Tuesday, January 1. 2013

New year's resolutions, sinking the boat with accumulated feathers, and standing on the shoulders of giants.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â Happy new year to all Underdog blog readers. Â Few of us have gotten through the last few days without coming up with new year's resolutions or piecing together an answer when asked for our resolution. No matter when during any given year we make the decision, resolving to improve ourselves and the world around us, locally and globally, and taking concrete and effective action on such resolutions, helps lift the world from the dark shadows, abhorrent human activities, and often deeply harmful negligence that we read about and witness too often and expand the substantial light and positive energy that are already present. Â My own years long ongoing resolutions continue to be making myself a better person in part through the daily practice of taijiquan and the supplemental less frequent practice of sitting meditation, and the attendant benefits of being in the now and non-attachment/non-duality; and by making the world a better place by feeling and showing compassion for myself and everyone else and all sentient beings, and by fighting for civil liberties and social justice, particularly in my daily work as a criminal defense lawyer where there is no such thing as getting a defendant out of a prosecution pickle on a technicality, but by pursuing my clients' Sixth Amendment Constitutional right to effective and zealous assistance of counsel. Â Caring about the world around us sometimes can seem a daunting and overwhelming task. It seems less so when we recognize that it takes a lifetime to make the greatest difference. Amnesty International's decades-long admonition to light a candle rather than curse the darkness did not at first register well enough with me, because the darkness, depth and breadth of worldwide human rights violations seemed too massive to produce and light enough candles, let alone to find and get access to the places and people -- from those doing good to those harming others and everyone in between -- that needed those candles. Â Then, I flipped through my 1990 Amnesty International calendar, and found a quote that "Accumulated feathers sink the boat," and that hit home. It took me twenty-seven years, until that day, to shed more of my ego's expectation that I could move mountains by myself in a short time.Â In The Essential Huainanzi: LiuAn, King of Huainan by An Liu and John S. Major, the above accumulated feathers concept is described as follows: "A pile of feathers can sink a boat. Lots of light things can break an axle."Â Yes, it is good to dream big, but many people and many years, at the very minimum, are often needed to make substantial differences. Then again, Ralph Nader urged the students at my law school not to get blindsided by people and events that are obstacles to achieving good or simply disinterested about doing so, but to remember that one of the most influential pieces of legislation (I forget which piece) was initially drafted by two cohorts at a kitchen table. Â Fortunately, many giants have preceded us in pursuing the path of good -- however one defines good -- including Gandhi, Martin Luther King, Jr. and thousands of others, including such inspiring advocates for justice as SunWolf, Steve Rench, and Mary Jane DeFrank. Gandhi, Martin Luther King, Jr., and many others paid with their lives for fighting for a better world. We are usually not creating new paths to improving ourselves and the world; at minimum we can expand those paths in the right direction and at best we can elevate those paths by quantum leaps and get much closer to their destinations, and we should have fun along the path. Â Recently, a state legislator I know almost dismissively (I say "almost" because he seems still to be very open minded in listening to others' opinions, no matter how much I disagree with some of his legislative stances) on a listserv referenced my opposition to one of his legislative efforts thusly: "I expected the civil libertarians to chime in." When we pour our blood, sweat and tears into endeavors that will help the world but may not earn us money, fame, nor power other than the power resulting from our achievements (and the power of our fight that can scare our opponents), there will be naysayers and well-meaning people who advise us to look after number one first (as if number one is somehow disconnected from everyone and everything around him or her) and of course naysayers who oppose our stance or path. When we are not interested in winning popularity contests nor in accumulating excessive wealth, we are less likely to be sidetracked by the naysayers. Â We are all in this life together. We are all connected. We are not divided by Republican v. Democrat v. Libertarian v. Anarchist v. Zappa-for-Dictator, nor by smoker v. non-smoker, gun-toter v. anti-gun activist, nor by criminal defense lawyer v. prosecutor and cop, and the list goes on. I constantly need to remind myself of that. As Ram Dass underlines the ultimate end of the path of non-attachment, in The Only Dance There Is:Â When you get finally finished with the attachment, the desires that keep making you be born again and again cease, and you become one with "the One." And that is the merging back into the One... [Y]ou only see the One if you're two. Once you are in the One it's non-dualism. Â Part of non-dualism/non-attachment is living and being in the now, including not staking our sense of well-being on the results of our labors, even though our wisely-planned labors are very important. A reminder of that is Derek Turesky's recent quote on Twitter: "What if we could let go of wanting things to be different and find the beauty in the way things are in this precious moment?" Yes, do not merely settle for things as they are, but we achieve more with even more energy and power by always being in the now.Â My goal is to be mindful in everything I do. When one live mindfully, the magic bursts forth.

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

Monday, December 31. 2012

How David Gregory can minimize criminal exposure over displaying a bullet magazine from a D.C. TV studio.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com.Â Â On December 23, Meet the Press host David Gregory held up a gun magazine in asking the NRA's Wayne LaPierre about passing laws limiting magazine bullet capacity size. Were I Gregory's lawyer, I would have advised against displaying the magazine without confirmation that the law allowed its display or that police and prosecutors would refrain from going after him for the display. It appears that possession of gun magazines is completely forbidden by statute in Washington, D.C. -- where he displayed the magazine during the Meet the Press segment -- and that the D.C. police told NBC's inquirer(s) in advance of the program that he would not be allowed to make such a display.Â Â As I commented on Jonathan Turley's blog entry on the matter: The police will be wasting their time to seek a prosecution so long as those at NBC and LaPierre refuse to talk with the police and so long as the magazine is not recovered. Of course, nobody at NBC may advise anyone not to talk, lest the adviser get charged with obstruction of justice. Unless the police recover the magazine displayed by Gregory, who is to know whether this was but a replica magazine that cannot even hold bullets, thus falling outside the DC criminal law's magazine definition? Â The courts are not likely to provide a First Amendment journalists' exception for possessing banned weapons and weapons implements, just as the Fourth Circuit in 2000 refused to give journalist Larry Matthews any journalists' pass for child pornography distribution and possession as part of his reporting investigation into such activity.Â By now, nearly 10,000 votes are on a petition on the White House website to prosecute Gregory. I do not support calls for prosecuting people who may have violated the law but caused no harm in the process, as in Gregory's case. Moreover, during my twenty-one years as a criminal defense lawyer I have never advocated prosecuting anyone. Â I do not expect that Gregory will receive any comfort in the monumental Second Amendment-strengthening decision in D.C. v. Heller, 554 U.S. 570 (2008). Even though the Seventh Circuit this month held that the Second Amendment includes protection for carrying handguns on the street, that was for purposes of self-protection, whereas Gregory did not possess the magazine for self-protection. Â Were I Gregory's attorney, due to the reported police investigation into Gregoryâ€™s magazine display, I would have been inclined immediately to try to work out a deal with police or prosecutors for him to pay penance in the form of attending a gun violence education class and a few dozen hours of community service (at the most) -- and possibly a promise not to violate the applicable weapons laws in the future -- in an effort to get an agreement for no prosecution.

Posted by Jon Katz in Criminal Defense at 06:00

My NBC Nightly News Interview (at 1:55 minutes, Dec. 30, 2012)

Visit NBCNews.com for breaking news, world news, and news about the economy

Posted by Jon Katz in JK in the news & live. at 01:00

Sunday, December 30. 2012

My "Today Show" interview (starting at minute 1:46)

Visit NBCNews.com for breaking news, world news, and news about the economy

Posted by Jon Katz in JK in the news & live. at 00:10

Jon Katz on NBC's "Weekend Today" and "Nightly News," on Dec. 30.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â Last night, NBC's Weekend TodayÂ interviewed me about the overkill school suspension of high school student Courtni Webb for writing a poem about the Newtown massacre, despite her never having handed in the writing. The segment aired December 30 around 8:20 a.m. MyÂ five-minute studio interview was cut to minute 1:46-1:58 in theÂ broadcst here. Such cutting is common. UPDATE: Another segment of my interview aired on NBC Nightly News December 30, starting here at minute 1:55. Â Â Of course, in the interview I stated my opposition to the suspension as a violation of Ms. Webb's First Amendment right to free expression, despite the Supreme Court's lower level of First Amendment protection within schoolhouse gates. Â Here are some other points I made: Â - The Sandy Hook massacre was deeply traumatic. For students and others to work through their feelings on this violence, they should not need to be looking over their shoulders when discussing it and should not feel compelled to bottle up their feelings on the tragedy. Â - Ms. WebbÂ is in a charter school for at-risk students. This suspension does no good for efforts to help her succeed in school. Â Â - Although Ms. Webb's poem'sÂ portion thatÂ "I know why he pulled the trigger" sounds disturbing, the poem is First Amendment-protected and clearly would not have been punishable if communicated outside of the schoolhouse gates. Â - As Ms. Webb says, Stephen King creates violent writings and never acts on that violence. As Mr. King has said:Â : "Certainly in this sensitized day and age, my own college writing would have raised red flags, and I'm certain someone would have tabbed me as mentally ill because of them."Â Â Â - It appears that Ms. Webb was suspended under a statute that allows suspensions for threats. Ms. Webb's words do not seem to amount to threats. Â - If we are going to prevent repeats of the Newtown massacre, it may be important to understand what motivated Adam Lanza to commit the Sandy Hook massacre, no matter how uncomfortable that might be. Ms. Webb seemed to be trying to do that. Similarly, trial lawyers are more effective in understanding the opponent, judges, jurors, opposing witnesses and others by reversing roles and by crawling under the skin of others. "Homo sum: humani nil a me alienum puto./I am human: nothing human is alien to me" - Publius Terence. Â - Ms. Webb's suspension is a bad civics lesson for Ms. Webb and her fellow students, and might chill other students from expressing themselves. Â ADDENDUM: If you want Courtni Webb's suspension reversed, please tell her school that now. The news reports that she was suspended from Life Learning Academy charter high schoolÂ in San Francisco. The school's contact information is hereÂ and hereÂ including: Life Learning Academy Charter High School651 8th Street, Treasure Island San Francisco, California 94130(ph): 415-397-8957 (f): 415-397-9274 Principal: Â Teri Delane Â teridelane18@yahoo.com Â CES Coordinator: Â Craig Miller Â cam@ix.netcom.com

Posted by Jon Katz in JK in the news & live. at 00:00

Friday, December 28. 2012

Before spilling the beans to the cops, read and negotiate the fine print.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â "No" is an essential response by a police suspect who has no lawyer present. On the other hand, once they have lawyers, a slew of federal criminal suspects line up with their lawyers at prosecutors' doors right away in the hopes of getting more favorable plea deals for divulging criminal activities by them and others, and often by providing ongoing assistance to prosecutors and law enforcement by going undercover to encourage and catch others in criminal activity, by providing further information on others' criminal activity, and by testifying against other criminal defendants. The initial such discussion by a suspect with police and prosecutors is called a proffer session, whereby as much immunity as possible for the suspect should be sought in writing to minimize being prosecuted for any information s/he divulges. Â I advise potential clients to find other counsel if they wish to snitch. By avoiding snitch work, I avoid feeling like a temporarily deputized prosecutor or police officer. I have lost numerous potential clients by telling them to hire other lawyers if they wish to snitch, but perhaps have been hired by numerous others -- at least those who are not likely to need to consider snitching -- who agree with my approach.
Â Criminal defense lawyers need to negotiate and review written proffer agreements like eaglehawks, before their clients utter even one word to police and prosecutors. Unfortunately, Gary Lee Gillion learned the hard way how unfavorable proffer agreement language can come back to haunt a suspect. U.S. v Gillion, __ F.3d _ (4th Cir., Dec. 28, 2012).Â Gillion entered into a written proffer agreement with the federal prosecutor's office, whereby the agreement included a provision that gave prosecutors the option of requiring him to answer questions by polygraph. The prosecutor's office ultimately opted to polygraph Gillion -- being investigated for fraud involving sales of commercial vehicles -- but he walked out in the middle of the polygraph session. Gillion ultimately proceeded to trial, and was convicted. Â At trial -- over Gillion's lawyer's objection -- the prosecutor introduced Gillion's statements from his proffer session into evidence. Federal proffer agreements ordinarily assure that the suspect's words at a proffer session will not be used against him or her at trial except to cross-examine the suspect if s/he testifies at trial counter to his or her words at the proffer session. Here, though, Gillion's proffer agreement withdrew such protections if he did not cooperate with polygraphing pursuant to his proffer agreement. Â The Fourth Circuit had no problem agreeing with the trial court that Gillion's walking out of the polygraph session breached his proffer agreement and allowed the prosecution to introduce at trial his words from his proffer session. The Fourth Circuit rejected Gillion's argument that Gillion's going to trial somehow extinguished punishing Gillion for his breach of the proffer agreement. Â Could Gillion's lawyer have negotiated the polygraph requirement out of his proffer agreement? How will we ever know?

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, December 27. 2012

Drive with defective automobile equipment at your own risk.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â One would think that those driving with contraband would avoid having defective vehicle equipment -- for instance burnt-out headlights and taillights -- to reduce their risk of being stopped for traffic offenses. However, repeatedly my clients tell me that the police correctly reported such defects, leading to arrests for carrying drugs (for instance after a drug dog sniff, or after the defendant fails to assert his or her right to silence when the officer asks about contraband therein) and for drunk driving. Â Yesterday, Virginia's intermediate appellate court affirmed a marijuana felony conviction following a stop for a partially illuminated center brake light. Otey v. Va., _ Va. App. _ (Dec. 26, 2012), saying that the mere ability to see the brakelight within five hundred feet did not preclude a stop where the officer had reasonable articulable suspicion to believe the light was defective.Â The officer who stopped OteyÂ testified that he smelled unburnt marijuana in the car and asked Otey about drugs therein, and that Otey admitted to having marijuana in various places in the car. Â Of course, we will keep seeing suspects run off at the mouth, as then-police officer George W. Bruch explains here starting at minute 27:30.

Posted by Jon Katz in Criminal Defense at 01:00

Wednesday, December 26. 2012

Tough-on-crime-talking Mike Crapo sees life from the other side of the handcuffs.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â "Homo sum: humani nil a me alienum puto./I am human: nothing human is alien to me" - Publius Terence. Â As I tell many of my clients charged with drivin under the influence of alcohol ("DWI"), the only difference between them and me is that they got caught. Of course, I stopped drinking after driving cold turkey over a quarter century ago, and have not imbibed at all for over seven years. Â The DWI laws are so draconian that it takes but two people sharing a bottle of wine at a restaurant to make the driver a potential DWI arrestee. When I started practicing criminal defense in 1991, it was a golden age when driving with a 0.10 blood alcohol content ("BAC") in Maryland created but a rebuttable presumption of DWI guilt. Then, the federal government came along -- just like it did in the 1980's, strongarming states to raise the drinking age to twenty-one (but still willing to send eighteen to twenty year olds to war) -- with new legislation conditioning ongoing federal highway funding on a state's making it a crime to drive with a 0.08 BAC. Â Unless and until the DWI laws outlaw DRUNK DRIVING rather than outlawing slight impairment from alcohol or a low BAC level of 0.08 -- and nobody know their BAC level in advance of being arrested and tested -- the DWI laws are a farce denigrating respect for the criminal justice system and lining courts' coffers with $millions in fines and costs for DWI convictions. Â Now comes along Idaho Republican Senator Mike Crapo with a DWI arrestÂ -- with a January 4, 2013, arraignment -- joining such other public officials charged with DWI as former Wicomico County chief prosecutor Davis Ruark; former Alexandria, Virginia, police chief David Baker; Maryland Delegate Herman Lee Taylor, Jr. (acquitted in court, and prior to his arrest sponsored a bill in 2006 to require a scarlet letter license plate emblazoned with "DUI" for those with over two drunk driving convictions); and Maryland house majority leader Kumar P. Barve, who entered a guilty plea to DUIÂ and received a probation before judgmentÂ in Montgomery County. Â To this very day, Senator Crapo's official website proclaims: "As a basic principle, any person convicted of injuring another individual should be punished to the highest extent of the law."Â Â Perhaps his recent DUI arest will show Senator Crapo to take a more balanced and in-depth view and action on the criminal laws and criminal justice. Â In any event, here are some additional thoughts on Senator Crapo's arrest and prosecutionÂ Â - CrapoÂ is presumed innocentÂ and his case may be winnable. For instance, the 0.11 BAC reading could be a false high. These machines can err. Â - Crapo's BAC reading will not come into evidence if no arrest probable cause is found. Â - The relevant BAC in Virginia is from theÂ time of driving. BAC can rise between time of driving and BAC testing, as alcohol can be absorbing into the bloodstream. Â - Breath BAC testing margin of error arises from machine error, operator error, excessive blowing and theÂ machine's assuming aÂ mouth temperature of 33 degrees celsius, whereas most people have a higher mouth temperature than that. The higher the mouth temperature, the higher the margin of error on the breath testing machine. Â I wish Mike Crapo the best in his pending DWI case, and hope that this case will enlighten his approach to criminal law in the Senate.

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

Monday, December 24. 2012

Ray Bryant left his body last year. A great musician inspiring to seize life by its horns.

I became a big jazz fan in 1976, when plenty of the key jazz greats from the 1940's and 1950's were still alive. Many American jazz musicians -- Cecil Taylor ultimately rejected the label "jazz", but I do not know of any substitute short description that comes as close to "jazz" -- performed, and even lived, overseas in Europe, with many also performing in Japan, where they would repeatedly draw much larger crowds than in the United States. If excellence determined audience numbers, Roy Eldridge, Dizzy Gillespie, McCoy Tyner, and Horace Silver would consistently fill the same stadiums filled by the biggest rock stars. Instead, I have delighted in seeing all of them in nightlclubs with crowds under one hundred. I have been blessed with experiencing performances by scores of the most key players in jazz history playing at their best, including this listing of people who appeared in the famous "Great Day in Harlem" photo. Â In 1978, I travelled to France and studied French with a group of fifty American high school students at a boarding school in Nice, France, which has an annual summer jazz festival. I experienced many of the top names in jazz, and got within a few feet of several, including meeting Dizzy in between practice sessions and being two people away from Bill Evans before learning decades later that he was more amazing than I realized at the time. Â The Nice jazz festival showcased musicians performing at their best on three stages among Roman ruins. The choice of which stage to attend was often difficult.When I went with a friend to get some dinner early on during the festival week, a kind American man behind us in the outdoor line for the carryout food started talking with us. We found out that he was Ray Bryant -- 47 at the time, and seeming even younger than that -- among the musicians performing at the festival. He was unassuming in the way he spoke, so I had no idea that he had already reached so many heights beginning two decades earlier, and to my best recollection I found out that he was playing piano that night with Lionel Hampton's all-star band, which included Cat Anderson blowing me away with his screaming trumpet. Â My friend and I sat down to eat, opened the official double-LP album for the festival, saw Ray Bryant as one of the album's featured musicians, and decided he must have some particular excellence to be featured in that collection. So we did what I learned that day never to do again, which was to ask him to autograph the album while he ate dinner. We said: "I am sorry" as we asked, and he replied surprised but kindly as he autographed our albums: "I'm sorry, too." Here is Ray Bryan performing in 1977, and here probably in the 2000's. Â I rarely seek any autographs any more -- agreeing with the Zappa fan who honored his hero by not disturbing him as he ate post-performance at a Chinese restaurant -- unless during a signing at a bookstore. In fact, when I was floored to see actor Lou Jacobi through the window of a shoe repair store one day near Rockefeller Center during a lunch break from work in 1986, I just smiled in childlike delight through the window, and he delighted with a smile back. I did not even enter the store, as our non-verbal communication had said it all. Â Something motivated me a few days ago to see how Ray Bryant is doing. I learned that I missed his passing last year. Â Ray Bryant taught me that we can make our dreams come true through passion, practice, and seizing opportunity; reminded me to do my best not to have a big ego, and to treat everyone the same, no matter their apparent stature, intellect and connections; and underlined that we can create our own magic in our lives. Ray broke into jazz in the 1950's when it was developing at a dizzying pace. Before turning thirty, he was already making albums under his own name, and over the years also played as a side musician with Dizzy, Miles, Bird, Carmen McRae, and more. Â Ray Bryant is among the people who inspire me to seize life by its horns and to transcend and deflate apparent obstacles. Â Thanking and bowing deeply to Ray Bryant.

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

Sunday, December 23. 2012

Not letting opponents nor others hijack our power nor schedule our upset.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â Â All of us have experienced stepping out into the day all exuberant and feeling like nothing can shake us. Then, we are shaken or angered by a car that sprays us with mud, a prosecutor who does something underhanded (for instance, violating the lawyers' ethics rules by telling a non-client witness not to talk with opposing counsel), a lying opposing witness, or a judge barely masking his or her unjust agenda. Each instance calls for action and not weakness, but not anger nor loss of power. The mud splattering justifies considering a calm talk with the driver; the prosecutor acting underhanded needs to be confronted directly or with the appropriate authorities; and the unjust judge at the very minimum calls for a huddle with colleagues about reversing the judge's unjustness, and consideration about whether an effort should be pursued to have the judge brought before disciplinary, impeachment, or re-appointment authorities. Â All of the foregoing actions can be done in as calm a manner as the character I watched in a 1950's World War II movieÂ who calmly gunned down Mussolini's soldiers while enjoying chomping on an unlit cigar. As much as I would prefer to present a less violent image, this movie scene exemplifies for me the power of calmness in battle. Â A great thing about practicing the taijiquan form daily and taijiquan pushing/sensing hands sparring is that the form helps increase my ability to take action in a powerfully relaxed, centered and harmonized way, and the sparring reminds me that there is no end to the challenges we will face from other human beings, that minor adjustments are often all that is needed to neutralize an attack, and that I am at much less risk of being rattled by what others do by continuing my taijiquan practice.It is not weak to act in a powerfully relaxed, clear-minded and calculated way. To do otherwise is weakness. Nor is it weakness to keep compassion and empathy -- and the realization that they one day can turn around for the better -- for those who test our patience, calm, and limits. The most powerful approach with such people, in addition to having compassion for ourselves and for them, is to empty our minds of expectations of wrongdoing or other bad acts by them, but to remain appropriately on guard at the same time. Â Today's blog entry was inspired significantly by last Monday's discussion about Dipa Ma by her student and Buddhism/meditation teacher Sharon Salzberg, who blesses me and many others in the Washington, D.C., area with monthly meditation and dharma talk sessions at the Campaign for Tibet. Dipa Ma transcended tragedy after tragedy -- with two children dying and then her husband, when her remaining child was but five-years-old. As Sharon relates: Â One day a doctor said to [Dipa Ma]: "You know, you're actually going to die of a broken heart unless you do something about it."Â Â Then in Burma, she proceeded to do meditation practice. Dipa Ma subsequently became a very accomplished meditator and spiritual person. One day in Calcutta, Dipa Ma had a visit from her Western student who had been practicing in India for several years, and whose parents very much disapproved of his path. As Sharon relates in A Heart as Wide as the World, Dipa Ma gave the student $12 that she had been given as a donation, saying "'Go buy a present and send it to your mother.'" Sharon says that this action of Dipa Ma exemplifies the Buddha's teaching of reconciliation that "if you are angry with someone, you should give them a gift." At minimum, I can give the gift of non-judgment and compassion to myself, my allies, birds of a feather, and those with whom I have conflict. That does not prevent me from working to stop them from violating justice in the future, but makes me more powerful on that and all paths. Â Similarly, I can give metta/lovingkindnes meditation and prayers to myself, my clients my allies, opponents, and those with whom I am in conflict, without weakening myself, and in fact empowering myself further by practicing non-anger. Metta meditation can powerfully proceed as addressed here, ending with the following wish: "May all beings be well, may all beings be happy, may all beings be free from suffering."

Posted by Jon Katz in Persuasion at 00:00

Friday, December 21. 2012

If you say poe-tay-toe and the jurors say poe-tah-toe, how to not call the whole thing off.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â You like potato and I like potahto, You like tomato and I like tomahto;Potato, potahto, tomato, tomahto! Let's call the whole thing off!Â Visit England, and you will hear people calling tomatoes "toe-mah-toes". Instead of the bathroom, you will visit the loo, and in some countries the W.C. (water closet) and in rustic America the outhouse. Â On a visit to Biddeford, Maine, high school, two students quibbled over whether the first one asked to close "ah window" or "owah window". A Bostonian economics teacher one day kept on talking about some economist named Rick-Kaa-Doe, and it was not until I read the subsequently-assigned reading assignment that I learned he was talking about Ricardo. A speaker of English from overseas kept testifying about what sounded like "July twentieth" only for his lawyer ultimately to clarify that he was saying "July twenty-eighth", which was a critical difference for what was being contested at trial. Â Then add to the mix the people who speak or hear English as speakers of second languages and the risk of the speaker of English as a first language mishearing the speaker of English as a second language, and the risks of the non-native English speaker mis-hearing the native English speaker.
Â Misperceptions in the courtroom of course are not limited to differences in accents, first and second languages, education levels, socioeconomic backgrounds, and regional speech. Recently when I was arguing an evidentiary issue before a very intelligent and caring judge in a theft-related bench trial, the judge made mention that the witness on the stand had testified that when my client (let us call him "Joe") went to make a purchase at his store, he provided the name George to the sales clerk, perhaps to hide his true identity. Praised be the prosecutor for joining with me in agreement when I told the judge that no such testimony had been presented.Â In the foregoing scenario, the factfinder revealed his misperception of the evidence in time for the parties to correct his misperception. The times are probably legion that factfinders, whether judges or jurors, misperceive the evidence and do not share their misperception in advance with the parties, let alone when jury verdicts arise from matters that the opposing lawyers had never considered or had thought to have been minuscule. Â How can a lawyer minimize being adversely affected by factfinder misperception of the evidence? Among the things that can be done are the following:- The lawyer should fully prepare his or her witnesses to speak clearly and concisely, and preferably to look at the person asking the questions and to look at the factfinder(s) when answering. The lawyer must also communicate clearly and concisely through everything s/he says and through all the evidence he presents, including the choice of what not to say or present. Â - The lawyer needs to closely and actively listen and pay attention to all testimony and evidence, and to speak up when significant misstatements are made from the witness stand and opposing counsel, and to speak up about exhibits with misstatements. Â - The lawyer can help overcome misstatements from the opposing side by including theories and themes that boil down his or her side of the case to its essence, from where the lawyer's persuasive presentation and story will unfold. Â - Different people place more emphasis on ideas, visuals, and sounds in processing information. Consequently, one or more simple slogans should also be considered (for instance "The scene erupted in chaos, with it being hard to remember who said what and who did what"); even a handful of visuals to show the jury -- including blown-up or on-screen images (a picture is worth a thousand words) of incident scenes and PowerPoint slides -- should be considered; and an onslaught of names, places, dates and evidence can be made more convenient to process by the factfinders by the lawyer's focusing them on the most important evidence, and the meaning of that evidence throughout all stages of the trial. Â Much of the above discussion is about being in the moment at all times, being fearless to speak up in advocating for one's client, and doing one's best to see matters from the perspective of the judges and jurors and to answer the questions that they likely have and to provide them the information that they likely wish to know.

Posted by Jon Katz in Persuasion at 00:00

Thursday, December 20. 2012

Maryland's highest court perverts Miranda after Defendant denies understanding Miranda warnings given in his second language.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â Mixtec is an Indian language that long predates Spanish's introduction in Mexico. A few years ago, police in Maryland arrested Ramiro Arce Gonzalez for suspicion of rape and murder. Gonzalez v. Maryland, __ Md. _ (Dec. 20, 2012). The police learned early on that Gonzalez's first language is Mixtec, did not understand Spanish well -- not even the words "attorney" and court", which goes to show how poor his Spanish was -- but proceeded to have a Spanish speaking police officer interpret for another police officer in Mirandizing Gonzalez and interrogating him, despite his repeated assertion that he did not understand the Spanish-language Miranda warnings, Miranda v. Arizona, 384 U.S. 436 (1966), which the Spanish-speaking officer tried remedying merely by expounding further in Spanish on the warnings, which sounds like a sad farce straight out of Gilbert and Sullivan, at best.Â Standing Miranda on its head -- perhaps giving more weight than Constitutionally permissible to the importance of cops getting confessions than in those confessions passing Fifth Amendment muster -- Maryland's highest court today affirmed the trial court's admission of Gonzalez's confession despite Gonzalez's above-described deep difficulty understanding Spanish, and despite the Spanish-speaking officer's reliance on Gonzalez's co-defendant's sister's (and what were her linguistic and bilingual qualifications?) providing a Mixtec translation of the critical words "attorney" and "court". Worse, the Spanish speaking officer forgot which purportedly Mixtec words he ultimately used for "lawyer" andÂ "court" and did not record those words. Furthermore, it appears that the case record is bereft about any reliability on the co-defendant's sister's ability to translate those words. Â Praised be the three dissenting judges among the seven in Gonzalez for seeing through Gonzalez's Miranda charade, and saying point blank that Gonzalez's confession should not have been admitted at trial. Â The majority's and dissent's legal analysis and legal rules discussion are discussed in much more detail than in my foregoing blog entry. Maryland's Court of Appeals repeatedly vindicates Constitutional rights in criminal cases, but failed to do so in Gonzalez.Â

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 19. 2012

The thrill of victory and the agoniy of defeat: When even superb trial lawyers miss the trophy.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â Trial work is not for unbending time managers. Judges and rules set deadlines that often cannot be extended or changed. Hurry up and wait often is the slogan of the day, hurrying to arrive to court on time, but often finding that many other cases will be handled first, and sometimes finding that one's case is going to be rescheduled. Â Contingent fee plaintiff's trial work is not for those not wanting to gamble their money nor time. As much as such people as former Democratic presidential contender John Edwards purportedly made a fortune representing injury victims as a lawyer, plenty of plaintiff's lawyers working on contingency lose huge sums along the way when losing a trial or on summary judgment after investing thousands and sometimes tens of thousands of dollars in expert witnesses, depositions, and other expenses and costs. Â Clients paying their lawyers hourly for trial work, and all clients for that matter,Â expect kick-ass work -- and hope for kick-ass results -- from their lawyers, and their lawyers feel that pressure. Â Trial work is like climbing steep mountains with no safety ropes in the event of a fall. Reaching the top and winning are exhilarating. Losing is going to happen along the path, but the losing best be despite the lawyer's best fight, rather than because of the lawyer's mistakes and inattention. Mistakes will be made by trial lawyers, at the very least, because they have no crystal balls into the minds of jurors and judges, but trial lawyers still need to rely heavily on incessant preparation, experience, passion for their clients and the case, close teamwork with their clients and with cooperative witnesses, joy in their work, joy in life, a thrill to compete, intuition, and wits. Â Four weeks ago, I blogged about legendary trial lawyer Gerry Spence's lead role at trial for a wrongfully convicted man sentenced to serve life in prison and who was not released until spending many years in a cage. As with Gerry's representation of Geoffrey Feiger at his criminal trial -- which resulted in a stunning acquittal that did not seem guaranteed at all -- representing his client Terry Harrington, Gerry once again risked ending his decades-long record of losing no trials. Gerry is apparently very wealthy for decades, and did not need the money that might be won in the case. He has proven himself again and again in the courtroom , and did not need to do so again. He is past eighty, and still has the drive to fight in court. Perhaps he went to trial this time out of a combination of a drive to serve justice against this wrongful conviction and prison time, and out of a drive to keep fighting in court. Those who love going to trial likely experience withdrawal symptoms by being away from court for too long. Â Last week, the jury was about to return a verdict against Gerry's client, and the co-plaintiff, until three jurors announced that the defense verdict was not theirs. The judge declared a mistrial. The weeks long trial will resume again. Â When a trial lawyer as great as Gerry Spence -- with all his available resources and ability to try this case, and with no other competing trial dates on his calendar -- comes this close to losing a trial, that reminds experienced trial lawyers what they already know: The best we can do is do our best to persuade jurors and judges. We cannot force their decision. We cannot find and execute any magical incantations. The best we can do is to do our best to enable jurors and judges to see our cases from our point of view, and to help embolden and empower them to minimize any concern they might have about any backlash on their decision from public opinion, the press, their friends, and loved ones, because they have only their oaths to obey and honor. Â The result in Gerry's case does not dim my optimism in defending my clients. It does serve as a sobering example I can tell my clients of the risks that often accompany going to trial. Â With my law practice overwhelmingly focused on criminal defense, the choice of going to trial again and again is easy. If my client -- through informed decisionmaking -- does not accept the prosecutor's last settlement offer after my best efforts to achieve the best settlement possible, we go to trial, unless the prosecutor is not ready to go to trial, which gets followed by a continuance -- usually over my objection -- or a case dismissal, whether or not the prosecutor tries to recharge the case. Â Gerry Spence's s trial for Mr. Harrington is a fight to reverse the still ongoing excess of wrongful convictions. On retrial, I wish the plaintiffs the best, which goes without saying.Â

Posted by Jon Katz in Persuasion at 00:00

Tuesday, December 18. 2012

Marijuana use freedom does not allow imposing pot on others.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â Â Â I only attended one Grateful Dead concert, in 1982 near the start of my sophomore college year. Entering the Boston Garden arena, I noticed a sharp reduction of available oxygen, replaced by the heavy stink of marijuana. There, I was a witting consumer of secondhand marijuana smoke, feeling no effects beyond those listed above. I enjoyed the concert, but was a jazz fanatic who did not feel a pull for a repeat performance. Â Â A few years later, I heard about people/person mixing LSD and water in a water pistol and shooting it at people at Grateful Dead concerts. I do not know if that is a mere rumor, nor about how well LSD absorbs through the skin (although LSD founder Albert Hoffmann apparently got an unwitting and wonderfulÂ trip from handling a psychedelic with his bare fingers), but I understand that one of the watchwords of LSD consumption is that if it is going to be used, to do so in a comforting and supportive setting. Being sprayed with it and not knowing what is in the spray is likely to lead to a bad trip, at least for someone who has not experienced LSD before. Â Â Now, a recent story from Colorado reports on prosecutions against two college students for allegedly giving pot brownies to a few people without telling them that marijuana was inside. I am curious how the prosecution plans to prove the charge, unless the defendants confessed, or unless one or more recipients had uneaten portions of brownie that tested positive by a chemist for marijuana ingredients. If the latter evidence is the only available physical evidence beyond illness, how will the prosecution be able to show the defendants knew marijuana was therein? Perhaps the defendants were given the brownies by someone else. Â Â Â In any event, in case anyone was curious, the legalization of marijuana for personal use in Colorado clearly is not going to make it legal to surreptiously slip marijuana into other people's brownies. That goes without saying.

Posted by Jon Katz in Drugs at 00:00

Monday, December 17. 2012

Washington state marijuana legalization comes with bitter pill of DUID conviction risk at 5 nanograms of THC.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â Over the weekend, I learned that last month's Washington state successful marijuana legalization referendum came with the bitter pill of a risk of guilt for driving under the influence of drugs with a THC concentration exceeding five nanograms per milliliter of blood. This information was available before the referendum voting date, but it is not possible for me to catch all essential news amidst the election seasonÂ blur of Republicans and meat. Here is the Washington state law on driving under the influence ofÂ marijuana, which incporates Washington's marijuana legalization referendum language; I copied this statutory language from Westlaw. Â Â Colorado, which also passed a marijuana legalization referendum last month, is also facing possible legislation setting a presumed level of unlawful THC content. Â THC ordinarily stays in the bloodstream for over two weeks, which counters any wisdom to setting blood THC concentration levels that presume driving under the influence of drugs. Â Moreover, daily medical marijuana users are going to have THC levels in their bloodstream always. The Marijuana Policy Project points to a study showing a 13 nanogram/mL blood THC level in a man who was not impaired. Criminalizing alcohol, THC and other drug levels makes no sense for impaired driving prosecutions, rather than prosecuting for impairment itself. Instead, the alcohol, THC or drug level should, at worst for the defendant, be part of the totality of the circumstances in determining whether the driver was unlawfully impaired by alcohol, marijuana or drugs. To do otherwise violates criminal defendants' right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. Â The MPP article addresses states setting THC blood concentration limits on drivers as follows: Â "Nevada and Montana have per se DUID laws. In Nevada, a driver is per se guilty of DUID if the level of THC in his or her blood exceeds two nanograms per milliliter (ng/mL) of blood. In Montana, the per se limit is five ng/mL for patients. In 2011, the Colorado Legislature debated setting a five ng/mL per se limit similar to Montanaâ€™s, but decided against it due to a lack of scientific consensus and concerns that many legal medical marijuana usersâ€™ blood would exceed the THC limits even when they are not legally impaired."Â California NORML has an article on the relevance of THC blood content levels to impaired driving here. Â One important decision that drunk and drugged driving suspects must make in states that allow them to refuse a breath, blood or urine test for impaired driving, is whether to refuse the test. Where I practice, the loss-of-license risks can be severe for refusing the test where the police officer has sufficient grounds for requesting the test. It is critical to consult a lawyer in advance of an arrest for influenced driving, to help decide whether to take such a test if ever asked to do so.Â

Posted by Jon Katz in Drugs at 06:54

Sunday, December 16. 2012

Obama will place less priority on enforcing against marijuana use in Colorado and Washington state.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â On December 11,Â I bloggedÂ on Gallup's finding that 64% do not want federal marijuana prosecutions where pot is legal.Â Said pollÂ follows the legalizationÂ of marijuna for personal use in Colorado and Washington state by referendum last month.Â Where does the Obama Adminsitration stand on prosecuting the personal use of marijuana in Colorado and Washington state? On the one hand, the federal government ordinarily does not prosecute mere personal possession -- rather than possession with intent to distribute or distribution -- of marijuana unless the offense takes place on federal property or cannot be prosecuted in state court for whatever reason. On the other hand, one or both of Colorado and Washington state also have provisions for licensing marijuana cultivators and dispensaries for personal use, which are areas for the Obama Administration to decide whether to enforce against or not. Â In any event, Reuters on December 14 reported that President Obama said he is disinclined to federally prosecute recreational drug use in Washington state and Colorado.Â On the same date, the White House Press Secretary issued a transcript of the day's press briefingÂ that includes the following from the President's press secretary: Â "What the President was saying I think is, much as he said about the use of medical marijuana, that in prioritizing our law enforcement objectives, that pursuing recreational users of marijuana in states where it has been, through a ballot initiative, declared legal, is not a top priority -- would not be a top priority given, as the President said, there are bigger fish to fry, more important law enforcement priorities."Â Don't rest until marijuana is legalized throughout the land.

Posted by Jon Katz in Drugs at 01:00

Newtown, Connecticut -- A few towns away from where I grew up.

Sending sympathy to all those killed and hurt in Newtown and their loved ones, and to those who witnessed and were nearby the horror. I know that is not enough from me, but it is a start. Â Newtown isÂ just several towns up the road from where I grew up. Even if it were further away, it would not make the tragedy seem any more distant.

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

Friday, December 14. 2012

Emails can become one's criminal undoing, and can metamorphosize from privleged to not.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting relentlessly for the best possible results for his clients. http://katzjustice.com Â Underlining that Abscam was far from the last time that legislators set themselves up for bribery convictions, yesterday the Fourth Circuit affirmed the bribery and extortion conviction of Phillip Hamilton forÂ using his then-existing position as a high-levelÂ Virginia state legislator to obtain a well-paying public college teaching position in exchange for his promise to steer one million dollars towards that college. U.S. v. Hamilton, __ F.2d _ (Dec. 13, 2012). Â Hamilton's downfall came from his emails on the topic to his wife. Hamilton unsuccessfully argued at the trial and appellate levelsÂ that those emails, sent from his work email address, were protected by the marital privilege. The Fourth Circuit said that the applicable emails to his wife, sent in 2006, became unprivileged once his employer announced three years later that no emails from their email system were confidential. Â The Fourth Circuit pointed out, as follows, the arguments of Hamilton and EPIC on the privilege matter, which arguments the Fourth Circuit rejected: Â Hamilton contends that he did not waive the privilege because he "had no reason to believe, at the time he sent and received the emails, that they were not privileged," and he could not waive his privilege retroactively. Amicus, the Electronic Privacy Information Center, adds that it seems "extreme" to "require an employee to scan all archived e-mails and remove any that are personal and confidential every time the workplace use policy changes," when "employees may not even be aware that archived e-mails exist or know where to find them." EPIC Br. at 18.Â Â People may feel a false cocoon of privacy when surfing the Internet and sending and receiving email. Underline the word "false".

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, December 13. 2012

Heavy tinting and jostling in the car do not by themselves justify a search.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting relentlessly for the best possible results for his clients. http://katzjustice.com Â Praised be the D.C. Court of Appeals for reversing a drug felony conviction, by invalidating a car search -- based on the officer's claim of reasonable articulable suspicion that one or both occupants were armed and dangerous -- arising from a stop forÂ dark tint on the defendant's car, the switching of seating positions by the driver and passenger after the stop for dark tinting (with the new driver's seat occupant explaining the switch based on the other occupant's not having a valid license), and much jostling in the vehicle to the point that the van was shaking. Jackson v. U.S., __ A.3d _ (D.C., Dec. 13, 2012). Â This wasÂ 2-1 decision, and may very well be taken up en banc.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 12. 2012

Seventh Circuit expands the wild, wild, west by invalidating Illinois' strict limits on carrying a handgun on the street.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting relentlessly for the best possible results for his clients. http://katzjustice.com Â When it comes to the prevalence of lawfully carrying concealed handguns, Virginia is like night and day from Maryland and Washington, D.C., where that right is still strictly limited. I sometimes cynically wonder whether the sunshine-y charm displayed in so much of Virginia is partly influenced by not wanting to upset a person who might be carrying a concealed weapon. Concealed carry permits are easy to obtain at Virginia circuit courthouses. Â Nevertheless, I strongly believe that the Second Amendment must be given real teeth -- unless it is amended -- because to do otherwise helps defang my beloved First Amendment all the more than the First Amendment already gets damaged by courts and governments. Â In the aftermath of the Supreme Court's monumental Heller Second Amendment decision invalidating D.C.'s total ban on handguns, yesterday the Seventh Circuit, 2-1, ruled that Heller clearly provides Second Amendment protection beyond one's home -- allowing the possession of handguns ready to use, rather than unloadedÂ -- in part seeing that the home is far from the only place where people face threats that might lead them to arm themsevles in defense. Moore, et al. v. Madigan, Â On a Constitutional basis, I am pleased with Moore. On a personal level, I urge everyone to refrain voluntarily from possessing and using handguns. Nonviolence is the way. Violence begets violence. These are truisms, not hollow platitudes.

Posted by Jon Katz in Constitutional Law at 01:00

D.C. Courts website reverses practice of linking to articles on arrests and pending trials.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting relentlessly for the best possible results for his clients. http://katzjustice.com Â On October 28, I strongly dissented from the D.C. Courts' then practice of heavily posting links about arrests, pending trials, and trial outcomes. Â The problem has now been solved. I circulated my foregoing blog entry to various colleagues after posting it, figuring that fixing the problem might be more likely and quick by my joining with others of like minds. Curiously, my blog post received the most support from members of the Trial Lawyers Association of the District of Columbia, which I had not associated as being a very activist group other than in advocating for laws and court procedures benefiting personal injury victims.Â A bar leader and TLA-DC member, of his own volition, called an administrator involved with the courts website. The administrator said that news of pending cases would be removed, but a stream of news links continued about arrests (without counterbalancing links explaining the presumption of innocence and other basic rights of criminal defendants) and trial court results (despite the possibility that such cases will come back to trial if successful on appeal). Another leader in the TLA-DC spoke with an administrative judge of the Superior Court and forwarded my emaled ongoing concerns to the judge. Within short order thereafter, the courts' website stopped posting links about arrests, pending cases,Â and case results. The administrative judge called me and said he agrees with my view on this, and welcomes viewpoints on other matters involving the court's functions. Thanks deeply to the TLA-DC members who joined in the effort to fix this problem, and thanks to the administrative judge who listened and helped get the problem fixd. Â It might feel invigorating to engage in efforts like Michael Moore's to even get an audience with General Motors' chief (never materialized)Â in Roger and Me, but is all the more effective when those in power actually listen, avoid ivoryÂ towersÂ and make changes when they agree that changes are due.Â

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

Tuesday, December 11. 2012

Gallup: 64% do not want federal marijuana prosecutions where pot is legal.

By Jon Katz, a criminal defense lawyer, drug defense lawyer, marijuana defense lawyer, and DWI/ DUI/ Drunk Driving lawyer advocating in Fairfax County, Virginia, Montgomery County, Maryland, and beyond for the best possible results for his clients. http://katzjustice.com Â Image from public domain.Â Gallup recentlyÂ found that 64% of those polled do not want federal marijuana prosecution where pot is legal. The Gallup survey details are here. Â The Obama Administration needs to stop wasting federal resources -- particularly in these economically troubled times --Â on going after such a comparatively benign substance as marijuana, particularly in states where the people have direcly or through their legislatures made marijuana legal for medical use, personal use, and even cultivation and sales.

Posted by Jon Katz at 00:00

Monday, December 10. 2012

Human rights now and forever.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com.Â The following blog entry is a re-print from my December 10, 2011, entry on this topic. Â Every December 10 is Human Rights Day, renewing life into the sixty-three-year-oldÂ Universal Declaration of Human Rights. Â Human rights violations run too rampant to just observe human rights day once a year. Daily, government officials, soldiers and police worldwide torture people, execute within and without the judicial system, and jail people because of their political beliefs, or racial, ethnic or religious status. In the United States, too many cops, judges, prosecutors, and jurors treat the Constitution as a nuisance in the way of their getting their job done. Too many cops love tasersÂ and have tremendous trouble keeping them holstered. Human rights violations come in many additional forms, of course. Â Too many people stay silent in the face of human rights violations until their own human rights are violated. They stay silent so as not to make waves, and so as not to cause problems with their jobs, for their family members, and for themselves. However, if you wait to speak up until your own rights are immediately threatened (they already are), that is too late. Silence is the voice of complicity; do not stay silent. Â Before you go to bed tonight, do your own part to strengthen human rights, even if it is as little as emailing and talking to your friends, family, and acquaintances about Human Rights Day, and writing at least one letter or email to a government official domestically or abroad to insist that human rights be protected now and forever.

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

How will federal prosecutors and federal public defenders get much jury trial experience?

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â Over ninety-five percent of federal criminal defendants enter guilty pleas. Federal sentencing lawyer expert Alan Ellis lays down the numbers even more starkly: Â "Nearly 97 percent of all federal criminal defendants will plead guilty. Of the remaining 6 percent who go to trial, as many as 75 percent will be convicted. Thus, nearly 99 percent of all federal criminal defendants will be sentenced." Â The foregoing statistics help explain why a federal public defender I knew moved to a state public defender job, likely at a substantial paycut, seeing that federal public defenders are generally the highest-paid public defender lawyers in the United States -- apparently paid on par with federal prosecutors, who are among the highest-paid federal lawyers -- with Los Angeles being a higher-paid exception, where state-level public defenders are paid on scale with their prosecutorial peers, who earn more than federal prosecutors the last time I checked. By switching to a state public defender job, this particular lawyer was likely assuring not only that he would have the opportunity to try more cases, but he was also likely to expand his types of cases beyond the common federal public defender plate of drugs and assisting clients in snitching. Â Last week, I attended a continuing legal education program on litigating in the Alexandria federal court -- with the time made available by a continued jury trial that was set for last week -- which is aptly known as the rocket docket, as is the rest of the U.S. District Court for the Eastern Division of Virginia, in Richmond and Norfolk. I attended more to get my mandatory live CLE credits than anything else. On the civil side, the federal Alexandria District Court and Magistrate Judges are deeply committed to assisting parties in getting their civil cases settled, to the point that the District Judge at the CLE talked of having had only around three civil jury trials in a year. I asked the same judge how many criminal jury trials she tends to have, and she said that she has not had any criminal jury trials since August 2012, and has a criminal bench trial set for this month. She attributed the federal sentencing guidelines -- which tend to be harsh and which tend to lead to lower guidelines when pleading guilty, and I suppose she was also referencing the draconian mandatory minimum sentencing system -- for leading to fewer trials. Â Financially, resource-wise, and prestige-wise, it may be tempting for public defender lawyers to prefer a federal public defender position over a state public defender position. However, with such high rates of guilty pleas in federal court, state public defender jobs will generally get a public defender lawyer more jury trial experience than federal public defender jobs, at least in the jurisdictions where I practice. Â In my view, the best way for a lawyer to get great trial experience is as a state-level public defender lawyer or prosecutor. Prosecutors in general probably get more jury trials than public defender lawyers, because they tend to have higher caseloads than public defender lawyers, and can sustain the risk of going to trial more easily than can a criminal defense lawyer, whose defendants' lives and liberty are on the line. However, for those like I who cannot stomach prosecuting, working at a high-quality, well-resourced state public defender office is a great way to get trial experience. On the private sector side, handling lower-level personal injury cases (e.g., car collision injuries with limited or no permanent injury) on the plaintiff or defense side also can yield substantial trial experience. I imagine that various

government civil litigation positions also get some good trial experience. I was privileged to have worked for five years as a Maryland public defender lawyer and two years at a plaintiff's personal injury law firm -- after working for two years at a corporate law firm -- before becoming my own boss fourteen years ago with plenty of trial experience already under my belt. If one is not averse to prosecuting, District of Columbia federal prosecutors have the possibility of getting substantial trial experience in the Superior Court -- where the U.S. Attorney's Office prosecutes most adult criminal cases, except for various misdemeanors that are reserved for the D.C. Attorney General's Office -- and also federal court prosecuting experience. Â Former Assistant United States Attorneys appear to be particularly favored by big corporate law firms for their litigation teams, probably for reasons including that U.S. Attorney offices tend to be well-resourced, well-trained, and focused on lawyers with pedigrees that big law firms tend to prefer, in terms of those from top-ranked law schools, with high grades, with law review experience, and who have clerked for federal judges. Â However, when it comes to federal prosecutors and federal public defenders, with the current high rate of guilty pleas, where do they get their jury trial experience? If they remain in their jobs long enough, they will get the experience, but it can be slow coming. Even though I focus on state criminal defense and handle fewer federal cases than federal public defenders, I have had a few federal jury trials, including two in Alexandria federal court, and numerous federal misdemeanor bench trials, on top of a week-and-a-half long federal civil jury trial that preceded the landmark First Amendment Supreme Court opinion in Snyder v. Phelps, et al., 562 U.S. __ (2011) (I defended Fred Phelps and the Westboro Baptist Church at trial, but did not participate at the appellate level.)Â When defending in federal criminal court, it bears keeping in mind that the chances are good that a newer federal prosecutor is likely to have had limited jury trial experience -- unless coming from a state prosecutor's office -- for whatever that is worth in considering how to approach plea negotiations. In one federal jury trial that I had in Alexandria federal court, I was stunned that one of the three prosecutors in the case was relying heavily on notes -- to the point of seeming to read much of it word-for-word -- in giving his opening statement. He did not speak much further at trial. Heavy reliance on notes does not do much to build rapport with a jury and to develop the jury's trust in a lawyer. I make detailed plans and outlines for my trials, but do my best to rely on notes as little as possible when talking before the jury, and focus on being in the moment, with my outline as a fallback to assure that I cover key matters, am fully rehearsed, and have smooth transitions. Â To be a great trial lawyer, nothing beats experience. Where I practice, state court is usually a better place numbers-wise to get that experience than federal court.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, December 7. 2012

Virginians- Say NO to criminalizing use of cellphones while driving.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â Virginia voters: A movement is afoot in the Virginia state legislature to criminalize all use of cellphones and smartphones for any reason other than phone conversations, thus criminalizing not only texting, but even using a phone's GPS software, playing music, or dictating a memo. Â Here is the currently-proposed language: Â Â§ 46.2-853. Driving vehicle that is not under control. Â A person shall be guilty of reckless driving who drives a vehicle which that is not under proper control or which that has inadequate or improperly adjusted brakes on any highway in the Commonwealth. Â "Driving a motor vehicle that is not under proper control" includes driving a motor vehicle on any highway in the Commonwealth while simultaneously using a handheld personal communications device for any purpose other than verbal communication. Â In Virginia, reckless driving is a Class 1 misdemeanor carrying up to a year in jail, a fine up to $2500, and suspended driving up to six months. This is serious business.Â Moreover, banning cellphone and smartphone use for any reason other than phone calls will provide one more reason -- in addition to such factors as driving without a seatbelt -- for police to stop drivers under the pretext of a moving violation, but with the actual purpose of seeing whether the person is driving drunk or has contraband in the car. Passing this cellphone criminal ban will provide police with further unbridled discretion about whose car to stop -- and how is a cop going to know that a person is using a cellphone, let alone for permitted rather than prohibited reasons -- and, to an extent, for how long. Too many police already engage in racial profiling in deciding which cars to stop -- including stops for driving while black (and, more frequently, driving while a young black male), and we should not expand such unbridled discretion in a state that had statutorily-mandated racial segregation right into the Sixties (and would have continued the segregation beyond the Sixties had the U.S. Supreme Court not put a stop to it). Â The 2013 legislative session is fast approaching. Please tell your state delegates and senators to vote NO on criminalizing cellphone use while driving. Please urge other Virginia voters to do the same. Â ADDENDUM I: A Virginia delegate whom I know, who is supporting legislation to make such cellphone/smartphone use (other than phone conversations) jailable reckless driving, pointed to studies showing a large percentage of car collisions caused by texting while driving. I respond: The proposed statute deals with much more than just texting while driving. Does the data on the correlation between texting and collisions eliminate minor collisions that cause little to know physical injury? How reliable and unbiased are the studies and their data? Instead of criminalizing such behavior, the legislators can amend the personal injury laws to allow for punitive damages for collisions caused by texting while driving. One colleague suggested not criminalizing any smartphone/cellphone use if a collision does not result; I simply oppose any criminalization of such activity as inviting excessive extra intrusion by police and the police state.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, December 6. 2012

Risking a mandatory minimum jail sentence on a predicate offense? Your fight has just begun.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com. Â Why do police routinely ask arrestees if they have any prior convictions? It is not only to provide bail-related information, but also to inform prosecutors about prior convictions that can be used by them in cross examining defendants and in making sentencing arguments in the event of a conviction. Police and prosecutors are not automatically able to obtain a defendants' complete and accurate criminal record --including if the defendant has used aliases in past cases or has an all-too-common name -- and look at what arrestees say about their criminal records. Â As I always say, it is best to avoid speaking with police without a lawyer present, other than to provide one's name in jurisdictions with laws criminalizing not providing one's name when asked when police have reasonable articulable suspicion to believe the suspect has committed a crime. After arrest, it is dangerous to provide information to police beyond basic booking information relevant to initial bond determinations by a judicial officer, including the arrestee's address, residential history, and work history. Providing information about prior arrests and convictions opens a Pandoraâ€™s box that can even include inaccuracies by the arrestee. Â Too many lawmakers are too fond of creating mandatory minimum jail penalties for those with certain prior convictions. Three strikes laws are among the most well known of such laws.

Merely because one is charged as a repeat offender risking mandatory minimum jail time does not diminish how important it is for criminal defendants to fight back, including: Â - As always, prepare the case to win. This is war. Â - Determine what type of proof the prosecutor needs to prove a predicate conviction, including proper documentation certified by the court where the prior conviction took place. If the conviction is from another state, will the prosecutor timely obtain the necessary documentation to prove the prior conviction? Â - Has the prosecutor timely filed the properly-worded notification putting the defendant on notice that s/he faces mandatory minimum sentencing? For settlement negotiations, explore withdrawing any such notices and any other factors that will risk mandatory minimum sentencing. Â - Can the prosecutor prove that a prior conviction is the defendant's conviction, particularly when the defendant has a very common name (e.g., Joe Smith) that is shared by many criminal defendants? Â - Even if the prosecutor has all the necessary documentation to prove the defendant's prior convictions, do the prior convictions qualify the defendant for mandatory minimum sentencing? Review the applicable mandatory minimum sentencing statutes with a fine tooth comb. Â - Prepare a timeline of the defendantâ€™s alleged offense and conviction dates for the predicate cases and current case. Determine whether mandatory minimum sentencing for the current case mandates a conviction on the predicate offense prior to the date of the instant offense, or at least requires that the predicate offense be committed before commission of the instant offense. Â - If the predicate convictions are from another state, are the out-of-state convictions from states that are sufficiently similar to the criminal laws risking mandatory minimum sentencing in the state of the present prosecution? Â In the latter regard, this week Virginia's intermediate appellate court ordered a retrial of Wendell Kirk Dean, due to the trial court's incorrectly admitting into evidence Mr. Dean's prior robbery convictions in Maryland, saying that his Maryland robbery offenses "were not substantially similar for purposes of [Virginia] Code Â§ 19.2-297.1," which governs Virginia mandatory minimum sentencing after prior convictions for such crimes as robberies. Dean v. Virginia.Â _ Va. App. _ (Dec. 4, 2012).Â http://www.courts.state.va.us/opinions/opncavwp/1590112.pdf

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, December 5. 2012

Getting to yes to eliminate a mandatory minimum sentence.

CASE RESULTS DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH CASE, AND DO NOT GUARANTEE OR PREDICT A SIMILAR RESULT IN ANY FUTURE CASE UNDERTAKEN BY OUR LAW FIRM.Â Va. R. Prof. Cond. 7.1(b). Â By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com.Â Negotiations are best pursued by negotiating on and discussing goals rather than positions, as underlined by Fisher and Ury in Getting to Yes. In criminal defense, I negotiate on a position when telling a prosecutor that my client offers a take-it-or-leave-it deal to plead guilty to an amended charge of drug paraphernalia from an original charge of marijuana possession. I negotiate on a goal when telling the prosecutor that my client is flexible about finding a disposition that avoids a marijuana conviction, telling the prosecutor that a marijuana conviction will deep six my client's federal student financial aid. Â Negotiations are best pursued from a position of strength. Fully, skillfully and fearlessly preparing a case for trial -- including investing the necessary funds into expert witnesses, serving subpoenas, and other necessary expenses -- is more likely to lead to a settlement than not preparing, and preparing a case to settle makes the case more likely to go to trial. Â Recently, I went to a nearby Virginia courthouse where my client's blood draw in his DWI case yielded a 0.20 blood alcohol content at the state lab, and a close confirmation of the result from the independent lab that I use. In Virginia, when the prosecutor proves beyond a reasonable doubt a blood alcohol content of 0.15-0.20 at the time of testing in a DWI case, the judge must impose a sentence of at least five days in jail, with none of that suspended. (The defendant gets a one-day credit against the five days for his or her arrest date.) My client and I were fully prepared for trial battle. I had already subpoenaed the Department of Forensic Science'sÂ notations and other data on the blood analysis, was armed with the relevant law and field sobriety testing guidelines, had my trial flowchart, and was fully prepared for any sentencing in the event of a conviction.Â

i did not expect that this particular county's prosecutor's office would offer a deal involving no jail. However, that never prevents me from recognizing that old patterns can sometimes be broken to my client's advantage. In this instance, I sat down with the prosecutor the morning of trial, and learned that the blood technician was present, but was in a state of health that made it better that he not need to go through a trial that day. The prosecutor suggested I make a reasonable settlement offer. He had his necessary witnesses. We were before a judge who was not going to be a pushover on my motion to suppress evidence, and, if he denied my suppression motion, was likely to find guilt of a blood alcohol content over 0.15. Â After speaking with my client, I told the prosecutor that my client was willing to plead guilty to an amended charge that listed a blood alcohol content below 0.15, to avoid mandatory jail time. The prosecutor knows I enjoy going to trial, and that he would have his time taken up on a trial with me that morning if my client did not get a settlement that he wanted. The prosecutor agreed to my offer, and my client entered a guilty plea whereby he received a suspended sentence rather than any active jail time, and paid a fine higher than usual for such cases. Â Lesson learned: Never say never to convincing prosecutors and judges about things they "never do." The worst outcome is for the prosecutor or judge to say no. Always be fully prepared for trial, so that no "aw sh*t" reaction comes from not being able to settle the case.

Posted by Jon Katz in Jon Katz's victories at 00:00

Tuesday, December 4. 2012

Md. appellate court upholds conviction relying on evidence obtained in violation of Stored Communication Act.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com.Â Â For federal prosecutions -- and in Maryland, to name one state -- statutory lawÂ generally prohibits phone service providers from disclosing material subscriber information to policeÂ without a court order. Â What happens when a phone company provides such information to police wihtout court order? Maryland's intermediate appellate court recently considered this issue, concluding that people do not have a reasonable expectation of privacy under theÂ Fourth AmendmentÂ in their phone company subscriber data -- and concludes that federal appellate courts have held the same -- and the state statute does not provide for excluding such evidence when a phone company provides such information to police without a court order. Â Here, Darren Whittington was stabbed and survived, and told police that "Ace" stabbed him. Whittington did not know Ace's realÂ name, but let police obtain Ace's phone number from Whittington's cellphone. Without obtaining a court order, the police tracked down Ace's cellphone number to Sprint, which provided Ace's subscriber information to the police without a court order in violation of Maryland's Stored Communication Act (which confirms we cannot rely on our cellphone carriers to protect our privacy). Â Defendant Upshur was one of the subscriber's to Ace's phone number, and Whittington identified Upshur's photograph, albeit in a tainted identification process that the appellate court forgave, becaue Whittington already knew Upshur from before. Upshure got convicted for assault, and the appellate court affirmed his conviction. Upshur v. Maryland, __ Md. App. _ (Nov. 28, 2012). Â Â

Posted by Jon Katz in Criminal Defense at 00:00

Monday, December 3. 2012

Frisk of carkeys is deemed lawful, and turns up handgun.

By Fairfax County/Northern Virginia/Maryland/Beltway criminal defense lawyer Jon Katz. Defending DWI/ DUI/ Drunk Driving, drugs, marijuana/medical marijuana/cultivation, sex cases, felonies and misdemeanors. Fighting tirelessly for the best possible results for his clients. http://katzjustice.com.Â Â Beware what you keep in your pockets, lest those items lawfully lead police to criminal evidence that could be used against you. Â Reginald McCracken got frisked for weapons on the basis of a woman's claim that he was illegally hacking/giving cabrides, his denial that he had been hacking, and his conflicting statements about how he arrived at the neighborhood. Â Maryland's highest court found that the police frisk of McCracken was lawful,Â with reasonable articulable suspicion under Terry v. Ohio, 392 U.S. 1 (1968). McCracken v. Maryland,Â __ Md. _ (Nov. 28, 2012).Â McCracken further found that the police lawfully seized car keys found during the frisk (possible evidence of violating the hacking laws), and that the police lawfully used the key set to press the car alarm signal that then found Defendant's car containing his handgun in plain view. Â Had McCracken not been carrying carkeys, he likely would not have been prosecuted nor convicted for possessing a handgun. However, he carried car keys, and the rest is history.

Posted by Jon Katz in Criminal Defense at 00:00