SUPREME COURT OF NEW JERSEY
DOCKET NO. 089877

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

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
Phone: 973-877-1200

RACHEL E. LESLIE
Assistant Deputy Public Defender
Attorney ID No. 404382022
Rachel.Leslie@opd.nj.gov
Of Counsel and On the Brief

Dated: June 27, 2025

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Dana Kearney was sentenced to 50 years' imprisonment for the murder of his girlfriend's cousin, Christopher Sharp. Although she was angry with Kearney, felt betrayed by Kearney, and even feared Kearney, Alicia Boone, Kearney's girlfriend, hired and paid for Kearney's defense attorney.

Boone then became the State's main witness. Without any eyewitnesses or any physical evidence to identify the killer, the key question for jurors was whether Kearney, one of his co-defendants, or a third party had fatally stabbed Sharp. In the early morning hours after her cousin's murder, Boone told police that Kearney told her he had "poked" Sharp. At trial, Boone distanced herself from that statement. To save its case, the State elicited the fee arrangement -- the fact that Boone had met with Kearney's lawyer three times and paid his fee -- and urged jurors to consider it in their evaluation of Boone's credibility.

Kearney filed a petition for post-conviction relief arguing that a conflict of interest had been created by the fee arrangement with Boone. Despite decades of jurisprudence recognizing how difficult, if not impossible, it is for a defendant to prove that his attorney acted against his interest due to a conflict, the Appellate Division affirmed the PCR court's denial of an evidentiary hearing. The essence of the appellate court's decision was that Kearney's lawyer seemed to do a good job -- that his cross-examination of Boone was

zealous enough. The Appellate Division also concluded that because Kearney did not exclaim his surprise on the record when the State brought up the fee arrangement, it was fair to infer that he had given his informed consent. Neither of those conclusions is proper.

The Appellate Division missed the crux of the conflict because it failed to take note of the precise interests at issue. First, Boone feared both that she could become a target of criminal liability, and that Kearney would retaliate against her or her family for speaking to police. Second, defense counsel had both a financial allegiance to Boone and a personal stake in ensuring his failure to abide by the Rules of Professional Conduct did not come to light. These interests directly conflicted with Kearney's interest in obtaining an acquittal or minimizing prison time by any lawful means. Defense counsel had a duty to give Kearney unrestrained advice on whether to take the stand; the possibility of leniency if he cooperated against Boone; or whether to accept a favorable plea deal. Defense counsel was also obliged to rigorously investigate and cross-examine Boone on all the motivations she had to falsely incriminate Kearney.

Because Kearney's defense counsel has since passed away, the extent of the effect of these contrary interests may never be fully known. But several things are clear. One, the payment of a defendant's criminal defense attorney

by a person whose interests are adverse to the defendant's interests amounts to a per se conflict of interest.

Two, despite its commitment to be more vigilant when it comes to conflict-ridden representation than its federal counterparts, New Jersey has impermissibly applied a more stringent standard to claims that an attorney labored under an actual conflict of interest than the Federal Constitution requires. This Court should therefore clarify that, as in the federal system, a New Jersey defendant need not show prejudice resulting from an actual conflict of interest to obtain relief. Under the federal standard, Kearney need not prove that his attorney made strategic decisions because of his loyalty to Boone or his personal interest in escaping ethical scrutiny. He must only show that defense counsel failed to pursue a plausible alternative strategy that would have conflicted with the other interests in play.

Three, although this Court should grant relief on the basis of either the per se or actual conflict readily discernible on the existing record, if it does not do so, Kearney is at minimum entitled to an evidentiary hearing on his claim that he was represented by conflicted or ineffective counsel, particularly where the State leveraged his attorney's fee arrangement to bolster its key piece of evidence.

PROCEDURAL HISTORY

Defendant-appellant Dana Kearney relies on the procedural history from his Appellate Division brief and adds the following. On September 18, 2024, the Appellate Division issued a published decision affirming the post-conviction relief (PCR) court's dismissal of Kearney's PCR petition without an evidentiary hearing. State v. Kearney, 479 N.J. Super. 539 (App. Div. 2024).

On April 11, 2025, this Court granted Kearney's petition for certification "limited 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)." 260 N.J. 327 (2025) (Dsa 1).[1]

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[1] Dsa — defendant's Supreme Court appendix.
Da — defendant's Appellate Division appendix.
1T — motion transcript dated May 3, 2017.
2T — hearing transcript dated May 16, 2017.
3T — motion transcript dated May 22, 2017.
4T — motion transcript dated May 22, 2017.
5T — hearing transcript dated May 23, 2017.
6T — hearing transcript dated June 19, 2017.
7T — hearing transcript dated July 5, 2017.
8T — hearing transcript dated July 6, 2017.
9T — hearing transcript dated July 18, 2017.
10T — trial transcript dated July 19, 2017.
11T — trial transcript dated July 20, 2017.
12T — trial transcript dated July 24, 2017.
13T — trial transcript dated July 25, 2017.
14T — trial transcript dated July 26, 2017.
15T — trial transcript dated August 2, 2017.

STATEMENT OF FACTS[2]

Dana Kearney was tried for murder, conspiracy to commit aggravated assault, endangering an injured victim, hindering, and witness tampering, along with two co-defendants, Joseph Kearney[3] and Shane Timmons. (Da 1-3) The charges stemmed from an altercation at a party at Dana Kearney's home in Perth Amboy. Kearney shared the home with his girlfriend, Alicia Boone. (20T 117-6 to 13) Alicia Boone's cousin, Christopher Sharp, was stabbed during the fight and died from his injuries. Sharp lived with Boone's mother and

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16T — trial transcript dated August 3, 2017.
17T — trial transcript dated August 14, 2017.
18T — trial transcript dated August 15, 2017.
19T — trial transcript dated August 16, 2017.
20T — trial transcript dated August 17, 2017.
21T — trial transcript dated August 18, 2017.
22T — trial transcript dated August 21, 2017.
23T — trial transcript dated August 22, 2017.
24T — trial transcript dated August 23, 2017.
25T — trial transcript dated August 24, 2017.
26T — trial transcript dated August 29, 2017.
27T — trial transcript dated August 30, 2017.
28T — trial transcript dated August 31, 2017.
29T — trial transcript dated September 5, 2017.
30T — sentencing transcript dated December 22, 2017.
31T — post-conviction relief hearing transcript dated January 19, 2023.

[2] This Statement of Facts largely follows the same section of Kearney's Appellate Division brief but focuses on those facts most relevant to the issue before this Court.

[3] Because Dana Kearney and Joseph Kearney share a last name, Joseph Kearney is referred to as "Joseph" throughout this brief.

stepfather. (20T 126-17 to 23) Boone's sister, Bria Williams, was Joseph Kearney's girlfriend. (15T 175-22 to 23)

A number of men and women attended the party, including Dana Kearney, Joseph, Timmons, Sharp, Timmons's cousin Tori Evelyn, Boone, Boone's sister, and Boone's stepsister. (16T 104-7 to 22; 20T 126-6 to 13; 20T 132-3 to 19; 24T 175-22 to 176-9) Evelyn testified that a man with flower tattoos on his arm and "a Spanish guy" also were at the party. (16T 38-12 to 39-6; 50-18 to 20; 19T 140-13 to 141-15)

The night of the party, Boone, along with her three children and her goddaughter, went to bed around 9:00 p.m. (20T 133-1 to 12) She woke up around midnight and went downstairs, where she found Sharp asleep on one couch, and Joseph asleep on the other in a pool of his own vomit. (20T 133-13 to 136-21) The front door to the house was open. (20T 136-22 to 137-10) Kearney was not there. Boone called Kearney to ask why her front door had been left open and to complain that the house was in disarray. Kearney agreed to return. (20T 137-16 to 138-10)

Kearney arrived home with Timmons and Evelyn. (l9T 39-1 to 19; 150-13 to 151- 12) Boone testified that Kearney came upstairs and told her Sharp had urinated on the floor. (20T 140-6 to 141-6; 22T 39-1 to 5) Boone went downstairs where she saw Joseph and Timmons arguing while Sharp still slept.

(20T 143-19 to 144-9) Kearney was cleaning up the house and yelling at Sharp to get up. (20T 144-10 to 16; 148-7 to 11) Boone went back upstairs briefly but returned downstairs when the argument grew louder. She testified that Joseph and Kearney were arguing when she saw Sharp wake up and get between them. (20T 151-13 to 152- 17) Timmons then placed Sharp in a headlock and tried to keep Joseph off him. (20T 152-18 to 155-1)

Evelyn gave conflicting statements to police and at trial, at times saying Kearney and "the other guy" were fighting, or that Sharp was fighting an unknown man with a flower tattoo. (16T 125-14 to 126-13; 20T 38-11 to 39-6)

Boone testified that she tried to convince Sharp to go home to her mother's house, where he lived, but he refused. (20T 156-13 to 21; 20T 157-5 to 22) Boone decided to leave the house with the children. While Boone gathered her children, Kearney came upstairs. (20T 162-2 to 20) One of Boone's daughters testified that she saw Kearney retrieve an object from a nightstand, but she could not recall what it was. However, in her statement to police, she described the object as a blade. (21T 110-1 to 113-6; 118-2 to 21). Boone's goddaughter also testified that she saw Kearney retrieve an object, which she could only describe as "small," from the nightstand. (21T 162-2 to 16).

Boone got into her car with the children as Kearney exited the house. A few moments later, Kearney also got into the car and asked her to take him to Plainfield. (20T 166-1 to 19) She refused and drove everyone to her mother's house, where Sharp lived. Boone's children went inside her mother's house and Kearney asked her to take him back to their home. Boone testified that she initially refused, but Kearney told her he had to go back because there was "something wrong with" Sharp, because "he's been poked," or "something to that effect." (20T 169-12 to 170-15) She agreed and drove him back home.

Around 2:00 a.m., Boone's stepfather arrived to check on Sharp. (22T 43-3 to 22) He saw Sharp on the floor and called 9-1-1. (22T 44-2 to 17)

That night, Boone gave her first statement to police. She told police Kearney had told her Sharp had "got cut" or "got poked," but that she could not remember the precise phrasing. (20T 171-18 to 172-22) Boone was held at the police station for over 16 hours. She then gave a second statement in which she claimed Kearney had said, "I poked him." (20T 174-5 to 13) She also told police Kearney was "mean," that he "has people," and that she was worried about something happening to her or her children. (21T 64-19 to 65-1) At trial, Boone testified that she only told police what she thought they wanted to hear because they insinuated she would not be allowed to go home otherwise. (20T 228-15 to 14)

To undermine Boone's efforts to disavow her statement to police, the State elicited testimony that Boone had met with Kearney's defense attorney, Neil Duffy, on three occasions. (21T 4-25 to 5-22) Boone testified that she eventually hired and paid Duffy to represent Kearney at trial. (21T 82-25 to 83-4) Boone denied discussing the substance of the case with Duffy at those meetings, saying "[h]e wouldn't talk about the facts of the case." (21T 5-19) The State leaned on this hiring and payment arrangement between Boone and Duffy as proof that Boone had had a change of heart and was lying at trial to protect Kearney. (27T 101-5 to 6; 20 to 21) No evidence or testimony suggested that Kearney had been counseled on and agreed to the payment arrangement.

The centerpiece of the State's case was Boone's second statement to police wherein she claimed Kearney told her he "poked" Sharp. Aside from that statement, a bloody palm print and a bloody fingerprint belonging to Joseph, not Kearney, were found at the scene. (14T 105-9 to 107-13; 14T 142-16 to 143-16; 14T 146-7 to 12) Neither Kearney nor Joseph could be excluded as contributors to DNA found under Sharp's fingernails. (23T 108-2 to 109-15). No murder weapon was ever found. (14T 53-1 to 10) And no eyewitness to the stabbing testified. Accordingly,

The jury convicted Kearney on all counts. (29T 39-18 to 40-6)

LEGAL ARGUMENT

POINT I

IN CRIMINAL CASES, A PER SE CONFLICT OF INTEREST ARISES WHEN A THIRD PARTY HIRES OR PAYS THE DEFENDANT'S ATTORNEY IF THAT THIRD PARTY HAS AN INTEREST IN THE PROCEEDING THAT IS ADVERSE TO THE DEFENDANT'S INTEREST.

Dana Kearney's girlfriend, Alicia Boone, hired and paid an attorney, Neil Duffy, to represent him at his trial for the murder of her cousin. At Kearney's trial, Boone was the State's main witness. Boone's statement to police was essential to the State's case because virtually no other evidence pointed to Kearney as the murderer: no eyewitness to the stabbing; no admissions from Kearney; no murder weapon; no forensic evidence tying Kearney to the murder;[4] and several alternative perpetrators, including Kearney's co-defendants, who had both motive and opportunity to commit the killing. The arrangement between Boone and Duffy created a per se conflict of interest because Boone's personal interests were adverse to Kearney's interest in obtaining an acquittal or minimizing his prison sentence by any lawful means.

[4] There was a mixture of DNA found under the victim's fingernails from which neither Dana nor Joseph Kearney could be excluded, but that was consistent with the undisputed fact that the men had physically fought. A bloody palm print and a bloody fingerprint belonging to Joseph Kearney, not Dana Kearney, were also found.

The per se conflict of interest violated Kearney's right to unconflicted counsel and requires reversal of his convictions.

Under both the State and Federal Constitutions, criminal defendants have a right to the assistance of counsel. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. The right to counsel includes the right to conflict-free representation. Cuyler v. Sullivan, 446 U.S. 335, 345 (1980); State v. Cottle, 194 N.J. 449, 466-67 (2008). Conflict-free representation requires an attorney's "undivided loyalty and representation that is 'untrammeled and unimpaired' by conflicting interests." State v. Norman, 151 N.J. 5, 23 (1997) (quoting State v. Bellucci, 81 N.J. 531, 538 (1980)).

A conflict of interest arises when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." RPC 1.7(a). "[C]ertain attorney conflicts" will "render the representation per se ineffective." Cottle, 194 N.J. at 470. When a per se conflict is found, "prejudice is presumed in the absence of a valid waiver, and the reversal of a conviction is mandated." Id. at 467.

A conflict results in a per se violation of the defendant's right to counsel when the conflict creates an inherent, structural threat to the attorney's loyalty or independent judgment. In such cases, where an attorney "may not be able to

pursue an unrestrained course of action in favor of a defendant," id. at 468 (quoting State v. Land, 73 N.J. 24, 30-31 (1977)), prejudice must be presumed because "the harm inflicted by such a conflict 'will not ordinarily be identifiable on the record,'" id. at 471 (quoting Norman, 151 N.J. at 24). In the absence of a per se standard, "the issue becomes whether counsel could have done more than he or she did, which seems always to be the case." 3 Wayne R. LaFave et al., Criminal Procedure § 11.9(d) (4th ed. 2024). In short, "the preferable rule" in our state "is that, in the absence of waiver, if a potential conflict of interest exists, prejudice will be presumed resulting in a violation of the New Jersey constitutional provision guaranteeing the assistance of counsel." Land, 73 N.J. at 35.

By embracing a per se rule for certain conflicts, New Jersey courts have proudly "exhibited a much lower tolerance for conflict-ridden representation under the New Jersey Constitution than federal courts have under the United States Constitution" for over 50 years. Cottle, 194 N.J. at 470. That is because "[t]here is no greater impairment of a defendant's constitutional right to counsel than that which can occur when his attorney is serving conflicting interests." Bellucci, 81 N.J. at 538; see also State ex rel S.G., 175 N.J. 132, 139 (2003) ("In criminal matters, in which the trust between attorney and client has enhanced importance, special vigilance is required because an

attorney's divided loyalty can undermine a defendant's Sixth Amendment right to effective assistance of counsel.").

This Court has already identified two per se conflicts that violate a criminal defendant's right to counsel: when co-defendants are represented by a single attorney, Bellucci, 81 N.J. at 543, and when a defendant's attorney is under indictment in the same county as the defendant, Cottle, 194 N.J. at 471.

Like the per se conflicts defined in Bellucci and Cottle, the payment of attorney fees by a third party whose interests are at odds with those of the defendant "has the inherent risk of dividing an attorney's loyalty." In re Abrams, 56 N.J. 271, 275 (1970). In Abrams, this Court explained that it was "improper for [an employee's attorney] to have accepted the [employer's] promise to pay his bill." Ibid. This Court determined that the fee arrangement created a per se conflict of interest.[5] Id. at 276 (observing that "a conflict of interest inheres in every such situation"). The payer's interests conflicted with the defendant's interests, this Court explained, because it was in the employer-payer's interest that the employee-defendant not "seek leniency by aiding the

[5] Because Abrams was an appeal from an attorney disciplinary proceeding, the Court had no occasion to address the impact of the conflict on the defendant's right to counsel, but the language of the opinion -- "inherently wrong"; "a conflict of interest inheres in every case"; "the ethical violation inheres in the improper arrangement and does not depend upon what did or did not follow in its wake" -- makes it clear the Court considered it to create a per se conflict.

State in its pursuit of his employer," whereas "the employee's interest may . . . be advanced by the employee's disclosure of his employer's criminal conduct." Ibid. Indeed, "[i]t is the duty of the defendant's attorney to advise him of [an] opportunity" to cooperate with the State, so the payer's interest was in direct conflict with that duty. Ibid.

Accordingly, this Court concluded that such fee arrangements -- wherein the payer's interests are adverse to the defendant's -- are "inherently wrong," "even if the attorney's devotion to his client was not in fact diminished," because they compromise the attorney's duty to advise his client about opportunities for cooperation and leniency, and they erode public confidence in the integrity of the legal profession. Id. at 276-77.

Two principles emerge from Bellucci, Cottle, and Abrams: (1) a per se conflict of interest arises when an attorney is hired or paid by a third party whose interests are adverse to the defendant's interests, and (2) a third party's interests are adverse if the third party's criminal liability may turn on the defendant's testimony or cooperation against the third party.

The fee arrangement in this case falls squarely into these categories. It is undisputed that Boone was at the home during the altercation that led to Sharp's death, and that she drove Kearney away from the scene and brought him to her mother's house. Detectives apparently suspected she was involved

in the crime -- Boone was Mirandized, held in custody for 15 to 17 hours, denied bathroom breaks which led her to urinate on herself twice, and Detective Rodriguez implied she might be charged with a crime. (21T 92-8 to 17; 99-11 to 15; 20T 230-14 to 15; 229-5 to 14) Boone was held long after her other family members had been allowed to leave the police station. (21T 36-11 to 20)

Though she had not been charged with a crime at the time of Kearney's trial, there is no question that Boone was concerned about her own criminal liability. As the Appellate Division noted, on Duffy's recommendation, Boone retained a criminal defense attorney to represent her.[6] Kearney, 479 N.J. Super. at 560. Her defense attorney was present at the courthouse for her testimony and conversed with Boone and Duffy in the hallway. (21T 77-4 to 78-17) Boone also repeatedly told detectives she was scared that she could be facing legal trouble. (25T 148-5 to 17; 153-5 to 6) For instance, Boone could have faced charges like endangering an injured victim, for leaving Sharp injured at the scene, and hindering, for giving false statements to police, just like Kearney and his co-defendants. Boone thus had a palpable concern she could

[6] The Appellate Division emphasized that Duffy "recommended Boone secure her own attorney to represent her interests" as though it helped prove there was no conflict. Kearney, 479 N.J. Super. at 560. But that fact is important for a different reason: Duffy apparently recognized that Boone's interests were adverse to Kearney's, and that he could not represent them both.

face adverse legal consequences for her testimony or that of other witnesses like Kearney -- particularly if it was revealed that she intentionally lied to police -- or that Kearney would cooperate against her if he could benefit from doing so.

In short, this precise concern is what led this Court to condemn "every such" conflict-ridden fee arrangement in Abrams. 56 N.J. at 276. The Court explained that "it is to the interest of the [third party] that the defendant shall not turn him in," and "[t]hat is why the [third party] is willing to pay." Id. at 275-76. And on the other hand, "[i]t is the duty of the defendant's attorney to advise him of [the] opportunity" to cooperate against other culpable parties. Id. at 276; see also State v. Alexander, 403 N.J. Super. 250, 258 (App. Div. 2008) (noting, after finding a per se conflict, that an unconflicted attorney "could have attempted to curry favor from the prosecutor at the time of sentencing, and could have asserted a potential mitigating factor that might have served to lessen the sentence eventually imposed," namely, "[t]he willingness of the defendant to cooperate with law enforcement authorities" (citing N.J.S.A. 2C:44-1(b)(12))). Here, it was in Boone's best interest that Duffy and Kearney not pursue those lines of action, though they would have been in Kearney's interest.

Boone had yet another interest that ran contrary to Kearney's -- she apparently feared violence against herself and her children from Kearney.[7] While in custody at the Perth Amboy Police Department, Boone told detectives she was worried something would happen to her family if she gave them a statement.

> DET. VALERA: . . . And -- and like we said we definitely feel this -- there may be a little bit more that you -- that you can help us with. Are you, you know, is there something we can answer for you? Are you nervous about something?
>
> MS. BOONE: I told the detective there, I can't have anything happen to my -- to my children, or to me, or my family, or my grandmother.
>
> DET. RODRIGUEZ: Why do you feel something might happen to you or your children?
>
> MS. BOONE: Because he's mean. He's mean.
>
> DET. RODRIGUEZ: He's mean?
>
> MS. BOONE: He's so mean. And he has people.
>
> DET. RODRIGUEZ: Yeah. He got people out there?
>
> . . .
>
> MS. BOONE: I've been scared of him now.
>
> DET. RODRIGUEZ: Why? You scared about something you -- you -- you know for a fact, or are you scared just because he's just a mean guy?
>
> MS. BOONE: Well, you know, he --
>
> DET. RODRIGUEZ: Is it a little bit of both, or --

[7] Whether Boone's subjective fears were well-founded is irrelevant; it matters that she held them.

MS. BOONE: He has a past.

DET. RODRIGUEZ: Yeah. Right.

MS. BOONE: Oh, you guys don't know.

[21T 42-15 to 43-22.]

Boone continued, "it's not -- not that I don't want to help. I just can't. I just don't want nothing to happen to -- nothing to happen to my family. . . . They told him that they know when my kids were home from school. Oh my gosh." (21T 44-20 to 24) After some encouragement, Boone revealed Kearney's purported confession that he had "poked" the victim. (21T 45-3 to 8) In addition, at Kearney's sentencing, one of the victim's daughters gave a victim impact statement in which she said, "Even your half part-time girlfriend, [Boone], is scared of you. She don't love you. She's scared. She's scared." (30T 59-11 to 12). A person who fears violent retaliation plainly has a direct, personal interest in the outcome of the criminal proceedings against the individual they fear.

Accordingly, Boone's apparent interests -- protecting herself and her family from criminal liability and retaliation -- were directly adverse to Kearney's interest in obtaining an acquittal or minimizing prison time. Kearney had a constitutional right to loyal counsel who would be unrestrained in pursuing any strategy reasonably likely to further those goals, even if it meant implicating Boone, taking the stand in his own defense, or accepting a

plea deal for significantly less prison time.[8] Kearney's attorney's acceptance of payment from a third party who had a personal stake in the outcome of trial had the unacceptable capacity to divide his loyalties. Boone's personal stakes and Duffy's financial allegiance to her structurally compromised Duffy's representation and resulted in a per se conflict that requires reversal.

Illinois courts recognize that per se conflicts exist in this context. "When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a per se conflict arises." People v. Juan Hernandez, 896 N.E.2d 297, 303 (Ill. 2008); see also People v. Palmer, 490 N.E.2d 154, 159 (Ill. App. Ct. 1986) ("[W]here an attorney representing a defendant has an actual or possible conflict of professional interests, a reviewing court will presume prejudice and reverse the conviction."). "[T]ies other than an attorney-client relationship can create a per se conflict of interest," such as the payment of counsel's fees by a person whose interests are adverse to the defendant. People v. Carr, 167 N.E.3d 224, 232 (Ill. App. Ct. 2020).

[8] Kearney contended in his PCR application that Duffy advised him not to take a plea offer of 15 years subject to NERA. (31T 9-18 to 24; 29-16 to 18) He was ultimately sentenced to a 50-year NERA sentence.

In Carr, a per se conflict of interest arose when the victim and State's main witness hired and paid for the defendant's attorney. 167 N.E.3d 224. A new trial was required because the defendant had not made a knowing and voluntary waiver of the conflict. Ibid. Although the defendant in Carr knew about the fee arrangement, mere knowledge was insufficient to find waiver because counsel "never brought the conflict to the court's attention, and there is no evidence that defendant was informed of how that conflict could affect his representation." Id. at 233-34. Cf. People v. Miguel Hernandez, 615 N.E.2d 843, 848 (Ill. App. Ct. 1993) (finding no per se conflict resulting from the payment of attorney's fees by a State's witness "without further facts establishing obvious antagonism").

Similarly, in Palmer, the defendant was convicted of arson and battery against his wife, who retained and paid counsel to represent him. 490 N.E.2d 154. The court rejected the State's argument that there was no conflict because the defendant and his wife both "wanted the court to acquit defendant." Id. at 160. Rather, the court observed that "[a]lthough . . . at times [his wife] indicated that she wanted defendant's charges dropped, she at other times wanted the State to prosecute defendant." Ibid. Like in Carr, the court found there was a per se conflict and ordered a new trial, despite the defendant's knowledge of the fee arrangement, because there was "no indication in the

record that anyone explained the conflict of interest to defendant and that he intentionally and knowingly waived the issue." Ibid.

While the Palmer and Carr cases each involved the payment of attorney fees by a victim rather than the victim's close family member, the central concern in those cases applies with equal force in this appeal -- a defense attorney is subject to a per se conflict of interest when he accepts payment from a person in a position "antagonistic" to the defendant. Carr, 167 N.E.3d at 231. A court must conduct "a realistic appraisal of defense counsel's professional relationship to someone other than the defendant under the circumstances of each case," rather than rely on "technicalities." Palmer, 490 N.E.2d at 160.

Moreover, compared with a fact-specific analysis, a per se conflict rule better protects defendants, institutional integrity, and our state's intolerance of conflicted representation. First, an attorney's performance can be subliminally affected by divided loyalties in ways that are hard to detect or prove. This Court has repeatedly recognized that principle. In Cottle, this Court explained that "the prejudice flowing from 'the restraints placed on an attorney's advocacy and independent judgment' is difficult, if not impossible, to measure." 194 N.J. at 471 (quoting Bellucci, 81 N.J. at 543). And "the harm inflicted by such a conflict 'will not ordinarily be identifiable on the record."

Ibid. (quoting Bellucci, 81 N.J. at 543). Accordingly, without a per se rule, "the issue becomes whether counsel could have done more than he or she did, which seems always to be the case." Id. at 470 (quoting 3 LaFave, § 11.9(d)).

Second, a per se rule recognizes that "in some circumstances a lawyer's conflict of interest may jeopardize not only the defendant's right to effective representation, but also 'the institutional interest in the rendition of just verdicts in criminal cases.'" State v. Loyal, 164 N.J. 418, 443 (2000) (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)). A per se rule is prophylactic -- it is designed to prevent harm before it occurs -- which in turn better protects the integrity of the legal profession.

Third, a case-specific analysis will be more complex and will yield less uniformity. See Juan Hernandez, 896 N.E.2d at 305-06 ("If we abandon the per se conflict rule, a fact-specific analysis would have to be undertaken in each and every case. This . . . would create more diversity than uniformity."). And the case-by-case approach places an additional burden on counsel who must defend against charges of disloyalty after the fact. See, e.g., People v. Kester, 361 N.E.2d 569, 572 (Ill. 1977) ("[A] lawyer who may have provided an able and vigorous defense with complete loyalty to the defendant is placed in the difficult and unfortunate position of being subject to unfounded charges of unfaithful representation."). It furthermore places the burden on defendants to

demonstrate the harm caused by their attorney's actions or inactions. A per se rule, by contrast, protects defendants who may not know their rights or how to assert them, especially when they are not receiving adequate advice from conflicted counsel.

Furthermore, there are many ways to preserve a non-indigent defendant's right to counsel of their choice under a per se rule, contrary to a concern raised by the Appellate Division. See Kearney, 479 N.J. Super. at 561. Courts can obtain a knowing and voluntary waiver of the conflict from the defendant, just as they do in other constitutional contexts. Cottle, 194 N.J. at 472 ("[A]fter full disclosure, the defendant must knowingly, intelligently, and voluntarily agree to proceed with a conflict-tainted attorney . . . [and] the attorney must aver that despite the conflict, he 'reasonably believes that [he] will be able to provide competent and diligent representation' to the client." (quoting RPC 1.7(b)(2))). In addition, courts can appoint independent counsel to advise the defendant of the risks of proceeding with conflicted counsel. See id. at 472 n.12 ("The trial court . . . may appoint an [independent] attorney to assist the defendant in determining whether to waive the conflict should it conclude that such an approach would be in the interests of justice."). Or, where a conflict is narrow enough, independent counsel can be appointed solely to conduct the examination of the particular witness to whom the conflict relates. See e.g.,

United States v. Lorenzana-Cordon, 125 F. Supp. 3d 129, 140 (D.D.C. 2015) (accepting defendant's waiver of a conflict in part because "separate counsel" would "handl[e] cross-examination of the witness and opening and closing arguments as they relate to the witness").

Finally, the Appellate Division did not analyze whether Kearney made a knowing and voluntary waiver of the conflict. To the extent that the appellate court commented on Kearney's knowledge of the fee arrangement, it was in the context of the RPC's requirement that a client give informed consent to any third-party payment arrangement. Kearney, 479 N.J. Super. at 560. First, as the Appellate Division noted, there is no proof whatsoever that Kearney gave informed consent to the arrangement, least of all his written informed consent as required by the RPCs for a fee arrangement that creates a potential conflict. RPC 1.7(b)(1). Second, Kearney's informed consent to the arrangement would do nothing to waive the conflict itself; it would only suggest Duffy had complied with the requirements of the RPCs. The real question is whether Kearney made a knowing and voluntary waiver of his constitutional right to unconflicted counsel. This Court "will not find a waiver from a silent record or presume waiver of the constitutional right to effective counsel." Cottle, 194 N.J. 472 (citing Norman, 151 N.J. at 35). Neither Kearney's informed consent

nor a knowing and voluntary waiver can be inferred from an utterly silent record.

For all the foregoing reasons, the relationship between Boone -- the murder victim's close family member and State's main witness, who feared retribution from Kearney and criminal charges from the State -- and Duffy created a per se conflict of interest. That conflict requires reversal of Kearney's convictions and entitles him to a new trial.

POINT II

BOONE'S SELECTION AND PAYMENT OF KEARNEY'S LAWYER WAS AN ACTUAL CONFLICT THAT ADVERSELY AFFECTED THE ATTORNEY'S REPRESENTATION.

Even if this Court does not deem the arrangement between Boone and Duffy a per se conflict of interest, the record demonstrates that their relationship created an actual conflict of interest. Here, the Appellate Division applied the wrong standard when it evaluated the conflict, requiring Kearney to prove "a great likelihood of prejudice." Kearney, 479 N.J. Super. at 562. Under the federal standard for assessing actual conflicts of interest, defendants need not show prejudice to obtain relief. Cuyler, 446 U.S. at 349. This Court should clarify the standard that applies to actual conflicts of interest and conclude that under that standard, Kearney is entitled to reversal of his convictions.

1. This Court should clarify that a defendant need not show prejudice resulting from an actual conflict of interest in order to establish a denial of the right to counsel.

Although New Jersey purports to be less tolerant of conflicted representation than federal courts, it has held defendants like Kearney to a more stringent standard than the federal standard. To assess whether a conflict of interest violated a defendant's right to counsel, the federal courts apply the test from Cuyler, 446 U.S. 335. Under the Cuyler standard, a defendant "need

not demonstrate prejudice in order to obtain relief." Id. at 349. Instead, the defendant only "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. at 348. The Cuyler standard is not limited to conflicts created by joint representation. See, e.g., Wood v. Georgia, 450 U.S. 261, 271-72 (1981) (sua sponte remanding case under Cuyler where potential conflict arose from employer's payment of counsel's fees).

Most federal circuits employ a two-pronged test for whether a conflict had an adverse effect on the lawyer's performance. The test, first set forth in United States v. Fahey, requires a defendant to demonstrate that some "plausible alternative defense strategy or tactic might have been pursued," and that the "alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." 769 F.2d 829, 836 (1st Cir. 1985). Under Fahey, a defendant "need not show that" a particular strategy "would necessarily have been successful if it had been used," only that "it possessed sufficient substance to be a viable alternative." Ibid.

A majority of federal circuits have adopted the Fahey test. See Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993); United States v. Gambino, 864 F.2d 1064, 1070-71 (3d Cir. 1988); Perillo v. Johnson, 79 F.3d 441, 449 (5th Cir. 1996); United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005); United States

v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).[9] The Seventh Circuit employs a more liberal version of Fahey, requiring a defendant to prove only "a reasonable likelihood" that counsel's performance was affected by a conflict. Hall v. United States, 371 F.3d 969, 974 (7th Cir. 2004). Importantly, the second prong of Fahey allows a defendant to show either that the foregone strategy was "inherently in conflict with . . . the attorney's other loyalties or interests," or that it was "not undertaken due to" those other interests. Fahey, 769 F.2d at 836 (emphasis added). In other words, a defendant need not prove that counsel would have acted differently but for the conflict, so long as he can show the alternative strategy conflicted with the attorney's competing interest. See, e.g., Nealy v. Cabana, 782 F.2d 1362, 1365 (5th Cir. 1986) ("The argument goes that, even if Arrington had not been representing both brothers,

[9] A minority of federal courts require a modified version of Fahey which adds a requirement for the defendant to "show that the alternative strategy or tactic was objectively reasonable under the facts of the case." Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001), aff'd without consideration of this point, 535 U.S. 162 (2002); Morelos v. United States, 709 F.3d 1246, 1252 (8th Cir. 2013); Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (en banc).

The Sixth Circuit appears to require that it be "clear" that counsel's decision "was not part of a legitimate strategy, judged under the deferential review of counsel's performance prescribed in Strickland v. Washington, 466 U.S. 668 (1984)." McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004). But see Thomas v. Foltz, 818 F.2d 476, 483 (6th Cir. 1987) (explaining that "the proper focus is solely on whether [the attorney's] conflict affected his actions" so "it is inappropriate to consider whether another attorney, untainted by a conflict of interest" would have made the same decision).

he would not have called Michael to testify. But a showing of adverse effect does not involve a 'but for' inquiry.").

By contrast, the standard set forth by this Court in Norman requires a defendant who has established a potential or actual conflict of interest to show the conflict created "a great likelihood of prejudice" in order to obtain relief. 151 N.J. at 25. The Norman standard was affirmed in Cottle, 194 N.J. at 467-68, and the Appellate Division applied it here, Kearney, 479 N.J. Super. at 556.

Because the Norman standard requires a defendant to show not only that a conflict affected his lawyer's performance, but also that the effect on counsel's performance had a "great likelihood" of changing the outcome of trial, the Norman standard erects a higher bar for defendants to clear than the federal standard. Accordingly, while Kearney urges this Court to recognize that a per se conflict arose in this case, see Point I, supra, if it does not do so, the Court should clarify that defendants are not required to prove more than the federal constitution requires. To honor New Jersey's tradition of extending greater protections to defendants under the State Constitution, and its particular commitment to doing so in the context of conflicts, this Court should evaluate Kearney's claims under the Cuyler and Fahey tests.

2. An actual conflict of interest adversely affected Duffy's representation.

The first step in applying the actual-conflict tests from Cuyler and Fahey is to identify the contrary interests at issue. As explained in Point I, Boone's interest in self-protection was inherently in conflict with any strategic decision that could expose her to criminal liability, for instance, a rigorous investigation into her background and her role on the night in question, testimony from Kearney implicating her in any criminal acts, a cross examination that suggested she had intentionally lied to police, or an offer for Kearney to cooperate against Boone in exchange for leniency at sentencing. Boone's apparent fear of retaliation was likewise fundamentally in conflict with any strategy that could reduce Kearney's chances of conviction or lessen his sentence.

Besides his financial allegiance to Boone, created by the hiring and payment arrangement, Duffy also had a personal interest that conflicted with Kearney's. See RPC 1.7(a)(2) (noting that a conflict of interest can arise from "a personal interest of the lawyer"). Duffy had an interest in concealing his violation of the Rules of Professional Conduct, which require a client's informed consent before an attorney may accept payment from a third party. RPC 1.8(f)(1).

"Informed consent" requires the client to agree "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." RPC 1.0(e). And, when "there is a significant risk that the representation" of the client "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), then the client's informed consent must be "in writing," RPC 1.7(b)(1). Here, as the Appellate Division noted, "the record contains no documentation of such express consent," and Kearney "alleges in his petition that counsel 'never advised him or sought a waiver.'" Kearney, 479 N.J. Super. at 560.[10]

An attorney who violates the RPCs may be subject to discipline or, at minimum, reputational damage. Duffy knew this, because he had faced escalating discipline for violations of the RPCs in three separate Disciplinary Review Board matters prior to Kearney's trial, and in a fourth matter about one year after the trial. In re Duffy, DRB Docket No. 09-311 (March 10, 2010) (issuing a letter of admonition); In re Duffy, 208 N.J. 431 (2011)

[10] The appellate court nonetheless dismissed the possibility that Duffy violated his ethical duty to obtain Kearney's informed consent on the basis that Kearney did not announce his surprise in open court or seek a mistrial. Id. at 560 n.4.

(encompassing DRB Docket Nos. 11-108 and 11-193 and ordering a reprimand); In re Duffy, 234 N.J. 401 (2018) (ordering censure for violations charged under DRB Docket No. 18-174). Given his disciplinary history, it was to Duffy's significant personal benefit that a failure to obtain Kearney's informed consent not come to light.

Next, having identified the interests at play, the Fahey test asks whether the attorney who is subject to those competing interests failed to pursue any plausible strategic decision on behalf of the client. If so, an actual conflict adversely affected the attorney's representation and requires reversal. Here, Duffy failed to pursue a number of strategic decisions on Kearney's behalf.

First, the Appellate Division relied heavily on Duffy's cross examination of Boone as proof that he was not subject to any conflict. But the appellate court overlooked that Duffy pursued an easily refuted explanation for Boone's prior statements to police -- one that cast her in a favorable light -- rather than other, more confrontational lines of questioning. Duffy could have cross examined Boone on the theory that she incriminated Kearney maliciously, to punish him for having a raucous party that led to the death of her cousin or to deflect attention away from her own culpability. Instead, Duffy only advanced an explanation for her statement that was wholly charitable to Boone -- that she had been the victim of unfair police pressure and coercion. That theory

was swiftly contradicted. The State introduced the video of Boone's statement which showed she was calm, not crying or distraught, and Boone's testified that she "wasn't afraid of Detective Jose Rodriguez or Detective Valera," but was afraid of Dana Kearney instead. (21T 69-24 to 70-7) Moreover, Boone admitted she never complained about mistreatment at the police station, and that she was angry about her cousin's death and felt betrayed by Kearney. (21T 70-8 to 71-7; 21-22 to 25; 18-6 to 8) Duffy's decision to forego a plausible -- and likely more effective -- challenge to Boone's statement clears the standard set by Fahey on its own.

Second, Boone's fear of retaliation from Kearney conflicted with Duffy's duty to obtain an acquittal or minimize Kearney's sentence. Kearney alleged in his PCR petition that Duffy counseled him out of the State's plea offer of a 15-year sentence subject to NERA, a far cry from the 50-year NERA sentence he ultimately received. In addition, when it came time for sentencing, Duffy did not file a sentencing memo,[11] did not cite a single mitigating factor on Kearney's behalf, and did not propose a specific term-of-years to counter the State's recommendation of life without parole. Duffy simply asked the court not to impose life without parole. (30T 52-3 to 5) Moreover, Duffy added, "I'm not here to try to suggest that Dana Kearney's a good guy. In fact, Alicia

[11] No memo was electronically filed or referenced in the transcripts.

Boone in her letter to the Court concedes that Dana's not an angel." (30T 51-18 to 21) Duffy pointed out that Kearney had at least been in his children's lives, but added that "he is behind in child support with one of them." (30T 51-21 to 25) In a setting meant for pleading leniency and arguing for mitigation, defense counsel instead quoted disparaging statements about Kearney made by the individual who paid his fees.

Third, Duffy knew that if Kearney testified, the State would probe his relationship with Boone and her decision to hire and pay for his services, because the arrangement was helpful to its case. Kearney's testimony could have revealed that he was unaware Boone had paid for his legal representation, or that he knew but had not been counseled adequately on the conflict it created, thereby exposing Duffy's ethical lapse. Thus, Duffy's interest in preventing testimony that he had not sought informed consent was in conflict with Kearney's constitutional right to testify in his own defense. Indeed, Kearney alleged in his PCR petition that Duffy counseled him not to testify, even though he wanted to. (31T 26-7 to 10) Duffy's personal interest compromised his ability to give candid, independent advice about a critical trial decision.

An actual conflict arose in a similar setting in Douglas v. United States when a defendant lodged an ethics grievance against his attorney. 448 A.2d

121, 136-37 (D.C. Cir. 1985). The court noted that the attorney "would have an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for post hoc criticism of his efforts," which "could compromise [his] professional judgment about the best means of defending this particular case; it could encourage the most standard or conservative trial strategy, as well as overcautious tactical decisions and courtroom demeanor." Id. at 137; see also Mathis v. Hood, 937 F.2d 790, 795 (2d Cir. 1991) (finding a conflict of interest was created by counsel's inexcusable delay in filing an appeal because counsel might avoid discipline for the delay if defendant lost the appeal); Cottle, 194 N.J. at 471-72 (explaining that "no convicted defendant should wonder whether his fate was sealed because his attorney's duty of zealous advocacy was compromised by fear for his own well-being"). Here, Duffy's interest in evading scrutiny constituted an actual conflict because it adversely affected his representation.

Finally, the fee arrangement in and of itself unquestionably worked to Kearney's significant disadvantage because the State used it to undermine Boone's attempts to walk back her original statement to police. Boone's statement was virtually the only piece of evidence directly suggesting that Kearney, and not a co-defendant or other third party, was the killer. There was no testimony from an eyewitness to the stabbing, no admissions from Kearney,

no murder weapon, and several alternative perpetrators with motive and opportunity to commit the killing. The only forensic evidence in the case involved DNA from both Dana Kearney and Joseph Kearney under the victim's fingernails, which was consistent with the undisputed fact that the men were engaged in a physical fight, and a bloody palm print belonging to Joseph Kearney, not Dana Kearney. The State was forced to rely on Boone's statement to police that Kearney had confessed to the killing, and Boone's goddaughter's statement that she saw Kearney retrieve a knife from an upstairs bedroom during the fight. The State accordingly capitalized on the fact that Boone hired and paid for Duffy's representation to bolster the credibility of her original statement to police and challenge her attempt at trial to disavow that statement.

On redirect, the State elicited that Boone had met with Duffy three times and discussed his payment. (21T 5-1 to 15) The State returned to the topic to close out its questioning:

> 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 to happen to him, right?
>
> A No.
>
> Q Certainly not because of anything that you say, right?
>
> A Exactly.
>
> [21T 82-22 to 83-17.]

Moreover, the State invoked the fee arrangement in its summation, telling jurors to consider it as they evaluate Boone's credibility. "[N]ot only did she hire Mr. Duffy for Dana Kearney, she hired her own lawyer. . . . So when you evaluate her credibility, keep that in mind." (27T 101-5 to 6; 20 to 21) Though he need not prove it under Fahey, there can be no lingering doubt that Kearney was in fact prejudiced by his attorney's relationship with Boone.

In sum, this Court should clarify that a defendant need not prove prejudice to establish that his attorney's actual conflict requires reversal. The defendant need only show that counsel failed to pursue a plausible alternative defense strategy that was inherently in conflict with counsel's other interests. Because it applied a different standard in this case, the appellate court focused

its decision on Duffy's apparently "zealous" representation. That was the wrong analysis.

Kearney is entitled to reversal because Duffy neglected to pursue several plausible strategies that conflicted with (1) his allegiance to Boone, a person whose interests were adverse to Kearney's, or (2) his fear of incurring a fourth ethical violation. The contrary interests in this case individually and cumulatively denied Kearney his right to unconflicted counsel and require reversal.

POINT III

AT MINIMUM, THE SELECTION AND PAYMENT OF KEARNEY'S LAWYER BY BOONE, A STATE'S WITNESS AND CLOSE RELATIVE OF THE MURDER VICTIM, ENTITLES KEARNEY TO AN EVIDENTIARY HEARING.

If this Court does not reverse Kearney's convictions on the grounds asserted in Points I or II, it should at minimum remand the matter for an evidentiary hearing to explore the potential conflict of interest created by Boone's payment of Duffy.

When a defendant has presented a prima facie case of ineffective assistance of counsel, "trial courts ordinarily should grant evidentiary hearings to resolve" those claims. State v. Preciose, 129 N.J. 451, 462 (1992). And the court "should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Id. at 462-63.

Here, although Kearney's claims far exceed the liberal standard for a prima facie claim that Duffy labored under a conflict of interest, no evidentiary hearing was conducted. Wood, 450 U.S. at 272-73 (remanding for a hearing because "the possibility of a conflict of interest was sufficiently apparent . . . to impose upon the court a duty to inquire further"). And even if this Court were to set aside the question of whether a conflict existed, Kearney minimally

made out a prime facie case of ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984). As to prong one of the Strickland test, Duffy's acceptance of payment from the State's main witness and the victim's close relative "fell below an objective standard of reasonableness." Id. at 688. As to prong two, that "unprofessional error[]" overtly prejudiced Kearney, id. at 694, because the State leveraged the fee arrangement itself to support its most crucial piece of evidence -- Boone's claim that Kearney confessed to the stabbing. See Point II, supra.

It was improper in the absence of a hearing to conclude that the hiring and fee arrangement between Boone and Duffy did not constitute even a potential conflict of interest or warrant an evidentiary hearing. Moreover, the PCR court and appellate court's assumption that Kearney gave informed consent to the arrangement had no basis in the record whatsoever. This Court should not reach those same conclusions without a hearing.

Kearney, however, maintains that the relief sought under Point I or II is a far more appropriate outcome, particularly in light of the fact that Duffy is now deceased. An evidentiary hearing is thus unlikely to shed meaningful light on whether the fee arrangement or Duffy's potential ethical violation affected his strategic decisions, nor on the question of whether Kearney gave informed

consent to the arrangement. Kearney should not be denied relief because circumstances beyond his control render an evidentiary hearing largely futile.

The PCR court's failure to hold an evidentiary hearing before dismissing Kearney's petition, at a minimum, mandates a reversal of the order dismissing the petition and a remand of the case for an evidentiary hearing.

CONCLUSION

For the reasons outlined in Point I, a per se conflict arose from Boone's hiring and paying for Kearney's lawyer, entitling Kearney to a new trial. In the alternative, for the reasons outlined in Point II, the fee arrangement constituted an actual conflict of interest and requires reversal of the convictions. At minimum, the PCR court erred when it denied Kearney an evidentiary hearing.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: 
RACHEL E. LESLIE
Assistant Deputy Public Defender
Attorney ID No. 404382022

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