

Friday, August 1, 2008

**"The Execution Team will insert a large bore intravenous channel into the appropriate vein."**

1961 saw the last military execution in the United States. Now, George Bush, II, has broken that execution-free period in the military by approving the execution of Ronald A. Gray. Presidential approval is required to proceed with a military execution. Mr. Gray entered a guilty plea in state court to several rapes and murders; the crimes to which he admitted make the stomach turn and heave for days. Although his state court sentence involved consecutive life sentences, the military nevertheless proceeded with a trial(s), apparently based on the same criminal conduct to which he pled in state court; this sounds like a variation on the theme or the actual theme of the separate sovereigns doctrine. He was convicted at the military trial and sentenced to death. The above-listed title for this blog entry comes straight from the Army's 2006 procedures for military executions. Jumping off the pages of those guidelines is the disconnect between the dispassionate technocratic language and the state-run legalized murder that is the death penalty. Thanks to the Courts Martial blog ([here](#) and [here](#)) for posting on this story, as well as the CAAF blog ([here](#) and [here](#)). Here is the Washington Post article on the case. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, July 31, 2008

### **Pouring salt into the wounds of police abuse, with lies.**

Â Why is lying so rampant n society? Does it start with people learning from their parents that "white lies" are okay, and then fester and spread from there like the Blob? Â Are cops tempted to lie by thinking they can get away with wrongdoing by filing false police reports against people who areÂ victims of police misconduct? Â Praised be the ongoing power of inexpensive video cameras -- and praised be the people who bravely record footage of people abusing others and abusing their positions -- Â this time with the above-displayed footage of a New York cop butting a cycling protestor to the ground from his bicycle. What could the cyclist have been doing to have merited such abuse? If the cyclist was being stopped for an alleged crime (e.g. throwing a dangerous object into the crowd), it happened outside the view of the camera, and the cop could have called to cops ahead to tell the cyclist to stop and to arrest him, rather than for the cop to have butted him off his bike without telling him first to stop and dismount. . Â Thank you to some lawyerÂ listerv members who brought this story to my attention, about police lying about the incident shown in this video, in part through filing criminal charges against the victim of the police abuse. Thank you also to Jonathan Turley for blogging on the story, and linking to the above-displayed video. (How does professor Turley find time to teach, sleep, and be with his family, when considering the volume and depth of his daily blogs?)Â Â I do not want to see more of these stories. I just want such abuse to stop.Â Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, July 30, 2008

### **A snitch's story.**

Â Image from Library of Congress's website. Â Los Angeles attorney Barry Tarlow refuses to assist clients with snitching. San Francisco legend Tony Serra also refuses such work ,Â and advises criminal defense lawyers of the importance of such an approach even at serious financial cost. Suffice it to say, refusing snitch work will preclude a lawyer from obtaining trial work with a federal public defender office, and will make the lawyer lose many potential retained federal felony clients. For those lawyers, fortunately the option remains to include state-level criminal defense in the mix. Â My standard retainer agreement provides for my potential clients to go to another lawyer if the potential client wants to pursue the snitch route. Each defendant has a right toÂ try to minimize conviction and prison term risk by snitching, so long as no dishonesty is involved (therein lies the rub), just as I have the right to avoid taking on such a client. Â The Washington City Paper does not come across to me as a pillar of journalistic excellence and reliability. When one adds an anonymous interviewee to the mix, my suspicions are raised all the more. Nevertheless, submitted for your perusal is this recent City Paper article claiming to summarize an interview with a snitch.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, July 29, 2008

**Persuading in the first person.**

Photo from website of U.S. District Court (W.D. Mi.). The National Criminal Defense College and Trial Lawyers College focus on persuasion through storytelling. What to do, though, when a judge tries to stop the lawyer from first-person storytelling ("I was sitting there minding my own business, when he rushed at me with a meat cleaver. I had no choice but to shoot him, or else I would have been dead")? A trial lawyer listerv recently discussed the foregoing matter. In addition to arguments to present to the judge (e.g., "Judge, we all know that lawyer arguments are not facts" and "my client will testify, anyway" (not all parties testify)) to keep doing first person storytelling, two related cases were mentioned: In *People v. Richmond*, 341 Ill. App. 3d 39, 791 N.E.2d 1132, 1138 (2003), the prosecution "delivered its entire opening statement in the first-person from [the complainant's] perspective. The State began with, 'Hi. My name is RJ, and I'm 8 years old \*\*\* I'm going to tell you about something that happened a couple of years ago when I was just a little kid.' Not long into the opening statement, the State also said, still in the first-person and from R.J.'s perspective, 'Now, my State's Attorneys, Miss Roseanne McDonnell and Theo Jamison then, they're going to present this evidence to you today.'" The court found: "Although the use of a first-person delivery may not be error under other circumstances, in this case it improperly bolstered the credibility of the State's star witness, an eight-year old." *Id.* at 1139. To what extent will a lawyer convince a judge to permit first-person opening and argument on the theory that it is no different than if a pro se party were giving the opening, of course, in the first person? Not, not all courts will give even pro se parties wide first person leeway, as confirmed by *U.S. v. West*, 877 F.2d 281, 286 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989), where the trial court found the pro se criminal defendant incompetent to represent himself, based on his following remarks in opening statement: "Although I am not a professional, I will do the best that my ability will allow, and I hope you will bear with me. I hope you will believe in our country's motto, innocent until proven guilty, not the complete opposite of guilty until proven innocent, which both the Court and the Government appear to have forced upon me. "At last, with all my respect to Mr. Hirschhorn, Mr. Michael, Mr. Gossett, Mr. Yannerella, for all the work they have done and all the ability they have, gentlemen, I feel we are somewhat at a disadvantage due to all that we have said, all that we have tried, and mostly, all our motions we have filed which have been denied. Men, I definitely feel we are not the home team. "I ask of you and pray to you, the jury, treat us not like the visitors. Thank you." The Fourth Circuit upheld the trial court's ordering defendant West to have counsel represent him. Do you have caselaw and arguments to support giving first-person opening and closing? If so, please send the items my way, preferably by a comment to this blog entry. ADDENDUM (August 20, 2008) Thanks to a fellow listerv member for the following case: *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, (Okla. Crim. App. 2000): "Malicoat first complains of the first stage closing argument in which the prosecutor delivered a two-page first-person account of Tessa Leadford's final hours. He made timely objection to this argument, preserving the issue for trial. While theatrical, we do not find this argument overly prejudicial. The prosecutor occasionally speculated as to Tessa's feelings and thoughts. The argument very nearly constitutes an improper solicitation of sympathy for the victim, but is largely based on the evidence presented. The medical examiner testified as to the type and severity of pain probably caused by Tessa's injuries and several witnesses testified about Malicoat's account of Tessa's abdominal injuries and death, including her screams of pain. Taken as a whole, the argument does not manipulate or misstate the evidence and we find no error." Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Monday, July 28, 2008

**No means no, and "I want a lawyer" means I want a lawyer.**

Â Bill of Rights.Â (From the public domain.)Â Â Praised be theÂ majority of en bancÂ Virginia Court of Appeals judges who voted to put teeth into Miranda, by saying that the police generally (after looking at the overall circumstances) must stop trying to interview a suspect once the suspect communicates the suspect's wish for a lawyer. In this instance, the Defendant's statement "I think I should get a lawyer" was sufficient to prevent police from continuing efforts to get the defendant to communicate. The case is Ferguson v. Com. \_\_ Va. App. \_ (July 22, 2008). Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, July 27, 2008

### **Come visit my new digs.**

Â On July 24, I wrote of the July 28, 2008, opening of my new law firm, Jon Katz, P.C.Â The move was completed this weekend, and my new law firm's doors are open, at 8720 Georgia Avenue,Â Suite 703, Silver Spring, MD 20910, (301) 495-7755 and fax (301) 578-7733.Â My work will remain unchanged, except for now being solo -- with the same and expanded staff -- where before I partnered with Jay Marks, who primarily practices immigration law. Â My new firm is just three blocks from my old one, in downtown Silver Spring. If you are in the neighborhood, I will be delighted if you stop by to say hello and to show you the office. Â Fortunately, through the beauty of technology, I will be as easy to find as ever. As provided in the partnership agreement for my former law firm, anybody calling the former firm's main phone number will receive a message telling of the whereabouts of me and my former law partner Jay Marks. By agreement, I have taken the website and Underdog blog with me. People emailing me at my old e-addressÂ will have their email forwarded to my new one. My web sitehost is in the process of getting my new email address up and running this weekend, and to have automatic edits updating my website to reflect my new law firm's nameÂ andÂ address.

Â Recently I spoke with another local lawyer who, upon learning that my split with Jay is an amicable one, remarked at such fortune, and about the ugly partnership split he underwent a few years ago. In any event, it is critical that law partners enter a comprehensive and well-written partnership agreement. It is an essential pre-nuptial agreement, and Jay and I had one drafted by a get-things-done business lawyer that served us well in navigating an easy roadmap to our split. Â Jay and I had ten very good years together. Early on, we each expected to be spending substantial time advocating for injury victims,Â but then, to our delight, found we could be successful doing what we love doing most in law practice, which is criminal defense for me and immigration for Jay. Jay and I go back to 1969, when we first met at a mutual friend's birthday party in Monroe, Connecticut. The bonds we forged do not simply disappear with the birth of our new law firms. Going into practice with Jay made it less scary than if I had started solo. Eventually we both learned that we each can doÂ good and do wellÂ as solo practitioners. We have been encouraging each other on the road to ongoing success, and will continue doing so.

Posted by Jon Katz in First Amendment at 00:00

Friday, July 25, 2008

### **Why treat prosecutors for happy hour?**

Â Bill of Rights.Â (From the public domain.)Â Â When I joined the Maryland Public Defender's Office from a law firm serving financial institutions and transportation companies, something seemed very wrong: Conviviality was the game of the day in this particular county between a slew of prosecutors, criminal defense lawyers, and cops. It was similar to the conviviality that did not concern me so much, which was amongÂ courthouse personnel andÂ many judges together with the lawyers making appearances there; that spilled into the conviviality among prosecutors, cops and criminal defense lawyers. Â Who was missing from all this conviviality? My clients -- my clients whom too many prosecutors and cops and some judges and even some criminal defense lawyers would degrade, dehumanize, and disrespect. Most cops and prosecutors I speak with -- and probably plenty of judges -- assume my clients are guilty,Â and not just in the lawbook sense of guilty beyond a reasonable doubt, but guilty, period. I hear the frequent laughter of cops, prosecutors, and sometimes other criminal defense lawyers with defendants at the butt of their jokes. A late judge at a guilty plea settlement conference in his chambers (the conferences were only among lawyers; my client was waiting in the hallway) had a good belly laugh reading the criminal statement of charges: "Ha! He carried the crack rock under his tongue." The judge was talking as if my client was guilty as charged -- no chance the cops had it wrong -- and was having a good laugh at my client's expense; I concede that the judge then proceeded, as expected, to say there would need to be a sentence at the lower end of the sentencing guidelines if there were a guilty plea; under the circumstances, it would have been a fair sentence, all things considered. Â On another day in court, after my client's case was finished, a courthouse deputy sheriffÂ and the opposing prosecutor had a good chuckle as my bewildered client got handcuffed by the deputy for an alleged open warrant. Praised be the courtroom bailiff who later talked to me about it and decried turning such an arrest into an eagerly-awaited joke. Â A fellow public defender lawyerÂ once tried giving me an example of having good relations with prosecutors -- "Jon, we have to deal with these prosecutors every day" -- by praising a more experienced public defender lawyer for laughing with one of the most heartless-acting prosecutorsÂ about theÂ bizarre happenings allegedly involved in a theft case that had just finished. Â Suffice it to say, my bright-eyed and bushy-tailed idealismÂ of joining the public defender's office did not have such conviviality in mind. I probably was better suited to join the District of Columbia Public Defender Service, where I doubt much if any joint lunchgoing happens between public defender lawyers and prosecutors, who are employed by the same federal Justice Department that has given us such "leaders" as Alberto Gonzales, Ed Meese, and George Mitchell. Â Should IÂ exclude prosecutors and cops from my time at lunch and after-hours activities? The prospect is tempting. How would I feel about a client seeing me breaking bread with the same prosecutor or cop who is trying to get my client locked up, particularly in instances where I feel the prosecution is based on false evidence, an effort to obtain a disproportionately severe sentence, or a law that I feel should be stricken or heavily decriminalized in the first place (e.g., I want the legalization of marijuana, prostitution, gambling, criminal libelÂ and obscenityÂ and the heavy decriminalization of all other drugs)?Â It is essential to treat others on their own merits and not to stereotype. Certainly many of my favorite criminal defense lawyers have prosecuted, including Gerry Spence and my supreme trial law guru Steve Rench, who included prosecution work while in law school, who said he had no problem prosecuting unless it was the death penalty, and who once told me he prefers representing the underdog (see the name of this blog). Okay, then, how about if I tell prosecutors and cops who seem otherwise likeable and honorable that we can revisit whether to break bread together once they are no longer cops or prosecutors? Â Last week, an email went out to local criminal defense lawyers inviting them to a happy hour this evening (when I will be indisposed no matter what, although I would make an exception for a happy hour tonight with the likes of SunWolfÂ / La Loba, Tony Serra, or Charles Abourezk) with the county's prosecutors, and soliciting donations up to \$50 each to cover the prosecutors' drinks, pointing out that the newer prosecutors do not earn much (well, at least in their suffering economically, they might be able to transfer that to understanding the suffering of my clients). My first reaction, and continued reaction (which I have only shared thus far with another local lawyer, but now this blog entry shares it with everyone), was that it sounds fishy to be buying anything for prosecutors. First, paying for prosecutors' happy hour refreshmentsÂ creates dissonanceÂ in me as to my clients' role in the mix. That is right, no clients were invited to the happy hour.Â If I went to this shindig at a tapas restaurant two blocks from the county courthouse, I would think it a good idea to invite some of my clients, to humanize them (while assuring they do not discuss their cases), to respect them rather than having a private get-together withÂ the opponents of them and me, and to highlight that the business as usual of marginalizing criminal defendants is unacceptable. Second. I wonder how such purchases jibe with bribery statutes, even though I do not believe such behavior should be made criminal. Â On the other hand, maybe this gratis happy hour for prosecutors is a good idea, at least if all the defense lawyers drink near beer, virgin sangria and soda pop, while the opposition drinks scotch and Sams, ready to be arrested and prosecuted for drunk driving by the cops, who have a station just one quarter of a mile away. Do any fair trade laws or legal ethics rules prevent me from billing a premium for doing such defense, as a sort of fine for all the misery most prosecutors cause my clients? I doubt an arrested prosecutor would come to me instead of going to a former prosecutor. Then again, I have had ex-cops,

military folks, political conservatives and other so-called law-and-order people hire me. Â Certainly, it is important to know the opposition. However, I have no interest in paying for the opposition's drinks while getting to know the opposition, and I do my best to keep in mind how my clients would react to seeing me with a group of criminal defense lawyers and prosecutors at a happy hour.Â I would much more enjoy going hiking or canoeing with a client. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, July 24, 2008

**Joining forces with like-minded lawyers - Never being alone.**

When I joined the National Association of Criminal Defense Lawyers seventeen years ago, I was drawn to the group's slogan "Never Be Alone." On the one hand, the phrase sounded abstract, having joined the NACDL when I was still at a 25-lawyer Washington, D.C., law firm primarily representing financial institutions and transportation companies. On the other hand, before being hired by the Maryland Public Defender's Office made it unnecessary, I was making alternative plans to hang my own shingle and to include court-appointed criminal cases; the prospect of opening a solo law firm just two years out of law school did raise the real specter of being alone in my own office. In any event, one of the most important things a lawyer can do is to find allies and kindred spirits, not only because there is strength in numbers, but also because the successful practice of law demands exchanging ideas, brainstorming, and moral and time support with kindred lawyers. Of course, when a lawyer asks help or advice from another lawyer, the asking lawyer is showing his or her vulnerability, whether it be that the lawyer has not figured out the question on his or her own, that s/he does not have other established people to turn to first, and/or that the lawyer has dragged his or her feet longer than prudent for seeking the help. However, dust swept under the carpet is still there, and all lawyers have dust to resolve of one type or another. As I embark with the opening of my solo law firm Jon Katz, P.C. this coming Monday (when my new office buildout, wiring and moving will be complete -- my new Silver Spring address will be posted on this blog) I think again of the benefit of not feeling alone by putting aside ego and any trepidation to call upon kindred lawyers and non-lawyers for help and brainstorming, and to give the same in return much more than has been received. I am blessed to be in a new building with another lawyer I already collaborate with, and numerous others I look forward to interacting with. One of the biggest challenges facing a solo and small firm practitioner is the oppression of seemingly inflexible court calendaring in some places. Unless a lawyer only works in the same courthouse at all times, tensions are bound to happen when Judge A sees that the lawyer has frequently conflicting court dates in numerous other courts. In a big law firm, the problem often is resolved by having a substitute lawyer at the very least take over in seeking a postponement if the primary lawyer is booked up to even do that. Fortunately, I have always been able to resolve court calendaring conflicts, but sometimes through great toil (e.g., when a weaselly opposing counsel set a motions hearing in a court that does not require clearing the date with opposing counsel, and that has no automatic mechanism to request a date change in writing) and at the expense of paying another lawyer to appear for me at a procedural court date that becomes unchangeable. One reason I have been able to resolve calendaring conflicts is to avoid taking new clients who are so close to their trial date that the court may very well deny a continuance (or to have a colleague at the ready, with my client's consent, to take the case or to co-counsel, in the event I cannot get a continuance - but that only works for misdemeanors that can be handled without needing to meet a slew of procedural and case-specific deadlines), and to be straightforward with the client not only about the chances that I can change the court date, but also about any disadvantage for doing so (e.g., whether it is better to keep the current court date to preserve speedy trial rights and evidentiary issues, and whether rescheduling a preliminary hearing will make it more likely that an indictment will take place first and preclude the preliminary hearing). The most important time for lawyers to come to each others' support -- even when the lawyer in need is someone the other lawyer ordinarily might avoid even having lunch with -- is when judges and opponents intentionally or unintentionally come down hard and unfairly on the lawyer for doing nothing other than following the lawyer's ethical obligation to zealously represent the client. The stories are many about judges who show upset that a "clearly guilty" defendant gets acquitted by a jury, who get irritated at lawyers who do not simply "move along" the docket, who are intolerant of any challenges to the judge's authority (e.g., in response to a lawyer telling a defendant at sentencing not to answer a particular question from the judge), and the list goes on. Judges and opponents need to know that when they unfairly shoot towards a lawyer, the lawyer has a strike force of lawyers ready to defend the lawyer in such ways as entering an appearance to defend or to co-counsel with the lawyer and packing the courtroom when the judge sets a contempt or other hearing questioning the lawyer's reasonable and ethically zealous actions. Fortunately, such groups as the NACDL have lawyer strike forces that include some of the best of the best criminal defense lawyers giving their time and advocacy for free for what would otherwise amount to big dollar figures. Of course, lawyers receiving such task force benefits should give back many times over, through similar help to other lawyers, and, when the lawyer has it, extra donations to the lawyers' group and some nice favors and gifts to the representing lawyer. As the years pass, I have a stronger network of allied and kindred lawyers and non-lawyers whom I can call and who will make the time for me even if that means their getting to sleep later that night. This sharing is particularly true among graduates of the Trial Lawyers College, even for those who never have met one another before; the connection perhaps is fostered all the more by having shared several weeks miles from the nearest paved road, showering and brushing teeth among the stink of the adjacent toilet stalls, and, most importantly, having committed to clearing court calendars for so many weeks to become better lawyers and better people. It is probably a similar connection to what frat members feel, aside from episodes of drinking mass quantities of beer and being obnoxious, although many drink beer and act like hyenas at the Trial Lawyers College, too, at least after hours. When a

Trial Lawyers College grad calls me or I call them, invariably it is an instant human-to-human conversation, skipping the lawyer-to-lawyer-ese. Lawyers: Before you end today, won't you reach out to at least one other kindred lawyer, whether it be as small a gesture as wishing him or her well on tomorrow's trial, or offering empathy over a trial loss or brainstorming or other support on a pending matter. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, July 23, 2008

### **Mukasey and racial profiling.**

Â Bill of Rights.Â (From the public domain.)Â The websites at suchÂ kindred organizations as the American Civil Liberties Union and the Alliance for Justice decry the United States Justice Department's purportedly proposed inclusion of racial considerations in investigating terrorism. However, other than news articles briefly addressing the matter, I have not found any details from Justice Department sources, includingÂ theÂ department's website. Â Â An article in the July 9, 2008, USA Today reports the following: Â "[Attorney General] Mukasey said he is considering changes so FBI agents have 'clear and consistent rules for conducting investigations while maintaining vital civil liberties protections.' The proposed policy, first reported last week by the Associated Press, would let FBI agents open preliminary terrorism investigations after mining public records and intelligence to build a profile of traits that, taken together, were deemed suspicious. Factors that could make a U.S. citizen or resident the subject of an investigation include travel to regions of the world known for terrorist activity, access to weapons or military training and someone's race or ethnicity.Â "When questioned about whether or not someone's ethnicity is enough to put them under investigation, Mukasey gave an emphatic 'no.' However, when asked whether a U.S. citizen from Pakistan, whom [sic] makes frequent trips to Pakistan, would be subject to investigation, Mukasey said he was not prepared to discuss hypothetical questions. He added that 'this is part of an ongoing process.' Mukasey's tone often remained careful and sometimes ambivalent during his exchanges. Â "When pressed by Sen. Russ Feingold, D-Wis., on whether people might be investigated based on their ethnicity, travel habits and whether they own a gun, Mukasey declined to answer directly. He said, 'the nature of evidence gathered and the way that it's gathered will be subject to review.'"Â The following excerpt comes from a July 2, 2008, Associated Press article on the matter: Â "The Justice Department is considering letting the FBI investigate Americans without any evidence of wrongdoing, relying instead on a terrorist profile that could single out Muslims, Arabs or other racial and ethnic groups. Law enforcement officials say the proposed policy would help them do exactly what Congress demanded after the Sept. 11, 2001, attacks: root out terrorists before they strike. Although President Bush has disavowed targeting suspects based on their race or ethnicity, the new rules would allow the FBI to consider those factors among a number of traits that could trigger a national security investigation.Â "Currently, FBI agents need specific reasons â€” like evidence or allegations that a law probably has been violated â€” to investigate U.S. citizens and legal residents. The new policy, law enforcement officials told The Associated Press, would let agents open preliminary terrorism investigations after mining public records and intelligence to build a profile of traits that, taken together, were deemed suspicious. Among the factors that could make someone subject of an investigation is travel to regions of the world known for terrorist activity, access to weapons or military training, along with the person's race or ethnicity."Â Fox News's July 2 articleÂ claims to add additional information to the foregoing Associated Press article. Â Do any of you know where I can find primary sources on such "changes" being considered by Attorney General Mukasey? I have not found such informationÂ through searching the Federal Register. Nor have I found such information through a general Google search, nor through a search of the Justice Department's website, nor through reviewing some of the webpages discussing the issue.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, July 22. 2008

## Of FCCENSORSHIP, Bono, and Janet Jackson's bared right breast.

Â Bill of Rights.Â (From the public domain.)Â Welcome to the land of bland: A land where television is dumbed down toÂ a child's level, where broadcasters furiously self-censor, and where most Americans keep returning for more and more and more. It is the land of broadcast television, where so-called oral and visual "indecenty" is forbidden from 6:00 a.m. to 10:00 p.m.Â When courts first permitted indecenty bans on broadcast (versus cable and Internet) television and radio, the theory behind it apparently included reliance on the limited number of available space for broadcasters, who are required by law to include service to the so-called "public interest." That basis by now is archaic, when cable stations and satellite radio abound. Â Americans ultimately have themselves to thank for this state of affairs, not only because the anti-censors have not spoken out enough and effectively enough (do too many of them fear television content that they do not like if they speak up against broadcast censorship?), but also because tens of millions of viewers daily return for more of such broadcast pablum. Â Enter Janet Jackson and Justin Timberlake at the 2004 Super Bowl, challenging the land of bland during the halftime show, with Timberlake singing "gonna have you naked by the end of this song," while, unscripted, ripping off part of Jackson's costume to reveal her right breast for nine-sixteenths ofÂ a second until CBS cut the image. Were this Europe, the reaction would have been no different than to the thousands of barebreasted women sunning themselves on beaches in France and Italy, exercising their right not to cover up any more than men are required.Â This not being Europe, though, countless Americans fear bared breasts. Fortunately, women have won the right to breastfeed in public in most places, and in some locales publicly bared breasts are permitted, whether by legislative intention or oversight. For whatever reason, bared breasts are more eroticized overall in American society than the many places where it is commonplace for women to be barebreasted all the time in public, causing little more notice than if they were covered up. Â No sooner does Janet Jackson get removed from the halftime stage than the complaints of her bared breast come flooding into the Federal Communications Commission. Ultimately, finding Ms. Jackson's and Mr. Timberlake'sÂ bared breastcapade "indecent" -- how on earth can a bared breast be indecent? -- the FCC hit CBS with a \$550,000 fine, which I decried in an interview with the USA Today McNewspaper. Mind you, a \$550,000 fine in and of itself is a drop in the bucket for CBS, which likely paid its lawyers more than that amountÂ to litigate against the fine through the appellate level, but repeated indecenty fines can add up and can lead to more self censorship. Â CBS's investment in legal counsel paid off yesterday with the Third Circuit's reversal of the entire half million dollar fine. CBS v. FCC, \_\_\_ F.3d \_\_ (3rd Cir. July 21, 2008).Â Â Kudos to fellow First Amendment Lawyers Association member Robert Corn-Revere for successfully arguing the case.Â Shame on the FCC forÂ having levied any fine, and shame even more for having imposed such a huge fine as to chill smaller broadcasters with much shallowerÂ financial pockets. Â The Third Circuit -- in a 2-1 opinion, with the concurring-dissenting judge as spiritedly in agreement with the result and with most of the reasoning therefor -- reversed the FCC's fine on CBS on two grounds. First, the court found that the FCC's fine amounted to an arbitrary and capricious retroactive application of a new policy banning fleeting indecent images (the change was spurred by Golden Globe award-accepting Bono's exclamation thatÂ "this is really, really f--king brilliant," where if I were theÂ awardee, I might have opted for theÂ pithier "F--king 'A'") where previously the FCC had at least allowed indecent fleeting words. Second, the Third Circuit found that CBS -- which the FCC conceded had no foreknowledge of the then-impending bared breast -- was not liable (with willfulnessÂ being the liability standard)Â for the breast-baringÂ actions of independent contractors Jackson and Timberlake no matter how one slices it, whether, for instance,Â on a theory of employer liability or vicarious liability, or on a theory of a responsibility to have time-delay technology for presenting visual images, which technology CBS only had implemented for sound transmissions. Â As the Third Circuit recounts, in the FCC's upholding the half million dollar fine on CBS, "the FCC relied on a contextual analysis to find the broadcast of Jackson's exposedÂ breast was: (1) graphic and explicit, (2) shocking and pandering, and (3) fleeting... It further concluded that the brevity of the image was outweighed by the other two factors... The standard applied by the Commission is derived from its 2001 policy statement setting forth a two-part test for indecenty: (1) 'the material must describe or depict sexual or excretory organs or activities,' and (2) it must be 'patently offensive as measured by contemporary community standards for the broadcast medium.'Â CBS v. FCC, \_\_\_ F.3d \_\_. Â CBS v. FCC, explains that, unlike obscenity, indecenty still gets First Amendment protection on the airwaves, which ledÂ the FCC to "confine[] enforcement of indecenty restrictions to the hours 'between 6:00 a.m. and 10:00 p.m.'" See 47 C.F.R. Â§ 73.3999," which are the hours when youngsters are more likely to be watching and listening to broadcasts. CBS v. FCC, \_\_\_ F.3d \_\_. Â Will the FCC seek review of this case in the Supreme Court? The agency probably has at least four good friends if cert. is granted: certainly Justices Thomas and Scalia, and likely Chief Justice Roberts and Justice Alito. From considering his concurrence inÂ Los Angeles v. Alameda Books, 535 U.S. 425 (2002) -- which left open the door to challenging the multitude of tired and disingenuous negative secondary effects "studies" that are repeatedly recycled by municipalities to try to zone out adult video stores and strip clubs -- Justice Kennedy might be a wild card if the FCC is permitted a Supreme Court appeal. Considering their joining the dissenting camp in Alameda Books and their overall records, it seems a good bet that CBS will find a friend in

Justices Stevens, Souter, Ginsburg and Breyer. Â In the meantime, congratulations CBS, Janet Jackson, and Justin Timberlake, and thanks to the Third Circuit for keeping life breathed into the First Amendment.Â Jon Katz.Â ADDENDUM: See my First Amendment defense brother Marc Randazza's views on this CBS v. FCC case.

Posted by Jon Katz in Constitutional Law at 00:00

Monday, July 21. 2008

### **DNA for exonerating and for convicting.**

Â Bill of Rights.Â (From the public domain.)Â A late, ordinarily likeable, often entertaining, and sometimes frustrating (for his overly informal manner that too often overlooked the law and procedural rules) judge was said to have pontificated about speed radar something along the lines that "Radar is spelled the same backwards and forwards, and helped keep me and my fellow sailors safe in wartime." In other words, Radar evidence was impenetrable to attack for him, even though radar and laser evidence is ripe for attack on such grounds as whether the radar and laser were correctly calibrated, whether such calibration evidence exists to come in under evidentiary rules, and whether the equipment was correctly handled by a certified operator. Â Similarly, fingerprint technology is far from infallible. Â Finally, DNA testing is far from infallible, as well, as highlighted in this July 19 Los Angeles Times article -- thanks to Scott Greenfield for posting the article -- concerning a state crime lab analyst's findings since 2001 that debunk the concept that no two people are likely to have similar DNA at nine of thirteen chromosomal markers. The article is lengthy, and I have just started reading it in further depth. Â Of course, such DNA issues also might open a can of worms for trying to exonerate convicts through DNA evidence. Of course, such concerns do not merit doing anything but critically examiningÂ DNA evidence's reliability. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, July 20, 2008

### Gershwin's inspiration to scale new heights.

^ Hundreds of times I improvised haunting and sometimes sad versions of Gershwin's "Summertime" on the trumpet that for over twenty years has not touched my lips, and now sits in my garage. The song continues moving me as much today as ever. ^ "Summertime" comes from Gershwin's earth-moving Porgy and Bess, which premiered in 1935 after Gershwin spent several weeks on an island off Charleston,^ South Carolina, to hear and join in the rhythms of life, music and speaking that he would incorporate into this opera with signature Gershwin music, rather than the typical classical music that ordinarily accompanied operas at the time and usually still does. ^ First performed during the height of rabid and unabashed racism in the United States, the opera would^ be overwhelmingly cast with Black actors, as provided by Gershwin's brother Ira, who worked with George as lyricist. Among the many concerned about the opera's portrayal of Black people were Paul Robeson and Duke Ellington. Although the Socialist Worker is not ordinarily my preferred source for reliable information, the paper's likely decidedly anti-racist approach makes it particularly noteworthy that one of its^ writers wrote in 2005: "Some black artists criticised the work, believing it to portray black communities in too negative a light. Duke Ellington stated 'no Negro could possibly be fooled by Porgy and Bess'. Paul Robeson, who Gershwin asked to play the roll of Porgy, having written the part with his voice in mind, refused the role... In later years however both Ellington and Robeson recorded Gershwin's^ music because he had played a role in putting black artists in the mainstream theatres." ^ A 2006 BBC article says Porgy and Bess "was revived after the war in the United States and attracted performers like Maya Angelou and Todd Duncan.^ ^ A filmed version starring Sidney Poitier (after Harry Belafonte turned it down because it demeaned black people) was produced by Samuel Goldwyn in 1959.^ After that the work encountered the civil rights and black power era." The rest of the brief article^ is worth a read. In any event, when local public radio covered the opera's current run at the Kennedy Center, I remained curious and concerned about such issues, starting with grammar errors in such song lines as "I loves you Porgy" and "Bess,^ you is my woman now." ^ What prompted me to write today's blog was Gershwin's surprise that he had been able to reach such heights in creating the music to Porgy and Bess. What a wonderful way to exit the planet; he died two years after the opera's premiere. ^ Similarly, criminal defense lawyers are challenged every day to surmount the often seemingly insurmountable^ obstacles of reality and would-be reality. How many times do my fellow criminal defense lawyers and I say "Oh sh-t" in the face of apparently insurmountable odds to win a case and, if there is a conviction, to get the most favorable sentence rather than an utterly draconian one? The amazing SunWolf proclaims that "Reality is no obstacle," which at first blush might seem fanciful, but when examined more closely makes perfect sense when considering that many competing would-be realities are usually involved in a criminal case, and jurors and judges have various ways of deciding what is reality and how to handle that reality, sometimes including convicting the utterly innocent and acquitting the clearly guilty. It reminds me of a story from my trial law guru Steve Rench, about a woman he successfully defended in a theft trial. His client was arrested for^ allegedly pickpocketing a man she danced with in a bar; perhaps the jury got the idea that the would-be victim was there with unwholesome intentions. At one point while the jury was present^ but the proceedings^ were on hold, Steve went to a sheriff's deputy and pointed towards his client (held on bond during trial but in civilian clothes)^ during the conversation. Although his client was caught redhanded, the jury acquitted. Steve later saw one of the jurors at a bus stop, and asked the him if he had any comments about the trial. The juror merely said "Your client is okay," meaning to Steve that the jury disregarded the judges' jury instructions out of a belief that she had served enough time in the pokey while waiting for trial. In Steve's view, jurors are results-oriented, seeking to fix problems, which can put a real damper on the commands of jury instructions. ^ Again and again, I encounter staff members, clients, and witnesses (even an expert witness recently) who are fearful of doing something because it takes them out of their comfort or experience zone. Sometimes the fear is as basic as fearing to testify for the first time, or, with staffmembers, to tackle an assignment they have never done before. When I believe the person is capable of rising to the occasion, I encourage the person, sometimes by sharing some of my own trepidations along the path, including the fear of doing anything to let a client down and thus causing a conviction or a worse sentence than otherwise; it might be less fearful for me to draft wills and contracts, but certainly less meaningful and fulfilling. I remind them that it is okay to be fearful, but that the fear should not prevent them from proceeding forward. The idea is not to ignore the fear, but to know the fear and to send it on its way, similarly to the t'ai chi posture of embrace tiger/return [the tiger] to mountain. ^ Ordinarily, a musician or composer might not be seen as having a fearful occupation. Then again, George Gershwin broke radically new ground and entered new frontiers without knowing how audiences and critics would receive Porgy and Bess^ -- or even how he might rise to the occasion in creating the opera -- when he easily could have rested on the laurels of such preceding masterpieces as "Rhapsody in Blue" and "An American in Paris". ^ Of course, storytelling is central to persuading jurors and judges. Gershwin was a masterful storyteller, even when only doing it to music, before adding any lyrics. At least with^ "Rhapsody in Blue",^ "An American in Paris" and Porgy and Bess, Gershwin's music takes the listener on a storied journey that takes unexpected turns and captures the five senses and deep feelings along the way. ^ I stopped playing the trumpet that brought forth my versions of "Summertime" in the

fall of 1985, when I moved to a shoebox one-room/no-kitchen ten-foot by ten-foot single resident occupancy apartment in Manhattan when working in the belly of the capitalist beast. Rather than scout out a place to play that would not disturb my neighbors where before I would play at my college's music practice rooms and at my parents' home, I stopped playing, and that carried on to law school, even though I probably could have found music practice space at the university; I was not ready to re-learn to get my mouth muscles back to where they were needed to be to play the way I wanted to play. Not playing a musical instrument has left a creative and musical void in me. It is time to pick the horn back up, regardless of the state of my lip muscles. As a quote on the door of my ethnomusicology professor Jeff Todd Titon said, loosely remembered: "Music does not expect excellence. It welcomes being surprised by it, but does not require it." Consequently, in writing this blog entry, Gershwin has not only continued to inspire me to treat reality as no obstacle in my law practice, but also to open my trumpet case, to see if the valves are not beyond repair to oil them to working function, to vaseline the slides to move them into tuned performance, and to play and play and play, lost in the sheer enjoyment of the music. Jon Katz. ADDENDUM: Here are some additional excellent Gershwin links, in addition to those above, which include YouTube performances of "Summertime", "Rhapsody in Blue", and "An American in Paris": - Dubose Heyward's Porgy, which led to Gershwin's opera. - PBS on Porgy and Bess. Be bowled over by Maya Angelou's discussion of the opera and her role as Ruby in a mid-1950's European tour. - Film excerpt from Porgy and Bess. - 2006 NPR coverage of the first time Porgy and Bess's premiere version was re-presented. - Sarah Vaughan singing "Summertime", and Janis Joplin substantially altering it. - Claudia Pierpont on "Why We Still Listen to Gershwin."

Posted by Jon Katz in Persuasion at 00:00

Friday, July 18, 2008

### **Circuits are split on sex offense as crime of violence.**

Â Bill of Rights.Â (From the public domain.)Â Following is a brief overview of a federal circuit split that likely will find its way to the Supreme Court to resolve this split that likely affects a large number of criminal defendants. Although I have tried to keep the language as non-graphic as possible, you have been so advised. Â Numerous circuits are split onÂ "whether a sex offense perpetrated in the absence of consent â€" and which does not have as an element the use, attempted use, or threatened use of physical force â€" constitutes a 'crime of violence' under the Guidelines," because the federal sentencing guidelines do not sufficiently define "forcible sex offense,"Â which is a crime of violenceÂ that increases a defendant's sentencing guidelines. U.S. v. Chacon, \_\_ F.3d \_ (4th Cir. July 14, 2008). This is a critical question, as Mr. Chacon -- whose instant case involved a conviction for unlawfully re-entering the United States -- full well knows, from having received an increase in hisÂ Sentencing Guidelines base offense level by sixteen levels due to his previous Maryland second degree rape conviction. Notably, Chacon does not say whether the second-degree rape for which he was convicted in Maryland was based on an allegation of non-consensual sex with an adult or so-called consensual sex with an underage person, which the law treats as non-consensual based on the age of the victim. Â What is a "sex offense" as to the above issue?Â Rape was Mr. Chacon's prior conviction, and the Fourth Circuit had no problem classifying rape as a sex offense, just as courts likely will have no problem classifying non-consensual oral sex and anal sex as sex offenses. However, my initial review of Chacon does not seem to define sex offense, thus leaving open the question of the extent to which the following commonly prosecuted crimes will receive sex offense classification by the federal courts for sentencing guidelines purposes: non-consensual feeling of the clothed or unclothed body parts of another for purposes of arousal; and non-consensual penetration by finger or other object of one's genitals or anus. Â How does it feel to defend sex crime cases, at least where it seems clear that the person committed the alleged crime? I answer that hereÂ in discussing my defense of a man accused of raping his grandmother. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, July 17, 2008

### **What keeps a lawyer practicing law?**

What keeps me practicing law, and enjoying it? Law school was not sufficient to keep me practicing law and enjoying it, with the exception that I benefited tremendously spiritually, intellectually, and growth-wise from the immigration law clinic, through which I first-chaired the first two trials of my life. I had too much trouble separating the good I learned at law school from the many professors who were too aloof and the one who resisted even discussing the results of a final exam to enable learning from the experience ("Can you come back to me near the end of the semester on that?"), and had no interest for liking the law merely for the law's sake, rather than using it as a vehicle to obtain real justice. It was not my first legal job, as a law clerk at the then-named Federal Home Loan Bank Board -- which later became the Office of Thrift Supervision, in the Treasury Department -- where although I obtained unparalleled learning in how to research, analyze, and try to influence federal regulating, and interacted with some wonderful people, much of the tenor there seemed too lifeless. It was not my first lawyer job, where, although I got great litigation and business and regulatory law experience with some very talented people, including two who kindly took me under their wing, I felt like I anticipated I would: I was fortunately avoiding doing any work that would harm society (except for doing some otherwise very interesting legal analysis and writing defending an employment discrimination case, for the management side), but I did not feel like I was contributing anything much to society either, although with mortgage banking clients included in the mix, even a greedy goal of doing mortgage banking still contributed to more widespread home ownership and empowerment of ordinary people, including through such programs as FHA- and VA-insured home loans.

Becoming a public defender lawyer two years out of law school enabled me to break out of the preceding doldrums, and what kept me going during the doldrums was keeping alive the ideals that brought me to law school in the first place, which was to find a way to do justice with my legal training, rather than settling for a job doing nothing more than helping corporations maximize and keep as much of their profits as possible. I already did the corporate profit protection stint during my year before law school as a financial auditor with a Wall Street bank, in the hope that there would be a way to earn good income while giving back to society (which is possible, but I just did not find any kindred spirits at my company, other than that it had a very generous charitable donation matching program, which was probably inspired more by the competition than anything else).

By sticking to what I feel is a calling to focus on defending justice -- now primarily representing criminal defendants and Constitutional rights, with some student discipline defense in the mix, which usually is tremendously enjoyable in standing up to and persuading the principals' and deans' offices -- that is all I need to keep me going and to keep the adrenaline rushing. Helping the adrenaline all the more is having found so many kindred spirits -- after long stretches of not finding many of them before moving to criminal defense -- including so many who are willing to drop what they are doing to help out. That is all the more important when I am the only criminal defense lawyer at my firm, that I can just pick up the phone or the email mouse, and get a rapid response from some of my most talented and effective colleagues. Among the most generous things a colleague ever has done for me was to join me in visiting a client jailed pretrial for a very serious felony, to add my friend's perspective to the brainstorming in seeking the best outcome for my client, and also to help reassure my client that my views on getting his feet planted on the ground were shared by another highly experienced criminal defense lawyer.

On numerous occasions, several local lawyers have dropped what they ordinarily would have done on a weekend morning to join me for a trial/psychodrama workshop -- sometimes including my particular client's presence -- to find a way towards victory by, in part, reducing the obstacle of apparent reality. As my brother lawyer Marc Randazza says, there are some debts that can never be repaid, and we can only reduce the debt by paying it back again and again and again, which I try my best to put into practice with helping my colleagues in need.

What also keeps me going is the many lawyers who remain humans first and lawyers as a part of their humanity, rather than the excessive number of lawyers and law students who let the law consume them so much (it is okay to put in long hours practicing the law without being swallowed up by it) that they become more like humanoids than the more caring and feeling people they were before entering law school.

One lawyer who inspires me to keep on loving the practice of law while maintaining the very human perspective that is critical along the way, is Charles Abourezk, whom I got to know a bit, through email, by our both having attended the Trial Lawyers College. Check out Warrior Charlie's fascinating website. Among the many interesting items there is that beyond his law practice, Charlie has long fought for American Indian rights (as a lawyer and before that), makes films, is a writer, and is a justice of the Rosebud Sioux Tribe Supreme Court and a retired justice of the Oglala Sioux Nation Supreme Court. I either represent civil plaintiffs or criminal defendants and that I do not represent or work for insurance companies or business corporations or entities, or for local, state or federal prosecutors.

Charlie co-directed and co-wrote *A Tattoo On My Heart: The Warriors of Wounded Knee* 1973, <http://www.filmbaby.com/films/308>. Check out Charlie's writings, including: "The Use of Psychodrama in Depositions, Direct and Cross-Examination", "Constructing Reality 2001", and "Unpopular Clients, Unpopular Causes." Then, again, with the first two articles, will you heed Charlie's command to confirm that "I started seeing lawyers coming alive the most when I joined and started attending gatherings of the National Association of Criminal Defense

Lawyers and the Maryland Criminal Defense Attorneys Association even before I had defended my first criminal case. That snowballed into feeling the very human presence, touch and caring of so many attendees at the National Criminal Defense College's Trial Practice Institute followed by the Trial Lawyers College. When other lawyers talk about how to market their services, for me, the key to doing that starts with the basics underlined by the NCDC and Trial Lawyers College, which is to care 100% about our clients at all times and to bridge that caring with the best skills and persuasive arguments that we can put forth and improve. Unless the potential client wants nothing more than a lawyer who "knows the prosecutors, to get a better deal" or who charges little to walk the client through a guilty plea rather than pursuing the possibility of victory, clients know when a lawyer really cares about them, just as a patient knows when a doctor truly cares, or just feels imprisoned in the profession of a doctor, lest switching jobs will bring financial downfall. One of the best things about the Trial Lawyers College is the instant connection even among those who have never been in touch before. Not having been in a college frat, maybe that is a similar connection to what frat members feel, aside from episodes of drinking mass quantities of beer and being obnoxious (I hope I exaggerate). When a Trial Lawyers College grad calls me or I call them, invariably it is an instant human-to-human conversation, skipping the lawyer-to-lawyer-ese. Boiled down to its very essence, then, what ultimately keeps me going and inspired and energized as a lawyer is the positive human touch, compassion and helping with my clients, with my colleagues who share my same vision and caring and who remain the same person throughout the day rather than putting on their lawyer hats when leaving the home and taking them off upon returning home, and with the many other people with whom I connect along the way, who share with me and who teach me. What and who inspire you? Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Wednesday, July 16, 2008

### **Avvogatto in AVVO.**

Â Â Image from Library of Congress's website.Â My tireless blogging colleague Scott Greenfield has written repeatedly about (partly) consumer-driven lawyer ranking site AVVOÂ (whose spelling can mistakenly be seen as "awo", depending on how closely one's computer screen places the vees in the word). Â Having learned about AVVO from Scott's site, I answered the site's information questionnaire. Eventually, after my questionnaire information and a few client reviews, I was given a ranking of 9.4 out of ten, or "superb". Although I am happy to receive such recognition, the rankings system does not sound scientific. Â On July 15, a Maryland Daily Record reporter called meÂ for an article that appeared today, curious about her assertion that "Searching for a Maryland lawyer brings up Katz near the top of the list." If you do not want to be misquoted or distorted out of context, do not speak with a journalist; knowing this frequent risk, I still ordinarily speak freelyÂ with journalists about matters not involving my clients,Â with possibly the most stark example of unprofessionalÂ interviewing of me coming from theÂ insensitivity of a reporter (and/or his news organization) engaging in what I thought was sensationalism by telling me on camera rather than off that Deborah Palfrey had killed herself, and then seeking comment -- without ever pausing the camera -- when I had nothing to do with the case. Â The reporter's somewhat minor distortion in this AVVO article is in writing that I have "suggested that clients write positive reviews" on AVVO. In reality,Â I was answeringÂ her question about how people ended up writing the handful of AVVO reviews about me, by saying that in the past when clients thanked me deeply for my service, I would offer for them the option of sending meÂ an anonymous testimonial for me to post to our website if they wished, and now add the option to post an AVVO review. The AVVO review is a convenient way for a client to eliminate me as the middleman in getting feedback posted. Â In any event, the article confirms that AVVO's name comes from avvocato, which is the Italian word for lawyer. Curiously, whether or not intentionally, the French word for lawyer, avocat, also is the word for avocado, which is one of my favorite foods. Early on when my law partner Jay Marks and I hosted a call-in Spanish radio show "Legally Speaking: Where your cause is our cause" I got the moniker "gato" for cat/Katz, which then led to the less frequent moniker of "abogato", blending abogado for lawyer and gato for cat. The equivalent in Italian would be avvogatto. Â Finishing on this tangential discussion of the word lawyer, a very persuasive, dedicated, and intelligent longtimeÂ Amnesty International activist who spoke at the invitation of my law school's Amnesty International chapter started out by saying that the law is an ass, because, in his view, it is slow and plodding to achieve beneficial change. He then asked "If the law is an ass, what are lawyers?" I did not get around to asking him if he meant ass--les, but he had me in stitches nevertheless, even though I thought such a view was hyperbole taken from frustration with the legions of lawyers who to this day focus heavily on money and little on fairness and justice. (Only a few years ago, a colleague who includes criminal defense in his practice very seriously asked if I agreed with his view that the law practice is all about making money; I strenuously disagree with him.)Â My laughter in response to the Amnesty International activist came in the context ofÂ Â having expected that part of my law studies would involve learning the language of the oppressive enemy, so that I could more successfully battle that enemy.Â In any event, AVVO probably presents serious challenges to the once predominant Martindale-Hubbell legal directory, which is driven by rankings purportedly based on peer reviews, and expanded listings arising from payments for the inclusion. (Disclaimer: Our firm pays for such a listing.)Then again, the Internet has created substantial competition throughout the for-profit sector, including shaking the previous predominance of yellow page directories.Â Â Jon Katz

Posted by Jon Katz in Jon Katz in the News at 00:00

Tuesday, July 15, 2008

### When release is conditioned on drugging.

Bill of Rights. (From the public domain.) More commonly when I was a public defender lawyer, from time to time I would have clients who were at great risk of being ordered by the judge for a psychological evaluation -- e.g., for being seriously delusional, and, therefore, at risk for being found to be a harm to themselves or others, thus justifying involuntary commitment in a mental institution -- and then being warehoused in a psychiatric hospital through the duration of their case, if not longer. Some criminal defense lawyers might feel tempted to seek court assistance with such clients by asking for a psychological evaluation or by seeking a finding of not criminally responsible. It is one thing to seek such a path for a first degree murder case, but something quite different to do the same for a misdemeanor charge carrying the risk of much less incarceration time than indefinite incarceration in a mental institution on a finding that the person is a harm to himself or others. In such instances, it is important for the criminal defense lawyer to get the advice of a qualified and independent mental health professional. Many years ago, a client charged with a misdemeanor was very uncommunicative. When asked a question, he would say something completely unrelated; for instance "One right shoe; one left shoe." His father complained that this happens when he stops taking his psychological medication. A year later, I had him as a client for a new misdemeanor case. He seemed very lucid. When I asked him what caused the change, he said he was back on his medications. Since when do psychological medications not have significant side effects, whether it be sleeplessness, reduced libido, change in eating patterns, or anything else? Recently, the Fourth Circuit affirmed a District Court's order that during supervised release a defendant be injected with antipsychotic drugs, after he was forced to take such drugs in prison after he threatened to kill himself and others, and did not voluntarily take his oral anti-psychotic medicines after his initial release. Between his initial release and being ordered to be injected while on supervised release, the defendant "was arrested several weeks [after his release], after he was found wandering aimlessly..." U.S. v. Holman, \_\_\_ F.3d \_ (4th Cir. July 7, 2008). Holman laid out the Supreme Court's standard as follows for determining when a defendant may be forced to take anti-psychotic drugs: The Supreme Court has made it clear that under the Due Process Clauses of the Fifth and Fourteenth Amendments, individuals (including pre-trial detainees and convicted criminals) have "a constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs" an interest that only an essential or overriding governmental interest might overcome." Sell v. United States, 539 U.S. 166, 178-79 (2003) (internal quotation marks omitted); see also Washington v. Harper, 494 U.S. 210, 221-22 (1990) ("We have no doubt that . . . respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."). Among the governmental interests that in a given case may be sufficiently important to support an order for involuntary medication are the need to protect the individual and others from the individual's potentially dangerous behavior, see Riggins v. Nevada, 504 U.S. 127, 134-35 (1992); Harper, 494 U.S. at 225-26; and the government's interest in rendering a criminal defendant competent to stand trial, see Sell, 539 U.S. at 179-80. U.S. v. Holman, \_\_\_ F.3d \_ (4th Cir. July 7, 2008). The Fourth Circuit reasoned as follows in affirming the trial court's order for forced injection of anti-psychotic drugs: The evidence establishing Holman's dangerousness also establishes that the district court's order was narrowly tailored to the circumstances of this case. As the district court noted, Holman became a danger to himself and others when he was off his medication, and injections of long-lasting antipsychotic drugs provide the only means of insuring that Holman takes his medication. The special condition of supervised release thus significantly furthers and is clearly necessary to further the government's interests in protecting Holman and the public. See Sell, 539 U.S. at 181 (explaining that an order to involuntarily medicate an individual must "significantly further" overriding governmental interests and must be "necessary to further those interests" and that involuntary medication may be necessary if "any alternative, less intrusive treatments are unlikely to achieve substantially the same results"). Holman, \_\_\_ F.3d \_ . Judges, of course, are not mental health experts, so they rely on mental health professionals in deciding questions of forced drugging and detention for psychological reasons. Trial judges ordinarily have very busy dockets, which probably creates all the more of a tendency for them to place heavy reliance on the opinions of such psychological professionals, even if those opinions are wrong, and even if those opinions are influenced by the professionals' own biases about whether or not the United States is too de-institutionalized when it comes to mentally ill people. (For those born after One Flew Over the Cuckoo's Nest's 1962 publication, through the 1960's it was much easier to force people into mental hospitals in the United States. Of course, in the Soviet Union, many dissidents were wrongfully classified as mentally ill and forced to receive harmful psychological medicines.) Mr. Holman's situation may have been extreme enough for the trial and appellate judges to feel comfortable with okaying his forced anti-psychotic medications. (At the end of his supervised release period, Mr. Holman will not be under court order to receive further forced injections. What happens then?) What happens with defendants whose situations are less extreme? The foregoing case law certainly does not solve that problem well enough. Trial judges wield extraordinary power over the matter. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, July 14, 2008

**When office-runners run roughshod over free speech.**

Â Â Bill of Rights.Â (From the public domain.)Â Â Last Friday I blogged about the undemocratic aspects of the judicial branch of government. Of course, the remaining branches of government are hardly immune from undemocratic actions, which are repeated and rampantÂ by the executive and legislative branchesÂ at the federal, state and municipal levels. As just one of legions of examples, the 1968 Chicago police abuse of demonstrators during the Democratic presidential convention may have been extreme, but certainly was not the only instance of abuse of power by government that continues to this day. Â Unfortunately, candidates for elected office and high government officials repeatedly abdicate their responsibility to protect the First Amendment right of people to protest against them;Â and probably agree with the suppression and pretend to be unaware of such suppression, as if the suppression is being handled independently by the candidate's handlers (where does the buck stop?). Such suppression happens with both Tweedledee and Tweedledum parties. We see repeatedly see huge demonstration-rein zones during Democratic and Republican presidential conventions, backed by force, arrests and prosecutions. We saw such manhandling last September, when John Kerry kept droning on and on as an obnoxious questioner's microphone (he raised some valid points, though) was cut off, followed by cops manhandling him, and then tazing him when he would not go quietly. Clearly, Kerry knew the man's mike had been cut off and that the police had carted him away to leave a sanitized auditorium; Kerry did nothing, except to continue to drone. See my full blogtails here. Â Two Novembers ago, as then-Senator George Allen was about to be booted out of office, some of hisÂ goons shoved away a dissenter when he asked questions designed to make Allen win. See my full blog details here. Â Donald Rumsfeld -- who does not count me as a fan -- in this videoÂ uploaded by my lawyer brother Marc Randazza, shows how easy and essential it is for a government official to put the brakes on police otherwise chomping at the bit to wrongfully arrest a speaker exercising the First Amendment right to dissent.Â If politicians do not want to hear dissent, they should avoid public appearances and find another line of work; I am not holding my breath, lest I expire. Â Thanks to brother Randazza for continuing to follow the suppression of dissenters at politicians' political stops with this YouTube video showing the ongoing sanitizing of dissent by politicians at the expense of free expression, with the July 7 trespassing arrest/citation in Denver of a librarian holding a McCain=Bush sign as she waited to enter his so-called town hall meeting. (How is it a true town hall meeting if dissenters are ejected before they even enter?).Â Â This opinion piece in the Rocky Mountain News complains of an allegedÂ anti-McCain slantÂ in the coverage of the foregoing ejection of the anti-McCain dissenter. The writer, David Kopel, asserts that the woman was not on government property to be able to get First Amendment benefits. Opinion writer David Kopel says: "[A]ccording to the venerable left-wing magazine The Progressive (Dec. 12, 2007), police acting at the behest of the Obama campaign expelled three peaceful anti-nuclear waste protesters from the area outside a University of South Carolina stadium where Obama was scheduled to speak. Post columnist Susan Greene made a start at examining the Obama side of Colorado speech control. On Thursday, she wrote that 'Kreck's [the foregoing arrested librarian with the McCain=Bush sign]Â citation came the same day Englewood's police chief convinced the City Council to pass an anti-picketing ordinance meant to control protesters in August. A note written by the city's attorney's office inexplicably says the language of the measure was "recommended by the [Democratic National Committee."""Â Â Kopel likely is correct when he asserts that "the evidence suggests that when it comes to squashing protesters, McCain and Obama are two peas in a pod." Those peas should change their seasoning, and pronto. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:05

Friday, July 11, 2008

### Judges: Respect is a two-way street.

Â Bill of Rights.Â (From the public domain.)Â Â In many ways, judges are antithetical to America's finest democratic ideals. Who else in AmericanÂ government gets cloaked in such enforceable majesty as judges? What other government official walks into and leaves a government chamber with commands to rise from everyone's seats, but ordinarily not rise in reciprocation? What other government official gets called your honor, but responds with "Mr." or "Ms." to the speaker? What other government official can find a person in contempt for disrespecting that official or his or her office, even if the disrespect is expressed in a calm tone of voice? What other government official gets a protected office of power for life at the federal level and for plenty of years in between elections and re-appointments in the states that do not have lifetime judicial seats? Â Judges are humans, and humans err. The republic will not collapse if we democratize judges more, even if that is toÂ commence no further than eliminating commanding the audience to rise when the judge enters and leaves the courtroom. I applaud theÂ judges who opt to have the room advised to remain seated, and at least one federal court has a tradition of reciprocating the rising by coming down from the bench after oral argument to shake the hands of the arguing lawyers. I am not ready to say that judges' tenure should be subject to the political winds any more than what already affects such tenure. I am wondering, though, about the extent to which all this majesty with which judges are cloaked is more a holdover from the insufficiently democratic English tradition than an adaptation to the more democratic governing system that purportedly took hold in America despite the inclination of some even to turn General George Washington into a king. Â State and federal executive branches further get in on the act of the undemocratic nature of judging, through the administrative law judge system. Just walk into any immigration courtroom, for instance, where you will see administrative law judges cloaked in black robes, looking superficially like real judges, being called "your honor", and being analogized to a "court". Heck, they are not real judges; they are employees picked by the executive branch, never considered or confirmed by the legislative branch, consequently not sufficiently independent from the executive branch, but so often acting in an undemocratic manner. What a sleight of hand to follow a spirited contested election for president, governor or mayor, with the victor or his or her appointees selecting these administrative law judges who are not real judges and who serve in such undemocratic roles.Â I say to strip administrative law judges of the title of judge, to strip them of their black robes, and to call them what they really are: hearing examiners, hearing board members, adjudicators, tribunal presidors, or anything else other than words that smack of judge, your honor, or court. Â Fortunately, many judges are folksy people who care about doing the right thing (as they define the right thing, of course) and who are unmoved by the trappings of the office and are motivated more by the best judicial traditions of Solomon. Fortunately, many judges do not get jaded through day-in and day-out visits to variations on the same often seemingly-whining/complaining themes, while battling often crushing dockets and insufficient resources to justly serve each litigant. Such judges continue to see each litigant as an individual on his or her merits, with real problems riding on the court case,Â and not as just another drunk driving case; just another divorce case; or just another fender bender. They continue to engage in conversation with laypeople and lawyers, without crossing over the line of ex parte communications and ex parte favoritism. Those are the judges who should be the role model for every new judge and for every judge at risk for being jaded or worse, or who already has crossed that line. Â A lawyer I know who seems to be highly respected by judges and who is the age contemporary or older than most of them told me that many judges he knows very much dislike plenty of what they do. It seems that some of them started out with the goal of serving the public, but got jaded. If the jading does not go away, should the judge stay on the bench? Â At a trial lawyers seminar several years ago, I got a chance to serve as a mock judge at a mock personal injury jury trial. I was surprised when one of the mock jurors told me afterwards that I would make an excellent non-mock judge. How would I be able to last as a judge without being impeached? Imagine my first bond hearing: Judge Katz: "I see you are charged with burglary after having been convicted of burglary three times already, I am reducing your bond to \$5.00." Defendant: "Huh?" Judge Katz: "Okay, fifty cents, then, but not a penny lower." Imagine how I would be at sentencing; criminal defense lawyers would fight each other to be first on the path to my courtroom. Â The best judges treat litigants, lawyers, witnesses, jurors and everyone else as if the judges were not wearing black robes in the first place, but who instead feel honored and humbled to have the opportunity to exercise such awesome power and who invest themselves fully to exercising that power fairly, justly, and according to the real meaning of the law. For them, the black robe is not something that elevates them over the courtroom's other visitors, but is a reminder to them of the extraordinary power that they wield. When judges take that approach, I do not get too concerned about their being called "your honor" orÂ "the court" or entering and leaving the court after everyone else is told to rise. Â Judges being human, judges wielding extraordinary power, and power being what it is, such horror stories as the following ordeal of Casey Price (see here, too) will continue to happen. The key is to make them as rare an occurrence as possible. In a nutshell, Casey Price proceeded to a jury trial for drunk driving. Judicial blunder number one: As the jury deliberated, the judge was already talking aloud about the type of sentence she might impose in the event of a guilty verdict. Â Kudos to Ms. Price for being acquitted by the jury. But wait. The joyous aftermath does not happen for Ms. Price. Instead, in judicial

blunder number two the judge orders Ms. Price to be drug tested, rather than releasing her from the courthouse on the spot. Next, a courthouse drug testing office blunder rears its ugly head as Ms. Price gets treated as if she is a criminal rather than as the innocent person the jury declared her to be. Some lawyers say wonderful things about this judge. Apparently this judge is mainly experienced with civil cases. If this judge is not removed from the bench, hopefully she will be removed from criminal cases. This week, Casey Price filed a criminal complaint against her judge. You heard that right, a criminal complaint, not a civil complaint. If Ms. Casey's complaint were only civil in nature, I would be patting her on the back all the way. However, I am not inclined to cross over from my criminal defense role to encouraging Ms. Price's criminal complaint; I will wait first for her to file a civil complaint. In any event, an essential element to being a great judge is to follow the golden rule. Respect is a two-way street; no exceptions. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, July 10, 2008

### **Meeting the Longest Walkers.**

Connecticut, or is that Quinnehtukqut? (Image from Energy Information Agency's website). Having blogged a few times about the Longest Walkers, here is an update on their activities and my meeting with some of them today. The 1978 Longest Walk was "a peaceful, spiritual effort to educate the public about Native American rights and the Native way of life. Native American Treaty Rights under the U.S. Constitution are to be honored as the supreme law of the land. The 3,600 mile walk was successful in its purpose: to gather enough support to halt proposed legislation abrogating Indian treaties with the U.S. government." This year's Longest Walk II is "with the message: All Life is Sacred, Save Mother Earth." With their environmental message, it is fitting that, on the last leg of their walk, the Longest Walkers are camping at the Greenbelt federal park in Greenbelt, Maryland. On July 9, I visited the campground to observe a signing ceremony of the Sovereignty Declaration of One Nation; however, the ceremony was not held then. My friend and spiritual mentor Jun Yasuda was there, and I also spoke briefly with Dennis Banks, a founder of the American Indian Movement. Jun-san walked with the original 1978 Longest Walk; in the interim, she probably has logged tens of thousands of miles on peace walks. With client and court obligations, I was only able to stay briefly. A highlight of the visit was being in the sacred circle when one of the walkers was beating on a drum and telling the story of coming from Alcatraz to Washington on the walk, which is the same path of the first walk. Those close to Washington, D.C., and interested in the walk might be interested in the walkers' itinerary running through this Saturday. For instance, on Friday will be a Capital Steps pipe ceremony with Harry Belafonte and Dennis Banks (seen here talking about the Longest Walk). On Saturday and Sunday will be a pow-wow near the National Museum of the American Indian. Although I grew up in a state with numerous Indian place names, there were few Indians living there at the time, and I doubt that has changed much through today. The state's very name is Indian, from Quinnehtukqut ("place of the long river"). On the law side, as I recently said, I have just a little knowledge about the law affecting and empowering Native Americans, and have much more to learn about that area of the law and about other Native American issues, including such matters as treaty rights, land rights, and sacred medicine. Jon Katz.

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

Wednesday, July 9, 2008

### "Beat the Heat" now online.

Â Bill of Rights.Â (From the public domain.)Â Â In 2000, I met Katya Komisaruk, when I joined other National Lawyers Guild members in defending World Bank/IMF protestors. Katya took an interesting path from being imprisoned after a 1987 Plowshares action hammering on a computer mainframe and other property at an airforce base, to graduating from law school, and then defending activists (I assume activists of a "progressive" bent). Â A few years ago, Katya wrote the very useful Beat the HeatÂ manual on dealing with police. Thanks to a link from WindyPundit, I found the Just Cause Law Collective's website, which has links to much -- if not all -- of the same information available in Beat the Heat. TheÂ Â Just Cause Law Collective's online manual is an excellent supplement to the Busted video that I prominently display here. Also, check out material about dealing with the policeÂ at the Midnight Special Law Collective's website. Â To switch gears from the aboveÂ Beat the HeatÂ topic, here is some more information about Katya and Plowshares actions: Â For Katya's Plowshares action,Â she originally was prosecuted for sabotage and destruction of government property.Â Over a decade later, I joined the legal team defendingÂ Plowshares activists who hammered on warplanes in late 1999.Â Both sets of activists were originally charged with sabotage but later only prosecuted for property destruction; in my case, the judge granted my motion to dismiss the sabotage count, which is a move that may not have won after my shared victory in a landmark Maryland double jeopardy case three years later. In Katya's case, the prosecutor dismissed the sabotage count after her lawyers filed a motion concerning proof of that count. Â Here are some more details about Katya's Plowshares action: Â - Here is the case summary from the Meiklejohn Civil Liberties Institute Archives: Â "U.S. v. Katya Komisaruk 874 F2d 686 (9th Cir 1989). 6/2/87: Def entered Vandenberg AFB, wrote "international law" on obsolete computer, smashed what she thought was part of NAVSTAR 1st-strike guidance system, wrote "Nuremberg Principles" on antenna. 6/3/87: Def described acts at news conference in San Francisco; FBI arrested Def: destruction of Gov't property, sabotage (18 USC Â§1361, 2155). U.S. Atty abandoned sabotage charge.Â "Rea, DJ, granted Gov't motion in limine barring necessity defense, Nuremberg Principles, motive evidence, int'l law. 11/16/87: Jury convicted Def of destroying Gov't property. 1/11/88: DJ sentenced: 5 yrs prison; \$500,000 restitution to come from book, movie deals; denied bail. 5/10/89: 9th Cir aff'd. Def served 25 mths; released. 1990: Def entered 1st yr Harvard Law School.Â "Leonard Weinglass, 6 W 20th St, NY, NY 10011; Dan Williams [whom I know through the Trial Lawyers College], 600 Montgomery St, 94111; William Simpich Jr, 223 Precita, 94110; both San Francisco, CA; Benjamin Gibson."Â - This link and this one further details Katya's action and her motivations forÂ doing it. Â Â - In true Plowshares fashion, Katya fully admitted what she did, as detailed at a Plowshares site: Â "On June 2, 1987 in the early morning, Katya Komisaruk, a peace activist from the San Francisco Bay area, walked through an unlocked gate leaving cookies and a bouquet of flowers for security guards and entered a satellite control facility named "NAVSTAR" at the Vandenberg AFB in Santa Barbara County, California. (Â™NAVSTARÂ™ is the U.S. global positioning system of satellites. When fully operational, this system will consist of 18 orbiting satellites which will be able to provide the navigational and guidance signals to Trident II and other nuclear missiles as well as the Star Wars system, for a first-strike nuclear attack.) Once inside, she used a hammer, crowbar and cordless electric drill to damage panels of an IBM mainframe computer and a satellite dish on top of the building. Using a crowbar she removed the computer's chip boards and danced on them. On the walls she spray-painted "Nuremberg," "International Law," and statements for disarmament. After being undetected for two hours, she left the base and hitchhiked to San Francisco. The next morning she held a press conference at the Federal Building in San Francisco to explain her action whereupon she was taken into custody by the FBI."Â A Plowshares activist once invited me to cross over from defending them to joining them. I declined. First, I am not a total pacifist even though I leanÂ in that direction. Second, Plowshares actions have religious motivations that I do not share (hammering swords into plowshares (that part I agree with generally) and pouring one's blood on armaments (symbolizing the blood of Jesus)). Third, such actions violate the criminal law, which raises questions about when one will risk violating the criminal law when lawful protest and activism does not work (e.g., working in the Underground railroad to free slaves was a very legitimate action, even if it was considered criminal under various state laws). Fourth, I do not believe that such actions are effective enough to merit the criminal exposure, even though the actions and sometimes the subsequent trials bring more media attention than a peace march (on the other hand, the huge numbers of anti-Vietnam protestors and opponentsÂ helped end the war, in large part through the very large numbers and wide cross section of protestors; Plowshares actions get a very small number of participants, seeing that a limited number of people are ready to put their liberty on the line like that).Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, July 8, 2008

### Drug defenses and the opposition.

Bill of Rights. (From the public domain.) Drug prosecutions consume a huge percentage of felony court dockets. (If I have my way with heavily decriminalizing drugs, clogged court dockets will be quickly unclogged.) Once suppression motions are lost in such cases, what defenses do defendants have left? They include the following:

- The defendant did not possess the drugs. Possession is generally defined as knowledge, dominion and control. *Livingston v. State*, 317 Md. 408 (1989).
- The defendant possessed the drugs, but only for personal use, and not with the intent to distribute.
- Somebody else committed the crime. -- This defense is more common where the arresting police officer neither finds drugs on the defendant's person nor receives drugs from the defendant. For instance, an undercover cop might buy drugs from a suspect and then radio a description of the suspect to the arresting cops; this raises misidentification issues. Cops may try to weaken a misidentification issue by using pre-recorded or marked currency to buy the drugs; however, this does not eliminate the possibility that the arrestee has received the money from the seller in a legitimate way (e.g., where the seller gives the suspect gas money for a ride by the suspect, or pays back a legitimate debt).
- This defense also is available where cops dragnet several suspects into a mass arrest, where no drugs are found on the defendant but are found on other nearby suspects or in the nearby vicinity.
- The cop or undercover purchaser (often a criminal suspect himself or herself) are lying about the situation and/or are mistaken about the defendant's identity.
- The cop planted drugs on or near the defendant.
- The defendant received a package of drugs in the mail, but had no involvement with arranging the delivery nor receipt.
- The prosecutor has not proven that the alleged drugs are actually controlled dangerous substances, and has not proven chain of custody of the drugs. Challenging the chemist can be risky before the jury, unless it is done without presenting inconsistent case theories to the jury (e.g., the chemist might be cross examined to show that the analysis is consistent with simple possession, or to show that the analysis did not connect the drugs to the defendant).

What does the prosecution do when the defendant claims s/he only possessed the drugs for personal use? The prosecution sometimes presents the testimony of a police officer to testify as an expert in possession with intent to distribute drugs. It is junk science, but that does not automatically prevent the witnesses from testifying. An example of such junk testimony is found in *Ricky Williams v. Com.*, \_\_ Va. App. \_\_ (June 24, 2008). Each jurisdiction's rules of evidence, statutory law and caselaw need to be consulted in moving to exclude such "experts".

What happens when the chemist only test-checks some of the alleged controlled dangerous substances? In *Ricky Williams v. Com.*, \_\_ Va. App. \_\_ (June 24, 2008), the chemist only tested one of ten alleged methadone tablets and opined that the remaining nine tablets looked similar to the tablet that tested positive for methadone. Nevertheless, the appellate court permitted the factfinding judge (this was a bench trial) to reach a verdict beyond a reasonable doubt that the defendant had possessed the methadone with intent to distribute it. *Id.* Williams quoted favorably from the Fifth Circuit, which said that: "Random sampling [of controlled dangerous substances] is generally accepted as a method of identifying the entire substance whose quantity has been measured." *U.S. v. Fitzgerald*, 89 F.3d 218, 223 n.5 (5th Cir. 1996), cert. denied, 519 U.S. 987 (1996). The chemist had the alleged drugs available to test; it is not too much to insist that a possession with intent to distribute conviction for methadone be precluded without testing each pill, or at least over half the pills.

Further about Williams since when is a chemist permitted to testify that a pill looks like a methadone tablet? With a defendant's liberty on the line, the chemist should either test each tablet -- particularly when there are so few tablets -- or else should keep quiet about the untested tablets.

Jon Katz.

Posted by Jon Katz in Drugs at 00:05

Monday, July 7, 2008

**Balancing Zappa and Norman Vincent Peale.**

At first blush, a criminal defense colleague whom I admire very much comes across as laid back in a powerful and relaxed way. I remarked how I find this inspiring in my lifetime movement towards harmony and away from the imbalance of intensity and much disharmony. My friend quickly dispelled the notion that he always is fully laid back; it takes him much work to get there from many of the same frustrations I often feel when some clients remain in stratospheric left field just one day before trial, and when so much of the criminal justice system is so unjust. Daily, I work to bridge the gap between the harmony that is essential to being powerful and feeling fulfilled on the one hand, and the turmoil that surrounds me in the form of war, inhumanity, indifference towards the plight of other humans and non-humans, an excessively unjust criminal justice system, and opposing lawyers and witnesses who would think nothing of stabbing me in the back if there were no countervailing repercussions for doing so. I write more here about achieving a more harmonized approach to life, not out of embracing any new age concept, but out of necessity. Applying this approach to the practice of criminal defense, I think of the below-described imperfect parallel to Freud's id, ego, and superego, where the ego balances the id and superego. I call it the trio of Zappa, my above-described laidback friend, and the man with the flies. Frank Zappa inspires me tremendously, not only as a creative genius, but also as an important example of how it is possible to be a caring and nurturing parent -- including requiring that a minor child's homework be finished before going to the movies with a friend -- without surrendering to mainstream society, American Idol, America's Top 40, and Barney. Zappa was passionate against the mediocrity that permeates society, said CNN confirmed the correctness of his not liking people very much, and told Alan Thicke he was ready to tell a bunch of academic composers to stop in their tracks and get real estate licenses. (See Zappa's Thicke interview covering his foregoing views, with his being civil with Casey Kasem, the very instigator of America's Top 40.) As the great Daniel Schorr eulogized Zappa: "He was also contrary. Talk about his success, and he would say he was a failure. Talk about his popularity, and he said he was lonely. Maybe he was. Maybe the world around him was too crass, too mediocre, too homogenized. So he cursed it with dirty words, and went back to his music synthesizer, searching for new musical meanings. And ways of serving kids. His own, and the world's." Zappa's very critical and cynical approach to life, music and art may have served him well as a musician, but does not serve me in shedding concerns about the extent of mediocrity and fallibility while trying to inspire, motivate and persuade a jury to my client's side, particularly when my jury might include fans of American Idol, America's Top 40, and Barney. The other end of the Zappa spectrum is the above-displayed video of a meditating man battling flies with his sword, and somehow ultimately experiencing the flies as beautiful flower petals, where the video begins with Norman Vincent Peale's quote "Change your thoughts and you change your world." For me, an important balance of Zappa's cynicism and intensity on the one hand and the above Norman Vincent Peale-inspired video is found in trial lawyer colleagues who -- like I -- know how unjustly brutal the criminal justice system is, but refuse to turn their backs on the system lest they are left to seek justice only from outside that system. My above-described laidback criminal defense lawyer friend is one of those inspirations. Gerry Spence is another. It goes without saying that SunWolf is on the top of that list. I have not included my trial practice guru Steve Rench in the above list, because he seems to have transcended long ago feeling any tension with the injustices of the criminal justice system as he focuses on victory. Steve applies the basic, and effective, lesson of the magic mirror. If a judge knows s/he has a poor reputation with lawyers, that presents all the more a reason for the lawyer to empty the mind of any such thoughts, and to give the judge a clean slate that day. Oversimplistically, it is like trying to find the thorn in the lion's sole and to pull it out, rather than trying to slay the lion. I aspire ultimately to reach Steve's level of optimism. What do you do to reach power by balancing between healthy (and even unhealthy) cynicism and overoptimism? Jon Katz. ADDENDUM I: Thanks to karmatube for posting the above-displayed video. ADDENDUM II: Off topic: Who was Frank Zappa if he was willing, even momentarily, to trade places with the Monkees' Mike Nesmith?

Posted by Jon Katz in Persuasion at 00:05

Sunday, July 6, 2008

### Four cops, t'ai chi, and heebie-jeebies revisited.

Â T'ai chi is about being as still as a mountain and powerful as a rushing river. It is a peaceful counterpoint to cops packing heat. Â On a national trial lawyer's listserv, I asked members what they would have done if faced with the same situation as mine -- about which I blogged on June 27 -- when a cop unlawfully Terry-detained me when an airport denizen allegedly got the heebie-jeebies seeing me practice t'ai chi at National Airport. (An irony of the stop is that t'ai chi is all about achieving relaxation, balance and harmony, which are the very things one would expect cops and the rest of society to value.) Â One listserv member replied: "What would have been the problem with stepping out of the bathroom and saying 'oh yeah I was just doing some sweet tai chi moves because I hadnâ€™t had a chance to work on that yet today'?" Â Then cop no. 2 says 'thatâ€™s what I thought.' Â No problem.' Â And everyone goes on their way." Â Accepting his invitation to detail what would have been the problem by wagging my tongue at the outset, I replied: Â Thanks. Answering your question: My problem with telling him is that I love the Fifth Amendment too much, believe I was unlawfully Terry-stopped, am wary of cops twisting suspectsâ€™ words to their detriment, too much dislike cops hassling people like this and in worse ways, bury my head in my hands everytime a client got screwed by not asserting his or her Fifth/Fourth Amendment rights, and probably would have given no explanation had I not been balancing my obligation to pickup two visitors coming directly from Japan and had I not intuited that cop number two (playing good cop) would likely help me when it was not so clear to know if cop number one would have detained me longer had I explained the situation to him (remember, he was the one who unlawfully imposed a Terry stop in the first place, saying I was not free to leave). Â Had I kept my mouth shut, if there had been an arrest, aside from having strong ammo to dismiss the case for failure to state a claim, if the so-called witness was an out-of-towner and a no-show in court, thereâ€™d have been insufficient evidence. However, when a suspect wags the tongue, sometimes thatâ€™s the only witness needed (together with slight corroboration), in addition to the cop to whom he or she wags the tongue. Silence is golden, sometimes even platinum. Â Â ADDENDUM: After writing my original June 27 blog entry on this matter, I reviewed the Washington Airports Authorities regulations, and saw no basis there for detaining me, just as I saw no basis under federal or state law for doing the same. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:05

Friday, July 4, 2008

**July 4 is meaningless without an ongoing struggle for civil liberties.**

Â Bill of Rights.Â (From the public domain.)Â NOTE: While you enjoy the long weekend, here is a reprint of what I wrote last year on July 4.Â Whenever I look around on July 4, the scene is long on fireworks, beer, and merrymaking, and too short on discussion of what Independence Day is all about.Â The Declaration of Independence was hardly signed by a bunch of pacifists. The signers must have realized the bloodshed among the warring sides would lengthen and intensify with the Declaration of Independence, and it did.Â Violence begets violence, and the rampant violence that led to Britain's surrender did not take place in a vacuum; instead, it fed into all subsequent American wars and smaller military actions.Â The United States' repeated victories in wars (withÂ the Vietnam war probably ending all the later to delay America's first war defeat) likely made the United States all the more militaristic and cocksure militarily.Â Â ByÂ now, the United States governmentÂ thrives on control backed by force,Â the threat ofÂ force, and punishment, not only through militaryÂ might, but also through an overgrown and overbearing criminalÂ "justice" system of police, laws, money, prosecutors, courts, andÂ prisons; Â an overgrown national security system that leaves us little privacy, security, or sufficientÂ liberty; and an overgrown spying and "intelligence" system. Â Fortunately, a strong movement continues in favor of civil liberties and government by the governed rather than the reverse. The movement is led by the American Civil Liberties Union, fearless and skilled criminal defense and Constitutional lawyers, the drug legalization movement, and the list goes on. Â July 4 is meaningless without an ongoing struggle for civil liberties. Now is the time to join that struggle. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, July 3, 2008

### **When a cop lies.**

Â Bill of RightsÂ (From public domain.)Â How on earth does one lie less by wearing a police badge? Am I the only one who believes that the vast majority of people lie frequently, and go well beyond so-called white lies? If that is true, then there is no reason to believe that cops are any more honest than those in the general population. Â I go one step further to believe that lying permeates police culture more than in the general population. What is the motivation for police to lie? Peer pressure, anyÂ historical culture of lying in the ranks of the department,Â and groupthink are some motivations. Frustration with the exclusionary rule and Miranda are other motivations for cops to lie. An additional motivation is the rationalization that whether or not the suspect committed the crime at hand, certainly the suspect has already been committing and getting away with other crimes. Another motivation is just to get through another workday; sometimes it seems easier in the short run to cut corners around the truth than to invest the extra time to tell the truth. One more motivation can come from the feeling of pressure from higher-ups to increase arrest and conviction statistics to make the department look good, lest heads roll and budgets decline for "too few" arrests and convictions. Â Police wield extraordinary power. They choose whether to arrest, whom to arrest, what accusations to make, and what recommendations to make to the prosecutor.Â With their guns, handcuffs and power of arrest, they are able to intimidate people to talk to them, and sometimes or many times people will lie to the cops to tell them what they think the cops want to hear, only to have the lies turned against innocent suspects. Unfortunately, power is corruptive on anyone who wields it, and, among other things, can lead to lying. Â Why, then, is it so hard to convince too manyÂ judges not to accept police testimony as the truth any more than one would accept a civilian's testimony as the truth? Once a judge believes a cop at a suppression hearing, no appellate court will overturn that factual finding. How many judges conclude that police have no motivation to lie, particularly when compared to a defendant who might seem to have more to gain from lying than the cops do?Â No motivation to lie? What aboutÂ the motivations listed above?Â Praised be the inventors of video cameras and today's inexpensive ones to show howÂ extensive is police misconduct, from lying to planting evidence to beating suspects (see also hereÂ and here). In that regard, Charm City (Baltimore) is not so charming these days, with video revelations of lying cops, even at the veteran cop level. In the instance of Detective Deryl Turner and Sgt. Allen Adkins -- both veteran police --Â street video cameras impeached their claims of finding drugs in an abandoned bag on the street rather than in a home through a Fourth Amendment violation, and Baltimore's chief drug prosecutor, Antonio Gioia, took the seemingly unusual move of starting his own investigation of the matter rather than waiting for a police investigation. How many defendants were convicted on the testimony of these two police officers, and how many will file post conviction actions as a result? Thanks, Antonio for doing the right thing here, and to his boss and chief prosecutor Patricia Jessamy to the extent that she supported Gioia's investigation and termination of the prosecution that spurred the investigation. Â Elsewhere in Baltimore, security cameras at a bar showed police lied about how they found drugs on a bar patron. Â A problem about lying is that the more it is done, the more it becomes second nature, like taking cookies out of the forbidden cookie jar.Â Prosecutors: Lying by police is too commonÂ just to decide to let the judge or jury sort out who is telling the truth, and to have the defendant feel pressure to plead guilty in the face of the risk that a prosecution witness's lies will be believed by a jury. Lives and liberty are at stake here.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, July 2, 2008

## Supporting Native American Rights

Protect the right to use sacred medicines. Recently, I further updated my Native American links and blog links involving both law and non-law topics. I wish to learn more about Native American law -- including issues concerning treaty rights, land rights, gambling, and sacred medicine -- and also about the past and current mistreatment of Native Americans and efforts and accomplishments to reverse such mistreatment. Rather than taking the time, yet, to create a separate blogroll section for Native American blogs, I have inserted them into the More Law and Beyond the Law sections of the Underdog Blog. I welcome recommendations for links to additional Native American blogs and static webpages, including law blogs. I took a particularly greater interest in Native American issues from reading Dennis Banks's *Ojibwa Warrior* (written with Richard Erdoes), and then meeting him in 2006 at the conclusion of the Sacred Run. We are both friends of Jun Yasuda, who joined Dennis from California when he went "underground to the Onondaga Reservation in New York" after California's Jerry Brown -- who refused to extradite Dennis to South Dakota concerning criminal charges over the Wounded Knee event -- left the governor's office. Unless my court schedule changes, I very much look forward to spending some time next week with Dennis Banks, Jun Yasuda, and the other Longest Walkers when they arrive in Maryland early next week -- and hopefully on a leg of the walk -- including a signing ceremony of the Sovereignty Declaration of One Nation to be held July 9 at Greenbelt Park. In *Ojibwa Warrior*, Dennis Banks details his life from childhood, to being ripped by the government from his family and forced into a faraway United States government school meant to take the Indian culture out of Native Americans, and to his ironic joining of the military defending the same government that had forced him to that boarding school. *Ojibwa Warrior* continues with Dennis's learning about Jun Yasuda's Nipponzan Myohoji Buddhist order when some members of the order joined a protest against the building of an airport in Japan, and Dennis was sent there as part of his military duties: "The Buddhist monks and nuns sitting still on the ground in front of us were chanting when the police rushed them and started cracking skulls with a terrible sound as if they were striking coconuts. The monks and nuns did not fight back. It was a terrible thing to witness. I saw elderly nuns with blood streaming down their faces... Sergeant Johnson suddenly grabbed his BAR and fired a round into the air. Then he hollered [in Japanese] 'Stop it! Stop it! Halt!'... Then all was quiet." *Ojibwa Warrior* continues with Dennis Banks's return to the United States, the continued virulent racism against Native Americans, and his central participation in the founding of the American Indian Movement. He gives an insider's view of the 1973 Wounded Knee takeover, Leonard Peltier's plight, and AIM's fierce conflicts with Dick Wilson, who was the elected Pine Ridge tribal chair and whom Banks describes as running around with violent goons. Dennis also describes the movement's conflicts with William Janklow, who became South Dakota's attorney general in the early 1970's. In 1978 came the Longest Walk for Native American rights. Now in progress is the Longest Walk II. I have just a little knowledge about the law affecting and empowering Native Americans, and have much more to learn about that area of the law and about other Native American issues. My law school did not offer any Native American law classes. The University of Oklahoma law school seems to be a particularly good source for such study. If you share my interest in this area, please let me know. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, July 1. 2008

### **When my least favorite justices issue one of my favorite rulings.**

Supreme Court spiral staircase. Generally, it is critical to elect Barack Obama to have less damage done to the Constitution by new federal judicial appointees than the damage that will be wreaked by McCain appointees in such areas as the death penalty, criminal defendants' rights, immigrants' rights, reproductive rights, and free expression. However, one area where McCain appointees likely will do no worse or possibly better than Obama appointees is in an area generally more near and dear to Republicans' hearts than Democrats': defining the reach of Second Amendment rights. In fact, four justices whom I have never wanted on the Supreme Court were in the majority in last Thursday's Heller decision confirming that the right to bear arms is an individual right rather than merely a collective right. Said justices all are appointees of Reagan, Bush I and Bush II: Justices Scalia, Thomas, Alito, and Roberts (C.J.). The fifth justice in the Heller majority is Reagan-appointed Justice Kennedy. I still recommend Obama as the lesser of the evils as compared to McCain, including for judicial appointments, even though McCain's appointees are more likely to interpret Heller more expansively than Obama's appointees. For such prosecutions as possessing firearms in the course of a drug felony, though, Republican appointees are unlikely to be any more favorable to defendants than Democratic appointees. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00