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Kentucky Law Survey: Criminal Procedure

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Criminal Procedure

BY WILLIAM H. FORTUNE*

INTRODUCTION

This Survey covers significant criminal procedure decisions of the Kentucky appellate courts for the period July 1, 1980, to July 1, 1982. It does not include cases construing the penal code or noteworthy decisions in the Kentucky law of evidence. The author has selected the most important criminal procedure cases for treatment in the text; a number of significant cases are summarized in footnotes.1

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1 The Supreme Court of Kentucky rendered a number of important decisions not otherwise discussed in this Survey, e.g., Commonwealth v. Key, 633 S.W.2d 55 (Ky. 1982) (evidence in the hands of the county attorney may be imputed to the commonwealth attorney for purposes of the duty to disclose exculpatory evidence) (dictum); Schooley v. Commonwealth, 627 S.W.2d 576 (Ky. 1982) (defendant must make a showing that disclosure of the name of an informant will be helpful in the trial on the merits before disclosure will be ordered); Commonwealth v. Brown, 619 S.W.2d 699 (Ky. 1981) (prosecutors and courts have no inherent power to grant immunity from prosecution); Tabor v. Commonwealth, 613 S.W.2d 133 (Ky. 1981) (prosecution must prove the voluntariness of a confession by a preponderance of the evidence); Susman v. Commonwealth, 610 S.W.2d 608 (Ky. 1980) (in order to have standing to challenge the search of an apartment one must have more than a right of access—application of Rawlings v. Kentucky, 448 U.S. 98 (1980); Commonwealth v. Donovan, 610 S.W.2d 601 (Ky. 1980) (an order requiring exchange of witness lists does not violate the privilege against self incrimination even though it does violate the criminal rules).

Other important cases include Commonwealth v. Hamblen, 628 S.W.2d 345 (Ky. Ct. App. 1981) (return of an indictment in felony cases places sole jurisdiction in the circuit court and terminates the jurisdiction of the district court); Turlock v. Commonwealth, 620 S.W.2d 329 (Ky. Ct. App. 1981) (rule requiring explanation of potential conflict and written waiver in case of multiple representation by attorney is mandatory and violation requires reversal even though no prejudice can be shown); C.E.H. v. Commonwealth, 619 S.W.2d 725 (Ky. Ct. App. 1981) (order transferring juvenile case to circuit court is not appealable); Thurman v. Commonwealth, 611 S.W.2d 803 (Ky. Ct. App. 1980) (thirteenth juror, who had been discharged from the panel after the completion of final arguments, could not be recalled when a juror became ill during deliberations); Commonwealth v. Cornelius, 606 S.W.2d 172 (Ky. Ct. App. 1980) (statute granting courts power to parole misdemeanants is unconstitutional since parole is inherently an executive function).
I. SEARCH AND SEIZURE

A. Auto Inventory Searches

In 1979, the Kentucky Supreme Court decided Wagner v. Commonwealth,\(^2\) one of the most significant search and seizure cases ever decided by the state's highest court. Although there is some debate over Wagner's\(^3\) exact meaning, two things are clear: 1) the Court rested its decision on section 10 of the Kentucky Constitution,\(^4\) rather than the fourth amendment, because it disagreed with the United States Supreme Court's decision in South Dakota v. Opperman;\(^5\) and 2) the Court intended to clarify the circumstances under which police could impound and search a car.\(^6\) The Kentucky Court said that a vehicle may be impounded without a warrant in only four situations:

1) The owner or permissive user consents to the impoundment;

2) The vehicle, if not removed, constitutes a danger to other persons or property or the public safety and the owner or permissive user cannot reasonably arrange for alternate means of removal;

3) The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party, or

4) The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed.\(^7\)

\(^2\) 581 S.W.2d 352 (Ky. 1979).
\(^3\) Compare Note, Search and Seizure, 68 Ky. L.J. 611, 631 (1980-81) (arguing that Wagner makes it clear that warrants are required to search cars in Kentucky, absent exigent circumstances) with Givan, Notes on Wagner v. Commonwealth, Ky. Bench and Bar, July 1981, at 11, 12 (arguing that Wagner should not be construed as limiting the authority of police to make warrantless vehicular searches in non-inventory situations).
\(^4\) See 581 S.W.2d at 356.
\(^5\) 428 U.S. 364 (1976). Opperman held that a routine police search of an impounded car that disclosed marijuana in the glove compartment did not constitute a violation of fourth amendment rights.
\(^6\) See 581 S.W.2d at 356-57.
\(^7\) Id. at 356 (footnotes omitted).
The Court went on to say that an impounded vehicle could be inventoried: 1) pursuant to a warrant based on probable cause; 2) with the consent of the owner or permissive user; or 3) upon substantial necessities grounded upon public safety justifications.\(^8\) The Court, however, also said it was reserving a determination of what circumstances would permit an inventory of an impounded vehicle whose owner could not be contacted.\(^9\)

In *Cardwell v. Commonwealth*,\(^{10}\) the court of appeals dealt with the question reserved in *Wagner*—the question of when an impounded vehicle can be inventoried where the owner is absent and cannot be contacted.\(^{11}\) In *Cardwell*, the defendant had burglarized a house and put the stolen property in the trunk of his car. He collided with another motorist and fled the scene with the other driver in pursuit. He then lost control of his car, and it turned over several times, coming to rest alongside and perhaps protruding onto the highway. The defendant was injured and his car damaged. Before the defendant was taken to the hospital, he told the investigating trooper that his father would tow the car with a wrecker from Louisville, which was several hours from the accident scene. Believing, however, that the car was a safety hazard, the trooper summoned a local wrecker to impound the car. At some point the trooper noted that the trunk lid, although down, was not latched and its lock was missing. Having made the decision to impound the vehicle, the trooper decided to look in the unlocked trunk "for valuables . . . because the car was going to be towed in."\(^{12}\) When the wrecker arrived, the trooper opened the trunk and found the fruits of the earlier burglary. By this time the defendant had been removed to the hospital.

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\(^{8}\) *Id.* at 357.

\(^{9}\) *Id.*

\(^{10}\) 639 S.W.2d 549 (Ky. Ct. App. 1982), *discretionary review denied*, (Ky. Oct. 5, 1982). Pack v. Commonwealth, 610 S.W.2d 597 (Ky. 1980), decided by the Supreme Court during the Survey period, was merely an application of *Wagner*. In *Pack*, the officer made an arrest for driving while under the influence. The car was impounded and subsequently searched for evidence of a crime that the driver and a cohort were suspected of committing. The impoundment was justified on the theory that the cohort might destroy evidence if the car was left at the scene; the search was justified by application of the plain view doctrine.

\(^{11}\) 639 S.W.2d at 552.

\(^{12}\) *Id.* at 550.
The court first considered the legality of the impoundment of the vehicle in light of the defendant's desire that his father get the car. The court had no difficulty in upholding the impoundment under the second Wagner situation—the car constituted a hazard on the highway and it was not reasonable to wait for the father to arrive from Louisville, some 100 miles away.\[13\]

The court next considered the difficult question of the opening of the trunk. In what must be regarded as dictum, the court first suggested that lifting the lid of the trunk might not be a search for purposes of the fourth amendment and section 10 of the Kentucky Constitution, because the trooper did not have a "police mentality," that is, a suspicion that a body or guns were in the trunk.\[14\] The court quoted from Nichols v. Commonwealth,\[15\] a case which does not support this proposition.\[16\] To suggest that the constitutional protections against unreasonable searches and seizures apply only when the police are looking for evidence of a crime would drastically circumscribe those protections. The United States Supreme Court has not drawn this distinction\[17\] in earlier cases or in Opperman.\[18\] Within Kentucky, City of Danville v. Dawson\[19\] clearly holds that an officer's benign motive does not change a search to a non-search.

After suggesting that no search occurred, the court went on to hold that the search was, in any event, justified by the implied consent of the owner. The court reasoned that because the defendant was on his way to the hospital, the trooper had done him a favor by opening the trunk.\[20\] While seeming absurd, this reasoning is consistent with Wagner and Justice Marshall's dissent in Opperman.\[21\] Assuming that the defendant could not reasonably
be contacted, was it reasonable for the trooper to suppose that the defendant would want the trunk opened to check for valuables? Arguably, on the facts of *Cardwell*, such a supposition was warranted; the trunk could not be secured because it had no lock. Thus, the police could not safeguard the contents by locking the trunk. *Cardwell* seems to be the exception to the rule presuming against consent to search and clearly does not modify the general requirement in Kentucky that police safeguard the contents of a vehicle by locking the doors.

The defect in *Cardwell* is the court’s assumption that the owner could not reasonably be contacted. The facts set out in the opinion reflect that the owner-defendant was at the scene prior to the search and was on his way to the hospital when the search occurred. No reason is given as to why the trooper believed he could not delay the search until he had contacted the owner. *Wagner* requires an explanation of a failure to contact the owner, and *Cardwell* contains no such explanation.

B. Search Incident to Arrest

In *Brock v. Commonwealth*, the court of appeals upheld, as incident to arrest, the search of a lunchbox belonging to Larry Brock found within the passenger compartment of a van following the arrest of the driver, a man named Linders. The court applied the recently-announced rule of *New York v. Belton* that “articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary item,’” and that the passenger compartment and all items within it may be searched incident to arrest. The United States Supreme Court in *Belton* opted for a “bright line” approach to a common situation—an arrest on the highway accompanied by fear that weapons or evidence are

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22 639 S.W.2d at 550, 552.
23 581 S.W.2d at 357.
26 Id. at 460.
within the car—to establish a rule which the majority believe is easy to understand and apply. Simply stated, the rule permits the passenger compartment and all items within it to be searched without a showing that the arrestee could in fact gain access to the item seized. 27

In addition to its significance as the first Kentucky case to apply Belton, Brock is noteworthy for two other reasons. First, the court declined an invitation to find that the Kentucky Constitution affords protection to the individual in addition to that afforded by the fourth amendment. 28 Second, the court applied the rationale of search incident to arrest even though the opinion suggests that the officers thought they were searching pursuant to the consent of the driver, Linders, and that they had no fear that he would try to grab something from the van. 29 By contrast, the officer in Belton was faced with a volatile situation in which he believed himself to be in danger. 30 In Belton, the Supreme Court held that adhering to a rule which is measured after the fact by a judge’s view of an arrestee’s actual ability to reach an object within a car is inconsistent with the deterrent purpose of the exclusionary rule. The Court did not, however, hold it unnecessary to determine whether an officer’s search is motivated by fear. Since Chimel v. California, 31 the exception for searches incident

27 Id. at 460-61. The case for a bright line approach to fourth amendment adjudication is well stated in LaPave, “Case-by-Case Adjudication” versus “Standardized Procedure”: The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 141-42 (1975).

28 See 627 S.W.2d at 41. But cf. Wagner v. Commonwealth, 581 S.W.2d at 352, where the Kentucky Supreme Court held that § 10 of the Kentucky Constitution imposes more stringent standards for police inventory searches than required by the fourth amendment as interpreted by the Supreme Court in South Dakota v. Opperman, 428 U.S. at 364.

29 The trial judge upheld the search on the basis of consent and probable cause plus exigent circumstances. 627 S.W.2d at 40. The court of appeals realized that Linders’ consent could not be effective as to Brock’s lunch box and believed that probable cause plus exigent circumstances would not prevail in light of Robbins v. California, 453 U.S. 420 (1981) (now overruled on the salient point by United States v. Ross, 102 S. Ct. 2157 (1982)). Thus, the court in Brock found it necessary to rest its decision on a ground not relied on by the trial court.


31 395 U.S. 752 (1969). In Chimel, the Supreme Court relied on Terry v. Ohio, 392 U.S. 1 (1968), which focused on the officer’s reasonable belief that action was necessary for personal safety. 395 U.S. at 762. The Court went on in Chimel to say:
to arrest has been tied to the officer's belief that such a search is necessary to prevent the seizure of a weapon or destructible evidence by the arrestee. The Kentucky court in *Brock* has either overlooked this rationale or has quietly decided that *Belton* simply permits an area search, regardless of either the arrestee's ability to reach items within the area or the officer's motive for searching.

II. **Exclusion of Evidence as a Remedy for Violation of a Statute**

Suppression is not an appropriate remedy for the violation of a court rule or statute, where the violation does not impair the substantial rights of the defendant. On the other hand, when a statute is designed to confer substantial rights, evidence seized in violation of the statute arguably should be suppressed. Thus, in *Davidson v. Commonwealth* the court of appeals held that it was error to admit incriminating statements of two juveniles taken after an arrest in which police failed to follow the procedures set forth in Kentucky Revised Statutes (KRS) section 208.110. Although the decision could have been based on other

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When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.

395 U.S. at 763 (emphasis added). Although this language implies that the arrestee should have the actual ability to reach the item in question, the Kentucky Supreme Court held in *Collins v. Commonwealth*, 574 S.W.2d 296 (Ky. 1978) that physical proximity between the arrestee and the area searched would suffice. This is consistent with the Supreme Court's approach in *Belton*. For a critical analysis of *Collins*, see Note, supra note 3.

32 Little v. Commonwealth, 438 S.W.2d 527 (Ky. 1968); Commonwealth v. Wilson, 610 S.W.2d 896 (Ky. Ct. App. 1980).


35 Ky. REV. STAT. § 208.110(3) (Bobbs-Merrill 1982) [hereinafter cited as KRS] requires a peace officer taking a child into custody to notify the parent or relative of this fact and give an account of the charges against the child, the reason for the detention and the time and place of the detention hearing.
grounds, the court of appeals read the statute as evincing a legislative concern for juveniles confronted by law enforcement personnel. Because the court believed the statute was enacted to ensure that confessions were not given in ignorance of the right to remain silent, suppression of evidence taken in violation of the statute seemed the appropriate remedy.

In contrast, the Kentucky Supreme Court in Commonwealth v. Gordon held it was error to suppress an out-of-court identification which was traceable to a photograph of a juvenile retained by the police in violation of KRS section 208.196. The Court based its holding on the following: 1) the statute is for the protection of juveniles and the defendant was an adult at the time the photo was viewed by the victims; 2) the statute provides its own remedy—misdemeanor sanctions; and 3) the statute is a deterrent but is not constitutional in nature. A juvenile does not have a constitutional right to the confidentiality of a mug shot. On the other hand, the statute involved in Davidson is designed to provide notice to the parent, or other responsible person, of the nature of the charge, the reason for detention and the time and place of the detention hearing. The court of appeals regarded the subject of this statute as closely tied to the constitutional privilege against self-incrimination. So interpreted, the statute implements a federal constitutional right, and suppression is an appropriate remedy.

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36 The court also found there was a lack of probable cause for arrest, a ground that would invalidate a resulting confession. See Taylor v. Alabama, 102 S. Ct. 2664 (1982).
37 613 S.W.2d at 435.
38 Id.
39 621 S.W.2d at 27.
40 KRS § 208.196(2) (1976) requires that physical evidence and records be surrendered to the court upon the elimination of the child as a suspect.
41 621 S.W.2d at 28.
42 KRS § 208.110 (1976).
43 The court referred to this as the “right to remain silent.” 613 S.W.2d at 435.
44 The court quoted from In re Gault, 387 U.S. 1 (1967), a case holding that a juvenile has a constitutional right to counsel in a proceeding in which his or her liberty may be lost. 613 S.W.2d at 435. The Kentucky court’s holding, while based on the statute, was in response to an argument that Gault and Miranda v. Arizona, 384 U.S. 436 (1966), require warnings on arrest. 613 S.W.2d at 435. The United States Supreme Court has held that Miranda warnings are required only if there is to be interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980). There was no interrogation in Davidson.
III. ENFORCEABILITY OF PLEA AGREEMENTS

Plea agreements are legal\(^{45}\) and may be enforced against the state by specific performance,\(^{46}\) at least in cases where the defendant has performed and cannot be returned to the status quo ante.\(^{47}\) In *Brock v. Sowders*,\(^{48}\) the Kentucky Supreme Court held the agreement of a local prosecutor enforceable against the Kentucky Bureau of Corrections. The local prosecutor had agreed that in return for a guilty plea he would recommend that Brock receive three ten-year sentences, to run concurrently with each other and with an Indiana sentence then being served. Brock pled guilty, was sentenced in accord with the agreement and was returned to Indiana to serve out his sentence in that state. After completion of the Indiana sentence, he was brought back to Kentucky to serve the balance of the Kentucky sentences. At that point, the Kentucky Bureau of Corrections refused to give credit for the time served in Indiana because of the absence of express statutory authority. Brock filed a petition for habeas corpus, which was denied by the circuit court and the court of appeals. The Supreme Court reversed, stating that plea agreements must be carried out regardless of the absence of express statutory authority.\(^{49}\)

On the facts, *Brock* stands for the proposition that a local prosecutor's agreement, ratified by a sentencing court, is binding on the Commonwealth of Kentucky irrespective of whether the prosecutor went beyond his or her authority.\(^{50}\) If this reading of *Brock* is correct, an agreement with a local prosecutor will be binding on other prosecutors within the state.\(^{51}\) The need for consultation is obvious.

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\(^{46}\) See Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979).
\(^{47}\) In re Geisser, 554 F.2d 698, 706 (5th Cir. 1977).
\(^{48}\) 610 S.W.2d 591 (Ky. 1980).
\(^{49}\) Id. at 592.
IV. PUBLIC RIGHT OF ACCESS TO PRE-TRIAL PROCEEDINGS

Both the United States and Kentucky Constitutions have been interpreted as providing a public right of access to trials. The public and the media may not be denied access to trial proceedings without a particularized showing that closure is necessary to protect the defendant or vindicate a legitimate state interest. The United States Supreme Court has not yet ruled, however, that the press or public have a constitutional right of access to pre-trial proceedings. In the important case of Ashland Publishing Co. v. Asbury, a panel of the Kentucky Court of Appeals held that sections 8, 11, and 14 of the Kentucky Consti-

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52 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (“[t]he right to attend criminal trials is implicit in the guarantees of the First Amendment”).


54 448 U.S. at 581.

55 See Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982) (error to close proceedings during testimony of minor rape victims without a showing that the victims were unwilling to testify in the presence of the press); Lexington Herald-Leader Co., Inc. v. Tackett, 601 S.W.2d 905 (Ky. 1980); Johnson v. Simpson, 433 S.W.2d 644 (Ky. 1968).


57 612 S.W.2d at 749.

58 KY. CONST. § 8 states:

Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

59 KY. CONST. § 11 states:

In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the general assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

60 KY. CONST. § 14 states: “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”
tution—viewed in the context of a tradition of accessibility—create a constitutional right of access to pre-trial hearings, as well as to trials. The court held it was error for the trial judge to enter an order excluding the press and public from pre-trial hearings in the absence of a showing that closure was necessary to protect the defendant.

The court went on to set guidelines for the handling of requests to close pre-trial hearings. The proceeding should not be closed unless the judge concludes “that there is a substantial probability [that] the right of the accused to a fair trial or his other Constitutional rights will be irreparably damaged.” Presumably, a judge also may consider legitimate state interests, such as the identity of an informer. If the expected evidence at the pre-trial hearing is not generally known, the judge should consider closure when the evidence is of a kind that would be inadmissible at trial. The judge should consider the likelihood that the pre-trial hearing would not be reported in the media, because not every criminal case is a “cause célèbre.” In any case in which closure is requested, the judge should give the press and public a right to be heard, consider the utility of other means of protecting the defendant and make specific findings setting out the need for closure.

Ashland Publishing Co. is an excellent decision. The public has an interest in being informed about the operation of the criminal justice system. Extending the right of access to pre-trial hearings advances that interest because most criminal cases are disposed of without trial.
V. JOINDER AND SEVERANCE

In *Hubbard v. Commonwealth*, defendant Hubbard was indicted for burglary, theft and possession of a handgun by a convicted felon, following the theft of an automobile from a dealer's garage. The charge of possessing a firearm after having been convicted of a felony centered on a handgun which fell out of the car when the vehicle was stopped by the police. Both Hubbard and a passenger in the car identified the firearm as belonging to the passenger.

Prior to trial, Hubbard moved for a separate trial on the felon in possession charge, pointing out that he would be prejudiced in defending against the burglary and theft charges by the introduction of his previous felony conviction. The trial court denied the motion for severance, and Hubbard was subjected to trial on all charges. The prior felony conviction was admitted, ostensibly to prove the felon in possession charge. Hubbard was acquitted on that count but convicted of the burglary.

On appeal, the Kentucky Supreme Court reversed, holding that the trial judge abused his discretion in not granting a separate trial on the felon in possession charge. The Court stated:

RCr 9.16 provides that if it appears that either the Commonwealth or the defendant will be prejudiced by a joint trial of separate offenses they shall be tried separately. This case is a perfect example of when a severance should be granted. The two-stage proceeding in persistent felony-offender cases was designed for the specific purpose of obviating the prejudice that necessarily results from a jury's knowledge of previous convictions while it is weighing the guilt or innocence of a defendant on another charge. Cf. KRS 532.080(1), enacted in 1974.

The reasoning in *Hubbard* is sound. Prejudice invariably results from the introduction of evidence of a felony conviction. If the conviction is admissible on one count and inadmissible on a

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68 633 S.W.2d 67 (Ky. 1982).
69 Id. at 68.
70 Id.
71 Id.
second count of a multi-count indictment, a motion to sever should always be granted.\textsuperscript{72}

VI. COMPETENCY TO STAND TRIAL

The test for competency to stand trial is whether the accused “as a result of mental disease or defect lacks capacity to appreciate the nature and consequences of the proceedings against him or [is unable] to participate rationally in his own defense.”\textsuperscript{73} If a defendant has a poor memory, it can be argued that he is incompetent to stand trial because he cannot participate in his own defense—he cannot tell his attorney what occurred, assist in the location of witnesses, testify to the events in question or assist in challenging prosecution witnesses.\textsuperscript{74}

Although the Kentucky high court held in 1972 that occasional lapses of memory do not necessarily render an individual incompetent for trial,\textsuperscript{75} the Court did not speak definitively on the issue of amnesia until the 1981 decision of Commonwealth v. Griffin.\textsuperscript{76} In Griffin, the Court reversed the court of appeals which had upheld the trial court’s finding of incompetency. The Court found that the trial judge abused his discretion in declaring incompetent a defendant whose medically-certified lack of memory prevented him from assisting his attorney at trial.\textsuperscript{77} Reversing, the Court said: “We reject amnesia by virtue of mental

\textsuperscript{72} Although the question of severance is generally within the discretion of the trial court, Ware v. Commonwealth, 537 S.W.2d 174 (Ky. 1976), the Court recently held it error to require a defendant to present inconsistent defenses to counts of a multi-count indictment before the same jury. In Romans v. Commonwealth, 547 S.W.2d 128 (Ky. 1977), the defendant was indicted on two counts of rape, involving different victims. Joinder was proper under Ky. R. Crim. P. 6.18 [hereafter cited as RCr], because the acts were of the same character. The accused defended count one on consent and count two on mistaken identity. The Supreme Court held, inter alia, that the charges ought not to be tried together. \textit{Id.} at 131.


\textsuperscript{74} See the trial judge’s findings as reported in Commonwealth v. Griffin, 622 S.W.2d 214, 215 (Ky. 1981); S. SHAH, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 101-03 (1974).

\textsuperscript{75} Dye v. Commonwealth, 477 S.W.2d 805 (Ky. 1972), \textit{aff’d sub nom.} Dye v. Cowan, 472 F.2d 1206 (6th Cir. 1972).

\textsuperscript{76} 622 S.W.2d 214 (Ky. 1981).

\textsuperscript{77} \textit{Id.} at 215-16.
disease or otherwise as a basis for declaring an accused incompetent to stand trial. This holding includes partial loss of memory or distorted memory of events at the time of commission of a crime."  

To answer the contention that lack of memory puts the defense at a considerable disadvantage, the Court suggested that in a case of medically-confirmed amnesia the trial court could order the prosecution to open its files to the defendant. In this way, defense counsel could be better apprised of the historical facts. The Court gratuitously stated that "[l]oss of memory due to self-induced intoxication would not warrant an order opening prosecution files to the defendant."  

Griffin is a remarkable example of judicial insensitivity toward the accused and defense counsel. The right to effective assistance of counsel includes the right to effective investigation. When a defense attorney is unable to investigate the facts because of a client's loss of memory, for whatever reason, the trial court should require the prosecution to cooperate fully in assisting the defense attorney in reconstructing the historical facts. On a sufficient showing of need, the trial court should authorize payment of the fee of a hypnotist when expert testimony holds out the hope that hypnosis may unlock the accused's memory.  

If amnesia persists at trial, the judge should fashion substitutes for the assistance the accused would ordinarily have provided to defense counsel. For example, the court could permit

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78 Id. at 217.  
79 Id.  
80 Id.  
81 See STANDARDS—THE DEFENSE FUNCTION § 3.2 (1980), which provides that as "soon as practicable the lawyer should seek to determine all relevant facts known to the accused." Further, it "is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." Id. § 4.1.  
82 According to the opinion in Griffin, loss of memory as the result of self-induced intoxication would not warrant opening the prosecution files. 622 S.W.2d at 217. The plight of defense counsel is the same whatever the reason for the loss of memory.  
83 KRS § 31.100 (1980) defines a "needy person" as one who is "unable to provide for the payment of an attorney and all other necessary expenses of representation."  
defense counsel a limited examination, outside the hearing of the jury, of any witness who had refused to talk to defense counsel prior to trial. The court should be generous in considering defense requests for continuances.

Finally, in the event of a conviction, the court should consider whether the proceeding was fair. In Wilson v. United States, Judge Skelley Wright of the Court of Appeals for the District of Columbia said the trial court should make specific written findings, after an evidentiary hearing if necessary, considering the following factors:

(1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
(2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
(3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
(4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.
(5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
(6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

After finding the facts, the court should determine whether the trial was fair. If so, the conviction should stand. If not, the court should decide whether to dismiss the indictment or give the state an opportunity to attempt to eliminate the unfairness in a retrial.

Justice Stephenson's opinion for the Kentucky Court in Griffin compares unfavorably with that of Judge Wright in Wilson.

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85 391 F.2d 460 (D.C. Cir. 1968).
86 Id. at 463-64 (footnote omitted).
87 Id. at 464.
To flatly hold that amnesia does not render a person unfit for trial overlooks the problems that poor memory presents for defense counsel. Needless to say, a trial judge is not required to believe an accused's claim of loss of memory. At a competency hearing, the trial judge may choose whom to believe. In *Griffin*, however, the accused presented a verified history of mental illness and the trial judge found the loss of memory to be genuine.

VII. IDENTIFICATION PROCEDURES

Due process is violated by the admission of identification evidence where there is a substantial chance of misidentification as a result of unnecessarily suggestive procedures. In *Riley v. Commonwealth*, the Kentucky Supreme Court was faced with an identification procedure which was not only extremely suggestive, but also reached the limit of what may be required of an accused without violating the right to a fair trial.

The clerk of a store robbed by two masked men (one tall, one short) provided general descriptions of the robbers, who were armed with handguns. Soon after the robbery, Holland and Riley were apprehended. Apparently, they had guns in their possession; clothing matching that used by the robbers (two scarves and a trenchcoat) was found nearby. After the arrest, Holland and Riley were exhibited to the clerk, who failed to identify them as the robbers. She also failed to identify their photos and failed to identify Riley at a preliminary hearing.

At trial, the judge ordered Holland and Riley to act out the robbery before the jury to determine if the clerk could identify them. Riley was forced to put on the black silk scarf, take the .38 caliber revolver, stand near the clerk and say the words spoken by the taller robber. Holland was required to put on the black trench coat and mask and place the black handgun in the waistband of his trousers. After this staging, the clerk identified Holland and Riley as the robbers, and they were convicted.

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89 620 S.W.2d 316 (Ky. 1981).
90 *Id.* at 317.
91 *Id.* at 317-18.
On appeal, the Court applied the factors\(^9\) set out in Neil v. Biggers\(^9\) and found that the "dress rehearsal held before the jury, when considered in light of the totality of the circumstances, was so unnecessarily suggestive and conducive to irreparable mistaken identity that movant was denied due process."\(^4\) The Court was obviously impressed by the failure of the clerk to identify Riley on three previous occasions and the fact that the clerk was not asked to make an in-court identification until Riley and Holland were clad in the robbers' garb. The conclusion reached was that the clerk identified the clothes rather than the people in the clothes.\(^9\)

Even in the absence of a substantial chance of misidentification, forcing an accused to don a mask, brandish a gun and utter threats in the presence of the jury seems inimical to a fair trial.\(^9\)

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\(^9\) Id. at 318. These are:
(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.


\(^9\) 620 S.W.2d at 319.

\(^9\) Id.

\(^9\) In Pena v. State, 630 S.W.2d 686, 689 (Tex. Ct. App. 1981), the trial court forced the accused to put on a ski mask and gloves, not for purposes of identification, but to bolster the officer's testimony that he was frightened when confronted by the accused. The court found this was reversible error. But cf. People v. Holt, 104 Cal. Rptr. 572, 578-79 (Cal. Ct. App. 1972), cert. denied 413 U.S. 921 (1973), overruled, Evans v. Superior Ct., 522 P.2d 681, 686 n.6 (1974) (overruled Holt only insofar as inconsistent with Evans) (not error to require accused to brandish gun and utter words said by robber, rejecting claims of misidentification and violation of the privilege against self-incrimination; no claim was made that the prejudicial effect outweighed the probative value of the evidence).

The privilege against self-incrimination is implicated if the accused is compelled to perform some communicative or testimonial act. Thus, in Serratore v. People, 497 P.2d 1018, 1022 (Colo. 1972), overruled sub. nom, People v. Ramirez, 609 P.2d 616, 621 n.9 (Colo. 1980) (overruled only insofar as Ramirez limits Serratore to courtroom demonstrations), the Colorado Supreme Court reversed a conviction where the prosecutor had sought, in open court, to compel the accused, a man only four-foot-ten-inches tall, to try to place his thumb print on a stove five-foot-seven-inches off the floor. The court viewed this as the equivalent of asking the accused if he could reach the spot.

Requiring the accused to speak or otherwise exhibit physical characteristics does not violate the privilege against self-incrimination. United States v. Wade, 388 U.S. 218 (1967); Francis v. Commonwealth, 468 S.W.2d 287 (Ky. 1971).

For a comprehensive annotation of cases involving the propriety of requiring a defendant to perform an act in the presence of the jury, see Annot., 3 A.L.R. 4th 387 (1981).
Such a procedure vests the accused, as the actor, with the characteristics of the role he is given to play. If the ability of a witness to identify depends upon seeing and hearing an individual imitating the criminal, the identification should take place before trial in a properly conducted lineup.97 Nothing supports forcing the accused to accept the starring role in a re-creation of the crime for an audience of twelve jurors.98

VIII. PRIVILEGE AGAINST SELF-INCRIMINATION

Kentucky prosecutors do not have the inherent power to grant immunity to witnesses to compel testimony.99 Commonwealth v. Gettys100 illustrates the difficulties this lack of authority presents for a prosecutor whose case depends upon a reluctant witness. The defendant Gettys and an individual named Schworer were indicted for bribery. Though the opinion is not explicit, a plea bargain apparently was struck whereby Schworer would testify against Gettys in return for a light sentence on an amended charge.101 Schworer apparently reneged on the bargain. He pled guilty to an amended charge with sentencing deferred until after the Gettys trial. When called as the state's first witness, however, Schworer invoked the privilege against self-incrimination. The trial judge ruled that the privilege could still be claimed since Schworer had not been sentenced and might withdraw his guilty plea. At this point, a recess was called and Schworer was sentenced to a term in the county jail.102

After sentencing, the trial judge ruled that Schworer was not entitled to claim the privilege with regard to the Gettys bribe. Schworer persisted in his refusal to testify, asserting that he had

97 United States v. Wade, 388 U.S. at 218. A properly conducted lineup will lessen the chances of a witness misidentifying the defendant. On a proper showing by the defendant a trial court should order the prosecution to conduct a pre-trial lineup. Evans v. Superior Court, 522 P.2d at 681.

98 However, if the defendant chooses to testify in his own behalf, he may be required to demonstrate as part of cross-examination. Fox v. Commonwealth, 185 S.W.2d 394, 398 (Ky. 1945).


100 610 S.W.2d 899 (Ky. Ct. App. 1980).

101 See id. at 900.

102 Id.
testified before the grand jury that he had made no campaign contributions to anyone, while another witness testified he had received $500 from Schworer. Thus, it was argued, Schworer might be indicted for perjury if he were to testify differently on this collateral matter. Gettys' attorney stated that he intended to ask Schworer about the $500 payment.\(^{103}\)

Over the state's objection, the court ruled that cross-examination as to the $500 campaign payment would be proper and that Schworer was entitled to claim the privilege against self-incrimination with respect to the payment. The court then declared that Schworer could not be compelled to testify at all, presumably because the judge believed Gettys' right of cross-examination required that Schworer answer questions about the $500 payment. A verdict was directed for the defendant Gettys and the law was certified to the court of appeals.\(^{104}\) On appeal, the court held that a trial judge faced with this dilemma should endeavor

[first] to make a thorough examination of the questions to be asked to determine whether or not responsive answers would be incriminating. Second, the trial court must determine, taking into account any peculiar facts known to it, what crimes might reasonably be anticipated to be elicited by responsive answers on the part of the witness claiming the privilege.\(^{105}\)

The prosecutor should frame the questions as narrowly as possible,\(^{106}\) and the judge should consider all information offered by the parties to determine whether an anticipated answer might provide a link in the chain of evidence needed to prosecute the witness for a crime.\(^{107}\)

In Gettys, the court of appeals went on to say that the alleged $500 campaign contribution was collateral to the Gettys bribe, that the trial judge should have ruled cross-examination on that

\(^{103}\) *Id.*

\(^{104}\) *Id.*

\(^{105}\) *Id.* at 901.

\(^{106}\) See, e.g., Arnett v. Meade, 462 S.W.2d 940, 943 (Ky. 1971) (the specific questions asked by the prosecutor set out the story of the crime, assuming a "yes" answer to each question).

matter to be improper and therefore the claim of the privilege in
the bribery proceedings as to the $500 payment should not have
been sustained. On this point, the court of appeals seems to be
in error. If Schworer had testified against Gettys, it would have
been clearly relevant to cross-examine him about his motives for
implicating Gettys. That the prosecution could have charged
Schworer with perjury and another count of bribery and did not
do so is a factor a jury should be able to consider in deciding what
weight to give Schworer’s testimony.

In certifying the law, the court should have dealt with the
issue of waiver, a matter not argued before the trial court and
therefore not considered by the court of appeals. Schworer testi-
fied before the grand jury about the $500 payment. He then as-
serted the privilege against self-incrimination at Gettys’ trial, ap-
parently claiming that his testimony about the payment would
provide evidence that he committed perjury before the grand
jury. Whether a false answer before a grand jury gives rise to a
privilege not to answer truthfully concerning the subject of the
prior inquiry is a question that should be judicially answered.
The courts need to fashion a response to this problem which will
protect the witness while providing a means to compel testi-
mony. A witness should not be able to immunize trial testi-
momy by giving false testimony before a grand jury.

108 610 S.W.2d at 901.
109 Barrett v. Commonwealth, 608 S.W.2d 374 (Ky. 1980), is the most recent
example of a reversal of a conviction because of a curtailment of cross-examination. In
Barrett the Court relied on Davis v. Alaska, 415 U.S. 308 (1974), which stands for the
proposition that the confrontation clause of the sixth amendment guarantees the right to
cross-examine a witness as to his possible motivation for testifying falsely. 608 S.W.2d at
376.
110 610 S.W.2d at 900.
111 In State v. De Cola, 164 A.2d 729, 738 (N.J. 1960), the New Jersey Supreme
Court held that, in such a situation, the testimony could be compelled, but that such testi-
mony could not be used in a perjury prosecution. The court reasoned that it was not over-
stepping its authority by creating an immunity, but rather was giving meaning to the privi-
lege against self-incrimination. De Cola is criticized in C. McCormick, Handbook of
112 A related question is whether the witness waives the privilege as to the underlying
events by giving testimony before the grand jury. The Kentucky Court held in Galloway
v. Commonwealth, 374 S.W.2d 835 (Ky. 1964), that waiver does not result in this situa-
tion.
Gettys illustrates the ability of a witness to frustrate the truth-finding process by abuse of the privilege against self-incrimination. A general immunity statute should be enacted by the Kentucky legislature to meet this problem.\textsuperscript{113}

**IX. ORDER OF PROOF**

The Kentucky high court has previously condemned the practice of a prosecutor holding back substantial evidence for introduction in rebuttal after the defense has rested.\textsuperscript{114} In Gilbert v. Commonwealth,\textsuperscript{115} the Court reversed a conviction where the prosecutor had been permitted to introduce a taped confession under the guise of rebutting the defendant's denial of guilt. In reversing, the Court said that an admonition that the tape should be considered only for the purpose of contradiction could not cure the prejudice to the defendant.\textsuperscript{116} The "prejudice" in Gilbert was that the defendant made the decision to testify, and did testify, in ignorance of the devastating evidence the state possessed.\textsuperscript{117} Thus, he was branded a liar by the introduction of the tape, a factor perhaps reflected in the relatively harsh sentence given by the jury.\textsuperscript{118} The opinion in Gilbert reflects the Court's concern that the prosecution play by the rules\textsuperscript{119} and introduce its evidence in chief first, that the defendant then have an opportunity to present evidence and that evidence thereafter be truly in the nature of rebuttal.

\textsuperscript{113} In Commonwealth v. Brown, 619 S.W.2d at 699, the Court made it clear that the question of immunity is a legislative matter, that neither a prosecutor nor a judge has the power to grant immunity absent statutory authority. An immunity bill was introduced in the 1982 Kentucky General Assembly, but was not enacted. S. 45, 1982 Ky. General Assembly.

\textsuperscript{114} Archer v. Commonwealth, 473 S.W.2d 141, 143 (Ky. 1971); Collier v. Commonwealth, 339 S.W.2d 167, 168 (Ky. 1960).

\textsuperscript{115} 633 S.W.2d 69 (Ky. 1982).

\textsuperscript{116} Id. at 71.

\textsuperscript{117} The defendant was charged with rape of an eleven-year-old girl. In a taped interview with a state police officer, in questions and answers couched in street language, he admitted having intercourse with the child. Id. at 70.

\textsuperscript{118} He was sentenced to 40 years in the penitentiary. Id. at 69.

\textsuperscript{119} RCr 9.43 (1978) sets out the order of proof.
X. INSTRUCTING IN THE ALTERNATIVE

Section 7 of the Kentucky Constitution requires a unanimous verdict in criminal cases. In 1978, the Kentucky Supreme Court was confronted with the question of "whether a verdict is unanimous if jurors are split in their belief as to which of two alternative elements the evidence establishes when proof of either element alone would justify the convictions." The defendant was charged with first degree assault and the jury was instructed that it could find the defendant guilty if he intended to cause serious physical injury or if he wantonly engaged in conduct creating a grave risk of death. Thus, some members of the jury might have believed that his actions were intentional while other jurors believed his conduct to be wanton. In Wells v. Commonwealth, the Court affirmed the conviction and, in so doing, held that the constitutional requirement of unanimity is not violated by instructing in the alternative so long as both alternatives are supported by the evidence.

In Boulder v. Commonwealth and Hayes v. Commonwealth, the Court applied Wells and reversed convictions where one of the alternatives was without evidentiary support. In both cases, the alternative instructions permitted a verdict of guilty on a finding of intentional action or wanton conduct. The Court, in reversing the convictions, held that in neither case did the evidence support a finding that the conduct was other than intentional. Thus, it was error to instruct the jury on wantonness.

XI. DENYING THE JURY INFORMATION ABOUT THE CONSEQUENCES OF A VERDICT

In Payne v. Commonwealth, the Court held that a jury charged with the responsibility of sentencing cannot be informed
about the consequences of a verdict of not guilty by reason of insanity. Overruling cases that permitted comment but not evidence, the Court held that "neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial." No mention is to be made of "treatment, civil commitment, probation, shock probation [or] parole," for consideration of those factors may "distort" the jury's finding of fact.

The 1982 legislature created the verdict of "guilty but mentally ill." If mental illness becomes an issue at trial, the jury will have four possible verdicts—not guilty, guilty, not guilty by reason of insanity and guilty but mentally ill—and, pursuant to Payne, it would be error for anyone to tell the jury what may happen to the accused under any of the verdicts. The Supreme Court expressed a normative standard for jury behavior—the jury is to concern itself only with the offense and the defendant's responsibility for his behavior. For example, it is error to tell the jury that a verdict of guilty but mentally ill does not insure treatment or that the judge must initiate civil commitment proceedings after a verdict of not guilty by reason of insanity. This author believes that jurors cannot decide cases without consideration of the effect of a decision, that jurors now decide cases on the basis of speculation and inaccurate information and that forcing speculative, misinformed decisions is unfair to jurors and litigants.

A related issue is that of withholding from the jury information relevant to fixing a sentence. Although the constitutional

130 Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980); Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977).
131 623 S.W.2d at 870.
132 Id.
133 KRS § 504.120 (Supp. 1982).
134 Id.
135 623 S.W.2d at 870.
136 The judge is to order treatment only if he or she finds the defendant mentally ill at the time of sentencing. KRS § 504.150 (Cum. Supp. 1982). The jury is to determine mental illness at the time of the offense. KRS § 504.120 (Cum. Supp. 1982).
137 KRS § 504.030 (Supp. 1982).
right to trial by jury is limited to the determination of guilt or innocence, the rules of criminal procedure provide for jury sentencing on a jury finding of guilt. The jury must fix the term of imprisonment within the penalty range set by law. The jury is forced to sentence solely on its knowledge of the offense and whatever incidental information is learned about the defendant if he or she testifies. The jury is denied the information in fixing sentence that the legislature has said the judge must consider in imposing sentence.

Since the trial judge can reduce the sentence within the penalty range, run sentences consecutively or concurrently and grant probation, the jury's sentence merely fixes a maximum term of imprisonment. The judge, and later the parole board, may mitigate the sentence after evaluation of the individual; thus, defendants are generally not harmed by the present system of jury sentencing. The harm is to the system, for jurors are required to fix sentence while knowing little about the defendant. If jurors are to continue to perform the function of fixing sentence, the rules should be changed to provide for a bifurcated trial, with the jury given all relevant information in the penalty phase.

XII. Belated Appeals

The issue of reinstatement of an appeal continues to bedevil the Kentucky appellate courts. In Hammershoy v. Commonwealth...
wealth, the Kentucky high court held that a trial court erred in refusing to vacate a sentence for the purpose of granting the defendant a belated appeal. His appointed attorney had filed a notice of appeal, but had taken no further steps to perfect the appeal, apparently because he believed there was no meritorious issue to present.

Twelve years after Hammershoy, the Court decided Cleaver v. Commonwealth. Without overruling Hammershoy the Court held that a trial court has no authority to reinstate an appeal which had been dismissed by the Supreme Court. "A right to a belated appeal, or to reinstate a lapsed appeal, can be granted only by the appellate court that is to entertain it."

Because Hammershoy had not been explicitly overruled, one panel of the court of appeals read Cleaver as limited to cases of dismissed appeals; belated appeals, said the court, were still governed by Hammershoy. Whether this reading of Cleaver was justified is questionable in light of the language of Cleaver and other cases following that decision.

In 1981, in an unsigned opinion and without explanation, the Supreme Court undercut Cleaver. In Stahl v. Commonwealth, a timely notice of appeal was filed with the Supreme Court. The Court dismissed the appeal for failure to file a brief. At this juncture the defendant, disregarding the command of Cleaver, filed a RCr 11.42 motion in the trial court, seeking the reinstatement of his appeal or a new trial. The trial court ordered a new trial and the Commonwealth appealed. The court of appeals reversed and the defendant appealed to the Supreme Court.

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148 398 S.W.2d 883 (Ky. 1966).
149 Id. at 884.
151 569 S.W.2d at 169.
152 593 S.W.2d 869, 872 (Ky. Ct. App. 1979).
153 569 S.W.2d at 169.
154 Gregory v. Commonwealth, 574 S.W.2d 308 (Ky. 1978); Amburgey v. Commonwealth, 579 S.W.2d 376 (Ky. Ct. App. 1979).
155 613 S.W.2d 617 (Ky. 1981).
156 Id. at 618.
The Supreme Court reversed the court of appeals and reinstated the order of the trial court. The Court cited both *Cleaver* and *Hammershoy* with approval: *Cleaver* for the proposition that only an appellate court could consider a belated or lapsed appeal, *Hammershoy* for the proposition that a motion to the trial court is the proper remedy for a "frustrated" right of appeal. The Court did not explain the difference between belated or lapsed appeals and frustrated appeals.

Although the trial court order had been for a new trial (perhaps in an attempt to avoid the *Cleaver* rule), the Supreme Court made it clear that the trial court could consider issues of fact which might have caused ineffective assistance of counsel at the appellate level, and that if it found such to exist, the proper remedy would be to vacate the order of conviction and enter a new judgment from which a new appeal would lie. The distinction between such an order and the order soundly condemned in *Gregory v. Commonwealth* on similar facts is paper thin.

XIII. POST-CONVICTION PROCEEDINGS

In *Commonwealth v. Ivey*, the Court held that KRS section 31.110 requires the appointment of counsel to assist in the preparation of a RCr 11.42 petition. The Court reconciled apparently conflicting provisions of KRS section 31.110 and RCr 11.42 by treating the criminal rule as setting a minimum standard for the appointment of counsel, and the statute as a legislative decision that indigents deserve a more generous policy.

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157 Id.
158 Id.
159 574 S.W.2d at 309 (The circuit court in which the defendant was convicted had no jurisdiction to reinstate the defendant’s right to a direct appeal; only the appellate court that is to entertain the appeal can grant the right to a belated appeal).
160 599 S.W.2d 456 (Ky. 1980); see Collier, supra note 150, at 660-63, for a discussion of this decision.
161 KRS § 31.110(2) (1980) provides that “[a] needy person . . . is entitled . . . (c) [t]o be represented in any other post-conviction proceeding that the attorney and the needy person considers appropriate.”
162 RCr 11.42(5) provides for the appointment of counsel if the petition and answer raise an issue of fact that cannot be resolved on the record, necessitating an evidentiary hearing.
163 599 S.W.2d at 457.
The Court in *Ivey* emphasized the fact that a poorly drafted RCr 11.42 petition could be fatal to meritorious claims.\(^{164}\)

In *Ray v. Commonwealth*,\(^{165}\) the court of appeals applied *Ivey* to the following facts. In 1969, Ray was convicted of two felonies and received a five-year sentence of imprisonment. In 1980, he was tried on another charge, convicted, and the 1969 convictions were then used to enhance the sentence in a persistent felony offender proceeding. In 1981, Ray filed a CR 60.02\(^{166}\) motion seeking to vacate the 1969 convictions on the ground that his guilty pleas were not obtained in compliance with *Boykin v. Alabama*.\(^{167}\) With the CR 60.02 motion, Ray asked for the assistance of counsel. When the trial court refused to appoint counsel and denied the CR 60.02 motion, Ray appealed.

The court of appeals held that Ray was not entitled to counsel at state expense because he was not being detained on the 1969 convictions, but rather on the 1980 persistent felony offender conviction.\(^{168}\) The court then passed to the merits of the CR 60.02 claim. In holding that the trial court properly denied relief, the court of appeals pointed out that CR 60.02 motions must advance reasons of an extraordinary nature justifying relief and must be made within a reasonable time. The movant advanced no reason why he had not attacked the 1969 convictions at an earlier date.\(^{169}\)

Although *Ray* correctly applies CR 60.02, the court's grudging construction of KRS section 31.110 seems inconsistent with *Ivey*. Ray's 1980 persistent felony offender sentence, as a practical matter, was the product of the 1969 convictions and the underlying substantive conviction in 1980. Ray's custody status

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\(^{164}\) *Id.* at 458.

\(^{165}\) 633 S.W.2d 71 (Ky. Ct. App. 1982).

\(^{166}\) CR 60.02 provides for relief from final judgments on a showing of newly discovered evidence, fraud or other equitable grounds, including that alleged in *Ray*: "Any other reason of an extraordinary nature justifying relief." CR 60.02(6). Civil rules applicable before the promulgation of the rules of criminal procedure and not superseded by the criminal rules may still be relied on in criminal cases. RCr 13.04.

\(^{167}\) 395 U.S. 238 (1969). The *Boykin* Court held that an intelligent waiver of the right to a trial cannot be presumed from a silent record.

\(^{168}\) 633 S.W.2d at 72.

\(^{169}\) *Id.* at 73.
was as much the result of what happened in 1969 as what happened in 1980. In 1981, the availability of RCr 11.42 as a means of attacking a conviction was extended to those on probation, parole or conditional discharge.\textsuperscript{170} KRS section 31.110, however, does not provide for the appointment of counsel for one who is not in detention and not under formal charges.\textsuperscript{171} Thus, an indigent convict who is not in detention will not be entitled to the appointment of counsel in the preparation of a RCr 11.42 petition, though he will be entitled to the appointment of counsel if the court schedules a hearing on the petition. This result seems clearly inconsistent with \textit{Ivey}, where the Kentucky Supreme Court emphasized the need for careful preparation of RCr 11.42 petitions to guard against the inadvertent omission of valid grounds for voiding a conviction.\textsuperscript{172}

\textsuperscript{170} RCr 11.42(1).
\textsuperscript{171} KRS \$ 31.110(1) (Supp. 1982).
\textsuperscript{172} 599 S.W.2d at 457-58.