No. 126187

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

ISSUE PRESENTED FOR REVIEW

Whether Michael Yost was denied his right to the effective assistance of counsel because his defense counsel labored under a *per se* conflict of interest where it is undisputed that counsel previously represented the victim of Mr. Yost's offense, and Mr. Yost did not waive his right to conflict-free representation.

STATEMENT OF FACTS

In March 2015, the State charged Michael Yost with four counts of first degree murder, alleging that he intentionally caused the death of Sheri Randall. (C. 36-39). The trial court appointed Bradford Rau, the Moultrie County Public Defender, to represent Mr. Yost. (C. 42; Sec. R. 1081). Following a bench trial in September 2016, the court found Mr. Yost guilty of murder. (Sec. R. 150-844). Six days later, in a letter dated September 21, 2016, Mr. Yost wrote the following to the court:

> "I would like to motion for a new trial. 725 ILCS 5/116-1. I have just been made aware that my attorney Mr. Brad Rau was also a [*sic*] attorney for [t]he victim in my case MRS [*sic*] Sheri Randall in a past case of hers. This means they had a past working relationship together wich [*sic*] means there was a conflict of interest. Nobody made me aware of this when Mr. Rau was appointed to me and I never once said I was ok with this! With a case a [*sic*] serious as mine this is something that should never be overlooked. I feel this was very unfair to me and that is why I now motion the court for a new [t]rial in case #15-CF-6." (C. 516).

The next day, Mr. Yost's letter to the court was placed on file, and the clerk was directed to provide a copy to the State and to Rau. (C. 518).

On September 30, 2016, Rau filed a motion for a new trial, in which there was no reference to Mr. Yost's conflict-of-interest allegation. (C. 523-525). After a hearing, the court denied the motion and sentenced Mr. Yost to 75 years in prison. (C. 543; Sec. R. 969-978). Rau subsequently filed a motion to reconsider the sentence, again with no mention of Mr. Yost's conflict-of-interest allegation, which the court denied. (C. 547-549; Sec. R. 966). Mr. Yost appealed. (C. 564, 566).

The appellate court remanded the case for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), directing the trial court to determine whether to appoint independent counsel to investigate Mr. Yost's ineffective-assistance-of-counsel claim. (C. 576). The trial court found that Mr. Yost's claim had merit, and appointed Walter Lookofsky to investigate. (C. 584; Sec. R. 1093-1095).

Lookofsky filed a document, titled "Disclosure of Potential Conflict of Interest," revealing that he had previously hired Rau as his own attorney in an unrelated civil litigation case that had concluded prior to Lookofsky's appointment in Mr. Yost's case. (C. 586). Lookofsky asserted he had spoken with Mr. Yost about the potential conflict, and Mr. Yost was willing to waive it. (C. 587). At a hearing on the motion, Judge Hugh Finson addressed his own potential conflict with Mr. Yost, noting he had represented Mr. Yost in a case 20 years prior and he had represented Mr. Yost's father in adoption and divorce proceedings. (Sec. R. 1099-1100). Mr. Yost was willing to waive both potential conflicts, and the court accepted his waiver after ensuring it was provided voluntarily. (Sec. R. 1100-1101).

Lookofsky then filed an amended motion for a new trial, arguing that Mr. Yost's defense counsel had labored under a *per se* conflict of interest where he had previously represented the victim of Mr. Yost's offense, and Mr. Yost had not waived his right to conflict-free counsel. (C. 589-594). Specifically, Rau, who had represented Mr. Yost during his murder trial, had previously represented the murder victim, Randall, in Moultrie County Case No. 2008-DT-22. (C. 589). Rau had appeared with Randall twice, including when she entered into a negotiated guilty plea with the State. (C. 589). Lookofsky contended that Mr. Yost was unaware Rau had previously represented Randall until after the murder trial, when his mother discovered this information and relayed it to him. (C. 590). The docket sheet from 2008-DT-22 was attached for corroboration. (C. 594).

In response, the State conceded that: Rau had represented Mr. Yost, Rau had previously represented the victim in Mr. Yost's case, and Mr. Yost had not waived the conflict of interest. (C. 597). But the State disagreed that there was a *per se* conflict. (C. 597). It argued the *per se* conflict rule did not apply because: (1) Randall was deceased; (2) Rau represented Randall only prior to, not simultaneously or contemporaneously with, his representation of Mr. Yost; and (3) Rau never recalled the prior representation until it was brought to his attention after Mr. Yost's trial. (C. 600).

The State claimed that "even though a *per se* conflict 'has been found' where counsel had a prior association with the victim, a *per se* conflict need not always be found in that situation." (C. 602). The State urged the court to follow *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), and "conclude that application of the *per se* conflict rule [wa]s simply not warranted based on a 'realistic appraisal' of [Rau's] limited prior professional relationship with" Randall. (C. 609).

At the hearing on the motion, Mr. Yost testified that after his conviction, but before his sentencing, he learned that Rau had previously represented Randall because his mother "found it on Judici." (Sec. R. 1107-1108). When Mr. Yost confronted Rau with the information, Rau "said he was unsure whether he had represented her or not, but if he had, it didn't matter because she had passed away." (Sec. R. 1109). Mr. Yost denied waiving any potential conflict of interest with Rau. (Sec. R. 1108). Per Lookofsky's request, the court took judicial notice of the cases in which Rau had represented Randall and Mr. Yost, 2008-DT-22 and 2015-CF-6. (Sec. R. 1110).

Prior to calling Rau to the stand, his affidavit was admitted into evidence. (Sec. R. 1111; E. 13-14). Rau served as Public Defender for Moultrie County from 2004 until 2017. (Sec. R. 1112). In 2008, Rau was appointed to represent Randall in 2008-DT-22. (Sec. R. 1113; E. 13). Rau appeared with Randall on the date of his appointment in August 2008, and again in October 2008, when she entered a fully negotiated guilty plea to driving under the influence of alcohol. (C. 594; E. 13). In 2015, Rau was appointed to represent Mr. Yost in 2015-CF-6, a case in which Mr. Yost was charged with the murder of Randall. (Sec. R. 1112; E. 13).

Rau averred that "at the time [he] was appointed to represent Mr. Yost *** and continuing throughout the length of [his] representation of Mr. Yost in said cause, [he] did not recall having represented [] Randall." (E. 13). Rau acknowledged that Mr. Yost brought his prior representation of Randall to his attention after the murder trial. (Sec. R. 1113-1115; E. 13). But he explained that he and Mr. Yost "discussed the matter, whereupon [he] concluded that prior, unrelated representation, of which [he] did not recall, did not constitute a conflict of interest." (Sec. R. 1113-1115; E. 13). Rau attested "[t]hat even if [he] had recalled previously representing []Randall,

while representing Mr. Yost, [he] would not have felt that [he] had any continuing duty or obligation to [his] deceased former client because [his] limited representation of []Randall was long concluded and completely unrelated to Mr. Yost's case." (Sec. R. 1114; E. 14).

At the hearing, Rau testified consistently with his affidavit. (Sec. R. 1112-1116). He insisted he had no "independent recollection of ever representing" Randall. (Sec. R. 1113). And he did not "feel [he] owed any duties or obligations to her[.]" (Sec. R. 1114-1115). When asked if he ever addressed Mr. Yost's letter with the court, Rau responded: "My recollection is we did, but it's not in the transcript anywhere." (Sec. R. 1115-1116).

During argument, the State asserted, "The courts have said that when Your Honor is evaluating whether a *per se* conflict exists, the Court should take a realistic appraisal of defense counsel's professional relationship to somebody other than the defendant, and when Your Honor goes through a realistic appraisal of [] Rau's representation of [] Randall and Mr. Yost, it's going to be clear there is no *per se* conflict here." (Sec. R. 1128). The State concluded:

> "Your Honor, if the Supreme Court had wanted to put a blanket rule that no matter what -- no matter how big or small a county, no matter how many attorneys involved in the bar association, no matter if somebody represented a victim a year ago or ten years ago, regardless of what kind of representation that was, they could have put a blanket prohibition on their representation. They could have said: Attorneys who want to represent a defendant charged with harming a victim after they've already represented that particular victim can't do it. They have never said that, Your Honor, and in *Hillenbrand*, in fact, they found there was no *per se* conflict in that kind of situation." (Sec. R. 1135).

The court denied Mr. Yost's motion for a new trial, finding there was no *per se* conflict of interest under *Hillenbrand*. (Sec. R. 1138-1139). Mr. Yost appealed. (C. 781, 786).

The appellate court reversed Mr. Yost's conviction and remanded the case for a new trial, holding that Rau labored under a *per se* conflict of interest, and Mr. Yost did not waive his right to conflict-free representation. *People v. Yost*, 2020 IL App (4th) 190333-U, ¶¶ 1, 51. In doing so, the court rejected the State's argument that this case is controlled by *Hillenbrand*. *Yost*, 2020 IL App (4th) 190333-U, ¶¶ 53-54. The court acknowledged that in *Hillenbrand*, this Court commented that defense counsel's representation of the victim "was concluded long

before [the present case]." *Id.* ¶ 54 (quoting *Hillenbrand*, 121 Ill. 2d at 545). But the court found that "this comment should be viewed as *obiter dicta*." *Id.* Further, citing *People v. Hernandez*, 231 Ill. 2d 134, 151-152 (2008), the court noted that *Hillenbrand*'s *obiter dicta* was "inconsistent with [this Court's] more recent precedent applying the *per se* conflict rule." *Id.* After concluding it was not the court's role to examine the "nature and extent" of the attorney-client relationship between Rau and Randall where the parties did not dispute that Rau previously represented Randall, and Mr. Yost did not waive his right to conflict-free representation, the court found that reversal was required. *Id.* ¶ 57.

This Court granted the State's petition for leave to appeal.

ARGUMENT

Michael Yost was denied his right to the effective assistance of counsel because his defense counsel labored under a *per se* conflict of interest where it is undisputed that counsel had previously represented the victim of Mr. Yost's offense, and Mr. Yost did not waive his right to conflict-free representation.

A few simple, incontrovertible facts resolve this case. First, while on trial for murder, Michael Yost was represented by the same attorney – Bradford Rau – who had previously represented the murder victim, Sheri Randall. And second, Mr. Yost did not waive his right to conflict-free representation. This Court has held that defense counsel's prior representation of a victim of the defendant's offense is a *per se* conflict of interest. *People v. Hernandez*, 231 Ill. 2d 134, 143 (2008). Unless a defendant waives his right to conflict-free representation, a *per se* conflict is grounds for automatic reversal. *Hernandez*, 231 Ill. 2d at 143. Because Mr. Yost was denied his constitutional right to conflict-free representation, this Court should affirm the appellate court's judgment, and reverse and remand for a new trial. *Id*.

Standard of Review

The question of whether a *per se* conflict exists is a legal question where, as is the case here, the facts underlying the appeal are undisputed. *Hernandez*, 231 Ill. 2d at 144. This Court reviews legal questions *de novo*. *Id.*

General Authorities

Every criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amend. VI; *People v. Green*, 2020 IL 125005, ¶ 20. The right to the effective assistance of counsel "includes the correlative right to conflict-free representation." *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 142-144. A *per se* conflict is one in which "certain facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict." (Emphasis in original.) *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988); *People v. Fields*, 2012 IL 112438, ¶ 17. An actual conflict, conversely, is one in which there exists a "specific defect in [] counsel's strategy, tactics, or decision making attributable to the conflict." *Spreitzer*, 123 Ill. 2d at 18.

Where a *per se* conflict of interest exists, the defendant is not required to show that counsel's performance was affected by the existence of the conflict. *Hernandez*, 231 Ill. 2d at 143. This Court has recognized 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 [the] defendant." *Fields*, 2012 IL 112438, ¶ 18.

The rationale underlying the *per se* conflict rule is two-fold. *Spreitzer*, 123 Ill. 2d at 16; *Hernandez*, 231 Ill. 2d at 143. First, "the knowledge that a favorable result for the defendant would inevitably conflict with the interest of his client, employer or self might 'subliminally' affect counsel's performance in ways difficult to detect and demonstrate." *Spreitzer*, 123 Ill. 2d at 16. And second, there is "the possibility that the conflict will unnecessarily subject the attorney to 'later charges that his representation was not completely faithful.'" *Id*. at 17. Unless a defendant waives his right to conflict-free representation, the existence of a *per se* conflict is grounds for automatic reversal. *Hernandez*, 231 Ill. 2d at 143.

A.

This Court's *per se* conflict-of-interest jurisprudence establishes that defense counsel labored under a *per se* conflict in Mr. Yost's case.

While this Court first used the term "*per se*" conflict of interest in *People v. Coslet*, 67 Ill. 2d 127 (1977), it "adopted a *per se* conflict-of-interest rule" in an earlier case, *People v. Stoval*, 40 Ill. 2d 109 (1968). *Green*, 2020 IL 125005, ¶ 21; *Coslet*, 67 Ill. 2d at 133. In *Stoval*, a case where there was no showing that counsel represented the defendant with anything less than "diligence and resoluteness," this Court held that "sound policy disfavors the representation of an accused, especially when counsel is appointed, by an attorney with possible conflict of interests." *Stoval*, 40 Ill. 2d at 113.

The defendant in *Stoval* was convicted of burglary and theft for smashing the display window at Navarro's - The Diamond House Limited, and taking jewelry. *Id*. at 110. The defendant's appointed counsel was a member of a law firm that had represented, and continued to represent, both the jewelry corporation and Navarro, the owner. *Id*. at 112. Appointed counsel had also personally represented the jewelry corporation and Navarro in the past. *Id*.

On appeal, this Court reversed the defendant's conviction and remanded for a new trial, noting it was "unfair to the accused" because counsel's representation may have been subliminally affected by the conflict. *Id*. at 113-114. This Court also noted it "place[d] an additional burden on counsel, however conscientious, and expose[d] him unnecessarily to later charges that his representation was not completely faithful." *Id*. Thus, *Stoval*, which set the foundation upon which the *per se* conflict-of-interest rule was built, recognized, *inter alia*, that a *per se* conflict exists where appointed counsel previously represented the victim of the defendant's offense. *Id*.

Subsequently, in *Coslet*, this Court reiterated its holding in *Stoval* and further found that "[t]he test is not and cannot be based only upon the source of a financial gain by the attorney." *Coslet*, 67 Ill. 2d at 133. As this Court observed, "[a] rule based solely on financial gain would not only be *unworkable* in the everyday practice of law but would also have *no necessary correlation with the conflicts of interest that arise* in such practice." (Emphasis added.) *Id*. This Court clarified that the rule in *Stoval* was "*based upon actual commitments to others*," which was "both workable and necessarily correlate[d] with such conflicts." (Emphasis added.) *Id*.

In *Coslet*, the defendant was charged with voluntary manslaughter and concealment of a homicidal death involving the death of her husband. *Id*. at 130. The court appointed her an attorney, Raymond Lee, Jr. *Id*. at 131. The defendant thereafter petitioned for the Tuscola National Bank to be named the administrator of her husband's estate, and the bank accepted. *Id*. at 132. Lee, who was the attorney for the bank, became the attorney for the estate's administrator. *Id*. The defendant was eventually found guilty of both offenses. *Id*.

On appeal, this Court found that the defendant's conviction raised the possibility the decedent's estate would be enriched because the decedent had died intestate, and the defendant was not his sole heir. *Id*. at 134. This is because, due to the defendant's voluntary manslaughter conviction, the estate's administrator had sought to bar her from receiving title to the whole marital premises as the surviving joint tenant. *Id*. at 132. The estate's administrator had instead argued that the marital premises be sold, and half of the remainder be disbursed to the defendant and the other half be disbursed among the heirs at law. *Id*. Since Lee, as the attorney for the estate's administrator, had a "duty to collect all of the assets he could muster and distribute them to the heirs," and the defendant's conviction resulted in the decedent's interests in certain properties becoming a part of his estate rather than passing to her, this Court held there was a *per se* conflict when Lee represented the defendant. *Id*. at 134.

Certainly, this Court noted that Lee's fee as the attorney for the estate's administrator was $1,000, whereas it would normally be $500. *Id*. But this Court did not find a *per se* conflict based solely upon Lee's financial gain in representing the estate's administrator. *Id*. Indeed, *Coslet* expressly sets out that the *per se* conflict rule "is not and cannot be based only upon the source of a financial gain by the attorney[,]" and is instead "based upon actual commitments to others." *Id*. at 133.

Put differently, *Coslet* – the first case in which this Court used the term "*per se*" conflict of interest (*Green*, 2020 IL 125005, ¶ 21) – highlights that the *per se* conflict rule is rooted in barring counsel from representing a defendant where counsel has a conflicting commitment to another. And together, *Stoval* and *Coslet* establish that appointed counsel's prior or contemporaneous representation of the victim of the defendant's offense constitutes a *per se* conflict of interest. *Stoval*, 40 Ill. 2d at 112; *Coslet*, 67 Ill. 2d at 133.

Critically, since *Stoval*, this Court has reaffirmed that a *per se* conflict exists where counsel has previously represented the victim of the defendant's offense by distinguishing between counsel's prior professional and prior personal relationships with the victim. In *People v. Lewis*, 88 Ill. 2d 429, 431 (1981), the defendant was convicted after a jury trial of murder, armed robbery,

and aggravated kidnapping in connection with the robbery of a bank and the death of a bank security guard. Prior to trial, defense counsel informed the court that he had known the victim, who had previously worked as an assistant probation officer, and that he had attended the victim's funeral. *Lewis*, 88 Ill. 2d at 431-432. This Court found there was no *per se* conflict where the alleged conflict involved only counsel's prior "personal work-based acquaintance with the victim, rather than some type of professional commitment or obligation toward that victim." *Id*. at 441.

Likewise, in *People v. Free*, 112 Ill. 2d 154, 166, 168 (1986), this Court noted that appointed counsel did not have a *per se* conflict of interest where he had previously represented the murder victim's mother-in-law and had met the victim "four to six times" when she drove her mother-in-law to his office. This Court observed that counsel did not have "a professional association or interest as to the victim" and that it was "only in instances where there is a conflict in professional interests that this court will hold that prejudice need not be shown by the defendant." *Free*, 112 Ill. 2d at 168.

This Court in *Lewis* and *Free* compared counsel's prior personal relationships to the victims of the defendants offenses with counsel's prior professional relationships with such victims, and found that the former does not constitute a *per se* conflict while the latter does. *Lewis*, 88 Ill. 2d at 441; *Free*, 112 Ill. 2d at 168. *Lewis* and *Free* therefore confirm that a *per se* conflict of interest exists where counsel has a prior professional relationship to the victim of the defendant's offense.

Further, this Court in *Hernandez* put to rest any remaining doubt that counsel's prior representation of the victim of the defendant's offense constitutes a *per se* conflict by expressly holding that the *per se* conflict rule does not require counsel's relationship with the victim to be "active." *Hernandez*, 231 Ill. 2d at 151. In *Hernandez*, the defendant was charged in May 2000 with solicitation of murder for hire for offering an acquaintance a reduced price on the purchase of cocaine in exchange for killing Jaime Cepeda. *Id*. at 138. In 2003, the defendant retained counsel to represent him. *Id*. at 138-139.

The defendant, however, did not know that Cepeda had previously retained the same counsel to represent him in connection with a September 1999 charge. *Id*. Counsel had represented Cepeda through January 2001, when a bond forfeiture warrant was issued against him for his failure to appear in court. *Id*. Cepeda had fled the country prior to that time, and had not returned. *Id*. Counsel's last contact with Cepeda was in January 2001, years before the defendant retained him as counsel, but he continued to be counsel of record for Cepeda. *Id*.

The defendant was eventually found guilty of solicitation to commit murder for hire. *Id*. The defendant thereafter filed a postconviction petition, alleging that counsel's contemporaneous representation of him and Cepeda, of which he was previously unaware, constituted a *per se* conflict of interest. *Id*. Attached to the petition was counsel's affidavit, in which counsel averred: "I still considered myself to be his [Cepeda's] attorney, for if he was arrested on that warrant [bond forfeiture], as my appearance was still on file, I would still be his attorney." (Bracketed material in original.) *Id*. Counsel further averred that neither he nor the State brought his "prior and active representation" of Cepeda to the attention of the court or the defendant. *Id*.

During the evidentiary hearing on the petition, counsel testified that the reason he did not tell the defendant about his representation of Cepeda was because he "didn't think there was a problem" and he did not believe there was a conflict of interest. *Id*. at 140. But counsel acknowledged that if Cepeda had been arrested on the bond forfeiture warrant, he would have appeared at court on Cepeda's behalf because he was Cepeda's attorney. *Id*. at 141. The circuit court denied the defendant's petition, finding there was no ongoing relationship between counsel and Cepeda because their last contact was five years prior. *Id*.

On appeal, the State advanced the same argument – that there was no *per se* conflict because counsel did not have an "active relationship" with Cepeda. *Id*. at 150. This Court rejected the State's argument, but not because it held there was an active or ongoing attorney-client relationship. *Id*. at 150. Rather, this Court refused "to impose an 'active' requirement upon this category of *per se* conflicts" and dismissed the State's argument outright because "the very nature of a *per se* conflict rule precludes inquiry into the specific facts of a case." *Id*. at 150-151.

The State's reliance on the particular details of counsel's representation of Cepeda called for a "case-by-case determination of the facts," and this Court found that sanctioning the State's aberrant approach "would extinguish the *per se* conflict rule entirely." *Id*. at 151.

Moreover, this Court noted that it had "construed broadly" the *per se* conflict rule when counsel represents both the defendant and the victim of the defendant's offense by not requiring the "representation of the victim to be 'contemporaneous' or 'active.'" *Id*. This Court stated its holding in clear and unqualified terms: "to ensure that a defendant's right to effective assistance of counsel is given effect, 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." *Id*. at 151-152.

Despite *Hernandez*'s holding, the State argues here that *Hernandez* is limited to contemporaneous representation cases, and that "its statements regarding prior representation were *dicta*." (St. br., 15). The State is incorrect. As explained above, this Court's holding in *Hernandez* was not dependent on defense counsel's acknowledgment of a continuing obligation to his former client. *Hernandez*, 231 Ill. 2d at 150. In fact, this Court refused to inquire into the specific facts of counsel's representation of Cepeda because it had "clearly stated in the past that a prior relationship falls within" the first category of *per se* conflicts. *Id*. at 151. The first category of *per se* conflicts are ones "where defense counsel has a *prior* or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution." (Emphasis added.) *Id*. at 143. By refusing to impose an "active" requirement on the first category of *per se* conflicts, the category at issue here, this Court's holding in *Hernandez* squarely addresses the facts of this case and dictates its outcome.

The State attempts to undermine *Hernandez* by claiming that "none of the cases cited [therein] involved a conflict based on defense counsel's prior representation of a victim[,]" and then proceeds to distinguish the cited cases. (St. br., 14-15). To be clear, the State is referring

to the following paragraph in *Hernandez*:

> "Moreover, we have construed broadly the *per se* conflict rule when counsel represents both the victim of defendant's offense and the defendant himself. In general, we have not required representation of the victim to be 'contemporaneous' or 'active.' Ordinarily, conflict arises from counsel's 'association,' 'relationship,' 'commitment,' 'professional connection,' or 'some tie' with the victim, a party, or the prosecution, which is either 'prior or current' or 'previous or current.' See *People v. Hardin*, 217 Ill.2d 289, 301 [string cite omitted] (2005); *Morales*, 209 Ill.2d at 345–46 [string cite omitted]; *People v. Graham*, 206 Ill.2d 465, 472 [string cite omitted] (2003); *People v. Miller*, 199 Ill.2d 541, 545 [string cite omitted] (2002); *People v. Moore*, 189 Ill.2d 521, 538–39 [string cite omitted] (2000); *Lawson*, 163 Ill.2d at 211 [string cite omitted]; *People v. Kitchen*, 159 Ill.2d 1, 29 [string cite omitted] (1994); *Spreitzer*, 123 Ill.2d at 15 [string cite omitted]." *Hernandez*, 231 Ill. 2d at 151.

But, despite the State's contention, nothing in this Court's language above suggests that it cited to the aforementioned cases as specific examples of where a *per se* conflict has been found based on counsel's prior representation of a victim. *Id*. Further, the State does not explain how this Court's internal citations in *Hernandez* diminishes its unequivocal holding that a *per se* conflict exists where counsel represented the victim of the defendant's offense, regardless of whether the representation was "contemporaneous" or "active." *Id*. The State's argument thus fails.

Significantly, since *Hernandez*, this Court has consistently held that a *per se* conflict exists where counsel has a prior relationship with the victim of the defendant's offense. *Hernandez*, 231 Ill. 2d at 143; *Fields*, 2012 IL 112438, ¶ 18; *Green*, 2020 IL 125005, ¶ 24. The State acknowledges as much, but argues that this Court's "broad statement [in those cases] cannot be squared with *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), which this Court has not overruled and was correctly decided." (St. br., 13). As it did in the lower court, the State urges this Court to follow *Hillenbrand*, claiming that case is the "sole decision addressing a claimed *per se* conflict resulting from defense counsel's prior representation of the victim." (St. br., 16); *People v. Yost*, 2020 IL App (4th) 190333-U, ¶¶ 53-54.

First, even if *Hillenbrand* addressed counsel's prior representation of the victim – which, as argued below, it did not – it would not be the only case to do so. As mentioned above, this Court addressed counsel's prior representation of the victim in *Stoval*. There, counsel was

appointed to represent the defendant on burglary and theft charges against a jewelry corporation and its owner, both of whom counsel had personally represented in the past. *Stoval*, 40 Ill. 2d at 110-112. Counsel's law firm had also represented, and continued to represent, both the jewelry corporation and the owner. *Id*. at 112. On appeal, this Court reversed the defendant's conviction and remanded the case for a new trial, setting forth for the first time the rationales underlying what this Court would later refer to in *Coslet* as the *per se* conflict rule. *Id*. at 113-114; *Coslet*, 67 Ill. 2d 133.

While *Stoval* dealt with both counsel's prior representation of the victims of the defendant's offenses, and the law firm's contemporaneous representation of said victims, this Court did not distinguish between the conflicts when finding that reversal was required. *Stoval*, 40 Ill. 2d at 113-114. As such, considering this Court found a *per se* conflict of interest where counsel previously represented the victims in the first case in which it "adopted [the] *per se* conflict-of-interest rule," the State is incorrect in claiming *Hillenbrand* is the only case addressing counsel's prior representation of the victim. *Id*.; *Coslet*, 67 Ill. 2d at 133.

Second, *Hillenbrand* did not directly address counsel's prior representation of the victim, as the State suggests. (St. br., 13). While the State summarizes *Hillenbrand*'s facts in one sentence, a more thorough examination is necessary to demonstrate why *Hillenbrand* is inapplicable here. (St. br., 13). In *Hillenbrand*, the defendant pleaded guilty to two counts of murder, including that of the mother of his child, Patricia Pence. *Hillenbrand*, 121 Ill. 2d at 542. The defendant later moved to withdraw his plea. *Id.* at 543. At a hearing on his motion, the evidence showed that the defendant's counsel had previously prepared personal and business income tax returns for Patrica's parents, and that Patricia's father was a "steady client" for roughly five years. *Id.* Counsel had also represented Patricia's father in a marriage dissolution against his wife, and a gambling charge. *Id.* at 543-544. Further, counsel had prepared the income tax returns for the defendant's and Patricia's restaurant. *Id.* at 543. The defendant had, in fact, previously gone to counsel's office "many times" for legal services, including tax work. *Id.*

Patricia's parents did not have counsel on retainer, and Patricia's father had later been represented by two other attorneys in his divorce proceedings. *Id*. at 544. The defendant paid no legal fees for counsel's representation on the murder charge as counsel had volunteered to do so. *Id*. After the hearing, the trial court denied the defendant's motion to withdraw his plea. *Id.* at 545.

On appeal, the defendant argued that his counsel labored under a *per se* conflict because he had regularly represented the victim's parents in business and personal matters. *Id.* at 543. This Court disagreed, and found that defense counsel "did not have a contemporaneous professional commitment" to the victim's parents that created a conflict of interest in his representation of the defendant. *Id.* at 545. The defendant alternatively argued that because the victim's parents were possible prosecution witnesses, a *per se* conflict existed because counsel had a financial interest in seeking to "stay in their good graces." *Id*. at 546. This Court again disagreed with the defendant, concluding that counsel "had neither an ongoing professional commitment to [the victim's parents] nor a financial interest in maintaining their favor that would have created a conflict of interest in representing the defendant." *Id.* at 547.

In other words, the issue of counsel's prior representation of the victim was not before this Court in *Hillenbrand*. *Id*. at 543. The defendant's basis for arguing that a *per se* conflict existed was counsel's *contemporaneous* representation of the victim's parents. *Id*. Further, this Court only addressed contemporaneous representation, not prior representation, in its decision. *Id.* at 545.

Undoubtedly, this Court noted in passing that counsel had "also represented Patricia [] on tax matters in connection with the restaurant, but that representation was concluded long before the murders." *Id.* at 545. But, again, this passing comment was not in response to an argument raised on appeal, and therefore it does not constitute judicial *dicta*. *Id*. at 543; see *People v. Williams*, 204 Ill. 2d 191, 206 (2003) ("Judicial *dicta* are comments in a judicial opinion

that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. *** Judicial *dicta* have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court."). Consequently, at most, this Court's remark in *Hillenbrand* should be considered *obiter dicta*, which is a comment in a judicial opinion that is unnecessary to the disposition of the case, and is not binding as authority where there is a contrary decision. See *Williams*, 204 Ill. 2d at 206-207. *Hillenbrand*'s *obiter dicta* is not binding because it is inconsistent with this Court's many subsequent decisions, such as *Hernandez*, *Fields*, and *Green*, holding there is a *per se* conflict where counsel has previously represented the victim of the defendant's offense. *Hernandez*, 231 Ill. 2d at 143; *Fields*, 2012 IL 112438, ¶18; *Green*, 2020 IL 125005, ¶24. But to the extent that *Hillenbrand*'s *obiter dicta* is inconsistent with this Court's subsequent decisions regarding the first category of *per se* conflicts, Mr. Yost requests that this Court explicitly overrule *Hillenbrand* to limit any further confusion.

Here, under this Court's *per se* conflict-of-interest jurisprudence, and *Hernandez* specifically, this Court must reverse Mr. Yost's conviction and remand the case for a new trial. The record establishes that while on trial for murder, Mr. Yost was represented by the same attorney who previously represented the murder victim. (C. 597). Counsel's prior representation of Randall falls squarely within a well-recognized category of *per se* conflicts. *Hernandez*, 231 Ill. 2d at 151-152; *Fields*, 2012 IL 112438, ¶ 29 (observing that while counsel's prior representation of a prosecution witness is not a *per se* conflict, "the first situation where a *per se* conflict of interest exists encompasses defense counsel's prior or contemporaneous association with the victim"). Further, the record establishes that Mr. Yost did not waive his right to conflict-free representation. (C. 597). Consequently, where Mr. Yost's counsel labored under a *per se* conflict of interest, and Mr. Yost did not waive his right to conflict-free representation, he is entitled to a new trial. *Hernandez*, 231 Ill. 2d at 143.

B.

This Court should not depart from its straightforward, simple *per se* conflict rule.

The current *per se* conflict rule is remarkably uncomplicated. If counsel represents the defendant, and had previously represented the victim of the defendant's offense, there is a *per se* conflict of interest. *Hernandez*, 231 Ill. 2d at 147 (noting the application of the *per se* rule is simple because where counsel represents the defendant and the victim of the defendant's alleged conduct, "that ends the matter[,]" and there is a *per se* conflict). And just because there is a *per se* conflict does not mean that counsel must withdraw from the defendant's case. Rather, counsel may advise the defendant about the existence and the significance of the conflict, and the defendant may waive the right to conflict-free representation. *Stoval*, 40 Ill. 2d at 113-114.

The simplicity of the conflict-of-interest rule is borne out in Mr. Yost's case. After the appellate court remanded the case for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court appointed Walter Lookofsky to investigate Mr. Yost's ineffective-assistance-of-counsel claim. (C. 576, 584; Sec. R. 1093-1095). Lookofsky thereafter filed a document, titled "Disclosure of Potential Conflict of Interest," revealing that he had previously hired Mr. Yost's defense counsel as his own attorney in an unrelated civil litigation case. (C. 586). At the hearing on the motion, Judge Hugh Finson addressed his own potential conflict with Mr. Yost, noting he had represented Mr. Yost in a case 20 years prior and he had represented Mr. Yost's father in adoption and divorce proceedings. (Sec. R. 1099-1100). Mr. Yost was willing to waive both potential conflicts, and the court accepted his waiver after ensuring it was provided voluntarily. (Sec. R. 1100-1101).

Lookofsky and Judge Finson, in other words, did what Mr. Yost's defense counsel failed to do by being transparent about a potential conflict of interest *before* actively assuming a role in Mr. Yost's case. Certainly, the State characterizes defense counsel's inaction in this case as a "mere oversight" because he "forg[o]t" that he previously represented the victim. (St. br., 18). But counsel's failure to conduct a conflict-of-interest check prior to representing

Mr. Yost cannot be excused as a "mere oversight" where this Court has been addressing such conflicts since *Stoval* in 1968, and more recently in *Hernandez* in 2008. *Stoval*, 40 Ill. 2d at 113-114; *Hernandez*, 231 Ill. 2d at 151-152. And if Mr. Yost's mother was capable of discovering that counsel had previously represented the victim through an internet search of public records, surely it is indefensible that counsel did not do so. (Sec. R. 1107-1108).

If defense counsel had conducted a conflict check, and had been as transparent as Lookofsky and Judge Finson were about their potential conflicts, Mr. Yost would have been able to knowledgeably weigh whether counsel's conflict would affect his representation. But counsel did not do so. The conflict-of-interest rule was thus ineffectual during Mr. Yost's trial solely because counsel failed to take the integral step of determining whether there was a potential conflict. But the rule functioned exactly as it was meant to in regards to Lookofsky and Judge Finson's potential conflicts by ensuring Mr. Yost's right to conflict-free representation, but also allowing him to knowledgeably and voluntarily waive that right. See *Hernandez*, 231 Ill. 2d at 143.

Despite the simplicity of the rule, the State requests that this Court "narrow" it to exclude counsel's prior representation of the victim of the defendant's offense when: (1) the victim is deceased, and (2) the prior representation was by appointment. (St. br., 16). But the State's proposed exclusions from the *per se* conflict rule rests on faulty reasoning. This is partly because the State relies heavily on the unique facts of Mr. Yost's case when suggesting a new *per se* conflict rule that would apply to defendants across Illinois. (St. br., 17-20); see *Hernandez*, 231 Ill. 2d at 150 (holding that "the very nature of a *per se* conflict rule precludes inquiry into the specific facts of a case").

The State asks this Court to find there is no *per se* conflict where appointed counsel's prior representation of the victim of the defendant's offense involves a deceased victim. (St. br., 16). The State points to counsel Rau's testimony here that he had no recollection of representing Randall. (St. br., 17). Specifically, Rau averred that "[he] would not have felt that [he] had any continuing duty or obligation to [his] deceased former client because [his] limited representation of []Randall was long concluded . . . ." (Sec. R. 1114; E. 14).

Rau's statement demonstrates the flaws in outright excluding deceased victims from the *per se* conflict rule. Rau felt his duty to Randall had concluded where he had represented her seven years prior and had represented her in only one case – not because she was deceased. (Sec. R. 1114; E. 14). But under the State's proposed rule, there would be no *per se* conflict despite the length or complexity of the professional relationship between appointed counsel and his prior client as long as the victim was deceased. For example, under the State's proposal, there would be no *per se* conflict even if Rau had represented Randall up until the moment Mr. Yost allegedly caused her death. There would also be no *per se* conflict if Randall had been a reoccurring offender, and Rau had represented her extensively throughout the years leading up to her death. In both situations, counsel would undoubtedly have a strong tie to the deceased victim and a thorough understanding of the victim's previous cases. But despite counsel's lengthy and complex representation of the prior victim, there would be no *per se* conflict. The State's proposed rule is thus untenable.

Further, in *Hernandez*, this Court 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. *Hernandez*, 231 Ill. 2d at 148. There, counsel indicated he had a duty to his prior client, the victim in the case, but the State contended there was no *per se* conflict because counsel had not spoken to the victim in years. *Id*. at 139, 148. This Court held there was a *per se* conflict, but not because it found there was an active or ongoing attorney-client relationship. *Id*. at 148. Rather, this Court reiterated that "the very nature of a *per se* conflict rule precludes inquiry into the specific facts of a case." *Id*. at 150-151. This Court should thus reject the State's request to wholly exclude deceased prior victims from the rule merely because appointed counsel claims not to remember the prior victim or counsel alleges that they felt no continuing obligation to the prior client.

The State also argues that counsel has no continuing loyalty to a deceased prior client because: (1) the client could not benefit from an unfavorable verdict against the defendant, and (2) counsel would not be required to cross-examine a deceased prior client. (St. br., 17); see *Spreitzer*, 123 Ill. 2d at 16. The State, however, does not cite to any case law that demonstrates counsel has no continuing loyalty to a prior client who is deceased. See *DeHart v. DeHart*, 2013 IL 114137, ¶69 (holding that attorney-client privilege generally survives the client's death except in relation to wills); Ill. R. Prof'l Conduct (2010) R. 1.9(c) (eff. Jan. 1, 2010) ("A lawyer who has formerly represented a client in a matter *** shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

Further, just because counsel would not have to cross-examine a deceased prior client does not mean counsel would not have to challenge the admissibility of evidence related to the client. For example, counsel might have to object to a prior client's dying declaration being admitted as an exception to the hearsay rule. *People v. Harris*, 2020 IL App (5th) 160454, ¶42. And if the court admits the statement, counsel might have to show that the prior deceased client, in making the statements, "entertained feelings of malice and hostility" towards the defendant, counsel's current client. (Internal citation omitted.) See *People v. Edgeston*, 157 Ill. 2d 201, 222 (1993). Additionally, where there is evidence of mutual combat, counsel would have to argue the deceased prior client entered the fight as willingly as the defendant did. *People v. Austin*, 133 Ill. 2d 118, 125 (1989). While these are only two instances of many where counsel's actual commitments to a prior deceased client conflict with counsel's commitment to the defendant, they exemplify how the conflict "might 'subliminally' affect counsel's performance in ways difficult to detect and demonstrate." *Spreitzer*, 123 Ill. 2d at 16.

The State also fails 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*, such as to justify departing from the current *per se* conflict rule. In *Hernandez*, the defendant retained counsel who, unbeknownst to him, had previously and was contemporaneously representing the victim of the defendant's crime, Cepeda. *Hernandez*, 231 Ill. 2d at 138-139. Cepeda, however, had fled the country years before the defendant retained counsel. *Id*. at 139. And, critically, while Cepeda's name appeared on the State's list as a potential witness, the State had assured retained counsel that Cepeda would not testify in the defendant's case. *Id*. at 139, 148.

Hernandez therefore presented the same concerns the State identifies in this case. Cepeda, just like a deceased prior client, arguably could not benefit from an unfavorable verdict against the defendant because he had fled the country years before the defendant's trial and there was no evidence he was returning to stand trial on his own charges. *Id*. at 138-139. Further, similar to a deceased prior client, there was no possibility that Cepeda was going to testify against the defendant. *Id*. at 148. Nevertheless, this Court held that counsel labored under a *per se* conflict when he represented the defendant because counsel's "*status* as Cepeda's attorney itself" dictated application of the *per se* rule. (Emphasis added.) *Id*. at 150-152. As such, this Court should reject the State's request to entirely exclude deceased victims represented by appointed counsel from the *per se* conflict rule based on the same concerns that were present in *Hernandez*.

The State also asks this Court to find there is no *per se* conflict where counsel's prior representation of the victim of the defendant's offense was by appointment. (St. br., 16). The State claims that counsel would feel no continuing loyalty to a deceased prior client where "there were no financial interests involved." (St. br., 17). The State also argues "there is no possibility that any financial interests would subject [counsel] to later charges that his

representation was not completely faithful" where counsel is appointed to the prior client. (St. br., 17); see *Spreitzer*, 123 Ill. 2d at 17 (noting the second rationale for the *per se* conflict rule is to remove "the possibility that the conflict will unnecessarily subject the attorney to 'later charges that his representation was not completely faithful'").

In other words, the State insinuates that the quality of counsel's loyalty and representation to a client is directly correlated with counsel's financial interests in the client, and therefore a *per se* conflict does not exist where counsel is appointed in a case. This Court, however, rejected such a notion in *Coslet*. There, this Court explicitly held that the *per se* conflict rule "is not and cannot be based only upon the source of a financial gain by the attorney[,]" but rather is based on counsel's "actual commitments to others." (Emphasis omitted.) *Coslet*, 67 Ill. 2d at 133. This is because "[a] rule based solely on financial gain would not only be *unworkable* in the everyday practice of law but would also have *no necessary correlation with the conflicts of interest that arise* in such practice." (Emphasis added.) *Id*. *Coslet* therefore vitiates the State's reasoning to exclude appointed counsel from the *per se* conflict rule because the rule is based on counsel's actual commitments, and not on counsel's financial interests.

Further, the State's suggestion that counsel's loyalty to a client is based on counsel's potential financial gain in representing the client is an affront to both private counsel and public defenders. (St. br., 17). It suggests that private counsel has no independent loyalty to their clients other than what money can buy, and that public defenders have absolutely no loyalty to their clients because they are not being compensated for their representation. Certainly, this Court has considered an attorney's "pecuniary interest and desire for possible future business" in examining whether a *per se* conflict exists. *Hillenbrand*, 121 Ill. 2d at 546. But this Court has never suggested, as the State does here, that the absence of a financial interest in a client signifies that counsel has no duty of loyalty to the client.

Indeed, this Court has consistently maintained that a public defender's loyalty to his client is so undivided that, unlike in a law firm, a conflict on the part of one public defender does not *per se* disqualify other attorneys within the public defender's office. *People v. Robinson*, 79 Ill. 2d 147, 168 (1979); *People v. Miller*, 79 Ill. 2d 454, 461 (1980); *Cole*, 2017 IL 120997, ¶ 44. And relying on this principle of undivided loyalty, this Court has also held there is no *per se* conflict where attorneys within the same public defender's office raise each other's ineffectiveness. *People v. Banks*, 121 Ill. 2d 36, 44 (1987). This Court should thus repudiate the State's argument that appointed counsel feels "no continuing loyalty to a deceased prior client," simply because "there were no financial interests involved." (St. br., 17).

This Court should likewise reject the State's argument 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. (St. br., 17). First, the State does not cite to any cases to show that the defendant may only challenge counsel's representation where counsel had a financial interest in the victim. And second, defendants have, in fact, repeatedly alleged – and this Court has found – *per se* conflicts where counsel's failure to provide "faithful" representation involved counsel's actual commitment to others, and not counsel's financial interest in others. *People v. Fife*, 76 Ill. 2d 418, 424 (1979) (finding a *per se* conflict of interest exists where appointed counsel simultaneously represented the defendant and was a special assistant Attorney General, even though counsel was limited to workmen's compensation cases); *People v. Washington*, 101 Ill. 2d 104, 112 (1984) (finding a *per se* conflict of interest exists where the defendant's retained counsel represented him on a murder charge in Chicago while also serving as the city attorney for Chicago Heights because the Chicago case stemmed from an arrest in Chicago Heights that the defendant argued was not supported by probable cause).

Notably, that is precisely what occurred here. Less than six days after Mr. Yost was found guilty of murdering Randall, he learned through his mother that his defense counsel had previously represented Randall. (C. 516; Sec. R. 150-844). Mr. Yost wrote the following to the court: "Nobody made me aware of this when Mr. Rau was appointed to me and I never once said I was ok with this! With a case a [*sic*] serious as mine this is something that should never be overlooked. I feel this was very unfair to me and that is why I now motion the court for a new [t]rial in case #15-CF-6." (C. 516).

Mr. Yost accordingly felt that counsel's representation was "not completely faithful" because of counsel's actual commitment to Randall, which he was surprised to learn about after trial and via his mother. *Spreitzer*, 123 Ill. 2d at 17. The sense of betrayal Mr. Yost felt at discovering this information at the time and manner in which he did is, in fact, one of the reasons the *per se* conflict rule exists. *Id*. (noting the second rationale for the *per se* conflict rule is to remove "the possibility that the conflict will unnecessarily subject the attorney to 'later charges that his representation was not completely faithful'"). As such, the State's attempt to exclude appointed counsel from the *per se* conflict rule, where counsel has no financial interest in the deceased victim, is unreasonable.

Of course, relying on the facts of Mr. Yost's case, the State also argues that the *per se* conflict rule "disproportionately affects smaller counties where the Public Defender has few (or no) assistants." (St. br., 19). The State contends that if defendants are unwilling to waive *per se* conflicts, "courts must search further afield for conflict-free counsel who are capable of providing representation on par with the Public Defender (and the county must pay for the representation)." (St. br., 19-20).

Critically, the State overlooks that the court here was able to appoint conflict-free counsel on remand, and did not express any difficulties in doing so. (C. 584; Sec. R. 1093-1095).

Moreover, the State fails to cite to any case where this Court has undermined a defendant's constitutional right to the effective assistance of counsel because smaller counties may have to pay for conflict-free counsel. Each county in Illinois is responsible for determining how to ensure that a defendant is provided his right to conflict-free counsel. To suggest that a county's financial obligations should factor into whether this Court narrows its *per se* conflict rule is both unprecedented and unwarranted.

The State also urges this Court to narrow the *per se* conflict rule because a violation of the rule "imposes a harsh consequence: automatic reversal." (St. br., 18). But the State forgets 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. The question then becomes whether the defendant would have even been found guilty of the offense if counsel had not labored under a *per se* conflict. Surely the State is not suggesting that automatic reversal is a harsher consequence than a defendant being imprisoned for an offense he or she may not have been guilty of but for counsel's ineffective assistance. Indeed, this Court has noted: "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." (Internal citation and quotations omitted.) *Stoval*, 40 Ill. 2d at 114; see *People v. Bull*, 185 Ill. 2d 179, 216 (1998) ("[I]t is a fundamental value determination of the American criminal justice system that it is far worse to convict an innocent person than to let a guilty person go free.").

Narrowing the *per se* conflict rule, as the State suggests, will create more "diversity" than unity in the law. See *Hernandez*, 231 Ill. 2d at 147. Defendants will still allege counsel's ineffectiveness where appointed counsel previously represented the victim, but rather than having a bright-line rule that directly addresses the issue, trial courts will be required to decide at what point counsel's representation of the victim was no longer prejudicial to the defendant.

Some courts may find that appointed counsel's prior representation of the victim created a conflict where the representation was extensive, others may find a conflict where the representation only concluded months before the victim's death, and still others may find that there is no conflict.

This Court deliberately fashioned the *per se* conflict rule to provide defendants with categorical, bright-line protection against a class of conflicts that are all too likely to be prejudicial yet difficult to prove prejudicial. See *Hernandez*, 231 Ill. 2d at 151. Further, the rule is designed to afford attorneys broad protection from inevitable allegations that their conflicted representation was less than fully faithful–even though such allegations will often be "unfounded," or in other words, even though the prohibited conflict will not always adversely affect defense counsel's performance. *People v. Kester*, 66 Ill. 2d 162, 168 (1977); see also *Hernandez*, 231 Ill. 2d at 151; *Stoval*, 40 Ill. 2d at 113. These difficulties create an "untenable situation" for counsel and defendant alike, and they "should be avoided in the interests of the sound administration of criminal justice." *Kester*, 66 Ill. 2d at 168. Replacing the rule's broad prophylactic sweep with a case-by-case factual inquiry, as the State urges, would undermine the rule's intended functions. This Court should accordingly deny the State's request to narrow the *per se* conflict rule.

In sum, it is undisputed that while on trial for murder, Mr. Yost was represented by the same attorney who previously represented the murder victim. (C. 597). It is also undisputed that Mr. Yost did not waive his right to conflict-free representation. (C. 597). This Court should therefore affirm the appellate court's judgment, reverse Mr. Yost's conviction, and remand for a new trial. See *Hernandez*, 231 Ill. 2d at 143.

CONCLUSION

For the foregoing reasons, Michael Yost, defendant-appellee, respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 twenty-eight pages.

/s/Sheril J. Varughese
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IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 12, 2021, 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 defendant-appellee in an envelope deposited in a U.S. mail box in Springfield, 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.

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