The Advocate

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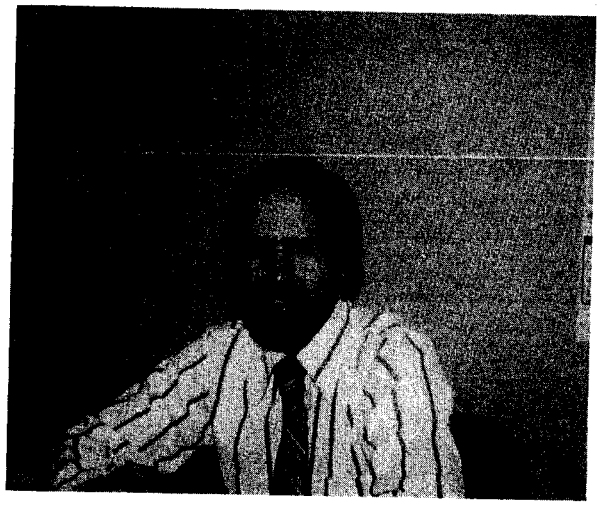
OPENINGS FOR TRIAL ATTORNEYS

The Department of Public Advocacy is opening eight new trial offices during 1983. In May of 1983, the Elizabethtown and Bowling Green offices will begin. Later in the summer and early fall, offices will open their doors in Harlan, Frankfort, Richmond, Danville, Owensboro and Mayfield.

(See Openings, P. 24)



INSIDE

THE ADVOCATE FEATURES

Rick Kaiser of the Hazard regional office is the Advocate's featured attorney this month. Rick's dedication to his work and record during his year with the DPA have been impressive. He has tried nearly 20 cases and won acquittals in more than a third of them, including a rare not guilty by reason of insanity verdict. Rick's grasp of even the most complex areas of criminal law is amazing for an attorney with only a year's experience in criminal practice.

Rick switched to public defender work after three years with the Appalachian Research and Defense Fund. He wanted to

(See Kaiser, P. 24)

WEST'S REVIEW

A major focus of Kentucky decisional law during the months of September and October was procedural constraints on the availability of post-conviction relief. In two separate opinions the Court of Appeals has unambiguously enunciated the rule that failure to challange the validity of a prior conviction at the time it is introduced to obtain a persistent felony offender conviction waives any challenge raised in a later post-conviction proceeding. Gross v. Commonwealth, Ky.App., 29 K.L.S. 11 at 1 (September 3, 1982); Alvey v. Commonwealth, Ky. App., 29 K.L.S. 11 at 2 (September 3, 1982). Discretionary review has been granted by the Kentucky Supreme Court in both cases. The Court of Appeals in Gross and Alvey relied on its prior decision in Ray v. Commonwealth, Ky. App., 633 S.W.2d 71 (1982). Ray held that a motion under CR 60.02, filed after the conviction it sought to challenge was used to obtain an enhanced sentence, was not filed within the required "reasonable time." The holdings in Gross and Alvey make explicit the implicit holding of Ray that once a conviction forms the basis for a persistent felony offender conviction it is no longer subject to collateral attack.

The position taken by the Court of Appeals in Gross and Alvey would place on trial counsel defending a PFO charge an obligation to investigate and present all grounds for a post-conviction challenge to her/his client's prior convictions at the trial of the PFO charge. Various problems flow from the rule adopted by the Court. Most obviously, a challenge to the validity of a prior conviction raised during PFO proceedings cannot in every instance be the equivalent of a motion to vacate judgment on the prior conviction. This is so since the court trying the PFO charge will not necessarily be the court which issued the prior judgment. In such a case, a ruling by the court trying the PFO charge that the prior conviction was invalid would not operate to vacate judgment on the prior conviction. To obtain vacation of the judgment the defendant would still be compelled to file a post-conviction challenge in the court in which he was convicted. In such a situation, an attack on the validity of a prior conviction

(Continued, P. 3)

during a PFO proceeding and a post-conviction challenge seek distinct and separate forms of relief. And in any case, a defendant who fails to challenge a prior conviction at the PFO proceeding, thus lending finality to the conviction for enhancement purposes, may still have a legitimate interest in challenging the prior conviction so that it will not later be used to again obtain an enhanced sentence. The holding of the Court of Appeals would preclude a post-conviction challenge for any purpose following the conviction's use for enhancement. This blanket waiver rule is clearly vulnerable to challenge.

The Court of Appeals also held in Gross that the defendant was not entitled to appointment of counsel on his CR 60.02 motion. The Court had previously reached the same holding in Ray v. Commonwealth, supra. The Kentucky Supreme Court has, of course, held in Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), that an indigent movant under RCr 11.42 is entitled to appointment of counsel. Discretionary review of this portion of the decision in Gross has also been granted.

In Williams v. Commonwealth, Ky. App., 29 K.L.S. 11 at 2 (September 3, 1982), the Court of Appeals held that a conviction following an offense committed by an offender while on parole is a separate conviction for PFO purposes even though the term of imprisonment imposed on the conviction is concurrent to the offender's previous sentence. KRS 532.080(4) provides that "for the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction... ." The Court held that "the concurrent sentence break is provided only to those who may have committed more than one crime but received their sentences for these crimes prior to serving any time in prison."

In Eary v. Commonwealth, Ky. App., 29 K.L.S. 12 at 1 (October 1, 1982), the Court of Appeals rejected Freddie Eary's argument that the defendant's convictions of possession of a handgun by a convicted felon and as a persistent felony offender violated double jeopardy. In Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980) and Heady v. Commonwealth, Ky., 597 S.W.2d 613 (1980) the Kentucky Supreme Court held that double jeopardy was violated by the use of defendant's conviction of possession of a handgun by a convicted felon followed by the use of his status as a convicted felon to obtain a PFO conviction. The Court in Eary apparently based its holding on the fact that separate offenses

(Continued, P. 4)

were used to establish the defendant's status as a felon for purposes of the principal charge and then to obtain his PFO conviction. The Court did not address the question of whether Boulder prohibits the use of a defendant's status as a felon, rather than merely the use of a single felony, to prove the substantive offense and then to enhance the penalty imposed. A dissenting opinion by Judge Vance voices this distinction and would find Boulder and Heady controlling. Discretionary review is being sought.

The Kentucky Supreme Court again had before it the case of Brian Douglas Schaefer. Commonwealth v. Schaefer, Ky., 29 K.L.S. 12 at 11 (October 12, 1982). The Court had previously reversed Schaefer's conviction because of prosecutorial references to a tape recording which the trial court had excluded from evidence. Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981). On retrial the trial court again ruled the tape recording inadmissible. The Commonwealth appealed from this ruling. The Supreme Court did not reach the question of the admissibility of the tape. It instead disposed of the case by resort to the "law of the case" doctrine. The Court held that because the Commonwealth had not previously pursued an appeal from the ruling of the trial court it had "allowed all of the issues presented at the first trial and not presented on the first appeal to become 'res judicata' under the doctrine of the 'law of the case.'"

The Supreme Court ordered that the opinion of the Court of Appeals in Houston v. Commonwealth, Ky.App., 29 K.L.S. 12 at 16 (October 12, 1982) be published. The Court in Houston held that a one year delay in bringing the defendant to trial, during six months of which the defendant was unaware of the charge against him, did not deprive the defendant of a speedy trial. The Court analyzed the claimed speedy trial violation in terms of the four factors set out in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2181, 33 L.Ed.2d 101 (1972): 1) length of the delay, 2) the reason for the delay, 3) the defendant's assertion of his rights, and 4) the resulting prejudice. Houston also asserted that he was entitled to jail credit time for time spent in jail awaiting trial. However, the Court noted that the defendant was "released to the Jefferson County Jail by Indiana where he was serving time for another criminal conviction in Indiana." The defendant would have been incarcerated even had he not been facing the Kentucky charges. Consequently, he was not entitled to jail time credit.

No opinions were issued by the United States Supreme Court during September and October.

LINDA WEST

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THE DEATH PENALTY

KENTUCKY'S DEATH ROW POPULATION 13

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 65

CERT. ACTION UNDER THE BIG TENT

The United States Supreme Court's term has barely begun so it is too early for any full blown opinions in death cases. However, there have been some significant rulings since the spring on certiorari petitions. A review of the issues at least some Justices are drawn to will help us recognize potential flaws when they occur prior to and during a capital trial. Likewise, favorable decisions left intact should not go unnoticed.

WAIVER

In Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated and remanded for reconsideration, 73 L.Ed.2d 1326 (1982), adhered to on remand, 686 F.2d 311 (5th Cir. 1982), the Fifth Circuit originally granted habeas relief because the state trial court permitted evidence and jury consideration of non-statutory aggravating circumstances. 661 F.2d at 58-61. However, the Supreme Court remanded for consideration in light of Engle v. Isaac, 102 S.Ct. 1558, 1572, 1574 (1982). Isaac held, in part, "that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial..." and that alleged unawareness of a constitutional claim at the time of the trial does not constitute cause where "the tools to construct" the constitutional claim were available.

On remand, the Fifth Circuit reinstated the prior judgment. The Court found no procedural bar for two reasons. First, a default does not occur by virtue of "the failure of trial counsel to belabor a point once raised and clearly lost..." Second, in death cases, Florida "excercises a special scope of review enabling them to excuse procedural defaults... In the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to a failure to preserve it by timely objection, the state must be presumed to have ... reach[ed] ... the merits." 686 F.2d at 314. Although James Henry may, for the time being, avoid execution despite an alleged mistake by his counsel, it behooves us to carefully record all constitutional (and other) claims in a proper and timely fashion. It could mean the difference between life and death.

(Continued, P. 6)

WITHERSPOON

In Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982) cert. denied 102 S.Ct. 3495 (1982), the Fifth Circuit held that a potential juror was improperly excluded for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), as interpreted in Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adhered to en banc 626 F.2d 396 (1980). The juror "did not wish to serve" and stated "her feelings would 'affect' her deliberations..." However, "[i]f you make me do it, I'll do it right..." 670 F.2d at 56. The court also held that the fact that the state had unexercised peremptory challenges sufficient to compensate for any improperly excused jurors does not, under Davis v. Georgia, 429 U.S. 122 (1976), render Witherspoon error harmless. The Supreme Court denied review despite close scrutiny of death cases arising from federal circuits (so far only the 5th and 11th).

Moore, especially Judge Goldberg's forceful concurrence on harmless error, casts a long shadow over our Supreme Court's decision in Gall v. Commonwealth, Ky., 607 S.W.2d 97, 104 (1980), which stated: "It will be recalled that the Commonwealth left one of its peremptory challenges unexercised... . Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless... . We reach the same conclusion... ." In a remarkably perceptive analysis, Judge Goldberg noted that acceptance of the prosecution's argument "would be tantamount to insulating all jury selection from any meaningful appellate review... . One can readily predict what might happen if we were to adopt this position: prosecutors could routinely 'save a peremptory' in the event its 'for cause' challenge was unsuccessful." 670 F.2d at 60 (concurring opinion).

Predictably, Kentucky prosecutors have been instructed to hang on to peremptories in the hopes of circumventing Witherspoon's mandate. In the wake of Gall, indeed just three days after the decision became final, Assistant Attorney General James L. Dickinson notified all Commonwealth's Attorneys "that the prosecutor should, if at all possible, reserve a peremptory challenge... . [I]t is now clear," Dickinson claimed, "that the Court will find a Witherspoon error...harmless... if the prosecutor has not used all of his peremptory challenges... ." Dickinson's Memorandum of October 17, 1980 at 4-5. Hopefully, Moore will put such gamesmanship to rest.

COMMENT ON PAROLE

In People v. Ramos, 639 P.2d 908 (Cal. 1982), cert. granted, 32 Cr.L. 4001 (Oct. 4, 1982), the California Supreme Court held unconstitutional a statutorily mandated instruction at the penalty phase of a death case. The so-called "Briggs Instruction...tells the jury that a sentence of life

(Continued, P. 7)

without...parole may in the future be modified by the Governor to permit parole...," 639 P.2d at 930. The Court found a violation of the 5th, 8th and 14th Amendments because such comments creates a risk that death will be imposed despite factors which call for a lesser sentence. The instruction invites "the jury to consider an extraneous and speculative factor." Id. It is also "partial, incomplete and misleading... ." 639 P.2d at 933. The Supreme Court has granted review.

Counsel should object to the "injection of [such] questions into a sentence proceeding [because they] tend to skew the legislature's constitutionally sound death penalty scheme." State v. Willie, 410 So.2d 1019, 1032-33 (La. 1982). Although Kentucky doesn't provide for such an instruction, comments of this nature can be made by the prosecutor or by the trial judge in response to questions by the jury. The latter situation arose in State v. Brown, 414 So.2d 689, 699 (La. 1982), and the Court reversed a death sentence because comments on pardon power "allowed the interjection of arbitrary factors into the jury sentencing deliberations."

TWO COUNSEL AND $ FOR EXPERTS

In another California case, the Court has dismissed the prosecution's appeal "for want of a substantial federal question." People v. Keenan, 640 P.2d 108 (Cal. 1982), appeal dismissed, 32 CrL 4050 (Oct. 18, 1982). The California Supreme Court held that a trial court abused its discretion in refusing to appoint a second attorney in a death case where the indigent defendant had already been awarded $23,000 "for investigation and experts." 640 P.2d at 110. Defense counsel was permitted to hire "a criminalist, an investigator, a jury selection service, and psychiatric, psychological and neurological testing... ." 640 P.2d at 114 (emphasis in original.) Nevertheless, "[i]f it appears that a second attorney may lend important assistance in preparing for a trial or presenting the case, the court should rule favorably on the request." Upon "a showing of genuine need...a presumption arises that a second attorney

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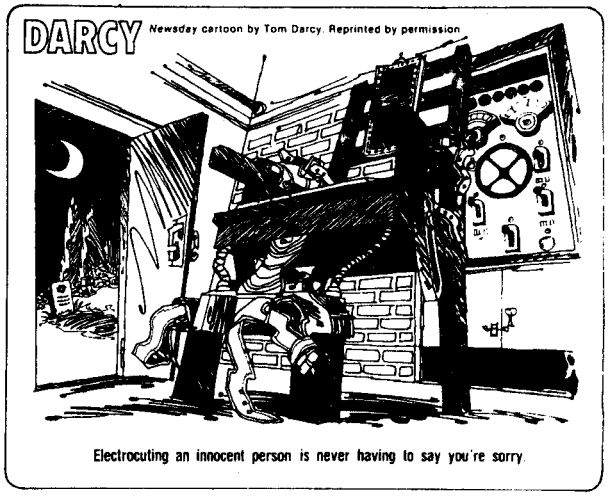

is required." 640 P.2d at 113-14. The Court emphasized the "mammoth responsibility" counsel has in a capital case. 640 P.2d at 112.

The prosecution also complained about the ex parte, in camera procedure employed. "[T]he request for such funds and the contents of the application shall remain confidential... [t]o avoid undue disclosure of defense strategy... ." 640 P.2d at 110 n.5, 111. Counsel facing a capital indictment should give serious thought to making a Keenan motion. Anyone who has tried a capital case knows that it should not be done alone. Further, requests for experts should be sought ex parte. See, e.g., United States v. Sutton, 464 F.2d 552 (5th Cir. 1972); Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970). This procedure has been employed by Judge Smith in Scott County and Judge Meigs in Franklin County. Commonwealth v. Ford (Franklin Co. Ind. No. 80-CR-070).

APPELLATE REVIEW

The Supreme Court has granted review of Barclay v. State, 411 So. 2d 1310 (Fla. 1981), cert. granted, 32 CrL 4076 (1982), which presents issues central to the appellate review process in death cases. Barclay claims that his death sentence was upheld on the basis of three invalid aggravating factors, one non-statutory aggravating factor and in the face of a jury recommendation of life. The petition for certiorari (at 7-8) alleges that since Proffitt v. Florida, 428 U.S. 242 (1976), "the Florida Supreme Court has failed in its duty to 'review and reweigh the aggravating and mitigating circumstances...' In this case, the Florida Supreme Court has engaged in precisely the 'cursory or rubber stamp review' that Proffitt... [assumed] would not occur."

In Zant v. Stephens, 102 S.Ct. 1856 (1982), question certified to Ga. Sup. Ct., cert. granted to review, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (1981), the Court has pending a question similar to that in Barclay. [See The Advocate, Vol. 4, No. 4 at 15 (June, 1982)]. It is possible that the manner of appellate review in Georgia and Florida has begun to "undermine the confidence" the Court expressed in the various sentencing schemes in 1976. Stephens, 102 S.Ct. at 1859. Only a month before Barclay, in Quince v. Florida, 32 CrL 4016 (Oct. 4, 1982), Justices Marshall and Brennan dissented from a refusal to hear a challenge to the Florida Supreme Court's mode of review in another death case. "In light of the Florida Supreme Court's abandonment of its previously recognized duty to make an independent determination of whether a death sentence is warranted, the constitutionality of the Florida death penalty statute should be reappraised." 32 CrL at 4017. See generally, Dix, Appellate Review of the Decision to Impose Death, 68 GEO. L. J. 97 (1979)

In yet another case, Justice Marshall dissented from a denial of certiorari, in part because "the South Carolina

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Supreme Court fail[ed] to ensure the existence of a sufficient evidentiary basis for the jury's determination" of the aggravating factor. Butler v. State, 290 S.E.2d 1 (S.C. 1982), cert. denied, 31 CrL 4036 at 37 (Oct. 11, 1982). Additionally, the dissent criticized an instruction which equated "reasonable doubt" with "substantial doubt." This definition (formerly used in Kentucky) "create[d] a serious danger that the jury may have found the existence of the aggravating circumstance on a lesser showing than 'beyond a reasonable doubt.'" Id. Counsel should be on the lookout for similar influences in capital trials.

ACCOMPLICE LIABILITY - PROSECUTION MISCONDUCT

A case from Missouri failed to catch the attention of four members of the Court but may contain issues which will arise again. In Newlon v. State, 627 S.W.2d 606 (Mo. 1982), cert. denied, 32 CrL 4014 (Oct. 4, 1982), Justices Marshall and Brennan dissented from the Court's refusal to grant certiorari. The jury instructions had offered an accomplice theory in a case where it was disputed whether Mr. Newlon was the triggerman. The dissenters argued the death sentence was contrary to Enmund v. Florida, 102 S.Ct. 3368 (1982), "because the instructions in the punishment phase of the trial permitted the jury to impose the death sentence solely on the basis of the conduct and mental state of the principal." 32 CrL at 4015. "[P]unishment must be tailored to [the defendant's] personal and moral guilt." Enmund, 102 S.Ct. at 3378.

A second issue noted by the dissenters and discussed at length by Judge Seiler in dissent below, 627 S.W.2d at 623, 633-34, was the prosecutor's argument. Inter alia, he argued "the jury would be cowardly if it imposed the lesser sentence... ('I hope you have the courage to do that...')"; the defendant's life sentence might be commuted ("All it says is no parole. It doesn't say it can't be commuted... ."); and "that the availability of post-trial procedures relieved the jury of the full responsibility for its decision... ('under the law Judge Ruddy must review it...')". 32 CrL at 4015-16. The dissenters felt that these remarks "exhort[ed] the jury to depart from the statutory sentencing standards and... invited an unreasoned imposition of the death sentence..." in violation of the Constitution. Worthy of attention is the last remark which is routinely being used by Kentucky prosecutors ("It's only a recommendation..."). Object to it.

KEVIN MCNALLY

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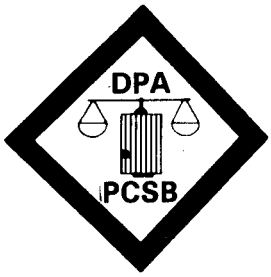

A STATEMENT ABOUT SIMPLE JUSTICE

In a recent case a defendant filed a pro se CR 60.02 motion challenging a 1969 conviction for detaining a female. The defendant claimed he did not fully understand the extent of the constitutional rights he had given up when entering his plea of guilty. The record disclosed that the Boykin colloquy had not taken place when his plea was accepted by the trial court. The 1969 judgment was subsequently used in a PFO count to enhance punishment of a new conviction; no challenge to the 1969 conviction was mounted during the PFO hearing.

At the CR 60.02 hearing the Commonwealth relied heavily on the fact that thirteen (13) years had elapsed without a challenge to the 1969 judgment, that the proper time to question the validity of that conviction would have been during the subsequent PFO trial when it was used to enhance punishment, and that because the defendant had several convictions prior to 1969 he could be presumed to have known his rights in 1969. [All but one (1) pre-1969 convictions were on guilty pleas, not trials.] Therefore, under Ray v. Commonwealth, Ky. App., 633 S.W.2d 71 (1982), Copeland v. Commonwealth, Ky., 415 S.W.2d 842 (1967), and Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978), the CR 60.02 must be denied, claimed the state.

In his pro se closing argument the defendant addressed the logic of those cases and the state's position:

> [The prosecutor] brought up the fact that I had been through...this Court numerous times...I'm not an integral part of this system. I'm just a passenger...I'm not skilled in law. I [do] the best I can with what I [learn] ...[The prosecutor] has insinuated that because I passed through here, that I should be aware of my rights, and this argument certainly can't hold water. I have people at the reformatory with me right now, men my age, younger men...that are in academic school trying to learn to read and write. Passing through the Court doesn't give you an education in law or academics [just as] age alone does not.
>
> His insinuation that I would know my rights simply because I walked in and did what an attorney told me to do...doesn't have any basis in reality... You do what you're told [out of] fear. You know, my child...minds me because...if she don't she gets [spanked]. [Acting out of fear doesn't mean] she gets smarter because of it.

(Continued, P. 11)

We get into the question of why...wait so long to bring these things up, 1969 conviction is what, almost 13 years old... . And the answer is simple, because I didn't know I could bring it up until now...I haven't had four years of college, two years of law school and practice before the Court. I have to go up there and do it the hard way, read a book at a time..., ask questions [when I can] and go to my public advocate ...and other people and try and put it together...until I know ...what I'm entitled to, at least what they think I'm entitled to... .

I've never heard anybody from the prosecutor's office say we can't prosecute this PFO charge because it's 25 years old... . And I'm [only] talking about a '69 case...

...[The prosecutor will probably win because] I'm a little stupid, and I admit it, but I'm trying, and the fact then...doesn't mean that the Court should continue to deny me my rights so that they can say that the Court is always right or that the Commonwealth is always right.

...[The prosecutor] has the skill... . [He] has the intelligence and the legal ability.

[But] [m]orally, he is wrong...as Brandeis...said far better than I could, he said that when a Court of justice or the government has to stoop to break the law to convict those that break the law, they are no better than the ones they convicted.

[The prosecutor] is not interested in this case. He don't [sic] care whether they gave me my rights then. [He's] interested in making a win. Winners are the thing, not right or wrong winners.

...That's [how] you build your reputation... [The prosecutor] may be on the way up, I don't know. The question is, how many bodies does he have to climb over before he gets there? I don't want one of them to be mine...

Morally and spiritually, I know I'm right...

...There is a record that [the 1969 guilty plea] was voluntary. It was involuntary, because [I] had been before the Court...so many times and [had] been told, "do what I tell you, keep your mouth shut, go out there and do what you're told, and we'll get this over with in a hurry", and that's what I did. I walked out there and did what I was told. I'm a litle tired of doing what I'm told. I want...justice... .

...I was one of the poeple that didn't want to rock the boat, I didn't want to make waves, and I didn't. And now its time to splash a little. I have no more to say.

After that, there is very little more that can be said.

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TRIAL TIPS

AVOWALS

"The strongest bulwark of authority is uniformity; the least divergence from it is the greatest crime."

-Emma Goldman

Preservation of the record for appellate review is not one of criminal law's sexy issues. It is, however, essential to protecting and furthering the cause of your criminal client. Proper preservation of the record is not everything, but without it your client is dead on appeal. It's the ticket into the ballpark.

An avowal, or offer of proof or proffer, is but one of the many aspects of record preservation. While the rules of avowals are rather straightforward, the appropriate and timely use of an offer of proof at the trial level is often neglected.

WHAT IS AN AVOWAL?

An avowal is the introduction by counsel of evidence into the record when counsel has been prevented from having that evidence introduced before the trier of fact. See generally 23 C.J.S. Criminal Law, Section 1029 (1961).

PURPOSE OF AVOWAL

A proffer has two prime reasons for being required. First, it allows the reviewing court the opportunity to view the actual evidence kept from the trier of fact, and decide if counsel was properly or improperly prevented from introducing the evidence. Second, if it was error for the trial court to exclude the proffered evidence, an avowal allows the appellate court a basis for determining whether the exclusion was prejudicial.

DUTY TO MAKE

Defense counsel bears the burden of placing the excluded evidence into the record. RCr 9.52 states: "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his answer to the question."

FORM OF AN AVOWAL

Dean Ladd has summarized the four principal methods of making an offer as follows:

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(1) Dictation of statement into the record of the testimony anticipated from the excluded question....This statement is properly made at the reporter's desk so that it may be heard by the court and opposing counsel, if he desires, but not heard by the jury or witness....

(2) Introduction of statement written by examining counsel containing the answer the witness would give, in the opinion of questioner, if permitted to testify.

(3) A written statement of the witness's testimony signed by the witness and offered as part of the record. This would occur principally when witness was friendly and available before trial and the testimonial issue is known as a pivotal problem during preparation for trial. It is desirable when matter of competency or privilege of witness is in issue, for then the excluded testimony may be easily presented in the record. It is suggested in using this and the preceding method that the writing be marked as an exhibit and introduced into the record for proper identification on appeal.

(4) Request the court to excuse the jury temporarily, examine the witness before the court, and have the answers reported in the record. If it were not for the inconvenience, this would be by far the most desirable method. It is the only method of demonstrating the actuality of the error of exclusion of real testimony given under oath in the trial....This and the preceding method of offer are the only methods that truly approximate meeting the imaginary error theory of offers.

Ladd, "The Need in Iowa of An Offer of Excluded Testimony for Appeal," 18 Iowa L. Rev. 304, 318 at note 28 (1933).

In Kentucky, RCr 9.52 sets out but one method of making a proffer:

> In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

The Kentucky courts have interpreted this language to require the actual taking of testimony from the witness. Herbert v. Commonwealth, Ky. App., 566 S.W.2d 798 (1978)

(Continued, P. 14)

indicated the manner necessary to make a proper avowal: "the witness must offer the testimony which will constitute the avowal. The examining attorney is not permitted to state the substance of the witness's proposed testimony." Id. at 803. Complete accuracy is the rationale the courts use for requiring this particular method. The "testimony of the witness himself, under oath and subject to examination and cross-examination, is the only sure indication of what would have been said in the presence of the jury." Powell v. Commonwealth, Ky., 554 S.W.2d 386, 390 (1977). It allows the other party to offer contrary evidence, and thus place it in an accurate context.

While the Kentucky Supreme Court has reversed a case on the basis of an avowal which was not made in this manner, Colvin v. Commonwealth, Ky., 570 S.W.2d 281 (1978) (defense attorney dictated into the record an uncontroverted avowal that the court instructed the three jury commissioners to exclude school teachers from the jury wheel and they did), it would be unwise for an attorney to rely on the court's ever taking that position again.

It is also believed by some attorneys that a specific proffer need not be made when counsel is prevented from having a cross-examination question answered. Kentucky appellate courts are clear in demanding a specific offer of proof in those cases.

In Queen v. Commonwealth, Ky., 551 S.W.2d 239 (1977) defendant's counsel asked a co-indictee who testified for the Commonwealth, "And has the prosecutor told you that he would recommend dismissal of your case if you testified in this case?" The trial court sustained the Commonwealth's objection to that question. No avowal of the co-indictee's answer was made by defense counsel. The court refused to review the error. Id. at 241.

In Cain v. Commonwealth, Ky., 554 S.W.2d 369 (1977) the court, in a highly analogous

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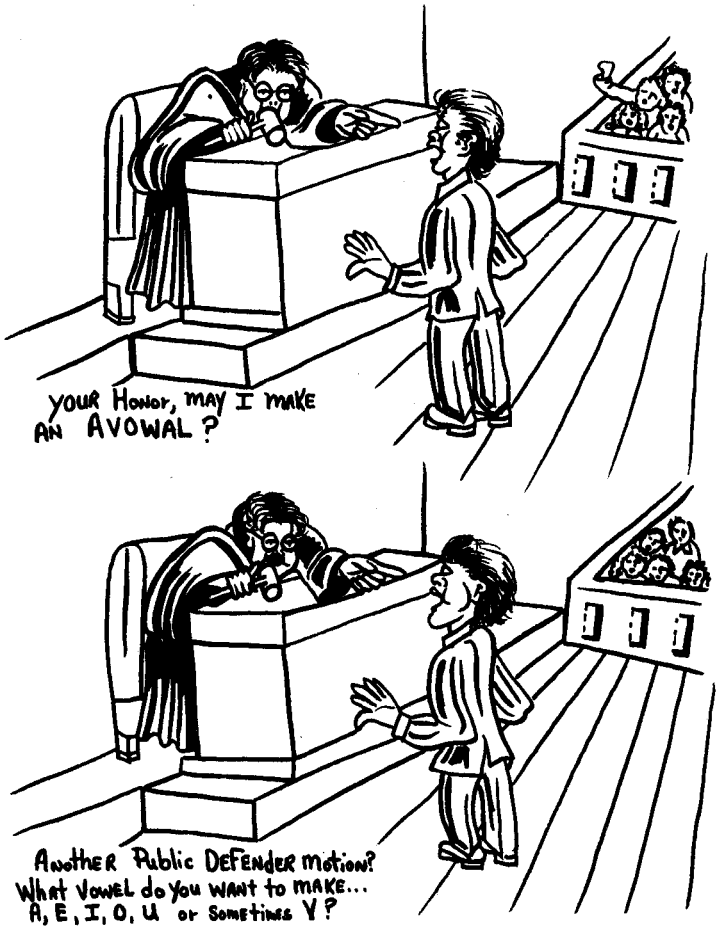

fact situation, ruled the error unpreserved stating, "The inquiry was, of course, admissible to discover possible bias on the part of the witness, and the trial court erred in disallowing it, but without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial." Id. at 375.

However, "[c]ounsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory...to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 219, 75 L.Ed 624 (1931). Thus, the constitutional viability of the rulings in Queen and Cain is suspect. See Murrell, Kentucky Criminal Procedure, Section 22.14 (1975).

"Nevertheless, it is incumbent upon defense counsel to attempt to make an avowal of the actual testimony of the witness and to obtain a definitive ruling in order to preserve the issue for appellate review. At the same time, it should be noted that the right of confrontation includes the right of the jury to determine the veracity of the witness from his demeanor as well as from his testimony, and an evasive denial may be as effective as an admission. However, the demeanor cannot be placed in the record by avowal, and an objection to the adequacy of an avowal should be made on this basis." Fitzgerald, 8 Kentucky Practice Section 824 fn. 68 (1978).

SPECIFICITY AND TIMING OF AN AVOWAL

Unless it is tactically unwise, counsel should insist on making a concrete, full-blown offer of evidence immediately upon being denied the right to have it introduced. When an avowal is made, the trial judge hears outside the presence of the jury the very evidence he excluded. If the proffer is done immediately and specifically, there will be a better chance of changing the trial judge's mind. Thus, hearing the actual evidence may be more persuasive than any abstract argument of counsel. All or part of the evidence may be admitted after all. As a practical matter, people are persuaded by hearing specific information rather than generalizations. An immediate, concrete avowal also sends a clear message to the trial judge that you are serious in intending to press the matter further, should you need to appeal. The judge also receives the message that the matter is so important to you that in your mind it warrants the time it will take to make a full record. Immediately making a specific avowal will likely have the collateral benefit of increasing your persuasion of the judge to your position. It also keeps the witness' testimony within the context of the rest of the cross-examina-

(Continued, P. 16)

tion, and helps counsel from forgetting to do it later.

In order to leap the harmless error hurdle on appeal, the excluded evidence will have to be shown to be sufficiently prejudicial. Counsel is not merely entering into the record enough evidence to let the appellate court understand the nature of evidence, but counsel is also concerned with demonstrating to the reviewing court the seriously prejudicial nature of its exclusion.

IF NOT ALLOWED TO MAKE AN AVOWAL

Case law is clear. If counsel is not permitted to make an avowal, automatic reversal must be forthcoming:

> When the trial court denied the appellant the opportunity to adduce evidence, even by avowal, relating to this vital question, any vestige of judicial review was foreclosed. Clearly, no "due-process" hearing or judicial review may be found in a proceeding in which even the opportunity for avowing evidence on such a crucial point is summarily denied. Mehnke v. Commonwealth, Ky., 451 S.W.2d 162, 166 (1970).

The failure to allow an avowal effectively denies a defendant his right to appeal guaranteed him by the Kentucky Constitution. Powell v. Commonwealth, Ky., 554 S.W.2d 386, 390 (1977).

When prevented from making an avowal, counsel should consider what further action is in the best interest of his client. Caution would probably require counsel to tender an affidavit setting out the evidence that was sought to be placed into the record. This could even be done at the motion for new trial stage, see Powell, supra at 390, although the Kentucky appellate courts do not require this step. Id.

TYPE OF EVIDENCE

It necessarily follows that avowals are required for all types of evidence, not just testimonial evidence. Counsel has the right under RCr 9.52 to place nontestimonial evidence into the record by way of a proffer. See Eilers v. Eilers, Ky., 412 S.W.2d 871, 872 (1967) (a letter written by the witness).

If a judge rules the entire testimony of one of your witnesses inadmissible, you must, in order to fully preserve the error, place the witness's testimony in the record. Likewise, avowals are required in pretrial hearings where the court does not allow the introduction of certain evidence.

CAUTION

It is not uncommon for the lack of compliance with all aspects of preservation to be used as a sword against the defendant in his appeal. The ruling in Scruggs v. Commonwealth, Ky., 566 S.W.2d 405 (1978) should be enough caution:

(Continued, P. 17)

"Next, the appellant charges that the trial court erred by refusing to allow Jeanetta Scruggs, the appellant's daughter, to testify concerning the contents of the missing note. The appellant argues that he was prohibited from placing an avowal into the record and that therefore we must reverse this case for a new trial. Once again the facts gleaned from the record do not bear out the appellant's argument. The transcript of Jeanetta Scruggs' testimony shows that counsel for appellant asked the following question, 'At any time that day did your father say anything to you about a note?' The witness replied, 'I don't remember.' Thus the question was asked by counsel and answered by the witness. Since the appellant's counsel received a definitive answer to the question he pro-pounded, we fail to see merit in the argument that an avowal should have been allowed as a matter of right. We find no error here." Id. at 410.

It should be second nature for the defense attorney to take the protective action necessary to absolutely insure appellate review. For instance, the better policy is probably to place into the record by way of avowal the answer to any question put to a prospective juror during voir dire which the trial judge does not permit to be asked.

STATUTORY AVOWAL

The legislature has required the defendant to avow in every sexual offense case all the evidence of prior sexual conduct of the complaining witness that the defendant intends to use for impeachment. The statute, KRS 510.145, sets out requirements beyond the normal avowal:

....

(2) In any prosecution under KRS 510.040 through 510.140, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of these sections, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant.

(3) Notwithstanding the prohibition contained in subsection (2) of this section, evidence of the complaining witness' prior sexual conduct or habits with the defendant or evidence directly pertaining to the act on which the prosecution is based, may be admitted at the trial if the relevancy of such evidence is determined in the following manner:

(a) A written motion shall be filed by the

(Continued, P. 18)

defendant with the court no later than two (2) days prior to the day of trial, or at such later time as the court may for good cause permit, stating that the defendant has an offer of relevant evidence of prior sexual conduct or habits of the complaining witness.

(b) A hearing on the motion shall be held in the judge's chambers. If, following the hearing, the court determines that the offered proof is relevant and that it is material to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof, in whole or in part, in accordance with the applicable rules of evidence.

The proffer is but one of the many unnatural acts of preservation that trial defense counsel must ingrain into himself to the point of its being triggered instinctively.

The message of this state's judicial authority is clear: the least divergence from the rules of avowals will prevent an appellant from having his case fully considered on the merits.

ED MONAHAN

* * * * * *

THE INTOXICATION DEFENSE

A. Statutory Defense of Intoxication

KRS 501.080 provides a defense to a criminal charge for an accused who was intoxicated at the time of the offense, even if the accused voluntarily became intoxicated. For the voluntary intoxication of an accused to constitute a defense, the intoxication must be so severe that it negates the existence of an element of the offense. If the accused was intoxicated, but did not voluntarily become intoxicated, it constitutes a defense if the intoxication deprives the accused of the "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

"Intoxication" is broadly defined in KRS 501.010(2) to include mental or physical disturbances resulting from ingestion of substances into the body. "Voluntary intoxication" is defined to mean intoxication caused by substances the accused knowingly ingests when he knows or ought to know the substance would cause intoxication. This statute provides that substances ingested pursuant to medical advice or under duress are not ingested voluntarily and the subsequent intoxication is not voluntary. When an accused ingests an intoxicant

(Continued, P. 19)

but is unaware that he is doing so, as with the proverbial Mickey Finn, he is not voluntarily intoxicated.

KKS 501.080 appears to present a startling defense because of the large number of offenses committed by persons who were under the influence of alcohol or drugs. However, the accused must have been beyond mere intoxication to merit an instruction on the intoxication defense; he must have been so intoxicated that formation of the intent to commit the offense was not possible. Jewell v. Commonwealth, Ky., 549 S.W.2d 80 (1977). This defense is not available to an accused who formed the intent to commit the crime and then became intoxicated to get the "courage" to carry out the intended act. Nor is the defense available to someone who forms the intent to commit the offense charged and then becomes so intoxicated that he cannot control his actions.

This defense is difficult to present to a jury without destruction of any sympathy or good feeling the jury might have for the accused who, by invoking the defense, admits commission of the act that constitutes the offense charged. This defense is seldom anything other than a defense of the last resort.

B. Crimes to Which Intoxication Defense Applies

In KRS 501.020 the legislature defined the mental states used in the Penal Code: intentionally, knowingly, wantonly, and recklessly. According to the definitions, the voluntary intoxication defense applies to offenses requiring the accused to act knowingly or intentionally. The definition of "wantonly" specifically excludes voluntary intoxication as a defense to offenses requiring wanton conduct, when the person creating a risk is unaware of the risk solely because of the voluntary intoxication and acts wantonly in regard to that risk. KRS 501.020(3). The Commentary to KRS 501.080 suggests that the intoxication defense is applicable only to offenses that require knowing or intentional acts and not to wanton or reckless acts. However, "wantonly" is defined as consciously disregarding a known risk and the definition leaves open a situation where an accused is unable to "consciously disregard" the risk because of the extent of intoxication.

In Brown v. Commonwealth, Ky., 575 S.W.2d 451 (1978), the Court states that the voluntary intoxication defense is only for crimes requiring intentional acts. The Brown Court established a two-part test for use of the defense: 1) what intent or knowledge does the crime charged require? 2) was the accused able to obtain the knowledge or form the intent necessary for the crime in light of the accused's intoxicated state? What were called specific intent crimes in Kentucky prior to enactment of the Penal Code, crimes requiring intent over and above

(Continued, P. 20)

intention to engage in particular forbidden conduct, are certainly still encompassed by the voluntary intoxication defense. However, the statute is not framed in terms of specific general intent crimes, but in terms of the four mental states.

Brown's two-part test and KRS 501.080 enlarge the crimes subject to the voluntary intoxication defense to any crime requiring intentional or knowing conduct, no longer limiting it to specific intent crimes. Therefore, burglary (knowingly entering a dwelling with intent to commit a crime) and theft (taking with intent to deprive), as specific intent crimes, are still subject to this defense. Rape (engaging in sexual intercourse by forcible compulsion), formerly a general intent crime, was held in 1930 not to be subject to the intoxication defense and that decision has been recently reaffirmed. Malone v. Commonwealth, Ky., 29 K.L.S. 8 at 16 (July 6, 1982); Abbott v. Commonwealth, Ky., 28 S.W.2d 486 (1930). In Malone, the Court states that no specific mental state need be shown to prove the crime of rape. Appellant argued that KRS 501.050 requires that there be a culpable mental state for all criminal offenses that are not violations, misdemeanors, or defined outside of the penal code, but the Court rejected that argument stating that rape has a long history of requiring no specific mental state. With that limitation in the opinion of the Court, KRS 501.050 should be used to argue that the voluntary intoxication defense is applicable to any crime that does not specifically require a wanton or reckless conduct or is not an absolute liability crime.

While it may seem too obvious to mention, the defense of voluntary intoxication does not apply to offenses involving intoxication as an element of the crime, e.g., DUI and Public Intoxication.

C. Procedure for Use of Voluntary Intoxication Defense

The accused must present reasonably sufficient proof to support a doubt about the accused's ability to form the intent required to commit the crime in order to get the issue before the jury. Brown v. Commonwealth, Ky., 555 S.W.2d 252 (1977); Mishler v. Commonwealth, Ky., 556 S.W.2d 676 (1977). Once the issue has been properly raised by the defense, the Commonwealth has the burden to negate the intoxication defense beyond a reasonable doubt. Id. Under any circumstances, the accused is entitled to an instruction on the defense of intoxication whenever evidence indicates an intoxication severe enough to negate the existence of an element of the crime charged. Id., Parido v. Commonwealth, Ky., 547 S.W.2d 125 (1977).

(Continued, P. 21)

D. Alternatives: Withdrawal, Chronic Alcohol Brain Syndrome, Alcohol Hallucinosis, and Secondary Alcoholism

Medical science and psychology differentiate between intoxication and other mental or physical conditions secondary to or following after intoxication. Voluntary intoxication is not the basis for an insanity defense; however, that bar should be limited only to the situation where the primary mental condition at the time of the offense is one of intense intoxication. The insanity defense may be available in other situations involving ingestion of alcohol or other intoxicants before the offense such as:

a. Withdrawal - This is a mental or physical condition caused by removal of the substance from the body rather than by ingestion. This can cause erratic behavior including restlessness and anxiety, irritability, seizures, blackouts, delerium, hallucinations, disorientation, or paranoid ideation. This condition should be considered especially in cases where alcohol or barbiturates are involved.

b. Alcohol Hallucinosis - This condition is characterized by paranoid psychosis and auditory hallucinations which may cause a person to act aggressively. This can occur during or after acute intoxication.

c. Chronic Alcoholic Brain Syndrome - This condition exists to some degree regardless of the state of intoxication and can cause increasingly erratic behavior, memory and recall problems, and/or emotional instability.

d. Secondary Alcoholism or Drug Ingestion - Sometimes an accused has an underlying major mental disease and the alcohol or drugs are used as self-medication. In such cases the underlying mental condition exists independently of the state of intoxication.

Be aware of the possibilities of proving the existence of one of these conditions and avoid the mistake of assuming that the insanity defense is unavailable simply because there is evidence that the accused had been drinking or was intoxicated.

KRS 501.080 does not bar the possible use of acute intoxication as a "mental illness" under the "guilty but mentally ill" statute. However, if the state of intoxication was an isolated event and not reflective of alcohol or drug addiction, or habitual excessive abuse, then the state of mental illness would dissipate by the time of sentence.

BY: David E. Davidson
W. Robert Lotz

* * * * * *

WHEN YOU CAN LEAD A WITNESS ON DIRECT EXAMINATION

One of the first things we all learn in law school is that the difference between direct and cross-examination is that you can lead on the latter but not the former. While that distinction is in fact an important one, it is just as important to realize that as a trial attorney there are instances when you can lead on direct examination.

Leading on direct examination is important because leading allows you as the examiner to shape your witness' testimony in a smooth and interesting manner. Leading gives pace to direct examination, allowing the examiner to lead quickly through preliminary matters so that the witness can narrate on that which is important. Leading permits the examiner to remain in control of where the witness is going, and how quickly he gets there. Leading allows the examiner to structure the testimony in an organized fashion, and to move between topics with ease.

Leading is important. Just as important is to know when you may lead, in order to avoid the embarrassment of the valid sustaining of an objection to your leading.

You may lead your witness on direct examination in the following situations:

1. Preliminary facts. You may lead your witness through the preliminary facts of their testimony, such as name, address, occupation, etc. The disadvantage to this leading is that it doesn't give your witness the chance to get his or her sea legs at a time when they may be most nervous.

2. Facts which are uncontroverted, or inconsequential. There is no risk of putting words in witness' mouths where the answer is unimportant anyway.

3. To move to a new topic. This is the most important instance of leading. If you have four or five different areas you want to cover, it is often difficult to move between them smoothly. By using leading questions, you can effect transition between topics in an orderly fashion.

4. The boorish, hostile, predisposed, reluctant or adverse witness. Where a witness is naturally against you (the victim), hostile to you, reluctant to answer, or for any other reason is uncooperative, the Court should allow you to lead such a witness.

5. Disabled witness. If you have a witness who is competent but for some reason has a limited capacity to speak, you may lead that witness.

6. A witness who has totally forgotten their testimony.

(Continued, P. 23)

You should continue to be aware of when you may lead a witness on direct examination, both to make the witness' testimony more effective and to avoid embarrassing yourself as an advocate.

ERNIE LEWIS

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CONGRATULATIONS BILL!

Recently, Bill Radigan was named President Elect of the Criminal Law Section of the Kentucky Bar Association.

He will be working with Dan Goyette, the Chairman of the section.

Bill's new position allows him to organize and conduct at least one seminar a year using KBA funds, and to enhance knowledge and education in the criminal law field.

If you have any suggestions or ideas concerning organization or topics for future seminars, please feel free to call Bill at (502) 564-5228. Your comments will be welcomed.

* * * * * *

J. VINCENT APRILE II ELECTED TO NLADA BOARD OF DIRECTORS

J. Vincent Aprile II, General Counsel for the Department of Public Advocacy, has been elected to the Board of Directors of the National Legal Aid and Defender Association (NLADA).

Founded in 1911, NLADA is a private, non-profit organization that works to ensure that America's poor people have access to legal representation that is equal in quality to that provided to paying clients. The Association's membership includes the programs and professionals that provide civil and criminal legal assistance to the poor, along with members of the private bar, legal services clients, and the general public.

For approximately the last two years, Vince has been General Counsel for the DPA, and has been on the staff of the office since 1973. He is very active in NLADA and was elected Vice Chairman of the Association's Defender committee in 1982. At the recent NLADA Annual

(Continued, P. 24)

Conference in Boston on November 8, he was elected to be chairperson of the Defender Committee for the upcoming year 1982-1983. Vince has trained lawyers across the country and has lectured at the University of Louisville School of Law since 1975. He has also chaired the Criminal Law Section of the Kentucky Bar Association.

The DPA is proud that Vince has received this honor.

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(Openings, Continued from P. 1)

DPA needs directing attorneys and staff attorneys for all of these offices. Directing Attorneys' salaries start at $24,168; staff attorney with two years experience or more start at $21,924; attorneys with under two years experience start at $14,832. These are all state merit positions.

If you are interested in any of the above positions, please send resume and writing sample to Ernie Lewis, Chief, Trial Services Branch, State Office Building Annex, Frankfort, Kentucky 40601, or call (502) 564-7341.

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(Kaiser, Continued from P. 1)

do more trial work, and he has definitely had that opportunity. Rick enjoys trials, saying that he's nervous beforehand but has "a lot of fun" once in the courtroom. Public defender clients have certainly benefitted from his decision, made at a time when he could only be guaranteed employment for a few months, to begin working at the Hazard office.

Rick is from Milwaukee and graduated from the University of Wisconsin at Milwaukee where he majored in history. His law degree was earned at the University of Tennessee, Knoxville in May of 1978. Rick and his wife Jocelynn live in the country near Hazard with a brood of cats and dogs and enjoy raising a big garden.

Thanks for your outstanding and diligent work on behalf of your clients, Rick. APPALRED's loss was certainly DPA's gain.

GAIL ROBINSON

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