The Advocate

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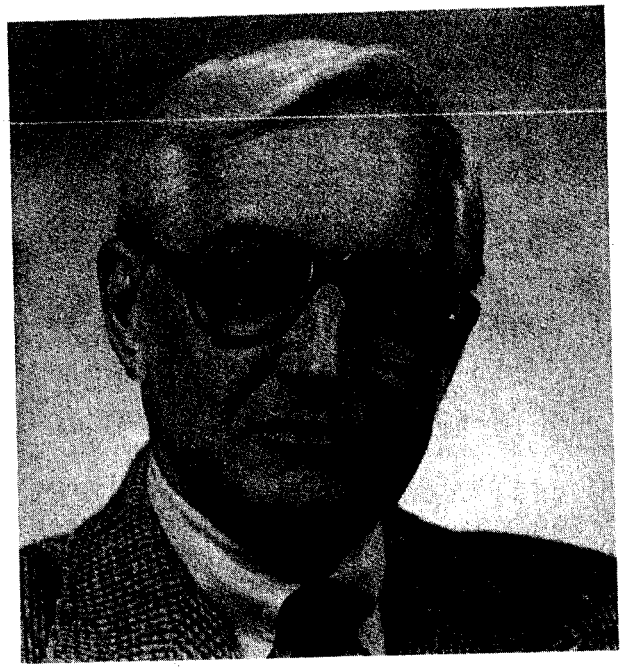
PUBLIC ADVOCACY COMMISSION

The Public Advocacy Commission was recently created by the Kentucky General Assembly to provide guidance and support for the statewide public advocacy system. Appointments to the Commission are now complete and its first meeting was held September 29, 1982, in Frankfort.

The Governor has appointed five members of the twelve person Commission, two of which are discretionary appointments and three from nominees submitted by the Kentucky Bar Association and the Protection and Advocacy Advisory Board.

(See Commission, P. 2)

INSIDE



THE ADVOCATE FEATURES

On August 31 of this year, after ten years as the executive director of the Louisville-Jefferson County District Public Defender Corporation, Paul G. Tobin stepped down from that position and retired from public practice, but, characteristic of his intense involvement in the public defender movement, he accepted a gubernatorial appointment to the newly created Public Advocacy Commission.

(See Tobin, P. 3)

Commission, Continued from P.1

Helen Cleavinger, Paducah, Chairperson of the Protection and Advocacy Advisory Board was appointed as that board's representative to the Commission.

Henry Hughes, well known Lexington attorney, and Paul G. Tobin, former Louisville-Jefferson County District Public Defender, are the Kentucky Bar Association representatives.

James Park, former Chief Judge of the Kentucky Court of Appeals, and now a principal in the law firm of Brown, Todd and Heyburn, Lexington, is one of the Governor's discretionary appointees.

Jesse Crenshaw was the other Governor's discretionary appointee. Crenshaw, now a Lexington attorney, was the former head of Criminal Justice Studies at Kentucky State University.

William E. Rummage, prominent Owensboro attorney, and former President of the Kentucky Bar Association, has been appointed by Senator Joe Prather, President Pro-Tem of the Senate.

Lambert Hehl, Jr., has been appointed by Representative Bobby Richardson, Speaker of the House of Representatives. Hehl was formerly County Judge/Executive of Campbell County and now is a practicing attorney in Newport.

Appointed by the Kentucky Supreme Court were Justice J. Calvin Aker, Somerset, and Judge Anthony M. Wilhoit, Versailles.

Justice Aker was formerly a district judge and a practicing attorney in Somerset. Judge Wilhoit, now serving on the Kentucky Court of Appeals, was formerly Deputy Secretary of the Kentucky Department of Justice and was also Kentucky's first state Public Defender. Justice Aker and Judge Wilhoit also served on the Governor's Executive Task Force which recommended the creation of the Public Advocacy Commission.

The law setting up the Commission also names the deans or their designees of the state's law schools as members, and each has agreed to serve personally.

Barbara B. Lewis, new dean at the University of Louisville School of Law, was formerly Professor of Law at the University of Oklahoma.

The new dean at the University of Kentucky Law School, Robert Lawson, has taught criminal law for many years at the University of Kentucky and was the principal architect of the Kentucky Penal Code.

William K. Jones, dean of the Chase Law School at Northern Kentucky University, completes the membership of the Commision.

JACK EMORY FARLEY

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Tobin, Continued from P. 1

In 1972, Paul Tobin, then a 52-year old newly retired Army colonel and military judge, was recruited to organize the first staffed public defender office in Kentucky. In July of that year, Paul Tobin's public defender operation commenced some three months before the statewide public defender agency came into existence.

Paul was born in Idaho and raised in Casper, Wyoming. Prior to World War II, he joined the Wyoming National Guard. With the approach of World War II, he was activated and assigned to the armored cavalry. In 1947, after 7 years of active service, Tobin left the Army as a major. He returned to Wyoming where he completed the University of Wyoming Law School, only to be called back into the Army during the Korean conflict. He remained in the Army after Korea, serving in Berlin. Tobin was later assigned to the Office of the Judge Advocate General and was named an Army Judge. All in all, 20 of Paul's 34 years in the Army were spent as a military lawyer or judge. From 1965 until 1972 Tobin served as a senior trial judge on two separate tours in the United States and from 1967-1969, he was chief military judge for an area that included Vietnam.

During his sojourn with the Louisville Public Defender Office, Paul has been an active member of the legal community. He is presently the president of the Louisville Bar Association and a member of that organization's Board of Directors. He is the chairperson of the LBA's Prepaid Legal Committee and a member of the Kentucky Bar Association's Comparable Committee. In 1977, Paul was the recipient of the Louisville Bar Association's annual Lawyer of the Year award. He is a member of the KBA's House of Delegates and the former chairperson of the KBA Criminal Justice Section. His credentials include former membership on the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants.

Dan Goyette, the Louisville office's former associate director and Tobin's successor as executive director, categorizes Paul as a "pioneer in the provision of defender services in Kentucky." According to Goyette, "perhaps Paul's most significant accomplishment was to establish an effective and efficient operation providing high-quality defense representation in the state's largest criminal court jurisdiction." Dan adds, "To Paul's credit, the office has gained the respect and acceptance of the private bar and enjoys the esteem of both the trial and appellate judiciary."

The Advocate salutes Paul Tobin for a job well done and welcomes him as a member of the Public Advocacy Commission.

VINCE APRILE

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THREE TRIAL OFFICES OPEN

On November 1, 1982, the Department of Public Advocacy opens three new trial offices. These three offices are located in The Red River Gorge area, Morehead, and Hopkinsville.

The Red River Gorge Office is located in Stanton, and is covering Powell, Wolfe, Estill, Lee, Owsley and Breathitt Counties.

Jay Barrett is directing the office, which is also staffed by Lee Rowland, Jonathan Stanley and Mike Mueller.

The Morehead Office is being directed by Allen Holbrook, and includes one other attorney, John Sellers. The office is presently covering Rowan, Morgan and Elliott Counties, although more counties and attorneys will be added later in 1983.

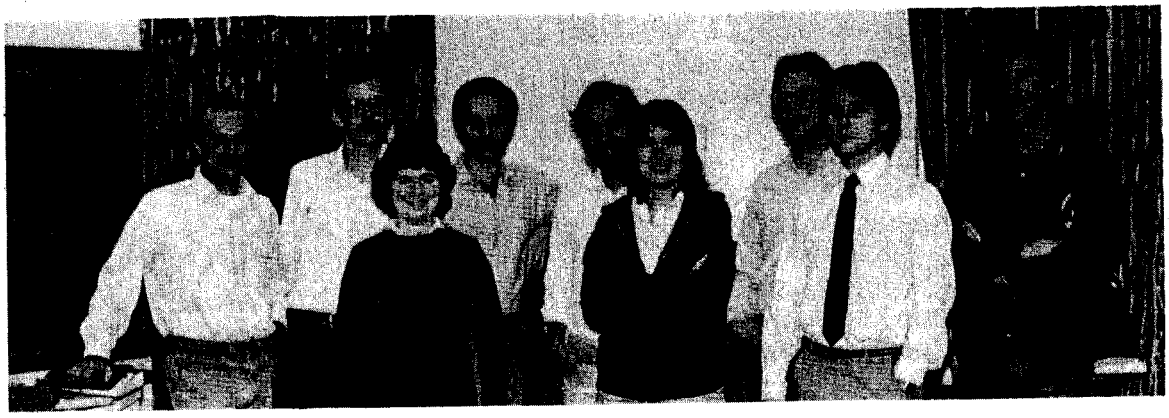
The third office is located in Hopkinsville, and is staffed by four attorneys, including Denise Regan and Christopher Burke. The attorneys in this office are handling cases in Christian and Hopkins.

We are excited about these new offices and particularly the attorneys we have hired for them. The new attorneys we have hired, who are pictured in this issue, are a source of constant surprise for us. They were located in Frankfort from August 16 - October 8 for training, and gave us in enthusiasm easily as much as we were able to give them in the area of criminal law and trial advocacy.

Next spring, DPA plans to open two additional offices, one in Bowling Green and one in Elizabethtown. Applications are now being accepted for positions in these offices. If you are interested, please contact me at:

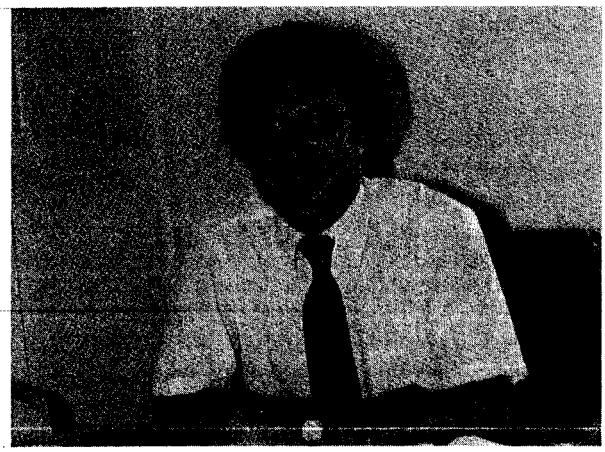
Department of Public Advocacy
State Office Building Annex
Third Floor
Frankfort, Kentucky 40601

ERNIE LEWIS
CHIEF, TRIAL SERVICES BRANCH

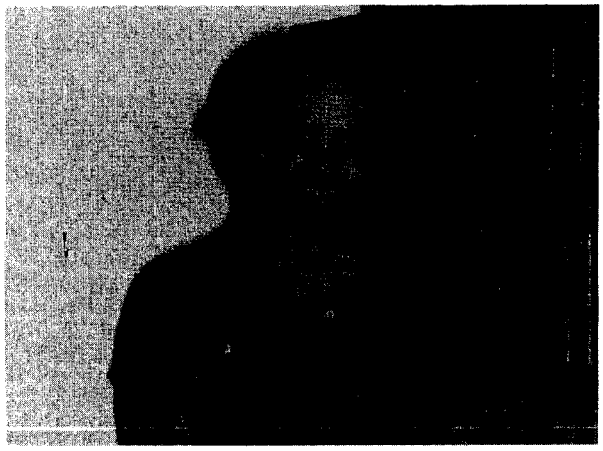


Chris Burke, John Halstead, Pat McNally, Michael Mueller, Rob Riley, John Sellers, Denise Regan, Mary Obermeyer, John Stanely, Linda McCubbin (not pictured).

APPELLATE BRANCH CHIEF CHANGE



MARK POSNANSKY



TIM RIDDELL

Effective October 1, 1982, Tim Riddell will step down as Chief of the Appellate Branch, and Mark Posnansky, presently with the Appellate Branch, will become the new branch chief. Tim started working with the Department of Public Advocacy, then the Public Defender Office, in January of 1973 while a law student at the University of Kentucky College of Law. Tim was appointed as an Assistant Public Defender on June 1, 1974 with primarily appellate responsibilities. On April 1, 1981, he was appointed head of the Appellate Branch. In addition to his responsibilities as Chief of the Appellate Branch Tim has also assisted in training attorneys throughout the state as well as becoming an extremely knowledgeable resource person in the procedural aspects of the appellate process.

Tim, on behalf of the Department of Public Advocacy, as well as the many attorneys throughout the state who often call you and the many clients whom you have represented, we thank you. In stepping down as Chief of the Appellate Branch Tim will continue to work as an appellate attorney within the branch.

Mark in being selected as Chief of the Appellate Branch has been with the Department of Public Advocacy since his appointment as an Assistant Public Defender on April 25, 1977. He is a graduate of the University of Louisville, College of Law and was in private practice prior to his coming to the Public Advocacy Office. Since 1977 until now Mark has worked with appeals and has been involved in trials as well as other special projects. He brings with him extensive experience in the appellate process and can be reached at (502) 564-5234.

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TRIAL PRACTICE INSTITUTE COMPLETED

This Department's first Trial Practice Institute was held in August in Richmond. Over thirty full-time public advocates from our regional offices and from the Louisville and Lexington offices were trained in trial skills.

A faculty of 13 included attorneys from the Frankfort office, our Kenton County public defender, Bob Carran, a private Prestonsburg attorney, Gary Johnson, as well as Steve Goldberg, a Professor at the University of Minnesota and NITA faculty member, and Joe Guastaferro, Associate Dean of the Goodman School of Drama of DePaul University, Chicago.

During the 4 days of training, the participants practiced each aspect of a criminal trial. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Through the help of Dr. Christie Lewis of Lexington, we had actual doctors play the role of our expert medical witnesses. Actors from Eastern Kentucky University, and DPA investigators played the roles of jurors, the defendant and the victim.

Steve Goldberg spoke at the Saturday luncheon on the duty public defenders owe to the rest of the Bar. Steve observed that this nation has made two unique contributions to the advancement of civilization: 1) we have institutionalized fairness and its process, and 2) we have developed the principle that, if that fairness isn't available to all, it should not be available to any. Goldberg urged us to recognize that with the criminal defense attorney,

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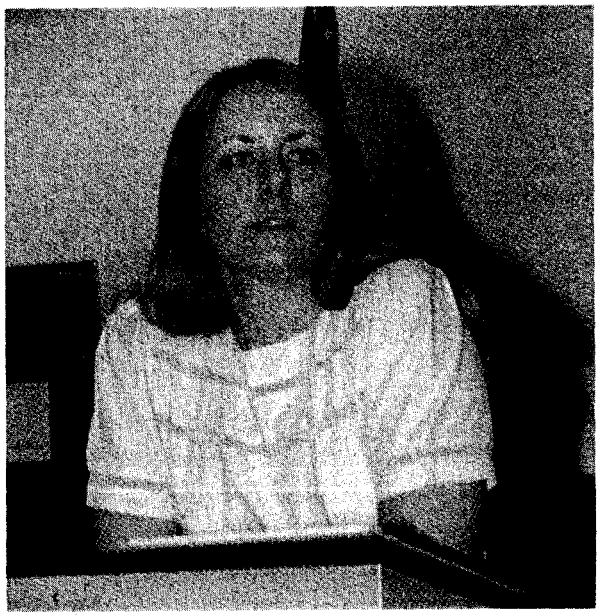
Joe Guastaferro, Bob Carran, Gary Johnson, Steve Goldberg

Our "out of town" connection!



Donna Proctor

now almost exclusively public defenders, rests the burden of insuring that this liberty is maintained. No other group of people possess the ability to control the destiny of liberty as do public defenders.

Public defenders are indeed liberty's last champion. Hopefully, armed with the best skills, knowledge and attitude, we will be up to the immense challenge.

On a lighter note, we learned that leaving your shoes on for four days can often lead to skin problems!

Thanks to those who made this training effort a success.

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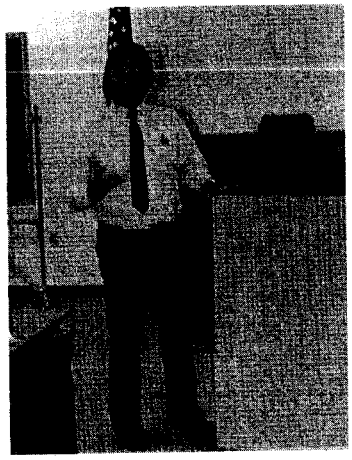
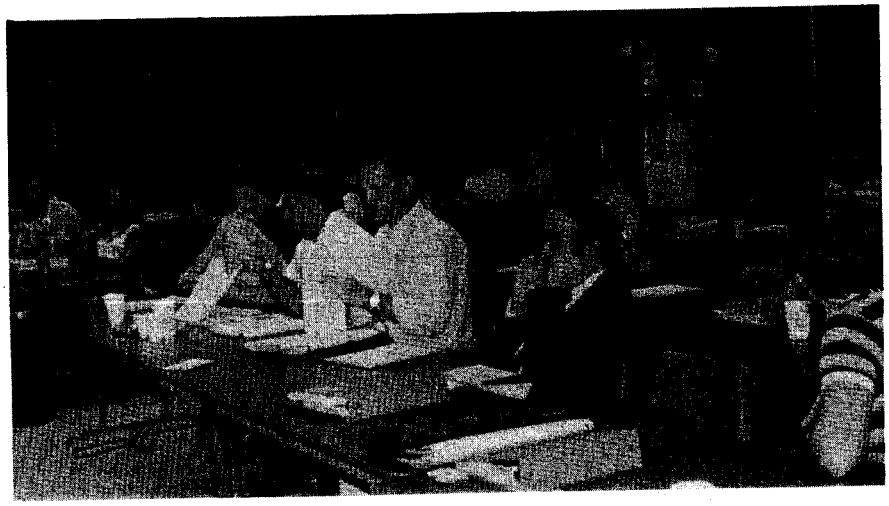


Vince Aprile

"Now mom, can you identify the man who attacked you out of his lineup?" "Yes, it won't be too hard. He had glasses, a moustache; was bald, and was wearing a T-shirt with a bird on it. Just give me a minute officer."



THE LOSS OF A CLIENT

As most of you have probably read in the newspaper Alexander Bowling, a death row resident at KSP, died in August of this year. The autopsy revealed that his death was a suicide. Alex took an overdose of anti-depressant medication which he had evidently been hoarding for such a purpose. Alex was Ernie Lewis' and my client on appeal. His death has caused extensive reflection on our part that we feel should be shared with other public advocates.

It is hard for us as attorneys to maintain an understanding of the conditions under which our convicted clients live. The conditions on death row are especially onerous. While we never lose sight of the fact that prison is an unpleasant experience we often fail to recognize the effect the experience has on our clients and the dehumanization it represents. We cannot live our clients' lives, and we can never truly know their experience but Alex's death has reminded me that I can never again lose sight of the helplessness, frustration and psychological trauma of my clients.

In Alex's case his relationship with us varied from week to week. His constant requests for financial assistance, his complaints about seemingly trivial matters and his inability to maintain a good relationship with fellow residents was a source of irritation to us. As attorneys we were interested in Alex's legal problems. The case promised to be interesting. We felt we had an excellent possibility of success on appeal. We also felt we might be making new law, this was "a case of first impression" in Kentucky--Alex had been sentenced to death following a guilty plea.

We failed to truly recognize, though, that the tedious and drawn out appellate process loses significance in the everyday life of the men on death row. Alex's life there was miserable. In his last letter to us he wrote "Being alive means nothing if there's nothing in your life to do. You have to have something to look forward to each day. Right now all I care about is living out what time I have left, the best I can under the circumstances."

There is probably nothing we could have done to save Alex Bowling. We are not psychologists or social workers. However, we are attorneys and we are people who must share the responsibility for the lives of others. What we can do is work to eliminate the inhumanity of life on death row. We can and must demand that the dignity which all humans possess is accorded our clients. We can start by recognizing that humanity in our clients, and demanding that the judicial and correctional system treat our clients fairly and with humanity.

DEBBIE FITZGERALD

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WEST'S REVIEW

A number of important decisions were rendered by the Kentucky Supreme Court during July and August.

In Pevlor v. Commonwealth, Ky., 29 K.L.S. 8 at 14 (July 6, 1982), the Court construed KRS 208.170(5)(a), which provides that, when a juvenile case is transferred from district to circuit court, the grand jury which indicts the child must be instructed that it may either return an indictment or recommend that the case be transferred to juvenile court. The Court held it was proper to so instruct the jury before it returned an indictment, rather than after as contended by the defendant. The Court also found that the district court did not abuse its discretion in transferring Pevlor's case to circuit court. The Court additionally held that it was not error to permit a doctor who examined the victim to testify that his findings (bruises and sperm present in the vagina) were compatible with rape.

The Court has held that voluntary intoxication is not a defense to charges of rape and sodomy. Malone v. Commonwealth, Ky., 29 K.L.S. 8 at 16 (July 6, 1982). Voluntary intoxication is a defense to a crime if it negates an element (typically intent or knowledge) of the offense. KRS 501.080. The Court rejected the argument that a mental element should be read into the crime of rape, stating: "We do not think the drafters of the Penal Code intended to inject the elements of intent or knowledge...into the crimes of forcible rape and sodomy so as to make voluntary intoxication available as a defense."

The Court has at last renounced the "farce and mockery" test as a standard for evaluating claims of ineffective assistance of counsel. In Henderson v. Commonwealth, Ky., 29 K.L.S. 8 at 17 (July 6, 1982), the court announced that "we now adopt the more logical test of Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), wherein it was held 'that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance.'" "Having adopted the Beasley test, supra, we conclude that as an adequate standard the defense counsel should be required to perform at least as well as a lawyer with ordinary training and skill in criminal law, utilizing that degree of training to conscientiously protect his client's interests."

In Gilbert v. Commonwealth, Ky., 29 K.L.S. 8 at 18 (July 6, 1982), the Court reversed convictions of wanton endangerment and attempted kidnapping. The Court held that the defendant's use of a pistol during a robbery did not give rise to a separate charge of wanton endangerment. The Court also held that the defendant's conviction of attempted kidnapping based on

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his action in attempting to force the robbery victim into his car was barred under KRS 509.050, the kidnapping exemption statute. A charge of kidnapping or unlawful imprisonment becomes proper when the restraint of the victim exceeds that which is "immediate and incidential" to the commission of some other offense. "In this additional step that authorizes a kidnapping conviction there is no room to insert the offense of attempted kidnapping." The Court also held that evidence obtained during a warrantless, nonconsensual entry to effect the defendant's arrest was not illegally seized. The United States Supreme Court held in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 539 (1980), that in the absence of exigent circumstances such an entry was unlawful and evidence resulting from it must be suppressed. The Court in Gilbert found that "the warrantless entry here is justified by the exigent circumstances displayed in the factual situation."

The Court reversed the defendant's murder conviction in Nugent v. Commonwealth, Ky., 29 K.L.S. 10 at 10 (August 31, 1982). In an effort to impeach a prosecuting witness the defense asked the witness whether it was not true that he had stated that he "always wanted to be a policeman." On redirect the prosecution was then permitted to introduce the witness' out-of-court statement stating that he thought the defendant had "dropped the hammer" on the victim. The Court held that "it was clearly erroneous to admit into evidence Bryant's opinion as to appellant's guilt." The Court rejected the Commonwealth's argument that the defendant had "opened the door" to this incompetent evidence by cross-examination into "the witness' state of mind."

In Harston v. Commonwealth, Ky., 29 K.L.S. 10 at 12 (August 31, 1982), the Court held that the defendant was not entitled to reopen the question of his competency to stand trial in the absence of "some change in the defendant's condition." The trial court based a finding of competency, in part, on lay testimony by jailers and inmates that the defendant behaved normally. The defendant subsequently sought to reopen the question of his competency by introducing psychiatric testimony that lay witnesses cannot always detect schizophrenia. The defendant relied on RCr 8.06, which provides for a determination of competency at any point in the proceedings if there are reasonable grounds to believe the defendant is incompetent. The Supreme Court held that RCr 8.06 does not create "a right to a continual succession of competency hearings in the absence of some new factor."

The Court reversed on the basis of prosecutorial misconduct in Pace v. Commonwealth, Ky., 29 K.L.S. 10 at 14 (August 31, 1982). The prosecution committed prejudicial error when it improperly impeached a key defense witness with a prior inconsistent statement without first laying a foundation. A proper foundation, under Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969),

(Continued, P. 11)

requires that the witness be asked about the inconsistent statement and permitted to explain it. The Court also held that the trial court's instructions erroneously permitted the jury to return inconsistent verdicts. The jury convicted the defendant of second degree manslaughter and second degree assault (wanton offenses) and third degree assault (a reckless offense), arising out of a single collision between the defendant's vehicle and three pedestrians. The Court found that the defendant could only have had a single mental state with respect to the three victims. The Court also noted error in the persistent felony offender stage of the proceedings in the prosecution's introduction of details of the defendant's prior felonies and the introduction of a jacket worn by the defendant.

The Court has held that expert testimony regarding "antigenic factors" in blood is admissible to exclude the possibility that blood found on the defendant is his own. Brown v. Commonwealth, Ky., 29 K.L.S. 10 at 14 (August 31, 1982). The Court described the analysis of antigenic factors as "in its infancy in this country and has not yet come into general acceptance and use." The Court, however, held that such evidence was distinguishable from polygraph test results and "admissible on the same basis as any other expert opinion." The Court stated it was "somewhat disturbed by the trial court's refusal to grant a continuance in order for defense counsel to research the blood-grouping theory." However, the Court declined to reverse on this ground since defense counsel was aware of the expert testmiony but made no motion for continance until the witness was called.

The Court affirmed the Court of Appeals' denial of a writ of prohibition which would prohibit the Perry Circuit Court from trying a defendant a fourth time after three previous trials resulted in hung juries. Jones v. Hogg, Ky., 29 K.L.S. 10 at 15 (August 31, 1982). The Court held that the successive prosecutions, without conviction, did not constitute double jeopardy. Consequently, the Court reasoned that Jones' remedy lay in appeal should he be convicted. The Court did not address the question of whether an indefinite succession of prosecutions resulting in hung juries will at some point deprive a defendant of due process.

The Court has held that it is in the sound discretion of the trial court to order that the Commonwealth make available to the defense recorded or written statements of witnesses it intends to call before trial. Wright v. Commonwealth, Ky., 29 K.L.S. 10 at 16 (August 31, 1982). RCr 7.26(1) provides for the production of witnesses' statements "[b]efore a witness called by the Commonwealth testifies."

In Richmond v. Commonwealth, Ky., 29 K.L.S. 10 at 18 (August 31, 1982), the Court held that any judge may issue a search warrant to be executed in a judicial district other than the one for which he is judge. The Court also held that a

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voluntary deposition of the defendant's wife was not subject to a claim of husband-wife privilege. In giving the deposition the wife waived the privilege. "After she had testified by deposition, certainly she was entitled to claim its protection against further testifying at trial, but the effect was to make her unavailable, and thus to render her deposition admissible."

The Court of Appeals also rendered a number of decisions during the period under review. In Commonwealth v. Melear, Ky.App., 29 K.L.S. 8 at 8 (July 2, 1982), the Court of Appeals held that the trial court properly quashed a subpoena duces tecum issued by the Commonwealth to obtain statements made by the defendant to a vehicular homicide charge to a representative of her insurance carrier. The Court relied on case law holding that "the communications between an insured and a representative of the insurance carrier are privileged because the carrier is required to represent the insured and the insured is obligated to cooperate with the carrier, thus making it, in effect, an attorney-client relationship."

In Romans v. Brooks, Ky.App., 29 K.L.S. 9 at 1 (July 9, 1982), the court affirmed a denial of habeas corpus. Romans had plead guilty to a felony charge. A misdemeanor joined with the felony was remanded to district court which ultimately imposed a year sentence. The circuit court subsequently granted Romans shock probation. Romans then sought release from custody on the misdemeanor, asserting that the grant of probation on his indeterminate sentence constituted service of the definite sentence. Romans relied on KRS 532.110(1), which provides that "A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term..." The Court of Appeals rejected this argument, stating "[w]e cannot...accept the proposition that shock probation constitutes service of a sentence as envisioned by KRS 532.110." The Court did, however, hold that KRS 532.110 required that Romans receive credit on his misdemeanor sentence for time served on the felony term.

The Court has held that a trial court may not fix the sentence on a persistent felony offender conviction. Crooks v. Commonwealth, Ky.App., 29 K.L.S. 9 at 4 (July 16, 1982). The jury convicted Crooks as a PFO but could not agree on a sentence. Over defense objection the trial judge then imposed the minimum sentence. KRS 532.080 provides that the jury "shall" fix the sentence to be imposed upon a PFO conviction. Citing the statute, the Court stated, "we are of the opinion that in the PFO proceedings, the finding of guilt and the fixing of an appropriate sentence are inextricably linked, and no final action has been taken until the jury performs both functions." "Each of the allegations embracing the previous convictions must be submitted to the jury, and no matter how thoroughly they have been proven, it is still the

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jury's prerogative to disbelieve any or all of it." They rejected the defendant's argument that retrial of the PFO charge would constitute double jeopardy and remanded the case for a new trial of that charge.

In Finney v. Commonwealth, Ky.App., 29 K.L.S. 9 at 7 (August 6, 1982), the Court held that the trial court did not err by refusing to instruct the jury on the defendant's right not to take the stand at PFO proceedings. The U.S. Supreme Court's decision in Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1982), requires such an instruction upon defense request. The Court of Appeals noted "we are not persuaded that the mandate of Carter and RCr 9.54(3) is to be extended to an enhancement proceeding..."

The Court upheld the first degree robbery conviction of R. B. Williams. Williams v. Commonwealth, Ky.App., 29 K.L.S. 10 at 2 (August 13, 1982). Williams was unlawfully present in Downs Cleaners in Hopkinsville when an employee opened the store. Williams fled, carrying stolen clothing and with the employee in pursuit. Williams discarded the clothing and flourished a pocket knife at the employee to effect his escape. Williams argued that since the theft was complete when he pulled the knife the display of the knife could not convert the theft to a robbery, but was instead an instance of terroristic threatening. The Court found that "[t]he force used was in the course of committing the theft because it happened during the escape stage." "Therefore, we conclude that robbery in the first degree was committed."

The court, certifying the law, has held that a prior conviction of possession of a handgun by a convicted felon can be used as a previous felony for the purpose of sentence enhancement under the persistent felony offender statute. Commonwealth v. Jackson, Ky.App. 29 K.L.S. 10 at 5 (August 20, 1982). The court distinguished the situation before it from Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980) and Heady v. Commonwealth, Ky., 597 S.W.2d 613 (1980), stating: "Those decisions should be narrowly construed to hold that a prior conviction should not be used to enhance punishment for an offense of which it is an essential element." Thus, in Boulder the Kentucky Supreme Court held that the prosecution could not use a prior conviction to establish the offense of possession of a handgun by a convicted felon and then use the same prior conviction to enhance the penalty on the handgun charge. However, the court found that "[t]here is no reason to prohibit the prosecution from using the weapons conviction, together with any other prior conviction as a felon, to enhance a defendant's PFO status when he commits another subsequent felony."

No opinions were issued by the United States Supreme Court during the period under review.

LINDA WEST

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FRANK COPPOLA EXECUTED IN VIRGINIA: STATE ADMINISTERED SUICIDE?

Once again a condemned inmate has lost all hope and rejected legal efforts to overturn his death sentence. On August 10, Frank Coppola was electrocuted in Virginia's chair. Coppola, who maintained his innocence until the end, is the fifth person to die at the hands of state governments since 1976. Of the five, Coppola was the fourth to go to the death chamber willingly. Gary Gilmore (Utah, 1976), Jesse Bishop (Nevada, 1979) and Steven Judy (Indiana, 1981) also asked to die. All of these cases ended at the door of the U.S. Supreme Court in last minute attempts by counsel, family and/or friends to stop the execution. The Court has consistently refused to intervene, over repeated objections by Justices Marshall and Brennan and, in certain cases, other members of the Court. In Lenhard v. Wolff, 444 U.S. 807 (1979)(Jesse Bishop), the Court's decision was denounced by Justice Marshall as "indefensible" and "nothing less than state-administered suicide." See Gilmore v. Utah, 429 U.S. 1021 (1976)(White, Brennan, Marshall, Blackmum, separately dissenting), where Justice Blackmum appears to have suggested that "the Court has been almost irresponsibly feverish in dealing with these cases." New York Times Co. v. United States, 403 U.S. 713, 753 (1971)(Harlan, dissenting).

Coppola reportedly decided to die because "further imprisonment would strip him of his dignity, impose continued hardship on his family and expose his two teenage sons to ridicule." L.A. Times (August 11, 1982). Coppola was one of four persons allegedly involved in the beating death and robbery of a prominent Newport News woman. He was the only one to receive a death sentence. Absent from some news reports was the fact that Coppola was formerly a policeman and, before that, a seminarian. His two sons were 13 and 14.

Judge John Butzner of the 4th Circuit had granted an indefinite stay of execution just 10 hours before it was to take place. However, the Supreme Court lifted the stay 1/2 hour before the execution, after the Virginia prosecutors flew to Washington to file the necessary papers. The lawyers were taken to Chief Justice Burger's home and a conference call was arranged with 7 other justices. Justices Brennan and Marshall voted to deny Virginia's application. Justice Stevens wanted to, at least, wait for a response from Coppola's lawyer. Apparently, the others did not find this necessary. A handwritten pleading was filed by Coppola's lawyer 3 minutes before the Court's decision was announced; but it was not considered. Mitchell v. Lawrence, 31 Cr.L. 4136 (Aug. 10, 1982).

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DEATH ON KENTUCKY'S ROW: ALEXANDER BOWLING'S SUICIDE

As the article on page eight describes, Alex Bowling, a resident of Eddyville's death row, gave up hope and took his own life on August 16. It is doubtful that any of us can appreciate the enormous psychological and physical pressures placed upon those men and women confined awaiting execution. The few attempts to analyze the environment called "death row" have been uniformly bleak: "Warehousing for death is the grisly reality of American justice for...condemned men and women...Death row emerges as an environment in which prisoners feel impotent, afraid, and alone, defenseless against their keepers and unable to alter their fate. A few prisoners deteriorate dramatically; all experience, in varying degrees, a living death." R. Johnson, Warehousing for Death, Observations on the Human Environment of Death Row, 26 CRIME & DELINQ. 545 (1980). For a more detailed treatment of the subject see also R. Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 LAW & PSYCH. REV. 141 (1979). Eyewitnesses have confirmed the acute mental suffering experienced by death row inmates as their execution becomes imminent. Harry D. Bolser of Paducah is a retired staff writer for the Louisville Courier Journal. Part of Mr. Bolser's "beat" was Kentucky State Penitentiary. Mr. Bolser testified in a capital case on the basis of his experience, having witnessed 22 executions by electrocution and 1 public hanging. Commonwealth v. Bendingfield (Jefferson Co. Ind. No. 155177; File No. 79-SC-153-MR; TE VII, 877):

Q Have you yourself ever conducted an interview, a final interview?

A Many.

Q Would you please describe these men generally and individually; how they seem as they face their death?

A Mostly incoherent.

Q Incoherent?

A Yes. They speak but what they talk about don't make sense.

Q Would it be fair to say they fear their death?

A In some cases yes, and in some cases by that time they have very little mental capacity left remaining.

Since 1976 there have been 8 suicides on death row. To this number we must now add the name of Alex Bowling. If we include the 4 "self-inflicted executions" since 1976, the ratio is 13 suicides to 1 involuntary execution. Another grisly statistic has been added to the continuing debate over capital punishment.

VIETNAM LEGACY: THE KILLING CONTINUES

Those of us who think the killing resulting from the Vietnam war has ended might think again. The death toll didn't stop when it reached 57,692. If you "think the war is over, [you] should travel to

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the Caddo Parish Jail in Shreveport, La., and listen to the story of Wayne Robert Felde, a 31-year-old Vietnam veteran who spent his 20th year in the jungles of the Central Highlands near Pleiku." Felde was sentenced to death for killing a policeman. There is evidence he may have been trying to kill himself as he struggled with the officer. The members of the jury, some of whom wept during the trial, reportedly agreed with the defense contention that Felde's actions were a result of "delayed stress syndrome" and had their roots in Vietnam. Nevertheless, Felde was sentenced to death in compliance with his request that he be given the death penalty rather than life imprisonment without hope of psychiatric care. Before sentencing, Felde stated:

> "I am not a criminal but a troubled and wrecked man. Like many other vets I know what Vietnam did to me... Critical wounds do not always pierce the skin but enter the hearts and minds and dreams of those that are only begging for help so badly needed."

Felde has made several suicide attempts. The last was after the re-lase of the 52 American hostages from Iran and the tumultuous welcome home they received. He slit his wrists and scrawled "White Collar Heroes" in blood on his cell wall. D. Magee, "The Long War of Wayne Felde", The Nation (1982). (See the book "Slow Coming Dark: Interviews on Death Row" by Doug Magee.)

INNOCENT BUT CONDEMNED

Most folks remember a story or two of someone who was executed years ago and may have been innocent. Nicola Sacco and Bartholomeo Vanzetti come to mind. But it is generally assumed that such horror does not occur in these "modern" times. Not so. Ask Earl Charles. He was sentenced to death in Georgia in 1975 through the use of suggestive identification procedures. A key prosecution witness, a parole violator, admitted he lied about a supposed confession by Charles. In return, a police detective promised the witness his freedom. Charles was released in 1978 after the state acknowledged his innocence. Another police officer helped verify that Charles was, in fact, pumping gas in Tampa, Florida, at the time of the robbery and murders. However, he will never be the same. In testimony before the Senate Judiciary Committee, Charles stated: "[J]ust being on death row...for all that time is very strenuous. If it wasn't, Gilmore wouldn't have been hollering, 'Kill me;' Bishop wouldn't have been hollering, 'Come kill me;' Judy wouldn't have said, 'Come kill me'.... A great part of me is still back there." The Los Angeles Daily Journal (July 19, 1982).

OUR DEATH ROW

Lightning struck twice more this summer on opposite ends of the state. In Harlan County, on July 29, Judge Sid Douglass sentenced Hugh Marlowe to death. In Jefferson County, after a widely publicized trial, Kevin Stanford was sentenced to death by Judge Charles Leibson. This brings to

(Continued, P. 17)

11 those who are under death sentences. The residents of death row are, in chronological order of their sentences:

1. Eugene Gall (Boone)
2. Gene White (Breathitt)
3. Todd Ice (Powell)
4. Jack Holland (Oldham)
5. Larry James (Oldham)
6. Harold McQueen (Madison)
7. Paul Kordenbrock (Boone)
8. Ray McClellan (Jefferson)
9. David Skaggs (Muhlenburg)
10. Hugh Marlowe (Harlan)
11. Kevin Stanford (Jefferson)

These latest developments can do little to bolster the "confidence" the U.S. Supreme Court had in 1976 that the new capital sentencing scheme "would avoid the arbitrary and capricious imposition of the death penalty..." Zant v. Stephens, 31 Cr.L. 3035, 36 (1982). Kevin Stanford is the second person presently on death row who was a juvenile at the time of the offense. Hugh Marlowe, on the other hand, was 20 at the time of the offense and has no prior criminal record.

DEATH ROW ELIGIBILITY: NOT FOR THE RICH AND POWERFUL

The state decided some time ago not to seek the death penalty against Stevie Sizemore, a coal operator and member of a prominent Clay County family. No reason was given. Lexington Herald (July 27, 1982). Sizemore is charged with the 1980 slayings of two London coal truck drivers, Ernest Begley and Ray Broughton, who were on strike against Sizemore's operation in Manchester. If convicted, Sizemore could have been subject to a death sentence because the shootings resulted in "multiple deaths." KRS 532.025(2)(a)(6). Sizemore was acquitted of another double murder in 1974.

For his present case, Sizemore has employed various prominent defense attorneys and his first trial resulted in a hung jury. The prosecutor's decision has led to this recent observation by Kentucky journalist Bill Straub:

> "Let there be no dispute about Kentucky's capital punishment law. If you're certifiably insane, like Eugene Gall, or strung-out on drugs, like Paul Kordenbrock, you can expect to be sent to Death Row at the Eddyville State Penitentiary for the murders you commit.
>
> But if you happen to be an eastern Kentucky coal operator, there apparently is no reason to fear for your life--especially if all you are charged with is killing striking miners.
>
> * * * *
>
> This latest case should prove to everyone just how fairly administered the death penalty really is."

Kentucky Post (July 30, 1982)

DEATH QUALIFICATION ANOTHER WEAPON IN THE PROSECUTOR'S ARSENAL

It would be grossly unfair, and duplicitous, for us to suggest or assume Stevie Sizemore's guilt. But even the prosecution's decision on whether to seek the death penalty can have

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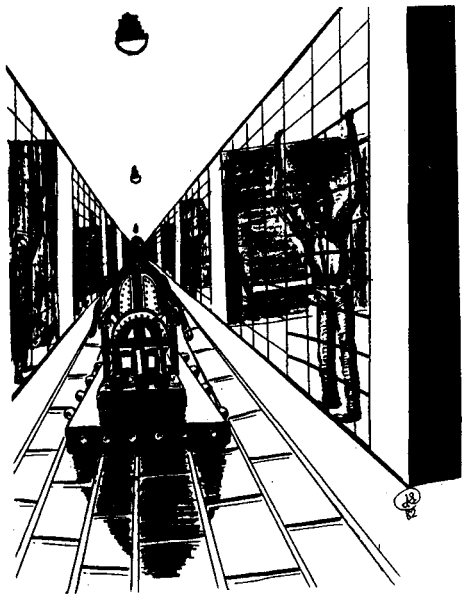
drastic consequences for a defendant, putting aside the possibility that he or she might actually end up on death row. Sizemore, for example, did not have to face a "death qualified" jury--that is a jury from whom persons have been excluded because of feelings about the death penalty. In Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968), the Court left open the possibility "in some future case" it could be proven that death-qualified jurors were conviction-prone. See also Bumper v. North Carolina, 391 U.S. 543 (1968).

Since the time of Witherspoon many scientific studies have emerged and they are in agreement that death-qualified jurors are "less than neutral with respect to guilt." 391 U.S. at 520 n.18. In Hovey v. Superior Court of Alameda City, 616 P.2d 1301 (Cal. 1980), the California Supreme Court conducted an exhaustive analysis of the scientific research on this question and accepted the various studies as accurate. (The Court, however, declined to prohibit death-qualification until the effect on juries of exclusion of "automatic death penalty" (reverse Witherspoon) jurors was considered.) See generally White, Death Qualified Juries: The Prosecution-Proneness Argument Re-examined, 41 U.PITT.L. REV. 353 (1980). Back in 1961, one author wrote "Were I to be charged with a capital offense, I should greatly prefer to have the issue of my guilt or innocence tried by the first twelve people to pass the courthouse no questions asked... than by a jury qualified upon the death sentence." Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of A Fair Trial on Issue of Guilt? 39 TEX.L.REV. 545 (1961) (original emphasis). One 1968 study computed the odds at 24 to 1 that jurors without scruples against the death penalty were more likely to vote guilty than scrupled jurors. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment, 28-29 (1968).

Recognizing the validity of these studies, some prosecutors have sought the death penalty simply "to obtain a death qualified, conviction prone jury, even though they promptly waive the death penalty upon conviction of guilt." State v. Mercer, 618 S.W.2d 1, 17 (Mo. banc. 1981) (Seiler, J., dissenting). Stevie Sizemore is, at least, fortunate that he need not face a death-qualified jury.

KEVIN McNALLY

* * * * * *



"REFORM" OF HABEAS: BAD POLICY THAT WON'T FIGHT CRIME

On March 16, 1982, Senator Strom Thurmond, introduced S.2216 in the United States Senate at the request of the U.S. Department of Justice. Referred to as the Habeas Corpus Reform Act of 1982, the bill proposes to restrict the use of habeas corpus petitions by prisoners in state custody in many significant ways. (A companion measure, H.R. 6050, was introduced in the House of Representatives on April 1, by Representative Dan Lungren and President Reagan recently proposed legislation including similar restrictions.)

First, the bill would prevent claims not raised in a time or manner required by state procedural rules from being entertained absent actual prejudice and a showing that 1) unlawful state action caused the failure, 2) the right asserted was not recognized prior to the default or 3) the factual predicate to the claim could not have been discovered through reasonable diligence prior to the default. Also, the bill would establish a one year statute of limitations for filing such petitions to be calculated from the date of 1) the exhaustion of state remedies, 2) the removal of any unlawful state impediment to the filing of the petition, 3) the initial recognition of the federal right or 4) the time at which the factual predicate of the claim could have been discovered through reasonable diligence, whichever is latest. The bill would also require exhaustion of all claims unless there is an absence of corrective processes within the state or such relief would be futile. But the act would allow habeas corpus petitions to be denied on merit absent exhaustion.

Finally, the bill would prevent the granting of habeas corpus petitions with respect to any claim that has been fully and fairly adjudicated in a state proceeding. Further, state determinations of factual issues that have been fully and fairly adjudicated would be presumed correct and could only be rebutted by clear and convincing evidence.

The following article by Richard J. Wilson, which originally appeared in the May, 1982 issue of NLADA Cornerstone, discusses why the justifications for these reforms are ill conceived:

Congress is hot on the trail of a red herring that would do nothing to fight crime in the streets and threatens to gut a fundamental constitutional right - the writ of habeas corpus. There are more than a half dozen proposals now pending to "reform" habeas corpus procedures. Last month, the Department of Justice sent its bill to both Houses of Congress. The Senate Judiciary Committee now has completed hearings, and on April 22, the House Subcommittee on Criminal Justice, chaired by Rep. John

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Conyers (D-MI), considered proposals to amend habeas corpus provisions as part of the immense changes proposed to the federal criminal code. In his year-end address on the state of the judiciary Chief Justice Burger alluded to abuses of these types of remedies.

Last year, Attorney General William French Smith's Task force on Violent Crime wrote of alleged abuses of the writ in federal courts by inmates of state prisons. Provisions to limit access to habeas corpus by state prisoners were part of a group of Task Force recommendations designed to reform perceived abuses in criminal courts.

The habeas corpus amendments, like other proposals made by the Task force, are barely understood by even informed members of the public. They have given their proponents a lot of political mileage on the issue of violent crime. But these proposals, based on myth and misunderstanding of the criminal justice system, would have virtually no effect on violent street crime.

Although it is said over and over, it bears repeating that the court system is being unjustly blamed for our crime problems. The police admit that for every 100 crimes, only 30 are reported. On the average, arrests occur in about 6 of those 30 cases. This track record demonstrates that the courts are not involved with the bulk of criminal activity. However, we still seek scapegoats for our collective rage, wanting to take out all of our frustrations about crime on the few individuals who are taken into the system.

Habeas corpus "reform" is a proposal which is full of sound and fury, but signifies nothing. Proponents suggest that such changes are appropriate on the grounds that they will stem an "explosion" in the use of the federal court remedies by state prisoners. Others suggest that these limitations will greatly assist in lending finality and certainty to the decisions of state courts and that they will eliminate "unnecessary friction" between state and federal courts. In fact, the evidence shows that there is no such "explosion" or "unnecessary friction." Most of the evidence comes from the U.S. Supreme Court's own statistical arm, the Administrative Office of U.S. Courts, and, ironically, from a 1979 study conducted for the very Department of Justice which now proposes limitations on habeas corpus.

During the last decade, the United States has experienced a precipitous growth in criminal convictions and prison populations. In 1980, well over 2.5 million criminal cases were disposed of by state courts of general jurisdiction. At least that same number passed through courts of more limited jurisdiction. However, in 1981, only 7,790 petitions for habeas corpus relief were filed by state court prisoners, according to the Annual Report of the Administrative Office of U.S. Courts. Habeas corpus filings

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by state court prisoners, therefore, represent about three-tenths of one percent of all criminal cases disposed of in state courts last year. The 7,790 habeas petitions represent a 14% decline over the 9,000 habeas corpus petitions filed during 1980.

The data regarding what happens to habeas corpus actions is also revealing. Filings accounted for only 3% of the total number of total filings in federal court in 1981 (over 200,000). The Administrative Office's statistics show that only 165 hearings were held in the entire United States last year in habeas corpus actions; that is about one hearing for every three judges. So much for the "flood of litigation" theory. From all the available data, it appears not only that these petitions remain a very small number, but that the number of cases is declining, even as the number of state court convictions continues to increase. Yet Congress now seeks to further limit the number of such cases, spending its time and effort on an issue that makes up a minuscule portion of the federal court dockets.

The Department of Justice's own study is even more damning. It examined nearly 2,000 cases over a 2-year period, and found that nearly 97% of the small number of cases filed were denied. Of those that were granted, the defendant seldom walked out the door free. The most frequent remedy was to send the case back to the state court, where the defendant goes back to the starting line. Most frequently, another conviction occurs.

So why do a few Senators and Representatives have such strong feelings about the need for these changes despite the evidence?

One answer may be the death penalty. Within the last month, the total number of inmates on death row finally exceeded 1,000. The number of persons sentenced to death increases almost daily. Only four executions have occurred since 1976. The remaining convictions are in the appellate process.

Much of the criticism of the writ of habeas corpus comes from southern prosecutors, practitioners and judges. Unique pressures are put on state and federal systems by a high proportion of death sentences in southern states. Seventy-five percent of all current death penalty convictions occurred in the South. Nearly half of all the persons under sentence of death were convicted in Florida, Georgia and Texas.

The cost of imposition of capital sentences is inevitably high, since any competent defense attorney will pursue every avenue of relief, including review by federal habeas corpus, to ensure that the death penalty is not discriminatorily, arbitrarily, or mistakenly imposed. Death is different from any other punishment. A mistaken or improper conviction cannot be corrected when the defendant is dead. These southern states have chosen to impose the death penalty with increasing frequency. A direct result of

(Continued, P. 22)

that choice is a high frequency of habeas corpus cases. But the heavier use of the writ that may occur on a regional basis does not militate revision of habeas corpus provisions for all convictions in all states. As the government's own statistics show, the remedy is not being abused at all. In fact, it has been used judiciously, moderately, and with decreasing frequency nationwide.

These "reform" proposals are based upon an erroneous theory that federal courts routinely run rough-shod over decisions by state courts. Again, this is simply not the case. No one proposes total abolition of the writ of habeas corpus. So long as the writ exists, the federal courts are required to intervene to vindicate federal constitutional rights. Former Justice Potter Stewart recognized this fact in one of his Supreme Court opinions where he noted that the state courts serve well in the vast majority of cases in which federal constitutional rights come into question. However, he also said "it is the occasional abuse that the federal writ of habeas corpus stands ready to correct." Congress should leave well enough alone.

RICHARD J. WILSON
NATIONAL LEGAL AID & DEFENDER ASSOCIATION

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TRIAL TIPS

A NEW EQUATION FOR THE INSANITY DEFENSE

GUILTY BUT MENTALLY ILL:

GBMI ≠ NGRI
GBMI < NGRI
GBMI = G

DISADVANTAGES AND DEFICIENCIES OF THE GBMI VERDICT

(This is the second and concluding article on the GBMI verdict.)

GBMI: NO ALTERNATIVE TO NGRI

The new criminal verdict of guilty but mentally ill (GBMI) does not provide an alternative to the verdict of not guilty by reason of insanity (NGRI). Contrary to the assertions of GBMI proponents, the "insanity" defense under both prior and present law requires the jury to find an accused guilty of the charged offense even though he was suffering from a mental condition (mental disease or defect) at the time of the criminal conduct when the mental illness has no affect on either the accused's ability to appreciate the criminality of his conduct or his ability to conform his conduct to the law.

Evidence of mental illness without more does not even entitle a defendant to an instruction on the insanity defense. Edwards v. Commonwealth, Ky., 554 S.W.2d 380, 383 (1977), citing Newsome v. Commonwealth, Ky., 366 S.W.2d 174, 177 (1962). Similarly, if the jury believes the defendant was mentally ill at the time of the offense, but the illness did not substantially deprive him of his ability to know right from wrong or to conform to the right, the jury has to reject the insanity defense and find the defendant guilty of the offense. Edwards v. Commonwealth, supra at 383, citing KRS 504.020 and Henderson v. Commonwealth, Ky., 507 S.W.2d 454 (1974). Now, the GBMI verdict simply expresses the jury's belief that the defendant was mentally ill at the time of the offense, but that he could still know right from wrong and still do the right if he so desired.

NO CHANGE IN NGRI DEFENSE

The legislation implementing the GBMI verdict makes no substantial change in the definiton or principles of insanity as a defense or an exception to criminal responsibility. The phrase "mental disease or defect" is replaced by the term "mental condition" in the new definiton of "insanity." KRS 504.060(4). Basically, the GBMI legislation maintains the same test or principles of criminal responsibility that existed under the prior law. Consequently, any Kentucky jury instructed on the issue of insanity and criminal accountability will still be confronted with the question of

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whether the mental condition, if it is proven to exist at the time of the commission of the offense, affected either the ability of the defendant to appreciate the criminality of his conduct or his ability to act in accordance with legal norms. Theoretically, persons found NGRI under the prior laws would still be found NGKI even under the new GBMI legislation.

NO CHANGE IN DISPOSITION OF PERSONS FOUND NGRI

Similarly, the new GBMI legislation does not create a substantial change in the disposition of a defendant found not guilty by reason of insanity. A person acquitted as a result of his insanity at the time of the offense is no longer subject to confinement within the criminal justice system, but is only susceptible to institutionalization on the basis of involuntary commitment proceedings which may or may not be initiated against him. A person found NGRI will still be hospitalized against his will solely on the basis of an involuntary commitment under KRS Chapter 202A or 202B. A person who does not qualify for involuntary commitment, even though acquitted by reason of insanity, may not be institutionalized or imprisoned under the GBMI law.

GBMI WILL CONFUSE THE JURY

Because the GBMI verdict has no legal or factual impact on the determination by a jury of the issues of insanity and criminal accountability, the new GBMI verdict will merely confuse a jury.

Under the prior law, a properly instructed jury in Kentucky was well aware that by rejecting the verdit of NGRI and finding the defendant guilty of the charged offense, they had held the defendant responsible for his criminal actions even though they may have believed him to be mentally ill at the time of the alleged offense. For this reason, a GBMI verdict is simply not necessary; guilty verdicts and verdicts of NGRI are enough to clarify the full spectrum of choices for any Kentucky jury.

Additionally, the definitons of "mental illness" and "insanity" substantially overlap. Unlike the phraselogy of the insanity defense, the GBMI's definition of mental illness injects psychiatric and psychological jargon, such as "maladaptive behavior" and "emotional symptoms" into the jury's fact-finding function.

Recently, a federal study on jury instructions funded by a National Institute of Mental Health and the Justice Department's National Institute of Justice concluded that instructions to juries are often confusing or incomprehensible. An unnecessary instruction such as the GBMI verdict which does not purport to explain to the jury the effect of such a finding cannot be classified as an aid to resolving the issues of insanity, mental illness and criminal accountability in a trial.

The jury will be given no reason for the GBMI verdict as

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opposed to the guilty verdict since the GBMI verdict will require the jury to select a sentence of imprisonment just as a guilty verdict does. In a jurisdiction such as Kentucky where the jury initially performs a sentencing function, the jury will be given the same sentencing ranges under both a guilty verdict and a GBMI verdict.

JURY TO BE UNINFORMED ON CONSEQUENCES OF GBMI VERDICT

Supporters of this legislation argue that the GBMI verdict enables jurors to be confident that a defendant who is incarcerated as a result of their verdict will receive treatment for that illness while confined. Under this legislation as enacted and under the case law of this jurisdiction, neither the instructions on the GBMI verdict nor comments by the trial judge or counsel may inform the jury of the treatment provided under the GBMI verdict.

"The main function of the jury is to determine guilt or innocence" and "[t]he constitutional right to a trial by jury is limited to that determination." Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981). "The consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury's finding of fact and may serve to distort it." Id.; emphasis added. "For that reason [the Supreme Court of Kentucky] now hold[s] that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial." Id. "[E]xternal considerations have no legitimate bearing on the jury's factual determination of guilt or innocence." Id.

Additionally, a verdict which allows the jury to recommend treatment for a defendant as a condition of punishment reflects a fundamental misunderstanding of the function of the jury in addressing the question of insanity and criminal accountability. The GBMI verdict focuses on mental illness at the time of the offense - not at the time of trial and sentencing. A finding by the jury that a defendant was mentally ill at the time he committed the charged offense has little relationship to his present need for psychiatric or psychological treatment. Presumably a defendant being tried before a jury has been determined by the trial judge to be so free of present mental illness as to be competent to stand trial. Nothing in the jury's verdict of GBMI indicates to the jury or the defendant that the defendant will receive treatment for the mental illness which existed at the time of the offense. Likewise, the GBMI verdict provides no factual predicate for subsequent psychological or psychiatric treatment of the defendant since it is a finding not of present mental illness, but only of mental illness at the time of the charged crime. See Gall v. Commonwealth, Ky., 607 S.W.2d 97, 111 (1980).

(Continued, P. 26)

GBMI VERDICT DOES NOT BENEFIT DEFENDANT

Of course, despite the concerns expressed for the plight of the mentally ill but not legally insane person who commits a crime, the GBMI verdict does not mitigate the defendant's criminal act nor reduce the degree of the crime or the authorized punishment.

Numerous factors indicate that the GBMI verdict is counter-productive to subsequent psychiatric treatment. The jury's labeling of a defendant as guilty but mentally ill stigmatizes the prisoner more so than a psychiatrist's or a psychologist's evaluation. Some mental health pro-fessionals believe that the GBMI mandated treatment until no longer mentally ill will constitute a disincentive for the prisoner or probationer to cooperate in his therapy. A very practical problem arises from the fact that the GBMI mandate of treatment does not provide any legislative criteria for determining when a person is no longer mentally ill and appropriate for release from treatment.

Trial defense attorneys should be aware that the GBMI legislation is an inferior and unnecessary duplication of present sentencing laws. For example, a pre-sentence psychiatric exam and report are presently available to the trial judge as a means of determining any defendant's mental condition at the time of sentencing. KRS 532.050(3). In fact, psychiatric treatment and institutionalization are already statutorily authorized conditions of probation, even when the jury has not returned a GBMI verdict. KRS 533.030 (2)(e).

The GBMI verdict only identifies mental illness at the time of the offense not at the time of sentencing; the GBMI finding is not probative of the defendant's mental illness at the time of sentencing. It should be remembered that "[i]f the defendant is found mentally ill at the time of sentencing, treatment shall be provided the defendant until he is no longer mentally ill or until expiration of his sentence, which ever occurs first." KRS 504.150. Obviously, the jury's finding of GBMI does not insure the opportunity for treatment of the convicted defendant. The identification of mental illness in the convicted defendant and the recognition of the need for treatment while in confinement is the result of the pre-sentencing psychiatric evaluation and the judge's sentencing determination that the defendant is at the time mentally ill. In fact, the GBMI defendant may be granted probation, conditional release, shock probation, and parole even though still mentally ill. The only requirement is that treatment be a mandatory condition of any of those sentencing alternatives "so long as the defendant is mentally ill." KRS 504.150(2).

SENTENCING HEARINGS UNDER GBMI VERDICT

The judge's decision on whether a defendant is mentally ill at the time of sentencing will require a complete adversarial hearing with the defense's

(Continued, P. 27)

right to cross-examine the psychiatrist or psychologist, the defense right to present its own witnesses, and written findings of fact and conclusions of law by the trial judge. Sentencing is a critical stage of the proceedings at which the defendant is entitled to due process. Gardner v. Florida, 97 S.Ct. 1197 (1977).

Additionally, institutionalization for psychiatric treatment as opposed to imprisonment for an offense is a substantial change necessitating an adversarial hearing complete with due process safeguards. Vitek v. Jones, 100 S.Ct. 1254 (1980). "[I]nvoluntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." Id. at 1264. "A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections." Id. "[T]he stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivation of liberty that reqires procedural protections." Id.

MENTALLY ILL AT SENTENCING = INCOMPETENCY

A judge's finding that the GBMI defendant is mentally ill at the time of sentencing will automatically require a competency hearing. The definition of "mental illness" under the GBMI statute is substantially the same as that used in KRS 202A.010(7), the "involuntary commitment" chapter. A judicial finding of "mental illness" at the time of sentencing would virtually constitute as a matter of law "reasonable grounds to believe" that the defendant is incompetent to be sentenced. See Pate v. Robinson, 86 S.Ct. 836 (1966); Drope v. Missouri, 95 S.Ct. 896 (1975); Hayden v. Commonwealth, Ky., 563 S.W.2d 720 (1978).

"If...during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his defense, the proceedings shall be postponed and the issue of incapacity [to stand trial] determined as provided by" statute. RCr 8.06. "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope v. Missouri, supra at 908. Incompetency at sentencing would preclude sentencing under the GBMI law until the defendant becomes competent. RCr 8.06.

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CONSTITUTIONAL RIGHT NOT TO COOPERATE IN PRE-SENTENCING EXAM

Trial defense counsel should realize that the GBMI defendant has a federal constitutional right to refuse to participate in the pre-sentencing psychiatric exam and is entitled to the assistance of counsel at the interview and exam. Estelle v. Smith, 101 S.Ct. 1866, 1872-73 (1981).

GBMI VERDICT: AN AUTOMATIC MITIGATING CIRCUMSTANCE

A GBMI verdict in a death penalty case would require the judge to rule that the statutory mitigating circumstance of mental illness at the time of the capital offense was established as a matter of law. Under KRS 532.025(2)(b)(7), it is a "mitigating circumstance" when "[a]t the time of the capital offense the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law was impaired as a result of mental disease or defect...even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of the law is insufficient to constitute a defense to the crime."

THE GBMI PLEA

Finally, trial defense counsel should be aware that a plea of GBMI is a very dangerous strategy. Entering a plea ofGBMI to insure that the defendant will receive treatment during the course of his sentence, whether it be incarceration or probation, reveals a miscomprehension of the GBMI law. Even after the trial judge accepts a plea of GBMI, he is not authorized by law to require treatment as a condition of the sentence unless he finds, following a pre-sentence psychiatric evaluation and report, that the defendant is mentally ill at the time of sentencing. Any sentencing concessions that a defense attorney can hope to acquire from the prosecution and the judge through a plea of GBMI can be accomplished by the entry of a simple plea of guilty with the sentencing concessions and/or alternatives geared to other statutory rights, such as treatment as a condition of probation.

VINCE APRILE

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Proceedings of the Correctional Education Association Conference Available

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WHEN PUSH COMES TO SHOVE

At some point, every public defender faces the situation of the relationship he or she has with the trial judge deteriorating to the point that it affects the rights of the client he is defending. There are some very important things the defender needs to remember when this occurs.

First of all, the defender should remember that his first allegiance must be to providing effective assistance of counsel to his client. Questions of irritating the judge, or the effect this might have on the defender's private practice, etc., are out of place and highly inappropriate for the court appointed lawyer. Timidity is equally out of place. There is no substitute for being aware of what is going on, knowing what to do, and doing it.

Secondly, the trial court itself has a great deal of responsibility to avoid being partisan. The trial court "represents the majesty and impersonality of the law, which has no displeasure, no contempt for any man on trial, or for the counsel who pleads his case." Merritt v. Commonwealth, Ky., 386 S.W.2d 727, 731 (1965). Further, the court "should be the exemplar of dignity and impartiality. He should suppress his personal predilictions, and control his temper and emotions." ABA Standards Relating to the Function of the Trial Judge, Section 6.4 (1972). It is, indeed, his responsibility to ensure that "justice...satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954).

As a result, "judicial comments in the presence of the jury are subject to special scrutiny" by appellate courts. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972). The reason for this is that "undue importance and great weight may be attached by members of the jury to any remark made by him in their presence...due to the confidence in and esteem for a judge and respect for his position." Collins v. Sparks, Ky., 310 S.W.2d 45, 47 (19580. Even one improper remark by a trial court may be grounds for reversal of a criminal conviction. Massie v. Commonwealth, Ky., 15 Ky. 562, 24 S.W. 611 (1894).

The defender should use these truisms when the trial court abandons his role of neutral arbiter and begins to criticize, engage in banter, ridicule, or other behavior which adversely effects the person on trial. The defender, of course, must be aware of the effect that his objections to the judge's behavior will have on the jury. This is no excuse for not objecting; rather, the defender should simply ensure that his comments and objections are made out of the jury's presence.

Further, it is vital to remember to put everything on the record. Too often a defender will lose pertinent and timely objections because the court reporter, for many reasons, fails to take down bench and in-chambers conferences.

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This is particularly vital when the objection is to judicial misconduct. Much of what may be objectionable will not appear on the record. For example, the judge who smiles or shakes his head during a defendant's testimony is doing so silently. The defender should place on the record his observation of the trial court's behavior. He should say, "let the record reflect that the trial court has been shaking his head throughout the defendant's testimony, that this expresses the trial court's belief in the defendant's guilt, thereby depriving him of his right to a fair trial, etc." A motion for a mistrial and then a request for an admonition should follow. But remember at all times--the appellate court cannot see the trial judge, and thus you must put on the record any perceived misconduct.

The defender must be aware of what the trial court can and cannot do. The list of don'ts is long, and occasionally changes. What follows is a partial listing, which should be added to by the reader:

1. A judge cannot refer to particular actions by counsel in other cases. "You've been doing that repeatedly and I'm not going to stand for it." See McGill v. Commonwealth, 216 Ky. 430, 287 S.W. 949 (1929).

2. The court cannot disparage an affidavit read as a deposition in lieu of a continuance. Ledford v. Commonwealth, Ky., 246 S.W.2d 456 (1961).

3. He cannot recall the defendant to the stand to clarify particular matters; nor can he require the defendant to testify at a particular time.

4. The court should not restrict counsel's right to object, in front of the jury. Whitaker v. Commonwealth, 298 Ky. 442, 183 S.W.2d 18 (1944).

5. The court should not question a psychiatrist in such a way as to point out the inadequacy of civil commitments, in cases where insanity is a defense. Paul v. Commonwealth, Ky., 625 S.W.2d 569 (1981).

6. The court should not interrupt either direct or cross. If he does so, object that your client is being denied his right to the effective assistance of counsel. Realize too that judicial intervention is not reversible error where the trial is particuarly long,

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counsel is unprepared or obstreperous or the witness is difficult to deal with. United States v. Hickman, 592 F.2d 931 (6th Cir. 1979).

7. The trial court should not make known in any direct or indirect way that jury sequestration was caused by defense counsel. Anderson v. Commonwealth, 194 S.W.2d 530, 302 Ky. 275 (1946).

8. The court cannot express disbelief in a defense theory, a defense witness, or the defendant's testimony. If he engages in cross-examination of the defendant in a prosecutorial manner, this can constitute reversible error. LeGrande v. Commonwealth, Ky., 474 S.W.2d 726 (1973).

9. The court should not continually disparage defense counsel, tell him to be brief, to stop wasting the jury's time, etc. You as a defender have a right to be treated fairly in such a manner which will not prejudice your client's rights.

10. The court may not participate in the case as a partisan. Rogers v. Commonwealth, Ky., 424 S.W.2d 130 (1968). For example, in a case where the prosecuting witness is a deputy sheriff, it is reversible error to say to the jury "We must get tough and enforce the law. A deputy sheriff has been shot into and it is up to us to stop this kind of thing and back the officers up..." Holbert v. Commonwealth, Ky., 334 S.W.2d 922 (1960).

These are some of the many things which are objectionable. When push comes to shove, as it occasionally does, it is imperative that the defender vigorously protect his client's rights by objecting to improper judicial behavior.

ERNIE LEWIS

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AMENDMENT OF SUPREME COURT RULES AFFECTS INVOLUNTARY COMMITMENT PROCEEDINGS

The new involuntary commitment law (KRS Chapter 202A, effective July 1, 1982) was specifically designed to involve the judicial system in the proceedings at the earliest possible stage. For instance, under KRS 202A.041 a police officer who arrests an individual who is mentally ill and presents a danger or threat of danger to self or others must bring that individual before a judge within twelve (12) hours of the arrest. Similarly, under KRS 202A.051 and KRS 202A.071 a preliminary hearing is required to be held in an involuntary commitment case within five (5) days of the filing of a petition. Other duties requiring immediate action by the district judge would include questioning the petitioner under oath, the issuance of a warrant or summons, the appointment of an attorney, and the appointment of qualified mental health professionals.

Since July 1st, however, situations have been encountered around the state where the district judge, for one reason or another, is not present in the county at the

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time he is needed. Traditionally, a trial commissioner has been used when the district judge was not available. SCR 5.030(f) which delineated the powers of the trial commissioner in this area stated that he could "issue orders of involuntary hospitalization of mentally ill persons for periods not exceeding seven days or as may be otherwise limited by statute." However, because the new KRS Chapter 202A eliminated the seven day commitment procedure, the trial commissioner was not authorized to undertake any action in an involuntary commitment action.

Effective September 10, 1982, SCR 5.030(f) was amended to reflect the changes in KRS Chapter 202A. The trial commissioner is now authorized to undertake the following actions:

> "(f) In mental health cases, to conduct all preliminary proceedings relating to involuntary commitments, and, specifically:
>
> (i) to issue a warrant or summons for the respondent if he is not already detained;
> (ii) to release persons for whom no warrant has been taken pursuant to KRS 202A.041;
> (iii) to order immediate mental examinations pursuant to KRS 202A.041 and 202A.051;
> (iv) to appoint counsel for respondent;
> (v) to set and conduct preliminary hearings in involuntary commitment cases pursuant to KRS 202A.041, 202A.051 and 202A.071; and
> (vi) to order the detention of the respondent pending the preliminary and final hearings."

With this amendment, the unavailability of a district judge will be no excuse for the failure to meet the time requirements contained in KRS Chapter 202A.

BILL RADIGAN

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