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Kentucky Law Survey: Criminal Rules

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Criminal Rules

By William H. Fortune*

Introduction

In May 1978 the Kentucky Supreme Court set up a Criminal Rules Revision Committee (Advisory Committee) to study Kentucky's Rules of Criminal Procedure. The purpose of the Advisory Committee was to make recommendations to the Judicial Council. The committee met sixteen times between July 1978 and July 1980, and at the conclusion of its study, submitted a comprehensive revision of the rules of criminal procedure to the judicial council. These proposed revisions went beyond mere amendment of the existing rules. The Advisory Committee drew heavily from the Federal Rules of Criminal Procedure, and ultimately proposed extensive changes in plea bargaining, grand jury practice, discovery and sentencing.

On July 3, 1980 the Judicial Council submitted the proposed rules to the Kentucky Supreme Court. The Court received written comments and held a public hearing on December 9, 1980. At that time, Justice Robert Stephens was appointed to chair a committee of the Court to consider the proposed rules in light of written and oral comments received by the Court—many of which were addressed to a proposal to do away with jury sentencing. On June 12, 1981 the Supreme Court entered an order amending the criminal rules, and the amendments went into effect on September 1, 1981. The order represented the Court's modification of the proposals of the Advisory Committee. Some proposals were adopted without change; others were modified.

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1 Telephone interview with Jean Collier, Kentucky Administrative Office of the Courts (Mar. 22, 1982). The Criminal Rules Advisory Committee was chaired by Circuit Judge Thomas Spain and included the following members: Circuit Judge J.B. Johnson; John K. Carter and Leonard Kopowski, both district judges; James E. McDaniel and Larry S. Roberts, both Commonwealth attorneys; County Attorney Thomas Sayars; Assistant Attorney General James Ringo; Professor Robert Lawson; State Representative Charles R. Holbrook; Terrence Fitzgerald and David Murrett, both public defenders; and William Thurman, Elizabeth Oberst, and Kathy Peale, all of the Administrative Office of the Courts.
by the Court. Many committee proposals—including the controversial proposal for judge sentencing—were rejected, and the Court originated a number of changes in the 1981 amendments itself. The Advisory Committee had included a proposed “Official Commentary” with a number of rules, but the Court neither adopted any of the proposed commentary nor generated its own commentary.\(^2\)

This article addresses the major changes in criminal procedure effected by the 1981 amendments. Reference is made where appropriate to the Advisory Committee proposals and its proposed “Official Commentary.” The commentary provides insight into the intent of the drafters of rules adopted by the Court without change. No attempt is made in this article to discuss the committee proposals which were not adopted.

I. INITIATION OF PROCEEDINGS UNDER THE RULES OF CRIMINAL PROCEDURE (RCr)

A. Warrantless Arrests

An arrest is effected by either placing the person being arrested under restraint or by that person submitting to the control of the arresting officer.\(^3\) A peace officer\(^4\) can arrest without a warrant:

1. for a felony or misdemeanor committed in his presence;\(^5\)
2. when he has reasonable grounds to believe that the person to be arrested has committed a felony;\(^6\)
3. when he has probable cause to believe that the person has committed larceny in a retail or wholesale establishment;\(^7\)
4. when he has probable cause to believe that the person has wantonly or intentionally caused physical injury to a

\(^2\) Id.
\(^4\) A private person can arrest without a warrant when a felony has been committed and when the person effecting the arrest has reasonable grounds to believe that the person to be arrested has committed the crime. KRS § 431.005(4) (Cum. Supp. 1980).
\(^5\) KRS § 431.005(1)(b) & (d) (Cum. Supp. 1980).
\(^7\) KRS § 433.236(3) (Cum. Supp. 1980). This is part of the shoplifting statute which gives merchants the right to detain, search and question shoplifting suspects. Subsection
member of his family, and that the person will present a danger or threat of danger to others if not immediately restrained; 8

(5) for violations 9 committed in the presence of the officer which, by their nature, ordinarily require that the accused be taken into custody; 10 and

(6) for violations committed in his presence if the officer has reasonable grounds to believe the accused will not honor a citation. 11

An officer may not enter a private residence or office to make an arrest without an arrest or search warrant, absent exigent circumstances or consent. 12

RCr 3.02(2), as amended, provides that any person making a warrantless arrest shall take the accused before a judge without unnecessary delay and file with the court a post-arrest complaint, specifying the offense for which the arrest was made and the facts constituting probable cause to believe that the offense

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(3) gives peace officers the authority to arrest on probable cause for misdemeanor thefts not committed in the presence of the officer. This statute thus eliminates the need for the merchant to swear to a complaint before a judicial officer, since the merchant's report to the investigating officer ordinarily will constitute probable cause.

8 KRS § 431.005(2) (Cum. Supp. 1980). If the abused person is an adult, the peace officer must request that within twelve hours he or she sign a statement, which need not be sworn, setting out the facts of the assault. If the abused person refuses to sign such a statement, the charges must be dismissed. The probable intent of this statute is to permit a peace officer to make a warrantless arrest in misdemeanor assault cases (KRS § 408.030 (1975)) when he has probable cause to believe that the accused has injured a family member and will do so again after the police leave the residence.

9 Offenses punishable by death or imprisonment in a penitentiary are defined as felonies; offenses punishable by confinement other than in the penitentiary are defined as misdemeanors; and offenses punishable only by fine or punishment other than death or imprisonment are defined as violations. KRS § 431.060 (Cum. Supp. 1980).

10 KRS § 431.005(1)(e) (Cum. Supp. 1980) lists the following offenses which, when committed in the officer's presence, justify arrest without a warrant: (1) KRS § 189.290 (1980)—reckless driving; (2) KRS § 189.393 (1980)—failure to comply with traffic officer's signal; (3) KRS § 189.520 (1980)—driving under the influence; (4) KRS § 189.580 (1980)—leaving the scene of an accident; (5) KRS § 511.080 (1975)—criminal trespass in the third degree; and (6) KRS § 525.070 (1975)—harassment.


12 In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court held that, absent exigent circumstances or consent, an arrest warrant is required to enter the home of a suspect to arrest him. In Steagald v. United States, 451 U.S. 204 (1981), the Supreme Court answered affirmatively the question reserved in Payton; that is, whether a search warrant is required to enter the home of a third person to arrest a suspect.
was committed.\textsuperscript{13} The post-arrest complaint must be signed by the person making the arrest, but need not be verified. The rule further provides that "[i]f no judge is available in the county in which the arrest was made the defendant shall be taken to jail, in which case any documents relating to the arrest shall be given to the jailer."\textsuperscript{14} If the accused does not post bond, the jailer is to take him before a judge without unnecessary delay.\textsuperscript{15} In any event "[a]ny documents relating to the arrest that are in the possession of the jailer shall be delivered to the clerk [of the court] on or before the next business day."\textsuperscript{16}

Amended RCr 3.02 raises several points worthy of particular attention. The proposed commentary to the rule, as drafted by the rules Advisory Committee, was as follows:

This amendment formally establishes the use of a "post-arrest complaint" document when there is an arrest without a warrant. While not sworn to, it is signed by the arresting officer and will set out why the officer believes there was probable cause to make the arrest. This document will follow the defendant to court. If the defendant is arrested at such time that taking him to court is impracticable, he may be taken to jail for a short period of time, and the officer leaves the post-arrest complaint with the jailer, whose duty it is to see that the defendant is taken before the judge at the proper time. The jailer is also to see that the complaint is forwarded to the clerk at the same time he causes bail papers, etc., to be sent to the clerk's office. This use of a post-arrest document is not new as police currently use "arrest slips" to set out the circumstances surrounding the arrest. The committee felt that formalizing its use would be a big help to the courts as an indication why the defendant is before the court since it will be required to follow the defendant through the court process. This is particularly acute when there is a warrantless arrest. Also, current law puts the duty of getting the defendant before the court on the arresting officer. In reality, the defendant is often left at the jail and the officer

\begin{footnotes}
\item[14] RCr 3.02(3).
\item[15] Id.
\item[16] RCr 3.02(4).
\end{footnotes}
is miles away before the judge can see the defendant. Thus, the burden is shifted to the jailer in this rule. However, with the pretrial system and pretrial release officers this burden, if any, will be at a minimum.\(^{17}\)

While the Kentucky Supreme Court did not adopt the proposed commentary, it is clear that the purpose of the requirement of a post-arrest complaint is to provide a charging instrument in cases initiated by warrantless arrest. A proper post-arrest complaint will inform the district judge of the reason why the accused is before the court, and can be acted on by the judge, the prosecutor and the defense attorney.

The post-arrest complaint must state facts constituting probable cause; conclusory statements will not meet the letter or the spirit of the rule.\(^{18}\) There is, however, no remedy provided in the rules for a defective post-arrest complaint, and it is likely that district judges will deal with the problem in different ways. In Gerstein v. Pugh,\(^{19}\) the United States Supreme Court held that the fourth amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following a warrantless arrest. The Gerstein Court declared that a system providing for extended detention on the basis of a prosecutor’s information worked an unreasonable seizure of those so detained.\(^{20}\) RCr 3.02, as amended, remedies the constitutional defect in the previous Kentucky practice, if it can be assumed that an unverified complaint can be relied on to present the facts to the district judge,\(^{21}\) and if district judges will consider defense motions to dismiss defective complaints and release the accused from custody. The Kentucky Supreme Court now requires a post-arrest complaint setting out facts constituting probable

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\(^{17}\) Commentary to Proposed Amendments to Kentucky Rules of Criminal Procedure 8-9 (1980) (on file with the Kentucky Law Journal) (hereinafter cited as Advisory Committee Report).

\(^{18}\) See RCr 3.02(2). RCr 2.02 defines a complaint as “a written statement of the essential facts constituting the offense charged.”

\(^{19}\) 420 U.S. 103 (1975).

\(^{20}\) Id. at 112-19.

\(^{21}\) Gerstein did not address the issue of whether an unsigned statement could be relied on by a judge in making a probable cause determination. The “oath or affirmation” requirement is a part of the warrant clause of the fourth amendment, but in Gerstein the Court was construing the “reasonableness” clause of the fourth amendment, which is ap-
cause; this rule would seem to contemplate a judicial remedy for a defective complaint, and it is likely that district judges will fashion such a remedy either in the form of outright dismissal or in an order providing for dismissal if an adequate complaint is not filed promptly.

The Kentucky Supreme Court also eliminated the requirement that an accused be taken before a judge within twelve hours in the absence of exceptional circumstances. Since the rule now requires that the accused be taken before a judge "without unnecessary delay," the Court may have thought the twelve hour provision was superfluous. Nevertheless, the elimination of this requirement may be interpreted as a signal that delays of more than twelve hours are acceptable. Furthermore, the amended rules seem to contemplate that the peace officer making a warrantless arrest will take the accused first to the judge if there is a judge available in the county, and that only if a judge is not available may the officer take the accused to jail.

In one respect, however, RCr 3.02 was amended to conform to prevailing practice rather than work a change on existing criminal procedures and practices. RCr 3.02(3) gives the jailer authority to hold someone left in his custody by a peace officer and makes it the responsibility of the jailer to take the accused before the judge if he is not released on bond, qualified again, however, by the troublesome "without unnecessary delay" provision. RCr 3.02(3) and RCr 3.02(4) provide that all papers relating to the arrest (which would include the post-arrest complaint)

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Applicable to all searches and seizures, whether supported by warrant or not. The thrust of the majority opinion in Gerstein is that any state procedure which provides a fair and reliable determination of probable cause as a condition for significant pre-trial restraint will satisfy the requirements of the fourth amendment. Though not under oath a peace officer's statement of facts deserves a presumption of sincerity by virtue of his position and because a false statement of fact in a post-arrest complaint would be evidence of a misdemeanor—either KRS § 522.030 (1975) (official misconduct) or KRS § 523.100 (1975) (falsification to authorities). If this analysis is correct, Kentucky's current practice of requiring a signed, but unsworn, statement of facts satisfies Gerstein.

See RCr 3.02(2).

Perhaps by oversight the 12 hour provision of RCr 4.20 was not eliminated. RCr 4.20 provides that "[b]efore said waiver [by executing a bail bond in accord with the misdemeanor schedule] is effective, the defendant must be informed of his right to appear before a judge without unnecessary delay, in no event more than twelve hours, and to be considered for release on personal recognizance." Id. (emphasis added).
are to be delivered with the accused to the jailer whose responsibility it then is to take the papers to the court clerk by the next business day. 24

B. Arrests Pursuant to Warrant

Section 10 of the Kentucky Constitution provides that "no warrant shall issue to . . . seize any person . . . without describing [him] as nearly as may be, nor without probable cause supported by oath or affirmation." 25 Section 10 is substantially the same as the warrant clause of the fourth amendment of the United States Constitution. The Kentucky criminal rules implement the constitutional provisions by requiring a complaint under oath setting out the essential facts constituting the offense. 26 This complaint must be reviewed by a judicial officer for an independent determination of probable cause, 27 and the arrest warrant must particularly describe the person to be arrested. 28

While the peace officer making the arrest is not required to have a copy of the warrant in his possession, 29 the rules as amended require that a copy of the warrant and complaint be served on the accused at the time of arrest or as soon thereafter as practicable. 30 It can be anticipated that cases will arise in which the defendant is not served with a copy of the complaint and warrant, but such a failure should be treated as a mere technical defect. Noncompliance should neither invalidate the arrest nor

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24 RCr 3.02(3); RCr 3.02(4).
25 Ky. Const. § 10.
26 RCr 2.02.
27 The judicial officer may be a circuit judge or district judge, or even a circuit clerk in the event that the prosecutor certifies there is no judge available in the county. KRS § 15.725 (Cum. Supp. 1980). The Supreme Court has held that a clerk may act as a judicial officer for the purpose of issuing warrants if the clerk is capable of making the determination of probable cause and is independent of the prosecutor. Shadwick v. City of Tampa, 407 U.S. 345, 354 (1972). It appears that the Kentucky statute compromises the neutrality of the clerk by providing that the clerk may issue warrants prepared by the Commonwealth Attorney or County Attorney. Nevertheless a panel of the Kentucky Court of Appeals has upheld the constitutionality of KRS § 15.725. Commonwealth v. Bertram, 596 S.W.2d 379 (Ky. Ct. App. 1980).
28 RCr 2.06.
29 RCr 2.10(1).
30 RCr 2.06(4).
cause the suppression of anything seized incident to arrest.\textsuperscript{31}

The 1981 amendments work a minor change in the requirements for a warrant. As amended the rules require the judge to state on the warrant the type of security required, if any, for bailable offenses.\textsuperscript{32} This change apparently requires the judicial officer to refer to the bail schedule for misdemeanors and violations.\textsuperscript{33} Felonies are not bailable by reference to a preset schedule.\textsuperscript{34}

As amended, the rules make clear that the arresting officer is to make his return on the warrant and deliver it, together with a copy of the complaint, to the court in which the warrant is returnable.\textsuperscript{35} It would seem that if the arresting officer does not have the warrant and complaint in his possession at the time of the arrest, he should obtain these papers, serve them on the accused, and reflect both the arrest and the service of papers in his return.

C. Arrests Pursuant to Bench Warrant

The amended rules purport to codify existing practice with respect to the issuance of bench warrants.\textsuperscript{36} If a witness fails to appear in response to a subpoena or a defendant fails to appear in response to a summons, the judge may issue a warrant “from the bench” for that person’s arrest. Failure to respond to a policeman’s citation will not support the issuance of a bench warrant.

\begin{itemize}
\item \textsuperscript{31} See Little v. Commonwealth, 438 S.W.2d 527 (Ky. 1969).
\item \textsuperscript{32} RCr 2.06(3).
\item \textsuperscript{33} This bail schedule appears in Appendix A to the Kentucky Rules of Criminal Procedure.
\item \textsuperscript{34} See RCr 4.04(3); RCr 4.16(3); RCr 4.20(1). It is believed that many district courts maintain informal schedules for felonies to enable arrested persons to post a pre-set bail without a court hearing. This practice is not sanctioned by the criminal rules.
\item \textsuperscript{35} RCr 2.12(1).
\item \textsuperscript{36} RCr 2.05. The proposed commentary to RCr 2.05 stated:
  
  This officially recognizes . . . the existence of “bench warrants,” which issue from the judge without a supporting affidavit or complaint. While these warrants are common in practice, the Committee felt that it was important to give them some basis in the rules, particularly since they are not the same as regular warrants of arrest.

Advisory Committee Report, supra note 17, at 4.
\end{itemize}
because a policeman is not a judicial officer.\textsuperscript{37} The policeman must first swear to a complaint setting out the facts of the underlying offense; the judge may then issue a warrant based on this document.

D. \textit{Criminal Cases Initiated by Summons}

A criminal summons is another method of initiating a criminal case. The summons is similar to a warrant in form and is also signed by a judicial officer after finding that a sworn complaint sets out probable cause. The crucial difference between a warrant and a summons is that a summons commands the defendant to appear before the court on a certain date, while a warrant is a command to peace officers to take the defendant into custody and bring him before the court.\textsuperscript{38} Obviously a summons is less burdensome than a warrant; the rules and statutes require that summonses be used for most violations and encourage the use of summonses in other situations. Kentucky Revised Statutes (KRS) section 431.410 makes the use of summonses (as opposed to warrants) mandatory for most violations\textsuperscript{39} (a violation being an offense punishable only by fine), and RCr 2.04 permits the court to issue a summons, rather than a warrant, for any offense if the court believes the defendant will respond to a summons.\textsuperscript{40} If the defendant is a corporation, it must be summoned rather than arrested.\textsuperscript{41} The 1981 amendments encourage the use of summonses through two minor changes. In addition to personal service on the defendant or an adult member of the household,\textsuperscript{42} the sum-

\textsuperscript{37} See KRS § 431.015(3) (Cum. Supp. 1980). It would be unconstitutional to issue a bench warrant on the basis of non-appearance in response to a citation. In such a case there would be no statement under oath of the essential facts of the underlying offense, and such a statement under oath is required by both the Kentucky Constitution and the United States Constitution. U.S. CONST. amend. IV; KY. CONST. § 10.

\textsuperscript{38} See RCr 2.06.

\textsuperscript{39} KRS § 431.410 (Cum. Supp. 1980). See note 9 supra for a description of what constitutes a "violation." See note 10 supra for a list of violations that can be the subject of arrest, rather than summons or citation. See the text accompanying note 45 infra for a discussion of the requirements for issuing a warrant.

\textsuperscript{40} RCr 2.04.

\textsuperscript{41} Id.

\textsuperscript{42} See RCr 2.10(2)(a).
mons may now be served by certified mail\textsuperscript{43} or by an officer who
does not have a summons in his possession issuing the defendant a
citation containing the information in the summons.\textsuperscript{44}

While ordinarily a warrant may not be issued for a violation,
KRS section 431.410 provides that a warrant may issue if the ju-
dicial officer reviewing the complaint finds one or more of the
following circumstances:

(1) The defendant previously has failed to respond to a cita-
tion or summons for an offense; or
(2) He has no ties to the community and there is a substantial
likelihood that he will refuse to respond to a summons; or
(3) The whereabouts of the defendant are unknown and the is-
suance of an arrest warrant is necessary in order to subject him
to the jurisdiction of the court; or
(4) Where arrest is necessary to prevent imminent bodily harm
to the accused or to another; or
(5) For any other good and compelling reason as determined
by the judicial officer.\textsuperscript{45}

Between 1976, the effective date of KRS section 431.410, and
1981, there was a conflict between the statute and the applicable
criminal rule.\textsuperscript{46} The rule gave the court unfettered discretion to

\begin{itemize}
  \item \textsuperscript{43} RCr 2.10(2)(b). The rule permits service by mail as provided in Ky. R. C\textsuperscript{i}v. P. 4.01(1)(a) [hereinafter cited as CR] at the direction of the judge or the prosecutor. The proposed commentary to RCr 2.10 stated in part:
  \begin{quote}
      Since a summons is a less harsh form of getting a person before the court, the Committee wanted to facilitate its use. In some parts of the state, personal service of a warrant is becoming difficult and personal service of a summons by peace officers is almost an impossibility. Service by mail is the only practical solution.
  \end{quote}
  Advisory Committee Report, supra note 17, at 6.
  \item \textsuperscript{44} RCr 2.10(2)(c). The proposed commentary further stated:
  \begin{quote}
      [T]his rule permits execution of a summons which is not in the possession of a peace officer by the issuance of a citation containing the pertinent information. Just as it is not necessary to have a warrant in hand when executing it, the Committee felt that there might be situations where an officer, knowing a summons had been issued, could supply the defendant with the information at the time he is with the defendant. This will assist peace officers, and may likewise assist some defendants who might otherwise be served in the middle of the night.
  \end{quote}
  Advisory Committee Report, supra note 17, at 6.
  \item \textsuperscript{45} KRS § 431.410 (Cum. Supp. 1980).
\end{itemize}
issue warrants for the commission of violations whereas the statute expressly defined a court's power. The 1981 amendments eliminated this conflict by expressly referring to KRS section 431.410 in defining the power of courts to issue warrants.\textsuperscript{47}

E. Cases Initiated by Citation

A citation is a document written by a peace officer and given to a person who has committed a violation or misdemeanor in the officer's presence.\textsuperscript{48} The citation is signed by the officer and is an invitation to appear in court on the date specified.\textsuperscript{49} Most citations are for traffic offenses punishable by fine, payable in advance of the court date.\textsuperscript{50} The citation serves as the charging document in traffic offenses as well as fish and wildlife offenses.\textsuperscript{51} It is more analogous to a complaint than to a warrant or a summons. One question which may arise is whether a citation can serve as a post-arrest complaint. It is likely that it can, provided it states facts describing the offense. The officer could merely issue the citation to the person placed under arrest, and substitute the word "ARRESTED" for the date of the court appearance.\textsuperscript{52}

F. Right to Contact an Attorney

RCr 2.14 previously provided that a person arrested and in jail had the immediate right to contact an attorney.\textsuperscript{53} The 1981 amendments worked two changes which the Advisory Committee felt to be declaratory of the present state of the law. The rule,

\textsuperscript{47} RCr 2.04(1).
\textsuperscript{51} RCr 6.02(2). Unfortunately this rule does not provide that the citation can be used as a charging instrument in all cases in which a citation has been properly issued. An officer may issue a citation for a misdemeanor committed in his presence, rather than take the defendant to jail. There is no logical reason why the citation should not serve as the charging instrument in such a case. Under RCr 6.02(2), however, the citation cannot serve as the charging instrument and the prosecutor must file an information or complaint. See the text accompanying notes 112-14 infra for a discussion of the requirement of a charging instrument.
as amended, provides that a person in custody (rather than in jail) has the right to contact an attorney as soon as practicable (rather than immediately). The commentary of the Advisory Committee stated in part:

The "as soon as practicable" provision takes into account the fact that an attorney is not practicable when a defendant is in the squad car. On the other hand, it also recognizes that if the police intend to interrogate a person in the squad car, that person is entitled to have an attorney present.

Certainly the defendant has a right to the presence of counsel if the police intend to subject him to custodial interrogation. The United States Supreme Court has held, however, that the right to have counsel present during lineups or during non-custodial questioning does not attach until the commencement of formal court proceedings. It is possible, though unlikely, that the Kentucky courts would view RCr 2.14 as guaranteeing a right to counsel prior to the commencement of proceedings for purposes other than custodial interrogation.

II. PRE-TRIAL MATTERS

A. Initial Appearance

At the initial appearance the district judge shall: (1) advise

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54 RCr 2.14(1).
55 Advisory Committee Report, supra note 17, at 7.
59 KRS § 31.110(2)(a) (1980) (one of the statutes in the chapter on the Office of Public Advocacy) states that a needy person is entitled to "be counseled and defended at all stages of the matter beginning with the earliest time when a person providing for his own counsel would be entitled to be represented by an attorney." Therefore, if there is a right to retain counsel for all purposes during the post-arrest pre-court appearance stage, there is also a right to appointed counsel during this period. In Cane v. Commonwealth, 556 S.W.2d 902 (Ky. Ct. App. 1977), however, a Kentucky appellate court stated that the right to counsel guaranteed by § 11 of the Kentucky Constitution is no greater than the right of counsel guaranteed by the sixth amendment of the United States Constitution. Id. at 906. It is doubtful that the Kentucky appellate courts would interpret RCr 2.14 and
the defendant of the charge against him, of his right to remain silent, and of his right to a preliminary hearing or trial; \(^\text{60}\) (2) advise the defendant of his right to counsel and appoint an attorney if the defendant is a "needy" person; \(^\text{61}\) and (3) fix conditions for pre-trial release unless pre-set bond has been posted. \(^\text{62}\) In addition, the district judge should be able to consider the adequacy of any post-arrest complaint on a defense motion to dismiss. \(^\text{63}\)

The 1981 amendments moved the criminal rule providing for appointment of counsel from the chapter governing post-indictment proceedings to the chapter covering initial appearances, where such a rule logically belongs. \(^\text{64}\) The rule, as amended, refers specifically to the statute which defines "needy person," but it is in conflict with the statutes that define the offenses for which counsel must be appointed. \(^\text{65}\) Those statutes provide that counsel must be appointed for any offense punishable by confinement or by a fine of $500 or more, but the rule as amended provides for the appointment of counsel only if imprisonment is pos-

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\(^\text{60}\) RCr 3.05.
\(^\text{61}\) Id.
\(^\text{62}\) Id.
\(^\text{63}\) See the text accompanying note 21 supra for discussion of the judicial remedy for a defective post-arrest complaint.
\(^\text{64}\) The provision for appointment of counsel previously appeared as Former RCr 8.04 (17 KRS Cum. Supp. 1980) (abolished 1981) and now appears as RCr 3.05(2). RCr 8.30, which sets out the requirements for appointment of counsel in multiple defendant cases, should have been moved also.

\(^\text{65}\) KRS § 31.120(3) (Cum. Supp. 1980) provides that it shall be prima facie evidence that a person is not entitled to counsel paid for by the Commonwealth if he: a) owns real estate; or b) is not receiving or eligible for public assistance; or c) has paid (by or for himself) money bail to secure his release; or d) owns more than one motor vehicle. The judge may order the accused to pay for all or part of the cost of his defense. See KRS § 31.120(4) (Cum. Supp. 1980).

\(^\text{66}\) Compare RCr 3.05 with KRS § 31.100(4) (1980) and KRS § 31.110 (1980). The statutes require appointment of counsel if the crime is punishable by a fine of $500 or more. While there is no constitutional mandate to provide counsel unless punishment is actually imposed, Scott v. Illinois, 440 U.S. 367 (1979), the Kentucky legislature has clearly created a state right to counsel if the crime is punishable by imprisonment or fine of $500 or more. KRS § 31.110 (1980).
sible. While there are no offenses within the penal code punishable by a fine of $500 or more, but not punishable by imprisonment,\(^{67}\) there are such offenses outside the penal code\(^{68}\) and one—first offense driving under the influence\(^{69}\)—is very common. It is unclear how appellate courts will resolve this conflict between the statutes and amended rules.\(^{70}\)

B. Bail

The 1981 amendments made numerous minor changes in the criminal rules governing bail. RCr 4.34 provides that if a bail bond is to be secured by real estate, the unencumbered equity of the real estate must be at least double the amount of the bond.\(^{71}\) RCr 4.40 requires a judge denying a request for a change in the conditions of release to record his reasons in writing.\(^{72}\) RCr 4.42 states that the return of an indictment shall not, of itself, be treated as a material change in circumstances which would justify an increased bond.\(^{73}\) RCr 4.43 codifies the procedures for appellate review of circuit court decisions concerning bail—a rule adopted in response to Abraham v. Commonwealth,\(^{74}\) which held that appeal is the proper method of reviewing bond decisions of circuit judges. Finally, RCr 4.54 makes it clear that jurisdiction over bail passes immediately to the circuit judge on the binding over of the defendant at the preliminary hearing and remains with the circuit judge until the case is completed.\(^{75}\)

C. Preliminary Hearings

Preliminary hearings will be conducted differently under the

\(^{67}\) See KRS § 534.040(1) (Cum. Supp. 1980); KRS § 532.090 (1975).

\(^{68}\) See KRS § 189.990(2)(a) & (b) (1980).

\(^{69}\) KRS § 189.520(2) (1980); KRS § 189.990(9)(a) (1980).

\(^{70}\) See the text accompanying notes 92-94 infra for a discussion of Lunsford v. Commonwealth, 436 S.W.2d 512 (Ky. 1969).

\(^{71}\) RCr 4.34(5).

\(^{72}\) RCr 4.40(2).

\(^{73}\) RCr 4.42(6).

\(^{74}\) 565 S.W.2d 152 (Ky. Ct. App. 1977). Abraham further held that review of a district court bail decision is by writ of habeas corpus filed in the circuit court.

\(^{75}\) RCr 4.54.
1981 amendments. The receipt of hearsay is expressly provided for;\(^{76}\) suppression motions and objections to evidence on constitutional grounds are not permitted;\(^{77}\) and strict time limits are imposed for the holding of preliminary hearings.\(^{78}\)

The preliminary hearing is to be held within ten days of the initial appearance if the defendant is in custody, and within twenty days if he is not.\(^{79}\) These time limits are to be extended over the defendant's objection only on a "showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice."\(^{80}\) The sanction for failing to hold the preliminary hearing within the time limits is the discharge of the defendant from custody or the exoneration of his bond, with the Commonwealth permitted to proceed thereafter only by indictment.\(^{81}\)

While the strict time limits place a burden on the prosecutor, that burden is eased by the rule specifically providing for the receipt of hearsay.\(^{82}\) There is a question whether a district judge may require the prosecutor to produce witnesses with firsthand knowledge. The Advisory Committee's proposed comment to RCr 3.14 stated in part: "This amendment expressly states that [the] probable cause finding could be based on hearsay and other otherwise inadmissible evidence. However, the court can require a showing that admissible evidence will be available at trial."\(^{83}\) If the district judge has the authority to require a showing that admissible evidence will be available at trial, it follows that the judge can require the production of witnesses with firsthand knowledge if he concludes that the offered hearsay is inherently unreliable. District judges should, however, routinely admit laboratory reports unless ambiguous or otherwise suspect.

The rule as amended provides that the defendant may intro-

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\(^{76}\) RCr 3.14(2).
\(^{77}\) RCr 3.14(3).
\(^{78}\) RCr 3.10(2).
\(^{79}\) Id. The Advisory Committee proposed 20 days if in custody, 45 days if not. Advisory Committee Report, supra note 17, at 10, 11. The Kentucky Supreme Court opted for the time limits used in FED. R. CRIM. P. 5.
\(^{80}\) RCr 3.10(2).
\(^{81}\) Id.
\(^{82}\) See RCr 3.14(2).
\(^{83}\) Advisory Committee Report, supra note 17, at 12.
duce witnesses in his own behalf. The testimony of such witnesses must, however, be relevant to the probable cause determination. The defendant should not be permitted to use the preliminary hearing as a discovery device to call and interrogate prospective witnesses under the guise of introducing evidence "in his own behalf." 

As before, the Commonwealth has the right to call its witnesses for examination, notwithstanding waiver of the preliminary hearing by the defendant. The Supreme Court, however, amended RCr 7.22, which had permitted the receipt at trial of preliminary hearing testimony of a witness who would be unavailable. As amended, RCr 7.22 does not permit the receipt of preliminary hearing testimony of such an unavailable witness. This change removes the major incentive for a prosecutor to call his witnesses in the face of a waiver of preliminary hearing.

The other change in the rules governing preliminary hearings is found in the modification and renumbering of former RCr 2.08. RCr 3.13, as it is now known, permits the amendment of a defective complaint to fit the facts as they are determined to be before or during the preliminary hearing, subject to the caveat that amendment is not permitted if substantial rights of the defendant would be prejudiced thereby. While RCr 3.13 is straightforward, two problems remain. First, it is not clear whether the rule is applicable to misdemeanors and violations. The significance of this problem is apparent from an examination of

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84 RCr 3.14(2).
85 See United States v. King, 482 F.2d 768 (D.C. Cir. 1973) (upholding trial court's refusal to allow rape defendant to call alleged victim as witness at preliminary hearing).
86 RCr 3.10(3).
87 See RCr 7.22. The history of RCr 7.22 is circular. Prior to 1978 the rule provided that a "duly authenticated transcript of testimony given by a witness in a previous trial of the same defendant on the same charge in the same court shall be the equivalent of a deposition." Former RCr 7.22 (17 KRS Bound Volume (1972)) (amended 1978). In Commonwealth v. Bugg, 514 S.W.2d 119 (Ky. 1974), the Court held that the rule precluded the use of preliminary hearing testimony of an unavailable witness. In 1978 the Court amended the rule to provide for the receipt of preliminary hearing testimony. The official comment stated: "This rule broadens the rule to include testimony in an examining trial at which the defendant and his attorney were present." Comment to Former RCr 7.22 (17 KRS Cum. Supp. 1980) (amended 1981). In 1981 the Court changed the rule, again forbidding the admission of preliminary hearing testimony of unavailable witnesses. RCr 7.22.
88 RCr 3.13.
RCr 6.16, the other criminal rule applicable to amendments. That rule provides for amendment of indictments, informations, complaints and citations provided that the substantial rights of the defendant are not prejudiced and further provided that no additional or different offense is charged. Thus, RCr 6.16 cannot be relied on in the trial of a misdemeanor or violation if the complaint or citation charges the defendant with a crime different from that supported by the proof. RCr 3.13 contains no such limitation but appears on its face to be limited to amending the charging instrument in felony cases in district court. Thus, it is uncertain whether there is any authority for a district judge to amend a complaint or citation to correspond to the facts produced in the trial of a misdemeanor or violation. The second problem is that the rule does not clearly provide a remedy if the post-arrest complaint is subject to dismissal at the initial appearance. The district judge should be able to hold the defendant in custody for a brief period (perhaps twenty-four hours) while a proper post-arrest complaint is prepared. The rule does not cover this situation, for it speaks only in terms of holding a defendant in custody if it appears to the judge that there is probable cause. At the initial appearance there will be no way for the judge to make this determination except on the basis of the post-arrest complaint. If that instrument is defective, and the officer is not present, it is not clear whether the judge has authority to continue custody while a proper post-arrest complaint is prepared.

D. Peace Bonds

Peace bonds ("bail for good behavior") were previously the subject of a criminal rule in the chapter titled "Proceedings be-

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89 RCr 6.16. Because one accused of a felony has a right under the Kentucky Constitution to be proceeded against only after indictment by a grand jury, it would be unconstitutional to permit a prosecutor to amend an indictment to charge a new offense. See Ky. Const. § 12. There is no constitutional barrier to a rule permitting free amendment of informations, complaints and citations, provided the defendant is not prejudiced thereby.

90 See RCr 3.13. The rule does, however, speak about a defendant appearing in response to a summons or citation, which would imply that it is applicable to misdemeanors and violations.

fore the Magistrate.” The Kentucky Supreme Court abolished the rule as inconsistent with the case of Lunsford v. Commonwealth, which held that an earlier criminal rule authorizing peace bonds was unconstitutional as an encroachment on the powers of the legislature. The Court in Lunsford deemed peace bonds to be matters of substance, not procedure, and hence within the province of the legislature rather than the judiciary. The effect of Lunsford was to resurrect the old Criminal Code provisions thought to have been repealed upon the passage of the criminal rules. The peace bond provisions in the old code are of doubtful constitutionality, but they are the law in Kentucky until repealed by the legislature or successfully challenged in court.

III. GRAND JURIES

The 1981 amendments worked a number of minor changes and one major change in the functioning of the grand jury. The major change requires the prosecutor to record all grand jury testimony and to make the recording or a transcript thereof available to defense counsel prior to trial. While the Supreme Court rejected most of the discovery recommendations of the Advisory Committee, in this instance the Court went further than the recommendation of the committee. The committee recommended that recording be required only in cases originating with the grand jury. The committee would not have required recording in cases in which there had been a preliminary hearing, since grand jury testimony could be expected to be substantially the

92 436 S.W.2d 512 (Ky. 1969).
93 Ky. CRIM. CODE §§ 382-393 (1877).
94 For example, Ky. CRIM. CODE § 384 (1877) provides for the setting of a peace bond (and the incarceration of the accused if he cannot post the bond) on the court’s being satisfied that there are reasonable grounds for believing the defendant will commit an offense. The Constitution requires as a condition for the imposition of criminal punishment that the trier of fact find the defendant guilty beyond a reasonable doubt of having committed each element of the offense. In re Winship, 397 U.S. 358 (1970). It is thought that the benefits of the peace bond can be obtained by finding the accused guilty of the underlying offense and imposing as a term of probation the condition of “keeping the peace.” For a discussion of peace bonds and the Lunsford case, see Henley, RCr 3.06: Today’s Peace Bond, KY. BENCH AND B., Apr. 1978, at 20.
95 RCr 5.16.
same as that given at the examining trial. The Court, however, mandated recording and disclosure in all cases, and it can be expected that part of the routine discovery request will be for a copy of the grand jury testimony. The Court also amended the secrecy requirements to permit counsel to disclose such information as may be necessary for trial or other disposition. Perhaps by oversight, the Court did not strike the requirement that the indictment be indorsed with the names of the grand jury witnesses.

It is significant that the rule requires recordation of all testimony before the grand jury, rather than all proceedings before that body. The prosecutor is thus able to speak "off the record" without fear that his remarks will prove embarrassing later.

The Court effected a number of minor changes in the rules governing grand juries. Rejecting the committee's recommendation that a witness have a limited right to counsel in the grand jury room, the Court did provide that a witness can be accompanied by his parent, custodian or guardian if the witness is a minor or person under disability. The rules now provide that the grand jury is to be told specifically of its power to exclude the prosecutor while questioning witnesses and of its rights and

96 Advisory Committee Report, supra note 17, at 30.
97 See RCr 5.16.
98 RCr 5.24.
99 See RCr 6.08.
100 The comparable federal rule requires recordation of all proceedings except when the grand jury is deliberating or voting. Fed. R. Crim. P. 6(3)(I). Under the federal rules, however, there is no general pre-trial right to grand jury testimony. Grand jury testimony must be produced after a witness testifies at trial. Fed. R. Crim. P. 26.2.
102 The committee proposed that a witness have the right to an attorney for the sole purpose of advising the witness of his privilege against self-incrimination. The committee's proposed comment described the difficulties with the current practice, which requires that a witness must leave the room to consult with his attorney waiting in the hall. Advisory Committee Report, supra note 17, at 29.
103 RCr 5.18.
duties in regard to juvenile cases.\footnote{RCr 5.02.} Requests by the defendant to testify or to otherwise present evidence must be conveyed by the prosecutor to the grand jury foreman, though the grand jury is under no obligation to hear the evidence.\footnote{RCr 5.08.} The Court eliminated the word "competent" from RCr 5.10 so that the rule now provides that the grand jurors shall find an indictment when they have received what they believe to be sufficient evidence to support it. This change is merely declaratory of the existing law.\footnote{RCr 5.10 specifically provides that no indictment shall be quashed, nor conviction reversed, on the ground that there was insufficient evidence to support the indictment. Thus the provision in Former RCr 5.10 that the grand jury should indict on the basis of sufficient competent evidence was meaningless because the sufficiency of the evidence could not be attacked.} Finally, the rules provide that a grand jury can refer a case in writing to the next grand jury. If the second grand jury does not indict within sixty days of the referral order, the defendant is entitled to discharge from custody or exoneration of his bond.\footnote{RCr 5.22(2). The proposed commentary to the rule stated in part: This amendment permits a grand jury to refer a case to the next grand jury without a defendant being entitled to discharge. . . . The Committee was concerned that certain dangerous defendants . . . would flee upon being discharged when the only reason for their discharge was the fact that the grand jury simply did not have sufficient time to hear the case. Advisory Committee Report, supra note 17, at 32.}

IV. INDICTMENT AND INFORMATION

Three changes in the chapter entitled "Indictment and Information" deserve mention. The most important change enables a defendant to waive indictment and consent instead to be proceeded against by information.\footnote{RCr 6.02(1). Section 12 of the Kentucky Constitution provides that no person shall be proceeded against by information for an indictable offense. It is reasonably clear, however, that this provision is not jurisdictional, but is rather for the protection of the accused and hence subject to waiver. Federal courts have held that a similar provision in the fifth amendment is a personal right which may be waived. Barkman v. Sanford, 162 F.2d 592 (5th Cir. 1947); United States v. Gill, 55 F.2d 399 (D.N.M. 1931). Section 12 of the Kentucky Constitution is part of the Bill of Rights of the 1891 Constitution. It is very unlikely that a court would regard section 12 as jurisdictional and declare RCr 6.02 unconstitutional.} In construing a similar provision in the federal rules, the Court of Appeals for the Fifth Cir-
cuit said: "An impecunious accused, unable to furnish bail, should not be required to languish in the common jail, with nothing to do but gripe and grow mean in association with others evilly inclined while waiting for the grand jury to convene." While it can be expected that most indictment waivers will be offered by defendants who intend to plead guilty, the rule is also for the benefit of those who choose to stand trial. Unfortunately the rule does not state that the prosecutor must accept the indictment waiver. It is easy to foresee that some prosecutors may decline to file an information in an attempt to keep the defendant in jail until the grand jury meets or because the prosecutor feels an indictment returned by a grand jury has probative effect before a trial jury.

Two other changes are worthy of mention. The rules now provide, for the first time, for a charging instrument in all criminal cases. The charging instrument gives notice and provides a record for res judicata purposes. Under the new rule, the charging instrument may be an indictment, information, complaint or, in the case of traffic or fish and wildlife offenses, a uniform citation. While the rule does not list post-arrest complaints as instruments which will suffice as charging instruments, the word "complaint" in RCr 6.02(2) should be construed to include post-arrest complaints. A warrantless arrest for a misdemeanor or violation will be followed by a post-arrest complaint stating facts which constitute probable cause. It would serve no purpose to also require the prosecutor to file an information in the district court. This unnecessary burden could be avoided by interpreting the word "complaint" in RCr 6.02(2) as including post-arrest complaints.

Because of the wording of RCr 6.02(2), however, it appears

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109 162 F.2d at 594.
110 See Bartlett v. United States, 354 F.2d 745, 749 (8th Cir. 1966).
111 RCr 6.02 provides that the offense may be prosecuted by information in the event of waiver; the rule does not say that in such event the offense shall be prosecuted by information. In construing Fed. R. Crim. P. 7(b), the Court of Appeals for the District of Columbia held that the United States Attorney was not required to file an information since the federal rule used the language "may be prosecuted by information." Rattley v. Irelan, 197 F.2d 585 (D.C. Cir. 1952).
112 See RCr 6.02(2).
113 RCr 3.02(2).
that the prosecutor will be required to file informations in dis-
trict court for violations other than traffic and fish and wildlife
violations as well as for misdemeanors initiated by citation.
Rather than simply providing that a citation may serve as the
charging instrument, RCr 6.02 limits the use of citations for this
purpose to violations of the traffic and game laws. If a peace offi-
cer issues a citation for a misdemeanor or violation other than
traffic or fish and wildlife, it appears that the prosecutor will also
need to file an information in the district court before a plea is
entered.

The other change to be noted is the elimination of the re-
quirement that an indictment include the colorful language,
"Against the peace and dignity of the Commonwealth of Ken-
tucky."

V. Production of Evidence

Although the Kentucky Supreme Court declined to adopt the
liberal discovery rules proposed by the Advisory Committee, the
Court did make four significant changes in the chapter entitled
"Production of Evidence." One of these changes, the elimina-
tion of the provision for the receipt of preliminary hearing testi-
ymony of an unavailable witness, has already been discussed.

The change in this area which affects everyday trial practice
is the requirement that the prosecutor produce witness state-
ments before eliciting testimony. Prior to 1981, the Common-
wealth was required to produce witness statements after direct

\textsuperscript{115} The committee proposed "open file" discovery under which the prosecutor would
have been required to turn over to the defense everything relevant to the case except attor-
ney work-product. Proposed rule 7.32. The prosecution would also have been required to
give written notice of the names and addresses of potential witnesses and their criminal
records. Proposed rule 7.32. Some reciprocal discovery was provided. Proposed rule 7.34.
Drawn from the Uniform Rules of Criminal Procedure, the committee's proposals went
far beyond what is provided in the federal rules and may have appeared radical to the
Kentucky Supreme Court. As a result, no change in the discovery rules was forthcoming
from the Court. For an excellent analysis of Kentucky discovery law, see Note, Conun-
drum of Criminal Discovery: Constitutional Arguments, ABA Standards, Federal Rules,
and Kentucky Law, 64 Ky. L.J. 800 (1975-76).
\textsuperscript{116} See note 87 \textit{supra} for a discussion of RCr 7.22.
\textsuperscript{117} RCr 7.26(1).
examination. RCr 7.26 now provides that the court is to examine the statement in camera if the prosecutor asserts that the statement does not relate to the anticipated direct examination. On such a claim, the judge is to examine the statement in light of the prosecutor's statement of what the testimony will be, strike the irrelevant portions, and turn the redacted statement over to defense counsel.118

Another important change appears in RCr 7.02(2). For the first time, courts are clearly authorized to compel the production of documents by subpoena duces tecum prior to trial. The rule states:

The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.119

This provision is borrowed from the federal rules120 and should be construed as the federal rule has been construed. As interpreted by the federal courts, a subpoena duces tecum may issue in the discretion of the trial judge for the pre-trial production of evidentiary material in the hands of the government121 or a third party.122 Evidentiary material is defined as material which can be identified and which the party seeking discovery believes in good faith may be admissible at trial.123 The burden is on the moving party to show that the subpoenaed material may be admissible, that there is a need to inspect it prior to trial, and that the material cannot be procured by other means.124 In the leading

118 RCr7.26(2).
119 RCr7.02(2).
120 The quoted provision is taken from Fed. R. Crim. P. 17(c). Advisory Committee Report, supra note 17, at 37. The other material in RCr 7.02 combines three former rules, Former RCr 7.03 (17 KRS Bound Volume (1972)) (amended 1981); Former RCr 7.04 & 7.08 (17 KRS Bound Volume (1972)) (abolished 1981), and spells out procedures which had formerly been incorporated from the civil rules.
case, *United States v. Nixon*, the United States Supreme Court held that the judge did not err in finding that Special Prosecutor Leon Jaworski had satisfied his burden with respect to designated Watergate tapes, even though Mr. Jaworski did not know what was on them. The Court declared: “As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.”

Although RCr 7.02(2) provides a mechanism for compelling the pre-trial production of materials in the hands of third parties, the compulsory production of materials in the control of the Commonwealth will continue to be governed by RCr 7.24, the discovery rule. The latter rule permits a court to order the prosecutor to disclose documents or other objects which may be material to defense preparation. The cases interpreting the federal rule for subpoenas duces tecum have used a standard which is substantially the same as a “may be material” standard. It is unlikely that the Kentucky courts will interpret the new Kentucky rule as providing access to the prosecutor’s files in addition to that provided by RCr 7.24. If the courts do interpret the rules in this manner, the importance of RCr 7.02(2) is that it provides a means to compel production of documents and other objects in the hands of third parties.

The Court also changed the rules applicable to material witnesses. Formerly the rule permitted a judge to fix bail for a witness on an ex parte showing that the testimony of the witness was expected to be “material” and that reasonable grounds existed to believe that it might be impracticable to secure the attendance of

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126 Id. at 700.
127 It has been noted that the constitutional right to compulsory process should extend to the pre-trial production of materials in the hands of third parties in instances where pre-trial examination is essential to proper presentation of the defense. D. Murrell, *Kentucky Criminal Practice* 102-03 (1975).
129 For an example of what the Kentucky high court deems to be material to the defense, see Punkey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972).
the witness by subpoena. Implicit in the old rule was the power of the court to issue a bench warrant for the arrest of the person for whom bail was set and to hold him in custody until bail was posted or his testimony obtained (by deposition or otherwise).

RCr 7.06, as amended, changes the standard from "material" to "indispensable" and specifically incorporates the bail provisions of Chapter IV. The rule further makes clear that a witness incarcerated for failure to post bond can insist on giving his testimony by deposition. Most importantly, bail cannot be set—nor the witness arrested—until after a hearing at which the witness is present and represented by counsel, unless waived. As a practical matter this requirement will make it very difficult to obtain the testimony of one who wishes to avoid process. It will be necessary to first subpoena the person to a hearing on the issue of whether he should be required to give bail as an indispensable witness. If he fails to appear at the hearing, a bench warrant may issue, but by that time the witness may have fled the jurisdiction or gone into hiding. Only if the witness is in custody on another matter does it appear practicable to utilize the provisions of the indispensable witness rule.131

VI. ARRAIGNMENT AND PLEADINGS

Only minor changes were made in Chapter VIII. To protect the right of the Commonwealth to appeal adverse decisions rendered prior to the attachment of jeopardy,132 the Court provided that a trial court may not defer ruling on a pre-trial motion when to do so would adversely affect the right of appeal.133 The Court also codified the power of trial courts to exclude defendants who persist in disruptive conduct,134 and further provided that defen-

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130 Former RCr 7.06 (17 KRS Bound Volume (1972)) (amended 1981).
131 See RCr 7.06. By contrast, KRS § 421.240 (1972) enables any Kentucky judge to order the arrest of a person wanted as a witness in another state on receipt of a certificate from a judge of that state certifying that the person is a material witness and recommend- ing immediate apprehension.
132 See KRS § 22A.020(4) (1980).
133 RCr 8.22. KRS § 22A.020(4)(a) (1980) provides, however, that an appeal by the Commonwealth from an interlocutory order shall not stay the proceedings.
dants should not be forced to wear prisoners' garb or be displayed in shackles before the jury. In another change, the Court modified the procedural rule on incapacity to stand trial to conform to the statutory provisions.

The Court did not accept the major proposals of the Advisory Committee in Chapter VIII. Rejected were proposals to legitimize the plea of nolo contendere, to make plea bargaining a matter of public record, to make more specific the requirements of a voluntary and informed plea of guilty, and to require suppression motions to be made prior to trial.

VII. TRIAL

The Kentucky Supreme Court adopted certain provisions from Federal Rule 23 requiring written jury waivers and requiring special findings of fact on request in cases tried to the bench. Since there is a right to jury trial in Kentucky for all offenses, including traffic violations, judges will be forced to no-

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136 RCr 8.06. The statute governing incapacity to stand trial is KRS § 504.040 (Cum. Supp. 1980). Lack of responsibility for criminal conduct as a result of mental disease or defect describes a mental state different from incapacity to stand trial. "Insanity" at the time of the offense is an affirmative defense to be pleaded and proved by the defendant. KRS § 504.020 (1975); KRS § 504.050 (Cum. Supp. 1980).

137 Proposed rule 8.08.

138 Proposed rule 8.09.

139 Proposed rule 8.08.

140 Proposed rule 8.18(c). The failure to adopt the proposed rule requiring suppression motions to be made prior to trial is inexplicable. Under the present rule, RCr 9.78, defense counsel can object during trial to a confession or to the fruits of a search. Not only will it delay the proceedings to conduct the required evidentiary hearing during trial, but the objection is first brought to the court's attention after jeopardy has attached.

141 Fed. R. Crim. P. 23(a) & (e). These changes were not included in the Advisory Committee Report to the Court.

142 RCr 9.26(1).

143 RCr 9.26(2).

144 KRS § 29A.270(1) (1980). The constitutional right to jury trial in Kentucky extends only to non-petty offenses. Hauck v. Starck, 64 S.W.2d 565, 566 (Ky. 1933). See KY. CONST. §§ 7, 11. The United States Supreme Court has held that the dividing line between petty and non-petty offenses for purposes of the sixth amendment is six months im-
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tify all who plead not guilty (including the person accused of running a stop sign) of the right to jury trial. If the defendant states that he does not want a jury, the judge will be required to have him sign a written waiver before hearing the case. The requirement of special findings of fact should have the salutary effect of forcing judges to be familiar with the elements of various offenses and to listen closely to the evidence. If the findings of fact do not cover all elements of the offense, the conviction is subject to reversal. 145

The 1981 amendments redefine "harmless error"146 and "substantial error"147 to conform to the definitions of those terms in the civil rules.148 No substantive change is worked by these amendments. It remains the law in Kentucky that an error is to be disregarded if the court concludes, on a review of the entire record, that there is no substantial possibility that the result would have been different without the error.149 Furthermore, it remains the law that a reviewing court has discretion to grant relief even though the complained of error was not preserved for appeal, if failure to do so would cause "manifest injustice."150 Un-

145 See Haywood v. United States, 393 F.2d 780, 781-82 (5th Cir. 1968).
146 Former RCr 9.24 (17 KRS Bound Volume (1972)) (amended 1981) stated the test for harmless error in terms of error which "does not affect substantial rights." As amended, RCr 9.24 uses the same terminology but adds a provision that error is to be disregarded unless "the denial of such relief would be inconsistent with substantial justice."
147 Former RCr 9.26 (17 KRS Bound Volume (1972)) (amended 1981) defined substantial error to be when the court, on review of the whole case, was satisfied "that the substantial rights of the defendant have been prejudiced." The substantial error rule has been renumbered as RCr 10.26 and defined as "palpable error which affects the substantial rights of a party" which may be considered though not preserved for review, if the appellate court believes that "manifest injustice has resulted from the error."
148 See CR 61.01; CR 61.02.
150 See Gunter v. Commonwealth, 576 S.W.2d 518, 522 (Ky. 1978); Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977); Tackett v. Commonwealth, 320 S.W.2d 299 (Ky. 1959).
doubtedly the reviewing courts will continue to be very selective in reviewing unpreserved errors.\footnote{151}{Burch v. Commonwealth, 555 S.W.2d 955 (Ky. 1977).}

It is important to note that the standard set out in the rules of criminal procedure for reviewing harmless error is applicable only to claims of error based on state law. If the defendant claims that his rights under the United States Constitution have been violated, the reviewing court must apply the federal standard.\footnote{152}{See Chapman v. California, 386 U.S. 18, 21 (1967).}

Though not entirely free from doubt,\footnote{153}{Compare Chapman v. California, 386 U.S. 18 (focusing solely on the error and its logical relationship to the result) with Harrington v. California, 395 U.S. 250, 254 (1969) and Schneble v. Florida, 405 U.S. 427, 431-32 (1972) (permitting consideration of other evidence in the record supporting the verdict). See Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 427-32 (1980).} the federal standard can be said to require the appellate court to decide whether, in light of the entire record, the untainted evidence establishes the guilt of the accused beyond a reasonable doubt.\footnote{154}{Harryman v. Estelle, 616 F.2d 870, 876 (5th Cir. 1980).} Though worded differently, the federal and state harmless error standards appear capable of yielding substantially identical results. Under either standard a review of the entire record is required and the court is required to speculate what the result would have been had the error not occurred. However the standard may be expressed, the reviewing court should reverse unless it can say with certainty that the result would have been the same.

An interesting minor change is found in RCr 9.72 ("Jury to Take Exhibits"). The rule now permits jurors to take any notes they have made into the jury room, but "upon request of either party the jury shall be admonished that the notes . . . shall not be given any more weight in deliberation than the memory of.

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\footnote{151}{Burch v. Commonwealth, 555 S.W.2d 955 (Ky. 1977).}
\footnote{152}{See Chapman v. California, 386 U.S. 18, 21 (1967).}
\footnote{154}{Harryman v. Estelle, 616 F.2d 870, 876 (5th Cir. 1980).}
other jurors." It is evidently the intent of the rule to give jurors the right to take notes, as well as the right to take those notes into the jury room. While an admonition may be necessary to prevent a juror who has taken notes from dominating the effort of the jury to reconstruct the evidence, an admonition that notes are not to be given any more weight than unaided memory is contrary to common sense and runs counter to the purpose of taking notes.

In other minor changes, the Court set out a number of provisions previously incorporated by reference to the civil rules and codified the requirement of *Carter v. Kentucky* that the jury be instructed on request that the defendant is not required to testify and that the jury is to draw no inference of guilt from the failure of the defendant to testify.

### VIII. MISCELLANEOUS CHANGES

The Court extended the right to seek collateral relief under RCr 11.42 to those on probation, parole or conditional discharge, while eliminating the provision for reimbursement of counsel appointed to represent rule 11.42 claimants. Another change eliminated the rule requiring preference to be given on appeal to criminal cases. In other changes, the Court made it

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155 The Advisory Committee's commentary stated that the amendment expressly permits the jury to take notes during trial. Advisory Committee Report, supra note 17, at 67. While the amendment does not expressly state that jurors are permitted to take notes, it should be construed in accord with the intent of the committee and the Court (which adopted the rule as it came from the committee).

156 Permitting note taking is in the discretion of the trial court in the absence of a statute or court rule. Watkins v. State, 393 S.W.2d 141, 145-49 (Tenn. 1965).

157 If an admonition is to be given, it should be that notes are not a transcript and are merely an aid to memory. See Toles v. United States, 308 F.2d 590, 594 (9th Cir. 1962).

158 The changes affect the following provisions: RCr 9.36 (challenge to jurors); RCr 9.44 (proof of official record); RCr 9.52 (avowals).


160 RCr 9.54(3).

161 RCr 11.42(1).


clear that judicial officers empowered to issue arrest warrants can also issue search warrants and spelled out the requirements for a peace officer’s return on a search warrant.\textsuperscript{164}

\textbf{CONCLUSION}

While the 1981 amendments made significant changes in the rules of criminal procedure, the Supreme Court rejected the proposals which would have fundamentally altered the trial of criminal cases: open file discovery and judge sentencing. Perhaps the Advisory Committee’s proposals on these topics were too ambitious, ideas whose time had not yet come. It would be unfortunate, however, if the Court were to regard the rejection of these proposals as anything more than a temporary decision. Kentucky’s discovery rules are inadequate, and the present system of jury sentencing requires a body of laymen to fix the defendant’s sentence without most of the information needed for the decision. It is to be hoped that interest on these topics will continue and that the Court will be willing to make significant changes at a future time.

\textsuperscript{164} RCr 13.10.