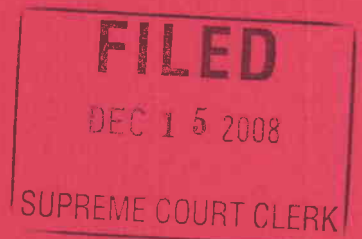


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
CASE NO. 2008-SC-00079-DG



CHARLES BRENT BEARD

APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT  
HONORABLE C. RENE WILLIAMS, JUDGE  
INDICTMENT NO. 05-CR-0053

COMMONWEALTH OF KENTUCKY

APPELLEE

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BRIEF FOR APPELLANT, CHARLES BRENT BEARD

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Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served by first-class mail upon Hon. C. Rene Williams, Judge, Crittenden Circuit Court, Judicial Annex, 35 U.S. Hwy. 41AS, P.O. Box 126, Dixon, Kentucky 42409-126; Hon Zachery Greenwell, Commonwealth's Attorney, 215 North Main Street, P.O. Box 341, Marion, Kentucky 42064-0341; Hon. Jason J. Pfeil, Assistant Public Advocate, Department Of Public Advocacy, 739 South Main Street, P.O. Box 695, Henderson, Kentucky 42419-0695; and to the Hon. Jack Conway, Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this 15<sup>th</sup> day of December, 2008. The record on appeal has been returned to the Kentucky Supreme Court.

  
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J. BRANDON PIGG

## INTRODUCTION

Charles Brent Beard appeals his August 18, 2006 conviction in Crittenden Circuit Court on charges of First Degree Trafficking in a Controlled Substance, First Degree Persistent Felony and two misdemeanor counts of Trafficking in Marijuana Less Than Eight (8) Ounces. As a result of these convictions, Mr. Beard was sentenced to 10 years imprisonment. Mr. Beard appealed as a matter of right. The Court of Appeals affirmed and this Court granted discretionary review.

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Appellant requests oral argument

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## STATEMENT OF THE CASE

In 2006, Jackie Davis contacted authorities in Crittenden County and told them that he wanted to serve as a confidential informant. (VR NO. 7: 8/18/06, 10:58:40). He was directed to a Detective Kirk of the Pennyrile Drug Task Force. (VR NO. 7: 8/18/06, 10:59:02). According to Davis, he volunteered because he wanted to clean his life up and fight drugs in the community. (VR NO. 7: 8/18/06, 19:59:19). However, not only was Jackie Davis a convicted felon, he also failed to inform Detective Kirk and other authorities that he was still serving a sentence of probation at the same time he was attempting to work as a confidential informant. (VR NO. 7: 8/18/06, 10:58:14 and VR NO. 7: 8/18/06, 11:20:00). More importantly, no one in law enforcement did any investigation into Davis' background to determine if he was on probation. (VR NO. 7: 8/18/06, 5:08:55). Also, though Jackie Davis alleges that he did not request to be paid, he was ultimately paid in excess of twenty five hundred (\$2500.00) dollars to be a confidential informant. (VR NO. 7: 8/18/06, 11:25:50).

On September 12, 2005, after beginning work as a confidential informant, Jackie Davis went to the residence of a man named Chris Walker. (VR NO. 7: 8/18/06, 11:03:08). Jackie Davis and Detective Kirk had intended that Walker be the target of a controlled buy on that day, but he was not at the residence when Davis arrived. (VR NO. 7: 8/18/06, 11:03:39). According to Davis, as he was leaving the residence, he "ran into" Appellant, Charles Beard. (VR NO. 7: 8/18/06, 11:03:46). Beard asked Davis if needed anything and Davis responded

that he was looking for some marijuana. (VR NO. 7: 8/18/06, 11:04:35). Beard told him to follow him to his house where he ultimately sold him marijuana. (VR NO. 7: 8/18/06, 11:04:50 – 11:05:52).

In the days that followed, Davis set up two subsequent controlled buys where he bought drugs, he alleged, from Charles Beard. (VR NO. 7: 8/18/06, 11:07:06 and VR NO. 7: 8/18/06, 11:11:02). Jackie Davis stated that, during the third controlled buy, he purchased methamphetamines from Beard. (VR NO. 7: 8/18/06, 11:16:07). Following these alleged purchases, Charles Beard was indicted on December 5, 2005 on one count of First Degree Trafficking in a Controlled Substance (Methamphetamine), First Degree Persistent Felony Offender and two misdemeanor counts of Trafficking in Marijuana (less than 8 ounces). (Transcript of Record "TR", pp. 1-2).

Prior to trial, Appellant, *pro se* and through counsel, filed two motions with the trial court. The first motion was filed by Beard's counsel and sought to suppress the evidence of the control buys because Jackie Davis, who was on probation at the time of the alleged buys, had been used by authorities without prior judicial approval and, therefore, contrary to Kentucky Administrative Regulations (501 KAR 6:270) and Kentucky Corrections Policies and Procedures 27-07-01. (TR, 29–31). These regulations and procedures forbid the use of probationers or parolees as confidential informants. (Id.) The trial court noted that the forbiddance of using probationers as informants expressed in the regulations, but found Detective Kirk's action in not checking Jackie Davis' prior

history and probation status to not have been done in bad faith and overruled the motion. (Id.).

Charles Beard filed a second motion *pro se*. The motion asked the court to dismiss Beard's counsel and appoint new counsel due to a conflict of interest. (TR, 51 – 55). The conflict of interest stemmed from the fact that Mr. Beard's defense counsel, Hon. Jason J. Pfeil, had represented Jackie Davis, the confidential informant and chief witness against Mr. Beard, in a previous case. (Id.). Beard also alleged that during Mr. Pfeil's representation of another client, Ron Damron, that Pfeil asked for a recess in Mr. Damron's trial and went to the jail and questioned Mr. Beard regarding his role in Mr. Damron's case. (Id.).

A hearing on this motion was held on August 14, 2006. At that hearing, Beard's counsel told the court that he had indeed represented the informant in this case, Jackie Davis, and indicated that he had been appointed, and intended, to represent Davis in a future hearing regarding possibly revoking his probation status. (VR NO. 6: 8/14/06, 3:04:24 – 3:05:44). Pfeil also openly admitted that during Mr. Damron's trial he did obtain a recess, go the detention center and question Mr. Beard about his relationship with Mr. Damron and the alleged victim in Mr. Damron's case. (VR NO. 6: 8/14/06, 3:06:07 – 3:06:41). Also at this hearing, Mr. Beard repeatedly complained of what he considered as Pfeil's failure to prepare for trial. The trial court overruled Mr. Beard's *pro se* motion noting on a docket sheet that the "Court finds no evidence to support Def.'s claim of conflict of interest." (TR, p. 59).

A jury trial was held on August 18, 2006 in Crittenden Circuit Court and Mr. Beard was found guilty of First Degree Trafficking in a Controlled Substance, First Degree Persistent Felony and two misdemeanor counts of Trafficking in Marijuana Less Than Eight (8) Ounces. As a result of these convictions, Mr. Beard was sentenced to 10 years imprisonment. (TR, pp. 150–152). Mr. Beard appealed.

The Court of Appeals, in a 2-1 decision, affirmed the trial court's decision declaring that, despite the apparent conflict of interest, Mr. Beard had failed to show that his counsel was adversely affected by his counsel's prior representation of the Commonwealth's chief witness.<sup>1</sup> Mr. Beard asked for and this Court granted review.

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<sup>1</sup> This statement ignores the fact that Beard's counsel told the court that he had represented the informant in this case, Jackie Davis, in the past and, more importantly, indicated that he had been appointed, and intended, to represent Davis in a future hearing regarding his probation status. (VR NO. 6: 8/14/06, 3:04:24—3:05:44).

## ARGUMENT

THE TRIAL COURT ERRED TO MR. BEARD'S SUBSTANTIAL PREJUDICE WHEN IT OVERRULED HIS MOTION TO DISMISS HIS APPOINTED COUNSEL AND APPOINT NEW COUNSEL AFTER HE HAD ESTABLISHED THAT HIS APPOINTED COUNSEL WAS UNABLE TO EFFECTIVELY REPRESENT HIM DUE TO A CONFLICT OF INTEREST IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS TWO AND ELEVEN OF THE KENTUCKY CONSTITUTION.

### Preservation

This issue is preserved. Prior to trial Charles Beard filed a *pro se* motion with the Crittenden Circuit Court asking it to dismiss his appointed counsel due to a conflict of interest. (TR, 51 – 55). A hearing was held on August 14, 2006. Beard informed the court of the conflict created due to his counsel previous and current representation of the confidential informant and chief witness in the case against him. (Id.). Beard also informed the trial court of the fact that his appointed counsel visited him during the trial of another client and questioned him about his involvement in that case. Despite Beard's evidence establishing the clear conflict of interest, the trial court overruled his motion to dismiss his appointed counsel. (TR, p. 59). Therefore, this issue is preserved.

### Relief Requested

Because the trial court erred in overruling Charles Beard's *pro se* motion to dismiss his appointed counsel, this Court should vacate his conviction and

remand this case to the trial court with the instructions to appoint new counsel on retrial.

**Grounds**

“The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client... Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.” Von Moltke v. Gillies, 332 U.S. 708, 725-726 (1948).

To warrant a substitution of counsel, the Kentucky Supreme Court has set out specific requirements that must be met by a defendant requesting new counsel and, once those requirements have been met, the procedures to be followed by a trial court in appointing substitute counsel. Specifically, the defendant must show “good cause” to support a request for a substitution of counsel. Deno v. Commonwealth, 177 S.W.3d 753, 759 (Ky. 2005). “Good cause” has been described as: (1) complete breakdown of communication between counsel and himself, (2) a conflict of interest, or (3) that is legitimate interests are being prejudiced. Id. citing Baker v. Commonwealth, 574 S.W.2d 325, 326 (Ky. App. 1978).

With respect to conflicts of interest, SCR 3.130(1.7) states:

**Conflict of interest: general rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The rule clearly explains that a conflict of interests exists when, among other things, a lawyer represents a client and that representation is directly adverse to another client without the consent of each client. In this case, defense counsel Pfeil represented, not only Appellant, but also Jackie Davis, the confidential informant and chief witness against Appellant. Pfeil stated that he had in fact represented Jackie Davis on a previous criminal charge on which

Davis was given probation. (VR NO. 6: 8/14/06, 3:04:24). More importantly, Pfeil stated that Davis was being considered for probation revocation and he had again been appointed to represent him. (VR NO. 6: 8/14/06, 3:04:55). The trial judge noted that, as to Mr. Davis, the issue before the court regarding his possible probation revocation was the allegation that he failed to report. (VR NO. 6: 8/14/06, 3:07:50). This is extremely important for several reasons.

To begin, throughout the proceedings, when questioned by the Commonwealth and by defense counsel Pfeil why he did not tell Detective Kirk that he was on probation when he approached him requesting to serve as a confidential informant, Davis repeatedly responded that he did not know he was on probation. (VR NO. 5: 8/07/06, 12:41:58 and VR NO. 7: 8/18/06, 11:20:08). More specifically, when questioned by Pfeil about the alleged probation violation, which Pfeil himself was slated to represent him at a future hearing, Davis stated that he had failed to report because he was not aware he was on probation and, therefore, was not aware that he needed to report. (VR NO. 5: 8/07/06, 12:42:48). This clearly demonstrates that the defense Davis intended to put forth in his upcoming probation revocation was that he was unaware that he needed to report because he did not know he was on probation. This created a severe conflict of interest for attorney Pfeil. Pfeil had represented Davis when he was sentenced to probation and had, as his attorney, undoubtedly had conversations with him regarding probation and, more importantly, been present when he was sentenced to probation.

Pfeil was placed in a situation where, while representing Beard, he was attacking and attempting to discredit Davis and the defense Davis intended to put forth to his alleged probation violation, that he would be representing him on in his upcoming hearing. Put simply, Pfeil was discrediting Davis' defense only weeks before he would turn around and defend the same defense. It is difficult to imagine how Pfeil's representation of both Beard and Davis was not prejudicial to one, if not both, clients.

A major portion of Beard's defense was that the officers involved had conducted a reckless and sloppy investigation in his case. Chief among this defense was the fact that the officers had used Davis as a confidential informant while he was still on probation. To adequately present this defense and zealously represent his client, Pfeil needed to attack Davis' contention that he did not know he was in fact on probation. Paradoxically, Davis clearly indicated that his contention that he did not know he was on probation was why he did not report to his probation officer and revocation proceedings had been initiated against him in which Pfeil was representing him. This not only placed Pfeil in a conflict of interest, but also created a situation where Pfeil could not represent one client without adversely affecting the other.

Pfeil was forced to either adversely affect Davis by attacking Davis' contention that he did not know he was on probation and thereby illicit incriminating statements from him that could then be used at his upcoming probation hearing. Or he would adversely affect Beard by failing to zealously

represent him and attack the credibility of Davis, the chief witness against him. This is clearly a conflict of interest as defined by SCR 3.130(1.7) and the trial court erred in not granting Mr. Beard's *pro se* motion to remove his counsel and appoint new counsel.

Similarly, Pfeil's actions of calling a recess in the trial of Ron Damron and visiting Mr. Beard to question him about his involvement in the alleged crime Damron had been charged with created a conflict of interest sufficient to warrant Pfeil's dismissal from representing Beard and the appointment of new counsel. Pfeil openly admitted that he had indeed called a recess in Damron's trial and had gone to the detention center and questioned Beard about his involvement and knowledge of the crime Damron was charged with committing. (VR NO. 6: 8/14/06, 3:06:00—3:06:58). Specifically, Pfeil stated that he had questioned Beard about his relationship with Ron Damron, his relationship with the alleged victim in the case, what he knew about the case and, apparently, if Beard thought the victim in that case might have misidentified Damron. (VR NO. 6: 8/14/06, 3:06:33—VR NO.6: 8/14/06, 3:06:58). Once Pfeil began questioning Beard, his client, about his involvement in the crime for which Damron, another client, was on trial for, his loyalty for either client had been severely damaged and a conflict was created that was sufficient to warrant Pfeil's removal and the appointment of new counsel. Therefore, the trial court's refusal to dismiss Mr. Pfeil and appoint new counsel was in error.

### Kirkland v. Commonwealth

The majority opinion from the Court of Appeals is based in large part on an incorrect interpretation of Kirkland v. Commonwealth, 53 S.W.3d 71 (Ky. 2001). In Kirkland, this Court found that failing to advise codefendants, who were represented by two individually assigned public defenders, regarding the rule governing separate counsel for codefendants did not warrant automatic reversal. 53 S.W.3d 71, 75 (Ky. 2001). However, Kirkland is both factually and procedurally clearly distinguishable from this case.

In Kirkland, two codefendants were each represented by their own individual lawyer from the Fayette County Legal Aid. Id. However the trial judge failed to explain to the codefendants of the possibility of a conflict of interest as required under RCr 8.30 (1). Id. Prior to Kirkland, noncompliance with the provisions of RCr 8.30 was presumptively prejudicial and warranted reversal. Id. *see also* Peyton v. Commonwealth, 931 S.W.2d 451 (Ky. 1996) and Trulock v. Commonwealth, 620 S.W.2d 329 (Ky. App. 1981).

This Court in Kirkland stated that the “narrow issue” before it was “whether there is a presumption of a conflict of interest when an RCr. 830 waiver is not executed.” Id. This was due in part because neither codefendant had actually presented facts to support that an actual conflict of interest existed, but had instead merely argued for reversal based on the failure of the trial court to follow RCr 8.30. Id. It is in this context that that this Court stated “a defendant must show a real conflict of interest in order to obtain reversal.” Id.

More importantly, in the years since Kirkland, this Court has at least twice faced similar situations and never held that a defendant bears the burden of proving that their trial counsel's conflict of interest affected their representation. Specifically, in Deno and Schell v. Commonwealth, 2008 WL 203036<sup>2</sup> this Court reiterated the standard originally put forth in Baker v. Commonwealth, 574 S.W.2d 325 (Ky. App. 1978) that a defendant need only show "good cause" for the appointment of substitution counsel.

In its opinion, the Court of Appeals has ignored the clear precedent in Baker, Deno, and Schell, and instead, on its own accord, placed upon Mr. Beard the burden of somehow proving that his attorney's performance was adversely affected because of his prior, current and future representation of the star witness testifying against Beard, Mr. Davis. The Court of Appeals stated that "Beard failed to show in any way how the performance of his counsel was adversely affected by counsel's prior representation of the Commonwealth's chief witness or that his defense was otherwise prejudiced." Opinion pp. 2-3. Such a standard is simply untenable.

To begin, the Court of Appeals' interpretation of the language of Kirkland is incorrect as to the Court's determination that Mr. Beard bore the burden to prove the deficiencies of his counsel due to conflict. As stated, no facts were put before the Court in Kirkland demonstrating that a conflict existed. It was merely

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<sup>2</sup> This case is unpublished and is being cited pursuant to CR 76.28(4). As such, the required copy of the entire decisions is included in the appendix of this brief.

a request for reversal for the trial court failing to comply with RCr. 8.30. The Court simply said that failure to follow RCr. 8.30, by itself, was not sufficient for reversal. There had to be a claim of conflict made based on facts. This Court stated that a defendant “must show a real conflict of interest in order to obtain a reversal.” Kirkland, 53 at 75. Here, Beard presented the trial court and the Court of Appeals with abundant facts demonstrating that a conflict of interest existed. Those facts clearly demonstrate that Mr. Beard did “show a real conflict” as defined by SCR 3.130(1.7).

Also, Kirkland’s holding with respect to RCr. 8.30 is easily distinguishable to this case procedurally. In this case, the appeal stems from the denial of a motion to substitute counsel. As stated *supra*, to warrant a substitution of counsel, this Court has set out specific requirements that must be followed for a trial court to appoint substitute counsel. Specifically, the defendant must show “good cause” to support a request for a substitution of counsel. Deno, 177 S.W.3d at 759. “Good cause” has been described as: (1) complete breakdown of communication between counsel and himself, (2) a conflict of interest, or (3) that is legitimate interests are being prejudiced. Id. *citing Baker v. Commonwealth*, 574 S.W.2d at 326.

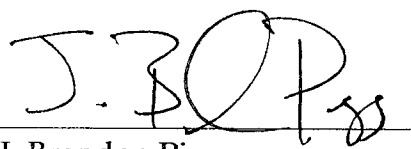
As such, the question before the Court of Appeals was whether the trial court, in view of the facts as they existed when the motion was made, was correct in overruling the motion. The evidence submitted to the trial court demonstrated that a conflict of interest existed and therefore “good cause” was

established to support the motion. It should matter little how well a reviewing court may feel that counsel "performed" following the denial of the motion, but whether the facts, as they existed at the time of the filing of the motion to substitute, warranted the granting of that motion.

#### CONCLUSION

For the foregoing reasons, Charles Brent Beard requests that his conviction be vacated and the case remanded for a new trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. B. Pigg" with a stylized flourish at the end.

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APPENDIX

<u>Tab Number</u>	<u>Item Description</u>	<u>Record Location</u>
1	Court of Appeals Opinion	Rendered 1/4/08
2	Final Judgment	TR 150 - 152
3	Indictment	TR 1 - 2
4	Motion to Suppress	TR 26 - 27
5	Order	TR 29 - 31
6	Motion to Dismiss Counsel Due to Conflict	TR 47 - 50
7	Response to Defendant's Motion to Dismiss Counsel	TR 57 - 58
8	Docket Sheet	TR 59
9	<i>Schell v. Commonwealth,</i> 2008 WL 203036	Unpublished opinion