

Sunday, March 1. 2009

### **Paul Kay departs the planet.**

If I try to see death as an artificial marker in the continuum of life, why do I blog on occasion about those who depart their bodies, and thus this planet? One reason is that this transition is significant to those who remain on the planet. Another reason is to pay honor to them in case they are aware of the honor being paid, and for the benefit of their surviving loved ones. I first met the late trial lawyer Paul E. Kaye in the early 1990's, when I was active with District of Columbia criminal defense lawyer activities, in anticipation of my ultimate return to private practice from public defender practice. He was among those I asked about how they arrived at the path of being their own boss in the practice of criminal defense. Paul seemed sure in his decision to become his own boss, which is the kind of positive energy I sought on the path to becoming my own boss ten years ago. Paul had numerous courtroom successes, and would cross-examine cops testifying about the junk-science field sobriety tests for drunk driving cases by acting out the tests with his large frame, underlining how silly it is to expect that even a sober person -- nervous from an accusatory police encounter -- would not flub on them. I do not write this blog entry for the purpose of mentioning that Paul was blind, which resulted from retinitis pigmentosa. On the other hand, he seemed to be a living example of transcending handicaps and other impediments on the road to success. The Washington Post obituary reports that according to Paul's sister, he "considered blindness more of a nuisance than a handicap." In at least two instances, Paul took action when others did not see it that way. In the early 1990's, Paul successfully pushed to prohibit the District of Columbia Superior Court from automatically barring blind people from juries. On another occasion, he successfully sued a restaurant that would not admit his assistant Dog Smokey. Paul's dog Smokey was more important to him than mere hired "help." After Smokey's retirement, Paul told me of at least one visit with him several states away with Smokey's then new caretaking humans. Paul passed away on January 7, 2009. I missed the timely notice in the local criminal lawyers' listserv (entitled merely "Paul Kay" which made me think someone was seeking his contact information or writing of one of his successes), and the later notice in the Washington Post. However, I finally caught the news today in a listserv posting about his memorial service to be held in May. Thanks, Paul, for you and for your inspiration. Jon Katz

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

### **Bloggers: Upload police beating videos.**

NOTE: The link to the video covered in this blog entry is listed here, but the still photo of the video has been removed due to formatting problems that followed. Despite the years of publicized videos of police using excessive force and outright assaults against unarmed civilians, too many police still do it. The idea is not to get cops to conduct beatings behind closed doors and away from cameras, but for them to stop in the first place. As I have said repeatedly, we will have better police, better police hiring, better police training, better police supervision and review, and better police personnel support once the criminal justice system is substantially shrunk by legalizing marijuana, heavily decriminalizing all other drugs, eliminating mandatory minimum sentencing, and eliminating the death penalty. Until the system is shrunk, I urge bloggers and static website owners to do their part to speak up against police abuse and to post videos catching cops unjustly assaulting civilians. Shown above is a video released this past Friday, that has been making the Internet rounds of a November 29, 2008, beating by then-sheriff's deputy Paul Schene, of the King County, Washington sheriff's department, while an unidentified colleague is within ten feet of the beating, doing nothing to stop it. You can easily post the video -- which includes the police beating victim possibly lightly kicking the cop, but seems too far away to do so -- to your blog or website by embedding the embedding code listed here. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Friday, February 27, 2009

**Marylanders: Urge your legislators to support abolition of the death penalty.**

Maryland voters: The state finally has a governor, Martin O'Malley, committed so fully to the death penalty's abolition that he is pushing for such legislation in the current legislative session. Please call, write, visit, and camp out at your state senators' and delegates' offices to make death penalty abolition a reality in Maryland. The voting in the state legislature will happen soon.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, February 26, 2009

### How did Daniel Ellsberg avoid a conviction?

Daniel Ellsberg leaked the Pentagon Papers about the Vietnam War to the press in 1971. Ellsberg's website says that his "trial, on twelve felony counts posing a possible sentence of 115 years, was dismissed in 1973 on grounds of governmental misconduct against him, which led to the convictions of several White House aides and figured in the impeachment proceedings against President Nixon." Whether or not federal law enforcement folks and federal prosecutors have learned from their failure to convict Ellsberg, it appears that the federal government today pursues and prosecutes leaks of confidential government information (conveniently classified as confidential by the executive branch, itself) with a vengeance, unless Obama changes course. As a result, Scooter Libby was prosecuted, followed by Bush's commutation of his sentence. Currently, the feds are prosecuting two officials of the American Israeli Public Affairs Committee for allegedly leaking confidential government information. I believe in erring on the side of disclosing too much government information to the public than too little, and that there is overprosecution for leaks of confidential government information. The federal government classifies too much information as confidential in the first place. Such overclassification is a relic of the Cold War and today often is publicly explained in the name of countering terrorism. In the current AIPAC federal prosecution against Steven J. Rosen and Keith Weissman, the prosecution wants as little classified information to get into the jury's hands as possible. (See the case docket.) However, how can the defendants get a fair trial if the defense does not have the opportunity to present the jury with extensive relevant information -- both classified and not -- concerning this prosecution? If the prosecutors do not want the jury to have such information, they always have the opportunity to dismiss the prosecution. Through an interlocutory appeal brought by the prosecution, last Tuesday, the Fourth Circuit affirmed trial Judge T.S. Ellis, III's (E.D. Va.) action to give a partial loaf to the defense and a partial loaf to the prosecution on how much classified information the jury will be permitted to receive. Underlining the confidentiality issues involved in this prosecution, the Fourth Circuit's opinion is riddled with the phrase "[redacted]", having excised numerous words and phrases of its opinion from public view. U.S. v. Rosen and Weissman, \_\_\_ F.3d \_\_ (4th Cir., Feb. 24, 2009). All this government classification of confidential information helps keep Wite-Out profitable, but does not serve the cause of open and democratic government.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, February 25, 2009

## You are what you wipe with?

This blog mainly deals with the law and social justice. Of course, if the environment gets as bad as 1973's science fiction-fact *Soylent Green*, the world and social justice will be in even deeper doo-doo than it already is. Speaking of doo-doo, it is curious how poverty can encourage environmental preservation when it comes to toilet paper and other luxury items. Not until I was twenty-years-old did I come to the realization that the vast majority of the world's population does not use it, because it is too expensive. A fellow college student who grew up in a poor area of a developing country before moving to Great Neck, Long Island, told me that he had to walk a distance to defecate, and then would clean up with water and his left hand; that was it. When I traveled in Southeast Asia after taking the bar exam, I always carried a supply of toilet paper with me for when there was a public bathroom or outhouse with no paper. My excellent tourguide for a multi-day trek among the hilltribe people that included the Golden Triangle insisted that the hand and water method is much cleaner; he has a point, aside from what gets on the hand. I understand that the left hand is used, making it an insult in some societies to pass food to others with anything but the right hand. Aside from daily gas and electricity consumption, toilet paper -- followed by facial tissues, napkins, and paper towels -- probably ranks high as a way that most people in the United States and other economically-wealthy countries daily degrade the environment. Until people substitute the hand-water method for the toilet paper method -- and holding one nostril while blowing out the other one onto the street or other ground, which is practiced by millions of poor people around the world -- the critical choice is recycled toilet paper, to eliminate the cutting of existing trees and forests for the mere sake of a velvety-soft feel against one's bottom. The recycled stuff still feels nicer than the paper towel consistency I found in public toilets in France and elsewhere. Greenpeace has a great online guide that ranks toilet paper, facial tissues, paper towels and napkins based on the criteria of 100% recycled content, at least 50% post-consumer recycled content, and bleaching without chlorine components. That throws out the Mr. Whipple window such brands as Charmin, Kleenex, Bounty, and Scott. The foregoing criteria herald in such products and brands as handkerchiefs, cloth towels, Seventh Generation, Trader Joe's, 365 and CVS Earth Essentials. Let's shake on it. Jon Katz

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

Tuesday, February 24, 2009

### **If Zippy the Pinhead got permission to visit Cuba, so should everyone else.**

Bill Griffith's comic strip hero and alter-ego "Zippy the Pinhead" is so saturated with commercialism and television that he turns the "commercial, the televised, and the real" into the surreal, to the point where he worships at the altar of laundromat dryers. "Testing what would happen if Zippy went to a place where American commercialism and pop culture is suppressed -- due to an embargo nearly fifty-years old -- Bill Griffith traveled to Cuba on a cultural exchange in the mid-1990's, and recounted some of his experiences there word-for-word in his comic strip. "Now, through happy surrealism, none other than longtime Republican Senator Richard Lugar -- from the party that most recently dominated the Cold War before it ended -- has taken wind out of the sails of Democrats (whose president, Kennedy, imposed the embargo in the first place), by urging a major revisiting of the embargo. I have had little chance to read anything but the CNN article on the matter, including the following excerpt from Lugar's February 23, 2009, cover letter accompanying a staff trip report to the Senate Foreign Relations Committee, entitled "Changing Cuba Policy-In The United States National Interest" (thanks to a listserv member for posting the article): "After 47 years, however, the unilateral embargo on Cuba has failed to achieve its stated purpose of 'bringing democracy to the Cuban people,' while it may have been used as a foil by the regime to demand further sacrifices from Cuba's impoverished population. The current U.S. policy has many passionate defenders, and their criticism of the Castro regime is justified. We must recognize, nevertheless [this word was handwritten into the letter], the ineffectiveness of our current policy and deal with the Cuban regime in a way that enhances U.S. From a civil liberties and criminal defense perspective, it will be wonderful to see the embargo of Cuba ended, no matter how brutal the Cuban regime has been. Once the embargo ends, no longer will United States citizens visit Cuba as tourists (rather than only through government-authorized educational exchanges) with the risk of prosecution, with the higher expense of flying there from such third countries as Mexico, and against the violation of freedom of association and movement imposed by the embargo. No longer will Americans have to settle for cigars that are second-rate to the Cuban champagnes of cigars. "Once the Cuba embargo is lifted, might we expect Bill Griffith and Zippy to visit North Korea, which probably is the last inhabited place on earth that American pop culture and commercialism has barely infiltrated (save for Antarctica)?"

Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, February 23, 2009

### "I will never forget that face, or will I?"

Â Bill of Rights.Â (From the public domain.)Â People misidentify other peopleÂ all the time. People startled by the trauma of a burglary or otherÂ felony in progress will tend to misidentify all the more. Â As Maryland's highest court recognized last week, depending on the person doing the identification, cross-racial identification can increase the risk of misidentification allÂ theÂ more.Â *Dion G. Tucker v. Maryland*, \_\_ Md. \_\_ (Feb. 20, 2009). In this instance, the Court of Appeals reversed the conviction of Tucker, because the trial court added the following erroneousÂ final sentence to the jury instruction on cross-racial identification: Â "In this case the identifying witness is of a different race than the Defendant. In the experience of many, it is more difficult to identify members of a different race than members of their own race. If this is also your experience, you may consider that fact in evaluating the witnessâ€™s testimony. You must also consider whether there are other factors present in the case which overcome any such difficulty in identification. For example, you may conclude that the witness had sufficient contacts with members of Defendantâ€™s race that he would not have any greater difficulty in making a reliable identification There is no particular reason to think that cross-racial identification applies to eyewitnesses in actual criminal cases." In reversing Tucker's conviction, Maryland's Court of Appeals addressed the incorrect jury instruction on cross-racial identification: Â "It is the last sentenceÂ â€“ suggesting that there are two sides to the issue of cross-race effect when real crimes, asÂ opposed to laboratory situations, are involved â€“ with which we are concerned. When theÂ State offered the sentence, 'There is no particular reason to think that cross-racialÂ identification applies to eyewitnesses in actual criminal cases,' it was only providing oneÂ part, one hypothesis, from the dichotomy of theories that were explained. In so doing, theÂ State mischaracterized what we were suggesting in *Smith* â€“ that there were commentators whoÂ both supported and denied the real-life effect of cross-racial identification â€“ by offering onlyÂ that portion of the sentence that referred to commentators who denied the cross-race effect in real life situations. The proffer was an inaccurate statement of the law, and, as a result, we hold that it was error for the trial judge to have given the instruction requested by the State." Jon KatzÂ

Posted by Jon Katz in Constitutional Law at 00:00

Sunday, February 22, 2009

### **Congrats to the video game community and the First Amendment.**

One thing I did not like about my years before eighteen-years-old was all the added restrictions on my liberty, including things as simple as going to a music club or dance club just because I had not yet reached the drinking age (which was eighteen in my native Connecticut at the time) even if I did not give a damn about drinking there. Praised be federal trial judge Ronald M. Whyte (a Republican appointee, no less, in the form of George H.W. Bush) and the Ninth Circuit three-judge panel (two of three are Bush I and Bush II appointees) for invalidating on First Amendment grounds, a California law limiting minors' access to so-called "violent video games." *VSDA v. Scharzenneger, et al.*, \_\_\_ F.3d \_\_ (9th Cir., Feb. 20, 2009). I am no fan of violence, but remain strongly convinced that my free expression zealotry is on firm ground, and that it is important to err on the side of allowing too much speech rather than too little. Those opposing violent imagery and other violent material have the same First Amendment rights to rail against such material, but not to have government censor it, nor to require ratings of such material (e.g., PG, R and X). Of course, when courts allow a ban on free speech, censors will try to take the ban further. In *VSDA*, at least, the Ninth Circuit refused to extend to non-sexual material the Supreme Court's previous permission in *Ginsberg v. New York*, 390 U.S. 629 (1968), for governments to limit minors' access to sexually explicit material. ADDENDUM: Thanks to the WSJ Law Blog for covering this item.

Posted by Jon Katz in First Amendment at 00:00

Friday, February 20, 2009

### **Cops: Exceed a frisk at your own risk.**

Â Bill of Rights.Â (From the public domain.)Â Praised be Maryland's highest court, which this week reversed a conviction where the police opened a gym bag (and found heroin there), without more than reasonable, articulable suspicion at the time. The Court confirmed: Â "When the container is subjected to a more intrusive search in lieu of a pat-down, the State can sustain its burden of proof that the search was reasonable either by having the officer explain why it was necessary to conduct that search or by demonstrating from the container itself that a pat-down would not have revealed the presence or absence of a weapon. It is not a difficult burden, only a necessary one. It derives from the requirement laid out in Terry itself that the officer â€œbe able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.â€• McDowell v. Maryland, \_\_ Md. \_\_ (Feb. 19, 2009). Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, February 19, 2009

**Prosecutors: No reward for late-produced drug chemist reports.**

Â Bill of Rights.Â (From the public domain.)Â Prosecutors like getting drug analysis reports into evidence at trial without the chemist's presence, so that chemists may test more drugs, more drugs, and even more drugs Â in an effort to nab more people in the unjust drug war. Â Praised be the D.C. Court of Appeals today for having put the prosecution's feet to the fire by requiring the presence of the chemist to testify where the drug analysis report is not delivered to the defense within the statutorily required time to give the defense an opportunity to decide whether to arrange for the chemist's presence to testify at trial. Eric R. Washington v. U.S., \_ A.2d \_ (D.C. App.Â Feb. 19, 2009). Â Â In Washington, on appeal the prosecution conceded that the defense was not delivered the chemist report on time to trigger the defendant's statutory requirement to seek the chemist's presence at trial. The trial court should have reached the same result, but did not. Thanks to the D.C. Court of Appeals for reaching the right result.Â Â Jon Katz

Posted by Jon Katz in Drugs at 00:00

Wednesday, February 18, 2009

### **Batson advanced in the former cradle of the confederacy.**

Â Bill of Rights.Â (From the public domain.)Â Remnants of the confederacy are still heavily highlighted all over Virginia, which closes its courts and other government offices on Lee-Jackson day, hasÂ the miles-long [Robert E.] Lee Highway that stops just a half mile from Washington, D.C., has the confederate flag prominently displayed on many trucks,Â and has a confederate soldier statue standing guard outside the Loudoun County courthouse in northern Virginia, without a Martin Luther King, Jr., statue or anything else nearby the statueÂ toÂ promote a color-blind justice system. Virginians can warn me all they want that I will come across as a carpetbagger to complain about this state of affairs, but the discomfort continues as I recall the slavery,Â severe racism and Jim Crow that drenched the state's soil right into the 1960's. Â Fortunately, offsetting the foregoing state of affairs is this week's Batson-reaffirming decision from Virginia's Court of Appeals. *Hopkins v. Virginia*, \_\_ Va. App. \_\_ (Feb. 17, 2009). In a cocaine distribution case, the prosecution exercised all its four peremptory strikes on African-Americans. The defense justifiably brought a Batson challenge. and the prosecution said that two of the potential jurors were stricken for having had criminal records. The prosecution said that the remaining two of the potential jurors were stricken because they had family members charged with drug-related offenses. Â However, seven potential jurors had family members charged with drug-related offenses.Â Only three of the seven were stricken for this reason, leaving four of that groups still on the jury. The trial judge rejected the Batson challenge. However, the Court of Appeals reversed, correctly concluding that the prosecution "did not explain its inconsistent treatment in light of the common stated reason applicable to African-Americans and non-African Americans... Thus "the reason asserted [was] not a satisfactory race-neutral explanation for the Commonwealth's strikes." *Hopkins*. Â The Court of Appeals did right. Why did the trial court go wrong on Batson, though? Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, February 17, 2009

### How to stay healthy during trial battle?

Regular Underdog readers know of my strong interest in improving physical, mental, and spiritual health to be a more powerful trial lawyer. That is why I practice t'ai chi daily, to improve physical health, reduce stress, and increase calm. Trial work involves battle and war, and no warrior should go to battle from the couch potato position. Vigorous exercise also is good for health, and can release amazing endorphins. However, a fifteen-mile run is not advisable for a person who has been mostly sedentary for the last year; one must ease into such activity, which can rip up one's knees if all the running is on pavement for years on end. Bicycling and swimming are less punishing on the body than running, but lengthy long distance runs have been among my most ultimate thrills, including running eight miles after a snowstorm that included snowplow mounds on which to run, running in the soaking rain, running in high altitudes where the air is thinner, and getting second winds to speed up during the last half-mile of a long run. Hikes that require adding armwork to legwork are also beneficial, including such places as the Billy Goat Trail on the Maryland side of the Potomac's Great Falls. How does a strict vegetarian lifestyle affect health? I have been 100% vegetarian for over two decades, and 99% vegan for over seven years. A recent check showed good pulse and blood pressure, and low LDL cholesterol, which is the type of cholesterol that is good to be low. Against the widespread belief of the importance of having a high HDL (the so-called good cholesterol)-to-LDL cholesterol ratio, my HDL cholesterol also is very low. As a result, I googled the HDL issue, and found this June 2008 article in which the chief physician of the Division of Preventive Medicine and Nutrition, Columbia University College of Physicians and Surgeons writes: "[W]e offer reassurance that low HDL cholesterol in the setting of very low LDL cholesterol does not matter or, at the very least, is less important. Otherwise, why not encourage them to eat fatty foods to raise their HDL cholesterol levels?" In any event, rather than taking this opportunity to get on a soapbox to try to convince more people to reduce or eliminate their consumption of mammal, bird, and fish corpse (and in the process to stop being a graveyard for countless slaughtered innocent animals and fish), I take this opportunity to encourage those interested in pursuing or remaining on the vegetarian path. The meat, milk, and egg industry want people to believe they cannot be healthy without eating such items. Maybe risks will be uncovered for not feeding babies and young children eggs and some milk products (e.g., organic yogurt and cheese rather than drinking milk), but millions of people have lived healthy vegetarian lives over the centuries, and even healthy vegan lives, including the case of India, which for centuries has had millions of strict vegetarians who eat that way for religious reasons. Moreover, I am convinced that the crisis of expensive health care and health insurance would be dramatically reduced if everyone stopped eating meat, birds and fish. Constant trial law work can get very intense, often with very long hours and tight deadlines, and the work can test people's immunity levels, stress levels, and overall health levels when also considering the many hours spent inside with stagnant air, often windowless courtrooms, and a huge percentage of prisons and jails that focus more on herding in people than in providing a healthy environment. To trial lawyers and everyone else who works in stressful situations, I ask what you do to stay healthy and strong through trial battles, and what you experience when you do little exercise, get little sleep, and eat unhealthy diets. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Monday, February 16, 2009

### **Trial after trial after trial not automatically unconstitutional.**

Â Bill of Rights.Â (From the public domain.)Â A colleague once suggested that the risks of being sufficiently paid for one's time for drawn-out federal drug conspiracy defense work are often too high unless the work is done by court appointment under the Criminal Justice Act. A simple-enough-looking drug conspiracy indictment can grow multiple hydra heads. Down the pike can come superseding indictments adding multiple new criminal counts and multiple new criminal defendants, and, therefore, the prospect of a lengthier trial, more voluminous discovery (often dumped on the defense in the thousands of pagesÂ -- with court agreement -- too close to the trial date to sufficiently review all the discovery) and many more hours of motions,Â trial preparation, and keeping track of which co-defendants fold and snitch.Â Unless the lawyerÂ bills and is paid in advance a royal sum, how can the lawyer justify doing the work, knowing that s/he will need to reserve huge calendar blocks of time for trial dates that might be rescheduled for new superseding indictments, time for the prosecution to capture newly-added defendants, time for prosecutors to try to scare the sh\*t out of existing and potential co-defendants to make them become snitches (which prosecutors may try to categorize asÂ time to obtain a first or subsequent superseding indictment), andÂ unexpected calendaring issues (for instance, having one of the co-defense counsel suffer a medical emergency immediately before trial orÂ mid-trial that requires weeks of hospitalization). What if a mistrial is declared after the parties are weeks or months into the trial, and the case is retried? Â Consider the six-month federal terrorism conspiracy trial against Sami Al-Arian and other co-defendants. It appears that at least one or more of the defenseÂ lawyers were on retainer, and not paid through Criminal Justice Act funds. On the one hand, Mr. Al-Arian's victory over the vast majority of counts probably added to the marketability of his lawyers, but that fortune could have been very different had he not won so many critical counts. On the other hand, not only did the lawyers need to be compensated during the pendency of the trial, but they also had no opportunity to serve other clients in court during those six months. After a trial as lengthy as that, unless the lawyer has loyal law partners and associates to back up the lawyer's practice, the defense lawyer can find himself or herself rebuilding a sizeable chunk of his or her retained law practice. Â Federal prosecutors undoubtedly know the difficulty the foregoing factors pose to federal criminal defendants in obtaining qualified privately-paid counsel. Sure, some great federal public defender lawyers and --Â when multiple defendants create conflicts of interest forÂ theÂ public defender -- CJA counsel are ready to defend them. However, I have witnessed firsthand at least one federal CJA lawyer who never belonged there. No matter the extent to which the latter lawyer is an aberration in the federal CJA system, even the best lawyers need to pay their expenses, their staff salaries, and their own salaries, and CJA pay not only is so low as to not attract plenty of excellent lawyers who would do the work if the pay were higher (TalkLeft's Jeralyn Merritt views such court-appointed work as pro bono, with the pay as low as it is),Â but also does not guarantee advance payment nor real-time paymentÂ for case expenses nor sufficient periodic payments for long, drawn-out cases; the time lag for such payment can be long. Â Last month came another case in point of how long and drawn out federal drug conspiracy defenseÂ can get. The case is U.S. v. Handy and Hall, 551 F.3d 257 (4th Cir. 2009). The defendants in HandyÂ Â first were indictedÂ in the District of Columbia. After a nearly five-month trial, the trial judge entered judgment of acquittal on a firearms count against one of the defendants, and ultimately declaredÂ a mistrial on the remaining counts, findingÂ the jury deadlocked. Â The HandyÂ Â prosecution took advantage of the mistrial by filing a superseding indictment in the District of Columbia federal court that included additional criminal counts. The subsequent trial tookÂ five months. The judge granted acquittal on one count; theÂ jury acquitted on some counts andÂ could not reach a verdict on the remaining. The court declared a mistrial again. Â Perhaps in part due to feeling that a Maryland federal jury would be more favorable to the prosecution than a District of Columbia jury, the prosecution then indicted in Maryland federal court and next obtained a superseding indictment with more counts than the original Maryland federal indictment, that then went to trial. The jury in Maryland was unable to reach a verdict, and the Maryland federal court declared a mistrial. Â The prosecution again indicted the defendants in Maryland federal court, apparently with an indictment identical to the one used for the first Maryland federal trial. Defendants Handy and Hall were convicted, and received prison sentences of 360 months and 300 months respectively. Â On Appeal, the Fourth Circuit affirmed the convictions and sentences. The Court found no violation of speedy trial rights, even though the case took six years to complete from the date of the initial indictment in the District of Columbia to the verdict in the last trial in Maryland. The Fourth Circuit also found no double jeopardy violation. The Fourth CircuitÂ mentioned that the defendants never objected to the three mistrials that were declared. U.S. v. Handy, 551 F.3d 257. Â How do we change the state of affairs, to assure quality defense to each criminal defendant caught up in such drawn-out drug conspiracy prosecutions? In the first place, marijuana needs to be legalized, all other drugs need to be heavily decriminalized, mandatory minimum sentencing must be abolished, and capital punishment must be abolished. This will heavily reduce the number and length ofÂ federal prosecutions (and state prosecutions), and will cause less financial and time strain in the first place on quality court-appointed counsel and on government fundsÂ budgeted for paying them. Also, the Supreme Court should close the gap between Supreme Court rulings and the Sixth Amendment's guarantee of effective assistance of counsel. See *Strickland v. Washington*,

466 US 668 (1984).<sup>Â</sup> Furthermore, the government needs to put its money where its mouth is if all these prosecutions are going to be permitted,<sup>Â</sup> by increasing the hourly pay rate and resources for court-appointed counsel. (Federal public defenders apparently already are paid on par with Assistant United States Attorneys.) Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, February 15, 2009

### **Kangaroo tribunals and student discipline.**

In addition to criminal defense, I do student discipline defense. The two legal defense areas go well together, sometimes with student disciplinary matters relating to pending or potential criminal charges, and involving the fight for fair proceedings and fair treatment. My zeal for fighting for criminal defendants and students goes as far back as the age of nine, when a fourth grade teacher -- not even my teacher -- stopped me in the hall, and asked: "Why were you playing last Wednesday at the apartments across the street?" I asked why she was accusing me. "Because someone reported a brown-haired boy in a blue coat doing that." I replied: "You have just described half the boys in the school. Have a nice day." Four years later, I talked a teacher into reversing a detention he ordered over my talking with a friend while he was trying to teach class. Many students and their parents do not call a lawyer over a student discipline matter until the lawyer has less fighting power to offer than if s/he had been hired earlier. Perhaps the student has already spilled the beans to the school's administrators or consented to a search. Perhaps the student has already had a disciplinary hearing (or waived a hearing for a more informal proceeding) and now wants help with an appeal (it is better to fight alongside an attorney from the beginning) or with suing the educational institution (that can be much more expensive than hiring an attorney at the front end). Some people wait so long to call an attorney for such work to try to save money. Others do not think of the option to hire an attorney for reasons beyond economics, or mistakenly feel that hiring an attorney will be used against them. After I graduated from college in 1985, the stakes became higher overall in student disciplinary matters. In 1989, my undergraduate alma mater, Tufts led the draconian student disciplinary kangaroo court system by imposing probation on a student for distributing an offensive, abhorrent, and sophomoric t-shirt with fifteen alleged reasons why beer was better than women at Tufts. Fortunately, Tufts' disciplinary bungle later was reversed. However, not all students are as lucky in this atmosphere of zero tolerance and near-zero tolerance on so many student disciplinary matters, and with the Supreme Court giving a big green light for schools to clamp down on a wide range of disciplinary matters that even involve mere speech. We read about students who get hammered for innocently giving an Advil tablet to a student who needs the pain relief, for lampooning or criticizing teachers on the Internet, and for activities that students have no good reason to believe will be punished in the first place. Students in private schools and private universities do not even have the protection of the Bill of Rights in disciplinary proceedings, because Constitutional rights only may be enforced against the government. The only recourse of private school students who have been wrongfully disciplined is to go to court under a breach of contract theory of recovery. Most of the student disciplinary authorities and student discipline hearing panels I deal with tend to speak with respectful tones of voice, but then move forward with proceedings and disciplinary decisions that do not reflect such social graces. Some student disciplinary offices are called offices of judicial conduct or such similar names, but then insist that student discipline is different from court proceedings and the protections provided therefor, even though their offices are called offices of judicial conduct. One university before which I appeared even had its student hearing panel dressed in black judges' robes, yet my client was only permitted to have me advise him at the hearing, but not for me to say a peep to anyone else. Why add insult to injury by wearing judges' robes if the student's lawyer is not permitted to talk to the judicially-robed folks who are permitted to ask the student questions about the alleged offense? Worse, some private educational institutions do not even permit a lawyer in the hearing room, and one told me that my client did not even automatically have a right periodically to come to the hallway to consult with me. Caveat emptor: Before you choose a college, graduate school, or private high school, read the institution's student discipline code to make sure whether you still want to attend. Also, I recommend googling "site:thefire.org [insert the name of the academic institution that interests you]." TheFire.org is the web address for the indispensable Foundation for Individual Rights in Education, which focuses on stopping the rampant runaway train of unfair student conduct codes and student discipline. The FIRE was started by political conservatives, and rounded itself out with ACLU types, among others. Among the services it provides are these free information guides geared particularly to students unable to hire and pay for a lawyer. Scent of a Woman with Al Pacino came out eight years before I started doing student discipline defense. Scent of a Woman's scene of a student disciplinary hearing does not realistically depict the hearings I have experienced, with my hearings whiting out the names of other students accused of the same wrongdoings, and not being open to the public even if my client wanted to expose the kangaroo court hearings through making them public. Certainly, each academic institutional has its own codes of conduct, and student disciplinary rules, procedures and practices. If you know of any institutions that you believe have fair student conduct rules, procedures and practices, please tell me, so that those institutions might serve as examples for reform to the remaining academic institutions. Jon Katz

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

Friday, February 13, 2009

### Chatting with cops

Today, I was waiting in line at a lunch carryout, and a local cop was behind me. I admit that I remain so obsessed over all the police brutality, other police misconduct, police slickness, and legally-sanctioned police lying (to get confessions and other discovery) going on in the world that I do not tend to do much chatting with cops outside the courthouse (unless it is about a pending case), as much as I know the value of knowing the opponent. Today, I tried to move farther away from the stereotyping aspect of my concerns, but cops still are involved in enforcing many crimes that I think do not belong on the books or are too harshly punished, and they are taught slick skills and lying skills to get confessions. In any event, I warmly greeted the cop, and asked how he was doing, figuring at the very least that we have seen each other in the county's courthouses. He very much welcomed the opportunity to speak; I am not sure if he recognized me as a lawyer, as I was not in a suit because my jury trial had been rescheduled two days ago. The cop immediately asked me: "Let me ask you something. If you are in the Hallmark store looking at greeting cards, and someone steps right in front of you to look at the same set of cards, and blocks your view, is that rude?" I replied: "Yes, that's rude. Is that what you did?" I still cannot help myself sometimes. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Thursday, February 12, 2009

**Don't get caught in cops' slickness.**

For awhile I have praised the Busted video for giving people practical approaches to assert their Fourth, Fifth and Sixth Amendment rights with the police. Now adding to that arsenal of important information is the following YouTube presentation by a former criminal defense lawyer and a cop, where the professor encourages people to assert their Fifth Amendment right to remain silent, and the cop says that the vast majority of people can be coaxed to talk within the bounds of law. This YouTube arsenal is [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#). Thanks to the Nobody's Business blog for uploading these priceless videos. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, February 11, 2009

### **Gerry Spence on video.**

The powerhouse of John Johnson and Gerry Spence (Aug. 1995, Thunderhead Ranch) -- Lately, more videos of trial great Gerry Spence -- who founded the Trial Lawyers College, which I attended in 1995 -- are getting to YouTube. Here are the most notable videos: -- Cross examining, and asking: "You did have a coach? Oh!..." -- Recent radio interview, here, here, here. and here. -- Talking at Thunderhead Ranch, about successfully defending Geoffrey Fieger, here and here. -- On the false terrorism prosecution of Brandon Mayfield. -- Direct-examining about what happened to John Kennedy's brain immediately after his assassination, having allegedly mostly been blown out of his head. -- Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Tuesday, February 10, 2009

**Apprendi and safety valve sentencing.**

Photo from website of U.S. District Court (W.D. MI). Imagine pleading guilty when facing a high risk of a three-strikes non-parolable life term in prison. Why enter such a guilty plea unless such an approach is one's only realistic hope not to die in prison, for instance where the prosecutor offers, in exchange for a guilty plea, to dismiss other pending criminal charges that are even more certain to result in life imprisonment either by themselves or by accumulation of counts? A Scott William Thompson unsuccessfully rolled the dice by entering such a guilty plea. He when he knew beforehand that the prosecution was seeking a three-strikes life sentence on his bank robbery guilty plea, due to his conceded prior two strikes for qualifying "serious violent felonies." 18 U.S.C. § 3559(c). U.S. v. Thompson, \_\_\_ F.3d \_\_\_ (4th Cir., Feb. 9, 2009). Thompson tried to avoid a three-strikes sentence by turning to the statutory safety valve/affirmative defense of trying to show by clear and convincing evidence that in this robbery, "no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense." 18 U.S.C. § 3559(c)(3). However, the trial judge did not buy that argument, after considering the testimony of prosecution witnesses who said Thompson threatened to shoot a gun if his demands were not met, versus defense witnesses who testified to hearing no such threats. Thompson's best but unsuccessful shot on appeal was to argue that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), only a jury has the power to determine whether he had proven by clear and convincing evidence that his bank robbery did not qualify as one of the three strikes to mandate a mandatory life sentence. Following in the footsteps of several other federal circuits, The Fourth Circuit held that *Apprendi* does not apply where, as here, the law assigns the defendant with the burden to prove that an offense does not qualify for a three-strikes calculus, versus circumstances where the prosecutor has the burden to prove the existence of circumstances to enable an enhanced sentence. I doubt Thompson will get far through an en banc petition for the entire Circuit Court to rehear his case, nor with a cert. petition to the Supreme Court, at least if the Fourth Circuit in *U.S. v. Thompson*, is correct that no circuits have ruled differently on this safety-valve/three strikes issue. When I awaited my oral argument a few months ago at the Fourth Circuit, one of the judges asked a litigant if he was trying to create a split in the circuits. The judge's concern probably was that a split in the circuits creates less certainty about the state of the law in circuits that have not yet resolved the particular legal issue, and less certainty in the remaining circuits about how the Supreme Court will handle the issue, because an absence of a split in the circuits is less likely to lead to Supreme Court review. Hopefully judges do not let circuit split issues guide their decisions, but at the very least they are going to consider such issues when questions are close calls. Mandatory minimum sentencing is part of what keeps the American criminal "justice" system overgrown and overly expensive. Parole in the federal system and various states has been abolished, which means that those serving life sentences will only be released from imprisonment if they obtain appellate or other post-conviction court relief or applicable intervention from the president or governor. In the meantime, until mandatory life sentencing is abolished, governments should consider home detention options for older prisoners if not outright release. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, February 9, 2009

### Human cattle call and a roll of toilet paper in John Waters country.

Â Too many people are unjustly caged inÂ American prisons.Â (Image from Bureau of Prisons' website).Â Why does John Waters make so many of his films in Baltimore? Because nobody could createÂ in a studio settingÂ as strange a place so full of urban decay and quirks as Baltimore. I love Baltimore, and not the mall-ified Inner Harbor, but the Bromo Seltzer tower; the ugly blocks after blocks of identical inexpensive rowhouses; the Baltimore accent punctuated by many withÂ "Howyadoin', hon?"; a walk in Hampden; and even some of the gritty aspects of the infamous Block, whose businesses' First Amendment rights I strongly support. Poe was at home here, as was John Waters, and Frank Zappa lived there for a short spell before his family relocated to the decidedly non-Baltimore Lancaster, California, for his asthma. Â Even the jail and prison area of Baltimore is fascinating, until one factors in the countless human beings warehoused inside. In other words, I have a love/discomfort relationship with Baltimore. Then again, no matter what part of the world I enjoy, it is offset by the unjust criminal justice system that pervades the entire world. Some parts of the world have less unjust criminal justice systems than others, but in the end they all are unjust overall for being overgrown with laws that over-arrest, over-convict, and over-imprison; for having no jury trial right and no presumption of innocence in the vast majority of places; for overcriminalizing through drug laws rather than decriminalizing drugs; for failing to be more just by shrinking the size of the criminal justice system (and thus increasing the quality of those hired to work in the system and hopefully increasing the other resources for the system); and the list goes on. Â My most recent professional visit to Baltimore was today, to visit a potential client at Central Booking only about a mile or two from the polished Inner Harbor, which looks more likeÂ New York's South Street Seaport (apparently both were developed by the same company) than like Baltimore,Â and to stop at the Eastside District Courthouse on the way to see the man's court file.Â I first stopped my car a half mile away from the courthouse before arriving there, to stow my briefcase in my trunk, just in case. As I got out of my car to do so, a woman walking nearby down the sidewalk kept pointing her index finger -- palm down -- towards my car, and then towards passing cars. At first, I took this as the woman's being odd, but then noticed she was with another woman doing the same thing, and then that a car stopped soon after. Was this a new hand signal to hitchhike? Was it a signal of willingness to pay for a ride (but the buses were out in force on North Avenue, a major thoroughfare)? Was something illegal being sold in the car? Â I walked into the courthouse, converted in the early Eighties from a former Sears, and was re-reminded how inhuman is the design, architecture and mood of the whole building and most courthouses, most of which have windowless courtrooms, at least where I practice law.Â The people working at the court clerk's window could not have been nicer, and automatically handed me a copy of the charging document before I even requested it. Then I hopped into my car to drive to the Central Booking Facility, which is within four blocks of theÂ Baltimore jail, the Maryland Penitentiary, the supermaximum prison, and theÂ intake prison through which new inmates of the prison system pass to find out which prison they will be sent to. I have spent many hours visiting clients in the last three places. They all are bizarre and boring places in their own ways, surrounded by blocks that can best be described as very gray in mood.Â The Maryland Penitentiary's visiting areas are about as gray and depressing as they get, and it would seem that the housing areas are grayer. At least I get to leave before the day is out. Â During the half-hour wait toÂ bring me to my client and my client to me, a closed circuit television in the waiting roomÂ piped inÂ incessant droning upstairs of a District Court session for reviews of inmates' bonds that were set by the court commissioner within twenty-four hours of arrest, or that were set by a judge even longer ago than the then-current court session. The judge talked very quickly about each defendants' rights to a jury trial or not, and to obtain the services of a public defender lawyer if qualified, or a private lawyer no matter what. Each bond review lasted one to two minutes at most, it seemed, with the judge's initial spiel leading to a pretrial services employee's droning out the defendant's criminal record -- many had numerous arrests, but not all led to convictions -- and sometimes separate pending criminal cases, followed by the prosecutor's usually nonchalant few words about her stand about bond (sometimes just deferring to the judge who did not seem to be reducing the bonds set by the court commissioner, anyway). Fortunately, theÂ public defender's office makesÂ lawyers available at these hearings;Â not all Maryland county public defender offices provide lawyers for the initial bond hearing. As the public defender lawyers next spoke to the judge, their clients were not even standing next to them, but were sitting next to other inmates on a nearby bench, perhaps at the behest of the judge to make things "move along," since having the inmates next to their lawyers involved extra security measures, and thus extra time. Â Â The bond hearings moved along and moved along and moved along and moved along, with the judge's repeated refusal to ameliorate the bonds set by the court commissioners -- who generally are not lawyers and who can be expected often to set high bonds, because their job security is less at risk to set bonds too high than too low -- and revoking some of the commissioners' bonds. No matter how much the public defender lawyers tried to humanize their clients, talking about such factors as the jobs and families they needed to return to, their ties to the community, their educations, and the pettiness of some of the charges (some were charged with just possessing some marijuana or another drug, and others were charged -- and at this point they are charges only, with the defendants presumed innocent -- with violent assault and other felonies beyond just drugs), the courtroom seemed to have an overarching

centrifugal force generally to throw the defendants back to their jail cells with the same bonds with which they walked into the courtroom, or worse. The whole situation seemed not much better nor much different than a cattle call.

Finally, I was saved from the closed circuit video monitor when told it was time for me to go see my potential client. This is the first Maryland detention facility where I ever have been frisked (frisking seems to be common for the contact visits made by lawyers to the District of Columbia jail, too), even though there was a scanner of sorts to walk through. I took heart that everybody got frisked, even the guards that entered. Fortunately, the frisking did not touch my genitals or butt; therefore, I suppose that if anybody wanted to bring some contraband, those might be the ideal places to hide them. Fortunately, the frisker was a likeable person, but I still felt I was going through a frisking cattle call.

Going up the elevator, I saw the jail chief and warden, whose pictures were among the 1984-ish display of framed pictures of the governor, lieutenant governor, state public safety chief, and two others I could not make out, looking down at those in the reception area of the jail. You will see the same thing in federal buildings, except this time with framed pictures of Obama, Biden, and the agency's chief. The chief got out of the elevator too soon for me to inquire why he did not try to get a better pose than the very unsmiling one in the picture frame. Shortly after I got off the elevator, my potential client was brought out. We barely had a chance to say hello before the guard in the large area off the elevator pointed to a corner in that open area for us to speak. The area was totally in the open, without any privacy, with people moving in and out all over the place. I asked for a private area to speak, and the guard showed us to an adjacent medical examination room, complete with a scale and examination table. That worked just fine, until officers opened the door three times without knocking, perhaps not knowing the room was occupied. When I finally asked for a knock before an entrance to our private meeting, the officer said "That will be fine" and then placed an object around one foot by one foot between the door and the doorframe, and kept it open even more than that. I said I wanted to close the door, and the guard said I could close it against the one foot by one foot object. I said I wanted to close the door all the way, and the guard said that was not allowed. Intervening, I was heartened by the one or two nearby inmates who said "They have a right to a private meeting." I said I wanted to speak with someone in charge to make my request for a meeting area without an open door, and the guard again said it is not allowed, and I said I would take it up with someone in charge. Within five minutes, a guard showed us to another room next door, and said I could close the door, which I was able to do after removing the toilet paper roll that kept it open. And the toilet paper roll symbolizes how shitty and unjust the criminal justice system still remains, and how far it still needs to go to wipe away the stench.

Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, February 8, 2009

### **Trials and the art of bloodless war.**

Â Â Is criminal defense work about proverbial war and sometimes bloodletting? Hell, yes, whether one wants it that way or not. As I have said before, t'ai chi principles are important to criminal defense, for focusing on harmonizing an imbalanced situation without applying more than a few ounces of force and without seeking to inflict heavy proverbial casualties as a goal, but not shying away from inflicting such casualties if necessary and within the bounds of law and legal ethics. Â Lessons from the following heavily inform my trial battle approach: t'ai chi; Taoism (which heavily influences t'ai chi); Sun Tzu's Art of War (t'ai chi masterpiece Cheng Tzu's Thirteen Treatises is intentionally entitled similarly to the alternative title of Sun Tzu's Art of War, which is Sun Tzu's Thirteen Treatises); the Trial Lawyers College (the TLC's primary founder Gerry Spence references Sun Tzu); and Buddhist teachings on no coming-no going/no birth-no death/no increase-no decrease (t'ai chi master Benjamin Pang Jeng Lo speaks of "not chasing [the opponent's] attributes, or competing, or catching up, or exceeding him"). Â Fortunately, the warfare of criminal defense does not require baring fangs, beating chests, or raising voices. However, a criminal defense lawyer is severely weakened when s/he expects fairness from the law, opponents, lawyers of co-defendants who might be (come) snitches, judges, opposing witnesses, and jurors. Fairness from any of these corners is to be enjoyed, but to always expect it is to guarantee severe disappointment. The sooner a lawyer knows of rampant unfairness in the criminal justice system, the sooner the lawyer's skin will be thick enough -- still surrounding a caring heart, hopefully -- to barely bat an eyelash when unfair and underhanded goings-on happen inside and outside the courtroom, so as to leave the matters for later or ongoing commiseration with colleagues and for efforts at reform and improvement. Â Even semi-pacifists like myself can learn vital trial battle lessons from the likes of Sun Tzu's Art of War (translated in full here), which is over two millennia old, but less than three centuries in grabbing the attention of Western military and non-military thinkers and actors. Â Although Sun Tzu is discussed all over the place about business and many other areas beyond the military, I have found no book-length discussion of Sun Tzu as his teachings apply to criminal defense practice, but have found some of the below-addressed shorter discussions related to criminal defense practice. Today's blog entry brings together some of my observations about Sun Tzu and criminal defense, and links to others' related discussions. Â In the second of the Art of War's thirteen chapters, Sun Tzu says: "When doing battle, seek a quick victory. A protracted battle will blunt weapons and dampen ardor." Here are some of the ways this passage relates to criminal defense: Â - A slew of felony defendants are detained pretrial either because they cannot afford bond, the judge has set a bond too high, or the judge has refused to find that the defense has rebutted the presumption of no bond in so many felony matters. Â The no-bond status erodes the defendant's morale and funds, particularly if the defendant will lose his or her job due to the pretrial detention, and if the defendant is responsible for financially supporting those other than the defendant. Â - A criminal defendant detained pretrial can expect to be billed higher fees from potential private criminal defense lawyers than if they are not detained and are free to travel to the lawyers office, rather than requiring a lawyer's time-consuming task of driving to the jail around established visiting hours, clearing security, sometimes waiting for a free visiting booth, and waiting to meet with the client. Some federal pretrial defendants are put in jails far from the courthouse and the lawyer's office. On the one hand, many such defendants will qualify for indigent counsel, and many of the nation's top criminal defense lawyers are public defenders and those who include court-appointed work. However, when a pretrial defendant knows that s/he is unable to pay for a lawyer of the defendant's choice because of being locked up, that can be demoralizing for depriving the defendant of choice. Â - A common denominator among many criminal defendants is wanting "to get it over with." Just witness the reaction of many criminal defendants when the prosecutor gets a trial continuance over the defense lawyer's strenuous objection, particularly when the trial judge refuses to reduce bond as an imperfect quid pro quo for the continuance. The suspense of waiting for the case outcome can be excruciating for many criminal defendants. Here is an example of where the client's trust in the lawyer can get tested, and where the client will withstand folding the more that s/he continues maintaining trust in the lawyer. Â - Taking a pre-emptive approach against prolonged battles on too many geographical fronts, adult entertainment business veteran Phil Harvey in 1990 fought for and obtained a preliminary injunction preventing the federal government from prosecuting him and his company in more than one federal judicial district. *PHE v. U.S. Dept. of Justice*, 743 F.Supp. 15 (D.D.C. 1990). Â The Art of War also talks in depth about having sufficient human, intellectual and material resources to prosecute effective warfare. However, too many state-level public defender offices are under-resourced and underfinanced, and many state-level public defender lawyers have caseloads too large to fulfill the Constitutional guarantee under the Sixth Amendment of effective assistance of counsel. Gerry Spence has written about this conundrum, and about the ideal situation his clients are in by his having full resources to execute an effective trial war. Â A student of Sun Tzu says: "Sun Tzu's ideal military leader is calm in the midst of chaos, being able to even appear chaotic to deceive his enemy. The ultimate skill is separating oneself from the stresses of everyday life. Thus, a strong leader's response does not correlate and follow with the stimulus, which in effect, is quite impressive to his or her people and to the competition. With this ability, one can think clearly without influences corrupting the process in bringing about the best solution. He or

she has inner peace in a world of perpetual turbulence. How many times do you find yourself so wrapped up in present worries, you can't seem to think clearly, and that the decision was made based primarily from the tension?" Sun Tzu values winning without needing to fight, and not expending more force than necessary to reach one's goals: "To subjugate the enemy's army without doing battle is the highest of excellence. Therefore, the best warfare strategy is to attack the enemy's plans, next is to attack alliances, next is to attack the army, and the worst is to attack a walled city. Laying siege to a city is only done when other options are not available." LINKS TO DISCUSSIONS ON SUN TZU AND LITIGATION. - My brother criminal defense lawyer Mark Bennett talks of the importance of learning to be in the moment in order to benefit from Sun Tzu. - Canadian lawyer Antonin Pribetic wrote a recent law review article entitled "The 'Trial Warrior': Applying Sun Tzu's The Art of War to Trial Advocacy," 45.4 Alberta L. Rev. 1017 (2008). - This article discusses the Art of War for litigators. This link only covers the first three pages of the article, which is lengthier than that. - This article discusses applying Sun Tzu to litigation negotiation. - A mediation center relates Sun Tzu to litigation mediation. - Two Houston lawyers address the relationship of Sun Tzu to litigation-related public relations. PROSECUTORS, COPS, AND MAO GET IN ON THE ACT. - The Western Justice prosecution blog has several times referenced Sun Tzu's lessons to criminal trial practice. - A trainer of police and prosecutors draws from Sun Tzu to encourage police to being open to speaking with criminal defense counsel, without requiring the prosecutor's presence. This article should be brought everywhere that criminal defense lawyers go. - A police firearms instructor draws relevant lessons from Sun Tzu. - Military people purportedly influenced by Sun Tzu include Napoleon, the architect of Japan's Pearl Harbor attack, Mao Zedong, a leading North Vietnamese general in strategizing against the U.S. military, and the U.S. Marines in Warfighting (1989), which was penned by a member of the Air Force. I welcome hearing of your own experiences applying Sun Tzu to your practice of law or any other area of life. Jon Katz

Posted by Jon Katz in Persuasion at 00:00

Friday, February 6, 2009

**If everyone substituted marijuana for alcohol, society would be a better place.**

Image from public domain. Imagine if everyone drinking alcohol tonight switched to puffing marijuana, nibbling a hash brownie, or downing a marijuana smoothie. As a result, fewer people would beat the sh\*t out of others, fewer would act like raving lunatics, fewer would be heaving chunks, and some people would be receiving medicine superior to many of the pills and injectables peddled by Pharmaceutical, Inc. (Do not drive under the influence of anything, and marijuana can be a wonderful sleep aid at home to not even need to consider getting behind the wheel.) Alcohol can be nice in moderation, but too many people overindulge and overdamage with alcohol as a result. Moreover, alcoholism is rampant and tough to beat, but not marijuana-ism. if it even existed. Therefore, all the power to Michael Phelps for having been photographed smoking from a bong rather than from a liquor or beer glass or bottle, aside from the activity apparently having been in a state where it is illegal to do so. On the White House front, thanks to Barack Obama for having previously stated his disinclination -- NORML calls it a pledge -- to waste federal resources to interfere with medical marijuana activities in states that permit doctors to prescribe marijuana as medicine. With the February 2, 2009, Drug Enforcement Administration raids on Los Angeles medical marijuana dispensaries (Drew Carey introduces us to this wonderful Los Angeles dispensary), Obama has the opportunity to make good on that stance by ordering the immediate return of property seized from the dispensaries, cancelling any criminal investigations or actions involving the dispensaries, banning any further such raids, and immediately replacing George W. Bush's appointees responsible for the raids with appointees who will stay out of the hair of states that permit medical marijuana. To take action to stop federal medical marijuana raids, take a look at the Drug Policy Action Network's suggestions on doing so. You can email President Obama here. Obama should be reminded of his previous statements on this issue: "I would not have the Justice Department prosecuting and raiding medical marijuana users ...It's not a good use of our resources." (Comments from 2007.) NORML's website quotes Obama as saying: "When it comes to medical marijuana, I have more of a practical view than anything else... My attitude is that if it's an issue of doctors prescribing medical marijuana as a treatment for glaucoma or as a cancer treatment, I think that should be appropriate because there really is no difference between that and a doctor prescribing morphine or anything else. I think there are legitimate concerns in not wanting to allow people to grow their own or start setting up mom and pop shops because at that point it becomes fairly difficult to regulate." (March 2008.) Before going to sleep tonight, please let President Obama hear your voice to stop federal interference with state-permitted medical marijuana activity, and feel free to tell him to support marijuana legalization while he is at it. Jon Katz

Posted by Jon Katz in Drugs at 06:00

**Respond to despicable speech with more speech.**

Bill of Rights. (From the public domain.) Recently, a fellow lawyer asked me my motivation for representing libel defendants "who destroy another person's reputation and peace of mind with malice." I turned my answer into the following blog entry: - I strongly believe that libel suits violate and are incompatible with the First Amendment. Protecting the First Amendment always comes at a price, including the real harm caused to those who are victims of intentional lies about them. The public loses out when the First Amendment has no more teeth than toilet paper. - Too many newspapers are lands of bland, knowing that even if a libel suit is groundless, the financial exposure is too great a business risk and the cost of libel insurance is too high to cover against exposure to paying out of pocket for a substantial part of a huge libel verdict. The reading public suffers for this. - Too many activists get silenced and muted by groundless and oppressive SLAPP/libel suits, where the suing corporations know that the suit helps neutralize the defendants both through litigation costs and keeping the defendants in court and depositions when they might otherwise be picketing an allegedly rogue corporation. The public loses out when activists who would otherwise serve social justice stay silent for fear of libel suits. - The beef industry sued Oprah Winfrey for libel for dismissing the safety of eating beef before her television audience, and dragged her through a court battle that she survived and won because she had the money to do so, but which easily could have cowed less well-heeled defendants to settle the case for a huge sum together with an agreement for the defendant to remain silent on the topic of the defendant's protest forevermore. Oprah's message needed to get out to the widespread audience that she commands. - Some states have criminal libel laws, which enable a person's liberty to be restrained starting pretrial on nothing but probable cause found by the judge. This is another example of the severe injustices caused by libel suits. - The logic of your asking my motivation to defend even the most heartless libel defendants sounds no less flawed than that of a person who rails against a lawyer for defending a person prosecuted for murder, whether or not the lawyer believes or knows the person to be guilty. Moreover, just as the lawyer who defends a clearly guilty murder defendant can help keep the criminal justice system more just and honest, and can honorably fight the unjust capital punishment system, a libel defense lawyer can help

thaw the chill that libel laws present to too many people in exercising their First Amendment rights, and can help rein in the passions of a misguided and vindictive jury that is otherwise inclined to hammer a defendant with an excessive verdict for reasons beyond the jury instructions. - Sometimes reputation and peace of mind are even destroyed by opinions that contain no mis-statement of facts. Opinions clearly should not be actionable in a libel lawsuit. Consequently, I will be honored to defend any libel defendant who pays my fee. Jon Katz

Posted by Jon Katz in First Amendment at 01:00

### **William Thomas's funeral is February 7**

The peace symbol went far beyond hippies. Gerald Holtom designed the symbol in 1958, and the Campaign for Nuclear Disarmament adopted the symbol for its logo. On January 25, I blogged about the passing of William Thomas. News reached me yesterday of his following funeral time and location: February 7, 2009, 4:00pm-5:30pm, New York Avenue Presbyterian Church, 1313 New York Avenue NW, Washington, DC, 20005. Jon Katz

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

Thursday, February 5, 2009

### The jury is the thing. Petty offenses are the barrier.

Â Bill of Rights.Â (From the public domain.)Â Yesterday I blogged on a recent marijuana bench trial victory in federal magistrates court. Â In my view, however, it is unconstitutional -- absent the clear and informed consent of the criminal defendant on the record in court -- toÂ expose a person to incarceration without a judge nominated by a governor or the president and confirmed by the respective legislature -- or else elected pursuant to state Constitutional provisions --Â and without the right to a trial by jury.Â Â Federal judges rely heavily on magistrate judges to handle trials for misdemeanors notailable for more than six months, for extradition hearings, and for a slew of civil matters and other criminal matters. Among the jurisdictions where I practice law, the most heavy use of magistrate judges at the non-federal level in criminal court is in the District of Columbia, where magistrate judges have wide authority toÂ set bail and release conditions, and the authority to revoke bail forÂailable traffic matters that are notailableÂ over six months. Â Magistrate judges in the federal court andÂ the D.C. Superior CourtÂ areÂ hired by presidentially appointedÂ judges. Federal statutory law gives criminal defendants facing no more than six months incarceration per count (also known as "petty offenses", which are defined by name at 18 U.S.C. Â§ 19 and by maximum sentencing length at 18 U.S.C. Â§ 3559(a)(7)) neither a right to a trial by jury (long confirmed by the Supreme Court as to the jury trial right, as further discussed below) nor by a presidentially-nominated judge, as opposed to by a magistrate judge. 18 U.S.C. Â§ 3401(a)-(b); Fed. R. Crim. Proc. 58(b).Â Â I have been unable to find any federal appellate decisions about the Constitutionality of forcing a criminal defendant to be tried by a magistrate judge for petty offenses. The most relevant recent judicial decision that I found permitting the practice as Constitutional (and I found no judicial decisions finding the opposite) is U.S. v. Rivera-Negron, 21 F.R.D. 285 (D.P.R. 2001), which says in pertinent part:"In 1996 Congress enacted amendments to 18 U.S.C. Â§ 3401 which allowed magistrateÂ judges to try persons accused of an infraction, Class C misdemeanor or Class B misdemeanor involving a motor vehicle offense, without the defendant's consent. 18 U.S.C. Â§ 3701 (1997). Thereafter, a constitutional challenge was brought contending Â§ 3401 as unconstitutional as it eliminated the requirement that a defendant consent to be tried before a magistrate judge. See United States v. McCrickard, 957 F. Supp. 1149 (E.D. Calif. 1996). Following an extensive analysis, the Court concluded that amendments to 18 U.S.C. Â§ 3401 were constitutional given the historical evidence that the Framers distinguished between the constitutional rights of defendants charged with felonies and petty offenses.Â Id. at 1155. Moreover, the Court looked to the Congress' capacity to confer jurisdiction on a magistrate judge to try petty offenses.Â Id. at 1155-56. Finally, the Court took into consideration that Congress was aware of the constitutional issues posed by the 1996 amendment and resolved same by reference to Supreme Court precedent and historical practices. Id. at 1156. The 2000 amendments to 18 U.S.C. Â§ 3401 are similar to the 1996 amendments. As with the 1996 amendments, the 2000 amendments also eliminate the need for consent, but expands the scope toÂ all petty offenses. The analysis employed in McCrickard is applicable to the 2000 amendments. There is no support for Rivera's blanket assertion that recently amended 18 U.S.C. Â§ 3401 is unconstitutional." Â As to the right to trial by jury in criminal cases, although the Sixth Amendment unmistakably assures that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," the United States Supreme Court has long maintained that somehow the Sixth Amendment does not mean what it says, in that the Constitution generally does not guarantee the right to a jury trial for a petty offense, even when (as ruled by aÂ 5-4 Supreme Court vote) the defendant faces the prospect of multiple consecutive sentences for multiple criminal charges each of which separately carries no more than a maximum of six months of incarceration Lewis v. U.S. , 518 U.S. 322, 326 (1996). Â As a result of the Supreme Court's above-discussedÂ sleight of hand with the Sixth Amendment jury trial right for petty offenses, in the 1990's the District of Columbia cynically reduced the maximum possible penalty on a legion of first-time misdemeanor offenses to no more than six months, in order to deprive a slew of defendants the jury trial right, when it became clear that prosecutors had a much easier job obtaining convictions without juries. Fortunately, crabbed Supreme Court rulings do not prevent states from affording greater individual liberties than those assured by the Supreme Court. For instance, neighboring Maryland guarantees a jury trial for all offenses carrying over ninety days in jail; the vast majority ofailable Maryland offenses (other than such charges as trespassing, disorderly conduct, and less seriousailable motor vehicle violations) are, in fact,ailable over ninety days, and are therefore jury triable.Â Moreover, both Maryland and Virginia law guarantee a de novo appeal and jury trial right in Circuit Court from District Court so long as the matter isailable for at least one day. Â Clearly, a criminal defendant, and only a criminal defendant exposed to incarceration must have the right to choose between a trial by jury or a bench trial. Yes, sometimes the chances of acquittal are better with a judge than a jury, but sometimes the situation is the opposite. Some judges, for instance, seem to have as much trouble saying "not guilty" as Johnny Depp's Willy Wonka had saying "parents".Â Â New York provides a particularlyÂ nauseating example of the tyranny that results from not guaranteeing a jury trial right to all criminal defendants exposed to incarceration. Many jurisdictions in New York state haveÂ municipal justice courts. The judges often are part-time, underpaid, under-resourced, not lawyers, incompetent, and barely understanding of (nor given the funds to be sufficiently trained in)

even the most basic requirements of judging, including assuring that indigent criminal defendants obtain court-appointed counsel, and avoiding communicating ex parte with any party. Some admit they rule from their gut -- with the written law be damned -- and that they got elected to the position because nobody else wanted the job.Â The New York Times's 2006 three-part expose of this shocking abortion of justice is [here](#), [here](#), and [here](#). Â The jury's the thing that can catch theÂ conscience of justice.Â Jon KatzÂ ADDENDUM: Today's blog title is taken from Hamlet's declaration that: "The play is the thing wherein I'll catch the conscience of the king."

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, February 4, 2009

### Defending in federal magistrates' court

Â Bill of Rights.Â (From the public domain.)Â Recently, I won a marijuana possession case in federal magistrate's court. I won the case not through pulling any rabbits out of the hat, but by using procedural rules and procedural strategy to my advantage.Â Â My client was issued a citation for possessing a small amount of marijuana in a national park. The cop issued him a citation that looks similar to a speeding ticket, and left. The citation provided the alternative to pay the ticket rather than needing to defend in court. The upside of paying the ticket was eliminating the risk of incarcerationÂ and the need to pay a lawyer. The downside is that the payment of the fine can be considered a convictionÂ for allegations of violating existing probation for an earlier case, and when the defendantÂ applies for a security clearance, applies for a job, has a bond set for any future arrests, and gets sentenced for any future conviction. Â Here are some arguments I made to try to win the case. I welcome your thoughts, particularly the thoughts of colleagues who have defended cases in federal magistrate's court: Â My client was charged under the Interior Department's regulation against possessing controlled substances on national park property; the maximum possible incarceration time for such a charge is six months. For my motion to suppress, I argued, unsuccessfully, that the park rangers had no authority to seize, search, nor arrest my client. I wrote: Â "The discovery indicates that exclusively park rangers were involved in the investigation, interrogation, search and arrest of Defendant. However, for the following grounds, the rangers were without lawful authority and jurisdiction to do so: Â Â "16 USCS Â§ 1a-6(b) provides, inter alia: 'In addition to any other authority conferred by law, the Secretary of the Interior is authorized to designate, pursuant to standards prescribed in regulations by the Secretary, certain officers or employees of the Department of the Interior who shall maintain law and order and protect persons and property within areas of the National Park System.' 16 USCS Â§ 1a-6(b) (emphasis added). Â "However, a careful search of the Code of Federal Regulations and the United States Code finds no authority conferred by the Secretary of the Interior nor statute to park rangers to 'maintain law and order' in the National Park System. First, a Lexis searchÂ for the term 'ranger' within the statutory language in the United States Code only finds [the following omitted] results that do not convey authority on rangers to 'maintain law and order.'Â "Second, a Lexis searchÂ for the terms 'ranger' and 'Interior' within the Interior Department'sÂ regulations at Title 36 of the Code of Federal Regulations only reveals the following [omitted] Interior-related regulations (omitting those results for the Agriculture Department), and none of the resulting regulations convey authority on rangers to 'maintain law and order.'"Â For my motion to dismiss the prosecution, I unsuccessfully argued that the Interior Department's criminal rule against controlled substances was unconstitutional: Â "The Interior Department's regulation under which Defendant is being prosecuted represents an instance where Congress 'delegated excessive legislative power' and 'upset the constitutionally mandated balance of powers among the coordinate Branches.' *Mistretta v. United States*, 488 U.S. 361, 413 (1989). Â "The statute that delegates the Interior Secretary the authority to establish the regulation applicable to Defendant's criminal prosecution is overly vague and overbroad: Â Â "The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this Act shall be punished by a fine of not more than \$ 500 or imprisonment for not exceeding six months, or both, and be adjudged to pay all costs of the proceedings.Â Â "16 U.S.C. Â§ 3 (emphasis added). Consequently, with the foregoing statute, Congress 'delegated excessive legislative power' and 'upset the constitutionally mandated balance of powers among the coordinate Branches.' *Mistretta v. United States*, 488 U.S. 361, 413 (1989). Consequently, the ongoing prosecution of Defendant is unconstitutional."Â Â At the conclusion of motions arguments, the prosecutor moved to reschedule the trial to another day, in order to bring the drug chemist to court from 150 minutes away. I argued the prejudice of rescheduling, seeing how my client already was missing work to be at trial, and seeing that my client's costs increase each timeÂ he and I take the hours-long trip to this court. The judge denied the prosecutor's motion, and I wonder how much that this had to do with the long distance needed for me and my client to drive back to court. Â Curiously, the prosecutor decided to proceed to trial even without the chemist. However, the chemist's absence did not automatically guarantee a victory. For instance, if the judge believed that the defendant admitted that the suspected marijuana was actual marijuana, such an admission only needed slight corroboration for the judge to have been able to use the admission against him. The possible corroboration came in the form of the cop's testifying, over my objection, that some seized items smelled either like marijuana (which can reek when burnt ) and unburnt marijuana (which is very difficult to identify in small amounts). Â Fortunately, the prosecutor was unable to present any damaging corroborated admission from my client, and we won, which is the outcome I wish for all marijuana defendants. I still look forward to the day when marijuana is fully legalized. Jon KatzÂ

Posted by Jon Katz in Drugs at 00:00

Tuesday, February 3, 2009

### **When a court's affirmative orders meet with lawyer silence.**

Photo from website of U.S. District Court (W.D. Mi.). Today, Virginia's intermediate appellate court found a lawyer in contempt and disbarred her from practicing before the Virginia Court of Appeals (thanks to Ken Lammers for pointing out that the disbarment only applies to that court, and not to all Virginia courts) for her insufficiently explained silence in response to the Court of Appeals' orders to file an amended petition for appeal after denying her petition to withdraw as court-appointed appellate criminal counsel (she also was silent when the order was repeated), not responding to a subsequent order to show cause why the foregoing behavior should not lead to a contempt order, and then not appearing in court on the date designated for hearing the contempt show cause matter. In re Lynch, Rec. No. 0051-09-1 (Va. App., Feb. 3, 2009). The Virginia Court of Appeals re-set the contempt show-cause hearing for January 13, 2009. At that hearing, the lawyer insufficiently explained her actions, by saying her caseload was too heavy, and she failed to pay proper attention to the court's orders. The Court's contempt and disbarment Order permits the lawyer to petition for reinstatement after showing completion of "sufficient" continuing legal education in the areas of time management, appellate practice, and professionalism. Lynch I remember taking a criminal court appointment for a drug felony appeal several years ago, not in Virginia, where the court-appointed appellate lawyer had already been dismissed from the case for twice missing court deadlines to file a simple, short docketing statement. I was very frustrated when I tried unsuccessfully to get the case file from him. The court's order directed him to get me the file, but he dragged his feet for many days, and the briefing deadline was short. He finally hand-delivered the file to me. Attorney Lynch committed more lengthy and more serious delays with the Virginia Court of Appeals than the foregoing predecessor lawyer in my appellate case, which probably caused more frustration to the appellate judges than I felt with the lawyer who delayed in getting me his file. Whether or not Ms. Lynch's disbarment was appropriate, versus a lesser sanction of a short suspension at worst, it would have been folly for Ms. Lynch to have expected to get away with nothing more than a slap on the wrist after she finally appeared before the Court of Appeals for her contempt show cause hearing. .Jon Katz

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

Monday, February 2, 2009

### Why is PETA's sexy vegetable ad worse for children than McDonald's cruelty on a bun ads?

Following up on my January 30 blog entry on PETA's racy vegetable ad rejected for Super Bowl airtime (see NBC's very explicit rejection e-mail at PETA's site), Jonathan Turley -- whose blog is among the handful I read almost daily -- blogged yesterday his view that too many children watch the Super Bowl to justify running the ad during that event. I responded as follows, and Jonathan posted his thoughtful reply here. Here is my reply: Hi, Jonathan- Thanks for bringing this story to a wider audience than my several hundred daily blog visitors. My blog entry last Friday on this issue is here: <http://katzjustice.com/underdog/permalink/JusticeForAnimals.html> . All kidding aside, why is it that a huge percentage of Americans over the decades have put less emphasis on shielding their children's eyes from violence than from sexuality? Clearly, as a free expression fanatic, I favor expansive interpretation of the First Amendment when the government tries limiting advertising content. Here, PETA has no First Amendment rights in the matter, seeing that NBC, which rejected the ad, is a non-governmental entity. Commercials for McDonalds and other meat purveyors seem more questionable for children than the PETA commercial. McDonald's gets away with having clown Ronald McDonald and Mayor McCheez sell its hamburgers, which is a whitewash of the cruelty of raising meat animals in captivity -- often in overly close, uncomfortable quarters -- during a short lifespan, and then inflicting suffering on them not only upon slaughter, but during the terror of hearing and seeing their brother and sister animals slaughtered as they soon are to be next. Human executions are excruciatingly painful, despite litigation geared to reduce the pain. No similar efforts are made to minimize the physical and psychological suffering of animals, as they are led to slaughter first seeing and hearing their brother and sister animals slaughtered before their very eyes. Unlike humans executed in American death chambers, food animals are methodically beheaded, stabbed, and killed through many other methods. See PETA's gruesome video giving a brief meeting of your meat at <http://tinyurl.com/GrossMeatGross>. In any event, PETA has posted NBC's emailed explanation (here [http://blog.peta.org/archives/veggie\\_love.pdf](http://blog.peta.org/archives/veggie_love.pdf) ) of the items that would need to be sanitized in the ad, to have a chance of being shown on Super Bowl Sunda. PETA references the email from NBC here [http://blog.peta.org/archives/2009/01/veggie\\_love.php](http://blog.peta.org/archives/2009/01/veggie_love.php) as authentic. /s/ Jon Katz

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

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