No. 125005

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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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

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[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

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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 at143-44 (*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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COUNSEL FOR PETITIONER-APPELLANT

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

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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

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STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF LAKE

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*This hearing is out of sequential order.

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Report of Proceedings ("R")

	Direct	Cross	Redir.	Recr.
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

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-264
DONNELL GREEN,	)	Honorable George D. Strickland,
Defendant-Appellant.	)	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.

¶ 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,

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,

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

¶ 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

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

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

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
CIRCUIT CLERK

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS)
)
VS.) GEN. NO. 08CF264
Donnell Green)

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

NOTICE AND PROOF OF SERVICE

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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
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