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Kentucky Law Survey: Criminal Procedure

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Criminal Procedure

BY WILLIAM H. FORTUNE*

INTRODUCTION

Many important criminal procedure cases were decided by the Kentucky appellate courts during the Survey period—too many to permit meaningful comment on each case. The author has selected those criminal procedure cases he feels are most significant and has not attempted to comment on penal code cases, most of which involve matters of criminal law.

I. INTERROGATION

In *Denny v. Commonwealth*,¹ the Kentucky Supreme Court ignored applicable decisions of the United States Supreme Court and upheld a conviction based on a confession elicited by a sheriff's statement, "I feel like you have something else you want to tell me."² This statement was made as the sheriff escorted the defendant back to jail after the initial appearance before the district judge. On the previous day the defendant had been advised of his *Miranda* rights³ and had elected to talk, telling the sheriff that he was not guilty.⁴ During that conversation the sheriff had said that he would talk with the defendant any time the defendant wished.⁵ At the arraignment the defendant was readvised of his *Miranda* rights, and counsel was appointed. The defendant neither invoked nor waived his rights to remain silent and to have an attorney present during questioning.⁶

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¹ 670 S.W.2d 847 (Ky. 1984).

² See *id.* at 849.

³ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁴ 670 S.W.2d at 849.

⁵ *Id.*

⁶ *Id.*

The Kentucky Supreme Court assumed the defendant's sixth amendment right to counsel had attached⁷ but held that the sheriff's statement was neither interrogation nor a ruse designed to elicit information.⁸ While the Court attempted to distinguish *Brewer v. Williams*⁹—the famous "Christian burial speech" case—the majority opinion makes no mention of three other United States Supreme Court cases,¹⁰ any one of which requires a different result: *Rhode Island v. Innis*,¹¹ which defines interrogation as direct questioning or statements reasonably likely to elicit an incriminating response;¹² *Edwards v. Arizona*,¹³ which forbids police-initiated interrogation after the invocation of the right to counsel;¹⁴ and *United States v. Henry*,¹⁵ which forbids the police from deliberately eliciting information by *any* means after the commencement of adversary proceedings.¹⁶

⁷ *Id.* at 850.

⁸ *Id.* The Court did not argue that the defendant's exculpatory statements the day before the arraignment amounted to a continuing waiver of the right to remain silent, which would excuse the failure of the sheriff to re-advise the defendant of his rights before questioning him on the way back to jail. *Id.* An argument can be made for the proposition that the defendant's waiver the day before of his right to remain silent was still effective after arraignment. In *Wyrick v. Fields*, 459 U.S. 42 (1982), the Supreme Court held that a pre-polygraph waiver of *Miranda* rights was still in effect after the test was completed and that new warnings were not required before interrogating the subject about the results. It is doubtful, however, that a waiver of *Miranda* rights the day before could serve to waive the sixth amendment right to counsel which attached at arraignment. *United States v. Mohabir*, 624 F.2d 1140, 1147-49 (2d Cir. 1980).

⁹ 430 U.S. 387 (1977).

¹⁰ See 670 S.W.2d at 849-50.

¹¹ 446 U.S. 291 (1980).

¹² *Id.* at 301-02. The sheriff's statement in *Denny* appears to be a direct question in that it calls for an answer. To say otherwise puts a premium on the form of the sentence.

¹³ 451 U.S. 477 (1981).

¹⁴ See *id.* at 484-85. In *Edwards* the defendant had asked for counsel. The police ceased questioning but, after a period, re-advise the individual and secured a waiver of the right to remain silent and to have counsel. *Id.* at 478-80. In *Denny*, although the defendant had not invoked his right to remain silent or his right to counsel, the court had appointed counsel at the initial arraignment. 670 S.W.2d at 849.

¹⁵ 447 U.S. 264 (1980).

¹⁶ See *id.* at 269-75. *Henry* appears controlling. In that case the police arranged for an informer to share the defendant's cell. The defendant made an incriminating statement. Even though there was no compulsion, the Court held the statement inadmissible on the theory that the sixth amendment bars police from attempting to get a person to incriminate himself after the commencement of adversary proceedings. See *id.* The sheriff's statement in *Denny* obviously violates this bar.

II. SEARCH AND SEIZURE

A. Section 10 of the Kentucky Constitution

In 1979, the Kentucky Supreme Court indicated a willingness to construe the search and seizure section of the Kentucky Constitution independently of the fourth amendment to the United States Constitution. In that year, the Court held in *Wagner v. Commonwealth*,¹⁷ that searches of an automobile would be governed by rules promulgated pursuant to section 10 of the Kentucky Constitution,¹⁸ rather than by *South Dakota v. Opperman*,¹⁹ the applicable decision of the United States Supreme Court construing the fourth amendment.

In 1984, however, *Estep v. Commonwealth*²⁰ and *Beemer v. Commonwealth*²¹ dashed any hopes (or fears) that the Kentucky Supreme Court might continue interpreting section 10 to afford protection against unreasonable searches and seizures beyond that provided by the fourth amendment.

Estep overrules *Wagner*²² and follows *United States v. Ross*,²³ the latest in a series of United States Supreme Court cases developing the "automobile exception" to the warrant requirement of the fourth amendment:²⁴

¹⁷ 581 S.W.2d 352 (Ky. 1979). In *Wagner*, the defendant's car was seized by police who suspected it contained various items used in an alleged rape. *Id.* at 355. The Court held that the subsequent "inventory" search of Wagner's car was impermissible because police had failed to obtain either Wagner's consent or a search warrant. *See id.* at 357.

¹⁸ KY. CONST. § 10 provides: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." The Court cited *Oregon v. Hass*, 420 U.S. 714 (1974), which repeated earlier holdings that a state is "free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Id.* at 719. *See* 581 S.W.2d at 356.

¹⁹ 428 U.S. 364 (1976). *Opperman* is similar to *Wagner* in that both involved the impoundment and subsequent "inventory" search of the defendant's car. *See* note 17 *supra*.

²⁰ 663 S.W.2d 213 (Ky. 1984).

²¹ 665 S.W.2d 912 (Ky. 1984).

²² *See Estep v. Commonwealth*, 663 S.W.2d at 216. The Court relied on its previous decision in *Wydman v. Commonwealth*, 512 S.W.2d 507 (Ky. 1974).

²³ 456 U.S. 798 (1982).

²⁴ *See, e.g., Arkansas v. Sanders*, 442 U.S. 753 (1979); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Texas v. White*, 423 U.S. 67 (1975); *Chambers v. Maroney*, 399 U.S. 42 (1970). The "automobile exception" was established in *Carroll v. United States*, 267 U.S. 132 (1925). *Carroll* involved the search of a car by federal prohibition agents. *Id.* at 134. The search yielded 68 bottles of illegal liquor which led to convictions. *Id.* Part of the Court's rationale for the automobile exception was based upon the historically different treatment of autos, as compared to buildings. *Id.* at 153.

Police who have a legitimate reason to stop an automobile and who have probable cause to believe that the objects of the search are concealed somewhere within the vehicle may conduct a warrantless search of the vehicle and all the compartments and containers thereof as well as the contents thereof that are not in plain view.²⁵

In *Aguilar v. Texas*²⁶ and *Spinelli v. United States*²⁷ the United States Supreme Court established a two-pronged test for determining the validity of search warrants based on information from anonymous informants. Under the two-pronged test, the affidavit must establish independently: (1) the basis of the informant's knowledge and (2) the truthfulness of the informant.²⁸ However, in *Illinois v. Gates*²⁹ the Court recently abandoned the two-pronged test in favor of a more lenient "totality of the circumstances" test. The Court held that a deficiency in one prong can be compensated for by the strength of the other prong,³⁰ and that a reviewing court must accord great deference to the magistrate's decision to issue a warrant.³¹

*Beemer v. Commonwealth*³² presented the Kentucky Supreme Court with an opportunity to continue applying the two-pronged test as a matter of state constitutional law. However, stating it was "fully in accord with the relaxation of the federal requirements as expressed in *Illinois v. Gates*,"³³ the Court overruled its decisions applying the two-pronged test.³⁴ The *Beemer* Court took the position that the earlier Kentucky cases "did not con-

²⁵ *Estep v. Commonwealth*, 663 S.W.2d at 215.

²⁶ 378 U.S. 108 (1964).

²⁷ 393 U.S. 410 (1969).

²⁸ See 378 U.S. at 114; 393 U.S. at 416.

²⁹ 462 U.S. 213 (1983). The Court commented that since informants' tips vary greatly in their value and reliability, "[r]igid legal rules are ill-suited to an area of such diversity." *Id.* at 232. Furthermore, the Court was wary of the two-pronged test because it directed analysis into two independent categories—veracity and basis of knowledge. The Court reasoned that the two categories "are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations. . . ." *Id.* at 233.

³⁰ *Id.* at 233-35.

³¹ *Id.* at 236 (quoting *Spinelli v. United States*, 393 U.S. at 419).

³² 665 S.W.2d 912.

³³ *Id.* at 915.

³⁴ See *id.* (overruling *Buchenburger v. Commonwealth*, 482 S.W.2d 747 (Ky. 1972); *Thompson v. Commonwealth*, 472 S.W.2d 884 (Ky. 1971); and *Berkshire v. Commonwealth*, 471 S.W.2d 695 (Ky. 1971)).

stitute an independent determination of Kentucky law but were compelled by federal law.”³⁵ By this reasoning, references to the Kentucky Constitution in the earlier cases must have been gratuitous. The Kentucky Supreme Court appears philosophically in tune with the United States Supreme Court in matters of search and seizure. There will be no independent development of section 10 of the state constitution in the foreseeable future.

B. Wiretaps

In *Basham v. Commonwealth*,³⁶ the Kentucky Supreme Court affirmed convictions based in part on tape recordings obtained pursuant to a federal court order authorizing a wiretap on the telephones of the defendant, Shirley Basham.³⁷ This case is of considerable importance since Kentucky has not seen fit to enact statutes authorizing wiretaps by law enforcement officers.³⁸ There is no “law enforcement exception” in Kentucky to the statutory prohibition against wiretapping.³⁹

Shirley Basham was the object of independent state and federal investigations for the same activity—dealing in stolen property and illegal drugs.⁴⁰ The federal authorities made two unsuccessful attempts to obtain a federal court order to tap Basham’s unlisted residential phones. On learning of the state investigation, the federal agents suggested that the state and federal investigators cooperate. The Kentucky authorities agreed. Through their combined efforts enough information was developed for the federal authorities to document an application for a wiretap order to the satisfaction of the federal district judge. The wiretap was conducted by federal officers. State police were not permitted to listen on the earphones but were kept advised

³⁵ *Id.*

³⁶ 675 S.W.2d 376 (Ky. 1984), *cert. denied*, 53 U.S.L.W. 3668 (U.S. Mar. 18, 1985) (No. 84-855).

³⁷ *Id.* at 377. The recordings also played a part in the conviction of Basham’s wife and son. *Id.* at 378.

³⁸ *Cf.* 18 U.S.C. § 2516(2) (1982) (permits states to enact wiretap legislation conforming to the procedural requirements of 18 U.S.C. § 2518 (1968)).

³⁹ KY. REV. STAT. ANN. § 526.020(2) (Bobbs-Merrill 1975) [hereinafter cited as KRS] makes eavesdropping a Class D felony. The definition of “eavesdrop” in KRS § 526.010 (1975) includes wiretapping.

⁴⁰ 675 S.W.2d at 378.

of what was overheard.⁴¹ Based on this information, the state authorities obtained search warrants which produced stolen property and drugs. Tape recordings of the monitored conversations were introduced into evidence along with the stolen property and drugs.⁴²

Writing for the majority, Justice Leibson reasoned:⁴³ (1) the wiretap was not illegal under state law because it was conducted pursuant to a valid federal court order;⁴⁴ (2) absent express statutory prohibition against the admission of evidence procured through wiretaps, the exclusionary rule should not be applied to the fruits of a valid federal wiretap,⁴⁵ and (3) there was no "collusion" between state and federal officers which would render the evidence inadmissible.⁴⁶

The majority's treatment of the first two issues is sound. It is obvious that federal agents, armed with a federal court order, should not be regarded as being in violation of state law for doing what the order authorizes. The Court held the federal officers were "justified" under state law,⁴⁷ and noted in passing that Kentucky could not make illegal that which Congress deems legal.⁴⁸

Similarly, in light of the purpose of the exclusionary rule—to deter illegal conduct by law enforcement officers⁴⁹—it would make no sense to create a rule which would exclude *legally* obtained evidence in state prosecutions. The Court recognized the concern for privacy evident in the Kentucky statutes making wiretapping a crime, but pointed out that the legislation does

⁴¹ *Id.*

⁴² *Id.*

⁴³ Chief Justice Stephens wrote a brief dissent in which he accused the majority of "doublethink," but he did not point out the flaw, if any, in Justice Leibson's reasoning. *See id.* at 384 (Stephens, C.J., dissenting).

⁴⁴ *Id.* at 379.

⁴⁵ *Id.* at 380-81.

⁴⁶ *Id.* at 381-82.

⁴⁷ *See id.* at 379. KRS § 503.040(2) (1975) provides a defense of "justification" to one acting pursuant to court order.

⁴⁸ *Cf.* 18 U.S.C. § 2510 (1968). The Court cited *United States v. Hall*, 543 F.2d 1229 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977), as supporting the proposition that "federal preemption" precludes states from excluding evidence expressly legal under federal law. *See* 675 S.W.2d at 379.

⁴⁹ *See, e.g., United States v. Calandra*, 414 U.S. 338, 348 (1974).

not contain an evidentiary exclusion.⁵⁰ Stating that it is for the legislature to “strike the balance” between concerns for personal privacy and the need to protect the public against criminal activity, the Court invited the General Assembly “to decide whether *all* information obtained by electronic surveillance should be suppressed in Kentucky prosecutions.”⁵¹

On the third issue, however—whether there was “collusion” between federal and state authorities to avoid the state statute⁵²—the majority opinion is subject to criticism. As applied in *Basham*, the Court reasoned that “if there were no federal investigation in progress and no reason to believe that a federal offense of the kind authorized for a wiretap investigation by 18 U.S.C. § 2516(1), there would be collusion vitiating the legality of the wiretap investigation and the admissibility of the evidence thus obtained.”⁵³ The Court emphasized that federal authorities were investigating Basham at a time when they were unaware of the parallel state investigation.⁵⁴ The following facts, however, indicate that the investigation became primarily a state affair after the combination of forces: (1) state officers were kept advised of what was overheard on the wiretaps; (2) the search warrants were obtained in state court by state police; and (3) the ultimate prosecutions were in state courts.⁵⁵

While it is inevitable that facts will be interpreted differently—“cooperation” to one jurist may be “collusion” to another—the majority’s test for collusion affords an opportunity for state officers to avoid the strictures of state law. In the first place Justice Leibson chose a word—“collusion”—which is defined as an “agreement to defraud,”⁵⁶ and later stated that “fraud and illicit activity [are] inherent in the term collusion.”⁵⁷ This moralistic terminology is likely to divert trial courts from

⁵⁰ See 675 S.W.2d at 380. The Court contrasted *People v. Jones*, 106 Cal. Rptr. 749 (Cal. App.), *appeal dismissed*, 429 U.S. 804 (1973), and *State v. Williams*, 617 P.2d 1012 (Wash. 1980), in which the applicable statutes contain exclusionary provisions. See *id.*

⁵¹ 675 S.W.2d at 380.

⁵² See text accompanying notes 44-46 *supra*.

⁵³ 675 S.W.2d at 381-82.

⁵⁴ See *id.* at 382.

⁵⁵ See *id.*

⁵⁶ BLACK'S LAW DICTIONARY 240 (5th ed. 1979).

⁵⁷ 675 S.W.2d at 382.

what should be the inquiry—whether the federal wiretap in question was an accommodation for a state investigation.⁵⁸ Second, the opinion is misleading in implying that federal and state crimes are likely to be separate. If this were true there would be little likelihood of federal agents being in a position to accommodate a state investigation. In fact many state crimes are also federal crimes, and a state investigation can easily turn into a federal investigation, or vice versa. In the instant case Shirley Basham was dealing in illegal drugs and in the interstate transportation of stolen goods. This activity was illegal under both state and federal law.⁵⁹ It is misleading for the Court to stress the “separate responsibilities [of law enforcement] investigating federal and state crimes, respectively.”⁶⁰ In cases like *Basham*, there must always be a federal investigation because federal agents will have to apply for the wiretap order. There will always be reason to believe that a federal offense of the kind specified in 18 U.S.C. section 2516(1) will be present because the federal judge must find this to be so before issuing the wiretap order.⁶¹ An inquiry which stops with a finding of a federal investigation and a potential federal crime is insufficient. To deter state officers from circumventing state law, the Court should make it clear that a trial court must determine who decided to seek the wiretap order and for what purpose.

C. Probable Cause and the Anonymous Tip

*Graham v. Commonwealth*⁶² and *Whisman v. Commonwealth*⁶³ are court of appeals decisions arising from the same fact situation. The cases add significantly to Kentucky search

⁵⁸ Cf. *People v. Fidler*, 391 N.E.2d 210 (Ill. App. 1979) (relied on by the Court in *Basham*). In *Fidler* federal authorities obtained the wiretap without state assistance, monitored the phones, developed evidence of a federal crime, and obtained and executed a federal search warrant to obtain further evidence. They unexpectedly found evidence of an unrelated state crime and turned this evidence over to state police. The Appellate Court of Illinois held that the evidence could be used in the state's case against the defendant. See *id.* at 213.

⁵⁹ See 21 U.S.C. § 841 (1980) (trafficking in illegal drugs); KRS § 218A.140 (1978) (same). See also 18 U.S.C. § 659 (1966) (interstate transportation of stolen property); KRS § 514.110 (1975) (receiving stolen property).

⁶⁰ See 675 S.W.2d at 382.

⁶¹ See 18 U.S.C. § 2518(3)(a).

⁶² 667 S.W.2d 697 (Ky. Ct. App. 1984).

⁶³ 667 S.W.2d 394 (Ky. Ct. App. 1984).

and seizure law. In addition the opinions are interesting in that their rationales and statements of fact are different, even though one member of the court of appeals sat on both panels.⁶⁴

The cases grew out of an anonymous tip which led to the stopping of a car. As recited in *Graham*, the police received an anonymous call that someone in a white Camaro had drawn a gun and that the car had pulled into a Save-Mart lot. Two police cars went to the scene and stopped a white Camaro somewhere in the vicinity of the Save-Mart. Graham was driving; Whisman, the automobile owner, was a passenger. Pills were noticed on the floor and a search of the car revealed bottles of drugs and a gun in the glove compartment. A pat down search of Graham produced a packet of illegal drugs which led to his conviction.⁶⁵

As recited in *Whisman*, the facts are the same except that the opinion states that the officers arrived at the Save-Mart and saw the Camaro parked there with two occupants inside.⁶⁶ As the car started to leave, the officers stopped it and ordered the occupants out; the plain view seizure and search of the glove compartment produced the drugs that convicted Whisman.⁶⁷

The *Graham* court treated the stop of the car as a *Terry*⁶⁸ stop and defined the issue as whether an anonymous tip can form the basis for an officer's reasonable suspicion.⁶⁹ Relying on *Cook v. Commonwealth*,⁷⁰ the court answered this question in the affirmative.⁷¹

The *Whisman* court, on the other hand, stated the issue to be whether the police had probable cause to stop the vehicle.⁷² As a matter of first impression, the court assumed the "totality

⁶⁴ Judge McDonald wrote the opinion in *Whisman* and concurred in *Graham*.

⁶⁵ 667 S.W.2d at 698.

⁶⁶ See 667 S.W.2d at 395.

⁶⁷ *Id.* at 395-96.

⁶⁸ See *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (police may stop and frisk a person on reasonable suspicion that he or she is armed and dangerous).

⁶⁹ See 667 S.W.2d at 698.

⁷⁰ See 649 S.W.2d 198 (Ky. 1983). In *Cook*, the information leading to the defendant's arrest was obtained from an informant who had furnished reliable information in the past. *Id.* at 199. The Court held that the information brought the police actions within the realm of *Terry*, rendering the seized evidence admissible. *Id.* at 200-01.

⁷¹ 667 S.W.2d at 699. The court stated that its research had found this to be an issue of first impression, and that it would therefore follow the rule of *Cook*, although it did require a slight extension to cover the facts at bar. See *id.*

⁷² See 667 S.W.2d at 396.

of the circumstances'' approach of *Illinois v. Gates*⁷³ should be applied to warrantless searches on anonymous tips.⁷⁴ Applying the *Gates* test, the court found that probable cause arose when the police discovered the Camaro where the tipster said it would be.⁷⁵

While the *Whisman* court placed the Camaro in the Save-Mart parking lot when the police arrived, the *Graham* court placed the car on the streets somewhere in the vicinity.⁷⁶ Thus, in the *Graham* version the confirmation of the tip was weaker. This may explain the court's application of *Terry*, with its less-exacting reasonable suspicion standard.

Graham and *Whisman* are more than a judicial curiosity. While *Graham* seems to be a sound application of *Terry*, *Whisman* shows that the Kentucky appellate courts read *Gates* as authority for the proposition that probable cause follows from *any* confirmation of an anonymous tip that a dangerous situation exists. Of course, probable cause supports not only an investigatory stop but also arrest and a full search. The holding in *Whisman* was not dictated by the facts because, as pointed out in *Graham*, the investigatory stop (which could be supported by reasonable suspicion) revealed the pills in plain view.⁷⁷ The discovery of the pills supported everything which occurred thereafter. As recited in *Whisman*, the information available to the officers at the time of the stop consisted of a tip plus one confirming fact—the presence of a car matching the description given by the tipster. This is far short of the information set out in the affidavit in *Illinois v. Gates*, which included a detailed anonymous letter predicting future actions which were in part corroborated by police investigation.⁷⁸ The Kentucky court's reliance on *Gates* is justified only if *Gates* can be read as eliminating the distinction between probable cause and reasonable

⁷³ See notes 29-33 *supra* and accompanying text.

⁷⁴ See 667 S.W.2d at 397. The search in *Gates* was pursuant to a warrant. The Kentucky court reasonably concluded that the *Gates* approach is not restricted to cases involving warrants. See *id.*

⁷⁵ See *id.*

⁷⁶ 667 S.W.2d at 699.

⁷⁷ See *id.* at 398.

⁷⁸ See *Illinois v. Gates*, 462 U.S. at 225. Justice Rehnquist, in the majority opinion, also points out that "the anonymous letter [revealed] a range of details relating not just to easily obtained facts . . . but [also] to future actions of third parties." See *id.* at 245.

suspicion, a result not supported by any decision of the United States Supreme Court.⁷⁹

D. *DUI Roadblocks*

In *Kinslow v. Commonwealth*,⁸⁰ the court of appeals upheld the constitutionality of a road block established by state and local police to detect and arrest drivers under the influence of alcohol or drugs.⁸¹ In a short opinion, the court stated:

The question is whether the road block was conducted in a manner not permitting the 'unconstrained discretion' inherent in some road block situations and condemned in *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L.E.2d 660 (1979). The key here is the fact that all vehicles were stopped. Therefore, the officers did not exercise the discretion referred to and condemned in *Delaware v. Prouse*. . . .⁸²

Hopefully this opinion will not be the last word from Kentucky appellate courts on the subject. *Kinslow* leaves the impression that the *only* issue of constitutional significance is whether officers have discretion to choose which car to stop.⁸³ Courts in other jurisdictions, however, have concluded that discretion is only one factor to be considered in determining the constitutionality of DUI road blocks.⁸⁴

It is clear that stopping an automobile is a "seizure" within the meaning of the fourth and fourteenth amendments to the United States Constitution, even though the purpose of the stop is limited and the detention of the occupants is brief.⁸⁵ Since the fourth amendment forbids only "unreasonable" searches and seizures, the question is the reasonableness of governmental action. In considering the constitutionality of identification checks, the United States Supreme Court articulated a balancing test for

⁷⁹ *E.g.*, *Hayes v. Florida*, 36 CRIM. L. REP. (BNA) 3216 (U.S. 1985). Transporting a suspect to a police station for fingerprinting requires probable cause; since only reasonable suspicion was present the seizure was unreasonable. *Id.* at 3216-17.

⁸⁰ 660 S.W.2d 677 (Ky. Ct. App. 1983), *cert. denied*, 104 S. Ct. 1606 (1984).

⁸¹ *See id.*

⁸² *Id.* at 678.

⁸³ The court viewed this issue not only as "the key," but as the only pertinent issue; no other aspect of the road block procedure was mentioned. *See id.*

⁸⁴ *See* cases cited *infra* note 106.

⁸⁵ *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

temporary seizures: "[T]he constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."⁸⁶ This three-pronged test requires that reviewing courts (1) consider the legitimacy of the governmental interest advanced to support the seizure; (2) judge the efficacy of the seizure in advancing the governmental interest; and (3) weigh the interference with individual liberty against the advancement of governmental interests. Ordinarily, individualized suspicion is required to support a search or seizure.⁸⁷ However, the Supreme Court has recognized that certain legitimate governmental interests cannot be adequately protected by searches and seizures on individualized suspicion. In these situations, the Court has approved systematic searches and seizures determined by the application of neutral factors. Thus in *Camara v. Municipal Court*,⁸⁸ the Court held that building and fire codes advance a legitimate governmental interest and that enforcement necessitates inspections based on neutral factors such as passage of time, the nature of the building and the condition of an entire area.⁸⁹ The Court held that building inspectors need not await the development of individualized suspicion that a particular dwelling has become unsafe.⁹⁰ The Court regarded periodic inspections as a necessary tool in the enforcement of minimum fire, housing and sanitation standards.⁹¹

In *United States v. Martinez-Fuerte*,⁹² the Court upheld the constitutionality of a fixed checkpoint on the interstate highway between San Diego and Los Angeles. The purpose of the checkpoint was to abate the northward flow of illegal aliens.⁹³ The Court recognized the legitimacy of United States immigration policy and the gravity of the illegal alien problem,⁹⁴ and found

⁸⁶ *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

⁸⁷ *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

⁸⁸ 387 U.S. 523 (1967).

⁸⁹ *Id.* at 538.

⁹⁰ *Id.* at 535-38.

⁹¹ *See id.* at 535-37. The Court further held in *Camara* that a warrant is required for an administrative search. *See id.* at 539.

⁹² 428 U.S. 543 (1976).

⁹³ *Id.* at 551-54.

⁹⁴ *See id.* at 551.

that routine stops for inquiry at permanent checkpoints play an important role in the effort to deter illegal immigration.⁹⁵ In reviewing the procedures at the permanent road block, the Court noted the presence of warnings, the permanent nature of the checkpoints, the absence of discretion in the initial stops, the brevity of the stops, and the absence of search beyond visual inquiry. The Court found these factors supported the conclusion that intrusions were minimal and outweighed by the need for permanent checkpoints to check illegal immigration.⁹⁶

While *Camara* requires that subjects be selected for administrative searches by application of neutral criteria,⁹⁷ *Martinez-Fuerte* seems to treat neutrality—the absence of discretion—as only one factor to be considered in judging reasonableness. In *Martinez-Fuerte*, all cars were stopped at the checkpoints, but only a small percentage were waved to a secondary inspection area.⁹⁸ Both the majority⁹⁹ and the dissent¹⁰⁰ assumed that Border Patrol agents made secondary inspections on the basis of apparent Mexican ancestry, a factor condemned in *Unites States v. Brignoni-Ponce*.¹⁰¹ The Court's discussion of the point, however, concludes: "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."¹⁰² Thus it cannot be concluded from *Martinez-Fuerte* that discretion necessarily contaminates an otherwise reasonable search, nor should *Camara* and *Martinez-Fuerte* be read as holding that the absence of discretion cures an otherwise unreasonable search.

In *Delaware v. Prouse*, the Court relied on *Brignoni-Ponce* and *Martinez-Fuerte* to hold unconstitutional discretionary spot

⁹⁵ See *id.* at 554. In 1973, 17,000 aliens were apprehended at the San Clemente checkpoint. *Id.*

⁹⁶ See *id.* at 562 n.15.

⁹⁷ See text accompanying note 62 *supra*.

⁹⁸ 428 U.S. at 554. During one eight-day period, 146,000 cars passed through the checkpoint; only 820 were referred to the secondary inspection area. In 171 of those detained vehicles, agents discovered a total of 725 deportable aliens. *Id.*

⁹⁹ See *id.* at 563.

¹⁰⁰ See *id.* at 571-73 (Brennan, J., dissenting).

¹⁰¹ See 422 U.S. 873, 886-87 (1975).

¹⁰² 428 U.S. at 563-64.

checks for operator license and car registration.¹⁰³ While it is true that the presence of "unbridled discretion" was of primary concern to the Court, it is not clear that the Court would have invalidated a roadblock/check point with officers given discretion, as in *Martinez-Fuerte*, to select cars and drivers for additional questioning and inspection.¹⁰⁴ Nor is it clear that the Court would have upheld a nondiscretionary scheme in which motorists were subjected to substantial delays for insubstantial gains in deterring or detecting traffic violators.¹⁰⁵

DUI road blocks have been the subject of a number of recent opinions from state appellate courts.¹⁰⁶ *Little v. State*¹⁰⁷ is typical of the better-reasoned opinions. In allowing such road blocks, the Maryland Court of Appeals noted the gravity of the drunk driving problem and the effectiveness of road blocks for both detection and deterrence.¹⁰⁸ In addition, the court found procedures were being used which substantially reduced the possibility that a motorist would be singled out arbitrarily or subjected to harassment.¹⁰⁹ Road block locations were selected by supervisors on the basis of neutral standards—data on alcohol-related accidents supplied by the highway department.¹¹⁰ All traffic was stopped unless congestion occurred, in which case the officer in charge was empowered to temporarily suspend the operation.¹¹¹ Field officers were instructed on what to say to motorists and

¹⁰³ See *Delaware v. Prouse*, 440 U.S. at 663. The Court stated that there must be "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered" before such a stop is justified. *Id.*

¹⁰⁴ The Court stated that motorists are less likely to be frightened or annoyed by checkpoints than by roving stops. *Id.* at 657.

¹⁰⁵ The Court pointed out the need for the state to show the productivity of roving stops—why roving stops were deemed to be a necessary complement to stops based on individualized suspicion. See *id.* at 660.

¹⁰⁶ See *State v. Superior Court*, 36 CRIM. L. REP. (BNA) 2182 (Ariz. 1984); *Jones v. State*, 36 CRIM. L. REP. (BNA) 2004 (Fla. Ct. App. 1984); *People v. Bartley*, 35 CRIM. L. REP. (BNA) 2318 (Ill. App. 1984); *State v. Deskins*, 673 P.2d 1174 (Kan. 1983); *Little v. State*, 479 A.2d 903 (Md. 1984); *Commonwealth v. McGeoghegan*, 449 N.E.2d 349 (Mass. 1983); *State v. Cocco*, 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980); *People v. Scott*, 36 CRIM. L. REP. (BNA) 2181 (N.Y. 1984); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

¹⁰⁷ 479 A.2d 903.

¹⁰⁸ See *id.* For example, the court cited a 17% decrease in alcohol-related accidents in one participating county. See *id.* at 913.

¹⁰⁹ See *id.*

¹¹⁰ *Id.* at 905.

¹¹¹ *Id.*

on what to do if a driver showed signs of intoxication.¹¹² Interrogations and searches were forbidden in the absence of individualized suspicion.¹¹³

In *State v. Deskins*,¹¹⁴ the Kansas court listed a number of factors to be considered in evaluating the constitutional permissibility of road blocks:

(1) the degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear on the test.¹¹⁵

The Kansas court read *Prouse*¹¹⁶ as establishing that "unbridled discretion" of field officers would contaminate a road block even though all other factors weighed in favor of the state.¹¹⁷

While indicating that officers cannot be given discretion to select which cars to stop, *Prouse* and *Martinez-Fuerte* seem to permit the exercise of *some* discretion after the car is stopped—on such matters as the nature and length of questioning, shining a light into the car, and asking the driver to perform field sobriety tests.¹¹⁸

There are two misconceptions about the constitutional requirements for a valid road block. The first is that *Martinez-Fuerte* requires road blocks to be permanent, with advance notice of the site to the public.¹¹⁹ If DUI road blocks were permanent,

¹¹² *Id.* at 906.

¹¹³ *Id.*

¹¹⁴ 673 P.2d 1174.

¹¹⁵ *Id.* at 1185.

¹¹⁶ See notes 103-05 *supra* and accompanying text.

¹¹⁷ See 673 P.2d at 1185.

¹¹⁸ See notes 99-104 *supra* and accompanying text.

¹¹⁹ See *State v. Olgaard*, 248 N.W.2d at 394. In *Olgaard*, the Supreme Court of South Dakota found all other aspects of the roadblock to be within the standards of *Martinez-Fuerte*. Consequently, the critical fact was that the road block at issue was not permanent. See *id.*

drinking drivers would simply use alternate routes. Recent decisions have recognized that the effectiveness of road blocks depends on the public's ignorance of exact sites.¹²⁰ Although advance publicity serves as a useful deterrent, the public should only be told that road blocks will be established on a certain date or dates.

The second misconception is that the state must establish the superiority of road blocks as a device to catch drunk drivers. In *People v. Bartley*,¹²¹ for example, the Illinois Appellate Court struck down a road block because, "there is nothing in the record which shows that the only practical or effective means of catching drunk drivers is by arbitrarily subjecting all citizens to police scrutiny without suspicion of wrong-doing."¹²² In *State ex Rel. Ekstrom v. Justice Court of State*,¹²³ the Arizona Supreme Court reached a similar conclusion, holding that the state had "stipulated itself out of court" by agreeing that highway patrol officers become highly skilled at detecting drunk drivers and can detect many drunk drivers without roadblocks.¹²⁴ Dissenting in the Kansas case of *State v. Deskins*,¹²⁵ Justice Prager noted the relative ineffectiveness of the road block in question as a detection device—over a four hour period, thirty-five police officers stopped 2,000 to 3,000 vehicles and netted only fifteen drunk drivers.¹²⁶

These opinions overlook the fact that, given advance publicity, road blocks can operate as a deterrent—public awareness of the presence of road blocks will deter those who would drink and drive. Thus, in *State v. Superior Court*,¹²⁷ the Arizona Supreme Court distinguished *Ekstrom* and upheld a publicized road block in Tucson where the state showed a reduction in alcohol-related accidents.¹²⁸ The New York Court of Appeals

¹²⁰ See *Little v. State*, 479 A.2d at 914; *People v. Scott*, 36 CRIM. L. REP. (BNA) at 2182.

¹²¹ 35 CRIM. L. REP. (BNA) 2318.

¹²² *Id.*

¹²³ 663 P.2d 992 (Ariz. 1983).

¹²⁴ See *id.* at 996.

¹²⁵ 673 P.2d 1174.

¹²⁶ See *id.* at 1187 (Prager, J., dissenting).

¹²⁷ 36 CRIM. L. REP. (BNA) 2182 (Ariz. 1984).

¹²⁸ *Id.* at 2183. It was evident, in fact, that the Tucson police had used the facts of *Ekstrom* in an attempt to set up a constitutional road block. See *id.*

recently held that the state was entitled to the inference that road blocks were partly responsible for the reduction of alcohol-related accidents since 1980.¹²⁹ The Maryland Court of Appeals also relied on deterrence in upholding the constitutionality of road blocks in that state.¹³⁰

Kentucky state and local police are apparently setting up DUI road blocks on the authority of *Kinslow v. Commonwealth*.¹³¹ To be constitutional the road blocks must satisfy the following criteria: (1) site selection must be determined by supervisory personnel according to neutral criteria;¹³² (2) either all cars must be stopped or neutral criteria (i.e., every third car if traffic is light, every fifth car if traffic is heavy) must be employed to guard against arbitrarily singling out drivers;¹³³ (3) field officers should be instructed on procedures to follow in approaching cars and questioning drivers, although it seems that field officers may have some discretion here;¹³⁴ (4) public safety must be assured by adequate illumination, stopping areas, and other factors;¹³⁵ (5) uniformed officers should be employed to lessen public apprehension;¹³⁶ and (6) road blocks should be designed to prevent lengthy delays.¹³⁷ In addition, it clearly weighs in the state's favor if the road blocks are publicized, because the state then can rely on deterrence as a rationale.¹³⁸ The Kentucky appellate courts should recognize the need to expand *Kinslow* to provide adequate direction to law enforcement.

III. RIGHT TO COUNSEL

On several occasions the Kentucky Supreme Court has suggested that because of the likelihood of conflict of interest,

¹²⁹ See *People v. Scott*, 36 CRIM. L. REP. (BNA) at 2182.

¹³⁰ See *Little v. State*, 479 A.2d at 913.

¹³¹ For a discussion of *Kinslow*, see notes 80-83 *supra* and accompanying text. See also *The Courier-Journal* (Louisville), Dec. 16, 1984, at B10 (roadblocks established in at least eleven counties, 55 arrests made; Kentucky State Police spokesperson attributed the relatively small number of arrests to advance publicity).

¹³² See *Jones v. State*, 36 CRIM. L. REP. (BNA) at 2005 (no proof that the roadblock was established according to plan of supervisory personnel); *State v. Cocomo*, 427 A.2d at 134 (roadblock established on high accident road—reasonable criterion).

¹³³ See *State v. Deskins*, 673 P.2d at 1185; 479 A.2d at 909.

¹³⁴ See 479 A.2d at 906.

¹³⁵ *Id.* at 914; *Commonwealth v. McGeoghegan*, 449 N.E.2d at 353.

¹³⁶ See 479 A.2d at 914.

¹³⁷ See 673 P.2d at 1185; 449 N.E.2d at 353.

¹³⁸ See note 121-30 *supra* and accompanying text.

separate counsel should be appointed for each indigent defendant in a criminal case.¹³⁹ In 1977, the Court adopted what appears to be a prophylactic rule designed to eliminate case-by-case inquiries into the existence of conflict.¹⁴⁰ Kentucky Rule of Criminal Procedure (RCr) 8.30 provides that no attorney shall act as counsel for more than one defendant unless the judge explains to each defendant the possibility of a conflict of interest with the co-defendant, and each defendant signs a statement to the effect that the possibility of a conflict of interest has been explained and the person nevertheless desires to be represented by the attorney in question.¹⁴¹

The purpose of the rule is clear. The Court was establishing a procedure to be routinely employed by trial judges in order to insulate convictions from after-the-fact claims of conflict.¹⁴² Predictably, since the adoption of the rule, the Kentucky courts have treated waivers of the right to separate counsel as forestalling later claims of inadequacy of counsel.¹⁴³ The Kentucky

¹³⁹ See *Mishler v. Commonwealth*, 556 S.W.2d 676, 682 (Ky. 1977); *Ware v. Commonwealth*, 537 S.W.2d 174, 177 (Ky. 1976); *Maynard v. Commonwealth*, 507 S.W.2d 143, 144 (Ky. 1974).

¹⁴⁰ See KY. R. CRIM. P. 8.30 [hereinafter cited as RCr].

¹⁴¹ RCr 8.30(1) provides:

If the crime of which the defendant is charged is punishable by a fine of more than \$500, or by confinement, no attorney shall be permitted at any stage of the proceedings to act as counsel for him while at the same time engaged as counsel for another person or persons accused of the same offense or of offenses arising out of the same incident or series of related incidents unless (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to [be in] the best interests of one client may not be to the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to him by the court and that he nevertheless desires to be represented by the same attorney.

¹⁴² See, e.g., *Milsap v. Commonwealth*, 662 S.W.2d 488, 491 (Ky. Ct. App. 1984) (obtaining a waiver by the defendant on potential conflicts of interest serves judicial economy by eliminating a later claim of conflict).

¹⁴³ See *White v. Commonwealth*, 671 S.W.2d 241, 243-45 (Ky.), *cert. denied*, 105 S. Ct. 363 (1984); *Brock v. Commonwealth*, 627 S.W.2d 42, 44 (Ky. Ct. App. 1981), *cert. denied*, 456 U.S. 1009 (1982). The court of appeals in *Brock*, however, voiced its concern that the defendant was not aware of the consequences of joint representation. See *id.* It is very difficult for even a conscientious judge to ascertain that the defendant understands the problems which may arise through joint representation. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1102-03 (1978-79).

Supreme Court should treat noncompliance with RCr 8.30 as automatic grounds for reversal, since the purpose of the rule is to encourage compliance by trial court judges.¹⁴⁴ In *Trulock v. Commonwealth*,¹⁴⁵ the court of appeals so read RCr 8.30, and refused to inquire into the existence of prejudice. The court assumed that no prejudice had occurred yet reversed the conviction because it viewed the rule as mandatory.¹⁴⁶

In *Smith v. Commonwealth*,¹⁴⁷ however, the Supreme Court overruled *Trulock* and held that prejudice must be shown to justify overturning a conviction obtained in disregard of RCr 8.30.¹⁴⁸ As the dissent in *Smith* pointed out, the cases relied on by the majority¹⁴⁹ were decided before the adoption of the rule,¹⁵⁰ and the majority opinion is otherwise without supporting rationale. The result in *Smith* is clear: a case-by-case inquiry is required to determine prejudice when trial judges fail to comply with a rule designed to obviate the necessity for case-by-case inquiry.

In a related matter the court of appeals seemed to approve the practice of appointing an attorney from a public defender's office to challenge the effectiveness of representation afforded by another attorney from the same office. In *Milsap v. Commonwealth*,¹⁵¹ the defendant was represented by an attorney from the Jefferson District Public Defender's Office. After conviction, the defendant filed a RCr 11.42¹⁵² motion alleging ineffective assistance of counsel. The trial judge appointed another attorney from the same office to represent the defendant in this collateral

¹⁴⁴ Cf. *McCarthy v. United States*, 394 U.S. 459, 468-72 (1969) (automatic reversal for violations of FED. R. CRIM. P. 11 insures that guilty pleas will be accompanied by procedural safeguards and conserves judicial resources). *McCarthy*, however, has in effect been overruled by the adoption of FED. R. CRIM. P. 11(h) which provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

¹⁴⁵ 620 S.W.2d 329 (Ky. Ct. App. 1981).

¹⁴⁶ See *id.* at 330-31.

¹⁴⁷ 669 S.W.2d 527 (Ky. 1984).

¹⁴⁸ See *id.* at 530.

¹⁴⁹ The majority relied on *Mishler v. Commonwealth*, 556 S.W.2d 676; *Self v. Commonwealth*, 550 S.W.2d 509 (Ky. 1977); and *Ware v. Commonwealth*, 537 S.W.2d 174 (Ky. 1976). See 669 S.W.2d at 530.

¹⁵⁰ 669 S.W.2d at 531 (Gant, J., dissenting).

¹⁵¹ 662 S.W.2d at 488.

¹⁵² RCr 11.42 governs the procedure for vacating, setting aside or correcting sentence.

attack on the conviction.¹⁵³ After denial of the motion for new trial, the defendant filed a second RCr 11.42 motion, alleging that his second attorney's representation suffered from a conflict of interest. The motion was denied, and the court of appeals affirmed because the defendant failed to show how he was prejudiced by the conflict.¹⁵⁴ In affirming, however, the court said that trial judges should establish for the record that the defendant is aware of the conflict and elects to waive it.¹⁵⁵ As stated by the court: "In the absence of a waiver, a public defender from another office or a private attorney should be appointed. In this way, the rights of criminal defendants will be scrupulously protected while judicial economy also will be well served by obviating a later claim of conflict."¹⁵⁶

In *Ivey v. Commonwealth*,¹⁵⁷ another significant case involving the right to counsel, the court of appeals held that the test of *Henderson v. Commonwealth*¹⁵⁸—"counsel reasonably likely to render and rendering reasonably effective assistance"¹⁵⁹—applies to retained as well as appointed counsel.¹⁶⁰ The court recognized the logic of the argument that the state ought not be penalized—through the setting aside of a conviction—for the negligence of an attorney selected by the defendant, unless the negligence is so obvious that the prosecutor or judge should take notice.¹⁶¹ The court, however, read *Henderson* as overruling the earlier "farce and mockery" test in all respects.¹⁶² Applying the test of reasonable effectiveness the court concluded that the attorney's failure to properly argue the Interstate Agreement on Detainers¹⁶³ constituted ineffective assistance of counsel.¹⁶⁴

¹⁵³ 662 S.W.2d at 489.

¹⁵⁴ See *id.* at 490-91.

¹⁵⁵ See *id.* at 491.

¹⁵⁶ *Id.*

¹⁵⁷ 655 S.W.2d 506 (Ky. Ct. App. 1983).

¹⁵⁸ 636 S.W.2d 648 (Ky. 1982).

¹⁵⁹ *Id.* at 650. See also *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984) (test for sixth amendment purposes is one of reasonable competence).

¹⁶⁰ See 655 S.W.2d at 509.

¹⁶¹ *Id.*

¹⁶² See *id.* As the court noted, *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) indicates that the same test should apply to retained and appointed counsel in conflict cases. See 655 S.W.2d at 509.

¹⁶³ See KRS § 440.450 (1984).

¹⁶⁴ See 655 S.W.2d at 512.

In other cases involving the right to counsel the Kentucky Supreme Court made it clear that the responsibility for paying for an indigent defendant's expert witness falls on the counties,¹⁶⁵ and held that the state is under no obligation to afford a transcript¹⁶⁶ or counsel¹⁶⁷ to a RCr 11.42 movant whose petition fails to establish grounds for relief. In two death penalty cases the Court affirmed the refusal of the trial courts to order the counties to provide funds to pay experts to challenge the composition of the juries.¹⁶⁸ Essentially the Court held that a defendant must make a prima facie case of irregularity in order to show that a jury expert is necessary to the defense.¹⁶⁹

IV. CHALLENGES TO PRIOR CONVICTIONS

Persistent felony offender laws provide for enhanced penalties for those who commit crimes after having previously been convicted.¹⁷⁰ An enhanced penalty does not follow automatically from a prior felony conviction; the indictment must specify the prior conviction, and the prosecutor must prove it during the persistent felony offender stage of the case.¹⁷¹ The defendant may wish to assert that the prior conviction is invalid. The usual contention is that the conviction is in violation of the sixth amendment because counsel was not provided.¹⁷² *Commonwealth v. Gadd*¹⁷³ sets out the procedures which must be followed in challenging a prior conviction.

¹⁶⁵ See, e.g., *Perry County Fiscal Court v. Commonwealth*, 674 S.W.2d 954, 957 (Ky. 1984). The court of appeals has also held that counties are obligated to supplement state funding of local defender operations. See *Boyle County Fiscal Court v. Shewmaker*, 666 S.W.2d 759, 762 (Ky. Ct. App. 1984).

¹⁶⁶ See *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858-59 (Ky. 1983).

¹⁶⁷ *Commonwealth v. Stamps*, 672 S.W.2d 336, 339 (Ky. 1984) (modifying *Commonwealth v. Ivey*, 599 S.W.2d 456, 457-58 (Ky. 1980), which held that counsel must be appointed in any case where requested by a RCr 11.42 movant).

¹⁶⁸ See *McQueen v. Commonwealth*, 669 S.W.2d 519, 521-22 (Ky.), cert. denied, 105 S. Ct. 269 (1984); *Ford v. Commonwealth*, 665 S.W.2d 304, 309 (Ky. 1983).

¹⁶⁹ *Ford v. Commonwealth*, 665 S.W.2d at 309.

¹⁷⁰ See KRS § 532.080 (1984).

¹⁷¹ See KRS § 532.080(1). The prosecutor must also prove that the defendant was over eighteen at the time of the prior offense and that he or she is presently over twenty-one. KRS § 532.080(2). See also *Hon v. Commonwealth*, 670 S.W.2d 851, 853 (Ky. 1984) ("defendant in a persistent felony offender prosecution must have been at least eighteen years old at the time the previous offenses were committed").

¹⁷² See, e.g., *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967).

¹⁷³ 665 S.W.2d 915 (Ky. 1984).

The defendant must file a pretrial motion in the court in which the persistent felony indictment is brought.¹⁷⁴ The motion should set out the basis for the defendant's contention that a prior conviction is invalid.¹⁷⁵ The court then holds a pre-trial hearing, at which time the defendant has the burden of proving the invalidity of the conviction.¹⁷⁶ If the defendant fails to follow these procedures the courts will refuse to entertain a challenge to the prior convictions.¹⁷⁷

V. MEDIA ACCESS TO TRIALS

In *Lexington Herald-Leader v. Meigs*,¹⁷⁸ the Kentucky Supreme Court held that the trial judge in a death penalty case did not abuse his discretion in closing individual voir dire to the press and public.¹⁷⁹ While stating that it was not arranging "a series of hoops for the trial court to jump through,"¹⁸⁰ the Court did summarize the constitutional requirements. According to the Court, if the public or press objects to the closure the court must provide an opportunity to be heard.¹⁸¹ In addition, the person seeking closure bears the burden of establishing the need for closure.¹⁸² Finally, in determining the need for closure, the court must consider three factors: (1) the importance of the right which the movant seeks to protect by closure; (2) alternatives to closure; and (3) the effectiveness of closure in protecting the right.¹⁸³ As applied to the facts of *Meigs*, the Court concluded that closure of individual voir dire was necessary to prevent prospective jurors from being exposed to news accounts of the questions of counsel and the answers of other prospective jurors

¹⁷⁴ *Id.* at 918. The Supreme Court held that it would be unreasonable to require the defendant to go back to the court in which the conviction was obtained. *See id.* at 917.

¹⁷⁵ *Id.* at 918.

¹⁷⁶ *Id.*

¹⁷⁷ *See* *Commonwealth v. Stamps*, 672 S.W.2d at 338. *See also* *Alvey v. Commonwealth*, 648 S.W.2d 858, 860 (Ky. 1983); *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983).

¹⁷⁸ 660 S.W.2d 658 (Ky. 1983).

¹⁷⁹ *See id.* at 662-63.

¹⁸⁰ *Id.* at 665.

¹⁸¹ *Id.* at 666.

¹⁸² *Id.*

¹⁸³ *See id.* at 663-64.

regarding both knowledge of facts of the case and death penalty views.¹⁸⁴ From the accused's point of view, it would be an empty victory if the trial judge granted individual voir dire on the issue of pre-trial publicity, only to find that future jurors had read news accounts of the dialogues between counsel and prospective jurors referring to the allegedly prejudicial publicity.¹⁸⁵ By asking a probing question the attorney would be supplying the headline that would affect those not yet summoned to jury duty.

Although its rationale is somewhat weakened by a recent United States Supreme Court opinion,¹⁸⁶ *Meigs* is a good decision. While setting out a general proposition, the Court leaves development of specific procedures for closure motions to the trial courts, and manifests a willingness to defer to the discretion of trial courts in these matters.¹⁸⁷

VI. TRIAL

In *Commonwealth v. Sawhill*,¹⁸⁸ the Kentucky Supreme Court clarified the standard to be applied in ruling on motions for directed verdict. After reviewing previous cases, the Court adopted the following language:

With the evidence viewed in the light most favorable to the Commonwealth, if the totality of the evidence is such that the trial judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient and the case should be submitted to the jury. If the evidence cannot meet this test it is insufficient and a directed verdict of acquittal should be granted.¹⁸⁹

In another case, the Court held that judges should not give an instruction which states that "if you find the defendant guilty

¹⁸⁴ *Id.* at 666.

¹⁸⁵ *Id.* at 666-67.

¹⁸⁶ *Meigs* is premised, in part, on the assertion that individual voir dire was historically closed to the press and public. See 660 S.W.2d at 663. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984), asserts, however, that voir dire was historically open, *id.* at 822-23, and the United States Supreme Court's historical interpretation is controlling since the closing of voir dire proceedings raises first and sixth amendment questions. See *id.* at 827-29 (Stevens, J., concurring).

¹⁸⁷ See 660 S.W.2d at 665.

¹⁸⁸ 660 S.W.2d 3 (Ky. 1983).

¹⁸⁹ *Id.* at 4.

but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree."¹⁹⁰ In a second case involving reasonable doubt, the Court implemented RCr 9.56(2), which provides that the instructions shall not define reasonable doubt: "Prospectively, trial courts shall prohibit counsel from *any* definition of 'reasonable doubt' at any point in the trial. . . ."¹⁹¹

In *Commonwealth v. Howard*,¹⁹² the court of appeals held that an absent witness's testimony at a bond reduction hearing could be admitted at the defendant's trial.¹⁹³ The court noted that if the defendant had the opportunity to cross-examine at the hearing and if the testimony bore "sufficient indicia of reliability" to satisfy the confrontation clause of the sixth amendment, then the prior testimony is admissible at trial.¹⁹⁴ The court interpreted RCr 7.22 as permitting the introduction of testimony from preliminary hearings and other pre-trial hearings so long as "the prior testimony is found by the trial court to be reliable and trustworthy, and the witness was subjected to cross-examination, . . . provided the same offense and charge are being dealt with."¹⁹⁵ *Howard* thus interprets the term "trial" in RCr 7.22 to include other hearings where the witness is subject to cross-examination. Such a result is desirable—to hold otherwise would deprive the trier of fact of reliable evidence.¹⁹⁶

VII. DOUBLE JEOPARDY

In *Burks v. United States*,¹⁹⁷ the United States Supreme Court held that where an appellate court concludes the evidence at trial

¹⁹⁰ *Carwile v. Commonwealth*, 656 S.W.2d 722, 724 (Ky. 1983).

¹⁹¹ *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984) (emphasis in original).

¹⁹² 665 S.W.2d 320 (Ky. Ct. App. 1984).

¹⁹³ *See id.* at 323.

¹⁹⁴ *Id.* at 322-23. The court followed *Ohio v. Roberts*, 448 U.S. 56 (1980), the latest significant confrontation clause opinion of the United States Supreme Court. *See* 665 S.W.2d at 322-23.

¹⁹⁵ *See* 665 S.W.2d at 323. RCr 7.22 provides: "Transcript of previous testimony.—For purposes of Rule 7.20 a duly authenticated transcript of testimony given by a witness in a previous trial of the same offense in any district or circuit court on the same charge shall be the equivalent of a deposition."

¹⁹⁶ A case not discussed in *Howard*, *Commonwealth v. Bugg*, 514 S.W.2d 119 (Ky. 1974), interprets RCr 7.22 narrowly to exclude preliminary hearing testimony. *See id.* at 121. For a history of RCr 7.22 see Fortune, *Criminal Rules*, 70 Ky. L.J. 395, 410 n.87 (1981-82).

¹⁹⁷ 437 U.S. 1 (1978).

was insufficient to convict, the federal double jeopardy clause¹⁹⁸ precludes retrial.¹⁹⁹ During the Survey period the Kentucky Supreme Court applied *Burks* in three different fact situations. The three cases neatly tie double jeopardy law together in this area. *Hon v. Commonwealth*²⁰⁰ is similar to *Burks*. On direct appeal, the Supreme Court held that the evidence was insufficient to prove the defendant was over eighteen years of age at the time of the commission of a previous offense²⁰¹ which formed the basis of a persistent felony offender conviction.²⁰² The Court held that the date of a previous conviction is not evidence that the offense occurred within any certain period before the conviction.²⁰³ Thus the Court held that the fact the defendant was twenty-two and twenty-three years of age at the time of his prior convictions was not evidence that he was over the age of eighteen at the time of the offenses.²⁰⁴ The Court said the state is entitled to no inference and must prove age at the time of the offense by direct evidence.²⁰⁵ The Court reversed the conviction with the intent to preclude retrial.²⁰⁶

By contrast, in *Hobbs v. Commonwealth*²⁰⁷ the state introduced records, apparently from the Bureau of Corrections, which recited the date of previous offenses as well as the defendant's date of birth.²⁰⁸ Based on this evidence the jury found the defendant to have been over the age of eighteen at the time of the prior offenses and convicted him of being a persistent felony offender in the first degree.²⁰⁹ The court of appeals reversed the persistent felony offender conviction on the grounds that the records were improperly admitted to show the date of the

¹⁹⁸ See U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

¹⁹⁹ 437 U.S. at 18. The Court held that in such situations, acquittal is the only "just" remedy. *Id.*

²⁰⁰ 670 S.W.2d 851 (Ky. 1984).

²⁰¹ *Id.* at 852.

²⁰² KRS § 532.080(2)(b) provides that in order for the previous crime to qualify as a felony, the defendant must have been 18 years of age when the prior crime was committed.

²⁰³ See 670 S.W.2d at 852-53.

²⁰⁴ *Id.* at 853.

²⁰⁵ See *id.*

²⁰⁶ *Id.* at 852-53.

²⁰⁷ 655 S.W.2d 472 (Ky. 1983).

²⁰⁸ See *id.* at 474 (Leibson, J., concurring).

²⁰⁹ *Id.* at 473.

offenses.²¹⁰ Rather than reverse for dismissal, however, the court of appeals remanded the case for a new trial.²¹¹ The Supreme Court granted discretionary review to the defendant on the issue of the application of *Burks*.²¹² Affirming the court of appeals, the Supreme Court drew the proper distinction between reversal for evidentiary insufficiency and reversal for trial error:

In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. *Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.*²¹³

Another argument supporting the Court's decision is that, in sustaining its burden to prove the elements of the crime, the state should be entitled to rely on evidence admitted by the trial judge. The state should not have to anticipate that an appellate court might disagree with the trial judge's evidentiary rulings.

Hon and *Hobbs* were appellate reversals of convictions. In *Nichols v. Commonwealth*,²¹⁴ however, the first trial ended in a mistrial after the jury was unable to reach a verdict. The judge overruled the defendant's motion for directed verdict and ordered a new trial. There is no indication that the defendant attempted to prevent the new trial by filing a motion in the court of appeals for writ of prohibition.²¹⁵ The state's evidence

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* The Court also considered *Crawley v. Commonwealth*, 568 S.W.2d 927 (Ky. 1978), *cert. denied*, 439 U.S. 1119 (1979), a decision based upon *Burks*. See *id.*

²¹³ *Id.* at 474 (emphasis in original).

²¹⁴ 657 S.W.2d 932 (Ky. 1983), *cert. denied*, 104 S. Ct. 1289 (1984).

²¹⁵ "Prohibition is that process by which a superior court prevents an inferior court . . . from exceeding its jurisdiction in matters over which it has cognizance or usurping matters not within its jurisdiction to hear or determine." The Florida Bar, 329 So. 2d 301, 302 (Fla. 1974) (citing *Degroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957)). The writ in *Nichols* would have been premised on the appellant's claim that he was entitled to a directed verdict on his first trial because the evidence was not sufficient to sustain a verdict, and therefore the double jeopardy provisions of the United States and the Kentucky Constitutions prohibited the court from retrying him. See 657 S.W.2d at 933.

at the second trial was stronger and the defendant was convicted. On appeal, the defendant argued that the state's evidence at the first trial was insufficient and that retrial was barred by the double jeopardy clauses of both the state and federal constitutions.²¹⁶ The Supreme Court, although disagreeing with the defendant on the strength of the state's proof at the first trial,²¹⁷ accepted the proposition that *Burks* and *Commonwealth v. Burris*²¹⁸ preclude a second trial if the evidence at the first trial was insufficient to convict.²¹⁹ Hence, the Court reviewed both the evidence produced at the first trial and matters which arose at the second trial.²²⁰

While *Nichols* reaches a desirable result, it is questionable whether the federal double jeopardy clause requires an appellate court to examine the sufficiency of the evidence produced at a trial which ended with a hung jury. In *Justices of Boston Municipal Court v. Lydon*²²¹ and *Richardson v. United States*,²²² the United States Supreme Court endorsed the concept of "continuing jeopardy"²²³ and restricted the *Burks* rule²²⁴ to situations in which the state's evidence *has been* adjudged insufficient by a court of competent jurisdiction.²²⁵ *Lydon* and *Richardson* clearly held that the double jeopardy clause does not require a state to afford appellate review of a trial judge's decision that the state's evidence was sufficient, *before* subjecting the defendant to a second trial.²²⁶ Justice Stevens, concurring in *Lydon*, argued that the sufficiency of evidence at the first trial should be considered by the appellate court, with a determination of insufficiency

²¹⁶ 657 S.W.2d at 933.

²¹⁷ *Id.*

²¹⁸ 590 S.W.2d 878 (Ky. 1979).

²¹⁹ See 657 S.W.2d at 933. In *Burris*, after conviction, the defendant's motion for judgment notwithstanding the verdict was granted. After the court of appeals reversed that ruling, the Supreme Court reinstated the trial court's decision by holding that the directed verdict was not subject to appeal. See 590 S.W.2d at 878.

²²⁰ See 657 S.W.2d at 933-35.

²²¹ 104 S. Ct. 1805 (1984).

²²² 104 S. Ct. 3081 (1984).

²²³ See *id.* at 3085; 104 S. Ct. at 1814.

²²⁴ See text accompanying notes 197-99 *supra*.

²²⁵ The court of competent jurisdiction can be an appellate court as in *Burks* or a trial court. 104 S. Ct. at 3085. See, e.g., *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981) (judge at first trial grants motion for new trial after finding evidence insufficient to support defendant's conviction).

²²⁶ See 104 S. Ct. at 1814; 104 S. Ct. at 3086.

resulting in a *nunc pro tunc* ruling that the second trial violated the double jeopardy clause.²²⁷ It is significant that Justice Stevens stood alone on this point.

This is not to say that the Kentucky Supreme Court in *Nichols* erred by considering the evidence presented at the first trial. In light of the decision to order a second trial, the defendant could not immediately appeal the judge's order overruling his motion for a directed verdict of acquittal.²²⁸ Appellate review was available, if at all, at the conclusion of the second trial. The Kentucky Supreme Court's review of the matter at that time is consistent with the constitutional right to an appeal.²²⁹ If, at the first trial, the state failed to present evidence on which reasonable persons could find the defendant guilty beyond a reasonable doubt,²³⁰ then the error should be corrected by setting aside the second conviction. The second conviction should be set aside simply as a means of rectifying the error of the judge at the first trial, and not because of double jeopardy.

*Macklin v. Ryan*²³¹ holds that mandamus is the appropriate remedy to bar a retrial when there was no "manifest necessity" for the declaration of a mistrial.²³² In *Macklin* the trial court declared a mistrial over the defendant's objection. A juror had stated to the judge privately during deliberations that she could not be "unbiased" because she knew the co-defendant's mother. The judge rejected the defendant's request to determine whether the jury had reached a verdict as to him prior to the juror's admission or, in the alternative, to accept the verdict of eleven jurors.²³³ After discharge it was ascertained that the jury had voted the defendant "not guilty" at the time of mistrial.²³⁴ On

²²⁷ See 104 S. Ct. at 1825 (Stevens, J., concurring). Justice Stevens seems to argue that this result is required by *Jackson v. Virginia*, 443 U.S. 307 (1979), which holds that the due process clause requires the state to introduce evidence sufficient to prove every element beyond a reasonable doubt. See 104 S.Ct. at 1824. This argument overlooks the fact that the conviction in *Lydon* came at the second trial, not the first. That is, nothing adverse happened to Lydon as a result of the first trial.

²²⁸ Cf. *Macklin v. Ryan*, 672 S.W.2d 60 (Ky. 1984) (no right of appeal after declaration of mistrial; mandamus appropriate under certain circumstances).

²²⁹ See Ky. CONST. § 116.

²³⁰ See *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

²³¹ 672 S.W.2d 60.

²³² See *id.* at 61.

²³³ *Id.* at 60.

²³⁴ *Id.* at 60-61. The Court pointed out that the verdict was never signed. See *id.*

these facts the Supreme Court had no difficulty in determining that there was no manifest necessity for the mistrial as to the defendant because the criminal rules provide for separate verdicts in multiple defendant cases.²³⁵ The Court therefore found that it was error for the court of appeals to deny the motion for writ of mandamus to prevent the retrial.²³⁶

There is language in *Richardson v. United States* which supports the proposition that a defendant cannot be put in double jeopardy by a retrial following a mistrial because there is no termination of the original jeopardy.²³⁷ Regardless of whether this interpretation of *Richardson* is correct, Kentucky law clearly recognizes improper termination of a trial as giving rise to the defense of double jeopardy.²³⁸

*Commonwealth v. Karnes*²³⁹ illustrates the need for cooperation between county attorneys and commonwealth attorneys. The defendant was arrested on felony charges and arraigned in district court.²⁴⁰ It is not clear whether the case was set for preliminary hearing. In any event, the grand jury considered the case and indicted the defendant on three felony counts.²⁴¹ The indictment was signed by the foreperson of the grand jury and presented to the circuit judge at 11:30 a.m. the next day. The district judge, apparently on the recommendation of the county attorney, reduced the charges to a misdemeanor, and a guilty plea was entered.²⁴²

The circuit judge then dismissed the indictment, holding that the district court could exercise its jurisdiction until the reporting of the incident to the circuit court. If the district court judgment was valid, the double jeopardy claim would bar further prosecution. On appeal, the court of appeals and the Supreme Court

²³⁵ See RCr 9.82(2).

²³⁶ 672 S.W.2d at 61.

²³⁷ "Our holding in *Burks* established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal; it obviously did not establish . . . that a hung jury is the equivalent of an acquittal." 104 S. Ct. at 3086.

²³⁸ See KRS § 505.030 (1975).

²³⁹ 657 S.W.2d 583 (Ky. 1983).

²⁴⁰ *Id.*

²⁴¹ The defendant was charged with second-degree robbery, receiving stolen property and being a persistent felon. *Id.*

²⁴² *Id.*

both affirmed.²⁴³ In addition to deciding the point at which the district court's jurisdiction ends, *Karnes* is a prime example of the consequences of noncooperation.

In *Jones v. Hogg*,²⁴⁴ the Sixth Circuit Court of Appeals reversed the district court's denial of a writ of habeas corpus and remanded the case for further fact finding.²⁴⁵ Three times Jones had gone to trial for murder; each time the jury had been unable to reach a verdict and was discharged.²⁴⁶ When Jones was scheduled for a fourth trial he sought a writ of prohibition from the Kentucky Court of Appeals. The court of appeals denied the writ. The Kentucky Supreme Court affirmed the denial,²⁴⁷ holding that neither state²⁴⁸ nor federal²⁴⁹ double jeopardy clauses barred Jones' retrial.²⁵⁰ Jones then instituted a habeas corpus proceeding in federal court.

In reversing the denial of the writ of habeas corpus, the federal court of appeals articulated a useful test to apply in judging the "necessity"—for double jeopardy purposes—of a mistrial order following a hung jury. The court first quoted from *United States v. Perez*:²⁵¹

"[I]n all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act. . . . They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution. . . ."²⁵²

The opinion then notes that the trial court's discretion to grant mistrials is not without limits²⁵³ and states:

²⁴³ See *id.* at 584.

²⁴⁴ 732 F.2d 53 (6th Cir. 1984).

²⁴⁵ See *id.*

²⁴⁶ *Id.* at 54.

²⁴⁷ See *Jones v. Hogg*, 639 S.W.2d 543, 544 (Ky. 1982).

²⁴⁸ See KY. CONST. § 13.

²⁴⁹ U.S. CONST. amend. V.

²⁵⁰ See 639 S.W.2d at 544-45.

²⁵¹ 22 U.S. (9 Wheat.) 194 (1824).

²⁵² See 732 F.2d at 55 (quoting 22 U.S. (9 Wheat.) at 195).

²⁵³ See *id.*

In determining whether sound discretion has been exercised, several factors must be considered. These factors include: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree on a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication which the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.²⁵⁴

The Federal court of appeals noted that the Kentucky Supreme Court had apparently misunderstood the *Perez* rule.²⁵⁵ The Kentucky opinion states that the issue is "whether . . . there is a manifest necessity for invoking the defense of double jeopardy."²⁵⁶ The question, of course, is whether there is a manifest necessity for declaring a mistrial, not whether there is a necessity for invoking double jeopardy.²⁵⁷

While *Jones* involved a man who had been tried three times without conviction, the test set out is applicable to the common situation of a retrial after a single hung jury. Trial judges should carefully consider the factors set out in *Jones* before declaring a mistrial over the defendant's objection.

²⁵⁴ *Id.* at 56. Cf. *Rogers v. United States*, 609 F.2d 1315 (9th Cir. 1979).

²⁵⁵ See 732 F.2d at 56.

²⁵⁶ 639 S.W.2d at 544.

²⁵⁷ See 732 F.2d at 56.