



The Advocate

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THE ADVOCATE FEATURES



"It was great!" That's what the zealous David Melcher had to say July 8, the day after a client of his was acquitted on a murder charge. The first trial ended with a hung jury, but not the second. The jury concluded that the victim committed suicide. David believes this was the most intense and emotional case he's ever had. He and his law partner, John Swinford, worked many, many long hours but, "It was sure worth it and very rewarding."

David proudly works with Swinford and Sims, a law firm which has been in Cynthiana for over one hundred years. He is a general practitioner, but devotes approximately twenty percent of his time to public defender work. He is the

(See Melcher, P. 28)

NAME OF LAB CHANGES TO TRIAL SERVICES BRANCH

The Department of Public Advocacy (formerly the Office for Public Advocacy which was formerly the Office of Public Defender) has changed the name of the Local Assistance Branch (LAB) to the Trial Services Branch. Big deal, right?

Maybe not a big deal, but we think it is important. The Local Assistance Branch was organized in November of 1980 in order to emphasize the priority then being placed on public defender work at the trial level.

The change in name to the Trial Services Branch is another action which mirrors the substantive change in priorities in the Department of Public Advocacy (DPA). Besides committing a group of

(See Name Change, P. 2)

INSIDE

	<u>Page</u>
Legislative Highlights...	4
West's Review.....	8
Protection & Advocacy....	15
Death Penalty.....	17
Guilty But Mentally Ill..	22
Appellate Procedure.....	25



Ernie Lewis, a 1973 graduate of Vanderbilt Divinity School and a 1977 graduate of Washington University School of Law in St. Louis, Missouri, came to the DPA in June of 1977, and has served as appellate attorney, Trial Services attorney, and creator and long-time editor of The Advocate.



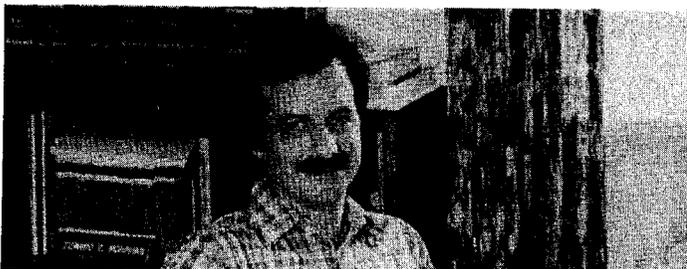
Donna Proctor graduated from the University of Kentucky School of Law in 1977, and has been with the DPA ever since. Donna recently participated as a faculty member at a two week trial advocacy course offered by the University of Kentucky.



Debbie FitzGerald, a U.K. School of Law graduate, started her legal career as a trial attorney with the DPA trial office in Winchester. When that office closed, she continued her devotion to trial work by moving to the Trial Services Branch.



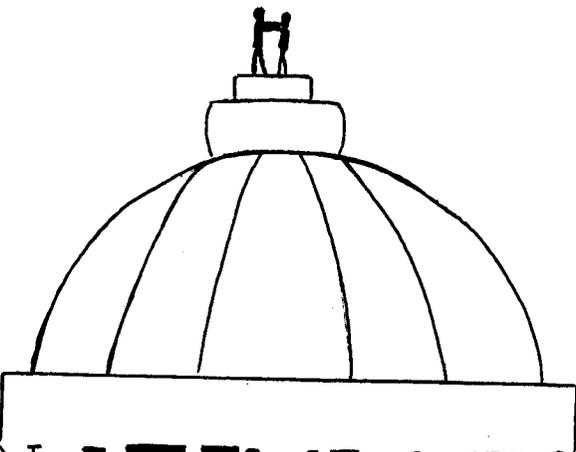
Kevin McNally has been with the DPA since 1976. A graduate of the University of Louisville School of Law, he has made a home with his wife Gail Robinson and son Sean on a Franklin County farm. Kevin is responsible for the monitoring of the death penalty statewide.



Ed Monahan has been with the DPA since 1976. He graduated from Catholic University Law School in Washington, D.C. in 1976. Ed, former chairman of the Death Penalty Task Force and chief of the Trial Services Branch, is now devoting his energy to developing and executing a training program for trial attorneys.



Gail Robinson, like her husband Kevin, graduated second in her class from the University of Louisville School of Law. Gail has been with the DPA since 1976, following short careers as both school teacher and Louisville social worker.



LEGISLATIVE HIGHLIGHTS

July 15th is the effective date for legislation enacted during the 1982 regular session of the Kentucky General Assembly. There are several additions and changes to the statutes which impact the practice of criminal defense law. What follows is a brief summary of the more significant bills which is intended to alert public advocate defense attorneys to these changes. Should more detailed information be required one should request a copy of the final version of a particular bill by contacting the Legislative Research Commission, 3rd Floor, Capitol Building, Frankfort, Kentucky 40601, phone: (502) 564-8100.

NEW CRIMES

House Bill (HB) 148: makes it illegal to "sell, possess with intent to sell or advertise for sale" so called "look-alike" drugs. Penalty for conviction is a Class A misdemeanor for the first offense and a Class D felony for subsequent convictions.

HB 26; an amendment to this bill created new sections of KRS 218A defining "drug paraphenalia" and outlawing the possession, sale and advertisement for sale of drug paraphenalia. Conviction carries Class A misdemeanor sanctions.

HB 319: makes it a Class D felony to steal mail or possess or sell stolen mail.

HB 669: creates new sections of KRS 508 establishing the crimes of criminal abuse in the first, second and third degrees. The crime is for abusing or permitting another person to cause serious physical injury or mental injury to someone who is physically or mentally helpless or 12 years of age or less. Distinction in degree of the crime is based on whether it was intentionally, wantonly or recklessly inflicted and penalties range from Class C felony to a Class A misdemeanor respectively.

(Continued, P. 5)

HB 301: The Auto Title Law establishes Kentucky as a motor vehicle title state and although it is basically a non-criminal bill it also created several new felonies including crimes relating to misuse of the computer system, possession of blank "auto titles", obscuring manufacturer's numbers and interestingly enough it establishes the crime of "trafficking stolen vehicles or parts".

AMENDMENTS TO EXISTING CRIMES

Senate Bill (SB) 75: increased the penalty for certain cases of criminal littering from a Class B misdemeanor to a Class A misdemeanor.

HB 20: made wholesale changes in the arson statute by redefining the crime and establishing first, second and third degree arson distinctions.

HB 253: amended the "theft by deception" statute to include the obtaining of, not only property, but "services" by deception as an offense.

HB 466: took cocaine from its location in the schedule of controlled substances where it was defined as a "narcotic" and placed it in a "non-narcotic" classification. There is however no change in the penalties relating to "cocaine" offenses by this move.

HB 489: added language to the persistent felony offender statute to specify that someone may be charged with being a PFO for a crime committed while on conditional release or while in custody.

SB 340: specifically defines marijuana as "dangerous contraband" under the "promoting contraband" statute which has the practical effect of making it a Class D felony rather than a Class A misdemeanor to possess marijuana around a jail or penal institution.

HB 88 and HB 26: These bills basically increased the penalties for the possession, transfer, use or sale of marijuana. HB 26 makes it a Class D felony to grow marijuana with the intent to sell it and carries a presumption of that intent if there are 25 or more plants growing. HB 88 changes the penalties for possession with intent to sell, sale or manufacture of marijuana as follows: less than 8 oz., Class A misdemeanor; 8 oz. to 5 lbs., Class D felony; 5 lbs. or more Class C felony. Penalty for possession for one's own use remains a Class B misdemeanor.

This bill also makes it a separate offense for a person over 18 years old to sell or transfer marijuana to persons under 18, making it a Class D felony for the first offense and Class C felony for subsequent convictions.

SB 190: provides that an "attempt" to escape from a penal institution will be a Class D felony (the same as a successful escape) and defines certain activities that will constitute an "attempt". It further mandates that any

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sentence must run consecutively to the sentence being served.

HB 383: amends KRS 508 (assault) to create a "new" assault third degree crime when with recklessness a person causes or attempts to cause physical injury to a peace officer or probation and parole officer by means of a deadly weapon or dangerous instrument. It is a Class D felony. The old third degree misdemeanor assault will now be assault in the fourth degree.

HB 536: broadens the Attorney General's powers in the investigation and prosecution of "welfare fraud" cases, broadens the elements of the offense of false or fraudulent claims and aims at the provider violators by subjecting them to treble damages and expenses of the investigation and prosecution.

VERDICTS, SENTENCING, POST- CONVICTION CHANGES

HB 23: This bill, potentially one of the most significant, creates a new verdict of 'guilty, but mentally ill' in Kentucky. An entire article dealing with the provisions of the bill and its ramifications in more detail is on page 22 of this issue.

HB 105: requires probationers and parolees to, in essence, pay fees for their supervision in amounts varying from \$100.00 to \$500.00 for misdemeanants and from \$500.00 to \$2,500.00 for felons in the discretion of the releasing authority in either lump sum or by installment. Failure to pay such fees would constitute grounds for revocation.

HB 149: also requires any defendant placed on probation or parole to pay an additional \$10 in court costs which will go to the Crime Victims Compensation Board.

HB 379: provides statutory authority for judges to order persons sentenced to imprisonment in county jails to work on "community service projects".

HB 450: amends KRS 533.030 to require restitution in full as a condition for probation when a victim has suffered monetary damages or a state agency has paid medical bills or other claims resulting from the crime. The court may, in lieu of monetary restitution, order the defendant to perform uncompensated work for the victim or a public agency and may hold the defendant in contempt or in violation of his terms of probation for failure to comply with such restitution orders.

SB 213: establishes that shock probation is available for convicted misdemeanants upon motion after 30 days and before 60 days and extends the period to file for shock probation in felony cases from between 30 and 60 days to between 30 and 90 days.

MISCELLANEOUS BILLS

HB 40: authorizes more extensive use of surveillance equipment at airports and bestows arrest authority on airport personnel.

(Continued, P. 7)

HB 336: grants county-wide arrest authority to city police in cities of the second and third class.

SB 177: permits the Attorney General to designate certain of his investigators as peace officers allowing them to carry firearms.

HB 281: authorizes a judge to require a complaining witness to post a \$25.00 appearance bond.

HB 370: postpones the 1980 bill which "decriminalized" public intoxication until July 1, 1984.

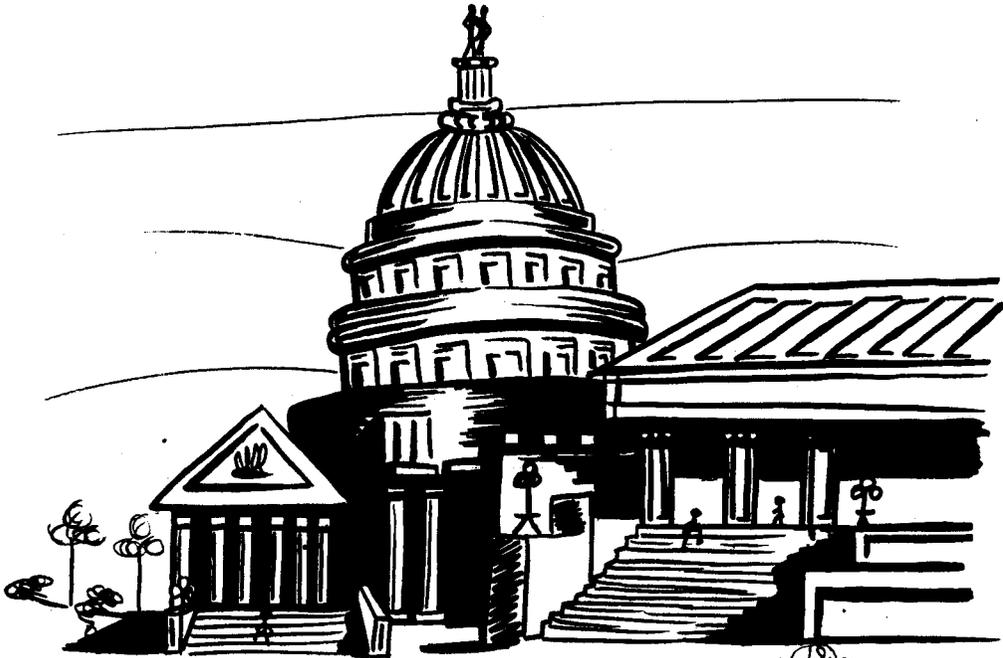
HB 282: postpones the effective date of the previously enacted "Juvenile Code" until July 15, 1984.

Based on these bills one can see that legislators during the recent session of the General Assembly demonstrated a desire to "get tough on crime" - but it is some consolation to know that it could have been worse.

Like the line from the proverbial returning fisherman -- "you should have seen the ones that got away." It points up the extremely important necessity of lawyers taking the time to find out about proposed legislation in the area of criminal law during a session, prior to their passage, and then contacting legislators to express support or opposition to such bills.

POSTSCRIPT: Joe Barrows is the State Representative from the 56th Legislative District (Woodford, Jessamine & Franklin Counties) and serves on the Judicial-Criminal Committee. He is a practicing attorney in Versailles, Kentucky, where he serves as the administrator for the Woodford County Public Advocacy Organization.

* * * * *



WEST'S REVIEW

The United States Supreme Court marked the end of its 1981 term with a flood of opinions. The conservative leaning of the Court is evident in decisions whose subject matter ranges from double jeopardy to search and seizure.

In Oregon v. Kennedy, 31 CrL 3041 (May 24, 1982), the Court held that double jeopardy does not bar retrial of a defendant whose first trial ended with a mistrial occasioned by prosecutorial misconduct so long as the misconduct was not intended to provoke a mistrial. The general rule is that double jeopardy principles are not applicable where a trial is terminated before verdict at the defendant's behest. In United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), the Court recognized an exception for those situations where "governmental actions [are] intended to provoke mistrial requests." The exception was later broadened by state and federal courts to prohibit retrial where a mistrial resulted from "prosecutorial error motivated by bad faith or undertaken to harass or prejudice." Drayton v. Hayes, 589 F.2d 117, 121 (2nd Cir. 1979); accord United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976); United States v. Martin, 561 F.2d 133 (8th Cir. 1977). The Supreme Court has now specifically rejected any

standard broader than "intent". "Prosecutorial conduct that might be viewed as harassment or overreaching ... does not bar retrial absent intent by the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." The narrow standard articulated by the court fails to address those situations where prosecutorial misconduct, while not intended to precipitate a mistrial, would amount to a calculated "wager." In such a situation if the prosecution is lucky, defense counsel will fail to seek a mistrial or other relief based on the prosecutorial misconduct and the prosecution would thus have gained an unfair advantage. Conversely, if a mistrial is sought and granted the prosecution will merely be afforded a later opportunity to obtain a conviction. Justice Stevens, in a concurring opinion joined in by Justices Brennan, Marshall, and Blackmun would have adopted "overreaching" as a standard in addition to "intent," thereby encompassing those situations in which "the prosecutor seeks to inject enough unfair prejudice into the trial to ensure a conviction but hopefully not so much prejudice as to cause a reversal of that conviction."

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The Court has overruled its previous decision in Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, L.Ed.2d (1981), and renounced language in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 58 L.Ed.2d 236 (1979), that the warrantless search of closed containers in a lawfully searched vehicle is invalid. U.S. v. Ross, 31 CrL 3051 (June 1, 1982). The Court held that the police, when lawfully conducting a warrantless vehicle search, "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'" The Court based its holding on the exigency inherent in a vehicle search. However, the Court strove to distinguish its holdings in United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 538 (1977) and Arkansas v. Sanders, supra, that probable cause to search a closed container does not justify a warrantless search of the container merely because it has been placed in a vehicle. The Court emphasized that in Sanders "the police had probable cause to search the suitcase before it was placed in the cab and did not have probable cause to search the taxi itself." Justice Marshall, in a dissenting opinion joined in by Justice Brennan, pointed out that those exigencies which permit the seizure of a vehicle and containers within it lose their force once that seizure is completed. At that point, a warrant may be obtained in the absence of the owner's consent to search. The Kentucky

Supreme Court has essentially adopted this position. Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979).

In Tibbs v. Florida, 31 CrL 3065 (June 7, 1982), the Court held that where the defendant's conviction was reversed and expressly remanded for a retrial based on the weight, rather than the insufficiency of the evidence, the double jeopardy clause does not bar retrial. The Court has previously held in Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) that a defendant may not be retried after his conviction is reversed for insufficiency of the evidence. The Florida Supreme Court had reversed Tibb's conviction, holding that although the complaining witness' testimony would be sufficient to sustain the conviction if believed by the jury, it was lacking in credibility. The Supreme Court concluded that "the Double Jeopardy Clause does not prevent an appellate court from granting a convicted defendant an opportunity to seek acquittal through a new trial." Justices White, Marshall, Brennan, and Blackmun assert in a dissenting opinion that a distinction between "weight" and "sufficiency" of the evidence is unworkable for purposes of Double Jeopardy analysis and may encourage appellate judges to base reversals on the weight rather than the insufficiency of the evidence.

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The Court has declined to extend the "presumption of vindictiveness" applied by it in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). In U.S. v. Goodwin, 31 CrL 3082 (June 18, 1982), the Court rejected the argument that a presumption of vindictiveness should apply to prohibit a prosecutor from seeking a felony indictment after the defendant requested a jury trial on a misdemeanor charge. The Court has previously held in Pearce, supra, that imposition of a harsher sentence on retrial after a defendant has obtained a reversal of his conviction gives rise to a presumption of vindictiveness which may be overcome only by evidence, in the record, which would justify an increased sentence. Similarly, in Blackledge the Court applied a presumption of vindictiveness to preclude a prosecutor from seeking a felony indictment after a defendant exercised his right to a trial de novo of a misdemeanor. In rejecting the applicability of such a presumption to the facts before it, the Court in Goodwin emphasized that, because the case had not yet been tried, the prosecutor's decision to seek an indictment was much more likely to represent a legitimate reassessment of its case than did the prosecutorial actions in Pearce and Blackledge. The Court also viewed a defendant's request for a jury trial, rather than a bench trial, as insufficiently burdensome to the prosecution to support a presumption that

the prosecutor would vindictively seek an indictment in order to deter the request. In closing, the Court left open "the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." Brennan and Marshall dissented.

In Taylor v. Alabama, 31 CrL 3118 (June 23, 1982), the Court reversed the defendant's conviction which was based on a confession obtained six hours after his illegal arrest. The confession was given after the defendant received Miranda warnings and was visited by his girlfriend. The majority found that the case was "a virtual replica" of Brown v. Illinois, 422 U.S. 590, 100 S.Ct. 1603, 63 L.Ed.2d 788 (1975) and Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). "In Brown and Dunaway, this Court firmly established that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that Miranda warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest." The Chief Justice and Justices O'Connor, Powell and Rehnquist stated in a dissenting opinion that they would find the giving of Miranda warnings and visit by the girlfriend to be a sufficient "intervening circumstance" to remove the taint of the illegal arrest.

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An unusual number of significant decisions were issued by the Kentucky Supreme Court during May and June. Foremost among the Court's decisions is its opinion reversing the murder conviction and death sentence of Brian Keith Moore.

The Court held that Moore was deprived of a fair trial by improper impeachment of a defense witness. Moore v. Commonwealth, Ky., 29 K.L.S. 7 at 10 (June 15, 1982). The witness, James Lofton, testified that Kenny Blair, a prosecution witness who had directed the police to Moore as a suspect, had revealed to Lofton in jail that Blair himself had killed the victim. On cross-examination of Lofton the Commonwealth elicited from him the fact that he had previous convictions for escape, robbery, murder, and arson, and that he was presently awaiting trial on charges of kidnapping, robbery and murder. The Commonwealth also asked Lofton whether it wasn't true that he had "axed" a woman to death in Indiana. The Supreme Court held that this evidence did not constitute proper impeachment under Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970). "The impeaching crime must be a felony conviction, and not a pending charge." "Homicide and escape are not impeaching offenses." The Court also held that the evidence was not admissible as showing bias. "Lofton's testimony for the defense, not the Commonwealth, given at a time when serious charges were pending against him, could bring him no profit." The Court concluded that admission of the evidence

was prejudicial error inasmuch as "Lofton's testimony was the chief prop upon which the appellant's defense stood."

The Court also addressed a number of other issues in Moore. The Court found that the trial court erred by refusing to conduct a hearing on appellant's motion to suppress his incriminating admissions. After an unrelated pretrial hearing appellant's trial counsel assured the court that no further requests for evidentiary hearings would be made. The later request for a suppression hearing was denied. The Supreme Court held that the trial court's refusal to conduct an evidentiary hearing violated RCr 9.78 which provides that "the trial court shall conduct an evidentiary hearing if at any time before...or during trial" a defendant moves to suppress a confession. The Court also ruled that the Commonwealth Attorney acted improperly in closing argument when he commented on an excluded tape recording by telling the jury that he wished they could have heard it. (See "The Death Penalty" for a review of death penalty related issues decided in Moore).

In Hubbard v. Commonwealth, Ky., 29 K.L.S. 6 at 14 (May 25, 1982), the Court held that the defendant was denied a fair trial when he was tried jointly for third degree burglary and possession of a handgun by a convicted felon. The Court analogized to the persistent felony offender

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statute which provides for a bifurcated proceeding in order to "obviate the prejudice that necessarily results from a jury's knowledge of previous convictions while it is weighing the guilt or innocence of the defendant on another charge." Citing RCr 9.16 the Court held that "[t]his case is a perfect example of when a severance should be granted."

The Court has held that a district court lacks jurisdiction to dispose of a misdemeanor which is a lesser included offense of a felony for which a defendant has been indicted. Jackson v. Commonwealth, Ky., 29 K.L.S. 6 at 15 (May 25, 1982). After appearing in Clark County District Court on a misdemeanor charge of possession of PCP, Jackson was indicted for trafficking in the same substance in circuit court. However, before being tried for the felony Jackson pled guilty to the possession charge. Jackson then asserted double jeopardy as a bar to this trial on the felony charge. The Kentucky Supreme Court rejected Jackson's argument. "[W]e hold that once the indictment was returned charging the offense of trafficking, the district court no longer had jurisdiction to make final disposition of the offense of possession."

In Gilbert v. Commonwealth, Ky., 29 K.L.S. 6 at 16 (May 25, 1982), the Court held that it was error for the trial court to permit the Commonwealth to introduce "substantive evidence in the guise of rebuttal." The evidence complained of was a recorded conversation between the defendant and a police

officer in which the defendant admitted having sexual intercourse with the victim. The Commonwealth ostensibly offered this evidence as a prior inconsistent statement to impeach the defendant's testimony. The testimony, however, went "to the very substance of the matter by directly showing appellant's culpability." The Court, citing Archer v. Commonwealth, Ky., 473 S.W.2d 141 (1971), found that the trial court had abused its discretion. "It is improper for a trial court to permit evidence to be introduced in rebuttal that could and should have been introduced in chief, if it appears probable that its introduction after the defense has rested will have a prejudicial effect on the defendant's case."

The Court has apparently signaled a retreat from the decision in Phillips v. Commonwealth, Ky.App., 600 S.W.2d 485 (1980). Smith v. Commonwealth, Ky., 29 K.L.S. 7 at 14 (June 15, 1982). The Court of Appeals held in Phillips that an out of court statement of a witness who refused to testify after asserting a claim of privilege could not be used to impeach the witness' "silence." The Court in Smith held that a prior inconsistent statement introduced under Jett v. Commonwealth, Ky., 436 S.W.2d 188 (1969) is admissible as substantive evidence so long as the witness does respond to questions, even though as a hostile witness. The Court also noted that defense

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counsel failed to attempt cross-examination based on the witness' assertion that he would not respond. "The proper course would have been for counsel to pose his questions and allow the witness to refuse to answer each of them, thereby creating an effective record for appeal." (See "The Death Penalty" for a discussion of other issues decided in Smith).

The Court upheld qualifications placed on the defendant's privilege of self-protection in Charles v. Commonwealth, Ky., 29 K.L.S. 7 at 15 (June 15, 1982). The trial court in Charles qualified the defendant's right to self-protection by instructing the jury pursuant to KRS 503.060(2), that the defendant was not entitled to use self-protection if he provoked the use of physical force by the victim with the intent of causing death or serious physical injury to the victim. The trial court also instructed the jury pursuant to KRS 503.060(3)(b) that it should not consider the defendant's privilege of self-protection to be so qualified if it believed that he withdrew from the encounter and effectively communicated his intent to withdraw to the victim. Initially, the Supreme Court held that "one who provokes a fight with the intent to kill or seriously injure may claim self-protection if the conditions in KRS 503.060(3)(b) are met by the evidence." The Court then held that the trial court properly submitted the issue as to the defendant's claimed "withdrawal" from the affray to the jury since, contrary to the defendant's

assertion, evidence of the withdrawal was not controverted.

In Carver v. Commonwealth, Ky., 29 K.L.S. 7 at 16 (June 15, 1982), the Court reversed the defendant's district court conviction under the local option law. The McLean Circuit Court had already vacated an enhanced sentence returned by the jury after the jury found that the defendant had been previously convicted of a violation of the option law. The enhanced sentence was held invalid because it was based on an unsigned judgment. The circuit court, however, did not invalidate the underlying conviction, but instead directed the district court to enter judgment sentencing the defendant to the maximum unenanced sentence. The Kentucky Supreme Court, reversing, held that "the circuit court improperly attempted to divine the intent of the district court jury," and remanded for a new trial.

The Court affirmed the murder conviction of Essie Caldwell and held that he was not entitled to instructions on second degree manslaughter and reckless homicide. Caldwell v. Commonwealth, Ky., 29 K.L.S. 7 at 17 (June 15, 1982). Caldwell's defense was one of self-protection. Caldwell argued that the jury could have found, under KRS 503.125 (1), that he believed the use of deadly force was necessary, but that he was wanton or reckless in so believing, thus justifying instructions on second degree manslaughter and

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reckless homicide. The Court, however, held that there was insufficient evidence of wantonness or recklessness to support such instructions. The evidence showed that Caldwell was clearly threatened with deadly force by the victim. The Court contrasted these facts with those in Blake v. Commonwealth, Ky., 607 S.W.2d 422 (1980), in which it was held that the defendant was entitled to instructions on second degree manslaughter and reckless homicide based on evidence that he shot the victim because he erroneously believed the victim had a gun.

Finally, in Hulan v. Commonwealth, Ky., 29 K.L.S. 7 at 18 (June 15, 1982), the Court held that a conviction of sodomy does not require proof of penetration. Deviate sexual intercourse, the act of sodomy, consists of "any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another." KRS 510.010(1). "Thus, while penetration...is a necessary element of rape (see KRS 510.040 - 510-060), it is not necessary to the crime of sodomy as defined in the Kentucky Penal Code."

The Court of Appeals has held that a defendant may be convicted of murder in the death of an unborn fetus. Commonwealth v. Hollis, Ky.App., 29 K.L.S. 6 at 7 (May 21, 1982). The defendant in Hollis told his estranged, pregnant wife that he did not want her to have the baby and then forced his hand into her vagina, resulting in the fetus' death. The fetus was 28-30

weeks old at the time of death. The trial court dismissed the murder indictment, ruling that causing the death of an unborn child did not constitute murder under KRS 507.020, in that an unborn fetus was not a "person" as contemplated by the statute. The Commonwealth appealed, contending that "the question as to whether or not the deceased was a living human being...like the cause of death itself, is a proper subject of adversary litigation." The Court of Appeals stated "[w]e agree with the Commonwealth," thus apparently approving the anomalous proposition that whether the fetus was a person was a question of fact for the jury. A petition for rehearing has been filed.

In Commonwealth v. Thompson, Ky.App., 29 K.L.S. 7 at 5 (June 4, 1982), the Court, certifying the law, held that the trial court erred by admitting evidence of prior criminal convictions of the victim. The convictions were introduced as evidence of a violent disposition and in support of a defense of self-protection. "[I]t is settled law in this jurisdiction that evidence of prior specific acts are (sic) inadmissible to show a victim's character for violence or aggression." The trial court also erred in admitting evidence of the prior criminal record of an individual present at the scene of the offense but who was not called as a witness.

LINDA WEST

* * * * *



THE COURT RULING
"FOR THE RETARDED: RIGHTS
OF ANOTHER GROUP ENUNCIATED

by George Will

In his 33 years Nicholas Romeo has not been given much. Recently, however, he, and approximately 135,000 persons similarly situated, acquired some rights.

The word "landmark" is used too casually concerning Supreme Court rulings. But in its ruling in Romeo's case, the court stepped, gingerly but unanimously, into new territory. For the first time it has affirmed substantive rights of involuntarily committed retarded persons in institutions. In this context, "involuntarily" does not mean against the individual's will, but rather that the individual's will was not engaged.

Romeo is profoundly retarded. Since the death of his father seven years ago, he has been a resident of Pennsylvania's much-criticized Pennhurst institution. He can not talk and lacks basic self-care skills.

When petitioning for his admission to Pennhurst, his mother said: "he becomes violent - kicks, punches, breaks glass. He can't speak - wants to express himself but can't."

In Pennhurst he was injured 63 times, by his own violence or that of other residents, in the two years before his mother went to court. When in Pennhurst's infirmary for treatment of a broken arm, he was physically restrained in bed during parts of the day, with "soft" restraints on his arms. The staff said this was not for punishment but for his protection, and that of other patients.

Now the court has held that there are constitutionally required conditions of confinement, derived from the 14th Amendment. The ruling is a delicate assertion of judicial oversight, tempered by assertions of deference to professionals in the field of institutional care.

The opinion, written by Justice Powell, affirms three rights: to safety, freedom of movement, and training. The first two "needs" are rights conditioned by institutional necessities, and the right to training is defined, minimally, as training necessary for enjoyment of the first two rights. But Romeo claimed only a right to "minimally adequate habilitation."

The court calls even this claim "troubling" for several reasons. One is that "as a

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general matter, no state has a constitutional duty to provide substantive services for those within its border." The court says the term "habilitation" is defined neither precisely nor consistently in psychiatry. (Actually, it is unclear how such habilitation is a psychiatric matter.) The court also says that professionals differ "strongly" as to whether effective training of all severely or profoundly retarded persons is possible.

The court does not know what the experience of recent years proves, that pessimistic prognoses, even by professionals, concerning all kinds of retardation, are apt to be wrong (although, alas, somewhat self-fulfilling). But the court knows that an institutionalized person requires rights - enforceable claims - because he or she is wholly dependent on the state.

All Romeo sought, and all the court affirmed, is a right to "training suited to" the two "needs" of bodily safety and minimum physical restraint. The court stressed that, "This case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se." The court actually pruned a lower court ruling, which it considered so broad as to permit excessive judicial intrusiveness. The court said there is a "presumption of correctness" regarding the decisions of professionals, who "shall not be required to make each decision in the shadow of an action for damages."

Nevertheless, this ruling will, like a hovering angel, cast a comforting shadow on the approximately 135,000 retarded persons in institutions, many of whom are living in stomach-turning conditions. Furthermore, it expresses, and thereby nourishes, a social sensibility important to 6 million other retarded citizens.

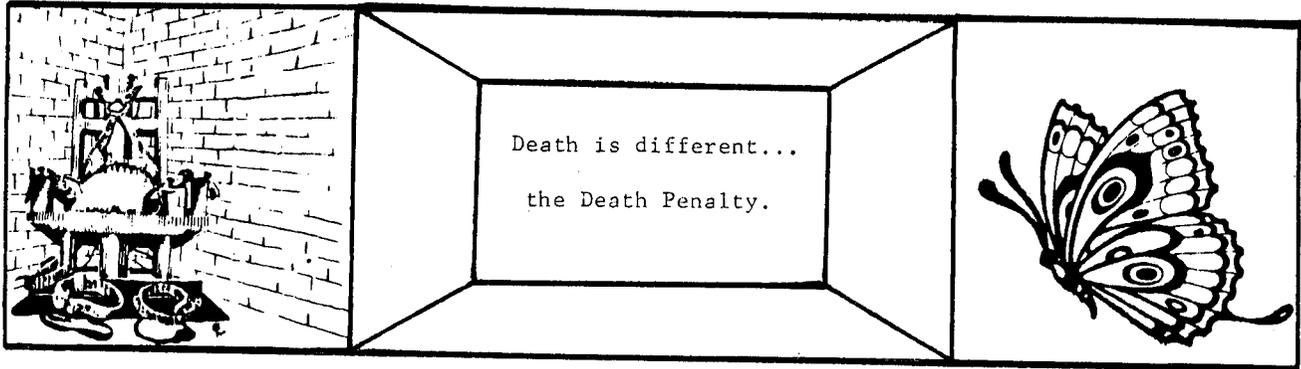
The affecting surge of gratitude among friends of retarded citizens, including friends whose retarded friends are not institutionalized, is perhaps disproportionate to the rights affirmed by the ruling. But the satisfaction is commensurate with the expressive, as distinct from the technical, power of the ruling.

Americans are litigious, but not lawyer-like. American society is not animated by the dry distinctions that characterize judicial craftsmanship. Rulings like this one, and *Brown v. Board of Education*, the 1954 school desegregation decision, are examples of the law's tutelary functions.

In 1954, the elemental message was: Blacks are full citizens. In 1982, the message is: Retarded people, too, are members of the community that the Constitution constitutes. The fact that these messages have had to be sent down from the Supreme Court - the Mount Sinai of American government - is a measure of how bad things were then, and are in some places today.

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CAPITAL COMMENTS

Reader Response

We have had some interesting feedback on the death penalty section as a result of the survey contained in the last Advocate. Some want more information about the death penalty, other want less--depending, quite naturally, on whether those responding have been or are involved in capital litigation. It was pointed out by some readers that the death penalty was overemphasized in The Advocate since only a minority of the readership is involved in death penalty cases. While this is no doubt true, the number of attorneys involved in capital litigation in Kentucky is increasing. The Advocate is presently our only vehicle for communication of important information-- specifically recent decisions --regarding the death penalty. As the number of capital indictments and residents of death row increases, capital litigation is becoming a burdensome drain on the resources of the DPA, local counsel and, no doubt, the judiciary. Although this section is not of interest to all readers, we will continue to include it in The Advocate because we feel it serves an essential function.

Some of our readers, particularly judges from around the state, complained about editorializing regarding the death penalty. We feel this constructive criticism is well taken and an effort will be made to deemphasize the staff's personal opinions in future issues. However, by no means do we wish to (or will we) obscure our statutory, indeed ethical, obligation to resist the use of execution as a punishment for crimes allegedly committed by our clients. Instead, following the suggestions of many of you, emphasis will primarily be placed in two areas: (1) recent decisions or new information from this and other jurisdictions which may be of use to the trial practitioner and (2) informational items regarding the progress of capital litigation in Kentucky. Those of you who haven't made your views known on The Advocate in general, and the death penalty section in particular, please drop us a line.

(Continued, P. 18)

Action Under The Big
Tent

Enmund v. Florida:
Death Penalty
Unconstitutional
For NonTriggerman

On July 2, the U.S. Supreme Court decided Enmund v. Florida, 31 Cr.L. 3149. The Court (5-4) held that it violates the 8th and 14th Amendments "for one who neither took life, attempted to take life, nor intended to take life" to be sentenced to death. Enmund planned the robbery which resulted in the murder of two elderly people. However, he apparently acted only as the wheelman waiting in the getaway car.

Enmund calls into question the constitutionality of at least parts of Kentucky's death penalty scheme. The four dissenting justices note that Kentucky authorizes the death penalty for wanton conduct. 31 Cr.L. at 3159 n.37. Kentucky, the Court noted, does "not require the intent to kill that the petitioner believes is constitutionally mandated before the death sentence may be imposed." 31 Cr.L. at 3159.

Justice White, for the majority, did not reach the second question presented in the petition: Whether the degree of Enmund's participation in the killings was given the consideration required by the 8th and 14th Amendments. 31 Cr.L. at 3150 n.4. Nevertheless, the Court makes it clear that such must be considered in imposing the death sentence. "The focus must be on his culpability,

not on that of those who committed the robbery and shot the victims..." citing Lockett v. Ohio, 438 U.S. 586, 605 (1978). 31 Cr.L. at 3153. Even the dissenters noted Justice Blackmun's opinion in Lockett, 438 U.S. at 613, requiring "consideration by the sentencing authority of the extent of [the defendant's] involvement, or the degree of her mens rea, in the commission of the homicide." 31 Cr.L. at 3158. "[T]he type of mens rea of the defendant must be considered carefully in assessing the proper penalty." 31 Cr.L. at 3161. The failure of the trial court to give "sufficient consideration to the petitioner's role in the crimes" and failure to consider this as a "mitigating circumstance" because of Enmund's "relative lack of mens rea and his peripheral participation in the murder" required, say the dissenters, a new sentencing hearing. Also implicit in Justice O'Connor's dissent is the obvious principle that a trial judge is bound by the evidence adduced at trial in determining the extent of the defendant's involvement in the murder.

Hopper v. Evans:
A Unique Harmless
Error Death Case

On May 26, the Supreme Court decided Hopper v. Evans, 31 Cr.L. 3041 which presented the question of whether the Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), was a per se rule. Beck

(Continued, P. 19)

overturned an Alabama case where the death penalty statute precluded the jury from considering lesser included offenses. Evans asked whether "a new trial is required in a capital case in which the defendant's own evidence negates the possibility that such an instruction might have been warranted." 31 Cr.L. at 3041. A unanimous court found harmless error under Chapman v. California, 386 U.S. 18, 24 (1967). John Evans "had confessed at least four times..." to deliberately shooting the victim. 31 Cr.L. at 3042. He even took the witness stand at his trial and threatened the jury if they did not give him a death sentence. Chief Justice Burger took pains to note the "uniqueness" of Evans' situation. In a footnote, the Court noted that in another case "a defendant might make a plausible claim that he would have employed different trial tactics." 31 Cr.L. at 3043. Evans teaches us that counsel must avoid this "Gilmore" type situation from arising in the trial court if at all possible. The client may not be able to change his mind later.

Importantly, the Court held that Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion), stands for the proposition that a pattern of submitting lesser included offenses unsupported by the evidence in capital cases "inevitably lead[s] to arbitrary results." Id. Thus, the Court has created a tension between Beck on one hand, and Roberts, on the other. Constitutional error occurs both when lesser included instructions are submitted

without an evidentiary basis and when they are denied in the presence of an evidentiary basis. Counsel should be aware of this tension both in capital and noncapital cases.

Brian Moore's
Conviction And Death
Sentence Reversed

June 15 brought two significant death penalty decisions from the Supreme Court of Kentucky. Brian Moore's Jefferson County conviction of murder, kidnapping and robbery and his resulting death sentence was overturned. The Court reversed due to the prosecutor's improper cross examination of a key defense witness. The Court also relied upon an improper prosecution closing argument. [See West's Review.] Our Court specifically reaffirmed its long standing rule that technical procedural defaults will not bar review in capital cases. Moore, slip opinion at 19. Even the lone dissenting opinion of Justice Stephenson conceded that "we consider errors not objected to in a capital cases..." Moore, dissenting opinion at 3.

Also worthy of note is the holding that error occurred during the penalty phase when Rev. George Wilson's testimony was excluded. By avowal, Rev. Wilson had testified regarding various factors relevant to the imposition of capital punishment; i.e., Brian's poor economic background, abandonment by his mother and placement in foster homes,

(Continued, P. 20)

youth, etc. "Even though the testimony may have been cumulative, and even though he had only a brief acquaintance with appellant [having met twice], the exclusion of this testimony specifically ruled out what the statute specifically allowed." Moore at 16. The dissent complained that "Wilson's concern was to instruct the jury how they should consider the death penalty." Moore, dissenting opinion at 4. This reversal is the fourth in the first five capital appeals, as our Court bears witness to the fact that wholly different considerations surround the weighing of legal issues in death penalty appeals. Three of the four reversals have been on trial error unrelated to death penalty issues. The other case, Hudson, dealt with the ex post facto clause.

Trial Judges Have Discretion To Throw Out Death Penalty Before Trial

A second significant decision on June 15, was in Smith v. Commonwealth and the related cross appeal. The Court affirmed a murder conviction where the defendant did not receive the death penalty [See West's Review]. On cross appeal, however, the Court held that "the trial judge has the power to relieve the jury of any consideration of the death penalty" prior to trial rather than waste time with a death penalty hearing if he will ultimately decide on a sentence less than death anyway (slip opinion at 5). Judge Liebson of Louisville had excluded death as "unconstitutional" since the triggerman had received only 20 years. Judge

Liebson held that the death penalty would be "disproportionate" in light of the sentence in the codefendant's case. The Court described the dispro-portionality argument as a "significant reason" for excluding death. Id.

The Hung Jury

One important constitutional issue yet to be decided by our Supreme Court is what to do if the jury hangs on penalty in a death penalty case. Recently, two juries have deadlocked in capital trials. On July 13, David Skaggs was sentenced to death by Judge Walden in Barren County. The penalty phase was retried after the original jury deadlocked on the question of punishment. As pointed out in a Louisville Courier Journal editorial on June 18, this procedure raises a host of constitutional questions. A second jury deadlocked in Harry Shelor's case in Butler County. The procedure to be used in that case is currently being determined.

Abused Or Neglected Children

What do our clients accused of violent crime have in common? Do condemned inmates enter the world destined for death row? Or do we teach our children to kill? In a series of articles that appeared in the Los Angeles Times on April 7, a study is described which should be of interest to those involved with the death penalty. "When asked recently by University of California... investigators to rate the

(Continued, P. 21)

amount of physical punishment they got before the age of 10 on a scale of 1 to 5--with 5 spelled out as 'needing medical attention or hospitalization'--100% of the violent inmates at San Quentin circled '5.' Given the same survey, 64% of a juvenile delinquent population marked '5,' compared to 0% in a sampling of college freshmen and professional people."

Child neglect or abuse is an aspect of a client's background which every attorney facing a penalty phase trial should explore fully. It is important not only to document the neglect or abuse but to offer expert testimony about the implications of such treatment for the child's development. The DPA is currently collecting information on child abuse and how it relates to criminal defense. Anyone with any ideas or information, please contact us. (Thanks to Michael Millman and California's Death Penalty Update.)

KEVIN McNALLY

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W A N T E D

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* * * * *

DEATH ROW U.S.A.

June 20, 1982

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE LEGAL DEFENSE FUND: 1038

Race:

Black	437	(42.10%)
White	543	(52.31%)
Hispanic	47	(4.52%)
Native American	7	(.67%)
Asian	3	(.29%)
Unknown	1	(.01%)

Crime: Homicide

Sex: Male	1025	(98.75%)
Female	13	(1.25%)

DISPOSITIONS SINCE JANUARY 1, 1973

Executions:	4
Suicides:	8
Commutations:	20

Died of natural causes, or killed while under death sentence: 5

* * * * *

TRIAL TIPS

GUILTY BUT MENTALLY ILL:

GBMI \neq NGRI
GBMI $<$ NGRI
GBMI = G

A NEW EQUATION FOR THE INSANITY DEFENSE

On July 15, 1982, as a result of various legislative revisions to KRS Chapter 504, a new criminal verdict of guilty but mentally ill (GBMI) became a part of the lexicon of the criminal justice system of Kentucky. Due to these revisions, the defense of "lack of criminal responsibility by reason of mental disease or defect" was replaced by a verdict of not guilty by reason of insanity (NGRI).

PRIOR LAW OF INSANITY

Under prior law, a person was "not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lack[ed] substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." KRS 504.020(1). A defendant was permitted to "prove mental disease or defect," as used in KRS 504.020, "in exculpation of criminal conduct." KRS 504.020(3). "[T]he term 'mental disease or defect'" did "not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior." KRS 504.020(3).

[KRS 504.020 is specifically repealed by the GBMI bill.]

Under RCr 8.08, "[a] defendant may plead not guilty or guilty." "If the defense of insanity is made by the defendant," RCr 9.90(1) requires that "the jury must be instructed to state the finding of insanity in their verdict if they acquit him on that ground." RCr 9.90(1).

NEW LAW

Under the new law, "[i]n cases in which the defendant provides evidence at trial of his mental illness or insanity at the time of the offense," the jury or court [in a bench trial] may find the defendant:

- (1) guilty;
- (2) not guilty;
- (3) not guilty by reason of insanity at the time of the offense; or
- (4) guilty but mentally ill at the time of the offense.

KRS 504.120.

According to the new law, "[t]he defendant may be found guilty but mentally ill if:

(a) [t]he prosecution proves beyond a reasonable doubt that the defendant is guilty of an offense; and

(b) [t]he defendant proves by a preponderance of the evidence that he was mentally ill at the time of the offense." KRS 504.130.

(Continued, P. 23)

The new definition of "insanity" is "that, as a result of mental condition, lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." KRS 504.060(4).

In contrast, "mental illness" means "substantially impaired capacity to use self-control, judgment or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior or emotional symptoms can be related to physiological, psychological or social factors." KRS 504.060 (5). [This definition of "mental illness" is substantially the same as that used in KRS 202A.010(7), the "involuntary commitment" chapter.]

GUILTY PLEA OF GBMI

"If the defendant waives his right to trial, the court may accept a plea of guilty but mentally ill if it finds that the defendant was mentally ill at the time of the offense." KRS 504.130(2).

GBMI PRE-SENTENCING PSYCHOLOGICAL/PSYCHIATRIC EXAM

"If a defendant is found guilty but mentally ill, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition at time of sentencing." KRS 504.140 (emphasis added), compare KRS 532.050(3).

SENTENCING THE GBMI DEFENDANT

"The court shall sentence a defendant found guilty but mentally ill at the time of the offense in the same manner as a defendant found guilty." KRS 504.150.

However, "[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, whichever occurs first." KRS 504.150.

"Treatment shall be a condition of probation, shock probation, conditional discharge, parole or conditional release so long as the defendant is mentally ill." KRS 504.150(2).

"Treatment" means "medication or counseling, therapy, psychotherapy and other professional services provided by or at the direction of psychologists or psychiatrists." KRS 504.060(9). Treatment "does not include electroshock therapy or psychosurgery." Id.

The bureau of corrections "shall initiate or be responsible for initiation of hospitalization proceedings under KRS Chapter 202A or 202B for any inmate who needs mental health care at the expiration of his sentence." KRS 196.065(2) (amendment).

RETROACTIVE APPLICATION OF GBMI

Although the GBMI legislation became effective on July 15,

(Continued, P. 24)

1982, any defendant tried or retried after that date should nevertheless be entitled to the protection of the prior law of acquittal for lack of criminal responsibility by reason of mental disease or defect as long as the charged offense allegedly occurred before July 15, 1982. To hold otherwise would violate the federal and state constitutional prohibitions against a legislature's ex post facto action as well as state statutory prohibitions against retroactive application of legislation.

To allow the Commonwealth to utilize the GBMI verdict in cases where the alleged offense occurred before July 15, 1982 would violate Art. I, Sec. 10 of the United States Constitution and Sec. 19 of the Kentucky Constitution, both of which forbid ex post facto laws. See Commonwealth v. Brown, Ky., 619 S.W.2d 699, 703 (1981).

Article I, Sec. 10, of the United States Constitution prohibits a state from passing any "ex post facto law." It is settled law that "any statute which...deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." Bezell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

But even if the ex post facto constitutional arguments were decided against a defendant, Kentucky statutory law would prohibit the retroactive application of the GBMI legislation.

In Kentucky, "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). "The legislature has proclaimed that it will expressly indicate those instances in which an act is retrospective in nature." Hudson v. Commonwealth, Ky., 597 S.W.2d 610, 611, (1980). Nothing in the GBMI legislation "even hints at retroactive application, much less expressly declares other than prospective application." See Hudson v. Commonwealth, supra at 611; emphasis in original.

Consequently, "statutorily", the GBMI verdict "may only be imposed in those cases in which the crime was committed after the effective date" of the GBMI legislation. See Hudson v. Commonwealth, supra at 611.

However, should a defendant desire to use the GBMI verdict or plea on or after July 15, 1982 for an offense which allegedly occurred prior to that date, he has a statutory right to make that election. Under KRS 446.110, "[i]f any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

(Next issue: Disadvantages and deficiencies of the GBMI verdict.)

VINCE APRILE

* * * * *

APPELLATE PROCEDURE

In order to enable the Department of Public Advocacy to properly process appeals for indigent defendants from the circuit courts to the appropriate appellate courts, local counsel must comply promptly with the rules of procedure governing how and when an appeal is to be taken and with the regulation and statute for processing appeals to the Department of Public Advocacy (See 504 KAR 1:010 and KRS 31.115). The following is a bare-bones outline of the procedures which local counsel must follow to insure that indigent defendants will be afforded their constitutional right to appeal.

1. Procedures at Sentencing

An order allowing the defendant to proceed on appeal in forma pauperis should be obtained immediately after the defendant has been sentenced. Without such an order the circuit clerk's office may be reluctant to file the Notice of Appeal in the absence of a filing fee. (But see CR 76.42(2)(b)). Furthermore, the Department of Public Advocacy may not technically have jurisdiction to handle the defendant's appeal. Also it is needed in order to file a timely Certificate as to Transcript (see below).

Since it is local counsel's responsibility for applying to the trial court for bail on appeal for the defendant, trial counsel should make a formal request for bail pending appeal at sentencing.

2. Notice of Appeal

The Notice of Appeal must be filed within ten days after the date of entry of the judgment or the order from which the appeal is being taken (RCr 12.04(3)). This usually means that the Notice of Appeal must be filed within ten days of the entry of the final judgment. However, when defense counsel has filed a timely motion for a new trial under RCr 10.06 or pursuant to RCr 10.24 (motion for judgment notwithstanding verdict), then the Notice of Appeal must be filed within ten days after the date of the entry of the order overruling the motion unless the final judgment is entered after that.

All that the Notice of Appeal need include is the names of all the appellants and appellees and a statement that the appellant is appealing from the final judgment (this is true even if the time for filing the Notice of Appeal from the final judgment is triggered by an order overruling a motion for a new trial). It is not necessary to state the date the final judgment was entered or to specify the Court to which the appeal is being taken. The following is an acceptable format for the body of a Notice of Appeal:

Notice is hereby given that the above-named defendant appeals from the final judgment entered herein. On appeal the Appellant will be John Defendant

(Continued, P. 26)

and the Appellee will be the Commonwealth of Kentucky.

3. Designation of Record and Certificate as to Transcript

Within ten days after the Notice of Appeal is filed, the trial attorney must file a Designation of Record and a Certificate as to Transcript. (CR 75.01(1)(2)).

The Designation of Record must state what portion of the proceedings stenographically or otherwise reported the Appellant wishes to have included in the Transcript of Evidence (CR 75.01(1)). Counsel must specifically request that the transcript include voir dire, opening statements and closing arguments or they will not be included. (See CR 75.02(2)). The Designation of Record must be served on the Commonwealth Attorney.

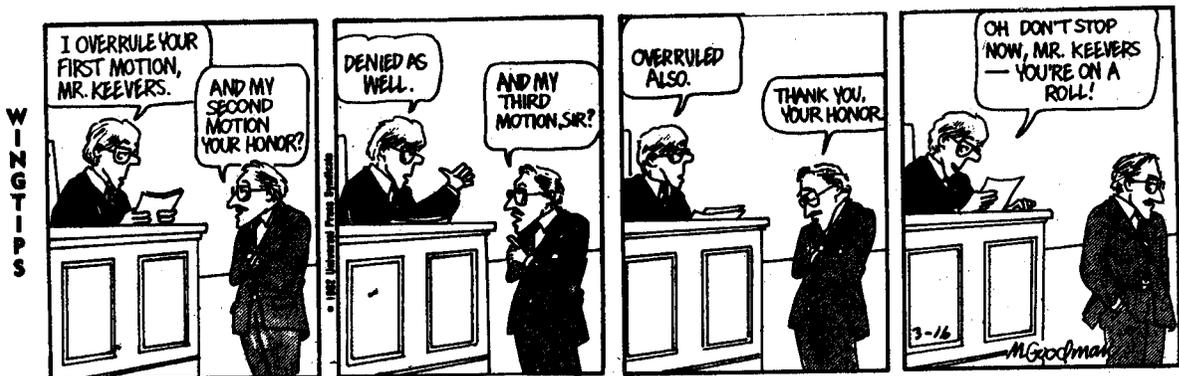
A Certificate as to Transcript is a newly required document which must be filed with the Designation of Record within ten days after the Notice of Appeal is filed. The Certificate as to Transcript must be signed by the designating counsel and the

court reporter and it must state the date on which the Transcript of Evidence was requested, the estimated completion date of the transcript, and that satisfactory financial arrangements have been made for transcribing and preparing the requested proceedings (CR 75.01(2)). See also Form 23 in the appendix of Official Forms to the rules of Civil Procedure). In a public defender case, satisfactory financial arrangements will simply mean that counsel has obtained an order permitting the defendant to proceed on appeal in forma pauperis.

4. Notification to the Department of Public Advocacy

Once a Notice of Appeal and Designation of Record with attached Certificate as to Transcript have been filed, and once an Order permitting the defendant to proceed on appeal in forma pauperis has been entered, trial counsel must notify the Chief of the Appellate Branch in the Frankfort Office that the Central Office will be responsible for handling the defendant's appeal. The

(Continued, P. 27)



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following are to be included in that notification:

- a. The defendant's name, address, and, if he is out on bond, his telephone number, if known;
- b. The name, address and telephone number of the court reporter;
- c. Statement indicating the amount of bail and whether or not the defendant has been released on bail pending appeal; and
- d. A brief statement of any suspected errors which occurred during the trial.

Copies of the Final Judgment, Notice of Appeal, and Designation of Record with Certificate as to Transcript attached should be sent with the notification (KRS 31.115(2)).

Once the notification is received by the Frankfort Office, the primary responsibility for processing the appeal to the appropriate appellate court is that Office's. The local defender, however, still has responsibility for the case until the record on appeal is certified by the circuit clerk. In that light the Central Office may request the local defender to procure an extension of time in the circuit court to have the record certified. (The record on appeal must be certified within sixty days after the date the notice of appeal was filed (CR 73.08)). If the

record cannot be completed within the first sixty days, an order must be entered extending the time for certifying the record by the trial court in the circuit clerk's office either on or before the 60th day (CR 73.08). The trial court can enter an order extending the time up to and including 120 days from the date of the filing of the Notice of Appeal in which to have the record on appeal certified as being complete. Any additional extension of time must be obtained from the appropriate appellate court. Seeking such extensions would be the responsibility of the Central Office.

In sum, at sentencing an order allowing defendant to proceed in forma pauperis on appeal should be entered and a formal application for bail pending appeal should be made. Notice of Appeal must be filed within ten days of entry of Final Judgment (or order overruling motion for new trial whichever is entered later). It should simply state that the defendant is appealing from the Final Judgment. Designation of Record and Certificate as to Transcript must be filed within ten days of Notice of Appeal. Notification must then immediately be sent to Central Office in Frankfort in care of the Appellate Branch.

If any questions arise about any aspect of appellate procedure, please do not hesitate to contact Tim Riddell at (502) 564-5212.

* * * * *

(Melcher, Continued from P. 1)

administrator for the public defender system in the 18th judicial district which includes Harrison, Nicholas, Robertson and Pendleton counties. He organizes and obtains counsel for indigent persons who need public defenders. David not only does public defender work in state court, but often in the federal courts. On an appointed basis, David has done numerous habeas proceedings and probation and parole revocation hearings in Federal Court.

David is a very conscientious attorney who obviously cares a great deal for his clients. He enjoys public defender work and finds it very rewarding even though he "may not always be appreciated or understood." He believes it is very important to give indigent persons the same opportunities that persons with unlimited funds have.

David graduated from the University of Dayton in 1968 with a degree in Political Science and History. He then obtained his law degree from the University of Cincinnati in 1971.

He began his impressive legal career by working as a clerk in the U.S. Attorney's office in Cincinnati. About a year later, he became the Chief Staff Attorney for the U.S. Court of Appeals for the 6th Circuit. Then 3-1/2 years later in 1976, he became the Assistant U.S. Attorney in Cincinnati.

A 140 acre farm was what brought David to the northern part of Harrison County. He lives on that farm with his wife, Anne, a medical technician, and their two children, Erin who is 11 years old, and Jesse who is 7.

In his little free time, David coaches his son's T-ball team and his daughter's softball team. He also enjoys viewing the beautiful scenery in Kentucky, water skiing, jogging and swimming in their new wood-heated pool.

Thanks for the interview David and especially for the outstanding job you're doing!

KAREN CARNEY

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