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ISSUES PRESENTED

1. Whether the lower courts correctly concluded that trial counsel’s prior representation of an intended victim — who was not the actual victim of any charged crime — falls outside the recognized category of per se conflicts of interest for prior representation of victims.
2. Whether this Court should decline to recognize a new category of per se conflicts of interest arising from counsel’s prior representation of an intended victim who was not the actual victim of a charged crime.

STATEMENT OF FACTS

Petitioner was charged with three counts of first degree murder for shooting and killing Jimmy Lewis with the intent or knowledge that his conduct would cause Lewis’s death or create a strong probability of death or great bodily harm. C3-5.¹ On July 20, 2009, attorney Robert Ritacca entered his appearance on petitioner’s behalf. C90; R101.

Trial and Direct Appeal

Evidence from petitioner’s June 2010 jury trial established the following. On October 18, 2007, Jimmy “Bernie Mac” Lewis was fatally shot while a passenger in a Cadillac driven by Danny “Keeko” Williams. R1080-

¹ “C_” and “R_” refer to the common law record and report of proceedings using the numbering found at the top and bottom right-hand corner of each page; “State Ex. _” refers to the People’s trial exhibits; “Pet. Br. _” refers to petitioner’s opening brief; “Pet. App. Ct. Br. _” refers to petitioner’s opening postconviction appellate court brief, certified copies of which have been filed in this Court under Rule 318(c).

85, 1102, 1139, 1296-97, 1303, 1305, 1308, 1545-46, 1678;² Pet. Br. 26.³

Keeko and Lewis were members of the “Moe” “sect” of the “Black Peace Stones” street gang. R1141, R1144, 1544-47; Pet. Br. 26.

On the same date, petitioner was riding in the front passenger seat of a Saturn driven by Chappel Craigen. Jabril “Snakebite” Harmon was in the rear driver’s side seat behind Craigen, and Emmanuel “E-Man” Johnson was in the rear passenger seat behind petitioner. R1140-41, 1339-40; Pet. Br. 26. Petitioner and his friends belonged to the rival “Four Corner Hustlers” street gang, also called the “Foes.” R1144-45, 1543, 1547-49, 1557; Pet. Br. 26. A longstanding feud between the Moes and the Foes had resulted in a recent “large fight” in which petitioner was a participant and for which he was arrested for battery. R1140, 1145, 1549-50, 2665-67; C1769; Pet. Br. 26; *see also* R1357-62 (describing fight).⁴

The group in the Saturn got “excited” upon seeing the Cadillac, which they associated with Keeko and the rival Moes; “they all” said, “[t]here they are.” R1142; Pet. Br. 26-27. As Craigen followed the Cadillac, petitioner

² A portion of the trial transcript is out of sequence: proceedings in R1205-1336 appear to have occurred prior to those in R1073-1204. A portion of the postconviction transcript is also out of sequence: proceedings in R1205-1336 appear to have occurred prior to those in R1073-1204.

³ Citations to the appellate court opinion below are to petitioner’s appendix, specifically Pet. Br. 25-32.

⁴ In some court documents, Lewis’s first name is spelled “Jimmie,” while Keeko occasionally appears as “Keko” and “Kiko,” Johnson’s first name is sometimes spelled “Emanuel,” and the “Black Peace Stones” gang sometimes appears as “Black P. Stones.” Additionally, while most individuals are referred to by their last names, this brief uses the first name Keeko to distinguish him from his brothers, who share the same last name and who are named in petitioner’s brief, *see, e.g.*, Pet. Br. 9. *See also infra* note 6.

grabbed a gun from the center console and said, “I’ll do it,” meaning that he would shoot at the Cadillac. R1142-43, 1788; Pet. Br. 27. Because the Cadillac was in the inside lane, Craigen pulled up alongside the Cadillac’s passenger side to avoid oncoming traffic. R1199-1201; Pet. Br. 27. Petitioner passed the gun to the back seat; Harmon, who was seated on the driver’s side (and thus closer to the Cadillac than petitioner) fired the gun multiple times, killing Lewis. R1102, 1144, 1201-02; Pet. Br. 27.⁵

During closing argument, the prosecutor asserted that Harmon was the shooter and that petitioner was legally responsible for Harmon’s conduct under an accountability theory because petitioner passed back the gun after stating his willingness to do the shooting himself. R1885-87, 1891-92. The prosecutor also explained that petitioner and his friends had targeted the rival gang members and that regardless of whether they intended to shoot Keeko or Lewis, petitioner was guilty under the doctrine of “transfer of intent.” R1908; Pet. Br. 27.

Following deliberations, petitioner was convicted of first degree murder and sentenced to 35 years in prison. C961-62, 964; R1985, 2122-23; Pet. Br. 25.

⁵ The October 18, 2007 sequence of events was established through testimony of the police officer who interviewed petitioner, R1111, 1117, 1130, as confirmed by petitioner’s videotaped and transcribed inculpatory statement that was presented to the jury. State Exhs. 71 & 73 (transcripts of videos). Petitioner testified at trial that he was in the car that night, but insisted that he was not a gang member, he lacked any intent to shoot anyone, and Craigen was the shooter. R1784, 1787, 1793-94, 1798.

On direct appeal, the appellate court rejected petitioner's claim that the State failed to prove beyond a reasonable doubt that he was accountable for Lewis's murder. C1036-58.

Postconviction Proceedings

Petitioner's subsequent postconviction petition included a claim that Ritacca labored under a per se conflict of interest, or at least an actual conflict of interest, due to Ritacca's prior representation of Keeko, the intended murder victim. C1074-80. The petition also alleged a conflict due to Ritacca's professional ties to other members of the Moes, including Keeko's two brothers. C1080-82. During a hearing on the State's motion to dismiss, the trial court dismissed the per se conflict claim upon finding that Keeko was not the victim of the murder for which petitioner was charged and convicted. C1674; R2212-14, 2217, 2226. The trial court advanced to a third-stage hearing petitioner's additional claims alleging that counsel had an actual conflict of interest and provided ineffective assistance. C1674; R2224, 2226. Notwithstanding its dismissal of petitioner's per se conflict claim, the trial court stated prior to the start of the third-stage evidentiary hearing that petitioner could still attempt to prove a per se conflict of interest. R2334-35.

At the evidentiary hearing, Ritacca testified that he entered his appearance on behalf of petitioner on July 23, 2009. R2504-05, 2558, 2565; Pet. Br. 27. Ritacca testified that he represented Keeko at the time of the shooting in this case and that the representation ended on March 14, 2008,

i.e., before he entered his appearance in this case. R2512, 2565; Pet. Br. 27. Documents attached to the postconviction petition provided additional detail, reflecting that Ritacca represented Keeko in cases involving charges of driving while license revoked (between July 18, 2007 and March 14, 2008) and cannabis possession (between June 10, 2007 and November 28, 2007). C1078, 1426-32.

Ritacca further testified that he could not remember whether he informed petitioner or the prosecutors of his prior representation of Keeko; Ritacca confirmed that he did not so inform the trial court. R2570-71; Pet. Br. 27. Petitioner testified that Ritacca did not tell him that he had previously represented Keeko. R2600-01; *see also* R2624.

Following the evidentiary hearing, the trial court denied the petition. C1777-79; R2752-92. The court held that Ritacca did not labor under a per se conflict of interest due to his prior representation of Keeko. C1777; R2758-59, 2763. The trial court accepted the premise that Keeko was the intended, rather than the actual, victim of the shooting. R2761-62. However, the court also noted that petitioner's per se conflict argument was "novel," explaining that no court had recognized a per se conflict in the transferred-intent situation presented by this case. R2762. The court also declined to find an actual conflict arising from the prior representation of Keeko or a conflict due to Ritacca's professional ties to other Moes, including Keeko's two brothers. R2763-68.

Postconviction Appeal

The appellate court unanimously affirmed. Pet. Br. 26, 31. First, the court rejected petitioner’s argument that prior representation of an intended victim qualifies as a per se conflict under established law. *Id.* at 29-30. Second, the court rejected petitioner’s invitation to recognize a new category of per se conflicts, finding that only this Court should do so. *Id.* at 30-31.

STANDARD OF REVIEW

Whether a per se conflict of interest exists is ultimately a legal question subject to de novo review. *People v. Fields*, 2012 IL 112438, ¶ 19. Underlying factual findings and credibility determinations, made after a third-stage postconviction evidentiary hearing, are reviewed for manifest error, *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998), meaning error that is “clearly evident, plain, and indisputable,” *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (internal quotation marks omitted). The de novo standard applies here because the parties do not dispute any such factual finding underlying the ultimate conflict issue.

ARGUMENT

I. Relevant Background Principles

Petitioner was found guilty of first degree murder after the prosecution argued for the application of two doctrines: transferred intent and accountability. Under Illinois’s murder statute, the requisite mens rea may be directed towards either the decedent or another person, a codification of

the doctrine of transferred intent. *People v. Shum*, 117 Ill. 2d 317, 360 (1987) (citing Ill. Rev. Stat. 1981, ch. 38, par. 9-1(a), now codified at 720 ILCS 5/9-1(a) (2020)). And a person is legally accountable for another person's conduct when, before or during the commission of the offense, and with the intent to facilitate its commission, a person "solicits, aids, abets, agrees or attempts to aid" the other person in the planning or commission of the offense. *People v. Rodriguez*, 229 Ill. 2d 285, 288-89 (2008) (citing 720 ILCS 5/5-2(c) (2006)).

The State is not required, in the charging instrument, to expressly reference its intent to rely on the doctrines of transferred intent or accountability, so long as these theories are supported by evidence at trial. *People v. Ceja*, 204 Ill. 2d 332, 361 (2003) (accountability); *People v. Hill*, 276 Ill. App. 3d 683, 691 (1st Dist. 1995) (transferred intent); *People v. Franklin*, 225 Ill. App. 3d 948, 949 (3d Dist. 1992) (same).

Here, the State's theory of the case was that petitioner, who said "I'll do it" and then handed the gun to the back seat passengers, was legally accountable for Harmon's conduct: shooting multiple times at the Cadillac, which caused Lewis's death. R1885-87, 1891-92. The State further theorized that, under the doctrine of transferred intent, a guilty verdict was proper regardless of whether petitioner and his friends intended to target Keeko specifically or the Moes (including Lewis) more generally. R1908; Pet. Br. 27.

II. Trial Counsel's Prior Representation of Keeko Williams Did Not Create a Per Se Conflict of Interest.

A criminal defendant's Sixth Amendment right to effective assistance of counsel encompasses the right to conflict-free counsel, meaning counsel whose allegiance is not diluted by conflicting interests or inconsistent obligations. *People v. Peterson*, 2017 IL 120331, ¶ 102. Illinois law recognizes two types of conflicts: per se and actual. *Id.* A per se conflict is one in which facts about counsel's status, in and of themselves, create a disabling conflict. *Id.*, ¶ 103 (citing *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988); *Fields*, 2012 IL 112438, ¶ 17). Unless a defendant has waived his right to conflict-free counsel, a per se conflict requires automatic reversal – that is, the court must reverse the defendant's conviction even absent a showing that the conflict influenced counsel's representation. *Id.*, ¶ 104. In contrast, an actual conflict of interest does not require reversal unless the defendant demonstrates that the conflict adversely affected counsel's representation. *Id.*, ¶ 105.

As relevant here, “long-standing precedent” from this Court recognizes that a per se conflict exists in three situations: where defense counsel (1) “has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution”; (2) “contemporaneously represents a prosecution witness”; or (3) “was a former prosecutor who had been personally involved” with defendant's prosecution. *Id.*, ¶ 103 (internal

quotation marks and citation omitted). Petitioner’s claim here concerns only the first of these categories.

This Court should reject petitioner’s assertion that his trial counsel operated under a per se conflict of interest given his prior representation of Keeko, for Keeko was not an actual victim of the charged offense. No case holds that prior representation of an intended victim creates a per se conflict, and this Court should not expand the per se conflict categories to include this situation.⁶

A. The established categories of per se conflicts include prior representation of actual victims of charged crimes, but not intended victims.

Petitioner asserts that his counsel had a per se conflict under the first category, *i.e.*, where counsel has a “prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution.” *Peterson*, 2017 IL 120331, ¶ 104. However, no court has ever recognized that prior representation of an intended victim — who is not an actual victim of any charged crime — creates a per se conflict, and this Court should decline to embrace this novel argument.

⁶ Petitioner has forfeited any claim that his counsel was encumbered by an actual conflict of interest due to counsel’s prior representation of Keeko. After raising it in his postconviction petition, C1076, he failed to pursue it in his initial postconviction appeal or in his opening brief before this Court, *see Peterson*, 2017 IL 120331, ¶ 115; *see also People v. Thomas*, 116 Ill. 2d 290, 303-04 (1987) (appellant forfeits issue raised for first time in reply brief). For the same reason, petitioner has forfeited any claim that he is entitled to relief in light of counsel’s association with Keeko’s brothers or the Moes more generally. *See* Pet. Br.; Pet. App. Ct. Br.

Petitioner correctly recites that in cases such as *Hernandez*, this Court described the first category of per se conflicts as including cases in which counsel had a prior or contemporaneous association with “the victim.” Pet. Br. 15-16 (citing *People v. Hernandez*, 231 Ill. 2d 134, 143-44 (2008)). But by insisting that this Court “must” reverse petitioner’s conviction under *Hernandez, id.*, petitioner overlooks an important — and determinative — factual distinction between that case and this one: here, Keeko was not a victim of the charged offense.

Hernandez was charged with solicitation of murder for hire after he hired an informant to kill Jaime Cepeda. *Hernandez*, 231 Ill. 2d at 138. Hernandez retained attorney John DeLeon to represent him, unaware that Cepeda had retained DeLeon years earlier and that the representation was ongoing at the time of the crime (but had effectively ended before Hernandez’s trial). *Id.* at 138-39. Cepeda was listed as a potential prosecution witness, though the State assured DeLeon that Cepeda would not testify. *Id.* at 139, 148. While DeLeon and the prosecutor were aware of DeLeon’s representation of Cepeda, Hernandez and the trial court were not. *Id.* at 139.

Prior precedent dictated that Cepeda’s status as a potential witness did not create a per se conflict of interest because Cepeda was never called to testify. *Id.* at 148-49 (citing *People v. Morales*, 209 Ill. 2d 340, 344-46 (2004)).

But counsel's prior representation of Cepeda — the actual victim — resulted in a per se conflict. *Id.* at 149-52.

Here, petitioner attempts to analogize his case to *Hernandez* because in both cases, counsel had a prior professional relationship with the intended murder victim. Pet. Br. 18-19. But the cases are distinguishable. In *Hernandez*, Cepeda was the *actual* victim of the charged offense, solicitation of murder for hire, regardless of the fact that Cepeda was not killed. *See* 720 ILCS 5/8-1.2(a) (solicitation of murder for hire does not require that target be killed). Here, in contrast, Lewis (not Keeko) was the *actual* victim of the charged offense, first degree murder, because Lewis (not Keeko) died. *See* 720 ILCS 5/9-1(a) (first degree murder requires that an individual be killed); *see also* Pet. Br. 28-30 (appellate court rejecting per se conflict claim after distinguishing *Hernandez*).

Importantly, petitioner was never charged with attempted murder of Keeko, a charge for which Keeko would be considered the *actual* victim; Keeko was not mentioned in the charging instrument at all. To the extent that petitioner and his friends intended to shoot Keeko when firing shots at the Cadillac, that intent transferred to Lewis when Lewis instead was fatally shot. 720 ILCS 5/9-1(a)(1) & (2) (2007); *Shum*, 117 Ill. 2d at 360. Thus, unlike Cepeda in *Hernandez*, Keeko was not the victim of a charged offense. R2212-14 (trial court rejecting per se conflict claim, noting that Keeko was not victim in that petitioner not charged with attempted murder of Keeko).

As the trial court acknowledged in rejecting petitioner's claim, no court has embraced his "novel" argument that a per se conflict arises from counsel's prior representation of an intended victim who was not the actual victim of a charged crime. R2762; *see also* R2681-82. Indeed, petitioner cites no case — and respondent is aware of none — in which a per se conflict was held to have existed in these circumstances. Accordingly, this Court should hold that petitioner's case does not fall within the first category of per se conflicts of interest.

B. This Court should not announce a new category of per se conflicts for prior representation of an intended victim who was not the actual victim of a charged crime.

Nor should this Court expand the list of established per se conflicts of interest to encompass Ritacca's prior representation of Keeko, who might have been an intended victim but was not the actual victim of a charged crime. The lone justification that petitioner offers to support such an expansion has already been rejected by this Court. And there are good reasons to reject the proposed expansion, both of which are illustrated by this case: it can be difficult to identify the intended victim(s) in transferred-intent cases, and such an expansion would be inappropriately overbroad in cases where offenders target groups instead of individuals.

This Court has recognized two justifications for the per se conflict rule. First, counsel's knowledge that a person (or entity) with whom counsel has a professional association might benefit from an unfavorable verdict against

the defendant “might subliminally affect counsel’s performance in ways that are difficult to detect and demonstrate.” *Fields*, 2012 IL 112438, ¶ 40 (internal quotation marks and brackets omitted). Second, the per se conflict rule avoids the risk that there might be some appearance of impropriety creating the “possibility that counsel’s conflict would subject him to later charges that his representation was not completely faithful.” *Id.* (internal quotation marks omitted).

Petitioner’s argument in favor of expanding the established per se conflict categories rests on an assertion that these justifications apply with equal force to cases in which counsel previously represented the intended victim in a transferred-intent case. Pet. Br. 19-22. But this Court in *Fields* explained that the rule’s justifications neither provide a fourth category of per se conflicts nor an alternative basis for recognizing a new category of per se conflicts. 2012 IL 112438, ¶¶ 40-41. In other words, petitioner’s reliance on the rule’s justifications is insufficient to warrant expansion of the established categories of per se conflicts.

Moreover, even if the three existing categories do not represent an exhaustive list of per se conflicts, *see* Pet. Br. 21-22, expansion of the per se conflict rule to the facts of this case would be unworkable given the difficulty of identifying the intended victim(s), especially early in the proceedings when the determination whether a conflict exists needs to be made so that the defendant can decide whether to waive the conflict. Significantly, the State is

not required to allege a transferred-intent theory in the charging instrument, *see, e.g., Hill*, 276 Ill. App. 3d at 691; *Franklin*, 225 Ill. App. 3d at 949, and evidence of transferred intent may not emerge until trial, a concern that the trial court voiced in explaining the policy reason for declining to find a per se conflict here. R2762-63.

Moreover, the identity of the intended victim may *never* be clearly revealed, even at trial. Precedent reflects that transferred-intent jury instructions are often deemed appropriate — and resulting convictions are upheld — precisely because the identity of the intended victim is unclear. *See, e.g., People v. Shelton*, 293 Ill. App. 3d 747, 749-50, 751-53 (1st Dist. 1997) (holding that jury was properly instructed on transferred intent because it was “impossible” to determine whether shooters targeted the victims, a third person, or any and all rival gang members).

Indeed, petitioner’s case, like *Shelton*, illustrates this problem. In opening statement, the prosecutor explained that petitioner’s group targeted the occupants of the Cadillac, saying “that’s *them*,” upon recognizing it as a vehicle driven by the rival Moes. R1282 (emphasis added). During his videotaped statement to police, which was played for the jury, R1148-49, petitioner explained that the group went after the Cadillac because they associated it with the Moes, rather than emphasizing a specific animosity towards Keeko. State Ex. 71 at 14-17; *see also* R1145. Petitioner also said that he recognized Lewis as a person associated with the Moes. R1144.

Similarly, during the jury instruction conference, the prosecutor explained that this case involved transferred intent because Lewis was “not necessarily” the target. R1862. And, during closing argument, the prosecutor argued that *both* Keeko and the Moes were the targets, repeatedly referring to the fact that the criminal act had been “to shoot into the carload of people.” R1892, 1893; *see also* R1895 (intended target: the Moes); R1896 (intended target: the Moes and Keeko); R1899-1900 (motive for shooting was fact that “we got jumped” by “those guys” and longstanding gang feud). Likewise, in rebuttal closing argument, the prosecutor asserted that the group intended to shoot Keeko and anyone else in the car. R1939; *see also* R1908 (stating that petitioner’s group was after the Moes, either Lewis or Keeko, “it doesn’t matter”). And during the postconviction proceedings, the parties stipulated that the shooting at Keeko’s vehicle, killing Lewis, was “part of a violent gang feud that had been ongoing for several years” between the Moes and the Foes. C1769; R2665-66.

Thus, the prosecution presented evidence and argument that petitioner’s group fired at the Cadillac with the intent to shoot Keeko or any member of the Moes, including Lewis. This comprehensive summary of the evidence and argument rebuts petitioner’s assertion that the State’s trial theory was instead that Keeko alone was the intended victim. Pet. Br. 16; *see also* C1074; R2677. To be sure, after the postconviction evidentiary hearing, the trial court stated that Keeko was the intended target of the shooting.

R2758-59. But the court was not asked to determine whether Keeko alone was the intended victim. Rather, the court's statement likely merely reflected that it was willing, for argument's sake, to accept the premise of petitioner's claim — that Ritacca previously represented the intended victim, Keeko — before holding that the situation did not constitute a per se conflict.⁷ *Id.*

In any event, this case demonstrates that the intended victim is not easily determined in many transferred-intent cases. And this Court has emphasized that the per se rule has the advantage of avoiding the case-by-case factual determinations that would otherwise be required when assessing whether a conflict of interest exists. *Hernandez*, 231 Ill. 2d at 147. The difficulties associated with identifying the intended victim in transferred-intent cases thus make these cases a poor fit for the per se conflicts rule.

Relatedly, such difficulties worsen when the intended “victim” is a large group of people, such as a rival gang. This case illustrates the problem. Petitioner also argued in the trial court that Ritacca's legal work for other members of the Moes — none of whom were present on the night of the shooting — also indicated that Ritacca had loyalty towards the Moes that could have influenced his representation of petitioner, especially given that

⁷ Alternatively, if this Court construes the trial court's statement as a factual finding that Keeko alone was the intended victim here, such a finding would be manifestly erroneous — meaning error that was “clearly evident, plain, and indisputable,” *see Ortiz*, 235 Ill. 2d at 333 (internal quotation marks omitted) — in light of this summary of trial evidence and argument. *See Coleman*, 183 Ill. 2d at 333. But the key point is that the identity of the intended victim is reasonably subject to dispute.

this shooting was motivated by the ongoing gang feud. C1080-82; R2677-78, 2682. But it would be all the more difficult for courts and defense counsel to timely identify which, or how many, professional relationships of counsel with purported members of the targeted group, the rival gang, could give rise to a per se conflict if permitted to potentially justify a finding of a per se conflict.

In addition to posing difficult factual questions, adopting petitioner's proposed new category of per se conflicts of interest would also have the effect of significantly expanding the likelihood of a per se conflict. Such similar overbreadth would likely recur, for example, in other gang-related shooting cases. *See, e.g., Shelton*, 293 Ill. App. 3d at 749-50, 751-53. In short, in cases in which crimes target groups, the term "intended victim" applies to many people, with no clear limiting principle to prevent potential application to a prohibitively large number of people.

Such overbreadth is concerning because a per se conflict requires automatic reversal; the defendant need not show that the conflict influenced counsel's performance. *Peterson*, 2017 IL 120331, ¶¶ 104-05. Indeed, in other contexts, courts extend a remedy of automatic reversal with restraint. *Cf. People v. Rivera*, 227 Ill. 2d 1, 20 (2007) (quoting *Washington v. Recuenco*, 548 U.S. 212 (2006)) (noting that "[o]nly in rare cases" has Court found structural error requiring automatic reversal).

In fact, this Court expressed concerns about overbreadth when declining to expand another of the per se conflict categories. The Court held that a per se conflict exists if defense counsel was formerly a prosecutor *personally involved* in the defendant's case. *Spreitzer*, 123 Ill. 2d at 19-20. That counsel was merely a prosecutor at the time that others in the prosecutor's office decided to charge defendant did not create a per se conflict; in fact, the Court rejected this broader rule as "ludicrous" because it threatened to discourage public defender offices from hiring competent former prosecutors, especially in smaller counties where there are a limited number of attorneys practicing criminal law. *Id.* Similarly, here, criminal defendants, especially those charged in smaller counties, might struggle to find experienced local counsel who have not previously represented a member of a rival gang. Relatedly, where the intended victims are difficult to identify, counsel themselves will likely struggle to determine whether they have a per se conflict.

Petitioner's argument that this Court should expand the categories of per se conflicts to include Ritacca's representation of Keeko also is inconsistent with the Court's precedent regarding prosecution witnesses. This Court has declined to extend the per se conflict rule to include counsel's (1) contemporaneous representation of a *potential* prosecution witness who does not testify at trial, *Morales*, 209 Ill. 2d at 345-46; or (2) *prior* representation of a prosecution witness, *Fields*, 2012 IL 112438, ¶ 20, 40-41.

Here, Ritacca previously represented Keeko, a potential prosecution witness who did not testify at trial. Thus, the Court should find that petitioner's per se conflict argument is foreclosed by *Morales* and *Fields*. Indeed, in some transferred-intent cases, the intended victim – if that person can be identified – may testify as an eyewitness for the prosecution. Thus, the established per se conflict categories already encompass many transferred-intent cases; petitioner's case is simply not one of them.

Finally, it bears mention that even if a criminal defendant cannot establish a per se conflict, he is not without recourse. He can still pursue either a claim that counsel was working under an actual conflict of interest or a general ineffective assistance claim based on a particular aspect of counsel's representation. To properly cabin the per se rule — and its requirement of automatic reversal — and for ease of application, this Court should reject petitioner's suggestion that the per se rule be expanded to include prior representation of any intended victim in a transferred-intent case.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully ask this Court to affirm the appellate court's judgment.

February 11, 2020

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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 containing 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(a) is 20 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 11, 2020, the **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

Lucas Walker
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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General