Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42

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Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42

BY JOHN S. GILLIG*

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The author acknowledges his debt to an early unpublished work of Kay Alley, Post-Conviction Relief Digest (Judicial Conference and Judicial Council 1972; reissued by the Office of the Attorney General 1972). This excellent but sadly dated handbook was the inspiration for a practice manual written by the author and distributed to prosecutors statewide as the Kentucky Post-Conviction Manual (Office of the Attorney General 1990). The author also acknowledges the assistance and legal insight of Assistant Attorney General Ian Sonego, who privately reviewed drafts of this Article at various stages and always provided valuable additions and suggestions. Needless to say, the opinions expressed here are those of the author alone.
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Providing a person imprisoned by a jailer, warden, or other public official with the ability to challenge the justness of confinement through legal process is not a new idea. The roots of this concept predate the
Magna Charta of 1215, which states: "No freeman shall be taken, or imprisoned . . . but by lawful judgment of his peers, or by the law of the land." English common law has long recognized the right of an individual to seek a writ of habeas corpus from a competent court in order to compel the government agent to bring the prisoner before the bench. The availability of this writ was recognized in medieval England as a fundamental protection of free citizens against the power of the crown. Acknowledging the need for such protection in a republic and following forms of law imported from England during the colonial period, the framers of the Constitution of the United States specifically provided that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." As is typical among the states, Kentucky has used almost identical language in each version of its constitution to insure that an imprisoned citizen of the Commonwealth may petition state courts for a writ of habeas corpus to test the legality of his or her detention.

The early constitutional, statutory, and common law remedies afforded by federal and state habeas corpus were not aimed primarily at freeing an unjustly incarcerated defendant after conviction. That use of habeas corpus came later. In Kentucky, as in all the states, other well-established remedies were available for that purpose. Early Kentucky statutes and the common law recognized and used the post-judgment remedies of new trial, writ of error, and so on.

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1 KY. REV. STAT. ANN. § 843 (Michie/Bobbs-Merrill 1988).
3 U.S. CONST. art. I, § 9, cl. 2.
4 KY. CONST. art. XII, § 16 (1792) ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."); id. art. X, § 16 (1799); id. art. XIII, § 18 (1850); id. § 16 (1892). Only minor variations in punctuation differentiate the texts.
5 WILKES, POSTCONVICTION REMEDIES, supra note 2, § 3-1 (discussing the writ of habeas corpus in North America).
6 Id. §§ 3-3, 3-7, 3-9.
7 Prior to full development of the direct appeal in the modern era, the motion for new trial was a primary means of attempting to reverse an adverse judgment of a Kentucky trial court. Its importance is indicated by the large number of reported cases of an early date. See, e.g., W.W. FRY ET AL., AN ANALYTICAL DIGEST OF THE DECISIONS OF THE COURT OF APPEALS OF KENTUCKY 290-96 (1852).
8 Loudon v. Commonwealth, 2 Ky. (Sneed) 347, 347 (1805) (using writ of error to reverse criminal conviction). The writ of error, like the modern-day writ of certiorari, was established in the common law as the writ (or order) of an appellate court directing a
peal, and writ audita quælera, as well as writ of error coram nobis,
court of record (trial court) to remit that court’s record and judgment to the appellate
court, thus allowing the appellate court to determine if alleged errors required the
judgment to be reversed, corrected, or affirmed. BLACK’S LAW DICTIONARY 1610 (6th ed. 1990).

Appeals were originally taken from decrees of the trial court, while writs of error
were taken from judgments. For this reason, early direct challenges to criminal judgments
were made by writ of error. The number of reported Kentucky criminal cases involving
appeals was very small. By 1809 the distinction between appeal and writ of error had
worn away, and the two were used interchangeably in Kentucky practice. Johnston v.
Commonwealth, 4 Ky. (1 Bibb) 598, 598 (1809) (observing that “writ of error” and
“appeal” could be used interchangeably).

In 1792, the Kentucky General Assembly recognized the writ of error or appeal in
the statute creating the Kentucky Court of Appeals. 1 WILLIAM Littel, THE STATUTE
LAW OF KENTUCKY 105-07 (1809) [hereinafter Littel, STATUTE LAW 1809]. The
General Assembly could and did eliminate the writ of error or appeal for certain crimes,
as in, for example, an 1804 provision under the act respecting “riots, routs, and unlawful
assemblies of the people, or under the act respecting the disturbance of religious
societies.” 3 WILLIAM Littel, THE STATUTE LAW OF KENTUCKY 241 (1811) [hereinafter
Littel, STATUTE LAW 1811].

In Kentucky, no general right to appeal existed prior to the Code of Practice in
Criminal Cases which became effective on July 1, 1854. Judgments rendered prior to that
time were irreversible and could not be appealed. Commonwealth v. Craig, 54 Ky. (15
B. Mon.) 534, 537 (1855) (holding that criminal conviction rendered in June of 1854 was
irreversible). The only grounds which could result in reversal under § 334 of the Code
of Practice in Criminal Cases were: improper admission or suppression of important
evidence, improper instructions given or proper instructions refused, failure to attest the
judgment, or improper allowance or disallowance of a peremptory challenge. Comely v.
Commonwealth, 56 Ky. (17 B. Mon.) 403, 408 (1856) (listing grounds that could result
in reversal of criminal conviction under Code of Practice in Criminal Cases).

Until 1976, the modern right of appeal was based upon a “matter of right” statutory
provision and was, therefore, not a constitutional right at all. McInteer v. Moss, 139 S.W.
842, 844 (Ky. 1911) (holding that the legislature can determine the rights of appeal from
different Kentucky courts and the respective amount-in-controversy requirements). The
1892 Kentucky constitutional provision stated: “The right to appeal or sue out a writ of
error shall remain as it now exists until altered by law, hereby giving to the General
Assembly the power to change or modify said right.” KY. CONST. § 127 (repealed 1976).
The General Assembly, therefore, could and did limit appeals in certain criminal cases.
See, e.g., Holcomb v. Mayes, 290 S.W.2d 486, 487 (Ky. 1956) (holding that the
legislature may modify the right to appeal as it sees fit); McInteer, 139 S.W. at 844.

The 1975 passage of the Judicial Article, reorganizing the court system in Kentucky,
established direct appeal as a constitutional right. KY. CONST. § 115 (amended 1976).

The writ of audita querela was identified as being closely related in nature to the
writ of coram nobis and thus seemingly available to test post-conviction detention in
Robertson v. Commonwealth, 132 S.W.2d 69, 71 (Ky. 1939) (holding that, under the facts
presented, neither the writ of coram nobis nor the writ of audita querela was available for
convicted appellant). The writ of audita querela was never used to test post-conviction
writ of error coram vobis, and writ of habeas corpus. These ancient forms of action were all well developed by the eighteenth century and "became a part of our remedial law upon Kentucky's admission into the Union" in 1792.11 Similar rudimentary protections could be utilized in the federal courts for those convicted of violating the laws of the United States.12

Of these common law remedies, only coram nobis (sometimes called coram vobis) and habeas corpus were thought adequate to become "post-conviction remedies" in the modern sense.13 The various new trial-type motions, common law actions upon writs of error, and appeal, were and still are direct attacks on the judgment of conviction or the sentence

detention with any regularity or effect. Id. at 70-71. "The technical distinction is that coram nobis attacks the judgment itself, whereas audita querela may be directed against the enforcement, or further enforcement, of a judgment which when rendered was just and unimpeachable." Balsley v. Commonwealth, 428 S.W.2d 614, 616 (Ky. 1967) (holding that remedy formerly available by way of either writ of error coram nobis or writ of audita querela was preserved under Ky. R. Civ. P. 60.02(5)). The writ of audita querela was specifically abolished by Kentucky Rule of Civil Procedure ("CR") 60.05.

11 Jones v. Commonwealth, 108 S.W.2d 816, 817 (Ky. 1937) (holding writ of error coram nobis, unless repealed, was still a remedy under Kentucky law). For further information on the development of early common law remedies in Kentucky, see generally Fred P. Caldwell, THE KENTUCKY JUDICIAL DICTIONARY (1916 & Supp. 1924); Oliver Hogan, CRIMINAL DIGEST FOR KENTUCKY (1920); Ben Monroe & James Harlan, DIGEST OF CASES AT COMMON LAW AND IN EQUITY, DECIDED BY THE COURT OF APPEALS OF KENTUCKY, FROM ITS ORGANIZATION IN 1792, TO THE CLOSE OF THE WINTER TERM OF 1852-3 (1853); Charles S. Morehead & Mason Brown, A DIGEST OF THE STATUTE LAWS OF KENTUCKY (1834).

For further information on early Kentucky criminal law, see generally James P. Gregory, GREGORY'S KENTUCKY CRIMINAL LAW, PROCEDURE AND FORMS (1918); John E. Newman, A TREATISE ON PLEADING AND PRACTICE UNDER THE CIVIL CODE OF KENTUCKY (2d ed. 1907); James M. Roberson, KENTUCKY CRIMINAL LAW AND PROCEDURE (1899).

12 See Mary K.B. Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 3-13 (1978). This Kentucky historian has noted the difficulty in attempting to fathom the intricacies of the old forms of action.

The law then had a language all its own, a highly stylized English interspersed with Latin. . . . Until the reforms of the codification movement of the mid-nineteenth century, all court cases at the trial level were pursued in forms of action that have since been superseded and largely forgotten. Not only is the nature of a grievance obscured by language barriers, but also the methods of resolving it seem almost incomprehensibly ritualistic. There are no adequate guidebooks, ancient or modern, to help one through this most unfamiliar terrain. What was once so obvious and elementary that it did not seem worth writing down and explaining is now elusive and abstruse to a conventionally trained historian.

Id. at 8.

13 Wilkes, POSTCONVICTION REMEDIES, supra note 2, § 3-7.
imposed. As direct remedies, these procedures suffer from various flaws. With limited exceptions, they become permanently unavailable within a short period of time,\(^{14}\) are subject to various procedural bars, and are of no help in responding to allegations outside of the trial court record. Thus the necessity for a relatively new type of review, one which would stretch beyond the trial court record in search of constitutional error, became apparent. Modern post-conviction review proceedings were designed to bridge this gap.

In the United States, the long and significant judicial development of federal habeas corpus provided the model for state post-conviction review. Habeas corpus moved from its English origins as a mechanism to challenge arbitrary detention without legal process (which normally occurs prior to conviction), to an expanded federal remedy for federal prisoners, to its dominant and present use in American criminal law as a means for state prisoners to obtain federal review of the legality of state criminal proceedings.

The United States Supreme Court evidenced its willingness to continually broaden the coverage of federal habeas corpus relief available to state prisoners, and the number of federal habeas corpus “reversals” of state court convictions greatly increased. State judiciaries and legislatures were forced to react.\(^ {15}\) At the same time, the Supreme Court used the Fourteenth Amendment to apply an ever-broader array of federal constitutional rights to the states.\(^ {16}\)

By the 1930s and 1940s, Kentucky’s high court had begun to experiment with the modification of the common law writs of coram nobis and

\(^{14}\) Donald E. Wilkes, Jr., Federal and State Postconviction Remedies and Relief 3 (2d ed. 1987) [hereinafter Wilkes, Remedies and Relief] (providing a concise history of post-conviction relief in the United States); Note, State Post-Conviction Remedies, 61 Colum. L. Rev. 681, 681 n.1 (1961) (discussing extraordinary remedies that continue to be available after time limit for appeal has expired). Generally, a motion for new trial under Kentucky Rule of Criminal Procedure (“RCr”) 10.02 must be made within five days of the verdict, although such a motion based upon newly discovered evidence may be made up to one year after the entry of judgment or “at a later time if the court for good cause so permits.” Ky. R. Crim. P. 10.06(1). A notice of appeal in a criminal case must be filed within ten days after the entry of judgment. Id. 12.04(3).

\(^{15}\) Kentucky was no exception. In reviewing a 1943 Kentucky decision which significantly expanded the common law writ of coram nobis, an observer noted that “[i]n reaching its decision in the instant case, the court appears to have been much impressed by the fact that after denying coram nobis in Jones v. Commonwealth, the defendant appealed to the federal courts and won his release on a writ of habeas corpus.” Leo E. Oxley, Note, Perjured Testimony as a Ground for Coram Nobis in Kentucky, 32 Ky. L.J. 296, 297 (1943-1944).

\(^{16}\) See Wilkes, Remedies and Relief, supra note 14, at 3.
habeas corpus and to maximize state court fact-finding, one of the few areas left to the states, in an attempt to save state court convictions from falling prey to the federal courts. This experiment, however, was not successful. Both coram nobis and habeas corpus were traditionally and logically inadequate means to perform a task that was becoming more complex and difficult each day. It was widely recognized, even by 1951, that the increasingly comprehensive federal concept of due process "put pressure on the state courts and legislatures to liberalize existing remedies, and provide new procedures and safeguards to citizens being tried on a criminal charge."17 In 1955, Kentucky Assistant Attorney General Jo. M. Ferguson18 wrote to Kentucky Governor Lawrence Wetherby to complain that federal habeas corpus was being abused by prisoners seeking only "to delay and impede execution of state judgments."19 In 1965, the Kentucky high court indicated its disapproval to what it termed the "new look" in federal constitutional rights,20 yet neither state governors nor state judges could control these events. In the end, the flexibility provided by the Kentucky Rules of Criminal Procedure was the deciding factor in choosing to utilize court rules as the most effective way to meet an evident need.

On January 1, 1963, RCr 11.42 became effective, making Kentucky one of the first states to modernize its post-conviction procedures.21 On March 13, 1964, the high court of Kentucky held that RCr 11.42 was the exclusive

18 Ferguson became Attorney General in 1956.
20 Coles v. Commonwealth, 386 S.W.2d 465, 466 (Ky. 1965) (explaining that KY. R. CRIM. P. 11.42 provides a method by which a prisoner's claim of unconstitutional infringement, no matter how "unfounded" that claim may be, can be settled in one proceeding).
21 By mid-1965, when it appeared the U.S. Supreme Court was poised to require this modernization as a matter of constitutional law, six states had already enacted post-conviction relief statutes. ILL. REV. STAT. ch. 38, paras. 122-1 to -7 (1963); ME. REV. STAT. ANN. tit. 126, §§ 1-A to -G (West Supp. 1963); MD. ANN. CODE art. 27, §§ 645A - J (Supp. 1964); N.C. GEN. STAT. §§ 15-217 to -222 (Supp. 1963); OR. REV. STAT. §§ 138.510 - .680 (1963); WYO. STAT. §§ 7-408.1 to .8 (1963 Cum. Supp.). Six additional states had adopted modern post-conviction procedures by rule of court. ALASKA SUP. CT. R. 35(b); DEL. SUPER. CT. CRIM. P. R. 35; FLA. R. CRIM. P. 1; KY. R. CRIM. P. 11.42; MO. SUP. CT. R. 27.26; N.J. CRIM. PRAC. R. OF SUPER. AND COUNTYCTS. R. 3:10A-2; see also Case v. Nebraska, 381 U.S. 336, 345-46 n.8 (1965) (Brennan, J., concurring) (Clark, J., concurring) (writing that a Nebraska statute providing for hearings of claims of due process violations was an adequate corrective process).
remedy for collateral attack on Kentucky criminal judgments. Since that time, the Rule has been invoked by state prisoners in literally thousands of unpublished decisions and over four hundred published ones. Now, RCr 11.42 has operated for more than thirty years to reduce federal intrusion into Kentucky's criminal justice system, to aid the inmate litigant, and to generate significant work for trial courts, appellate courts, and prosecutors.

Legal scholars categorize modem post-conviction remedies as "those procedural vehicles by which persons convicted of crime can seek relief, usually on federal constitutional grounds, after trial and direct review in the appellate courts." Current theories of post-conviction review generally recognize the procedure as a challenge based upon matters outside of the original trial court record and raising legal claims not reviewable on direct appeal. Post-conviction review is traditionally more limited in scope and more tilted against the defendant than, for example, direct appeal. However, a modern post-conviction relief petition or motion raising at least a prima facie showing of the violation of a state or federal right activates a powerful weapon. In most states, the reviewing court is required to conduct an evidentiary hearing to allow the prisoner to develop facts outside of the original record in support of his or her legal claims. Although the burden is on the prisoner to prove the violation of law and prejudice, the ability to compel witnesses to testify under oath to matters outside of the trial court record is a significant protection. Furthermore, most states either require the appointment of counsel to assist the indigent prisoner in the investigation and presentation of the claims or at least have in place a strong presumption in favor of such appointments.

The conclusion of the hearing process normally results in written factual and legal findings by the reviewing court. These, in turn, provide the basis for further review, either on direct appeal to a state appellate court or on petition for writ of habeas corpus in the federal courts, including the attendant appeals common in that forum. The essence of the modern post-conviction relief proceeding is comprised of the various mechanisms provided by the state to ventilate constitutional claims through the development of a new record which tests the validity of a state conviction or sentence under legal theories or facts not previously raised.

This Article examines the background and development of post-conviction remedies in Kentucky. Included within this subject are the unprecedented expansion of federal habeas corpus jurisdiction and the

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22 Ayers v. Davis, 377 S.W.2d 154, 154 (Ky. 1964).
24 WHIKES, POSTCONVICTION REMEDIES, supra note 2, § 1-5.
25 Id.
26 Id.
simultaneous willingness of federal courts to throw out state convictions on federal constitutional grounds. The main historical emphasis, however, is upon state habeas corpus and coram nobis. The adoption of a specific post-conviction rule in the Kentucky Rules of Criminal Procedure opens a new chapter. Thus, significant attention is paid to RCr 11.42 and its development as a court-created tool for the administration of post-conviction criminal justice in Kentucky. Finally, the Article suggests ways to render RCr 11.42 more efficient and responsive to the delicate balance which must exist between the criminal defendant who seeks to vindicate his or her constitutional rights and the officers and judges of the Commonwealth of Kentucky who seek to protect and serve its citizens.

I. BACKGROUND: THE THEORY OF THE VOIDABLE JUDGMENT AND MODERN POST-CONVICTION REVIEW

Although it is not readily apparent, a consistent analytic framework exists and should be understood and applied to decisions resolving post-conviction challenges. This framework divides criminal judgments, which are presumptively correct when entered, into four classes: valid, erroneous, void, and voidable.27

Both valid and erroneous judgments rendered by courts of competent jurisdiction may be enforced against the defendant. The entry of an error-free judgment of conviction by the trial court, of course, guarantees that the judgment is unassailable. However, even if error during the proceedings occurred, an enforceable judgment may still result on direct appeal or post-conviction review if the error was harmless under both state and federal constitutions,28 was waived,29 or was otherwise consistent with due process.30

27 The author is indebted for this suggestion and parts of the subsequent analysis to the Amicus Curiae Brief by Criminal Justice Legal Foundation at 3-4, Parke v. Raley, 113 S. Ct. 517 (1992) (No. 91-719).
28 Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (holding that proper standard for habeas review was whether trial-type error "had substantial and injurious effect or influence in determining the jury's verdict"). Brecht rejected using the direct review standard of Chapman v. California, 386 U.S. 18, 21-24 (1967) (holding that federal constitutional error committed by state court may be viewed as harmless on direct appeal if non-prejudicial beyond a reasonable doubt). Brecht, 113 S. Ct. at 1721-22. Collateral attacks on state convictions, therefore, are reviewed on federal habeas corpus with a less rigorous standard. Brecht shifted the burden from the state proving non-prejudice "beyond a reasonable doubt" to the petitioner proving "substantial and injurious effect" on the jury verdict. Id.
29 WILKES, POSTCONVICTION REMEDIES, supra note 2, § 1-4.
30 Id. § 1-5.
A judgment which is challenged as void ab initio presents an entirely different set of considerations. The only inquiry is whether the trial court had jurisdiction to render judgment over the issue presented, with jurisdiction referring to the court’s legal authority to resolve a particular type of question or case. A truly “void” judgment is one which can never be enforced against the defendant because the court was without jurisdiction to render it. An early example is found in Curtsinger v. Commonwealth. Curtsinger had been convicted of possession of burglary tools and initially was placed on probation for the statutory maximum of five years. While probation was not revoked during this period, the trial court attempted to extend its authority to revoke probation beyond the statutory maximum and thus continued to monitor the defendant. During this additional period, probation was revoked and Curtsinger was returned to prison. He then filed an RCr 11.42 motion to vacate, which was overruled. On appeal, the Kentucky Supreme Court found the probation revocation order void because, by action of statute, the trial court had lost jurisdiction prior to issuing the order.

A similar situation was recently presented in Commonwealth v. Marcum. Marcum’s sentence upon conviction for second-degree burglary was incorrectly enhanced to five years, far less than the statutory minimum of ten years required by his status as a first-degree persistent felony offender (habitual criminal). Apparently recognizing its error, the trial court entered an “amended” judgment enhancing Marcum’s sentence to the ten-year minimum; however, this “amended” judgment was entered almost eight weeks later, far beyond the ten days allotted by CR 59.05 for a trial court to amend its judgment. Thus, at the end of the ten days,

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31 See, e.g., Duncan v. O’Nan, 451 S.W.2d 626, 631 (Ky. 1970) (“The circuit court had general jurisdiction of the subject matter. It had the power to try this kind of case.”). Contrast the clarity of this view with the strong tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction. This is because characterizing a court’s departure in exercising authority as “jurisdictional” permits an objection to the departure to be taken belatedly. This, in turn, permits a serious blunder to be remedied despite tardy objection.

Reprintement (Second) of Judgments § 11 cmt. e (1982) (footnote omitted). Although the Restatement concerns only civil judgments, the same tendency is apparent in the criminal law.

32 549 S.W.2d 515 (Ky. 1977).
33 Id. at 516.
34 Id.
35 Id.
36 873 S.W.2d 207 (Ky. 1994) (explaining that KY. R. CRIM. P. 11.42 may be an inadequate remedy where judgment is void ab initio).
the trial court had lost jurisdiction over the judgment. By the time of the
appellate decision, Marcum had already served more than five years. The
Kentucky Supreme Court granted state habeas corpus relief. Both
majority and dissent agreed that the "amended" judgment was void ab
initio because the trial court was without jurisdiction to render it, and it
therefore could not be enforced against Marcum.37 In dissent, two
justices argued that the first judgment was also void, since the five-year
term initially imposed was outside of the trial court's statutory authori-
ty.38

As illustrated by Curtzinger and Marcum, a void judgment cannot be
enforced because, in a legal sense, it does not legitimately exist. The true
void judgment can be challenged at any time, and the defect cannot be
waived by the parties.39

However, even though a court may have general subject matter
jurisdiction over a particular kind of issue, a judgment may still be ruled
"voidable." For post-conviction purposes, the question involved "is one
of policy rather than power [and the] policy consideration is one of due
process."40 Therefore, a presumptively valid criminal judgment may be
set aside if the judgment is so fundamentally flawed that it may be deter-
m ined to be "voidable" and then held "void" on due process grounds. Such a judgment is not void merely because of error, but it is void
because the error is so great as to render the judgment voidable.41

37 Id. at 212; id. (Wintersheimer, J., dissenting).
38 Id. (Wintersheimer, J., dissenting).
39 Duncan v. O'Nan, 451 S.W.2d 626, 631 (Ky. 1970); see also Schooley v. Commonwealth, 556 S.W.2d 912, 915 (Ky. Ct. App. 1977) (discussing jurisdiction and waiver in the context of an appeal under KY. R. CRIM. P. 11.42). The test for the proper application of waiver has long been recognized in Kentucky, but it is subject to interpretation as well. For example, in considering the constitutionality of a well-established Kentucky practice which permitted lay judges who presided over certain misdemeanor trials to be paid a percentage of the fine relating to a conviction, an observer noted: "There has long been a split of authority as to whether the [financial] interest of a judge renders the judgment void so that the objection may not be waived or whether it is voidable so that the objection may be waived." Frank K. Wamock, Note, Pecuniary Interest of a Justice of the Peace in Final Trial of a Misdemeanor in Kentucky — Violation of the Due Process Clause of the Fourteenth Amendment, 36 KY. L.J. 422, 426 (1947-1948).
40 Schooley, 556 S.W.2d at 916; see Anderson v. Commonwealth, 465 S.W.2d 70, 74-75 (Ky. 1971) (explaining that the validity of juvenile's waiver is a due process, not a jurisdictional, question); Clay v. Commonwealth, 454 S.W.2d 109, 109 (Ky.) (analyzing a fact situation to determine if it presented "a failure of due process sufficient to void a conviction"), cert. denied, 400 U.S. 943 (1970).
41 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND
However, because a due process error is the focus of the attack on the judgment, the defect may be waived.\textsuperscript{42}

The rhetoric of the "void" or "voidable" judgment is most often associated with collateral attack, since, according to black letter law, a collateral attack would be successful only against a void judgment.\textsuperscript{43}

The position of RCr 11.42 in this scheme was muddled quite early, since the Kentucky high court considered the filing of an 11.42 motion to be a direct attack.\textsuperscript{44} While this approach would theoretically expand the scope of review, the Kentucky high court did not wish such a result and therefore adopted the confusing position that RCr 11.42 provided for direct attack on any issue that, under common law, would render the judgment subject to collateral attack.\textsuperscript{45} The same approach was adopted for CR 60.02, when the high court held that CR 60.02 permitted a "direct attack by motion where the judgment is voidable — as distinguished from a void judgment."\textsuperscript{46} Although the older cases frequently held the
judgment void in a successful RCr 11.42 case, this rhetoric lost meaning over the years. In fact, it may be argued that RCr 11.42 inadvertently evolved into a new remedy in which all that is required is something which might be called "due process error."

This development is illustrated by the 1994 decision in Commonwealth v. Marcum, in which the Kentucky Supreme Court distinguished between state habeas corpus and RCr 11.42.47 In part of the opinion, the court noted that RCr 11.42, like habeas corpus,

provides a procedure for "collateral attack" but it uses the term in a much broader sense than applies when using habeas corpus to attack a void judgment. RCr 11.42 encompasses every issue that suffices as reason to vacate a judgment which could not have been addressed by direct appeal. Such reasons need not be jurisdictional in nature, nor necessarily such as to render the judgment void or even voidable.48

Even though this statement is clearly dicta, it is still troublesome in some aspects. No one need mourn the dropping of the ritualistic "voiding the judgment" language from the typical RCr 11.42 appellate decision. However, the underlying importance of the notion that the error must be of such proportions as to void the judgment served to stress that only the most fundamental flaws should produce so drastic a result. In this regard, the court may be moving away from the well-established principle in both Kentucky and federal case law that a successful collateral attack requires the movant to meet a higher standard than in a direct attack.49 Thus, it has frequently been held that RCr 11.42 will not provide relief in situations where the claim of error, if raised on direct appeal, would admittedly be successful at that level. Presumably, this position is still the law. If it is not, the Kentucky Supreme Court has added a fifth class of

The distinction drawn is between a void election, and one merely voidable; between preconditions to a valid election, and an election with some latent insufficiency. An election is void where the conditions precedent to the holding of a valid election have not been met. In such case the election is not authorized by law.

Id. at 204.

47 873 S.W.2d 207 (Ky. 1994).

48 Id. at 210-11 (emphasis added).

49 See, e.g., Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982) (finding that mere error in applying state law is not sufficient for collateral attack of state court conviction); Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968) (noting that KY. R. CRIM. P. 11.42 is extraordinary remedy).
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judgment, previously unknown, to the four types of judgments commonly recognized. 50

II. THE FEDERAL COURTS INCREASE THEIR INVOLVEMENT IN STATE CRIMINAL PROCEDURE

In the last sixty years, three interrelated federal law developments forced the states to confront the adequacy of their traditional post-conviction remedies. First, the U.S. Supreme Court became increasingly willing to apply federal constitutional norms ("rights") to state criminal prosecutions under the Due Process Clause of the Fourteenth Amendment. 51 Over time, this development dramatically increased the complexity and "federalization" of the average state criminal case. Second, the Court seized upon federal habeas corpus as the means to enforce those norms upon recalcitrant state courts. 52 Finally, the U.S. Supreme Court

50 See supra text accompanying note 27.
51 Wilkes, Postconviction Remedies, supra note 2, § 3-4.
52 Unless the Supreme Court is to become an error-correcting court, instead of a policy-making court (which, given the volume of state cases, has always been an impossible task), enforcement must be accomplished by the lower federal courts. However, federal habeas corpus review of state criminal convictions may also create unusual situations because of the historical limitations of American federalism. Thus, while the Kentucky Supreme Court is obliged to follow the holdings of the U.S. Supreme Court, it is not obliged to follow the holdings of the lesser federal courts, including the U.S. Circuit Courts of Appeals. See Lockhart v. Fretwell, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) ("[A] state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); Perkins v. Commonwealth, 516 S.W.2d 873, 874 n.1 (Ky. 1974) ("The Public Defender is, of course, in error in his claim that the Sixth Circuit opinions constitute controlling higher authority in the sense of establishing precedents binding on this court."), cert. denied, 421 U.S. 971 (1975).

This anomaly of the federal system of government may result in divergent standards of review of federal constitutional violations, each of which is binding on the trial courts within each appellate jurisdiction. This situation occurred in Kentucky only recently. In 1985, the Kentucky Supreme Court decided the procedure to be followed in Kentucky's trial courts in determining the constitutionality of prior convictions which the prosecution needs to prove in order to establish habitual criminal or persistent felony offender status. Dunn v. Commonwealth, 703 S.W.2d 874, 876 (Ky. 1985), cert. denied, 479 U.S. 832 (1986). In 1989, the United States Court of Appeals for the Sixth Circuit held that the procedure set out in Dunn was constitutionally flawed. Dunn v. Simmons, 877 F.2d 1275, 1278 (6th Cir. 1989). The Supreme Court of Kentucky subsequently declined to adopt the new standard established by the Sixth Circuit, which, of course, remained binding on the U.S. District Courts for the Eastern and Western Districts of Kentucky. Conklin v. Commonwealth, 799 S.W.2d 582, 583-84 (Ky. 1990). It was only a matter of time before state prisoners began to be released on federal habeas corpus as a result of the failure of
strongly implied that a state prisoner has a federal constitutional right of access to a constitutionally adequate state post-conviction remedy.\footnote{See infra note 101.}

\section*{A. Federal Habeas Corpus from Its Origins to 1938}

Considerable scholarly attention has been devoted to the emergence of the "Great Writ" as a protector of individual liberty in medieval England.\footnote{See, e.g., WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); William F. Duker, The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame, 53 N.Y.U. L. REV. 983 (1978); George F. Longsdorf, Habeas Corpus A Protean Writ and Remedy, 8 F.R.D. 179 (1948).} As early as the twelfth century, the writ or order of habeas corpus could be used by a judge to compel the physical attendance in court of a person necessary to the adjudication of a matter.\footnote{This power is evident from the words "habeas corpus," which are translated from Latin as "you have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990); see also Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95-97 (1807) (discussing the writ in general). The writ has always been held up as the great protector of the individual and the cornerstone upon which all other rights are ultimately based. In 1811, for example, a well-known legal dictionary had this to say about the right of an individual to petition the courts: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any... magistrate, to imprison arbitrarily, whenever he or his officers thought proper, there would soon be an end of all other rights and immunities." 3 T.E. TOMLINS, LAW DICTIONARY 222 (1st Am. ed. 1811).} Scattered judicial and legislative developments culminated in the Habeas Corpus

Kentucky trial courts to follow a procedure that the state's highest court had forbidden them to utilize. This impasse was resolved when the Sixth Circuit decided a follow-up case, Raley v. Parke, 945 F.2d 137, 140-41 (6th Cir. 1991) (holding that when trial record is silent as to whether defendant waived his rights to jury trial, to confront his accusers, and to remain silent, the burden of proof to uphold conviction shifts to the Commonwealth). Certiorari was granted and a unanimous U.S. Supreme Court upheld the state approach, thereby reversing the Sixth Circuit Court of Appeals. Parke v. Raley, 113 S. Ct. 517, 522 (1992) (holding that when trial record is silent as to whether defendant was advised of his or her constitutional rights, the shift of some burden to the defendant is constitutional).
Act of 1679. By codifying common law protections and ensuring a speedy response to an order of the court, the Act forced the government to explain the legal basis for a challenged imprisonment. While the Act was certainly reformative, the purpose of Parliament was narrowly limited to providing “a remedy for arbitrary, non-judicial commitment by the executive.” By 1768, William Blackstone had identified five variations of habeas corpus writs, each with a specifically defined nomenclature and function. The writ of habeas corpus ad subjiciendum was the form of the writ used to test the legality of imprisonment, and it is to this form of the writ that the words “habeas corpus” typically refer.

The successful transplantation of habeas corpus to the American colonies and into the Constitution of the United States was uneventful. The constitutional provision reflected colonial concerns that the writ of habeas corpus should not be “suspended” except when the nation itself was in danger. The delegates to the constitutional convention did not define habeas corpus or seek to insure that it would be applied in a specific manner because they were well aware of its meaning and use under English law. The delegates saw habeas corpus not as a post-conviction remedy but as a protection against imprisonment by order of government officers outside of the process normally accorded by law — exactly the kind of broad executive power which could be justified “when in Cases of Rebellion or Invasion the public Safety may require it.”

The delegates also did not view the constitutional provision as

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56 Yackle, supra note 23, at 12. The history of habeas corpus in Kentucky is more dependent upon this Act of Parliament than one might suspect. In 1960, the Kentucky high court pointed to the fact that a pertinent part of the language of Parliament from 1679 had survived virtually intact in section 422 of the Kentucky Code of Criminal Practice, and this section was used to resolve the case at hand. Young v. Russell, 332 S.W.2d 629, 632 (Ky. 1960).


58 1 William Blackstone, Commentaries *131; see also Bollman, 8 U.S. (4 Cranch) at 95 (holding that the Supreme Court has jurisdiction to issue a writ of habeas corpus).

59 McFeeley, supra note 57, at 594 (discussing the writ of habeas corpus in relation to the U.S. Constitution).

60 U.S. Const. art. I, § 9, cl. 2. Blackstone argued that such powers, conferred by the legislature, were acceptable “when the state is in real danger.” 1 Blackstone, supra note 58, at *136. In his view, it is the “legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing . . . . [T]his experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for awhile, in order to preserve it for ever.” Id.
a guarantee of the ability of federal courts to apply habeas corpus against the states, since the clause relating to the suspension of habeas corpus was placed in the Constitution along with other limitations on the federal government.  

This view is further confirmed by the actions of the first Congress under the new Constitution. The Judiciary Act of 1789, which established the lower federal courts, granted to the U.S. Supreme Court and the district courts the power to grant the writ to inquire into the causes of confinement. Prisoners held under color of state law, however, were explicitly excluded from the provisions of the Act. Again, the writ itself was not defined nor was any direction on its proper use thought necessary. In addition, it was assumed and uncontroverted that the federal courts would apply federal habeas to federal prisoners while state courts would apply state habeas to state prisoners. The exclusive nature of federal habeas corpus was later confirmed by cases such as Ex parte Dorr, in which the U.S. Supreme Court refused habeas relief to a state prisoner, stating: "Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness."  

The statutory limitation on federal habeas jurisdiction over state prisoners was narrowly expanded by Congress on only two occasions prior to the Civil War. After the war, the inherent difficulties of Reconstruction and the

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61 Section 10 of Article I restricts the powers of the states. It was assumed during the debates at the constitutional convention that individual states would retain the power to suspend state habeas corpus within their own borders regardless of the federal constitutional provision. U.S. DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 5 (1988).

62 Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81 (1789).

63 Habeas corpus "shall in no case extend to prisoners in gaol [jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed to trial before some court of the same, or are necessary to be brought into court to testify." Id.

64 See Ex parte Parks, 93 U.S. 18, 21 (1876). According to the Supreme Court: The general principles upon which the writ of habeas corpus is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. Id.

65 44 U.S. (3 How.) 103, 105 (1845).

66 The first time was in 1833, when Congress, reacting to the nullification crisis in South Carolina, gave federal courts habeas jurisdiction over federal officers who, in attempting to enforce federal law in the states, had been placed in state custody. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634 (1833); see Parks, 93 U.S. at 22. It took a major diplomatic incident to legislatively expand the writ further. In 1842, Congress gave federal courts jurisdiction over subjects or citizens of foreign governments held as state
plight of newly liberated slaves led Congress to place state prisoners under the federal writ in 1867. With one stroke, Congress gave federal courts the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Only one year later, however, Congress removed jurisdiction from the U.S. Supreme Court to hear state habeas cases on direct appeal from federal circuit courts. This limitation on the Supreme Court's appellate jurisdiction had the unfortunate result of ensuring that the Supreme Court would not issue opinions decided under the 1867 Act, although it continued to determine federal habeas cases under the Judiciary Act of 1789. This situation left the lower federal courts without unifying guidance in applying the writ to state prisoners and became a source of state frustration with federal review. Appellate jurisdiction over cases arising from the claims of state prisoners was finally restored in 1885.

From this brief history it is apparent that the early statutory expansion of habeas corpus was largely a matter of congressional action in response to specific political problems. In the courts, the situation was different. The early American common law protection of the writ of habeas corpus was initially limited, as in England, to cases in which no final criminal judgment had been

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67 Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 385 (1867). The petitioner could answer the government's claim of justification for confinement, and the court was authorized to conduct hearings, gather evidence, and make factual findings. Id. at 386. Thus, for the first time, the federal courts were empowered to look beyond the state court record. Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 487 n.120 (1963) (discussing the expansive scope ascribed to federal habeas corpus). The clear purpose of the 1867 Act was to protect newly emancipated slaves in the southern states. U.S. Dep't of Justice, supra note 61, at 7-9, 25.

68 Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1869) (holding that the 1867 Act had removed the Supreme Court's appellate jurisdiction of state habeas corpus).

69 See id. at 514; Stanley Kutler, Judicial Power and Reconstruction Politics 111-13 (1968). The states were helpless to obtain further review. As one critic wrote in 1884: "In this way the inferior Federal courts have unlocked the penitentiaries of the States, exercised the power and authority of passing finally and conclusively upon the validity of State laws, and even of the ordinances of State constitutions." Thompson, supra note 66, at 21-22.

70 Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (1885); see Thompson, supra note 66, at 16. The Supreme Court immediately decided Ex parte Royall, 117 U.S. 241, 252-53 (1886), holding that federal courts should review the habeas petitions of a state prisoner only after process to correct the alleged infirmity had been attempted in the state courts (in other words, after state court remedies had been "exhausted").
Because the writ was viewed as a protection against arbitrary detention by the executive, a demonstration by the government that the prisoner was detained under the final judgment of a court of competent jurisdiction ended the inquiry. Chief Justice of the U.S. Supreme Court John Marshall explained this reasoning in 1830:

A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. . . . It puts an end to inquiry concerning the fact by deciding it. . . . It would be strange if, under colour of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. 

Thus, the very core of modern-day habeas corpus—the search for constitutional error in a federal or state court criminal proceeding—was entirely missing.

Even the Habeas Corpus Act of 1867 did not immediately alter this narrow inquiry into the absence of subject-matter jurisdiction which would render a criminal judgment void. For the remainder of the century, federal habeas claims were analyzed from the perspective, or at least the rhetoric, of the void or voidable judgment, and such claims suffered from the fact that until 1885 no general right of appeal to the Supreme Court in federal habeas cases existed. Toward the turn of the century, the cases in the federal courts increasingly showed the inherent strains of trying to limit habeas consideration to narrow jurisdictional questions when the facts of the cases demonstrated that the enforcement of fundamental rights was at stake. Two such cases were decided in the 1870s, each opening a new avenue of inquiry on habeas for state prisoners. In Ex parte Lange, the Supreme Court held that the imposition and service of a sentence for a crime ended the original jurisdiction of a trial court to impose punishment. Therefore, a second

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71 Bator, supra note 67, at 444-53 (discussing whether state conviction could ever be final if subject to federal habeas review).
72 Ex parte Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830) (refusing to grant writ of habeas corpus to determine whether petitioner had committed any offense punishable by the original court).
73 Bator, supra note 67, at 474-83 (discussing limited availability of federal habeas corpus remedy for state convicts for the period of 1867-1915).
75 85 U.S. (18 Wall.) 163, 178 (1874) (holding that completion of sentence of one of two alternative penalties ended the original court's jurisdiction).
judgment imposing additional punishment was void as being without jurisdiction, and habeas would lie. A similar expansion occurred in Ex parte Siebold, which held that a prosecution predicated upon an unconstitutional law was itself a nullity. Since an unconstitutional law was the same as no law at all, the trial court was considered as having acted without jurisdiction. Thus, the constitutionality of a statute became cognizable in a federal habeas corpus proceeding.

Although both cases were framed in terms of jurisdiction, it has been argued that the Supreme Court was intentionally subverting the jurisdictional limitation required by common law. The general confusion in the cases of this era may be explained, at least in part, by the lack of a general right of appeal throughout most of this period, which increased pressure on the Supreme Court to use federal habeas corpus to accomplish institutional objectives. The eventual granting of appeal or writ of error rights reduced this pressure in the short run but failed overall to confine habeas corpus to the traditional jurisdictional inquiry.

By 1915, in Frank v. Mangum, the Supreme Court had come to recognize that the 1867 Act authorized “a more searching investigation” of the jurisdiction of the state trial court and that state court fact-finding would also be subject to dispute. Leo M. Frank claimed that domination of his state court trial by an angry mob had deprived the trial court of its jurisdiction over the verdict and sentence. This argument, although stretched, was still

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76 Id.
77 100 U.S. 373 (1880) (holding that habeas corpus review will lie in cases where indictment was predicated on an act of Congress alleged to be unconstitutional).
78 Id. at 376-77.
79 Under this view, the use of habeas corpus as an all-purpose remedy actually began in the 1880s, and framing the issue of an unconstitutional state statute or an illegal sentence in terms of a court's jurisdiction was mere window-dressing to achieve a desired result. Professor Paul M. Bator has counseled against uncritically viewing Lange, Siebold, and other cases of this era as examples of an assumed effort to stretch federal habeas corpus beyond the basic jurisdictional inquiry. “The fact is that the nineteenth century judges plainly did not feel that their distinctions were verbal fictions under cover of which they could produce such an expansion, and we should not regard their cases as authorizing us to do so.” Bator, supra note 67, at 472.
80 Id. at 473-74.
81 Salinger v. Loisel, 265 U.S. 224, 231 (1924) (“When a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed.”); Markuson v. Boucher, 175 U.S. 184, 185-86 (1899) (“We have frequently pronounced against the review by habeas corpus of the judgments of the state courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error.”).
82 237 U.S. 309, 331 (1915).
83 Id. at 324-25.
framed in the traditional manner. Despite the ultimate denial of habeas relief, the Supreme Court recognized that habeas jurisdiction extended to those cases where the state had not provided an adequate opportunity to be heard. Justice Oliver Wendell Holmes took this occasion to write a justly celebrated dissent which argued that habeas was available wherever the "processes of justice are actually subverted." His reasoning was quickly adopted. By 1923 the Supreme Court, in an opinion written by Holmes, decided that a state judgment flowing from a trial dominated by an angry mob was subject to review and determination on federal habeas corpus if the federal court should find that the process afforded by the state was but a hollow mask covering a violation of due process.

Within a short period of time, federal trial courts began throwing out state convictions with increasing frequency, thus, to some observers, occupying the same relative position as state appellate courts. The states were generally resentful and critical of this process, in particular because federal judges were not perceived as holding a monopoly on legal wisdom and they decided cases alone, without benefit of the multi-judge panel typical of appellate review. Even the Supreme Court recognized that the exercise of habeas corpus jurisdiction is "more delicate, [and] the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a state." Nonetheless, the active intervention of the federal judiciary in state criminal justice systems became an established fact.

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4 Id. at 326, 345.
5 Id. at 347 (Holmes, J., dissenting).
7 Wilkes, REMEDIES AND RELIEF, supra note 14, § 3-4.
8 Id. at 184, 187 (1899) (holding that proper post-conviction remedy for state conviction is a writ of error).

An example of the confusion that resulted may be seen in a pair of federal cases in Kentucky deciding an identical issue. In 1927 the Supreme Court decided Tumey v. Ohio, 273 U.S. 510, 534 (1927), striking down an Ohio statute which permitted the mayor of a city to try certain misdemeanor cases and, if a conviction were imposed, to recover a fee for services, which gave the mayor a constitutionally impermissible interest in the outcome. Id. at 518-19. A similar fee payment was authorized at this time for Kentucky's county judges. Within a 10-day period, two published opinions deciding federal habeas corpus challenges to the Kentucky practice were issued, and they reached opposite conclusions. Ex parte Baer, 20 F.2d 912 (E.D. Ky. 1927) (holding conviction by state judge with financial interest in conviction violated due process, and, consequently, federal habeas corpus remedy was available); Ex parte Meeks, 20 F.2d 543 (W.D. Ky. 1927) (holding state judge's financial interest in conviction did not violate due process because convict had not availed himself of all other remedies afforded by the state); see Warnock, supra note 39, at 422-27.
B. Federal Habeas Corpus from 1938 to 1963

When the Supreme Court decided Johnson v. Zerbst in 1938,90 the jurisdictional requirement still limited federal habeas corpus review of state convictions. In Johnson, the Supreme Court theorized a loss of state trial court jurisdiction from a violation of the defendant's right to counsel and made clear that the line of cases limiting the writ to "jurisdictional" inquiries was no longer meaningful.91 By 1942, the Supreme Court approved the use of habeas corpus by federal prisoners to challenge all manner of constitutional deprivations in those "exceptional cases where the conviction has been in disregard of the constitutional rights of the accused."92 For state prisoners, federal habeas corpus for all constitutional issues was shortly made available in instances where state court remedies failed to provide "full and fair" adjudication of the issues, where no state remedy existed, or where the remedy existed but was unavailable or impracticable.93

The states, however, continued to be displeased with these developments. In response to criticism, Congress enacted amendments to the Habeas Corpus Act in 1948 in an unsuccessful effort to curb habeas "abuses."94 Shortly thereafter, the attorney generals of forty-one states joined in an unsuccessful effort to get the Habeas Corpus Act declared

90 304 U.S. 458 (1938).
91 Id. at 468.
93 Ex parte Hawk, 321 U.S. 114, 118 (1944) (collecting cases).
94 Pub. L. No. 773, 62 Stat. 869, 964-68 (1948). The 1948 statutory measures had been proposed by a committee of the Judicial Conference chaired by Judge John J. Parker. In 1948, Parker wrote that the passage of the amendments ensured, "in the case of state prisoners, [that] resort to the lower federal courts is practically eliminated where adequate remedy is provided by state law." John J. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 174 (1948) (arguing that the provisions of the revised code were necessary to stop the abuse of the habeas corpus doctrine). This assessment proved to be quite incorrect, although certain procedural reforms were accomplished. At a minimum, state trial judges could no longer be compelled to testify in front of federal trial judges on the conduct of a state court proceeding. Frank W. Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741, 745-46 (1966) (suggesting remedies to stop the increase in federal habeas corpus actions). For interesting sidelights on the issues surrounding the expansion of federal habeas corpus during this era, see John W. Winkle, III, Judges as Lobbyists: Habeas Corpus Reform in the 1940's, 68 Judicature 262 (1985) (concentrating on events leading up to congressional passage of habeas corpus legislation in 1948); Louis E. Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F.R.D. 313 (1947) (suggesting that reliance on the fundamental doctrine of judicial discretion was the best method for dealing with problems of habeas corpus abuse).
unconstitutional as applied to state prisoners. The Supreme Court was not swayed, having in 1953 decided Brown v. Allen, which confirmed federal power to review state court convictions on federal habeas corpus. Then, in 1963, the Court decided two additional cases of tremendous significance to federal habeas corpus jurisprudence. Fay v. Noia represented a comprehensive revision of the power of federal district courts to issue habeas relief to state prisoners. It created a rule that would enforce state procedural defaults, such as a failure to object at trial, only if the state could show the defendant had made a purposeful choice to default by "deliberately by-passing" orderly state court procedures. The companion case of Townsend v. Sain expanded the discretion of district judges to reject state court factual findings and to hold federal evidentiary hearings on disputed factual matters.

At the same time as the ability of federal courts to review state criminal convictions was growing, the substantive federal constitutional rights of the state prisoner were expanding. The 1963 Supreme Court

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95 United States ex rel. Elliott v. Hendricks, 213 F.2d 922, 924 (3d Cir.) (holding that proceeding by an inferior federal court in habeas corpus was not unconstitutional), cert. denied, 48 U.S. 851 (1954).

96 344 U.S. 443 (1953). Although habeas relief was denied in this proceeding, the right of state prisoners to bring general claims concerning all manner of constitutional violations was assumed by the Supreme Court. Id. at 473-75, 485.

97 372 U.S. 391 (1963) (holding that state prisoner's failure to appeal his murder conviction did not justify withholding of federal habeas corpus).

98 Id. at 438-39. This standard was an almost impossible one for a state to meet.

99 372 U.S. 293, 293 (1963) (holding that an evidentiary hearing was required in federal court if the district court could not determine what findings had been made by the state trial judge).

100 Coextensive with the expansion of federal habeas corpus was the Supreme Court's use of the Due Process Clause of the Fourteenth Amendment to apply numerous federal rights contained in the Fifth, Sixth, and Eighth Amendments to state prisoners. Only a few of the important cases decided in the 1960s can be mentioned here. See, e.g., Benton v. Maryland, 395 U.S. 784 (1969) (involving double jeopardy); Boykin v. Alabama, 395 U.S. 238 (1969) (requiring the guilty plea record to indicate valid waiver of constitutional rights); Miranda v. Arizona, 384 U.S. 436 (1966) (establishing the famous "Miranda warnings" necessary for constitutional custodial police interrogation); Pointer v. Texas, 380 U.S. 400 (1965) (involving the Confrontation Clause); Malloy v. Hogan, 378 U.S. 1 (1964) (involving the privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (involving the right to trial counsel in felony cases); Mapp v. Ohio, 367 U.S. 643 (1961) (establishing that the exclusionary rule applies to the states).

Since review of state criminal convictions has always depended upon a state prisoner's invocation of a right guaranteed under the Constitution of the United States, "this proliferation of possible federal questions meant that a greatly increased percentage of state criminal convictions could be subjected to Supreme Court review." Daniel J.
cases had brought federal habeas corpus review of state convictions to its high-water mark. It is no coincidence that 1963 was the year in which Kentucky RCr 11.42 came into effect. The Supreme Court's "new look" in constitutional law and the threat that the states would soon be constitutionally required to provide such relief\(^{101}\) had made such a rule imperative.

C. Federal Habeas Corpus After 1963

Shortly after 1963, the appointment of more conservative justices to the Supreme Court\(^{102}\) and the changes in the governing statutes by

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\(^{101}\) In Young v. Ragen, 337 U.S. 235, 238-39 (1949), the Supreme Court explained that the federal habeas corpus doctrine requiring exhaustion of state remedies "presupposes that some adequate state remedy exists" and that states provide some "clearly defined method" through which state prisoners may claim a denial of federal rights in a state forum. The Court emphasized this position again in Fay v. Noia, 372 U.S. 391, 441 (1963): "If the States withhold effective remedy, the federal courts have the power and duty to provide it."

In 1964 the Supreme Court granted certiorari on the question of whether the Fourteenth Amendment required the states to adopt an adequate post-conviction review process to resolve federal constitutional claims. Case v. Nebraska, 381 U.S. 336, 337 (1965). Although Nebraska's adoption of a post-conviction relief statute mooted the question, most observers believed that the Supreme Court was prepared to hold that the Constitution mandated an adequate state corrective process for post-conviction claims. For example, in 1971 the Kentucky high court stated flatly: "It is the duty of the states to provide post-conviction remedies to give prisoners the opportunity to demand that a court vacate a judgment when constitutional rights have been abridged or fundamental procedural fairness has not [been] obtained." Case v. Commonwealth, 467 S.W.2d 367, 368 (Ky. 1971).

However, in 1987 the Supreme Court revisited this question and, in Pennsylvania v. Finley, 481 U.S. 551, 557 (1987), held that the states are not constitutionally required to provide post-conviction remedies. However, the existence of state post-conviction remedies keeps the primary fact-finding and the initial determination of federal rights violations where the Supreme Court majority clearly wants them — in the states.

Congress spurred the inevitable readjustment. Congestion caused by state prisoner litigation in federal courts became a constant theme.\(^{103}\) Within a few short years, the Supreme Court began a re-examination of habeas corpus.\(^{104}\) During 1976, the Supreme Court issued no fewer than three decisions significantly restricting the application of federal habeas corpus to state prisoners\(^{105}\) and, in 1977, issued *Wainwright v. Sykes* which

\(^{103}\) See John L. Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?* 6 CUMB. L. REV. 363, 372-75 (1975) (discussing problems generated by federal habeas corpus in its application to state prisoners); George C. Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A. J. 323, 324 (1971) (noting a "tidal wave" of petitions); Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974) [hereinafter Friendly, *Averting the Flood*] (discussing how to divert the increasing flow of habeas corpus). In 1963, Professor Paul M. Bator challenged the notion of expansive federal habeas corpus review of state convictions in an important and often-cited article. Bator, *supra* note 67. This effort was followed up by an essay evocatively entitled "Is Innocence Irrelevant?" and authored by U.S. Court of Appeals Judge Henry J. Friendly in 1970. Friendly, *Collateral Attack*, supra note 100. The pervasive thread in this piece, as the title suggests, is that actual innocence of the crime for which a defendant was tried should be *at least* a factor in determining whether a petitioner is entitled to habeas corpus relief from a state conviction. The U.S. Supreme Court appears to be moving in this direction, and the influence of Judge Friendly’s article is both acknowledged and apparent. *See* Herrera v. Collins, 113 S. Ct. 853, 862 (1993) (explaining that while claim of innocence based on newly discovered evidence was not ground for federal habeas relief, “this is not to say that our habeas jurisprudence casts a blind eye towards innocence”); Sawyer v. Whitley, 112 S. Ct. 2514, 2518-19, 2523 (1992) (analysing “actual innocence” jurisprudence and applying it to sentence of death); Smith v. Murray, 477 U.S. 527, 537-39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986) (noting that actual innocence may justify granting writ of habeas corpus despite procedural default); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (holding that ends of justice required consideration of successive petition when petitioner raised a colorable showing of factual innocence).


\(^{105}\) Stone v. Powell, 428 U.S. 465 (1976) (holding that full and fair adjudication of Fourth Amendment search and seizure claims at state level barred raising the issue on federal habeas corpus); Francis v. Henderson, 425 U.S. 536 (1976) (holding that failure to object was waiver
adopted the "cause" and "prejudice" test for state prisoners to overcome procedural default. The Supreme Court’s critical view of extensive federal supervision of state court convictions has continued. This process of significantly restricting the application of federal habeas corpus to state prisoners, or at least its goal, has been both praised and challenged, but the majority of commentators have continued to argue for an expansive view of the writ. Some of the difficulties are systemic, for in a federal form of government, tension between

and barred federal habeas corpus review unless petitioner could demonstrate cause and prejudice; Estelle v. Williams, 425 U.S. 501 (1976) (discussing "failure to object").

See, e.g., Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (applying more lenient standard of harmless error review on collateral attack); Teague v. Lane, 489 U.S. 288, 306-09 (1989) (advancing restrictive view of habeas corpus and limiting retroactive application of new rulings); Murray v. Carrier, 477 U.S. 509 (1986) (requiring state prisoners to exhaust all claims before a petition for habeas corpus can be considered); Rose v. Lundy, 455 U.S. 509 (1982) (requiring state prisoners to exhaust all claims before a petition for habeas corpus can be considered); Powers, supra note 104, at 444-47; see also Richard A. Michael, The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings, 64 Iowa L. Rev. 233 (1979) (suggesting that the Burger Court's increasing reliance on state courts to protect constitutional rights of individuals was a positive development).


Although many authors have expressed opinions regarding the proper scope of habeas corpus review, relatively few have deeply probed the fundamental issues involved. The expectations of the states under traditional notions of federalism, comity, and finality are difficult to balance with federal habeas corpus as currently applied to state prisoners.
parallel court systems will always exist. Those who favor restricting the use of federal habeas corpus articulate other problems which flow from the unique nature of habeas corpus itself.\textsuperscript{112} Legitimate concerns exist which involve the erosion of long-established doctrines such as comity, finality of criminal judgments, and the traditional primary role of the state court in enforcing state criminal law. An additional issue concerns the limited success of the habeas petitioner in the modern era. For example, even under expanded habeas review, petitioners were successful in only 1.4% of cases in the twelve-year period from 1946 to 1957.\textsuperscript{113} A survey of state habeas actions in six federal districts from 1975 to 1977 showed similar results: the success rate of all forms of relief was only 3.2%.\textsuperscript{114}

For a stimulating debate on the conceptual bases of the Great Writ, see generally Bator, \textit{supra} note 67; Erwin Chemerinsky, \textit{Thinking About Habeas Corpus}, 37 CASE W. RES. L. REV. 748 (1987) (discussing the various habeas corpus issues: federalism, separation of powers, criminal justice system, and nature of litigation involved); Friendly, \textit{Collateral Attack, supra} note 109; Neuborne, \textit{supra} note 109, at 1114-30 (opining that since state courts are not as zealous in upholding federal constitutional rights, federal habeas review is necessary); Larry W. Yackle, \textit{Explaining Habeas Corpus}, 60 N.Y.U. L. REV. 991, 998-1010 (1985) (arguing that habeas review is the trade-off for allowing the states primary responsibility for the enforcement of criminal laws). For the view that parity has been substantially achieved, see Michael E. Solimine & James L. Walker, \textit{State Court Protection of Federal Constitutional Rights}, 12 HARV. J.L. & PUB. POL'Y 127, 127-30 (1989).

In the author's judgment, the basic issue is relatively simple, resting entirely upon the ability and willingness of state court judges to enforce federal rights in state courts. In our federal system, the states are clearly charged with "primary authority for defining and enforcing the criminal law." \textit{Engle v. Isaac}, 456 U.S. 107, 128 (1982). This authority by definition includes responsibility for vigorously enforcing \textit{both} state and federal constitutions. The 1867 expansion of habeas corpus by Congress was a tool to fix a specific problem. Habeas corpus review of state criminal convictions should be viewed this way today. If state courts could perfectly adjudicate all federally based claims in state court, then habeas corpus for state prisoners would be redundant. And, if no state court could adjudicate correctly any federal constitutional claim, then federal habeas would be a necessity in every case where such a claim was raised. The real issue concerns the job the state courts are doing and whether the costs of federal habeas corpus are justified by the results. \textit{But see} Joseph L. Hoffman & William J. Stuntz, \textit{Habeas After the Revolution}, 1993 SUP. CT. REV. 65 (1994) (arguing that parity is irrelevant because both sides of the traditional habeas debate have missed the point through their failure to simply examine how federal habeas corpus can best be used to further the goals of criminal justice systems).

\textsuperscript{112} \textit{See, e.g.}, Graddick, \textit{supra} note 108, at 16-29 (criticizing the use of habeas corpus).


\textsuperscript{114} Karen M. Allen et al., \textit{Federal Habeas Corpus and Its Reform: An Empirical Analysis}, 13 RUTGERS L.J. 675, 699 (1982) (analyzing how well current proposals for reform of habeas corpus review would accommodate the competing societal interests). \textit{A}
Even this limited result may be illusory. As Professor Paul M. Bator,115 U.S. Court of Appeals Judge Henry J. Friendly,116 and others have argued,117 a federal habeas court “reversal” does not necessarily translate into justice served but may merely indicate the rewards of forum-shopping and luck.118

In contrast, proponents of expansive federal habeas corpus jurisdiction over state prisoner petitions argue that the availability of federal habeas corpus is a necessary price to pay for effective enforcement of federal constitutional rights.119 To these commentators, fears of a flood of state
clear exception exists in state death penalty cases, where a higher rate of federal court reversal is obtained. However, the rate of federal habeas corpus success for death row inmates often has been overstated. VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 88 (1994). This source, comparing 1990 and 1992 data, concludes that

habeas petitions were granted more frequently in death penalty cases than in other cases in federal courts, but granted less frequently than other cases in state courts. In either event, petitioners' success rate in death penalty cases are [sic] vastly overstated. These data lend support to the argument that state courts can be trusted to guarantee constitutional rights, or conversely, weakens [sic] the argument that state courts are making so many errors that federal oversight is essential.

115 Bator, supra note 67, at 487.
116 Friendly, Collateral Attack, supra note 100, at 165 n.125.
117 See, e.g., Meador, supra note 100, at 274.
118 One functional problem with federal habeas corpus, viewed from the perspective of the states, is that it returns the basic decision to a single federal trial judge. As an appellate prosecutor with many years of experience in federal habeas corpus litigation, the author can unequivocally state that many close cases are significantly influenced by chance based upon the random assignment of the case to a particular district judge (and the same could be said of state trial judges as well). In contrast, all true appellate courts are composed of more than one judge or justice for good reason. A single judge does not have the benefit of co-equal (and voting) colleagues to refine and alter a point of view.

This observation is relevant to the small number of habeas petitions that are successful. Since claims presented in a habeas petition must be exhausted (that is, previously presented in state court on appeal or post-conviction review), they have, by definition, been presented to at least one multi-judge appellate court. A majority of the state appellate court, also by definition, must have found no federal law violation. The fact that a federal district judge decides to grant habeas relief does not necessarily mean that the state appellate judges were “wrong” and the single federal trial judge is “right.” Friendly, Collateral Attack, supra note 100, at 165 n.125 (“In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few cases where we disagree, I feel no assurance that the federal determination is superior.”).

119 See, e.g., Neuborne, supra note 109, at 1115-18 (arguing that federal courts are better suited to handle federal constitutional problems).
prisoner petitions engulfing the federal courts are exaggerated, the states’ desire for finality is not endangered where few petitions are actually granted, and the Supreme Court’s virtual presumption of parity between the state and federal judiciary in dealing with federal constitutional rights is open to serious question.\textsuperscript{120}

The Supreme Court, of course, is not immune to such shifting winds. In \textit{Wainwright v. Sykes}, Justice William Rehnquist noted that the Court had exhibited a "willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."\textsuperscript{121} This battle over the scope of federal habeas corpus review has been waged on historical fronts\textsuperscript{122} and in Congress.\textsuperscript{123} It cannot be resolved here. However, RCr 11.42 will be affected by these events, because as the scope of federal habeas corpus review further contracts, the necessity for comprehensive post-conviction review in Kentucky theoretically increases proportionally.

\textsuperscript{120} \textit{Id.}
\textsuperscript{121} 433 U.S. 72, 81 (1977); see Jack A. Guttenberg, \textit{Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance}, 12 HOFSTRA L. REV. 617, 619 (1984) (commenting on the manipulation of federal habeas corpus by both conservative and liberal majorities of the Supreme Court); see also Rosemm, \textit{supra} note 102, at 359 (discussing the recent trend of the Supreme Court “to further curb the availability of habeas relief in the federal courts”).
\textsuperscript{122} Rex A. Collings, Jr., \textit{Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?} 40 CAL. L. REV. 335 (1952) (discussing historical background of habeas corpus review); Lewis Mayers, \textit{The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian}, 33 U. CHI. L. REV. 31 (1965) (suggesting that the Supreme Court’s claim of merely fulfilling intentions of 1867 Congress was without historical foundation); Dallin H. Oaks, \textit{Legal History in the High Court—Habeas Corpus}, 64 MICH. L. REV. 451 (1966) (suggesting that the Supreme Court’s use of historical background of habeas corpus to support its current use was wrong).
The dramatic expansion of federal habeas corpus jurisdiction over state prisoners strengthened the conclusion that modern post-conviction procedures were necessary to the proper administration of criminal justice in the states. Each state, however, was left to redefine the scope and purpose of its own statutory and common law in accomplishing this goal, with few available sources of guidance. The National Conference of Commissioners on Uniform State Laws did not approve its model Post-Conviction Procedure Act until 1955, and American Bar Association standards for post-conviction relief were not released in draft form until 1967. One model that was eventually available was the federal post-conviction relief statute, 28 U.S.C. § 2255. However, Kentucky initially was not interested in a statutory or rule-based remedy, preferring to place its reliance in the common law writs of habeas corpus and coram nobis.

Both habeas corpus and coram nobis (or coram vobis) were found in some form in all common law states and in federal jurisprudence. During the first half of the nineteenth century, these writs were gradually modified by local practice, by statute, and eventually by comprehensive codes of procedure springing from the reformist codification movement which swept the United States between 1840 and 1860. The Kentucky General Assembly’s enactment of civil and criminal practice codes marked the first step in the modern development of the writs of habeas corpus and coram nobis. In time it would be amply demonstrated that mere expansion of these writs, either alone or in combination, would not
be enough to adequately cover the breadth of federal constitutional challenges presented by state prisoners. The common law lacked a unified, simply administered system which could provide state prisoners with an adequate forum to ventilate their federal due process claims. What resulted from the patchwork use of the common law was a period of difficulty, naturally occurring through the Kentucky high court’s attempt to fit square pegs into round holes. The result was a less than adequate remedy and confusion on all sides. Not without justification did one Kentucky appellate judge write in 1943 that the Kentucky high court’s published decisions were “in such confusion on the writ of coram nobis that no one can tell where we stand. In writing on the subject we have wobbled and bobbled like a lost raft at sea.”

The legal and historical heritage of the common law writs simply could not be overcome easily. Nonetheless, until the promulgation of Kentucky RCr 11.42 in 1963, these common law writs, with their long histories and peculiar limitations, served as the law on Kentucky post-conviction relief. The attempted use of these writs to broadly test the legality of detention had important ramifications in the development of RCr 11.42 as a modern post-conviction remedy.

A. Habeas Corpus in Kentucky

As Kentucky’s high court explained in Day v. Caudill: “The purpose of the habeas corpus proceeding is to regain the liberty of a person who is being illegally restrained. As such, it has been used to regain the custody of a child, to attack a void criminal judgment, and to obtain bail.”

1. 1792 to the Early Twentieth Century

The writ of habeas corpus ad subjiciendum, usually simply called “habeas corpus,” was intended to provide swift and summary resolution of claims of illegal confinement. As early as 1796 the Kentucky

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128 Anderson v. Buchanan, 168 S.W.2d 48, 55 (Ky. 1943) (Sims, J., dissenting). This opinion was not uncommon. See, e.g., Mitchell v. State, 176 So. 743, 747 (Miss. 1937) (Smith, C.J., concurring) (stating that state courts attempting to modernize post-conviction remedies through revitalization of writ of coram nobis found it easy to “become lost in the mist and fog of the ancient common law”).

129 300 S.W.2d 45, 46 (Ky. 1957).

130 Ex parte Alexander, 2 Am. L. Reg., O.S., 44, 48 (Louisville, Ky., Ch. Ct., 1853) (holding that a commitment for contempt “until the further order of the Court” was void).
General Assembly had passed an act "directing the mode of suing out and prosecuting writs of Habeas Corpus." As with the enactment of the original Habeas Corpus Act in England in 1679, the evil sought to be remedied was the deliberate and illegal imprisonment by government officials of individuals who had a right, at that particular moment in time, to immediate freedom. The single great purpose was to bring the prisoner before a court which had the power to vindicate, a hundred times if necessary, the prisoner's right to liberty.

The filing of a pleading, usually called a petition, which named the warden, jailer, or other official with custody of the prisoner, initiated the proceeding. Its purpose was not to resolve the legal status of the petitioner, nor to determine, for example, whether the petitioner was legally a slave, was guilty of a crime, or had received a fair trial. The

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131 1 Little, Statute Law 1809, supra note 9, at 600-03. The Kentucky act was "a mere re-enactment of the common law." Alexander, 2 Am. L. Reg., O.S., at 48.

132 See 1 Joseph Chitty, A Practical Treatise on the Criminal Law 97-109 (Riley's Am. ed. 1819). This reference work provides an extensive discussion of all aspects of habeas corpus practice in England, with footnote references to American statutes and important case law. This treatise was owned by Benjamin Franklin Bennett, great-great-grandfather of the author, and is presently in the author's collection. Born in 1829, B.F. Bennett moved from southern Ohio to Greenup County, Kentucky, in 1855, and became a member of the Kentucky bar in 1866. Nelson W. Evans, A History of Scioto County, Ohio 901-02 (1903). In 1890, he served as a delegate to the convention which framed Kentucky's present constitution, and he was still practicing law in 1891, as evidenced by Bennett v. Greenup County, 17 S.W. 167 (Ky. 1891).

A hornbook such as Chitty's treatise would have been more than a mere collector's item to a Kentucky lawyer in 1866. The use of English precedents was so widespread that in 1807 the Kentucky General Assembly prohibited the use of English decisions rendered after July 4, 1776. See Chitty, supra, at 97-109. Nonetheless, in Leigh v. Everheart's Executor, 20 Ky. (4 T.B. Mon.) 379, 381 (1827), the court recognized that insofar "as the reasoning and illustrations of principles, contained in those [English] reports can enlighten the understanding and persuade the judgment, they are useful, and have been used out of court." The necessity to refer to English precedent was particularly compelling in cases involving habeas corpus, since the number of Kentucky decisions available for consultation was very limited.

For an example of a later use of the English law in deciding a child custody habeas corpus case, see Ellis v. Jessup, 74 Ky. (11 Bush) 403, 413-15 (1875). In its opinion, the court relied almost exclusively upon Kent's Commentaries, Blackstone's Commentaries, and English case law. Id. at 413-14.

133 Chitty, supra note 132, at 97.

134 C.A. Wickliffe et al., The Revised Statutes of Kentucky 379 (1852).

135 Weddington v. Sloan, 54 Ky. (15 B. Mon.) 147, 154-55 (1854). This decision was consistent with Maria v. Kirby, 51 Ky. (12 B. Mon.) 542, 551 (1851), in which the Kentucky high court refused to give effect to a writ of habeas corpus, issued in Pennsylvania, freeing a female slave.
proceeding focused on bringing before the court an imprisoned individual who claimed to be illegally detained.\textsuperscript{136} By the 1850s, Kentucky's criminal code stated that the writ of habeas corpus "shall be granted forthwith" to any person in custody of the state whose petition showed, "by affidavit or other evidence, probable cause to believe [the petitioner] is detained without lawful authority, or is imprisoned when, by law, he is entitled to bail."\textsuperscript{137} The issuance of habeas corpus—bringing the

\textsuperscript{136} See RICHARD H. STANTON, A TREATISE ON THE LAW RELATING TO THE POWERS AND DUTIES OF JUSTICES OF THE PEACE AND CONSTABLES, IN THE STATE OF KENTUCKY (1863). This source, in the author's collection, provides suggested forms for the writ and the return by using what is apparently an actual example from the pleadings filed in the murder case of one Henry Hawkins. The petition is not included, but the writ and the return are reproduced below. Some of the alternative language suggested by Stanton on this form pleading has been removed.

THE COMMONWEALTH OF KENTUCKY, to Wm. B. Parker, jailor, of the county of Mason:

We command you, that you have the body of Henry Hawkins, detained in your custody, as it is said, together with the day and cause of his being taken, before our judge of the Mason circuit court, at the court house thereof, in the city of Maysville, on Thursday the 8th day of November 1860, at the hour of nine o'clock, of the forenoon of said day; and that you then and there state in writing, the cause of detaining the said Henry Hawkins, and produce your authority for so doing; and hereof you are not to fail under the heavy penalties denounced by law against those who disobey this writ, and to submit to and receive all those things which shall then and there be adjudged in his behalf.

Given under my hand, this 5th day of November 1860.

LEWIS JEFFERSON, [Justice of the Peace, Mason County].

\textit{Id.} at 365 (alteration in original). This form could be used before the judge of the circuit, chancery, or county court, and certain other officials as provided by statute.

The return on the writ was to be substantially as follows:

William B. Parker, jailor of Mason county, on this 8th day of [November] 1860, produces the within named Henry Hawkins, before Lewis Jefferson and Wm. P. Ray, two justices of the peace for Mason county, as he is by the within writ commanded, and says, that the said Henry Hawkins, was, on the 26th day of October 1860, committed to the jail of Mason county, and to his custody as jailor thereof, on a charge of murder, by the warrant of Daniel S. Bradley and Alexander K. Marshall, two justices of the peace for said county, sitting as an examining court, and that he has been, and is now detained by him, as jailor aforesaid, by virtue of said warrant of commitment, and for no other cause. The said warrant of commitment is here produced.

WILLIAM B. PARKER, Jailor of Mason County.

\textit{Id.} at 367 (alteration in original).

\textsuperscript{137} KY. CODE CRM. P. § 395(3) (1854). Almost identical language is used in the present codification of this provision. KY. REV. STAT. ANN. § 419.020 (Michie/Bobbs-Merrill 1992).
petitioner physically before the court—clearly was discretionary and
arguably only reluctantly granted.\textsuperscript{138} If the petition sufficiently drew
the legality of detention into question, the writ would issue. Substantial
penalties were provided for the judicial officer who improperly failed to
issue the writ and for the jailer or other governmental official who failed
to produce the prisoner at the time and place specified.\textsuperscript{139}

\textsuperscript{138} Habeas corpus is “a discretionary writ, to be issued only upon probable cause
being shown, and if upon the face of a petition therefor it appears that there is no
sufficient ground for the release of the prisoner the writ will be denied.” Bethuram v.
Black, 74 Ky. (11 Bush) 628, 632 (1876) (holding that a person in prison is not, as a
matter of course, entitled to habeas corpus); accord Jones v. Murphy, 314 S.W.2d 545,
547 (Ky. 1958) (holding that whenever a court has acquired jurisdiction of a case, no
other court may, by habeas corpus, interfere with its action); Sprinkles v. Downey, 195
S.W.2d 760, 761 (Ky. 1946) (holding that habeas corpus proceeding for discharge from
custody lies only where judgment is void or has been satisfied); Commonwealth ex rel.
Meredith v. Smith, 118 S.W.2d 538, 540 (Ky. 1938) (holding that petition asking for
habeas corpus did not state facts sufficient to authorize its issuance); Cornellison v.
Toney, 12 Ky. L. Rptr. 746, 746-47 (Ky. Sup. Ct. 1891) (holding that statutory penalty
for refusing to issue habeas corpus can only be imposed when applicant demonstrates
probable cause that he is being detained without authority).

\textsuperscript{139} The Kentucky Habeas Corpus Act of 1796 specified that if the person upon whom
the writ was served, usually the jailer, failed to produce the prisoner and a return (answer)
showing the legal basis for detention at the time and place specified, the officer would
be liable to the prisoner for the sum of “one hundred pounds.” 1 Litell, Statute Law
1809, supra note 9, at 602. Such personal liability provisions were commonly found in
habeas corpus statutes throughout the states. See Lewis N. Dembitz, Kentucky
Jurisprudence 149 (1890). In 1876, the Kentucky high court interpreted this provision
based upon a claim for judgment (by this time the penalty had been amended to $1,000)
against the jailer of Rockcastle County:

This statute is plain and peremptory, and if the writ be issued by an officer
having jurisdiction, the one to whom it is directed and upon whom it has been
served has no discretion, but must obey it by producing the body of the prisoner
at the time and place named in said writ, if it is in his power to do so, or he
will be liable for the penalty.

Bethuram, 74 Ky. (11 Bush) at 630.

The universal practice of requiring the officer (usually a jailer or warden) with
physical custody of the petitioner to answer to the petition emphasizes that traditional
habeas corpus was not generally concerned with what might be termed “due process”
arguments. This practice was acceptable because the officer would be swearing only to
the existence of a facially valid judgment or warrant, leaving the reviewing court with the
question of law as to whether the court issuing such warrant or judgment had jurisdiction
to do so. See, e.g., Ex parte Knowles, 16 Ky. L. Rptr. 263, 264-65 (Warren Cir. Ct.
1894).

A considerable sum could also be levied against the judge. Section 401 of the
Kentucky Code of Criminal Practice stated that “[i]f any officer authorized to grant the
writ shall, when legally applied to, refuse to issue it, he shall forfeit and pay, to the
In keeping with its summary nature, a habeas corpus proceeding could "be ex parte, and carried on without the knowledge of the persons directly interested in the decision." Once the prisoner was before the court, possible outcomes included a discharge of the prisoner from custody or a remand of the petitioner for further imprisonment. Since habeas corpus was concerned with the legality of imprisonment at a particular moment in time, if the first petition was unsuccessful and the prisoner remanded, no general limitation existed on filing a subsequent petition, either in the same or another court. No appeal was permitted from an adverse ruling for two reasons. First, action on the petition was not considered a final, appealable order of the court which had rendered it. Second, to allow an appeal would interfere with the very purpose

person in whose behalf it was applied for, five hundred dollars." Joshua F. Bullitt, Civil and Criminal Codes of Practice of Kentucky 127 (3d ed. 1902). This stiff penalty applied to improper or illegal acts, not simply erroneous ones, and the statute was not intended to restrain or control official discretion. Corneillon, 12 Ky. L. Rptr. at 747. As this requirement was highly penal in nature, it was strictly construed. Stewart v. Fuson, 153 S.W. 247, 249 (Ky. 1913) (holding that a person advising marshal not to obey writ of habeas corpus was not liable for the penalty proscribed by the Criminal Code of Practice).

140 Weddington v. Sloan, 54 Ky. (15 B. Mon.) 147, 155 (1854). For this obvious reason, habeas corpus was inappropriate to resolve issues of conflicting legal rights between parties.

141 American law generally considered the discharge a "conclusive determination" that the prisoner had been improperly detained and provided that the former prisoner could not be rearrested "without some new circumstance to authorize the arrest which did not exist when the discharge was granted." 21 Cyclopaedia of Law and Practice 349 (William Mack ed., 1906). Kentucky followed this rule of law. The discharge was conclusive if the court or officer discharging the prisoner had proper jurisdiction to do so. Young v. Russell, 332 S.W.2d 629, 631-32 (Ky. 1960).

142 Ex parte Alexander, 2 Am. L. Reg., O.S., 44, 46 (Louisville, Ky., Ch. Ct., 1853) (holding that refusal to grant habeas corpus by Kentucky circuit court was no bar to consideration of the same writ in chancery court); Maria v. Kirby, 51 Ky. (12 B. Mon.) 542, 550 (1851). This rule of law apparently lasted until Baker v. Davis, 383 S.W.2d 125, 126 (Ky. 1964), when the federal standard for denying a federal habeas corpus hearing on a subsequent application, set out in Sanders v. United States, 373 U.S. 1 (1963), was adopted in Kentucky. But see Yost v. Smith, 862 S.W.2d 852, 853 (Ky. 1993) (holding that successive petitions may be filed on same claim).

143 Mann v. Russell, 60 S.W. 522, 522 (Ky. 1901) (holding that the court had no jurisdiction over an appeal from the judgment of a judge of the circuit court who refused to discharge someone on a writ of habeas corpus); Broadwell v. Commonwealth, 32 S.W. 141, 142 (Ky. 1895) (holding that an order of a judge dismissing a writ of habeas corpus, although made during a term of court, was not appealable); In re Gill, 17 S.W. 166, 166 (Ky. 1891) (holding that no appeal lies from the refusal of a police judge to grant a writ of habeas corpus); Weddington, 54 Ky. (15 B. Mon.) at 153 (holding that since decisions
of the writ, which was to provide a speedy release from improper confinement. This latter reason was aptly stated in 1854 by the court in *Weddington v. Sloan*:

> The writ of *habeas corpus* is intended to furnish a speedy and summary remedy for illegal confinement, and a suspension of the order of the judge who hears and determines the matter, by an appeal to this court, might in a great degree frustrate the whole object and design of the proceeding.\footnote{144}

From the very beginning, an important function of the habeas corpus petition was resolving questions of bail.\footnote{145} In 1839, it was held that habeas corpus in bail cases provided a source of "compulsory process" to bring a prisoner before the court so that bail could be considered.\footnote{146} Habeas corpus was also used by a chancery court in 1853 to free an individual from indefinite imprisonment imposed for contempt of court.\footnote{147}

Since few cases were reported, very little remains of the earliest history of habeas corpus in Kentucky.\footnote{148} However in 1881, a significant

\footnotesize{uppon writs of habeas corpus are not required to take place in court, they cannot be appealed).}

\footnote{144} S. Ky. (15 B. Mon.) at 153; see Wilkes, REMEDIES AND RELIEF, supra note 14, at 15 (noting that habeas corpus is swift and summary in nature). Appeals were only grudgingly allowed in any event. The Kentucky Constitution of 1850 was the first to permit the legislature to preserve an appeal from the judgment of a trial court. KY. CONST. of 1850, art. IV, § 18. This progressive step was undertaken "not on the ground of preserving justice for the defendant, as he was seen already to have too many advantages, but for the purpose of enforcing and making uniform the rules of practice." LEGISLATIVE RESEARCH COMM’N, RESEARCH PUBLICATION NO. 68, CRIMINAL PROCEDURE: PRACTICE PRIOR TO ADOPTION OF THE CODE (1959). Only by the process of appeal and the issuance of appellate opinions could the lower courts be instructed by the appellate courts in their duties and the holdings of the appellate court be enforced.

\footnote{145} Id. \footnote{146} Ready v. Commonwealth, 39 Ky. (9 Dana) 38, 39 (1839) (holding that the court had power to release murder suspect on bail if evidence did not create strong presumption of guilt).

\footnote{147} *Ex parte* Alexander, 2 Am. L. Reg., O.S., 44, 50-51, 56 (Louisville, Ky., Ch. Ct., 1853) (explaining that habeas corpus lies where committing court has imposed a sentence unknown to the law or in excess of its authority).

\footnote{148} This limitation concerned the trial bench. As the Warren County, Kentucky, Circuit Court lamented in 1894:

> It is to be regretted that there is no right of appeal in *habeas corpus* cases in Kentucky, as by reason thereof we are left without positive authority from our Court of Appeals upon questions arising in such cases, and must, therefore,
reported case, Haggard v. Commonwealth, documented the use of the writ of habeas corpus in Kentucky, following the federal example, to present a constitutional challenge. Haggard, who was black, was convicted of malicious stabbing by an all-white jury in Cumberland Circuit Court. He had begun the process of appeal when, instead, he “sued out a writ of habeas corpus” and was subsequently released by the police judge of Burksville, who vacated the judgment of conviction. Under the statute in existence at time of trial, only white males who met certain qualifications could serve on grand or petit juries. All four of Haggard’s attorneys argued that the statute as it existed at time of trial was illegal and in conflict with the U.S. Constitution. The Kentucky high court, however, after briefly mentioning its decision the preceding year which declared the statute unconstitutional, held that the issue was not one that could be raised on habeas corpus. The court was not prepared to expand the scope of the habeas corpus inquiry to violations of constitutional rights, even where these were apparent on the record, at least where the defendant had waived other methods of challenging the conviction.

Over time, Kentucky prisoners and their counsel continued to seek out new uses for the writ. Around the turn of the century, habeas corpus was used to challenge revocation of parole; however, this issue eventually was held to be outside of the purpose of the writ, thus insulating parole board actions from summary habeas corpus proceedings. Habeas corpus was also used to challenge judicial overreaching. For example,
during the era of Prohibition, at least two judges in eastern Kentucky attempted to reduce lawlessness by requiring numerous “peace bonds” (also nicknamed “liberty bonds”) and quickly imprisoned violators for all manner of transgressions. The novelty of this approach to law and order could not escape the reach of the writ of habeas corpus, leading one of the judges to complain publicly that

[b]ootleggers, feudists and other dangerous characters now besiege the court with writs of habeas corpus and petitions for writs of prohibition in their efforts to escape the required “Liberty Bond,” and the trial judge may now be required to assume the additional burden of becoming a party litigant with the criminal he tries before the Kentucky Court of Appeals . . . .

A habeas corpus petition was also successfully used to obtain a jury trial on the issue of the petitioner’s insanity after the individual had been illegally committed to a state mental institution. The trial court granted relief, reasoning that “the Lawrence Circuit Court had jurisdiction to determine the sanity of Ferguson, but in order to do so it acted beyond its jurisdiction when it undertook to try him without notice to him personally and without giving him the right of trial by jury.”

In 1933, the Kentucky high court, in *Department of Public Welfare v. Polsgrove*, collected numerous authorities to summarize the scope of habeas corpus in Kentucky and in other jurisdictions. The court’s unstated purpose was to rebut the continued attempts to take habeas corpus beyond its traditional uses and to keep Kentucky law apart from the liberalization of habeas corpus which was increasingly evident in the federal courts. After comprehensive examination, the court concluded that the “sole inquiry when determining the right of one confined under a judgment of conviction, on considering a writ of habeas corpus, is

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156 *Id.* at 80. A writ of prohibition was issued against Judge Manning on one such peace bond after the county judge refused to release the prisoner on habeas corpus. *Bowles v. Manning*, 245 S.W. 506, 507 (Ky. 1922).


158 *Id.* The analysis of the court stressed the loss of jurisdiction, the traditional predicate to habeas corpus relief. *Id.* at 106.

159 63 S.W.2d 603 (Ky. 1933).

160 *Id.* at 604.
whether the indictment describes an offense of the class which the law recognizes and of which the court had jurisdiction.”

2. 1937 to 1963

The “modern era” of habeas corpus in Kentucky lies between 1937 and 1963. In this crucial period, the state judiciary began to realize that the common law remedies could not remain stagnant and that Kentucky courts would need to achieve the more searching inquiry found in the federal system. During these years, hundreds of Kentucky habeas corpus cases were decided, and an entire body of jurisprudence, which would become the foundation for RCr 11.42, was erected.

As federal habeas corpus activity increased, the number of state habeas petitions also began to rise. In common with other state appellate courts of that day, Kentucky’s high court sharply criticized this trend. At this time, few, if any, of the prisoners applying for review under state habeas corpus employed counsel. In 1949 the Kentucky high court, perhaps in an effort to stem the tide of inmate petitions, noted, “Although this court has been more or less besieged with such self prosecuted proceedings, it has never sustained any of them.” Additionally, the court was irritated by the fact that a habeas corpus petitioner could file successive petitions, even in the same case and upon the same facts, and was allowed, in keeping with common law provisions going back hundreds of years, to have a friend, relative, or other interested person make application for the writ on the prisoner’s behalf. On the other hand, no provision existed to develop a record outside of that which

161 Id. (collecting cases).
162 These dates, of course, are somewhat arbitrary. In 1937, the Kentucky high court first recognized that coram nobis was an available remedy in Kentucky. Jones v. Commonwealth, 108 S.W.2d 816, 817 (Ky. 1937), overruled on other grounds by Smith v. Buchanan, 163 S.W.2d 5 (Ky. 1942). This holding had an obvious effect on state habeas corpus. In 1963, RCr 11.42 became effective, and the important case of Rice v. Davis, 366 S.W.2d 153 (Ky. 1963), which held Kentucky habeas corpus to be coextensive with the modern federal theory of habeas corpus relief, was decided.
163 It is not the purpose of this section to chronicle the development of this case law in detail or to comprehensively illustrate how each legal issue was resolved. Certain important cases and general trends, however, are illustrated.
164 See Keeton v. Commonwealth, 459 S.W.2d 612, 613 (Ky. 1970) (“Federal habeas corpus petitions increased from 89 in 1940 to over 12,000 in 1970. State court postconviction proceedings followed the same pattern.”).
165 Wooten v. Buchanan, 223 S.W.2d 976, 976 (Ky. 1949).
166 Day v. Skinner, 300 S.W.2d 48, 50 (Ky. 1957).
already existed, so the scope of inquiry was severely limited.\textsuperscript{167} An additional jurisdictional hook during this era required that the petitioner be in "actual or physical restraint," thereby excluding, for example, one who was out on bail.\textsuperscript{168} The petitioner was also subject to additional technical requirements.\textsuperscript{169}

The restrictive traditions of Kentucky habeas corpus initially made analysis of cases relatively simple. First, the court would note that relief was available only if the judgment was void.\textsuperscript{170} The second prong of the analysis was equally simple — the judgment could not be void, even if a constitutional right had been denied, where "the court had jurisdiction of the person of the defendant and of the offense charged."\textsuperscript{171} By 1958, 

\textsuperscript{167} See Moss v. Jones, 342 S.W.2d 522, 523 (Ky. 1961) ("Habeas corpus does not lie to correct hidden errors which were unknown to the court and defendant at the time of judgment."); Woldorf v. Buchanan, 232 S.W.2d 1016, 1018 (Ky. 1950) (holding that habeas corpus will lie only "when the judgment is void and when the invalidating effects are shown in the record of the trial"); Smith v. Buchanan, 163 S.W.2d 5, 7 (Ky. 1942) (holding that, since the court had jurisdiction of both the subject matter and the defendant, habeas corpus was not the proper remedy because judgment was not void).

\textsuperscript{168} Ex parte Noel, 338 S.W.2d 903, 905 (Ky. 1960); Robinson v. Bax, 247 S.W.2d 38, 38 (Ky. 1952) (holding that habeas corpus is only appropriate in situations of actual or physical restraint).

\textsuperscript{169} First, the writ was properly dismissed where the petitioner failed to correctly name the official allegedly detaining the petitioner without proper authority or filed the writ as an original action in the appellate court. In re Winburn, 320 S.W.2d 622, 623 (Ky. 1959); Num v. Buchanan, 223 S.W.2d 355, 355 (Ky. 1949); Fuson v. Stewart, 126 S.W. 1097, 1098 (Ky. 1910). In addition, the state would not provide a free transcript to an indigent petitioner, to be used to prepare a habeas corpus petition where the allegations regarding the fairness of the underlying trial were not specific. Blevins v. Tartar, 306 S.W.2d 297, 298 (Ky. 1957) (noting unsuccessful use of mandamus to obtain transcript); Moy v. Bradley, 306 S.W.2d 296, 297 (Ky. 1957); see GREGORY, supra note 11, at 903-12.

\textsuperscript{170} See Moss v. Jones, 342 S.W.2d 522, 523 (Ky. 1961) ("Habeas corpus does not lie to correct hidden errors which were unknown to the court and defendant at the time of judgment."); Woldorf v. Buchanan, 232 S.W.2d 1016, 1018 (Ky. 1950) (holding that habeas corpus will lie only "when the judgment is void and when the invalidating effects are shown in the record of the trial"); Smith v. Buchanan, 163 S.W.2d 5, 7 (Ky. 1942) (holding that, since the court had jurisdiction of both the subject matter and the defendant, habeas corpus was not the proper remedy because judgment was not void).

\textsuperscript{171} Owen v. Commonwealth, 280 S.W.2d 524, 525 (Ky. 1955); Brown v. Hoblitze, 307 S.W.2d 739, 739 (Ky. 1956); id. at 750 (Sims, J., dissenting) ("It is the general rule,
the second prong was recognized to be in some flux, with the Kentucky high court indicating that a judgment "may possibly be subject to some modification in a case where constitutional rights have been violated."\footnote{Thomas v. Maggard, 313 S.W.2d 271, 272 (Ky. 1958); Berry v. Gray, 299 S.W.2d 124, 125 (Ky.), cert. denied, 353 U.S. 986 (1957).} By 1961, the court's position shifted again, and it held flatly, in \textit{Moss v. Jones}, that mere denial of a constitutional right did not void a criminal judgment.\footnote{342 S.W.2d 522, 523 (Ky. 1961) ("Even the denial of a constitutional right will not render a judgment void if the court had jurisdiction of the person and of the offense.").} A year later, the Kentucky high court decided a case on the same principle which it had rejected in \textit{Moss}. That case, \textit{Thomas v. Morrow}, concerned the fate of a habeas petitioner with a long history of mental problems who had pled guilty and had been sentenced but had been demonstrably incompetent on both occasions.\footnote{See id.} Under these facts, the \textit{Thomas} court held that the resulting judgment was void and indicated that habeas would lie to correct such a wrong.\footnote{Decker v. Russell, 357 S.W.2d 886, 888 (Ky. 1962) (explaining that a denial of a constitutional right does not invalidate a judgment if the court had jurisdiction of the case); Owen, 280 S.W.2d at 525; Smith v. Buchanan, 163 S.W.2d 5, 7 (Ky. 1942).} Although it may be supposed that the issue was not a "constitutional" one since no violation of constitutional rights was mentioned in the opinion, the nature of the holding indicated constitutional issues surrounded cases in which mental incompetents were imprisoned without the requisite due process — for the trial court had jurisdiction over both the person of the defendant and the offense.\footnote{178 Smith v. Buchanan, 163 S.W.2d 5, 7 (Ky. 1942).} No attempt was made to square this holding with numerous prior decisions limiting a habeas inquiry to the jurisdictional question.\footnote{Id. at 106.}

During the period from the mid-1920s until the arrival of \textit{RCr 11.42} in 1963, state habeas corpus petitions were brought in a wide variety of cases. For example, petitioners sought to obtain immediate release on grounds of cruel and unusual punishment,\footnote{Decker v. Russell, 357 S.W.2d 886, 887 (Ky. 1962).} erroneous sentencing,\footnote{Owen, 280 S.W.2d at 525; Smith v. Buchanan, 163 S.W.2d 5, 7 (Ky. 1942).} error in consol-
idating warrants or charges for trial,\textsuperscript{180} defective indictment,\textsuperscript{181} newly discovered evidence,\textsuperscript{182} unreasonable or illegal denial of bail,\textsuperscript{183} and irregularity in the formation of the jury.\textsuperscript{184} In some cases, the traditional civil nature of a habeas corpus proceeding affected the outcome of legal issues.\textsuperscript{185}

Although most applications were denied, a few petitioners were successful in obtaining the following: a judgment granting the prisoner the right to reasonable bail;\textsuperscript{186} a ruling that state jurisdiction over a prisoner who had been given over to federal authorities to serve time in

judgment void and, in pleading guilty, the defendant waived right to jury involvement); Lynch v. Jones, 342 S.W.2d 394, 395 (Ky. 1961) (holding that judgment was not rendered void where a judge delivered a sentence without the intervention of the jury).

\textsuperscript{180} Brown v. Hoblitzeill, 307 S.W.2d 739, 742 (Ky. 1956).

\textsuperscript{181} Underwood v. Jones, 346 S.W.2d 46, 47-48 (Ky. 1961) (holding that proper manner of dealing with a defective indictment is by direct appeal rather than habeas corpus).

\textsuperscript{182} Adkins v. Commonwealth, 328 S.W.2d 412, 413 (Ky. 1959) (holding that habeas corpus is not proper method for dealing with newly discovered evidence which should have been previously discovered with due diligence).

\textsuperscript{183} A leading "bail" case prior to the enactment of RCr 11.42 was Smith v. Henson, 182 S.W.2d 666, 669 (Ky. 1944) (holding that a habeas corpus petition to obtain bail should come only after a motion for bail has been made, and in order for habeas corpus to stand, it must be shown that denial of bail pursuant to the motion was illegal). See generally Lycans v. Burke, 453 S.W.2d 8 (Ky. 1970) (holding that refusal of bail does not constitute error in a capital offense case where the proof is evident or the presumption of guilt great); Lewis v. Ball, 299 S.W.2d 810 (Ky. 1957) (holding that habeas corpus petition must show that the court acted illegally in denying bail); Duke v. Smith, 253 S.W.2d 242 (Ky. 1952) (recognizing that the standard that denial of bail must be reasonable and lawful is met by a showing of proof of evidence giving rise to a great presumption of guilt).

\textsuperscript{184} Sexton v. Buchanan, 168 S.W.2d 19, 20 (Ky. 1943) (holding that alleged irregularities in the formation of the jury only lead to having judgment declared erroneous, not void, and, therefore, habeas corpus petition would not succeed).

\textsuperscript{185} Haney v. Wingo, 453 S.W.2d 556, 557 (Ky. 1970) (holding that since habeas corpus is a civil proceeding, appointment of counsel for indigent is not required); Crady v. Cranfill, 371 S.W.2d 640, 644 (Ky. 1963) (holding that because habeas corpus is essentially a civil proceeding, the bail provisions of the criminal procedure rules do not apply); accord Ross v. Wingo, 433 S.W.2d 137, 138 (Ky. 1968) (supporting the proposition that, due to the civil nature of habeas corpus, appointment of counsel is not required). However, the writ of habeas corpus may, for certain purposes at least, have a criminal nature. Bragg v. Knauf, 275 S.W.2d 905, 906 (Ky. 1955) (holding that regardless of whether habeas corpus proceeding is civil or criminal in nature, the time within which appeal may be taken must be computed according to Criminal Code of Practice).

\textsuperscript{186} Damron v. Coleman, 270 S.W.2d 170, 171 (Ky. 1954) (granting habeas corpus where prisoner's guilt or presumption of guilt is not so evident or great as to justify a denial of bail).
federal prison had been waived, releasing him from the remainder of his Kentucky sentence;\textsuperscript{187} a hearing on claims of ineffective assistance of counsel;\textsuperscript{188} and a new trial based on a void indictment.\textsuperscript{189}

As a modern post-conviction remedy, the common law writ of habeas corpus had several distinct disadvantages. First, by logic and unbendable common law tradition, the petition had to be brought in the court having jurisdiction over the body of the petitioner — that is, the court in the district where the prisoner was located. This requirement created numerous difficulties as the volume and complexity of cases increased. For instance, the potential workload was shifted to the few courts in areas with prisons, and neither the trial record nor likely witnesses would normally be found in the judicial circuit where the petition was being examined. Second, the Kentucky high court correctly predicted problems of “comity” between state trial courts which might overturn each other’s convictions.\textsuperscript{190} Third, at least initially, the trial court was only authorized to release the petitioner from the illegal confinement — a situation

\begin{footnotes}
\textsuperscript{187} Jones v. Raybom, 346 S.W.2d 743, 748 (Ky. 1961). This principle was reaffirmed in Yost v. Smith, 862 S.W.2d 852, 854-55 (Ky. 1993) (holding writ of habeas corpus should be granted because state forfeited right to hold petitioner for remainder of sentence where transfer of prisoner did not comply with procedures).

\textsuperscript{188} Rice v. Davis, 366 S.W.2d 153, 157 (Ky. 1963).

\textsuperscript{189} Beach v. Lady, 262 S.W.2d 837, 839 (Ky. 1953). Coram nobis was not available to test this judgment of conviction because the defect in the void indictment, which necessarily rendered the judgment void, was not based on a “hidden mistake of fact which could not have been discovered in the exercise of due diligence by appellant in time to have been presented to the court which tried him.” \textit{Id.} The defendant, however, prevailed on a writ of habeas corpus. \textit{Id.}

\textsuperscript{190} The Kentucky high court’s insistence upon restricting the use of habeas corpus was explained in Sharpe v. Commonwealth, 165 S.W.2d 993, 995 (Ky. 1942) (holding that in the case of a valid judgment the appropriate application for a new trial was to the court which rendered the judgment):

\textquoteright\

While it may be necessary and proper for the Federal Courts to extend the scope of habeas corpus in order to give full effect to the due process clause of the 14th Amendment to the Federal Constitution, and this seems to be the tendency, we deem it advisable to confine the scope of such proceedings within rather narrow limits. Under our system of procedure, it would be unseemly to vest power in one circuit court to annul, or refuse to give effect to, the valid judgment of another circuit court. Equally unseemly, it appears to us, would be the vesting of power in one circuit court to grant a new trial of an action which had been tried in another circuit court.

Another potential problem was that a prisoner being transferred around the state to various institutions could leave a trail of habeas petitions in every jurisdiction. This problem was solved quite early by the judicial rule that once one trial court acquired jurisdiction of the legal issue, no other court could interfere. Jones v. Murphy, 314 S.W.2d 545, 548 (Ky. 1958).
\end{footnotes}
which amounted to returning the prisoner to immediate freedom, with all its attendant disadvantages. Eventually, the Kentucky high court recognized the use of the conditional writ, with which the court could find that the petitioner was imprisoned on a void judgment but would not release the petitioner immediately. Instead, the Commonwealth would be given a limited time to retry or recommit the prisoner on the same charge. The prisoner, meanwhile, would remain in custody. If the state took no action to base the imprisonment on a valid judgment, a final writ would issue and the prisoner would go free. Fourth and finally, the error alleged by the habeas petition had to be evident from the trial record, a serious limitation which artificially bound the reviewing court to the transcript of record or the record of proceedings.

Due to these limitations, which could only slowly be overcome by overruling legal doctrines which had been considered immutable for generations, Kentucky's high court began to shift the emphasis away from the use of state habeas corpus as the primary post-conviction remedy. Increasingly, the court turned to the state law writ of coram nobis as a more attractive means to supplement habeas corpus and to satisfy Kentucky's need for a modern system of post-conviction relief.

3. After Enactment of RCr 11.42

The final break with the restrictive view of the scope of state habeas corpus as a post-conviction remedy came in 1963, when it no longer mattered, in Rice v. Davis. Although observing that Kentucky had heretofore followed the traditional, limited view of state habeas corpus, the court in Rice was faced with prima facie evidence that trial counsel had committed numerous reversible errors, had worked a substantial injustice on his client, and had failed to have a record available for appeal, thus effectively closing that avenue of relief. However, by the time this case was decided, RCr 11.42, which offered a post-conviction relief process quite different from state habeas corpus, was already in effect. In this posture, the Kentucky high court chose to adopt the "newer" or "federal" view of habeas corpus that "a judgment may be void

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191 The purpose of the conditional writ, of course, was to prevent the flight of the prisoner pending retrial. Conditional writs were specifically suggested by the high court in Beach, 262 S.W.2d at 839, and Robinson v. Kieren, 216 S.W.2d 925, 928 (Ky. 1949).
192 Beach, 262 S.W.2d at 839; Robinson, 216 S.W.2d at 928.
194 Id.
195 Id. at 157.
and thereby subject to attack for certain extreme irregularities” unrelated to jurisdiction over the person and the offense. Rice thus became the theoretical foundation from which RCr 11.42 was to evolve, since the Rule was later held to contain no more by way of post-conviction relief than the prisoner had already been granted in Rice.

The fact that habeas corpus was available only where the prisoner could show the remedy provided by RCr 11.42 or direct appeal was inadequate led to some interesting decisions concerning the adequacy, or propriety, of relying on RCr 11.42 in certain situations. For example, RCr 11.42, consistent with its role as Kentucky’s primary post-conviction remedy, normally is not considered inadequate merely because proceeding under the Rule in the county of conviction may take longer than a habeas petition in the county of incarceration. Although it may be more time-consuming to dismiss the habeas petition and require the inmate to refile under RCr 11.42, the court in the county of incarceration generally cannot consider the habeas petition.

Additionally, a prisoner may not attempt to bypass the procedural bars to successive RCr 11.42 motions by resorting to habeas corpus after waiver or loss under the Rule; such use of a habeas petition is foreclosed. Nor, apparently, may a petitioner in a state habeas proceeding

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196 Id. at 155, 157; see First Annual Kentucky Court of Appeals Review, 52 KY. L.J. 631, 648-49 (1963-1964). This decision was important only to habeas petitions already in the pipeline and did not apply to proceedings originating on or after January 1, 1963. Ayers v. Davis, 377 S.W.2d 154, 154 (Ky. 1964).

197 Lear v. Commonwealth, 884 S.W.2d 657, 660 (Ky. 1994) (“Habeas corpus is an extraordinary remedy which is only available when other relief is inadequate.”); Ayers, 377 S.W.2d at 154. For other cases holding that a habeas corpus petition should be dismissed where there was no showing that the remedy provided by RCr 11.42 was inadequate, see Davis v. Wingo, 396 S.W.2d 53, 53 (Ky. 1965), and Harris v. Wingo, 396 S.W.2d 46, 47 (Ky. 1965).

As an exclusive remedy, RCr 11.42 was arguably unconstitutional as a suspension of the writ of habeas corpus. This claim was specifically rejected in Ayers, 377 S.W.2d at 154. The constitutionality of “suspending” federal habeas corpus by enacting an exclusive federal statutory post-conviction remedy had already been upheld in United States v. Hayman, 342 U.S. 205, 223-24 (1952).

198 Richardson v. Howard, 448 S.W.2d 49, 50-51 (Ky. 1969) (holding that unless prisoner can show that the remedy provided by the Rule is inadequate, it constitutes the exclusive remedy for attacking a judgment of conviction).

199 But see Commonwealth v. Marcum, 873 S.W.2d 207, 211-12 (Ky. 1994) (holding the expeditious relief provided by a habeas corpus petition may be used where a prisoner can demonstrate that the judgment under which he is held is void ab initio).

200 Debose v. Cowan, 490 S.W.2d 480, 481 (Ky. 1973); see Waddle v. Howard, 450 S.W.2d 233, 234 (Ky. 1970); Walker v. Wingo, 398 S.W.2d 885, 885 (Ky. 1966) (“The fact that a prisoner has lost his remedy under RCr 11.42 by failing properly to invoke it
have his or her claim reviewed on the basis that RCr 11.42 has become an inadequate remedy because a previous court decision held that the particular allegation the petitioner wishes to make is not a ground for RCr 11.42 relief.\textsuperscript{201}

While the writ of habeas corpus was originally available only to one who was actually imprisoned, Walters \textit{v. Smith} expanded the scope of state habeas corpus in 1980 by holding that the release of the petitioner on parole did not moot his appeal of the trial court's dismissal of the writ.\textsuperscript{202} Later that same year, however, as if for clarification, the Kentucky Supreme Court reaffirmed the position that a habeas petition would be mooted where the sentence of incarceration had been completely served.\textsuperscript{203} Moreover, a habeas corpus claim is also subject to the equitable defense of laches, so that if the Commonwealth is prejudiced by the unreasonable delay of the petitioner in advancing a claim, the petition will be dismissed.\textsuperscript{204}

Several areas of significance are still subject to state habeas corpus. With the exception of the first, judgment void ab initio, the specific sections which follow represent legal challenges for which habeas corpus is available as a potential remedy because these attacks are not based upon the alleged invalidity of the underlying judgments of conviction.

\textbf{a. Judgment Void Ab Initio}

In a significant expansion of the rights of state prisoners to utilize state habeas corpus for relief, the Kentucky Supreme Court in 1994 decided \textit{Commonwealth v. Marcum}.\textsuperscript{205} At least six of the justices in \textit{Marcum} agreed that the "amended" judgment which was the basis for Marcum's confinement was void ab initio because the circuit court was without jurisdiction to enter it.\textsuperscript{206} Marcum had filed for relief under the habeas statute and clearly was entitled to relief. According great weight does not mean that the rule does not provide an adequate remedy . . . ."

\textsuperscript{201} Brown \textit{v. Wingo}, 396 S.W.2d 785, 786 (Ky. 1965).


\textsuperscript{203} Griffith \textit{v. Schultz}, 609 S.W.2d 125, 126 (Ky. 1980) (citing Hinton \textit{v. Byerly}, 483 S.W.2d 138, 144 (Ky. 1972), which held that a child custody "habeas corpus proceeding became moot when its objective had been accomplished by other means").

\textsuperscript{204} Brunfley \textit{v. Seahold}, 885 S.W.2d 954, 956-57 (Ky. Ct. App. 1994) (holding that habeas petition was dismissed properly where petitioner waited until administrative records were destroyed to bring his claim).

\textsuperscript{205} 873 S.W.2d 207 (Ky. 1994).

\textsuperscript{206} \textit{Id.} at 211.
to the summary and expedited nature of a habeas corpus proceeding, the opinion framed the issue as involving "the balance between the Commonwealth's need for an orderly procedure as provided for by RCr 11.42 and the prisoner's right to an expeditious release through habeas corpus when it is patently obvious he is being unlawfully detained." Obviously believing in the need to act as rapidly as possible, the court redefined the showing of inadequacy of the remedy provided by RCr 11.42. This will only make it more difficult, if the petitioner is unsuccessful, to bar subsequent attempts to raise the same issue. If the court is concerned that the normal RCr 11.42 procedure is too slow in certain situations, the court can and should amend RCr 11.42 to provide for expedited review in such a case.

Prior to Marcum, the law was reasonably clear that RCr 11.42 was used to attack judgments and habeas corpus was used where the right to immediate release was based on claims outside of the judgment. Opening up state habeas, even in admittedly narrow circumstances, only encourages multiple attacks in different forums, with no penalty to the prisoner, since a Marcum claim raised and decided adversely to the petitioner on state habeas presumably may be presented again on RCr 11.42. Because they are two different procedures, it may be that identical claims can be raised in each. And if not, how will the RCr 11.42 court, the court of conviction, enforce the bar without knowing whether a state habeas claim, in the court of imprisonment, already has been raised and decided? One thing that is clear is that Marcum will not be the last case decided on this issue.

b. Pretrial Detention

An important remaining use of state habeas corpus, staying true to the tradition of the writ, is to challenge pretrial detention. While this chal-
lenge could obviously apply to any type of illegal pretrial detention, its use is most often premised upon improper denial of bail or unreasonable setting of bail while the petitioner awaits trial for a criminal offense.\textsuperscript{211} This traditional use was dramatically altered in 1981, when RCr 4.43 was adopted by the Kentucky Supreme Court as a codification of \textit{Abraham v. Commonwealth.}\textsuperscript{212} That case held that trial court decisions regarding motions for alteration of bail in felony cases were appealable.\textsuperscript{213} Although the petition for habeas corpus was acknowledged to have been traditionally used to challenge bail determinations, counsel for Abraham provided the court with several reasons why it was more efficient to allow the defendant to appeal from the adverse order than to force prisoners to file a separate habeas proceeding. The most important reason was that the respondent in a habeas action, usually a jailer, would have no interest in such a matter.\textsuperscript{214} The decision preserved habeas corpus as the proper course for review of district court actions regarding bail while allowing appeal for challenging bail in felony cases. As stated earlier, this policy was later codified in RCr 4.43,\textsuperscript{215} thus removing an historic function of habeas corpus from felony cases.

Other forms of illegal pretrial detention, however, are still subject to habeas corpus relief. In \textit{Watkins v. Turner}, the petitioner, Watkins, was being held in the Breathitt County jail for murder.\textsuperscript{1} Both the defense and the prosecution agreed that he was hopelessly incompetent to stand trial in the foreseeable future.\textsuperscript{217} Under these circumstances, the Kentucky Court of Appeals held that it was improper for the trial court to

\textsuperscript{211} The Kentucky Constitution provides a right to reasonable bail and imposes a presumption in favor of granting bail. KY. CONST. §§ 16, 17. Historically, state prisoners have had some success in challenging, through a habeas petition, the denial of bail. See, \textit{e.g.}, \textit{Thacker}, 394 S.W.2d at 589 (holding that Commonwealth had failed to sustain its burden of showing either evident proof or great presumption as to petitioner’s guilt and, thus, that denial of bail was improper); \textit{Day v. Caudill}, 300 S.W.2d 45, 48 (Ky. 1957) (holding that sufficient proof or presumption of guilt did not exist to justify the denial of bail).

\textsuperscript{212} 565 S.W.2d 152 (Ky. Ct. App. 1977).

\textsuperscript{213} \textit{Id.} at 154-55.

\textsuperscript{214} \textit{Id.} at 154.

\textsuperscript{215} In fact, RCr 4.43(2) specifically provides that “the writ of habeas corpus remains the proper method for seeking circuit court review of the action of a district court respecting bail.” See William H. Fortune, \textit{Kentucky Law Survey — Criminal Rules}, 70 KY. L.J. 395, 408 (1981-1982) (discussing major changes to the Kentucky Rules of Criminal Procedure as a result of the 1981 amendments adopted by the Kentucky Supreme Court).

\textsuperscript{216} 587 S.W.2d 275 (Ky. Ct. App. 1979).

\textsuperscript{217} \textit{Id.} at 276.
have dismissed Watkins’ habeas corpus petition.\textsuperscript{218} The appellate court ordered that the petition be granted and instructed the trial court to begin proper proceedings to have Watkins committed to a state mental institution.\textsuperscript{219}

c. Extradition and Loss of Jurisdiction

Other remaining uses of state habeas are to test the legality of extradition proceedings\textsuperscript{220} and to test a prisoner’s claim that Kentucky has lost jurisdiction over him by voluntarily surrendering him to another state for service of sentence on another crime.\textsuperscript{221} A recent case in which a state prisoner won immediate release from custody through habeas corpus is \textit{Yost v. Smith}.\textsuperscript{222} Yost, convicted of burglary and theft in Kentucky, was also wanted on criminal charges in at least six other states. A Louisiana prosecutor and a Louisiana district judge executed and

\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} \textit{Ex parte Noel}, 338 S.W.2d 903, 905 (Ky. 1960). The challenge may also be made, and is probably better made, by invoking Kentucky’s extradition statute. See Uniform Criminal Extradition Act, KY. REV. STAT. ANN. §§ 440.150 - .420 (Michie/Bobbs-Merrill 1985). The Kentucky statutory scheme specifically provides anyone arrested pursuant to this statute the ability to utilize habeas corpus, to obtain counsel, and to have a hearing. \textit{Id.} § 440.250; see Gall v. Commonwealth, 702 S.W.2d 37, 43 (Ky. 1985) (rejecting the argument of a death penalty defendant, on appeal from the overruling of his 11.42 motion, that reversible error occurred because he was not allowed to file a writ of habeas corpus under the Uniform Criminal Extradition Act and test the legality of his detention), \textit{cert. denied}, 478 U.S. 1010 (1986).
\textsuperscript{221} See Interstate Agreement on Detainers, KY. REV. STAT. ANN. § 440.450 (Michie/Bobbs-Merrill 1984 & Supp. 1992). Under this statute, an individual facing confinement in another state or in the federal system may escape service of his or her sentence in Kentucky if prematurely turned over to other authorities for service of sentence in another jurisdiction. In Herndon v. Wingo, 399 S.W.2d 486, 487 (Ky. 1966), the court specifically held that RCr 11.42 was unavailable to challenge the return of the prisoner to Kentucky since the legal issue was not related to the validity of the original judgment of conviction. See \textit{generally} Shanks v. Commonwealth, 574 S.W.2d 688, 690 (Ky. Ct. App. 1978) (explaining that the writ of habeas corpus ad prosequendum, seeking to obtain prisoner for prosecution in another jurisdiction, was not considered a detainer under the Interstate Agreement on Detainers, where the writ was issued prior to the detainer).

State prisoners, however, are foreclosed from using federal habeas corpus to challenge extradition proceedings arising under the Interstate Agreement on Detainers until the remedies provided by the agreement have been exhausted. Norton v. Parke, 892 F.2d 476, 479-80 (6th Cir. 1989), \textit{cert. denied}, 494 U.S. 1060 (1990).
\textsuperscript{222} 862 S.W.2d 852 (Ky. 1993).
forwarded to Kentucky a standard form request for temporary custody under the Interstate Agreement on Detainers in order to try Yost in Louisiana and then return him to Kentucky for service of sentence. The state delivered Yost up to Louisiana despite a Kentucky trial court’s denial of the state’s motion to transfer. It was then discovered, to the embarrassment of all sides, that Louisiana was not a signatory of the Interstate Agreement on Detainers and the transfer was improper.\(^{223}\)

Basing its decision upon Section 2 of the Bill of Rights to the Kentucky Constitution, the Kentucky Supreme Court held that, by its actions, the state had lost jurisdiction over the prisoner and could not require Yost to serve out his sentence in this state.\(^{224}\) The dissent argued for a “good faith exception” and noted that Yost had not spent any additional time in prison because of the brief transfer to Louisiana, that he was returned to Kentucky by Louisiana without delay once the mistake was uncovered, and that the majority’s decision was simply an undeserved reward for Yost dubiously based upon “an honest mistake” by Kentucky authorities.\(^{225}\)

**d. Probation, Parole, and “Good Time”**

State habeas corpus can still be used to claim that the sentence of imprisonment the prisoner is serving has already expired.\(^{226}\) Habeas corpus also has been used, sometimes improperly, to challenge revocation of probation or parole where the indigent prisoner was not afforded counsel at the revocation hearing,\(^{227}\) a hearing was not

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\(^{223}\) Id. at 853.

\(^{224}\) Id. at 853-54. This holding is based on Jones v. Rayborn, 346 S.W.2d 743, 748 (Ky. 1961), an earlier habeas corpus case which established the principle that transfer of a state prisoner to the authorities of another jurisdiction, when done without the consent of the prisoner and without lawful authority, caused the state to relinquish jurisdiction over the remainder of the sentence. Similar cases utilizing habeas corpus and relying upon the decision in Jones v. Rayborn are collected in the Yost opinion. Yost, 862 S.W.2d at 854.

\(^{225}\) Yost, 862 S.W.2d at 856 (Spain, J., dissenting). Because this petition was Yost’s second habeas petition, the opinion of the majority seems to authorize multiple successive habeas corpus petitions dealing with the same issue, a troublesome holding. Yost, 862 S.W.2d at 853.

\(^{226}\) Howard v. Ingram, 452 S.W.2d 410, 411 (Ky. 1970); see Ross v. Wingo, 433 S.W.2d 137, 137 (Ky. 1968) (noting that a petitioner who claimed prison records showed an incorrect future release date could not establish a habeas corpus claim because he was not being illegally restrained).

\(^{227}\) Reeder v. Commonwealth, 507 S.W.2d 491, 494 (Ky. 1973) (holding that there is no duty to provide counsel in revocation proceeding where the petitioner fails to assert
held, the prisoner was required to serve sentences in an improper manner, and probation was improperly revoked. Habeas corpus may not, however, be used to challenge administrative decisions regarding "good time" reductions in sentence unless immediate release will be the result.

Habeas corpus has also been used to challenge other defects in the parole board's actions or authority. In a companion habeas case, the Kentucky high court held that "mandamus is the only proper remedy for an abuse of authority by the parole board in connection with re-arrest and revocation of parole." Allen v. Wingo, 472 S.W.2d 688, 688 (Ky. 1971). But see Boulder v. Parke, 791 S.W.2d 376, 378 (Ky. Ct. App. 1990) (holding in habeas corpus proceeding that parolee's due process rights were not violated by automatic revocation of his parole upon conviction for the crime committed during his parole); Anglian v. Sowders, 566 S.W.2d 789, 790-91 (Ky. Ct. App. 1978) (rejecting petitioner's argument that delay in holding parole revocation hearing prejudiced him in various ways, thereby entitling him to release on habeas corpus). Apparently, these two cases were raised and decided under the assumption that habeas corpus provided a proper remedy.

Wallace v. Wingo, 453 S.W.2d 557, 557-58 (Ky. 1970) (holding that petitioner was not entitled to habeas corpus because, by committing crime while on parole, he terminated his parole status).

Wells v. Webb, 511 S.W.2d 214, 215 (Ky. 1974) (holding that procedure violated recently imposed federal standards under Gagnon v. Scarpelli, 411 U.S. 778, 781-82, 790 (1973), which held that due process entitles probationer to receive both a hearing and the representation of counsel before his probation can be revoked). See generally Lynch v. Commonwealth, 610 S.W.2d 902, 906 (Ky. Ct. App. 1980) (resolving the issue of improper revocation which was raised on KY. R. CRIM. P. 11.42 motion).

Brumley v. Seabold, 885 S.W.2d 954, 956 (Ky. Ct. App. 1994) (holding that petitioner's claimed entitlement of immediate release due to improper administrative procedures in calculating sentence properly invoked habeas corpus); Polsgrove v. Kentucky Bureau of Corrections, 559 S.W.2d 736, 737 (Ky.), rev'd 549 S.W.2d 834 (Ky. Ct. App. 1977). Polsgrove claimed the prison authorities had incorrectly calculated his "good time" (a term used to refer to statutorily authorized reduction of sentence for good behavior). Id. The intermediate appellate court had held that habeas corpus was the proper means to raise this challenge, but the Kentucky Supreme Court reversed, saying:

Polsgrove is not seeking immediate release, but a reduction of his sentence. In this jurisdiction it has been held as far back as "the memory of man runneth not to the contrary" that in criminal cases a writ of habeas corpus has been esteemed the best and only sufficient defense of personal freedom, having for its object the speedy release by judicial decree of persons who are illegally restrained of their liberty.
A habeas corpus challenge to "good time" revocation may be barred by laches.\textsuperscript{232}

e. Other Available Uses

In \textit{Chick v. Commonwealth}, the defendant had escaped from jail in 1943, after his conviction but before sentencing.\textsuperscript{233} After arrest, conviction, and service of a life sentence in Texas, he was returned to Kentucky and was awaiting sentence in the Boyd County jail when he filed a habeas petition challenging his 1943 convictions. However, RCr 11.42 was held to be unavailable, since it required a person to be held "in custody under sentence" before the Rule could be utilized, and, of course, the defendant was not under sentence.\textsuperscript{234} Habeas corpus, therefore, was appropriate as a remedy although, under the facts of the case, relief was denied.\textsuperscript{235}

In contrast, habeas corpus was used successfully in \textit{Spurlock v. Noe} to obtain release from jail time imposed solely as the result of an indigent prisoner's inability to pay a fine.\textsuperscript{236} Compelled by a recent holding of the Supreme Court to overrule long-established precedent, the Kentucky court ordered the prisoner released from custody.\textsuperscript{237} The court emphasized, however, that the fine was still owed and its payment could be compelled by other legal means.\textsuperscript{238} Habeas corpus was also used at least

\textit{Id.} (emphasis added). This issue had been reserved in \textit{Haney v. Wingo}, 453 S.W.2d 556, 556 (Ky. 1970) ("We pass the question of whether habeas corpus was an appropriate form of remedy, considering that immediate release from custody was not sought."). Two recent cases are \textit{O'Dea v. Clark}, 883 S.W.2d 888, 892 (Ky. Ct. App. 1994) (holding writ of habeas corpus to be inappropriate for restoring "good time" or expunging inmate records), and \textit{Graham v. O'Dea}, 876 S.W.2d 621, 621-22 (Ky. Ct. App. 1994) (holding that restoration of good time credits was not cognizable on habeas corpus where prisoner had not asserted that immediate release would result).

\textsuperscript{232} \textit{Brumley}, 885 S.W.2d at 956-57.

\textsuperscript{233} 405 S.W.2d 14 (Ky.) (affirming denial of habeas corpus while holding that Kentucky had not forfeited jurisdiction over petitioner arrested in Nevada and wanted in both Kentucky and Texas), \textit{cert. denied}, 385 U.S. 977 (1966).

\textsuperscript{234} \textit{Id.} at 15 (quoting KY. R. CRMIL P. 11.42 which, by its terms, affords relief only to "[a] prisoner in custody under sentence who claims a right to be released on the ground his sentence is subject to collateral attack").

\textsuperscript{235} \textit{Id.}

\textsuperscript{236} 467 S.W.2d 320 (Ky. 1971) (reversing circuit court's denial of habeas corpus where petitioner had served out sentence but was still held in custody for failure to pay fine).

\textsuperscript{237} \textit{Id.} at 321.

\textsuperscript{238} \textit{Id.} at 321-22.
in one case to test the constitutionality of Kentucky's system of allowing lay judges to preside over police court in certain smaller, rural areas.\textsuperscript{239}

Yet another successful use of habeas corpus may be found in \textit{Brock v. Sowders}.\textsuperscript{240} In this case, the prosecutor had agreed that if Brock pled guilty the prosecutor would recommend that Brock's Kentucky sentence run concurrently with an Indiana sentence. Brock agreed and plead guilty, and the trial court, following the prosecutor's recommendation, sentenced Brock according to the terms of the agreement. When Brock was returned to Kentucky some years later, having been placed on parole in Indiana, the Kentucky Bureau of Corrections refused to credit him for time served.\textsuperscript{241}

Once the Kentucky Supreme Court determined that the plea bargain had to be enforced,\textsuperscript{242} an additional and more pertinent question was presented. Because Indiana, in contrast to Kentucky, treated time on parole as service of the actual sentence, Brock was being illegally detained \textit{unless} the Indiana sentence had been fully served, a fact not in the record.\textsuperscript{243} Brock was entitled to serve out the Indiana sentence, whether actually in prison or on parole, before being forced to begin his Kentucky sentence in prison. Brock's habeas petition, therefore, required at least a hearing to determine the status of the Indiana sentence, and if it were not fully served, Brock would be entitled to immediate release.\textsuperscript{244}

In summary, the writ of habeas corpus, having been restricted in recent years to matters which RCr 11.42 could not reach, has now been broadened to overlap with RCr 11.42 in certain situations where a judgment is alleged to be void ab initio and speed of relief is important.\textsuperscript{245} Although, as a general rule, state habeas corpus does not lie to attack a judgment and the present exception is narrowly drawn, it remains

\textsuperscript{239} North v. Russell, 516 S.W.2d 103 (Ky. 1974).

\textsuperscript{240} 610 S.W.2d 591 (Ky. 1980) (reversing denial of habeas corpus, enforcing plea agreement for Kentucky and Indiana sentences to run concurrently, and construing the Indiana sentence to include time on parole as time served, as required by Indiana law).

\textsuperscript{241} Id. at 592.

\textsuperscript{242} Id. (citing Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979), which held that "[the government should not be allowed to welsh on its bargain").

\textsuperscript{243} Id. at 592-93.

\textsuperscript{244} Id. at 593.

\textsuperscript{245} See Commonwealth v. Marcum, 873 S.W.2d 207, 211-12 (Ky. 1994).
to be seen whether other claims based upon the relative speed of habeas corpus will result in further expansion.

B. Coram Nobis in Kentucky

The common law writ of error coram nobis has a long history in Kentucky as a means for a trial court to correct its own judgment. While coram nobis was legally distinguishable from the writ of habeas corpus, which did not correct judgments but merely released prisoners, and from the similar writ of coram vobis, in American practice coram nobis and coram vobis were used interchangeably. Although a “rather technical writ,” coram nobis was later purposefully extended by Kentucky’s high court in an unsuccessful attempt to provide the state with an adequate post-conviction corrective process. At times, coram nobis supplemented state habeas corpus, filling in the areas where habeas corpus could not reach. At other times, it appeared to be a substitute for habeas corpus, having, as it did, several distinct advantages over that writ. Kentucky’s most significant utilization of coram nobis occurred between 1937 and 1953, when the writ was finally abolished in the civil rules. Between 1953 and the enactment of the criminal rules in 1963, the

\footnote{246 See Sublett, supra note 17, at 441.}

\footnote{247 In accord with the highly stylized language of early common law, coram vobis was technically distinct since it was issued by a reviewing court as an order to the court of judgment (trial court) to correct an error in fact. BLACK’S LAW DICTIONARY 337 (6th ed. 1990). Over time, particularly in American courts, the distinction between coram nobis and coram vobis was lost. George v. Commonwealth, 349 S.W.2d 843, 844 (Ky. 1961) (noting that coram nobis is sometimes “indiscriminately” called coram vobis); YACKLE, supra note 23, at 38-39; Robert R. Nelson, Comment, Coram Nobis as a Post-Conviction Remedy: Flight of the Phoenix?, 32 S.D. L. REV. 300, 301 (1987) (reviewing the history of coram nobis in South Dakota and in American law).

Whether the early Kentucky courts using the writ felt it was more properly designated coram nobis or coram vobis is not easily determined. Many early cases use coram vobis, but the United States Circuit Court observed in 1831 that a writ which is issued by a court to reverse its own judgment, is called in England a writ of error coram nobis, and such is its title as used in the state courts of [Kentucky]. . . . The writ has grown out of use in England, and is seldom issued in the practice of the state courts. In this state, however, its use is still continued . . . .

Ledgerwood v. Pickett’s Heirs, 15 F. Cas. 132, 133 (C.C.D. Ky. 1831) (No. 8,175).

\footnote{248 See infra notes 283-91 and accompanying text.}

\footnote{249 Clark v. Commonwealth, 259 S.W.2d 446, 446 (Ky. 1953).}

\footnote{250 See, e.g., Hamm v. Jones, 353 S.W.2d 544, 544 (Ky. 1962) (noting that when petitioner filed a writ of coram nobis in 1957, “the writ of coram nobis [had] been abolished”).}
Kentucky courts normally applied and further developed coram nobis principles as part of CR 60.02. However, before going further into the progression of coram nobis, it will be beneficial to discuss the use of this writ at its inception.

1. 1792 to the Early Twentieth Century

As originally conceived by the English courts, coram nobis allowed a trial court to reopen and correct its judgment in light of the discovery of a substantial factual error not appearing in the record which, if known at the time of judgment, would have been grounds to prevent judgment from being pronounced. Errors of fact alone could form the basis for the writ. Despite its narrow focus, the writ of coram nobis or vobis was recognized in Kentucky quite early and proved useful. In 1810, an appeal was taken in a civil matter in which one of the parties claimed error at trial, alleging that he was a minor and that, contrary to law, a guardian had not been appointed to represent him. The appellate court acknowledged that, if true, error had been committed. It deferred inquiry, holding that the factual issue of the defendant's age could be raised only by coram vobis and should be determined by the trial court.

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21 See, e.g., Bradley v. Commonwealth, 347 S.W.2d 532, 533 (Ky.) ("Writs of coram nobis have been expressly abolished, but the object of such a writ can now be sought by motion or by an independent action under CR 60.02."). cert. denied, 368 U.S. 859 (1961).

22 William W. Thornton, Coram Nobis Et Coram Vobis, 5 IND. L.J. 603, 606 (1930); Michael F. Cole & Jeffrey Small, Note, State Post-Conviction Remedy and Federal Habeas Corpus, 40 N.Y.U. L. REV. 154, 159 (1965); see Yackle, supra note 23, at 31-32 (describing the core features of coram nobis and the divergence of case law); Edwin W. Briggs, "Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?, 17 MONT. L. REV. 160 (1955) (examining the availability of this remedy under Montana law and whether it satisfies the Supreme Court's requirements for an adequate post-conviction remedy).

23 See Case v. Ribelin, 24 Ky. (1 J.J. Marsh.) 29, 29-30 (1829) ("[T]he judgment was certainly erroneous; and as the error was one in fact, and not apparent on the record, the writ of error coram vobis, was the appropriate, if not the only proceeding for exposing it, and rectifying the judgment."). This case established the common law for errors of fact occurring before judgment, for which coram vobis (or coram nobis) was available and satisfactory. Id. at 30. An act of the General Assembly, passed in 1802, had regulated the procedure for attacking decisions affecting criminal bail and bond claims after judgment. 3 Litell, Statute Law 1811, supra note 9, at 92-93.

24 Meredith v. Sanders, 5 Ky. (2 Bibb) 101, 102 (1810) (affirming judgment against minor child in dispute over title to slave).

25 Id.
As with habeas corpus, the writ of error coram nobis or vobis was a matter of right. However, the writ saw only scattered use in published criminal cases prior to the twentieth century, making it difficult to trace its American development. The potential of coram nobis was generally unrecognized until 1883 when the Indiana Supreme Court decided Sanders v. State. This decision was influential in that it convinced a number of state courts, including the Kentucky high court, that use of coram nobis in criminal cases was justified and acceptable. In these jurisdictions, the writ was “seized upon as a means of reviewing the intrinsic fairness of a trial in criminal proceedings,” while other states, in contrast, allowed its use to decline or abolished the writ by statute.

2. Jones v. Commonwealth (1937)

The use of the writ in collateral attacks of Kentucky criminal convictions was first recognized in 1937 as an unused but available remedy inherited from the common law of Virginia. The legal imbroglio faced by convicted murderer Tom Jones in 1937 precipitated this event. Jones, accused of shooting and killing his wife, was convicted...

256 Combs v. Carter, 31 Ky. (1 Dana) 178, 178 (1833).
257 A noteworthy early example was the 1848 case of Ex parte Toney, in which the Missouri Supreme Court directed a lower court to issue coram nobis in a criminal case. 11 Mo. 661 (1848), cited in Abraham L. Freedman, The Writ of Error Coram Nobis, 3 Temp. L.Q. 365, 372-73 (1929) (reviewing the use of this writ at common law and in American law). Another early case also cited by Freedman, supra, at 373, Adler v. State, 35 Ark. 517 (1880), held that coram nobis was recognized as an available common law remedy to challenge sanity at time of trial.
258 85 Ind. 318, 320 (1883) (recognizing availability of coram nobis to free defendant from guilty plea entered due to fear of violence by angry mob).
259 See, e.g., Morris v. Thomas, 275 S.W.2d 423, 423 (Ky. 1955) (citing to Sanders for the proposition that coram nobis is no longer limited to civil cases but is applicable to criminal proceedings as well).
260 ELI FRANK, CORAM NOBIS 4, 8-10 (1953); see UNIF. POST-CONVICTION PROCEDURE ACT, 11 U.L.A. 477, 480, Commissioners' Prefatory Note (1974); Note, Post-Conviction Remedies — The Need for Coram Nobis, 57 Nw. U. L. Rev. 467, 473-76 (1962) (arguing desirability of coram nobis relief for wrongly convicted persons who no longer qualify as “in custody” so as to be eligible for habeas corpus relief).
261 Briggs, supra note 252, at 163-65; Freedman, supra note 257, at 375-90.
262 Jones v. Commonwealth ("Jones II"), 108 S.W.2d 816, 817-18 (Ky. 1937) (holding that this writ, unless it was repealed, became part of Kentucky remedial law on its admission to the Union), overruled on other grounds by Anderson v. Buchanan, 168 S.W.2d 48 (Ky. 1943).
and sentenced to death primarily upon the testimony of a six-year-old girl and a woman purportedly testifying to the deceased's dying declaration. Numerous arguments were raised on appeal, but the conviction was affirmed. Sometime later, based upon affidavits of newly discovered witnesses, an attempt was made for executive clemency, which was denied. Only hours before his scheduled execution, Jones filed a writ of habeas corpus in federal district court. A hearing was held May 7, 1937, with Jones' newly discovered witnesses cross-examined by the Attorney General. Ten days later, the district judge issued an unpublished opinion finding that the failure to grant a continuance unconstitutionally deprived the defendant of a fair trial and that the conviction was based on perjured testimony. The district judge was hesitant to intervene in a state matter; thus, the opinion contained a suggestion that Kentucky should provide post-conviction relief for Jones and a warning that if Kentucky did nothing, the federal court would act. Counsel for Jones then filed a petition for writ of habeas corpus directly in the Kentucky high court and a petition for a writ of coram nobis in the Bell Circuit Court. It was believed to be the first use of coram nobis to collaterally attack a criminal conviction in the history of the state. This attempted use of coram nobis was promptly denied by the trial court and appealed, resulting in the near-simultaneous issuance of two appellate decisions styled Jones v. Commonwealth. The habeas corpus petition was dismissed in the first Jones opinion, but the second established the remedy of coram nobis in Kentucky. Nonetheless, the Kentucky high court denied relief because newly discovered evidence, no matter how probative, was not a ground for relief under coram nobis and because Jones' evidence was of doubtful truthfulness itself. The

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263 Jones v. Commonwealth ("Jones I"), 108 S.W.2d 812, 813 (Ky. 1937).
264 Perry B. Miller, State and Federal Administration of Criminal Justice, 2 KY. ST. B.J., 12, 13 (1938) (describing how the author, a retired U.S. attorney, was moved to take up Jones' cause and represent him in the habeas corpus action).
265 Id. at 13.
266 Id. at 14.
267 Id. at 14.
268 Sublett, supra note 17, at 442.
269 Jones I, 108 S.W.2d 812 (Ky. June 11, 1937) (habeas corpus); Jones II, 108 S.W.2d 816 (Ky. June 18, 1937) (coram nobis). See Grant F. Knuckles, Note, Coram Nobis in Kentucky, 31 KY. L.J. 86, 86-87 (1942-1943) (finding coram nobis available in criminal cases under certain situations, although displaced by statutory remedies in civil cases); Sublett, supra note 17, at 442-43.
270 Jones I, 108 S.W.2d at 815.
271 Jones II, 108 S.W.2d at 817.
272 Id. at 818-19. The Kentucky Attorney General, representing Kentucky in the
Kentucky high court could suggest nothing more than a further appeal to executive clemency.\textsuperscript{273}

The journey of Tom Jones through the court system, however, was not yet over. Relief from Kentucky having been denied, the issue was back before the federal district judge.\textsuperscript{274} The district court, doubtful of the propriety of throwing out the Kentucky conviction on its own, issued a stay to be effective only until the completion of Jones' habeas corpus appeal to the Sixth Circuit Court of Appeals.\textsuperscript{275} The Sixth Circuit, unlike the district court, had no hesitation in striking down the Kentucky judgment and directing the district court to grant the writ and order Jones' release.\textsuperscript{276} The legal reasoning of the Kentucky high court in its earlier opinions was dismissed in scathing terms:

> The judicial processes of the state have here been vainly invoked. The court below stayed its hand until they had been given full opportunity to function. Even then it was thought wiser to have the clearly indicated relief sanctioned by a three judge reviewing court than to have responsibility for setting aside a state court judgment assumed by a single judge of an inferior Federal court. Considerations of delicacy and propriety need no longer deter amelioration. The appellant is not to be sacrificed upon the altar of a formal legalism too literally applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional right may be perceived, and the door to clemency is closed.\textsuperscript{277}

This series of cases, with prominent personalities involved on all sides and with genuine doubt being raised about the fairness of Kentucky's criminal justice system, changed post-conviction remedies in this state forever.\textsuperscript{278} The Kentucky high court had refused to yield, despite the recommendation of the Attorney General\textsuperscript{279} and the willingness of

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\textsuperscript{273} See Sublett, supra note 17, at 443.

\textsuperscript{274} Miller, supra note 264, at 14.

\textsuperscript{275} Jones v. Commonwealth of Kentucky, 97 F.2d 335, 338 (6th Cir. 1938).

\textsuperscript{276} Id.

\textsuperscript{277} Jones II, 108 S.W.2d at 819.

\textsuperscript{278} Miller, supra note 264, at 14.

\textsuperscript{279} Kentucky Attorney General Hubert Meredith, having personally cross-examined the new witnesses and considering the potential for perjured testimony at the original trial, told the Kentucky high court: "W)e cannot ask the court to let the judgment of habeas corpus action brought directly in the Kentucky high court and having reviewed the record and examined the witnesses, urged the Kentucky high court to grant relief and void the judgment. Miller, supra note 264, at 14-15.
a former federal district attorney to come out of retirement to defend the accused. The federal courts had demonstrated that they would utilize federal habeas corpus to vindicate the rights of Kentucky prisoners, and it was apparent that in the future this power would be wielded by a single federal district judge. More than anything else, this case made apparent the need for Kentucky to provide more comprehensive post-conviction review or, in the alternative, to simply abandon that review to the federal courts. Of these two policy choices, Kentucky chose the former.

The court's recognition that the existing scope of coram nobis could not reach such claims and Jones' success with federal habeas corpus were instrumental in the subsequent expansion of the writ of coram nobis in Kentucky. Jones, incidentally, was never retried after federal habeas corpus procured his release.

An important opinion rendered within a few years of Jones was the Kentucky high court's decision in Smith v. Buchanan. The Smith opinion authorized resort to coram nobis in a case where the defendant's appointed counsel was discovered, after defendant's conviction, to be unlicensed and untrained in the law, although he had previously represented clients on various matters in the local courts. When this deception came to light, the Kentucky high court noted that habeas corpus was unavailable because the defect was not part of the record. Coram nobis was recommended as the appropriate remedy since it could be brought in the trial court — the court of conviction — where the evidence was close at hand. A further advantage was noted: if the judgment were held to be void under habeas, then the petitioner would be entitled to immediate release. This drastic remedy "might result in [the petitioner's] final escape from apprehension and punishment for the commission of his crime." Under coram nobis, the reviewing court was "vested with inherent power to direct a suspension of the execution of the judgment of conviction, if the necessities of the case require it, until the application for the writ may be heard and disposed of.

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20 See Anderson v. Buchanan, 168 S.W.2d 48, 52 (Ky. 1943) (finding that defendant whose innocence could be established by showing he was convicted on perjured testimony should not have to go to federal court to obtain relief).


22 Anderson, 168 S.W.2d at 52.

23 163 S.W.2d 5 (Ky. 1942).

24 Id. at 7.

25 Id. at 8.

26 Id.

27 Id.
Smith was followed closely by Anderson v. Buchanan, in which the scope of the writ was broadened significantly to include newly discovered evidence.288 By this holding, coram nobis was extended as an extraordinary remedy to

revest the court with jurisdiction in an extreme emergency and permit inquiry into the important question of whether the judgment of conviction should be vacated because the defendant was unknowingly deprived of a defense which would have probably disproved his guilt and prevented his conviction, and if that probability be established to grant the defendant a new trial of the accusation.289

The decision of the court in Anderson to open up coram nobis and allow relief upon a claim of newly discovered evidence in the form of perjured testimony—the identical legal issue presented and rejected in Jones v. Commonwealth—represented a significant advance in the availability of the writ. The lack of emphasis on unknown factual error and the scope of the holding in Anderson led one dissenter to characterize the judicial evolution of Kentucky coram nobis as "the wild ass of the law which the courts cannot control."290 Rhetoric notwithstanding, in practice Kentucky's high court almost always treated the writ as broad in purpose but narrow in actual application.291 The actual parameters of the writ, however, kept changing. The Kentucky high court simply could not make up its mind as to what coram nobis was and how it should be applied.

3. Procedural Aspects to 1963

A major strength of coram nobis as a post-conviction remedy was its ability, under the common law, to reach matters outside of the trial court record.292 This advantage was an important one which was not found in early habeas corpus jurisprudence but was itself still subject to certain peculiarities. Because the focus of coram nobis was on matters outside of the record, the errors considered could "not include those of the trial judge, since he had to be unaware of them in order for coram nobis to be

288 168 S.W.2d 48, 53-54 (Ky. 1943).
289 Id. at 53 (emphasis added).
290 Id. at 55 (Sims, J., dissenting). This remark has been noted frequently in the literature. See, e.g., Sublett, supra note 17, at 445. The undue expansion of coram nobis was always a concern, as in Walsh v. Tuggle, 197 S.W.2d 253, 254 (Ky. 1946).
291 Harrod v. Whaley, 242 S.W.2d 750, 750 (Ky. 1951).
292 Cole & Small, supra note 252, at 159.
Although this theory of coram nobis was more strictly enforced in England, state judges in the United States never completely accepted the English interpretation. Instead, these judges have placed far more importance on whether the defendant had knowledge or should have had knowledge of the fact in question at the time of his trial, rather than whether the court had been presented with the fact at the trial.24

At first in Kentucky, the cases emphasized that the unknown error must be one of fact, not law. As stated in Ford v. Commonwealth: “The writ of coram nobis will lie where [the] accused desires to bring some new fact before the court which cannot be presented by a motion for a new trial, appeal, or other existing statutory proceedings.”25 This restriction had begun with the original Kentucky coram nobis decision in Jones v. Commonwealth in 193726 but was entirely consistent with four hundred years of English and American law. At first, this restriction was narrowed to allow the use of coram nobis only for correcting factual errors bearing on “guilt or innocence,” a new and significant limitation which did not last.27 As stated in Walsh v. Tuggle: “A writ of error

25 Id. at 159-60; Creech v. Commonwealth, 291 S.W.2d 565, 566 (Ky. 1956) (holding that errors “allegedly committed by the lower court during the hearing on a motion for a new trial at the original trial” were not cognizable on coram nobis).
24 Cole & Small, supra note 252, at 160.
26 229 S.W.2d 470, 472 (Ky. 1950) (emphasis added) (affirming denial of writ of coram nobis where, in rape prosecution, defendant failed to prove by clear and convincing evidence that jury was influenced by the rumor that defendant was the father of the illegitimate child of the victim’s sister).
27 Jones II explained that the purpose of the writ was to allow a criminal defendant a new trial because of conditions for which the applicant was in no wise [sic] responsible and which made the record in which the complained of judgment was rendered appear regular, proper, and in conformity with law, but which the real facts, as later presented on application for the writ, rendered the original trial tantamount to none at all . . . .
108 S.W.2d 816, 817 (Ky. 1937) (emphasis added), overruled on other grounds by Anderson v. Buchanan, 168 S.W.2d 48 (Ky. 1943); see Beach v. Lady, 262 S.W.2d 837, 839 (Ky. 1953) (“[F]or coram nobis to be available it is essential there be a hidden mistake of fact . . . .”); Harrod v. Whaley, 242 S.W.2d 750, 751 (Ky. 1951).
27 Commonwealth v. Sirles, 267 S.W.2d 66, 66 (Ky. 1953) (“The error in the case at bar, if it be construed as a mistake of fact, is a mistake which does not bear on the question of guilt or innocence, and hence the enforcement of the judgment sentencing Sirles would not be a denial of justice.”). The Sirles court recognized that it was denying access to the writ in a potentially meritorious case “on technical grounds,” but it offered
coram nobis is a common law writ whereby one imprisoned upon conviction of a crime may obtain a new trial by producing proof that, at the previous trial, he unknowingly was deprived of a defense which probably would have established his innocence.\textsuperscript{288}

Eventually Kentucky's high court softened its earlier language and did not speak of "facts" alone, but of "facts or grounds" as reviewable under a coram nobis action to set aside a criminal judgment.\textsuperscript{299} Not softened was the requirement that the petitioner exercise due diligence during the trial proceeding\textsuperscript{300} or demonstrate that the error was not presented to the trial court because of duress, fear, or other sufficient cause.\textsuperscript{301} The strict "due diligence" requirement which had always been a part of common law coram nobis was strengthened as the writ was utilized increasingly from the 1930s to the 1950s by death-row inmates attempting to gain a stay of execution and a new trial.\textsuperscript{302}

The defendant only the suggestion that he apply for executive clemency. \textit{Id.}

\textsuperscript{288} 197 S.W.2d 253, 253 (Ky. 1946); George v. Commonwealth, 349 S.W.2d 843, 844 (Ky. 1961) (holding errors of fact should bear on guilt or innocence). \textit{But see Anderson v. Buchanan}, 168 S.W.2d 48, 54 (Ky. 1943) (explaining that the issue is not guilt or innocence, but only "the probability that the conviction would not have resulted if the truth had been revealed"); Richardson v. Commonwealth, 328 S.W.2d 154, 155 (Ky. 1959) (finding no impeaching testimony to support motion for writ of coram nobis under \textit{Anderson} standard).

\textsuperscript{299} Hamm v. Mansfield, 317 S.W.2d 172, 173 (Ky. 1958), \textit{cert. denied}, 359 U.S. 928 (1959); Harris v. Commonwealth, 296 S.W.2d 700, 701 (Ky. 1956) (holding that coram nobis is "an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after the rendition of the judgment without fault of the party seeking relief").

\textsuperscript{300} A finding that due diligence was not used was fatal to a petition for writ of error coram nobis. For application of the "due diligence" requirement, see \textit{Hamm}, 317 S.W.2d at 173-74, and \textit{Walsh}, 197 S.W.2d at 253. The burden was upon the petitioner to allege or prove that due diligence was used to attempt to discover the fact or ground earlier. \textit{Harris}, 296 S.W.2d at 702; Duff v. Commonwealth, 178 S.W.2d 191, 192 (Ky. 1944) (affirming denial of coram nobis where petitioner did not allege facts showing exercise of due diligence on his part to discover errors).

\textsuperscript{301} Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) (explaining that the purpose of coram nobis was to bring before the trial court unknown errors of fact, supported by a showing that due diligence had been exercised or that failure to present evidence had been caused by duress or fear).

\textsuperscript{302} Three cases illustrate the use, and abuse, of the writ for this purpose. In \textit{Anderson}, 168 S.W.2d at 54, the court adopted the due diligence requirement with the observation that

delay in seeking this extraordinary writ until the executioner is seen approaching is obviously a suspicious circumstance. It should always be made
It is also significant that the writ was considered available "only after all other judicial processes [i.e., all other available remedies] have been exhausted." This requirement embraced the idea of default. The writ of coram nobis was unavailable if the defendant's claim could have been or had been presented by direct appeal, motion for new trial, or other proceedings. Because the writ emphasized uncovering the facts and because any hearing would be in the nature of a collateral attack made in front of a judge, the rule excluding hearsay evidence was not as strictly observed. However, the petitioner still had a high standard to meet, for "[o]btaining the writ is not a matter of right but the granting of it is a matter of sound judicial discretion based upon a showing of reasonable certainty." Finally, the state received an important procedural and practical advantage through the use of coram nobis as a post-conviction remedy. If a judgment were voided under coram nobis, the result for the defendant would be only a new trial—not, as in habeas corpus,
immediate release, which would enable the defendant to flee the jurisdiction.\textsuperscript{306}

During its relatively short existence as an important post-conviction remedy, the writ of error coram nobis was used in a variety of legal challenges, but with limited success. It is now hard to imagine the extent to which inmate litigants’ claims were foreclosed by the narrow scope of this traditional writ and the slowness of its judicial expansion. Particularly striking is the ineffectiveness of coram nobis in adjudicating claims of ineffective assistance of counsel; these claims were simply not available using this writ. A good example of this limitation is found in \textit{Kinder v. Commonwealth}.\textsuperscript{307} In his petition, Kinder stated that he was unaware of his right to testify in his own defense and would have done so if he had been properly informed by his attorney. The appellate court rejected this claim because the petitioner was not unknowingly deprived of a defense,\textsuperscript{308} the alleged errors in attorney performance were not properly brought under coram nobis,\textsuperscript{309} and Kinder’s denial of involvement in the killing, had it been presented to the jury, would not have created a probability of disproving his guilt.\textsuperscript{310} Even in a death penalty case, the court had earlier noted, “inexperience, incompetency or inefficiency of counsel is not ground for granting coram nobis” in many state and federal jurisdictions.\textsuperscript{311}

\textsuperscript{306} Smith v. Buchanan, 163 S.W.2d 5, 8 (Ky. 1942); Creedle, \textit{supra} note 167, at 232.

Modern practice allows federal district courts granting a writ of habeas corpus against a state to make the writ “conditional” by allowing the state to retry the prisoner within a set period of time. Thus, the prisoner does not gain immediate release in any event and, if retried promptly and again convicted, will remain in prison continuously. \textit{See} Gardner v. Forister, 472 F. Supp. 1, 2 (W.D.N.C. 1979) (“[T]he typical order of a district court in state prisoner [habeas corpus] cases is a conditional release.”) (quoting Davis v. Pitchess, 388 F. Supp. 105, 108 (C.D. Cal.), aff’d, 518 F.2d 141 (9th Cir. 1974), rev’d on other grounds, 421 U.S. 482 (1975)).

\textsuperscript{307} 269 S.W.2d 212 (Ky. 1954) (affirming denial of coram nobis where defendant alleged he was unaware of his right to testify in his own defense).

\textsuperscript{308} \textit{Id.} at 214. The petitioner admitted that his counsel had \textit{advised} him not to testify but alleged he had not known he had a \textit{right} to testify if he so desired. From the petitioner’s perspective, this scenario made his claim “unknown” at the time of trial. This “ingenious” claim was rejected with the additional observation that, if it were accepted, “then in every criminal case the accused could merely not testify and, after conviction, claim he did not know he had the right to testify, and apply to the court for a writ of coram nobis. We will not sanction such a procedure.” \textit{Id.}

\textsuperscript{309} \textit{Id.}; \textit{see} Meredith v. Commonwealth, 312 S.W.2d 460, 462 (Ky. 1958); Spears v. Commonwealth, 253 S.W.2d 570, 572 (Ky. 1952) (noting that ineffective assistance of counsel was not a ground for writ of coram nobis).

\textsuperscript{310} \textit{Kinder}, 269 S.W.2d at 214.

\textsuperscript{311} \textit{Spears}, 253 S.W.2d at 572.
In a series of cases, the appellate court also rejected the use of coram nobis to retry the original case through newly discovered evidence. Again, the hurdle for the inmate litigant was very high. The newly discovered evidence had to be "of such a conclusive character as to remove from the case the basis upon which the conviction and judgment were predicated" for the petitioner to prevail.312

In summary, the limitations upon the use of the writ at the height of its development reflected, in general, the prevailing legal norm that a state post-conviction remedy represented extraordinary relief which would be granted only under unusual and compelling circumstances. Restrictions on the use of the writ of coram nobis, therefore, were substantial. First, because of the emphasis on errors of fact, coram nobis was manifestly a trial court proceeding at which arguments of law, as in appellate review or upon a writ of error, were unavailable.313 This limitation theoretically excluded the constitutional arguments of law which today comprise the bulk of claims raised by state prisoners. Second, the error also had to be "hidden or unseen" for the defendant to prevail — common trial errors of court or counsel, therefore, could not be raised.314 Apparently, some cases required that the petitioner demonstrate what would today be termed "actual innocence." These limitations, in addition to the simple awkwardness of creating a modern post-conviction remedy out of a common law writ, led to the eventual demise of coram nobis. What became increasingly clear was that the ancient writs were too narrow to remain in place as the state's primary forms of post-conviction remedy.

4. Since Enactment of CR 60.02

It should come as no surprise, then, to find that the adoption of the Kentucky Rules of Civil Procedure in 1953 resulted in the specific abolishment of the writ of error coram nobis.315 Motions to vacate

\[312\] Merrifield v. Commonwealth ex rel. Buckman, 283 S.W.2d 214, 215 (Ky. 1955); see Underhill v. Thomas, 299 S.W.2d 633, 634 (Ky. 1957) (holding that trial judge's denial of coram nobis was not abuse of discretion where petitioner failed to show due diligence in presenting alibi evidence); Harris v. Commonwealth, 296 S.W.2d 700, 703 (Ky. 1956); Creech v. Commonwealth, 291 S.W.2d 565, 566-67 (Ky. 1956) (holding that impeaching testimony affecting the credibility of witnesses was not a basis for coram nobis relief).

\[313\] Green v. Commonwealth, 309 S.W.2d 178, 180 (Ky. 1958) (denying coram nobis relief because alleged errors were all on record).

\[314\] Creech, 291 S.W.2d at 566.

\[315\] The new civil procedure rules were designed to eliminate inconsistent, confusing, and technical distinctions between various forms of action and to create instead uniform
judgment under coram nobis were routinely treated as motions for relief under CR 60.02 after the civil rules came into effect. This treatment meant that CR 60.02 motions were to be applied to issues of fact, not issues of law, and that the scope of the remedy under CR 60.02 was coextensive with that provided by the common law writ.

While it is clear that CR 60.05 abolished the use of coram nobis in civil cases and that coram nobis, like habeas corpus, generally was considered a civil remedy used to attack a criminal conviction, to some extent coram nobis apparently retained its status as a criminal remedy until the adoption of the criminal rules. For example, the Criminal Code Revision Committee Report of 1961 stated that the writ of coram nobis in criminal practice would be replaced by RCr 11.42 and RCr 10.06.

According to CR 60.05, "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment [under the civil rules] shall be as provided in Rule 60.02 or 60.03."

rules applying to all kinds of actions. Amett v. De Weese, 304 S.W.2d 784, 787 (Ky. 1957); see Porter Sims, The Work of Kentucky’s Civil Code Committee, 40 Ky. L.J. 7 (1951-1952) (discussing how civil procedure reform in Kentucky proved necessary).

According to CR 60.05, "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment [under the civil rules] shall be as provided in Rule 60.02 or 60.03."

316 Jackson v. Commonwealth, 344 S.W.2d 381, 382 (Ky.), cert. denied, 368 U.S. 842 (1961) (converting motion to vacate judgment into 60.02 motion); Wallace v. Commonwealth, 327 S.W.2d 17, 18 (Ky. 1959) (holding coram nobis abolished "in name only"); Sherrill v. Commonwealth, 323 S.W.2d 586, 586 (Ky. 1959) (converting motion to vacate judgment on coram nobis into 60.02 motion); Green, 309 S.W.2d at 179; Underhill v. Thomas, 299 S.W.2d 633, 634 (Ky. 1957); Harris, 296 S.W.2d at 701-02 (noting that KY. R. CIV. P. 60.02 was similar to FED. R. CIV. P. 60(b), which also utilized coram nobis principles).

The fact that the proceeding was civil in nature had procedural implications; no constitutional rights were violated where procedures normally associated with criminal prosecutions were not followed. Collins v. Commonwealth, 297 S.W.2d 54, 57 (Ky. 1956) (finding that a failure to grant a hearing on the motion was not a violation of petitioner’s constitutional rights), cert. denied, 355 U.S. 816 (1957); Abrams v. Commonwealth, 296 S.W.2d 210, 210 (Ky. 1956) (holding that petitioner had no right to be present in court when merits of coram nobis petition were considered and decided), cert. denied, 352 U.S. 1013 (1957); Elliott v. Commonwealth, 167 S.W.2d 703, 706 (Ky. 1942) (holding that petitioner had no right to be present in court when merits of coram nobis petition were tried).

317 Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983); Bradley v. Commonwealth, 347 S.W.2d 552, 553 (Ky.) (explaining that objects of coram nobis can be sought under 60.02, cert. denied, 368 U.S. 859 (1961); Green, 309 S.W.2d at 179-80. As noted in Davis v. Home Indemnity Co., 659 S.W.2d 185, 188 (Ky. 1983), “CR 60.02 was intended to codify the common law writ of coram nobis.”

318 KY. R. CRM. P. 11.42 cmt. (1962). This view is reinforced by the 1960 comment in Dee A. Akers, Revision of Criminal Procedure, 24 KY. ST. B.J. 130, 134 (1960), that under the proposed revision of criminal practice “[t]he Writ of Coram Nobis is abolished,
The relationship of CR 60.02 to the traditional remedy was first clarified in *Harris v. Commonwealth*, which held:

CR 60.02 does not extend the scope of the remedy nor add additional grounds of relief. A criminal judgment may be set aside only in extraordinary and emergency cases where the showing made is of such a conclusive character as to indicate the verdict most probably would not have been rendered and there is a strong probability of a miscarriage of justice . . . . Relief may be granted only upon recognized and limited *coram nosis* principles.\(^{319}\)

Moreover, the Kentucky Supreme Court recently made clear that CR 60.02, in some ways, is even more limited than its common law predecessor. In *Gross v. Commonwealth*, the court thoroughly reviewed the position of the use of this extraordinary civil remedy in the criminal justice system,\(^{320}\) and, as one commentator observed, “strictly limited the availability of CR 60.02.”\(^{321}\) Although noting that “the remedies formerly available in criminal cases by writ of *coram nosis* have been preserved by CR 60.02,”\(^{322}\) the high court recognized that the very language of CR 60.02 limits its application. Claims of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or perjury are limited to motions for relief filed not more than one year after

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\(^{319}\) *Harris v. Commonwealth*, 296 S.W.2d 700, 702 (Ky. 1956); accord *Hamm v. Mansfield*, 317 S.W.2d 172, 173 (Ky. 1958), *cert. denied*, 359 U.S. 928 (1959); *Green*, 309 S.W.2d at 179.

\(^{320}\) As stated in the opinion:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

648 S.W.2d at 856.


\(^{322}\) *Gross*, 648 S.W.2d at 856 (citing Balsey v. Commonwealth, 428 S.W.2d 614, 616 (Ky. 1967)); see *Harris*, 296 S.W.2d at 702.
The additional grounds found in CR 60.02, including reasons of an "extraordinary nature," are "specific and explicit." According to the holding in Gross, claims that a defendant's constitutional rights have been violated fit only the last ground: "any other reason of an extraordinary nature justifying relief." In addition, CR 60.02 is discretionary with the reviewing court, and relief may be denied if the motion is not made within a "reasonable time" based upon the facts of the particular case—a further matter for the discretion of the reviewing court. Any claim which could have been made in an earlier proceeding is barred, and a movant is not entitled to appointed counsel in CR 60.02 proceedings.

From the foregoing it is evident that, as with the writ of coram nobis, relief under CR 60.02 will be extremely difficult for the criminal defendant to procure. By its own terms, CR 60.02 is an extraordinary remedy for relief from a challenged final judgment. It is a supplement to RCr 11.42 and is not supplanted by it, a point made in cases such as Perkins v. Commonwealth. It is, in a very real sense, a last resort; as such, the burden on the movant is extraordinarily high. For constitutional errors occurring at trial, this burden may mean, as under coram nobis, "a showing of conditions which established that the original

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323 Ky. R. Civ. P. 60.02(a)-(c); cf. Ky. R. Crim. P. 10.06(1).
324 Gross, 648 S.W.2d at 857.
325 Id.
326 Id. The court did not explain why a judgment reached by newly discovered unconstitutional means could not be a judgment which was simply no longer equitable or was "void," as also allowed by CR 60.02(e). This oversight does not affect the court's argument, however, that in any event the ground urged must be one of an "extraordinary nature." See id.
327 Gross, 648 S.W.2d at 857; Ky. R. Civ. P. 60.02.
328 Gross, 648 S.W.2d at 857-58; accord Ray v. Commonwealth, 633 S.W.2d 71, 73 (Ky. Ct. App. 1982) (holding that motions for KY. R. CIV. P. 60.02 relief must be filed within a reasonable time).
329 Alvey v. Commonwealth, 648 S.W.2d 858, 859-60 (Ky. 1983); Gross, 648 S.W.2d at 857.
330 The reasons of an extraordinary nature justifying the relief sought by the movant must relate to the judgment of conviction. Allegations which are irrelevant to the fairness of the process which resulted in detention can never be cognizable under CR 60.02. Wine v. Commonwealth, 699 S.W.2d 752, 754 (Ky. Ct. App. 1985) (holding 60.02 motion requesting early release from sentence based upon a change in family situation was properly overruled).
331 382 S.W.2d 393, 394 (Ky. 1964); accord Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966) (holding that Ky. R. Civ. P. 60.02 "is an extraordinary remedy and is available only when a substantial miscarriage of justice will result from the effect of the final judgment").
trial was tantamount to none at all.\textsuperscript{332} As a result, CR 60.02, like coram nobis, will rarely be used with success by criminal defendants.

IV. HIGH COURT RULE MAKING AND KENTUCKY RULE OF CRIMINAL PROCEDURE 11.42

A. Code Revision and the Enactment of RCr 11.42

The 1952 adoption of the Kentucky Rules of Civil Procedure was a significant development in the practice of law in Kentucky and represented the first comprehensive revision of Kentucky’s civil code in over one hundred years.\textsuperscript{333} Recognizing the difficulty of maintaining the practice codes through legislation, the Kentucky General Assembly simultaneously created the civil rules and turned their future amendment over to Kentucky’s highest appellate court.\textsuperscript{334} The transfer took place July 1,
1953, when "all laws relating to [civil] pleading, practice and procedure shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this Act the rule shall take precedence over such laws."\textsuperscript{335}

The Kentucky General Assembly initiated criminal code changes in 1958 through the creation of a study committee.\textsuperscript{336} The legislature adopted the study committee's proposed Rules of Criminal Procedure, including RCr 11.42, in 1962.\textsuperscript{337} The legislative version of RCr 11.42, however, was inadequate, and, using its inherent rule-making powers, the Kentucky high court decided to model the proposed rule more closely on the post-conviction review statute available to federal prisoners and codified at 28 U.S.C. § 2255.\textsuperscript{338} More specifically, the Kentucky high

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\textsuperscript{335} 1952 Ky. Acts 31.
\textsuperscript{337} 1962 Ky. Acts 789-827. The proposed rule was insufficient. Although it apparently provided for a mandatory hearing on every motion that could not be summarily dismissed, it was weak on the details necessary for proper administration and made no provision for assistance of counsel. The proposed rule, in its entirety, was as follows:

A prisoner in custody under sentence who claims a right to be released on the ground that the sentence was imposed in violation of the Constitution or statutes of the Commonwealth or of the United States, or that the Court imposing the sentence was without jurisdiction to do so, or that the sentence was in excess of that authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed the sentence to vacate, set aside or correct the same. If the motion and the files and records of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall so determine and enter an order accordingly; otherwise the court shall cause notice thereof to be served on the attorney for the Commonwealth and grant a prompt hearing thereon. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may be appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

\textit{Id.} at 822.
\textsuperscript{338} The similarity between 28 U.S.C. § 2255 (1988) and RCr 11.42 has been noted by the Kentucky courts. Gilliam v. Commonwealth, 652 S.W.2d 856, 859 (Ky. 1983); Nickell v. Commonwealth, 451 S.W.2d 651, 652 (Ky. 1970); Wilson v. Commonwealth,
The court sought to "provide a broader post-conviction review procedure in which the right to counsel is secured and written findings of fact are required." By the time of final promulgation, following review and modification by the high court, RCr 11.42 had been substantially altered:

[1] A prisoner in custody under sentence who claims a right to be released on the ground that the sentence was imposed in violation of the Constitution or statutes of the Commonwealth or of the United States, or that the court imposing the sentence was without jurisdiction to do so, or that the sentence was in excess of that authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed the sentence to vacate, set aside or correct the same.

[2] The clerk of the court shall notify the Attorney General and the Commonwealth's Attorney in writing that such motion (whether it be styled a motion, petition, or otherwise) has been filed, and the Commonwealth shall have 30 days after the date of mailing of notice by the clerk to the Attorney General in which to serve an answer on the movant.

[3] Affirmative allegations contained in such answer shall be treated as controverted of record. If the answer raises an issue of fact that cannot be determined from the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding.

[4] At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and shall discharge the prisoner.

403 S.W.2d 710, 711-12 (Ky. 1966); Collier v. Commonwealth, 387 S.W.2d 858, 859 (Ky. 1965); King v. Commonwealth, 387 S.W.2d 582, 583 (Ky. 1965); Ayers v. Davis, 377 S.W.2d 154, 154 (Ky. 1964); see also John S. Palmore, A New Course for Judicial Review, 28 KY. ST. B.J. 25, 25 (1964) (discussing similarities of KY. R. CRIM. P. 11.42 and 28 U.S.C. § 2255).

Like RCr 11.42, 28 U.S.C. § 2255 requires the federal prisoner to file the petition in the trial or sentencing court. Congress enacted this statute to provide a modern post-conviction relief process for prisoners under federal sentence. This statute explicitly replaced common law habeas corpus for prisoners with federal convictions and is their primary post-conviction remedy.

resentence him, grant a new trial, or correct the sentence as may be appropriate.

[5] Either the movant or the Commonwealth may appeal to the Court of Appeals, as a matter of right, if the controversy involves a sentence of confinement or imprisonment for twelve months or more, and by motion otherwise.

[6] The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.54 and shall be suspended pending final disposition of an appeal duly taken and perfected.

[7] Original applications for relief of the nature described in this Rule which are addressed directly to the Court of Appeals shall be referred to the Chief Justice, who shall cause same to be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth.

[8] Counsel appointed for the movant under this Rule 11.42 shall be entitled to reimbursement by the Commonwealth for his reasonable expenses of travel and subsistence for necessary conferences with the movant at his place of confinement, provided that each trip made for that purpose be authorized in advance thereof by order of the trial court.340

The legislative proposal had contained no explanation of RCr 11.42, but the Kentucky high court added the following brief commentary:

RCr 11.42 supplements CR 60.02 and provides a post-conviction review procedure consistent with the trend of U.S. Supreme Court pronouncements. See Uniform Code Sec. 44. This rule and RCr 10.06 replace coram nobis.

Caveat: The provision for counsel's travel expenses cannot be given effect until such time as statutory authority for payment is enacted.341

The new post-conviction relief mechanism had several strengths. First, the motion was to be filed in the court which imposed the sentence,

340 LEGISLATIVE RESEARCH COMM’N, KENTUCKY RULES OF CRIMINAL PROCEDURE 30 (n.d.) (copy available in State Law Library, Frankfort, Ky.). In the original version the Kentucky high court did not break RCr 11.42 down into sections or paragraphs; the text was continuous. KY. R. CRIM. P. 11.42 (1962). This was corrected in 1965. KY. R. CRIM. P. 11.42 (1965). For clarity, the author has added paragraph numbers in brackets to the original version.

easing access to pertinent records and witnesses and thereby increasing efficiency. Second, where a legitimate issue of fact was raised, the movant was entitled to a prompt hearing and, if indigent, appointed counsel. Finally, the movant was guaranteed an appeal if the trial court overruled the motion to vacate. Curiously, the Kentucky high court eliminated the legislative recommendation that RCr 11.42 contain a provision restricting successive motions, a mistake quickly discovered and rectified within a few years.

Although RCr 11.42 has been amended on several occasions in its thirty-year existence, all major changes, except for two, were in place by 1965. In an omnibus rule change effective January 1, 1965, RCr 11.42 was structurally broken into paragraphs, section numbers were added, the first section was shortened to eliminate references to specific grounds for attack while more inclusive language was substituted, and several new sections were added which reflected the frustration of Kentucky’s high court with abuses of RCr 11.42 by litigious inmates filing indecipherable pleadings and advancing frivolous claims. New section 2 stated:

(2) The motion shall be signed or verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

342 Richardson v. Howard, 448 S.W.2d 49, 50-51 (Ky. 1969) (explaining that petitioner “is benefited by having available at the place of his trial all pertinent records relevant to the issue and the scope of the remedy is thereby broadened”).


344 Id.


346 Id. 11.42 compiler’s notes.

347 The complete text of the Rule after amendment is reprinted in Order, supra note 343, at 28-29. The language of the first section describing the scope of RCr 11.42 was broadened to indicate that any allegation of “a right to be released on the ground that the sentence is subject to collateral attack” would be considered and that the prisoner could “proceed directly by motion” in the trial court to challenge it. KY. R. CRIM. P. 11.42(1).


349 Order, supra note 343, at 28.
New section 3 required all known claims to be filed in the original motion and added a procedural bar against successive petitions, a much needed improvement. Other modifications by 1965 were provisions reducing, from thirty to twenty days, the time within which the Commonwealth could respond and making allowance for the appointment of counsel on appeal. Finally, section 10 of the Rule was modified to give the chief justice discretionary power to retain a motion filed directly and improperly in the state appellate court, presumably for summary dismissal.

With this omnibus amendment, most significant aspects of RCr 11.42, as it exists today, were in place. The Rule focused on one motion, one proceeding to determine the merits, and, if the movant desired, one appeal. As a practical matter, however, the necessity for further revision developed from time to time. Learning the hard way that certain inmates often saw the "facts" differently than more disinterested observers, the court modified the Rule in 1970 by changing the requirement that the motion be "signed or verified" to stipulate that it be "signed and verified" as an aid for perjury prosecutions. Between 1970 and 1981, other minor adjustments were made.

350 Section 3 stated: "(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." *Id.* This language was retained in the current version. Compare KY. R. CRIM. P. 11.42(3) (1965) with KY. R. CRIM. P. 11.42(3) (1962).

In Tipton v. Commonwealth, 398 S.W.2d 493, 494 (Ky. 1966), overruled on other grounds by Stinnett v. Commonwealth, 446 S.W.2d 292 (Ky. 1969), the high court explained that the procedural bar against successive petitions, added in 1965, was "merely declaratory of the common law rule which already applied to RCr 11.42 as it was originally drafted" and was therefore retroactive.

351 *Order, supra* note 343, at 28.

352 *Id.* at 29.

353 *RULES OF CRIMINAL PROCEDURE WITH AMENDMENTS TO JANUARY 1, 1978* (reprinted from 9 BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED (1978)) (copy available in State Law Library, Frankfort, Ky.) (emphasis added). The requirement that all applications be verified was suggested by Lukowsky, *supra* note 348, at 444. Lukowsky later served on the Kentucky Supreme Court.

354 *RULES OF CRIMINAL PROCEDURE WITH AMENDMENTS TO JANUARY 1, 1978, supra* note 353.

In further amendments effective July 1, 1976, the Kentucky high court directed that misfiled applications in any court be automatically transferred to the sentencing court and liberalized the appeal process from an adverse RCr 11.42 final order. KY. R. CRIM. P. 11.42(10) (1976).

A technical correction was made in 1978 to RCr 11.42(8). The reference to "RCr 12.54" was amended to "RCr 12.04." KY. R. CRIM. P. 11.42(8) (1978).
In 1981, the court amended RCr 11.42(1) to significantly enlarge the class of defendants eligible to invoke the remedy. This group now included, in addition to those “in custody,” individuals subject to a judgment of conviction who were no longer incarcerated or who had never been incarcerated, but were “on probation, parole or conditional discharge.” Following this change, the court adopted only three other amendments. In 1984, the court modified provisions for appointment of counsel to permit appointment only upon the “specific written request” of the movant. Shortly thereafter, the court modified RCr 11.42(4) to clarify that the Commonwealth’s Attorney, not the Attorney General, had primary responsibility to respond on behalf of the Commonwealth of Kentucky. In 1994, the court made a final amendment, probably the most important addition to the Rule since it was adopted, which imposed a three-year filing limitation, placed into the Rule the defense of laches, and also included a provision that the trial court in an RCr 11.42 proceeding could not be reversed or remanded for failure to “make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to CR 52.02.”

B. The Number and Pattern of Claims

In 1963, when the Kentucky Court of Appeals, then the state’s highest court, first considered and adopted the language of RCr 11.42, it intended that the remedy offered by the Rule would provide the prisoner no more than what was already available under Kentucky law through the writ of habeas corpus. The principal advantage of RCr 11.42 over the common law writs was a savings to the court system by requiring the case to be heard in the court of conviction, where the witnesses, record, travel expenses for counsel, were also deleted. See KY. R. CRIM. P. 11.42(9) (1981) compiler’s notes.


Id. 11.42(4) (1986).


Tipton v. Commonwealth, 376 S.W.2d 290, 291 (Ky. 1963). The limitations of RCr 11.42 were lamented by at least one jurist of Kentucky’s high court, who wrote: “When the new criminal rule was proposed, I, alone, seem to have had the impression that under certain conditions the attack was frontal.” Id. (Moremen, J., concurring).
and other evidence were located. The Rule also had the effect of spreading the workload associated with its implementation across all judicial circuits, not just those with major correctional facilities. In other words, the major benefits of the Rule tended to accrue to the state rather than the prisoner. Nevertheless, filings under the new procedure rapidly increased.

Although RCr 11.42 became effective January 1, 1963, the first related substantive appellate decisions were not published until 1964. During 1964 and 1965, over one hundred published decisions resolving RCr 11.42 questions were issued. In 1970, the Office of the Attorney General, which represents the state in virtually all criminal appeals in Kentucky, reported that of the 142 cases briefed before the Kentucky appellate court in 1969, fifty-seven were RCr 11.42 appeals and eight were state habeas corpus appeals, representing almost one-half of the total. This "substantial increase" in overall workload was "due chiefly to a larger number of appeals in post-conviction cases involving motions to vacate judgments of conviction under RCr 11.42." It was not until the early 1970s that the flow of published decisions leveled off to three to five cases a year, the current average. Thus, much of the case law concerning RCr 11.42 is of an early date.

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360 Jones v. Breslin, 385 S.W.2d 71, 72 (Ky. 1964) (explaining that the advantage to hearing the motion in the sentencing court is that "all the available records would be in that court and thus the expense and responsibility of copying and forwarding various transcripts would be obviated"); Higbee v. Thomas, 376 S.W.2d 305, 307 (Ky. 1964) (explaining that by having the KY. R. CRIM. P. 11.42 hearing in the sentencing court, the records and witnesses are readily available); Palmore, supra note 338, at 25 (discussing that the net effect of new KY. R. CRIM. P. 11.42 is to channel claims to the court of record where it is less likely that erroneous allegations will be established as facts through lack of information). A further perceived advantage was that factual findings of the court of conviction,

if supported by substantial evidence, are binding upon the federal courts. So, although the Supreme Court has opened up for review belated claims of constitutional infringement, Rule 11.42 as promulgated and construed by the Court of Appeals puts this review substantially where it belongs, in the state court where the infringement is claimed to have occurred rather than some distant federal court which might otherwise find it necessary to ascertain the facts on inadequate and incomplete evidence.

Id.

361 Cf. Ayer, supra note 348, at 5 (noting that inmates had nothing to lose and were encouraged by what few "success stories" existed).


363 Id.


365 Id.
As of January 1, 1995, some 342 published appellate opinions had arisen from the appeal of an adverse decision by the court of record on a motion under RCr 11.42, either by the movant or the state, and had dealt with substantive criminal law issues. These published opinions represent a statistically significant number of cases and may be assumed to roughly indicate the range of issues in unpublished cases as well. The author surveyed the claims discussed by the appellate courts in these opinions in an effort to analyze the focus of prisoner challenges through RCr 11.42 motions.

The results are quickly summarized. It should come as no surprise that ineffective assistance of counsel allegations comprise the most often raised ground for relief, appearing as one of the issues in over 47% of RCr 11.42 appeals. Claims that the movant’s guilty plea was coerced or otherwise improper occurred in 21% of the appeals, and allegations that the Sixth Amendment right to counsel had been denied were found in 18% of the cases. Another popular claim, advanced in 15% of the appeals, was that the right of the movant to a direct appeal of the judgment of conviction had been unconstitutionally denied, usually through ineffective assistance of counsel. Such claims are of interest because, unlike the typical claim which at least has the potential to result in a new trial, the remedy for unconstitutional denial of direct appeal is, of course, the restoration of one’s right to appeal.

In 7% of the motions, the defendants challenged the sufficiency of the evidence presented at trial, a very difficult claim on which to prevail. About the same percentage claimed to have been imprisoned under a defective or otherwise improper indictment. Claims of incompetency or insanity at some point during the proceedings, attacks on jury instructions, and miscellaneous “jury” issues (jury composition, tainted jury, etc.) each commanded about 5% percent of the total. Below this level, generalizations are not as easily made, and the significance of any

366 The survey of cases covers volumes 371 through 890, Southwestern Reporter, Second Series. Certain inherent difficulties accompany any compilation of this sort. First, unusual or especially significant claims are more likely to result in published opinions, which are used by the appellate court to instruct bench and bar. Second, the total figure represents “pure” RCr 11.42 appeals on substantive issues of criminal law and substantive RCr 11.42 procedural matters. Not included are cases merely citing the Rule and contrasting it with habeas corpus or mandamus cases to compel the trial court to rule on a pending RCr 11.42 motion.

Even weeding out these cases provides less-than-perfect results. In a number of cases, the appellate court discussed the prisoner’s main claim(s) and then dismissed the others, without indicating their nature. This sample, however, provides a good approximation of the claims filed under RCr 11.42 over the past three decades.
statistics that could be generated becomes increasingly suspect. Nonetheless, the sheer number of challenges and the wide variety of legal reasoning presented are impressive.

One result which would be expected and which is borne out by the statistics is the low percentage of relief granted at the appellate court level. In only five appeals, less than 2% of the total, was a new trial granted. In only two cases did the movant walk out the prison door based on the RCr 11.42 appeal. A significantly higher number of petitioners obtained some lesser relief, including a remand for an evidentiary hearing, a grant of access to a transcript of record, a restoration of a lost right to direct appeal, and actions in the nature of mandamus to compel the lower court to rule on a pending RCr 11.42 motion. Petitioners were successful in getting some action on their motions, whether substantive or procedural, in 14% of the published RCr 11.42 opinions of the Kentucky appellate courts.

367 Vaughan v. Commonwealth, 505 S.W.2d 768, 770 (Ky. 1974) (finding ineffective assistance of counsel due to lack of preparation and potential conflict of interest), overruled on other grounds by Henderson v. Commonwealth, 636 S.W.2d 648, 650 (Ky. 1982); Wedding v. Commonwealth, 394 S.W.2d 105, 106 (Ky. 1965) (holding that movant received ineffective assistance of counsel, as lawyers had admitted no preparation for trial was made); Dillingham v. Commonwealth, 684 S.W.2d 307, 309 (Ky. Ct. App. 1985) (holding that attorney's failure to object to use of non-qualifying felony conviction in persistent felony offender trial amounted to ineffective assistance of counsel); Holland v. Commonwealth, 679 S.W.2d 832, 832 (Ky. Ct. App. 1984) (holding that "counsel's failure to subpoena favorable alibi witnesses" amounted to ineffective assistance of counsel); Scott v. Commonwealth, 555 S.W.2d 623, 626-27 (Ky. Ct. App. 1977) (holding that waiver of rights on guilty plea was inadequate when the competency of the defendant was in question).

368 Curtsinger v. Commonwealth, 549 S.W.2d 515, 516 (Ky. 1977) (holding that trial court erred in ordering movant imprisoned for probation violation even though the court had lost its jurisdiction over movant); Ivey v. Commonwealth, 655 S.W.2d 506, 512 (Ky. Ct. App. 1983) (holding violation of Interstate Agreement on Detainers required dismissal of the charge with prejudice).

369 The very small number of opinions in which a remand for an evidentiary hearing occurred and the even smaller number of new trials are consistent with the experiences of other states. Gary L. Anderson, Post-Conviction Relief in Tennessee -- Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act, 48 TENN. L. REV. 605, 624-25 (1981) (examining Tennessee's Post-Conviction Procedure Act and its effectiveness); Gary L. Anderson, Post-Conviction Relief in Missouri -- Five Years Under Amended Rule 27.26, 38 Mo. L. REV. 1, 5-6 (1973) (noting that Missouri does not give literal meaning to language of its rule and that the scope of relief is narrow); Edward A. Tomlinson, Post-Conviction in Maryland: Past, Present and Future, 45 MD. L. REV. 927, 948 (1986) (noting that petitioner probably obtains new trial in one case out of a hundred at best).
To provide a basis for comparison and to more accurately assess a prison litigant’s chances of obtaining relief on appeal from the denial of his or her RCr 11.42 motion in the trial court, the author also surveyed the Kentucky Legal Practitioner, a bimonthly publication which summarized all opinions of Kentucky’s appellate courts, both published and unpublished. The survey covered the two-year period of 1990-1991 since these were the last two full years of publication. Of 321 relevant appellate opinions, only twenty-seven, less than 9%, showed any relief whatsoever. Of these, only seven appeals, or 2%, involved the grant of a new trial. The remaining twenty appeals, about 6% of the total, resulted in minor relief such as a remand for an evidentiary hearing. The remaining 294 appellate opinions, including government appeals, affirmed the trial court’s denial or grant of RCr 11.42 relief. Apparently, based on this survey, most of RCr 11.42 cases are correctly resolved at the trial court level, and even in some of the “reversals,” room for legal disagreement obviously exists. The burden on the Kentucky Court of Appeals, which must hear all RCr 11.42 appeals except those in death penalty cases, appears quite out of proportion to the relief granted.

V. APPLYING FOR RELIEF AND PROCESSING THE MOTION

The appellant is entitled to a fair trial under the law. He is not entitled to try the court and his lawyer and the law.

The goal of RCr 11.42 is to achieve meaningful and efficient state post-conviction review of criminal judgments. As with most areas of criminal law, the process through which this policy objective is realized is of special significance. Errors appearing in the original record must be tested on appeal, while alleged errors arising outside of the original record are reserved for post-conviction relief. Therefore, an effective

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370 The Kentucky Legal Practitioner ceased publication in mid-1992. All appellate opinions were indexed; this survey covers all cases indexed as “postconviction relief” for the period January 1, 1990, through December 31, 1991.

371 Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968) (citing Penn v. Commonwealth, 427 S.W.2d 808 (Ky. 1968)).

372 Gross v. Commonwealth, 648 S.W.2d 853, 855 (Ky. 1983) (holding that KY. R. CRIM. P. 11.42 is the “vehicle to attack an erroneous judgment for reasons which are not accessible [on] direct appeal”); Howard v. Commonwealth, 364 S.W.2d 809, 810 (Ky. 1963) (holding that trial errors should be corrected on direct appeal).

Note, however, that RCr 11.42 is available only to review a “judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself.” Hicks v. Commonwealth, 825 S.W.2d 280, 281 (Ky. 1992). Constitution-
post-conviction remedy must allow for the development of a supplemental record, if necessary, and ensure that meritorious claims are quickly recognized and frivolous claims are quickly discarded. By early 1965, the Kentucky high court, acutely aware of the large number of post-conviction motions then streaming into the system, had offered its view of both the relief offered under the new Rule and the demands upon the court system necessary to effectuate it. Speaking to the state-wide constituency then poring over law books in an effort to understand and apply the new procedure, the court provided a blunt summary:

The purpose of RCr 11.42 is to provide a method by which a prisoner’s claim of constitutional infringement can be effectively settled in one proceeding for all time. In order for this to be possible, that is, in order for the resolution of the factual basis of the claim to be accepted in the federal courts as final and conclusive, it is necessary that the movant be given a full and fair opportunity to litigate the claim. No matter how unfounded it may be, and even though the court knows it is not true, if on its face the claim states a valid basis for relief the bare essentials of such an opportunity are: (1) effective assistance of counsel, (2) a hearing, (3) a determination of the material facts, followed by a judgment based on that determination, (4) a transcript of the record (including the hearing) in the event he appeals, and (5) an appeal.373

Over the years, Kentucky’s appellate courts have rendered a considerable number of opinions related to issues arising out of the mechanics of drafting, filing, and processing the post-conviction relief motion. Kentucky case law now provides some guidance on nearly every aspect of RCr 11.42 pleading, practice, and procedure.

A. General Principles

1. Constitutional Grounds for Attack

A collateral attack on a judgment of conviction, raised by motion under RCr 11.42, must be based upon an allegation of a violation of the defendant’s constitutional rights.374 Nothing less will do.

373 Coles v. Commonwealth, 386 S.W.2d 465, 466 (Ky. 1965); accord Wilson v. Jefferson Circuit Court, 384 S.W.2d 305, 306 (Ky. 1964) (explaining that a defendant is entitled to formal hearing and counsel unless allegations are insufficient); cf. Schroeder v. Thomas, 387 S.W.2d 312, 314 (Ky. 1964) (expressing view that KY. R. CRIM. P. 11.42 scheme is “constitutionally adequate if trial courts adequately apply it”), overruled by Lycans v. Commonwealth, 511 S.W.2d 232 (Ky. 1974).

374 Hicks, 825 S.W.2d at 281; Commonwealth v. Wine, 694 S.W.2d 689, 694 (Ky.
2. Burden of Proof

It is well established that the "burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." Should the prisoner fail to introduce any evidence supporting a claim, the issue is waived. In addition, as the Kentucky high court has emphasized, "[T]he moving party on a motion under RCr 11.42 undertakes a heavy burden to overcome the regularity of the conviction."

3. Timing the Motion

Prior to October 1, 1994, the language of the Rule permitted an individual to "at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it." Thus, as a practical matter, no matter how far in the past the prisoner's judgment of conviction had been rendered, it was still subject to attack under RCr 11.42. Although by 1992 an intermediate appellate court panel had apparently recognized a laches defense for the prosecutor forced to defend 1985); Commonwealth v. Basnight, 770 S.W.2d 231, 237 (Ky. Ct. App. 1989); see Howard v. Commonwealth, 777 S.W.2d 888, 890 (Ky. 1989) (Vance, J., dissenting) ("The very purpose of RCr 11.42 is to allow vacation of judgments which are the result of the denial of constitutional due process."); cert. denied, 494 U.S. 1068 (1990).

Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968) (emphasis added); United States v. Morgan, 346 U.S. 502, 512 (1954) ("It is presumed the proceedings were correct and the burden rests on the accused to show otherwise."); Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (holding petitioner had burden of proving that the right to counsel was not waived); accord Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967) (explaining that the fact the trial court had serious doubts regarding the adequacy of the prisoner's counsel was an insufficient ground to grant relief under KY. R. CRM. P. 11.42). Shifting the burden to the inmate in post-conviction proceedings is the universal practice. FRANK, supra note 260, at 79; YACKLE, supra note 23, at 502; see Parke v. Raley, 113 S. Ct. 517 (1992) (discussing burden of proof regarding the constitutional validity of prior conviction).

King v. Commonwealth, 408 S.W.2d 204, 205 (Ky. 1966) ("King did not introduce any evidence on this issue at his RCr 11.42 hearing, so we consider it waived."); cert. denied, 386 U.S. 924 (1967); accord Matthews v. Commonwealth, 468 S.W.2d 313, 314 (Ky.) (holding that motion to vacate was properly overruled where defendant presented no evidence to support claim), cert. denied, 404 U.S. 966 (1971).


stale RCr 11.42 claims, the "at any time" provision had been a problem for decades, with numerous belated motions to vacate being advanced. Although this decision was the first to recognize laches, Kentucky's appellate courts had always shown a certain sympathy to the prosecution for the problems created by delayed claims. One of the older examples was McKinney v. Commonwealth, where the movant waited thirteen years after trial before filing his motion. By that time, defense counsel was deceased and the foundation of the Commonwealth's defense against McKinney's ineffective assistance of counsel claim was irretrievably lost. The Kentucky high court concluded that McKinney did not meet the heavy burden of proof required by such circumstances. In Jordan v. Commonwealth, Prater v. Commonwealth, Wooten v. Commonwealth and Reams v. Commonwealth, the Kentucky high court seemed to recognize the existence of an ad hoc laches defense, whether specifically plead or raised by the court sua sponte. On the other hand, citing approvingly from Heflin v. United

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380 Lukowsky, supra note 348, at 441 (observing that the appellate courts quickly felt the weight of delayed inmate motions to vacate). According to Lukowsky, three factors led to serious difficulties in responding to stale inmate claims: "First, while the court itself is perpetual, its judges die and otherwise vanish from the scene. Second, lawyers too are mortal, they die and otherwise fade away. Third, the files and records kept by the courts in criminal matters were surprisingly sketchy and inadequate." Id.

381 445 S.W.2d 874 (Ky. 1969).

382 Id. at 877-78.

383 Id. at 878; accord Miller v. Commonwealth, 458 S.W.2d 453, 454 (Ky. 1970) (holding that defendant had to establish that plea of guilty was "unintelligent" in order to prove counsel was ineffective); Ringo v. Commonwealth, 455 S.W.2d 49, 50 (Ky. 1970) (explaining that conclusive character of public records increases with age and may become unassailable).

384 445 S.W.2d 878, 879-80 (Ky. 1969) (explaining that since defendant had waited 15 years to contest conviction, defendant was the only witness to testify against conviction).

385 474 S.W.2d 383, 384 (Ky. 1971) (explaining that defendant who had waited 16 years to contest conviction bore a heavy burden).

386 473 S.W.2d 116, 117 (Ky. 1971) (explaining that defendant who had waited 25 years to contest conviction had waited too long).

387 522 S.W.2d 853, 854 (Ky. 1975) (explaining that defendant who had waited 20 years to contest conviction had waited too long).

388 See, e.g., Hayes v. Commonwealth, 837 S.W.2d 902, 906 (Ky. Ct. App. 1992) (Wilhoit, J., concurring in result) (observing that the defense of laches, if available, should be specifically pled under KY. R. CIV. P. 8.02).

389 See, e.g., Reams, 522 S.W.2d at 854.
States, Kentucky's highest court had also recognized that the RCr 11.42 provision allowing a prisoner to file "at any time" meant that "as in habeas corpus, there is no statute of limitations, no res judicata, and the doctrine of laches is inapplicable."

The approach in the older cases appeared simply to be that, although the petition could be brought "at any time," the movant's burden of proof increased with the passage of time. No standard was provided to guide the trial courts' determination of how much heavier that burden became with each passing year, and the state of the law in this area was unworkable.

This unfortunate situation was resolved when the Kentucky Supreme Court amended RCr 11.42 in 1994 to add new section (10), which requires the filing of a RCr 11.42 motion "within three years after the judgment becomes final," within three years after the facts upon which a previously undiscovered claim is predicated became known, or within three years after the "fundamental constitutional right asserted" was created and held to apply retroactively. The equitable defense of laches was also recognized to apply even within these more restrictive time frames. Arguably, the 1994 Amendment was the most significant modification to RCr 11.42 in the history of the Rule and has greatly simplified this aspect of RCr 11.42 pleading and practice.

Although the most important aspect of the timing of a motion under RCr 11.42 is contained in the 1994 Amendment, another general consideration exists. Any application of RCr 11.42 is subject to the general requirements that the movant be a "prisoner in custody under sentence or a defendant on probation, parole or conditional discharge" and that the issues sought to be raised are ripe for resolution under RCr 11.42. Therefore, in the first instance, a judgment against the movant must be the object of the attack. A motion to vacate filed prior to the entry of judgment warrants summary dismissal or at least abatement. However, the trial court may and should fully consider a motion under RCr 11.42 even though direct appeal is pending.


Prater v. Commonwealth, 474 S.W.2d 383, 384 (Ky. 1971).

See supra notes 381-89 and accompanying text.

KY. R. CRIM. P. 11.42(10).

Prater, 474 S.W.2d at 384.

4. Successive Motions

The terms of RCr 11.42(3) require the prisoner to "state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." The applicant for post-conviction relief under RCr 11.42 is required to specify all complaints of which he has knowledge "so that one careful and complete consideration of his application will conclude the litigation and the courts and the bar will not be required again to devote time and effort to his cause." This procedural bar to successive petitions is not absolute,

that defendant should be permitted to raise, with an 11.42 motion, considerations that are not object of direct appeal and that are supported by facts).

See, e.g., Alvey v. Commonwealth, 648 S.W.2d 858, 859 (Ky. 1983) (holding that defendant who failed to challenge earlier guilty plea prior to challenging instant guilty plea had waived right to challenge either plea); Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983) (involving a defendant who failed to challenge earlier convictions while "in custody, under sentence or on probation" and was thus precluded from challenging the conviction under KY. R. CIV. P. 60.02); Gregory v. Knuckles, 471 S.W.2d 306, 307 (Ky. 1971) (holding defendant not entitled to transcript of record in attempt to appeal order overruling second motion for post-conviction relief).

Courts have disposed of a large number of successive RCr 11.42 motions based upon this aspect of the Rule. Dismissals of successive petitions occurred in at least the following published cases: Crick v. Commonwealth, 550 S.W.2d 534, 535 (Ky. 1977) (alleging invalid juvenile waiver); Shepherd v. Commonwealth, 477 S.W.2d 798, 799 (Ky. 1972) (claiming denial of right of appeal); Butler v. Commonwealth, 473 S.W.2d 108, 109 (Ky. 1971) (alleging coercion of guilty plea and ineffective assistance of counsel); Kennedy v. Commonwealth, 451 S.W.2d 158, 159 (Ky. 1970) (alleging incompetency at time of guilty plea); Milner v. Commonwealth, 408 S.W.2d 646, 647 (Ky. 1966) (holding that since allegation should have been raised in first motion, court was correct in overruling second); Deweese v. Commonwealth, 407 S.W.2d 402, 403 (Ky. 1966) (holding that allegation was "repetitious"); Jennings v. Commonwealth, 400 S.W.2d 233, 234 (Ky. 1966) (holding that allegation was the same as previous ones denied); Rowe v. Commonwealth, 399 S.W.2d 730, 731 (Ky. 1966) (noting that second motion involved same allegation of coercion); Warner v. Commonwealth, 398 S.W.2d 490, 490 (Ky. 1966) (holding that allegation was same as previously one denied); Bell v. Commonwealth, 396 S.W.2d 772, 772 (Ky. 1965) (holding that allegation was same as earlier ones denied); Kinmon v. Commonwealth, 396 S.W.2d 331, 332 (Ky. 1965) (holding that subsequent motion was merely an effort to trifle with the court), cert. denied, 383 U.S. 930 (1966); Burton v. Tartar, 385 S.W.2d 168, 169 (Ky. 1964) (holding that allegation was same as that twice brought previously amounted to trifling with the court), cert. denied, 380 U.S. 984 (1965).

Case v. Commonwealth, 467 S.W.2d 367, 369 (Ky. 1971) (holding that defendant's second petition for post-conviction relief contained nothing that could not have been brought in first petition); see Lycans v. Commonwealth, 511 S.W.2d 232, 232 (Ky. 1974) (dismissing defendant's second motion under KY. R. CRIM. P. 11.42 without an
but it is a significant hurdle to overcome if the grounds raised could have been presented earlier. However, where the first motion was denied without a hearing and subsequent Kentucky case law made it clear that a hearing should have been provided, a movant advancing the same grounds would be granted a hearing on the second motion. The application of this standard is clearly left to the discretion of the judge. A successive motion under RCr 11.42 apparently may be allowed if a new claim, unknown and not reasonably discoverable at the time of the first motion, was raised. This situation occurred in Smith v. Commonwealth, in which the appellate court reversed and directed the trial court evidentiary hearing because the issue should have been raised in the first motion; Hampton v. Commonwealth, 454 S.W.2d 672, 673 (Ky. 1970) (denying defendant's successive motions under Ky. R. CRIM. P. 11.42 and Ky. R. CIV. P. 60.02 because new evidence presented by defendant had been available to defendant at the time of trial); see also 1965-66 Kentucky Court of Appeals Review, 55 KY. L.J. 253, 377 (1966-1967). The appellate courts have criticized piecemeal litigation, the effects of which provide the reason for this restriction. Shepherd v. Commonwealth, 477 S.W.2d 798, 798 (Ky. 1972) ("Appellant seems to believe that RCr 11.42 gives him the right to advance reasons for vacating the judgment one at a time in a series of motions that will allow him to command the attention of the courts in perpetuity. In this he is mistaken.").

Johnson v. Commonwealth, 461 S.W.2d 379, 380 (Ky. 1970) (finding defendant who was denied appeal on original claim to be entitled to hearing on the issue). The Kentucky appellate courts have sometimes invoked the procedural bar but then have addressed the merits in a sentence or two, almost as an afterthought; this practice may have unfavorable federal habeas corpus implications, in that the court rules on the merits of the prisoner's claims by merely mentioning them as being groundless. In effect, a court which intended to dispose of the claims on procedural grounds in a sentence or two can end up ruling on the merits. This enables a federal habeas corpus court to also reach the merits of the issue. For examples of such unwise dicta, see Szabo v. Commonwealth, 458 S.W.2d 167, 168 (Ky 1970) (resolving unnecessarily eight issues in one sentence); Angelo v. Commonwealth, 451 S.W.2d 646, 647 (Ky. 1970) (deciding ineffective assistance of counsel claim raised for the first time on appeal); Odewahn v. Commonwealth, 407 S.W.2d 137, 138 (Ky. 1966) (deciding merits of successive motion); Tipton v. Commonwealth, 398 S.W.2d 493, 495 (Ky. 1966) (deciding merits of successive motion), overruled on other grounds by Stinnett v. Commonwealth, 446 S.W.2d 292 (Ky. 1969); Carter v. Commonwealth, 397 S.W.2d 165, 166 (Ky. 1965) (dismissing appeal of subsequent motion but resolving issues raised in first motion, the denial of which was not appealed).

On other occasions, the appellate courts have upheld completely the procedural bar. See, e.g., Crick, 550 S.W.2d at 535 (declining to review allegedly invalid juvenile waiver); Hampton, 454 S.W.2d at 673 (refusing to review overruling of successive motion by trial court). Gilliam v. Commonwealth, 652 S.W.2d 856, 858 (Ky. 1983) (explaining that a defendant is not precluded from receiving relief under a subsequent KY. R. CRIM. P. 11.42 motion "upon a ground which was not known or reasonably discoverable at the time the first motion was made").
to grant appellant an evidentiary hearing since, at the time appellant filed his first RCr 11.42 motion, the prisoner did not know and had no reason to know that counsel had failed to timely file a notice of appeal. The first RCr 11.42 motion had been overruled on the reasoning that all issues raised could and would be resolved on direct appeal, but the direct appeal was later dismissed because of the error of counsel. The trial court then dismissed appellant's second RCr 11.42 motion as successive. Under these circumstances, the appellate court found that the trial court had abused its discretion.

5. Other Procedural Bars

A procedural bar arises when a criminal defendant takes or fails to take some action, the result of which can be construed as waiver of his or her claim. For example, RCr 11.42 is not a substitute for direct appeal, and a litigant is therefore properly barred from raising in an RCr 11.42 motion an issue that either was raised on direct appeal or could have been raised on direct appeal or by another pre-RCr 11.42 proceeding. This principle was succinctly stated in Cole v. Commonwealth, when the court concluded: "The issues Cole now raises could have been raised on that appeal. They were not of such character as to render the judgments utterly void and thus subject to collateral attack without reference to the appeal. It is now too late."

Finally, a procedural bar

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401 502 S.W.2d 516, 516-17 (Ky. 1973).
402 Id. at 516.
403 Id.
404 Id. at 516-17.
406 Id. (adopting decision of the Kentucky Court of Appeals that since KY. R. CRIM. P. 11.42 issues had been decided adversely to petitioner by the Kentucky Supreme Court on direct appeal, they should not be considered on 11.42 motion); Holt v. Commonwealth, 525 S.W.2d 660, 661 (Ky. 1975) ("RCr 11.42 is not a substitute for appeal."); Thacker v. Commonwealth, 476 S.W.2d 838, 839 (Ky. 1972) (explaining that the purpose of KY. R. CRIM. P. 11.42 is not to retry settled issues); Parish v. Commonwealth, 472 S.W.2d 69, 71 (Ky. 1971) (holding that failure to raise claim of improper instructions in motion for new trial constituted waiver for purposes of KY. R. CRIM. P. 11.42); Clay v. Commonwealth, 454 S.W.2d 109, 110 (Ky.) (holding that KY. R. CRIM. P. 11.42 is not a substitute for appeal and does not permit review of all trial errors), cert. denied, 400 U.S. 943 (1970); Yates v. Commonwealth, 375 S.W.2d 271, 273 (Ky.) (holding that failure to appeal precludes post-conviction attack), cert. denied, 377 U.S. 937 (1964).
407 441 S.W.2d 160, 162 (Ky. 1969) (holding defendant's allegations of incompetent counsel, biased jury, and denial of continuance to be an insufficient basis for a collateral attack since defendant had failed to raise these issues on appeal).
exists regarding the appeal of a denial of an RCr 11.42 motion. Once the motion to vacate has been overruled by the trial court and the decision to appeal that ruling is made, the movant cannot raise new issues. The issues appealed must, for obvious reasons, have been presented to the trial court in the original motion or through amended pleadings.408

The Kentucky appellate courts usually hold that any claim under RCr 11.42 which could have been raised on direct appeal but was not is barred. On one hand, for example, Kentucky’s highest court has held that where the movant was represented by counsel at trial and his counsel made no motion for a continuance, the request for RCr 11.42 relief based upon the failure of the trial court to grant a continuance was properly denied.409 In a similar fashion, it has been held that the failure of counsel to object at trial to an allegedly tainted in-court identification waived movant’s claim under RCr 11.42,410 as did the failure to pursue a timely appeal of a juvenile court waiver of jurisdiction.411 Compare these cases to Smith v. Commonwealth, where the defendant complained he had not been represented by counsel in a 1958 juvenile proceeding leading to conviction.412 The 1958 conviction was not appealed, but the Kentucky appellate court still allowed Smith to raise the issue of the juvenile waiver. The court reasoned that since the right to counsel in a juvenile proceeding did not exist in 1958, the appellant was not dilatory in failing to raise the issue.413 This situation justified an exception to the general rule.414

408 Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983) (holding that defendant who had failed to request counsel for KY. R. CRIM. P. 11.42 hearing was precluded from appealing based upon failure to appoint counsel); Brock v. Commonwealth, 479 S.W.2d 644, 646 (Ky. 1972) (finding that the claim the trial court had failed to advise defendant of right to appeal was not raised in KY. R. CRIM. P. 11.42 motion); Russell v. Commonwealth, 472 S.W.2d 259, 260 (Ky. 1971) (declining to consider defendant’s arguments which were not raised at trial court level); Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970) (declining to consider defendant’s claims which were not raised at hearings); Angelo v. Commonwealth, 451 S.W.2d 646, 647 (Ky. 1970) (declining to consider claims which were not set forth in appellant’s motion); Brister v. Commonwealth, 439 S.W.2d 940, 941 (Ky. 1969) (declining to review claims which were not presented to trial court); Bell v. Commonwealth, 395 S.W.2d 784, 786 (Ky. 1965) (explaining that issue of “inadequate” counsel would not be considered on appeal), cert. denied, 382 U.S. 1020 (1966).

409 Williams v. Commonwealth, 398 S.W.2d 503, 503 (Ky. 1966).

410 Butcher v. Commonwealth, 473 S.W.2d 114, 115 (Ky. 1971).

411 Holt v. Commonwealth, 525 S.W.2d 660, 661 (Ky. 1975).


413 Id. at 259.

414 Id.
Moreover, any procedural bar potentially can be overcome under Kentucky law through several avenues and at several different stages of the proceedings. First, the fact that an issue has been raised and decided on direct appeal does not mean that the issue is concluded. On the contrary, litigants and their attorneys have learned to raise the barred issue by alleging ineffective assistance of counsel as the basis of the claim. This approach merely shifts the emphasis from the error itself to the failure of counsel to prevent the error from occurring in the first place. Second, a procedural bar or default may be overlooked on direct appeal from a judgment if the court finds prejudice to a substantial right of the defendant under RCr 10.26, or if upholding the judgment of conviction would result in a “manifest injustice.” Third, without careful analysis, a reviewing court may be tempted to view a serious departure from accepted procedure as a defect in the court’s jurisdiction, thus preventing enforcement of the procedural bar. One area which illustrates this problem is the allegedly improper transfer of jurisdiction from juvenile court to circuit court, followed by a failure of the defendant to appeal, which is considered a waiver. This subject is exhaustively discussed in *Schooley v. Commonwealth*. The Schooley court was careful to distinguish between issues of jurisdiction and due process, concluding that an improper transfer from juvenile to circuit court was not jurisdictional and that procedural defects in the transfer could be waived by failure to appeal. This approach is the correct one, since jurisdiction concerns the power to act, not the manner in which the court has acted, even if defective.

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415 Skaggs v. Commonwealth, 803 S.W.2d 573, 574 (Ky. 1990) (involving claims of fraud by psychologist and errors in instructions, raised and rejected on direct appeal, which were resurrected on Ky. R. Crim. P. 11.42 as ineffective assistance of counsel), cert. denied, 502 U.S. 844 (1991); Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990) (involving a juror bias claim raised on direct appeal which was transformed into ineffective assistance claim based on failure of counsel to discover juror bias); Williams v. Commonwealth, 639 S.W.2d 788, 790 (Ky. Ct. App. 1982) (holding that while sufficiency of evidence claim was not raised on direct appeal and was therefore barred, the ineffective assistance of counsel claim arising out of same facts must be considered). Note that this situation is different from that presented when defense counsel has failed to preserve an issue at trial, thereby waiving it on direct appeal and leaving RCr 11.42 as the only possible remedy. See infra notes 686-88 and accompanying text.

416 See, e.g., West v. Commonwealth, 780 S.W.2d 600, 602-03 (Ky. 1989).


418 *Schooley*, 556 S.W.2d at 915-16.

419 Id.
B. Pleading Requirements

The text of RCr 11.42 itself offers only minimal guidance on pleading requirements. The appellate courts have added broad, common sense restrictions through their decisions. Many of these restrictions were the result of published opinions from the 1960s, when the Kentucky high court found it necessary to articulate basic standards governing the filing of a prima facie challenge under RCr 11.42 while insuring that the Rule continued to fulfill its purpose of offering an orderly mechanism to deal with complaints of constitutional magnitude or fundamental fairness. Four general principles are highlighted here as especially significant.

1. Basis for Complaint

First, RCr 11.42 is grounded on the premise that the movant is aware of a significant constitutional or jurisdictional trial error sufficient to warrant voiding the judgment. Consistent with this position, an indigent is not entitled to a transcript, provided at the state’s expense, to search the trial record for errors which might somehow evolve into a motion for post-conviction relief or which do not attack the judgment. The purpose of the Rule “is to provide a forum for known grievances, not to provide an opportunity to research for grievances.” The complaint or allegation must be of such a nature that the grounds presented, if true, would entitle the prisoner to relief! Where no such basis for relief has been provided, the motion may be summarily dismissed without appointment of counsel or a hearing. Above all, the allegation cannot be an attempt to utilize RCr 11.42 as a substitute for an appeal.

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420 See Gilliam v. Commonwealth, 652 S.W.2d 856, 858 (Ky. 1983) (denying transcript due to lack of evidence that basis for KY. R. CRIM. P. 11.42 motion existed); Odewahn v. Ropke, 385 S.W.2d 163, 164 (Ky. 1964) (holding that motion which failed to factually demonstrate existence of valid grounds for grant of relief could be dismissed); Oakes v. Gentry, 380 S.W.2d 237, 238 (Ky. 1964) (holding that failure to file a timely appeal precluded grant of motion for transcript).

421 Clements v. Commonwealth, 441 S.W.2d 158, 159 (Ky. 1969), provides an example. The allegation was that the defendant’s lawyer received $400 to “guarantee” probation, and, of course, the defendant was not probated. Even if true, this event occurred after conviction and could not be a ground for relief under RCr 11.42, since under RCr 11.42 only the judgment could be challenged. Id. at 160.

422 Gilliam, 652 S.W.2d at 858.

423 Oakes, 380 S.W.2d at 238.

424 Odewahn v. Ropke, 385 S.W.2d 163, 164 (Ky. 1964).

425 See, e.g., Cinnamon v. Commonwealth, 455 S.W.2d 583, 584 (Ky. 1970)
2. Supporting Facts

By the terms of the Rule itself, the motion, which is to be in writing, "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." The burden, therefore, is on the defendant to file a motion which adequately describes the nature of the constitutional violation and presents sufficient facts in support. This burden allocation is particularly vital where counsel has been appointed, as required by Commonwealth v. Ivey, as appointment of counsel ensures that the movant is given legal assistance for preparing and presenting his claims. Summary dismissal is the penalty for failure to comply. This rule of law is justified because it would be unfair and inefficient to ask the state to investigate nebulous claims in a vain effort to determine the truth. It is not enough, therefore, to simply charge the denial of the right to a fair trial and leave it at that. To pass this hurdle, "[t]he movant must aver facts with sufficient specificity to generate a basis for relief."

Failure to comply with this requirement may occur in any variety of ways. For example, a bare allegation that a guilty plea has been obtained through "trickery" has been held insufficient on at least two occasions. In another case, the movant advanced the claim that his guilty plea was "coerced" by delay in bringing his case to trial, but because no facts were presented to support the allegation, the motion to vacate was

(explaining that the allegation that appellant only pled guilty to one charge and not others must be raised on appeal, not under 11.42), cert. denied, 401 U.S. 941 (1971).


Stanford, 854 S.W.2d at 748.

599 S.W.2d 456, 457 (Ky. 1980) (holding right of indigent to free counsel extends to KY. R. CRIM. P. 11.42 hearings).

Stanford, 854 S.W.2d at 748 ("Without a minimum of factual basis, contained in the verified RCr 11.42 motion, the motion should be summarily overruled."); Skaggs, 803 S.W.2d at 576; Cook v. Commonwealth, 402 S.W.2d 847, 847 (Ky. 1966); Wilson v. Commonwealth, 761 S.W.2d 182, 184 (Ky. Ct. App. 1988).

Lucas v. Commonwealth, 465 S.W.2d 267, 268 (Ky. 1971) (holding that the claim for relief was without any legal basis). To allow the movant to proceed with only conclusory allegations, devoid of facts, would place an intolerable burden on trial courts. Jennings v. Commonwealth, 380 S.W.2d 284, 286 (Ky. 1964); accord Sharp v. Commonwealth, 395 S.W.2d 317, 317 (Ky. 1964).

properly dismissed. In guilty plea cases, the movant is required to affirmatively state, as a constitutional basis for relief, that the guilty plea was not knowing and voluntary.

Finally, although it has been held that pro se pleadings are subject to less stringent standards than those presented through legal counsel, a pro se motion is justly required to give both the court and opposing party fair notice of the nature of the claim. Allegations made in bad faith will cause the motion to be stricken and the proceedings to be dismissed.

3. Substantial Compliance

The requirement on the face of the Rule that a motion for post-conviction relief be in writing is jurisdictional. Under the civil rules, the trial court loses jurisdiction over its judgment ten days after entry. The filing of an RCr 11.42 motion is a rule-based resumption of the original criminal case in the court of conviction. Because the motion may be made after the trial court has lost jurisdiction over its judgment, the requirement for a written motion is particularly important. Cleaver v. Commonwealth teaches:

The procedure for obtaining relief pursuant to the provisions of RCr 11.42 must be complied with. The motion for relief must be in writing, verified by the movant, and state specifically the grounds of challenge and the facts in support thereof. In the instant case, there being no written motion, there could be no compliance with the provisions of RCr 11.42, not even a substantial compliance. It is jurisdictional that

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432 Boffman v. Commonwealth, 459 S.W.2d 603 (Ky. 1970); accord Wedding v. Commonwealth, 468 S.W.2d 273, 274 (Ky. 1971); Parker v. Commonwealth, 465 S.W.2d 280, 281 (Ky. 1971) (holding that allegation of coercion of guilty plea was unsupported by facts); Farmer v. Commonwealth, 450 S.W.2d 494, 494 (Ky. 1970) (holding that allegation was not sufficiently definite to merit further inquiry).

433 Lucas, 465 S.W.2d at 268.

434 Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983) (finding that defendant had filed form of indigency which was not sufficiently specific in requesting private counsel); Commonwealth v. Miller, 416 S.W.2d 358, 360 (Ky. 1967) (explaining that failure to follow procedural standards of Ky. R. CRM. P. 11.42 and Ky. R. CIV. P. 60.02 by prisoner proceeding pro se could be excusable if fair notice had been given to other parties).

435 Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993), cert. denied, 114 S. Ct. 703 (1994); Miller, 416 S.W.2d at 360-61.

436 Cleaver v. Commonwealth, 569 S.W.2d 166, 169 (Ky. 1978).

437 KY. R. CIV. P. 59.05.
the terms and provisions of RCr 11.42 must be complied with, even though a substantial, and not an absolute, compliance is adequate. Therefore, even had RCr 11.42 been an appropriate remedy in this instance, in the absence of an appropriate motion as required by RCr 11.42, the Johnson Circuit Court would not have had the authority to enter an order granting the appellant any relief.\(^4\)

Failure to make the motion in writing, therefore, is a fatal jurisdictional error, as is failure to sign the motion and verify its accuracy.\(^5\) None of these requirements imposes a substantial burden upon the movant, and each is essential for the orderly processing of RCr 11.42 motions. Even the requirement that the movant verify the contents of the motion is an important component of an orderly process, equivalent to “due process” for the state. This requirement aids accountability and helps ensure that the state does not waste valuable resources — both executive and judicial — in processing false claims. This requirement thus frees those resources for the consideration of more substantial and substantiated allegations.

4. Custody

Additionally, RCr 11.42 provides that the motion for relief may be made by a “prisoner in custody under sentence or a defendant on probation, parole or conditional discharge.”\(^6\) This pleading requirement was initially intended to be the equivalent of the “in custody” requirement under federal habeas corpus.\(^7\) The original wording of RCr 11.42 limited its use to a “prisoner in custody” and, by its own terms, limited the collateral attack to the sentence actually being served

\(^{4}\) 569 S.W.2d at 169 (emphasis added).

\(^{5}\) Id.

\(^{6}\) Id.

\(^{7}\) KY. R. CRIM. P. 11.42(1).

\(^{1}\) The jurisdiction of federal courts is extended to federal habeas petitions filed by state prisoners “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3) (1988).

This provision had been interpreted to require physical incarceration at the time of filing. In Jones v. Cunningham, 371 U.S. 236, 240-41 (1963), the Court expanded the scope of the “in custody” requirement to include a prisoner on parole, as significant restrictions on liberty still exist because the release from prison is not unconditional. Where, however, a previous sentence has been fully served, it cannot be directly attacked in a federal habeas corpus proceeding even though it may someday be used to enhance a prisoner’s sentence under a persistent felony offender or habitual criminal statute. Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam).
through confinement at the time of filing. The Rule was later amended, consistent with developments in federal habeas corpus, to expand the concept of “custody” to its present understanding, but the basic requirement of an outstanding judgment which the prisoner or defendant seeks to attack through RCr 11.42 remained. In certain circumstances, the movant’s status forecloses review. For example, a sentence which has been completely served is not subject to collateral attack, and therefore, as a matter of policy, a former prisoner cannot use RCr 11.42 to simply clear his or her name.

The chances of overturning a judgment of conviction through a successful RCr 11.42 motion are extremely small. Scarce judicial resources justify the policy decision that the Rule is not available once a sentence has been completely served, even though technical or personal disabilities, such as difficulty in finding a certain type of employment, may remain. Nor may prisoners awaiting trial or sentencing utilize RCr 11.42, since they are not yet “under sentence.”

This policy extends to prior felony convictions which may, if the person is tried for later crimes, entail significant consequences. In Wilson v. Commonwealth, the court held that an RCr 11.42 motion was not available to attack a 1933 conviction which had been completely served, even though it was one of several used to impose a sentence of life in the defendant’s prosecution as a persistent felony offender or habitual criminal. In Commonwealth v. Stamps, the Kentucky Supreme Court reiterated that RCr 11.42 was “never intended as a defense to a persistent

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442 See supra note 355 and accompanying text.
443 Keltee v. Commonwealth, 648 S.W.2d 860, 860 (Ky. 1983) (affirming denial of request for relief under 11.42 because sentence had been completed “long before” the motion was filed); Sipple v. Commonwealth, 384 S. W.2d 332, 332 (Ky. 1964) (“RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody.”).
445 403 S.W.2d 705, 712 (Ky. 1966); accord Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983) (holding that defendant was not permitted to use KY. R. CRIM. P. 11.42 to attack a conviction for which period of incarceration and parole had been completed); see also supra note 441 and accompanying text.
felony offender charge and the legal system has been badly abused by the misuse of the rule for this unintended purpose.\textsuperscript{446} 

The language of the Wilson opinion remains instructive. The court stated that defendant Francis Wilson “is not in custody by virtue of the 1933 Warren Circuit Court conviction, nor has he shown or claimed a right to be released from custody of that sentence.”\textsuperscript{447} A persistent felony offender or habitual criminal charge simply results in the possibility of an enhanced sentence on a current, or triggering, felony based upon the defendant’s status as a persistent felony offender.\textsuperscript{448} An attack upon one of the underlying convictions used to meet the prosecution’s statutory burden of proving that status is simply not an attack upon the judgment of conviction of the triggering felony.\textsuperscript{449} The decisions of the Kentucky appellate courts provide defendants seeking to challenge prior convictions an avenue prior to trial\textsuperscript{450} or pursuant to CR 60.02, but only upon grounds that could not have been raised on direct appeal or via RCr 11.42, regardless of whether such grounds were actually raised.\textsuperscript{451} Finally, the “in custody” requirement of RCr 11.42

\textsuperscript{446} 672 S.W.2d 336, 338 (Ky. 1984) (holding that defendant’s failure to attack earlier conviction operated as a waiver of his right to use motion to vacate).

\textsuperscript{447} 403 S.W.2d at 712 (emphasis added). The court noted that Wilson was “seeking to use a remedy in a manner which was never intended by the Court in drafting RCr 11.42” and that Wilson’s proper remedy was through CR 60.02, which had replaced coram nobis. \textit{Id.; accord Kellee,} 648 S.W.2d at 860.

\textsuperscript{448} KY. REV. STAT. ANN. § 532.080(1) (Michie/Bobbs-Merrill 1994).


\textsuperscript{450} This avenue of attack on direct appeal was strictly limited for prior convictions obtained by a guilty plea in McGuire v. Commonwealth, 885 S.W.2d 931, 936-37 (Ky. 1994) (holding that, as in federal jurisprudence, the Commonwealth can meet its burden of proof by showing the fact of the prior conviction so long as there was not a complete denial of counsel at the guilty plea) (citing Custis v. United States, 114 S. Ct. 1732 (1994)). \textit{See Howard v. Commonwealth,} 777 S.W.2d 888, 889 (Ky. 1989) (instructing that defendant should attack conviction “when challenge [is] a live issue”); Commonwealth v. Gadd, 665 S.W.2d 915, 916 (Ky. 1984) (instructing that effort to suppress evidence of prior convictions should be made by pretrial motion); Alvey v. Commonwealth, 648 S.W.2d 858, 859 (Ky. 1983) (holding that failure to challenge earlier conviction prior to entering guilty plea to subsequent charge waives right to attack the earlier conviction).

\textsuperscript{451} Gross,'648 S.W.2d at 857.
contemplates a sentence of imprisonment; a criminal conviction resulting in only a fine may not be challenged under the Rule since the prisoner is not in custody.\footnote{Lewallen v. Commonwealth, 584 S.W.2d 748, 749 (Ky. Ct. App. 1979) (involving a defendant who pled guilty to four counts of distributing obscene material and was fined $1,000).}

C. \textit{Indigents and Prisoners Proceeding Pro Se}

Numerous issues arise in the context of inmates proceeding without counsel or without other resources available to the non-indigent defendant. Several are discussed below.

1. \textit{Transcripts}

In general, an indigent defendant is constitutionally entitled to a free transcript of the trial in order to perfect a direct appeal.\footnote{Griffin v. Illinois, 351 U.S. 12, 19 (1956).} Once a state has established a post-conviction procedure, it cannot permit financial considerations to limit its availability to an indigent.\footnote{Id.; see Smith v. Bennett, 365 U.S. 708, 709 (1961).} However, an indigent defendant contemplating the filing of an RCr 11.42 motion is not automatically entitled to have a trial transcript prepared or copied at the state’s expense.\footnote{Jones v. Breslin, 385 S.W.2d 71, 72 (Ky. 1964) (holding that copies of transcripts did not have to be forwarded to defendant where no motion had been filed).} To obtain the transcript, the inmate must have already filed an RCr 11.42 motion, demonstrated that his claim is not frivolous, and shown why the trial transcript, or a relevant portion thereof, is necessary to resolve the issue.\footnote{A transcript will not be provided prior to the filing of an RCr 11.42 motion. Gilliam v. Commonwealth, 652 S.W.2d 856, 858-59 (Ky. 1983); Harden v. Turner, 394 S.W.2d 749, 750 (Ky. 1965); Jones v. Commonwealth, 388 S.W.2d 601, 603 (Ky. 1965); Allen v. Wolfinbarger, 385 S.W.2d 160, 160 (Ky. 1964); Oakes v. Gentry, 380 S.W.2d 237, 238 (Ky. 1964). The motion to vacate judgment must present a claim which, if true, would entitle the movant to post-conviction relief. Gilliam, 652 S.W.2d at 858; Gregory v. Knuckles, 471 S.W.2d 306, 307 (Ky. 1971).} The trial court may decide to release
to the defendant only those portions of the trial transcript relevant to the issues raised in the motion. The matter is thus left to the discretion of the trial court in which the motion is filed. Kentucky decisions have noted that these restrictions are necessary to prevent the inmate from embarking on a state-sponsored "fishing expedition." As stated in *Gilliam v. Commonwealth*, the "purpose of the rule is to provide a forum for known grievances, not to provide an opportunity to research for grievances." Although an independently wealthy prisoner would not face these obstacles, the Kentucky Supreme Court has rejected due process and equal protection challenges. Even if the trial transcript is available without additional cost to the state, the trial court is not required to turn it over to a prisoner until a legally sufficient RCr 11.42 motion has been filed.

In practice, these requirements affect few prisoners seeking post-conviction relief. Many will have retained, or have available from court-appointed appellate counsel, a copy of the transcript from the direct appeal. Such restrictions are consistent, however, with the limited purpose of collateral attack and the state's interest in controlling frivolous requests. It should be noted that these restrictions apply to indigents obtaining trial transcripts for use in preparing an RCr 11.42 claim. If a hearing is conducted on the motion which is later overruled, then the indigent has an absolute right to a transcript of the RCr 11.42 proceeding for purposes of appealing the trial court's decision on the motion. Mandamus will

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458 Moore v. Ropke, 385 S.W.2d 161, 161 (Ky. 1964) (denying writ of mandamus where sole reason petitioner requested court record was to lay groundwork to attack conviction).
459 652 S.W.2d at 858 (applying United States v. MacCollom, 426 U.S. 317 (1976)).
460 Id. at 859.
461 Id.; Jones v. Commonwealth, 388 S.W.2d 601, 603 (Ky. 1965) (stating that trial court gave indigent more than the law required since it furnished him a transcript before the motion was filed, thereby permitting movant to embark on a "wholly unwarranted fishing expedition").
462 Long v. District Court, 385 U.S. 192, 194 (1966) (holding that state cannot deny transcript of hearing necessary for post-conviction appeal); Richardson v. Cannon, 506 S.W.2d 509, 510 (Ky. 1974) ("To deny such a transcript would be a denial of equal protection of the law"); Davis v. Knuckles, 407 S.W.2d 702, 703 (Ky. 1966) (entitling petitioner to transcript in order to perfect appeal); Roark v. Stivers, 401 S.W.2d 56, 56 (Ky. 1966) (holding that mandamus would issue to insure that record of 11.42 proceeding is furnished to indigent); Davenport v. Winn, 385 S.W.2d 185, 186 (Ky. 1964) (holding that mandamus would issue to compel trial court to furnish indigent with transcript of 11.42 proceedings).
lie for such a purpose even where the trial court has affirmatively responded that the movant had a fair trial and that the allegations in the RCr 11.42 motion were meritless.  

2. Appointment of Counsel

A prisoner who is entitled to seek post-conviction relief cannot be barred from assistance of counsel in preparing the motion. However, the state is under no federal constitutional duty to provide such assistance. The Kentucky Supreme Court has held that section 31.110 of the Kentucky Revised Statutes limits the trial court’s discretion to appoint counsel if requested by an indigent, but the failure to make such an appointment is prejudicial error only if the motion and answer raise a material issue of fact that cannot be determined without an evidentiary hearing. In appropriate cases, counsel should be appointed early in the process, because RCr 11.42(3) requires the movant to present all grounds for relief of which the prisoner has knowledge. This requirement acts as a bar to successive motions, and, therefore, “[w]ithout the assistance of counsel [the movant] could be effectively precluded from raising valid grounds by failure to include such grounds at the time of his first motion.” Any request for counsel must be “clear and unambiguous,” and absent such request, RCr 11.42 does not require automatic appointment.

463 Bingham v. Stivers, 396 S.W.2d 800, 801 (Ky. 1965) (holding that record must be provided regardless of merits of appeal).
464 Murray v. Giarratano, 492 U.S. 1, 10 (1989) (holding that indigent has no constitutional right to counsel in post-conviction proceeding); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (holding that states are not subject to a federal constitutional requirement to provide counsel for collateral proceedings); Commonwealth v. Stamps, 672 S.W.2d 336, 339 (Ky. 1984) (“Such right to counsel for a needy person as exists in an RCr 11.42 proceeding is provided by rule and by statute.”).
465 Stamps, 672 S.W.2d at 339 (holding that no constitutional right to an attorney exists in KY. R. CRIM. P. 11.42 proceeding), modifying Commonwealth v. Ivey, 599 S.W.2d 456 (Ky. 1980).
466 Ivey, 599 S.W.2d at 458 (holding that KY. REV. STAT. ANN. § 31.110 and KY. R. CRIM. P. 11.42 are complementary and clearly provide for appointment of counsel).
467 KY. R. CRIM. P. 11.42(5) (mandating that request be specific and written); Beecham v. Commonwealth, 657 S.W.2d 234, 237 (Ky. 1983) (holding that a form affidavit of indigency not to be specific request for counsel).

The movant should specify the purpose for which counsel is desired. Allen v. Commonwealth, 668 S.W.2d 556, 557 (Ky. Ct. App. 1984) (holding that request for counsel to assist in evidentiary hearing was properly denied where no hearing was necessary).
The common practice is for prisoners to simultaneously file an RCr 11.42 motion and a request for counsel to aid in its preparation. This approach would seem to be required, or at least authorized, by Beecham v. Commonwealth. This somewhat contradictory practice is actually beneficial since it gives the trial court a "feel" for the case, the significance of the issues raised pro se, and the abilities of the inmate. The original motion becomes the basis for the decision on whether to appoint. If counsel is appointed, the original motion to vacate is either substituted or supplemented by pleadings prepared with the assistance of counsel. It should be noted that a trial court’s denial of a request for counsel does not affect the authority of the Kentucky Department of Public Advocacy, which can provide counsel for indigents at post-conviction proceedings. If a hearing is ordered, the movant normally is entitled to representation to prepare for and conduct the hearing. If an indigent movant alleges ineffective assistance of counsel in the RCr 11.42 motion, then the trial court should be alert to the potential for conflict of interest in appointing a public defender from the same office as trial counsel. However, in any event, the defendant would have the burden to demonstrate prejudice from any conflict — which would require a showing that the outcome of the RCr 11.42 motion would have been different. The better practice involves establishing on the record that the movant, aware of the possible conflict, intelligently chooses to waive it if no waiver is obtained, then a public defender from another office or a private attorney should be appointed. Finally, failure to appoint counsel as required by section 31.110, where the movant has raised a material issue of fact and has submitted a written request as required by RCr 11.42(5), is harmless error unless prejudice to the movant is shown.

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657 S.W.2d at 237 (holding that request for appointed counsel must be “clear and unambiguous and contained in the body of the RCr 11.42 motion”).

KY. REV. STAT. ANN. § 31.110(2)(c) (Michie/Bobbs-Merrill 1992). Under the authority of Ray v. Commonwealth, 633 S.W.2d 71, 72 (Ky. Ct. App. 1982), the indigent must be represented on the conviction under which he or she is presently being detained. The appointment of counsel authorized by § 31.110 is not available where the sentence has been completely served.

Coles v. Commonwealth, 386 S.W.2d 465, 466 (Ky. 1965).

Milsap v. Commonwealth, 662 S.W.2d 488, 490-91 (Ky. Ct. App. 1984) (denying motion to vacate conviction where appellant failed to show counsel’s conflict of interest affected the adequacy of representation).

Id.

Id. at 491.

Commonwealth v. Stamps, 672 S.W.2d 336, 339 (Ky. 1984); Allen v. Commonwealth, 668 S.W.2d 556, 557 (Ky. Ct. App. 1984) (upholding denial of appointed counsel
3. **Standards for Pro Se Motions**

A motion made pro se is not required to meet the same standards as a pleading filed by counsel. Even so, two fundamental threshold requirements must be met to avoid a summary dismissal of the pro se motion to vacate. First, the allegations and the supporting facts provided in the motion to vacate must be specific enough to inform the trial court of their nature and to allow the Commonwealth an opportunity to respond. Kentucky appellate courts have steadfastly supported this basic obligation. Second, the allegations must be truthful, or else the motion to vacate judgment may be summarily dismissed and the movant may be subject to the consequences of contempt of court or perjury. Courts may not be required to rely on the allegations of a movant upon basis that record clearly refuted need for hearing; *William S. Haynes, Kentucky Jurisprudence: Criminal Procedure* 449 (1985) (stating that failure to appoint counsel is reversible error only if movant shows that prejudice resulted from error).

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475 Commonwealth v. Miller, 416 S.W.2d 358, 360 (Ky. 1967) (stating that prisoner’s pro se motion was sufficient as it gave court and opposing party notice); *see also* Case v. Commonwealth, 467 S.W.2d 367, 368 (Ky. 1971) (holding that pleadings prepared by prisoner need not meet the standards for those submitted by legal counsel); Miller v. Commonwealth, 458 S.W.2d 453, 454 (Ky. 1970) (denying Commonwealth’s argument that allegations did not meet required standards); Brooks v. Commonwealth, 447 S.W.2d 614, 618 (Ky. 1969) (stating that more liberal standards apply to prisoners proceeding pro se); *cf.* Griffith v. Schultz, 609 S.W.2d 125, 126 (Ky. 1980) (“[T]he nature and legal effect of a pleading will be determined by its substance rather than by mere linguistic form.”).

476 Commonwealth v. Miller, 416 S.W.2d at 360.

477 *E.g.*, King v. Commonwealth, 408 S.W.2d 622, 623 (Ky. 1966) (denying petitioner’s motion because grounds were “meaningless”); Ringo v. Commonwealth, 391 S.W.2d 392, 392 (Ky. 1965) (explaining that court is entitled to know exactly what petitioner intends to prove); Oakes v. Gentry, 380 S.W.2d 237, 238 (Ky. 1964) (holding that petitioner must specify with particularity the grounds of his claim).

478 As the court in Commonwealth v. Miller, 416 S.W.2d at 360–61, explained:

> Courts should not and will not permit a pleader, even though the proceeding be pro se, to make allegations which he knows or should know are false. Our system of justice is based on truth, without which it cannot survive. Resort to untruth is contemptuous. Miller was in contempt and trifling with the court . . . .

> When the trial court discovered that Miller had made material statements in his motion, which were false, the motion should have been stricken. It was error on the part of the trial court not to strike the motion and dismiss the proceedings.

*Id.* (citations omitted); *accord* Burton v. Tartar, 385 S.W.2d 168, 169 (Ky. 1964) (denying petitioner’s motion because it was not filed in good faith), *cert. denied*, 380 U.S. 984 (1965).

479 Adkins v. Commonwealth, 471 S.W.2d 721, 722 (Ky. 1971) (calling for perjury prosecution for those who knowingly submit false applications); Taylor v. Common-
with a history of false statements in previous pleadings, and this prior conduct may be taken into account in dismissing the motion.\textsuperscript{480}

4. Presence of the Movant at Hearings

Not every hearing requires the circuit court to order the personal presence of the movant, and the movant has no constitutional right to be present.\textsuperscript{481} Even if material issues of fact are to be decided, the movant has no right to be present if he or she has nothing to contribute to the resolution of those issues. The presence of the movant at an evidentiary hearing is a matter within the sound discretion of the trial court.\textsuperscript{482}

In Odewahn v. Ropke, the inmate filed a petition for writ of mandamus to compel the trial court to order his presence at a preliminary hearing.\textsuperscript{483} The appellate court rejected the petition, stating:

It is not every filing of an RCr 11.42 motion which will entitle the movant to appear in person in the court. Only upon those cases wherein it is determined that counsel should be appointed and a hearing granted will it be necessary, usually, for the movant to be in court by his own proper person. Conceivably, other situations could arise where the personal appearance would be appropriate, but such is not the case at bar.\textsuperscript{484}

\textsuperscript{480} Adkins, 471 S.W.2d at 722.
\textsuperscript{481} Sanders v. United States, 373 U.S. 1, 20 (1963) (explaining that although a hearing was required, it may not be necessary for petitioner to be present); Machibroda v. United States, 368 U.S. 487, 495-96 (1962) (explaining that sometimes facts can be investigated without prisoner's personal presence); United States v. Hayman, 342 U.S. 205, 223 (1952) (holding that prisoner should be produced where there are "substantial issues of fact as to events in which the prisoner participated").
\textsuperscript{482} Sanders, 373 U.S. at 21.
\textsuperscript{483} Id. at 165; accord Nickell v. Commonwealth, 451 S.W.2d 651, 652-53 (Ky. 1970);
The same reasoning, yet leading to a different result, may be found in *Hall v. Commonwealth*. Hall charged on appeal that he was entitled to an evidentiary hearing based on his contention that appointed counsel had “refused to prepare a defense” because he was not being compensated, thereby coercing Hall to pleading guilty. The appellate court agreed and ordered an evidentiary hearing with Hall in attendance, noting that “the investigation of the allegations without the personal presence of the prisoner cannot be appropriately accomplished.” In most cases, however, appellate courts have proved reluctant to grant petitioning inmates their “desired ambition of a vacation and a trip to the sentencing court” unless need for that presence can be shown or is apparent from the nature of the allegations. This burden is a modest one for the movant to meet.

D. Response, Hearing, and Duties of Trial Court

1. Commonwealth’s Response

Under RCr 11.42(4), the Commonwealth has twenty days to respond to an 11.42 motion, but a motion to vacate, set aside, or correct sentence is not a pleading and no written response is required to establish the right of the Commonwealth to oppose it. In *Ramsey v. Commonwealth*, the accused argued that the trial court should have accepted the allegations in the motion to vacate as uncontroverted because the Commonwealth

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485 429 S.W.2d 359 (Ky. 1968).
486 Id. at 359.
487 Id. at 360.
488 Nickell, 451 S.W.2d at 652; cf. Thomsberry v. Commonwealth, 400 S.W.2d 226, 226 (Ky.) (approving a refusal to allow movant to attend 11.42 hearing), cert. denied, 385 U.S. 868 (1966).
489 Polsgrove v. Commonwealth, 439 S.W.2d 776, 778 (Ky. 1969) (holding that 11.42 allows but does not require the Commonwealth to provide an answer); Roark v. Commonwealth, 404 S.W.2d 22, 23 (Ky. 1965) (holding that no response was necessary because motion did not present grounds necessary for relief); Ramsey v. Commonwealth, 399 S.W.2d 473, 475 (Ky.) (explaining that no written response is required to oppose a motion), cert. denied, 385 U.S. 865 (1966); Underhill v. Thomas, 299 S.W.2d 633, 634 (Ky. 1957) (denying petition for writ of coram nobis even though no response was filed because movant established no relief which should be granted). This approach is in accord with CR 55.04, which states that “[n]o judgment by default shall be entered against the Commonwealth . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court.” See Terrence R. Fitzgerald, 8 Kentucky Practice: Criminal Practice and Procedure 482-83 (1978).
had not filed an answer. The prosecutor had, however, orally denied movant’s claims, and on appeal, the Kentucky high court upheld the lower court’s judgment in overruling the motion. Polsgrove v. Commonwealth was similar, in that the movant contended that the prosecutor’s response to the RCr 11.42 motion was insufficient and that the trial court erred by not taking his allegations as “confessed” and granting him a new trial. The denial of this contention was affirmed.

Nor is the movant automatically entitled to an evidentiary hearing on his motion simply because the Commonwealth failed to answer the allegations. This aspect of RCr 11.42 practice and procedure is presumably governed by section (5), which stipulates that allegations in the answer are “avoided of record.” This formulation is confusing and seems inconsistent with CR 8.04, which states that “averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided.” It also seems inconsistent with CR 55.04, which prevents a default judgment from being entered against the Common-
wealth unless the claim of the other party is proven to the court by satisfactory evidence.\textsuperscript{497} Whether the Commonwealth chooses not to respond or inadvertently does not respond, the merits of the motion should not be affected because the Commonwealth has no duty to respond. If no duty to respond is imposed by RCr 11.42, how can the Commonwealth "default" for failure to perform a duty it never had? Nevertheless, it is worth remembering that the trial court also has the power, in its sound discretion, to allow the Commonwealth additional time to file an answer should that be necessary.\textsuperscript{498}

2. \textit{Evidentiary Hearing}

The trial court, upon receiving a motion to vacate under RCr 11.42, frequently will be confronted with a motion for an evidentiary hearing. Initially, the court must decide whether the motion to vacate raises some material issue of fact which must be resolved in order to dispose of the movant's claim.\textsuperscript{499} Yet it is black letter law in Kentucky that even if

\textsuperscript{497} Id. 55.04.

\textsuperscript{498} Weigand v. Ropke, 419 S.W.2d 151, 151 (Ky. 1967) (explaining that the court was within its authority to extend time for filing an answer under 11.42).

\textsuperscript{499} Turner v. Commonwealth, 404 S.W.2d 13, 13 (Ky.) ("Obviously an evidentiary hearing (with the appellant present) would serve no purpose when no material issue of fact was raised by appellant's motion."), \textit{cert. denied}, 385 U.S. 888 (1966); Lawson v. Commonwealth, 386 S.W.2d 734, 734-35 (Ky.) (holding that trial court's action in overruling motion was proper because appellant had failed to show that he was entitled to relief), \textit{cert. denied}, 381 U.S. 946 (1965); Bell v. Gentry, 380 S.W.2d 259, 260 (Ky. 1964) (holding that a motion may be overruled when, on its face, it fails to state a specific ground which would entitle movant to relief).

One such issue which may require a hearing is whether the movant was prejudiced by a constitutional violation occurring during the trial. In one case where the trial court had summarily found constitutional error and granted a new trial, the Commonwealth was held to be entitled to a hearing on the issue of prejudice, and the case was remanded to the trial court for that purpose. Commonwealth v. Gilpin, 777 S.W.2d 603, 606 (Ky. Ct. App. 1989).

The trial court's refusal to conduct an evidentiary hearing has been held proper. See, e.g., Lay v. Commonwealth, 506 S.W.2d 507, 509 (Ky. 1974) (holding that where petition does not state grounds upon which relief may be granted, the petition is properly dismissed without an evidentiary hearing); Glass v. Commonwealth, 474 S.W.2d 400, 401 (Ky. 1971) (holding that movant was not entitled to evidentiary hearing because his claim was refuted by the record); Lett v. Commonwealth, 461 S.W.2d 83, 84 (Ky. 1970) (holding that movant was "abundantly" represented by counsel at trial and therefore no evidentiary hearing was required); Bruner v. Commonwealth, 459 S.W.2d 138, 140 (Ky. 1970) (denying movant's petition because it was refuted by record and did not allege any facts upon which his conclusion was based); Hopewell v. Commonwealth, 687 S.W.2d...
material factual issues exist, it is "unnecessary for the court to order a
hearing if the material issues of fact can fairly be determined on the face
of the record"500 or if the allegations, even if true, would not be
sufficient to invalidate the conviction.501 No hearing is required where
only a question of law is presented, nor is error committed by refusing
to hold a hearing when the court has no idea what evidence would be
offered.502 Only when the movant makes out a claim with "prima facia
substance" is a hearing normally necessary to resolve the issue.503

153, 154 (Ky. Ct. App. 1985) (holding that no evidentiary hearing was necessary where
record refuted movant's allegations); Allen v. Commonwealth, 668 S.W.2d 556, 557 (Ky.
Ct. App. 1984) (holding that evidentiary hearing was not warranted after review of record
showed movant's guilty plea had been properly entered); Trice v. Commonwealth, 632
S.W.2d 458, 458 (Ky. Ct. App. 1982) (holding that evidentiary hearing was not necessary
where appellant's rights were fully protected at trial level).

500 Maggard v. Commonwealth, 394 S.W.2d 893, 894 (Ky. 1965) (holding that movant
cannot prevail if record refutes the allegations); accord, e.g., Stanford v. Commonwealth,
854 S.W.2d 742, 743 (Ky. 1993) ("Even in a capital case, an RCr 11.42 movant is not
automatically entitled to an evidentiary hearing."); cert. denied, 114 S. Ct. 703 (1994);
Skaggs v. Commonwealth, 803 S.W.2d 573, 576 (Ky. 1990) (explaining that the purpose
of an evidentiary hearing is to determine factual issues which cannot be resolved from the
record), cert. denied, 112 S. Ct. 140 (1991); Commonwealth v. Stamps, 672 S.W.2d 336,
339 (Ky. 1984) (upholding denial of an evidentiary hearing which would have been
futile); Glass v. Commonwealth, 474 S.W.2d 400, 401 (Ky. 1971) (holding that the record
refuted petitioner's claim of an involuntary guilty plea); Messer v. Commonwealth, 454
S.W.2d 694, 695 (Ky. 1970) (reaffirming the language and holding in Maggard); Brewster v.
Commonwealth, 723 S.W.2d 863, 865 (Ky. Ct. App. 1986) (concerning an actual
prejudice determination on claim of ineffective assistance of counsel); Sparks v.
Commonwealth, 721 S.W.2d 726, 727 (Ky. Ct. App. 1986) (confining review, on appeal,
to whether motion's allegations were refuted on record); Robbins v. Commonwealth, 719
S.W.2d 742, 744 (Ky. Ct. App. 1986) (explaining that allegations in the motion were
considerably refuted by the record); Allen v. Commonwealth, 668 S.W.2d 556, 557 (Ky.
Ct. App. 1984) (denying an evidentiary hearing where the record refuted appellant's
allegations).

501 Maye v. Commonwealth, 386 S.W.2d 731, 732 (Ky. 1965); cf. Stanford, 854
S.W.2d at 743 ("If the record refutes the claims of error, there is no basis for granting an
RCr 11.42 motion."); Newsome v. Commonwealth, 456 S.W.2d 686, 687 (Ky. 1970) ("An
evidentiary hearing is not required . . . where the allegations are insufficient.").

502 Freeman v. Commonwealth, 697 S.W.2d 133, 134 (Ky. 1985) (upholding the
denial of a claim of ineffective assistance of counsel where record failed to show what
evidence could be offered); Ringo v. Commonwealth, 391 S.W.2d 392, 392 (Ky. 1965)
(holding that no hearing is required where motion does not specify how effective
assistance of counsel was denied).

503 Curry v. Commonwealth, 390 S.W.2d 891, 892 (Ky. 1965) (holding that
petitioner's allegations of counsel's refusal to appeal were sufficient to make prima facie
These restrictions, however, do not mean that hearings in RCr 11.42 proceedings are held infrequently. In fact, just the opposite is true. During the period immediately preceding the enactment of RCr 11.42, Kentucky’s high court frequently complained of the sparseness of the post-conviction record before it, and it therefore made sure that the Rule would be adequate to properly develop the record for consideration by the trial judge and for possible appeal. The tradition in handling RCr 11.42 motions is far more conducive to hearings than under the common law writs, and, indeed, the emphasis on evidentiary hearings is one of the strongest protections of inmate rights in Kentucky’s post-conviction system.

The propriety of the trial court’s failure to hold an evidentiary hearing before dismissal of the pending RCr 11.42 motion is frequently one of the claims of error on appeal. In general, where the trial court has denied an RCr 11.42 hearing, the standard on appellate review is “whether the motion ‘on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.’” If the motion failed to clear this hurdle, no hearing was necessary and no error was committed. This result was recently obtained in MacLaughlin v. Commonwealth, in which the Kentucky Court of Appeals again held that where the existing record disposes of the movant’s claims, no evidentiary hearing is necessary. Nor does the trial court abuse its discretion by refusing to continue an RCr 11.42 hearing so the defendant can secure out-of-state witnesses through the compulsory process provided by section 421.250 of the Kentucky Revised Statutes. While available at trial, section 421.250 “is not applicable to an RCr 11.42 proceeding.”

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504 See, e.g., Barber v. Thomas, 355 S.W.2d 682, 682 (Ky. 1962); Tippit v. Thomas, 355 S.W.2d 149, 149 (Ky. 1962). The Kentucky Supreme Court has emphasized that trial courts should “generally” hold evidentiary hearings to determine material issues of fact. Stanford, 854 S.W.2d at 744 (holding that, under the facts of the case, the trial court did not err by failing to conduct an evidentiary hearing).


508 McQueen v. Commonwealth, 721 S.W.2d 694, 702 (Ky. 1986) (holding that the court did not abuse its discretion by failing to order compulsory attendance of out-of-state witness), cert. denied, 481 U.S. 1059 (1987); accord Gall v. Commonwealth, 702 S.W.2d 37, 45 (Ky. 1985) (finding that the denial of a continuance to allow petitioner to secure...
3. Duties of Trial Court and Appellate Court

Initially, the trial judge should determine whether the motion has been filed in the proper court. If it has not, then the motion should be transmitted to the sentencing court as required by RCr 11.42(9). The court should also confirm that the motion is signed and verified, and the record should be examined to ascertain whether a hearing is required. The requirement that the motion be signed and verified is jurisdictional in nature, and the trial court does not have the power to review a motion in violation of this requirement. If an RCr 11.42 motion is filed but the movant’s present status does not allow application for relief, then the trial court may apparently still reach the merits of the claims by treating the motion as one filed under CR 60.02. Under some circumstances the trial judge may be required to recuse himself or herself, but this situation is rare, and the defendant must raise the issue before the RCr 11.42 motion is decided in order to apprise the judge of the possible conflict.

The further duties of the trial court, aside from the appropriate appointment of counsel, are found in RCr 11.42(6): “At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly.” Specific written findings disposing of every ground or claim are required.

out-of-state witness was not abuse of discretion), cert. denied, 478 U.S. 1010 (1986).

See supra notes 436-39 and accompanying text.

Keltee v. Commonwealth, 648 S.W.2d 860, 860 (Ky. 1983) (explaining that KY. R. CRIM. P. 11.42 motion filed after movant had completed his sentence could be treated as KY. R. CIV. P. 60.02 motion).

McCarthy v. Commonwealth, 450 S.W.2d 534, 535-36 (Ky. 1970) (holding that recusal was not warranted although judge had been prosecutor on movant’s first trial and conviction and trial judge at second trial and conviction); Morgan v. Commonwealth, 399 S.W.2d 725, 726 (Ky. 1966) (involving trial judge on post-conviction motion who was former Commonwealth’s Attorney).

Schroader v. Thomas, 387 S.W.2d 312, 314 (Ky. 1964), overruled on other grounds by Lycans v. Commonwealth, 511 S.W.2d 232 (Ky. 1974). In dicta, the Kentucky high court has indicated that “facts and circumstances” which are not found in the record may not appear in the court’s order. Jones v. Commonwealth, 388 S.W.2d 601, 602 (Ky. 1965).

In another case containing some unfortunate dicta, the Kentucky Supreme Court improperly interpreted RCr 11.42(6), which requires findings to be made “[a]t the conclusion of the hearing or hearings.” The high court stated this meant that “[i]f there is no hearing, then no findings are required.” Stanford v. Commonwealth, 854 S.W.2d
Although these requirements are mandatory for the court to follow, they are not due process guarantees for the movant, and the failure of a trial court to make findings is not by itself reversible error. If the trial court fails to make specific findings, then it is incumbent upon the movant to request such findings under CR 52.04, which is applicable to RCr 11.42 proceedings. Defects in the findings can therefore be waived. This position found in case law was confirmed in the 1994 Amendment to RCr 11.42(6), which requires a written request or motion to preserve as error the failure to make important findings or to include them in the final order.

An important function of the trial court at any evidentiary hearing is to observe the witnesses and resolve issues of credibility and conflicting evidence, as the trial judge is in a superior position to perform this task. However, an older published decision implies that the court should not rely upon independent recollection of the movant's trial or guilty plea in deciding RCr 11.42 evidentiary issues. Another issue which is frequently

742, 744 (Ky. 1993), cert. denied, 114 S. Ct. 703 (1994). Where only conclusions of law are necessary, the statement is true enough, but it is otherwise misleading. The trial court should issue specific written findings even though the contested issues of fact may be resolved based upon the available record.

“A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request ....” KY. R. CIV. P. 52.04.

Blankenship v. Commonwealth, 554 S.W.2d 898, 903 (Ky. Ct. App. 1977) (holding that trial court's failure to make finding on a particular issue did not constitute reversible error since no specific request was made as required by KY. R. CIV. P. 52.04); accord Lynch v. Commonwealth, 610 S.W.2d 902, 905 (Ky. Ct. App. 1981).

McQueen v. Commonwealth, 721 S.W.2d 694, 698 (Ky. 1986) (holding that the trial court has the right to resolve credibility issue against appellant), cert. denied, 481 U.S. 1059 (1987).

Id.; Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

As the court in Lawson v. Commonwealth, 386 S.W.2d 734, 735 (Ky.), cert. denied, 381 U.S. 946 (1965), explained:

In passing, it is observed that the trial judge who presided at the rape trial and who overruled the RCr 11.42 motion (without a hearing) incorporated in the order a recitation that appellant's counsel at the rape trial had rendered effective assistance, resulting in a light sentence. Although this may well be quite true, we doubt the propriety of an ex parte finding based upon the independent recollection of the presiding judge, and we do not base our present holding upon that portion of the record.

raised in death penalty cases concerns the provision of funds for expert witnesses at the RCr 11.42 hearing; this matter is in the sound discretion of the trial court.\textsuperscript{522}

The trial court may summarily dismiss an RCr 11.42 motion, thereby obviating the need for an evidentiary hearing. Assuming the motion is properly filed in the first place, summary dismissal is mandated on occasions when the allegations lack specificity,\textsuperscript{523} are mere conclusions,\textsuperscript{524} are untrue,\textsuperscript{525} fail to constitute a ground for relief,\textsuperscript{526} are refuted by the record,\textsuperscript{527} were set forth in an earlier motion to vacate, or were waived by a valid guilty plea.\textsuperscript{528} The motion may also be dismissed after an evidentiary hearing, or, if relief is to be granted, the court “shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.”\textsuperscript{529} In all cases, however, the “nature of the proceeding under RCr 11.42 is such that the circuit court should expedite disposition of the motion,” and where “a hearing is required, it should be ‘prompt.’”\textsuperscript{530}

After the court has ruled, the movant is notified by the receipt of a copy of the order, which begins the running of the ten days allowed to file a notice of appeal.\textsuperscript{531} An appeal by either side is specifically

\begin{footnotesize}
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\item 944, 946 (Ky. 1969) (denying hearing on bases that appellant’s allegation was refuted by the record and that judge on 11.42 motion was trial judge who knew what had transpired).
\item 522 \textit{McQueen}, 721 S.W.2d at 702.
\item 523 \textit{See supra} notes 426-35 and accompanying text.
\item 524 \textit{See supra} notes 430-32 and accompanying text.
\item 525 \textit{Adkins v. Commonwealth}, 471 S.W.2d 721, 722 (Ky. 1971) (“Claims based upon allegations which are blatantly false cannot be tolerated.”); \textit{see supra} notes 478-80 and accompanying text.
\item 526 Many claims simply fall outside the type of allegation RCr 11.42 was designed to handle. A good example is \textit{Hargrove v. Commonwealth}, 396 S.W.2d 75, 76 (Ky. 1965), in which the ground raised was that the defendants were “not guilty.” Such a claim is not a ground for relief under RCr 11.42. \textit{See supra} notes 421-23 and accompanying text.
\item 527 Allen v. Commonwealth, 668 S.W.2d 556, 557 (Ky. Ct. App. 1984) (“[The record refutes in every way the appellant’s allegations in his motion to vacate judgment.”); \textit{Trice v. Commonwealth}, 632 S.W.2d 458 (Ky. Ct. App. 1982) (holding that no hearing was required since the record rebutted movant’s claim); \textit{see supra} notes 500-06 and accompanying text.
\item 528 \textit{See infra} notes 794-805 and accompanying text.
\item 529 \textit{KY. R. CRM. P. 11.42(6).}
\item 530 \textit{Helton v. Stivers}, 385 S.W.2d 172, 172 (Ky. 1964) (stating that delay is not in the best interest of the administration of justice); \textit{accord FitzGerald, supra} note 489, at 483 n.63.
\item 531 \textit{KY. R. CRM. P. 12.04; Kraus v. Ropke}, 385 S.W.2d 162, 162 (Ky. 1964) (indicating that trial courts have been lax in notifying movants of the status of their motions, thus affecting the right of appeal); \textit{cf. Perry v. Commonwealth}, 383 S.W.2d 689,
allowed by RCr 11.42(7). The movant is restricted to raising on appeal only those issues presented in the original motion. Under RCr 11.42(8), the order of the circuit court disposing of the issues presented cannot become effective until the time to file a notice of appeal under RCr 12.04 has expired and shall remain suspended until any RCr 11.42 appeal has concluded. Mandamus will lie to compel the circuit court to provide a transcript of the RCr 11.42 proceedings for appeal purposes. Where an RCr 11.42 motion is summarily overruled, appellate review is limited to whether the motion states grounds which are not conclusively refuted by the record and which, if true, would render the judgment of conviction void. The trial court’s factual findings will not be disturbed on appeal unless clearly erroneous. In at least one case, the appellate court, faced with an inconclusive post-conviction and trial record, deemed the mishandling of the guilty plea and the RCr 11.42 proceeding so severe that it reversed and ordered a new trial rather than remanding for an evidentiary hearing, the normal remedy where the record is unclear.

690 (Ky. 1964) (holding that appeal filed beyond 10-day deadline was properly dismissed).

553 Russell v. Commonwealth, 472 S.W.2d 259, 260 (Ky. 1971) (rejecting petitioner’s arguments which were not raised at trial level); Bell v. Commonwealth, 395 S.W.2d 784, 785-86 (Ky. 1965) (denying appellant an opportunity to raise issue of ineffective counsel for first time on KY. R. CRIM. P. 11.42 appeal), cert. denied, 382 U.S. 1020 (1966); Kinmon v. Commonwealth, 383 S.W.2d 338, 340 (Ky. 1964) (refusing to consider grounds which were not presented to trial court).

551 Commonwealth v. Miller, 416 S.W.2d 358, 359 (Ky. 1967). However, RCr 11.42(8) suspends the order of the trial court only pending the outcome of an RCr 11.42 appeal, not a direct appeal. Wilson v. Commonwealth, 761 S.W.2d 182, 185 (Ky. Ct. App. 1988).

554 Vanhoose v. Sparks, 410 S.W.2d 623, 624 (Ky. 1967) (granting petition for mandamus and ordering circuit court judge to file a record of KY. R. CRIM. P. 11.42 proceeding with Court of Appeals and to forward a copy of same to petitioner); Brummett v. Knuckles, 409 S.W.2d 807, 807 (Ky. 1966) (ordering circuit court judge to forward record of petitioner’s KY. R. CRIM. P. 11.42 motion to vacate judgment to Court of Appeals and to petitioner at no cost); Davis v. Knuckles, 407 S.W.2d 702, 703 (Ky. 1965) (holding that petitioner was entitled to record of KY. R. CRIM. P. 11.42 proceeding).

553 Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967) (explaining that review is confined to face of motion); Baldwin v. Commonwealth, 406 S.W.2d 860, 861 (Ky. 1966) (directing court’s review to grounds of motion).

556 Adams v. Commonwealth, 424 S.W.2d 849, 851 (Ky. 1968) (noting that the trial court is in better position to view witnesses); Bell v. Commonwealth, 395 S.W.2d 784, 785 (Ky. 1965) (holding that the trial court’s factual determinations would not be disturbed unless clearly erroneous), cert. denied, 382 U.S. 1020 (1966).

Finally, where the trial court has ruled on the motion, the defendant cannot normally expect to reopen the proceedings. In *Crockett v. Commonwealth*, the Kentucky high court held that the failure to reopen proceedings based on an affidavit produced after the motion had been overruled was not an abuse of discretion.\(^{538}\) Citing the "need for finality" in post-conviction proceedings, the opinion made clear that the court would not "ignore this need and allow the accused to reopen any time he is able to conjure up a new contention for relief."\(^{539}\) The court noted that "[t]o do so would destroy the intent and purpose of RCr 11.42(3)," which is to have all claims presented in one proceeding.\(^{540}\)

### E. Mandamus and Reopening of RCr 11.42 Proceedings

The purpose of RCr 11.42 is to provide an orderly mechanism for the resolution of post-conviction claims. The Rule itself does not provide a time frame within which the trial court must rule on the motion or otherwise take action,\(^{541}\) and in the event of unnecessary delay, movants have learned to file an original action in the Kentucky Court of Appeals to compel the trial court to rule on the pending motion.\(^{542}\) The original action is brought under CR 76.36 as a substitute for the common law writ of mandamus, but in practice these pleadings are often styled or referred to as petitions for writ of mandamus. The large volume of pro se mandamus actions has led the Kentucky Administrative Office of the Courts to prepare a one-page "check-off form" through which the trial court can respond and explain the delay; the court must respond to the

\(^{538}\) 473 S.W.2d 112, 113 (Ky. 1971).

\(^{539}\) Id. at 114.

\(^{540}\) Id.

\(^{541}\) Davis v. Knuckles, 469 S.W.2d 702, 702 (Ky. 1971) (holding that trial court's one-month delay in deciding case would not warrant mandamus).

\(^{542}\) An original action to compel a trial court to rule on a post-conviction motion to vacate may be brought only in the Kentucky Court of Appeals, an intermediate appellate court. Williams v. Ventes, 550 S.W.2d 547, 548 (Ky. 1977); see also Francis v. Taylor, 593 S.W.2d 514, 515 (Ky. 1980) (holding that Kentucky Court of Appeals had jurisdiction to entertain and issue writ of mandamus). Kentucky Supreme Court Rule 1.030(3) provides that the "Court of Appeals may administer oaths, punish contempt, and issue necessary orders to give control over lower courts."

For early views of mandamus and prohibition in Kentucky, see George R. Hunt, *Control of Inferior by Superior Jurisdictions by Proper Writs*, 11 KY. L.J. 10 (1922-1923) (discussing power of Kentucky Court of Appeals, under the state constitution, to issue writs); Squire N. Williams, Jr., *The Ancient Writs of Mandamus and Prohibition*, 26 KY. ST. B.J. 262 (1962) (tracing origins of writs of mandamus and prohibition).
petition within ten days or the allegations are taken as confessed. The results of these actions depend upon the facts and circumstances of each case. After notice of appeal has been filed, an original action or mandamus may be used to obtain from the trial court a record of movant's RCr 11.42 proceedings in order to perfect an appeal from the overruled motion.

VI. RECENT AND PROPOSED MEASURES FOR REFORM

The root causes of the problems identified and mitigated by many of the reform proposals which follow have been evident from the beginning of Kentucky's experiment with RCr 11.42 and stem directly from the historic and procedural nature of the post-conviction process. In the years since the Rule's enactment, the workload imposed by post-conviction motion practice has increased substantially, but with very little critical thinking about what is being accomplished. Clearly, part of the problem is the sheer number of post-conviction motions. As early as 1964 the Kentucky high court, which at that time had to hear all RCr 11.42 appeals, vented its frustrations with post-conviction practice:

The flood of baseless and meritless proceedings filed by indigent prisoners has reached alarming proportions. ... While the preparation by indigent prisoners of proceedings of the type here considered may be deemed to have certain therapeutic and rehabilitative benefits to a prisoner, such benefits are accomplished at the expense of the courts,

543 Davis v. Knuckles, 407 S.W.2d 702, 703 (Ky. 1966) (ruling that because no response had been filed to petitioner's motion, its allegations would be treated as confessed); Stacy v. Turner, 407 S.W.2d 131, 131 (Ky. 1966) (holding that no response leaves allegations as confessed); Wahl v. Simpson, 385 S.W.2d 171, 171 (Ky. 1964) (holding that allegations stood confessed since no response had been filed within 10 days).

544 See Davis v. Knuckles, 469 S.W.2d 702, 702 (Ky. 1971) (holding that no mandamus would lie as a result of a one-month delay); Moore v. Pound, 390 S.W.2d 159, 159 (Ky. 1965) (granting mandamus ordering judge to take action on prisoner's KY. R. CRIM. P. 11.42 motion filed five weeks earlier); Collier v. Conley, 386 S.W.2d 270, 271 (Ky. 1965) (holding that mandamus would be granted after three-month delay); Helton v. Stivers, 385 S.W.2d 172, 172 (Ky. 1964) (granting mandamus on four-month delay); Flatt v. Wilson, 385 S.W.2d 172, 173 (Ky. 1964) (granting mandamus on five-month delay); Wahl, 385 S.W.2d at 171 (granting mandamus on five-month delay).

545 Davis v. Knuckles, 407 S.W.2d 702, 703 (Ky. 1966); Davenport v. Winn, 385 S.W.2d 185, 186 (Ky. 1964).
court personnel, litigants, and attorneys who have to prepare such records, counsel such prisoners, and consider such cases.6

A similar observation was made by Justice John S. Palmore in Coles v. Commonwealth: "The situation is not of our choosing, but is thrust on us by the new look in federal constitutional rights. The alternative is a plethora of new trials in old cases, starting from scratch."7

Volume, however, is only one of the aspects to be considered. The overarching concern in the administration of any criminal justice system must, of course, be substantive justice for the defendant. This goal must, in turn, be reconciled with the important doctrine of "finality" which requires that criminal litigation, at some point, be brought to a conclusion. The government has a vested interest in determining when and how finality is achieved. All states have in place constitutional provisions, statutes, rules of procedure, and common law doctrines which limit the scope and number of proceedings which may be brought before their courts. In the context of a criminal case, the state has an obvious interest in avoiding piecemeal litigation and in achieving a final judicial determination of guilt. Both state and

546 Bauer v. Pound, 385 S.W.2d 167, 168 (Ky. 1964) (denying petitioner's request for copies of trial records absent a basis for the claim that judgment under attack was void).
547 386 S.W.2d 465, 466 (Ky. 1965).
548 See infra notes 568-80 and accompanying text.
549 Considerations of finality have been approved in a variety of situations of relevance to RCr 11.42:

Relief Under CR 60.02 — Merrifield v. Commonwealth, 283 S.W.2d 214, 215 (Ky. 1955) (restricting application of writ of coram nobis in order to preserve finality of judgments); Wine v. Commonwealth, 699 S.W.2d 752, 754 (Ky. Ct. App. 1985) (rejecting changes in family circumstances as grounds for relief, because otherwise "great uncertainty would arise surrounding the finality of judgments").

Acquittal on Criminal Charges — Davis v. Commonwealth, 561 S.W.2d 91, 93 (Ky. 1978) (citing Brown v. United States, 432 U.S. 161, 165 (1977)) (holding that double jeopardy is a constitutional policy of finality which benefits the acquitted defendant).

Criminal Judgments — See, e.g., Guins v. Meade, 528 S.W.2d 680, 684 (Ky. 1975) ("To adopt the petitioner's abstract argument would encourage the waste of public money and delay finality in the disposition of criminal cases to the detriment of the affected defendant and society which deserves protection."); cert. denied, 424 U.S. 972 (1976); Hord v. Commonwealth, 450 S.W.2d 530, 532 (Ky. 1970) ("Judgments in criminal cases, as in civil cases, must by necessity have some finality."); Gossett v. Commonwealth, 441 S.W.2d 117, 118 (Ky. 1969) (stating that there must be an end to litigation); Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968) ([T]his court absolutely will not turn back the clock and retry these cases in an effort to second guess what counsel should have or should not have done at the time. To follow such proceeding would be to deprive the judgments of our courts of any finality."); Commonwealth v. Strickland, 375 S.W.2d
federal courts have expressed in strong language the importance of finality as related to reviewing criminal judgments, compelling litigants in criminal cases to advance their claims in an orderly fashion, and focusing the judicial inquiry on a limited number of proceedings. The common law requirement that the appellant must raise all possible issues on direct appeal or else waive them is an obvious example. As the Kentucky high court stated in 1963, errors are often “committed during the course of a trial and unless there is a restriction upon the method and time in which these errors are suggested and corrected, a chaotic situation would result. Few judgments would ever achieve finality.”

Finality is also an important consideration supporting the requirement of contemporaneous objection for challenges to trial procedures and in harmless error analysis. The doctrine of finality recognizes that, in many cases, inmates are less concerned with vindicating abstract constitutional rights than with “getting out.” Once an inmate makes parole, state post-conviction motions are usually not pursued. However, if parole is revoked after the passage of years and the service of the prior

701, 704 (Ky. 1964) (Montgomery, J., dissenting) (expressing concern over lack of finality created by allowing unlimited appeals under KY. R. CRIM. P. 11.42); Howard v. Commonwealth, 364 S.W.2d 809, 810 (Ky. 1963) (noting that, without reasonable restrictions promoting finality, “a chaotic situation would result”); Merrifield, 283 S.W.2d at 215 (noting that depriving criminal judgments of finality would be a “greater evil than would flow from rare cases of possible injustice”); Keller v. Commonwealth, 719 S.W.2d 5, 6 (Ky. Ct. App. 1986) (explaining that principle of finality does not prevent judge from rejecting plea to lesser offense); Turner v. Commonwealth, 647 S.W.2d 500, 502 (Ky. Ct. App. 1982); Polk v. Commonwealth, 574 S.W.2d 335, 337-38 (Ky. Ct. App. 1978) (citing Goins to deny petitioner trial transcript).

See, e.g., United States v. Timmreck, 441 U.S. 780, 784 (1979) (Stevens, J., dissenting) (“Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.”) (quoting with approval from United States v. Smith, 440 F.2d 521, 528 (7th Cir. 1971)).

Howard, 364 S.W.2d at 810; accord Lewallen v. Commonwealth, 584 S.W.2d 748, 749 (Ky. Ct. App. 1979) (involving attack on guilty plea under KY. R. CIV. P. 60.02).

Salisbury v. Commonwealth, 556 S.W.2d 922, 927-28 (Ky. Ct. App. 1977) (“When a defendant's attorney is aware of an issue and elects to raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications.”).

As stated in Schooley v. Commonwealth, 556 S.W.2d 912, 917 (Ky. Ct. App. 1977), an error claimed in an RCr 11.42 motion must be of such magnitude as to render the judgment of conviction so fundamentally unfair that the defendant can be said to have been denied due process of law. The interest of the public in the finality of criminal judgments of long standing weighs heavily in the determination when the error is relatively minor.
sentence is resumed, then the inmate often jumps back into litigation of his or her claim.\textsuperscript{554}

Can finality be reconciled with substantive justice? It can when measures are taken to limit frivolous and wasteful practices without substantially impacting meritorious allegations. Without reasonable rules of procedure, the litigation of claims would follow the schedule and whim of the criminal defendant, which would amount to an intolerable and unnecessary extravagance. Already in effect are a number of procedural "gatekeeping" rules which still allow, or even enhance, an opportunity for inmate litigants to bring meritorious claims before the courts.\textsuperscript{555} No system will ever be devised to immediately and perfectly adjudicate all claims in one court. Nonetheless, immediate measures exist which the Kentucky Supreme Court could adopt to improve the fairness, efficiency, and economy of the present post-conviction process.

Two such measures, already mentioned, have recently been adopted by the Kentucky Supreme Court in its 1994 Amendment to the Kentucky Rules of Criminal Procedure.\textsuperscript{556} Effective October 1, 1994, the court imposed a three-year time limit for filing under RCr 11.42 unless certain specific exceptions are met.\textsuperscript{557} The same amendment also recognized the defense of laches.\textsuperscript{558} As demonstrated below, the 1994 Amendment will go far in preventing stale claims and in reducing the burden on the criminal justice system, while imposing no cost upon the diligent prisoner.

\textsuperscript{554} As the court explained in Alvey v. Commonwealth, 648 S.W.2d 858, 859 (Ky. 1983);

As is true in so many of this type of case, an appellant finds no fault with his initial or earlier criminal proceedings but when he is released from confinement and continues his life of illegal activities with its attendant persistent felony offender charge, then, and only then, does it occur that the accused has been denied due process. This view is supported by U.S. Court of Appeals Judge Henry J. Friendly, who wrote: "[M]y impression is that prisoners unsuccessful in their post-conviction applications through the state hierarchy almost inevitably have a go at federal habeas, save when their sentences have expired." Friendly, \textit{Collateral Attack, supra} note 100, at 168.

\textsuperscript{555} In addition to RCr 11.42, prisoners may seek relief under RCr 10.02 (motion for new trial), CR 60.02 (motion to set aside on grounds of mistake, new evidence, or fraud), and CR 73.01 (appeal).

\textsuperscript{556} The 1994 Amendment, \textit{supra} note 358.

\textsuperscript{557} \textit{Id.}

\textsuperscript{558} \textit{Id.} Both of these changes were advocated by the author in the original draft of this article as submitted for publication; their adoption has necessitated a hasty rewrite of these sections, a task the author was pleased to perform.
A. The 1994 Reform Amendment

1. Time Limitation

Kentucky has now adopted a three-year time limit for filing under RCr 11.42.\(^{559}\) The period for filing begins to run from the date of judgment of conviction or, if the conviction is appealed, from the date when the opinion affirming the judgment on direct appeal becomes final. Absent a showing either of the existence of previously unknown facts material to the claim and not previously discoverable through due diligence or that the constitutional right upon which the movant’s claim is based was not established within the time scheme and is to be applied retroactively, claims not filed within this period are considered to have been waived.\(^{560}\) According to the current version of RCr 11.42(10):

\[
\text{(10) any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:}
\]

\[
\text{(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or}
\]

\[
\text{(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.}
\]

If the judgment becomes final before the effective date of this rule [October 1, 1994], the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three-year time limit, the motion shall be filed within three years after the event establishing the exception occurred.\(^{561}\)

Thus, for older cases where finality has already been achieved, the three-year period began on October 1, 1994, while a motion proceeding

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\(^{559}\) The 1994 Amendment, supra note 358.

\(^{560}\) Id.

\(^{561}\) Id. It should be noted that the Kentucky Supreme Court forgot to remove the provision allowing an RCr 11.42 motion to be filed “at any time” from RCr 11.42(1), thus putting that section in seeming conflict with new section (10). In reality, of course, the section which is more specific and more recent in time should control — especially since what the Kentucky Supreme Court wished to accomplish with the change is obvious. The “at any time” provision of RCr 11.41(1) is now meaningless.
under an exception establishes its own "statute of limitation" based upon the date of the event creating the exception. The most obvious example of such an event would be the rendition date of a U.S. Supreme Court decision which retroactively applies a recently established constitutional right.

The use of an express limitation as a restriction on the time available for filing a post-conviction attack is well-established. As stated by the U.S. Supreme Court: "A state's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitation." Numerous justifications exist for restricting the ability of the convicted party to control the pace of litigation.

First, the remedy provided by RCr 11.42 is written in the broadest possible terms, and the petitioner has the benefit of hindsight in bringing claims. Second, as a matter of fairness, claims should be advanced and decided in the most expeditious manner possible. The court in Adams v. Commonwealth aptly justified the defendant's burden in this regard: "Justice is not denied by requiring an indigent defendant to bestir himself to some extent to protect his rights and remedies." Third, even the simplest case in Kentucky takes from two to three years to traverse the entire state/federal system. In fact, prior to the 1994 Amendment, a relatively simple case could drag on for decades. The passage of excessive amounts of time is virtually meaningless to the defendant who has a lengthy sentence but is on parole; however, the delay is particularly onerous to the state because, if the case is eventually reversed, retrial becomes increasingly unlikely with the passage of time. Of course,

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562 Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (holding that the Constitution does not bar application of forum state's statute of limitations to claims governed by substantive law of a different state); Brown v. Allen, 344 U.S. 443, 486 (1953) (holding that the Constitution allows state time limitations on presentation of claims).

563 For example, allegations of ineffective assistance of counsel are readily subject to after-the-fact conjecture or, since only two parties were participants in most conversations, to misunderstanding or outright falsehood. Courts have made similar observations. See, e.g., Thomas v. Commonwealth, 437 S.W.2d 512, 515 (Ky. 1969) ("Manifestly, it is rather easy, in retrospect, to suggest that some other course or tactic would have produced different or better results. The difficulty is that there is no assurance that different results would have been reached even if the newly-suggested tactics had been pursued."), cert. denied, 397 U.S. 956 (1970).

564 551 S.W.2d 249, 251 (Ky. Ct. App. 1977) (affirming trial court's decision that petitioner waived right to appeal by remaining silent after being informed of rights).

where probation or parole was denied, the defendant also wants to be released and might push his or her case through to conclusion as rapidly as possible. However, many serious offenders are already serving lengthy sentences either in Kentucky or in other states (with detainers to return the out-of-state offenders to Kentucky to begin service on their Kentucky convictions as soon as the sentences in the other jurisdictions are served). For both of these types of inmates, there is no penalty for delay. Finally, the 1994 Amendment limiting the time to file contains explicit exceptions to extend the period allowed for filing, thereby helping to prevent a litigant from being unfairly penalized.565

One advantage of establishing a mandatory period for filing is that it allows post-conviction records to be developed in a more timely manner. Previously, many claims arose out of cases in which one or more of the

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565 This approach is identical to that controlling the defendant's claim of the right to a new trial based on newly discovered evidence. Demands of finality support the provision of RCr 10.06(1) that a motion on this ground must be made within one year of the entry of judgment except for good cause.
necessary participants — prosecutor, public defender, court reporter, judge — had died or had become otherwise unavailable. The time limitation should result in an economic benefit to the Commonwealth, since assistant public advocates, assistant attorneys general, and judges of the Kentucky Court of Appeals or justices of the Kentucky Supreme Court will not have to sort through stale claims. Moreover, fewer frivolous claims should occur because inmates will be less likely to rely on the hope that they will benefit from faded memories, lost transcripts, or untimely deaths. In sum, the advantages of moving post-conviction proceedings along shortly after the conclusion of trial or direct appeal are substantial.

Other states have successfully adopted similar approaches. In 1989, Arkansas adopted rules of court requiring ineffective assistance of counsel claims to be raised within thirty days of judgment and imposing a three-year time period for the filing of post-conviction claims. After fifteen months of study and comment by the bench and bar, the Arkansas Supreme Court reduced the post-conviction time for filing from three years to “ninety days in cases where the defendant pleaded guilty or did not elect to appeal and sixty days where an appeal was taken.” The Missouri Supreme Court recently upheld the constitutionality of its thirty- and ninety-day time limits on the filing of post-conviction claims.

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567 See, e.g., Crockett v. Commonwealth, 473 S.W.2d 112, 113 (Ky. 1971) (explaining that Commonwealth’s Attorney had died in the period between petitioner’s conviction and the filing of his KY. R. CRM. P. 11.42 motion 15 years later); Warner v. Commonwealth, 385 S.W.2d 62, 65 (Ky. 1964) (explaining that defendant’s chief attorney had passed away before petitioner’s KY. R. CRM. P. 11.42 action 15 years later).

568 In re Post-Conviction Procedures, 797 S.W.2d 458, 458 (Ark. 1990) (explaining that the 90-day time limit for post-conviction relief motions adequately protects defendants’ constitutional rights); In re Reinstatement of Rule 37, 797 S.W.2d 458, 459 (Ark. 1990); see ARK. CODE ANN., CT. R. CRM. P. § 37.2 (Michie 1994). The Eighth Circuit U.S. Court of Appeals upheld the Arkansas time limit under a former version of the rule. Williams v. Lockhart, 873 F.2d 1129, 1130 (8th Cir.) (holding failure to comply with Arkansas statute of limitation for filing post-conviction claim to be a procedural default requiring dismissal of federal habeas corpus petition), cert. denied, 493 U.S. 942 (1989).

569 Day v. State, 770 S.W.2d 692, 695-96 (Mo.) (holding that defendants’ failure to file petitions for relief before deadline constituted waiver), cert. denied, Walker v. Missouri, 493 U.S. 866 (1989); see MO. R. CRM. P. § 24.035(b) (providing that, for judgments rendered after guilty plea, the time to file expires 90 days “after the movant is delivered to the custody of the department of corrections”); id. § 29.15(b) (providing that, for judgments rendered after trial, the time to file expires 30 days after the filing of the transcript on direct appeal or 90 days after delivery to the department of corrections if no appeal is taken).
New Jersey, Florida, Mississippi, Washington, Oregon, and Wyoming have similar limitations. In 1986, the legislature in Tennessee added a three-year statute of limitations to the Tennessee Post-Conviction Procedure Act. Iowa's three-year statute of limitations has also been held constitutional. Some states, like Colorado, allow actions to be brought after the statute of limitations has run, if there has been a showing of "justifiable excuse or excusable neglect." The statute of


571 Fla. R. CRIM. P. 3.850(b) (mandating a two-year limitation on filing after the judgment becomes final except in certain circumstances). This statute of limitations has also been recognized by the federal courts. Whiddon v. Dugger, 894 F.2d 1266, 1266-67 (11th Cir.) (holding that unexcused failure to file within the time period constituted a procedural default), cert. denied, 498 U.S. 834 (1990).

572 Part of the Mississippi Uniform Post-Conviction Collateral Relief Act bars filing collateral relief actions after three years. Miss. CODE ANN. §§ 99-39-5(2) (Supp. 1993). This provision was upheld as constitutional in Cole v. State, 608 So. 2d 1313, 1319 (Miss. 1992).

573 In Washington, a one-year deadline for filing, see Wash. REV. CODE § 10.73.090(1) (1990), was determined to be constitutional in Petition of Runyan, 853 P.2d 424, 431 (Wash. 1993).


575 Wyoming provides that post-conviction actions are barred if not commenced within five years of conviction, unless the defendant can show that the delay was not due to neglect. Wyo. STAT. § 7-14-101(c) (1987).

576 Tenn. CODE ANN. § 40-30-102 (1990) (providing that "[a] prisoner in custody under sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or consideration of such petition shall be barred"). Although a Tennessee court found this statute "complies with the requirements of the United States and Tennessee constitutions," the court ruled its application in specific cases may deprive a person of due process. Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992).

577 Davis v. State, 443 N.W.2d 707, 710-11 (Iowa 1989); see IOWA CODE § 822.3 (1993).

578 The court in People v. Germany, 674 P.2d 345, 354 (Colo. 1983), found Colorado's statute of limitations to be violative of due process because it contained no exception for default resulting from "justifiable excuse or excusable neglect." The Colorado legislature then amended the statute to allow belated claims upon a showing of "justifiable excuse or excusable neglect." Colo. REV. STAT. ANN. § 16-5-402(2)(d) (West 1986).

However, the position of the Colorado appellate court is a minority one, and the fact that the Kentucky provision does not include a similar "escape clause" does not affect its
limitations imposed by the Illinois legislature has been in existence since at least 1963, and its history is instructive. Although it began as a five-year limitation on filing, it was lengthened in 1965, at the height of federal habeas corpus review of state prisoner convictions, to twenty years. The statutory period was reduced to ten years in 1984 and reduced again in 1992 to three years from the date of conviction or six months after denial of leave to appeal, or to the later of six months after a final opinion by the Illinois Supreme Court or six months after denial of certiorari in the U.S. Supreme Court. Kentucky now has joined these states in imposing a reasonable limitation on stale claims brought forward in RCr 11.42 motions.

2. Laches

The 1994 Amendment makes a further advance by expressly recognizing, as the federal courts have done, the doctrine of "laches."

579 ILL. COMP. STAT. ch. 725, para. 5/122-1 (1944) (historical and statutory notes).
580 Id.

Rule 9(a) regarding § 2254 cases states:

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Thus, the doctrine of laches is applicable to protect state court convictions at the federal level. Note, however, that the use of habeas laches at the federal level does not apply if the delay simply hinders or prevents effective retrial should the petitioner be successful. Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (holding that states cannot rely on difficulties in retrial alone to defeat petition for habeas corpus).

Nonetheless, Rule 9(a) is useful. The Sixth Circuit Court of Appeals has relied upon it on more than one occasion to bar stale claims. See, e.g., Moore v. Smith, 694 F.2d 115, 118-19 (6th Cir. 1982) (11-year delay), cert. denied, 460 U.S. 1044 (1983); Ford v. Superintendent, 687 F.2d 870, 872 (6th Cir. 1982) (14-year delay), cert. denied, 459 U.S. 1216 (1983). The American Bar Association has suggested the use of a flexible rule such
The use of laches in post-conviction proceedings is an equitable defense based on the premise that it is unfair for petitioners or movants to profit from delay and gain an advantage by prejudicing the defending party's ability to respond to the allegation. Since finding expression in early cases, the importance of laches in post-conviction relief has been broadly recognized, increasing the movant's burden of proof on stale claims.

The final sentence of the 1994 Amendment creating new section (10) reads as follows:

Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Prior to this amendment, Kentucky's approach to allowing the Commonwealth a laches defense in RCr 11.42 proceedings was half-hearted and uncertain, despite notable instances of prisoner abuse. A recent opinion of the majority of a Kentucky Court of Appeals panel in Hayes v. Commonwealth apparently established laches as a defense. However, amending the Rule was a better alternative. Inmate litigants are now as laches. ABA STANDARDS FOR CRIMINAL JUSTICE: POSTCONVICTION REMEDIES, ch. 22-2.4 (2d ed. 1980 & Supp. 1986) [hereinafter ABA STANDARDS].

Some defendants may deliberately delay post-conviction processes until the evidence of guilt has been substantially affected. ABA STANDARDS, supra note 581, at ch. 22-2.4, cmt.; see Alvey v. Commonwealth, 648 S.W.2d 858, 859 (Ky. 1983) ("In many instances the offender has a distinct advantage because with the passage of time witnesses become unavailable, memories fade or any number of things may happen which make a second prosecution impractical or even impossible.").

The 1994 Amendment, supra note 358.

See, e.g., Reams v. Commonwealth, 522 S.W.2d 853 (Ky. 1975) (delay of 20 years); King v. Commonwealth, 487 S.W.2d 683 (Ky. 1972) (delay of 32 years); Wooten v. Commonwealth, 473 S.W.2d 116 (Ky. 1971) (delay of 27 years); Wedding v. Commonwealth, 468 S.W.2d 273 (Ky. 1971) (delay of 20 years); Lett v. Commonwealth, 461 S.W.2d 83 (Ky. 1970) (delay of 29 years); Ringo v. Commonwealth, 455 S.W.2d 49 (Ky. 1970) (delay of 20 years); Ruggles v. Commonwealth, 451 S.W.2d 634 (Ky. 1970) (delay of 18 years); Brister v. Commonwealth, 439 S.W.2d 940 (Ky. 1969) (delay of 16 years); King v. Commonwealth, 408 S.W.2d 204 (Ky. 1966) (delay of 26 years), cert. denied, 386 U.S. 924 (1967); Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966) (delay of 31 years); Hayes v. Commonwealth, 837 S.W.2d 902 (Ky. Ct. App. 1992) (delay of 23 years).

837 S.W.2d at 905-06 (explaining that petitioner is not allowed to take advantage of 23-year lapse between conviction and attempt at post-conviction relief).
firmly on notice that stale claims may be barred if the delay in bringing such claims prejudices the Commonwealth.

B. Unfinished Business: Additional Proposals for Reform

The Kentucky Supreme Court’s 1994 Amendment has been the most significant change to RCr 11.42 since its promulgation in 1963. However, additional improvements should still be considered. The following suggestions would also have a significant and beneficial effect upon the practice of post-conviction relief in this state.

1. Appeal from the Denial of an RCr 11.42 Motion Should Be Discretionary

An appeal serves two purposes. First, it allows an appellate court to correct the errors of the lower court. Second, it allows the appellate court, through its published decisions, to control the lower courts and to unify procedure. Both of these objectives would be undiminished if appeal from the denial of an RCr 11.42 motion, except in death penalty cases, were made discretionary in the Kentucky Court of Appeals. This result could be achieved by deleting the portion of RCr 11.42(7) which specifically provides that either the movant or the Commonwealth may appeal from the final order or judgment of the trial court in proceedings brought under the Rule, modifying RCr 11.42(8), which deals with suspension of the trial court’s order until time for appeal has run, and incorporating into RCr 11.42 the procedure for discretionary review found in CR 76.20. In the alternative, the court could adopt a leave-to-file procedure such as that currently used by the appellate court in Maryland to control its post-conviction docket. A Maryland-like approach would create a special

57 Monitoring the Kentucky Supreme Court adopt this procedure, § 22A.020(1) of the Kentucky Revised Statutes would have to be amended or held unconstitutional. See KY. REV. STAT. ANN. § 22A.020(1) (Michie/Bobbs-Merrill 1992). In the author’s opinion, the statute is in fact unconstitutional since it infringes upon the judiciary’s power to control its procedures and jurisdiction.

58 MD. R. P. § 8-204 (providing that leave to file application shall contain a concise statement giving reasons why the judgment should be reversed, to which a response may be filed within 15 days). The workings of this procedure have been described as follows:

The application for leave to appeal need only contain a brief statement of the reasons why the Court of Special Appeals should reverse the judgment below. The record on appeal contains only the original petition, the state’s attorney’s response, any subsequent papers filed in the proceeding, and the trial court’s memorandum and order. In the overwhelming majority of cases, the Court of
discretionary review procedure specific to RCr 11.42. A similar concept is utilized in federal courts with regard to federal habeas corpus appeals brought by state prisoners. Unlike the procedure in Maryland, in the federal system trial courts are expected to act as gatekeepers for the appellate courts, weeding out frivolous appeals by denying litigants a “Certificate of Probable Cause for Appeal,” which acts as a leave-to-file document.589

As has already been noted, surveys of the results of RCr 11.42 cases on appeal indicate that the number of meritorious claims is very small. In only a few cases is the movant successful on appeal in receiving a new trial, a remand for an evidentiary hearing, or some other form of lesser relief; however, the number of post-conviction appeals continues to grow.590 If the workload of the Kentucky Court of Appeals permits, then the present system of providing full review of all RCr 11.42 appeals can be continued. However, if, as the author expects, the lower appellate court is becoming increasingly overburdened and needs more time to provide additional consideration to more important criminal and civil matters, then the approach suggested herein should be adopted.

Would such a change violate the Kentucky Constitution? Section 115 of the state constitution provides a right to a single appeal to another court, except for a Commonwealth appeal from a judgment of acquittal, in “all cases.”591 The answer, therefore, depends on whether a motion

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Special Appeals denies leave to appeal in an unpublished opinion that merely states that the court has considered, read and denied the application for leave to appeal.


589 FED. R. APP. P. 22(b).

590 See supra notes 359-70 and accompanying text. In Judge Wilhoit’s study of both published and unpublished post-conviction opinions rendered in 1983 and 1984, he reported that the “most striking thing about these cases is how infrequently they resulted in the reversal of a conviction. Of the 189 opinions issued in the two years, only three directed the outright reversal of the appellant’s conviction . . . .” Wilhoit, supra note 565, at 27. All three reversals involved ineffective assistance of counsel claims. Id.

It may also be remembered that the author’s survey of the Kentucky Legal Practitioner for the years 1990 and 1991 showed that the Kentucky Court of Appeals issued 321 published and unpublished opinions in RCr 11.42 cases, a significant increase over the 189 issued in 1983 and 1984. See supra note 370 and accompanying text.

591 Interestingly, § 115 cannot apply to an original action or proceeding in a court of last resort because no higher court exists to which one can appeal. Ex parte Farley, 570 S.W.2d 617, 620, 622 n.2 (Ky. 1978). The author also considers CR 76.37(10), as presently written and practiced by the Kentucky Supreme Court, to be unconstitutional, since it makes discretionary the “one appeal” by the Commonwealth for purpose of
under RCr 11.42 is considered the beginning of a new "case" or a continuation of the old one. In answering this question, it is understood, of course, that RCr 11.42 provides for a direct attack, by motion, upon any conviction that would otherwise be subject to a collateral attack by petition for writ of habeas corpus or writ of error coram nobis; however, a procedure allowing direct attack is not necessarily the equivalent of starting a new "case." In contrast to a petition for writ of habeas corpus, which is civil in nature, a proceeding under RCr 11.42 is criminal in nature. Unlike habeas corpus, RCr 11.42 deals not with the broad issue of illegal imprisonment, but only with attacks on a single specific judgment. As such, RCr 11.42 is a post-conviction remedy in the nature of coram nobis, mandating that the court of conviction should be the first court of post-conviction review. In United States v. Morgan, the Supreme Court contrasted habeas corpus with coram nobis in this regard, observing that a coram nobis motion "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." These factors all support the conclusion reached in most of the cases which have raised the question: RCr 11.42 is a mere continuation or resumption of the prior criminal proceeding at which the defendant was convicted.

Certification of the law in seeming violation of the plain language of Section 115 of the Kentucky Constitution, which states, "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court."

KY. R. CRIM. P. 11.42(1); Higbee v. Thomas, 376 S.W.2d 305, 307 (Ky. 1964) (holding that KY. R. CRIM. P. 11.42 motion is a "resumption or continuation of the criminal proceeding").

Crady v. Cranfill, 371 S.W.2d 640, 644 (Ky. 1963) (holding that rules relating to bail have no application in habeas corpus proceedings because those proceedings are civil in nature).

See infra note 596 and accompanying text.


Cleaver v. Commonwealth, 569 S.W.2d 166, 168 (Ky. 1978) (holding that KY. R. CRIM. P. 11.42 motion is resumption of criminal proceeding); Tipton v. Commonwealth, 456 S.W.2d 681, 682 (Ky. 1970) (holding that 11.42 allows delayed review of criminal judgments, after the trial court has normally lost jurisdiction); Funelli v. Commonwealth, 423 S.W.2d 255, 257 (Ky. 1968) (holding that a motion under 11.42 to vacate or to modify is a continuation or reopening of the same proceeding); Higbee v. Thomas, 376 S.W.2d 305, 307 (Ky. 1964) ("An RCr 11.42 motion is a resumption or continuation of the criminal proceeding."); cf. Commonwealth v. Basnight, 770 S.W.2d 231, 237 (Ky. Ct. App. 1989) (observing that 11.42 motion represents an "independent action" but providing no explanation or justification for this view).

Likewise, 28 U.S.C. § 2255 motions, which initiate post-conviction proceedings for federal prisoners, are also considered a further step in the original case. See RULES GOVERNING § 2255 CASES, Rule 1, 28 U.S.C. fol. § 2255 (1988) (Advisory Committee's
However, not all RCr 11.42 appeals would be discretionary, even under the proposed amendment. If a defendant did not utilize his or her direct appeal, then appeal from the denial of RCr 11.42 would still be open as a matter of right since it would be the first appeal in that particular case. Absent this last factual circumstance, it appears that no constitutional right of appeal exists from an order denying post-conviction relief under RCr 11.42. The Kentucky Supreme Court can and should adopt this amendment and permit the Kentucky Court of Appeals to have discretionary authority to review meritorious RCr 11.42 appeals except in death penalty cases.

2. Summary Dismissal and Hearing Procedure

Additionally, RCr 11.42(5) should be modified to require the trial court to summarily dismiss a motion to vacate or docket an evidentiary hearing within forty days of its filing. The Rule should be amended to read as follows:597

(5) Within 40 days after the filing of the motion by the clerk of the court, the court shall examine the motion and enter a written order pursuant to this section. Affirmative allegations contained in the answer shall be treated as controverted or avoided of record.

(a) If the court determines that the motion is frivolous, or is patently without merit, or fails to state a claim for which relief may be granted under this rule, or should otherwise be dismissed, the order of the court shall summarily dismiss the motion.

(b) If the answer raises a material issue of fact that cannot be determined on the face of the record, or the motion is not otherwise subject to summary dismissal, the order of the court shall [grant a prompt hearing, and] notify the movant and the Commonwealth that an evidentiary hearing is required and set a prompt date for such hearing. If the movant is without counsel of record and is financially unable to employ counsel, the court shall, upon specific written request by the movant, appoint counsel to represent him in the proceeding, including appeal.

(c) Any order of the court pursuant to this rule shall be in writing, specifying the findings of fact and conclusions of law made in reaching the decision.

Notes). 597 Proposed changes are indicated in italics. Language which should be removed is indicated by brackets and bold print.
This proposed change would make several improvements. Recognizing that the present text offers very little guidance to trial courts, this proposal would standardize certain aspects of court practice across judicial circuits and help insure not only that the inmate litigant is properly served, but also that an adequate record is generated to aid the Commonwealth in defending the trial court's decision on appeal and in federal habeas corpus proceedings. To this end, the change would provide a definite time period within which the court must examine the motion and dismiss it or schedule a hearing. At present, no time limit applies to actions by the trial court, although an original action in the Kentucky Court of Appeals, usually styled a mandamus action, is available to compel resolution of the motion if the trial court "takes too long" in ruling. The purpose of this provision would be to insure that RCr 11.42 motions are examined expeditiously, within a set period of time, as is common practice in several states. Also, the change would clarify the grounds for summary dismissal. Additionally, the suggestion would require the order of the court to be in writing, which is not a present requirement under RCr 11.42(6) although it is impliedly required by case law. The importance of the writing requirement should not be overlooked. Unless the order is in writing, including complete findings of fact and conclusions of law, a real danger of prolonging future proceedings is presented by the potential for loss or destruction of such items as

598 See supra notes 541-45 and accompanying text.
599 In Kentucky, the high court has already ruled that 30 days is sufficient to take some action on an RCr 11.42 motion. Kivett v. Knuckles, 407 S.W.2d 405, 405-06 (Ky. 1966). Trial courts in Illinois have 90 days in non-death penalty cases to either dismiss the petition in a written order or docket the case for further consideration. ILL. COMP. STAT. ch. 725, para. 5/122-2.1 (1994). In Texas, the trial court must determine within 20 days of the state's response to the petition whether there are "controverted, previously unresolved facts material to the legality of the appellant's confinement." TEX. CODE CRIM. PROC. ANN. art. 11.07(2)(c), (d) (West Supp. 1995).
600 Schroader v. Thomas, 387 S.W.2d 312, 314 (Ky. 1964) (explaining that due process was met where specific written findings disposed of grounds alleged), overruled on other grounds, Lycans v. Commonwealth, 511 S.W.2d 232 (Ky. 1974). The American Bar Association has recommended trial court preparation of a "memorandum opinion" at the conclusion of post-conviction proceedings. ABA STANDARDS, supra note 581, ch. 22-4.7(b). Such a change is advisable because oral decisions are more likely to omit pertinent facts and contain weak analysis. The increased workload on judges would be minimal because, in general, most judges reduce their orders to writing anyway. In the alternative, if requiring a written order in every RCr 11.42 is considered too burdensome, the oral record of decision should be immediately transcribed. See, e.g., Md. R. P. § 4-407(a) (providing for immediate transcription of a court's ruling that was dictated into the record).
court reporter's notes and tape recordings. Every order resolving an RCr 11.42 motion should thus be in writing or, if given orally, transcribed immediately and placed in the record.

3. Use of a Form Motion and Other Changes

Further improvement would be achieved if RCr 11.42 were amended to require submission of the motion on a form to be provided by the Kentucky Administrative Office of the Courts. The only existing requirements regarding the contents of such a motion — "whether it be styled a motion, petition or otherwise" - are that the body of the motion contain specific allegations supported by facts and that the motion be signed and verified. In its present form, the Rule is inadequate, and the movant should be required to furnish more comprehensive information, as is commonly mandated by many states. More detailed requirements would benefit both the movant and the Commonwealth by discouraging the submission of confused, sometimes almost indecipherable, free-form pleadings. The American Bar Association has recom-

601 KY. R. CRIM. P. 11.42(4).
602 Id. 11.42(2).
603 See, e.g., N.J.R. GOV. CRIM. P. § 3:22-8 (requiring petition for post-conviction relief to include, among other things, date and docket number of original case, previous post-conviction proceedings relating to the same conviction, and the date and nature of their disposition); PA. R. CRIM. P. § 1502 (requiring motion for post-conviction relief to contain detailed information including, among other things, specific references in the record supporting petitioner’s claims); Mo. R. CRIM. P. FORM 40 (requiring detailed information on prior convictions and earlier post-conviction proceedings).
604 The proposed additions to the Rule are shown in italics:

(2) The motion shall be submitted on a form prepared for this purpose by the Administrative Office of the Courts. The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.


A federal habeas corpus form has been used with success in the federal courts for decades. See RULES GOVERNING § 2255 PROCEEDINGS, Rule 2, app., 28 U.S.C. fol. § 2255 (1988) (applying to federal prisoners); RULES GOVERNING § 2254 PROCEEDINGS, Rule 2, app., 28 U.S.C. fol. § 2254 (1988) (applying to state prisoners); Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States
mended the use of a standardized form, citing the obvious advantages that such a form provides in encouraging applicants to provide complete information, including information regarding prior litigation in the case, necessary to process claims. The use of such a form in RCr 11.42 proceedings was recommended by Judge Robert O. Lukowsky as early as 1969 and is a common sense and cost-effective measure which in no way impairs the rights of the inmate litigant.

Three other changes also should be considered. First, the court should remove the "at any time" language from RCr 11.42(1) in order to harmonize that section with the 1994 Amendment now found in RCr 11.42(10). Second, the court should clarify that an otherwise unmeritorious RCr 11.42 motion does not require the trial court to grant relief merely because the Commonwealth, for whatever reason, has failed to respond. The burden is on the defendant to prove that he or she is entitled to the relief sought. RCr 11.42(5) should be amended to substitute "motion" for "answer," as previously discussed. Finally, the court should consider amending the Rule to provide for expedited review of attacks on a judgment claimed to be void ab initio and entitling, if successful, the defendant to immediate release. This would eliminate the problem presented to the court in Marcum v. Commonwealth without the necessity to rely upon state habeas corpus, with its attendant disadvantages.

VII. Resolution of Substantive Issues Under RCr 11.42

Because it is further removed from trial than a direct appeal, an RCr 11.42 proceeding requires the prisoner resorting to the Rule to carry the burden of demonstrating fundamental, constitutionally based error which prejudiced either trial or sentence. As stated in Commonwealth v. Basnight: "Constitutional grounds must form the basis upon which relief can be granted by collateral attack." Yet not every violation of a

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63 ABA STANDARDS, supra note 581, ch. 3.2.
65 Lukowsky, supra note 348, at 444.
66 See supra note 561.
67 See supra notes 489-98 and accompanying text.
68 See 873 S.W.2d 207 (Ky. 1994); supra notes 205-09 and accompanying text.
69 See 770 S.W.2d 231, 237 (Ky. Ct. App. 1989) (denying inmate's motion for relief under KY. R. CRIM. P. 11.42); see Warner v. Commonwealth, 385 S.W.2d 62, 64 (Ky. 1964) (holding that post-conviction relief requires "violation of a constitutional right, a
constitutional right will be significant enough to bring the validity of the judgment of conviction or sentence into question. *Dupin v. Commonwealth* further clarified that an RCr 11.42 proceeding “does not provide an arena in which all claims of the violation of constitutional rights shall be tested. Only those violations which may have had a bearing on the legality or the fundamental fairness of the trial may be considered.”

Several advantages accrue to the state which maintains a system of post-conviction relief. An RCr 11.42 motion to vacate which is properly filed in the court of conviction helps secure access to evidence and testimony pertinent to the case, insures that if a hearing is held an adequate record will be developed which can be reviewed in later appellate or federal proceedings on the same issue, and allows the state to first defend on the constitutional issue in a “friendly” forum. These advantages are guaranteed to the state by the federal requirement that individuals wishing to test their claims in district court under a federal habeas corpus petition must first present, or “exhaust,” their claims in state court. Thus, RCr 11.42 is a stepping stone between direct appeal of the original conviction and the relitigation in a federal forum of all aspects of a state court conviction envisioned under current theories of federal habeas corpus.

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1 Lack of jurisdiction, or such violation of statute as to make the judgment void”); Tipton v. Commonwealth, 376 S.W.2d 290, 290 (Ky. 1964) (explaining that KY. R. CRIM. P. 11.42 does not authorize relief from a judgment of conviction for mere errors of the trial court).

404 S.W.2d 280, 281 (Ky. 1966) (explaining that excessive bail has no bearing on the propriety of the trial).

61 This statement is not designed to imply that federal district court judges are not “friendly,” but it simply notes that most prosecutors would rather have a post-conviction hearing in the court of conviction, where the witnesses and the record are readily available, the procedures and the setting are familiar, and the presiding judge is a known factor.

At the federal level, it is the practice in Kentucky that the Office of the Kentucky Attorney General represents the interests of the state in most, if not all, evidentiary hearings on federal habeas corpus petitions arising out of state court criminal convictions. This division of labor is possible logistically only because such hearings in non-capital cases are few in number; in three years as an Assistant Attorney General specializing in federal habeas corpus litigation, the author only had one such hearing. All other cases were able to be resolved on the basis of the record generated in state court.

Many RCr 11.42 motions are filed without the assistance of counsel. When first promulgated, RCr 11.42 sparked an explosion of claims, filed mostly by inmates or inmate writ-writers. In an effort to keep the rapidly rising river within its banks, the Kentucky high court issued a large number of published RCr 11.42 cases in the mid-1960s. The vast majority of these decisions involved unfavorable results for the prisoner, as the court was vigorously reestablishing the limits of post-conviction relief in Kentucky while prisoners were raising every conceivable claim. Most of these early cases simply held that RCr 11.42 was not available as a remedy for a particular type of claim or that the allegations were not sufficient to overcome the presumption of regularity which attached to a criminal judgment and which was strongest on collateral attack. As the body of case law grew, the appellate courts turned more to resolving specific problems and filling in the gaps. This body of case law provides comprehensive guidance on a large number of substantive RCr 11.42 criminal law issues.

A. The Need for Adequate Counsel

Appellant's argument that his counsel was ineffective for not raising a meritless contention is without merit.

614 An inmate writ-writer is a lay prisoner who undertakes to "represent" other inmates in their various legal proceedings. Although the term is now rarely used in Kentucky, the work of writ-writers is well known to the courts. See, e.g., Johnson v. Avery, 393 U.S. 483, 488 (1969) ("It is indisputable that prison 'writwriters' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskilled as to be a burden on the courts which receive them."). See generally Charles Larsen et al., Prison Writ-Writing: Three Essays, 56 CAL. L. REV. 342 (1968) (discussing the development, abuses, and shortcomings of an extensive inmate writ-writing system).

Kentucky appellate courts have had occasion to review the work of unscrupulous inmates. See, e.g., Renfrow v. Commonwealth, 459 S.W.2d 93, 94 (Ky. 1970) (criticizing the role of writ-writers); McKinney v. Commonwealth, 445 S.W.2d 874, 877 (Ky. 1969) (noting that, since Ky. R. CRIM. P. 11.42 was enacted, "prisoners and jailhouse lawyers have plagued this court"); Taylor v. Commonwealth, 642 S.W.2d 344, 345 (Ky. Ct. App. 1982) (expressing hope that Taylor and his "lay inmate counsel" would face perjury charges).

615 See, e.g., Schooley v. Commonwealth, 556 S.W. 2d 912, 917 (Ky. Ct. App. 1977) ("There are errors which would require reversal on direct appeal but which do not justify vacating a judgment of conviction by motion under RCr 11.42."); Perry v. Commonwealth, 407 S.W.2d 714, 715 (Ky. 1966), cert. denied, 386 U.S. 968 (1967).

616 Williams v. Commonwealth, 639 S.W.2d 788, 790 (Ky. Ct. App. 1982). For somewhat similar sentiments, see Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993) ("Failure to offer at the penalty phase evidence which would not have been admissible cannot rightly be characterized as ineffective representation."), cert. denied,
No rights are more commonly asserted and reviewed in federal and state post-conviction proceedings than those relating to assistance of counsel. As criminal trials grow increasingly lengthy and complex, the need to protect the constitutional rights of the defendant through effective representation has correspondingly increased. For representation of counsel to be meaningful, not only must counsel be physically available, but also the performance of counsel must rise to a certain level in order to satisfy constitutional requirements. This level of performance is the constitutionally mandated standard of "effective assistance of counsel." Indigents must generally be afforded counsel by the state. However, the goal is not to provide, at state expense, all of the prerogatives of the monied defendant. For this reason, an indigent defendant "does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel."

The most frequent allegations found in RCr 11.42 motions attack the performance of counsel. This issue found its way into forty-seven...
percent of the published RCr 11.42 cases of the last thirty years.\textsuperscript{220} As a subject of collateral attack, the performance of counsel is particularly attractive. Every decision of trial counsel, or the sum of all of them, is potentially suspect. In most cases no witnesses to and no record of conversations between trial counsel and the accused will exist. A defendant may argue that if only counsel had acted or advised differently, the result would have been an acquittal, a reduced sentence, a dismissal of the charges, or a plea to a lesser offense. Additionally, to win on this issue is to win a new trial. Ineffective assistance of counsel or an unconstitutional denial of counsel is not subject to harmless error analysis.\textsuperscript{221}

As with many fundamental constitutional rights, assistance of counsel in a criminal case can be waived.\textsuperscript{222} For a waiver to be valid, it must clearly appear from the record that it was a voluntary, knowing, and intelligent relinquishment of the privilege, as determined by the facts of each case.\textsuperscript{223} Despite formidable obstacles, defendants can and do effectively waive assistance of counsel, even at trial, and their convictions are upheld.\textsuperscript{224} Failure to permit an accused, properly counseled as to the

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\textsuperscript{220} See supra notes 366-67 and accompanying text.

\textsuperscript{221} A distinction exists, of course, between a constitutional error committed by counsel, which may be harmless, and judicial fact-finding which results in the legal conclusion that the defendant received ineffective assistance of counsel. Since prejudice is one of the elements of ineffective assistance, a constitutional deprivation in that situation can never be harmless.


\textsuperscript{223} Brewer v. Williams, 430 U.S. 387, 403-06 (1977) (failing to find an effective waiver of counsel); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (concluding that the issue of whether effective waiver exists depends "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused").

\textsuperscript{224} As with the case of the monied individual who chooses to act as his own attorney, the Constitution of the United States does not stand as a guarantor against vanity or bad judgment. For a general discussion of the issues surrounding what might be termed "self-appointment" of counsel, see McKaskle v. Wiggins, 465 U.S. 168, 177-88 (1984) (describing the effect of court-appointed "standby " counsel on defendant's conducting own defense); Faretta v. California, 422 U.S. 806, 812-36 (1975) (holding that the state cannot force a defendant to forego self-representation); cf. Ramsey v. Commonwealth, 399 S.W.2d 473, 475 (Ky.) (holding that the trial court's refusal to dismiss court-appointed
consequences, to represent himself or herself, particularly on a guilty plea, can be a ground for relief under RCr 11.42.625

B. Provision of Counsel

1. Failure to Appoint

Few areas of criminal law have received greater attention than the provision relating to counsel for the accused.626 It has long been recognized that seldom, if ever, will a defendant be able to formulate and communicate to a trial judge or jury the legal and factual characteristics of the case to the same extent as trained, experienced counsel. Therefore, the courts provide appointed counsel for indigent defendants who are unable to employ counsel. This general principle is not new — Kentucky recognized a due process right to counsel in guilty plea cases, absent a waiver, in 1948.627 Kentucky has required appointment of counsel for indigents “from time immemorial.”628 In 1972, the Kentucky General Assembly adopted the statewide public defender system.629 However, only in the past thirty years has the right to counsel become universally applied through extension by the U.S. Supreme Court to indigent counsel and allow defendant to represent himself was not an abuse of discretion), cert. denied, 385 U.S. 865 (1966).

625 Faretta, 422 U.S. at 812-36 (holding that failure to allow defendant to represent himself at trial deprived him of the right to self-representation secured by the Sixth Amendment).


628 John S. Palmore, Counsel for the Indigent in Criminal Cases, 29 KY. ST. B.J. 21, 21 (1965) (“Gideon v. Wainwright came as no shock to the bench and bar of Kentucky.”) (citing Williams v. Commonwealth, 110 S.W. 339 (1908), which held that the court has a duty to insure the defendant is properly represented).

defendants in all the states and in new areas, such as juvenile proceedings.

An area of potentially valid claims concerns the indigent defendant's allegation that counsel was denied in violation of state or federal constitutional law. The Sixth Amendment to the U.S. Constitution states that the accused in a criminal prosecution has the right "to have the Assistance of Counsel for his defence." The Kentucky Constitution contains a similar provision. This right is said to "attach" at certain times during the investigation and prosecution of criminal offenses. Numerous cases at both the state and federal levels have been devoted to making and refining this determination. In some instances, a claim that counsel was denied can be refuted by the record; in others, it is

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630 Prior to 1963, indigents had no recognized right under the U.S. Constitution to appointed counsel in state criminal cases. In that year the Supreme Court decided Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963), which applied the Sixth Amendment to the states and held that an indigent defendant has the right to request and be assigned counsel. This principle was subsequently expanded to include all offenses for which imprisonment is the resulting punishment. Scott v. Illinois, 440 U.S. 367, 373 (1979) (adopting actual imprisonment as the constitutional line); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (providing that, absent waiver, no person can be imprisoned unless represented by counsel at trial).

Even before Gideon, many states, like Kentucky, had mechanisms in place to allow appointment of counsel in specific cases. The trial court generally would determine the seriousness of the case, the necessity for counsel, and the experience and availability of local attorneys. The appointment was based upon some combination of these factors. See Bird, supra note 627, at 509-12.

631 In re Gault, 387 U.S. 1, 36 (1967) (applying the Sixth Amendment to juveniles); Workman v. Commonwealth, 429 S.W.2d 374, 376 (Ky. 1968) (recognizing that the Sixth Amendment applies to juveniles); Smith v. Commonwealth, 412 S.W.2d 256, 259 (Ky.) (holding that juvenile proceeding was a critical stage of litigation in which the defendant was entitled to counsel), cert. denied, 389 U.S. 873 (1967).

632 U.S. CONST. amend. VI.

633 KY. CONST. § 11.

634 See, e.g., Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (holding that the right attaches at "critical state" of prosecution); Coleman v. Alabama, 399 U.S. 1, 7-10 (1970) (clarifying what constitutes "critical stage"); Sipple v. Commonwealth, 384 S.W.2d 332, 332-33 (Ky. 1964) (holding that counsel is required when a defendant enters guilty plea).

635 Lett v. Commonwealth, 461 S.W.2d 83, 84 (Ky. 1970) (holding that an evidentiary hearing was not necessary); Newberry v. Commonwealth, 451 S.W.2d 670, 671 (Ky. 1970) (holding that, although defendant claimed he had been denied counsel and coerced into pleading guilty, the record showed he had pled not guilty and was convicted after a jury trial in which he had received the assistance of appointed counsel); accord Moore v. Commonwealth, 407 S.W.2d 136, 136 (Ky. 1966) ("[M]ere unsupported allegations of lack of counsel will not be permitted to contradict plain, unambiguous court records."), cert. denied, 386 U.S. 1038 (1967).
necessary to hold an evidentiary hearing before the court can make a
determination on whether relief should be granted.\textsuperscript{636}

Reversal of the conviction is required where the denial of counsel
occurs at a critical stage of the proceedings as determined under the state
constitution, or the denial violates one of the Supreme Court’s “bright
line” determinations of which portions of the process are considered
critical under the U.S. Constitution.\textsuperscript{637} For example, the constitutional
right to counsel during trial is fundamental and undisputed, since the trial
is obviously a “critical stage” of the proceedings.\textsuperscript{638} Pretrial proceedings
present a more difficult determination of what constitutes a “critical
stage.” In response, the Supreme Court and the highest state courts have
utilized “bright line” holdings for discrete procedural steps and case-by-
case analysis for other situations. An example of the former is the right
to assistance of counsel at a guilty plea proceeding. There, the right,
unless waived, is absolute, since a guilty plea is clearly a critical stage of
the proceedings.\textsuperscript{639}

The problem becomes more difficult where investigatory events such
as pretrial interrogations or police lineups are concerned. The determina-

\textsuperscript{636} Moore v. Commonwealth, 394 S.W.2d 931, 933 (Ky. 1965) (holding that a hearing
was required where boilerplate judgment mentioned counsel but records submitted by
movant indicated significant factual issue existed as to that point).

\textsuperscript{637} Hamilton, 368 U.S. at 54 (holding that arraignment is a “critical stage” in
Alabama); Coleman, 399 U.S. at 7 (containing the test for determining whether a
particular proceeding is a “critical stage”).

\textsuperscript{638} Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (recognizing that the Sixth
Amendment guarantees all criminal defendants the right to representation by counsel at
trial); see also United States v. Morgan, 346 U.S. 502, 512 (1954) (holding that federal
conviction is barred when accused is denied assistance of counsel); Johnson v. Zerbst, 304
U.S. 458, 463 (1938) (holding that federal courts do not have power to deprive an
individual of life or liberty unless he or she was furnished with counsel or waived the
right to counsel).

\textsuperscript{639} As the court explained in Sipple v. Commonwealth, 384 S.W.2d 332, 332-33 (Ky.
1964):

The Commonwealth’s response was to the effect that by reason of the guilty
pleas “there was no necessity for the appointment of counsel to represent the
interests of the defendant.” That proposition is not correct. He was entitled to
counsel, and unless he was advised or knew of that right and voluntarily waived
it the convictions were void.

Cf. Hall v. Commonwealth, 403 S.W.2d 288, 288 (Ky. 1966) (“As the Attorney General
concedes, an allegation that the prisoner was deprived of counsel at any vital stage of the
proceedings charges a constitutional violation and entitles the movant to a hearing with
the assistance of counsel.”); Moore v. Commonwealth, 380 S.W.2d 76, 76 (Ky. 1964)
(holding that a silent record and an allegation of denial of counsel during guilty plea
entitled movant to a hearing in which he would be represented by appointed counsel).
tion of whether a critical stage has been reached in a pretrial confronta-
tion between the accused and the accusers is complex and largely
governed by federal case law.640 Pretrial lineups or showups (showing
the accused alone to the victim or witness) may require counsel depend-
ing upon the circumstances. For example, in Thomas v. Commonwealth,
the defendant claimed that the judgment of conviction should be vacated
because he had been held in jail for thirteen hours after arrest without the
assistance of counsel.641 The court held that the RCr 11.42 motion was
properly overruled as to this ground since no evidence obtained during
this period was offered against him at trial.642 In Kentucky, counsel is
not required at a pre-indictment lineup.643 After indictment, however,
counsel must generally be provided as a matter of federal constitutional
law,644 although the Kentucky Supreme Court has held that the Sixth
Amendment right to counsel does not attach prior to arraignment.645

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640 Frequently the issues to be determined are whether the individual was the subject
of "custodial interrogation," as defined by Miranda v. Arizona, 384 U.S. 436, 444 (1966)
and derivative cases, and whether the right to counsel was invoked or waived. These
determinations are highly fact-specific, and a survey of relevant case law is beyond the
scope of this Article. Those interested may wish to review the following cases; Arizona
(1987) (examining what constitutes "functional equivalent" of interrogation); Michigan
(1983) (illuminating the meaning of "custodial interrogation"); Edwards v. Arizona, 451
U.S. 477, 484-85 (1981) (holding that an accused who has requested counsel cannot be
subjected to further interrogation until counsel is provided, unless accused initiates it);
Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) (analyzing the term "interrogation"
as used in Miranda).


642 Id. at 515. This same issue was decided, based upon the same reasoning, in Bartley v.
Commonwealth, 463 S.W.2d 321, 322 (Ky. 1971) and Messer v. Commonwealth, 454
S.W.2d 694, 695 (Ky. 1970).

643 Cane v. Commonwealth, 556 S.W.2d 902, 906 (Ky. Ct. App. 1977) (citing Kirby
Commonwealth, 487 S.W.2d 892 (Ky. 1972)).

644 Gilbert v. California, 388 U.S. 263, 272 (1967) (recognizing constitutional error
where in-court identification may have been tainted by illegal pre-trial lineup conducted
without notice to accused of Sixth Amendment right to counsel); United States v. Wade,
388 U.S. 218, 237 (1967) (holding that a post-indictment lineup is a critical stage
requiring presence of counsel).

1971) (recognizing that a lack of counsel at arraignment does not provide grounds for
relief under KY. R. CRIM. P. 11.42 where accused pled not guilty); McKinney v.
Commonwealth, 445 S.W.2d 874, 877 (Ky. 1969) (holding that the absence of counsel
at arraignment does not provide grounds for relief); Collins v. Commonwealth, 433
Preliminary hearings on the case are considered critical stages at which the right to be represented by counsel has already attached, but the failure to appoint counsel may be harmless error.\footnote{Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (remanding for determination of whether denial of counsel at preliminary hearing was prejudicial); Shanks v. Commonwealth, 386 S.W.2d 450, 451 (Ky.) (holding that arraignment does not require assistance of counsel), \textit{cert. denied}, 380 U.S. 988 (1965); Carson v. Commonwealth, 382 S.W.2d 85, 94 (Ky. 1964) (holding that assistance of counsel is not required at arraignment), \textit{cert. denied}, 380 U.S. 938 (1965).} Post-trial procedures present new circumstances. Because of sentencing practices in this state, the Kentucky Supreme Court has consistently held that sentencing in Kentucky is not a "critical stage" of the proceedings unless prejudice is shown.\footnote{Steenbergen v. Commonwealth, 532 S.W.2d 766, 767 (Ky. 1976); Thomas v. Commonwealth, 437 S.W.2d 512, 514 (Ky. 1969), \textit{cert. denied}, 397 U.S. 956 (1970); \textit{Collins}, 433 S.W.2d at 666; McIntosh v. Commonwealth, 368 S.W.2d 331, 335 (Ky. 1963). \textit{But see} Oliver v. Cowan, 487 F.2d 895, 896 (6th Cir. 1973) (holding that sentencing in Kentucky is a critical stage), \textit{cert. denied}, 416 U.S. 975 (1974). In Reams v. Commonwealth, 322 S.W.2d 853, 854 (Ky. 1975), the Kentucky high court expressly refused to follow the holding of \textit{Oliver}. The U.S. Supreme Court has required counsel at sentencing in a state criminal proceeding where the procedure adopted by that particular state indicates that the substantial rights of the accused may be affected. Mempa v. Rhay, 389 U.S. 128, 135-36 (1967) (construing Washington state law).} On appeal, the right of an indigent to the assistance of counsel is provided by statute and case law.\footnote{KY. REV. STAT. ANN. § 31.110(2) (Michie/Bobbs-Merrill 1993); Douglas v. California, 372 U.S. 353, 357-58 (1938) (holding that defendant must be represented by counsel for purpose of appeal). The counsel provided must be effective counsel.\textit{Evitts v. Lucey}, 469 U.S. 375, 379 (1985) (holding that defendant has a right to effective counsel on appeal); \textit{see supra} notes 616-21 and accompanying text.} The court-imposed right to counsel also extends to Kentucky post-conviction proceedings, such as those under RCr 11.42, provided that the indigent movant or petitioner carries the initial burden of establishing the necessity for the appointment.\footnote{Accordingly, RCr 11.42(5) provides for the appointment of counsel to assist the defendant, to conduct an evidentiary hearing if necessary, and for purposes of any RCr 11.42 appeal.} Finally, section 31.110(2) of the S.W.2d 663, 665 (Ky. 1968) (holding that arraignment is not a critical stage in Kentucky); Yates v. Commonwealth, 386 S.W.2d 450, 451 (Ky.) (holding that arraignment does not require assistance of counsel), \textit{cert. denied}, 380 U.S. 988 (1965); Carson v. Commonwealth, 382 S.W.2d 85, 94 (Ky. 1964) (holding that assistance of counsel is not required at arraignment), \textit{cert. denied}, 380 U.S. 938 (1965).}
Kentucky Revised Statutes provides for the appointment of counsel for indigents “at all stages . . . including revocation of probation or parole,” although providing counsel at revocation of probation or parole proceedings is not a federal constitutional requirement.650

2. Failure to Perform

The most notorious of all post-conviction claims is that trial counsel was “ineffective.” Since the action or inaction of defense counsel will generally lie outside of the record, a hearing is normally required to develop facts upon which the court may base its ruling. Typically, the hearing will have only the movant and defense counsel as witnesses, but in some cases other witnesses may be heard.

The original common law standard used in post-conviction determinations of ineffective assistance of trial counsel in Kentucky was quite strict, requiring a finding “that the circumstances of the representation were such as to shock the conscience of the court and to render the proceedings a farce and a mockery of justice.”651 The Kentucky “farce and mockery” standard was dropped in 1982 in favor of the federal test.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent him in the proceeding, including appeal.

See, e.g., Coles v. Commonwealth, 386 S.W.2d 465, 466 (Ky. 1965) (holding that trial court in post-conviction evidentiary hearing should determine if prisoner is able to secure an attorney).

650 Gagnon v. Scarpelli, 411 U.S. 778, 787-91 (1973) (holding that counsel is not required at proceeding where revocation of probation or parole is at issue).

651 King v. Commonwealth, 387 S.W.2d 582, 585 (Ky. 1965). King is representative of this line of cases. It is interesting to recall that for many years Kentucky did not recognize a right to effective assistance of counsel from a privately retained attorney, the theory apparently being that the consumer should face the result of his or her own choice of counsel. See Sayre v. Commonwealth, 238 S.W. 737, 739 (Ky. 1922) (“A defendant who is sui juris cannot complain after the trial for the first time that he selected the wrong lawyer to represent him.”). In Rice v. Davis, 366 S.W.2d 153, 157 (Ky. 1963), the high court set aside a conviction for ineffectiveness of counsel despite the fact counsel was privately retained, but the court reversed itself in 1965. King, 387 S.W.2d at 585; see Carl Ousley, Ineffective Assistance of Appointed or Employed Counsel in Kentucky. Why a Difference?, 32 KY. ST. B.J. 38 (1968) (criticizing the court’s dual standard); cf. Ivey v. Commonwealth, 655 S.W.2d 506, 509 (Ky. Ct. App. 1983) (abandoning the dual approach in 1983).
adopted almost a decade earlier by the Sixth Circuit Court of Appeals. Analysis of two factors served as the basis for the new test. First, the court had to determine whether appointed counsel was reasonably likely to render effective assistance. Second, the court had to decide whether such assistance actually was rendered in that case.

Then, in 1984, the U.S. Supreme Court rewrote the standard for determining ineffective assistance of counsel in _Strickland v. Washington_, probably the most important criminal case of the decade. The

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62 Henderson v. Commonwealth, 636 S.W.2d 648, 650 (Ky. 1982) (utilizing the standard adopted by the Sixth Circuit Court of Appeals in _Beasley v. United States_, 491 F.2d 687, 695 (6th Cir. 1974)). As a legal theory, the "farce and mockery" test protected convictions but received strong criticism for being overly vague and inadequate. See, e.g., Bruce F. Clark, Comment, _Kentucky's Standard for Ineffective Counsel: A Farce and a Mockery?_, 63 KY. L.J. 803, 820-21 (1974-1975).

As the Sixth Circuit Court of Appeals explained in _Beasley_: "We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance." _Beasley_, 491 F.2d at 696. The Kentucky Supreme Court's adoption of the new standard was justified for many reasons, but none was more important than the fact that the test in _Beasley_ was already being applied to Kentucky convictions reaching the Sixth Circuit Court of Appeals on federal petitions for writ of habeas corpus. See Berry v. Cowan, 497 F.2d 1274, 1276 (6th Cir. 1974) (recognizing that Kentucky high court had applied the wrong standard and citing _Beasley_).

In _Perkins v. Commonwealth_, 516 S.W.2d 873, 874 n.1 (Ky. 1974), cert. denied, 421 U.S. 971 (1975), which was decided soon after _Beasley_, Kentucky's highest court specifically rejected the _Beasley_ standard. However, later Kentucky appellate opinions resolved constitutional issues under the _Beasley_ standard anyway in an effort to defend convictions on federal habeas corpus. See, e.g., Bishop v. Commonwealth, 549 S.W.2d 519, 523 (Ky. Ct. App. 1977) (concluding that counsel was effective under both state and federal standards).

63 Presumably this portion of the analysis would involve an examination of counsel's training, credentials, and previous experience. See, e.g., _Ivey_, 655 S.W.2d at 509 (noting that counsel for Ivey "was an experienced criminal defense attorney who had been involved in a great number of criminal trials"). In actuality these factors are not very helpful, since an inexperienced attorney with enough dedication and time is capable of providing exceptional representation and an apparent lack of preparation need not result in ineffectiveness. This prong of the test was always considered of little importance because "it would make no sense to reverse a conviction where an ill-prepared lawyer unexpectedly did an adequate, or more than adequate, job." William H. Fortune & Sarah N. Welling, _Kentucky Law Summary: Criminal Procedure_, 72 KY. L.J. 381, 388 (1983-1984) (stating that, in actuality, "the issue has always been whether the attorney in fact did render reasonably effective assistance").

64 See, e.g., _Ivey_, 655 S.W.2d at 509 (recognizing that the second part of the _Henderson_ test requires finding whether counsel, in fact, rendered reasonably effective assistance); _Henderson_, 636 S.W.2d at 650 (adopting the _Beasley_ standard).

Kentucky Supreme Court, in *Gall v. Commonwealth*, adopted the *Strickland* standard for ineffective assistance of counsel.\(^{656}\)

The basic premise underlying the *Strickland* decision is that effective assistance of counsel is required to insure a fair trial.\(^{657}\) Actual analysis of an ineffective assistance of counsel claim under *Strickland* has two components: deficient performance and prejudice. As for this first component, the standard, therefore, "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."\(^{658}\) Counsel's actual qualifications or experience are therefore immaterial; the important issue is the actual assistance rendered, which is determined by the court on a case-by-case basis.\(^{659}\) For example, in *Holland v. Commonwealth*, the court held that the failure to subpoena family members who would have testified in support of the defendant's alibi defense constituted ineffective assistance.\(^{660}\) Yet in a seemingly similar case, the appellate court reached the opposite conclusion, reasoning that "merely failing to produce witnesses in the appellant's defense is not error in the absence of any allegation that their testimony would have compelled an acquittal."\(^{661}\)

Judicial scrutiny of ineffective assistance of counsel claims must be "highly deferential" and therefore consistent with a proper reluctance of appellate courts to second-guess strategic decisions of trial counsel and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"\(^{662}\) In essence, ineffec-

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656 702 S.W.2d 37, 39 (Ky. 1985) (noting that it was bound by the *Strickland* principles), cert. denied, 478 U.S. 1010 (1986). Kentucky first utilized the new standard in Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky. Ct. App. 1985) (following the rule in *Strickland*).

657 466 U.S. at 686.

658 *Id.*

659 The standard for effective assistance of counsel is based upon actual performance. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688; see United States v. Cronic, 466 U.S. 648, 648 (1984) (explaining that defendant's case was counsel's first jury trial); cf. Stumph v. Commonwealth, 408 S.W.2d 618, 620 (Ky. 1966) (holding that failure, in a capital case, to grant a one-week continuance to two inexperienced attorneys was an abuse of discretion).


662 *Strickland*, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).
tive assistance of counsel will not lie on appeal in matters which may be fairly attributed to a reasonable trial strategy — for example, the decision to offer only limited evidence of insanity in order to avoid a "battle of the experts" over the issue.\textsuperscript{663} That which is "normal" to defense representation is not determinative of what is effective. For example, it is "normal" for defense counsel to make a motion for directed verdict regardless of the evidence presented in the particular case. Such a deviation from accepted practice, however, is legally meaningless unless the evidence was actually insufficient to establish an element of the charged offense.\textsuperscript{664} Failure to present character witnesses or make a closing argument are other pertinent examples which fall into this category.\textsuperscript{665}

Additional allegations concern the failure to challenge jurors for cause,\textsuperscript{666} the failure to demand separation of the witnesses,\textsuperscript{667} and the failure to request or provide that a trial be stenographically reported.\textsuperscript{668} Still other allegations raise issues regarding trial strategy,\textsuperscript{669} conflicts of

\textsuperscript{663} Gall v. Commonwealth, 702 S.W.2d 37, 40 (Ky. 1985), \textit{cert. denied}, 478 U.S. 1010 (1986).

\textsuperscript{664} Keeton v. Commonwealth, 459 S.W.2d 612, 613 (Ky. 1970) (refusing to find ineffective assistance of counsel for failure to move for directed verdict where directed verdict would not have been granted); Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky. Ct. App. 1985) (denying inmate's motion because no prejudice from failure of counsel to move for directed verdict occurred).

\textsuperscript{665} See, e.g., Ivey v. Commonwealth, 655 S.W.2d 506, 511 (Ky. Ct. App. 1983) (holding that attorney who did not make opening statement, cross-examine the prosecuting witness, or put on evidence-in-chief was not ineffective).

\textsuperscript{666} Dupin v. Commonwealth, 408 S.W.2d 443, 444 (Ky. 1966) (holding that the defendant had received effective assistance of counsel despite his attorney's alleged refusal to challenge certain jurors during voir dire proceeding or to allow appellant to testify).

\textsuperscript{667} McHenry v. Commonwealth, 490 S.W.2d 766, 768 (Ky. 1973) (holding that defense counsel's alleged failure to demand separation of witnesses, to subpoena witnesses, and to perfect an appeal was not prejudicial to defendant).

\textsuperscript{668} Tipton v. Commonwealth, 398 S.W.2d 493, 495 (Ky. 1966) (holding that alleged denial of court reporter at trial did not justify reversal of conviction), \textit{overruled on other grounds} by Stinnett v. Commonwealth, 446 S.W.2d 292 (Ky. 1969).

\textsuperscript{669} Because even the "best criminal defense attorneys would not defend a particular client in the same way," these allegations are subject to the strong presumption that counsel's conduct constitutes reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 689 (1984); \textit{see} Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993) ("After every trial, win or lose, candid lawyers can think of ways they might have done better."); \textit{cert. denied}, 114 S. Ct. 703 (1994); Ramsey v. Commonwealth, 399 S.W.2d 473, 475 (Ky.) ("Effective assistance of counsel does not guarantee error-free representation nor does it deny counsel freedom of discretion in determining the means of presenting his client's case."); \textit{cert. denied}, 385 U.S. 865 (1966); Hibbs v. Common-
interest; pressure, duress, or "insistence" by counsel that the accused plead guilty; disinterested counsel; or counsel who was prejudiced against a defendant who refused to enter a guilty plea.

Wealth, 570 S.W.2d 642, 644 (Ky. Ct. App. 1978) (explaining that the fact that another attorney might have used a different approach was immaterial); Relford v. Commonwealth, 558 S.W.2d 175, 178 (Ky. Ct. App. 1977) (holding that defense counsel was effective 'despite failure to insist on an accomplice instruction or to contest search and seizure). As indicated by Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968), the appellate courts have had very little patience with this approach:

We have previously pointed out, in what we believe to be forceful language, that this court absolutely will not turn back the clock and retry these cases in an effort to second guess what counsel should have or should not have done at the time. To follow such proceeding would be to deprive the judgments of our courts of any finality. The appellant is entitled to a fair trial under the law. He is not entitled to try the court and his lawyer and the law. . . . Appellant was convicted after a plea of guilty was entered by him freely and voluntarily in the presence of counsel and with full advice of competent counsel. We can not and will not probe and search this record and psychoanalyze the people involved in this proceeding in order to seek out some flimsy [sic] excuse to give this appeal a semblance of validity.

See generally Penn v. Commonwealth, 427 S.W.2d 808, 809 (Ky. 1968) ("RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court."); Dupin, 408 S.W.2d at 444 (explaining that counsel's failure to challenge jurors on voir dire and to have the defendant take the stand was "mere disagreement" on how the trial should be conducted).

Dawson v. Commonwealth, 498 S.W.2d 128, 129 (Ky. 1973) (involving trial counsel who was also city attorney); Cole v. Commonwealth, 441 S.W.2d 160, 161-62 (Ky. 1969) (stating that the fact defense counsel was also city attorney and therefore a part-time prosecutor should have been raised on appeal); Doss v. Commonwealth, 396 S.W.2d 807, 807 (Ky. 1965) (involving an alleged conflict where defendant initially claimed he was represented by an appointed attorney who was also the master commissioner).

Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970) (explaining that defendant was not denied effective counsel when he presented no evidence that his guilty plea had been coerced); Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967) (holding that defense counsel's advice that defendant plead guilty was proper and sound); Burton v. Commonwealth, 394 S.W.2d 933, 934 (Ky. 1965) (explaining that alleged "insistence" by counsel that defendant plead guilty may actually have been good advice).

Dupin, 408 S.W.2d at 444 (involving disinterest on the part of counsel who allegedly first claimed defendant could beat the charges in exchange for $100, but, upon learning defendant was indigent, allowed defendant to receive four-year prison sentence).

In Short v. Commonwealth, 394 S.W.2d 937, 938 (Ky. 1965), the court stated:

The second claimed element of ineffective assistance of counsel based on claimed "prejudice toward defendant because he would not plead guilty" was a matter entirely between appellant and his employee, his counsel. If he was not satisfied with the conduct of his attorney, he could have discharged him and
In regard to the second component of Strickland, the burden is on the defendant to affirmatively prove prejudice, which is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The trial court may also consider and decide the question of prejudice before it actually determines whether trial counsel was ineffective, for if the movant has failed to show that the result would have been different but for the alleged error, the trial court may decide the issue without an evidentiary hearing and without a determination that error even occurred.

Several other problems add to the prisoner's difficulties in affirmatively proving a violation under the strict standard imposed by Strickland. First, Strickland recognizes that the "presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." Second, in Kentucky, a claim of ineffective assistance of counsel waives the attorney-client privilege for all matters relevant to the claim. Finally, a prisoner whose conviction has been affirmed on direct appeal is not entitled to claim the privilege against self-incrimination on matters relevant to an RCr 11.42 hearing.

3. Application of the Performance Standard

In the thirty years since the adoption of RCr 11.42, petitioners have raised numerous motions requesting vacation of sentence based upon specific claims of ineffective assistance of counsel. As with any collateral attack, a complaint alleging ineffective assistance of counsel must be

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675 Brewster, 723 S.W.2d at 864-65.

676 466 U.S. at 697.


678 McQueen v. Commonwealth, 721 S.W.2d 694, 704 (Ky. 1986), cert denied, 481 U.S. 1059 (1987); Gall, 702 S.W.2d at 45.
grounded in specific facts which are provided to the court and opposing counsel in the motion. In *Brooks v. Commonwealth*, for example, conclusory allegations that uncompensated counsel failed to exert sufficient effort to prepare a defense and thereby compelled Brooks to plead guilty were refuted by the record. Since the movant had failed to indicate the nature of the defense that counsel should have raised, no arguable basis for delay existed and a hearing on the motion was not required. This case represents a long line of ineffective assistance of counsel cases where failure to make specific allegations was fatal to the defendant's case.

Where ineffective assistance of counsel on a guilty plea is claimed, the ultimate question to be decided is simply whether the actual assistance rendered allowed the defendant to enter a plea intelligently and voluntarily. An RCr 11.42 motion brought in a later case cannot challenge the validity of convictions obtained through guilty pleas in prior cases, as this is not the purpose of an RCr 11.42 motion. Furthermore, a guilty plea as a persistent felon (habitual criminal) in a prior case precludes raising the issue of the constitutionality of the first conviction in subsequent persistent felony offender trials. Failing to raise the issue when first available is considered a waiver. This situation merely exemplifies the general rule that waiver may limit the issues raised in any subsequent proceeding, whether a guilty plea or a conviction after trial is involved.

A claim of ineffective assistance of counsel, however, is very effective in allowing a movant to at least present "waived" issues through the back door by arguing that counsel was ineffective in preserving the issue for appellate review, in presenting it at an earlier proceeding, or in otherwise handling the issue in a competent manner. In 1984, the Kentucky Court of Appeals, in *Dillingham v. Commonwealth*, reversed

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679 See *supra* notes 426-35 and accompanying text.
680 447 S.W.2d 614, 617-18 (Ky. 1969).
681 Id. at 618.
683 *Alvey v. Commonwealth*, 648 S.W.2d 858, 859 (Ky. 1983) (denying defendant in a persistent felony offender case the right to challenge the validity of guilty pleas in prior cases, reasoning that the defendant should not be allowed "a second bite at the apple").
684 Id. at 860.
as a result of just such a "back door" argument. The appellate court declined on direct appeal to review the merits of the defendant's claim that a non-qualifying conviction had been improperly used to enhance his sentence as a persistent felony offender, since the issue had not been preserved by timely objection. However, the appellate court reviewed the claim on RCr 11.42 when raised in the context of ineffective assistance of counsel.

Dillingham stands in contrast to the use of RCr 11.42 to merely relitigate issues which were preserved but decided adversely to the inmate on direct appeal. An example of this tactic may be found in Gall v. Commonwealth, a death penalty RCr 11.42 proceeding in which many of the defendant's multiple ineffective assistance of counsel claims simply recast direct appeal issues for RCr 11.42. For example, a claim based on the failure of the trial court to sustain a change of venue motion, raised and decided on direct appeal, became on RCr 11.42 a claim of the failure of counsel to present an effective change of venue motion. Allegedly improper instructions to the jury, an issue decided adversely to the movant on direct appeal, became a claim of ineffective assistance of counsel in tendering the allegedly defective instruction. Normally, such an approach is unsuccessful and merely obscures more meritorious RCr 11.42 claims that have not already been presented and decided and that are therefore more worthy of the appellate court's attention.

A frequent allegation is that the failure of counsel to request a continuance is by itself grounds for relief, with the implication being that counsel was unprepared for trial. A factor which carries great weight

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68 Id. at 308.
69 Id.
70 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010 (1986).
70 Gall, 702 S.W.2d at 43; supra notes 662-73 and accompanying text (providing further examples).
71 The fact that a defendant believes counsel should have requested a continuance is not sufficient to support a motion to vacate judgment. If counsel did not request a continuance, it is presumed that counsel did not feel more time was necessary. Uwanich v. Commonwealth, 390 S.W.2d 658, 659 (Ky. 1965) (holding failure to request continuance insufficient to overturn conviction for armed robbery); Maye v. Commonwealth, 386 S.W.2d 731, 733 (Ky. 1965) (holding failure to request continuance irrelevant in light of defendant's written confession). Even the insistence of the defendant that a continuance be requested and the failure of counsel to do so would not constitute ineffective assistance if the counsel's judgment was itself reasonable. Jones v. Commonwealth, 388 S.W.2d 601,
in this analysis is the belief of counsel that the time to prepare was adequate, as indicated by either a positive statement announcing readiness for trial or a failure to ask for a continuance.\textsuperscript{692} However, where counsel, believing the case was sufficiently prepared, did not request a continuance, the defendant's burden of affirmatively proving ineffective assistance of counsel is difficult to meet.\textsuperscript{693} In 1965, for example,

\begin{footnotes}
603 (Ky. 1965) (holding that disagreement between counsel and defendant as to continuance was not enough to grant motion to vacate conviction); \textit{accord} Fyffe \textit{v. Commonwealth}, 408 S.W.2d 472, 473 (Ky. 1966) (holding that since record showed that counsel was appointed eight days before trial and that no continuance was sought, allegation of inadequate time for preparation was properly rejected); Hargrove \textit{v. Commonwealth}, 396 S.W.2d 75, 76 (Ky. 1965) (holding that failure of counsel, allegedly appointed five minutes before trial, to request continuance was insufficient to vacate conviction).

692 Stidham \textit{v. Commonwealth}, 444 S.W.2d 110, 111 (Ky. 1969). The Kentucky court stated:

- When an indigent defendant is given the lawyer whom he requests by name and that lawyer agrees to a trial date and later states that he had sufficient time to prepare defense, we believe it would be strange indeed to accept the unsupported statement of the accused that his lawyer did not have sufficient time. We believe this contention to be completely without merit. \textit{Stidham}, 444 S.W.2d at 111.

- See \textit{Fultz v. Commonwealth}, 398 S.W.2d 881, 882 (Ky. 1966) (refusing to overturn defendant's conviction where defendant dismissed his original counsel and trial court denied him new counsel); \textit{Collins v. Commonwealth}, 392 S.W.2d 77, 78 (Ky.) (holding that the "fact that a person is tried and convicted the same day counsel is appointed to represent him does not necessarily constitute a denial of due process"), \textit{cert. denied}, 382 U.S. 881 (1965); \textit{Tarrence v. Commonwealth}, 265 S.W.2d 40, 47 (Ky. 1953) (holding that defendant had received a fair trial and was not prejudiced by denial of continuance), \textit{cert. denied}, 348 U.S. 899 (1954). \textit{Contra} \textit{Vaughan v. Commonwealth}, 505 S.W.2d 768, 770 (Ky. 1974) (holding that 15-minute conference just prior to trial with newly appointed attorney who also had a conflict of interest was not adequate time for preparation, even if attorney did not ask for a continuance), \textit{overruled by} \textit{Henderson v. Commonwealth}, 636 S.W.2d 648 (Ky. 1982).

693 The fact that counsel may have met with the defendant only briefly is not of sufficient importance to require an evidentiary hearing unless the prisoner can demonstrate that communication was somehow frustrated or that the attorney refused to talk to him or her. \textit{Lewis v. Commonwealth}, 472 S.W.2d 65, 67 (Ky. 1971) ("The brief interviews appellant had with his counsel could well be adequate under the circumstances."), \textit{cert. denied}, 405 U.S. 1018 (1972); \textit{Smith v. Commonwealth}, 404 S.W.2d 285, 285-86 (Ky. 1966) (holding the fact that defendant's counsel advised guilty plea after short consultation to be insufficient to vacate judgment).

In most cases, the record will indicate that adequate communication between the defendant and counsel took place. In \textit{Lawson v. Commonwealth}, 386 S.W.2d 734, 735 (Ky.), \textit{cert. denied}, 381 U.S. 946 (1965), the appellant stated that his attorney was prejudiced and had failed to assist or defend him and that he had not been advised of his rights. The court held that the trial court was correct in overruling the motion without a
Kentucky’s high court held an allegation that a defendant was given a total of “thirty seconds or less” to confer with counsel, without more, to be insufficient to entitle the defendant to a hearing because “[h]is attorney could ask, ‘are you guilty,’ and get a yes or no answer in less than three seconds.” Similarly, a claim that movant was denied an attorney “until the date of trial,” without an allegation of prejudice, does not entitle the movant to a hearing. These cases demonstrate that the appellate courts require more than a mere conclusory allegation by the movant of insufficient time. As with other claims of ineffective assistance, the claimant bears the burden of proof and must demonstrate prejudice based on the alleged lack of preparation. This burden is particularly hard to overcome in a guilty plea case.

It is also not ineffective assistance to fail to investigate an alleged constitutional violation about which the attorney knows nothing. Unless the defendant has indicated that an earlier conviction was the result of an unconstitutionally obtained guilty plea, the attorney cannot be faulted for

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hearing because the record showed that appellant entered a plea of guilty to the rape charge; he received [the minimum sentence]. Appellant does not assert that counsel badgered him into entering a guilty plea, nor does he claim that he failed to understand the consequences of his guilty plea. Under these circumstances, the record shows on its face that no basis has been laid upon which to support the claim of inadequate counsel.

Finally, in Cole v. Commonwealth, 441 S.W.2d 160, 161 (Ky. 1969), the court considered a claim that counsel had refused to consult with the prisoner or prepare a defense. The court rejected this argument because sufficient evidence in the record “support[ed] the findings of the trial court that this charge was unfounded.” Id.

Burton v. Commonwealth, 394 S.W.2d 933, 934 (Ky. 1965).

Morgan v. Commonwealth, 399 S.W.2d 725, 726 (Ky. 1966); accord Hibbs v. Commonwealth, 570 S.W.2d 642, 644 (Ky. Ct. App. 1978) (explaining that the fact defense counsel, who had 27 years of experience, had secured minimum sentence for defendant overrode allegations of unpreparedness on counsel’s part); Fyffe, 408 S.W.2d at 473.

Jordan v. Commonwealth, 445 S.W.2d 878, 879 (Ky. 1969) (explaining that defendant failed to prove inadequate representation and record indicated counsel’s diligent efforts).

Taylor v. Commonwealth, 545 S.W.2d 76, 77 (Ky. 1976).

According to the court in Harris v. Commonwealth, 456 S.W.2d 690, 692 (Ky. 1970), “When the record shows that counsel has been appointed sufficiently far in advance of the time for trial and a plea of guilty is ultimately entered, a bare allegation that the attorney did not adequately prepare a defense is insufficient.” Accord Cox v. Commonwealth, 465 S.W.2d 76, 77 (Ky. 1971) (holding that four days was sufficient time for effective representation of counsel where defendant had pled guilty to manslaughter).
failing to make an independent check. In another recent case, the Kentucky Supreme Court also reaffirmed that the mere fact that an attorney consults with the client, investigates the case, and then recommends that the client plead guilty does not constitute ineffective assistance of counsel.

Properly excluded from consideration in an RCr 11.42 motion are claims of ineffective assistance of appellate counsel, which most frequently arise because counsel either fails to take an appeal or lets an appeal lapse. Although this issue has received considerable attention in the last ten years, it is now settled that a defaulted appeal cannot be restored by a trial court through RCr 11.42; this approach is sensible, since restoration of a right to appeal has nothing to do with attacking the judgment itself. The Kentucky Supreme Court now requires claims of ineffective assistance of appellate counsel to be presented by motion directly to the appropriate appellate court, which can then resolve the issue and decide the proper remedy. Nor can RCr 11.42 be used to challenge counsel’s alleged ineffectiveness merely because the defendant disagrees with the way a completely processed appeal was handled. Should a request for reinstatement of an appeal lost as a result of

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70 Beecham v. Commonwealth, 657 S.W.2d 234, 236-37 (Ky. 1983).
71 Section 115 of the Kentucky Constitution guarantees one appeal in each case as a matter of right. This state right is enforceable under the U.S. Constitution and includes effective assistance of appellate counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985) (holding that the Fourteenth Amendment guaranteed defendant effective counsel on first appeal).

The Kentucky appellate courts waffled as to whether RCr 11.42 could be used to raise: (1) a claim of ineffective counsel based upon a failure to timely file a notice of appeal (for which the remedy is the granting of a belated appeal); or (2) a claim that counsel procedurally defaulted the appeal after the notice had been filed (for which the remedy is the reinstatement of the appeal). See Vunetich v. Commonwealth, 847 S.W.2d 51, 51-52 (Ky. 1992); Thompson v. Commonwealth, 736 S.W.2d 319, 321-22 (Ky. 1987); Ewing v. Commonwealth, 734 S.W.2d 475, 476 (Ky. 1987); Commonwealth v. Wine, 694 S.W.2d 689, 694 (Ky. 1985).

72 Wine, 694 S.W.2d at 694.
73 Vunetich, 847 S.W.2d at 51-52; Hicks v. Commonwealth, 825 S.W.2d 280, 281 (Ky. 1992); Thompson, 736 S.W.2d at 320-21. The fact that an RCr 11.42 motion raising the same issue has been overruled does not affect the right to file a motion for ineffective assistance of appellate counsel. Ewing, 734 S.W.2d at 476.

74 Vunetich, 847 S.W.2d at 51 (holding that defendant could not claim ineffective assistance of appellate counsel when an appellate court had fully reviewed defendant's initial claim of ineffective assistance under KY. R. CRIM. P. 11.42); Hicks, 825 S.W.2d at 281 (denying defendant's claim of ineffective appellate counsel when appeal had been completely processed).
ineffective assistance of counsel require a hearing, the trial court is the appropriate forum. However, a defendant who enters a guilty plea normally waives his or her right to a direct appeal, so such an individual cannot later claim ineffective assistance of counsel on the ground that no notice of appeal from the judgment of conviction was filed. This use of RCr 11.42 is foreclosed.

4. Appellate Review of Counsel's Performance

Once the trial court has applied the correct standard to determine whether the defendant received effective assistance of counsel, the findings of the trial court, if supported by “sufficient substantive evidence,” will not be disturbed on appeal from the denial of an RCr 11.42 motion to vacate. Or, as interpreted in Ivey v. Commonwealth, the matter is “an issue of fact to be determined by the trial court, and its findings will not be set aside unless they are clearly erroneous.” In other words, the essential factual determination is made by the trial court, and the defendant’s subjective beliefs are irrelevant. An indigent defendant has no right to new counsel and no claim of ineffective assistance of counsel merely because the defendant believed appointed counsel to be ineffective and was denied substitute counsel by the trial court. The court in Lewis v. Commonwealth discussed the appropriate standard of appellate review in cases where no hearing was held. Lewis claimed that his appointed attorney refused to take the case to trial and was unprepared to do so, that Lewis himself had not even understood the charges until the day of trial, and that he was therefore forced to plead guilty or go to trial totally unprepared. The trial judge subsequently ruled against Lewis without requiring a hearing. On appeal, these allegations were held sufficient to require a hearing, based on the standard of review applied by the appellate court, which was “confined to whether the motion on its face states grounds that are not conclusively

703 Thompson, 736 S.W.2d at 322; Jones v. Commonwealth, 714 S.W.2d 490, 491 (Ky. Ct. App. 1986).
704 Greer v. Commonwealth, 713 S.W.2d 256, 257 (Ky. Ct. App. 1986) (holding that where defendant waives right to appeal by pleading guilty, defense counsel cannot be considered ineffective for failure to file notice of appeal).
706 655 S.W.2d 506, 509 (Ky. Ct. App. 1983); see also Robbins v. Commonwealth, 719 S.W.2d 742, 744 (Ky. Ct. App. 1986).
707 Henderson v. Commonwealth, 636 S.W.2d 648, 651 (Ky. 1982).
708 411 S.W.2d 321, 322 (Ky. 1967) (collecting cases).
refuted by the record and which, if true, would invalidate the conviction.\footnote{111} Considering the high volume of cases alleging ineffective assistance of counsel, it is somewhat surprising that more claims are not found to be meritorious on appeal. Although most of the RCr 11.42 claims which merited reversal and a new trial were ineffective assistance of counsel challenges, the vast number of inmate litigants were unsuccessful. In reviewing the cases that did not require reversal, it is apparent that the usual weakness in the defendant's scenario is the failure to demonstrate to the appellate court that the alleged error, if it occurred, would have made any difference — that it was prejudicial.\footnote{112} The courts simply will not second-guess defense counsel's reasonable performance. As explained in \textit{McHenry v. Commonwealth}, an appellate court faced with "charges of ineffectiveness [which] are based on trial tactics over which counsel has a wide discretion . . . . will not fault a lawyer for using a reasonable course which at the time seemed to be the proper one to follow."\footnote{113} In summary, a claim of ineffective assistance of counsel is remarkably easy to make. The hard part for most defendants is proving that counsel's tactics or actions were unreasonable and that substantial prejudice to the defendant was the result. Very few defendants are successful.

\textbf{C. Attacking a Guilty Plea}

The ability of a criminal defendant to waive the constitutional right to trial by jury has a long history in American jurisprudence and, along with plea bargaining, is administratively indispensable in most jurisdictions. As a matter of policy, a presumption against waiver of basic constitutional rights exists, and the validity of a waiver depends "in each case, upon the particular facts and circumstances surrounding that case."\footnote{114} Under Kentucky case law, an unconditional plea of guilty "waives all defenses except that the indictment did not charge an offense."\footnote{115} If properly admitted, a guilty plea operates as a "break in
Attacks on a guilty plea, therefore, whether raised on direct appeal or by RCr 11.42, generally center on those aspects indicating the plea itself was not "knowing" or "voluntary." In 1969, the U.S. Supreme Court, in *Boykin v. Alabama*, revolutionized the taking of guilty pleas by requiring trial judges to build a guilty plea record so that the existence of a valid waiver of basic constitutional rights could be determined from the record on appeal. In *Boykin*, the record was silent, as the defendant had been asked no questions and had said nothing to the court. Holding that waiver could not be presumed, the *Boykin* Court established standards to be utilized by state trial courts in determining valid waiver. In fact, RCr 8.08 conforms to the requirements of *Boykin* and requires that the trial court "shall not accept the [guilty] plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." To raise this issue, the motion to vacate must contain "an affirmative statement that the guilty plea was involuntary or made without understanding of the nature of the charge" before review will be undertaken. This requirement is an unfortunate necessity to insure that such is in fact the contention of the movant in his or her signed and verified (and therefore subject to perjury prosecution) motion to vacate.

In reviewing the motion and record for constitutional error, the Kentucky high court has directed that all the circumstances surrounding

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717 395 U.S. 238 (1969). One limitation on *Boykin* is that it is not applied retroactively, so that the finality of guilty pleas entered prior to 1969 is strengthened. *Hendron* v. Cowan, 532 F.2d 1081, 1082 (6th Cir. 1976); *Lewis* v. Commonwealth, 472 S.W.2d 65, 66 (Ky. 1971), cert. denied, 405 U.S. 1018 (1972).

718 KY. R. CRIM. P. 8.08.

719 *Lucas* v. Commonwealth, 465 S.W.2d 267, 268 (Ky. 1971) (holding that the defendant's failure to include an affirmative statement that guilty plea was involuntary or made without understanding of the charge precluded post-conviction relief).
The plea may be considered—not just the words that are said in the proceeding itself. These circumstances include the individual defendant's background and experience with the criminal justice system. Although a new proceeding is required if the record of the plea is completely silent, the record of the guilty plea need not be perfect and if it contains some evidence of understanding it can be supplemented by an evidentiary hearing. The court's analysis is also subject to the common sense requirement that a "knowing, voluntary and intelligent waiver" does not envision the defendant necessarily being "informed of every possible consequence and aspect of the guilty plea." Nor does the record have to reflect the separate waiver of

720 Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (holding that, after looking at all the evidence, the defendant's guilty plea had been entered voluntarily); Kiser v. Commonwealth, 829 S.W.2d 432, 434 (Ky. Ct. App. 1992) (holding that defendant's guilty plea was voluntary, as counsel had explained constitutional rights and allegations in the indictment); Centers, 799 S.W.2d at 54 (explaining that it is appropriate to look at accused's demeanor, background, and experience in deciding whether a plea was voluntary); Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. Ct. App. 1986) (holding that, in light of all evidence, counsel's advice to plead guilty was sound); Lynch v. Commonwealth, 610 S.W.2d 902, 904 (Ky. Ct. App. 1980) (holding that the evidence presented at hearing, including demeanor, background, and appellant's "continuous relationship" with Kentucky's criminal justice system, supported court's assessment that guilty plea was voluntary). But see Scott v. Commonwealth, 555 S.W.2d 623, 627 (Ky. Ct. App. 1977) (holding that the trial court's failure to follow KY. R. CRIM. P. 8.08 requires reversal for a new trial).

721 Centers, 799 S.W.2d at 54; Lynch, 610 S.W.2d at 904.

722 As the court explained in Lynch, 610 S.W.2d at 904: "[W]hen the record contains some indicia of understanding on the part of the accused, the correct path is to remand for an evidentiary hearing on the issue. Based on the outcome of that hearing, either the plea stands or the judgment is reversed with instructions for a new trial." See Kotas, 565 S.W.2d at 447; Hartsock v. Commonwealth, 505 S.W.2d 172, 173 (Ky. 1974) (holding that a new trial was not required and that remand for evidentiary hearing was appropriate because plea was fairly recent and record was not altogether silent).

723 Turner v. Commonwealth, 647 S.W.2d 500, 501 (Ky. Ct. App. 1982) (explaining that the failure of trial court to inform defendant of mandatory service nature of his sentence did not violate due process); see Jewell v. Commonwealth, 725 S.W.2d 593, 594-95 (Ky. 1987) (involving a defendant who claimed his guilty plea was invalid because he was not informed of the range of sentences which could be imposed); Holcomb v. Commonwealth, 441 S.W.2d 140, 142 (Ky. 1969) (holding that the defendant intelligently and voluntarily waived right to a jury trial by pleading guilty); Centers, 799 S.W.2d at 55. In Holcomb, 441 S.W.2d at 142, the court expressed this premise quite well:

The appointment of counsel would be a mockery if his professional advice [to plead guilty] was ineffective because the defendant was not specifically advised of each and every consideration upon which the attorney based his judgment. . . . The wheels of justice cannot be reversed every time a defendant who has been sentenced on a guilty plea has a speculative afterthought that he may get off better the next time around, with or without a jury trial.
each of the defendant's enumerated rights. If the record turns out to be insufficient, then the proper remedy is to allow the movant to withdraw the plea.

This area of the law still engenders considerable uncertainty and turmoil. The recommended course of action for bench and bar is to make the guilty plea proceedings as accurate and complete as possible, including in the record specific questions directed toward the defendant's counsel. On appeal, the RCr 11.42 record will be examined to determine whether the trial court's finding of fact and conclusion of law that the plea was entered into voluntarily was clearly erroneous.

Over the years, incarcerated defendants have used RCr 11.42 to advance a variety of imaginative claims purporting to show that their guilty pleas did not involve the knowing and voluntary waiver of basic constitutional rights required by Boykin. In one such example, it was argued that the guilty plea was the unwanted result of taking "nerve medicine" which made the defendant "drowsy," a contention found to be completely without merit in Renfrow v. Commonwealth. Defendants have raised numerous other claims respecting the validity of a guilty plea, some indicating physical abuse. In Ellis v. Commonwealth, the defendant's claim that his guilty plea had been induced by solitary confinement and limited diet (imposed after a jailbreak attempt) was rejected because of the trial judge's diligent guilty plea inquiry. The Ellis situation was similar to that in Cunningham v. Commonwealth, where severe maltreatment, including beatings, allegedly rendered

Footnotes:
725 See the recently overruled case of Dunn v. Simmons, 877 F.2d 1275, 1279 (6th Cir. 1989), cert. denied, 494 U.S. 1061 (1990), overruled by Parke v. Raley, 113 S. Ct. 517 (1992), which required proof of the Boykin inquiry to be both clear and convincing and which placed the burden upon the state, not the petitioner. This radical departure from normal post-conviction practice indicates the confusion still existing more than 20 years after Boykin. See also United States v. Newman, 912 F.2d 1119, 1124 (9th Cir. 1990); United States v. Taylor, 882 F.2d 1018, 1031 (6th Cir. 1989), cert. denied, 496 U.S. 907 (1990). The Supreme Court's decision in Parke v. Raley, 113 S. Ct. 517 (1992), essentially overruling Dunn and returning the burden to the petitioner, has hopefully clarified the case law.
727 The Kentucky Administrative Office of the Courts has produced three forms which comprehensively cover not only the plea but also the plea bargain agreement. Their use was held constitutional in Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990).
729 459 S.W.2d 93, 94 (Ky. 1970).
730 462 S.W.2d 914, 915 (Ky. 1971).
the defendant's guilty plea involuntary. The Kentucky high court resolved
the issue against Cunningham on the basis of the trial court’s finding that
whatever hardships Cunningham suffered were the result of jail discipline and
were not sufficient to render his plea involuntary.

A plea may still be "voluntary" even though there are constant, perhaps
even unique, pressures on the defendant to enter a guilty plea, such as the
threat of the death penalty or a persistent felony offender charge if the case
proceeds to trial. The simple fact that by going to trial the defendant will
face the possibility of a stiffer sentence and that the defendant has been so
informed by counsel is not relevant to the inquiry. A guilty plea cannot
be considered involuntary merely because the defendant asserts that an
alleged involuntary confession or the purported existence of illegally obtained
evidence left him with no choice but to plead guilty. Where such
constitutional infringements exist, the defendant has the option of going to
trial and challenging admissibility at that time.

In many RCr 11.42 motions, the defendant questions his competency to
plead guilty. Under Kentucky law, the standard used to determine competency
to plead guilty is the same strict standard required to determine that a
defendant is competent to stand trial, a position recently upheld by the
United States Supreme Court.

Conley v. Commonwealth dealt with, under RCr 11.42, the question of
the trial court’s failure to require a competency hearing. A mental

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71 Id. at 84.
72 Id. at 84.
73 Helems v. Commonwealth, 456 S.W.2d 45, 46 (Ky. 1970) (involving threat of
death penalty); Cunningham, 447 S.W.2d at 83 (involving threat of persistent felony
offender or habitual criminal indictment); McFalls v. Commonwealth, 439 S.W.2d 78, 79
(Ky. 1969) (involving “pressure” from jailer and county sheriff that defendant would
receive probated sentence with a guilty plea).
74 Capps v. Commonwealth, 465 S.W.2d 42, 44 (Ky. 1971) (finding no coercion by
defense counsel in eliciting defendant’s guilty plea where counsel merely informed
defendant of the possible consequences of going to trial).
75 Wheeler v. Commonwealth, 462 S.W.2d 921, 922 (Ky. 1971) (holding that defendant
waived his right to challenge admissibility of his confession when he pled guilty).
77 Conley v. Commonwealth, 569 S.W.2d 81, 82-83 (Ky. 1969).
78 Id. at 84.
79 Id. at 84.
80 Id. at 83-84.
examination ordered after indictment revealed that the defendant was competent to stand trial. A second examination, designed to determine criminal responsibility on the day of the crime, was never completed because he pled guilty. The appellate court ruled that the trial court's action in ordering the initial examination did not create a "reasonable doubt" as to the defendant's competency to enter a valid guilty plea. If a defendant wishes to contest the issue of competency, then a request for additional examinations "must be made before the trial or guilty plea."

A defendant may also allege ineffective assistance of counsel in overturning a guilty plea. Under the U.S. Constitution, the performance of counsel in a guilty plea proceeding is analyzed under the standards of Strickland v. Washington. For such an attack to succeed, the RCr 11.42 challenge must cross several hurdles. First, the defendant must demonstrate that the activities of counsel were ineffective. Second, the defendant must prove prejudice by showing a "reasonable probability that, but for counsel's errors, he [the defendant] would not have pleaded guilty and would have insisted on going to trial." Finally, if the state is accused of not adhering to the plea bargain agreement, RCr 11.42 does not apply and the defendant should seek relief by appeal.

D. Sentencing Error

Error in sentencing is specifically enumerated under RCr 11.42 as a ground for relief. Not every sentencing error, however, rises to the level of

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70 Id. at 686.
71 Id.; see Mozee v. Commonwealth, 769 S.W.2d 757, 757-58 (Ky. 1989) (explaining that the trial court was not "absolutely bound" by medical experts in determining competency); Pate v. Commonwealth, 769 S.W.2d 46, 48 (Ky. 1989) (finding no duty to hold additional competency hearing absent change in defendant's condition).
72 446 U.S. 668, 694-96 (1984); see supra notes 655-78 and accompanying text; see also Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that, in a challenge to a guilty plea based on ineffective assistance of counsel, two-part Strickland test applies to evaluate counsel's competency and to determine whether counsel's alleged prejudice influenced the defendant's decision to plead guilty).
73 Hill, 474 U.S. at 59; Skaggs v. Commonwealth, 885 S.W.2d 318, 320 (Ky. Ct. App. 1994) (holding that appellant had not proved prejudice although grand jury was improperly empaneled); Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky. Ct. App. 1986) (explaining that errors of attorney must create reasonable probability that defendant would have otherwise insisted on going to trial); Sparks v. Commonwealth, 721 S.W.2d 726, 728 (Ky. Ct. App. 1986) (explaining that advice which was not unreasonable under the circumstances was not constitutionally defective).
a constitutional violation; clearly many do not. Often the sentencing error results from the failure of a sentencing court to follow the Kentucky Rules of Criminal Procedure or the sentencing statutes. A deviation from either rule or statute, however, is not generally sufficient to render the judgment void or otherwise lead to RCr 11.42 relief.

A whole series of cases has resulted from the failure of trial courts to follow RCr 9.84(2), which allows the court to impose sentence when the defendant enters a plea of guilty, except where death is within the statutory range of punishment.\(^\text{745}\) If the trial court, acting alone, imposed a sentence of less than death when death was an available alternative, the trial court's action would be merely erroneous.\(^\text{746}\) An error in violation of RCr 9.84(2), therefore, is not of sufficient constitutional dimensions to render the judgment void.\(^\text{747}\) Moreover, a right to have a jury recommend punishment is procedural and can be waived,\(^\text{748}\) after which the court is within its rights to impose sentencing.

\(^{745}\) E.g., Hobbs v. Stivers, 385 S.W.2d 76, 77 (Ky. 1964).

\(^{746}\) Id. (explaining that "error is not of constitutional proportions and does not invalidate the judgment").

\(^{747}\) See, e.g., id. This issue has been decided in several cases, but in each the trial court imposed a sentence of less than death, allowing the appellate court to find that the movant's constitutional rights had not been violated.

No case has decided the issue where death was the court-imposed sentence. It is extremely doubtful that the Kentucky Supreme Court would reach the conclusion that the error was not of constitutional proportions, unless jury sentencing was waived as in Bevins v. Commonwealth, 712 S.W.2d 932, 933-34 (Ky. 1986), cert. denied, 479 U.S. 1070 (1987).

The federal courts have also held that sentencing error under RCr 9.84(2) "does not raise a question of constitutional magnitude." Angelo v. Howard, 311 F. Supp. 1234, 1236 (E.D. Ky. 1970).


Kentucky is one of the few states, if not the only state, to retain jury sentencing. All efforts to establish judge sentencing in Kentucky have proven unsuccessful despite the widely recognized fact that jury sentencing produces grossly disparate sentences for the same class of crimes and fact patterns. The latest attempt was made in the 1992 Kentucky General Assembly, when a bill establishing judge sentencing was recommended as part of a package of legislation proposed by the General Assembly's Task Force on Sentences and Sentencing Practices, on which the author served as the representative of the Office of the Kentucky Attorney General. Other proposed revisions of this longstanding Kentucky tradition have also failed. See William H. Fortune, Kentucky Law Survey — Criminal Rules, 70 Ky. L.J. 395 (1981-1982) (reporting on the demise of the 1980 rules revision to incorporate judge sentencing). For early and well-reasoned criticism of jury sentencing in Kentucky, see generally John S. Palmore, After the Verdict: The Problem of Sentencing and Corrections in Kentucky, 26 KY. St. B.J. 32 (1962), and Charles Kerr, A Needed Reform in Criminal Procedure, 6 KY. L.J. 107 (1918-1919).
A further violation of the Kentucky Rules of Criminal Procedure, involving a defendant who was not informed at sentencing of his right to appeal, was alleged in *Butcher v. Commonwealth*; however, the motion to vacate under RCr 11.42 was still unsuccessful. In *Parker v. Commonwealth*, the movant's allegation that he had not been formally sentenced, as proper criminal procedure demanded, was refuted by the record. Other allegations of sentencing error have included the claim that running the inmate's sentences consecutively would "do more harm than good," and that delay in sentencing had deprived the court of jurisdiction over the defendant. Where, however, the trial court erroneously sentenced the defendant to a term of imprisonment greater or less than that allowed by law and the judgment can no longer be amended by the trial court, RCr 11.42 will lie and relief may be granted.

E. Venue

An unsuccessful trial motion for change of venue based upon prejudicial pretrial publicity must be argued on direct appeal. In fact, failure to do so bars further consideration of the issue unless the resulting prejudice was so substantial that the judgment was void and due process was thus violated. Unfortunately for most defendants, the same result

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749 473 S.W.2d 114, 114 (Ky. 1971) (noting that judge failed to notify defendant of his right to appeal but that no retroactive effect was given to KY. R. CRIM. P. 11.02(2)).
750 465 S.W.2d 280, 281 (Ky. 1971).
751 McBride v. Commonwealth, 432 S.W.2d 410, 410 (Ky. 1968) (considering pro se “motion for concurrent sentence” as motion under KY. R. CRIM. P. 11.42).
753 Commonwealth v. Marcum, 873 S.W.2d 207, 211-12 (Ky. 1994) (granting habeas corpus where petitioner had been erroneously sentenced to less than the statutory minimum, trial court had lost jurisdiction by improperly amending the judgment, and petitioner had already served the original sentence); Curtsinger v. Commonwealth, 549 S.W.2d 515, 516 (Ky. 1977) (granting KY. R. CRIM. P. 11.42 relief where court imposed probationary period greater than that authorized by law and probation was revoked during the improper time). Note that *Marcum*, a state habeas corpus case, did not preclude the use of RCr 11.42 in such a situation.
754 Yager v. Commonwealth, 436 S.W.2d 527, 528 (Ky. 1968) (explaining that failure to pursue venue issue at trial and on direct appeal constitutes waiver and precludes review under KY. R. CRIM. P. 11.42), *cert. denied*, 395 U.S. 939 (1969); Kiper v. Commonwealth, 415 S.W.2d 92, 95 (Ky.) (explaining that change of venue is within discretion of trial court), *cert. denied*, 389 U.S. 875 (1967); see Schooley v. Commonwealth, 556 S.W.2d 912, 917 (Ky. Ct. App. 1977) (explaining that, to justify relief, jurisdictional error
is attained even where the allegation is that proper venue was unproven or the trial court's finding of venue was incorrect. Because venue is a quasi-jurisdictional question which the law places within a trial court's discretion, it is an issue which must be brought on direct appeal. Therefore, assuming the trial court has general subject matter jurisdiction, even if the court makes an erroneous finding of a jurisdictional fact, the conviction remains valid unless the judgment is rendered "fundamentally unfair." Stated another way, the simple fact of insufficient proof of venue is not a ground for collateral attack on a judgment of conviction.

F. Evidence

Evidentiary issues arising out of a criminal proceeding have always proved troublesome for trial and appellate courts, as evidentiary goals of the prosecution and the defense conflict. Courts must constantly balance the rights of the defendant with the jury's need for information. Protecting the defendant from the use of evidence gathered by law enforcement in violation of the defendant's constitutional rights involves the use of the "exclusionary rule," a court-created policy intended to curtail improper law enforcement. Challenges to the admissibility of evidence — with the defense arguing that the evidence should be removed from the jury's consideration because of unconstitutional government action — are raised at trial and frequently result in an evidentiary hearing on the issue. If the motion to exclude is overruled, then the defendant must present the question to the appellate court on direct appeal; RCr 11.42 is unavailable.

Kentucky has lengthy experience with this process, as in 1920 it adopted an exclusionary rule which protected citizens against the fruits of an illegal search and seizure. Kentucky's adoption of an exclusionary rule must be of such magnitude to render conviction so fundamentally unfair that the defendant can be said to have been denied due process of law.

756 Schooley, 556 S.W.2d at 917.
757 Warner v. Commonwealth, 385 S.W.2d 62, 64 (Ky. 1964) (finding no showing of failure to prove venue at the trial level); Tipton v. Commonwealth, 376 S.W.2d 290, 290-91 (Ky. 1963) (holding that the basis of petitioner's "motion [was] not one on which a judgment could have been collaterally attacked").
759 Collier v. Commonwealth, 387 S.W.2d 858, 859 (Ky. 1965).
760 Younan v. Commonwealth, 224 S.W. 860, 867 (Ky. 1920).
ary rule occurred long before the U.S. Supreme Court's holding in Mapp v. Ohio applied this practice to all states.\textsuperscript{761}

In general, evidentiary issues are ill-suited to post-conviction relief because deciding such questions may thrust the appellate court into the jury's role of determining the weight of the evidence on either side. As stated in Warner v. Commonwealth, such claims are inappropriate and not cognizable in an RCr 11.42 proceeding because the "[a]dministration of criminal law would be utterly frustrated if post-conviction procedures such as RCr 11.42 could be made the basis for a retrial of conflicting evidence."\textsuperscript{762} Certainly evidentiary challenges have come under increased scrutiny in the last thirty years, but most of these claims are properly made only on direct appeal. Because of this position, the activities of law enforcement personnel remain relatively insulated in a post-conviction proceeding under RCr 11.42. This approach has not, however, prevented such claims from being raised.

1. Searches and Seizures

Most RCr 11.42 claims against law enforcement personnel arise from allegations that evidence was procured through an unconstitutional search and seizure. The Kentucky high court, however, has made clear through numerous holdings that an admittedly illegal search and seizure does not provide a ground for RCr 11.42 relief.\textsuperscript{763} The basic principle was stated in Brown v. Wingo: "The reason an illegal search cannot form the basis for a successful RCr 11.42 proceeding is that an error consisting of the admission of improper evidence, even though the evidence may have been obtained in violation of constitutional rights, does not invalidate the proceeding or the judgment of conviction."\textsuperscript{764} Therefore, if the prisoner wishes to challenge the admission of evidence, he or she must do so at trial and on direct appeal.\textsuperscript{765}

\textsuperscript{761}See generally, e.g., Ohio v. Little, 380 U.S. 15 (1965); State v. Oliphant, 82 A.2d 584 (Ky. 1951); State v. Humes, 116 S.E.2d 456 (Ky. 1960).

\textsuperscript{762}Id. at 786; see, e.g., Carter v. Commonwealth, 450 S.W.2d 257, 258 (Ky. 1970); Stidham v. Commonwealth, 444 S.W.2d 110, 111 (Ky. 1969) (explaining that the "admission of illegal evidence amounts to nothing more than trial error and does not render the proceedings void"); Dupin v. Commonwealth, 404 S.W.2d 280, 281 (Ky. 1966); Collier v. Commonwealth, 387 S.W.2d 858 (Ky. 1965).

\textsuperscript{763}Compare John J. Howe, Comment on Decisions in Criminal Cases in 1922, 11 KY. L.J. 115, 123-30 (1922-1923) (critically discussing the adoption of the exclusionary rule in Kentucky), with Martin R. Glenn, Evidence Obtained by Illegal Search and Seizure, 22 KY. L.J. 63 (1933-1934) (supporting Kentucky's position).
2. Confessions

An unconstitutionally obtained confession which was admitted at trial must be challenged on direct appeal and is not a ground for relief under RCr 11.42.\textsuperscript{76} Even assuming a confession was illegally obtained, if it was not admitted into evidence at trial, the issue is irrelevant in an RCr 11.42 proceeding.\textsuperscript{76} A valid guilty plea, moreover, moots any issue raised in an RCr 11.42 motion alleging an illegal confession.\textsuperscript{76} However, a \textit{Bruton}\textsuperscript{79} violation may warrant RCr 11.42 relief, as the Kentucky high court held in \textit{Polsgrove v. Commonwealth}, but only if the totality of the circumstances indicates prejudice to the defendant.\textsuperscript{77}

3. Persistent Felony Offender (Habitual Criminal)

It is inappropriate in an RCr 11.42 motion to raise an issue regarding the constitutionality of prior convictions which have been used to enhance the sentence for which the defendant is presently in custody. The court held in \textit{Alvey v. Commonwealth} that “this jurisdiction requires [the

\textsuperscript{76} Wahl v. Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965) (explaining that, in Ky. R. Crim. P. 11.42 proceeding, the defendant is not in a position to challenge legality of search and seizure), cert. denied, 384 U.S. 976 (1967), overruled on other grounds by 636 S.W.2d 650 (Ky. 1982).

\textsuperscript{77} McMann v. Richardson, 397 U.S. 759, 767-68 (1970) (holding claim that guilty plea was triggered by coerced confession to be insufficient to warrant post-conviction hearing); Wheeler v. Commonwealth, 462 S.W.2d 921, 922 (Ky. 1971) (holding that defendant who voluntarily enters guilty plea waives right to challenge its admissibility); Harris v. Commonwealth, 456 S.W.2d 690, 692 (Ky. 1970) (explaining that an allegation of coerced confession, without any supporting evidence, was insufficient to warrant hearing for relief); Holcomb v. Commonwealth, 441 S.W.2d 140, 141 (Ky. 1969) (holding “evidence of guilt immaterial on his plea of guilty”); Triplett v. Commonwealth, 439 S.W.2d 944, 945 (Ky. 1969) (providing no relief under Ky. R. Crim. P. 11.42 where confession was not used against defendant); Cox, 411 S.W.2d at 321 (explaining that where defendant pled guilty, it was not necessary to use confession).

\textsuperscript{79} Bruton v. United States, 391 U.S. 123 (1968) (holding that the right of the accused to confront the witnesses against him is violated by admitting into evidence non-testifying co-defendant’s confession which incriminates the accused). \textit{Bruton} was held applicable to the states and retrospective in Roberts v. Russell, 392 U.S. 293, 294 (1968). However, a \textit{Bruton} error may be harmless. Harrington v. California, 395 U.S. 250, 254 (1969); Allee v. Commonwealth, 454 S.W.2d 336, 339 (Ky. 1970) (holding that where overwhelming evidence of guilt exists, no prejudice occurs), cert. denied, 401 U.S. 950 (1971).

\textsuperscript{70} 439 S.W.2d 776, 780 (Ky. 1969).
defendant] to raise any issues about the validity of those earlier convictions at the time he is tried as a persistent felon. If he does not, he is precluded from contesting the validity of the earlier convictions in subsequent post-conviction proceedings."  

In Commonwealth v. Gadd, the court held that the constitutionality of a prior conviction must be challenged by pretrial motion in the circuit court where the initiating indictment of the persistent felony offender stands to be tried. The movant does not go back to the circuit court where previously convicted. Gadd reaffirmed that this type of challenge was foreclosed under CR 60.02 and RCr 11.42. Failure to attack the validity of the prior conviction at the proper time waives the defendant's right to raise the issue in a post-conviction proceeding under RCr 11.42.

4. Other Evidentiary Claims

As a general matter, issues of admission or non-admission of evidence are not found within the scope of RCr 11.42. This principle encompasses specific claims of insufficiency of evidence, such as insufficiency of proof of a jurisdictional fact or the allegation that the defendant was convicted on the basis of the uncorroborated testimony of an accomplice. In specific cases, for example, the courts have held that any alleged insufficiency of evidence must be raised on direct appeal, not brought forward in an RCr 11.42 motion. Efforts to revive a lost

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771 648 S.W.2d 858, 859 (Ky. 1983) (collecting cases supporting the proposition); see Fortune & Welling, supra note 653, at 397-99.
772 665 S.W.2d 915, 918 (Ky. 1984). Under the recent decision of McGuire v. Commonwealth, 885 S.W.2d 931, 937 (Ky. 1994), a preliminary hearing need only be held if the defendant claims denial of assistance of counsel in the prior proceeding. This decision rests on Custis v. United States, 114 S. Ct. 1732, 1735 (1994) (applying this rule of law to federal persistent felony offender proceedings).
773 Gadd, 665 S.W.2d at 917-18.
774 Id.
775 Commonwealth v. Jones, 704 S.W.2d 203, 204 (Ky. 1986), overruled on other grounds by Thompson v. Commonwealth, 736 S.W.2d 319 (Ky. 1987); Commonwealth v. Stamps, 672 S.W.2d 336, 338 (Ky. 1984); see also Lovett v. Commonwealth, 858 S.W.2d 205, 207-08 & 207 n.1 (Ky. Ct. App. 1993) (noting philosophical conflict between Gadd and language in Corbett v. Commonwealth, 717 S.W.2d 831 (Ky. 1986)).
776 Page v. Commonwealth, 446 S.W.2d 552, 552 (Ky. 1969) (explaining that KY. R. CRIM. P. 11.42 is not a substitute for appeal).
777 Bronston v. Commonwealth, 481 S.W.2d 666, 667 (Ky. 1972) (explaining that appellate court will not permit use of KY. R. CRIM. P. 11.42 to try or retry issues that should have been raised on direct appeal, absent showing of ineffective assistance of counsel); Boles v. Commonwealth, 406 S.W.2d 853, 855 (Ky. 1966) ("[A]n attack upon
case through newly discovered evidence are controlled by an RCr 10.06 motion for new trial, and new evidence is thus not a proper ground for relief under RCr 11.42. An allegation of perjured testimony at trial is also not a cognizable claim in an RCr 11.42 proceeding, nor is a belated attack on the credibility of a witness. Finally, courts have noted that the admission at trial of an in-court identification allegedly tainted by a prior lineup raises only an evidentiary issue, as opposed to a constitutional issue, particularly where the defendant does not object at trial. If, however, the defendant received ineffective assistance of counsel, thus preventing the preservation of the issue for direct appeal, evidentiary error which otherwise would not be ground for relief under RCr 11.42 may be considered.

G. Jury

Jury issues provide only limited grounds for the reversal of a conviction in post-conviction proceedings, but movants have raised numerous challenges related to jury issues. Movants have attempted to
win new trials by alleging juror bias or prejudice,\textsuperscript{733} improper mention
of probation or parole,\textsuperscript{784} relationship between a juror and the prosecut-
ing witness,\textsuperscript{785} separation of the jury during a three-day trial,\textsuperscript{786} jury
composition,\textsuperscript{787} and an improper question by the trial court about
separation of the jury.\textsuperscript{788}

Using another approach in \textit{Warner v. Commonwealth}, the prisoner
also contended that the sheriff had entered the jury room during
deliberations but did not claim that any impropriety or jury tampering
occurred.\textsuperscript{789} The high court rejected the claim that the sheriff had
illegally entered the jury room during deliberations, holding that it could

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733 Brown v. Commonwealth, 788 S.W.2d 500, 500 (Ky. 1990) (alleging juror bias);
Johnston v. Commonwealth, 473 S.W.2d 823, 824 (Ky. 1971) (alleging racial prejudice);
Maggard v. Commonwealth, 394 S.W.2d 893, 894-95 (Ky. 1965). The \textit{Maggard} court stated:
In the absence of specific reasons why the opportunity of examining the jurors
on voir dire, the concomitant right to challenge for cause, and the right to seek
a change of venue were not ample and sufficient protection against prejudice,
[the claim] is a vaporous allegation without sufficient substance to warrant
inquiry. \textit{Id.} at 895.
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784 Farmer v. Commonwealth, 450 S.W.2d 494, 495 (Ky. 1970).
785 Dupin v. Commonwealth, 404 S.W.2d 280, 281 (Ky. 1966) (finding that a "simple
assertion" of improper relationship was not enough to result in a constitutional violation).
In this case the allegation was not specific, but it is apparent that a secret relationship
could, in appropriate circumstances, rise to the level of a constitutional violation
warranting RCr 11.42 or CR 60.02 relief.
787 Newsome v. Commonwealth, 456 S.W.2d 686, 687 (Ky. 1970) (finding no basis
to an objection regarding jury composition because defendant had waived
right to jury and pled guilty).
788 Warner v. Commonwealth, 385 S.W.2d 62, 65 (Ky. 1964). The Kentucky high
court conceded that it was reversible error under RCr 9.66 for the trial court to ask
defense counsel, in the hearing of the jury and in a capital case or where life imprison-
ment could be imposed, if counsel would consent to the separation of the jury. \textit{Id.}
However, in considering such a claim on collateral attack, the \textit{Warner} court concluded:
[W]e are unable to say that such an error is of that gravity which would render
the judgment void. We are unaware of any constitutional right which would
have been denied the defendant under such a circumstance. Thus, if any such
error had occurred, it would not be available under RCr 11.42.
\textit{Id.; see} Collins v. Commonwealth, 433 S.W.2d 663, 665 (Ky. 1968) (granting no relief
under KY. R. CRIM. P. 11.42 even if the jury was improperly separated); Adams v.
Commonwealth, 424 S.W.2d 849, 851 (Ky. 1968); Kinmon v. Commonwealth, 396
S.W.2d 331, 332 (Ky. 1965), \textit{cert. denied}, 383 U.S. 930 (1966); King v. Commonwealth,
387 S.W.2d 582, 585 (Ky. 1965).
789 385 S.W.2d at 65.
not be raised in an RCr 11.42 motion to vacate "absent some other showing which could be said to be a denial of due process." A similar approach was taken in Kiper v. Commonwealth, where the court held that although error had occurred when the trial court placed the jury in the custody of the sheriff and his deputies, all of whom were material witnesses, RCr 11.42 relief was not appropriate since the prisoner presented no "claim or proof that there was misbehavior on the part of the Sheriff, his deputies, or a juror." An even more novel approach was the attempt, by affidavit, to impeach and to vacate the judgment of life imprisonment eleven years after the judgment of conviction; since the only other available punishment for the defendant's crime was death, the appellate court upheld dismissal without a hearing. In summary, absent extraordinary circumstances, jury errors are mere trial errors cognizable on direct appeal and therefore not appropriate grounds for relief under RCr 11.42.

H. Waiver by Guilty Plea

A valid guilty plea is highly effective in limiting the issues that can be raised in a post-conviction relief motion because it waives all grounds which arose prior to the plea itself, except for jurisdiction. Thus, the

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700 Id. 415 S.W.2d 92, 95 (Ky.), cert. denied, 389 U.S. 875 (1967).
701 Grider v. Commonwealth, 398 S.W.2d 496, 497-98 (Ky. 1966).
702 Bronston v. Commonwealth, 481 S.W.2d 666, 667-68 (Ky. 1972) (involving allegations that excessive publicity tainted jury and that jurors discussed the case during recess).
703 Tollett v. Henderson, 411 U.S. 258, 267 (1973) (explaining that defendant could only attack voluntary and intelligent nature of guilty plea through showing of ineffective counsel); Hughes v. Commonwealth, 875 S.W.2d 99, 100 (Ky. 1994) ("The general rule is that pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense."); Davis v. Commonwealth, 471 S.W.2d 740, 742 (Ky. 1971); Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970) (explaining that guilty plea "waives all defenses other than that the indictment charges no offense"); Harris v. Commonwealth, 456 S.W.2d 690, 692 (Ky. 1970); Commonwealth v. Watkins, 398 S.W.2d 698, 701 (Ky.), cert. denied, 384 U.S. 965 (1966); Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky. Ct. App. 1990); Sanders v. Commonwealth, 663 S.W.2d 216, 218 (Ky. Ct. App. 1983).

A guilty plea is not as successful at eliminating claims on direct appeal since a guilty plea may be conditional, thereby reserving the right to raise certain issues despite the guilty plea. KY. R. CRIM. P. 8.09; see, e.g., Harris v. Commonwealth, 878 S.W.2d 801, 802-03 (Ky. Ct. App. 1994) (involving a judgment based on conditional guilty plea which was vacated on direct appeal).
allegations of the indictment are confessed when the defendant pleads guilty. This result is simply a matter of sound public policy. When a guilty plea is entered, the defendant, at the most basic level, forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence on grounds normally arising in the very trial which defendant elected to forego.

Numerous cases decided under RCr 11.42 follow this basic principle, which is applicable as long as the plea itself meets constitutional standards.

A valid guilty plea, therefore, waives search and seizure claims. Other types of errors waived by a constitutionally valid guilty plea are threat of admission of an allegedly coerced confession, pretrial

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795 Whitworth v. Commonwealth, 437 S.W.2d 731, 731 (Ky. 1969) (holding that indictment was not void and guilty plea admitted all allegations within the indictment); Boles v. Commonwealth, 406 S.W.2d 853, 854 (Ky. 1966) (holding that indictment was not void and guilty plea admitted all allegations within the indictment).


797 In Menna v. New York, 423 U.S. 61, 62 n.2 (1975), the Supreme Court explained that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." For this reason, the only challenges left available are those which go to the jurisdiction of the court or the plea itself. Stated another way, a defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be "cured."

Taylor, 724 S.W.2d at 225 (citing Peter Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 MICH. L. REV. 1214, 1226 (1977)); see also supra notes 714-44 and accompanying text (discussing attacks on guilty pleas).

798 Sanders, 663 S.W.2d at 218 (explaining that guilty plea waives evidence issues).

irregularities,\textsuperscript{800} loss of right to appeal,\textsuperscript{801} being held without bond prior to trial,\textsuperscript{802} beatings by police officers,\textsuperscript{803} denial of compulsory process,\textsuperscript{804} and ineffective assistance of counsel where the defense was not prejudiced.\textsuperscript{805}

I. Pretrial Publicity

An allegation that pretrial publicity made it impossible "to receive a fair and impartial trial" warranted an evidentiary hearing in \textit{Baldwin v. Commonwealth.}\textsuperscript{806} The court took note of two recent U.S. Supreme Court cases and decided that, although the allegation was conclusory,

the subject matter does not lend itself to specificity of pleading, especially [since it was written by] a person in confinement and without reputable counsel. We hardly expect that the movant will be able to prove the existence of publicity comparable with that in \textit{Estes} and \textit{Sheppard}, but neither this court nor the trial court can take judicial notice that it was not enough to have probable effect upon his trial.\textsuperscript{807}

Similar claims, however, were rejected in \textit{Collins v. Commonwealth},\textsuperscript{808} and \textit{Thomas v. Commonwealth.}\textsuperscript{809} In \textit{Wolfe v. Commonwealth}, the movant's claim that pretrial publicity had robbed him of a fair trial

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\item Thomas v. Commonwealth, 459 S.W.2d 72, 72 (Ky. 1970).
\item Greer v. Commonwealth, 713 S.W.2d 256, 257 (Ky. Ct. App. 1986).
\item Messer v. Commonwealth, 454 S.W.2d 694, 695 (Ky. 1970).
\item Harris v. Commonwealth, 456 S.W.2d 690, 692 (Ky. 1970).
\item Bruner v. Commonwealth, 459 S.W.2d 138, 140 (Ky. 1970).
\item 406 S.W.2d 860, 862 (Ky. 1966) (involving radio and newspaper coverage of armed robbery trial).
\item \textit{Id.} The two decisions discussed were \textit{Estes v. Texas}, 381 U.S. 532 (1965) (holding that televising of criminal swindling trial over objection of petitioner was error) and \textit{Sheppard v. Maxwell}, 384 U.S. 333 (1966) (holding that the trial court failed to control prejudicial media activity in murder trial).
\item 433 S.W.2d 663, 664 (Ky. 1968) (involving a single newspaper account of armed robbery "confession").
\item 437 S.W.2d 512, 515 (Ky. 1969) (involving a "few news items" regarding appellant's trial), \textit{cert. denied}, 397 U.S. 956 (1970).
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fourteen years earlier was properly overruled without a hearing because the same contention and evidence had been rejected in a change of venue motion prior to the 1954 trial. On the other hand, the failure of the defendant to pursue a change of venue motion at trial on the basis of alleged pretrial publicity constitutes a waiver of the issue and precludes review or relief under RCr 11.42.

J. Presence and Competence of the Accused

The purpose of the criminal trial is to rigorously develop the competing facts of the case, as perceived by both prosecution and defense, and to place these facts in front of the judge or jury. The defendant, of course, is constitutionally guaranteed a right to present a defense to the charges. Two related types of claims have frequently formed the basis for RCr 11.42 review: claims relating to the defendant's physical presence at the proceedings and claims relating to his or her competency to stand trial. First, a fairly large number of inmates have claimed that their convictions should be held void because they were not physically present at certain proceedings. Sometimes the defendant has a "bad memory," and the court will uncover documents that indicate that the defendant was in fact present at a particular proceeding. In other cases, it is apparent that the defendant was not present, at which point it becomes incumbent upon the movant seeking collateral relief to demonstrate prejudice. The defendant does not have to demonstrate prejudice where the nature of the proceeding is such that the presence of the defendant, unless waived, is always required.

For example, in Kentucky, the accused in a felony case has the well-settled right to be present at every important phase of the trial. However, a flat assertion that the defendant had not been present during all stages of his trial is not enough to warrant RCr 11.42 relief, and the claim is waived where no evidence of prejudice in support of this

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810 431 S.W.2d 859, 859-60 (Ky. 1968).
811 Yager v. Commonwealth, 436 S.W.2d 527, 528 (Ky. 1968), cert. denied, 395 U.S. 939 (1969). The court noted that the defendant could have pursued a change of venue on direct appeal as well. Id.
812 See infra notes 814-17 and accompanying text.
813 See infra notes 814-17 and accompanying text.
814 See Powell v. Commonwealth, 346 S.W.2d 731, 734 (Ky. 1961) (holding it to be reversible error for defendant's attorney to be out of courtroom when defendant was sentenced to death); Temple v. Commonwealth, 77 Ky. (14 Bush) 769, 771 (1879) (finding court's receipt of verdict without the presence of defendant or counsel to be erroneous).
assertion is presented at the hearing.\textsuperscript{815} Provided the accused is represented by counsel, the defendant's presence is required at preliminary hearings and proceedings only when the issues to be resolved go to the question of guilt or innocence.\textsuperscript{816} In general, an accused has no right to be present during pretrial motions, and relief based on such absence has been properly denied.\textsuperscript{817}

The question of the accused's competency to stand trial raises a different set of issues. In contrast to the jury issue of the accused's sanity at the time of the offense, which does go to guilt or innocence, this particular issue deals with the ability of the defendant to participate in his or her own defense. Initially, the legal issues presented under Kentucky law are similar to those already discussed relating to standards of competency to plead guilty,\textsuperscript{818} and the U.S. Supreme Court has recently concluded that, under the Constitution, the competency standard for waiving the right to counsel or for pleading guilty is no higher than the competency standard for standing trial.\textsuperscript{819} Two issues are typically presented. First, a defendant may utilize RCr 11.42 to claim that he was, in fact, incompetent to stand trial at the time of his original conviction.\textsuperscript{820} A trial or the entering of a guilty plea which occurs when the

\textsuperscript{815}King v. Commonwealth, 408 S.W.2d 204, 205 (Ky. 1966) (finding that the record showed that defendant was present at entering of judgment and during trial itself), cert. denied, 386 U.S. 924 (1967).

\textsuperscript{816}As one court explained:

Appellant complains that a "material portion of his trial was conducted in his absence." What he refers to is a conference in the trial judge's chambers at which his own counsel and the prosecuting attorney were present and at which certain legal questions were argued. . . . [Our cases] teach that the accused in a felony case must be present in person through every stage of the trial, but as appellant concedes, Harris v. Commonwealth, Ky., 285 S.W.2d 489, recites that the presence of the accused is not required during consultation or other preliminary proceedings which do not affect the question of his guilt or innocence.


\textsuperscript{817}See, e.g., Parrish v. Commonwealth, 472 S.W.2d 69, 71 (Ky. 1971) (involving motion for continuance); Hoskins v. Commonwealth, 221 S.W. 230, 233 (Ky. 1920) (involving preliminary examination on admission of evidence).

\textsuperscript{818}See supra notes 737-38 and accompanying text.

\textsuperscript{819}Godinez v. Moran, 113 S. Ct. 2680, 2684 (1993).

\textsuperscript{820}Mullins v. Commonwealth, 454 S.W.2d 689, 690 (Ky. 1970); Conners v.
defendant is incompetent or insane results in a void judgment, and RCr 11.42 relief is thus available. Or, a defendant may move for RCr 11.42 relief upon the lack of a court-ordered hearing or examination to determine competency, when a reasonable basis for doing so existed.

The issue of incompetency has been raised in RCr 11.42 motions in a variety of ways. In Lett v. Commonwealth, the defendant waited twenty-nine years after conviction to allege that he was incompetent to stand trial, but since the defendant’s hospitalization for mental problems occurred four years after conviction, he was not entitled to a hearing on this issue. The court in Matthews v. Commonwealth comprehensively summarized Kentucky law regarding pretrial hearings to determine the defendant’s capacity to stand trial. As the Matthews court interpreted RCr 8.06:

A hearing for the purpose of determining the mental capacity of a defendant is required under this rule only in a situation where there are reasonable grounds to believe that the defendant is insane. The reasonable grounds for such belief must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them.

Allegations of incompetency to stand trial were held insufficient to warrant RCr 11.42 relief in Bartley v. Commonwealth, McElwain v. Commonwealth, 400 S.W.2d 519, 520 (Ky. 1966), cert. denied, 385 U.S. 1012 (1967). A claim that the defendant was incompetent or insane at the time of the commission of the crime, however, cannot be brought in an RCr 11.42 motion and does not warrant a hearing. Mullins, 454 S.W.2d at 690; Conners, 400 S.W.2d at 520.

Barnes v. Commonwealth, 397 S.W.2d 44, 44 (Ky. 1965); Commonwealth v. Strickland, 375 S.W.2d 701, 703-04 (Ky. 1964).

Scott v. Commonwealth, 555 S.W.2d 623, 626-27 (Ky. Ct. App. 1977) (holding that trial court erred by failing to hold competency hearing when the court’s order “recommended” brain scan and complete psychiatric examination in prison).

461 S.W.2d 83, 84 (Ky. 1970).

468 S.W.2d 313 (Ky.), cert. denied, 404 U.S. 966 (1971). A person is considered incompetent to plead guilty or defend in a criminal proceeding if he does not have the “substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense.” Commonwealth v. Strickland, 375 S.W.2d 701, 703 (Ky. 1964).

Matthews, 468 S.W.2d at 314.

463 S.W.2d 321, 323 (Ky. 1971) (involving extensive psychiatric examination and a pretrial hearing, yet resulting in a jury finding that the defendant was not insane at the time of commission of the crime).
Commonwealth, the trial court’s finding of competency typically will be upheld. However, one defendant’s allegation, supported by inmate affidavits, that drugs administered to aid in treatment of his gunshot wounds kept him “practically incoherent” prior to trial and prevented him from assisting in his defense, did warrant a hearing. A special factual situation was presented in Vincent v. Commonwealth. In that case, the defendant was adjudged insane on the same day his guilty plea was accepted. Vincent was in fact committed before he was sentenced. Nonetheless, the Kentucky high court declined to hold the judgment void.

K. Bail

Unless prejudice is shown, RCr 11.42 motions objecting to various aspects of bail amounts and procedures have generally been rejected by the courts, even when a violation of constitutional rights is assumed.
Thus, "unless being held in jail prevented appellants from making adequate preparations for, or otherwise detracted from the fairness of the trial, their confinement under excessive bail is completely irrelevant to the validity of the judgment under attack."835

I. Indictment

In general, an RCr 11.42 motion may not be used to challenge defects in an indictment,836 since "no defect in an indictment short of one that completely vitiates it affects the validity of the proceeding."837 This general provision has been specifically held to apply to a number of imaginative and technical allegations of error. Using RCr 11.42, defendants have charged that post-conviction relief should be forthcoming based on the following: the indictment gave the wrong date for the commission of the crime,838 the indictment was "without merit,"839 the indictment was designed to frighten the movant into pleading guilty,840 the habitual criminal indictment contained a defect,841 and the indictments were improperly consolidated.842 Claims have also been based on defects in the indictment, including failure to indicate a specific statutory section,843 failure to show the endorsement of the names of sentence"); see also Messer v. Commonwealth, 454 S.W.2d 694, 695 (Ky. 1970) (holding that three-month confinement without bond and questioning without counsel were insufficient to vacate judgment because no evidence gained as a result was used against defendant at trial).

835 Dupin, 404 S.W.2d at 281; see also Messer, 454 S.W.2d at 695.
836 See Shepherd v. Commonwealth, 391 S.W.2d 689, 689 (Ky. 1965) (holding that defective indictment did not constitute grounds for relief under KY. R. CRIM. P. 11.42); Warner v. Commonwealth, 385 S.W.2d 77, 77-78 (Ky. 1964) ("[D]efects in an indictment will not support a collateral attack upon a judgment of conviction.").
837 Davenport v. Commonwealth, 390 S.W.2d 662, 663 (Ky. 1965) (citations omitted) (invoking criminal defendant who filed KY. R. CRIM. P. 11.42 motion alleging improper indictment), cert. denied, 383 U.S. 970 (1966); Harrod v. Whaley, 239 S.W.2d 480, 482 (Ky. 1951) (dismissing habeas petition because the stated defects "at most rendered judgment erroneous but not void").
839 Davenport, 390 S.W.2d at 663 (holding allegation to be insufficiently specific).
840 Irvin v. Commonwealth, 407 S.W.2d 122, 123 (Ky. 1966) (holding that habitual criminal indictment was not void for showing 11 prior convictions when only two were required under statute).
842 Trogdlen v. Commonwealth, 427 S.W.2d 577, 578 (Ky. 1968) (holding that error, if any, did not rise to constitutional level).
843 Newsome v. Commonwealth, 456 S.W.2d 686, 687 (Ky. 1970); Lairson v.
witnesses, failure to show the signature of the foreman, or other failures in form. Of course, RCr 11.42 is generally inapplicable in such situations because the indictment is available to the defendant from the beginning of the prosecution and can be amended easily by the trial court if the prosecutor is properly advised of the defect. It would not serve the ends of justice to allow a defendant to have built-in reversible error by inaction and then, after losing at trial, void the conviction on obviously technical grounds.

M. Pretrial Delays or Failure to Hold Pretrial Hearings

In dealing with claims of pretrial delays and failure to hold pretrial hearings, it is not enough for a defendant to simply state in the RCr 11.42 motion that some particular pretrial delay, act, or omission occurred. The defendant must present an associated showing of prejudice. This view has been reiterated in many cases. For example, without demonstrated prejudice to the defendant, a delay of three weeks between arrest and a grand jury hearing does not warrant post-conviction relief. Also, the passage of twenty-one months between arrest and guilty plea, without more, is insufficient to establish a denial of the right to a speedy trial under RCr 11.42.

The court in Nickell v. Commonwealth stated, “The assertion that the conviction should be vacated because of failure to appoint counsel at the preliminary hearing has no merit. There is no claim that anything which occurred at the preliminary hearing was used against the appellant at his

Commonwealth, 388 S.W.2d 592, 593 (Ky. 1965).

Jones v. Commonwealth, 388 S.W.2d 601, 603 (Ky. 1965).

Satterly v. Commonwealth, 441 S.W.2d 144, 145 (Ky. 1969) (holding that defendant’s claim was refuted by the trial record); Nicholas v. Thomas, 382 S.W.2d 871, 872 (Ky. 1964).

See, e.g., Carter v. Commonwealth, 397 S.W.2d 165, 165 (Ky. 1965).

Hargrove v. Commonwealth, 396 S.W.2d 75, 76 (Ky. 1965) (noting that since an indictment is “public record,” defendants “had a right to examine [it] had they so desired”).

Wahl v. Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965), cert. denied, 384 U.S. 976 (1967), overruled on other grounds by Henderson v. Commonwealth, 636 S.W.2d 648 (Ky. 1982).

Bruner v. Commonwealth, 459 S.W.2d 138, 140 (Ky. 1970); cf. Mullins v. Commonwealth, 454 S.W.2d 689, 690 (Ky. 1970) (denying defendant’s claim of lack of speedy trial where delay in trial resulted from defendant’s claimed mental illness).
In Rat, Kentucky courts have consistently said that no constitutional right to a preliminary hearing exists; thus, the failure to provide the accused with such a hearing (also called an examining hearing) does not demand RCr 11.42 relief absent "extraordinary circumstances." Unless the accused can show prejudice at trial, his or her post-conviction claims will fail.

N. Miscellaneous Grounds

Falling into this category are those complaints which may be broadly classified as simple trial errors. For years, the Kentucky appellate courts have had difficulty in convincing inmate litigants that the post-conviction remedy of RCr 11.42 was not created as a substitute for a failed appeal and that it is not available to correct all errors which might have occurred before, during, or after trial. As the court stated in Tipton v. Commonwealth: "RCr 11.42 does not authorize relief from a judgment of conviction for mere errors of the trial court." Because many of the alleged errors detailed in this section involve the trial court's discretion and not matters of substantive constitutional rights, even "prejudicial error on the trial court's part would render the judgment erroneous but not void." That statement is true, of course, unless the error rises to the point of a violation of due process.

Grounds which fall into this general category include the following: illegal arrest, promise of leniency to a witness testifying for the prosecu-

451 S.W.2d 651, 652 (Ky. 1970).
Little v. Commonwealth, 438 S.W.2d 527, 530 (Ky. 1968); see also Messer v. Commonwealth, 454 S.W.2d 694, 695 (Ky. 1970) (finding no constitutional right to a preliminary hearing); Hargrove v. Commonwealth, 396 S.W.2d 75, 76 (Ky. 1965) (finding no constitutional right to a preliminary hearing).
Russell v. Commonwealth, 472 S.W.2d 259, 260 (Ky. 1971) (quoting Commonwealth v. Watkins, 398 S.W.2d 698, 701 (Ky.), cert. denied, 384 U.S. 965 (1966)).
See, e.g., Clay v. Commonwealth, 454 S.W.2d 109, 110 (Ky.), cert. denied, 400 U.S. 943 (1970); Adams v. Commonwealth, 424 S.W.2d 849, 850 (Ky. 1968); Kiper v. Commonwealth, 415 S.W.2d 92, 94-95 (Ky.), cert. denied, 389 U.S. 875 (1967); Short v. Commonwealth, 394 S.W.2d 937, 939 (Ky. 1965); King v. Commonwealth, 387 S.W.2d 582, 584 (Ky. 1965).
376 S.W.2d 290, 290 (Ky. 1964) (involving challenge of conviction for improper venue).
Polsgrove v. Commonwealth, 439 S.W.2d 776, 779 (Ky. 1969) (holding that volunteered statement by witness at trial, which was not considered mistrial by judge, was not grounds to vacate).
Johnson v. Commonwealth, 473 S.W.2d 823, 824 (Ky. 1971) (explaining that
tion, double jeopardy, errors in instructing the jury, denial of a continuance, failure to advise the defendants of the charges against them, denial of compulsory process, failure to try defendants separately, concealment of exculpatory evidence by the prosecution, polygraph exam, and prejudice by the trial judge.

illegal arrest is "not the basis for post-conviction relief under RCr 11.42"); Triplett v. Commonwealth, 439 S.W.2d 944, 945 (Ky. 1969); Roberts v. Commonwealth, 417 S.W.2d 234, 234 (Ky. 1967); Morgan v. Commonwealth, 399 S.W.2d 725, 726 (Ky. 1966).

Baldwin v. Commonwealth, 406 S.W.2d 860, 862 (Ky. 1966) (finding allegation of promise of leniency for testifying witness to be insufficient to render judgment void or to warrant hearing).

Bruce v. Commonwealth, 465 S.W.2d 60, 61 (Ky. 1971) (involving a second trial conviction more severe than the first, which had been reversed due to illegally gained evidence).

King v. Commonwealth, 408 S.W.2d 204, 205 (Ky. 1966) (holding defendant's claim of error in instruction to be without merit and irrelevant to KY. R. CRIM. P. 11.42 relief), cert. denied, 386 U.S. 924 (1967); Boles v. Commonwealth, 406 S.W.2d 853, 855 (Ky. 1966); Uwaniwich v. Commonwealth, 390 S.W.2d 658, 658 (Ky. 1965) (explaining that "erroneous instructions do not invalidate a conviction").

King, 408 S.W.2d at 205.

Hargrove v. Commonwealth, 396 S.W.2d 75, 76 (Ky. 1965) (explaining that the Commonwealth was not required to read indictment to defendants until they were "put on trial").

Bruner v. Commonwealth, 459 S.W.2d 138, 140 (Ky. 1970) (explaining that, since defendant had made no allegations of fact to support his claim that he was denied compulsory process, his claim must be denied); Baldwin v. Commonwealth, 406 S.W.2d 860, 862 (Ky. 1966).

Polsgrove v. Commonwealth, 439 S.W.2d 776, 779 (Ky. 1969) (noting that decision by court as to how to try cases was a "matter of discretion"); Kinmon v. Commonwealth, 383 S.W.2d 338, 340 (Ky. 1964). The Kinmon court stated:

A defendant has no constitutional right to a separate trial, so even if there were a showing of some specific prejudice from being tried jointly there would have to be presented an extreme case of unfairness to warrant relief under RCr 11.42, which requires a showing of grounds that would subject the judgment to collateral attack.

Id.


Claims of prejudice by the trial judge were unsuccessful in McCarthy v. Commonwealth, 450 S.W.2d 534, 535-36 (Ky. 1970), where the prosecutor in the movant's first trial and conviction was the trial judge in the movant's second trial, and Morgan v. Commonwealth, 399 S.W.2d 725, 726 (Ky. 1966), where the trial judge had been the Commonwealth's Attorney at the time of the prior prosecution conducted by the Assistant Commonwealth's Attorney.
Most of these challenges cannot be brought on an RCr 11.42 motion to vacate, and Kentucky courts have repeatedly rejected them. It would be very unusual for an RCr 11.42 motion to vacate to be granted based upon the simple errors of the trial court.

CONCLUSION

If the states are to retain their primacy in the trial and disposition of criminal cases, then they must maintain systems of post-conviction relief which allow the immediate correction of state errors in state courts. In Kentucky, RCr 11.42 provides a generally effective system of post-conviction review. Its emphasis on evidentiary hearings for disputed issues of fact, representation of indigent movants by appointed counsel, and returning the movant, if necessary, to the sentencing court, all serve to ensure that an adequate record will be developed and the movant's meritorious claims fully explored. Kentucky's system further ensures adequate review in the higher Kentucky courts for death penalty cases and in federal court on habeas corpus motions. Although the actual number of cases in which a new trial is granted at the appellate stage is very small, the possibility of such review is a check upon the trial court and is an important component of the Kentucky appellate and post-conviction review system.

Although not constitutionally required, post-conviction review of state criminal convictions is here to stay. States need to have at least the first opportunity, through hearings in state trial courts and through appellate review, to correct their own errors. Deference to states is widely recognized in the federal system, where most federal courts are keenly aware that they are reviewing the convictions of a co-equal state judiciary. In the long run, the process of state court review of criminal convictions in light of both state and federal constitutions is relatively efficient. It is certainly more efficient than the only other alternative for the states — simply abrogating their responsibilities by shifting all post-conviction review to the federal courts.

However, this efficiency does not mean that RCr 11.42 is without its problems. Because post-conviction review under RCr 11.42 is so pervasive and is utilized by so many inmates, it imposes significant strains on Kentucky's criminal justice system. Some of the reforms suggested in this Article — for example, the use of a form in filing the RCr 11.42 motion — could relieve some of the strain at the trial court level, where the bulk of the work in deciding RCr 11.42 cases occurs. Although the "time for filing" limitation and the other changes adopted in 1994 should alleviate some of the pressures on both trial and appellate
courts by reducing or eliminating stale claims, further gains can still be made while fully protecting the integrity of the process and defendants' constitutional rights.

The adoption of the suggestion to give the Kentucky Court of Appeals the power to review RCr 11.42 appeals on a discretionary basis, except in death penalty cases, would allow significant trial court error to be corrected while saving a great deal of adjudication time. This change would also provide a mechanism by which decisions of special importance could be considered and published. Frivolous or routine cases, now fully briefed and ruled upon in formal unpublished opinions, could be dealt with more simply and quickly. This and other proposed reforms could have a significant impact on the efficiency of Kentucky's criminal justice system without compromising the due process rights of defendants or the ability of this state to correct errors before the defendant has a chance to petition a federal court. It is hoped that the Kentucky Supreme Court will soon take a comprehensive look at post-conviction practice and procedure and attempt to further improve Kentucky's already progressive system of post-conviction review.