "bad guys" in the first place. To shrink the criminal justice system to a more reasonable size and into a system in which more civil libertarians can have faith, let us start by legalizing marijuana, prostitution and gambling; heavily decriminalizing all other drugs; eliminating such overcriminalized laws as criminal libel; and eliminating mandatory minimum prison sentencing. With the foregoing backdrop, yesterday, the United States Supreme Court yesterday issued a 5-4 decision refusing to exclude evidence obtained through Fourth Amendment violations resulting from mere, innocent police negligence. *Herring v. U.S.*, ___ U.S. __ (Jan. 14, 2008). In this case, a police officer wanted to find an excuse to stop and search Bennie Herring, and got his supposed ticket when a police assistant called the neighboring police department to learn of an open arrest warrant for failing to appear in court. The only problem is that the court had already withdrawn the warrant, but the neighboring police department neglected to update its records accordingly. The Supreme Court affirmed Herring's conviction for being a felon in possession of a handgun and possessing methamphetamine, even though those items were found incident to his unlawful arrest. The majority reasoned that the Exclusionary Rule is designed to deter Fourth Amendment violations, and that such deterrence would not reach innocent police mistakes. To the contrary, if the Supreme Court extends the Exclusionary Rule to police negligence, police departments and personnel will be motivated to be less negligent, lest police leaders and underlings be disciplined and fired for being asleep at the wheel. Moreover, once governments follow my above-detailed recipe for shrinking the criminal justice system, there will be less police negligence in the first place,

because police departments will then be flush with enough cash to only hire, train, maintain, and supervise higher-quality police and police employees, and to have less information overload to manage and bungle. The effect of the Supreme Court's holding in Herring, even if unintended, is that sh*t happens; Police need to make countless decisions in a split-second, as many police are fond of saying when decrying public scrutiny of police decisions to shoot suspects when they fear that not shooting might leave a dead police officer or innocent civilian. Police are also filled with information overload at the police academy, about the Fourth Amendment right against unreasonable search and seizure and the Fourth Amendment's warrant requirements; the Fifth Amendment and the Miranda right to remain silent; detecting, testing and packaging suspected illegal drugs; detecting and investigating drunk driving; fingerprinting; handling scary and bloody situations; dealing with hysterical screaming complainants and suspects; diffusing dangerous situations; knowing when and how to use and not use their guns and tasers; knowing how to avoid being disarmed by suspects, and how to get them handcuffed and brought to the police station and court. With all the information overload in police officer's heads, the bright-line rule of Miranda, for instance, is critical, that once a suspect is not free to leave, the suspect's answers to questioning stay out of trial evidence without first being read and waiving the Miranda warnings. Both the police and public also need a bright-line rule that evidence obtained in violation of the Fourth Amendment gets excluded from trial, period. As Justice Breyer dissents in Herring: "I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation. The need for a clear line, and the recognition of such a line in our precedent, are further reasons in support of the outcome that JUSTICE GINSBURG's dissent would reach." Jon Katz

Posted by Jon Katz in Criminal Defense at 06:46

Wednesday, January 14, 2009

Three high-level DOJ picks are no strangers to the First Amendment.

Â United States Constitution (From public domain.)Â Not long after I started law school in 1986, numerous people encouraged the resume benefits of working at the Justice Department. I had trouble jibing that with Ed Meese's control of the Justice Department at the time. However, after Dick Thornburgh took over from Meese and through today, I recognized that I had deep systemic issues with the Justice Department that went far beyond any named attorney general, particularly withÂ the policing and prosecutorial arms of that agency. Â I got varied reactions from Justice Department lawyers who worked there during Meese's tenure. Two career people from the department -- who are able to stay no matter the party in control of the presidency -- just shook their heads and referred to "Old Ed", appreciating when he would keep his nose out of their areas of workÂ (environmental and wildlife).Â One of my law professors who worked in the Solicitor General's Office during the Meese years suggested that his work for the SG's office was hardly similar to working more directly with Meese and his influence. At a campus Passover seder, a tablemate was interested that I was a law student, but became upset when I told him I would never work at the Justice Department under Meese; he countered that Meese's position there did not discount the importance of this lawyer's work going after Nazis. The summer before my second year of law school, at a roundtable presentation to law students about career opportunities on Capitol Hill, I walked up to a Justice Department lawyer involved in putting together the presentation, and asked if lawyers there ever complained amongst themselves about Meese. His face contorted into a sourpuss, and insisted that such a question is not appropriate to be asked; I retorted that such a question is completely appropriate in a societyÂ claiming to be so democratic. Â In any event, for decades the Justice Department has consistently attracted law school graduates with the same high grades, law review membership and high-ranking law schools that most large law firms highly value for first-year associates. When they leave, they are among the most marketable lawyers. Â Recently, I learned that Barack Obama's picks for three top Justice Department posts not only have the sparkling resumes that big law firms seekÂ -- and all. like Obama, are Harvard law school graduates --Â but they also have significant experience dealing with the First Amendment, with at least two of them including experience working opposite the side of the angels. All are former Clinton Administration officials, and are close in age to Obama, with none of them more than seven years apart from him.Â Here is a brief rundown of the three: Â - Obama nominated David W. Ogden to be Deputy Attorney General, which is the department's second highest post. In the First Amendment arena, on the one hand, Mr. Ogden has litigated against the unconstitutional 18 U.S.C. Â§ 2257 regulations to maintain records of the ages of models in sexually explicit videos, films, and photographs. He also obtained an injunction against a state law limiting Internet speech. Among his Bill Clinton Administration posts, Ogden was the Assistant Attorney General for the Civil Division, which probably would have included cases aimed at restricting First Amendment rights. A question becomes whether First Amendment advocates prefer a First Amendment supporter doing such work, versus a lawyer who only pays lip service to this cherished amendment. Â - Obama nominated Thomas J. Perrelli to be Associate Attorney General, in charge of the department's Civil, Antitrust, and Civil Rights divisions.Â Repeatedly litigating for the Recording Industry, by default Mr. Perrelli hasÂ repeatedly workedÂ toÂ contract free expression rights rather than to expand them. CNET News's Declan McCullagh finds the Perrelli pick unsurprising: "Campaign rhetoric aside, this should be no surprise. Obama's selection of Joe Biden as vice president showed that the presidential hopeful was comfortable with someone with firmly pro-RIAA views. Biden urged the criminal prosecutions of copyright-infringing peer-to-peer users and tried to create a new federal felony involving playing unauthorized music." Perrelli's confirmation hearing may not go smoothly, considering the upset of social conservatives over his advocacy work to remove Terri Schiavo's feeding tube. Â - Reaching to Harvard's deanship, Obama has named Elena Kagan to be Solicitor General.Â The Solicitor General argues on behalf of the United States government for most major Supreme Court oral arguments. She apparently has never presented appellate oral argument anywhere.Â Ms. Kagan has repeatedly written on free speech. Kagan scores points with me for having attackedÂ the disingenuous secondary effects doctrine. Â Fortunately, Kagan and Ogden understand the pro-free speech side. Perrelli concerns me for having a resume showing much experience trying to limit speech, without my having found any information to counterbalance that. Jon Katz

Posted by Jon Katz in First Amendment at 00:00

Tuesday, January 13. 2009

The war in Gaza

With the war in Gaza continuing in its third week, it feels too awkward not to write here about the war. A distant cousin who long ago emigrated to Israel from the United States recently took notice of the lack of comments about Gaza on a discussion website that connects relatives descended from two ancestors going back nearly two centuries. I replied: "On the one hand, I do find it almost surreal that yours is the first mention of the fighting on this website, while most of the recent postings have been of the usual variety. I applaud you for posting, no matter how much I do or do not agree with your stated opinions. On the other hand, discussing Gaza can bring out much disagreement and debate, and that is fine with me. I have many concerns -- more than answers -- over the current violence in Gaza, including but not limited to: "- I am not a full pacifist, and believe in Israel's having an effective military. I do, though, believe very much that violence begets violence. "- I have been unable to reconcile war with my opposition to capital punishment. Killings in war involve much less due process and carefulness than the barbaric system of capital punishment. "- Humans are fallible, and that alone removes any army from being total angels, including Israel's. Moreover, when enough people with little life experience are sent to war, I think serious abuses will happen along the way. I feel at least the same about cops. "- I lost a lot of faith in the Israeli Army when I learned during the intifada in the late 1980's that Israeli soldiers were intentionally beating rock throwers after they already had been detained. "- I lost a lot of faith in the Israeli government when I learned in the late 1980's of the extent of censorship exercised by that government against even the display of the PLO flag, and in the occasional closure by that government of pro-PLO newspapers. "- I am not convinced that the Israeli military is doing enough to avoid civilian deaths and injuries. I understand the argument that Hamas hides among civilians. However, my understanding is that the Israeli airstrikes go beyond targeting Hamas members to targeting their physical infrastructures, as well, which makes it all the more a challenge to avoid harming civilians. "- Is the recent report true that Israeli weapons struck and killed a United Nations facility in which civilians had sought refuge? Were any Hamas fighters there? "- With Gaza being so densely populated (around 1.5 million people) in such a small geographical area, where can any of the civilians take refuge from the attacks? Will Israel or Egypt let them leave? "- What will the current fighting accomplish other than to weaken Hamas temporarily, and to increase support for Hamas among Palestinians and many other Arabs as standing up to Israel (and whose hearts and minds will be won by Israel in Gaza if civilian Gazans are not even allowed any refuge from being killed or injured during the fighting?)."- Is the recent bomb attack of Nahariya from southern Lebanon a prelude to the opening of an additional front during the fighting? "- In trying to find a solution to this mess, it is critical for everyone to try to humanize those on the 'other' side as much as possible, particularly the children and others who had no role in creating or sustaining the mess. It is much harder to shoot someone who is fully humanized to us. "As I said, I have more concerns than answers. I do have some answers in mind, including finding a resolve to taking a broader view about ways to keep more weapons holstered while finding non-violent roots to weakening support for Hamas and strengthening support among Palestinians for a peaceful solution that includes them in feeling that they have hope for empowered, fulfilled, and dignified lives." My cousin replied that any government would have responded to such bombings with an attack. I replied that it is not good enough for me to justify violent actions on how other governments would respond; we must set our sights higher than that. Now, several days after I posted the above thoughts, the war continues. Here are some more random thoughts: A - Severe burns are among the injuries suffered by injured survivors in the war. A - For many days, Egypt delayed admission of many volunteer doctors into Gaza. Today, permission was finally granted. A - The war in Gaza has sparked anti-Jewish violence in Europe. Such violence is unjustified, but illustrates how violence begets violence. A - It is a necessity, not a fantasy, for Israelis and Palestinians to interact in depth, as part of the effort to reach peace. Consider this video. A - Here is a Washington Post overview from today on the war. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:20

Monday, January 12, 2009

Eliminating the barrier between cops and criminal defense lawyers.

Â Â Cops and prosecutors were ordinary people before becomingÂ cops and prosecutors, and that is at least one point of commonality I have with them. Â In the District of Columbia Superior Court, I find more cops clam up when I try speaking with them than in any other courthouse where I practice, although there are plenty of exceptions. I do not know how much of it has to do with the high acquittal ratio there for criminal jury trials compared to neighboring Virginia and Maryland. Next comes the discovery desert of Virginia, where many cops -- even when otherwise affable -- insist that I get all case information from the prosecutor rather than from the cop. In Maryland, cops generally are more talkative, and this is facilitated in at least one county where the prosecutor issues a discovery letter that authorizesÂ the cops to get discovery straight to criminal defense lawyers on request. (Such authority should not be needed, but several times I have loosened a cop's tongue by showing that letter.)Â Â Generally, a criminal defense lawyer will get more helpful information from cops andÂ prosecutors, and further with negotiating cases with them, when talking with themÂ as if they are next door neighbors. I am not saying to talk with them as friends if that is not how the defense lawyer feels about them, but to talk with them the same as the defense lawyer would ideally talk withÂ anyone. which is with respect, withoutÂ separation by a ton of armor, with humor when that is fitting, and with realness at all times. That is not always so easy to do when the defense lawyer believes that a cop or prosecutor is being underhanded, dishonest, or uncaring, all to the detriment of the client. That is not easy to do when at the very outset the prosecutor or cop belittles the client as worthless scum. That is not easy to do in jurisdictions and in situations where the cards are particularly stacked against the client. Â People can be turned around, of course, and it is easier to do that when they are not keeping their guard up and full armor on. This was underlinedÂ once againÂ in court recently. My client was charged with some misdemeanors. Because neither count wasailable over ninety days, we had to have a bench trial before being able to appeal forÂ a trial de novo with or without a jury. We had a chance of winning, but that was not guaranteed. For a long time, the prosecutor would not budge from a plea offer of disorderly conduct, despite my offer to inactivate the case for many hours of community service. The cops essentially said my client had been acting like a royal jerk when they encountered him (that is but the cops' version).Â The prosecutor was much busier than I, and I walked into the hallway where the police witnesses were sitting, apparently with this as their only trial. I made some small talk, and then asked a few open-ended and non-confrontational questions geared in part to figure out the extent to which the police report accurately reflected the observations of the first cop on the scene, who did not write any report nor notes. The event happened a few months ago, and the cops seemed very interested in discussing the case with me. Sometimes all that is needed is an actively listening and non-judgmental ear by the defense lawyer. The prosecutor came over, and we all conversed about my idea of inactivating the case for community service. I calmly mentioned some of the weaknesses in the prosecutor's case, and said: "Of course, I do not know what the officers' other obligation are today that might encourage my community service offer. As for me, I always calendar to be in this courthouse the full day." Ten minutes later, the prosecutor accepted my offer. Â Taking a just folks approach can work with more serious cases, too, but usually will take longer than the five to ten minutes in which I took the above misdemeanor case out of the radar of a possible conviction. For some people, taking such an approach is easy because they always are like that. For me, it takes more work. It helps that I now do t'ai chi more often than before, usually not deviating from t'ai chi master Ben Lo's telling me recently of the need to practice t'ai chi in the morning and evening. This helps me both to relax and sink my mind and body respectively towards my tan tien and the rooting of the ground so as to remove any short fuses and so as to be as uncluttered as a Count Basie solo, a Yasujiro Ozu film, and sometime even Baba Hari Dass's minimalist chalkboard. Â I am also helped to have role models not only in being calm, but in dissipating anger into calm. Great trial lawyers Steve Rench and the late Bob Ritchie exemplify ongoing calm. However,Â because I still experience significant anger from time to time, it helps,Â too,Â for me to draw inspiration from those devoted to calm who still struggle with anger. The concept of being mindful of anger is underscored byÂ Claude AnShin Thomas, whoÂ became a mendicant Buddhist monk years after killing hundreds of people in Vietnam.Â I met Mr. Thomas five years ago during his speaking tour, and was taken by his dual approach of not denying or suppressing the anger that he still lives with, but also doing his best to dissipate and reduce the pain and anger.Â When he is about to get angry, he accepts the feeling, but tries to dissipate it by focusing on his breath and on the sound of a bell, whichÂ helps get him back to concentrating on his breath and calm rather than on anger. For me, sometimes I silently repeat the odaimoku, Na-Mu-Myo-Ho-Ren-Ge-Kyo, which is the Nichiren Buddhist prayer for peace, and I relax and sink, as with t'ai chi. I put that acronym, NMMHRGK,Â on my license plate, to inspire my ongoing calmness as I travel the roads. Â IfÂ Claude AnShin Thomas, who experienced and caused so much pain, death and misery can find a way to dissipate his anger, his message is that just about everyone else has the capacity to do it.Â CompassionÂ is a critical part of dissipating anger, as is finding a way to feel connected with others, even those seeming to act like hemorrhoids. Most people do not intentionally act like hemorrhoids. They often act like pains and cause pain to others because they are in pain, or else are so wrapped up in their own world that they have trouble considering others. It is much easier to conceptualize of this when sitting alone

typing at the computer than when confronted with people acting in such a way. Take for instance t'ai chi teacher Arthur Rosenfeld, who already knew the tools for t'ai chi calmness but whose first reaction to a man hurling insults at Rosenfeld for not finding a way to pull up any further in the drive-through line was to go for the door to slug the other driver. Rosenfeld's reaction went beyond that to a physiological downhill metamorphosis: " [M]y ire grew even further. Testosterone and adrenaline flooded my body and in a few seconds I had transformed from the peaceful, content, slightly thirsty writer/teacher to a raving lunatic. My heartbeat was up, my hands were clammy, my muscles were tense, and the whole world had constricted down to the tiny business of completing my hostile mission. Then I glanced in the mirror. The face of the impatient driver behind me was florid and twisted with anger and hate. I refocused my eyes and noticed that my own face didn't look much different. Whatever plague had taken him had penetrated the steel and glass of my car to infect me too, robbing me of my much-vaunted equilibrium, my peace, my balance, my equanimity--precisely that thing that my beloved tai chi training, and the Chinese philosophy behind it prizes most highly. I teach my students that it is best not to lose that balance--wuji in Chinese--through meditation, breathing, and tai chi training, but when you do, you can use any of three 'doors' to get it back. Door number one is meeting force with force: I could go ahead and start a fight. Door number two is yielding: I could kowtow on the concrete, admit to being an idiot, and beg the other driver's forgiveness. The best option, however, is door number three. That door is different every time. The trick is to figure out what that is." Rosenfeld chose door number three by telling the cashier he was paying for his own coffee and the order of the car behind him, even though it turned out that the honking man behind him had ordered a full spread for the whole carload. What happened next can be seen as the meaningful truism that expressed anger does not disappear in thin air and that goodwill is contagious, rather than as a corny publicity stunt possibly lengthened by the Starbucks drive-through store, in that the incessant honker proceeded to pay for the order of the car behind him, and the whole routine continued like dominoes with car after car that proceeded. Such a routine is embodied, by the way, with those who eat and volunteer at Karma Kitchen in Berkeley. Rosenfeld admits that his purpose was no higher than to return to calm, and he drove away to avoid the honker from finding him. However, he paid with a credit card, Starbucks blew his cover, and the media tracked him down to play the story on television. The newscast is displayed here. (Thanks to Taijiquan Journal for referencing this story.) Rosenfeld's focus on a door number three that covers a different approach depending on the challenge is being in the t'ai chi moment. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Sunday, January 11, 2009

Westboro Baptist case awaits Fourth Circuit opinion.

First Amendment and the rest of the Bill of Rights. (From the public domain.) Last month, the Fourth Circuit heard oral arguments in a critical appeal by the Westboro Baptist Church and its three members who lost a Maryland federal trial in October 2007 for intentional infliction of emotional distress and invasion of privacy. I did not continue into the appellate stage from the trial, at which I defended the church and its pastor Fred Phelps; on appeal, the appellants are represented by Margie Phelps. Here are the briefs in the appeal: Appellants' brief; Appellee's brief; and Appellants' reply brief. In amicus support of reversal are the American Civil Liberties Union, and the Thomas Jefferson Center for the Protection of Free Expression. The amicus supporting affirmance is Jeffrey Shulman, who teaches at Georgetown Law School. Remember, your own free expression rights are less protected if expression you detest is infringed by government, laws, and courts. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Friday, January 9, 2009

Cops: Lay off on unconstitutional disorderly conduct arrests.

Â Bill of Rights.Â (From the public domain.)Â Â Too often, police arrest for disorderly conduct simply because they cannot think of any other crimes to charge. That is beyond unjust. Â Thanks to Jonathan Turley for posting on last month's South Dakota Supreme Court decision that the First Amendment protects the right of people to yell expletives at cops. South Dakota v. Suhn, __ NW2d _ (SD, Dec.Â 30, 2008).Â In this instance, Marcus Suhn was among one hundred people on the sidewalk after bar-closing time, and he yelled the following at a passing police car:Â "F*cking cop, piece of sh*t. You f*cking cops suck. Cops are a bunch of f*cking a**holes." (Was he performing for a YouTube release?) Suhn.Â One of the officers immediately grabbed and arrested Suhn, and charged him with disorderly conduct, apparently only for the shouting and the content of Suhn's speech, because the statement of facts says nothing of any civiliansÂ being disturbed by Suhn. Suhn.Â The court below found Suhn's words unprotected fighting words under the First Amendment. Thankfully, the South Dakota Supreme Court found Suhn's words to be protected speech, and reversed. Suhn.Â Cops, you are no more entitled than anyone elseÂ to be free from having expletives hurled at you. That is a price of a First Amendment that means anything.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, January 8, 2009

When pleading guilty, consider a no-civil-commitment agreement.

Imagine being in prison for a few years or many more than that, and counting the days to freedom, as Tom Waits's Zack does at the beginning of this clip from *Down by Law*. Eventually the days until release are shorter than the days that have been spent in prison, and eventually the years turn into months, then weeks, and then days until release. And then someone plays what seems a cruel joke, with a government lawyer slapping a petition to keep you incarcerated as a dangerous person under the civil commitment laws -- under an evidentiary standard below the reasonable doubt standard, and without the right to a jury trial -- after having completed your criminal sentence. It happens. *U.S. v. Comstock, et al.*, ___ F.3d ___ (4th Cir., Jan. 8, 2008). Fortunately, the Fourth Circuit today said this scenario is impermissible in federal court: "The power claimed by § 4248 -- forcible, indefinite civil commitment -- is among the most severe wielded by any government. The Framers, distrustful of such authority, reposed such broad powers in the states, limiting the national government to specific and enumerated powers. "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Section 4248 thus cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution. For these reasons, we affirm the judgment of the district court [denying such a civil commitment]." *U.S. v. Comstock* As Comstock acknowledges, some other federal court -- all trial courts -- have reached the opposite conclusion, and Comstock does not interfere with civil commitment by state courts. This case looks headed for Supreme Court review. Consequently, it seems prudent to seek a no-civil-commitment provision in a guilty plea agreement for criminal activity that might risk exposure to civil commitment efforts as the prison stay approaches its end. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 7, 2009

Your refusal to talk to the cops stays out of evidence, but your refusal of a blood alcohol test does not.

Â Bill of RightsÂ (From public domain.)Â Yesterday I blogged that refusing a search is inadmissible at trial.Â So is refusing to talk with the cops. Doyle v. Ohio, 426 U.S. 610 (1976); U.S.Â v. Hale, 422 U.S. 171 (1975); Grier v. Maryland, 351 Md. 241, 718 A.2d 211 (1998).Â Unfortunately, the Supreme Court does not afford a Fifth Amendment or any other Constitutional right to bar the jury from knowing that a drunk driving defendant refused aÂ blood alcohol test.Â South Dakota v. Neville, 459 U.S. 553 (1983); Stevenson v. District of Columbia, 562 A.2d 622 (D.C. 1989). That makes no sense. Refusing aÂ blood alcohol test is a communication.Â Refusal to communicate withÂ the police is at the very heart of the Fifth Amendment. Hopefully Neville will be overturned.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, January 6, 2009

Refusal of a search is inadmissible at trial.

Â Â Bill of RightsÂ (From public domain.)Â Sometimes prosecutors try to present evidence at trial that my client refused a search. They may not do so: Â "A person has a constitutional right to refuse to consent to a warrantless search of his or her automobile, and such refusal may not later be used to implicate guilt. An unfair and impermissible burden would be placed upon the assertion of a constitutional right if the State could use a refusal to a warrantless search against an individual. See, e.g., *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir.1978); *Garcia v. State*, 103 N.M. 713, 712 P.2d 1375, 1376 (N.M. 1986). Moreover, a person's refusal to consent to a warrantlessÂ search cannot form the basis of reasonable suspicion or probable cause. See *Florida v. Bostick*, 501 U.S. 429, 437, 111 S. Ct. 2382, 2387, 115 L. Ed. 2d 389 (1991) (noting that 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure'); *Florida v. Royer*, 460 U.S. 491, 498, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983) (holding that a person 'may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listenÂ or answer does not, without more, furnish those grounds'); *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (holding that '[t]he failure to consent to a search cannot form any part of the basis for reasonable suspicion'). See also Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901, 937 (2002) (rejecting the constitutionalization of what the author terms an evidentiary issue, stating that evidence of refusal to consent is inadmissible ordinarily, not necessarily because it punishes a person for assertion of a constitutional right, but because refusal to consent is not probative of guilt or suspicion and is thus irrelevant)." Â *Longshore v. Maryland*, 399 Md. 486, 537-38, 924 A.2d 1129 (2007). Â The foregoing *Longshore* decision reversed the defendant's conviction, finding that the introduction before the juryÂ of testimony thatÂ defendant refused a search -- even if not intentionally produced by the prosecution, but instead by a police witness on the stand -- was not harmless error. *Id.*Â at 538. Â Following the foregoing legal analysis, because field sobriety tests are searches,Â *Blasi v. State*,Â 167 Md. App. 483, 893 A.2d 1152, cert. denied, 393 Md. 245, 900 A.2d 751 (2006), refusal to perform such tests also is inadmissible at trial. Â Most importantly, refuse police searches. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, January 5, 2009

Judges: Time to distinguish between the smell of burnt and raw marijuana.

Â Bill of RightsÂ (From public domain.)Â How many judges have experience smoking marijuana, smelling others who have smoked marijuana, and smelling raw marijuana? At least one judge has such experience. Soon after the Senate bounced Robert Bork, Ronald Reagan nominated a then-forty-one-year-old Douglas Ginsburg to the Supreme Court. His nomination went up in smoke within days after his admission that he had smoked marijuana while a law school professor. He has remained all this time on the D.C. Circuit. Certainly, marijuana smoking should not disqualify one from the bench; nor should marijuana be illegal in the first place. Â Whether or not it is a virtue for a judge to have had no direct experience with marijuana outside the courtroom, certainly judges should not be relying on other members of the bench to create judicial notice that marijuana smell provides sufficient probable cause for a search. Worse, judges should not permit unscientific and self-serving trial-level testimony of cops to create such a notion. Â For one thing, when smoked, marijuana reeks, but,Â when unburnt, it can be very difficult to detect, despite the often flippant and probably downright lying claims ofÂ police to the contrary, and particularly when the rawÂ marijuana quantities are small and not right under nor right insideÂ the cop's nose. For another thing, there are different varieties of marijuana, and I would like to know if that can affect the stink of burnt and raw marijuana. Most importantly, for judges to take such judicial notice removes defendants and their own lay and expert witnesses from the factfinding equation. Conducting reliable scientific studies of people's ability to smell burnt and unburnt marijuana over the variables of distance, quantity and passage of time is expensive, which probably helps explain why I only know of one study thus far thatÂ debunks the notion that unburnt marijuana is easy enough to smell to provide probable cause to search.Â The study was conducted byÂ Richard Doty, Ph.D.,Â of the University of Pennsylvania, whom I have called before to the witness stand as a raw marijuana smell expert. Â In any event, it appears that too many appellate cases finding marijuana odor as sufficient to justify searches fail to distinguish analytically, in their written opinions, or both, as to whether the marijuana is burnt or raw, of a high quantity or not, close or far from the smeller's nose, or interfered by wind, other odors, or even stuffed or dull noses. Consider the following appellate cases in that regard: Â - Praised be the Indiana Court of Appeals for recently upholding suppression of a search conducted on the basis of a cop's claim of smelling a small quantity of unburnt marijuana. *Indiana v. Holley*, No. 02A03-0808-CR-406 (Dec. 23, 2008). In pertinent part, Holley says:Â "There was no evidence that Officer Boles [the sole smelling officer] had any formal training regarding the detection of raw marijuana by odor or in distinguishing it from other substances. While there was evidence that he had encountered marijuana during the course of his duties, there was no evidence that he was qualified to know its odor or able to distinguish its odor from that of other substances. Â "On the basis of this evidence, we cannot say that the State sustained its burden of proof justifying the warrantless search of Holley's vehicle. The evidence of Officer Boles's qualifications to identify the presence of raw marijuana by odor alone was not without conflict and is insufficient to overturn the negative judgment of the trial court. While the testimony of a police officer shown to be qualified by training or experience to detect the odor of raw marijuana may be sufficient in a particular case to demonstrate the existence of probable cause as a matter of law, the State failed to make such a showing here." *Indiana v. Holley*. Thanks to John Wesley Hall for blogging on Holley.Â - Last year, Virginia's Court of Appeals permitted a search based on the smell of raw marijuana, saying: "As many courts have held, 'if an officer smellsÂ the odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana.'" *Bunch v. Virginia*, 51 Va. App. 491, 496, 658 S.E.2d 724 (2008) (approvingly quotingÂ *U.S. v. Humphries*, 372 F.3d 653, 660 (4th Cir. 2004)). Â Aside from the deep flaw of such judicial notice as that proclaimed in *Bunch v. Virginia*, many of the raw marijuana cases referenced by cases cited by the foregoing *U.S. v. Humphries* -- as discussed below -- deal with large marijuana quantities, sometimes in the hundreds of pounds, and often reference specialized experience by the detecting cops, who often are Border Patrol police. A court must review the totality of the circumstances and assess the credibility and reliability of witnesses before permitting a search based on probable cause, *Indiana v. Holley*, and such an approach is shortchanged and distorted to permit such searches on the mere claim of a cop that s/he smelled marijuana, particularly in the absence of a basis for the cop's training and experience in distinguishing between the smell of raw marijuana, oregano, or a wide variety of other substances. Â For instance, *Humphries* substantially relies onÂ *U.S. v. Scheetz*,Â 293 F.3d 175 (4th Cir. 2002). In turn, *Scheetz* relies heavily on the Tenth Circuit decision in *U.S. v. Morin*, 949 F.2d 297 (10th Cir. 1991). *Morin* says: "This court has long recognized that marijuana has a distinct smell and that the odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage. *United States v. Merryman*, 630 F.2d 780, 785 (10th Cir. 1980); *United States v. Sperow*, 551 F.2d 808, 811 (10th Cir. 1977), cert. denied, 431 U.S. 930, 53 L. Ed. 2d 245, 97 S. Ct. 2634 (1977); *United States v. Bowman*, 487 F.2d 1229, 1231 (10th Cir. 1973)." *Morin*, 949 F.2d at 300. Â *Morin* failed to acknowledge that the *Merryman* case it relies upon involved 242 lbs. of marijuana.Â *Merryman*, 630 F.2d at 783. The foregoing *Bowman* case relied upon by *Morin* involved twenty-five bricks of marijuana smelled by a Border Patrol Agent who "had smelled marijuana while on duty and ... was familiar with its odor. The court below made the

specific finding that Agent Goad did, in fact, detect the odor of marijuana." Bowman, 487 F.2d at 1230. As supported by Bowman, no probable cause to search can exist without the trial judge finding that the smelling officer was sufficiently trained and familiar with the distinction between the odor of raw marijuana and the odor of other substances. Id. Consequently, no judicial notice should be taken that a police officer may search a suspect on the mere claim of smelling marijuana. Bowman, upon which Morin relies, states: "In our disposition of this issue, we do not write on a clean judicial slate. It is well settled within the Ninth Circuit that a smell alone is sufficient to constitute probable cause for a subsequent search for marijuana." United States v. Barron, 9 Cir., 472 F.2d 1215, cert. den., 413 U.S. 920, 93 S. Ct. 3063, 37 L. Ed. 2d 1041 (1973); United States v. Campos, 9 Cir., 471 F.2d 296; Fernandez v. United States, 9 Cir., 321 F.2d 283." Bowman, 487 F.2d at 1230. However, although Bowman relies in part on the Ninth Circuit's Fernandez case to justify its foregoing pronouncement, Fernandez involved "five packages of marijuana wrapped in brown paper." Fernandez, 321 F.2d at 285. Consequently, enough is enough. Judges need to stop promoting and accepting the deeply flawed notion that a police officer's mere claim of smelling marijuana translates into probable cause to search. A case-by-case inquiry is necessary, to consider the totality of the circumstances that led to the search. Marijuana smell should not create any exception to that rule. Jon Katz.

Posted by Jon Katz in Drugs at 00:20

Praised be our support staff.

Not long ago, I blogged that I welcomed resumes for an added part-time legal assistant position at my law firm. I am pleased to say that this position has been filled by a highly-qualified applicant who started last week. As I do all the time to their faces, here in cyberspace I thank my staffmembers for their highly capable and dedicated work for our clients. They are my full-time legal assistant David and part-time legal assistant Young Hee, both of whom have been with me since the first day my law firm opened five months ago; and part-time legal assistant Letam. All my staffmembers are a pleasure to work with, and they give me and my clients boosted confidence that all is running smoothly when I am in court and elsewhere battling for justice. To those who employ or supervise employees, I send you good karma to share good karma with your employees every moment of the day. Thanks, again, David, Young Hee, and Letam. Jon Katz.

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

Sunday, January 4, 2009

What makes David Lynch tick?

Â David Lynch's *Eraserhead*.Â Great creativity from any quarter inspires me as a trial lawyer. Â Film directors who particularly inspire me include Jim Jarmusch, John Waters, and David Lynch.Â All three came to filmmaking from outside the Hollywood filmmaking establishment, and all of them have pushed the creative envelope. Jarmusch has said that he bypasses the suits and gets much of his film financing from Europe. In his early days, Waters assembled a motley crew from Baltimore in low-budget works that earned him the title of the prince of puke and the king of trash. David Lynch said that his now-widely celebrated *Eraserhead* has a one and one-half year time gap in a scene where Jack Nance opens a door and emerges on the other side, due to a budgeting drought. All three directors were passionate enough about filmmaking over profit that they persevered and succeeded. Â Pure, quality art for art's sake is inspiring, whether it be the visual or performing arts. Â As I discuss here, I first learned ofÂ Lynch'sÂ *Eraserhead*Â from the wall poster of a first-semester college roommateÂ with whom I was so narrow-minded that I resisted knowing about *Eraserhead* for years. I finally saw the film eighteen years ago, and it remains one of my favorites. Â This being Sunday, when I often blog on items less directly related to law, I post here the following links that might give some insight about what makes David Lynch tick: Â - Here is a lengthy presentation by Lynch and others, including the inspiration Lynch derives from Transcendental Meditation. He discusses meditation further here. TM was developed by Maharishi Mahesh Yogi, whom John Lennon eventually pannedÂ as but a mere mortal, at best.. I meditate through t'ai chiÂ standing meditation; beforehand, I sometimes meditated using the teachings of Herbert Benson in the Relaxation Response.Â - Lynch discusses the development of ideas. Â - He discusses *Eraserhead* here, here, and hereÂ (with Jack Nance, who played Henry, also in the last clip). Â - Here he discusses *Mulholland Drive*.Â - Lynch finds advertising product placement in films to be B.S.Â He says a film cannot be experienced on a telephone. He likes using expletives. Jon Katz.

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

Friday, January 2, 2009

Trial skills must be developed in tandem with maintaining a strong body and calm mind.

Lao Tzu, the purported author of the Tao te ching. Taoism is closely connected with t'ai chi principles. (Image from the public domain). For over a dozen years, I have studied, practiced, and applied t'ai chi to my life and practice of law, as explained here, here, and here. A good friend once told me one of his friends overheard me talking about t'ai chi at a Taco Bell. His friend chuckled about my being into so much "Asian" stuff when I am not myself Asian. That's like saying that only Japanese people can enjoy and appreciate Japanese directorial legend Akira Kurosawa, who directed from a worldwide perspective, and had a worldwide audience and universal messages in mind with his films. The late t'ai chi megamaster Cheng Man Ch'ing was committed to the worldwide quality teaching and learning of t'ai chi. He took a major step in doing so in the 1950's, when he accepted Taiwan-based Robert Smith -- then with the CIA -- as his first Western student. He took a greater leap teaching even more Western students when he opened and was resident at a t'ai chi school in Manhattan starting in the 1960's. Many of his Manhattan students went on to become great teachers in their own rite after the passing of Professor Cheng in 1975. Some authors are so great that it is worth learning the writer's language to better understand his or her works without having the translator as an intermediary. Learning and practicing French and Spanish for many years has been demanding enough that I am not about to study another language for such a purpose. Fortunately, Professor Cheng found the time in the late 1940's to write a book on the thirty-seven posture t'ai chi form that he shortened from the form he learned from legendary Yang Cheng-fu. This essential t'ai chi book -- Cheng Tzu's Thirteen Treatises on T'ai Chi Ch'uan -- stayed untranslated from Chinese to English for around thirty-five years, until Professor Cheng's senior student Benjamin Pang-jeng Lo and t'ai chi teacher Martin Inn, who is a good friend of Master Lo, translated Cheng Tzu's Thirteen Treatises. The pair were also involved in translating The Essence of T'ai Chi Ch'uan in the 1970's. As a result, a particularly reliable translation of Cheng Tzu's Thirteen Treatises is available to English-language readers, based on Ben Lo's devotion to t'ai chi and Professor Cheng and his living t'ai chi every moment of the day for sixty years. Recently I pulled the following three essential books that had been in storage for over three years, which is much too long: Cheng Tzu's Thirteen Treatises, T'ai Chi Ch'uan Ta Wen (translated by Benjamin Lo and Robert Smith), There are No Secrets: Professor Cheng Man ch'ing and his Tai Chi Chuan, and Samuel Griffith's highly acclaimed translation of Sun Tzu's The Art of War. I have yet to finish reading all of them except for Wolfe Lowenthal's excellent book, whose other writings and website are linked here. Here are some eye-opening items in the introductions to the English-language version of Cheng Tzu's Thirteen Treatises (North Atlantic Books, 1985): - When Professor Cheng started studying t'ai chi with Yang Cheng-fu, Cheng's body was very weak. He studied t'ai chi for six years with Master Yang, achieving a healthy and strong body. Remarkably, very few Chinese people practiced t'ai chi at the time. In any event, Min Hsiao-chi writes of Professor Cheng's fearlessness of danger. For instance, in the mountains one day, he calmly encountered a tiger. - The title Cheng Tzu's Thirteen Treatises is intentionally similar to the alternative title of Sun Tzu's Art of War, which is Sun Tzu's Thirteen Treatises. - Professor Cheng, a master of Chinese medicine, believed t'ai chi could prevent disease in the first place. This last point, about t'ai chi as preventive medicine, is very relevant to trial lawyers. The times are countless when I have worked very long days in trial preceded by trial preparation and followed by meeting my client and witnesses, and dealing with staff. Practicing t'ai chi upon rising and close to going to sleep helps me to remain feeling calm, comfortable and healthy even when in dusty, drafty, and otherwise-uninviting courtrooms, jails, and investigation scenes. Of course, vigorous exercise is also very beneficial. For that, I bike and run, currently doing more running than biking. It seems that reliable studies show all the more that getting less than seven hours of sleep nightly is too risky, thus requiring me to adjust from the days when sleep deprivation was a part of my life every few months or more. Finally, whether or not food is medicine, everything we eat, breathe, and otherwise ingest does affect how healthily our bodies function. Pepperoni, cheese doodles, and double-fudge ice cream will take a toll on the body. Cheng Man Ch'ing believed strongly that even having the most advanced weapons is like having no weapons at all if an army's soldiers are not physically strong. The same goes with trial lawyering. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00