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.

BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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NATURE OF THE ACTION

The People appeal from the judgment of the Illinois Appellate Court, Fourth District, reversing defendant's murder conviction upon finding that defense counsel had a per se conflict of interest due to his prior representation of defendant's victim.

ISSUES PRESENTED

1. Whether *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), which found no per se conflict of interest where defense counsel had previously represented a murder victim because "that representation was concluded long before the murders," *id.* at 545, remains good law, such that this Court should affirm the circuit court's judgment finding no per se conflict of interest.

2. Whether, if *Hillenbrand* is no longer good law, this Court should narrow its per se conflict rule to exclude from its application a defense attorney's prior representation of the victim when the victim is deceased and the prior representation was by appointment, because the twin rationales for the per se conflict rule are not meaningfully advanced in such circumstances.

JURISDICTION

Jurisdiction lies under Supreme Court Rule 315(a), as this Court allowed the People's petition for leave to appeal on September 30, 2020. *People v. Yost*, 154 N.E.3d 773 (Table) (Ill. 2020).

STATEMENT OF FACTS

In March 2015, the People charged defendant with four counts of first degree murder for fatally stabbing his former girlfriend, Sheri Randall. C36-39.[1] The court appointed Moultrie County Public Defender Bradford Rau to represent defendant, C42, and the case proceeded to a four-day bench trial in September 2016, SecR150, before Judge Flannell.

Defendant is convicted of first degree murder

When a neighbor did not hear from Randall on the morning of March 4, 2015, she entered Randall's apartment, where she discovered Randall's and defendant's bloody bodies and called 911. SecR337.

First responders entered Randall's apartment and observed large amounts of blood in the kitchen. SecR171. They also observed blood on the bed and on the bedroom floor, *id.*, where Randall lay on her back, and defendant lay next to her, on his side and with his arm draped over her; their bodies were partially covered by a blanket, SecR195-97. Defendant had several small puncture wounds and lacerations to his torso and neck. SecR366. Randall had similar wounds, but she also had a large laceration to her abdomen. *Id.* Defendant was still breathing, so responding paramedics took him to the hospital, SecR174; the coroner pronounced Randall dead at the scene, SecR658. The Sullivan Police Department requested assistance

[1] The common law record, secured common law record, and secured report of proceedings are cited as "C_," "SecC_," and "SecR_," respectively.

from the Illinois State Police (ISP), which took over the investigation later that day. SecR199.

An ISP crime scene investigator testified that an exterior window to Randall's apartment had been broken from the outside in, SecR425, and he made a cast of footprints left in the snow beneath the window, SecR428, 447. Defendant's cell phone was recovered from beneath the broken bedroom window. SecR449. The investigator recovered a box cutter from the bed and three bloody kitchen knives near Randall's body. SecR438. He also collected defendant's black athletic shoes and bloody socks, SecR446, 470, and swabbed various locations in the apartment, SecR454-46. Forensic testing of this evidence revealed that defendant's DNA was present on swabs from the bathroom sink handle, the kitchen sink handle, a Clorox bottle in the bathroom, and the box cutter blade; the major DNA profile taken from a bloody footprint belonged to Randall, while defendant could not be excluded from the minor profile; and the blood on the bottom of defendant's socks was Randall's. SecR634-52. Moreover, defendant's black athletic shoes could not be excluded as having made the print outside Randall's window. SecR476-85.

Data extracted from defendant's cell phone, SecR496, 513-14, included his March 3, 2015 browsing history, which showed that he had searched both for X-rated videos using the search terms "forced" and "murder," SecR517, and for Sheri Randall on Facebook, SecR522.

Numerous witnesses testified that defendant had made threats and jealous remarks regarding Randall in the days and weeks preceding her murder. For example, several months before the murder, defendant told a former girlfriend that Randall was the love of his life and that "If I cannot have Sheri, then nobody else can." SecR208-13. Another former girlfriend testified that in January 2015, defendant told her that his relationship with Randall was not going to end well and that he was fantasizing about killing her and himself. SecR233. Defendant later sent the former girlfriend a message telling her to retrieve her "stuff" because "this place will be a crime scene soon," SecR239, and that he had "Dexter plans," referring to the television serial killer, SecR239-41. Witnesses further testified that defendant threatened to kill Randall shortly before the murder, on February 27, 2015, while at a local bar. SecR259, 269.

On the afternoon and evening of March 3, 2015, the day before she was murdered, Randall was at a bar called The Landing. SecR284. Defendant was also at the bar, and he bought Randall several drinks. SecR285; SecR297-98. According to a bartender, defendant appeared to be obsessed with Randall, in that he talked of nothing else and played "Oh Sherrie" on the jukebox. SecR297.

A witness testified that Randall left the bar shortly before 10:30 p.m. SecR286. Around that same time, a second bartender testified, she kicked

defendant out of the bar because he had yelled and caused a "ruckus" after another man bumped into Randall in the bar. SecR307-08.

The forensic pathologist who performed Randall's autopsy opined that Randall's cause of death was "multiple stab wounds due to assault by another person or other persons," SecR685, because Randall had several stab wounds to her back, as well as defensive wounds on her hands, SecR686. The pathologist opined that due to the nature of the wounds, Randall's was a slow and painful death. SecR687. After reviewing defendant's medical records, the pathologist further opined that defendant's wounds were self-inflicted, SecR689, and that he could have used the recovered box cutter to inflict them, SecR692.

After the court denied defendant's motion for a directed verdict, SecR742, the parties stipulated to the admission of Dr. Jeckel's March 15, 2016 testimony (on the question of defendant's fitness to stand trial), *see* SecR893-908, which included his finding that defendant suffered from amnesia regarding the events of Randall's murder, SecR744-45; SecR900 (Jeckel).

The defense also presented testimony from defendant and a doctor. Defendant testified that he has Type 2 diabetes. SecR750. On the morning of March 3, 2015, his blood sugar was high, so he took his insulin medication and then walked to The Landing around 11:30 a.m. SecR752-53. Over the course of the afternoon, he had about four beers. SecR755. Defendant

recalled speaking with various people throughout the afternoon and evening, SecR758, but did not recall that the bartender kicked him out, SecR759; the next thing he could remember was being in Randall's apartment, talking to her as she was cooking at the stove, SecR759-60. Defendant recalled that he briefly "came to" in Randall's bedroom; he remembered "waking up and pulling a knife out of [himself] and collapsing again." SecR760. Defendant next recalled waking up in the hospital in Decatur. SecR761.

Dr. Gregory Clark testified that he reviewed defendant's medical history, SecR790, and opined that defendant suffered from hypoglycemia on March 3, 2015, SecR797. Clark testified that the condition can cause one to lose the ability to think clearly and that if one's blood sugar gets too low, one can become agitated, violent, and lose consciousness. SecR797-98. Clark conceded, however, that his opinion rested on defendant's self-report that he had taken his insulin medication. SecR815.

Following closing arguments, the judge found that the People sustained their burden of proof on all four counts of first degree murder, including the brutal or heinous aggravating factor. SecR844.

Days later, defendant wrote a letter to the trial judge, stating that he had "just been made aware" that his trial attorney, Rau, had previously represented Randall, creating a conflict of interest. C516. The judge directed that copies of the ex parte communication be sent to the prosecutor and Rau,

C518, but the record does not reflect whether the copies were sent, and the issue was not addressed on the record.

After denying defendant's motion for a new trial, SecR978, the court proceeded to sentencing. The People relied upon the presentence investigation report, which reflected defendant's prior conviction for aggravated criminal sexual assault, SecR974, 978, and presented victim impact testimony from Randall's family members, including her then nine-year-old son, whose statement reported that he was afraid that defendant would get out of jail and kill him and his family and that he had nightmares about his mom being killed, SecR982-83. He further reported that he was in second grade when defendant killed his mother, and that because the murder happened near the school, the other children were also afraid. SecR984.

In October 2016, the circuit judge sentenced defendant to 75 years in prison, SecR996; C543, and denied defendant's motion to reconsider that sentence in November 2016, SecR966.

Circuit court denies per se conflict of interest claim

Defendant appealed, and the appellate court remanded for a *Krankel* inquiry on defendant's attorney conflict claim. C576. A different judge, Judge Finson, presided on remand. After an initial inquiry, the court appointed counsel (Lookofsky) to investigate defendant's claim. C584; SecR1095. Lookofsky filed a "disclosure of potential conflict of interest," which explained that Rau had previously represented Lookofsky in an

unrelated civil matter, that Lookofsky had discussed the potential conflict with defendant, and that defendant waived any conflict and desired that Lookofsky continue to represent him. C586-87. Counsel also filed an amended motion for new trial. C589. Counsel argued that Rau had a per se conflict of interest because he had previously represented Randall in a 2008 DUI case and supported the motion with records showing that Rau appeared twice on Randall's behalf: at the August 2008 first appearance with counsel, and again in October 2008, when she entered her guilty plea. C594. Counsel asserted that defendant did not learn of Rau's prior representation of Randall until after his trial, "when his mother discovered the records and made him aware of that fact." C589-90.

Defendant orally waived any conflicts arising from Rau's prior representation of Lookofsky, as well as from Judge Finson's prior representation of defendant (in a Piatt County case) and defendant's father (in adoption and divorce matters), SecR1099-1100, and the matter proceeded to a hearing in May 2019. Defendant testified that after he was found guilty, but before sentencing, he learned that Rau had previously represented Randall. SecR1107-08. Defendant did not know of this prior representation, and he did not waive any conflict of interest. SecR1108.

Rau testified that he was an attorney licensed to practice in Illinois since 1983 and that he served as Moultrie County Public Defender from 2004 to 2017. SecR1112. Rau did not recall ever having represented Randall.

SecR1113. He explained that "part of [his] job as public defender was to be here on Monday mornings when people were appointed the public defender." SecR1114. "A lot of times," Rau would "meet with that person; the State would hand [him] the file; [he] would review the police reports and then [he] would step out and interview with the appointed client that day." *Id.* "[P]robably 70 percent of the time[,] the next time [he] saw that individual was at the next pretrial[.]" *Id.* According to court records, he appeared twice in Randall's case, "at the initial appearance and at the plea." *Id.* Asked whether, during his representation of defendant, he felt that he owed any duties or obligations to Randall, Rau answered "no." SecR1114-15.

Following argument, the circuit court held that defendant failed to demonstrate a per se conflict. The court reasoned that Rau did not even recall that he had once briefly represented Randall on a misdemeanor DUI case that concluded seven years before Rau represented defendant. SecR1139. Rau had no ongoing professional relationship with Randall or any member of her family, and he had "no financial interest in retaining Ms. Randall's favor" because Rau was "appointed as public defender and was paid by Moultrie County." *Id.* Relying on *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), in which this Court found no per se conflict of interest where defense counsel had previously represented a murder victim in preparing income tax returns for a business that she and the defendant owned together because

"that representation was concluded long before the murders," *id.* at 545, the circuit court held that Rau "had no per se conflict of interest," *id.*

Appellate court finds per se conflict of interest and reverses

On appeal, the Fourth District reversed, holding that Rau's prior representation of Randall constituted a per se conflict of interest. *People v. Yost*, 2020 IL App (4th) 190333-U, ¶¶ 44, 51. The court ruled that this Court's finding that the attorney in *Hillenbrand* was not working under a per se conflict because "counsel's representation of the victim 'was concluded long before [the present case],'" *id.* ¶ 54 (quoting *Hillenbrand*, 121 Ill. 2d at 545), "should be viewed as *obiter dicta*," because it was "inconsistent with . . . more recent precedent applying the per se conflict rule '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.* (quoting *People v. Hernandez*, 231 Ill. 2d 134, 151-52 (2008)) (emphasis in appellate court decision). Because defendant did not waive the per se conflict, reversal was required. *Id.* ¶ 57.

"[M]indful of the many issues reversal of defendant's conviction creates," the appellate court noted that "this was a case involving substantial media exposure and was aggressively litigated by both sides." *Id.* ¶ 58.

"Unfortunately," the court stated, its interpretation of *Hernandez* left it "no alternative." *Id.*

STANDARD OF REVIEW

Whether a per se conflict of interest exists is a legal question subject to de novo review. *People v. Fields*, 2012 IL 112438, ¶ 19.

ARGUMENT

I. The Per Se Conflict of Interest Rule

A criminal defendant's Sixth Amendment right to effective assistance of counsel encompasses the right to conflict-free counsel, that is, 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 even absent a showing that the conflict influenced counsel's representation. *Id.* ¶ 104. If no per se conflict exists, then a defendant must show that "an actual conflict" adversely affected counsel's representation. *Id.* ¶ 105.

The term "per se" conflict does not appear in United States Supreme Court case law or in cases from other jurisdictions. *Spreitzer*, 123 Ill. 2d at 14. This Court first used the term "per se" conflict in *People v. Coslet*, 67 Ill.

2d 127 (1977). *People v. Green*, 2020 IL 125005, ¶ 21. In *Coslet*, counsel for a woman accused of murdering her husband also acted as the administrator of the victim's estate, the defendant's conviction "at least raised the possibility that the decedent's estate would be enriched," and these circumstances constituted a per se conflict. *Green*, 2020 IL 125005, ¶ 21. Later, in *Spreitzer*, 123 Ill. 2d 1 (1988), the Court noted that, in cases finding a per se conflict of interest, "certain facts about the defense attorney's status were held to engender, by themselves, a disabling conflict." *Green*, 2020 IL 125005, ¶ 22. "[T]he justification for treating the conflicts in those cases as per se was that the defense counsel in each case had a 'tie to a person or entity—either counsel's client, employer, or own previous commitments—which would benefit from an unfavorable verdict for the defendant.'" *Id.* (quoting *Spreitzer*, 123 Ill. 2d at 16).

Such a tie creates two problems, which justify 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, there might be an 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).

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

This Court should hold that no per se conflict existed here because Rau did not contemporaneously represent the victim; indeed, his representation ended years before her murder.

Although this Court has stated 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." *Fields*, 2012 IL 112438, ¶ 18; *see also Green*, 2020 IL 125005, ¶ 24, such a broad statement cannot be squared with *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), which this Court has not overruled and was correctly decided.

Hillenbrand found no per se conflict of interest where defense counsel had previously represented the murder victim in preparing income tax returns for a business that she and the defendant owned together, a representation of the victim that "was concluded long before [the present case.]" *Id.* at 545. As the Court reasoned, the defendant "must show the attorney has a contemporaneous conflicting professional commitment to another" to demonstrate a per se conflict of interest. *Id.* at 544.

This Court has never overruled *Hillenbrand.* It held in *People v. Hernandez*, 231 Ill. 2d 134 (2008), that the *contemporaneous* representation of a victim constitutes a per se conflict. And although the Court claimed in

Hernandez to have "clearly stated in the past that a[n attorney's] prior relationship [with the victim] falls within [the per se] category," *id.* at 151, none of the cases cited in *Hernandez* involved a conflict based on defense counsel's prior representation of a victim.

For starters, *People v. Hardin*, 217 Ill. 2d 289, 290 (2005), addressed a circumstance in which postconviction counsel argued that trial counsel was ineffective, and more specifically whether the "simple fact that both attorneys were employed by the DuPage County public defender's office necessitated an inquiry . . . into a potential conflict of interest." *Hardin* thus presented no question about the application of the per se conflict rule based on defense counsel's prior representation of someone other the defendant.

Other cases cited in *Hernandez* involved per se conflicts based on counsel's current representation of a state witness or involvement in the defendant's case as a prosecutor, and therefore could not have established any rule based on prior representation of a victim. *See People v. Morales*, 209 Ill. 2d 340, 346 (2004) (defense counsel's simultaneous representation of potential state witness did not create per se conflict); *People v. Graham*, 206 Ill. 2d 465, 474 (2003) (no conflict where attorney had no attorney-client relationship with state witness), *People v. Miller*, 199 Ill. 2d 541, 546 (2002) (prosecutor's prior representation of defendant as public defender in the same case created per se conflict); *People v. Moore*, 189 Ill. 2d 521, 538-30 (2000) (no per se conflict where counsel had "no contemporaneous professional

relationship" with potential witness or her attorney); *People v. Lawson*, 163 Ill. 2d 187, 217-18 (1994) (per se conflict existed where "defendant's court-appointed defense counsel also previously served in the same criminal proceeding as the prosecuting assistant State's Attorney"); *People v. Kitchen*, 159 Ill. 2d 1, 30 (1994) (no per se conflict where "no indication that defense counsel was familiar with the prosecution, victim, or that he would have benefited from an unfavorable verdict"); *Spreitzer*, 123 Ill. 2d at 20-21 (prior involvement of public defender as prosecutor in defendant's case did not constitute per se conflict).

Hernandez similarly involved a simultaneous representation of the defendant and his victim, and its statements regarding prior representation were dicta, in that they were unnecessary to the disposition of that 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"); *People v. Flatt*, 82 Ill. 2d 250, 261 (1980) ("It is well settled that the precedential scope of a decision is limited to the facts before the court.").

Indeed, *Hillenbrand* was correctly decided, for only when counsel contemporaneously represents a victim can counsel truly be said to have a "tie to a person or entity . . . which would benefit from an unfavorable verdict for the defendant," *see Spreitzer*, 123 Ill. 2d at 16, that "might subliminally affect counsel's performance," or create an "appearance of impropriety," *see Fields*, 2012 IL 112438, ¶ 40. As illustrated by the facts of this case, counsel

often does not even recall the prior representation, much less feel any sense of loyalty, duty, or obligation to a former client. SecR1114-15.

Accordingly, this Court should follow *Hillenbrand*, its sole decision addressing a claimed per se conflict resulting from defense counsel's prior representation of the victim, and hold that Rau did not have a per se conflict of interest in this case.

III. 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.

Even if this Court were to overrule *Hillenbrand* and adopt a per se conflict rule based on prior representation of a victim, it should limit this category of per se conflicts to exclude a defense attorney's prior representation of the alleged victim when (1) the victim is deceased, and (2) the prior representation was by appointment.

The twin rationales for the per se conflict rule are not meaningfully advanced in these circumstances. This Court has recognized two purposes for the per se conflict rule: (1) 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"; and (2) the 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." *Fields*, 2020 IL 112438, ¶ 40 (internal quotation marks and brackets omitted).

But such concerns do not apply where, as here, counsel would feel no continuing loyalty to a deceased prior client, particularly when there were no financial interests involved because counsel was an appointed public defender. In contrast to the attorney's *contemporaneous* representation of the victim in *Hernandez*, where counsel expressly "acknowledged his loyalty to [the living victim]," 231 Ill. 2d at 146, counsel would have no similar loyalty to a deceased former client, who could not benefit from an unfavorable verdict against defendant. Indeed, Rau testified 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. SecR1114. Nor is there any possibility that a deceased victim will be called to testify against the defendant, such that counsel would be required to cross-examine a former client. *See Hernandez*, 231 Ill. 2d at 139, 149. Moreover, 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. Thus, there is no possibility that any financial interests would subject him to later charges that his representation was not completely faithful.

Although 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, narrowing the category of per se conflicts to exclude deceased victims who had been clients due to court appointment would not complicate application of the per se conflict rule. Rather, application of this revised rule would remain "straightforward and simple," *id.*, for it turns on two readily verifiable facts. If (1) the prior representation was (1) by appointment, and (2) if the prior client is deceased, then the per se conflict rule would not apply.

Application of the per se rule in these circumstances fails to meaningfully advance the purposes of the rule, and imposes a harsh consequence: automatic reversal. Courts extend a remedy of automatic reversal with restraint. *See 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). And the automatic reversal remedy is a disproportionate sanction for counsel's mere oversight here. Although this Court has rejected the argument that the per se rule provides an incentive for defense counsel to conceal possible conflicts, knowing that if their client is convicted, a new trial will be granted based on the conflict, *see Hernandez*, 231 Ill. 2d at 147, this case demonstrates that the harsh consequence of the per se rule also follows when defense counsel does not actively conceal a possible conflict, but instead merely forgets that he once briefly previously represented the victim years earlier.

Further, as the appellate court noted, "this was a case involving substantial media exposure and was aggressively litigated by both sides." *Yost*, 2020 IL App (4th) 190333-U, ¶ 58. Defendant has not challenged any aspect of Rau's defense, and the record confirms that he provided zealous representation, which included a motion for change of venue, a fitness hearing, and a four-day trial at which Rau vigorously challenged the State's case and presented testimony and evidence to support the defense theory of reasonable doubt, that defendant could not have performed a knowing or volitional act due to an episode of hypoglycemia, and that due to amnesia, "to [defendant's] knowledge," he "did not hurt her." *See* SecR835-41 (defense closing argument). The judge's remarks at sentencing demonstrate that the case was important not only to the parties and their families, but to the entire community. *See* SecR970-71 (cautioning those in attendance that court would not tolerate demonstrations or displays against defendant or victim and noting that it had taken steps to prevent threatened physical violence against defendant), SecR994 (noting that defendant had taken from the community its "belief that they were immune from this kind of thing").

The per se conflict rule also disproportionately affects smaller counties where the Public Defender has few (or no) assistants. As illustrated by 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. In smaller counties

with a small criminal defense bar, if defendants are unwilling to waive the conflict, 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 that representation).[2]

Application of the per se reversal rule here, where the justifications underlying the rule have little or no application, and the harms extend beyond the parties to the community at large, is thus unjustified.

Finally, it bears mention that even if a criminal defendant cannot establish a per se conflict, he is not without recourse, for he can still pursue a claim that counsel was working under an actual conflict of interest or an ineffective assistance of counsel claim based on some deficiency in counsel's representation. *See Green*, 2020 IL 125005, ¶ 38. To properly cabin application of the per se conflict rule — and its harsh remedy of automatic reversal — to circumstances that advance its underlying rationale, this Court should narrow the rule to exclude a defense attorney's prior representation of the alleged victim when (1) the victim is deceased, and (2) the prior representation was by appointment.

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[2] That defendant waived potential conflicts arising from Rau's prior representation of Lookofsky and Judge Finson's prior representation of defendant and his father, SecR1099-1100, further illustrates the potential for, and likelihood of, conflicts in smaller counties.

CONCLUSION

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

December 8, 2020

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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, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the proof of service, is 21 pages.

/s/ Katherine M. Doersch
Katherine M. Doersch
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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 December 8, 2020, the foregoing Brief and Appendix 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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APPENDIX

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2020 IL App (4th) 190333-U

NO. 4-19-0333

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 15, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Moultrie County
MICHAEL S. YOST,	)	No. 15CF6
Defendant-Appellant.	)	
	)	Honorable
	)	Wm. Hugh Finson,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed defendant's conviction and remanded the case for a new trial where trial counsel labored under a *per se* conflict of interest and defendant did not waive his right to conflict-free representation.

¶ 2 Following a September 2016 bench trial, the trial court found defendant, Michael S. Yost, guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)) and sentenced him to 75 years in prison. On appeal, this court allowed the State's motion for agreed summary remand pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). On remand, the trial court appointed independent counsel to investigate defendant's claim of ineffective assistance of trial counsel. In April 2019, defendant's new counsel filed a motion for a new trial, arguing trial counsel had a *per se* conflict of interest due to his prior representation of the victim in this case. Following a May 2019 hearing, the trial court denied the motion.

¶ 3 Defendant appeals, arguing the trial court erred in denying his motion for new trial because his trial counsel labored under a *per se* conflict of interest and defendant did not waive his right to conflict-free representation. For the following reasons, we agree, reverse defendant's conviction, and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In March 2015, the State charged defendant by information with four counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)). Count IV alleged that defendant, without lawful justification and with the intent to kill Sheri Randall, stabbed Randall multiple times, thereby causing her death, and the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. In June 2016, defendant waived his right to a jury trial and elected to proceed to a bench trial.

¶ 6 A. Bench Trial

¶ 7 Defendant's bench trial proceeded over four days beginning on September 12, 2016. We discuss only the evidence relevant to the disposition of this case.

¶ 8 1. *The State's Case-in-Chief*

¶ 9 Andrew Pistorious testified he was a police officer for the city of Sullivan, Illinois, and had been employed there for 13 years. Pistorious testified that he was on duty on March 4, 2015, and responded to a call at 1003 North Graham Street, Apartment 1, in Sullivan. When he entered the apartment, he could see "large amounts of blood in the kitchen area." When he entered the bedroom, he saw "two victims laying on the floor with large amounts of blood on the bed and floor."

¶ 10 As paramedics assessed the two individuals, Pistorious took photographs of the scene. The State introduced a photograph, which was marked as People's Exhibit No. 1.

Pistorious testified the photograph showed three subjects: a male, who he identified as defendant, a female, who he identified as Sheri Randall, and another male, Chief Mike Piper. Pistorious testified that the photograph showed Sheri "with a gaping gash on her side, with puncture wounds, and the male subject *** on his right side with his left arm on top of Sheri Randall." He again identified the male subject as defendant.

¶ 11 Pistorious testified that because defendant was still breathing, he was taken by ambulance to an emergency room for treatment. The State introduced various other photographs taken by Pistorious, which were marked as Exhibit Nos. 2 to 13, and which depicted defendant during his emergency room visit. The photographs showed defendant's injuries, including wounds on his feet, puncture wounds on his side, a large bruise on his hip, and a laceration on his arm near his elbow.

¶ 12 Sheryl Cochran testified she previously had a dating relationship with defendant. She was aware that defendant and Sheri also had a dating relationship. Cochran testified that around the time of Sheri's death, Cochran and defendant spoke on the phone. During this conversation, defendant told her "he was very emotional—and [defendant and Sheri] were broken up at the time—and he—I will quote this, he said, 'If I cannot have Sheri, then nobody else can.' "

¶ 13 Tamara McRill-Chambers testified she and defendant previously had a dating relationship and that they remained on friendly terms after the relationship ended in 2014. McRill-Chambers testified that during a phone conversation in January 2015, defendant stated that his relationship with Sheri "wasn't going to end well and he fanaticized [*sic*] about killing her and killing himself." McRill-Chambers also testified that in January 2015 she had a conversation with defendant using an application called Facebook Messenger. A transcript of the

conversation was introduced as People's Exhibit No. 19 and later admitted into evidence over defendant's objection. In the conversation, defendant told McRill, "You need to get your stuff soon," because "this place will be a crime scene soon." When McRill asked "Why?" defendant responded, "Don't worry about—just get your stuff soon. I do want you to have it. Let's just say, I got Dexter plans." McRill explained that when referring to "Dexter," defendant was alluding to a "serial killer show" and that Dexter committed murders where he "would plastic off a room to keep the blood splatter from getting on everything and then show his victims pictures of the people they've wronged and then kill them."

¶ 14 John Meyers, Jeffrey Lewis, and Stephanie Shaw all testified that they were present at a bar called the Night Landing on the evening of February 27, 2015, where they observed defendant. Each witness testified that they observed an interaction between defendant and Sheri wherein defendant threatened to kill Sheri. Meyers testified the threat occurred as defendant was leaving the bar. Lewis testified he heard defendant say to Sheri, " 'I will kill you, you b***h—you f**king b***h.' " Shaw testified that defendant said to Sheri, " 'I ought to kill you, b***h.' "

¶ 15 Jamie Lynn Polk and Heather Click both testified they were employed at a bar called the Landing and observed defendant and Sheri drinking there on the evening of March 3, 2015. Each witness testified they observed defendant purchase drinks for Sheri, but that defendant did not interact with Sheri directly except for when Sheri went outside to smoke. Click testified that around 10:30 p.m., she escorted defendant out of the bar because "he was yelling and causing a raucous [*sic*] because Sheri was down at the end of the bar having fun and one of the guys and her kind of bumped into one another and [defendant] flipped out and started yelling at him."

¶ 16 Hilary Grimm testified she saw defendant on March 4, 2015, walking down North Seymour Street in Sullivan around 5:50 a.m. as she was leaving for work. Defendant was walking away from his trailer on North Seymour Street in the direction of North Graham Street. Grimm testified she believed defendant was wearing a hooded sweatshirt.

¶ 17 Jill Bassett testified that she commonly goes by Nicki and that she had been friends with Sheri for 30 years. Bassett described Sheri and defendant's relationship as "off again/on again" and that they were not dating on March 4, 2015. Bassett testified she lived next door to Sheri and they shared a laundry room that was between the two apartments. Because they were "good friends" and "trusted each other," Bassett and Sheri usually did not lock their apartment doors leading to the laundry room and there was "movement back and forth between the two apartments." Bassett testified that on March 4, 2015, she took a lunch break at her apartment around 11 a.m. She went through the laundry room and attempted to enter Sheri's apartment, but the door was locked. Bassett stated that she knocked on the door but did not receive a response. She "knew something was wrong," so she picked the lock with a clothes hanger and entered Sheri's apartment. When Bassett entered the apartment, there was "blood everywhere" with "a trail from the living room, from the kitchen into [the] living room into the bedroom," where she found Sheri and defendant lying on the floor. Bassett testified there was a blanket over Sheri and defendant was lying right next to Sheri with his hand over her.

¶ 18 Stephen Hulen testified he was a crime scene investigator with the Illinois State Police. Hulen testified he was called to 1003 North Graham Street, Apartment 1, in Sullivan around 2 p.m. on March 4, 2015. When Hulen arrived, he observed a broken window on the west side of the apartment. Hulen testified the window "appeared to be broken from the outside in." Hulen observed footprints in the snow on the ground near the window and "directly under the

window there was broken glass and a concrete block." Hulen testified that when he entered the bathroom, he noticed "several drops of a blood-like substance on the floor, on the vanity, on the sink." Additionally, Hulen observed "a blood-like substance" on "a Clorox bottle on the tank of the toilet." Hulen also observed a footprint on the kitchen floor. Hulen testified the kitchen footprint appeared to be "a barefoot or sock foot." Hulen observed several weapons near Sheri's body, including two "steak or kitchen knives" on the left side of her body, "one knife" on her right, and a box cutter on the bed. Hulen testified some of the wounds on her hands could have been defensive wounds. Hulen testified he collected the following items for potential forensic testing: a pair of black tennis shoes from the bed, the Clorox bottle from the bathroom, a cell phone that was found under the broken window in the southwest bedroom, a gray sock, the box cutter, the kitchen knives, and swabs from the door to the laundry room, the bathroom sink, and the kitchen sink.

¶ 19 Corey Formea testified he worked for the Illinois State Police Forensic Lab in Springfield and that he specialized in deoxyribonucleic acid (DNA) analysis. Formea testified that he was able to conclude, with a reasonable degree of medical or forensic scientific certainty, that the following items contained a DNA profile consistent with that of defendant or from which defendant could not be excluded: (1) the swab from the kitchen sink, (2) the Clorox bottle from the bathroom, (3) the swab from the door handle to the laundry room, (4) the box cutter, (5) the black tennis shoes, (6) the swab from the bloody footprint on the kitchen floor, and (7) the gray sock.

¶ 20 Dr. Shiaping Boa testified he was a forensic pathologist and performed an autopsy on Sheri Randall on March 5, 2015, in Urbana, Illinois. In his expert opinion, the cause of Sheri's death was multiple stab wounds "due to assault by another person or persons." Sheri

could not have inflicted the wounds herself because "she had stab wounds on the back, which she cannot reach" and had a "classic defensive wound on the hands." Dr. Boa testified it took "probably one hour for her to die" and it "was not a quick death because no critical vessels [were] cut." Dr. Boa also testified that he reviewed defendant's medical records from when he was admitted on March 4, 2015. In Dr. Boa's opinion, defendant's injuries were self-inflicted because they were in the "same direction, same pattern," in contrast to Sheri's, which were "different, the direction, and clearly indicated the body moved—the body movement and body struggle."

¶ 21 2. *Defendant's Case-in-Chief*

¶ 22 Defendant testified he was diagnosed with Type 2 diabetes in 2013. On March 3, 2015, defendant left his trailer and walked to the Landing around 11:30 a.m. Over the course of the afternoon, defendant had about four beers. He left between 2 p.m. and 3 p.m. and returned to his trailer. He stopped there only briefly before walking back to the Landing. At this point, he had not had anything to eat but had taken approximately 75 units of Lantus, his insulin medication, around 7:30 a.m. Defendant did not remember leaving the Landing and did not remember much from the time period between 3:30 p.m. to 9:30 p.m. Defendant did not recall being escorted out of the bar. The next thing defendant remembered was being at Sheri's apartment and talking with her while she cooked. After that, defendant did not recall what occurred but remembered regaining consciousness in Sheri's bedroom, where he was between the bed and dresser. Defendant remembered waking up and pulling a knife out from his left upper abdomen area before collapsing again.

¶ 23 Dr. Gregory Clark was admitted as an expert in endocrinology. In his professional opinion, after reviewing defendant's medical records, Dr. Clark believed defendant's diabetes

was "not well controlled." Dr. Clark testified that on March 3, 2015, defendant was severely hypoglycemic, meaning his blood glucose levels were well below the normal range. Dr. Clark testified that, within a reasonable degree of scientific certainty, defendant likely lost consciousness on the evening of March 3, 2015, because of a diabetic episode.

¶ 24 Following closing arguments, the trial court found defendant guilty on all four counts of first degree murder.

¶ 25 B. Posttrial Proceedings and First Direct Appeal

¶ 26 On September 21, 2016, defendant wrote a letter to the trial court requesting a new trial. In the letter, defendant alleged the following:

> "I have just been made aware that my Attorney Mr. Brad Rau was also a[n] attorney for the victim in my case Mrs. Sheri Randall in a past case of hers. This means they had a past working relationship together which 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 okay with this. With a case a[s] 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 trial ***."

According to a docket entry dated September 22, 2016, the trial court placed defendant's letter on file and directed the circuit clerk to forward copies of the letter to the State and defense counsel. On September 30, 2016, defendant's trial counsel filed a motion for a new trial, which the trial court denied.

¶ 27 On October 21, 2016, the trial court found the four counts merged and sentenced defendant to 75 years in prison on count IV. Defendant timely filed a motion to reconsider the sentence, which the trial court denied.

¶ 28 Defendant appealed, and pursuant to *Krankel*, 102 Ill. 2d at 189, this court allowed the State's motion for agreed summary remand for a preliminary inquiry into the factual basis of defendant's claim of ineffective assistance of trial counsel based on an alleged conflict of interest. *People v. Yost*, No. 4-16-0903 (2019) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 29 C. *Krankel* Proceedings

¶ 30 On March 7, 2019, the trial court conducted a preliminary *Krankel* inquiry. At the hearing, defendant informed the court that his trial counsel previously represented the victim in this case. At the conclusion of the hearing, the court found that defendant's claim had merit and appointed new counsel to investigate defendant's claim of ineffective assistance of trial counsel. On April 2, 2019, defendant's new counsel filed an amended motion for new trial, alleging trial counsel labored under a *per se* conflict of interest and defendant never waived his right to conflict-free representation.

¶ 31 On May 21, 2019, the trial court held a hearing on defendant's amended motion for new trial.

¶ 32 1. *Defendant's Testimony*

¶ 33 Defendant testified that he was currently incarcerated at Lawrence Correctional Center and was convicted of first degree murder on September 15, 2016. Prior to that date, defendant did not know that his trial counsel, Bradford Rau, previously represented the victim in his case, Sheri Randall. Defendant's mother discovered this information through an internet search on a website called Judici. She told defendant about her discovery sometime after his conviction but before the sentencing hearing in October 2016. Defendant stated he never waived this conflict and "was never made aware of it at all."

¶ 34 On cross-examination, defendant testified that after he discovered Rau previously represented Sheri, he informed his trial counsel of that fact. Rau then told defendant that "it didn't matter." Specifically, Rau told defendant he "was unsure whether he had represented [the victim] or not, but if he had, it didn't matter because she had passed away ***." Rau did not tell defendant that Sheri's case involved a charge for driving under the influence (DUI), but defendant knew this was the case because "it showed up in Judici records." When asked if Sheri's DUI was seven years prior to his conviction, defendant testified that he did not remember.

¶ 35 At the conclusion of defendant's testimony, the court took judicial notice of its own records in *People v. Randall* (Moultrie County case No. 08-DT-22) and in the present case. The court also admitted People's Exhibit No. 1 into evidence, which contained a notarized affidavit from defendant's trial counsel.

¶ 36 2. *Bradford Rau's Testimony*

¶ 37 Rau testified that he served as a public defender in Moultrie county from 2004 to 2017. Rau further testified that he represented defendant through the bench trial in this case. He agreed that according to the circuit court's records, he also represented Sheri Randall, but he had no independent recollection of the representation. At the beginning of his representation of defendant and through the bench trial, Rau had no independent recollection of representing Sheri. After defendant brought up Rau's representation of Sheri after trial, Rau still did not recall representing her. Consequently, Rau agreed that in his representation of defendant, he did not feel that he "owed any duties or obligations" to Sheri.

¶ 38 On cross-examination, Rau testified that despite not recalling his representation of Sheri, he had no reason to doubt the circuit court's records. Rau believed that he spoke with

defendant about the issue at some point and remembered that defendant had sent a letter to the trial judge, Judge Flannell. Rau also recalled that the court addressed defendant's letter at some point but admitted he could not find anything in the record to support that recollection.

¶ 39 3. *Trial Court's Decision*

¶ 40 At the conclusion of the hearing, the trial court denied defendant's motion for new trial, stating:

> "Mr. Rau didn't recall representing [Sheri], and he still doesn't recall it based upon his testimony today. Admittedly he did not disclose to [defendant] that he previously represented [Sheri], but then he didn't remember the representation. [Defendant] found out from his mother researching online. She told him and then he told Mr. Rau. There was no knowing waiver—waiver, knowing or otherwise, of the issue by [defendant]. The important thing the Court sees is that Mr. Rau's representation of *** [Sheri] ended seven years before this case was filed, and when that negotiated plea was presented, from that point on he no longer had any duty or obligation to her. The evidence indicates that the DUI case from 2008 is the only thing Mr. Rau ever represented her on, didn't have any kind of ongoing professional relationship with her or with members of her family. He didn't represent her on anything else. Mr. Rau had no financial interest in retaining [Sheri's] favor. He wasn't financially beholden to her because she didn't pay him in the DUI case. She didn't pay a retainer; she didn't have to. He was appointed as public defender and was paid by Moultrie County. The court feels that the *Hillenbrand* decision, which is a decision of the [Illinois] Supreme Court and outweighs the decisions of the appellate courts, applies squarely to this case, that

based on the facts we have in this case and the decision in the *Hillenbrand* case, the Court finds that Mr. Rau had no *per se* conflict of interest."

¶ 41 Thereafter, the trial court entered a written order finding that trial counsel's previous representation of Sheri in Moultrie County case No. 08-DT-22 did not constitute a *per se* conflict of interest in his representation of defendant in the present case and thus denied defendant's amended motion for new trial.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 Defendant argues the trial court erred in denying his motion for new trial because his trial counsel labored under a *per se* conflict of interest where he previously represented the victim in this case for a 2008 DUI charge and defendant did not waive his right to conflict-free representation. We agree.

¶ 45 A. Applicable Law

¶ 46 "The right to effective assistance of counsel under the sixth amendment to the Constitution of the United States entitles a criminal defendant to the undivided loyalty of counsel, free from conflicting interests or inconsistent obligations." *People v. Enoch*, 146 Ill. 2d 44, 51-52, 585 N.E.2d 115, 119 (1991). "A criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to conflict-free representation." *People v. Peterson*, 2017 IL 120331, ¶ 102, 106 N.E.3d 944, *modified on denial of reh'g* (Jan. 19, 2018). "Two categories of conflict of interest exist: *per se* and actual." *Peterson*, 2017 IL 120331, ¶ 102.

¶ 47 A *per se* conflict of interest may be found "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the

prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant." *People v. Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35. "Under this rule, the defendant's conviction must be reversed if (1) defense counsel has an actual or potential conflict of interest stemming from a previous or current commitment to a party with interests adverse to the defendant, and (2) the defendant does not waive the conflict." *People v. Graham*, 206 Ill. 2d 465, 472, 795 N.E.2d 231, 236 (2003). Moreover, "[i]f a *per se* conflict exists, defendant is not required to show that counsel's actual performance was in any way affected by the existence of the conflict. [Citations.] In other words, a defendant is not required to show actual prejudice when a *per se* conflict exists. [Citation.]" (Internal quotation marks omitted.) *People v. Hernandez*, 231 Ill. 2d 134, 143, 896 N.E.2d 297, 303 (2008). When deciding whether a *per se* conflict exists, the reviewing court should make a "realistic appraisal of defense counsel's professional relationship to someone other than the defendant under the circumstances of each case." (Internal quotation marks omitted.) *People v. Austin M.*, 2012 IL 111194, ¶ 83, 975 N.E.2d 22.

¶ 48 The Illinois Supreme Court has held that generally, defense counsel's representation of the victim need not be "contemporaneous or active" for a *per se* conflict of interest to exist. (Internal quotation marks omitted.) *Hernandez*, 231 Ill. 2d at 151. "Ordinarily, conflict arises from counsel's 'association,' 'relationship,' 'commitment,' 'professional connection,' or 'some tie' with the victim, *** which is either 'prior or current' or 'previous or current.' " *Hernandez*, 231 Ill. 2d at 151.

> "[T]o 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." *Hernandez*, 231 Ill. 2d at 151-52.

¶ 49 Where the facts are undisputed, the question of whether a *per se* conflict of interest exists is a legal question that this court reviews *de novo*. *Hernandez*, 231 Ill. 2d at 144.

¶ 50 B. This Case

¶ 51 Here, the trial court erred when it determined that trial counsel did not labor under a *per se* conflict of interest. The record affirmatively demonstrates—and the parties do not dispute—that (1) trial counsel represented the victim in this case for a 2008 DUI charge, (2) trial counsel did not disclose his prior representation of the victim to defendant, and (3) defendant did not knowingly waive his right to conflict-free representation. As we discuss below, we find that trial counsel labored under a *per se* conflict of interest as a matter of law. *Hernandez*, 231 Ill. 2d at 143-44.

¶ 52 1. *Hillenbrand*

¶ 53 The trial court found, and the State argues in its brief, that this case is controlled by *People v. Hillenbrand*, 121 Ill. 2d 537, 521 N.E.2d 900 (1988). Defendant argues that (1) *Hillenbrand* only addressed defense counsel's contemporaneous, not prior, representation of a victim and (2) the State improperly relies on *obiter dicta*. We agree with defendant.

¶ 54 The State argues that the *Hillenbrand* case stands for the principle that a *per se* conflict will not be found where "[defense] counsel's prior representation of the victim was in a matter entirely unrelated to the defendant's case" and where the representation concluded long before the case *sub judice*. In *Hillenbrand*, the supreme court found no *per se* conflict of interest

where defense counsel had previously represented the murder victim in preparing income tax returns for a business that she and the defendant owned together. *Hillenbrand*, 121 Ill. 2d at 546-47. In reaching that decision, the supreme court stated that defense counsel's representation of the victim "was concluded long before [the present case]." *Hillenbrand*, 121 Ill. 2d at 545. We agree with defendant that this comment should be viewed as *obiter dicta*. See *People v. Williams*, 204 Ill. 2d 191, 206-07, 788 N.E.2d 1126, 1136 (2003) ("*Obiter dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case" and are "binding *in the absence of* a contrary decision of that court." (Emphasis added.)). The court's comment is inconsistent with its more recent precedent applying the *per se* conflict rule "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*." (Emphasis added.) *Hernandez*, 231 Ill. 2d at 151-52.

¶ 55 The supreme court also cited several cases for the proposition that in order to demonstrate a *per se* conflict of interest, "[t]he defendant *** must show the attorney has a contemporaneous conflicting professional commitment to another." *Hillenbrand*, 121 Ill. 2d at 544-45 (citing *People v. Free*, 121 Ill. 2d 154, 168-69, 492 N.E.2d 1269, 1275 (1986), *People v. Washington*, 101 Ill. 2d 104, 114, 461 N.E.2d 393, 398 (1984), and *People v. Coslet*, 67 Ill. 2d 127, 133-34, 364 N.E.2d 67, 70 (1977)). But the supreme court has also consistently held that a *per se* conflict arises where "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, 525 N.E.2d 30, 34 (1988). Specifically, the supreme court has found "disabling conflicts" in cases involving "the defense attorney's *prior or contemporaneous* association with either the

prosecution or the victim." (Emphasis added.) *Spreitzer*, 123 Ill. 2d at 14-15 (collecting cases); see *People v. Lawson*, 163 Ill. 2d 187, 211, 644 N.E.2d 1172, 1183 (1994) ("The common element in these cases that the defense counsel was *previously or contemporaneously* associated *** with the victim ***." (Emphasis added.)); see also *Graham*, 206 Ill. 2d at 472. Accordingly, we find the State's reliance on *Hillenbrand* unpersuasive.

¶ 56 2. *Hernandez*

¶ 57 The State further argues that this case is distinguishable from *Hernandez* because that case involved a contemporaneous, if not "active," representation of both a defendant and a victim. *Hernandez*, 231 Ill. 2d at 138-39. We find this argument unpersuasive. As stated above, the *Hernandez* court clearly stated that a *per se* conflict arises whether the representation is " 'prior or current' or 'previous or current.' " *Hernandez*, 231 Ill. 2d at 151. Moreover, the appellate court has found that "[t]he remoteness of the attorney-client relationship between defense counsel and the murder victim does not preclude a finding of a *per se* conflict." *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 45, 981 N.E.2d 470. "Nor does defense counsel's representation of the victim in limited proceedings many years ago necessarily preclude a finding of a *per se* conflict." *Cleveland*, 2012 IL App (1st) 101631, ¶ 46. Because the parties do not dispute the facts involved in this appeal and it is not our role to examine the "nature and extent" of the prior attorney-client relationship between the alleged victim and counsel for the defendant, we find the State's argument must fail. Defendant did not waive defense counsel's *per se* conflict of interest and automatic reversal is required. See *Hernandez*, 231 Ill. 2d at 143.

¶ 58 We are mindful of the many issues reversal of defendant's conviction creates. It is obvious from the record this was a case involving substantial media exposure and was aggressively litigated by both sides. Unfortunately, our analysis of our supreme court's reasoning

in *Hernandez* leaves us no alternative. Such is the nature of a *per se* conflict. One purpose for such a rule is to avoid conflicting interests "subliminally affect[ing] counsel's performance in ways difficult to detect or demonstrate"; another is to prevent counsel from "later charges that his representation was not completely faithful." *Hernandez*, 231 Ill. 2d at 143 (citing *Spreitzer*, 123 Ill. 2d at 16-17). Without an adequate record showing defendant's awareness of the conflict and his knowing waiver, we are left with no other option. See *Hernandez*, 231 Ill. 2d at 143. Unless and until our supreme court addresses the tension between *Hernandez* and *Hillenbrand* we are bound by the reasoning set forth above.

¶ 59 It is worth noting this matter could and should have been addressed at the time it was first raised. Defendant testified once he learned of the conflict from his mother, sometime between the finding of guilty and his sentencing hearing, he brought it to the court's and counsel's attention. The defendant was found guilty on September 15, 2016. His letter to the court was filed September 22, 2016, and an accompanying docket entry indicates the clerk was directed to provide a copy of the letter to both the State and defendant's trial counsel. The defendant was sentenced on October 21, 2016, and the issue was not raised at that time. It was not raised in the motion for new trial filed on September 30 or the motion to reconsider sentence filed October 28. Defendant's claim was not addressed on the record until after remand although there were at least the three opportunities listed above. There is no way for us to know, at this juncture, what the result might have been.

¶ 60 C. Sufficiency of the Evidence

¶ 61 We next turn to whether the evidence was sufficient to remand for a new trial. See *People v. Lopez*, 229 Ill. 2d 322, 367, 892 N.E.2d 1047, 1073 (2008) (holding that a retrial raises double jeopardy concerns requiring us to consider the sufficiency of the evidence). "The relevant

question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Lopez*, 229 Ill. 2d at 367.

¶ 62 Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found defendant guilty of first-degree murder beyond a reasonable doubt based on (1) defendant's prior threats toward Sheri, (2) defendant's presence at the crime scene, (3) Sheri's defensive wounds, (4) expert testimony that defendant's wounds were self-inflicted, and (5) the DNA evidence found in the apartment. Accordingly, we conclude that there is no double jeopardy impediment to retrial and thus remand the cause to the trial court.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we reverse defendant's conviction and remand the case for a new trial.

¶ 65 Reversed and remanded.

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