Friday, September 29. 2006

George Bush's Injustice Department - Returning to the dark ages of obscenity prosecutions for the written word.

Karen Fletcher allegedly posted disgusting fantasy stories on the Internet about pedophilia, torture of children, and murder of children. The federal prosecutor in Pittsburgh (part of George Bush's Justice Department) obtained a six-count obscenity indictment against Ms. Fletcher, on September 26. For added chill, the indictment seeks forfeiture of Ms. Fletcher's computer equipment.Â Â The last time I checked, the First Amendment robustly protects free speech, even such abhorrent speech as that alleged to have been posted by Ms. Fletcher.Â Â This obscenity prosecution, under 18 U.S.C. Â§ 1462 goes forward in the same federal courthouse where last year First Amendment lawyers Lou Sirkin and Jennifer Kinsley won a smashing Constitutional victory against the obscenity laws. However, that victory was short-lived, when the Third Circuit reversed. U.S. v. Robert Zicari, 431 F.3d 150 (3rd Cir. 2005).Â Â With this prosecution, the Justice Department regresses to the old days of chilling obscenity prosecutions against mere words, even against such great literary works as Ulysses, Howl, and the Tropic of Cancer. In other words, do not trust that the Bush administration will stop at bringing to bring obscenity prosecutions even against brilliant literary works. Sadly, no guarantee exists that a Democratic Justice Department would have done any different. Tweedledee and Tweedeldumb. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Wednesday, September 20. 2006

Know your judge and jury.

Criminal defense is about persuasion, strategy, and fighting in the trenches for our clients. This requires knowing our judge and jury, and finding out who they are.Â For Maryland and Virginia state criminal cases, judges usually are not specially assigned to a case. Depending on the case and the court, the assigned judge's name may not be disclosed until the evening before trial or the morning of trial. Even then, the judge lineup can change at a moment's notice.Â Â Our litigation arguments must be tailored to our decisionmaker, so it is critical to know about every judge who sits in a particular courthouse. Beyond knowing about the full-time judges, lawyers in Maryland District Court occasionally deal with visiting or retired judges, and adjunct judges sometimes sit in Fairfax County and other Virginia District Courts. Of course, when we file legal motions and arguments without knowing which judge will consider our filing (and judge's law clerks often will have substantial input into the disposition of those motions), we can only take our best educated guess at the lineup of judges who might be considering our motion.Â Â We must also know our juries, including obtaining the list of potential jurors once the list becomes available. In some courts, a list will be made available of all jurors assigned to the particular case. In other courts, only the entire jury list for a particular time period will be available. In other courts, no list will be available before the trial date, which makes it all the more important to arrive early enough to court to digest and analyze the jury list with the client, and to take care of all other matters that typically must be handled in court the morning of trial.Â Â Some official and personal ethical and fairness questions arise when the parties investigate the jurors on the list. Aside from issues of invasion of privacy in investigating potential jurors, how would it be fair for prosecutors to have more ready and accurate access than the defense to criminal histories of jurors and their friends and family? It is not fair. In the end, in investigating jurors, the criminal defense lawyer's full obligation is to the client, within the bounds of the governing law and rules.Â Â Some courthouses have so many judges, new judges, visiting retired judges, and visiting judges from other courthouses that it simply is not possible to have a scorecard and crystal ball about all of them. Often the public defender lawyers and court-appointed lawyers are the most knowledgeable about the lesser-known judges. As always, caveat emptor about the quality of such input when the public defender lawyer's eyes are focused, justifiably, on the day's clients more than having the luxury of giving enough details about the particular judge. Usually, different lawyers' crystal balls about judges are as varied as advice on the best way to choose a winning lottery number.Â Â I sometimes wonder whether some criminal defense lawyers warn against pleading innocent (warning of being punished for doing so if found guilty after a trial)Â versus guilty before some judges handling bench trials, just to have a better chance at the judge's having time to try their case. Usually I have good experiences brainstorming with my brother and sister criminal defense lawyers, when I choose carefully for the quality of input I might receive. Jon Katz.Â

Posted by Jon Katz in Persuasion at 00:00

Wednesday, September 13. 2006

Sanctions for refusing a blood alcohol test.

It is becoming a distant memory when Maryland law (1) imposed a blanket prohibition against prosecutors' introducing evidence at trial of a drunk driving defendant's refusal to take a blood alcohol test, and (2) did not turn particular blood alcohol levels into per se violations of the criminal law. Unfortunately, the United States Supreme Court has issued numerous decisions that throw extra obstacles in the way of a defendant's fight against a drunk driving prosecution.Â Â Â Following are some of the available criminal court sanctions for refusing to take such a test in Maryland, Virginia, and the District of Columbia when the police officer has sufficient legal basis for requesting such a test:Â Â Â - Maryland law this year added jail exposure up to two months for knowingly refusing a test for alcohol or drugs arising out of the same circumstances as the violation that leads to a guilty finding, if any. Md. Transp. Code Â§ 27-101(x). I contend that this statute is worded in such a way as to make it unenforceable, in part because it prohibits all refusals, rather than unreasonable refusals. See, e.g., Quinn v. Virginia, 9 Va. App. 321, 388 S.E.2d 268 (1990) (confirming that, in Virginia, the refusal must be unreasonable). Furthermore, the statute reads as a sentencing enhancement provision, rather than as requiring a trial on the matter with the requirement that the refusal be proven beyond a reasonable doubt as opposed to a lower standard of proof. By comparison, Virginia requires a trial on the matter. Va. Code Â§ 18.2-268.3.Â Â - Virginia law imposes penalties for "unreasonably refusing" a test for alcohol or drugs when arrested for drunk or drugged driving, and for having a 0.02 blood alcohol concentration when under twenty-one years old or when driving with restricted, suspended or revoked driving privileges. Va. Code Â§ 18.2-268.3.Â Â Â In Virginia, except as follows, a first violation of this refusal statute is a civil offense, and subsequent violations are criminal offenses. For a first offense, the court shall suspend the defendant's privilege to drive for a period of one year, consecutive to any suspension for a parallel drunk driving conviction. Where a violation of this refusal statute comes within ten years after a previous violation of the same statute or of drunk driving, the defendant is guilty of a Class 2 misdemeanor (up to six months in jail -- Va. Code Â§ 18.2-11), and the court shall suspend the defendant's driving privileges for three years, consecutive to any suspension for a parallel drunk driving conviction.Â Â If the foregoing were not bad enough, where a violation of this refusal statute comes within ten years after two violations of this refusal statute and/or the drunk driving laws -- arising out of separate occurrences -- the defendant is guilty of a Class 1 misdemeanor (up to one year in jail -- Va. Code Â§ 18.2-11), and the court shall suspend the defendant's driving privileges for three years, consecutive to any suspension for a parallel drunk driving conviction. The Virginia appellate courts generally have upheld this draconian state of affairs.Â Â Â - The District of Columbia, like Maryland and Virginia, permits introduction of evidence of a defendant's refusal to take the blood alcohol test for drunk driving prosecutions under D.C. Code Â§ 50-2201.05.Arguments against such evidentiary introduction include failure of the prosecutor to show that the defendant was given sufficient warnings about the administrative and legal consequences of not taking the test, and failure to give the defendant sufficient opportunity to take the test.Â Â Additionally, by practice, prosecutors in the District of Columbia Superior Court do not offer diversion (dismissal after succeeding in a drunk driving program) to defendants who refused the test. Jon Katz.

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

Tuesday, September 5. 2006

Identity theft will decline if TINs replace SSNs for identity.

As our immigration law partner Jay Marks and I have long known, today's New York Times reports that "Some ID Theft Is Not for Profit, but to Get a Job." Identity theft often takes the form of using false social security numbers, whether or not they belong to others. Generally, valid social security numbers are only given to people lawfully in the United States, from citizens to permanent residents ("green card" holders) to people with temporary visas to tourists. Barred from receiving social security numbers are the legions of immigrants who enter the United States without authorization in the first place (also known as undocumented people), or who overstay their visas without first obtaining a social security number.Â Â One of my high school social studies teachers was fond of saying that one barometer of freedom in a nation is whether the government allows people to emigrate. However, that is a particularly false barometer when immigration laws are so tight in the United States and elsewhere. Nevertheless, the gap between the substantial misery (political, economic, social and otherwise) in so many nations on the one hand and the perceived high standard of living in the United States on the other hand, will continue to lead people to risk their safety, comfort, family ties and national ties to come to the United States whether or not with a valid visa.Â Â Undocumented people will have less motivation to use others' social security numbers if government, financial institutions, and other entities will accept tax identification numbers to identify people (so long as tax identification numbers are freely and unconditionally made available to all by the Internal Revenue Service) for paying taxes, opening bank accounts, obtaining credit, obtaining drivers' licenses, and earning payroll funds, rather than using social security numbers for identity. Unfortunately, every year, social security numbers have been used more often as de facto national identification cards.Â Â Consequently, people sometimes come to us having been criminally charged with using false social security numbers and with related problems. Unfortunately, a conviction for using a false social security number or for purloining others' identity can lead to negative consequences with the immigration authorities.Â Â Jay and I strongly believe that immigrants are key to the success of American society, from today's immigrants to all who have preceded us (including the first nations, who originally came from across the Pacific). For too long, racism, xenophobia, and elitism have guided too much of America's immigration laws and policies. September 11 should not be used as an excuse to allow such an agenda to continue. Jon Katz.

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