RENDERED: June 6, 1997; 10:00 a.m.
TO BE PUBLISHED

NO. 97-CA-0970-OA

VINCENT STOPHER — PETITIONER

v. — AN ORIGINAL ACTION ARISING FROM JEFFERSON CIRCUIT COURT CASE NO. 97-CR-0615

HON F. KENNETH CONLIFFE, JUDGE
JEFFERSON CIRCUIT COURT, DIVISION 15 — RESPONDENT

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTEREST

OPINION AND ORDER
GRANTING WRIT

* * * * * * *

BEFORE: HUDDLESTON, JOHNSON and KNOPF, Judges.

KNOPF, Judge: Petitioner Vincent Stopher seeks a writ prohibiting Judge F. Kenneth Conliffe of the Jefferson Circuit Court from taking further action in Commonwealth of Kentucky v. Vincent Stopher, case no. 97-CR-0615, unless a record is made of all proceedings by the court's videotape equipment. Although the trial judge routinely videotapes hearings, some substantive matters concerning this Petitioner have allegedly occurred during the motion hour dockets which are not routinely recorded. Having reviewed the record and pleadings of counsel, we conclude that a writ should issue. Because we believe the principal issues relevant to the issuance of a writ were previously addressed

thoroughly in Judge Abramson's well-reasoned order rendered on Petitioner's motion for intermediate relief pursuant to CR 76.36 (4), we adopt the following portions of her order before entering our own separate finding on this CR 76.36 petition:

"Petitioner seeks an order prohibiting the Respondent Judge of the Jefferson Circuit Court from conducting any proceeding whatsoever in Indictment No. 97-CR-615 without utilizing the JAVS videotape recording system with which Division 15 is equipped. Petitioner alleges that the requested relief is required to create a verbatim record of all proceedings in the courtroom.

"It is undisputed that the offense with which Petitioner is charged stems from circumstances constituting an aggravating factor under KRS 532.025(2) for which the death penalty may be sought. Although the aggravating factor, killing of a deputy sheriff engaged at the time of the act in the lawful performance of his duties, has not as yet been noticed against Petitioner, it is not unreasonable to assume that the Commonwealth will at some point seek the death penalty. This likely eventuality was acknowledged by counsel for the Commonwealth in a hearing on this motion held by [Judge Abramson] on Wednesday, April 23, 1997.

"Soon after the indictment issued in this case, Petitioner sought to disqualify all present and former judges of the Jefferson Circuit and District Courts on the basis of their acquaintance with the victim [Jefferson County Deputy Sheriff Gregory Hans]. The Chief Judge of the Jefferson Circuit Court passed this motion to the Respondent Judge to whom the case was

randomly assigned. The motion was denied. A renewed motion to disqualify was also denied by the Respondent Judge. The rulings which precipitated the proceedings in this forum stem from two written defense motions to put all proceedings in the case, including motion hour, on the record via the videotape recording system installed in the courtroom. By order entered March 31, 1997, the Respondent Judge denied the first motion on the basis that '[a]ll proceedings are on the record, either by written order or recorded oral proceeding.' Petitioner maintains that he has not yet received a written ruling on the second motion, although a copy of an order appended to his CR 76.36 petition indicates that it was denied on April 14, 1997, [by the Judge's notation] '[see] order entered 3/31/97.'

"Petitioner argues that the Respondent Judge's refusal to activate the videotape recording system constitutes an abuse of discretion because without the verbatim record [the] equipment would provide, a complete record of proceedings essential to review in death penalty cases cannot be produced. Failure to record, Petitioner argues, denies a capital defendant a meaningful right of appeal as guaranteed by Section 115 of the Kentucky Constitution. He asserts that 'death is different' and that every motion, argument or proceeding in a death-eligible case should be available to a reviewing court for assessment of whether the defendant received a fair and impartial trial. Petitioner maintains that a verbatim record is the best method of providing the reviewing court a complete record 'without substantial inconvenience to respondent

and with minimal cost to the Court of Justice.'

"In response, the Commonwealth insists that there can be no abuse of discretion in the Respondent's denial of the motion to videotape all proceedings because 1) there is no legal requirement that he do so; 2) he has already and continues to agree to videotape all 'hearings' or substantive arguments; 3) the failure to videotape routine matters such as the setting of hearing dates on motion hour does not differ from the practice in some other divisions of Jefferson Circuit Court; and 4) a complete record is in fact being created by the motions and rulings in the written record and the video recordings of all hearings. Counsel posits that although it is conceivable that videotaping all proceedings could be considered a 'better idea' in death penalty cases, the refusal to tape so-called inconsequential matters cannot form the basis for a charge of abuse of discretion absent a legal duty compelling the Respondent Judge to do so.

* * * *

"Although not directly argued in his submitted pleadings or through argument of counsel, the affidavits appended to the CR 76.36 motion suggest that Petitioner perceives certain comments of the Respondent Judge to be indicative of a hostile or biased atmosphere, specifically citing the denial of a motion to recuse only moments after it was filed at arraignment. In contrast, the Commonwealth labels 'trial tactics' Petitioner's insistence upon rearguing every motion after a ruling has been given or purposely 'goading' the Respondent Judge into remarks which, when taken out

of context suggest bias, in an effort to manufacture an atmosphere of hostility toward the defense setting the stage for a renewed motion to recuse or error in the refusal to recuse on the previous motion." [We note that on May 6, 1997, Kentucky Supreme Court Chief Justice Robert F. Stephens, adjudged by order that an insufficient showing had been made to indicate that a special judge should be appointed.]

* * * *

"Turning to the merits of the pending request, the Supreme Court has clearly delineated the necessary prerequisites to relief pursuant to CR 76.36 generally. In Potter v. Eli Lilly and Co., Ky., 926 S.W.2d 449, 452 (1996), the Court noted that a writ of prohibition is an 'extraordinary remedy' issued:

> . . . only when the court in question is proceeding or is about to proceed outside its jurisdiction and there is no adequate remedy by appeal, or where it is about to act incorrectly, although it is within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and great injustice and irreparable injury would result to the petitioner if the court in question should so act.

[See also Jones v. Hogg, Ky., 639 S.W.2d 543 (1982) and Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981).]"

Applying the Potter criteria to the instant case, Judge Abramson concluded that they had been satisfied through the following analysis:

"Counsel for the Petitioner and the Commonwealth note that determination of when to 'go on the record' and videotape or otherwise record proceedings is a matter generally committed

to the sound discretion of the trial court. Consequently, the trial court's decision must be sustained unless there is an abuse of that discretion. The Commonwealth argues that it is not an abuse of discretion to decline to record routine proceedings at motion hour or at other times where action is being taken but the defendant is not present. Petitioner counters that in any case where the death penalty is an option no interaction between counsel and the court with respect to the case is so trivial as to justify refusing to activate the readily available video equipment. If the circuit court is not abusing its discretion, quite clearly there would be no basis for a writ. If an abuse of discretion is present, the first factor considered in issuing a writ, i.e., the court is acting incorrectly, is satisfied. Our first inquiry is thus whether the court's decision not to record all proceedings in the case is an abuse of discretion.

"Generally an abuse of discretion in the context of the exercise of judicial power 'implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.' Kentucky Nat. Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214, 217 (1945). In considering the exercise of discretion in this case, the Petitioner argues that 'death is different' and the trial court's otherwise broad discretion must be exercised with that eventual potential penalty foremost in mind. Counsel for the Commonwealth argues that 'due process is due process' and the presence of an aggravating circumstance which could result in notice of the prosecution's

intent to seek the death penalty is irrelevant. In fact, due process is a flexible concept:

> Once it is determined that due process applies, the question remains, what process is due.... [D]ue process is flexible and calls for such procedural protections as the particular situation demands.... [N]ot all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494 92 S. Ct. 2593 (1972) (remanding 'given the absence of an adequate record' to determine whether parole revocation hearing violated due process). The necessity for such a principle is perhaps best illustrated by the rationale of the Court in Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977):

> . . . death is a different kind of punishment from any other which may be imposed in this country. [citations omitted.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

403 U.S. at 357-58, (emphasis added).

"Moreover, Kentucky Rules of Court and case law expressly recognize that cases involving the death penalty are different. For example, in CR 75.02(2) only in those cases where the death penalty is sought must the appellate court be supplied with a transcript of the proceedings which includes all of the voir dire, all of the opening and all of the closing arguments, regardless of

objections. Only in cases where the death penalty is sought are the time frames for preparation of the transcript automatically extended by rule. CR 75.01(4). Only in death penalty cases must individual voir dire be conducted on certain issues as provided in RCr 9.38. Only in cases where the death penalty has been imposed are appeals to this court automatically transferred to the Supreme Court pursuant to CR 74.02(2). Only in those cases where the death penalty has been imposed is this court denied authority to review RCr 11.42 petitions. Skaggs v. Commonwealth, [Ky., 803 S.W.2d 573 (1990).] By rule and case law, the courts of this Commonwealth have repeatedly recognized that death penalty cases are different. The same obvious concerns that underlie the aforementioned distinctions cause [us] to conclude that the presence of the potential for the death penalty is a paramount consideration in determining whether a court has abused its discretion in the conduct of a given case.

"With that premise in mind, the constitutional right to appeal is compromised where the defendant faces a potential death penalty without a true and accurate record of all proceedings involving interaction of the court and counsel. This is particularly true where, as here, the trial judge has been asked to recuse himself and declined but the potential for a renewed motion is exceedingly high. Section 115 of the Kentucky Constitution guarantees a defendant the right of appeal 'upon the record' established in the lower court. A full and complete record is necessary to preserve and give meaning to the appeal right accorded

in that section as is evident by reference to the requirements imposed on an appellant seeking review. The appellant's obligation includes satisfying the appellate court that the issue has been preserved, establishing the error committed by the judge with respect to any action or inaction and showing that the error was so serious that substantial justice requires intervention by the appellate courts. See CR 76.12(4)(c)(iv); RCr 9.24 and Commonwealth v. Messex, Ky., 736 S.W.2d 341,342 (1987). Clearly these tasks are made easier by a record that includes videotapes of all matters brought before the court regardless of their seeming triviality.

"The Commonwealth urges that while recording every single encounter might be the better practice it is not required and the record currently being 'created' by written order of the court is adequate or 'good enough.' Again this argument misses the mark. Because the constitutional right to appeal is inevitably dependent on a full and accurate record and the underlying case is a potential capital murder case, there is a substantial likelihood that the court is abusing its discretion when it declines to create the most complete record. This conclusion is supported by reference to the aforementioned rules, cases and constitutional sections and a realistic view of the consequences of allowing the trial judge to exercise his discretion to create a seemingly 'good enough' record.

"The record before this court currently includes two affidavits from the Petitioner's counsel attributing direct quotes

to the trial judge which could have potential bearing in the event of an appeal. In the hearing before [Judge Abramson], the Commonwealth's counsel took exception to the precise language of the quotes and offered the observation that any reference to defense counsel ['just wasting trees by the filing of all these motions'] was made by the trial judge in exasperation after being 'goaded' by defense counsel. A videotape of the exchange would allow an appellate court to view and assess the encounter fully and fairly to the protection of all concerned should it be at issue as part of an appeal. In the absence of a videotape, the appellate court will be confined to affidavits which raises another troubling factor. If an attorney attributes an unrecorded remark, significant to an issue such as recusal, to the trial judge and opposing counsel does not offer an affidavit to the contrary will the trial judge then tender an affidavit to state what he really said? At that juncture the judge is most likely a material witness and SCR 4.300, Canon 3, Part C would require disqualification. If the judge does not tender an affidavit does he become a de facto witness if the parties must resort to CR 75.08, the rule which gives the trial court the power to settle all issues where 'any difference arises as to whether the record truly discloses what occurred in the trial court...'? If ineffective assistance of counsel is an issue on appeal what record is there of counsel's conduct in pretrial encounters with the court, a legitimate area of inquiry?

"None of the foregoing concerns is purely speculative;

they are the very real consequences of proceeding without the best possible record. Consideration of them underscores the inescapable fact that the interests of counsel, the trial court and an appellate court are best served by the creation of a videotape record which does not require resort to the vulnerable memories of defense counsel, the prosecutor and trial judge as to what actually occurred.

"Moreover, there is no real dispute that activation of the videotape system involves virtually no inconvenience or expense. The judge simply pushes a button and creates a time log. Other judges of the Jefferson [Circuit] Court routinely record all proceedings in such cases or at least will do so upon request of counsel. Counsel for the Commonwealth do not contend that it is burdensome and unreasonable to record but suggest that requiring it takes away the discretion of the trial court. Having the discretion to do something is not sufficient rationale for doing it. The law requires more. It is 'arbitrary' and 'capricious' or 'at least...unreasonable and unfair' as discussed in Kentucky Nat'l Park Commission, [supra] to refuse to record all proceedings in a potential death penalty case especially where renewed motions for recusal have been filed and all encounters between the court and counsel contain potentially relevant statements. The presence of videotape equipment and the ease with which a record can be created make it all the more arbitrary and capricious to deny what is clearly a reasonable request. Simply stated, a court's refusal in a potential death penalty case to make the best possible record

when the means are readily available and not inconvenient is 'unreasonable and unfair,' i.e., an abuse of discretion. In view of the foregoing, the substantial likelihood that the trial court is acting incorrectly exists and the next two factors in Potter must be considered.

"Where a petitioner has an adequate remedy by appeal, a writ must be denied. Potter, 926 S.W.2d at 452. Petitioner in this case argues persuasively that where the trial court's error is a failure to create the best possible record in a case potentially involving the death penalty, an appeal is manifestly inadequate. Proceedings in the underlying prosecution are proceeding apace and it is quite evident that what occurs off-the-record because of a refusal to record can never be fully recreated. While the written order of the trial judge will reveal disposition of a particular motion it will not, indeed it cannot, possibly convey all that preceded the ruling. The preceding interchange is sufficiently potentially significant to an appeal and the presence and exercise of an appeal right is wholly inadequate to remedy the situation. The second factor in Potter is satisfied.

"The final factor for consideration as to CR 76.36 relief generally is whether 'great injustice and irreparable injury would result...' if the writ does not issue. Given the aforestated conclusions regarding the right to appeal on a complete record in a potential death penalty case, there is a substantial likelihood that the three-judge panel will find that injustice and irreparable injury will occur if the trial judge is not stayed from further

unrecorded proceedings.

* * * *

"Although it appears that the scheduled hearings will be recorded, the recording of any other matters that would come before the trial court, particularly in the course of a regularly scheduled motion hour, is less certain. Motion hour has been the occasion for earlier disputes regarding what was said and done and future motion hours logically carry the same potential. It is not necessary or appropriate to wait and see whether those proceedings are recorded because at that juncture the injury will have already occurred. Under these circumstances, the Petitioner will suffer the type of immediate and irreparable injury that justifies [relief]."

Further support for the necessity of issuing a writ of prohibition is found in the concluding paragraphs of Judge Abramson's order which references federal due process concerns:

"Although this [intermediate] relief is granted based on the abuse of discretion which results in the trial court acting 'incorrectly', [we note] the Petitioner's citation to the Fourteenth Amendment of the United States Constitution and the requirement that where a state authorizes an appeal it must 'provide the basic tools of an adequate defense or appeal' which includes a transcript necessary to pursue an effective appeal, Griffin v. Illinois, 251 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 2d 891 (1956), and the right to effective assistance of counsel on a first appeal. Evitts v. Lucey, 469 U.S 387, 105 S. Ct. 830, 83 L. Ed. 2d

821 (1985). While these cases do not require the result reached here they are persuasive indicators of the existence of a federal due process issue where an adequate record is not generated by virtue of the trial court's exercise of discretion in determining what to record and what not to record. Additionally, the United States Supreme Court opinion in Matthews v. Eldridge, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18, 33 (1976), does provide the framework for assessing whether any particular state procedure constitutes a deprivation of federal due process. While counsel has cited no case law . . . applying the three-part test in Matthews v. Eldridge to an analogous case, application of the test to the facts on this petition is further support for the result reached herein.

"In conclusion, trial judges face an increasingly heavy caseload and must be accorded considerable latitude in handling the multitude of matters committed to their discretion. They are on the front lines dealing with numerous counsel and litigants on a daily basis and the appellate courts should very rarely intervene to direct the trial judge's conduct. However, this case focuses on a matter which strikes at the very heart of the constitutional right to appeal, the need for a complete and accurate record. Appellate courts have a particular interest in this issue since they are entirely dependent on the record created below. Where encounters containing matters potentially important on appeal are not videotaped, it undermines the appellate court's ability to carry out its constitutionally mandated responsibilities."

Based upon the analysis set out in the foregoing opinion, we conclude that the trial court is acting erroneously in not videotaping all proceedings, that an appeal is an inadequate remedy and that irreparable injury and injustice will result if a writ of prohibition does not issue. Accordingly, the Court ORDERS that Judge Conliffe is hereby prohibited from conducting all further proceedings in case no. 97-CR-0615, including any interaction at motion hour dockets between the court and counsel regarding the case, unless recorded by the court's videotape equipment.

ALL CONCUR.

ENTERED: June 6, 1997

/s/ William L. Knopf
JUDGE, COURT OF APPEALS

PETITION FOR VINCENT STOPHER:

Daniel T. Goyette
Jefferson District Public Defender

J. David Niehaus
Deputy Appellate Defender of the Jefferson District Public Defender
Louisville, Kentucky

RESPONSE FOR JUDGE CONLIFFE:

F. Kenneth Conliffe, Judge
Jefferson Circuit Court
Louisville, Kentucky

RESPONSE FOR COMMONWEALTH AS REAL PARTY IN INTEREST:

A.C. McKay Chauvin
Assistant Commonwealth's Attorney
Office of the Jefferson County Commonwealth's Attorney
Louisville, Kentucky