No. 125005

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DONNELL GREEN Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-16-0217. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 08 CF 264. Honorable George D. Strickland, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

This Court should find that Donnell Green established that his trial counsel had a *per se* conflict of interest, where counsel previously represented the intended victim of the murder and Green neither knew about the conflict nor waived it.

The State argues that trial counsel's prior representation of Danny Williams (a.k.a. "Keeko") did not create a *per se* conflict because Williams was not the actual victim of the charged offense. (St. Br. at 9-12) The State also argues that this Court should not find that trial counsel's prior representation of the intended victim constitutes a new category of *per se* conflict because it would be too difficult to identify an intended victim in transferred-intent cases and the rule would be overbroad in cases where offenders target groups rather than individuals. (St. Br. at 12-19) The State's arguments should not persuade this Court.

A. Williams was the intended victim of the shooting.

As an initial matter, in his opening brief, Green argued that Williams was the intended victim of the shooting. (Opening Br. at 13) Indeed, during a discussion on jury instructions, the State explicitly told the trial court that this case was "a transferred intent situation" and that "In our theory of the case the target was Keeko, or Danny Williams, not necessarily Jimmy Lewis,"and then explicitly stated that "The planned and intended act was to shoot Keeko." (R1862)

The evidence at trial showed that the occupants of the shooter's vehicle only followed the Cadillac after recognizing it as "Keeko's car." (R1142) Green testified that he told police that "the car that Keeko [was] driving [was] spotted and everybody said there *he* goes." (Emphasis added) (R1825) The presentence

investigation report (PSI) stated that, the day after the shooting, Green told Chappel Craigen that "an unintended victim died," and the PSI indicates that according to the offense report, "Mr. Lewis was *not* the intended target." (Emphasis added) (IC5, 15)[1] There were no objections to this portion of the PSI at sentencing. (R2076-77, 2093-98)

Additionally, Green claimed in his post-conviction petition that trial counsel labored under a *per se* conflict based on his prior representation of Williams who was the intended victim of the crime. (C1076-78) During the evidentiary hearing on the petition, where this claim was considered, trial counsel testified that the State's theory was that the intended target of the shooting was "Keeko Williams." (R2511) The police interview of Chappel Craigen, the driver of the shooter's vehicle, was admitted into evidence during the evidentiary hearing. (R2672) During his interview, Craigen told the Waukegan police that "the bullet wasn't even meant for [Lewis]."[2] (State ex. 12 at 19) When the interviewer asked who the bullet was meant for, Craigen replied, "Keeko." (State ex. 12 at 19) The trial court explicitly and properly found that "based on the evidence . . . Keeko Williams was, in fact, the target of the shooting." (R2758)

The State now confusingly claims that the identify of the intended victim is subject to dispute despite its prior statements to the trial court and its own determination that a *de novo* review applies here "because the parties do not dispute

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[1] The impounded common law record is cited as IC.

[2] Craigen said that the bullet was not meant for "Mac." (State ex. 12 at 19) Jimmy Lewis was also referred to as Bernice Mack. (R747)

any such factual finding underlying the ultimate conflict issue." (St. Br. at 6, 16 at n.7) The State asserts that the trial court's determination that Williams was the intended victim was just an example of the trial court going along with Green's claim "for argument's sake" because the trial court did not have to determine whether Williams was the intended victim. (St. Br. at 16) This argument fails where Green's claim was obviously at issue and the court explicitly based its finding that Williams was the intended victim of the shooting on the evidence presented at the evidentiary hearing. (St. Br. at 16) (R2758)

The State then includes a footnote in its brief that asks this Court to find the trial court's determination that Williams was the intended victim of the shooting manifestly erroneous given the State's "summary of trial evidence and argument." (St. Br. at n. 7) To support its claim that the identity of the intended victim is in dispute, the State cites to a portion of the record where during opening statements the State tells the jury that the occupants of the shooter's vehicle proclaimed "'that's *them*' upon recognizing the vehicle driven by the rival Moes." (Emphasis in original) (St. Br. at 14) The State also claims that Green did not express that there was any specific animosity towards Williams. (St. Br. at 14)

However, in his videotaped statement, Green said that his group had recognized the driver of the Cadillac as Williams and the only reason the Cadillac was associated with the rival gang (the Moes) was "because Keeko is a Moe." (State Ex. 71 at 14, 16) Green said that the occupants of the car he was in became excited when they saw the Cadillac and said, "that's them, that's them." (State Ex. 71 at 16) When the interviewer asked Green if they meant, "Those are the Moes?"

Green clarified and said they meant, "That's *one* of the Moes" or "That's Keeko." (Emphasis added) (State Ex. 71 at 17) Indeed, Green told the interviewer that there had been a fight at a restaurant prior to the shooting involving the rival gang and the record shows that Williams was present at that fight. (State Ex. 71 at 15; C681)

The State also cites to various statements made during the State's closing argument where it explained to the jury that it could find Green guilty regardless of who the intended victim was. (St. Br. at 15) The State explained the theory of transferred intent during its closing argument and told the jury "[i]ntent follows the bullet," and "it doesn't matter in the end" who the intended target was. (R1907-08) The State argued that the shooter was "after the Moe's, either Jimmy Lewis or Keeko, it doesn't matter." (R1908) Of course this explanation was necessary in order to ensure the jury did not believe they had to find the intended target was Lewis given the overwhelming evidence that Williams was actually the intended target.

Given the facts above, the trial court's determination that Williams was the intended victim of the shooting was not manifestly erroneous.

B. This Court should hold that Green's trial counsel labored under the first category of *per se* conflict because he previously represented the intended victim in this case.

The State argues that no court has ever recognized that trial counsel's prior representation of the intended victim of the charged crime constitutes a *per se*

conflict.[3] (St. Br. at 9, 12) Thus, the State claims, this Court should "decline to embrace this novel argument." (St. Br. at 9, 12) The State's argument is unpersuasive. Every argument in support of a new principle of law could initially be described as new or novel. There would never be any new case law created if all new or novel arguments to create case law had to be previously accepted by another jurisdiction beforehand. Moreover, the State has not cited to any other case where this specific issue was considered and rejected. Thus, using the State's logic, this means that this Court should likewise not reject it.

The State then argues that *People v. Hernandez,* 231 Ill. 2d 134 (2008), does not support Green's argument because the intended victim in *Hernandez* was the "actual victim of the charged offense" whereas Williams was not "a victim of the charged offense" and "was not mentioned in the charging instrument at all." (St. Br. at 10-11) These distinctions miss the main point of comparison.

In *Hernandez*, the defendant was charged with solicitation of murder for hire of trial counsel's former client. Thus, the "actual victim" in *Hernandez* was not actually harmed and was only a victim in the most technical sense, that being that the defendant was charged with procuring another person to murder him. In this case, Green was charged with murdering Lewis but the intended murder

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[3] The State claims that "no case" has held that a *per se* conflict exists in these circumstances. (St. Br. at 12) In order to ensure this Court is aware of another case where this argument was accepted, Green directs its attention to *People v. Smith*, 2018 IL App (2d) 150248-U, ¶ 1 ("Held: Where murder defendant's trial attorney had previously represented the intended victim of the murder, a *per se* conflict of interest existed"). Pursuant to Supreme Court Rule 23(e)(1), this case is not cited for precedential value.

victim was trial counsel's former client, Williams. Williams was not named in the charging instrument because it was a transferred intent situation where the intended victim was not killed. Thus, in *Hernandez* and in this case, the underlying facts are the same: trial counsel previously represented the intended victim of the charged crime who was not actually harmed. However, as it stands, only Hernandez can successfully claim a *per se* conflict existed. This disparate treatment requires correction by this Court.

The State is correct when it acknowledges that trial counsel's prior representation of Williams would constitute a *per se* conflict under the current case law if the State had decided to charge Green with the attempt murder of Williams because then Williams would have been the "actual" victim who was named in the charging instrument. (St. Br. at 11); *People v. Hill*, 276 Ill. App. 3d 683, 688 (1995) ("the doctrine of transferred intent is applicable in attempt murder cases"), citing *People v. Burrage,* 269 Ill. App.3d 67, 76 (1994).

The only substantive difference between *Hernandez* and this case is that the defendants were charged with different crimes thereby making the intended victim in *Hernandez* also the charged or "actual victim." Indeed, although active representation is not required to find a *per se* conflict, both trial counsel here and in *Hernandez* continued to serve the interests of their prior clients to the extent that they could not reveal confidential conversations with those clients absent certain exceptions. See Rule 1.9(c)(2) of the Illinois Professional Rules of Conduct of 2010 ("A lawyer who has formerly represented a client in a matter . . .shall not thereafter . . . reveal information relating to the representation except as these

Rules would permit or require with respect to a client"); *Hernandez*, 231 Ill. 2d at 146 ("DeLeon acknowledged his loyalty to Cepeda such that he would not reveal any conversations he had had with Cepeda"). Moreover, to the extent trial counsel in *Hernandez* contemporaneously represented the victim of the offense it was only in the most tenuous sense where he was still technically the "attorney of record" for the victim but had not had any contact with the victim for five years. *Hernandez*, 231 Ill. 2d at 139, 142. ("DeLeon had not seen nor spoken to Cepeda in five years. Further, DeLeon's appearance was still on file only because he could not withdraw in Cepeda's absence").

Rather than supporting the State's case, the difference in treatment of these two cases, despite their underlying factual similarity, should bolster the importance of finding that the prior representation of the intended victim of a crime also constitutes a *per se* conflict under the first category of *per se* conflicts as it relates to prior representation of victims. Obviously, both the intended victims in *Hernandez* and this case would benefit from an unfavorable verdict against the defendants who allegedly participated in attempts to kill them. The State does not contest this.

A determination of whether a defendant's right to conflict free counsel is protected and whether trial counsel is laboring under a *per se* conflict as it relates to his or her prior representation of a victim should rest on the justifications for the *per se* conflict rule and the underlying facts related to trial counsel and the intended victim of the offense. It should not depend on the discretionary charging decisions of the State or on language that the State can choose to include or not

to include in the charging instrument. As the State points out, there is no requirement to name the intended victim in a charging instrument when there is a transferred intent crime charged. (St. Br. at 7) *People v. Hill*, 276 Ill. App. 3d 683, 691 (1st Dist. 1995) *("*a person may be properly convicted under the theory of transferred intent even if the State does not specifically allege that theory in the charging instrument"), citing *People v. Franklin*, 225 Ill. App. 3d 948, 949 (3d Dist. 1992); *People v. Forrest*, 133 Ill. App. 2d 70, 71 (1st Dist. 1971). However, counsel is not aware of any rule barring the State from including it.

Thus, as it stands, a determination of whether a *per se* conflict exists when trial counsel previously represented the intended victim of the crime is currently dependent upon the whims of the State rather than more substantive concerns such as whether trial counsel has previously represented a person that the defendant intended to harm when committing the charged crime, a person who would obviously benefit from an unfavorable verdict for the defendant. *Hernandez*, 231 Ill. 2d at 143. This Court should reject the State's arguments and find that trial counsel's prior representation of the intended victim of the charged crime constitutes a *per se* conflict under the first category of *per se* conflicts as it relates to victims.

C. Alternatively, this Court should find that Green's trial counsel's prior representation of the intended murder victim constitutes a new category of *per se* conflict.

The State also takes issue with Green's alternative argument and argues that this Court should not find that trial counsel's prior representation of the intended victim of the crime constitutes a new category of *per se* conflict because

it may be difficult to identify the intended victim in transferred-intent cases and a new category would by overbroad where the target of a crime is a group rather than individuals. (St. Br. at 12)

To support its argument the State argues that in *People v. Fields*, 2012 IL 112438, ¶ 40, this Court determined that the justifications for the *per se* conflict rule do not provide an alternative basis for recognizing a new category of *per se* conflicts. (St. Br. at 13) Green addressed this argument in his opening brief. (Opening Br. at 21-22) Suffice to say, this Court left open the possibility of another category of *per se* conflict when the question arose in *Fields* where it stated, "there is no need to consider whether defendant is correct that additional situations might be found where a *per se* conflict of interest exists." *Fields*, 2012 IL 112438, ¶ 37. Green is respectfully asking this Court to find that the situation presented in this case constitutes an additional *per se* conflict situation.

Next, the State argues that even if this Court were open to creating another category of *per se* conflict, expansion of the rules to the prior representation of the intended victim of the crime would be unworkable because it may be difficult to determine the intended victim early in the proceedings. (St. Br. at 13-14)

This argument should not persuade this Court because even with the current category of *per se* conflict, as it relates to victims, there is a risk that the conflict will not be caught early in the proceedings. In the event that the conflict is not discovered until after trial, the claim can be raised in a post-conviction petition. Indeed, *Hernandez* speaks to this issue where, although the State and trial counsel were aware of trial counsel's relationship to the victim, the defendant had to raise

his *per se* conflict claim in a post-conviction petition because he was never made aware of it and it was never disclosed to the court. *Hernandez*, 231 Ill. 2d at 139; see also *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 1 (*per se* conflict claim raised in a post-conviction petition).

Similarly, here, trial counsel testified at the evidentiary hearing that, although he was aware that Williams was driving the car, he did not realize that Williams was his prior client until a couple of weeks prior to the evidentiary hearing. (R2514-15) Again, that did not prevent Green from discovering the issue and raising a claim in a post-conviction petition, and as evidenced by *Hernandez* and *Cleveland*, there will likely always be situations where that will unfortunately occur.

Additionally, this Court has made clear that the protection of a defendant's right to effective and conflict-free counsel is paramount and that the *per se* rule is justified even in light of the potential for intentional misuse of the rule, let alone unintentional oversights that can later be remedied through post-conviction petitions. Specifically, in response to an argument by the State in *Hernandez* that the *per se* conflict rule may provide an incentive for counsel to conceal a conflict in order to secure a new trial in the event of a conviction, this Court replied that "'This is a risk that this court is prepared to take, however, in order to assure that every person is assured of the right to effective assistance of counsel at his trial.'" *Hernandez*, 231 Ill. 2d at 147, quoting *People v. Coslet*, 67 Ill.2d 127, 136 (1977).

The State then argues that the proposed category is unworkable because it might be too difficult or impossible to determine whether there was an intended

victim and, it claims, an intended victim may "never" be revealed. (St. Br. at 13-14) The State cites *People v. Shelton,* 293 Ill. App. 3d 747 (1st. Dist. 1997), to support this argument. (St. Br. at 14) However, *Shelton* rebuts the State's argument where the facts demonstrate that, like this case, there was an intended victim who did not become the actual victim. The facts were clear that the defendant told the shooter to "shoot Howard"and the appellate court stated that the record was silent as to whether "*the intended victim*, Howard," was present when the shootings occurred. *Shelton*, 293 Ill. App. 3d at 750, 753.

The question in *Shelton* was whether a transferred intent instruction should have been given where the actual victim's death could have been the result of bad aim or mistaken identity. *Shelton*, 293 Ill. App. 3d at 753. The intended victim was not struck and the record did not disclose whether he was actually present at the scene of the shooting. Thus, the appellate court found that the jury could also have speculated that, rather then singling out a particular person, the shooter could have been acting with a general intent to shoot anyone at the rival gang "hangout."*Shelton*, 293 Ill. App. 3d at 753. Green is not arguing that a *per se* conflict should rest on mere speculation. A careful reading of *Shelton* shows that the only known intended victim of the crime was a person named Howard. The appellate court stated that it was unclear whether the two actual victims were also intended victims. *Shelton*, 293 Ill. App. 3d at 753. Thus, if the *per se* conflict rule proposed here was applied to *Shelton*, the question would simply be whether trial counsel had previously represented Howard.

Moreover, if as the State claims, a situation arose where it was too difficult

or impossible to determine an intended victim or an intended victim was "never clearly revealed" then, by definition, there is simply no claim of *per se* conflict to be brought under the proposed rule. A determination of whether trial counsel previously represented the intended victim of a crime would have to be based on evidence that demonstrates a particular intended victim or victims. If there is no such evidence available, there can be no claim. And, if evidence to support such a claim is discovered after trial, the claim can be raised in a post-conviction petition.

The State then attempts to illustrate the difficulty in determining an intended victim by citing to various points in the current record where the State argued that the intended victim in this case was either Lewis or Keeko, or any member of the Moes. (St. Br. at 14-16) This argument should fail to persuade this Court where, as demonstrated above, it is clear from the record that the parties understood that the intended victim was Williams. Indeed, the State told the trial court outside of the jury's presence that "based on [Green's] confession" (evidence that was available prior to trial), "the target was Keeko, or Danny Williams, not necessarily Jimmy Lewis," and that "The planned and intended act was to shoot Keeko." (R1862) Trial counsel testified at the evidentiary hearing that he understood the State's theory was that Williams was the intended victim. (R2511)

The State argues that in cases where the target of the crime is a group, the proposed rule would be overbroad without "a clear limiting principle to prevent potential application to a prohibitively large group of people." (St. Br. at 16-17) The State asserts that smaller counties "might struggle to find experienced local counsel who have not previously represented a member of a rival gang." (St. Br.

at 18)

Perhaps betraying the weakness of its argument, the State attempts to broaden the proposed category of *per se* conflict to facts not present in this case. Green is not arguing for a rule that extends to a generalized intent to harm some amorphous group of people, nor is Green arguing that trial counsel's prior representation of other rival gang members, who were not present at the scene and were not shown to be intended victims of the crime, constitutes a *per se* conflict. Rather, Green simply argues that this Court should extend the *per se* conflict situations to instances such as this case where the evidence shows that trial counsel had previously represented a particular person who was the intended victim of the charged crime. This should be a sufficiently specific and determinative limiting principle for a *per se* conflict category.

Moreover, in the event that evidence in a case shows there were a large number of intended victims, this Court has already decided it is worth any burden experienced by "smaller counties" in finding conflict free counsel because, given an unfortunate twist of fate, an intended victim could (by definition) be an actual victim, and prior representation of an actual victim is already a *per se* conflict. Thus, the judicial system in Illinois is already obligated to be prepared for such a scenario.

Finally, the State argues that this Court should not expand the categories of *per se* conflicts to include trial counsel's prior representation of Williams because Williams was a potential State witness who did not testify. (St. Br. at 18-19) According to the State, finding a *per se* conflict here would be inconsistent with

this Court's previous determination that trial counsel's prior representation of a prosecution witness who testifies or trial counsel's contemporaneous representation of a potential State witness who does not testify does not amount to a *per se* conflict. (St. Br. at 18-19), citing *People v. Morales*, 209 Ill. 2d 340, 345-46; *Fields*, 2012 IL 112438, at ¶ 20, 40-41.

The State describes Williams as a former client of trial counsel and potential State witness who did not testify, but this status does not fit into either of the two categories this Court rejected as *per se* conflict situations. (St. Br. at 18-19) The State is mixing the two distinct categories to argue that the representation of Williams by trial counsel should not amount to a *per se* conflict because: (1) trial counsel previously represented Williams; and (2) Williams was a potential State witness who did not testify at trial. (St. Br. at 18-19) This Court has not explicitly held that trial counsel's *prior* representation of a *potential* State witness cannot amount to a *per se* conflict. *Fields*, 2012 IL 112438, ¶ 25 (no *per se* conflict where defense counsel previously represented a prosecution witness); *Morales*, 209 Ill. 2d at 346 (no *per se* conflict when trial counsel contemporaneously represented a potential State's witness and the defendant). Green acknowledges that given *Fields* and *Morales*, it is likely this Court would find that no *per se* conflict exists if the only relationship at issue was trial counsel having previously represented a potential State witness. But Green is not making an argument based upon Williams' status as a potential State witness.

Indeed, the State's argument here has already been refuted by this Court where the issue is trial counsel's relationship with the victim. In *Hernandez*, the

State argued there was no *per se* conflict where the victim of the crime had a prior association with trial counsel but the victim was also a potential State witness who did not testify at trial. *Hernandez*, 231 Ill. 2d at 149. The State directed this Court to *Morales* where it was determined that trial counsel's representation of a potential State witness was not a *per se* conflict. *Morales*, 209 Ill.2d at 346. This Court found that "*Morales* does not control the outcome in the case at bar. While it is certainly true [trial counsel's prior client] could have been a witness for the State, the distinctive feature here . . . is that [trial counsel's prior client] was also the alleged victim of defendant's crime." *Hernandez*, 231 Ill. 2d at 149.

Similarly, here, Williams could have been a witness for the State but the distinctive feature here is that he was also the intended victim of the crime charged against Green.

In sum, this Court should reverse Green's conviction and remand the cause for a new trial, because Green's trial counsel labored under a *per se* conflict of interest due to his prior representation of the intended victim of the charged offense, and the conflict was not waived by Green.

CONCLUSION

For the foregoing reasons, and those in his opening brief, Donnell D. Green, petitioner-appellant, respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 16 pages.

/s/Lucas Walker
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No. 125005

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 20, 2020, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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