

No. 125005

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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E-FILED
12/2/2019 9:28 AM
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POINTS AND AUTHORITIES

Page

This Court should find that Donnell Green established that his trial counsel had a <i>per se</i> conflict of interest, where counsel previously represented the intended victim of the murder and Green neither knew about the conflict nor waived it	13
U. S. Const. Amends. VI, XIV	14
<i>People v. Green</i> , 2019 IL App (2d) 160217-U	13
<i>People v. King</i> , 316 Ill. App. 3d 901 (1st Dist. 2000)	13
<i>People v. Cleveland</i> , 2012 IL App (1st) 101631	13
<i>People v. Childress</i> , 191 Ill.2d 168 (2000)	13
<i>People v. Fields</i> , 2012 IL 112438	14
<i>People v. Hernandez</i> , 231 Ill. 2d 134 (2008)	14, 15
<i>People v. Hardin</i> , 217 Ill. 2d 289 (2005)	14
<i>People v. Brown</i> , 2017 IL App (3d) 140921	14
<i>People v. Spreitzer</i> , 123 Ill. 2d 1 (1988)	14
<i>People v. Stoval</i> , 40 Ill. 2d 109 (1968)	15
A. This Court should hold that Green’s trial counsel labored under the first category of <i>per se</i> conflict because he previously represented the intended victim in this case	15
<i>People v. Hernandez</i> , 231 Ill. 2d 134 (2008)	15, 16, 17, 18, 19
<i>People v. Spreitzer</i> , 123 Ill. 2d 1 (1988)	16, 19
<i>People v. Coslet</i> , 67 Ill. 2d 127 (1977)	17, 20
<i>People v. Fountain</i> , 2012 IL App (3d) 090558	19, 20
<i>People v. Cleveland II</i> , 2012 IL App (1st) 101631	19
<i>People v. Karas</i> , 81 Ill. App. 3d 990 (1st Dist. 1980)	20

POINTS AND AUTHORITIES (continued)

Page

B. Alternatively, this Court should find that Green’s trial counsel’s prior representation of the intended murder victim constitutes a new category of <i>per se</i> conflict	20
<i>People v. Spreitzer</i> , 123 Ill. 2d 1 (1988)	20
<i>People v. Fountain</i> , 2012 IL App (3d) 090558	21
<i>People v. Fields</i> , 2012 IL 112438	21
<i>People v. Hernandez</i> , 231 Ill. 2d 134 (2008)	21, 22
<i>People v. Austin M.</i> , 2012 IL 111194	21
<i>People v. Taylor</i> , 237 Ill. 2d 356 (2010)	21
<i>People v. Gacy</i> , 125 Ill. 2d 117 (1988)	21

NATURE OF THE CASE

Donnell D. Green, petitioner-appellant, appeals from a judgment denying his petition for post-conviction relief. An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether trial counsel's prior representation of the intended murder victim in this case constitutes a *per se* conflict of interest.

JURISDICTION

Donnell Green, petitioner-appellant, appeals from a judgment denying his petition for post-conviction relief after a third-stage evidentiary hearing. He timely filed a notice of appeal from the denial of his post-conviction petition on March 14, 2016. The Second District Appellate Court affirmed the conviction on June 21, 2019. *People v. Green*, 2019 IL App (2d) 160217-U. This Court granted the petition for leave to appeal from that judgment on September 25, 2019.

STATEMENT OF FACTS

On January 30, 2008, Donnell Green was charged with three counts of first degree murder alleging that he and Chappel Craigen committed the offense on October 18, 2007, when they shot Jimmy Lewis with a gun, thereby causing his death. (C3-5) Counts one through three charged intentional, knowing, and strong probability murder, respectively. (C3-5) Green's case was severed from his codefendants' cases.¹ (C110)

On July 20, 2009, attorney Robert Ritacca entered his appearance on behalf of Green. (C90; R101)

Jury Trial

The case proceeded to a jury trial in June, 2010. The State's theory was that Green was guilty through accountability. (R1285-86, 1894-95) The State told the trial court that this case was "a transferred intent situation" and that the "target" of the shooting was Danny Williams (a.k.a. "Keeko"), not Jimmy Lewis. (R1862)

The main evidence against Green was the testimony of Waukegan police detective Dominic Cappelluti regarding an interview he conducted of Green and the digital recording and transcript of the interview itself. Cappelluti recounted how the early investigation of the shooting had yielded three suspects, including Green and Craigen. The third suspect, Jabril Harmon, was arrested in Milwaukee a week and a half after the shooting, but Craigen and Green were not located until

¹ Although not named in Green's indictment, a third person, Jabril Harmon, was also charged with this murder.

January 15, 2008, when the Waukegan police were informed that they were in jail in Clarksdale, Mississippi. (R1117-1123)

Upon receiving that information, Cappelluti and his partner, Scott Thomas, drove to Mississippi. At about 4:00 p.m. on January 16, they arrived at the Clarksdale police station, where they made a video recording of an interrogation session involving themselves and Green. (R1122-1133) Cappelluti identified State's Exs. 70 and 72 as the DVDs on which the interview was recorded and State's Exs. 71 and 73 as transcripts of the DVDs. (R1147-1153)

During the interview, Cappelluti told Green that he and Detective Thomas were investigating the homicidal death of "Bernie Mac," which was Jimmy Lewis' nickname.² (State Ex. 71 at 3-4; R1139) Green said that he knew Bernie Mac was associated with the Black Stones gang, which also was known as the "Moes," while Green's high school friends were mostly associated with the Four Corner Hustlers gang, which also was called the "Fours" and the "Foes." (State Ex. 71 at 4-6) Green denied being a gang member. (State Ex. 71 at 5)

Green told Cappelluti that, on the night of the shooting, he, Harmon, Craigen, and Emmanuel "E-Man" Johnson were riding in a Saturn vehicle, on their way to a liquor store. Craigen drove, Green was the front seat passenger, Johnson sat behind Green, and Harmon sat behind Craigen. (State Ex. 71 at 12-13) At one point, the Saturn passed a Cadillac going in the opposite direction. Green and the others recognized the Cadillac as being associated with the Moes.

² The citations to the description of Green's statement are to the transcripts. (State Exs. 71 and 73)

Specifically, they recognized its driver as Daniel Williams, nicknamed “Keeko,” a member of the Moes. (R1545-46, 1722; State Ex. 71 at 13-15) Green explained that the Foes and the Moes had been feuding since 2005. (State Ex. 71 at 15)

Green said that, when he and the others saw the Cadillac, they became excited and said, “that’s them, that’s them,” meaning “That’s one of the Moes” or “That’s Keeko.” (State Ex. no. 71 at 16-17) Craigen turned the Saturn around and drove after the Cadillac, catching up to it when it was near a nursing home. (State. Ex. 71 at 17)

Green admitted that he then removed a black handgun from the console between the Saturn’s front seats and said, “I’ll do it. I’ll do it.” Cappelluti repeated, “You’ll do it, you’ll do it?” Green responded, “Yeh, but then I tell, I tell, I, I knew I really wasn’t, I wasn’t going to do it.” (State Ex. 71 at 19) Cappelluti asked Green, “And do it, to do it, was obviously not to—” Green responded, “To shoot.” Cappelluti asked, “To shoot?” Green answered, “Not to kill because I wasn’t going to kill a thing because I—” Cappelluti continued, “To shoot, to shoot at the car because these guys kept on messing?” Green responded, “Yeh. Yeh.” (State Ex. 71 at 20)

According to Green, Johnson, who was seated behind him, said “give it to me,” and Green passed the gun to him. Johnson hung out the car window, holding the gun. Green guessed that Johnson “felt the same way I felt,” because, instead of firing, he handed the gun to Harmon. (State Ex. 71 at 19-20) Green saw Harmon stick the gun out the rear window on the driver’s side of the Saturn. (State Ex. 71 at 20) Green saw Harmon put the gun out the window but pulled his hat over his head and did not see the firing of what he estimated was four to five gunshots.

(State. Ex.71 at 20-21)

Following the gunfire, Green heard Johnson scream, “he got it, he got it, he got it.” (State Ex. 71 at 21) Green first dismissed the notion that someone had been struck by the gunfire; however, when his companions said they had seen a passenger slump down he became concerned, thinking, “I hope it ain’t the case.” Hours later, Harmon told him that Bernie Mac had been killed. (State Ex. 71 at 21-22; State Ex.73 at 7)

During his trial testimony, Cappelluti denied having first done an unrecorded “rehearsal” interview with Green, during which Green was told what to say. He also denied having offered Green any benefits in exchange for his cooperation. (R1177-1179) He acknowledged that Green was not in his agency’s gang database. (R1180-81)

Green testified that, on the evening of the incident, he was at Emmanuel Johnson’s house, playing cards with Johnson, Craigen and Harmon. Sometime after 10:30, the group decided to drive to a liquor store before it closed for the night. Craigen drove, Green was the front passenger, Johnson sat behind Green, and Harmon sat behind Craigen. (R1764-1766)

On the way, Craigen slowed the car so Johnson could talk to a girl. Before Johnson was done talking, Craigen turned the car around, saying, “we’ll be back,” but not explaining why they were going in a new direction. (R1766-1768) Green did not tell Craigen to change course, nor did he recognize anyone in a Cadillac that Craigen began following. No one inside the car was yelling or excited about anything. (R1769-70)

As Craigen neared the Cadillac, he pulled out a gun and put it on his lap. Green denied having taken the gun out of the console and stated that he had never seen the gun before. (R1770-72) Craigen rolled down his window as the Saturn advanced on the Cadillac. Craigen turned up the car's music as loud as it would go, put his left arm out the window and fired "more than seven" shots at the Cadillac. Not wanting to be seen and unable to jump from the moving car, Green pulled a hat over his head and "prayed all [went] well." (R1770-73)

After firing the shots, Craigen drove the group back to Johnson's house. Green stayed inside the car while the others entered the house. Craigen emerged four or five minutes later and drove Green home. (R1774)

Green did not want to be around Craigen, Harmon, or Johnson after having witnessed the shooting. He did not accompany Craigen and Harmon to Milwaukee. (R1775-76) In January, he traveled to Clarksdale, Mississippi, where he stayed with a family member. On January 15, he was arrested in Clarksdale on a drug-related charge. While he was at the police station, Craigen was brought into the same room. Green was shocked, having no idea that Craigen also was in Clarksdale. (R1776-79)

After being told by the Clarksdale police that they knew he and Craigen were from Waukegan, Green said that he wanted to cooperate with the Waukegan police. Detectives Cappelluti and Thomas were summoned. (R1780-81) Green met with them at the Clarksdale police station on January 16. During an hour-long unrecorded interview, Green told the detectives that Craigen had fired the gun that killed Bernie Mac. (R1781-84) Thomas became angry, saying that he and

Cappelluti would leave if Green did not tell a story that was consistent with the evidence and witnesses they already had found. The detectives said that, if Green cooperated with them, the Mississippi charges would be dismissed. (R1785)

The detectives told Green that they did not need evidence against Craigen. They had Harmon, whom they knew to be the shooter. Green agreed to say that Harmon had fired the gun, even though it was not true. (R1786-87) When Green refused to say that he had handed the gun directly to Harmon, the officers told him to say that he handed it to Johnson who then gave it to Harmon. (R1788, 1791-1792) Green also agreed to say that he had been in Milwaukee with Craigen and Harmon after the shooting, although, he was actually not with them. (R1790)

Green explained that most of what he said on the recorded statement was false. He said that he neither intended to kill or harm anyone, nor was he a part of a plan to hurt or shoot anybody. (R1792-93)

On cross-examination, Green explained that, when he made the recorded statement to Cappelluti and Thomas, he did not realize that he was implicating himself in a murder. Instead, he thought he was being interviewed as a witness to a shooting. (R1815) He was confronted with a transcript of testimony he gave at a hearing on his pre-trial motion to suppress his recorded statement, at which time he had claimed that he saw Craigen every day while he was in Mississippi. (R1809-10) Green responded that he was not lying at trial and had misunderstood the question during the pre-trial hearing. (R1810) He also was confronted with the fact that, at the same pre-trial hearing, he had testified that Harmon was the shooter. (R1822-1823) Green responded that he had “meant to say Chappel”

at the pre-trial hearing. (R1823) He also acknowledged having previously testified that he was in Milwaukee with Craigen and Harmon. (R1825-1830) Green maintained that he had not been in Milwaukee and was not lying at the pretrial hearing. (R1829-30)

The jury found Green not guilty of intentional first degree murder (count one) but guilty of knowing and strong probability murder (counts two and three) while armed with a firearm. (C618-621; R1985) On October 6, 2010, Green was sentenced to serve a 35-year prison term for the conviction based on count two. (C961; 964; R2122-2123)

Direct Appeal

On direct appeal, Green argued that the State did not prove that he was accountable for the murder. (C1036-58) The appellate court disagreed and affirmed Green's conviction. (C1058)

Post-Conviction Petition

On June 23, 2014, Green filed a post-conviction petition claiming, among other things, that Ritacca was ineffective because he labored under a *per se* conflict where he previously represented the intended victim of the shooting, Daniel Williams ("Keeko"). (C1074-80)

During a second-stage hearing, the trial court granted the State's motion to dismiss as to the *per se* conflict claim because it found that, although Williams was the intended victim and could have been the victim of attempt murder, he was not the victim of the murder for which Green had been convicted. (C1674; R2214) The trial court based its ruling on the "face of the pleading" and said that

Green could still argue that a *per se* conflict existed at the evidentiary hearing. (R2334-35)

Evidentiary Hearing

On November 19, 2015, an evidentiary hearing was held. At that hearing, Green's father (Larry) testified that he hired Ritacca to represent Green at trial. (R2413-14) Larry would not have hired Ritacca if he had known that Ritacca previously represented Williams, the intended murder victim. (R2443-44)

Lawrence Wade, co-trial counsel, testified that he could not recall whether he was aware during his representation of Green that Ritacca had previously represented Williams. (R2458) Wade knew that Ritacca had previously represented Williams' brothers, Joey and Brannon.³ (R2459) Wade himself represented Brannon Williams in a traffic case from September 2010 through November 2010, when Green was facing sentencing. (R2460-61) Wade never disclosed his representation of Brannon to Green. (R2461)

Ritacca testified that he entered his appearance on behalf of Green on July 23, 2009. (R2504-05, 2565) At the time of the shooting in this case on October 18, 2007, Ritacca was representing Williams in cases for driving while license revoked (DWLR) and cannabis possession. (R2512, 2518-19) The DWLR case "ended" on March 14, 2008.⁴ (R2565) Ritacca testified that during the DWLR case Williams

³ "Brannon" is also sometimes referred to as "Brandon" in the record. He will be referred to as Brannon in this brief because that is how the name is spelled in court records contained in the post-conviction petition. (C1438-39)

⁴ Green's post-conviction petition contained more specific dates of representation. According to Green, in case 06-TR-164398 (DWLR), Ritacca represented Williams from July 18, 2007, through March 14, 2008. In case 07-

“failed to appear” and Ritacca “lost track of him.” (R2518, 2565) Ritacca could not recall if he told Green about his prior representation of Williams but acknowledged that he did not disclose it to the trial court. (R2570-71) Ritacca also represented Williams’ brothers Joey and Brannon prior to representing Green. (C1082; R2515-16, 2670) The parties stipulated that Brannon and Joey Williams were members of the Moes gang and former clients of Ritacca. (R2666-67)

The State’s theory at trial was that Williams was the intended target of the shooting. (R2511) At the evidentiary hearing, Chappel Craigen’s videotaped statement to Waukegan detectives was admitted, along with a transcript of that statement. (R2672-73; Def. Ex. 12) During the interview, Craigen told the detectives that “Keeko” was the intended victim. (Def. Ex. 12 at 19) Ritacca’s theory at trial was that Craigen was the shooter because Craigen had a personal animosity against Williams, as evidenced by Craigen having shot Williams’ brother Brannon one or two years earlier. (R2533, 2536, 2666)

Williams was listed as a potential trial witness for the defense and the State. (C361; R2519-20, 2667) Williams “kept on ducking subpoenas” and never testified at trial. (R2528) Ritacca testified that he did not call Williams as a witness during trial because he believed there was “ample testimony at the time to indicate that Chappel Craigen was the shooter” and he had presented “enough testimony without calling [Williams].” (R2543, 2568) Ritacca believed Williams would have testified that Craigen was the shooter. (R2543-44) A police report indicated that Williams

OV-4512 (cannabis possession), Ritacca represented Williams from June 10, 2007, through November 28, 2007. (C1078)

initially lied about being the driver of the Cadillac because he had been drinking and was driving on a revoked license. (C1146; R2566) The report also indicated that Williams did not see who shot Lewis. (C1145; R2566-67)

Ritacca testified that he did not realize until two weeks prior to the evidentiary hearing that Williams was a former client. (R2514-15, 2518-19) Ritacca later testified that he realized prior to trial that he had previously represented Williams but “did not realize that there was a conflict.” (R2550-54) Ritacca also testified that he “never recognized” that Williams was his former client. (R2556) Ritacca’s trial notes indicated that he would have established during a cross-examination of Williams that he had previously represented Williams. (Def Ex. 8; R2552)

Green testified that Ritacca did not tell him that he had previously represented Williams. (R2600-01) Green would not have hired Ritacca to represent him had he known about his prior representation of Williams and Williams’ family. (R2602-03, 2625)

After arguments, the trial court denied the post-conviction petition. (C1777-79; R2752-92) The court found: (1) Williams was the intended victim of the shooting; (2) Ritacca previously represented Williams; (3) Williams would “arguably” benefit from an unfavorable verdict to Green; and (4) the potential conflict was not waived. (R2758-59, 2762, 2767-68) The court reasoned, however, that Williams’ status as an intended victim was not the equivalent of being the actual victim. (R2761-63) The court also found that Ritacca’s prior representation of an intended victim did not amount to a new category of *per se* conflict. (R2760-61) According to the

court, “transferred intent does not . . . create a potential *per se* conflict.” (R2763)

Appeal

On appeal, Green argued that the trial court erred when it denied his post-conviction petition because 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. *People v. Green*, 2019 IL App (2d) 160217-U, ¶ 14. Specifically, Green argued that this situation should either fit into the first category of *per se* conflict that applies to trial counsel previously representing the victim of the crime or it should constitute a new category of *per se* conflict. *Id.* at ¶¶ 20-23.

The appellate court affirmed the trial court and found that there was no *per se* conflict because Williams was the *intended* victim, not the *actual* victim. Additionally, the appellate court stated that if this situation should constitute a new category of *per se* conflict, “it should be up to the supreme court to formulate it.” *Id.* at 23.

This Court granted leave to appeal.

ARGUMENT

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.

On trial for murder, Donnell Green was represented by the same lawyer (Robert Ritacca) who previously represented the intended murder victim, Daniel “Keeko” Williams, on charges of driving while license revoked and cannabis possession. (C90; R1862, 2512) After learning of Ritacca’s prior representation of Williams, Green filed a post-conviction petition alleging that Ritacca’s prior representation of Williams amounted to a *per se* conflict. (C1074-80) After a third-stage evidentiary hearing, the trial court found: (1) Williams was the intended victim of the shooting; (2) Ritacca previously represented Williams; (3) Williams would “arguably” benefit from an unfavorable verdict to Green; and (4) the potential conflict had not been waived. (C1777-79; R2758-59, 2762, 2767-68)

However, the trial court denied the petition and ruled that Ritacca’s prior representation of Williams did not amount to a *per se* conflict under the applicable law, and did not create a new criteria for finding a *per se* conflict. (R2758-63) The appellate court affirmed. *Green*, 2019 IL App (2d) 160217-U, ¶ 25.

A defendant is entitled to post-conviction relief if he shows that he has suffered “a substantial deprivation of federal or state constitutional rights,” such as the right to conflict-free counsel. *People v. King*, 316 Ill. App. 3d 901, 913 (1st Dist. 2000); *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 38. Generally the standard of review from the denial of post-conviction relief after an evidentiary hearing is whether the circuit court’s findings were manifestly erroneous. *People v. Childress*,

191 Ill.2d 168, 174 (2000). However, if there is no factual dispute, the issue is purely legal and review is *de novo*. *People v. Fields*, 2012 IL 112438, ¶ 19. Here, the facts are undisputed. Therefore, the issue of whether a *per se* conflict exists is a legal question that this Court reviews *de novo*. *People v. Hernandez*, 231 Ill. 2d 134, 144 (2008).

Every defendant has a constitutional right to the effective assistance of trial counsel, and this is the source of the right to conflict-free representation. U.S. Const. Amends. VI, XIV; *People v. Hardin*, 217 Ill. 2d 289, 299 (2005). There are two types of conflicts of interest: *per se* and actual. *Hernandez*, 231 Ill. 2d at 142-44; *People v. Brown*, 2017 IL App (3d) 140921, ¶ 30.

A *per se* conflict exists when facts about a defense attorney's status engender, by themselves, a disabling conflict. *Hernandez*, 231 Ill. 2d at 142. "The justification for treating these conflicts as *per se* has been that the defense counsel in each case had a tie to a person or entity—either counsel's client, employer, or own previous commitments—which would benefit from an unfavorable verdict for the defendant." *People v. Spreitzer*, 123 Ill. 2d 1, 16 (1988). Such facts have the potential to subliminally affect the attorney's performance or to subject the attorney to later charges of unfaithful representation. *Hernandez*, 231 Ill. 2d at 143. This subliminal influence can be difficult for a defendant to detect and a defendant therefore is not required to show that a *per se* conflict resulted in prejudice. *Hernandez*, 231 Ill. 2d at 143. Consequently, unless a defendant has waived conflict-free counsel, the existence of a *per se* conflict is grounds for automatic reversal. *Hernandez*, 231 Ill. 2d at 143.

Trial counsel's prior representation of a victim has been recognized as a *per se* conflict. *Hernandez*, 231 Ill. 2d at 143-44 (*per se* conflict where trial counsel represented the person defendant was charged with soliciting the murder of despite not being in contact with that person for several years); *People v. Stoval*, 40 Ill. 2d 109 (1968) (*per se* conflict where trial counsel previously represented the jewelry store and jewelry store owner defendant was charged with burglarizing). This Court should find that trial counsel's prior representation of Williams amounted to a *per se* conflict because the same concerns that justify a *per se* conflict when trial counsel previously represented the victim are present when trial counsel previously represented the intended victim. Therefore, the interests of justice are served by finding that trial counsel's prior representation of the intended victim amounts to a *per se* conflict. It is undisputed that Green's trial counsel represented Williams (the intended murder victim) on unrelated charges prior to his representation of Green, trial counsel did not disclose his prior representation of Williams to the trial court, and Green did not waive any potential conflict. (R1862, 2512, 2564-65, 2570-71, 2601, 2767) Because Green was denied his constitutional right to conflict-free counsel, this Court should reverse and remand for a new trial

A. 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.

In *Hernandez*, this Court stated that it had previously identified three situations in which a *per se* conflict exists: (1) when counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when counsel contemporaneously represents a prosecution

witness; and (3) when counsel was a former prosecutor who had been personally involved in the prosecution of the defendant. *Hernandez*, 231 Ill. 2d at 143-44.

This Court should find that trial counsel's prior representation of the *intended* victim of the crime falls within the first category of *per se* conflicts because such representation presents the same risks as trial counsel's prior representation of the victim. Specifically, "counsel's knowledge that a result favorable to his other client . . . would inevitably conflict with defendant's interest 'might 'subliminally' affect counsel's performance in ways [that are] difficult to detect and demonstrate . . . [and may] subject him to 'later charges that his representation was not completely faithful.'" *Hernandez*, 231 Ill. 2d at 143, quoting *Spreitzer*, 123 Ill. 2d at 16-17. It is undisputed that Green's trial counsel (Ritacca) previously represented Daniel "Keeko" Williams, the intended victim of the murder in the instant case. (R1862, 2512) Williams was not just the driver of the Cadillac when the shooting occurred. By the State's own admission, Williams was the intended victim of the shooting. (R1862) Indeed, the State explicitly stated that Williams was "the target" and that "the planned and intended act was to shoot [Williams]." (R1862)

This Court has made clear that "a prior relationship falls within this category." *Hernandez*, 231 Ill. 2d at 151. Ritacca's prior attorney-client relationship with Williams was therefore just the type of relationship that this Court categorized as a *per se* conflict automatically demanding reversal of the conviction and remand for a new trial. See *Hernandez*, 231 Ill. 2d at 151-52 ("the *per se* conflict rule applies whenever an attorney represents a defendant and the alleged victim of the

defendant's crime, regardless of whether the attorney's relationship with the alleged victim is active or not, and without inquiring into the specific facts concerning the nature and extent of counsel's representation of the victim"); *People v. Coslet*, 67 Ill. 2d 127, 132-33 (1977) ("once an attorney has been retained and received the confidence of a client, he cannot serve adverse interests regardless of how innocent his motives or how good his intentions ... The termination of the attorney's employment by the client does not affect the application of this rule"). Here, there is no disputing that Williams was the intended victim of the shooting.

In *Hernandez*, the defendant was charged with solicitation of murder after he hired someone to commit the crime who turned out to be a confidential informant. 231 Ill. 2d at 138. The person Hernandez sought to have killed (the intended victim of the murder), Jaime Cepeda, did not testify at trial because he had fled the country several years earlier and could not be located. *Id.* at 139. After Hernandez was convicted, he learned that his attorney had previously represented Cepeda in a criminal case. *Id.* Hernandez filed a post-conviction petition alleging that he was represented at trial by an attorney laboring under a conflict of interest.

At an evidentiary hearing, Hernandez's attorney testified that he had previously represented Cepeda in two different cases. *Id.* at 140. After Cepeda failed to appear in court, the attorney was unable to locate him and a bond forfeiture warrant was issued. *Id.* at 140. The attorney did not think his prior representation of Cepeda was important to Hernandez's case, nor did he believe it created any conflict of interest in his representation of Hernandez. *Id.* at 140-41. The circuit court agreed, finding no conflict where, although Hernandez's attorney was still

the “attorney of record” for Cepeda, he had not been in contact with Cepeda for five years, was not actively representing Cepeda, and Cepeda did not testify at trial. *Id.* at 141.

This Court rejected this reasoning and reversed Hernandez’s conviction. *Hernandez*, 231 Ill. 2d at 152. In addition to holding that the *per se* conflict rule applies regardless of the “nature and extent of counsel’s representation of the victim,” the Court explicitly rejected the State’s argument that no conflict existed because trial counsel had not seen or spoken with the victim in several years. *Id.* at 152. This Court held, “we decline to impose an active [representation] requirement upon this category of *per se* conflicts ... no active representation is necessary, and thus, we need not inquire into the specific facts of the nature and extent of the representation to determine whether the *per se* rule applies.” *Id.* at 151-52. Finally, this Court reaffirmed its previous holdings that an accused whose attorney labored under a *per se* conflict of interest is not required to show actual prejudice. A reversal of the defendant’s conviction(s) is automatic unless the record reflects that the defendant knew of the conflict and knowingly waived his right to conflict-free counsel. *Id.* at 143.

Under *Hernandez*, this Court must reverse Green’s conviction. The record is clear that Ritacca previously represented Williams, the intended murder victim, in two different cases much like the trial attorney in *Hernandez* previously represented Cepeda, the intended murder victim there in two different cases. (R1862, 2512) Additionally, like the attorney in *Hernandez*, Ritacca testified that during the traffic case Williams “failed to appear” and Ritacca “lost track of him.” (R2518)

Moreover, Ritacca's prior representation of Williams was never brought to the attention of the trial court and Green never waived the conflict. (R2571, 2601, 2767)

Trial counsel's prior representation of Williams on a traffic offense of driving on a revoked license and an ordinance violation of unlawful possession of cannabis should not be deemed too insignificant or unrelated to the current charge to satisfy the *per se* rule. As the Third District has observed, the "subject matter and duration of the conflicting representation are also irrelevant." *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 20, *petition for leave to appeal denied* (No. 114138, May 30, 2012); see also *People v. Cleveland II*, 2012 IL App (1st) 101631, ¶¶ 44, 50 (*per se* conflict exists where trial counsel previously represented the victim of the crime during a preliminary hearing seven years prior because "both prior and contemporaneous representation, regardless of extent, may serve as the basis for a *per se* conflict"), citing *Hernandez*, 231 Ill.2d at 151-52.

Green acknowledges that Jimmy Lewis, the unintended victim in this case, was the only victim named in the indictment. (C3-5) However, the same principle that mandates reversal when trial counsel previously represented the unintended victim (Lewis) should apply when trial counsel represented the intended victim (Williams). It only stands to reason that the same risks this Court has stressed—an imperceptible, negative subliminal affect on the attorney's performance and later charges of unfaithful representation—are present when trial counsel has previously represented the intended victim of the charged offense even if that person is not named in the charging instrument. *Spreitzer*, 123 Ill. 2d at 16; *Hernandez*, 231

Ill. 2d at 143. If anything, it is more difficult for defendants to detect such a conflict when, as here, the unintended victim is deceased and the intended victim previously represented by trial counsel is not named in the charging instrument. Moreover, just like any victim would benefit from an unfavorable verdict against the person who was accused of victimizing him or her, Williams would obviously benefit from an unfavorable verdict against Green who was accused of participating with rival gang members in an attempt to murder him. *Fountain*, 2012 IL App (3d) 090558, ¶ 21 (explaining that for purposes of *per se* conflict a victim benefits from defendant being incarcerated or punished), citing *People v. Karas*, 81 Ill. App. 3d 990, 995 (1st Dist. 1980) (finding *per se* conflict where defendant’s attorney also represented victim of defendant’s crime because victim would want the defendant to be convicted and to receive a substantial punishment); see also *Coslet*, 67 Ill. 2d at 133 (“The test is not and cannot be based only upon the source of a financial gain by the attorney”).

B. 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.

Should this Court find that Ritacca’s prior representation of Williams does not fit into the first category of *per se* conflicts, this Court should hold that such representation constitutes a new category of *per se* conflict. Indeed, the justification for treating conflicts as *per se* has been that “defense counsel in each case had a tie to a person or entity—either counsel’s client, employer, or own previous commitments—which would benefit from an unfavorable verdict for the defendant.” *Spreitzer*, 123 Ill. 2d at 16. Here, Williams was a prior client of Ritacca’s who would

obviously benefit from an unfavorable verdict for Green—a person who associated with members of a rival gang and was accused of participating in an attempt to murder him. *Fountain*, 2012 IL App (3d) 090558, ¶ 21. The trial court acknowledged as much. (R2762)

This Court has explained that the justification for the *per se* rule does not “provide an alternate basis for finding a *per se* conflict of interest.” *Fields*, 2012 IL 112438, ¶ 40. However, this Court has not explicitly stated that the three traditional categories listed in *Hernandez* are the exclusive categories of *per se* conflicts. Indeed, this Court has always used past-tense language, implying more categories could be identified in the future. See *Fields*, 2012 IL 112438, ¶ 18 (“[T]his court has found three situations where a *per se* conflict exists”); *People v. Austin M.*, 2012 IL 111194, ¶ 80 (“A *per se* conflict has been found in situations where”); *People v. Taylor*, 237 Ill. 2d 356, 374 (2010) (“This court has identified three situations”); *Hernandez*, 231 Ill. 2d at 143 (“We have identified three situations”). Notably, 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.

Indeed, this Court has found situations not explicitly contained among the traditional three categories can give rise to *per se* conflicts. See *People v. Gacy*, 125 Ill. 2d 117, 135 (1988) (“the acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a *per se* conflict”); see also *Austin M.*, 2012 IL 111194, ¶ 86 (“the interests of justice are best served by finding a

per se conflict when minor's counsel in a delinquency proceeding simultaneously functions as both defense counsel and guardian *ad litem*").

The cases cited above show that the categories of *per se* conflicts can expand as necessary to serve the interests of justice and to protect defendants against the risk of conflicted counsel. Here, the interests of justice are best served by finding a *per se* conflict exists when trial counsel has previously represented the intended victim of the charged offense.

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. *Hernandez*, 231 Ill. 2d at 152.

CONCLUSION

For the foregoing reasons, 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 brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 23 pages.

/s/Lucas Walker
LUCAS WALKER
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Donnell D. Green No. 125005

Index to the Record	1
Appellate Court Decision	25
Notice of Appeal	33

Table of Contents

STATE OF ILLINOIS

UNITED STATES OF AMERICA

COUNTY OF LAKE

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

VS

DONNELL GREEN

Case Number 2008CF000264

TABLE OF CONTENTS

<u>PAGE NUMBER</u>	<u>FILE DATE</u>	<u>DESCRIPTION</u>
C0000001 - C0000001		PLACITA
C0000002 - C0000002	01/17/2008	INFORMATION
C0000003 - C0000006	01/30/2008	INDICTMENT
C0000007 - C0000007	01/30/2008	MINUTE ORDER
C0000008 - C0000008	04/16/2008	CERTIFICATE OF ASSETS
C0000009 - C0000009	04/16/2008	WARRANT
C0000010 - C0000010	04/16/2008	SPEEDY TRIAL DEMAND
C0000011 - C0000011	04/16/2008	NOTICE OF APPOINTMENT
C0000012 - C0000012	04/16/2008	REMAND
C0000013 - C0000013	04/16/2008	MINUTE ORDER
C0000014 - C0000015	04/21/2008	MOTION TO WITHDRAW AS COUNSEL
C0000016 - C0000016	04/23/2008	NOTICE OF APPOINTMENT
C0000017 - C0000017	04/23/2008	REMAND
C0000018 - C0000018	04/23/2008	MINUTE ORDER
C0000019 - C0000019	04/24/2008	ORDER
C0000020 - C0000020	04/24/2008	REMAND
C0000021 - C0000021	04/24/2008	MINUTE ORDER
C0000022 - C0000022	05/09/2008	REMAND

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WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000023 - C0000024	06/17/2008	DISCLOSURE TO THE ACCUSED
C0000025 - C0000025	06/17/2008	ORDER
C0000026 - C0000026	06/17/2008	REMAND
C0000027 - C0000027	06/17/2008	MINUTE ORDER
C0000028 - C0000028	06/30/2008	MINUTE ORDER
C0000029 - C0000030	07/15/2008	SUPPLEMENTAL ANSWER TO MOTION FOR DISC...
C0000031 - C0000031	07/15/2008	REMAND
C0000032 - C0000032	07/15/2008	MINUTE ORDER
C0000033 - C0000033	08/04/2008	MINUTE ORDER
C0000034 - C0000034	08/21/2008	REMAND
C0000035 - C0000035	08/21/2008	MINUTE ORDER
C0000036 - C0000036	09/08/2008	MINUTE ORDER
C0000037 - C0000037	09/23/2008	REMAND
C0000038 - C0000038	09/23/2008	MINUTE ORDER
C0000039 - C0000039	10/14/2008	MINUTE ORDER
C0000040 - C0000040	10/23/2008	REMAND
C0000041 - C0000041	10/23/2008	MINUTE ORDER
C0000042 - C0000042	11/03/2008	REMAND
C0000043 - C0000043	11/03/2008	MINUTE ORDER
C0000044 - C0000044	11/17/2008	MINUTE ORDER
C0000045 - C0000045	12/02/2008	REMAND
C0000046 - C0000046	12/02/2008	MINUTE ORDER
C0000047 - C0000047	12/30/2008	REMAND
C0000048 - C0000048	12/30/2008	MINUTE ORDER
C0000049 - C0000049	01/08/2009	NOTICE TO THE DEFENDANT
C0000050 - C0000050	01/08/2009	REMAND
C0000051 - C0000051	01/08/2009	MINUTE ORDER
C0000052 - C0000052	01/12/2009	MINUTE ORDER
C0000053 - C0000053	01/15/2009	REMAND
C0000054 - C0000054	01/15/2009	MINUTE ORDER
C0000055 - C0000055	01/22/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000056 - C0000056	01/22/2009	REMAND
C0000057 - C0000057	01/22/2009	MINUTE ORDER
C0000058 - C0000058	01/27/2009	REMAND
C0000059 - C0000059	01/29/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000060 - C0000060	01/29/2009	REMAND
C0000061 - C0000061	01/29/2009	MINUTE ORDER
C0000062 - C0000062	02/10/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000063 - C0000063	02/10/2009	REMAND

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000064 - C0000064	02/10/2009	MINUTE ORDER
C0000065 - C0000065	02/17/2009	MINUTE ORDER
C0000066 - C0000066	03/05/2009	REMAND
C0000067 - C0000067	03/05/2009	MINUTE ORDER
C0000068 - C0000068	03/23/2009	REMAND
C0000069 - C0000069	03/23/2009	MINUTE ORDER
C0000070 - C0000070	03/30/2009	MINUTE ORDER
C0000071 - C0000071	04/21/2009	REMAND
C0000072 - C0000072	04/21/2009	MINUTE ORDER
C0000073 - C0000073	05/04/2009	MINUTE ORDER
C0000074 - C0000074	05/05/2009	REMAND
C0000075 - C0000075	05/05/2009	MINUTE ORDER
C0000076 - C0000076	05/27/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY - ...
C0000077 - C0000077	05/27/2009	REMAND
C0000078 - C0000078	05/27/2009	MINUTE ORDER
C0000079 - C0000079	06/04/2009	REMAND
C0000080 - C0000080	06/04/2009	MINUTE ORDER
C0000081 - C0000081	06/08/2009	MINUTE ORDER
C0000082 - C0000082	06/23/2009	REMAND
C0000083 - C0000083	06/23/2009	MINUTE ORDER
C0000084 - C0000084	07/09/2009	REMAND
C0000085 - C0000085	07/09/2009	MINUTE ORDER
C0000086 - C0000086	07/13/2009	MINUTE ORDER
C0000087 - C0000087	07/16/2009	REMAND
C0000088 - C0000088	07/16/2009	MINUTE ORDER
C0000089 - C0000089	07/20/2009	NOTICE OF MOTION
C0000090 - C0000090	07/20/2009	APPEARANCE
C0000091 - C0000091	07/23/2009	ORDER
C0000092 - C0000092	07/23/2009	REMAND
C0000093 - C0000093	07/23/2009	MINUTE ORDER
C0000094 - C0000094	08/05/2009	REMAND
C0000095 - C0000095	08/05/2009	MINUTE ORDER
C0000096 - C0000096	08/06/2009	SUBSTITUTION OF ATTORNEY
C0000097 - C0000097	08/06/2009	REMAND
C0000098 - C0000098	08/06/2009	MINUTE ORDER
C0000099 - C0000099	08/17/2009	MINUTE ORDER
C0000100 - C0000103	08/19/2009	MOTION TO QUASH AND SUPPRESS STOP AND ...
C0000104 - C0000104	08/25/2009	MOTION FOR SUPPLEMENTAL DISCOVERY
C0000105 - C0000108	08/25/2009	MOTION TO INTERVIEW WITNESS

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000109 - C0000109	08/25/2009	ORDER
C0000110 - C0000110	08/25/2009	REMAND
C0000111 - C0000111	08/25/2009	MINUTE ORDER
C0000112 - C0000113	08/31/2009	MOTION IN LIMINE
C0000114 - C0000115	08/31/2009	MOTION IN LIMINE_0002
C0000116 - C0000132	08/31/2009	MOTION IN LIMINE_0003
C0000133 - C0000149	08/31/2009	MOTION IN LIMINE_0004
C0000150 - C0000161	08/31/2009	MOTION TO QUASH AND SUPPRESS
C0000162 - C0000162	09/03/2009	REMAND
C0000163 - C0000163	09/03/2009	MINUTE ORDER
C0000164 - C0000165	09/04/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000166 - C0000167	09/04/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000168 - C0000169	09/04/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000170 - C0000171	09/04/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000172 - C0000173	09/04/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000174 - C0000174	09/04/2009	REMAND
C0000175 - C0000175	09/04/2009	MINUTE ORDER
C0000176 - C0000177	09/09/2009	MOTION FOR SUPPLEMENTAL DISCOVERY
C0000178 - C0000178	09/10/2009	REMAND
C0000179 - C0000179	09/10/2009	MINUTE ORDER
C0000180 - C0000210	09/21/2009	MOTION TO DISMISS INDICTMENT
C0000211 - C0000211	09/21/2009	MINUTE ORDER
C0000212 - C0000212	09/29/2009	SUPPLEMENTAL MOTION FOR DISCOVERY
C0000213 - C0000213	10/06/2009	REMAND
C0000214 - C0000214	10/06/2009	MINUTE ORDER
C0000215 - C0000215	10/19/2009	MINUTE ORDER
C0000216 - C0000216	10/20/2009	ORDER
C0000217 - C0000217	10/26/2009	MINUTE ORDER
C0000218 - C0000218	11/09/2009	REMAND
C0000219 - C0000219	11/09/2009	MINUTE ORDER
C0000220 - C0000220	11/23/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000221 - C0000221	11/23/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000222 - C0000222	11/23/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000223 - C0000223	11/23/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000224 - C0000224	11/23/2009	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000225 - C0000225	11/23/2009	REMAND
C0000226 - C0000226	11/23/2009	MINUTE ORDER
C0000227 - C0000227	11/24/2009	REMAND
C0000228 - C0000228	11/24/2009	MINUTE ORDER

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000229 - C0000229	11/25/2009	ORDER
C0000230 - C0000235	12/03/2009	ANSWER TO MOTION FOR DISCOVERY
C0000236 - C0000236	12/07/2009	MINUTE ORDER
C0000237 - C0000240	12/15/2009	ANSWER TO MOTION FOR DISCOVERY
C0000241 - C0000241	12/18/2009	NOTICE OF MOTION
C0000242 - C0000246	12/18/2009	MOTION TO COMPEL DISCOVERY
C0000247 - C0000247	12/22/2009	ANSWER TO MOTION FOR DISCOVERY
C0000248 - C0000248	12/29/2009	MINUTE ORDER
C0000249 - C0000250	01/05/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000251 - C0000252	01/05/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000253 - C0000253	01/05/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000254 - C0000255	01/05/2010	MOTION IN LIMINE - GENERAL
C0000256 - C0000258	01/05/2010	MOTION IN LIMINE - GANG EVIDENCE
C0000259 - C0000260	01/05/2010	MOTION IN LIMINE - MONTGOMERY MOTION
C0000261 - C0000263	01/05/2010	MOTION IN LIMINE - OTHER ACTS EVIDENCE
C0000264 - C0000264	01/05/2010	MINUTE ORDER
C0000265 - C0000265	01/07/2010	MINUTE ORDER
C0000266 - C0000266	01/19/2010	MINUTE ORDER
C0000267 - C0000268	01/20/2010	MOTION IN LIMINE
C0000269 - C0000272	01/20/2010	MOTION IN LIMINE - GANG EVIDENCE
C0000273 - C0000288	01/20/2010	MOTION IN LIMINE - ACCOUNTABILITY
C0000289 - C0000291	01/20/2010	MOTION IN LIMINE - MOTIVE
C0000292 - C0000322	01/20/2010	MOTION IN LIMINE - OTHER ACTS EVIDENCE
C0000323 - C0000334	01/20/2010	MOTION FOR SUPPLEMENTAL DISCOVERY
C0000335 - C0000338	01/20/2010	SUPPLEMENTAL ANSWER TO MOTION FOR DISC...
C0000339 - C0000340	01/20/2010	MOTION TO VIEW EVIDENCE
C0000341 - C0000341	01/20/2010	TRIAL CONTINUANCE ORDER
C0000342 - C0000342	01/20/2010	MINUTE ORDER
C0000343 - C0000343	01/22/2010	ORDER
C0000344 - C0000344	01/25/2010	MINUTE ORDER
C0000345 - C0000345	01/26/2010	MINUTE ORDER
C0000346 - C0000346	01/27/2010	MINUTE ORDER
C0000347 - C0000347	01/29/2010	AFFIDAVIT
C0000348 - C0000350	01/29/2010	ANSWER TO MOTION FOR DISCOVERY
C0000351 - C0000351	01/29/2010	MINUTE ORDER
C0000352 - C0000353	02/03/2010	CERTIFICATE
C0000354 - C0000355	02/03/2010	CERTIFICATE_0002
C0000356 - C0000357	02/03/2010	MOTION FOR CERTIFICATE
C0000358 - C0000359	02/03/2010	MOTION FOR CERTIFICATE_0002

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WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000360 - C0000360	02/03/2010	MINUTE ORDER
C0000361 - C0000361	02/08/2010	ANSWER TO MOTION FOR DISCOVERY
C0000362 - C0000362	02/17/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000363 - C0000363	02/17/2010	MINUTE ORDER
C0000364 - C0000364	02/18/2010	MINUTE ORDER
C0000365 - C0000365	02/23/2010	PETITION FOR WRIT OF HABEAS CORPUS
C0000366 - C0000366	02/23/2010	ORDER
C0000367 - C0000367	02/23/2010	MINUTE ORDER
C0000368 - C0000377	02/26/2010	ANSWER TO MOTION FOR DISCOVERY
C0000378 - C0000380	02/26/2010	MOTION FOR SUPPLEMENTAL DISCOVERY
C0000381 - C0000381	02/26/2010	ORDER
C0000382 - C0000382	02/26/2010	MINUTE ORDER
C0000383 - C0000383	03/01/2010	MINUTE ORDER
C0000384 - C0000391	03/08/2010	WRIT OF HABEAS CORPUS
C0000392 - C0000392	03/09/2010	SUPPLEMENTAL ANSWER TO MOTION FOR DISC...
C0000393 - C0000393	03/18/2010	ORDER
C0000394 - C0000394	03/18/2010	MINUTE ORDER
C0000395 - C0000395	03/18/2010	MINUTE ORDER_0002
C0000396 - C0000396	03/19/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000397 - C0000399	03/19/2010	SUMMARY OF DISCLOSURE OF DISCOVERY
C0000400 - C0000400	03/19/2010	MINUTE ORDER
C0000401 - C0000401	03/19/2010	MINUTE ORDER_0002
C0000402 - C0000407	03/22/2010	AMENDED MOTION TO QUASH AND SUPPRESS
C0000408 - C0000408	03/26/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000409 - C0000409	03/26/2010	MINUTE ORDER
C0000410 - C0000410	03/26/2010	MINUTE ORDER_0002
C0000411 - C0000429	04/01/2010	MOTION TO RECONSIDER
C0000430 - C0000430	04/05/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000431 - C0000433	04/05/2010	SUMMARY OF DISCLOSURE OF DISCOVERY
C0000434 - C0000434	04/05/2010	AGREED ORDER
C0000435 - C0000435	04/05/2010	MINUTE ORDER
C0000436 - C0000436	04/12/2010	MINUTE ORDER
C0000437 - C0000437	04/22/2010	ANSWER TO MOTION FOR DISCOVERY
C0000438 - C0000438	04/23/2010	MINUTE ORDER
C0000439 - C0000439	04/30/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000440 - C0000440	04/30/2010	ORDER
C0000441 - C0000441	04/30/2010	MINUTE ORDER
C0000442 - C0000444	05/12/2010	SUMMARY OF DISCLOSURE OF DISCOVERY - 3
C0000445 - C0000445	05/12/2010	MINUTE ORDER

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WAUKEGAN, ILLINOIS 60085

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2-16-0217

Table of Contents

C0000446 - C0000447	05/17/2010	MOTION
C0000448 - C0000449	05/17/2010	MOTION_0002
C0000450 - C0000451	05/17/2010	CERTIFICATE
C0000452 - C0000453	05/17/2010	CERTIFICATE_0002
C0000454 - C0000454	05/17/2010	PETITION FOR WRIT OF HABEAS CORPUS
C0000455 - C0000455	05/17/2010	ORDER
C0000456 - C0000456	05/17/2010	ORDER_0002
C0000457 - C0000457	05/17/2010	MINUTE ORDER
C0000458 - C0000458	05/17/2010	MINUTE ORDER_0002
C0000459 - C0000459	05/19/2010	PERSONAL RECOGNIZANCE BOND
C0000460 - C0000460	05/19/2010	BODY ATTACHMENT ORDER
C0000461 - C0000461	05/19/2010	RELEASE
C0000462 - C0000462	05/19/2010	MINUTE ORDER
C0000463 - C0000465	05/25/2010	BODY ATTACHMENT ORDER
C0000466 - C0000466	05/27/2010	PETITION FOR WRIT OF HABEAS CORPUS
C0000467 - C0000467	05/27/2010	ORDER
C0000468 - C0000468	06/04/2010	NOTICE
C0000469 - C0000471	06/04/2010	MOTION IN LIMINE - HEARSAY STATEMENTS
C0000472 - C0000479	06/08/2010	WRIT OF HABEAS CORPUS
C0000480 - C0000480	06/10/2010	MINUTE ORDER
C0000481 - C0000481	06/14/2010	BODY ATTACHMENT ORDER
C0000482 - C0000483	06/14/2010	PETITION FOR RULE TO SHOW CAUSE
C0000484 - C0000484	06/14/2010	RULE TO SHOW CAUSE
C0000485 - C0000485	06/14/2010	REMAND
C0000486 - C0000486	06/14/2010	MINUTE ORDER
C0000487 - C0000487	06/14/2010	MINUTE ORDER_0002
C0000488 - C0000488	06/15/2010	MINUTE ORDER
C0000489 - C0000490	06/16/2010	MOTION IN LIMINE - PERTAINING TO CRIML...
C0000491 - C0000492	06/16/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000493 - C0000493	06/16/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000494 - C0000494	06/16/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000495 - C0000495	06/16/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000496 - C0000496	06/16/2010	MINUTE ORDER
C0000497 - C0000497	06/17/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000498 - C0000498	06/17/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000499 - C0000502	06/17/2010	SUMMARY OF DISCLOSURE OF DISCOVERY
C0000503 - C0000504	06/17/2010	SUPPLEMENTAL DISCLOSURE
C0000505 - C0000505	06/17/2010	ORDER
C0000506 - C0000506	06/17/2010	ORDER_0002

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000507 - C0000507	06/17/2010	MINUTE ORDER
C0000508 - C0000509	06/18/2010	MOTION OF DANIEL WILLIAMS
C0000510 - C0000510	06/18/2010	PERSONAL RECONGNIZANCE BOND
C0000511 - C0000511	06/18/2010	RELEASE
C0000512 - C0000512	06/18/2010	MINUTE ORDER
C0000513 - C0000514	06/21/2010	STATEMENT OF FACTS
C0000515 - C0000519	06/21/2010	MOTION IN LIMINE - OTHER ACTS OF EVIDE...
C0000520 - C0000522	06/21/2010	MOTION IN LIMINE - HEARSAY STATEMENTS
C0000523 - C0000524	06/21/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000525 - C0000526	06/21/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000527 - C0000528	06/21/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000529 - C0000530	06/21/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000531 - C0000531	06/21/2010	SUPPLEMENTAL DISCLOSURE OF DISCOVERY -...
C0000532 - C0000532	06/21/2010	ORDER
C0000533 - C0000533	06/21/2010	REMAND
C0000534 - C0000534	06/21/2010	MINUTE ORDER
C0000535 - C0000535	06/21/2010	MINUTE ORDER_0002
C0000536 - C0000536	06/22/2010	CLOTHING AND KEEP SEPARATE ORDER
C0000537 - C0000537	06/22/2010	REMAND
C0000538 - C0000538	06/22/2010	MINUTE ORDER
C0000539 - C0000539	06/22/2010	MINUTE ORDER_0002
C0000540 - C0000541	06/23/2010	MOTION IN LIMINE- DANIEL WILLIAMS
C0000542 - C0000542	06/23/2010	KEEP SEPARATE ORDER
C0000543 - C0000543	06/23/2010	REMAND
C0000544 - C0000544	06/23/2010	MINUTE ORDER
C0000545 - C0000545	06/23/2010	MINUTE ORDER_0002
C0000546 - C0000546	06/24/2010	REMAND
C0000547 - C0000547	06/24/2010	MINUTE ORDER
C0000548 - C0000548	06/24/2010	MINUTE ORDER_0002
C0000549 - C0000549	06/25/2010	EXHIBIT RECEIPT
C0000550 - C0000555	06/25/2010	EXHIBIT LIST
C0000556 - C0000556	06/25/2010	ADULT PROBATION SERVICES REFERRAL
C0000557 - C0000557	06/25/2010	JURY COMMUNICATION
C0000558 - C0000558	06/25/2010	JURY COMMUNICATION_0002
C0000559 - C0000584	06/25/2010	JURY INSTRUCTIONS
C0000585 - C0000617	06/25/2010	JURY INSTRUCTIONS_0002
C0000618 - C0000618	06/25/2010	VERDICT
C0000619 - C0000619	06/25/2010	VERDICT_0002
C0000620 - C0000620	06/25/2010	VERDICT_0003

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000621 - C0000621	06/25/2010	VERDICT_0004
C0000622 - C0000622	06/25/2010	MINUTE ORDER
C0000623 - C0000623	06/25/2010	MINUTE ORDER_0002
C0000624 - C0000624	06/25/2010	MINUTE ORDER_0003
C0000625 - C0000625	06/25/2010	MINUTE ORDER_0004
C0000626 - C0000627	07/21/2010	MEMORANDUM
C0000628 - C0000628	07/23/2010	ADULT PROBATION SERVICES REFERRAL
C0000629 - C0000629	07/23/2010	MINUTE ORDER
C0000630 - C0000883	07/29/2010	MOTION FOR NEW TRIAL AND MOTION TO VAC...
C0000884 - C0000884	07/30/2010	MINUTE ORDER
C0000885 - C0000896	08/17/2010	RESPONSE TO MOTION FOR NEW TRIAL
C0000897 - C0000897	08/20/2010	MINUTE ORDER
C0000898 - C0000898	08/18/2010	PRESENTENCE INVESTIGATION ... (IMPOUNDED)
C0000899 - C0000904	09/09/2010	SUPPLEMENTAL MOTION FOR NEW TRIAL
C0000905 - C0000905	09/09/2010	MINUTE ORDER
C0000906 - C0000950	09/20/2010	RESPONSE TO SUPPLEMENTAL MOTION FOR NE...
C0000951 - C0000951	09/27/2010	MINUTE ORDER
C0000952 - C0000952	09/29/2010	MINUTE ORDER
C0000953 - C0000953	10/06/2010	NOTICE OF APPEAL
C0000954 - C0000957	10/06/2010	COURT REPORTER SCHEDULE
C0000958 - C0000959	10/06/2010	ORDER
C0000960 - C0000960	10/06/2010	DOC COVERSHEET
C0000961 - C0000962	10/06/2010	JUDGMENT - SENTENCING ORDER
C0000963 - C0000963	10/06/2010	ORDER FOR DOCKET CONTROL NUMBER
C0000964 - C0000964	10/06/2010	ORDER_0002
C0000965 - C0000965	10/06/2010	MINUTE ORDER
C0000966 - C0000966	10/14/2010	JAIL CREDITS
C0000967 - C0000967	10/25/2010	NOTICE OF MOTION
C0000968 - C0000969	10/25/2010	MOTION TO RECONSIDER SENTENCE
C0000970 - C0000970	10/25/2010	CERTIFICATE OF ATTORNEY
C0000971 - C0000971	10/26/2010	LETTER
C0000972 - C0000972	10/28/2010	MINUTE ORDER
C0000973 - C0000973	10/27/2010	NOTICE
C0000974 - C0000975	10/27/2010	MOTION TO RETRIEVE AND PHOTOGRAPH THE ...
C0000976 - C0000976	10/27/2010	NTOICE
C0000977 - C0000978	10/27/2010	MOTION TO RETRIEVE AND PHOTOGRAPH THE ...
C0000979 - C0000979	11/03/2010	APPELLATE COURT ORDER
C0000980 - C0000980	11/04/2010	ORDER
C0000981 - C0000981	11/04/2010	MINUTE ORDER

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0000982 - C0000982	11/16/2010	MINUTE ORDER
C0000983 - C0000983	11/23/2010	ORDER
C0000984 - C0000984	12/07/2010	EXHIBIT RECEIPT
C0000985 - C0000985	12/08/2010	PROOF OF SERVICE
C0000986 - C0000989	12/08/2010	MOTION FOR REVISION OF THE DUE DATE
C0000990 - C0000990	12/20/2010	APPELLATE COURT ORDER
C0000991 - C0001016	01/24/2010	CERTIFICATE IN LIEU OF RECORD
C0001017 - C0001022	01/24/2010	PROOF OF MAILING REPORT OF PROCEEDINGS
C0001023 - C0001024	01/24/2011	ATTORNEY CERTIFICATION
C0001025 - C0001027	09/14/2011	SUPPLEMENTAL CERTIFICATE IN LIEU
C0001028 - C0001028	09/14/2011	ATTORNEY CERTIFICATION
C0001029 - C0001029	11/16/2010	PROOF OF MAILING REPORT OF PROCEEDINGS
C0001030 - C0001030	09/30/2011	PRIORITY MAIL RECIEPT
C0001031 - C0001033	10/27/2011	LETTER
C0001034 - C0001059	12/03/2012	MANDATE
C0001060 - C0001062	03/11/2013	CIVIL WARRANT
C0001063 - C0001063	03/07/2013	ORDER
C0001064 - C0001064	03/07/2013	MINUTE ORDER
C0001065 - C0001065	06/23/2014	NOTICE OF FILING
C0001066 - C0001631	06/23/2014	PETITION FOR POST CONVICTION RELIEF
C0001632 - C0001632	06/30/2014	APPEARANCE
C0001633 - C0001633	06/30/2014	MINUTE ORDER
C0001634 - C0001634	08/28/2014	MINUTE ORDER
C0001635 - C0001635	10/16/2014	MINUTE ORDER
C0001636 - C0001636	11/14/2014	MINUTE ORDER
C0001637 - C0001642	12/12/2014	MOTION TO DISMISS POST CONVICTION PETI...
C0001643 - C0001643	12/12/2014	ORDER
C0001644 - C0001644	12/12/2014	MINUTE ORDER
C0001645 - C0001645	01/14/2015	NOTICE OF FILING
C0001646 - C0001653	01/14/2015	RESPONSE TO MOTION TO DISMISS PCP
C0001654 - C0001654	01/22/2015	NOTICE OF FILING
C0001655 - C0001672	01/22/2015	SUPPLEMENTAL RESPONSE TO MOTION TO DIS...
C0001673 - C0001673	02/06/2015	MINUTE ORDER
C0001674 - C0001674	03/13/2015	ORDER
C0001675 - C0001675	03/13/2015	MINUTE ORDER
C0001676 - C0001685	03/27/2015	ANSWER TO POST CONVICTION TO PETITION
C0001686 - C0001686	04/23/2015	MINUTE ORDER
C0001687 - C0001687	05/15/2015	WITNESS AND EXHIBIT LIST
C0001688 - C0001688	05/15/2015	ORDER

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

C0001689 - C0001689	05/15/2015	MINUTE ORDER
C0001690 - C0001690	06/09/2015	MINUTE ORDER
C0001691 - C0001691	07/20/2015	MINUTE ORDER
C0001692 - C0001692	08/14/2015	MINUTE ORDER
C0001693 - C0001693	08/28/2015	ORDER
C0001694 - C0001694	08/28/2015	AGREED ORDER
C0001695 - C0001695	08/28/2015	MINUTE ORDER
C0001696 - C0001696	09/03/2015	ORDER
C0001697 - C0001697	09/03/2015	MINUTE ORDER
C0001698 - C0001698	09/21/2015	SUBPOENA
C0001699 - C0001699	09/21/2015	PETITION FOR WRIT OF HABEAS CORPUS
C0001700 - C0001700	09/21/2015	ORDER FOR WRIT OF HABEAS CORPUS
C0001701 - C0001701	09/21/2015	PETITION FOR WRIT OF HABEAS CORPUS_000...
C0001702 - C0001702	09/21/2015	ORDER FOR WRIT OF HABEAS CORPUS_0002
C0001703 - C0001703	09/21/2015	MINUTE ORDER
C0001704 - C0001711	10/02/2015	WRIT OF HABEAS CORPUS
C0001712 - C0001723	10/02/2015	WRIT OF HABEAS CORPUS_0002
C0001724 - C0001725	10/15/2015	PROOF OF SERVICE
C0001726 - C0001726	10/23/2015	NOTICE
C0001727 - C0001728	10/23/2015	MOTION FOR CONTINUANCE
C0001729 - C0001729	10/28/2015	ORDER
C0001730 - C0001730	10/28/2015	MINUTE ORDER
C0001731 - C0001732	10/29/2015	TRANSMISSION VERIFICATION REPORT
C0001733 - C0001733	11/02/2015	PETITION FOR WRIT OF HABEAS CORPUS
C0001734 - C0001734	11/02/2015	ORDER FOR WRIT OF HABEAS CORPUS
C0001735 - C0001735	11/02/2015	MINUTE ORDER
C0001736 - C0001736	11/09/2015	MINUTE ORDER
C0001737 - C0001744	11/13/2015	WRIT OF HABEAS CORPUS
C0001745 - C0001745	11/16/2015	REMAND
C0001746 - C0001746	11/16/2015	MINUTE ORDER
C0001747 - C0001747	11/18/2015	REMAND
C0001748 - C0001748	11/18/2015	ORDER
C0001749 - C0001749	11/18/2015	ORDER_0002
C0001750 - C0001756	11/18/2015	NOTES
C0001757 - C0001757	11/18/2015	MINUTE ORDER
C0001758 - C0001758	11/19/2015	ORDER
C0001759 - C0001759	11/19/2015	ORDER_0002
C0001760 - C0001760	11/19/2015	REMAND
C0001761 - C0001761	11/19/2015	MINUTE ORDER

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

12F SUBMITTED - 1810414559 - LAKEAPPEAL - 05/13/2016 10:43:02 AM

DOCUMENT ACCEPTED ON: 05/13/2016 11:56:21 AM

2-16-0217

Table of Contents

C0001762 - C0001762	11/23/2015	MINUTE ORDER
C0001763 - C0001763	12/04/2015	ORDER
C0001764 - C0001764	12/04/2015	MINUTE ORDER
C0001765 - C0001765	12/14/2015	MINUTE ORDER
C0001766 - C0001766	12/17/2015	MINUTE ORDER
C0001767 - C0001767	12/22/2015	ORDER
C0001768 - C0001768	12/22/2015	MINUTE ORDER
C0001769 - C0001769	01/05/2016	STIPULATIONS REGARDING GANG EVIDENCE
C0001770 - C0001770	01/05/2016	MINUTE ORDER
C0001771 - C0001771	01/07/2016	JAIL CREDITS
C0001772 - C0001772	02/26/2015	EXHIBIT RECEIPT
C0001773 - C0001773	02/26/2016	ORDER
C0001774 - C0001774	02/26/2016	MINUTE ORDER
C0001775 - C0001775	03/14/2016	ORDER
C0001776 - C0001776	03/14/2016	NOTICE OF APPEAL
C0001777 - C0001779	03/14/2016	ORDER_0002
C0001780 - C0001782	03/14/2016	COURT REPORTER SCHEDULE
C0001783 - C0001784	03/14/2016	ORDER_0003
C0001785 - C0001785	03/14/2016	MINUTE ORDER
C0001786 - C0001786	03/22/2016	LETTER OF REQUEST
C0001787 - C0001787	03/28/2016	APPELLATE COURT ORDER
		CLERK'S CERTIFICATION OF TRIAL COURT RECORD

Table of Contents

STATE OF ILLINOIS

UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT

COUNTY OF LAKE

PEOPLE OF THE STATE OF ILLINOIS

VS

DONNELL GREEN

Case Number 2008CF000264

TABLE OF CONTENTS

<u>PAGE NUMBER</u>	<u>FILE DATE</u>	<u>DESCRIPTION</u>
IC000001 - IC000001		PLACITA
IC000002 - IC000106	08/18/2010	PRESENTENCE INVESTIGATION ... (IMPOUNDED) CLERK'S CERTIFICATION OF TRIAL COURT RECORD

Table of Contents

STATE OF ILLINOIS

UNITED STATES OF AMERICA

COUNTY OF LAKE

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

VS

DONNELL GREEN

Case Number 2008CF000264

TABLE OF CONTENTS
OF
REPORT OF PROCEEDINGS

<u>PAGE NUMBER</u>	<u>HEARING DATE</u>	<u>TIME</u>	<u>DESCRIPTION</u>
0000001 - 0000006	04/23/2008		REPORT OF PROCEEDINGS
0000007 - 0000011	04/24/2008		REPORT OF PROCEEDINGS
0000012 - 0000016	06/17/2008		REPORT OF PROCEEDINGS
0000017 - 0000020	07/15/2008		REPORT OF PROCEEDINGS
0000021 - 0000024	08/21/2008		REPORT OF PROCEEDINGS
0000025 - 0000029	09/23/2008		REPORT OF PROCEEDINGS
0000030 - 0000032	10/23/2008		REPORT OF PROCEEDINGS
0000033 - 0000036	11/03/2008		REPORT OF PROCEEDINGS
0000037 - 0000040	12/02/2008		REPORT OF PROCEEDINGS
0000041 - 0000044	12/30/2008		REPORT OF PROCEEDINGS
0000045 - 0000049	01/08/2009		REPORT OF PROCEEDINGS
0000050 - 0000052	01/15/2009		REPORT OF PROCEEDINGS
0000053 - 0000056	01/22/2009		REPORT OF PROCEEDINGS
0000057 - 0000062	02/10/2009		REPORT OF PROCEEDINGS
0000063 - 0000068	03/05/2009		REPORT OF PROCEEDINGS
0000069 - 0000073	03/23/2009		REPORT OF PROCEEDINGS
0000074 - 0000077	04/21/2009		REPORT OF PROCEEDINGS

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
 WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

0000078 - 0000081	05/05/2009	REPORT OF PROCEEDINGS
0000082 - 0000085	05/27/2009	REPORT OF PROCEEDINGS
0000086 - 0000090	06/23/2009	REPORT OF PROCEEDINGS
0000091 - 0000095	07/09/2009	REPORT OF PROCEEDINGS
0000096 - 0000099	07/16/2009	REPORT OF PROCEEDINGS
0000100 - 0000103	07/23/2009	REPORT OF PROCEEDINGS
0000104 - 0000107	08/05/2009	REPORT OF PROCEEDINGS
0000108 - 0000111	08/06/2009	REPORT OF PROCEEDINGS
0000112 - 0000117	08/25/2009	REPORT OF PROCEEDINGS
0000118 - 0000121	09/03/2009	REPORT OF PROCEEDINGS
0000122 - 0000130	09/04/2009	REPORT OF PROCEEDINGS
0000131 - 0000136	09/10/2009	REPORT OF PROCEEDINGS
0000137 - 0000143	10/06/2009	REPORT OF PROCEEDINGS
0000144 - 0000148	10/19/2009	REPORT OF PROCEEDINGS
0000149 - 0000156	11/09/2009	REPORT OF PROCEEDINGS
0000157 - 0000160	11/23/2009	REPORT OF PROCEEDINGS
0000161 - 0000167	11/24/2009	REPORT OF PROCEEDINGS
0000168 - 0000215	12/29/2009	REPORT OF PROCEEDINGS
0000216 - 0000309	01/05/0010	REPORT OF PROCEEDINGS
0000310 - 0000313	01/19/2010	REPORT OF PROCEEDINGS
0000314 - 0000344	01/20/2010	REPORT OF PROCEEDINGS
0000345 - 0000364	01/27/2010	REPORT OF PROCEEDINGS
0000365 - 0000425	02/17/2010	REPORT OF PROCEEDINGS
0000426 - 0000470	02/18/2010	REPORT OF PROCEEDINGS
0000471 - 0000521	02/23/2010	REPORT OF PROCEEDINGS
0000522 - 0000528	02/26/2010	REPORT OF PROCEEDINGS
0000529 - 0000536	03/18/2010	REPORT OF PROCEEDINGS
0000537 - 0000559	03/19/2010	REPORT OF PROCEEDINGS
0000560 - 0000574	03/19/2010	REPORT OF PROCEEDINGS_0002
0000575 - 0000601	03/26/2010	REPORT OF PROCEEDINGS
0000602 - 0000619	03/26/2010	REPORT OF PROCEEDINGS_0002
0000620 - 0000643	04/05/2010	REPORT OF PROCEEDINGS
0000644 - 0000647	04/23/2010	REPORT OF PROCEEDINGS
0000648 - 0000710	04/30/2010	REPORT OF PROCEEDINGS
0000711 - 0000717	05/12/2010	REPORT OF PROCEEDINGS
0000718 - 0000724	05/17/2010	REPORT OF PROCEEDINGS
0000725 - 0000730	05/19/2010	REPORT OF PROCEEDINGS
0000731 - 0000734	06/10/2010	REPORT OF PROCEEDINGS
0000735 - 0000742	06/16/2010	REPORT OF PROCEEDINGS

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

0000743 - 0000778	06/17/2010		REPORT OF PROCEEDINGS
0000779 - 0000783	06/18/2010		REPORT OF PROCEEDINGS
0000784 - 0000880	06/21/2010	AM	REPORT OF PROCEEDINGS
0000881 - 0001073	06/21/2010	PM	REPORT OF PROCEEDINGS_0002
0001074 - 0001205	06/22/2010	AM	REPORT OF PROCEEDINGS
0001206 - 0001337	06/22/2010	PM	REPORT OF PROCEEDINGS_0002
0001338 - 0001419	06/23/2010	AM	REPORT OF PROCEEDINGS
0001420 - 0001563	06/23/2010	PM	REPORT OF PROCEEDINGS_0002
0001564 - 0001711	06/24/2010	AM	REPORT OF PROCEEDINGS_0001
0001712 - 0001858	06/24/2010	PM	REPORT OF PROCEEDINGS_0002
0001859 - 0001995	06/25/2010		REPORT OF PROCEEDINGS
0001996 - 0002001	07/23/2010		REPORT OF PROCEEDINGS
0002002 - 0002006	07/23/2010	AM	REPORT OF PROCEEDINGS_0002
0002007 - 0002042	08/20/2010	AM	REPORT OF PROCEEDINGS
0002043 - 0002060	09/09/2010		REPORT OF PROCEEDINGS
0002061 - 0002063	09/27/2010	AM	REPORT OF PROCEEDINGS
0002064 - 0002091	09/29/2010	AM	REPORT OF PROCEEDINGS
0002092 - 0002127	10/06/2010		REPORT OF PROCEEDINGS
0002128 - 0002134	11/16/2010		REPORT OF PROCEEDINGS
0002135 - 0002140	11/04/2010		REPORT OF PROCEEDINGS
0002141 - 0002144	10/28/2010		REPORT OF PROCEEDINGS
0002145 - 0002148	06/30/2014		REPORT OF PROCEEDINGS
0002149 - 0002152	08/28/2014		REPORT OF PROCEEDINGS
0002153 - 0002157	10/16/2014		REPORT OF PROCEEDINGS
0002158 - 0002162	11/14/2014		REPORT OF PROCEEDINGS
0002163 - 0002166	12/12/2014		REPORT OF PROCEEDINGS
0002167 - 0002170	02/06/2015		REPORT OF PROCEEDINGS
0002171 - 0002228	03/13/2015		REPORT OF PROCEEDINGS
0002229 - 0002243	04/23/2015		REPORT OF PROCEEDINGS
0002244 - 0002258	05/15/2015		REPORT OF PROCEEDINGS
0002259 - 0002264	07/02/2015		REPORT OF PROCEEDINGS
0002265 - 0002268	07/20/2015		REPORT OF PROCEEDINGS
0002269 - 0002273	08/14/2015		REPORT OF PROCEEDINGS
0002274 - 0002278	09/03/2015		REPORT OF PROCEEDINGS
0002279 - 0002285	11/02/2015		REPORT OF PROCEEDINGS
0002286 - 0002289	11/16/2015		REPORT OF PROCEEDINGS
0002290 - 0002305	12/17/2015		REPORT OF PROCEEDINGS
0002306 - 0002319	12/22/2015		REPORT OF PROCEEDINGS
0002320 - 0002365	11/18/2015		REPORT OF PROCEEDINGS

KEITH S. BRIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

2-16-0217

Table of Contents

0002366 - 0002494	11/19/2015	REPORT OF PROCEEDINGS
0002495 - 0002589	11/23/2015	REPORT OF PROCEEDINGS
0002590 - 0002662	12/14/2015	REPORT OF PROCEEDINGS
0002663 - 0002750	01/05/2016	REPORT OF PROCEEDINGS
0002751 - 0002795	02/26/2015	REPORT OF PROCEEDINGS
		CLERK'S CERTIFICATION OF REPORT OF PRO...

People v. Donnell Green, Lake County Case No.: 08 CF 264
 Appellate Court No.: 2-16-0217, Supreme Court No. 125005

<u>Index to the Reports of Proceedings</u>	<u>Page</u>
April 23, 2008	R.0001
April 24, 2008	R.0007
June 17, 2008	R.0012
July 15, 2008	R.0017
August 21, 2008	R.0021
September 23, 2008	R.0025
October 23, 2008	R.0030
November 3, 2008	R.0033
December 2, 2008	R.0037
December 30, 2008	R.0041
January 8, 2009	R.0045
January 15, 2009	R.0050
January 22, 2009	R.0053
February 10, 2009	R.0057
March 5, 2009	R.0063
March 23, 2009	R.0069
April 21, 2009	R.0074
May 5, 2009	R.0078
May 27, 2009	R.0082
June 23, 2009	R.0086
July 9, 2009	R.0091
July 16, 2009	R.0096
July 23, 2009	R.0100
August 5, 2009	R.0104
August 6, 2009	R.0108
August 25, 2009	R.0112
September 3, 2009	R.0118
September 4, 2009	R.0122
September 10, 2009	R.0131
October 6, 2009	R.0137
October 19, 2009	R.0144
November 9, 2009	R.0149
November 23, 2009	R.0157
November 24, 2009	R.0161
December 29, 2009 - hearing on Motion to Suppress	R.0168

<u>Witness</u>	Direct	Cross	Redirect	Recross
Det. Domenic Cappelluti	R.0173			

January 5, 2010 - continued hearing on Motion to Suppress. R.0216

People v. Donnell Green, Lake County Case No. 08 CF 264
Appellate Court No.: 2-16-0217, Supreme Court No. 125005

Index to the Reports of Proceedings

Page

<u>Witnesses</u>	Direct	Cross	Redirect	Recross
------------------	--------	-------	----------	---------

Det. Domenic Cappelluti	R.0218	R.0219	R.0246	
Lary Green	R.0249	R.0256		
Donnell Green	R.0257	R.0274	R.0293	R.0298

January 19, 2010 R.0310

January 20, 2010 R.0314

<u>Witness</u>	Direct	Cross	Redirect	Recross
----------------	--------	-------	----------	---------

Lawrence Wade	R.0315	R.0322	R.0325	
---------------	--------	--------	--------	--

January 27, 2010 R.0345

January 29, 2010 R.0348

February 3, 2010 R.0360

February 17, 2010 - continued hearing on Motion to Suppress..... R.0365

<u>Witnesses</u>	Direct	Cross	Redirect	Recross
------------------	--------	-------	----------	---------

Cor. Joseph Wide	R.0376	C.0397	C.0399	
------------------	--------	--------	--------	--

Cap. Ricky Bridges	R.0403	C.0410		
--------------------	--------	--------	--	--

Det. Ramirez	R.0411	C.0417		
--------------	--------	--------	--	--

February 18, 2010 - continued hearing on Motion to Suppress..... R.0426

<u>Witness</u>	Direct	Cross	Redirect	Recross
----------------	--------	-------	----------	---------

Det. Scott Thomas	R.0431	R.0442	R.0461	
-------------------	--------	--------	--------	--

February 23, 2010 - continued hearing on Motion to Suppress..... R.0471

<u>Witness</u>	Direct	Cross	Redirect	Recross
----------------	--------	-------	----------	---------

Det. Domenic Cappelluti	R.0472			
-------------------------	--------	--	--	--

February 26, 2010 R.0522

March 18, 2010..... R.0529

March 19, 2010 - before Judge Shanes R.0537

<u>Witness</u>	Direct	Cross	Redirect	Recross
----------------	--------	-------	----------	---------

Brandon Sledge	R.0550			
----------------	--------	--	--	--

March 19, 2010 - before Judge Foreman..... R.0560

March 19, 2010 - p.m. session before Judge Foreman R.0567

March 26, 2010 - a.m. hearings on defense motions..... R.0575

March 26, 2010 p.m. hearings on defense motions..... R.0602

March 26, 2010 before Judge Shanes - no report of proceedings..... R.0619

April 5, 2010..... R.0620

People v. Donnell Green, Lake County Case No. 08 CF 264
Appellate Court No.: 2-16-0217, Supreme Court No. 125005

<u>Index to the Reports of Proceedings</u>	<u>Page</u>
April 23, 2010	R.0644
April 30, 2010 - hearings on defense motions	R.0648

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Domenic Cappelluti	R.0651	R.0677		
May 12, 2010				R.0711
May 17, 2010				R.0718
May 19, 2010				R.0725
June 10, 2010				R.0731
June 16, 2010				R.0735
June 17, 2010				R.0743
June 18, 2010				R.0779
June 21, 2010 - a.m. session				R.0784
Jury selection begins				R.0806
June 21, 2010 - p.m. session - jury selection continues				R.0881
June 22, 2010				R.1073

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Lainie Newman	R.1077	R.1086	R.1097	R.1098
Tammy Williams	R.1099	R.1107	R.1110	
Dominic Cappelluti	R.1110	R.1167	R.1193	R.1201
*June 22, 2010 - continued jury selection				R.1205
Opening statements				R.1277

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Tiffany Bishop	R.1291	R.1307	R.1315	
Michael Sellers	R.1318	R.1328	R.1331	
June 23, 2010 - a.m. proceedings				R.1337

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Cesar Garcia	R.1355	R.1361	R.1368	
Charles Smith	R.1370	R.1375	R.1382	
David Mercado	R.1385	R.1392	R.1404	
Russell Ewert	R.1407	R.1413	R.1415	R.1416
June 23, 2010 - p.m. proceedings				R.1419

*This hearing is out of sequential order.

People v. Donnell Green, Lake County Case No. 08 CF 264
Appellate Court No.: 2-16-0217, Supreme Court No. 125005

Index to the Reports of Proceedings

Page

<u>Witnesses</u>	Direct	Cross	Redirect	Recross
Jimmy Lewis, Sr.	R.1420			
Brian Bradfield	R.1423	R.1442	R.1454	
Brian Falotico	R.1456	R.1489	R.1514	R.1518
Brian Falotico further redirect			R.1520	
Larry Holman	R.1521	R.1531		
Michael Cress	R.1538	R.1550	R.1556	R.1557

June 24, 2010 - a.m. session R.1563

<u>Witnesses</u>	Direct	Cross	Redirect	Recross
Cor. Joseph Wide	R.1574	R.1593		
Peter Striupaitis	R.1619	R.1640	R.1645	R.1646
Dr. Eupil Choi	R.1651	R.1677	R.1689	
Brandon Sledge exam. by Ritacca	R.1706			

June 24, 2010 - p.m. session R.1711

<u>Witnesses</u>	Direct	Cross	Redirect	Recross
Alana Herrera	R.1720	R.1731	R.1738	
Brian Gay	R.1738	R.1744		
Johnny Johnson	R.1747	R.1756		
Donnell Green	R.1760	R.1795	R.1829	
Larry Green	R.1835	R.1845		
Lynell Collins	R.1848	R.1852		

June 25, 2010 R.1858

<u>Witness</u>	Direct	Cross	Redirect	Recross
David Mercado	R.1873	R.1878		

Closing arguments.	R.1884
Jury retires to deliberate	R.1971
Jury verdict read in open court.	R.1984

July 23, 2010	R.1995
July 30, 2010	R.2001
August 20, 2010 - defense post-trial motion	R.2006
September 9, 2010 -	R.2042
September 29, 2010	R.2063
October 6, 2010 - Sentencing.	R.2091

People v. Donnell Green, Lake County Case No. 08 CF 264
 Appellate Court No.: 2-16-0217, Supreme Court No. 125005

Index to the Reports of Proceedings

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>	<u>Page</u>
Lary Green	R.2097				
Court pronounces sentence					R.2122

INDEX TO THE RECORD

People v. Donnell D. Green,
 Lake County Case No.: 08 CF 264
 Appellate Court No.: 2-16-0217, Supreme Court No. 125005

Report of Proceedings ("R")

	<u>Direct</u>	<u>Cross</u>	<u>Redir.</u>	<u>Recr.</u>
October 6, 2010 (continued)				
Witness				
Larry Green	2097			
Court Pronounces Sentence				2122
November 19, 2015 Hearing on Post-Conviction Petition				2366
Defense Witnesses				
Chappel Craigen	2375	2392	2401	
Lary Green	2406	2419		
Examination by the Court				
Lary Green				2431
Lary Green			2440	
Lawrence Wade	2445	2461		
Examination by the Court				
Lawrence Wade				2471
Lawrence Wade			2478	2487
November 23, 2015 Hearing on Post-Conviction Petition				2495
Defense Witnesses				
Daphane Currenton	2497			
Robert Ritacca	2504	2556	2570	
December 14, 2015 Hearing on Post-Conviction Petition				2590
Defense Witness				

Report of Proceedings ("R")

	<u>Direct</u>	<u>Cross</u>	<u>Redir.</u>	<u>Recr.</u>
Donnell D. Green	2596	2625	2654	2656

EXHIBITS:

5 Volumes Exhibits (contained within 1 large white box)

2019 IL App (2d) 160217-U
No. 2-16-0217
Order filed June 21, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)
OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) No. 08-CF-264
)
DONNELL GREEN,)
)
Defendant-Appellant.)
)
Honorable
George D. Strickland,
Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

- ¶ 1 *Held:* The trial court did not err in denying defendant's postconviction petition. Therefore, we affirmed. We also granted the State request that defendant be assessed \$50 as costs for the appeal.
- ¶ 2 Following a jury trial, defendant, Donnell Green, was convicted of two counts of first-degree murder (720 ILCS 5/9-1(a)(1) and 5/9-1(a)(2) (West 2006)) under theories of accountability. The trial court sentenced defendant to 35 years' imprisonment.

2019 IL App (2d) 160217-U

¶ 3 Defendant now appeals from the trial court's order denying, after a third-stage evidentiary hearing, his petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). Defendant argues that the trial court erred by denying his petition because he established that his trial counsel had a *per se* conflict of interest, where counsel previously represented the intended victim of the murder and defendant neither knew about the conflict nor waived it. For the following reasons, we affirm.

¶ 4 The State also asks this court to assess costs against defendant for this appeal under section 2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)) and *People v. Nicholls*, 71 Ill. 2d 166 (1978). We grant the State's request pursuant to its cited authorities and the majority opinion in *People v. Knapp*, 2019 IL App (2d) 160162. We recognize that Justice McLaren dissented in that case, including on the issue of whether fees may be awarded to the State on an appeal from a postconviction petition. See *Knapp*, 2019 IL App (2d) 160162, ¶¶ 93-134 (McLaren, J., dissenting).

¶ 5 I. BACKGROUND

¶ 6 On October 18, 2007, Jimmie Lewis was killed while riding as a passenger in a Cadillac driven by Danny "Keeko" Williams. Defendant was charged by indictment with three counts of first-degree murder of Jimmie Lewis. Testimony at trial revealed that on the night of the shooting, defendant and his friends, Chappel Craigen, Jabril Harmon, and Emanuel Johnson, were driving together. Craigen was driving, with defendant in the front passenger seat, Johnson in the backseat behind defendant, and Harmon in the back seat behind Craigen. On their way to the liquor store, they passed the Cadillac being driven by Keeko. Keeko was part of a rival street gang, "the Moes," that was involved in a recent altercation with defendant and his group of friends, known as the "4 Corner Hustlers." When defendant and his friends saw the Cadillac,

2019 IL App (2d) 160217-U

they all said, “that’s them, that’s them,” which meant, “that’s the Moes *** that’s Keeko.” Craigen made a U-turn and followed the Cadillac, and everyone in the car “got excited.” Defendant grabbed the gun from the middle console and said “I’ll do it,” meaning he would shoot at the Cadillac. However, defendant passed the gun to Johnson, who passed it to Harmon. When the car was pulled up on the right side of the Cadillac, Harmon shot multiple times, hitting Lewis and causing his death.

¶ 7 During closing argument, the prosecutor argued that, on the night of the shooting, defendant and his friends, “were after the Moes, either Jimmy Lewis or Keeko [Williams], it doesn’t matter ***. It’s called transfer of intent.”

¶ 8 On direct appeal, defendant argued that the State failed to prove beyond a reasonable doubt that he was accountable for the murder of Jimmy Lewis. This court affirmed defendant’s conviction. See *People v. Green*, 2012 IL App (2d) 101043-U.

¶ 9 On June 23, 2014, defendant filed a postconviction petition alleging, *inter alia*, that defense counsel, Robert Ritacca, was ineffective because he labored under a *per se* conflict of interest due to Ritacca’s prior representation of the intended murder victim, Daniel “Keeko” Williams.

¶ 10 On November 19, 2015, a third-stage evidentiary hearing was held. Ritacca testified as follows. On July 23, 2009, Ritacca entered his appearance on behalf of defendant. Ritacca represented Daniel “Keeko” Williams from July 20, 2007, through March 14, 2008, in cases involving driving while license revoked and cannabis possession. Ritacca could not recall if he told defendant about his prior representation of Williams, but he did not disclose his prior representation of Williams to the trial court. Ritacca also represented Daniel Williams’ brothers,

2019 IL App (2d) 160217-U

Joey and Brannon, prior to representing defendant. The parties stipulated that Brannon and Joey Williams were members of the “Moes” gang.

¶ 11 On February 26, 2016, the trial court denied defendant’s petition. The trial court determined that Ritacca did not suffer under a *per se* conflict of interest based on his previous representation of Daniel “Keeko” Williams.

¶ 12 Defendant filed his notice of appeal on March 14, 2016.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that the trial court erred by denying his petition because he established that defense counsel had a *per se* conflict of interest where counsel previously represented the intended victim of the murder, and defendant neither knew about the conflict nor waived it.

¶ 15 A. Standard of Review

¶ 16 When a postconviction petition is advanced to the third-stage evidentiary hearing, where fact finding and credibility determinations are involved, we will not reverse the trial court’s decision unless it is manifestly erroneous. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). However, “[w]hen the record shows that the facts are undisputed, the issue of whether a *per se* conflict exists is a legal question that [a reviewing court] reviews *de novo*.” *People v. Fields*, 2012 IL 112438, ¶ 19. See also *People v. Rodriguez*, 402 Ill. App. 3d 932, 939 (2010) (review of the trial court’s denial of postconviction petition after a third-stage evidentiary hearing is *de novo* where the issues are purely legal questions). Here, the record shows that the relevant facts are undisputed; therefore, our review is *de novo*. See *People v. Hernandez*, 231 Ill. 2d 134, 143 (2008).

¶ 17 B. *Per Se* Conflict of Interest

2019 IL App (2d) 160217-U

¶ 18 “The sixth and fourteenth amendments to the United States Constitution guarantee the right to effective assistance of counsel.” *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). “A criminal defendant’s sixth amendment right to effective assistance of counsel includes the right to conflict-free representation.” *Id.* There are two types of conflicts: *per se* and actual. *Fields*, 2012 IL 112438, ¶ 17. Whether a conflict of interest exists must be evaluated on the specific facts of each case. See *People v. Poole*, 2015 IL App (4th) 130847, ¶ 25. A *per se* conflict of interest arises where a defendant’s attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. *Hernandez*, 231 Ill. 2d at 142. If a *per se* conflict exists, the defendant is not required to show actual prejudice. *Id.* at 143. Unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal. *Id.*

¶ 19 Our supreme court has identified three situations in which a *per se* conflict exists: “(1) where defense counsel has a prior or contemporaneous association with the *victim*, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant.” (Emphasis added.) *Fields*, 2012 IL 112438, ¶ 18.

¶ 20 Defendant argues that defense counsel labored under the first category of *per se* conflict because he previously represented Daniel “Keeko” Williams, the intended victim of the shooting. The State contends that a *per se* conflict did not exist because Williams was not the actual victim. Both defendant and the State cite *Hernandez*, 231 Ill. 2d 134, to support their arguments.

¶ 21 In *Hernandez*, the defendant was charged with and convicted of the solicitation of murder for hire of Jaime Cepeda. *Id.* at 138, 139. Defense counsel had previously represented Cepeda. *Id.* The defendant filed a postconviction petition alleging that defense counsel’s prior

2019 IL App (2d) 160217-U

representation of Cepeda constituted a *per se* conflict of interest. *Id.* at 139. The supreme court held that, although defense counsel's representation of the defendant and the alleged victim were not contemporaneous, a *per se* conflict existed and automatic reversal was required. *Id.* at 151-52. Here, defendant was charged with and convicted of the murder of Jimmy Lewis. Defendant was not charged with the murder of defense counsel's former client, Daniel Williams. Accordingly, this case is distinguishable from *Hernandez*, and the trial court properly determined that there was no *per se* conflict of interest.

¶ 22 Next, defendant urges us to recognize defense counsel's prior representation of the intended victim as a new fourth category of *per se* conflict of interest. Defendant quotes *People v. Spreitzer*, 123 Ill. 2d 1 (1988), to support his argument. Defendant contends that the justification for treating conflicts as *per se* is that "defense counsel in each case had a tie to a person or entity *** which would benefit from an unfavorable verdict for the defendant." *Id.* at 16. Defendant asserts that Williams obviously benefited from the guilty verdict for defendant.

¶ 23 However, defendant's use of the above-quoted language is overly broad and taken out of context. In *Spreitzer*, our supreme court explained that it had "invented" the term, "*per se* conflict," and that "[in] every case the conflict was created by the defense attorney's prior or contemporaneous association with either the prosecution or the *victim*." (Emphasis added.) *Id.* at 14. Thus, we reject defendant's interpretation of "the justification for the *per se* conflict rule as creating an additional, alternate basis for finding a *per se* conflict in this case. Pursuant to long-standing precedent, [our supreme] court has recognized three situations where a *per se* conflict of interest exists." *Fields*, 2012 IL 112438, ¶ 41. None of the recognized *per se* conflict situations apply to the facts at issue here. We believe if there is to be a fourth situation, it should

2019 IL App (2d) 160217-U

be up to the supreme court to formulate it. Accordingly, the trial court properly denied defendant's postconviction petition.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's denial of defendant's postconviction. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *Nicholls*, 71 Ill. 2d at 179; *Knapp*, 2019 IL App (2d) 160162.

¶ 26 Affirmed.

¶ 27 JUSTICE McLAREN, concurring in part and dissenting in part:

¶ 28 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the \$50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 29 However, as I have demonstrated in *Knapp*, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Knapp*, 2019 IL App (2d) 160162, ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id.* at ¶ 12 ("The statutory provision that allows imposition of the \$50 [*habeas corpus*] fee first appeared in the

2019 IL App (2d) 160217-U

statute in a 1907 amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition” (emphasis added); *Knapp*, 2016 IL App (2d) 160162, ¶ 133.

¶ 30 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The majority in *Knapp* declined to address *Nicholls*’ faulty premise. The majority here follows suit. While acknowledging my dissent in *Knapp*, the majority cites to *Knapp* to support the assessment of the fee in this case without addressing, let alone reconciling, the counterfactual basis underlying the *Nicholls* decision. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.

FILED

MAR 14 2016

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT, LAKE COUNTY, ILL.

Keith Bin
CIRCUIT CLERK

THE PEOPLE OF THE STATE OF ILLINOIS)

VS.
Donnell Green)

GEN. NO. 08CF264

NOTICE OF APPEAL

An Appeal is taken from the Order described below.

(1) Court to which Appeal is taken: Appellate Court - Second District

(2) Name of Appellant and address to which notices shall be sent.

Name: Donnell Green #M16889

Address: Menard Correctional Center P.O.Box 1000, Menard, IL, 62259

(3) Name and address of Appellant's attorney on appeal.

Name: Mr. Thomas A. Lilien Deputy Appellate Defender

Address: One Douglas Ave, 2nd Floor, Elgin, IL 60120

If Appellant is indigent and has no attorney, does he want one appointed? Yes

(4) Date of Judgment Order: 02/26/2016

(5) Offense of which convicted: Count (2) - First Degree Murder

(6) Sentence: Defendant sentenced to 35 years of Department of Corrections - Costs and Fees - DNA

(7) If appeal is not from a conviction, nature of Order appealed from: Denial of a Post Conviction Petition

(Signed)

Keith Bin

(May be signed by appellant, attorney for appellant, or Clerk of the Circuit Court)

171-89 Rev 2/01

No. 125005

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Edward Randall Psenicka, Deputy Director, State's Attorney Appellate Prosecutor, 2032 Larkin Avenue, Elgin, IL 60123, 2nddistrict.eserve@ilsaap.org;

Michael G. Nerheim, Lake County State's Attorney, 18 N. County St., 4th Floor, Waukegan, IL 60085, StatesAttorney@lakecountyil.gov;

Mr. Donnell D. Green, Register No. M16889, Lawrence Correctional Center, 10930 Lawrence Road, Sumner, IL 62466

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 December 2, 2019, the Brief and Argument 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 Brief and Argument to the Clerk of the above Court.

/s/Vinette Mistretta
LEGAL SECRETARY
 Office of the State Appellate Defender
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 Elgin, IL 60120
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 Service via email will be accepted at
2nddistrict.eserve@osad.state.il.us