**FILED,** Clerk of the Supreme Court, 23 Sep 2025, **089877**

# Supreme Court of New Jersey

## DOCKET NO. 089877

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| STATE OF NEW JERSEY, | : | CRIMINAL ACTION |
| Plaintiff-Respondent, | : | On Certification Granted from a Final Judgment of the Superior Court of New Jersey, Appellate Division. |
| v. | : | Sat Below: |
| DANA S. KEARNEY | : | Hon. Jack Sabatino, P.J.A.D., Hon. Maritza Berdote Byrne, J.A.D., Hon. Adam E. Jacobs, J.A.D. |
| Defendant-Appellant. | : | |

BRIEF ON BEHALF OF AMICUS CURIAE
THE ATTORNEY GENERAL OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR AMICUS CURIAE
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

KAILI E. MATTHEWS – ATTORNEY NO. 306652019
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
MatthewsK@njdcj.org

OF COUNSEL AND ON THE BRIEF

July 30, 2025

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31T – post-conviction relief hearing transcript dated January 19, 2023.

## PRELIMINARY STATEMENT

A friend or relative paying for the legal fees of a loved one in a criminal case is not an uncommon occurrence. Sometimes the payer may be called to testify at trial as a witness for either the State, defense, or–as in this case–both. These types of fee arrangements are permitted by our case law and the Rules of Professional Conduct (RPCs), but also make sense from a practical approach. Thus, when defendant, Dana Kearney's paramour, co-parent, and cohabitant (Alicia Boone) paid for his private criminal defense counsel fees, she did not create a per se or actual conflict of interest under the facts of this case.

In 2013, defendant fatally stabbed Boone's cousin. Boone paid some or all of his legal fees for his private criminal defense attorney. A few years after the fee arrangement was made and Boone had given the payments to the attorney, the attorney represented defendant at his trial for the murder and related charges.

At the trial, Boone was called as a witness first by the State and later by defendant's attorney. During her testimony, she was uncooperative with the State and even testified she believed defendant was innocent. She also testified about the fee arrangement with defendant's attorney. At no point did defendant, his co-defendants, his trial counsel, the judge, or the State question if this arrangement created a conflict of interest or divided his counsel's loyalties

between defendant and Boone. Rather, it was used to show the opposite: that Boone may be biased in favor of defendant.

Boone was one of nineteen witnesses called, though she did not witness the murder. The evidence adduced at trial established defendant and the victim got into a fight before defendant was seen going upstairs to his bedroom and retrieving a knife off his nightstand. After the stabbing, he told Boone the victim "got cut" or that defendant had "poked" him. Defendant's ripped tank top covered in blood matching the victim's was recovered from the scene and a positive association to defendant was found on one of the fingernail clippings from the victim's right hand. Defendant was ultimately convicted for the murder and related charges, and his convictions and sentence were affirmed on appeal.

In light of these facts, the Attorney General asks this Court to reject the conflict-of-interest claims defendant is raising in his petition for post-conviction relief (PCR), regarding the fee arrangement that he was seemingly aware of at trial. In doing so, this Court should focus its ruling on the question as it was presented to the lower courts and in defendant's petition: whether a trial witness paying a criminal defendant's attorney's fees creates a conflict of interest–and decline to address defendant's new claims about the basis of the conflict of interest. Indeed, these belated claims should be deemed waived.

As to the merits, this Court should hold that a third-party's payment of a private defense counsel's legal fees does not create a per se conflict of interest, regardless of if that payer may potentially be a witness for either side at trial. Moreover, this Court should hold, under the facts of this case, there was also no actual conflict of interest created when Boone paid for defendant's legal fees.

Relatedly, the Attorney General asks this Court, going forward, to articulate that a best practices approach in criminal cases where a private defense counsel's fees are paid for by another would be to memorialize the client's informed consent in writing, even though the RPCs do not require written informed consent in these situations.

Finally, this Court should affirm the denial of defendant's petition for PCR and hold that no evidentiary hearing is needed.

## QUESTION PRESENTED

Did defendant establish by a preponderance of the evidence that there was a conflict of interest when his paramour, who was the victim's cousin and called to testify at trial, paid for his trial counsel's legal fees years prior to the start of trial and when she had no communications with the attorney about the substance of the case?

## COUNTERSTATEMENT OF PROCEDURAL HISTORY

On October 21, 2016, a Middlesex County Superseding Indictment No. 16-10-01645 was filed, charging defendant with second-degree conspiracy to commit aggravated assault, under N.J.S.A. 2C:5-2(a) (count one); first-degree purposeful or knowing murder, under N.J.S.A. 2C:2-6(a) and N.J.S.A. 2C:11-3(a) (count two); third-degree endangering an injured victim, under N.J.S.A. 2C:12-1.2(a) (count three); second-degree hindering his own apprehension under N.J.S.A. 2C:29-3(b)(3) (count five); and third-degree witness tampering under N.J.S.A. 2C:28-5(a) (count six).[1] (Da1 to 3).

Defendant was tried in a joint trial with co-defendants Joseph Kearney and Shane Timmons before the Honorable Joseph Paone, J.S.C., from July 19 to September 5, 2017. See generally (1T to 29T). The jury convicted defendant on all counts. (Da4 to 7).

On December 22, 2017, Judge Paone sentenced defendant to a forty-year prison term for count two (murder) subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), a five-year flat term for count three (endangering an injured victim) to run concurrent to count one, a ten-year flat term for count five (hindering), and a five-year flat term for count six (witness tampering) to run consecutively

[1] Two co-defendants were also indicted in this case, but their convictions are not at issue in this appeal.

to count three. The judge merged count one (conspiracy) with count two. Thus, defendant's aggregate sentence was fifty years with thirty-four years of parole ineligibility. (30T79-3 to 88-7);(Da8 to 11).

Defendant appealed and on January 7, 2020, the Appellate Division affirmed his convictions and sentence. (Da12 to 112); State v. Timmons, et al., A-2567-17, A-2843-27, A-4138-17 (App. Div. Jan. 7, 2020). He then filed a petition for certification, which this Court denied on November 2, 2020. (Da113); State v. Kearney, 244 N.J. 349 (2020).

On April 1, 2021, defendant filed a petition for PCR and a supporting brief. (Da114 to 139). On January 19, 2023, the Honorable Colleen M. Flynn, P.J. Cr., heard arguments regarding his petition. See generally (31T). On February 1, 2023, she issued a written opinion and order denying relief on all issues except as to restitution, which is not at issue on appeal. (Da140 to 164).

On March 2, 2023, defendant filed a notice of appeal arguing, among other issues, that Judge Flynn should have found his trial counsel, who is now deceased–Neil G. Duffy, Esquire–had a conflict of interest because a trial witness paid for his counsel's fees. (Da115, 165). On September 18, 2024, in a published decision authored by the Honorable Jack M. Sabatino, P.J.A.D., the Appellate Division rejected defendant's claims and affirmed his convictions. State v. Kearney, 479 N.J. Super. 539 (App. Div. 2024); (Dsa2 to 32).

Defendant filed a petition of certification with this Court on September 20, 2024. This Court granted defendant's petition on April 11, 2025. (Dsa1).

This appeal follows.

## COUNTERSTATEMENT OF FACTS

The Attorney General relies on the facts as detailed in the Appellate Division's decisions in State v. Timmons, et al., A-2567-17, A2843-17, A-4138-17 (App. Div. Jan. 7, 2020) (Da12 to 112), and State v. Kearney, 479 N.J. Super. 539 (App. Div. 2024) (Dsa2 to 32), and adds the following.

### A. Boone's Trial Testimony

Defendant lived and co-parented with Alicia Boone, who was also his paramour. (20T113-9 to 114-12; 20T118-9 to 13). The victim, Christopher Sharp, who was friends with defendant and a cousin of Boone's, was fatally stabbed by defendant at defendant and Boone's residence on August 18, 2013. (20T126-7 to 21); (Da9). Following Sharp's murder, Boone and defendant continued to have a relationship leading up to and during trial. (21T74-12 to 76-25).

Boone was home the night Sharp was murdered and witnessed the events leading up to the stabbing but left the home moments before defendant stabbed Sharp. (Da18 to 21); (Dsa10). Without knowing about the murder, she drove defendant away from the scene of the crime and then back to it. (20T165-18 to

176-24); (Da21); (Dsa10). During the car ride defendant made statements to Boone that she later told police during three statements. (20T165-18 to 176-24); (Da28 to 29); (Dsa10). She did not learn of Sharp's death until after she dropped defendant back off at their home. (Da22 to 23); (Dsa10). As a result of these statements, and her first-hand account of the events leading up to the murder, she was one of nineteen witnesses the State called at trial. (Dsa10). After the State rested, defendant also chose to call her back to the stand as a witness as well. (26T107-17 to 130-25).

When called as a witness for the State, she testified about the events of the night leading up to Sharp's murder in the early morning hours of August 18, 2017, her statement to police the morning of August 18, 2017, her statement the afternoon of August 18, 2017, and her statement three days later on August 21, 2017. (20T112-18 to 249-22; 21T4-14 to 101-14); (Da28 to 29); (Dsa10 to 11). In her first statement to police, she told police that after defendant got in her car with her and the children and rode with her to her mother's home, he told Boone, "You got to take me back to the house," because "something was wrong with Chris." (20T169-12 to 16); (Da29); (Dsa10 to 11). In the morning statement she gave on August 18, Boone told police that defendant then said, "Chris got cut," but in her afternoon statement on August 18 and her August 21 statement, she told police that defendant then said, "I poked him." (Da29); (Dsa10 to 11).

Throughout the State's direct and re-direct examinations, Boone was acting uncooperative with the prosecutor's questions; the prosecutor even noted on one instance during a sidebar that "she[ was] clearly being a hostile witness with [the prosecutor] anyway." (21T38-24 to 25).

The fact that Boone was paying Duffy's fees first was elicited by Duffy at the start of his cross-examination of Boone as follows:

> Q: We know one another; right?
> A: Yes.
> Q: In fact you've been to my office; correct?
> A: Yes.
>
> [(20T180-14 to 17).]

The issue was then raised again during the State's redirect:

> Q: So, yesterday you had indicated that you had previously met Mr. Duffy. Is that right?
> A: Yes.
> Q: So, where did you meet him?
> A: At his office.
> Q: And how many times did you meet with him?
> A: I think three.
> . . . .
> Q: When you met with him what did you discuss?
> A: Payment.
> . . . .
> Q: Did you talk about the facts of the case at all?
> A: No. He wouldn't talk about the facts of the case.
> Q: Did anyone go with you when you met with him?
> A: I–no, I don't think so. It was over a period of time, but I don't–I don't think so.
>
> [(21T4-25 to 5-22).]

Pre-emptively, the State informed the judge and defense counsels that he would be seeking to elicit testimony from Boone as to her bias in favor of defendant. (21T74-12 to 76-25). Specifically, the prosecutor stated he would ask about Boone paying for Duffy's services and the amount of contact she has had with defendant since the night of Sharp's death. (21T74-12 to 76-25). Neither defendant, nor his defense counsel, objected to this questioning or indicated that Boone's payment of legal fees made her biased in favor of the State, not defendant. (21T74-12 to 76-25). Rather, Duffy only indicated he would object to any questioning about the cost of his fees. (21T75-9 to 11).

The State ultimately did question Boone about any bias she may have in favor of defendant through the following exchange:

> Q: Ms. Boone, you love Dana, right?
> A: Yes. I love all of them actually, but yes I do love Dana.
> Q: Like you told us before, you hired Mr. Duffy to represent him, right?
> A: Yes.
> Q: And you're paying for his services?
> A: Yes.
> Q: And Dana is the father of your child, right?
> A: Yes
> Q: And since this incident, you've spoken to him thousands of times. Is that fair to say?
> A: Yes.
> Q: You've seen him hundreds of occasions, right?
> A: Yes.
> Q: You don't want to see anything bad happen to him, right?
> A: No.

> Q: Certainly not because of anything that you say, right?
> A: Exactly.
>
> [(21T82-22 to 83-17).]

On re-cross, Duffy asked Boone when the last time she was at his office was, to which she replied, "Maybe 2014. Maybe possibly. A few years ago." (21T95-10 to 18). Then, on another redirect, the State asked Boone about whether she had been speaking with defendant about what had been going on with his trial, if he had told her what other witnesses have testified to, and about some of the aspects she may testify about. She replied yes to these questions. (21T96-11 to 97-21).

In a final recross, Duffy had the following exchange with Boone:

> Q: [The prosecutor] had asked you at some point in time, you wouldn't want anything bad to happen to Dana based on your statement. Remember that?
> A: Yes. That's right.
> Q: Is that true today?
> A: That's true.
> Q: In any way are you coloring your testimony because you don't want anything bad to happen to him?
> A: No. Today, 2017, my family and I are very much aware of who killed my cousin. We are much aware that it was not Dana Kearney. Unfortunately, all of that cannot be admissible in court, but to say that his murderer is not sitting here looking at me, he is, –
> [State]: Judge, I'm going to object to this, Judge.
> [Boone]: Well, I'm just letting it be known.
> [State]: Judge, I'm going to object. There's no question being asked.
> The Court: You can't just give a speech here.

> [Boone]: I'm sorry. I was listening and answering his question. But its four years later.
>
> [(21T100-4 to 101-1).]

Boone's first round of testimony was then concluded. (21T101-4 to 14). She was called back to the stand as a witness for defendant. (26T107-17 to 130-25). During her testimony, Duffy advocated for and successfully introduced her first statement to police wherein she said defendant told her "Sharp got cut" to oppose the statements the State introduced where she said defendant told her he had "poked" Sharp. (26T69-21 to 89-9; 26T112-25 to 121-16).

B. PCR Facts

Defendant filed a pro se petition for PCR and accompanying brief arguing, among other things, that his trial counsel, Duffy, had a conflict of interest with "the state's main witness," thus depriving him of effective assistance of counsel. (Da117). In his brief, defendant claims Duffy "accepted payments" from Boone but "never advised him nor sought a waiver from" defendant. (Da117). He further asserts that this constituted a per se conflict of interest because "the representation of [d]efendant by Neil Duffy was directly adverse to the representation of the State's main witness Ms. Boone." (Da120).

After hearing argument from the parties on the PCR issues raised, see generally, (31T), Judge Flynn issued a written decision denying his PCR petition on all grounds but reversed the restitution order, which is not relevant to this

appeal. (Da141 to 164). With regard to the conflict-of-interest ground, Judge Flynn held that "[w]hile it may be atypical for a victim's cousin and the State's main witness to pay for the petitioner's legal fees, those facts alone do not create an actual conflict of interest." (Da149). She found that the interactions between Duffy and Boone were limited in nature, arising early in the litigation when Boone made payments to trial counsel for his services, that Boone did not discuss the substance or case strategies with Duffy, and her discussion with Duffy did not extend beyond discussing payment. (Da149). She further held that Duffy's decision to refer Boone to another attorney showcases his attempts to prevent any conflicts of interest and protect defendant and found that Boone in fact did hire her own lawyer. (Da149). Finally, the PCR judge found that Boone's interactions with Duffy were solely for the purpose of paying his legal fees. (Da149). Considering these findings, based on the totality of the circumstances, Judge Flynn found there was no per se or actual conflict of interest and denied defendant's request for PCR relief. (Da149 to 150, 164).

C. Appellate Division Decision

The Appellate Division declined to find the fee arrangement created a per se conflict of interest for several reasons. First, it found that non-compliance with an ethics requirement, while relevant, does not automatically trigger per se civil or criminal consequences. State v. Kearney, 479 N.J. Super. 539, 560

(2024) (citing Baxt v. Lilola, 155 N.J. 190, 197-98 (1998)). Second, it found that "it is readily inferable from the record that defendant must have been fully aware that his co-parent Boone had paid for his legal fees, as was adduced in open court by Boone's trial testimony." Ibid. Third, the Appellate Division found that defense counsel "acted as a zealous advocate of defendant's interests and exhibited loyalty to his client," by "fiercely [advocating] to negate Boone's second and third police statements about defendant 'poking' the victim[and] . . . elicit[ing] extremely favorable testimony from her attesting that she did not believe defendant killed Sharp." Id. at 560-61. The court also found that Duffy was not restrained by Boone in his advocacy of defendant or that Duffy was materially limited by Boone's payment of his legal fees. Id. at 561. The panel thus concluded, "Any conceivable division of counsel's loyalties that could be the subject of a waiver was, in retrospect, purely hypothetical." Ibid.

The Appellate Division then analyzed whether there was an actual conflict of interest. Id. at 562. In addition to the reasons it described during its per se analysis, the court relied on Duffy's conduct to conclude there was no actual conflict of interest. Ibid. Specifically, the court detailed how Duffy endeavored to undermine the portion of Boone's statements that incriminated defendant, his "lengthy parries in Boone's cross-examination prompted the State to respond with extensive questioning on redirect," and he "spotlighted problems in the

State's case in a forceful summation." Ibid.

The court held that, while these strategic decisions ultimately failed given the strengths of the State's other proofs, they established that Boone's payment of Duffy's fees did not create an actual conflict of interest and did not prejudice defendant. Ibid.

In summary, the Appellate Division affirmed the denial of defendant's PCR petition, holding there was no conflict of interest[2] and no evidentiary hearing was required under these circumstances. Id. at 562-63.

[2] The Appellate Divion also rejected defendant's argument that he was not adequately advised about his right to testify. Kearney, 479 N.J. Super. at 563-64. While defendant filed an omnibus petition asking this Court to grant certification on all the issues he raised before the Appellate Division, this Court limited the grant of certification to "the issue articulated in defendant's letter petition regarding the payment of his legal fees by someone who testified for the State (i.e., Point I of defendant's brief to the Superior Court, Appellate Division)". Thus, the issue of whether defense counsel adequately advised defendant of his right to testify is not relevant to the question before this Court. Nevertheless, the Appellate Division affirmed the denial of defendant's PCR petition on this issue was well because the trial record amply demonstrated defendant knew he has a right to testify and voluntarily waived it. See Point I, infra, for a discussion as to why defendant's attempts to integrate this issue into the question before this Court are inappropriate.

## LEGAL ARGUMENT

### POINT I

### DEFENDANT'S NEW ARGUMENTS RELATED TO BOONE'S ALLEGED FEARS AND DUFFY'S PERSONAL INTERESTS WERE NEVER RAISED BELOW OR IN HIS PETITION FOR CERTIFICATION.

Defendant's belated arguments are not properly before this Court and are without merit. Before filing his supplemental brief with this Court, defendant's exclusive argument regarding an alleged conflict of interest was that the fee arrangement wherein Boone paid for his attorney's legal fees, created a per se conflict of interest that may have inhibited his attorney's cross-examination of her and summation.[3] This Court's order granted certification accordingly, limiting defendant's petition to "the issue articulated in defendant's letter petition regarding the payment of his legal fees by someone who testified for the State[.]" (Dsa1). But in his supplemental brief to this Court, defendant raises new arguments about the alleged adverse interests at issue, and how they impacted defense counsel's conduct. These arguments are waived and should be disregarded by this Court.

[3] Defendant filed a letter petition relying on his Appellate Division brief and appendix. (Dp1 to 2).

"Defendant may not present entirely new arguments to this Court." State v. Harris, 209 N.J. 431, 445 (2012); State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which are not raised below."). That is because "[a]ppellate review is not limitless," and instead, appellate jurisdiction is "bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." State v. Robinson, 200 N.J. 1, 19 (2009); State v. Legette, 227 N.J. 460, 467 n.1 (2017). See also State v. Vincenty, 237 N.J. 122, 135 (2019) (finding State "has waived" argument not raised before Appellate Division and therefore "declin[ing] to exercise our discretion to reach" the issue); State v. Cabbell, 207 N.J. 311, 327 n. 10 (2011) (declining to address claim not raised in petition for certification).

Indeed, this Court has rejected constitutional arguments raised for the first time on appeal even when the previously asserted arguments related to the same or similar underlying factual premise. For example, in Witt, the defendant previously challenged the validity of the warrantless search but challenged the stop itself for the first time on appeal. State v. Witt, 223 N.J. 409, 418 (2015). This Court rejected the latter claim raised for the first time on appeal, explaining that parties "must make known their positions" before the trial court. Ibid.

Thus, the Court held, "the Appellate Division should have declined to entertain the belatedly raised issue." Ibid.

It is not enough to simply raise an argument implicating the same or similar doctrine or issue on appeal. "[A]n issue can be broader in scope than an argument in that an issue may be addressed by multiple arguments which are the most basic building blocks of legal reasoning." United States v. Jones, 730 F.3d 336, 337 (3d Cir. 2013). "[F]or parties to preserve an argument for appeal, they must have raised the same argument in the [lower] Court–merely raising an issue that encompasses an appellate argument is not enough." Ibid.

That should bar review here. Defendant is raising separate arguments from the question certified by this Court, and no court below has reached the issues, nor were they requested to. Before both the Law Division and Appellate Division, defendant's only argument was that the fee arrangement caused a per se conflict of interest wherein Duffy was beholden to Boone which "might have inhibited his cross-examination and summation regarding her, in gratitude for her past payment and/or so as to secure any balance of payments." (Dab20 to 21). And he argued in the alternative for an evidentiary hearing on the issue. (Dab21).[4]

[4] Defendant raised a separate issue in Point II of his brief regarding his election to not testify at trial. As detailed above, this Court's certification grant was

But in his supplemental brief to this Court, defendant belatedly raises alternative arguments for the first time: (1) Boone allegedly had an adverse interest to defendant in avoiding criminal liability for herself thereby creating a per se and actual conflict of interest; (2) Boone allegedly had an adverse interest to defendant because she feared violence from defendant thereby creating a per se and actual conflict of interest; and (3) Duffy had an actual conflict of interest caused by his personal interest in concealing his alleged RPC violation and leading him to counsel defendant not to testify on his own behalf.

These new arguments contemplate markedly new factual allegations with different legal implications. The PCR court and Appellate Division were asked to focus their analysis on defense counsel's conduct because of financial influences from a State's witness who was also the victim's cousin–i.e. assessing if Boone's payment of his fees influenced Duffy's trial conduct because of gratitude to the payer and a financial fear that she may not pay him any remainder of the fee. The "adverse interests" the courts below were examining were Boone's interest as a factual witness for the State and as the cousin of the victim and Duffy's financial interest.

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limited to "Point I of defendant's brief to the Superior Court Appellate Division[.]" (Dsa1).

Defendant now asks this Court to make factual determinations about palpably different interests of Boone's, if those interests were adverse to defendant, if Duffy was aware of those interests prior to cultivating a trial strategy, and whether those interests impacted his trial strategy–before then making legal conclusions as to whether Boone's alleged interests create a per se or actual conflict, whether a trial strategy that took these alleged interests into account was unsound under the Sixth Amendment, and if he was prejudiced.

He then asks this Court to make factual findings about Duffy's professional-ethics interests and if those interests effected how he counseled defendant about defendant's right to testify, not how he conducted his cross-examination and summation. And in doing so, he asks this Court to examine a new, sub-doctrine of conflicts of interest law (a lawyer's personal interest as compared to a third-party payer's).

In addition to muddling the interests and conduct under review, defendant tries to muddle the issues by coalescing both points he petitioned on into the one point this Court granted certification on. Despite the Court not granting certification on the issue of whether defense counsel properly counseled defendant of his right to testify, defendant makes a transparent attempt to reframe the issue under the conflicts-of-interest doctrine to still get a bite at the apple. Defendant's attempts to circumvent the system and relitigate his claim

in a newly repackaged argument should be rejected by this Court as a procedural matter and on the merits.

By failing to raise these issues to the lower courts as he raises them before this Court, defendant deprived the Law Division and Appellate Division of developing arguments and findings on the matter and is thus barred from raising them now. Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-2 ("Appellants run the risk of having been found to have waived or abandoned objections . . . when objections are only raised tepidly."). These changed-litigation strategies, raised to this Court for the first time, thus run afoul of the principles in Witt and Robinson.

## POINT II

### BOONE'S PAYMENT OF DUFFY'S LEGAL FEES DID NOT CREATE A CONFLICT OF INTEREST.[5]

"A jury verdict that has been upheld on appeal 'should not be disturbed except for the clearest of reasons.'" State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Ways, 180 N.J. 171, 187 (2004)). Both Judge Flynn and the Appellate Division properly declined to disturb the jury's verdict here because

[5] This Point responds to defendant's Point I.

defendant failed to establish either a per se or actual conflict of interest with Boone paying Duffy.

Defendant filed a PCR petition claiming his trial counsel's representation was compromised because his co-parent and paramour, who was called as a witness at trial, paid for the legal fees of his private criminal defense attorney. See Kearney, 479 N.J. at 544-45. "[A]t a PCR hearing, the burden is on the petitioner to establish his right to 'relief by a preponderance of the credible evidence.'" Ibid. (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). To sustain this burden, defendant must allege and articulate facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992). Thus, "bald assertions" of deficient performance are insufficient to support a PCR application. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999); see also R. 3:22-10(b).

The test for determining if counsel's performance was effective for purposes of the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution, was formulated in Strickland v. Washington, 466 U.S. 668 (1984), which this Court adopted in State v. Fritz, 105 N.J. 42 (1987). To prevail on a claim of ineffective assistance of counsel, defendant must meet a two-prong test. Under the first prong, defendant must show counsel's performance was deficient, and he or she made errors so

egregious counsel was not functioning effectively as guaranteed by the Sixth Amendment of the United States Constitution. Strickland, 466 U.S. at 694.

Defendant must overcome the "'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling his responsibilities." State v. Hess, 207 N.J. 123, 147 (2011) (quoting Strickland, 466 U.S. at 689-90). In doing so, defendant "must demonstrate that counsel's actions were beyond the 'wide range of professionally competent assistance,'" State v. Savage, 120 N.J. 594, 614 (1990) (quoting Strickland, 466 U.S at 690), and that "trial counsel's actions did not equate to 'sound trial strategy," State v. Chew, 179 N.J. 186, 203 (2004) (quoting Strickland, 466 U.S. at 689). The Court must thus consider whether counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688.

In light of this strong presumption, "complaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy," Fritz, 105 N.J. at 54 (quoting State v. Willaims, 39 N.J. 471, 489 (1963)). "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting Strickland, 466 U.S. at 690-91); see also Nash, 212 N.J. at 542. Further, "[t]he quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality

of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 165 (1991)). "In evaluating a defendant's claim, the court 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of the attorney's conduct.'" Chew, 179 N.J. at 203 (quoting Strickland, 466 U.S. at 690).

The second prong requires defendant to show that the deficient performance prejudiced his right to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Within this context, "prejudice means 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Nash, 212 N.J. at 542 (quoting Strickland, 466 U.S. at 687). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 694). Accordingly, defendant must show more than just an error, but that the error actually prejudiced him because defendant is entitled to a fair trial, not a perfect one. State v. R.B., 183 N.J. 308, 333-34 (2005) (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).

Substantively, the question before this Court implicates conflicts-of-interest law, which is often guided by the RPCs and our case law. Our Courts employ a two-tiered approach when analyzing "whether a conflict of interest has deprived a defendant of this state constitutional right to the effective assistance of counsel." State v. Cottle, 194 N.J. 449, 467 (2008) (citing State v. Norman, 151 N.J. 5, 24-25 (1971)). First, in cases where there is a per se conflict, there must be a valid waiver or else prejudice is presumed. See ibid.; State v. Bellucci, 81 N.J. 531, 543 (1980).

Second, in the absence of a per se conflict, "the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel." Cottle, 194 N.J. at 467-68 (quoting Norman, 151 N.J. at 25). In the non-per-se context, prejudice is not presumed. Norman, 151 N.J. at 25.

Under both types of conflicts of interest, the first question under Strickland prong one is whether there is an un-waived conflict of interest. In this case, the alleged conflict of interest concerns payment of a criminal defendant's attorney's fees by a third-party payer. The RPCs are instructive as to this Court's analysis, though they are not themselves dispositive as to the effectiveness of counsel as guaranteed by the Sixth Amendment. See Kearney,

479 N.J. at 560. RPC 1.8(f) explicitly permits a lawyer to accept compensation for representing a client from one other than the client if three conditions are met: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and (3) information relating to the representation is protected as required by RPC 1.6.[6] See also In re State Grand Jury Investigation, 200 N.J. 481, 493 (2009).

But RPC 1.8(f), "does not exist in a vacuum: two other RPCs directly touch on the question presented." Id. at 494. RPC 1.7(a) forbids a lawyer from representing a client "if the representation involves a concurrent conflict of interest." See also In re State Grand Jury Investigation, 200 N.J. at 494. That RPC recognizes a concurrent conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer." RPC 1.7(a)(2); see also In re State Grand Jury Investigation, 200 N.J. at 494. Second, RPC 5.4(c) provides "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to

[6] RPC 1.6 concerns the confidentiality of information and when a lawyer is permitted to reveal information relating to representation of a client.

direct or regulate the lawyer's professional judgment in rendering such legal services." See also In re State Grand Jury Investigation, 200 N.J. at 494.

Thus, when harmonized together, these RPCs create a practical test permitting acceptance of payment directly or indirectly, from a third party provided six conditions are satisfied:

> 1) The informed consent of the client is secured. In this regard, "'[i]nformed consent' is defined as the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."
>
> (2) The third-party payer is prohibited from, in any way, directing, regulating or interfering with the lawyer's professional judgment in representing his client.
>
> (3) There cannot be any current attorney-client relationship between the lawyer and the third-party payer.
>
> (4) The lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation of his client. The breadth of this prohibition includes, but is not limited to, the careful and conscientious redaction of all detail from any billings submitted to the third-party payer.
>
> (5) The third-party payer shall process and pay all such invoices within the regular course of its business, consistent with manner, speed and frequency it pays its own counsel.

> (6) Once a third-party payer commits to pay for the representation of another, the third-party payer shall not be relieved of its continuing obligations to pay without leave of court brought on prior written notice to the lawyer and the client. In such an application, the third-party payer shall bear the burden of proving that its obligation to continue to pay for the representation should cease; the fact that the lawyer and the client have elected to pursue a course of conduct deemed in the client's best interests but disadvantageous to the third-party payer shall not be sufficient reason to discontinue the third-party payer's continuing obligation of payment. If a third-party payer fails to pay an employee's legal fees and expenses when due, the employee shall have the right, via a summary action, for an order to show cause why the third-party payer should not be ordered to pay those fees and expenses.
>
> [Id. at 495-97 (internal citations omitted).]

If either type of conflict of interest is found, then under Strickland's prong two, the prejudice requirement, "[a] defendant must demonstrate either that the error at issue was prejudicial [(actual conflict)] or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary [(per se conflict)]." Weaver v. Massachusetts, 582 U.S. 286, 308 (2017).

For the reasons discussed below, defendant has not overcome the strong presumption that his trial counsel was effective as he has failed to demonstrate by a preponderance of the evidence that his attorney had a conflict of interest or, where applicable, that he was prejudiced by this attorney's conduct. More

specifically, defendant has failed to establish that his attorney's acceptance of fees from Boone was a per se conflict of interest; nor has he established this conduct was a significant, actual conflict of interest or that it resulted in a great likelihood of prejudice. Therefore, the Attorney General asks this Court to affirm the Appellate Division's thorough and well-reasoned decision.

A. There is no per se conflict of interest.

As detailed above, the first question before this Court is whether the alleged conflict of interest was a per se conflict, and here, there was none. In this respect, New Jersey courts have departed from their federal counterparts and "have exhibited a much lower tolerance for conflict-ridden representation under the New Jersey Constitution than federal Courts have under the United States Constitution," by holding that "certain attorney conflicts render the representation per se ineffective," warranting a presumption of prejudice. Cottle, 194 N.J. at 470; see also State v. Drisco, 355 N.J. Super. 283, 292 (App. Div. 2002) ("New Jersey's constitutional standard thus provides broader protection against conflicts than does the Federal Constitution.").

But this Court "has never presumed prejudice . . . in a situation . . . in which the defendant was represented by competent counsel with no conflict of interest." Kearney, 479 N.J. Super. at 558 (alterations in original) (internal quotations omitted) (quoting State v. Miller, 216 N.J. 40, 60-61 (2013)). Thus,

the per se standard does not apply to every potential conflict of interest and is reserved for certain cases where the possibility of a division of loyalties cannot be overcome. Nevertheless, per se conflicts do not inherently trigger a mistrial or reversal of convictions, as they can be overcome upon showing of a valid waiver, Cottle, 194 N.J. at 467, and are rather rare.

Indeed, per se conflicts are "reserved for those cases in which counsel's performance is so likely to prejudice the accused that it is tantamount to a complete denial of counsel." Savage, 120 N.J. at 616; see also Miller, 216 N.J. at 70 (2013) ("[O]nly an extraordinary deprivation of the assistance of counsel triggers a presumption of prejudice."). This is only established in cases where there is an "overriding concern of divided loyalties." Cottle, 194 N.J. at 467 n.8.

Per se conflicts on constitutional grounds are generally "limited . . . to cases in which a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of codefendants.'" Cottle, 194 N.J. at 467 (citing Norman 151 N.J. at 24-25). The Court has found other narrow times when a per se conflict of interest exists; for example, where an attorney and his client were contemporaneously under indictment in the same county, and the client did not waive the conflict. Id. at 473.

The pivotal distinguishing fact in all the cases defendant relies on is that the record in those cases clearly establishes that the counsel's performance is so likely to prejudice the accused that it is tantamount to a complete denial of counsel. In other words, the facts of those cases establish a conflict of interest with more than hypotheticals or bald assertions like those defendant raises here. See Cottle, 194 N.J. at 449 (finding conflict where attorney and defendant were being prosecuted by same prosecutor's office); Bellucci, 81 N.J. at 535 (determining representation of multiple co-defendants is barred unless defendants were fully informed of the potential problems involved); People v. Carr, 167 N.E.3d 224, 226 (2020) (holding per se conflict of interest where victim paid for defendant's attorney fees); People v. Palmer, 490 N.E.2d 154, 156 (1986) (same).[7] Cf. People v. Hernandez, 615 N.E. 2d 843, 848 (Ill. App. Ct. 1993) (declining to find per se conflict where State's witness paid for attorney's fees "without further facts establishing obvious antagonism").

But here, that situation, simply does not exist as the record makes clear Duffy represented defendant and he advised Boone if she wanted counsel she should seek her own attorney, which she did. (21T4-25 to 5-22; 21T71-20 to

[7] Defendant also mistakenly relies on In re Abrams, 56 N.J. 271 (1970), which was rejected by this Court in In re State Grand Jury, 200 N.J. at 492-93, "in light of modern changes in the manner in which attorney-client relationships are to be viewed" and the implementation of the "more modern" Rules of Professional Conduct.

24; 21T98-2 to 12); (Da148 to 149). Rather, defendant unprecedentedly asks this Court to expand the per se conflicts doctrine to include situations where a defendant's legal fees are paid by a person who is ultimately called as a trial witness. But such a bright-line rule would run counter to the RPCs, case law, and public policy.

The Attorney General acknowledges, as is the law in our State, that where counsel's performance is so likely to prejudice the accused it is tantamount to a complete denial of counsel, there may be a conflict of interest and the analysis may turn on whether there is a valid waiver. But the necessary component of the per se analysis is specific facts about the performance evidencing divided loyalties or loyalty to a person antagonistic to the defendant. Indeed, the RPCs contemplate an actual adversarial situation pitting the lawyer against a person or an entity the lawyer represents in some other matter, or even the same matter. See RPC 1.7(a)(1) (prohibiting a lawyer from undertaking representation "directly adverse" to a current client of the lawyer). Despite defendant's assertion otherwise, it is not enough to simply assert a person known to defense counsel is or has the capacity to divide the counsel's loyalties; rather "so likely to prejudice the accused" implies the relationship between the third party and counsel must have a realistic probability of dividing counsel's loyalties based

on facts and circumstances of the relationship and facts of the case. See Savage, 120 N.J. at 616; Miller, 216 N.J. at 70.

Indeed, there should be no per se constitutional prohibition on such fee arrangements, particularly in light of the RPCs. RPC 1.8(f) clearly contemplates that a third party paying for the fees of the client is permissible, even in the criminal context, and thus should not be a per se conflict. See In re State Grand Jury, 200 N.J.at 490-91. Notably, RPC 1.8(f) does not differentiate between types of third-party payer–i.e., potential trial witness, non-witness, etc. Thus, this Court should not create a bright-line rule declaring anytime a potential trial witness pays the fees of a private defense counsel, there is a per se conflict of interest.

This is particularly true because per se conflicts of interest do not require a showing of prejudice and third-party payers are not uncommon in the criminal context. But under defendant's approach, payment of legal fees by a third-party payer would trigger a stricter standard than other potential conflicts of interest standards–aside from dual representation of co-defendants where the division of loyalties is clearer and more concrete than the alleged division here. Further, such an approach would burden the criminal-justice system and could invite gamesmanship.

The Appellate Division took judicial notice of the fact that "it is not unusual that a defendant's family and friends will pay a private defense lawyer's fees to represent a loved one or close acquaintance who is accused of a crime." Kearney, 479 N.J. Super. at 561. Private criminal defense counsel "perform a vital institutional role in supplementing the services provided by the Office of the Public Defender to clients who personally cannot afford counsel." Ibid. And it is certainly foreseeable, as is the case here, that there may be instances where the payer may also be a potential trial witness at the ensuing criminal trial. Ibid. Thus, creating a bright-line rule prohibiting this type of arrangement as a per se conflict would discourage access to private defense counsel and burden the criminal-justice system. It could also plausibly encourage gamesmanship by having a critical fact witness pay for the attorney's fees to create a "conflict of interest" and force a mistrial or threaten the integrity of the conviction if the State calls the witness-payer to the stand.

Next, turning to the merits of the alleged conflict, as described above, payment by a third party is permissible if six conditions are met. The PCR court found, and the Appellate Division affirmed, that Boone did not direct or interfere with defendant's counsel concerning the substance of the case. Boone testified at trial that she met with Duffy three times at the outset of his work to discuss and arrange payment, but that was the extent of their contact. No billing disputes

or payment problems have been identified or even alleged. Further, Duffy had no attorney-client relationship with Boone. Rather, to the contrary, Duffy recommended Boone secure her own attorney to represent her interests, which she did. Kearney, 479 N.J. Super. at 551 n.2, 560.

These facts, taken in total, evince that the last five of the conflict-of-interest conditions are met. With regard to the first condition, informed consent, this issue was never raised at trial, and thus never elicited during Boone's testimony or otherwise. For the first time in his PCR petition, defendant baldly asserts that Duffy never advised him or sought a waiver of a potential conflict. This Court should "decline to hinge a finding of a per se conflict and constitutional violation upon such a 'bald assertion,'" just as the Appellate Division did below. Kearney, 479 N.J. Super. at 560 (citing Cummings, 321 N.J. Super. at 170).

As the Appellate Division noted, defendant does not claim he was unaware that Boone was paying for his defense counsel fees. "[W]hen the State brought out in Boone's trial testimony that she had paid the fees, and defendant's counsel adduced further information about the fee arrangement in cross-examination the transcript lacks any indication that defendant was surprised by this disclosure to the jury or that he sought a mistrial." Kearney, 479 N.J. Super. at 560 n.4.

Nevertheless, alleged non-compliance with an ethics requirement is not dispositive of the effectiveness of counsel and does not automatically trigger per se civil or criminal consequences. See id. at 560 (citing Baxt, 155 N.J. at 197-98; Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). See also In re State Grand Jury, 200 N.J. at 497 (holding third-party payment of client's attorney's fees was permissible even where informed consent under RPC 1.8(f)(1) was not met).

Next, regarding defendant's new claim as to Boone's purported fear of criminal liability, the evidence shows Boone was home at the crime scene during the events that led up to the murder, but she left the home with her children before the stabbing occurred. Boone's potential criminal liability was never an issue at trial, aside from some testimony explaining differences in her statements to police. And none of the other defendants pointed to Boone as having criminal liability or focused their cross-examination of her as having been involved in the crime in any way.

Thus, defendant's assertion that Boone somehow influenced Duffy's representation of defendant because she feared criminal liability is belied by the record, as the evidence indicates she was not in the home at the time of the

stabbing or thought to be a possible perpetrator, beyond possibly the initial investigation in the hours after the murder, or by even the co-defendants at trial.

Indeed, Duffy's thorough and zealous cross-examination of her was seemingly unrestrained from painting Boone in a negative light. It was during Duffy's cross-examination of Boone that she testified she had urinated on herself twice in the time that she was at the police station, a fact she was embarrassed to admit. (20T230-9 to 25).

There is no evidence in the record that Kearney or any of the other defendants had the ability to cooperate against Boone. None of their statements to police seemingly implicate Boone, none of the physical evidence implicates her, and none of the testimonial evidence of other witnesses implicates her. Thus, defendant's assertion that if she had not paid for the legal fees of defendant, he would have sought an alternative trial strategy of implicating Boone is merely a bald assertion wholly belied by the record as it would have been an unreasonable trial strategy in light of the evidence in this case and the lack of proofs that Boone was involved.

Next, Boone's alleged fear of defendant was zealously called into question by Duffy himself. Again, throughout Duffy's thorough cross-examination of Boone, he elicited testimony from her that (1) she changed details between her first statement and subsequent statements not because of her fear of defendant,

but rather because of alleged police intimidation, (2) she did not believe defendant killed Sharp, and (3) while she loved defendant and did not want anything bad to happen to him, she was not coloring her testimony in any way. Further, this cross-examination prompted the State on redirect to question Boone about her bias where it was revealed she was still in contact with defendant, had seen him hundreds of times and spoken with him thousands of times, and had been in contact with him as recently as the trial to discuss things that had happened during the trial prior to her testimony. This was a reasonable, strategic decision Duffy undertook to combat Boone's statement that defendant was mean. Defendant's newly-created strategy that Duffy should have implicated Boone does not mean his loyalties were divided as this was a sound trial strategy that should not be adjudged in hindsight, particularly since that newly proposed trial strategy would have been less reasonable in light of the evidence. See Nash, 212 N.J. at 543 ("Courts are cautioned to avoid looking at events through the distorting lens of hindsight").

New Jersey treats conflicts of interest with a much lower tolerance than most other jurisdictions, and this would remain true even if this Court held that a paramour who is called as a trial witness and pays for the legal fees of the defendant, has not created a per se conflict of interest. Rather, as discussed next,

concerns involving a third-party's payment of legal fees–including those made by potential trial witnesses–should be evaluated on a case-by-case basis.

B. There is no actual conflict of interest.

Because there is no per se conflict, this Court must then determine whether there is an actual conflict of interest. The "evaluation of an actual or apparent conflict . . . does not take place in a vacuum, but is, instead, highly fact specific." In re State Grand Jury Investigation, 200 N.J. at 491 (quoting State v. Harvey, 176 N.J. 522, 529 (2003)). "In that respect, the Court's attention is directed to something more than a fanciful possibility." Ibid. (quoting Harvey, 176 N.J. at 529). Thus, "[t]o warrant disqualification in this setting, the asserted conflict must have some reasonable basis." Ibid. (quoting Harvey, 176, N.J. at 529).

Aside from being a fact-specific, case-by-case approach, the actual-conflict-of-interest analysis differs from the per se analysis through one critical distinction: prejudice is not presumed in an actual-conflict-of-interest analysis, rather, "the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel." Norman, 151 N.J. at 25. See also Cottle, 194 N.J. at 467-68. The Appellate Division in its opinion acknowledged that "[a] 'great likelihood of prejudice' is itself a lower standard than prong two of the Strickland test, which requires that counsel's

errors actually 'prejudiced defendant." Kearney, 479 N.J. Super. at 562 (quoting Fritz, 105 N.J. at 66). Rather, once a great likelihood of prejudice is found, then the courts presume that actual prejudice has resulted in constitutionally defective representation. Ibid. (quoting Drisco, 355 N.J. Super. at 292-93).

Defendant's request of this Court to forego the prejudice requirement in actual conflicts of interest cases is erroneous on two bases: (1) it undermines the structure of conflicts analysis in New Jersey, and (2) it misapplies federal conflicts-of-interest case law. First, eliminating the need to show prejudice under the actual conflicts of interest analysis would eliminate the doctrine completely. In other words, all conflicts would be assessed under the per se analysis. This contravenes the decades-long jurisprudence on the matter which has established a robust case law.

Second, defendant misrelies on the standard set forth in Cuyler v. Sullivan, 446 U.S. 335 (1980), and argues for its broad application. But the United States Supreme Court has indicated that the standard was not intended to have an expansive application beyond when the defendant "shows that his counsel actively represented conflicting interests[.]" Mickens v. Taylor, 535 U.S. 162, 174-75 (2002) (quoting Cuyler, 446 U.S. at 350). The standard was born because of the "high probability of prejudice arising from multiple concurrent representation, and the difficulty in proving that prejudice." Ibid.

(citing Cuyler, 446 U.S. at 348-49 and Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)). Notably, the Mickens Court aptly noted that "[n]ot all attorney conflicts present comparable difficulties," and postulated that under the Federal Rules of Criminal Procedure concurrent representations and prior representations are treated differently from other situations, like when counsel has previously represented another defendant in a substantially related matter. Ibid.

In this regard, the Cuyler standard is essentially the federal equivalent of the New Jersey per se conflict standard. While conflicts that fall into that narrow category can succeed without a showing of prejudice, it seemingly is not applied to all conflicts. Indeed, the United States Supreme Court went on to hold in Weaver v. Massachusetts, that "[t]he Court has relieved defendants of the obligation to make this affirmative showing [of prejudice] in only a very narrow set of cases in which the accused has effectively been denied counsel all together," 582 U.S. 286, 308 (2017) (emphasis added). Accord Savage, 120 N.J. at 616 (holding per se conflicts are "reserved for those cases in which counsel's performance is so likely to prejudice the accused that it is tantamount to a complete denial of counsel."). This Court stated that "[p]rejudice can be presumed with respect to these errors because they are 'so likely to prejudice

the accused that the cost of litigating their effect in a particular case is unjustified.'" Ibid. (United States v. Cronic, 466 U.S. 648, 658 (1984)).

Thus, defendant's argument that a showing of prejudice should not be required for actual conflicts of interest contravenes the limits of logic and case law. This Court should thus reject defendant's attempt to restructure the actual-conflicts-of-interest doctrine into a bright-line rule that would essentially cause all potential conflicts to be treated as per se conflicts.

But, as described in Point II(a), supra, the conflict of interest defendant is alleging should be analyzed under the actual conflicts doctrine. Further, for the same reasons described in Point II(a), supra, there is no actual conflict of interest for Boone's payment of Duffy's attorney fees, much less one that prejudiced defendant. Nor was a conflict of interest created by Duffy's alleged violation of the RPCs that supposedly prejudiced defendant.

First, as to the alleged conflict of interest based on Boone's interests, defendant's claims are merely bald assertions for the reasons described above. To briefly summarize, the record does not support any claim that she feared criminal liability or defendant in such a way she would cause Duffy to jeopardize defendant's case. Moreover, her testimony years after she paid the fees was not colored in any way against defendant based on her payment of the fees. She had

her own attorney and never spoke to defendant's counsel about the substance of the case.

Thus, the adverse interests defendant asserts Boone had and her alleged ability to influence Duffy's conduct are belied by the record. Second, that Boone was called by the State to testify does not automatically create a conflict of interest.

Her demeanor on the stand showed where her interests lied. The State called her to the stand and had to impeach her with her prior statements to police and indicated she was essentially acting as a hostile witness. The State also had to elicit testimony that tended to show she was biased in favor of defendant. She was reluctant to recall facts that helped establish defendant's guilt. She was also called by defendant as a character witness. And, while the statement was ultimately objected to, she told the jury she and her family believed defendant was innocent.

These facts, when taken together, clearly establish that Boone's interests did not run afoul of defendant's. Without an adverse or antagonistic interest, the actual-conflicts-of-interest doctrine is not implicated. Under the actual-conflict-of-interest-doctrine, waiver is not required unless the court first finds there is a conflict of interest. But here, no conflict exists thus, no finding of waiver is required. See Drisco, 355 N.J. Super. at 292-93 (upholding lower

court's finding of valid waiver, primarily because potential conflict of interest never materialized into actual conflict of interest).

Defendant also baldly asserts that "it was in Duffy's significant personal benefit that a failure to obtain Kearney's informed consent not come to light," but this is wholly belied by the record. (Db32). Duffy took no actions to prevent the possibility of this alleged fact from coming to light. In fact, Duffy's opening cross-examination questions of Boone are what first opened the door for testimony concerning the fee arrangement. (20T180-14 to 17). The circumstances of how Boone knew Duffy and of the fee payments were repeatedly visited throughout Boone's testimony both by the State on redirect without objection by Duffy, Duffy during his redirect, and when she returned to the stand as a defense witness. (26T107-17 to 130-25). The only limitation Duffy placed on this line of questioning was that he would object to any questions concerning the amount of the fee when the State indicated it would be visiting the issue to probe into Boone's bias in favor of defendant.

Rather than account for these facts, defendant meritlessly argues Duffy had a personal interest in preventing defendant from invoking his constitutional right to testify because such testimony would reveal his alleged failure to secure informed consent about the fee waiver. This argument strains the limits of logic for four, interrelated reasons.

First, it is unsettled whether Duffy even violated the RPCs or was aware his counseling would have been alleged to be an RPC violation. Aside from defendant's self-serving statements in his PCR petition, and because Duffy has since passed away, there is nothing in the record to indicate whether Duffy did in fact counsel defendant on the risks of a third-party paying his legal fees. Under RPC 1.8(f), informed consent is not required to be written; therefore, if Duffy counseled defendant and retained his informed consent verbally, there would not be a record of such. Further, if Duffy had informed defendant that Boone was paying his legal fees, he may have thought he satisfied the RPC. Under either plausible scenario, Duffy would then have no reason to base his entire strategy around preventing an RPC violation from coming to light because he would not think one existed.

Second, both the PCR Court and the Appellate Division rejected defendant's claim that he was not adequately counseled on his right to testify. Both courts found the record clearly showed defendant was adequately informed about his right to testify but ultimately declined to do so. Specifically, the PCR court found "the record reflects that the [defendant] told the judge that he has adequate time to discuss the potential of testifying with his lawyer [and that] [f]ollowing the judge's questioning the [defendant] waived his right to testify." (Da156). Further, the Appellate Division upheld the PCR court's finding that

the trial judge's voir dire was sufficient to notify the defendant of his rights; the colloquy "included advising the [defendant] that he would be cross-examined about his prior record and conviction." (Dsa31).

Third, it would have been an unreasonable trial strategy for defendant to testify, regardless of underlying RPC concerns. Defendant's testimony could have created an avenue for the State to ask about defendant's fabricated statements to police regarding the night of the murder and his prior record. As the PCR court found, "[i]t would fall within the realm of trial strategy decision to avoid testifying in light of [defendant]'s record." (Da156). See State v. Harris, 181 N.J. 391, 488 (2004) (quotations and citations omitted) ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

Fourth, it is unlikely Duffy's alleged RPC violation would have been implicated by defendant's testimony had he testified. As the issue of whether defendant consented to the fee arrangement was not elicited during Boone's testimony when her bias was a critical issue repeatedly broached throughout her testimony, it is difficult to imagine that it would be the subject of defendant's testimony when he was on trial for crimes as serious as murder, hindering, and witness tampering. Rather, it is more likely the questioning would have focused

on the events of the night, his prior record, and his fabricated statements to police.

Finally, regardless of the interest being examined, defendant is unable to show he was prejudiced as Duffy's conduct was that of a zealous advocate. Indeed, the trial judge even noted Duffy's zealous advocacy during his judgment of acquittal argument. See (26T57-9 to 17). His counsel advocated vigorously for him, both when it concerned Boone and when it did not.

Counsel's cross-examination of Boone was thorough and detailed, wherein he tried to call into question the veracity of her statements to police and the credibility of facts testified to by other witnesses. It also sought to establish her affinity for defendant and her purported belief in his innocence, as well as had her first statement to police entered into evidence and played for the jury in an attempt to undermine the State's reliance on her second statement which had more directly implicated defendant.

On summation, Duffy advocated vigorously against defendant's guilt and tried to undermine the State's strong evidence against him. He questioned the reliability of the then-minor witness who testified that she saw defendant grab a knife off his nightstand, explained how defendant's DNA was under the victim's nails because of their card game earlier in the night, and explained how defendant's ripped tank-top was at the scene because he had taken it off earlier

in the night. While these strategic arguments were ultimately rejected by the jury, they were a reasonable defense strategy and certainly not prejudicial to defendant.

When taken as a whole, Duffy's zealous advocacy did not prejudice defendant. In fact, arguing these belated theories defendant posits in his supplemental brief would have been an unreasonable approach and had the capacity to prejudice defendant more than the strategic ones Duffy undertook; particularly in light of the evidence against defendant, the lack of evidence against Boone, and the issues that would have been asked about had he testified.

Accordingly, the State asks this Court to hold that the actual-conflict-of-interest analysis requires a showing of prejudice. And when that test is applied to the facts of this case, it is clear Boone's and Duffy's interest neither ran afoul of defendant's, nor created circumstances with a great likelihood to prejudice to defendant. Thus, defendant has not met his burden of showing by a preponderance of the evidence that he is entitled to relief. This Court should affirm the denial of his PCR petition.

C. The Attorney General's Recommendations.

While a client's consent to a conflict of interest must be "confirmed in writing" for most conflicts arising under the RPCs, it is not required for the provisions relating to use of client information (RPC 1.8(b)), aggregate

settlements (RPC 1.8(g)), and most important to this appeal payment from a person other than the client (RPC 1.8(f)). As a matter of best practice, a waiver made following informed consent should generally be memorialized in situations where the third-party payer may be called as a potential witness by the State. See Drisco 355 N.J. Super. at 295 (holding that while there was no actual conflict of interest, the waiver of any potential conflict should be placed on the record).

For RPC purposes, confirmed in writing generally means that the consent must actually be given in writing by the client, or that the lawyers promptly transmit a "writing" to the client confirming an oral consent. RPC 1.0(b). The term writing is defined as tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and email. RPC 1.0(o). The requirement of a writing, while at first glance might appear burdensome, actually creates a number of benefits for a lawyer. If a consent is confirmed in a letter, the client has time to consider the implications of the conflict outside of the potentially coercive presence of the attorney, thus supporting the view that the consent was fully informed and voluntary. Michels, New Jersey Attorney Ethics, cmt. 26:5. Also, confirming a waiver in writing will avoid potentially having to litigate many years later whether informed consent was obtained. The Attorney General

thus recommends as a best practice that the waiver required by RPC 1.8(f) be done in writing.

## POINT III

## DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING.[8]

Because defendant failed to establish any likelihood of succeeding under Strickland's two-prong test, let alone a "reasonable likelihood," he is not entitled to an evidentiary hearing. State v. Preciose, 129 N.J. 451, 463 (1992). Trial courts are required to grant an evidentiary hearing only where defendant has presented a prima facie claim supporting post-conviction relief. Id. at 462; State v. Powell, 294 N.J. Super. 557, 564 (App. Div. 1996). Evidentiary hearings should not be granted if defendant's claims of ineffective assistance are vague, conclusory, or speculative. State v. Marshall, 148 N.J. 89, 158 (1997) (citing Preciose, 129 N.J. at 462-64 and State v. Odom, 113 N.J. Super. 186, 192 (App. Div. 1971)). Bald assertions cannot serve as the basis for such an evidentiary hearing. Cummings, 321 N.J. Super. at 170.

Defendant did not meet his burden of establishing a prima facie case of ineffective assistance of counsel. Neither prong under the Strickland/Fritz test

[8] This Point responds to defendant's Point II.

was met as discussed above. Instead, his bald assertions are unsupported by the record. Accordingly, he is not entitled to an evidentiary hearing.

## CONCLUSION

For the above reasons, the Attorney General urges this Court to hold that defendant received effective assistance of counsel that was uninhibited by any conflicts of interest. For the reasons described above and in the Appellate Divisions thorough and well-reasoned decision, this Court should affirm the denial of defendant's PCR petition and affirm his convictions.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR AMICUS CURIAE

BY: *Kaili E. Matthews*
Kaili E. Matthews
Deputy Attorney General
MatthewsK@njdcj.org

KAILI E. MATTHEWS
DEPUTY ATTORNEY GENERAL
ATTORNEY NO. 306652019
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
OF COUNSEL AND ON THE BRIEF

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