No. 126187

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Illinois Appellate Court, Fourth District, No. 4-19-0333
Plaintiff-Appellant,	)	There on Appeal from the Circuit Court of the Sixth Judicial Circuit,
v.	)	Moultrie County, Illinois,
	)	No. 15 CF 6
MICHAEL S. YOST,	)	The Honorable Hugh Finson,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

ARGUMENT

I. Under *Hillenbrand*, No Per Se Conflict Existed Because Counsel's Prior Representation of the Victim Concluded Long Before Defendant's Prosecution.

The People's opening brief explained that under *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), defendant's appointed attorney (Public Defender Bradford Rau) had no per se conflict of interest because he did not contemporaneously represent defendant's murder victim, Sheri Randall. Peo. Br. 13-16.[1] In *Hillenbrand*, defense counsel had "regularly represented" the victim's parents (June and Charles Pence) for about five years, but he had "concluded all of his services prior to representing" the defendant; counsel had also represented the victim (Patricia Pence) on tax matters in connection with a restaurant she owned with the defendant, "but that representation was [also] concluded long before the murders." *Id.* at 545. "Under the circumstances," the Court concluded, counsel "did not have a contemporaneous professional commitment to the Pences that created a conflict of interest in his representation of the defendant." *Id.*; *see also id.* at 544 (to establish per se conflict, defendant must show that "the attorney has a contemporaneous conflicting professional commitment to another").

Unlike in *Hillenbrand*, in *People v. Hernandez*, 231 Ill. 2d 134 (2008), this Court found a per se conflict due to counsel's contemporaneous

[1] "Peo. Br." and "Def. Br." denote the People's opening brief and defendant's brief, respectively.

representation of the defendant's victim. Although the victim had fled the country before trial, counsel remained the victim's attorney, and this Court rejected the People's argument that such contemporaneous representation must also be "active." *Id.* at 151 (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").

To be sure, in *Hernandez,* the Court maintained that it had "clearly stated in the past that a[n attorney's] prior relationship [with the victim] falls within [the per se] category," *id.* at 151, but as explained in the People's opening brief, Peo. Br. 14-15, none of the cases cited in support of that assertion involved a conflict based on defense counsel's prior representation of a victim. In fact, two of the cited cases — *People v. Morales* and *People v. Moore* — reiterated *Hillenbrand*'s contemporaneous representation rule. In *People v. Morales*, this Court noted that it has "found a per se conflict when defense counsel had a contemporaneous relationship with the victim, the prosecution, or an entity assisting the prosecution." 209 Ill. 2d 340, 345-46 (2004). And, in *People v. Moore*, this Court stated that "[t]o obtain relief based on an alleged per se conflict, a defendant must show only that counsel had a contemporaneous conflicting professional commitment to another." 189 Ill. 2d 521, 530 (2000) (citing *Hillenbrand* and *People v. Stoval*, 40 Ill. 2d 109, 113 (1968)). Thus, *Hernandez*'s statement about prior representation of a

victim was dicta, as it was unnecessary to the Court's disposition of the case. *See People v. Williams*, 204 Ill. 2d 191, 206 (2003) ("Obiter dicta are comments in a judicial opinion that are unnecessary to the disposition of the case.").

Neither *Hernandez* nor later decisions of this Court stating that a per se conflict exists "where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution" — such as *People v. Fields*, 2012 IL 112438, ¶ 18, and *People v. Green*, 2020 IL 125005, ¶ 24 — silently overruled *Hillenbrand*, for none of those cases involved prior representation, and "the precedential scope of a decision is limited to the facts before the court," *People v. Flatt*, 82 Ill. 2d 250, 261 (1980). Thus, for example, in *People v. Palmer*, 104 Ill. 2d 340 (1984), this Court applied this rule to reject the defendant's argument that conflicting dicta in a later decision had impliedly overruled two prior, dispositive decisions. *See id.* at 345-48 (because "the precedential scope of a decision is limited to the facts before the court," where an issue was not presented, "any comment the court made regarding that issue is properly characterized as dicta, which is not binding authority within the rule of stare decisis").

The People's opening brief further explained that *Hillenbrand* was correctly decided because it should be presumed that counsel has a "tie to a person or entity . . . which would benefit from an unfavorable verdict for the

defendant," *Spreitzer*, 123 Ill. 2d 1, 16 (1988), and that "might subliminally affect counsel's performance" or create an "appearance of impropriety," *Fields*, 2012 IL 112438, ¶ 40, only when counsel's representation of the victim is contemporaneous. Peo. Br. 15. As the facts of this case illustrate, counsel often does not even recall the prior representation, much less feel any sense of loyalty, duty, or obligation to a former client.

Accordingly, this Court should follow *Hillenbrand*'s rule — that to establish a per se conflict, defendant must show that "the attorney has a contemporaneous conflicting professional commitment to another," 121 Ill. 2d 544 — and hold that Rau did not have a per se conflict of interest.

Defendant's contrary arguments are meritless. First, *Hernandez* does not stand for the proposition that "defense counsel's prior representation of a victim of the defendant's offense is a *per se* conflict of interest," Def. Br. 7, because, as discussed, counsel in *Hernandez contemporaneously* represented the defendant's victim. Nor can such a rule be cobbled together from *People v. Stoval*, 40 Ill. 2d 109 (1968), and *People v. Coslet*, 67 Ill. 2d 127 (1977). *See* Def. Br. 10. In *Stoval*, the defendant robbed a jewelry store; defense counsel and his law firm had represented "both the jewelry corporation (the store which had been burglarized) and Navarro (the owner)," and the law firm "*continue[d] to represent both the jewelry store and Navarro*." 40 Ill. 2d at 112 (emphasis added). In *Coslet*, counsel *simultaneously* represented the defendant in her trial for voluntary manslaughter of her husband and served

as the administrator of the husband's estate; "the conflict raised the possibility that the estate would be enriched if the defendant was convicted." 67 Ill. 2d at 134. Thus, both *Stoval* and *Coslet* are contemporaneous representation cases, as this Court recognized in *Hernandez*. *Hernandez*, 231 Ill. 2d at 149-50 (discussing circumstances of *Stoval* and noting that a "*Stoval* conflict" had been found in *Coslet*, where counsel simultaneously represented the defendant and her victim).

Nor do *People v. Lewis*, 88 Ill. 2d 429 (1981), or *People v. Free*, 112 Ill. 2d 154 (1986), stand for the proposition that prior representation of a victim presents a per se conflict of interest. *See* Def. Br. 10-11. In *Lewis*, the defendant alleged that her attorney's work-based acquaintance with a former probation officer — her murder victim — presented a conflict of interest. 88 Ill. 2d at 436. This Court merely held that (1) the defendant had waived any conflict, *id.*, and (2) the per se conflict rule would not be extended to work-related acquaintances, *id.* at 441. Similarly, *Free* declined to extend the per se rule to circumstances in which counsel never had a professional association with the victim. 112 Ill. 2d at 168. There, the public defender "had represented the mother-in-law of the murder victim . . . in an earlier, unspecified conservatorship proceeding" and "had met the victim 'four to six times' when she drove her mother-in-law to [his] office." *Id.* at 166.

Defendant is also incorrect that "the issue of counsel's prior representation of the victim was not before this Court in *Hillenbrand*." Def.

Br. 16. As discussed, in *Hillenbrand*, the evidence showed that counsel had "regularly represented" the victim's parents for five years but had "concluded all of his services prior to representing" the defendant; counsel had also represented the victim on tax matters in connection with a restaurant she owned with the defendant, "but that representation was concluded long before the murders." *Id.* at 545. The Court plainly considered counsel's prior representation of victim Patricia Pence in concluding that counsel did not have a per se conflict. *Id.* ("Under the circumstances," counsel "did not have a contemporaneous professional commitment to the Pences that created a conflict of interest in his representation of the defendant.").

For all of these reasons, defendant is wrong to conclude that under "this Court's per se conflict-of-interest jurisprudence, and *Hernandez* specifically," this Court must reverse defendant's conviction and remand for a new trial. Def. Br. 17. Rather, under *Hillenbrand*, counsel's prior representation of Randall presented no per se conflict.

II. If This Court Overrules *Hillenbrand*, It Should Narrow the Per Se Conflict Rule to Exclude a Defense Attorney's Prior Representation of the Victim When (1) the Victim Is Deceased, and (2) the Prior Representation Was by Appointment.

The People's opening brief further explained that if the Court were to overrule *Hillenbrand* and hold that an attorney's prior representation of a victim constitutes a per se conflict of interest, then it should exclude from this category of per se conflicts a defense attorney's prior representation of the victim when (1) the victim is deceased, and (2) the prior representation was

by appointment, for the rationales for the per se conflict rule are not meaningfully advanced in these circumstances. Peo. Br. 16-20.

In those cases where this Court has found a per se conflict, "certain facts about the defense attorney's status were held to engender, by themselves, a disabling conflict." *Green*, 2020 IL 125005, ¶ 22. In those cases, defense counsel 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.'" *Id.* (quoting *Spreitzer*, 123 Ill. 2d at 16).

But extending the per se conflict rule to cases where appointed counsel previously represented the defendant's deceased victim advances neither of the twin rationales for the per se conflict rule. First, when the defendant's victim is deceased, it should not be presumed that counsel has a professional association with a person who might benefit from an unfavorable verdict against the defendant. *See Fields*, 2020 IL 112438, ¶ 40 (noting that counsel's knowledge that a person 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"); SecR1114 (Rau, testifying that although he did not recall his prior representation of Randall, even if he had, he would not have felt any continuing obligation or duty to a deceased former client).

Second, Rau had no financial stake in his prior representation of Randall, as he was appointed to represent her as Moultrie County Public Defender. Thus, no financial interest in that prior representation could subject him to later charges that his representation of defendant was not completely faithful. *See Fields*, 2020 IL 112438, ¶ 40 (noting that per se conflict rule avoids risk "that counsel's conflict would subject him to later charges that his representation was not completely faithful").

Moreover, the People's opening brief explained that excluding from the per se conflict rule deceased victims who had been clients due to court appointment would not complicate application of the per se conflict rule. Peo. Br. 17-18. The proposed rule, which turns on two readily verifiable facts, remains "straightforward and simple." *Hernandez*, 231 Ill. 2d at 147. If (1) the prior representation was by appointment, and (2) the prior client is deceased, then the per se conflict rule would not apply.

Further, application of the per se conflict rule results in a harsh consequence — automatic reversal — that is typically reserved for the rare case involving structural error. Here, the rule imposes a disproportionate sanction for counsel's failure to recall that he had once briefly represented defendant's victim years earlier. Peo. Br. 18. And strong policy considerations favor limiting the per se rule. Application of the per se rule would result in a new trial even though defendant has not challenged any aspect of counsel's representation and the record reveals that counsel

provided zealous advocacy. And a retrial would affect not only the parties and their families, but the entire community.

The People's brief further noted that the per se conflict rule has disproportionate effect in smaller counties. Peo. Br. 19. As illustrated by the facts of this case, a Public Defender may remain in office for many years, creating the potential for a great number of conflicts due to prior and concurrent representations of defendants, victims, and witnesses. For defendants unwilling to waive a resulting conflict, courts must secure conflict-free counsel who are capable of providing representation on par with the Public Defender. Thus, applying the per se rule here, where its justifications have little or no application and the harms extend beyond the parties to the community at large, is unjustified.

Moreover, even in the absence of the presumption established by the per se rule, in the unlikely event that a defendant could show that counsel's prior "by-appointment" representation of his deceased victim had some prejudicial effect under the circumstances of his particular case, he would not be without a remedy: he could pursue a claim that counsel was working under an actual conflict of interest or an ineffective assistance claim based on some deficiency in counsel's representation. *See Green*, 2020 IL 125005, ¶ 38.

Defendant's contention that the People's proposed rule is "untenable" because it applies "even if Rau had represented Randall up until the moment

Mr. Yost allegedly caused her death," Def. Br. 20, misstates the People's argument, which is limited to representation that had ceased prior to the victim's death. *See* Peo. Br. 18 (arguing that if the prior representation was (1) by appointment, and (2) if the prior client is deceased, then the per se conflict rule would not apply).

Defendant is also mistaken that *Hernandez* somehow disapproved the People's proposed rule. Def. Br. 20 (contending that *Hernandez* "rejected a similar argument that the existence of a per se conflict should be dependent on whether counsel declares a continuing obligation to a prior client"). As discussed, *Hernandez* found a per se conflict because defense counsel contemporaneously represented the defendant's victim. 231 Ill. 2d at 151 ("per se conflict rule applies whenever an attorney represents a defendant and the alleged victim of the defendant's crime"). Regardless of whether the client had fled the country, counsel contemporaneously represented the defendant, which distinguishes *Hernandez* from the present case. *See* Def. Br. 22 (complaining that the People "fail[] to explain how a deceased prior client is in any manner different than a client who has fled the country, as was the case in *Hernandez*").

Defendant devotes much of his brief to disputing the People's commonsense argument that application of the per se conflict rule in these circumstances does not advance the purposes of the rule because Rau had no financial stake in his prior representation of Randall (as he was appointed to

represent her in his role as Moultrie County Public Defender), and, as a result, there is no possibility that any financial interest in that prior representation would subject him to later charges that his representation of defendant was not completely faithful. To begin, it is not true, as defendant appears to suggest, *see* Def. Br. 23, that the Court may not consider the fact that Rau had no financial stake in the prior representation. The mere fact that the per se conflict rule is not based "solely on financial gain," *id.* (citing *Coslet*, 67 Ill. 2d at 133), does not mean that such evidence is irrelevant to the per se conflict analysis. Indeed, in the very next paragraph, defendant concedes that "this Court *has* considered an attorney's 'pecuniary interest and desire for possible future business'" in examining whether a per se conflict exists. *Id.* (quoting *Hillenbrand*, 121 Ill. 2d at 546) (emphasis added). And defendant misapprehends the People's argument when he claims that the People equate the absence of a financial interest to an absence of duty of loyalty to a client. *Id.* The People simply note that because counsel had no financial stake in the prior representation, no one could later argue that counsel's financial interest in that prior representation affected his representation of defendant.

Nor do the People argue that "where counsel is previously appointed to represent the victim of the defendant's offense, counsel cannot be subject to later charges by the defendant regarding the effectiveness of his representation," or that "the defendant may only challenge counsel's

representation where counsel had a financial interest in the victim." Def. Br. 24. To the contrary, even if a defendant cannot establish that his counsel had a per se conflict of interest, he always has a potential remedy in a claim that his counsel's representation was ineffective or that counsel had an actual conflict.

Defendant wrongly faults the People for considering the practical consequences of applying the per se rule here. Def. Br. 25-26. Courts routinely consider the practical effect of a proposed rule — particularly one that, like the per se conflict rule here, is not constitutionally required — in deciding whether to adopt it, including in *Lewis*, cited by defendant. Recall that in *Lewis*, defendant alleged that her attorney's work-based acquaintance with a victim presented a per se conflict of interest. 88 Ill. 2d at 436. In declining to extend the per se conflict rule to work-related acquaintances, *id.* at 441, this Court considered the consequences of the defendant's proposed rule, including that

> Extension of the per se rule to work-related acquaintances might also handicap efforts to provide adequate counsel for defendants, particularly in the smaller counties of the State. [Citation] In such counties all attorneys, or at least all attorneys having any substantial criminal practices, would likely be acquainted with local law-enforcement personnel and locally assigned State law-enforcement personnel. Accordingly, under the rule defendant urges us to adopt, it might well be the case that the better qualified local attorneys would be precluded from representing a defendant in a case similar to the present one. Defendants, or in the case of indigent defendants, society, might bear the added expense incident to distant counsel. Such defendants would be regularly deprived of advantages, including knowledge of local

> rules, procedures, and personnel, which local counsel might provide.

Id. at 441 (internal citation omitted). Similarly, in *Spreitzer*, 123 Ill. 2d at 19-20, this Court rejected a proposal to extend the per se conflict rule because, among other things, it "would have the undesirable effect of discouraging public defender's offices from hiring competent former prosecutors," and "[p]articularly in small counties where the entire criminal bar is itself not very large, a per se rule against assignment of an entire cohort of cases to a public defender who happens to employ a former prosecutor would be an administrative and financial nightmare."

Defendant's argument that "where a per se conflict exists, and the defendant did not waive said conflict, it is the defendant's fundamental constitutional rights at stake," Def. Br. 26, overlooks that the per se conflict rule was "invented by [this] Court in *People v. Coslet*" and "does not appear in the United States Supreme Court case law." *Spreitzer*, 123 Ill. 2d at 14; *see also Green*, 2020 WL 2562936, ¶ 20 (noting that "[t]here are two categories of conflict of interest: per se and actual."). Accordingly, federal courts have held that a per se conflict claim under Illinois law is not a claim of federal constitutional dimension. *E.g.*, *Reynolds v. Rednour*, No. 11 C 6809, 2012 WL 1192164, at *3 (N.D. Ill. Apr. 10, 2012); *United States ex rel. Williams v. Ott*, No. 07 C 1815, 2009 WL 249365, at *9 (N.D. Ill. Feb. 2, 2009) (collecting cases).

Finally, defendant is equally wrong to think that excluding from the per se conflict rule cases in which a defense attorney previously represented the deceased victim and the prior representation was by appointment, "trial courts will be required to decide at what point counsel's representation of the victim was no longer prejudicial to the defendant," Def. Br. 26, for it is firmly established that a defendant who establishes a per se conflict need not show prejudice, *Spreitzer*, 123 Ill. 2d at 15. The People have never argued that this defendant (or any other) must show prejudice to demonstrate a per se conflict, only that the above-described circumstances should be excluded from the per se conflict rule.

In sum, under *Hillenbrand*, defendant's appointed attorney had no per se conflict of interest because he did not contemporaneously represent defendant's murder victim. And if the Court were to overrule *Hillenbrand* and hold that an attorney's prior representation of a victim constitutes a per se conflict of interest, it should exclude from this category of per se conflicts a defense attorney's prior representation of the alleged victim when (1) the victim is deceased, and (2) the prior representation was by appointment, for the rationales for the per se conflict rule are not meaningfully advanced in these circumstances, and the resulting harms are unjustified.

CONCLUSION

This Court should reverse the appellate court's judgment and reinstate the judgment of the circuit court.

February 16, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance, and the proof of service, is 17 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 16, 2021, the foregoing Reply Brief of Plaintiff-Appellant, 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 via e-mail to the e-mail addresses listed below:

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