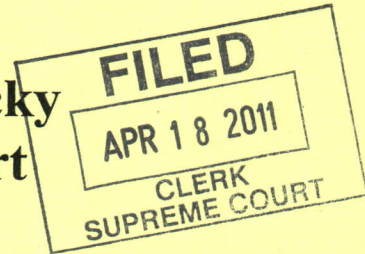


**Commonwealth of Kentucky**  
**Kentucky Supreme Court**

Case No. 2010-SC-91



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v.

Appeal from Hancock Circuit Court  
Hon. Ronnie C. Dortch, Judge  
Indictment No. 2000-CR-00038

**RANDY LEINENBACH**

**APPELLEE**

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**Reply Brief for Commonwealth**

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Respectfully submitted,

**JACK CONWAY**

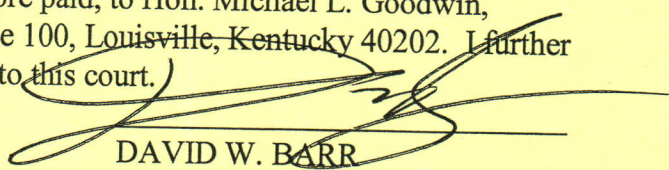
Attorney General of Kentucky

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Brief for the Commonwealth was served on the following named individuals by U.S. mail, postage pre paid, on this 18th day of April, 2011 to: Hon. Ronnie C. Dortch, Judge, Hancock Circuit Court, Community Center, 130 E. Washington Street., P. O. Box 169, Hartford, Kentucky 42347-0169; via electronic mail to: Hon. Timothy R. Coleman, Commonwealth Attorney, 206 E. Ohio Street., P. O. Box 1038, Morgantown, Kentucky 42261-1038; and by U.S. mail, postage pre paid, to Hon. Michael L. Goodwin, Counsel for Appellant, 600 West Main Street, Suite 100, Louisville, Kentucky 40202. I further certify that the record on appeal has been returned to this court.



**DAVID W. BARR**

Assistant Attorney General

## **PURPOSE OF REPLY BRIEF**

The purpose of this Reply Brief is to reply to the arguments raised by the appellee.

## ARGUMENT

### I

**APPELLEE DID NOT RAISE ANY CLAIM OF JURY INSTRUCTION ERROR ON DIRECT APPEAL. ANY CLAIM OF JURY INSTRUCTION ERROR WAS PROCEDURALLY DEFAULTED AND COULD NOT SERVE AS THE BASIS FOR ANY ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

On direct appeal, appellee did not raise any claim of jury instruction error. Counsel did not ask for palpable error review. Because the claim of jury instruction error was not raised in any manner on direct appeal, the same was procedurally defaulted. Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003); Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001); Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000).

As expected, appellee argues that his claim of ineffective assistance of counsel is proper per Leonard v. Commonwealth, 279 S.W.3d 151 (Ky. 2009) and Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006). Appellee's reliance is misplaced. Leonard and Martin allow RCr 11.42 review only when a claim was raised and decided on direct appeal under the palpable error standard of review. As noted, appellee did not raise any jury instruction claim in his direct appeal and, therefore, the palpable error standard of review was not employed. Leonard and Martin do not authorize RCr 11.42 review in cases like the case *sub judice* where the appellee could have easily raised the issue on direct appeal and asked for palpable error review. The issue was procedurally defaulted and the trial court properly denied the petition.

Appellee cites Humphrey v. Commonwealth, 962 S.W.2d 870, 872-73 (Ky. 1998) in support of his argument. Humphrey holds that claims of ineffective assistance of counsel cannot be raised on direct appeal. Humphrey did not abrogate the long-standing rule that RCr 11.42

review is not available for direct appeal issues, such as the propriety of jury instructions, that were or could/should have been raised on direct appeal. Appellee's argument, at its essence, is that any issue can be raised in an RCr 11.42 petition. Appellee's wishful thinking is not supported by any precedent.

Lastly, appellee claims that his RCr 11.42 claim is proper per Hollon v. Commonwealth, \_\_\_ S.W.3d \_\_\_, 2010 WL 4679534 (Ky. 2010). In Hollon, this Court authorized claims of ineffective assistance of appellate counsel in RCr 11.42 petitions. In his RCr 11.42 petition, appellee did not allege that his direct appeal counsel was ineffective for failing to raise the jury instruction issue. Any such claim is not before this Court.

## II.

**COMMONWEALTH V. DAVIS WAS IMPLICITLY OVERRULED BY HODGE V. COMMONWEALTH, HAIGHT V. COMMONWEALTH, AND BAZE V. COMMONWEALTH. THE COMMONWEALTH ASKS THIS COURT TO EXPRESSLY OVERRULE COMMONWEALTH V. DAVIS.**

Appellee continues to argue that Hodge, supra, Haight, supra, and Baze, supra, were completely overruled by Leonard and Martin. They were not. Only the rule that RCr 11.42 precludes review of issues raised and decided on direct appeal was modified. It was modified to allow RCr 11.42 review of direct appeal claims reviewed under the palpable error standard of review.

Commonwealth v. Davis, 14 S.W.3d 9 (Ky. 1999) predates Hodge, supra, Haight, supra, and Baze, supra, Leonard, supra, and Martin, supra. Nonetheless, in Davis, the propriety of the jury instructions was raised on direct appeal. Thus, Davis is factually distinguishable and not controlling. To the extent Davis allows RCr 11.42 review of a properly preserved issue, decided

on direct appeal and to the extent it conflicts with Hodge, supra, Haight, supra, and Baze, Davis should be overruled.

### III.

#### **THE COURT OF APPEALS ERRED IN ITS APPLICATION OF STRICKLAND V. WASHINGTON WHEN IT FAILED TO EXPRESSLY ADDRESS AND APPLY THE REQUIREMENT OF PREJUDICE.**

First, despite appellee's argument to the contrary, the Commonwealth does not concede that the Court of Appeals correctly held that the jury instructions were erroneous. Nonetheless, even if they were erroneous, that still does not mean that appellee is entitled to any relief.

Per Strickland v. Washington, 466 U.S. 668 (1984) (adopted by the Kentucky Supreme Court in Gall v. Commonwealth, 702 S.W.2d 37 (1985)), appellee must show that his counsel's performance was deficient. Second, he must show that his counsel's deficient performance prejudiced the defense. Though the Commonwealth raised the issue of prejudice before the Court of Appeals, the Court of Appeals did not address prejudice.

As appellee notes on page 13 of his brief before this Court, the Opinion of Court of Appeals "presumed" prejudice. That is not proper. Because the Court of Appeals did not address prejudice, this Court must review prejudice *de novo*.

The Commonwealth argues that appellee failed to show any prejudice. He was indicted and charged with one (1) count of first degree rape occurring on August 12, 2000. The jury certainly was not confused by the instructions. The jury instructions allowed the jury to differentiate between the alleged rape in Victim's car (found not guilty) and the rape that occurred in appellee's residence (found guilty), both occurring on August 12, 2000. Appellee was found guilty of one count of first degree rape, as charged. He was not prejudiced. He would have been

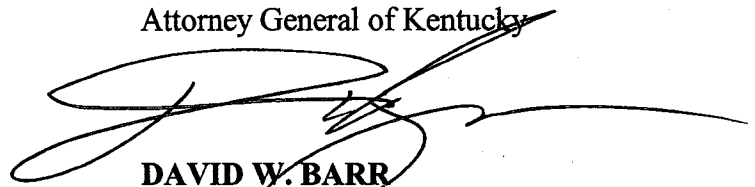
prejudiced had he been convicted of rape under both instructions. He would have been prejudiced had the jury instructions failed to differentiate between the act occurring in the car and that occurring in the residence. Because the jury differentiated between the two instructions, there was no prejudice. Appellee was charged with one (1) count of rape; he was convicted of one (1) count of rape. There was no prejudice. The Court of Appeals must be reversed, and the trial court's order denying RCr 11.42 relief must be affirmed.

**CONCLUSION**

WHEREFORE, the Commonwealth of Kentucky asks that the Opinion of the Court of Appeals of January 29, 2010 be REVERSED and that the trial court's order denying RCr 11.42 relief be affirmed.

Respectfully submitted,

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