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Kentucky Law Survey: Criminal Procedure

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Criminal Procedure
BY MATTHEW J. FIRZ*

INTRODUCTION

The topics considered by the Kentucky appellate courts in the general area of criminal procedure during the survey year¹ were many and varied. Four such topics have been chosen for in-depth consideration in this article.² The first involves inter-

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¹ July 1, 1977 through June 30, 1978.

² In addition to the topics discussed in the text, several other developments deserve mention. Two Kentucky criminal procedure cases reached the Supreme Court of the United States. In Taylor v. Kentucky, 98 S.Ct. 1930 (1978), the Court reversed a conviction of second degree robbery. It held that under the peculiar circumstances of the case, the state trial court's failure to give a requested instruction on the presumption of innocence resulted in a violation of defendant's right to a fair trial. Id. at 1937. In response, the Kentucky Supreme Court amended Rule 9.56 of the Kentucky Rules of Criminal Procedure [hereinafter cited as RCr] to require an instruction on the presumption of innocence in every case. See RCr 9.56 (as amended, effective July 1, 1978).

Bordenkircher v. Hayes, 434 U.S. 357 (1978), was a federal habeas corpus action brought by a Kentucky state prisoner. Hayes had been indicted for uttering a forged instrument under Ky. Rev. Stat. § 434.130 (repealed 1975) [hereinafter cited as KRS]. In the course of plea negotiations, the prosecutor offered to recommend a sentence of five years in prison for the offense, which carried a possible sentence of two to ten years, in exchange for a guilty plea. In addition, Hayes was told that if he did not plead guilty, the prosecution would seek an indictment under the Habitual Criminal Act, a charge justified by the facts, which in his case would mean a mandatory life sentence, KRS § 431.190 (repealed 1975). He chose not to plead guilty and was indicted again and convicted of both offenses. The Supreme Court held "that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." Id. at 365.

In Powell v. Commonwealth, 554 S.W.2d 386 (Ky. 1977), the Court reversed a manslaughter conviction. The trial court not only had denied the defense the right to question a witness concerning a suicidal disposition on the part of the decedent (due to a possible conflict with a stipulation made by the parties), but also refused to allow making of an avowal as to what the witness's testimony would have been. The Court commented:

RCr 9.52 permits the introduction of an avowal in order that it can be determined on appeal whether the proffered testimony should have been admitted and, if so, whether its exclusion was prejudicial. The right thus to preserve a claim of error is essential to the right of appeal. If a party is forbidden the opportunity of making an avowal he is to that extent deprived
of the remedy of appeal, to which he is entitled as a matter of right. Ordinarily a motion for new trial is not a timely method of preserving testimony that has been improperly excluded, but when the aggrieved party has been denied the opportunity of making an avowal it is about the only way in which he can get it in the record. Even, however, had there been no affidavit showing what the witness would have said, or if the affidavit had been controverted, still it would be necessary to treat the trial court's refusal to permit the avowal as a prejudicial error, because the testimony of the witness himself, under oath and subject to examination and cross-examination, is the only sure indication of what would have been said in the presence of the jury.

Id. at 390. See also Eilers v. Eilers, 412 S.W.2d 871 (Ky. 1967).

In Yocum v. Burnette Tractor Co., Inc., 566 S.W.2d 755 (Ky. 1978), the Court affirmed a decision of the Court of Appeals, 555 S.W.2d 823 (Ky. Ct. App. 1977) which had held that

[i]n the absence of any showing that the business . . . is inherently dangerous . . . or . . . was subject to Federal or state regulation and/or license, such as guns, liquor and drugs, or pervasively regulated or an industry with a long history of regulation, a search and inspection of the closed areas of the premises [pursuant to the Kentucky Occupational Safety and Health Act, KRS Ch. 338] . . . will not be permitted without a search warrant or court order, either of which must be based upon a showing of probable cause.

Id. at 825. The Court went on to hold that:

the probable cause requirement may be satisfied by demonstrating that the place to be inspected is of the general type due for inspection under statutory or administrative standards setting up categories of places subject to inspection and bearing a rational connection to the goal sought to be achieved by the Kentucky Occupational Health and Safety Act. [It] specifically reject[ed] the Respondent's contention that a showing of 'reasonable ground of suspicion of violation' in the particular premises is required before probable cause to inspect is deemed satisfied.

566 S.W.2d at 758.

Substantially the same conclusion was reached by the United States Supreme Court on the same day, with regard to inspections by the federal Occupational Safety and Health Administration, in Marshall v. Barlow's, Inc., 98 S.Ct. 1816 (1978). Both Courts relied heavily on Camara v. Municipal Court, 387 U.S. 523 (1967). See 98 S. Ct. at 1820-27; 566 S.W.2d at 757-58. Both Courts based their decisions on the Fourth Amendment to the United States Constitution. See 98 S. Ct. at 1819-20; 566 S.W.2d at 757-58. In addition, both the Kentucky Supreme Court and Court of Appeals decisions were based on § 10 of the Kentucky Constitution. See 566 S.W.2d at 757-58; 555 S.W.2d at 824. Although no Kentucky cases were cited as authority, the decision that § 10 requires a warrant in this case appears to be supported by Sullivan v. Brawner, 36 S.W.2d 364, 370 (Ky. 1931) (opinion of the Court by Thomas, J.), and Mansback Scrap Iron Co. v. City of Ashland, 30 S.W.2d 968, 971-73 (Ky. 1930) (Thomas, C.J., dissenting).

Finally, after several years of unheeded warnings to the bench and bar, the Kentucky Supreme Court moved decisively to eliminate the problems inherent in most cases of joint representation of criminal co-defendants by adopting RCr 8.30. The first version, adopted October 14, 1977, completely forbade joint representation in a criminal proceeding. Two months later, however, before its effective date, it was totally scrapped in favor of a more complicated yet fairer rule. The new version in effect leaves the decision regarding joint counsel to the defendants. It provides safeguards, including advice of the trial judge and counsel, and a requirement of a written waiver should the defendants desire joint representation. By providing basically that "no attorney
esting questions of jurisdiction and post-conviction relief in cases in which juvenile felony offenders had been convicted in circuit court. The second part explores cases of prosecutor misconduct and the judicial reaction to it. Part three examines developments in the area of presentence procedures. The fourth part discusses changes in the rules relating to attachment of jeopardy in a jury trial.

I. CHALLENGING JUVENILE FELONY CONVICTIONS

A. Introduction

KRS § 208.020(1) states, in part: "The juvenile session of the district court of each county shall have exclusive jurisdiction in proceedings concerning . . . any person who at the time of committing a public offense was under the age of eighteen (18) years . . . ." Under certain conditions, when the crime involved is a felony, the juvenile court may order a transfer of jurisdiction of the case to the circuit court. The consequences shall be permitted at any stage of the proceedings to act as counsel" for co-defendants, it retains the advantageous portion of the prior version. By excepting those cases in which the defendant, with full knowledge of the possibility of a conflict of interest, waives separate counsel, it of course avoids the problems inherent in the first version.

Under the old case law, a defendant could successfully challenge his conviction only by showing that there had been an actual conflict of interest at trial which had actually prejudiced him. Compare Maynard v. Commonwealth, 507 S.W.2d 143 (Ky. 1974) with Vaughan v. Commonwealth, 505 S.W.2d 768 (Ky. 1974). See also Self v. Commonwealth, 550 S.W.2d 509 (Ky. 1977); Ware v. Commonwealth, 537 S.W.2d 174 (Ky. 1976); Napier v. Commonwealth, 515 S.W.2d 615 (Ky. 1974); Campbell, Kentucky Law Survey — Criminal Procedure, 63 Ky. L.J. 701, 703-04 (1975). The advantage of the new rule to indigent defendants is obvious. That it is designed with them in mind is implied by the fact that it applies to the same class of cases to which the rule providing assignment of counsel applies. See RCr 8.04; RCr 8.30(1).

B. Procedure

KRS § 208.020(1) (Supp. 1978). Prior to creation of the district courts, exclusive jurisdiction over juveniles was vested in the juvenile session of the county court. Robinson v. Kieren, 216 S.W.2d 925, 927 (Ky. 1949). For convenience, subsequent references to either court will be to the "juvenile court.”

The cases in which such transfer is permissible and the procedures to be followed in effecting such a transfer are set out in KRS § 208.170 (1977). See also Mayes v. Commonwealth, 563 S.W.2d 4 (Ky. 1978); Sharp v. Commonwealth, 569 S.W.2d 727 (Ky. 1977); Hubbs v. Commonwealth, 511 S.W.2d 664 (Ky. 1974); Risner v. Commonwealth, 508 S.W.2d 775 (Ky. 1974); Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972). Since these procedures have already been the subject of extensive writing elsewhere details will be set out only where necessary. See T. Fitzgerald, 8 Kentucky Practice, Criminal Practice and Procedure § 417 (1978) [hereinafter cited as 8 Kentucky Practice]; Stamm, Transfer of Jurisdiction in Juvenile Court, 62 Ky. L.J.
of a failure to carry out proper transfer proceedings were examined in two cases during the survey year, and will be further explored in this article.

B. The Recent Cases

*Rich v. Commonwealth* and *Schooley v. Commonwealth* both involved appeals from denials of motions under Kentucky Rule of Criminal Procedure (RCr) 11.42 challenging convictions. *Rich* was decided in a memorandum opinion, per curiam, and was not published. *Schooley*, on the other hand, was a lengthy and far-reaching published opinion.

1. *Rich v. Commonwealth*

*Rich v. Commonwealth* was decided by the Kentucky Supreme Court on July 1, 1977. The appellant had been convicted in 1958, at age seventeen, of murder. In 1974 he was convicted of manslaughter and, on the basis of the 1974 and 1958 convictions, was also convicted of being a habitual criminal. A life sentence was imposed and the conviction was affirmed by the then Court of Appeals. Rich then instituted a...
post-conviction proceeding under RCr 11.42, arguing that his 1958 murder conviction was void, "as it was obtained in the total absence of any hearing or proper proceeding in juvenile court at which jurisdiction over him and the offense was waived." His motion was denied by the circuit court.

On appeal, the Supreme Court vacated the order denying Rich's RCr 11.42 motion. The Court found that "[i]n the instant case, there is no waiver order in the record, and there are strong indications that no hearing was in fact held." The Court also found that the motion was timely. It acknowledged that "[i]t is true that appellant's attack upon the validity of his 1958 conviction and its use to enhance the penalty for his 1974 conviction and sentence to life imprisonment are raised for the first time in this postconviction proceeding." It also recognized that prior cases of the United States Supreme Court and the Kentucky Court had "held that a challenge to a prior conviction must be raised in the recidivist proceeding or it cannot be raised in a postconviction proceeding." Those cases, however, involving claims of denial of, or ineffective assistance of, counsel were distinguished by the Court. The Court found that "the problem presented in this appeal requires a different disposition, as the alleged infirmity of the 1958 con-

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12 Rich v. Commonwealth, No. SC-79-MR, slip op. at 2 (Ky. July 1, 1977) (mem. per curiam). In support of his "RCr 11.42 motion was a letter from the Barren County Judge which stated that a search of the county court records did not reveal any juvenile court proceedings whatsoever against appellant." Id.

13 Id. at 3. On this point, quoting from Ingram v. Wingo, 320 F.Supp. 1032, 1033 (E.D. Ky. 1971), the Court stated that "'a recidivist conviction can only be obtained if it is shown that the defendant had been previously lawfully convicted of a felony.'" Rich v. Commonwealth, slip op. at 4. It then continued: "This language indicates, and this court must require, that the prosecution prove the validity of prior convictions(s) [sic] used in habitual criminal prosecutions." Id. at 4-5. Under the facts presented, however, Rich was not entitled to a new trial at this point, for "there is a presumption of regularity of judgments indicating prior convictions and . . . the burden [is] on the appellant to show that the prior convictions were unconstitutionally obtained." Id. at 5, citing McHenry v. Commonwealth, 490 S.W.2d 766 (Ky. Ct. 1972), and Ingram v. Commonwealth, 427 S.W.2d 815 (Ky. 1968). See Phillips v. Commonwealth, 559 S.W.2d 724 (Ky. 1977); Bell v. Commonwealth, 566 S.W.2d 785 (Ky. App. 1978).

14 Rich v. Commonwealth, slip op. at 3.


17 Rich v. Commonwealth, slip op. at 3.
viction is that it was obtained without the proper transfer of jurisdiction from the juvenile court to the circuit court."\(^{18}\)

While the Court hinted that it considered Rich's attack on his conviction a "pure jurisdictional objection,"\(^{19}\) it is clear that the main theme of the Court's analysis was due process. Since a prior valid conviction was essential to Rich's 1974 habitual criminal conviction,\(^{20}\) unless his 1958 conviction was valid, i.e., was obtained in compliance with the proper procedural safeguards, he was not guilty of the habitual criminal charge.\(^{21}\) Therefore, the Court vacated the order denying Rich's RCr 11.42 motion and remanded the case to the circuit court for a hearing on the merits of the motion.\(^{22}\) It ruled that:

"appellant is entitled to a full hearing on the questions of his status as a juvenile at the time of his trial in 1958; whether a transfer hearing was held, and if so, the nature and extent of such a hearing; and, whether these facts were established at his trial in 1958 . . . .\(^{23}\)

If, on remand, "appellant sustains his burden"\(^{24}\) of showing that his 1958 conviction was unconstitutionally obtained, he is entitled to a new trial. "Failing such a showing, the judgment should be reinstated."\(^{25}\)

\(^{18}\) Id. at 3-4 (emphasis by the Court).

\(^{19}\) Id. The Court quoted from Anderson v. Commonwealth, 465 S.W.2d 70, 74 (Ky. 1971): "It is true that pure jurisdictional objections may be presented for the first time on appeal . . . . But, only true jurisdictional attacks are thus permitted."


\(^{21}\) See notes 67-73 and accompanying text infra where the Court's analysis is further examined.

\(^{22}\) Rich v. Commonwealth, slip op. at 5.

\(^{23}\) Id.

\(^{24}\) Id. See note 13 supra and cases cited therein for an explanation of this burden of proof.

\(^{25}\) Rich v. Commonwealth, slip op. at 5. Compare Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966), in which the facts were strikingly similar to those in Rich. Rich "argued that a 1974 judgment, which imposed a life sentence upon him as a habitual criminal, was based on an invalid 1958 conviction which was obtained without the proper waiver of jurisdiction from juvenile court." Rich v. Commonwealth, slip op. at 1-2. Unlike Rich, the movant in Wilson was "currently confined under a sentence . . . as an habitual criminal . . . imposed incident to a 1964 conviction . . . for storehouse breaking," and sought to have a 1933 conviction which was, in part, the basis for his habitual criminal conviction, set aside under RCr 11.42, due to irregularities in juvenile court proceedings which had preceded that conviction. 403 S.W.2d at 711. The Court held that "RCr 11.42 is a procedural remedy designed to give a convicted prisoner a
The second case, *Schooley v. Commonwealth*, was decided by a three-judge panel of the Court of Appeals, just one week after the Supreme Court had issued its opinion in *Rich*. Schooley was sixteen years old when charged with seven counts of breaking and entering. Following a hearing, the juvenile court ordered his case transferred to the circuit court. He was subsequently indicted, entered a plea of guilty to two charges and was sentenced; he did not appeal. More than three years later, he filed an unsuccessful *pro se* motion to vacate. Two and one-half years after the first RCr 11.42 motion, a second such motion was filed on his behalf by counsel. This motion was also denied by the circuit court, which held that the 1968 transfer of jurisdiction from juvenile court to circuit court had been valid.

On appeal, the circuit court's denial of the second RCr 11.42 motion was affirmed. The court clearly treated the basic issue in the case as one of due process, rather than jurisdiction, and held that Schooley was foreclosed from challenging the validity of the transfer order because of his failure to appeal the denial of his first RCr 11.42 motion.

C. Characterizing the Error

The drafters of the Second Restatement of Judgments have noted that:

> [t]here is a 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 . . .

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2 Id. at 914. Procedurally, the case was identical to *Crick v. Commonwealth*, 550 S.W.2d 535 (Ky. 1977). It appears that the *Schooley* affirmance could have been based on a mere citation to *Crick*.
This, in turn, permits a serious blunder to be remedied despite tardy objection.29

One area in which the Kentucky courts have treated procedural errors as jurisdictional has been in cases involving the transfer of juvenile felony offenders from juvenile court to circuit court.30 As early as 1930, the Court stated that "[i]t has been held in a number of cases that circuit courts have no jurisdiction to try juvenile offenders, unless the . . . judge of the juvenile court . . . has first acquired jurisdiction and transferred or surrendered that jurisdiction to the circuit court."31 In most of the cases, the question was raised on direct appeal.32 In one, however, a prisoner who alleged that his conviction was void due to shortcomings in the juvenile court proceedings was successful in challenging his conviction in a habeas corpus action.33

This approach has been the subject of both scholarly and judicial criticism. In Schooley, the court gave lengthy consid-
eration to the term "jurisdiction." In short, its conclusion was similar to that found in a comment to the Second Restatement of Judgments: "Manifest defects in subject matter jurisdiction can be distinguished from matters concerning the merits and procedure." In this vein, the court noted that:

the rule that subject matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a tribunal vested with civil competence attempts to convict a citizen of a crime.

Obviously this was not such a case, because "[c]ircuit courts have general jurisdiction to try felony cases, including charges of storehouse breaking." Thus, no matter what defects occur in the transfer proceedings, or perhaps even in the total absence of such proceedings, the question of validity of the circuit court actions "is one of policy, rather than power. The policy consideration is one of due process." In other words, the shortcoming involves "mere error," not subject matter jurisdiction.

In any event, even if the error is characterized as one of

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38 556 S.W.2d at 915, quoting from Duncan v. O'Nan, 451 S.W.2d 626, 631-32 (Ky. 1970), which in turn had quoted from Commonwealth v. Berryman, 363 S.W.2d 525, 526 (Ky. 1962) and In Re Estate of Rougeron, 217 N.E.2d 639, 643 (N.Y.), cert. denied, 385 U.S. 899 (1966).


33 See, e.g., Commonwealth Dept. of Highways v. Berryman, 363 S.W.2d 525, 526 (Ky. 1962).

34 556 S.W.2d at 915, quoting In Re Estate of Rougeron, 217 N.E. 2d at 643 (footnote added) (emphasis added).

40 556 S.W.2d at 915. Therefore, even though, as pointed out by Robinson v. Kieren, 216 S.W.2d 925, 927 (Ky. 1949), "[u]nder [KRS §§ 208.020 (1977) and 208.170 (Supp. 1978)] the [district] court when sitting in juvenile session is [a court of exclusive and original jurisdiction], and the circuit court is regarded as one of limited or secondary jurisdiction," the circuit "court was not without some power to adjudicate and its fault was no greater than that of error which remains uncorrected until the appeal was finally resolved in the State's highest court." Nuernberger v. State, 359 N.E.2d 412, 416, (N.Y. 1976). The New York court had earlier noted that "discerning analysis would reveal that the absence of power of adjudication in a particular cause does not, in and of itself, automatically deprive a court's acts and proceedings of their validity." Id. at 415.

41 556 S.W.2d at 916.

jurisdiction, it is no longer certain that the challenge could be raised at any time. In this respect, the Second Restatement of Judgments has changed the focus of the First Restatement:43

It was formerly the rule that the court's subject matter jurisdiction could still be challenged in a subsequent attack on the judgment. The underlying proposition was that a judgment of a court that lacks subject matter jurisdiction is a legal nullity. The modern rule is that such a post-judgment attack on the court's subject matter jurisdiction may be made only in the impelling circumstances that justify lifting the rule of preclusion.44

Such a rule is consistent with that taken by the Kentucky Court in recent cases.45


As expressed in the first Restatement, the concept of validity of a judgment can be described as follows:

1. When certain requirements have been met concerning notice, territorial jurisdiction, and subject matter jurisdiction, a judgment is valid.

2. If those requirements are not met, the judgment is a legal nullity for all purposes.

3. If those requirements have been met the judgment is unimpeachably effective (under the rules stated in Chapters 3 and 4), except that relief may be obtained from its effects through equitable remedies (under the rules stated in Chapter 5 of the first Restatement).

The approach taken in the present formulation can be described as follows:

1. A court may properly render judgment only when certain requirements have been met concerning notice, territorial jurisdiction, and subject matter jurisdiction.

2. If those requirements have not been met, the judgment may be subject to avoidance and hence being treated as a legal nullity, depending on the nature of the defect concerning the particular requirement, the opportunity that the complaining party has to challenge the defect, and whether there has been reliance on the judgment since its rendition.

3. If the requirements have been met, the judgment is effective to the extent and with the qualifications accorded a valid judgment (under the rules stated in Chapters 3 and 4), except that relief may be obtained from its effects, or at least some of them, through various procedures whose appropriateness depends on the circumstances under which relief is sought (under the rules stated in Chapter 5).

Id. at 4 - 5.

45 See, e.g., Crick v. Commonwealth, 550 S.W.2d 534 (Ky. 1977); Holt v. Commonwealth, 525 S.W.2d 660 (Ky. 1975), discussed at note 58 infra.
Responding to *Kent v. United States*, the Kentucky Court had begun, in *Smith v. Commonwealth*, to examine cases of juvenile waivers to circuit court in terms of due process rather than jurisdiction. Before long, however, the Court began once more either to characterize the problem as one of jurisdiction, use both characterizations interchangeably, or not use either. Consequently the area was filled with confusion before *Schooley*. Judge Park's opinion in *Schooley* contains a careful analysis of the concept of subject matter jurisdiction and the consequences of characterizing an error as one of "jurisdiction."

If a transfer order is invalid on its face and a subsequent circuit court judgment is 'void' because of lack of 'jurisdiction,' it would seem that the issue could not be waived, but could be raised at any time. On the other hand, if the issue is considered as a question of due process there can be a waiver under certain circumstances by failure to appeal.

D. Due Process Treatment of Juvenile Transfer Cases

*Schooley* makes it clear that a circuit court has jurisdiction of criminal charges against a juvenile despite defects in the

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47 412 S.W.2d 256 (Ky.), cert. denied, 389 U.S. 873 (1967).
46 See Holt v. Commonwealth, 525 S.W.2d 660, 661 (Ky. 1975); Fields v. Commonwealth, 498 S.W.2d 130, 131 (Ky. 1973); Anderson v. Commonwealth, 465 S.W.2d 70, 74-75 (Ky. 1971).
45 See notes 29-32 and accompanying text supra, in which some of the pre-Kent cases are discussed.
44 See e.g., Bingham v. Commonwealth, 550 S.W.2d 535, 537 (Ky. 1977); Hamilton v. Commonwealth, 534 S.W.2d 802, 804 (Ky. 1976); Risner v. Commonwealth, 508 S.W.2d 775, 776 (Ky. 1974); Hopson v. Commonwealth, 500 S.W.2d 792, 793 (Ky. 1973); Anderson v. Commonwealth, 465 S.W.2d 70, 72 (Ky. 1971); Koonce v. Commonwealth, 452 S.W.2d 822, 824 (Ky. 1970).
43 See e.g., Richardson v. Commonwealth, 550 S.W.2d 538 (Ky. 1977); Whitaker v. Commonwealth, 479 S.W.2d 592, 594-95 (Ky. 1972).
42 See e.g., Crick v. Commonwealth, 550 S.W.2d 534 (Ky. 1977); Hubbs v. Commonwealth, 511 S.W.2d 664 (Ky. 1974); Baker v. Commonwealth, 500 S.W.2d 69 (Ky. 1973).
41 Schooley v. Commonwealth, 556 S.W.2d at 916-17. See Singleton v. Commonwealth, 208 S.W.2d 325, 326-27 (Ky. 1948); Ritchie v. Commonwealth, 17 S.W.2d 738, 739 (Ky. 1929). But see Restatement (Second) of Judgments §§ 14, 15 (Tent. Draft No. 5, 1978) discussed in notes 43 and 44 and accompanying text supra.
transfer from the juvenile court. As the Court of Appeals of New York has remarked:

It is an encyclopedia commonplace that "[w]here a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void" (21 C.J.S. Courts § 116). However deceptively attractive and convenient, this commonplace is both too simple and too broad. Definitions of "jurisdiction" are too varied and the consequences flowing from defective "jurisdiction" too diverse.54

While Kentucky courts have long relied on the commonplace rule,55 it was inevitable that at some point the need for finality56 would clash with the validity oriented rhetoric of the courts57 and the jurisdictional conceptualization would break down.58

55 See, e.g., Bingham v. Commonwealth, 550 S.W.2d 535, 537 (Ky. 1977); Singleton v. Commonwealth, 208 S.W.2d 325, 327 (Ky. 1948); Ritchie v. Commonwealth, 17 S.W.2d 738 (Ky. 1929); See also Hill v. Walker, 180 S.W.2d 93, 95 (Ky. 1944); Brown's Adm'r v. Gabhart, 23 S.W.2d 551, 552-53 (Ky. 1930); Kentucky Bonding Co. v. Commonwealth, 199 S.W. 807, 808-09 (Ky. 1918).
58 The two precursors of Schooley were Crick v. Commonwealth, 550 S.W.2d 534 (Ky. 1977), and Holt v. Commonwealth, 525 S.W.2d 660 (Ky. 1975). In Crick, the appellant's case had been waived by the juvenile court to the circuit court. He was thereafter indicted on three felony charges, entered guilty pleas, and was sentenced. He did not appeal, but he later unsuccessfully filed a RCr 11.42 motion to set aside the conviction, in which the jurisdictional issue was not raised. Finally, he filed a second RCr 11.42 motion, alleging that his conviction was void, due to a lack of jurisdiction in the circuit court as a result of an invalid waiver from juvenile court. On appeal, the circuit court's denial of the motion was affirmed. The Court held that: [t]he failure of Crick to litigate in his first RCr 11.42 proceeding effectively precludes his raising the issue in a second or any subsequent RCr 11.42 motion....

The record clearly demonstrates the fact that all issues concerning the validity of the juvenile court waiver could and should have been presented in Crick's initial RCr 11.42 motion.

550 S.W.2d at 535.

In Holt, the defendant's case was waived to the circuit court by the juvenile court. He was then indicted for murder and armed robbery. At this point, he successively: (1) appealed to the circuit court, challenging the validity of the waiver order; (2) sought to quash the indictment; and (3) sought a writ of prohibition in the Court of Appeals to halt the circuit court prosecution. All three of these requests were turned down. He thereupon entered guilty pleas to a charge of manslaughter and armed robbery and
1. *Due Process Analysis in Schooley*

After the *Schooley* court had approached the transfer issue as one of due process rather than jurisdiction, the only remaining issue was whether the appellant’s case merited relief. It was Schooley’s contention that the order transferring his case was “invalid because it failed to state the reasons for the transfer with sufficient particularity.” The court acknowledged the existence of such a defect. Nevertheless, it held “that there was no denial of due process justifying setting aside his judgment of conviction.” The purpose of a sufficiently particular statement of reasons is “to permit meaningful review of the transfer order by the circuit court or by an appellate court” on a direct appeal. When, however, the case arises, as did this one, “on a motion under RCr 11.42, . . . different considerations are applicable.” The court weighed “the interests of the public in the finality of criminal judgments of long standing” was sentenced. The following year he unsuccessfully sought relief under RCr 11.42. On appeal, he asserted that his fourteenth amendment due process rights had been violated “and that the requirements of KRS 208.170 were circumvented . . . .” 525 S.W.2d at 661. The Court affirmed, since “the complaints here asserted could and should have been presented . . . by a properly prosecuted appeal; . . . he may not now be heard any more than if this were a second application for post-conviction relief which contained complaints that could have been raised in an initial application.”

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5 Schooley v. Commonwealth, 556 S.W.2d at 916.
6 The court quoted the circuit court’s findings, one of which was “that public justice and the best interests’ of Schooley required that the case be transferred to circuit court.” Id. at 917. It noted that this finding did not satisfy the requirements of Hubbs v. Commonwealth, 511 S.W.2d 664, 666 (Ky. 1974), but warned that “this finding must not be taken out of context, and it should be considered in light of the language of the entire order.” 566 S.W.2d at 917.

4 Id. at 918.
5 Id. at 916. “When the validity of a transfer order is raised on a direct appeal, it would be reasonable to require that the reasons for the transfer be stated explicitly and that it not be necessary to infer the specific reasons for transfer from the record.” Id. at 917.
6 Id.
7 Id. The court noted that “[m]ore than eight years have elapsed since Schooley entered his pleas of guilty in the circuit court and was sentenced. Schooley is now twenty-five years of age and the juvenile court has consequently lost any power of disposition over Schooley. . . . When the issue of the validity of a transfer order is raised on direct appeal, there is a practical possibility that the juvenile defendant can still receive the benefit of adjudication in juvenile court. No such possibility exists in this case.” Id. at 917-18. The validity of at least part of this argument is now in doubt. KRS § 208.020 has recently been amended to read, in part, as follows:

1. The juvenile session of the district court of each county shall have
against the gravity of the error, which in this case was "relatively minor," and held in favor of finality.

2. Due Process Analysis in Rich

The Supreme Court in Rich also broke with its recent tradition and treated the transfer issue as one of due process. In this case; however, due process analysis did not yield the same result as in Schooley, i.e., a waiver of the right to object to the defect in juvenile proceedings. The Rich Court noted that "a recidivist conviction can only be obtained if it is shown that the defendant ha[s] been previously lawfully convicted of a felony." As has been stated in one factually similar case, exclusive jurisdiction in proceedings concerning . . . any person who at the time of committing a public offense was under the age of eighteen (18) years 1978 Ky. Acts. ch. 350, § 2 (emphasis in original); see also KRS § 208.020 (Supp. 1978). For details of prior wording of this section, see Lowry v. Commonwealth, 424 S.W.2d 841, 842 (Ky. 1968). See also Miller v. Anderson, 519 S.W.2d 826 (Ky. 1975).

556 S.W.2d at 917. The court noted that "[t]here is no issue with respect to Schooley's guilt," id. at 918, since he had pleaded guilty. It recognized that a plea of guilty alone "would not cure a substantial denial of due process in the proceedings in juvenile court," id., but noted that "the entry of a guilty plea has been a significant factor in the decision of other courts holding that there was no denial of due process to a juvenile defendant who seeks to make a collateral attack upon a judgment based upon a guilty plea following transfer from juvenile court." Id., citing Harris v. Procunier, 498 F.2d 576, 579 (9th Cir.), cert. denied, 419 U.S. 970 (1974); Smith v. Yeager, 459 F.2d 124, 126-27 (3d Cir. 1972); and Acuna v. Baker, 418 F.2d 639, 640 (10th Cir. 1969).

It was important to the Court that this was Schooley's second RCr 11.42 motion and that it was:
clear that Schooley failed to prosecute an appeal from the circuit court's order overruling the earlier motion under RCr 11.42. As Schooley ha[d] had an ample opportunity to challenge the validity of the transfer order by direct appeal or by the earlier motion under RCr 11.42, his challenge to the validity of the transfer order in the present motion under RCr 11.42 [was] not timely.

Schooley v. Commonwealth, 556 S.W.2d at 918, citing Crick v. Commonwealth, 550 S.W.2d 534 (Ky. 1977), and Holt v. Commonwealth, 525 S.W.2d 660 (Ky. 1965).

See, e.g., Bingham v. Commonwealth, 550 S.W.2d 535, 537 (Ky. 1977); Hamilton v. Commonwealth, 534 S.W.2d 802, 804 (Ky. 1976); Risner v. Commonwealth, 508 S.W.2d 775, 776 (Ky. 1974); Hopson v. Commonwealth, 500 S.W.2d 792 (Ky. 1973), all of which spoke of voidness or invalidity of a conviction due to lack of jurisdiction.

See notes 13-21 and accompanying text supra for details of the Court's analysis. See also Mayes v. Commonwealth, 563 S.W.2d 4 (Ky. 1978); Sharp v. Commonwealth, 559 S.W.2d 727 (Ky. 1977) (treating similar objections as an issue of due process, but finding no error; both cases were decided after Rich and Schooley).

"the unique nature of a recidivist proceeding transforms what may be only a procedural error in a prior conviction into a substantive failure of proof." Therefore, assuming that Rich's allegations as to the defects in his prior conviction are accurate, there was only one permissible conclusion: Rich "is not guilty of the habitual criminal conviction for which he is serving a sentence of life imprisonment because his [prior] conviction cannot be used as an offense under the habitual criminal statute." Thus the gravity of the alleged error in Rich was much greater than that in Schooley, while the interest in finality was less compelling.

E. Conclusion

Unfortunately, the Supreme Court did not order publication of its Rich opinion. While the opinion may not be cited as precedent, its analysis confirms the conclusions reached by the Court of Appeals in Schooley. Any return by the courts to notions of jurisdiction and automatic nullity and voidness would not only be conceptually inaccurate, but would reinject untold confusion into the transfer area.

See notes 22-25 and accompanying text supra for a discussion of the Court's directions for treatment of the case on remand.

See Canary v. Bland, slip op. at 9 (Merritt, J., concurring). See In Re Winship, 397 U.S. 358 (1970); Adams v. Commonwealth, 551 S.W.2d 561, 563-64 (Ky. 1977). See also Vachon v. New Hampshire, 414 U.S. 478, 480 (1974); Thompson v. City of Louisville, 362 U.S. 199, 205 (1960). It is worthy of note that the Court did not mention a recent line of its cases which has held that a defendant may waive his objection to a failure of the Commonwealth to prove an element of the habitual criminal offense by a lack of a timely objection or motion for acquittal. See Rudolph v. Commonwealth, 564 S.W.2d 1, 4 (Ky. 1977); Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977); Newell v. Commonwealth, 549 S.W.2d 89, 90-91 (Ky. 1977), discussed in Comment, supra note 56, at 223-224:

See notes 64-66 and accompanying text supra which discuss the balancing test applied in Schooley.
II. PROSECUTOR MISCONDUCT—USE OF DEFENDANT’S PRE-TRIAL SILENCE FOR IMPEACHMENT

Prosecutors have often sought to introduce into evidence defendant’s silence on being accused by police of commission of a crime. The theory of such admissibility is that silence in the face of an accusation constitutes an admission of guilt. Both the Kentucky Supreme Court and the United States Supreme Court have held that such action violates a defendant’s constitutional rights. Yet cases containing this error have continued to come before Kentucky courts and in many convictions have been affirmed, either through use of the harmless error loophole created by the Kentucky Supreme Court, or because of failure to preserve properly the issue for appellate review.

However, these procedural smokescreens may not shield this form of prosecutorial abuse in the future. Justice Lu-
kowsky, the first to voice real concern over the harmless error loophole created in Niemeyer v. Commonwealth, noted that:

Since our decision in ‘Niemeyer’ we have seen a parade of cases in which this error has reared its ugly head . . . . Having seen the same error pass in review so many times, I am compelled to conclude that prosecutors are deliberately disregarding the teachings of ‘Niemeyer’ in the hope of finding salvation in the harmless error doctrine. In other words, they are more interested in obtaining a conviction than in obtaining a conviction that will stick.

Justice Lukowsky felt that the approach taken by the Court since Niemeyer “encourage[d] the commission of such error,” concluding that:

The time has come for us to take a more prophylactic approach. We should exercise our supervisory authority over the lower courts of Kentucky and hold that whenever this error is committed it will result in reversal and a new trial. If that should prove to be insufficient to eliminate this form of gamesmanship we should assess the costs of appeal and the new trial against the Commonwealth Attorney.

Justice Lukowsky is undoubtedly correct that the rule, as stated and applied in Niemeyer, does little to discourage prosecutors willing to deliberately inject such error into the record. On the other hand, Darnell v. Commonwealth, the case which provoked Justice Lukowsky’s dissent, was a classic case of harmless error and the majority of the Court was undoubtedly reluctant to reverse, since there was overwhelming evidence of guilt in this particularly brutal and bizarre crime. Chuck Dar-
nell and Mike Nickel robbed Chuck's grandfather and step-grandmother of four or five hundred dollars; Chuck killed his grandfather's wife with a lug-wrench; Mike shot Chuck's grandfather in the right eye with a pistol. They admitted the crime to Chuck's father. The grandfather "testified positively that 'Chuckie' and Mike were the only persons [to visit his house] the night these sordid crimes were committed." There were three instances of alleged prosecutorial misuse of defendants' pretrial silence. First, the arresting officer was asked on direct examination by the prosecutor whether either defendant made a statement after being advised of his constitutional rights. He replied in the negative. A defense motion for a mistrial "was overruled but the jury was given an admonition."

Second, "Mike Nickel was asked on cross-examination if he had said, after being advised of his rights, 'Me and this other fellow . . . (nodding to Charles Darnell). . . have nothing to say. We want a lawyer'." A second motion for mistrial was made and denied. Finally, in rebuttal, the officer was asked whether Mike had indicated that the defendants would not make a statement, and answered "Yes, sir."

The Court concluded that:

the three isolated questions here constitute only harmless error which does not require reversal . . .

. . . In this case, the prosecutor did not focus on their silence by repetitive questioning, nor did he mention it in his closing argument. Secondly, the answer which was obtained

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90 The grandfather survived the attack and testified at trial. However, the Court related the grandfather's wife's wounds as follows:

A pathologist performed an autopsy on Hattie's body. He found multiple and extensive wounds and lacerations about the head and left side of the face, and the area above the bridge of her nose. A piece of the right ear was missing; there were multiple fractures of the cranial bones. There was massive hemorrhage over the entire surface of the brain. The pathologist also found there was a gunshot wound in the lower neck. He testified that in his opinion death was caused by a massive intracranial hemorrhage.

Id. at 592.

91 Id. at 593.

92 Id.

93 Id.

94 Id.

95 Cf. Niemeyer v. Commonwealth, 533 S.W.2d 218, 219-21 (Ky. 1976) (in which the prosecutor committed such further acts).
was that they desired the services of an attorney before making a statement. Thus an inference of guilt was negated by the explanation of their silence. Finally, the evidence against Chuck and Mike was overwhelming.88

Given a less clear-cut case, the Kentucky Supreme Court may be willing to abandon its reliance on the harmless error doctrine. In a case decided less than four months after Darnell, the Court went out of its way to comment on similar prosecutorial misconduct.89 After noting the United States Supreme Court's disapproval of "such a tactic"90 and the Commonwealth's concession of constitutional error, the Court concluded:

We did not reverse the conviction in Niemeyer because we thought that a word of caution would suffice to curb this practice; apparently we were wrong. While we have not yet reached the point where we think it necessary to invoke the prophylactic rule suggested by our brother Lukowsky . . . , we must admit our patience is wearing thin.91

The message to prosecutors at this point should be clear: anyone attempting to use a defendant's pretrial silence as a technique of impeachment does so at the genuine risk of reversal. The prosecutor faces not only the risk of an effective reversal by a federal court in collateral proceedings,100 but also the increasing risk of reversal by Kentucky courts as well.101

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88 Darnell v. Commonwealth, 558 S.W.2d at 593-94. The appellants raised several other issues, each of which was held by the Court not to require reversal. The sentences were vacated, however, and remanded for resentencing in compliance with KRS § 532.050 (Supp. 1978) and Brewer v. Commonwealth, 550 S.W.2d 474 (Ky. 1977).

89 Campbell v. Commonwealth, 564 S.W.2d 528 (Ky. 1978). The Court noted: "Although we do not choose to rely upon it as an alternative ground for reversal of [the] conviction, inasmuch as it was not objected to below, we are compelled in the exercise of our supervisory function to make mention of yet another instance of prosecutorial abuse." Id. at 531.

90 Id. at 532.

91 Id. Cf. Stiles v. Commonwealth, 570 S.W.2d 645, 646-47 (Ky. Ct. App. 1978) (questioning of defendant concerning his failure to give a statement "innocuous in comparison with the example in Niemeyer.").


93 In two survey period cases not involving the Niemeyer-Doyle error, convictions
III. REQUIRED PRESENTENCE PROCEDURES

A. Failure to Follow Presentencing Requirements

In 1974, the Kentucky General Assembly enacted KRS § 532.050, which sets forth a detailed list of presentence procedures for felony cases. In *Brewer v. Commonwealth* the were reversed due to prosecutor misconduct. *See* Campbell v. Commonwealth, 564 S.W.2d 528 (Ky. 1978) and Bowler v. Commonwealth, 558 S.W.2d 169 (Ky. 1977).

*Bowler*, in which the defendant had been convicted of the murder of his wife, involved two examples of abuse — "deliberately inject[ing] into the case, via a question, material prejudicial to the rights of the defendant without some reasonable basis to believe there will be an affirmative answer," *id.* at 171 (asking the defendant's stepdaughter whether he had ever molested her); and "improper argument in the presence of the jury after the cases was submitted to them — accusing the defense of deliberately concealing evidence." *Id.*

In *Campbell*, the prosecutor had questioned a witness about threats allegedly made against him, implying that the defendant had made them. The Court reversed the conviction, noting that "[i]t is a rule of longstanding in this jurisdiction that evidence that a witness has been threatened or otherwise influenced in an attempt to suppress his testimony is admissible in a criminal prosecution only where the threat was made by, or on behalf of the accused." 564 S.W.2d at 531. In this case, there was no basis for believing that the defendant had made the threat or caused it to be made. Therefore, the prosecutor's action was "an inexcusable breach of his duty as an officer of this court to prosecute with an eye towards fairness as well as with an eye towards winning." *Id.* at 532.

Bowler, 550 S.W.2d 474 (Ky. 1977).
Court held that the requirements of KRS § 532.050(1) and (4) are "mandatory and [do] not afford a trial judge the privilege or discretion of determining whether the report will be requested, obtained, or considered . . . . [T]hey are in fact a prerequisite to the entry of a valid judgment." Thus, in each case of conviction for a non-capital felony offense, the court must order a presentence investigation, consider a written report of the investigation, report its contents and conclusions to the defendant or his attorney, and, on request, allow an opportunity to challenge the report. Finally, "in view of the mandatory character of this requirement, the record of the proceeding should clearly disclose the fact that the trial court has fully complied with KRS § 532.050. . . ."

Several cases decided during the survey period involved a failure to carry out these mandatory procedures. The Court consistently vacated the judgments in these cases and remanded them for resentencing. In sum, unless the trial court complies with the statutory presentencing requirements and makes a clear record of its compliance, resentencing will be necessary.

B. **Timeliness of the Presentence Report Upon Resentencing**

In *Doolan v. Commonwealth*, the trial court twice failed

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104 *Id.* at 476. This holding obviates the necessity of examining whether the statute is an unconstitutional attempt by the legislature to invade the rule-making authority of the Court. See *Ky. Const.* §§ 109, 27, 28. Cf. *Commonwealth v. Schumacher*, 566 S.W.2d 762 (Ky. Ct. App. 1978) (holding a procedural statute not binding on the court).

105 *See KRS § 532.075 (Supp. 1978)* for special rules concerning review of a death sentence.

106 The contents of the report are outlined in KRS § 532.050(2). *See note 102, supra* for the text of the statute.

107 KRS § 532.050(1).

108 KRS § 532.050(4).

109 *Id.*

110 *Brewer v. Commonwealth*, 550 S.W.2d at 476-77.


112 566 S.W.2d 413 (Ky. 1978).
to comply with the mandate of Brewer and KRS § 532.050. On Doolan's first appeal from three robbery convictions, the Court remanded the case to the trial court for resentencing because the court had failed to advise him "of the factual contents and conclusions of the presentence investigation so that he might have an opportunity to controvert them as provided by KRS § 532.050(4)." On remand, the trial court resentenced him, and the defendant prosecuted a second appeal, "contend[ing] that the trial court again failed to follow the directives of this court and the relevant portions of the presentencing statute." He alleged two errors: first, that the trial court relied on the presentencing report which had been prepared approximately sixteen months earlier for the first sentencing, and declined to order an updated report; and second, though the appellant now discovered what he contended to be erroneous information in the report, that "[t]he trial court did not deem it necessary to postpone sentencing until the veracity of the appellant's claims could be fairly and accurately authenticated."

The Court again reversed the judgment and remanded for resentencing, stating:

A careful examination of the statute and the applicable case law leads to the inescapable conclusion that the trial court erred in not securing a current presentencing report and by not affording the appellant a fair opportunity to contradict the information contained therein . . . . It may be that a revised presentencing report would have elicited no new information which would have altered the appellant's sentence. On the other hand, a revised report may have presented an entirely different factual structure.

It may also be that the appellant will be unable to substantiate his contention that the prior criminal offenses listed in the report are not properly attributable to him. Nevertheless, the statute provides for a presentencing report and affords the appellant the right to controvert any information contained therein. To affirm the judgment of the trial court under these facts would be to disparage the logical intent and purpose of the statute.

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114 Doolan v. Commonwealth, 566 S.W.2d 413, 413 (Ky. 1978).
115 Id. at 414.
116 Id. at 414-15.
C. Waiver of Presentence Procedures

1. May They Be Waived?

Two cases decided during the survey period held that a defendant may waive the presentence procedures mandated by KRS § 532.050 and Brewer v. Commonwealth, since "[t]he requirements of KRS § 532.050 were established primarily for the benefit of the accused, and he should be allowed to forego these procedures if he so chooses." Other jurisdictions with mandatory presentence requirements similar to those of KRS § 532.050 are split on the issue of waiver of such procedures. In Illinois, for example, the statute expressly provides "that a defendant may waive his statutory right to a written presentence report." On the other hand, Michigan, New York, and Oregon courts have all held that a defendant cannot waive this procedure. These courts generally view the statutory purpose much more broadly than the Kentucky courts. As one New York court has stated:

[t]he pre-sentence report requirement is designed not merely to make the sentence more meaningful for the offender but also to bring before the court factors that may call for treatment in the community. The pre-sentence report requirement is designed for the criminal justice process, for the correctional process and society, rather than for the convenience of the court, the prosecutor and the defendant.

Nevertheless the mere existence of an independent societal interest is not itself dispositive. While "a defendant should be powerless to waive any rights that society has in the sentenc-

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117 Alcorn v. Commonwealth, 557 S.W.2d 624 (Ky. 1977); Risinger v. Commonwealth, 556 S.W.2d 177 (Ky. Ct. App. 1977).
118 Alcorn v. Commonwealth, 557 S.W.2d 624, 626 (Ky. 1977).
119 ILL. ANN. STAT. ch. 38 § 1005-3-2 (Smith-Hurd 1973).
ing process," those societal rights are protected in other ways, since "both the trial judge and the prosecuting attorney are in a position to assure that a defendant's waiver of the presentence report does not deprive the public of its right to have criminals properly punished." Therefore, as long as the courts are careful to safeguard the interests of society, waiver should be permitted as an instrument of economy.

2. Standard for Valid Waiver

Although waiver of presentence procedures is clearly permissible in Kentucky, the courts have not yet decided whether such a waiver must be made in an intelligent, understanding, and voluntary manner. The issue has been raised before the Kentucky Supreme Court, but since the Court felt "that the waiver by appellant was in fact understandingly made, [it] deem[ed] it unnecessary to pass on this question." In Illinois, any such waiver must be voluntary, understanding, and intelligent even though waiver is expressly permitted by statute. This standard has support in other jurisdictions as well.

Such a standard is certainly proper for Kentucky. Not only does the requirement further the purpose of KRS § 532.050, it also gives all parties concerned — the judge, prosecutor, defense counsel, and defendant — the opportunity to reflect on the propriety of the waiver. A voluntariness requirement for a valid waiver is one method of ensuring that the policy behind presentence procedure is not sacrificed for the sake of expediency alone.

IV. DOUBLE JEOPARDY — ATTACHMENT OF JEOPARDY

Prior to enactment of KRS § 505.030, "it [was] well

127 Id.
128 Id.
130 Alcorn v. Commonwealth, 557 S.W.2d 624, 627 (Ky. 1977).
133 This section was part of the Kentucky Penal Code. 1974 Ky. Acts ch. 406 § 48.
settled in this state that jeopardy does not attach until a jury has been sworn.\textsuperscript{133} KRS § 505.030 provides, however, that jeopardy does not attach until the first witness is sworn.\textsuperscript{134} The issue of the constitutionality of such a change was before both the Kentucky\textsuperscript{135} and United States\textsuperscript{136} Supreme Courts during the survey year. The Courts reached contrary results.

In Graham v. Commonwealth,\textsuperscript{137} the appellant was convicted of manslaughter in his second trial. The first trial had resulted in a mistrial, when "after the jury was selected and sworn, but before the first witness was sworn, the appellant through counsel stated that he had not been arraigned."\textsuperscript{138} The Commonwealth, rather than the defendant, moved for and was granted a mistrial. After proper arraignment a new trial was called. Graham pleaded double jeopardy. The plea was denied and Graham was found guilty by the jury.

On appeal, Graham argued that by being forced to stand trial a second time, when a jury had been sworn in the first, he had been subjected to double jeopardy.\textsuperscript{139} The Commonwealth responded that since the first trial ended before the first witness had been sworn, jeopardy had not attached at the first trial.\textsuperscript{140} The appellant's reply was that "the change effected by [KRS § 505.030(4)] violates a mandate of the Constitution of the United States."\textsuperscript{141}

The conviction was affirmed and the statute held to be constitutional. The rule on point of attachment urged by appellant was, the Court conceded, applicable to federal courts, but "[t]he Supreme Court has neither in Serfass\textsuperscript{142} nor in any

\textsuperscript{133} Allen v. Walter, 534 S.W.2d 453, 454 (Ky. 1976). See Baker v. Commonwealth, 132 S.W.2d 766 (Ky. 1939).
\textsuperscript{134} KRS § 505.030(4). "This definition of the attachment of jeopardy is identical to that contained in the American Law Institute's Model Penal Code . . . . The Institute could find no compelling reason to perpetuate the distinction between jury and bench trial as to the point at which jeopardy should be deemed to attach."
\textsuperscript{135} Graham v. Commonwealth, 562 S.W.2d 625, 626 (Ky. 1978).
\textsuperscript{137} 562 S.W.2d 625 (Ky. 1978).
\textsuperscript{138} Id. at 626.
\textsuperscript{139} U.S. CONST. amend. V, XIV.
\textsuperscript{140} See KRS § 505.030(4).
\textsuperscript{141} 562 S.W.2d at 626.
\textsuperscript{142} Serfass v. United States, 420 U.S. 377 (1975).
other case of which we have knowledge held that the federal
rules for the determination of the attachment of jeopardy are
constitutionally obligatory on the states.” In the Court’s
opinion “[j]eopardy attaches when a defendant is placed on
trial before the trier of the facts.” In the Court’s opinion,
since it is constitutionally permissible for the point of attach-
ment in bench trials to be at the point where the first witness
is sworn, the same point should govern in jury trials. The prac-
tice of differentiating between two points of attachment by
the number of triers of fact” was merely “a historical anach-
ronism.”

In Crist v. Bretz, the Supreme Court of the United
States held that the rule “that jeopardy attaches when the jury
is empaneled and sworn is an integral part of the constitutional
guarantee against double jeopardy.” Thus, the holding in
Graham is no longer authoritative and KRS § 505.030(4), to the
extent it provides otherwise, is unconstitutional. “[T]he rule
that jeopardy attaches when the jury is sworn [is not] simply
an arbitrary exercise of line-drawing.” Rather:

[i]t is a rule that both reflects and protects the defendant’s
interest in retaining a chosen jury. We cannot hold that this
rule, so grounded, is only at the periphery of double jeopardy
concerns. Those concerns—the finality of judgments, the
minimization of harassing exposure to the harrowing experi-
ence of a criminal trial, and the valued right to continue with
the chosen jury — have combined to produce the federal law
that in a jury trial jeopardy attaches when the jury is em-
paneled and sworn.

145 562 S.W.2d at 627. The Court noted that its holding conflicted with that in
Bretz v. Crist, 546 F.2d 1336 (9th Cir. 1976), which at the time Graham was decided
was before the U.S. Supreme Court on certiorari. The Court refused, however, to
accept the conclusions reached by the federal Court of Appeals in Crist.
146 562 S.W.2d at 627.
147 Id.
148 Id.
149 Id. at 2162.
150 Id. at 2162.
151 Id. at 2161.
152 Id. at 2162. Chief Justice Burger, Justice Powell, and Justice Rehnquist dis-
sented. In a separate opinion, the Chief Justice warned that “[w]e should be cautious
about constitutionalizing every procedural device found useful in federal courts,
thereby foreclosing the States from experimentation with different approaches which
However, the holding in Crist v. Bretz would not necessarily mandate a different result in Graham. Double jeopardy precluding retrial of a defendant requires not only an attachment of jeopardy in the first trial, but also requires that the "former prosecution [be] improperly terminated." Thus "[t]he attachment of jeopardy merely begins the inquiry as to whether the Double Jeopardy Clause of the Fifth Amendment proscribes a retrial." Under decisions of both the United States and Kentucky Supreme Courts, "termination is not improper if the defendant seeks, consents, or otherwise waives the right to object to the mistrial." Neither is termination improper if defendant causes the mistrial. While Graham did not himself make the actual motion for a mistrial, he did not voice any objections; it is possible that counsel in Graham deliberately failed to raise the lack of arraignment until the jury was sworn in an attempt to cause jeopardy to attach. Thus, even under Crist v. Bretz, the result in Graham probably would remain the same.

are equally compatible with constitutional principles." Id. at 2163 (Burger, C.J., dissenting). Justice Powell's opinion, in which the Chief Justice and Justice Rehnquist joined, had much of the flavor of the Kentucky Supreme Court's opinion in Graham. For example, it referred to the rule as the "product of historical accident." Id. at 2163 (Powell, J., dissenting).

153 KRS § 505.030(4).
154 See, e.g., Commonwealth v. Lewis, 548 S.W.2d 509 (Ky. 1977).
157 B KENTUCKY PRACTICE, supra note 4, at § 541. See KRS § 505.030(4)(a).
158 In addition, the failure to raise the lack of an arraignment until after the jury was sworn may have been intentional, i.e., a deliberate attempt to expose the defendant to jeopardy. See Commonwealth v. Lewis, 548 S.W.2d 509 (Ky. 1977).