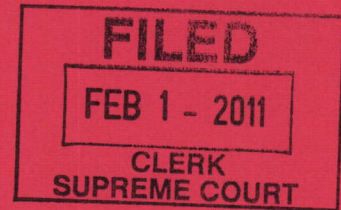


**Commonwealth of Kentucky  
Kentucky Supreme Court**

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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**Brief for Commonwealth**

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Respectfully submitted,

**JACK CONWAY**

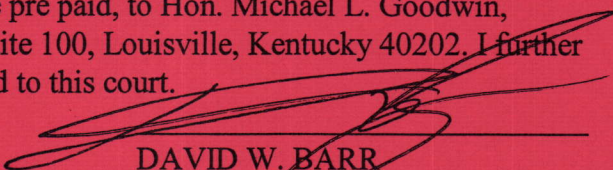
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**CERTIFICATE OF SERVICE**

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 27th day of January, 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

## INTRODUCTION

This matter is before the Court upon grant of the Commonwealth's motion for discretionary review. In its Opinion of January 29, 2010, the Court of Appeals reversed the trial court's denial of appellee, Randy Leinenbach's, RCr 11.42 petition. The Court of Appeals held that appellee was denied effective assistance of counsel when counsel failed to object to certain jury instructions. The propriety of the jury instructions was not raised on direct appeal, and the Court of Appeals did not conduct the prejudice analysis required by Strickland v. Washington, *infra*.

**STATEMENT CONCERNING ORAL ARGUMENT**

The Court normally orders oral argument in cases where discretionary review has been granted. The Commonwealth stands ready to present oral argument herein if so ordered.

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## COUNTERSTATEMENT OF THE CASE

On August 12, 2000, appellee, Randy Leinenbach, was married to "P.L." (hereinafter "Victim"). They had been separated and living apart since September 1999. VR 1, 8/4/05, 2:54:17 - 20. Victim resided in or around Cannelton, Indiana, and appellee resided in Hancock County, Kentucky. Appellee lived in the former marital home, and he had a roommate, Steve Wilcox (hereinafter "Wilcox").

On the morning of August 12, 2000, appellee and Wilcox drove to Cannelton, Indiana. VR 2, 8/5/05, 1:16:56 - 1:17:18. At approximately 10:30 a.m., Victim left her boyfriend's residence and walked down the street. Appellee approached her in his truck. Appellee exited his truck, and Wilcox drove it back to appellee's house. Appellee grabbed Victim by the back of her head, threw her into the passenger seat of her car, hit her head against the window, and drove into Hancock County, Kentucky. VR 1, 8/4/05, 2:59:20 - 3:01:18. While driving Victim's car, appellee began "ripping" her clothes with his bare hands. VR 1, 8/4/05, 3:01:19 - 3:01:51.

Appellee drove Victim to a remote part of Hancock County, Kentucky. While driving there, appellee told Victim that he had a friend awaiting them with a gun and that appellee was going to "blow her head off." VR 1, 8/4/05, 3:04:54 - 3:05:10. Appellee then stopped the car on a remote road and sexually assaulted Victim. VR 1, 8/4/05, 3:01:52 - 3:02:50.

Afterward, appellee drove Victim to the home of appellee's daughter, Julie Nix, and his son-in-law, Steve Nix. As he drove there, appellee continued hitting Victim about the head and chest. VR 1, 8/4/05, 3:04:20 - 45. When they arrived, they were met at the car by Julie Nix. Soon, they were joined by Steve Nix. An argument began. Julie Nix offered to take Victim back to Indiana, and Julie Nix grabbed the steering wheel. Appellee refused, stating he would take Victim back to Indiana. TR 93, 96. Appellee then fled with Victim. Appellee took Victim to his



home, which was nearby.

Some time later, Steve Nix drove to appellee's home "to determine if everything was OK." TR 93. When Steve Nix arrived, he spoke briefly, outside the residence, with Wilcox. Shortly thereafter, Nix returned to his home. Between "a half an hour" (TR 97) and "an hour and 15 minutes to an hour and a half later" (TR 94), Steve and Julie Nix drove back to appellant's home.

During this intervening period of time, appellee and Victim were alone inside appellee's home. When they arrived at the house, appellee grabbed Victim by the hair and pulled her towards the house. Once inside, he threw her into a recliner. He told her not to try to flee as she "wouldn't make it." VR 1, 8/4/05, 3:07:39 - 56. Appellee went to the kitchen and brought back a knife. He sharpened it in front of Victim. While Victim was still seated in the recliner, appellee jumped on her. He then threw her to the floor. He placed the knife to her throat and raped her. VR 1, 8/4/05, 3:08:26 - 57. Appellee penetrated Victim's vagina with his penis. VR 1, 8/4/05, 3:09:41 - 57.

Afterward, Victim was again seated in the recliner. Appellee verbally degraded her and started poking her in the arms and legs with the point of the knife. VR 1, 8/4/05, 3:09:00 - 28. Victim was thrown to the floor and raped again. Appellee warned Victim that he was going to decapitate her and lay her head beside her body. VR 1, 8/4/05, 3:10:22 - 38. Victim was ordered to shower, and she refused. She was then ordered to put on some clothes. Victim found some clothes she had left behind [when they separated nearly a year earlier] and dressed. VR 1, 8/4/05, 3:10:44 - 3:11:07.

Victim was again thrown into the recliner. At this point, Julie Nix knocked on the door.

Appellee told his daughter, Julie Nix, to give him a few minutes, and she left and waited outside. TR 94. VR 1, 8/4/05, 3:11:07 - 15. "Approximately five to ten minutes later" (TR 94), appellee, still holding the knife, jumped atop Victim, knocking over the recliner. VR 1, 8/4/05, 3:11:52. Julie Nix immediately returned, opened the door, and yelled for her husband and Wilcox to help. TR 94, 102-103. They observed appellee straddling Victim, holding a knife in his hand. TR 94, 97, 103. VR 1, 8/4/05, 5:12:18 - 42 and 5:40:07 - 09; VR 2, 8/5/05, 1:48:13 - 1:49:34. Julie Nix also saw that Victim had several cuts and was bleeding from her right hand. TR 97. VR 1, 8/4/05, 5:42:30 - 35.

On November 3, 2000, the Hancock County Grand Jury charged appellee with one (1) count of first degree rape and one (1) count of first degree unlawful imprisonment. The indictment did not specify where inside Hancock County the rape occurred, i.e., inside Victim's automobile or inside appellee's home. The jury was given two (2) instructions for first degree rape. Instruction No. 5 concerned the alleged rape inside the Victim's automobile. Instruction No. 6 concerned the rape inside appellee's home. Appellee was found not guilty under Instruction No. 5. Appellee was found guilty under Instruction No. 6. TR 119 - 122. Appellee did not tender any instructions. Appellee did not object to the instructions given. VR2, 8/5/05, 3:16:30 - 3:21:15 and 3:48:45 - 3:49:34.

Appellee was sentenced to 15 years for first degree rape and five years for first degree unlawful imprisonment. As recommended by the jury, the sentences were ordered to be served concurrently.

Appellee appealed his convictions to the Court of Appeals. Appellee raised three (3) issues therein. Appellee argued that the trial court erred in not granting his motion for a directed



verdict. Appellee argued (unpreserved) that his right to a speedy trial was violated. Lastly, appellee argued (unpreserved) that the trial court erred in allowing the Commonwealth to use an FBI agent's report to question two (2) hostile witnesses, Julie and Steve Nix. Appellee did not present **any** argument concerning the propriety of the above-referenced jury instructions for first degree rape. In its Opinion of July 28, 2006, the Court of Appeals affirmed the trial court.

On August 8, 2008, appellee filed his petition for relief per RCr 11.42. Appellee made several claims of ineffective assistance of trial counsel, including that his trial counsel was ineffective for failing to object to the above-referenced jury instructions for the rape charge. Appellee did not claim that his appellate counsel was ineffective for failing to raise the propriety of the jury instructions on direct appeal. Thus, the issue of ineffective assistance of appellate counsel is not before this Court.

In its Order of October 15, 2008, the trial court overruled appellee's request for relief per RCr 11.42. Appellee then appealed to the Court of Appeals. Appellee raised the same issues on appeal as in his RCr 11.42 petition. In its Opinion of January 29, 2010, the Court of Appeals reversed the trial court. The Court of Appeals only addressed the merits of two (2) issues.

Despite the Commonwealth's argument that the issue had been procedurally defaulted, the Court of Appeals held that trial counsel was ineffective for failing to object to the above-referenced jury instructions. The Court of Appeals did not address the Commonwealth's claim of procedural default.

The Opinion of the Court of Appeals primarily addressed the propriety of the jury instructions. The Court held that the instructions were improper as a matter of law. Opinion at p. 4 - 7. The Court very briefly addressed the issue of ineffectiveness and then only in a

conclusory manner. The gist of the Court of Appeals' holding was that, since the jury instructions were improper as a matter of law, trial counsel had to be ineffective for not objecting to the same. The Court did not address the issue of whether appellee was prejudiced by his counsel's failure to object to the jury instructions. Further, the Court did not address the Commonwealth's argument that appellee's claim of jury instruction error had been procedurally defaulted and could not be maintained as a RCr 11.42 claim.

**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.**

In his RCr 11.42 petition, appellee argued that his trial counsel was ineffective for failing to object to "erroneous jury instructions." TR 196. 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. Leonard v. Commonwealth, 279 S.W.3d 151 (Ky. 2009) and Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006) have no application to this case and do not save appellee's RCr 11.42 claim.

It is well-settled that an issue which could have been raised on direct appeal, but which was not so raised, cannot be repackaged as a claim of ineffective assistance of counsel. Any such issue is 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). Raising a procedurally defaulted issue in a RCr 11.42 petition does not provide cause to excuse the procedural default. Gail v. Parker, 231 F.3d 265, 319 (6th Cir. 2000); Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007).

The Commonwealth raised this procedural default argument before the trial court and the Court of Appeals. The Opinion of the Court of Appeals of January 29, 2010 completely ignores the argument. Because appellee could have, and should have, raised his claim of jury instruction error on direct appeal, he cannot raise it as a claim of ineffective assistance of counsel. The Court of Appeals erred in reversing the trial court. The Court of Appeals must be reversed. The trial court's order denying RCr 11.42 relief must be affirmed.

## 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.**

Though not cited by the Court of Appeals in its Opinion of January 29, 2010, Commonwealth v. Davis, 14 S.W.3d 9 (Ky. 1999), seems to support the holding of the Court of Appeals. In Davis, this Court stated: "Where the ineffective assistance of counsel claim is that counsel erred by failing to object to jury instructions or to the introduction of evidence, it must first be shown that the jury instructions were given in error or the evidence was admitted in error." Id at 11. But, there is a key difference. In Davis, unlike here, the propriety of the jury instructions was raised on direct appeal. Id. Davis is factually distinguishable and not controlling.

Davis seemingly allows a claim of jury instruction error, raised and rejected on direct

appeal, to be relitigated upon RCr 11.42 review as a claim of ineffective assistance of counsel. Davis is at odds with Hodge, Haight, and Baze, supra. These three cases, decided after Davis, hold that issues which were raised on direct appeal, or should have been raised on direct appeal (like the propriety of jury instructions) cannot serve as the basis for a claim of ineffective assistance of counsel. The Commonwealth argues that Davis, supra, was overruled by Hodge, Haight, and Baze, supra. The Court of Appeals erred by not following the clear holdings of Hodge, Haight, and Baze, supra. This Court should made clear that Davis, supra, was overruled by Hodge, Haight, and Baze, supra. The Opinion of the Court of Appeals must be reversed. The trial court's order denying RCr 11.42 relief must be affirmed.

### 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.**

It is well-settled that a RCr 11.42 movant bears the burden of proving the two-prong test provided in Strickland v. Washington, 466 U.S. 668 (1984) (adopted by the Kentucky Supreme Court in Gall v. Commonwealth, 702 S.W.2d 37 (1985)). First, the movant must show that his counsel's performance was deficient. Second, he must show that his counsel's deficient performance prejudiced the defense.

In its Opinion of January 29, 2010, the Court of Appeals only addressed the first prong of the Strickland test. The Court of Appeals found that counsel was deficient for failing to object to the jury instructions. The Opinion of the Court of Appeals is silent as to prejudice. That is improper. Because the Court of Appeals did not address prejudice, this Court may review prejudice *de novo*.

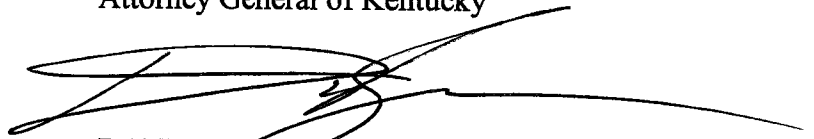
The Commonwealth argues that appellee failed to show any prejudice. He was indicted and charged with one (1) count of first degree rape occurring on August 12, 2000. The jury instructions allowed the jury to differentiate between the alleged rape in Victim's car (found not guilty) and the rape that occurred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

**JACK CONWAY**  
Attorney General of Kentucky

A handwritten signature in black ink, appearing to read "DAVID W. BARR", is written over the printed name and title of the Assistant Attorney General.

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