

Thursday, February 1, 2007

### **Marijuana is medicine, and can even reverse munchies.**

Image from public domain. Marijuana is medicine. GW Pharmaceuticals is among the business world members confirming as much. Now, ironically, the plant that brought us munchies (and, thus, vital relief to chemotherapy patients who otherwise have trouble wanting to eat and keeping food down) has been re-processed so as to curb appetites in the pursuit of weight loss. As GW Pharmaceuticals' Managing Director Justin Gover tells it: "The cannabis plant has 70 different cannabinoids in it, and each has a different affect on the body." "Some can stimulate your appetite, and some in the same plant can suppress your appetite. It is amazing both scientifically and commercially." More important than helping weight loss, GW Pharmaceuticals also produces the cannabis-based Sativex, which reduces spasticity in multiple sclerosis patients. With all the strong evidence about marijuana's medicinal benefits and with a Democratic-controlled Congress, now is a particularly good time to push for further reform of marijuana both on the medical and recreational use levels. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Wednesday, January 31, 2007

### **When jurors ask witnesses questions: A double-edged sword.**

Jurors have awesome power. (Photo from website of U.S. District Court (W.D. Mi.)). During the ongoing Lewis "Scooter" Libby Bush-Cheney-Plame-gate trial, federal trial Judge Reggie Walton is receiving and asking questions from jurors to ask the witnesses. For instance, as requested by one or more jurors, Judge Walton asked vice president Cheney's former press chief Cathie Martin why she did not stand up to a request to reveal to the press potentially classified information to back up Bush's claim in support of starting a Gulf War II that Iraq was attempting to obtain nuclear material. Ms. Martin apparently testified that this request came from none other than vice president Cheney, "so I didn't know where I was going to go." The CNN online report on the trial says Ms. Martin testified that she "learned that Bush had declassified those portions of the report." However, did she learn about this declassification before or after revealing this information to the press, and did Bush declassify this information for anything other than self-serving reasons? In federal criminal trials, judges have substantial discretion about the extent to which they will permit or prohibit juror-prompted questions of witnesses. *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985) (the parties were not prejudiced by the 95 juror-prompted questions -- half of them coming from the jury foreperson -- but "such juror questioning is a course fraught with peril for the trial court"); *U.S. v. Collins*, 226 F.3d 457, 461-65 (6th Cir. 2000), cert. denied sub nom *Ward v. U.S.*, 531 U.S. 1099 (2001) (addressing the potential prejudice and benefits of juror questions in such terms as complexity of the case and prophylactic measures taken against the risk of prejudice). Juror-initiated questions indeed can be double-edged swords. I think they should only be allowed if the criminal defendant agrees for them to be submitted at all. When judges allow the submission of proposed juror questions, they should be carefully screened by the judge, and should not be asked absent full consultation with the parties. The questions should only be asked by the judge, so as not to give the jury an impression of the extent to which the defendant favors or disfavors or fears the questions. Unfortunately, if a party successfully objects to the asking of a juror-proposed question, this can open up a can of worms with the jury that can spill into the jury deliberation room and that can become the subject of juror questions to the judge during deliberations. If the parties do not object to the juror-proposed question for fear of earning the jury's wrath, then a Pandora's box may be opened for the opponent to ask a slew of prejudicial and damaging questions, to which any objection might be met with a particularly jaundiced eye from jurors. What if a juror proposes a question to be directed to the defendant, who has the absolute right to remain silent, and not to have that silence mentioned at all to the jury? If the judge tells the jury it can propose questions for any witness, but not for the defendant, that just highlights that the defendant is playing by a different set of rules, perhaps unfairly, in jurors' minds. Pandora can play dirty and devastatingly harmful tricks. In a recent rather low-risk Maryland jury trial (a Circuit Court jury re-trial on a driving while impaired charge after a District Court bench trial's guilty finding of the lesser DUI charge (with a maximum penalty of no more than four months in jail)), the judge allowed jury questions. In part due to my client's low exposure to an adverse outcome from jury questions, and his low sentencing exposure, and after weighing the risks and benefits of this approach, I did not object to permitting submission of juror questions, in that jurors can sometimes stew more -- to the defendant's detriment -- over a question not asked than a question asked. Only about three or four questions were submitted by jurors. All but two were innocuous questions. Of the remaining two questions, one of them was a good one, which I was going to bring out through a defense witness anyway (that I was speaking Spanish -- not English -- to my client, so the interpreter's presence was not meant unfairly to beef up our argument that the police officer's exclusively communicating with our client in English amounted to a serious detriment to the prosecutor's proving the case beyond a reasonable doubt). Another juror asked a potentially prejudicial question about my client's background that had nothing to do with the trial, and the judge did a good job at likeably informing the jury that it would need to decide the case only based on the evidence presented at trial (which still may have begged the question to the jury about why this proposed question was not answered in order to elicit such evidence). The jury returned with half a loaf for our client, by finding him guilty of DWI (carrying a sixty-day maximum penalty) and not to have knowingly refused the breath test (carrying another sixty-day maximum penalty, and perhaps underscoring that the jury accepted our arguments about the language barrier and/or about the officer's zeal to have our client sign a refusal to take the breath test before he even arrived at the police station). The Circuit Court judge gave our client no worse a sentence than in District Court, which made worthwhile the risk of a retrial before a jury. I think this whole state of affairs highlights the importance, benefit and justice of permitting lawyer-directed jury selection/voir dire. The lawyer-directed voir dire process at least enables jurors to talk to the parties -- through the parties' attorneys -- without going as far as to let jurors indirectly question witnesses. Jon Katz. **ADDENDUM** Having finished court early on February 1, I visited the overflow large-screen video viewing room for some of Scooter Libby's trial at the nearby federal court. I did not catch any testimony, but instead watched arguments over the admissibility of statements to the press by former White House press secretary Scott McClennan, as part of the prosecution's efforts to counter Libby's contention that some of the president's people were trying to make him a scapegoat, or "throw him under the bus" as his lawyer phrased it. During

that brief forty-five minutes, I experienced nothing earth-shattering. The lead lawyers looked competent; the prosecutor looked like he had some ants in his pants at some points in addressing the judge -- and it was not in reaction to the judge's giving him a hard time, because the judge was not doing that -- but I have no basis of comparison to his demeanor during the rest of this case or elsewhere. In any event, the goal of winning a case is persuasion; so long as occasional ants in the pants do not interfere with persuasion, then it is not an issue. Mr. Libby has lawyers from several large corporate law firms defending him, according to the case docket. Unless his lawyers are working *pro bono* or low bono, his legal bill is huge and mounting. Hourly rates of partners at such law firms often are at \$500 or more. Sometimes less is more; this case does not seem to be complex enough to require so many people at the defense table. Even with his more complex case, O.J. Simpson probably won his criminal murder trial despite having had so many lawyers rather than because of it. In any event, even though I am far from fond of the Bush Administration, I am rooting for Libby to win. This prosecution focuses on his alleged lies about when he learned Valerie Plame was a CIA agent. In any event, as much as I want Bush out of office, I will be more than happy to see Mr. Libby acquitted. His indictment accuses him of lying to law enforcement and the grand jury investigating how and when Valerie Plame's CIA employment status got leaked to the press. I have uploaded the indictment here. So long as the criminal justice system remains as unjust as it has long been, it will be difficult for me to want to see convictions for such alleged crimes. Even if I conclude that Mr. Libby did tell any or all such lies, I still will feel the same. In any event, it is curious that Mr. Libby decided to testify before the grand jury. All court witnesses have the option to take the Fifth Amendment, unless their testimony is fully immunized. Similarly, he had no obligation to talk with law enforcement. In any event, what is done is done. Back to the ongoing Libby trial, for anybody wishing to attend, it is on the sixth floor of the District of Columbia federal courthouse. Camera phones must be checked at the entrance (which is better than the Alexandria federal courthouse, which prohibits all cellphones and palm pilots). The security people tell visitors to remove everything from their pockets before entering a bizarre pod-like area, where they must raise up their hands to be body-scanned. (I have not asked if the scanner leaves any of one's anatomy to the imagination; the security personnel claim the scanner is safe and emits no x-rays, but then again, some doctors in the 1950's claimed health benefits of tobacco). The trial may be viewed in the trial courtroom or in the adjacent overflow viewing room that has a big-screen four-view monitor. People may not enter or exit the main courtroom when proceedings are taking place. I was unable to get a seat in the main courtroom -- although I visited the main courtroom during a break -- because all but two rows had "reserved" or press signs there. However, an employee of the court told me in the hallway that she would try to assure that people knew that five rows were available to the public. The only reporter I recognized was NPR's Nina Totenberg. Meanwhile, here is Valerie Plame's and Joseph Wilson's federal civil Complaint against Libby, Rove and Cheney.

Posted by Jon Katz in Criminal Defense at 01:00

### **Rendering further praise where praise is due.**

Following up on our October 23 blog entry recognizing additions to our support staff (which now totals four), we welcome our new legal assistant Rose, who primarily is assisting me along with Aleida, who joined us in October as a legal assistant. Rose comes to us with previous legal secretarial experience at a local trial law firm, and a warm heart to match that of everyone else at our firm. Although being bilingual is not mandatory for all positions at our firm, all secretarial staff and attorneys have been fluent in Spanish (other than myself, speaking fluent French and proficient Spanish), with Jay Marks also speaking fluent Portuguese on top of his excellent Spanish. Most of Jay's clients are Spanish speakers, and around twenty percent of my clients at any given time speak Spanish and little English. My one semester of college Spanish studies -- enhanced by many years speaking French beforehand and thereafter -- led to my strengthened Spanish conversational skills both with the Spanish being spoken daily by many of our clients over eight years, and two years of appearing with Jay on our 1998-2000 weekly Spanish-language radio show "Legalmente Hablando: Donde su causa es nuestra causa" ("Legally Speaking, where your cause is our cause"). It is a given for us continuously to recognize and appreciate the efforts and accomplishments of our staff. Our staff members are a critical part of what our law firm is all about. Jon Katz.

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

Tuesday, January 30, 2007

### **Defending against drug-usage-based probation violation charges.**

The United States has gone drug-testing mad. (Image re-posted under the terms of the GNU Free Documentation License.) Probation and parole violation charges often include allegations that the defendant submitted one or more positive drug tests (usually involving a urine test) or that the urine was presumptively positive for drugs if the defendant was unable to produce a glass of urine (which often can reasonably be ascribed to physical health or diet issues, and more often to performance anxiety, particularly if the probation agent is standing behind the defendant to assure the defendant is not trying to submit someone's clean urine sample; at least one psychological study found that people have more trouble starting to urinate when someone is standing nearby). Here are a few ideas for defending against allegations of dirty urines: - Consider issuing a subpoena to obtain all documents (including notes, procedural rules, and certification of the materials used and the person analyzing the urine) and everyone related to the urine tests. - If a dipstick test was used, then a further test needs to be done for accuracy. Some probation offices do not save the dipstick nor urine sample for the defendant to re-test. Such disposal may be sufficient grounds to suppress the urinalysis. - If the urine was tested by a chemist, the defendant can challenge chain of custody of the urine, the testing methods used (including whether the urine got contaminated with other people's urine or other substances in the lab), and the qualifications of the tester. - In Maryland, the drug test results do not come into evidence without live chemist testimony at a hearing to revoke probation or work release where the defendant demands the chemist's presence to testify at least five days before the hearing. Md. Ann.Code, Cts. & Jud. Proc. art. § 10-914. - Toxicologists can be key witnesses and consultants on this. One place to look is <http://www.markskatz.com/criminalexerts.htm>. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

### **Rev. Robert F. Drinan leaves the planet.**

Robert F. Drinan, S.J. (From the public domain). Human rights activist and lawyer Robert F. Drinan, S.J. died this past Sunday. His vision of justice was uncomplicated and determined. He served ten years in Congress, and it took a direct Papal order against priests serving such posts for him to leave Congress. His political views on such issues as abortion and birth control apparently deviated very much from the Vatican's. I met Father Drinan a few times, starting with his talk at my Amnesty International chapter twenty years ago. He seemed to have no ego, and was very approachable. He was a very engaging speaker. Even while in Congress, Father Drinan lived a simple life in a simple room in Georgetown University's Jesuit community, sounding the simple and essential call to protect human rights. Jon Katz. ADDENDUM: Here is Colman McCarthy's excellent January 30, 2007, piece on Father Drinan.

Posted by Jon Katz in Jon's news & views at 00:15

Monday, January 29, 2007

### **Chemist reports are testimonial hearsay evidence under Crawford.**

Chemist reports are hearsay evidence. (In the public domain). Last month, the District of Columbia Court of Appeals held that a drug chemist's report -- for drug prosecutions -- is testimonial hearsay evidence that generally requires the chemist's live testimony to be admissible in evidence. *Thomas v. United States*, 914 A.2d 1 (D.C. 2006). The Court of Appeals upheld the provision of D.C. law requiring a defendant to file a written demand with the prosecutor for the presence and testimony at trial of the drug chemist, apparently to prevent unnecessary time burdens on drug chemists. The Court focused on the importance of assuring that failure to file such a demand not be the result of a mere passive waiver. The defendant here did not timely demand the presence of the chemist, which was the sole reason the court did not find the matter preserved for appeal. Thomas has substantial implications for neighboring jurisdictions that attempt to reduce the instances of chemist and breath technician testimony, absent a subpoena to testify. For instance, District of Columbia law requires a drunk driving defendant to make a sufficient written showing about the need for the presence of an alcohol breath technician at trial, or to subpoena the officer. The first activity might be deemed sufficient if it were to lead the prosecutor's obtaining the officer's presence in court. However, the second activity (serving a subpoena on one or more law enforcement personnel), likely will not be deemed sufficient under Thomas, particularly when considering that it is far from a simple task for a defense lawyer to convince a police officer to accept service of a witness subpoena. Were Thomas to apply in Virginia, which it should, this would result in the invalidation of Virginia's laws that make the drug chemist's report and breath technician's results admissible in evidence absent the defendant's issuance of a subpoena to testify. Virginia goes one step further by making field tests of suspected marijuana admissible into evidence at trial unless the defendant successfully files a motion to have the suspected marijuana tested. If Thomas applied in Maryland, Maryland's approach of requiring defendants to give advance written notice to produce the chemist or breath technician likely would be considered sufficient under Thomas. However, for drunk driving cases, one of the early questions would be whether Crawford will categorize as testimonial hearsay the certified records certifying the breath testing equipment as sufficiently operating. This sounds like testimonial evidence to me. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:15

### **Alice Coltrane leaves the planet,**

Last year, Alice Coltrane performed around the country for the last time. (From the public domain). On November 16, 2006, I blogged about the late jazz legend John Coltrane. I wrote about the ways I seek inspiration to prepare my clients' cases, and how John Coltrane created his masterpiece *A Love Supreme* after spending a long time in a little-used area of his new house. Sadly, Alice Coltrane -- who was married to John Coltrane for a few years, until his death -- passed away two weeks ago. Alice Coltrane -- also eventually known for many years as Swamini A. C. Turiyasangitananda -- was a very talented musician, and was devoted to Eastern spirituality. More about Ms. Coltrane is here. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:30

Sunday, January 28, 2007

### **Defending alleged prostitutes and their customers.**

Amsterdam's red light district. (Released into public domain by photograph's creator, Bjarki Sigursveinsson). Here are some thoughts about defending against prosecutions of prostitution other than street-level prostitution. Some of these ideas also apply to defending alleged street-level prostitution cases. In defending escort prostitution cases, it may be helpful to obtain information about the area's hobbyist (consumer) and provider (prostitute) culture. Resources to check out include <http://www.bigdoggie.net> and <http://hips.org> (I am a former board member). I understand it is very common for hobbyists and providers to try to minimize arrests and convictions by using euphemisms for services sought and provided (e.g. "speaking all languages") and by leaving payment in an envelope on top of a table, rather than mentioning it. Then, an available argument to the criminal defense lawyer is that the money was paid for the escort's opportunity cost of spending time with the customer rather than being elsewhere, that sexual activity was not part of the consideration for payment, and that there was no prostitution even if there was the hope that the escort might be attracted to the customer and be interested in sexual activity. To buttress this argument, escorts do exist -- possibly the majority -- who do not provide any sexual or physical contact at all. I have seen one weekly newspaper that boldly proclaims "non-sexual" in all ads for escorts, which might become a factor in defending a prosecution for someone hired or hiring from such an ad. I take it that embarrassment contributed to the 1995 dismissal of the sting prosecution in Howard County, Maryland, against some workers at a massage parlor who some undercover cops permitted not only to masturbate them, but apparently to do it to completion, which means such police truly were mixing business with misplaced pleasure. See an article on this scandalous mis-use of police resources here. Not heeding the lessons of this Howard County embarrassment, Spotsylvania County, Virginia, detectives, nevertheless pursued a sting of massage parlors through early 2006 by paying for and accepting sexual favors. At first, county Sheriff Howard D. Smith and the county's chief issued a press release backing up such skin-to-skin stings, claiming, according to the Washington Post, that "detectives needed to go beyond striking verbal deals of sex for money because the 'masseuses,' whom they called 'illegal aliens,' spoke little English and Virginia's prostitution laws require more than 'mere touching' to make a case." As an aside, why would the county's chief sheriff and chief prosecutor use the demeaning term "illegal aliens" rather than "undocumented persons", and why would they not give a person the benefit of the doubt about whether they are in the United States with lawful immigration status, particularly when the immigration laws are so complex that many immigrants are not sure of their immigration status? Moreover, why did these men even address the suspects' immigration status unless they are applying unjust and unfair discrimination? Let us leave immigration law enforcement to federal authorities trained in immigration law enforcement (which is not automatically to say that they do not often bungle and trample on the Constitution, because many of them do). Four days after the Washington Post covered the Spotsylvania County prostitution sting, public heat and laughter and ridicule ran high, and the sheriff suspended having detectives accept sexual favors in their prostitution investigations. Sheriff Howard D. Smith said: "I thought I was doing the right thing." Before his White House tapes were released, so did Nixon. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

Friday, January 26, 2007

### **"It took a few people willing to risk everything."**

Andrew Goodman, James Chaney, and Michael Schwerner. Murdered for registering African-American voters in Mississippi. (Government photo). When I learn more about people who have courageously stood up for justice at great personal risk and cost, I am reminded why I joined and remain a member of the National Lawyers Guild, despite some of my fierce disagreements with the group (see here and here). This is the only lawyers group I know of that few if any people join to burnish their resumes, but that they join with a strong, and usually fierce, devotion to justice as they define it (even though my sense of justice is not going on a mission to North Korea without at least confirming to the government that the visitors still have strong reservations about the nation's human rights abuses). Thanks to the Guild's home office for informing listserv members that courageous civil rights activist Mendy Samstein has passed away. I do not remember hearing about Mr. Samstein before, and know that the Guild is one of the best lawyers/legal workers' sources for learning about the civil rights movement; many of its members have deeply devoted themselves to the civil rights movement. As covered in his New York Times obituary, among his many civil rights activities, Mr. Samstein organized hundreds of college students, most of them white, to register black voters for the Mississippi Summer Project in 1964. Today, registering minority voters no longer is dangerous nor controversial; people like Mr. Samstein made this current reality possible. Mr. Samstein survived a 1964 bomb blast of a house in Mississippi. After seeing news footage of Mr. Samstein crawling out of the rubble, Abbie Hoffman was inspired to join the voting registration campaign in the South. The violence against Mr. Samstein continued, including being beaten by police at a stoplight. In 1966, he told an interviewer: "I curse this country every day of my life because it made me hate it, and I never wanted to." Civil rights activist Bob Moses recently told Mr. Samstein's family that the 1960's civil rights achievements in Mississippi were not obtained by huge numbers of people. "It took a few people willing to risk everything." Achieving justice demands such sacrifices. Jon Katz.

Posted by Jon Katz in Jon's news & views at 12:00

### **Nixon's man who "knows too damn much" dies.**

Do you need a Bay of Pigs invasion? Call this man. How about breaking into the office of Daniel Ellsberg's psychiatrist? Call this man. Time to wiretap the Democratic National Committee offices? Call this man? Now this man -- E. Howard Hunt -- has died, as have so many other Watergate figures, including Nixon. Hunt lived the life of a government operative outside the law, and his boss Nixon was a master at operating outside the law. One difference between the two of them: E. Howard Hunt spent thirty-three months in prison for Watergate, while Nixon received a pre-emptive pardon against prosecution. E. Howard Hunt: Even he was entitled to a zealous criminal defense. Shortly after the Watergate break-in -- which actually consisted of a first break-in to install wiretaps and a second to remove them -- Nixon recognized that "This fellow Hunt, he knows too damn much." Nixon went down two years later, when Hunt already was serving his thirty-three month prison sentence. As Watergate figures get older, and die, the Watergate office, hotel and co-op apartment complex still stands. The 1967-built Watergate's design is strange, as if the architects had a warped vision of a futuristic building to come. As I understand it, the break-in took place in what for over a decade has been a non-descript-looking orthopedic surgeon's practice which I have twice visited. From my understanding, no plaque, marker, or other indicator designates the spot; there is rent to be charged. I have seen at least three of the key Watergate figures. Four months before his downfall, I saw Nixon entering the Washington Hilton for a news conference or other gathering, on my first visit to the city. My parents bumped into Dick and Pat fourteen years later, and Nixon cheerfully gave his autograph for me and my brothers, with his "Best wishes." Around ten years ago, I saw G. Gordon Liddy conferring with someone in the hallway of the old courthouse in Upper Marlboro, Maryland, several miles down Pennsylvania Avenue from the White House. He seemed pleased to have been recognized; he was powerless, so there was no reason to tell him my unsolicited view on his role in Watergate. Then, a few days before Bush II launched Gulf War II, I went to an anti-Gulf War II demonstration. At the nearby Mall area, I saw the most important of the Watergate figures I have seen: Carl Bernstein. To him and Bob Woodward, I owe limitless thanks. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, January 25, 2007

### **Physical pain arising from internal pain and anger.**

Â Rage all around us: "The Rage of Achilles" by Giovanni Battista Tiepolo.Â Numerous times I have talked about the importance of relating wellÂ with our clients. Â In that regard, recently, I learned aboutÂ John E.Â Sarno, M.D., who is a Professor of Clinical Rehabilitation Medicine at New York University. Dr. Sarno believes that most back pain is rooted in psychology rather than in physiology, and calls this situation tension myositis syndrome (TMS). He also believes that TMS may also be the cause of various other pain disorders. Dr. Sarno says that the brain causes TMS to protect "you from the unconscious rage and other bad feelings you might have."Â I know someone -- whom I trust very much -- who has benefited tremendously from Dr. Sarno's teachings. Â Dr. SarnoÂ says that: "One reason why I've concluded that we all have rage inside of us is because there are other 'equivalent' physical states that seem to be serving the same psychological purpose -- conditions that are analogous to back pain. I'm referring to [gastroesophageal] reflux, which is very common; irritable bowel syndrome; headaches; common allergies; hayfever; and asthma. I'm referring to common skin disorders like eczema and others. The skin is a great area that the brain uses to create symptoms. These conditions all serve the same purpose: to keep one's attention focused on one's body."Â While I have long known about the interrelationship between physical health and mental health, Dr. Sarno more closely relates physical pain to internal rage and anger than I ever had thought possible. If Dr. Sarno's views are accurate and are not exaggerations,Â this raises a question about (1) the extent to which clients' physical ailments will tell trial lawyers additional information to help us relate to our clients -- and for judges and juries to relate to our clients -- beyond exploring only their psychological backgrounds, experiences, and psychological feelings, and (2) whether a medical expert will sometimes be beneficial to help achieve such an understanding. IfÂ some clients' physical ailments may be masking their addressing some of their rage and anger, then they may not even know enough about their rage and anger to relate it to their lawyers. Â The jury is out about how Dr. Sarno's findings might assist me in better relating to my clients,Â I plan to report back after reading his books.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, January 24, 2007

### **The Constitution is more valuable than gentility.**

Chief Judge Robert M. Bell dissented that George Junior Spry's taking twenty minutes to disperse did not constitute disorderly conduct. "The Constitution is more valuable than gentility." However, courts repeatedly uphold police efforts through the disorderly conduct laws to enforce gentility and public obedience to police. A recent example is *Spry v. Maryland*, No. 42, Sept. 2006 Term, \_\_\_ Md. \_\_ (2007). In *Spry*, all judges of Maryland's highest court, except for Chief Judge Bell, affirmed a disorderly conduct conviction for a man due to his taking twenty minutes to disperse after being told by the police to disperse. The man finally dispersed, yet, the next day police arrested him for disorderly conduct after he did not disperse quickly enough for their taste. Chief Judge Bell confirmed that the disorderly conduct law does not include a provision showing the amount of time a person may take when a police officer lawfully orders the person to disperse. Kudos to Judge Bell for dissenting. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, January 23, 2007

### **Collective memories must be sharpened and broadened to stop injustice.**

U.S. government photo. Napalm was one of the horrors of the Vietnam war. Here is the horrifying picture of Kim Phuc and other villagers after a napalm attack. Here are Kim Phuc's resulting physical scars. The vast majority of American soldiers in Iraq, Afghanistan and elsewhere not only do not recall the countless American military atrocities in Vietnam as they happened, but were not even born yet. What a splendid way for the military to have recruited with a cleansed slate on Vietnam, let alone the invasions of Grenada and Panama, and the list goes on. Rambo's asking his father if "we get to win this time" in Vietnam probably is better known by those under forty than the horrors of My Lai and mini-My Lais. Enter former Senator Gary Hart to remind us how critical are our collective memories at this time of civil liberties violations that approach and probably collectively exceed the civil liberties violations during the 1950's Communist witchhunts. His words are tremendously sobering in this December 2005 piece about the Bush Administration's continued reversal of the many post-Nixon Congressional efforts to reign in executive branch abuses committed in the name of national security. Mr. Hart's 1980's Donna Rice scandal makes his words no less important to heed. Mr. Hart's short article particularly drew my attention to the CIA's Phoenix program in Vietnam, in which American soldiers captured and killed countless innocent Vietnamese based on information from South Vietnamese army officers and village chiefs, where sometimes the finger-pointing was to settle a private score and had nothing to do with fighting the perceived "enemy" of the American military. In December 2003, investigative journalist Seymour Hersh wrote about the Phoenix Project and its relationship to today's covert United States intelligence operations in Iraq. Much of his piece still rings true today. One of my best friends -- who, like me, was obsessed from an early age with the world's injustices and who was determined to change that -- talked to me during law school in 1988 about how complacency (and fear for job security and social status security) was so prevalent at the expense of activism for justice. Since that time, with some people spurred on in part by the subsequent recession and wars, plenty of people are refusing to be complacent and are speaking out for civil liberties and human rights. Let us remember that today's injustices from government officials, employees and legislators in the United States come from all over the political spectrum. It will be a terrible mistake to expect that merely replacing Bush with a Democrat will automatically make the United States a civil liberties paradise. The Internet -- despite all the disinformation among the reliable facts on the Web-- has made it easier than ever to learn about past injustices so that they not be repeated. Jon Katz. **ADDENDUM:** More on the Vietnam atrocities are found through the Winter Soldier Investigation [here](#) (text); [here](#) (Winter Soldier Investigation video); [here](#) (part one of Winter Soldier Investigation excerpts); and [here](#) (part two of Winter Soldier Investigation excerpts).

Posted by Jon Katz in Jon's news & views at 01:00

Monday, January 22, 2007

### **Standing "with with our noses almost touching."**

Anwar Sadat, Jimmy Carter and Menachem Begin sign the Camp David peace accords (1978). In late 1992, I took a detour driving back from Florida to Washington, DC, to visit Plains, Georgia, because I was still fascinated with Jimmy Carter -- warts and all -- who returned to Plains after his presidency. As luck had it, I met President Carter briefly, as he left the annual December 31 barbecue lunch at the back of a downtown store. He seemed in a hurry, so we had little more than time for a brief chat and his suggestion to take a photo, so that he could move on. This man whom so many characterized as a weak president has long been a very strong and no-nonsense man, including his apparent penchant not to spend too much time eating barbecue on December 31. He appeared to many to be a weak president, in large part due to some fierce fires that started and raged during his presidency, including runaway inflation and interest rates, the hostage crisis, and the energy crisis. Offsetting that were his smashing success obtaining the historic peace accord with Egypt and Israel and his putting human rights closer to the front-burner of presidential affairs. After leaving office, Carter has had substantial successes bringing fierce opponents to the negotiating table and inspiring everyone to work for the poor and for social justice. I have not yet reached a conclusion about his recent and controversial book *Palestine Peace Not Apartheid*, but will have one once I have obtained and read it. A former military professional, Carter probably avoided committing troops to battle (aside from the failed attempt to rescue the hostages) more out of substantial restraint and caring for peace and world justice than out of any fear of going to battle. In the January 2005 *Esquire*, Carter said: "The hostage crisis lasted almost a year. Most of my political advisers were urging me to launch an attack against Iran. I could have, in effect, destroyed Iran with one strike. And it would have been politically popular to do so. But in the process, I would have also killed thousands of innocent Iranians. And it would have undoubtedly resulted in the execution of our hostages... My family tied me back to the human element in the most important international, diplomatic and military decisions I had to make. And in the end, I was thankful that although my profession was that of a military man - commander in chief of the armed forces, prepared to defend my nation with maximum force if I had to - I was able to go through my entire term in office without firing a bullet, dropping a bomb or launching a missile." This past Saturday, I heard President Carter emotionally relate how he convinced Anwar Sadat to reverse his decision to leave Camp David in mid-negotiation. This situation relates to my criminal defense practice in highlighting that any interest in being popular must take a backseat to the interests of a criminal defense lawyer's clients, and how criminal defense lawyers must always walk around with sharpened proverbial weapons ready in their backpockets just in case. About one week into the 1978 Israel-Egypt peace negotiations at Camp David, Egyptian leader Anwar Sadat prepared in midstream to return to Egypt. Carter relates that after kneeling down and praying, he went to Sadat's cabin and told everyone to leave. In the context of a personal friendship between the two men and a connection between their respective children: "Sadat and I stood with our noses almost touching," and I told him that he had betrayed me and betrayed his own people and if he left our friendship was severed forever and the relationship between the United States and Egypt would suffer." Sadat stayed -- maybe he would not have stayed had the availability of American economic and military aid not been at risk -- and the parties signed a peace treaty twelve days after the talks began. Carter's no-nonsense approach with Sadat -- mixed with his caring and perceptiveness -- carried the day. Similarly, successful criminal defense also repeatedly calls for a similar approach. Another lesson I learned from this period in history is from the first meeting in 1977 between Begin and Sadat in Israel. I watched on television as they emerged from their meeting and optimistically confirmed that at least they had agreed to be able to disagree. When an opposing prosecutor tries giving me grief about a proposal I make to negotiate a settlement or about proceeding to trial, I sometimes suggest that we approach the matter in a similar vein to Begin and Sadat's agree-to-disagree approach. Sometimes, when all else fails, a firmer approach than that is needed in dealing with opponents when they act unreasonably. Jon Katz.

Posted by Jon Katz in Persuasion at 01:00

Sunday, January 21, 2007

### **A farewell to Art.**

Art Buchwald. Art Buchwald left the planet last Wednesday. I read his columns from time to time, and found him good-natured with a joie de vivre. I later learned that he suffered from clinical depression, but he kept writing his columns, right through last month. He was well liked, apparently more for himself and the way he liked so many people, than for his columns or fame. Mr. Buchwald probably had the ability to use a sharper tongue. By being more warmly humorous than caustic, he probably got his views across more effectively to more people. Perhaps both types of political observers are needed: those to whom a large cross section of the public will listen, and those who will use a sharper pen to more pointedly rally like-minded people and some who are on the fence. I admired Mr. Buchwald, and very much enjoyed bumping into him one day near his office, which was near my law school. He was good-natured then, too, and gave me the time for a short chat. I next heard him speak at a reception for a human rights organization. The third and final time I saw him was at a local bookstore around eighteen months ago, where he was scheduled to speak. Unfortunately, I arrived late, and he was slowly walking out. I said hello, and he said hello back, sounding weak; I don't know if it was the late hour, his general health, or both. He once joked that although he had contemplated suicide before, he was concerned that another more famous person would die the same day and bump his passing off the front page of the New York Times. I did not check whether he got on the New York Times's front page last week, but he certainly is on mine. Jon Katz. ADDENDUM: "Hi. I'm Art Buchwald and I just died." Art Buchwald's video obituary on the New York Times's site, where he hopes that, after his death, "everyone would say what a wonderful guy I was."

Posted by Jon Katz in Jon's news & views at 01:00

Friday, January 19, 2007

### **Aiding and abetting theft is deportable.**

Cesar Chavez: A champion for the empowerment of workers and immigrants. Since the beginning, photographic tributes to Cesar Chavez and Martin Luther King, Jr., have been prominently displayed in our law firm's reception area, giving us continued inspiration to keep fighting for justice and the underdog. Our law firm strongly opposes the government's draconian laws enabling deportation for even the most petty, wrongfully-decided against the innocent, ancient, and first-time offenses. Defending non-U.S. citizens in criminal court often presents a minefield of risks for the defendants' immigration status. I neutralize and dilute many of these mines by working in tandem with our immigration law partner Jay Marks. My basic outline on this issue is here. The value of a green card/United States permanent residency, versus obtaining citizenship, has diminished substantially with the many convictions that bring immigration risks, and the reduction in various social services available to green card holders that are available to United States citizens. Convictions frequently even strike the innocent, both through wrong guilty findings by juries and judges (let alone from wrongful arrests and prosecutions), and by guilty pleas entered not because of guilt, but to avoid much harsher outcomes at trial as a result of lying snitches and other lying witnesses, mis-identification, and the list goes on. Confirming this risky criminal-immigration minefield is the Supreme Court's January 17, 2007, holding that aiding and abetting theft is deportable. The case is *Alberto Gonzales v. Duenas-Alvarez*, No. 05-1629, 549 U.S. \_\_\_ (Jan. 17, 2007). Many convictions of the innocent result from people being in the wrong place at the wrong time without having committed a crime at all. For instance, it is no crime to be a passenger in a stolen automobile without knowing that the car has been stolen, but, in such places as Maryland, it is a crime to be in a car with knowledge that it is stolen. Md. Crim. Code Â§ 7-203. Such a law is ripe with risks of wrongful arrests and convictions of passengers who do not know the cars are stolen, by juries and judges wrongfully inferring the passengers' knowledge of the theft. A passenger's innocent presence in a stolen vehicle also risks a conviction for stealing the car or for aiding and abetting the theft of the car. The Supreme Court's *Duenas-Alvarez* decision enables deportations for convictions for aiding and abetting theft. How do we end the injustice of wrongful convictions and deportations even for a fifteen-year-old conviction for stealing a dictionary from Borders? This can only be done through a multi-pronged approach of changing people's attitudes (please start learning, talking and writing now), insisting that our legislators reform the laws accordingly, insisting that our federal and state executive branches of government administer the criminal and immigration laws more fairly, reforming the entire criminal justice system, and bringing voter referendums for legal changes to improve the whole situation. A modest proposal? Jon Katz.

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

Thursday, January 18, 2007

### **Humanizing criminal defendants.**

Courtesy Sunwolf: A criminal defense lawyer's criminal defense lawyer, showing lawyers the powerful path to humanizing our clients, through storytelling, kindness to all, summoning our inner magic, and a reminder that "reality is no obstacle." When I started practicing criminal defense over fifteen years ago, a repeated theme during training and trial seminars was the necessity of humanizing our clients to juries and judges (and prosecutors, when trying to negotiate the resolution of a case), lest they be mistreated as nothing but numbers or statistics. Many prosecutors and police -- and sometimes probation and parole agents -- repeatedly try to dehumanize criminal defendants, and crushing court dockets often add to the dehumanization by courts' constant processing of criminal cases, rather than focusing on each criminal defendant on an individual basis. Many lawyers -- sometimes due to public defender offices with client loads too high and resources too low, private lawyers relying on court-appointed fees in jurisdictions that grossly underpay, and private lawyers accepting too many clients than they can effectively defend (the goal must not be to line one's pockets but to serve one's clients) -- have serious resource handicaps being able to humanize their clients. Some lawyers have psychological barriers to humanizing their clients; if they cannot overcome those barriers, they should not be practicing criminal defense. If criminal defense lawyers will not humanize their clients, nobody else will. The starting point is to want to care about and humanize one's client. If the criminal defense lawyer and client have walked very different paths in life, the lawyer ultimately needs to take a crash course and then a longer-term course not only in relating well with the client -- and assisting the client in relating well with the lawyer -- but in helping the judge and jury relate with and identify with the client. A critical ingredient of all this is to spend time with the client face-to-face, to immerse oneself to understand one's client, and to walk in the client's shoes. Patience often is a critical ingredient in the mix. When plotting my transition into criminal defense and away from a corporate law firm, I attended the mandatory training session for new court-appointed criminal defense lawyers in Washington, DC. The trainer was -- and still is -- a seasoned, excellent, and caring criminal defense lawyer. He has been one of my role models for connecting and relating with clients. Even if he had not financially and personally struggled himself, somehow he had become able to enter his clients' minds, souls and bodies so well that he felt instinctively what it was like to be his clients. I was on the path to bridging gaps in relating to indigent clients, when I had not experienced indigency nor other serious personal crises myself, short of such self-imposed deprivations as living in a tiny closet of an apartment in New York City, which hardly fit the bill. At one point, the training lawyer told us about being assigned to defend a man who was arrested in the act of sexually defiling a person's corpse, and was prosecuted as the alleged murderer. He said that if there is ever a time when a criminal defense lawyer knows whether s/he's cracked up to defend any criminal defendant without limitations, this is such a time. This gave me cause for pause at the time about whether there might come a time that I would feel unable to defend a client who very likely committed indescribably heinous violence. (With that experience in mind, it is folly to believe that jurors always acquit merely because they have reasonable doubt rather than substantial doubt that the defendant committed the alleged crime). However, that thought came when being on the outside of the criminal defense practice looking in. Moreover, I felt so committed to helping to equalize the quality of criminal defense provided to indigent clients as to paying clients that this goal -- but certainly not this goal by itself -- assisted helping me look well beyond such concerns about defending people accused of heinous violence, even when it seemed clear that the client had done the alleged act. With the help of such role models as this indigent defense trainer, I never hesitated for more than a moment about defending people charged with unspeakably despicable acts. One despicable accusation that particularly stands out of for me involved my defense of a man who had been convicted a few years before of breaking into his grandmother's house and raping her: I obtained a reversal of his conviction due to faulty jury instructions and defended him through the final resolution of his case. Before beginning my criminal defense practice, I would have struggled profoundly about defending this man had I thought he committed the alleged crime. By the time I started defending him, I was able to look at the bigger picture of the struggles that he experienced that would have led him to rape his grandmother, if he had indeed done that, without losing sight of the horrible crime he was alleged to have committed. Another man I defended was accused of burglarizing a woman's house, and locking her in the closet to keep her out of the way (rather than to kill her), where she stayed until she died of dehydration. Then, I have defended people accused of some of the most unspeakable rapes and sexual assaults. The list goes on. It is not enough intellectually to want to represent criminal defendants. If one's heart is not into helping the client, the client suffers. As another early criminal defense teacher admonished: "Love your client." "Even if your client smells, love your client, and stick close to your client." Who else will? Idealism may help pave the way to successfully defending criminal defendants, but nothing beats connecting with and caring about them, and developing the skills and experience necessary to successfully fight for them. Although it was but a movie, Joe Pesci in the title role in My Cousin Vinny exemplifies that caring is more important than idealism when it comes to criminal defense; otherwise, he would not have won his cousin's murder trial. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

Wednesday, January 17, 2007

### **What can trial lawyers learn and apply from Gandhi, MLK, and the Dalai Lama?**

An angry litigator is a weakened litigator, just as an angry competitor is a weakened competitor. Not many people would get angry at the tiger making the attack. However, the main reason that people get angry at other people's viciousness is feeling disappointed, at the very least, that the opponent does not appear to give a damn about fairness and justice. We fight more effectively once we eliminate anger -- which usually is rooted in fear and pain -- although eliminating anger is much more easily said than done. Many competitors make it a point to rattle their opponents with anger, discomfort and confusion. A trial lawyer once told of an opposing lawyer who, while making a point to the judge, walked right over to the lawyer's table, paused, and walked away. A second later, the lawyer smelled that his opponent had intentionally let loose some toxic flatus. Not only did the lawyer not get angry, but he did something that flabbergasts me to this day -- they became law partners. Another trial lawyer related a bench conference where the opponent objected to the lawyer's trial exhibit and started writing on the exhibit while objecting. In the non-legal context, a well-known basketball player got the notion that college rules allowed him to pull on the leg hair of his opponents, and he intentionally did this to rattle them. Another athlete told of never washing his wrestling clothes, so that the opponent would think twice about keeping a grip on him too long. The list of unfair lawyer and competitor tactics is limitless. For a lawyer, the case is not about winning against the opponent, but is about convincing the decisionmaker. When a lawyer lets anger overtake the lawyer, it can be as futile as the scene in "Jaws" where the shark eats its own guts that have been slit open, because that is the shark's nature. Conversely, how is a lawyer to handle causing anger in an opponent? From time to time, some lawyers will caution against doing things that will "piss off" the opponent. However, that is just the start of the analysis. A lawyer's goal should not be to anger the opponent. On the other hand, sometimes a lawyer cannot avoid such a result while simultaneously effectively representing the client. If an opponent exclaims surprise or anger that I am doing something so aggressively as to be causing the opponent a lot of hassle or anger, sometimes I will inform the opponent that my doing otherwise is disserving my client. This issue follows me everywhere. I can only keep my anger on the sidelines by being mindful of the whole situation. This concept of being mindful of anger is underscored by Claude AnShin Thomas, who became a mendicant Buddhist monk years after killing hundreds of people in Vietnam. I met Mr. Thomas nearly two years ago during his speaking tour, and was taken by his dual approach of not denying or suppressing the anger that he still lives with -- which for quite some time led him to soak himself in drugs, alcohol, and sex -- but also doing his best to dissipate and reduce the pain and anger. When he is about to get angry, he accepts the feeling, but tries to dissipate it by focusing on his breath and on the sound of a bell, which I suppose helps get him back to concentrating on his breath and calm rather than on anger. If Mr. Thomas, who experienced and caused so much pain, death and misery can find a way to dissipate his anger, his message is that just about everyone else has the capacity to do it. When one faces a fierce opponent, one approach is to move beyond one's reaction to the opponent, to what the opponent is experiencing. This is a psychodramatic approach. Ram Dass added humor to the mix when describing his view of George W. Bush three years ago. Rather than expressing anger or upset, Ram Dass joked that Bush must be going through a difficult reincarnation. The difficulty continues. On my path towards eliminating anger, I try following the Dalai Lama's approach of talking to everyone the same (as, apparently, did my hero Justice William J. Brennan, Jr., who "treated the Court's janitors with as much respect as he did his fellow justices"), ideally to do it as kindly as I talk to my son or my most valued teachers. How often do we say and do things that hurt the ones we love the most? If I have trouble doing this all at once, I start doing my best to apply this approach of the Dalai Lama with my loved ones and friends; then with the people with whom I work; then with those who are not my opponents; then with strangers; then with judges; and then with opponents. By taking this gradual approach, it is easier to feel natural talking kindly to opponents when I am already talking kindly with everyone else. The Dalai Lama calmly sits with a man struggling with his reincarnation. In public domain. Jurors appreciate the kind approach, which should not be mistaken with a weak or passive approach -- even if we need to keep proverbial knives and daggers in our back pockets as a backup -- because they then focus on the lawyer's words, rather than being preoccupied with where the lawyer's anger and self-control boundaries lie, and rather than getting irritated at the lawyer for expressing anger. How, then, does a lawyer express passion for the client's cause without expressing anger, since it can be hard for a juror or judge to get passionate for the client if the lawyer does not feel the passion? Ideally, if the lawyer feels the passion, the passion will shine, not only in the lawyer's delivery, but also in the lawyer's preparation and absorption in the client's cause. I suppose this is how the Dalai Lama, Martin Luther King, Jr., and Gandhi live/lived every day: fully passionate about their causes, but refusing to let anger overtake them, despite the misery suffered by so many people around them. While I have learned much about these three human powerhouses, I have much more to learn about what happened in each of these men's lives to make them able to reach such a place, and to learn how I and others can get there, as well. Jon Katz.

Posted by Jon Katz in Persuasion at 02:00

Tuesday, January 16, 2007

### **Decapitation by Iraq's official executioners.**

Death penalty: Always unjust. Â Saddam Hussein's half-brother was decapitated this past Sunday morning, when his executioners failed to set the rope length sufficiently commensurate with his size. Â Of course, all execution is brutal, not just this one. This siteÂ shows gruesome video and photos of Saddam Hussein's wounds from his hanging, and this video showing Hussein being hanged is gruesome enough as is. Â Hanging is a brutal and inhumane legacy continued from Saddam Hussein's brutal regime. Jon Katz.

Posted by Jon Katz in Jon's news & views at 01:00

### **Marijuana not a gateway drug; and more from Amsterdam and Vancouver.**

Image from public domain.Â In my ongoing support for marijuana legalization, hereÂ are some more information and insights: Â 1. The Marijuana Policy Project's Bruce Mirken, cites to twoÂ recent studies further debunking theÂ claim that marijuana use in and of itselfÂ leads to the use of more harmful drugs than marijuana. Â One of the reports is available for purchase online: "Predictors of Marijuana Use in Adolescents Before and After Licit Drug Use: Examination of the Gateway Hypothesis." The other report I could not find online. Â 2. Amsterdam has long been a marijuana-smoking haven. However, this Alternet article reports that the number of marijuana-serving coffee shops in the Netherlands is significantly decreasing as licenses for such shops have become harder than ever to obtain.Â This points out that the fight for marijuana legalization is never-ending on a worldwide basis. Â 3. Closer to home is Vancouver's mix of marijuana reform and retrenchment, and efforts towards various drug decriminalization measures. Â Vancouver provides a model for electing politicians who will focus away from law enforcement in the fight for drug harm reduction, and for pursuing such policies now from the halls of government and outside those halls, rather than just talking about them at conferences or in policy papers.Â A good start to reviewing Vancouver's drug decriminalization approach is this December 2005 article from the Drug Reform Coordination Network. The Vancouver government is pursuing a "Four Pillars Drug Strategy" that addresses drug prevention, treatment, harm reduction, and law enforcement. Vancouver's drug policy program is addressed further here. Â On my only visit to Vancouver (where I saw Roger Daltrey in a hotel lobby, which by itself made my whole trip worthwhile), just one month before September 11, I learned that a bar I visited had a glass-enclosedÂ room for buying, selling, and smoking small amounts of marijuana; (not firsthand) thatÂ sex-selling off-street escorts were legal or at least not prosecuted (which appears to be the norm throughout Canada); and that junkies injected themselves in broad daylight on the edge of Chinatown (which I learned on following the wrong path to a Buddhist temple, seeing a crazed junkie stab a syringe into his palm, and getting as far away as I could, lest he try to stab me). Â 4. Claiming not to be Canada's southern Big Brother, in 2003, the U.S. drug czar's special assistant David MurrayÂ reacted to aÂ Canadian plan to decriminalize marijuana by invoking -- according to the CBC -- "images of tie-ups at border crossings and intense bureaucracy." It appears from here and here that drug decriminalization legislation still has not passed since that time. Hopefully this delay has nothing to do with the United States, and I have no indication that it does. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Monday, January 15, 2007

### Happy Birthday, Martin Luther King, Jr.

Â Martin Luther King, Jr., 1964. (Photo from public domain).Â Happy, Birthday, Martin Luther King, Jr. If only you had lived to see more birthdays. Fortunately, you live on in countless ways. Â AÂ photo tribute to you hangs prominently in our reception area. For a long time, our letterhead and website have quoted from your "I Have a Dream" speech. Â Gandhi's photo hung in your office. Sadly, both of you powerful forces for non-violence were killed by assassins' bullets. You would not have wanted violence in response to your murder, and said: Â "The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy. Instead of diminishing evil, it multiplies it. Through violence you may murder the liar, but you cannot murder the lie, nor establish the truth. Through violence you murder the hater, but you do not murder hate. In fact, violence merely increases hate.... Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars. Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that." Dr. Martin Luther King Jr.Â When will everyone learn,Â agree with, and liveÂ this message? Jon Katz.

Posted by Jon Katz in Jon's news & views at 02:00

Sunday, January 14, 2007

### **Brennan advocated justice; Rehnquist said "wetbacks".**

Justice William J. Brennan, Jr., 1976. (Photo from the public domain.)<sup>^</sup> Writer Jim Newton previously obtained access to late Supreme Justice William Brennan's case papers, and has this month written a short three-part series here<sup>^</sup> about those memos. <sup>^</sup> Though all people have their flaws, I was starstruck the only time I met this human giant, even as he sat in a wheelchair when he could not stand very long. <sup>^</sup> I remember my eyes popping out of my head when reading an account in my law school's weekly newspaper of three law students who wrote a kind letter to Justice Brennan, and who received an invitation to join him for lunch at the Supreme Court. One of the invited students, who wrote the account, said one of the first things Brennan did was to<sup>^</sup> offer to introduce the students to the other justices. He apparently was very well-liked as a person among most of his colleagues even when they vehemently disagreed with him. <sup>^</sup> This man who fought so fiercely on the Supreme Court, apparently always with a very kind public manner, had some very strong words<sup>^</sup> in his private memos about<sup>^</sup> Chief Justice Earl Warren's successors. Sometimes the strength of the words came simply by<sup>^</sup> quoting his colleagues, including this passage from part three of Mr. Newton's series: <sup>^</sup> "In conference, as the case history notes, the justices squared off to their familiar positions: Brennan believed the Constitution extended equal protection to all people, including children of illegal immigrants. Marshall sided with him. Burger confusingly compared the right to an education with the right to receive welfare ("as if that was the issue," Brennan's history of the case notes grumpily), but White joined the chief justice. Blackmun and Powell joined Brennan's side. The most startling remarks, however, came from Rehnquist. He emphasized that many of the children demanding an education were not 5 or 6 years old but, rather, those who'd come to the country on their own. At conference Rehnquist referred to those illegal immigrants, shockingly, as 'wetbacks.'<sup>^</sup> "[Justice] Marshall had heard his share of slurs over the years<sup>^</sup>"much of his career, after all, was in the practice of NAACP law in the Deep South, below what he called the "Smith and Wesson line." But to hear such an epithet in a conference of the U.S. Supreme Court was more than he could bear. Marshall exploded at Rehnquist, who lamely attempted to defend himself by saying in his part of the country the term wetbacks still had "currency," as Brennan recalled it. Marshall fumed that by the same reasoning, he'd long been called a nigger."<sup>^</sup> Rehnquist's wetback comment comes in the context of his checkered past with race relations. In 1964, he testified against a ban against discrimination in Phoenix public accommodations. During Rehnquist's 1986 Senate hearings on his nomination to become chief justice, he denied witness testimony that in the early 1960's, while in private law practice, he went to voting places and harassed black and Latino voters by asking if they were qualified to vote. <sup>^</sup> Back to Justice Brennan, access to his papers remains limited. As author Jim Newton says: <sup>^</sup> "Many of [Brennan's] papers<sup>^</sup>"including a set of extraordinary annual memoranda documenting the court's work from the perspective of Brennan's chambers<sup>^</sup>"have been largely kept out of public hands, stored at the Library of Congress but protected by conditions Brennan placed upon them and yearned for by scholars. Before he died, however, Brennan's son, William J. Brennan III, allowed me access to his father's papers, including those memoranda. They are a historian's trove."<sup>^</sup> The Carnegie Legal Reporting Program confirms the currently limited access to Brennan's papers as follows: <sup>^</sup> "What's notable about [Newton's series on Brennan], beyond the actual substance of the reports, is that the revealed papers come from someone other than Stephen Wermiel, Brennan's official biographer. Wermiel, an American University law professor and former Supreme Court reporter for The Wall Street Journal and Boston Globe, has had what was thought to be exclusive access to all of Brennan's papers and has worked on the biography for a decade. His critics<sup>^</sup> have wondered when he'll finally hit the send key. Until he does, Brennan's papers evidently will continue to dribble out." Jon Katz.

Posted by Jon Katz in Constitutional Law at 01:00

Friday, January 12, 2007

### **Needing a more in-depth perspective of Gerald Ford.**

Ford, Kissinger and Rockefeller discuss American evacuation of Saigon. April 28, 1975. Many of the comments on Gerald Ford, after his death, in the widest-circulation press were so myopic as to be of little use to historians committed to writing the truth, the whole truth, and nothing but the truth. All presidents are human. Gushing over them upon their deaths may serve the desire of some to elevate presidents higher than that, or to try to show them respect, but their deaths certainly should not lead to whitewashing their pasts. Here is some food for thought in assessing Ford's presidential performance. Some of these points have been made elsewhere on the Internet, but often with a vengeance against Ford that I do not feel: Ford seemed to be a kindhearted man who had little obsession with power. I was eleven when Nixon resigned and Ford took over, and I followed his presidency as it happened. He was a moderate Republican, winced at the profound rightward shift of the balance of power in the GOP, and told Bob Woodward of his dissent from the Bush Administration's decision to start Gulf War II. It is hard for me -- particularly as a criminal defense lawyer -- to be upset that Ford pardoned Richard Nixon so long as it did not involve any secret deals. (If any secret deals took place, they likely were not to any benefit of Ford, who was practically guaranteed the presidency sooner or later, because Nixon was not going to stick around for an impeachment trial.) However, in granting Nixon the pardon, Ford pointed out how much difficulty Nixon would have in obtaining a fair jury trial. Hopefully people realize that on a daily basis countless people face jurors and judges who will not give them a fair trial, whether due to racial bias, hatred of the defendant's views or lifestyle even if neither have any relationship with the alleged crime, prejudicial pretrial publicity, and the list goes on. To this day, presidential pardons repeatedly forget the powerless and voiceless -- but no less deserving of pardons -- among convicted people. Although he dissented from Gulf War II, Ford put two of the war's architects in two of the most powerful positions in his administration: Cheney as chief of staff and Rumsfeld as defense secretary. Although he came into office claiming that the national nightmare was over, he brought in such Nixon holdovers as Kissinger, now as Secretary of State. Kissinger repeatedly and grossly placed realpolitik above respect for and protection of human rights. Ford kept Al "I'm-In-Charge" Haig in his Nixon White House position as chief of staff, and Haig later re-emerged as Reagan's Secretary of State. What did Ford get in return? Says MSNBC's Andrea Mitchell: "Bluntly put, [Ford] thought Haig - a holdover from the Nixon White House - had been disloyal, had in fact gone behind his back to tip off Nixon that Ford was going to grant the pardon in any case - so that Nixon didn't have to admit anything to get it." In 1975, Ford and Kissinger together gave Indonesia the green light to invade (see here also) and take over East Timor, which led to some of the Suharto government's most brutal and widespread human rights violations. Argentina's dirty war started during Ford's Administration, and Pinochet was in his second year in power after his U.S.-supported overthrow of Salvador Allende. Whether or not Ford intended to support both regimes despite their severe human rights abuses, he apparently did little or nothing to stop the abuses there. Fortunately, Jimmy Carter made human rights a hallmark of his campaign, and moved human rights higher up on the agenda than in previous White Houses. This profoundly influenced me on my own road to decades of work for human and civil rights, after witnessing a shift from a ruthless and angry-seeming president (Nixon) to Carter, who sincerely cared about human rights and decency. That is not to say, though, that Carter always practiced as he preached, including Carter's targeting of Iranian students for deportation after the shah's overthrow. Robert Parry -- who has written for Newsweek and the Associated Press -- believes that Ford, as president, first tried to rein in some presidential power, but later did the opposite, to the point that he paved the way to George Bush, Jr.'s current and heavy consolidation of tremendous power, thanks in part to the role of George Bush, Sr., as CIA director. Jon Katz.

Posted by Jon Katz in Jon's news & views at 03:00

Thursday, January 11, 2007

### **Supreme Court lets prosecutors avoid putting much specificity in indictments.**

Â Â Justice Stevens wrote the 8-1 majority opinion.Â This week, the United States Supreme Court reversed the Ninth Circuit's reversal of a conviction for attempting to re-enter the United States following deportation, even though the indictment did not specify what actions were used to effectuate the attempt. The case is U.S. v. Resendiz-Ponce, \_\_\_ U.S. \_\_ (Jan. 9, 2006). Â Praised be Justice Scalia -- the lone dissenter and generally quite the supporter of law and order -- for calling his fellow eight justices to task for the error of the majority's opinion, including the failure of such an indictment to assure that the grand jury understood the necessary legal elements of the crime of attempt. I have taken strong issue with Justice Scalia before, including here and here. Yet, sometimes, like in this case, he is right on the money. Jon Katz.

Posted by Jon Katz in Criminal Defense at 02:00

Wednesday, January 10, 2007

### **Judges speaking out against mandatory minimum sentencing.**

Mandatory minimum sentencing: Almost as unjust as capital punishment. For many years, many judges -- exercising the independence that rightfully is theirs -- have spoken out against mandatory minimum sentencing, which takes place both at the federal and state levels. I have written against mandatory minimum sentencing [here](#) and [here](#). Now that Democrats are in the Congressional majority, will they have the desire and courage to reverse the mandatory minimum sentencing tide, starting with eliminating the 100:1 sentencing disparity between powder cocaine weight and crack cocaine weight? This January 8 New York Times article addresses judges' views on mandatory minimum sentencing and the areas of mandatory minimum sentencing that Congress may address. However, will enough Congress members support such changes, and will president Bush veto such changes? Then, again, Bush will be out of office two years from now. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, January 9, 2007

### How to practice criminal defense in an unjust system?

Justice Thurgood Marshall (from public domain) As I posted a few days ago to a criminal defense lawyers' e-mail listserv: "I have long felt a tension about earning a living defending in a criminal justice system that is as unjust as ours, both because I'm participating in the system from the inside rather than just pushing against it from the outside, and because I am profiting from the injustice of the system (starting from unjust laws (e.g. against marijuana) and proceeding from there). Although I do not plan to stop practicing criminal defense as a result of this tension, since I feel the tension, I acknowledge it to myself." What do I do to alleviate this tension? A non-exhaustive list includes doing pro bono, low bono and court-appointed indigent client defense; going beyond the courtroom to support adding more justice to the criminal justice system (including through this Underdog Blog) and seeking legislative changes (where I should put in more time than before); remembering that no battlefield is ever fully fair (Justice Thurgood Marshall learned this early on); and to continue approaching my criminal defense work and life as a t'ai chi practitioner would. The foregoing approach often is easier said than done. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, January 8, 2007

### **Oppose McCain's bill to censor the Internet.**

Sen. John McCain (Oops; it's Alfred Hitchcock, another chillmaster).Â Â Thanks to TalkLeftÂ for reporting on Senator McCain's ludicrous proposed bill (1) to place substantial onus for reporting and keeping child pornography off the Internet, on Internet service providers, bloggers, search engines and just about anybody else who provides access to the Internet, and (2) to ban registered sex offenders from having MySpace and other presence on the Internet. Â If Senator McCain's bill passes, the result will be criminalized chilling of First Amendment-protected online communications, and over-self-censorship that will keep First Amendment-protected material off the Internet. If the government wants to censor the Internet, it should limit itself to seeking court intervention (at which time the defendants will be able to challenge such censorship) -- which is bad enough -- and should not be engaged in the forced deputization of private Internet participants in the process. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 01:00

Sunday, January 7, 2007

**Leahy and Specter introduce bill to reestablish habeas corpus for military commission cases.**

This follows up on my November 30 blog entry about Senator Dodd's proposed bill to provide habeas corpus rights and expanded trial rights for defendants in military commission cases. A search of Senate databases shows no further developments with Senator Dodd's proposed bill. Thanks to TalkLeft for reporting on December 7 about a bill from Senators Leahy and Specter that focuses on providing habeas corpus rights for defendants in military commission cases, whereas Senator Dodd's bill provides additional rights beyond habeas corpus. I look forward to seeing more legislators supporting habeas corpus rights for such defendants, particularly with the shift to Democratic party control of the Senate and House. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, January 5, 2007

### **George W. Bush: Rummaging through the mail.**

Â George W. Bush (or is that J. Edgar Hoover?) (from Library of Congress)Â No sooner do I write about governmental intrusions on privacy (here and here) than I learn thatÂ George W. Bush recently issued a signing statement asserting the right of the government to search mail without warrants in "exigent circumstances." Â Leaving the Bush administration to decide such exigent circumstances is like leaving a chocolate addict in charge of guarding a chocolate warehouse. Neither can be trusted with the task. This is a violation of the Fourth Amendment.Â Â This is another example of George Bush's disrespect for the Fourth Amendment. Jon Katz.

Posted by Jon Katz in Constitutional Law at 03:00

### **The Congressional disruption statute needs to go.**

U.S. Capitol, by F. Malotau (available through Creative Commons Attribution ShareAlike 2.5)Â In January 2006, I filed an amicus brief on behalf of the District of Columbia National Lawyers Guild, supporting appellant Elena Sassower inÂ Sassower v. U.S., D.C. Court of Appeals Appel Nos. 04-CM-760 and 04-CO-1600. Â Ms. Sassower proceeded pro se at trial and on appeal for this prosecution where she was accused of violating an unconstitutionallyÂ vague and overbroad District of Columbia statute prohibiting disruption ofÂ Congressional sessions, hearings and deliberations. In this instance, Ms. Sassower was arrested by Capitol police (your tax dollars at work) after she said at the conclusion of a Senate Judiciary Committee hearing on judicial nominees: "Mr. Chairman, there's citizen opposition to JudgeÂ [Â Â ]Â based on his documented corruption as a New York Court of Appeals judge.Â May I testify?"Â After being convicted, the Superior Court judge initially sentenced Ms. Sassower to a suspended sentence of just over three months, but changed the sentence to the maximum of six months incarceration after Ms. Sassower stated that she would not send the apology letters ordered by the judge, saying she was not remorseful and would not lie that she felt remorse. Â Unfortunately, the District of Columbia Court of Appeals affirmed Ms. Sassower's conviction. My amicus briefÂ challenged the Constitutionality of the disruption of Congress law. However, the Court of Appeals asserted that the issue was not raised at the trial level, and, therefore, had not been preserved for appeal. The Court of Appeals made the mistake of proceeding to find that the statute is Constitutional on its face, without providing a Constitutional analysis of the statute beyond citing to two previous improvidently-reached Court of Appeals decisions. The Court of Appeals is empowered to overturn its own decisions, and myÂ amicus briefÂ urged the court to find the statute unconstitutionally vague and overbroad in violation of the First Amendment, particularly with reference to Supreme Court holdings concerning vague and overbroad restraints on free expression. Â Unfortunately, the District of Columbia Court of Appeals avoided ruling about the trial judge's imposition of six months of jail after Ms. Sassower declined to send apology letters, by saying that the issue was moot. While the issue may be moot as to Ms. Sassower, who has already served her sentence, it is an issue that likely will arise with future defendants who will have completed their sentences by the time their appeal is reviewed. Â As my amicus briefÂ insists: "To uphold [Ms. Sassower's] conviction will be to drape the Senators who were present in the courtroom [I meant to say hearing room] in the cloaks of royalty at best, and the sinister protections of the KremlinÂ at worst.Â The Capitol, however, is the center of theÂ federal democracy, and the elected senators have no right nor business to so cloak themselves."Â Â Hopefully the Court of Appeals will grantÂ Ms. Sassower's petition to rehear the case en banc. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 01:00

Thursday, January 4, 2007

### **More on corporate and government spying.**

This follows up on today's earlier blog entry about paying taxes to be spied on, with the following information: A recent television documentary reports on the Electronic Frontier Foundation's revelations of the widespread extent to which private corporations assist surveillance of people, including attaching satellite GPS systems to track company employees' movements (sometimes without telling them they are being tracked), doing background checks on potential employees often with materially inaccurate information resulting in refusal to employ the applicant, the ability to be tracked geographically by one's cellphone even when it is not being used (as long as it is turned on), and microscopic tracking of printouts and copies made from some of the most popular copiers and printers. Information on this printout tracking is here and here. About the United States' surveillance of legitimate activities, here is an ACLU report about the FBI's amassing over one thousand documents on the ACLU, and documents on Greenpeace and United for Peace and Justice. On the one hand, some people might say that if they are breaking no laws, they have no reason to be concerned with this state of affairs. However, the amassing of so much information can even lead to erroneous criminal investigations (and arrests and convictions) of innocent people, and intimidation (both intentional intimidation and feelings of intimidation) of people who are innocent of any crimes. We can vote against this hyper-surveillance state of affairs with our dollars (as to corporate surveillance), and our voice and vote (as to government actions). Jon Katz.

Posted by Jon Katz in Jon's news & views at 02:00

### **Paying taxes to be spied upon.**

Today, it is hard to pick one's nose without it being caught by surveillance, whether one is driving by traffic cameras, buying diapers at the Target store (which has more visible security cameras than I have seen in any other retail establishment), walking on the National Mall, or walking down a so-called high-crime area. The National Security Agency prominently stuck its nose in our business -- with George W. Bush's full blessing -- with its domestic spying on phone calls, as revealed in May 2006 by USA Today, which for a long time I considered to be not much better than a rag. Curiously, when I ribbed an NSA employee and former high school classmate about a dozen years ago about the NSA's activities, with the most earnest and serious look imaginable he maintained that the NSA processed raw data. However, to process the data, the data must first be obtained, and sometimes it is obtained in violation of civil liberties and privacy. The Federal Bureau of Investigation admits that from 1942 to 1967, it conducted Black Bag operations, wherein FBI agents "illegally entered offices of targeted individuals and/or organizations, and photographed information found in their records." To get a flavor of the FBI's widespread surveillance activities, visit the FBI's Freedom of Information Act reading room. (Admittedly, not all the information there is about violations of privacy rights, but it shows how much the FBI has over-monitored people). Among the many documents found there are: A section on the Doors rock band: "The Doors was a group of musicians that performed with Jim Morrison. Letters were written to Director Hoover and Senator Sam Ervin, Jr. complaining that lyrics to songs performed by this group were filthy, vulgar, and offensive." Materials concerning the criminal investigation of McDonald's founder Ray Kroc "for contributing an excessive amount of money to the reelection campaign of Richard M. Nixon in 1972. These contributions made by the business were to try and ensure a grant of 'exclusive and monopolistic rights to all food services that will be officially approved by the American Revolutionary Commission for the 1976 bicentennial celebrations.' An investigation of the matter did not have enough proof to prosecute the case." A section on sex researcher Alfred Kinsey. Here is the American Civil Liberties Union's view of the FBI's surveillance of John Lennon. Government violations of our privacy rights continue. Thank goodness for the American Civil Liberties Union -- to which I have belonged for two decades, and on whose local Washington, DC, board I sat from 1992 to 1995 -- for having none of it. For instance, the ACLU fought a grand jury subpoena (meaning a subpoena approved by a grand jury at a federal prosecutor's request) demanding that the ACLU turn over declassified documents it obtained concerning the "Permissibility of Photographing Enemy Prisoners of War and Detainees." How does this all relate to my criminal defense practice? Hopefully such information will make judges and jurors recognize that police and other government officials are mere humans, many of whom grossly abuse their power and even stand up for those abuses once they are revealed. The world does not function in black and white, and police should never be seen as white knights protecting the Shire. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, January 3, 2007

### **Abu Ghraib was the tip of the iceberg.**

Sadly, just as the My Lai massacre was a larger scale example of widespread war atrocities by American soldiers in Vietnam, the Abu Ghraib atrocities by American soldiers is but a sample of gross violations of wartime detainees being held by the American military. This week, the FBI turned over documents to the ACLU, pursuant to the Freedom of Information Act, detailing widespread atrocities against prisoners at Guantanamo. Here is the FBI's Guantanamo Bay Inquiry page. Documents attached to the inquiry page are here, and include an account of the duct-taping of a bearded detainee. Such duct taping would make the removal of a bandage from a hairy arm seem like child's play. However, such an atrocity is just the tip of the iceberg in this FBI report. The Bush Administration wants to operate in the dark as best it can in dealing with suspected terrorists. This FBI report, alone, shows why the opposite should be taking place. How does this story relate to my criminal defense practice? It is another example of how power is at risk for abuse by anyone -- including police -- and at greater risk of abuse the greater is the power. Too many judges too often accept police at their word in suppression hearings and bench trials; too many jurors accept police at their word at trials. That is wrong and contravenes the oath of judges and juries to decide cases fairly and impartially. Hopefully, judges and jury members will recognize that police abuse and police brutality are not aberrations but are activities that are too ingrained in too many police and in police peer pressure and arising from systemic dysfunctions for decades, and that such activities even happen to police who enter the academy with the intention of being as clean as clean can be. Jon Katz.

Posted by Jon Katz in Constitutional Law at 06:00

### **Converting a drunk driving charge to a speeding conviction.**

Here is a recent example of the necessity for fully preparing well in advance for trial, for being fearless about proceeding to trial, and for using time as a commodity in negotiations. This approach is needed for all trials, both large and smaller; the following example is from a federal drunk driving case. Our client is caught speeding on a federal roadway, and ultimately is prosecuted in federal court for allegedly violating the state of Virginia's laws against driving while intoxicated and reckless driving (due to speed). The prosecutor is a gentleman, but still is the opposition pursuing enforcement of laws that set an unjustly low threshold on the blood alcohol level permitted in a driver's body, let alone the substantial unreliability of alcohol breath tests, alcohol blood tests, and field sobriety tests. The prosecutor calls me before the initial court appearance date, offering to "save the time" of me and my client, in case my client is interested in pleading guilty as a first-time offender on the initial appearance date (which would have involved the prosecutor's recommendation of, inter alia, a suspended sentence, a fine, and probation conditions). Time, though, can be a valuable negotiating commodity, one which all criminal defendants are wise to use to their best advantage. I secure the prosecutor's confirmation that the guilty plea offer would be left open through the trial date, and know that the available magistrate judges -- if we waive the right to a jury trial and a trial by a District Court judge (the drunk driving charge is jailable up to one year, and thus not a petty offense) -- likely will not harm my client much more by a guilty finding at trial than through a guilty plea. A few days before trial, the prosecutor leaves me a voice mail about my client's interest in pleading guilty. Before I have a chance to call him back, he calls me again about the case. I wonder if I smell blood on the opposition. When I call the prosecutor back, he tells me the breath technician is out of the country, and that -- absent a guilty plea -- he will move to dismiss the case, with the intention of recharging the case later on. Whether or not the prosecutor will be successful with such an approach (see, e.g., Fed. R. Crim. Proc. 48(a) ("the government may, with leave of court, dismiss an indictment, information, or complaint") and 18 U.S.C. § 3161 (factors for determining whether one's speedy trial rights have been violated)), the risk still exists that the prosecutor will decide to proceed to trial, anyway. A conviction for reckless driving is still possible, because the breath technician is not needed to prove reckless driving based on the alleged speed. The risk of a conviction for drunk driving is lower with the breath technician's unavailability, but is still a possibility through the testimony of the arresting officer, who remains available for trial, about our client's behavior after being stopped for speeding. In any event, the prosecutor offers to drop the drunk driving charge in exchange for pleading guilty to reckless driving, whereby the prosecutor will not seek executed jail time. I explain to the prosecutor that such a conviction will expose my client to adverse results with the authority that issued his driver's license. We go back and forth, and the prosecutor finally offers to dismiss the drunk driving charge in exchange for a guilty plea to speeding -- amended from reckless driving -- whereby the prosecutor will seek only a fine and no probation period and no jail time (sadly, speeding on a federal roadway is still jailable in this instance). My client accepts the speeding plea offer, and walks out of court with a fine and court costs to pay, and nothing more. Time and negotiations are on our side. Jon Katz. **ADDENDUM:** The foregoing discussion is an example of the importance of going to court with a lawyer for all jailable matters, and for numerous non-jailable criminal matters (e.g. for non-jailable

drug paraphernalia charges, for public drunkenness charges, and for charges of possessing an open alcohol container, all or some of which can pose probation and parole violation problems, stiffer sentence exposure for any future convictions, adverse employment and security clearance problems, and adverse immigration consequences for those who are not United States citizens). The foregoing discussion also points out the benefit of keeping guilty plea offers open until the trial date, which is more often possible in the bench trial courts where I appear than for cases set for jury trials. When the plea offer is kept open until the trial date, it ordinarily is wise not to accept the plea offer before the trial date, because sometimes a better plea deal can be reached on the trial date, and sometimes the prosecutor will not have essential witnesses or evidence available to obtain a guilty verdict. In another recent example of the benefit of waiting until the trial date when a plea offer is left open until the trial date, my client was charged in federal court with driving on a license that was previously suspended for a Virginia reckless driving conviction. The prosecutor left open a plea offer for driving while suspended whereby no executed jail time would be sought. The magistrate judge was unlikely to do worse than that upon a trial guilty verdict, so I went back and forth a few times on the trial date with the prosecutor and arresting officer about the possibility of pleading guilty to speeding in exchange for a hefty fine and no jail time or probation. It worked. Time, again, was on our side.

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

Tuesday, January 2, 2007

**Beware Barry Cooper's "Never Get Busted" video.**

At first I hesitated to discuss former police officer Barry Cooper's new "Never Get Busted Again" video, so as not to give more free publicity to the video than it has already received. However, more important to me than avoiding giving the video inadvertent free publicity is to give important food for thought (some of which has been addressed on other websites) to those considering buying and viewing the video, including: - Before plunking down \$25 plus postage and handling for the video, FlexYourRights already has provided the excellent free online Busted video (Feb. 19, 2007, update: the full-version online Busted video has moved here); Busted is prominently linked to our blog and to most pages of our website (Feb. 19, 2007, update: after the full-version online Busted video moved here, I took down the links to the video on our website other than on our blog and rights page, because it will be cumbersome to change the link on multiple webpages each time the link changes). Will Barry Cooper's perspective as a former cop be any more beneficial for viewers than the free online Busted video? Busted's high quality suggests it was produced with very good consultation from criminal defense or civil liberties lawyers. Busted's narrator is former ACLU national director Ira Glasser. - For those who want to wait and see about the video, Loretta Nall is a marijuana legalization activist who has ordered the video and promises to provide an online review at <http://nallforgovernor.blogspot.com>. (Granted, if I ordered and viewed the video, I would have more to say about it). - What is Barry Cooper's motivation for selling this video beyond making money? His website and YouTube videos (here and here) do not convincingly explain why or how he switched from making legions of drug arrests to now showing drivers how to minimize drug arrest exposure. - Does Mr. Cooper fit within the mold of once a cop always a cop? If so, why trust and rely on him with this video? - On his YouTube videos (here and here), Mr. Cooper seems to show more dissent from the marijuana war than from the rest of the drug wars. However, any efforts his video makes to help minimize marijuana arrests and convictions will presumably apply to all drugs. Why, then, has he produced this video, beyond the money-making motivation? - Nobody would buy this video if Mr. Cooper had not been a former police officer. Some consumers will feel discomfort about helping Mr. Cooper earn a buck in this fashion, particularly before knowing whether he truly is convinced against the drug war, and whether this video even delivers ten percent of what it promises. For whatever it is worth, Law Enforcement Against Prohibition has distanced itself both from Mr. Cooper and his video. By the way, the purpose of the Fourth, Fifth, and Sixth Amendments is to protect everyone's rights, whether or not they have violated the law. That puts the free online Busted video ahead of Mr. Cooper's video, because Busted addresses the broader Constitutional rights of everyone, whether or not they have violated any laws. Jon Katz. ADDENDUM: I blog further on this videotape here on February 13 2007.

Posted by Jon Katz in Drugs at 01:00

**Praised be jurors who reveal irregular jury proceedings.**

Was it any wonder that an apparently hopelessly deadlocked jury returned a guilty verdict after the judge kept the jury deliberating throughout a Saturday and talked of bringing the jury back for deliberations on Sunday and Christmas Eve day? It is more of a wonder -- and a thankful one, at that -- that a holdout juror revealed the irregularity of jury proceedings that produced the manslaughter guilty verdict against John H. White in Long Island. Now, it is time for the judge to reverse Mr. White's conviction, and to enable the prosecutor to decide whether to proceed with a retrial. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, January 1, 2007

### **Jazz music and trial lawyering.**

Long before ever stepping foot in law school, I was a jazz music fanatic, since the age of twelve in 1975, particularly for fellow trumpeters. I experienced Miles play that year in Newport, Dizzy two years later in Westport and two more times, Cat the following year in Nice, Roy the following year in New York, Woody a four years later in Boston, and Freddie a bit later the same year in Cambridge. Right into the eighties -- perhaps beyond then -- the most famous straightahead jazz masters ordinarily earned money that paled in comparison to rock star pay, sometimes only being able to fill an average-sized nightclub. They did it for love of the music, for excellence, for the ecstasy of living the music, and because this was part of who they were. That parallels what guided me to and kept me with criminal defense law. The struggles for justice for criminal defendants involve substantial toil and frequent frustrations with the criminal justice system; however, the victories make it all worth it, and the constant fight for justice is the only way to obtain those victories. Great jazz music involves spontaneity, improvisation, and often mind-blowing brilliance that make the best rock music look like tiddlywinks. Great criminal defense involves the same dynamics. This spontaneity, improvisation and being in the moment can pleasantly surprise and please both the musician and the trial lawyer. For instance, Cab Calloway's famous line from "Minnie the Moocher" -- "Hi-de-hi-de-hi-de-ho," "Oodlee-odlye-odlyee-oodlee-doo" -- came not from any advance planning, but from having to fill in the gaps when he forgot some of the song's lyrics. It is akin to being thrown a curve by a judge's improvidently sustaining an objection to a lawyer's line of questioning, and continuing a new line of attack flawlessly, without skipping a beat, and perhaps with more skilled ferocity than ever. Jon Katz.

Posted by Jon Katz in Persuasion at 02:00