SUPREME COURT OF NEW JERSEY
DOCKET NO. 089877

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

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On October 21, 2016, a Middlesex County Grand Jury returned Indictment No. 16-10-01645 charging Dana Kearney (hereinafter "defendant") charging him with Conspiracy to Commit Aggravated Assault in contravention of N.J.S.A. 2C:5-2a and N.J.S.A. 2C:12-1b(1) (Count One); one count of Murder in contravention of N.J.S.A. 2C:11-3a and N.J.S.A. 2C:2-6a (Count Two); Endangering an Injured Victim in contravention of N.J.S.A. 2C: 12-l.2a (Count Three); one count of Hindering Apprehension in contravention of N.J.S.A. 2C:29-3b(3) (Count Five); and one count of Witness Tampering in contravention of N.J.S.A. 2C:28-5a (Count Six). (Da1-3).[1]

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[1] The State adopts the following notations:
"Da" refers to defendant's Appellate Division appendix.
"Dsa" refers to defendant's supplemental appendix.
"Db" refers to defendant's brief.
"1T" denotes motion transcript dated May 3, 2017.
"2T" denotes hearing transcript dated May 16, 2017.
"3T" denotes motion to be relieved transcript dated May 22, 2017.
"4T" denotes motion transcript dated May 22, 2017.
"5T" denotes hearing transcript dated May 23, 2017.
"6T" denotes hearing transcript dated June 19, 2017.
"7T" denotes hearing transcript dated July 5, 2017.
"8T" denotes hearing transcript dated July 6, 2017.
"9T" denotes hearing transcript dated July 18, 2017.
"10T" denotes trial transcript dated July 19, 2017.
"11T" denotes trial transcript dated July 20, 2017.
"12T" denotes trial transcript dated July 24, 2017.
"13T" denotes trial transcript dated July 25, 2017.
"14T" denotes trial transcript dated July 26, 2017.
"15T" denotes trial transcript dated August 2, 2017.

Between July 19, 2017, and September 5, 2017, defendant and his two co-defendants, Joseph Kearney and Shane Timmons, were tried by the Honorable Joseph Paone, J.S.C., and a jury. Nineteen witnesses testified at trial. Defendant was found guilty of all charges. (10T to 29T).

On December 22, 2017, Judge Paone sentenced defendant to an aggregate fifty-year term of incarceration, subject to the No Early Release Act ("NERA"). (30T; Da8-11). On the charge of endangering an injured victim, the court imposed a ten-year term of imprisonment. Ibid. On the charge of hindering, the court imposed a term of ten years. Ibid. On the charge of witness tampering, the court imposed a term of five years imprisonment. Ibid. The court ordered that the sentence for endangering run consecutively to that for murder; that the

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

sentence for hindering run concurrently with that for murder; and that witness tampering run consecutively with the endangering count. Ibid. The court also imposed the mandatory fees, fines, and restitution of $2,500.00 to the Victims of Crime Compensation Office. Ibid.

On May 17, 2018, a notice of appeal was filed by defendant. The Appellate Division consolidated defendant's appeal with the appeals filed by his co-defendants. On January 7, 2020, the Appellate Division denied the appeal in an unpublished decision. (Da12-112). On November 2, 2020, the New Jersey Supreme Court denied defendant's petition for certification. (Da113). On April 1, 2021, defendant filed a petition for Post-Conviction Relief. (Da114). Oral arguments were held on January 19, 2023, and PCR was denied without an evidentiary hearing on February 1, 2023. (Da140-164).

Defendant appealed the denial of his PCR, alleging the PCR court erred in two ways: that the PCR incorrectly determined that his attorney did not have a conflict of interest because his defense fees were paid by his girlfriend, who was called as a witness for the State at trial and that the PCR incorrectly determined that he was fully advised of his Fifth Amendment right to testify. In a published opinion issued September 28, 2024, the Appellate Division affirmed the denial of defendant's PCR. (Dsa2-32).

This appeal follows, limited to the issue of whether defendant's trial counsel had a conflict of interest because defendant's legal fees were paid by a State's witness. (Dsa1).

COUNTER-STATEMENT OF FACTS

The State relies on the statement of facts contained in the Appellate Division's unpublished opinion in the companion case of State v. Timmons and its published decision in the instant matter of September 28, 2024:

> The State's proofs showed that the victim, Christopher Sharp, was stabbed to death after an altercation at a house party in Perth Amboy at the home of Alicia Boone. During the course of the party, an argument erupted between Sharp and the three defendants. [Defendant] went upstairs and grabbed an object and returned. The victim was then stabbed fatally three times in the chest. Outdoor surveillance footage showed the three defendants leaving the house in the middle of the night. A bloody palm print of Joseph Kearney was found on the porch railing.
>
> Boone and other witnesses provided testimony corroborating the altercation. Boone fled the house with her children in the middle of the night because the argument appeared to be escalating. When she returned later that early morning, Sharp had been killed.
>
> The jury found Joseph and [defendant] were both guilty of conspiracy to commit murder and aggravated assault, that all three defendants were guilty of hindering the prosecution, and that [defendant] was guilty of endangering an injured victim and witness tampering.
>
> The trial court sentenced [defendant], the apparent stabber, to a fifty-year aggregate custodial term. It imposed an aggregate thirty-year sentence upon Joseph Kearney, and seven years upon [Shane] Timmons.
>
> [State v. Timmons, A-2567-17T4 (App. Div. Jan. 7, 2020) (Da12-112).]

In its published opinion affirming the denial of defendant's PCR, the Appellate Division expanded on the facts pertinent to this appeal as follows:

> The stabbing occurred in the early morning hours of August 18, 2013, following a gathering that began at the home the day before. Boone lived in Perth Amboy with her three children, and the youngest child's father, defendant. Timmons, slip op. at 6. Boone, the witness who is at issue on appeal, was defendant's then-girlfriend and co-parent of her youngest child, and Sharp's cousin. Boone did not observe the stabbing, as she had left for her mother's house with her children beforehand. Boone had given defendant a ride to her mother's house and then had a conversation with defendant about him needing to go back to her house to check on Sharp. Boone learned later of Sharp's death.
>
> Boone's Three Interviews and Statements to Police
> Following the homicide, Police Detective Marcos Valera and Police Sergeant Jose Rodriguez interviewed Boone three times at the Perth Amboy police station. Timmons, slip op. at 17. Boone's first statement to police occurred on the morning of August 18, 2013, a few hours after Sharp's death.
>
> At trial, Boone acknowledged she told the police in her first interview that, shortly after the incident, defendant had told her he needed to return to her house because "Chris got cut," referring to the victim.
>
> Boone's second statement to the police took place later that afternoon. In her second statement, Boone expressed concerns for her family "because [defendant] was 'mean.' " Timmons, slip op. at 18. "She said her first statement to the officers was '90 percent true.' " Ibid. Boone acknowledged "initially telling detectives that [defendant] said he thought [Sharp] was 'cut,' but told them in her second statement that [defendant] said he 'poked' Sharp or 'another word like that.' " Ibid.

On August 21, Boone voluntarily returned to the police station and gave a third statement. Ibid. She recounted in that third statement that defendant admitted to her, "I poked Chris." Ibid.

Boone's Trial Testimony

The State called Boone as a witness at trial, essentially to confirm the substance of her statements to the police. The State specifically elicited Boone's recounting during her second and third interviews that defendant told her he had "poked" Sharp.

During Boone's cross-examination, defendant's counsel[1] zeroed in on the seven hours between Boone's first and second statements to the police. Defendant's counsel elicited testimony from Boone that she had been scared after an off-the-record conversation with another Police Detective, Carlos Rodriguez, which occurred in between her first and second statements, in which that detective allegedly "insinuated [Boone] wasn't going home." Boone agreed with counsel's query that she changed her statement regarding defendant because of that intimidation, and that "in a sense the[ ] [police] kind of broke [her]."

On redirect, Boone was vague in her recollection of the timing of her interaction with Detective Carlos Rodriguez and how and why her demeanor changed for the second statement. In this regard, Boone testified that

> [e]veryone had left. So, I asked Detective [Carlos] Rodriguez, I said,—I said, everybody's leaving. And he said, yeah. And I said, am I being locked up? No. I said, is there—I said, everyone's—I said, am I being locked up for something? And he said, well why do you ask that? And I said, because you let everyone leave but me. And he said, now that's a good

> observation. I insinuated that meant I was not going home, because all he had to say was yes or no. And that's not what he said.

Boone elaborated further about her conversation with the detective:

> Then he told me, come on, Alicia. He said, come on, you got something else to tell me. I said, no I don't have anything else to tell you. I said, I told you everything. He said, no, come on, you got something else. I said, Detective,—I was telling him, look, I don't. And then he—I mean he went on and on with that, and on. And then I said to him, look, [defendant]—and I said this. I said, look, [defendant] is—is mean. And then he said, he's mean. And I said yeah. And I said, I'm not going—I don't want to go in there and say—and he said, come on. He said, it's going to be all right, you know, I'm telling you it's going to be cool. I said, you know what. And then I didn't even agree actually. He said to the other detectives, you know what, I think Alicia has something else she want[s] to tell you guys. And that's when I went in there and made my second statement.

After her testimony on redirect, Boone's second recorded statement was played for the jury. The prosecutor then elicited testimony from Boone that she "was crying [during her second statement] because she was afraid of ... [defendant]." Boone testified that, apart from telling her lawyer, her cross-examination on the previous day was the first time she had spoken about her interactions with, and alleged mistreatment by, Detective Carlos Rodriguez. Boone further testified that, by comparison, both Detective Valera and Sergeant Jose Rodriguez were "very good to [her]." The prosecutor also reaffirmed with Boone her third statement to Detective Valera and Sergeant Jose

Rodriguez on August 21, 2013, in which she again told the police "that [defendant] said that he poked Chris."

On re-cross, defendant's counsel resumed his attack on the credibility of Boone's second and third statements to the police. Perhaps most significantly, defendant's counsel elicited dramatic testimony from Boone on a second re-cross in which she proclaimed, "my family and I are very much aware of who killed my cousin. We are much aware that it was not Dana Kearney."

Boone's Testimony About Her Payment of Defendant's Legal Fees and Interactions with His Counsel

Apart from their focus on Boone's police interviews, counsel also developed on the record certain facts relating to Boone's payment of defendant's legal fees. During her redirect by the State, Boone testified she had previously met defendant's trial counsel "[a]t his office" about "[t]hree times" where they discussed "[p]ayment." Boone testified that defendant's counsel "wouldn't talk about the facts of the case" and she did not think anyone had gone with her to those meetings. At the end of the redirect, the prosecutor elicited the following testimony from Boone:

Q. Ms. Boone, you love [defendant], right?

A. Yes. I love all of them actually, but yes I do love [defendant].

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 [defendant] 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.

On re-cross, defendant's counsel asked Boone about her visits to his office, prompting the following exchange:

Q. Now, the Prosecutor brought out that you have been to my office and that you had paid my legal fee.

A. Yes.

Q. When was the last time you were at my office?

A. I don't know. I mean, I don't—maybe 2014.... Maybe 2014. Maybe possibly. A few years ago.
....

Q. So, after you paid my legal fee, we really had no other direct communication?

A. No.

On a second re-cross, defendant's counsel asked Boone if she was "coloring [her] testimony because [she] d[id]n't want anything bad to happen to [defendant]," to which Boone responded "No."

Other Witnesses

Other trial witnesses, including Boone's daughters, goddaughter, and mother's boyfriend, provided incriminating evidence regarding defendant's actions.

. . .

The Defense Summation

During his summation, defendant's counsel addressed at length Boone's statements to police. Counsel delved into her credibility and potential motives for changing her initial statement about defendant's alleged words to her on the day of her cousin's death. He argued Detective Carlos Rodriguez had pressured Boone, and that her recollection of defendant telling her that he had "poked" Sharp had been "manufactured" and was not credible:

> [I now turn to] [t]he handling of Alicia Boone by the police. All right. She's brought to the police station at about 3 a.m. She's placed in somewhat solitary confinement. Nobody could really get to her except the police. Once again, we return to the issue of statement integrity. Not only was statement integrity violated by allowing witnesses for at least an hour at the crime scene itself to talk to her, [and] her mother, it also was violated at police headquarters.
>
> ....
>
> So let's examine Alicia's first statement to the police. You saw her. She was calm. She disclosed exactly what was stated to her concerning the

issue of what [defendant] told her about the nature of the injury.

[Defendant] said he wanted to return to the house. Why? Chris got cut, or words to that effect. Chris got cut, or words to that effect. Compare that with her statement some seven hours later. "I poked Chris," or words to that effect.

Now, [the] first statement is extremely different from the second statement, in what regard? Well, the first statement suggests facts that Alicia relied upon in reaching that conclusion. What were those facts? Glass was on the floor. In fact, Alicia indicated that her first reaction was that Chris must have cut himself on the glass on the floor. That was her initial reaction. Seems relatively straightforward, there's glass on the floor, he cut himself on that glass. Okay.

Then we go to the second one. What did that demonstrate? Well, the prosecutor is going to argue to you that the second statement, the second statement really was about the fact that he's mean. That was the point of the second statement, that he's mean? Or was that justification for the second statement. He's mean.

What possible, what possible, I don't know, what possible statement could that be, he's mean? Gone was that Chris got cut, and it was replaced by I poked him, or words to that effect. ...

....

Okay. At the end of the day, you have two dramatically different statements. You have the statement "Chris got cut" or words to that effect or "I think I poked Chris" or words to that effect. You must decide which of those statements are

> more reliable. It's on you. You must decide whether or not Alicia Boone, having sat in Perth Amboy Police Department for hours, changed up her statement for any other reason than well, [defendant]'s mean.
>
> Now if you believe that Chris got cut, or words to that effect, then your duty is obvious; you must vote to acquit. If you believe that Chris got cut or words to that effect, presents a reasonable alternative explanation to the State's theory, your duty is obvious; you must acquit. If you believe that "I poked Chris" is a reasonable, well, then, what can I tell you. You've already convicted.
>
> ....
>
> Didn't you expect Sergeant [Jose] Rodriguez to have stopped Alicia when she changed her statement regarding cut versus poked and ask her why she changed the statement? Didn't you expect Sergeant [Jose] Rodriguez to question Alicia about why she thought she was the only member of her family not to go home for all those 15 hours? After all, she was there voluntarily. Listen, I can go on for quite awhile, but I think at the end, you will be forced to conclude that the State manufactured a great deal in this case. [(Emphasis added).]

State v. Kearney, 479 N.J. Super. 539, 549–54 (App. Div. 2024).

LEGAL ARGUMENT

POINT I

DEFENDANT CANNOT RAISE NEW ARGUMENTS IN HIS SUPPEMENTAL BRIEF BEFORE THIS COURT

The entirety of defendant's appeal from the denial of his PCR consisted of just two points: first, that counsel was ineffective due to a purported conflict in his attorney's fees having been paid by a witness who testified for the State and, second, that he was deprived of his right to testify on his own behalf.

This Court granted certification only on the former point, which counsel framed in his brief to the Appellate Division as representing a *per se* conflict of interest, calling trial counsel "inescapably beholden" to Alicia Boone and making a bare assertion that such a fee arrangement "may have inhibited his cross-examination of Boone" without any further elaboration. Appellant goes on to invent a number of wild allegations that he believes impugn the integrity of trial counsel's strategy. Appellant argues alternately that trial counsel did not vigorously cross-examine Boone because she "incriminated [Appellant] maliciously"; because she was afraid of Appellant and his incarceration would therefore benefit her; and because trial counsel was afraid to elicit any testimony that showed Appellant was unaware that Boone was paying his legal fees. (Db34). As none of these arguments were raised at any point before the PCR

court, the Appellate Division, or in defendant's Petition for Certification, this Court must decline to hear them.

For sound jurisprudential reasons, with few exceptions, " 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.' " State v. Witt, 223 N.J. 409, 419 (2015), quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). See also State v. Arthur, 184 N.J. 307, 327 (2005). "The jurisdiction of appellate courts rightly 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, 18 (2009). "The presentation of new issues on appeal 'is repugnant to the spirit of our practice which contemplates that, except in extraordinary situations, as where public policy or jurisdiction are involved, a party shall make his points in the court of first instance before urging them as grounds on appeal.' " State v. Mahoney, 226 N.J.Super. 617, 626 (App.Div.1988) (quoting State v. Daquino, 56 N.J.Super. 230, 233 (App.Div.), certif. denied, 30 N.J. 603 (1959), cert. denied, 361 U.S. 944 (1960)).

"[A] party must make the same argument in the District Court that he makes on appeal" in order to preserve it. United States v. Abreu, 32 F.4th 271, 274 (3d Cir. 2022), citing United States v. Joseph, 730 F.3d 336, 341 (3d Cir. 2013). There is a clear distinction "between raising an issue . . . and raising an

argument, which can be pressed on appeal." Ibid. A properly raised argument is "essential to the proper functioning of our adversary system because even the most learned judges are not clairvoyant" and "we do not require [them] to anticipate and join arguments that are never raised by the parties." Id. at 275 citing United States v. Dupree, 617 F.3d 724, 728 (3d Cir. 2010).

On appeal, defendant's argument was limited to a brief paragraph alleging that Duffy's allegiance to Boone "might well have inhibited his cross-examination and summation regarding her, in gratitude for her past payments and/or so as to secure any balance of payments." (Db21). Defendant has never before mentioned any potential criminal liability for Boone; that Boone was afraid of him and had an interest in preventing his release; or that Duffy was aware that he was violating the RPCs and intentionally underperformed out of self-preservation. While these arguments relate to conflict of interest, they have vastly different implications than merely impugning Duffy's performance due to his purported financial interest in keeping Alicia Boone happy. In so doing, he has deprived both the Appellate Division and the PCR court of the ability to make factual findings related to these arguments. He further attempts to end-run this Court's decision to grant certification on only the issue of whether Boone's payment of defendant's legal fees created a conflict of interest by claiming that

this alleged conflict of interest could have caused Duffy to advise defendant not to testify.

These arguments must be rejected by this Court procedurally, as defendant had every opportunity to raise them below and failed to do so. The record before this Court is identical to the one before both the Appellate Division and the PCR court. Defendant's strategy here – to raise new arguments for the first time to this Court and to repackage a claim that this Court has already declined to hear – must be procedurally barred. State v. Walker, 385 N.J. Super. 388, 410 (2006).

POINT II[2]

THE APPELLATE DIVISION PROPERLY AFFIRMED THE DENIAL OF DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF (Da140-164).

This Court granted certification on one argument with respect to the constitutional effectiveness of his attorney on appeal: whether, because Alicia Boone paid for his attorney, trial counsel had an inherent conflict of interest and was *per se* ineffective. Here, both the trial court and the Appellate Division properly determined that, because Boone did no more than hire an attorney for defendant, no conflict existed. Defendant asserted that trial counsel was "beholden" to Boone and that trial counsel therefore was inhibited on cross-examination. As defendant's claims lack any evidentiary support, both the trial court and Appellate Division properly determined that they did not support a prima facie claim of ineffective assistance.

To establish a prima facie claim of ineffective assistance of counsel, a petitioner must demonstrate a reasonable likelihood that his claim will meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984) and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 51 (1987). (See State v. Preciose, 129 N.J. 451, 463 (1992)). In determining whether a prima facie claim has been

[2] Point II of the State's brief corresponds to Point I of defendant's brief.

established, reviewing courts must judge the facts in the light most favorable to the petitioner. Preciose at 462-63. Under the Strickland test, the petitioner must show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Preciose, 129 N.J. at 459.

The proper inquiry for the first prong is "whether counsel's assistance was reasonable considering all the circumstances." Strickland 466 U.S. at 668. Prevailing norms of the practice of law should be used as a guidepost. Ibid. The petition "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then decide in light of the particular circumstances of the case whether the acts or omissions identified by the petitioner "were outside the wide range of professionally competent assistance." Ibid. In rendering its decision, the court should apply the strong presumption that counsel has rendered adequate assistance. Ibid.

The second prong of Strickland requires that prejudice be proven by the petitioner; it is not presumed. Fritz, 105 N.J. at 52. "A petitioner alleging [ineffective assistance of counsel] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694). A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." Ibid. Purely speculative deficiencies in representation are insufficient to support a claim of ineffective assistance of counsel. Ibid. Thus, in order to be entitled to an evidentiary hearing, a petitioner "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154 at 170, certif. denied, 162 N.J. 199 (App. Div. 1999). Instead, a petitioner must allege facts sufficient to demonstrate counsel's alleged substandard performance. Id. In reviewing this claim, counsel's performance must be evaluated from his or her perspective at the time of the error, and "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689; Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). "A [reviewing] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Here, defendant alleges his attorney was laboring under an incurable conflict of interest. "The Rules of Professional Conduct are designed to assure that, in representing a client, counsel's judgment is not impaired by divided loyalties or other entangling interests." State v. Jimenez, 175 N.J. 484–85 (2003). Specifically, the Rules of Professional Conduct provide that a conflict

of interest exists 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." R.P.C. 1.7(b) (2004). Inquiries into conflicts of interest are highly fact specific. In re Op. No. 653 of the Advisory Comm. on Prof'l Ethics, 132 N.J. 124, 132 (1993).

"Under our State Constitution, [e]ffective counsel is an attorney who represents [their] client with undivided loyalty, unimpaired by conflicting interests." State v. Cottle, 194 N.J. 449, 466-67 (2008) (quoting State v. Norman, 151 N.J. 5, 23 (1997)). "[A]n attorney hobbled by conflicting interests that so thoroughly impede [their] ability to exercise single-minded loyalty on behalf of the client cannot render the effective assistance guaranteed by our constitution." Id. at 467. Further, "[o]ur Court's rulings have exhibited a much lower tolerance for conflict-ridden representation under the New Jersey Constitution than federal courts have under the United States Constitution." Id. at 470. New Jersey has "parted ways with the federal courts, which have generally eschewed finding per se conflicts under the Sixth Amendment." Ibid.; Mickens v. Taylor, 535 U.S. 162, 122 (2002).

Specifically, New Jersey courts "have adhered to a two-tiered approach in analyzing whether a conflict of interest has deprived a defendant of [their] state

constitutional right to the effective assistance of counsel." Id. at 467 (citing Norman, 151 N.J. at 24-25). "Under the first tier, '[i]f a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of codefendants, a per se conflict arises, and prejudice will be presumed, absent a valid waiver.' " State v. Drisco, 355 N.J. Super. 283, 292 (App. Div. 2002) (quoting Norman, 151 N.J. at 24-25). " 'Otherwise,' under the second tier, '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.' " Ibid. (quoting Norman, 151 N.J. at 25); see also State v. Bell, 90 N.J. 163, 171 (1982). "But not every potential attorney conflict rises to such an unacceptable level that it deprives a defendant of the right to effective assistance of counsel." State v. Murray, 162 N.J. 240, 249-50 (2000). "The relevant inquiry in potential conflict of interest situations is the potential impact the alleged conflict will likely have upon defendant." Ibid.

a. No per se conflict of interest existed.

There are a limited class of cases recognized as "per se conflicts." See State v. Bellucci, 81 N.J. 531 (1980); Norman, 151 N.J. at 28; Cottle, 194 N.J. at 467, 473. "The per se rule is necessary because '[t]he harmful effects of a conflict ... will not ordinarily be identifiable on the record,' and because, without a per se

rule, '[r]equiring a showing of prejudice would place an impossible burden on the accused and force the reviewing courts to engage in "unguided speculation." ' " State v. Alexander, 403 N.J. Super. 250, 257 (App. Div. 2008) (quoting Bellucci, 81 N.J. at 543; and Norman, 151 N.J. at 24). For example, when "a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of codefendants," before, during, or after trial there is a per se conflict, and, absent a valid waiver, the reversal of a conviction is mandated. See id. at 255-56 (quoting Norman, 151 N.J. at 24–25, 28).

Indeed, "the per se analysis is 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." State v. Savage, 120 N.J. 594, 616 (1990), citing Cronic, 466 U.S. at 659 and Strickland, 466 U.S. at 692. The examples given by the Savage Court include "counsel's failure to appear at a 'critical stage' of the proceedings and where "defense counsel faced criminal liability on same charges on which defendant was tried and acted as prosecution's witness." Ibid. These circumstances "would justify a presumption of prejudice" as they "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Ibid. citing Cronic, 466 U.S. at 658.

Defendant attempts to synthesize two principles from three per se conflict cases before this Court: that a per se conflict arises when an attorney is hired or

paid for by a third party with interests adverse to the defendant's and that an interest is considered adverse if the third party's criminal liability may turn on the defendant's testimony or cooperation against the third party. This analysis is simply not borne out by a review of the case law cited by defendant.

In the first case to touch upon the issue of divided loyalties, this Court confronted the question of whether a conflict of interest arises when a crime syndicate paid for an attorney to represent an employee charged with lottery offenses. In re Abrams, 56 N.J. 271 (1970). Abrams occurred in the context of a disciplinary proceeding, not a petition for post-conviction relief, and resulted in the mere reprimand of the attorney. Ibid. At sentencing, Abrams made a plea for leniency to the sentencing court. During the course of this colloquy, the following exchange occurred:

> THE COURT: Why do they pay you to make a speech if they won't pay his fine?
>
> MR. ABRAMS: That I can't answer. This I know to be a fact. Maybe because my fees are a little bit tough, sir. I don't know.
>
> THE COURT: Maybe you ought to make it a little bit tougher.
>
> MR. ABRAMS: I would like to, but they won't stand for it.

Abrams, 56 N.J. at 273. This exchange clearly shows that Abrams was beholden to the mafia; he could not offer his client's cooperation against the

mafia because the mafia was paying Abrams' fees. This Court noted that it would have been in the defendant's interest "to see leniency by aiding the State in its pursuit of his employer"; however, Abrams was "hardly well situated to discharge that duty when he has agreed to look to the syndicate for payment of his fee." Id. at 276.

Significantly, in the years since Abrams was decided, New Jersey has replaced its Canons of Professional Ethics and Disciplinary Rules with the more modern Rules of Professional Conduct. Third party payers, regardless of whether they are an employer with a potential interest in the outcome, are now subject to an actual conflict analysis rather than a per se conflict analysis. See In re State Grand Jury Investigation, 200 N.J. 481 (2009), discussed in greater detail *infra*. Given Abrams' irrelevance under today's Rules of Professional Conduct, defendant's reliance on it as a guiding principle in per se conflict analysis is both irrelevant and misguided.

In Bellucci, the attorney represented not only defendant, but two codefendants until shortly before they entered guilty pleas, and his law partner represented another codefendant, Johnson, at a joint trial for the then-existing crime of lottery. Id. 81 N.J. at 535. Bellucci testified at trial that, while he knew the premises was used for gambling, he was there to speak with one of his codefendants about a hospitalized family member. Id. at 536. This Court found

that the attorney's obligations to his prior clients had created a great likelihood of prejudice and made his representation of the defendant constitutionally defective. The clients who had pled guilty prior to trial had an interest in obtaining a lenient sentence by testifying for the State, while the defendant's penal interests dictated that his confederates testify for his benefit and corroborate his version of events. Id. at 540.

Further, it was a per se conflict of interest where the attorney's law partner represented a codefendant for a number of reasons. First, this Court determined that there exists "ready access to confidential information among members of a law firm" as each attorney's knowledge is imputed to the entire firm. Id. at 542. Second, "a financial stake in the outcome of a case is itself a source of conflict." Ibid. Finally, this Court's paramount concern related to "public confidence in the integrity of the bar" as "conduct proscribed for one lawyer could be performed by his partner." Ibid.

Simply put, Bellucci has nothing to do with a third-party payer. It is a fairly unremarkable case regarding divided loyalties and the variety of pitfalls of dual representation. Bellucci's attorney had a duty to zealously advocate for him at trial, including calling witnesses who could corroborate that Bellucci was merely present and not a participant. However, the same attorney had established attorney-client relationships with each individual who pled guilty

and had a duty to help each defendant pending sentence seek leniency. It was in Bellucci's interest to have his codefendants testify on his behalf, but it was in the codefendants' interest to testify as State's witnesses. The representation of Johnson by the attorney's law partner was akin to multiple representation. Both attorneys, as part of the same firm, were imputed to have full knowledge of both Bellucci's and Johnson's privileged information. This creates additional problems under the third concern set forth by this court: while Bellucci's attorney could not violate attorney-client privilege, Johnson's attorney would be free to do so with knowledge gained from his association in the same firm. Thus, any distinction between the two attorneys for purposes of conflict of interest analysis is without difference when they are employed by the same firm.

Bellucci is completely inapposite to the instant case. No third-party payers are even mentioned in its opinion; it is limited to the issue of multiple representation and the pitfalls of establishing multiple attorney-client relationships in the same case. By its own terms, it deals with two separate, but interrelated issues: when one attorney represents multiple defendants in one matter and when two attorneys from one firm each represent a different co-defendant in the same matter. It does not, and should not, have any bearing on the matter before this Court.

In the final case defendant urges this Court to consider, the defendant's attorney was himself under indictment by the Essex County Prosecutor's Office and was enrolled in the Pretrial Intervention Program at the time of the defendant's trial. State v. Cottle, 194 N.J. 449 (2008). This Court found that the attorney, "to some degree, might have been counting on the kindness" of the prosecutor's office. Cottle, 194 N.J. at 471. This Court noted that the attorney's divided loyalties with respect to his own criminal charges might have been "somehow related to his perfunctory opening statement, to his few meetings and communications with his client, to his failure to robustly challenge the identifications or present an alibi defense, and to a number of other alleged pretrial lapses." Ibid. The Cottle Court found that the "attorney's duty of zealous advocacy was compromised by fear for his own wellbeing." Id. at 473.

As with the first two cases, Cottle affords defendant no relief. While the attorney in question was not necessarily in an attorney-client relationship with himself, his own interests in self-preservation via currying favor with the Essex County Prosecutor's Office is undeniable. Further, the Cottle Court pointed to what it perceived to be deficient performance by the attorney in the record, citing a number of issues that could be attributed to the attorney's "fear for his own well-being." Ibid. Here, defendant has done no more than make a bare assertion

that Duffy was loyal to Boone; he has not been able to cite to any action that Duffy either took or omitted as he zealously advocated for defendant.

The controlling case on point with respect to third-party payers is In re State Grand Jury Investigation, 200 N.J. 481 (2009), which the Appellate Division relied upon heavily and which defendant curiously failed to address in his supplemental brief. There, an employer under investigation provided and paid for counsel to its employees when a grand jury inquiry commanded the testimony of several of said employees. Id. at 485. The State moved to disqualify counsel, arguing that "a per se conflict of interest arises whenever, as here, two facts contemporaneously appear: a target in a grand jury investigation unilaterally selects and retains a lawyer to represent potential witnesses against it, *and* the lawyer relies on the target for payment of legal fees." Id. at 490. This Court disagreed with Abrams, *supra*, citing the newer, more modern Rules of Professional Conduct that had gone into effect since Abrams was decided. This Court listed six relevant conditions to be satisfied before a lawyer may accept payment from one other than his client:

> (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." Tax Auth., Inc. v. Jackson Hewitt, Inc., 187 N.J. 4, 19 n.

2, 898 A.2d 512 (2006) (citation and internal quotation marks omitted).

(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. RPC 1.8(f)(2); RPC 5.4(c). See, e.g., In re Opinion 682 of the Advisory Comm. on Prof'l Ethics, 147 N.J. 360, 687 A.2d 1000 (1997) (holding, in part, that formation of title insurance company owned and managed by attorneys who would retain portion of premiums paid by client as part of fee calls into question lawyer's independent judgment).

(3) There cannot be any current attorney-client relationship between the lawyer and the third-party payer. In re Garber, 95 N.J. 597, 607, 472 A.2d 566 (1984) ("It is patently unethical for a lawyer in a legal proceeding to represent an individual whose interests are adverse to another party whom the lawyer represents in other matters, even if the two representations are not related." (citations omitted)); see also RPC 1.7 (general rule governing conflicts of interest).

(4) The lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation of his client. RPC 1.8(f)(3). 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., 496-97.

The Appellate Division here properly applied the test set forth in In re State Grand Jury Investigation and determined that no per se conflict of interest existed. Both the PCR court and the Appellate Division properly determined that five of the six factors were clearly met in the instant matter. Kearney, 479 N.J. Super at 560. Despite defense counsel's bare allegations raised for the first time in his petition, the Appellate Division correctly found that Boone did not direct or interfere with Duffy's representation of his defendant. Ibid. There is also no evidence that she discussed the case with him or established an attorney-client relationship with Duffy; indeed, the only evidence in the record is that

Duffy recommended Boone retain her own attorney, which she did. Ibid. No payment or billing issues have been identified to this date. Ibid.

Therefore, the only condition that can reasonably be disputed is the first: whether Duffy sought a waiver from defendant. Following defendant's trial, attorney Duffy passed away and therefore cannot expressly disprove this claim. However, the Appellate Division properly "decline to hinge a finding of a per se conflict and constitutional violation upon such a "bald assertion." Ibid. The Appellate Division gave three reasons for their holding. First, "the noncompliance with an ethics requirement, while relevant, does not automatically trigger per se civil or criminal consequences." Ibid. Second, defendant "must have been fully aware" that Boone paid for his attorney as demonstrated by her trial testimony. Ibid. Finally, trial counsel "acted as a zealous advocate of defendant's interests." Ibid.

The Appellate Division also properly took judicial notice that it was "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." Ibid. The lower court properly determined that there was no per se constitutional violation so long as "they are disclosed and with the assent of the defendant and where the counsel's vigorous representation of the client is not being materially limited by the payer." Here, it can be gleaned from the record that defendant

was well aware that Boone was paying his legal fees. The Appellate Division considered it significant that "defendant does not claim he was unaware that Boone was paying his defense counsel's fees," and no such evidence exists within the transcripts. Ibid. Indeed, defendant has not claimed at any stage of this litigation that he was unaware that Boone was paying for his attorney. In fact, the State elicited the following testimony from Boone on redirect:

STATE: And since this incident, you've spoken to him thousands of times. Is that fair to say?

BOONE: Yes.

STATE: You've seen him hundreds of occasions, right?

BOONE: Yes.

(21T 83-7 TO 10). Any assertion that defendant was unaware Boone was paying for Duffy, therefore, would be wholly disingenuous and not credible, as Boone was in regular contact with defendant by her own admission. The record is also void of any evidence that Duffy was materially limited by Boone's payment. Despite being in the throes of terminal cancer, Duffy thoroughly cross-examined Boone and "vigorously endeavored to show the critical portions of her second and third statement were not truthful." Ibid. Duffy gave a forceful closing in which he discredited Alicia Boone's statement as lacking "statement integrity." (27T 25-3 to 14; 42-6 to 49-15). This is the polar opposite of the attorney's performance in Cottle, in which this Court listed a number of "pretrial

lapses" that it found concerning. Indeed, the common thread in the cases to which defendant cites is an actual adversarial relationship between the third-party payer and the defendant as reflected in the record by counsel's deficiencies.

Finally, applying a per se conflict analysis to this type of situation makes little practical sense. As the Appellate Division noted, a loved one paying a defendant's lawyer fees is not an unusual scenario. Id. at 561. Post-Criminal Justic Reform Act, defendants who commit serious crimes and are facing lengthy periods of incarceration are more likely to be detained pending trial. Permitting a loved one to handle the financial side of obtaining a lawyer gives this group of defendants the ability to retain counsel of their choosing, allows private attorneys to take on cases in which there would otherwise be a risk that they would not be paid by a detained defendant who could eventually be serving a hefty prison sentence, and reduces the burden on the county's Office of the Public Defender.

Further, this Court should decline to find a per se conflict of interest in every case where a third-party payer is a witness for two reasons: first, because there is no distinction between types of third-party payer in the rule and second, because a payer's testimony will not always be so hostile to a defendant that it materially limits defense counsel. Indeed, it is far more logical that a

defendant's loved one will be hostile to the State, not to defendant. Here, Boone could not have been clearer that she did not want to give testimony that would assist in the State's case against defendant, and she did not even believe that defendant was responsible for Sharp's death. After conceding to the State on redirect that she did not want anything bad to happen to defendant, she stated without prompting that "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 . . ." (27T 100-12 to 16). Defendant has failed to demonstrate that any purported conflict of interest resulted in a performance so deficient it was tantamount to the complete denial of counsel, as required by a per se conflict of interest. Savage, 120 N.J. 616.

For the aforementioned reasons, a per se conflict of interest analysis is inappropriate for third-party payers who are potential trial witnesses. Any concerns regarding the independence of trial counsel in this context can – and should - be addressed appropriately with an actual conflict of interest analysis.

b. No actual conflict of interest existed.

The next step in the analysis is to evaluate whether a potential or actual conflict existed; if so, whether it was significant; and, if the two conditions precedent are met, whether the defendant has shown a great likelihood of

prejudice. Kearney, 479 at 562, citing Norman, 151 N.J. at 25. Rule of Professional Conduct 1.7(a) provides "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists when "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation ... 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." In other words, "there must be 'a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.' " In re Op. No. 17-2012 of Advisory Comm. on Prof'l. Ethics, 220 N.J. 468, 478 (2014) (quoting Model Rules of Prof'l. Conduct R. 1.7 cmt. 8 (2013)).

The Court explained " '[t]he critical questions are the likelihood that a difference in interests' will arise, and 'if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.' " Id. at 478-79 (quoting Model Rules of Prof'l. Conduct R. 1.7 cmt. 8). This Court has found that a disqualifying conflict " 'must have some reasonable basis' grounded in an actual conflict." State v. Smith, 478 N.J. Super. 52, 64 (App. Div. 2024), quoting State v. Harvey, 176 N.J. 522 (2003).

The "evaluation of an actual or apparent conflict, or of an appearance of impropriety, 'does not take place "in a vacuum," but is, instead, highly fact specific.' In that respect, the Court's attention 'is directed to "something more than a fanciful possibility." ' " Harvey at 525 (quoting In re Opinion 653, 132 N.J. 124, 132 (1993)). This differs from the per se conflict analysis in that prejudice is not presumed, but instead a great likelihood of prejudice must be shown by the defendant. The Appellate Division noted that this is already a lower standard for a defendant to prove than the standard Strickland analysis, which mandates actual prejudice. Id. at 562.

Defendant asserts that the Appellate Division applied the wrong standard in requiring defendant to prove a great likelihood of prejudice, despite said standard's existence and use in New Jersey for decades. (Db26). However, the idea that a defendant need not show *any* prejudice from a perceived conflict of interest in order to obtain relief strains credulity and obliterates any distinction between an actual conflict of interest and a per se conflict.

Defendant also fails to acknowledge the distinctions between what federal courts consider to be a per se conflict of interest and what our courts consider to be a per se conflict. Defendant rests his entire argument on a test set forth by the First Circuit, a circuit that does not appear to even recognize per se conflicts of interest. United States v. Fahey, 769 F.2d 829 (1st Cir. 1985). (Db27-30). In

a multiple representation case, the Massachusetts District Court noted that "the mere showing of joint representation is not enough to show ineffective assistance of counsel because joint representation does not constitute a per se conflict of interest," and a defendant would need to "exhibit contrary lines of defense" to even show that there was an actual conflict of interest. Garcia v. Roden, 672 F. Supp. 2d 198, 203 (D. Mass. 2009).

Even in situations like that presented in Cottle, in which the defense attorney himself is under investigation by the same office prosecuting his client, neither the First Circuit nor the Seventh Circuit recognize per se conflicts of interest. "[A] defendant has not shown a fatal conflict by showing only that his lawyer was under investigation and that the lawyer had some awareness of an investigation." Reyes-Vejerano v. United States, 276 F.3d 94, 99 (1st Cir. 2002); see also United States v. Montana, 199 F.3d 947, 949 (7th Cir. 1999), United States v. Hubbard, 22 F.3d 1410, 1418 (7th Cir. 1994).

The Second Circuit limits per se conflicts of interest to two situations: "where trial counsel is not authorized to practice law and where trial counsel is implicated in the 'same or closely related criminal conduct' for which the defendant is on trial." United States v. Williams, 372 F.3d 96, 103 (2d Cir. 2004), citing United States v. Fulton, 5 F.3d 605, 611 (2d Cir.1993). The Sixth Circuit "specifically has rejected a *per se* rule as to conflicts of interest and

requires proof of an actual conflict." Taylor v. United States, 985 F.2d 844, 846 (6th Cir. 1993). In denying a defendant's claim "that he was deprived of his right to conflict-free counsel because a relative paid his attorney and controlled the litigation," the Ninth Circuit has expressly found that "[t]here is no clearly established Supreme Court authority holding that a third-party fee arrangement results in a *per se* conflict of interest that 'affected counsel's performance—as opposed to a mere theoretical division of loyalties . . . ' " Mason v. Glebe, 674 Fed. Appx. 631 (9th Cir. 2017), citing Mickens v.Taylor, 535 U.S. 162, 171 (2002).

Additionally, many of the cases to which defendant cites in support of his position are multiple representation cases that would likely constitute a per se conflict in New Jersey. For example, in United States v. Gambino, the defendant's trial attorney submitted a certification indicating that he had "carefully avoided any questions which might have implicated [the codefendant], out of a sense of loyalty to him and for fear that he might jeopardize [the codefendant]'s position in his impending trial". 864 F.2d 1064, 1066 (3rd Cir. 1988).

Thus, urging this Court to adopt tests set forth by various federal courts affords defendant no relief because those courts do not recognize per se conflicts or severely limit the sphere of cases in which a per se conflict may be found.

This Court must continue to apply the test set forth in Norman, as the actual conflict test proposed by defendant has no logical place in our jurisprudence.

In applying the Norman test, it is apparent that no actual conflict existed here. As explained in greater detail *infra*, defendant does little more than set forth a series of bare allegations that Boone's interests conflicted with defendant's interests. His claims are unsupported by any evidence in the record at all, let alone competent, credible evidence. Defendant claims that Boone was most interested in shielding herself from criminal liability and from retaliation by defendant. (Db30).

For the first time before this Court, defendant further alleges that Duffy had a "personal interest" in concealing his RPC violation and cites to several Disciplinary Review Board decisions, the last of which was issued after Duffy's files had been surrendered to attorney-trustees. Ibid. Defendant claims that, despite the fact that there is no evidence that Boone was ever a suspect in either the murder or any events that occurred in its aftermath, Duffy avoided "any strategic decision" that could expose Boone to unspecified criminal liability. Defendant again tries to claim that he was somehow deprived of his constitutional right to testify because of Boone (despite this Court declining to hear this claim) and that his testimony could have implicated Boone in, again, unspecified criminal acts. Finally, defendant makes the preposterous claim that,

despite the fact that he was believed to be the one who wielded the knife against Sharp, he was deprived of a favorable plea offer in exchange for cooperation against Boone. (Db30). These fanciful claims are wholly unsupported by the record below; defendant has not even provided so much as a self-serving affidavit to this Court detailing what testimony he would have provided against Boone that would make the State cut a favorable plea deal with the actual murderer.

Defendant then takes aim at counsel's strategy on cross-examination, arguing that he should have adopted the theory that Boone incriminated Kearney either out of malice or out of self-preservation. Defendant never mentions that Boone was crying during the interview, or that she was crying so hard on the stand when describing what happened when she gave her statement that it was noted by the transcriber. (20T 229-21 to 230-18). During this exchange, Boone told the jury that she was not even allowed to use the bathroom and urinated on herself twice as a result. Ibid. Defendant claims that Duffy "cast [Boone] in a favorable light" during his cross-examination. Defendant fails to acknowledge that, while Boone's statements were damaging, her trial testimony was generally favorable to him. She claimed to not remember many details of the night and had to be prompted with a transcript of her statement. She told the jury without any prompting that an unnamed, uncharged individual had murdered Sharp, not

defendant. The State cross-examined her extensively on her bias in an attempt to explain her reluctance to provide any details. In fact, she was even recalled to the stand by Duffy himself while presenting his case as a character witness for defendant. Defendant does not – and cannot – explain how a more aggressive cross-examination would have been a more effective strategy against a woman who told the jury that she loved him, did not want to see him go to prison, and knew that he did not murder her cousin.

Defendant then alleges for the first time that Duffy's allegiance to Boone impacted his sentencing argument. Duffy began his sentencing argument by explaining to the trial court that defendant was steadfast in his position that he was not guilty of murder. (30T 49-4 to 6). He conceded that he was "a bit constrained in addressing certain factors that [he] normally would address at time of sentencing" due to defendant's position. Ibid. While he did not cite to mitigating factor (4), substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense, he argued that intoxication was a significant factor in the events leading up to Sharp's death. (30T 49-14 to 22). Duffy argued that the murder was not planned or done in cold blood, nor were the stab wounds in a location likely to result in death. (30T 49-22 to 50-3, 50-18 to 51-2). He told the court that the testimony of the medical examiner indicated that Sharp had died almost instantly and therefore whatever

course of action defendant took after the stabbing would not have saved Sharp. (30T 50-4 to 17). Defendant does not list what mitigating factors Duffy could have asked for or what evidence those factors would have been based upon.

Defendant again tries to claim that his right to testify was impacted by Duffy's performance. This claim was flatly rejected by the Appellate Division when it was framed as a failure to properly advise defendant of his right to testify. Kearney, 479 N.J. Super. at 563. Defendant does not get to relitigate this claim as subject to a conflict-of-interest analysis. The trial court discussed defendant's right to testify with him on the record at trial. (26T136-5 to 137-15). The record reflects that defendant told the judge that he had adequate time to discuss the potential of testifying with his lawyer. (26T138-22 to 138-25; Da155-156). Following the judge's questioning, defendant waived his right to testify. (26T138-22 to 139-7). The Appellate Division adopted these findings and ruled that any claims that defendant did not discuss his right to testify with his attorney were belied by the trial record. Kearney, 479 N.J. Super. at 563. Curiously, defendant does not mention that he has a 2003 conviction for manslaughter for which he had been released from parole supervision only a year before he stabbed Christopher Sharp, making said conviction admissible should he testify (subject, of course, to a Sands/Brunson motion). (26T 133-24

to 136-4). Nor does defendant admit that he would be subject to extensive cross-examination on the false statements he made to police regarding the murder.

Finally, defendant alleges that the fee arrangement was to defendant's detriment because the State incorporated it into its cross-examination to show Boone's bias towards defendant. This allegation is not borne out even by the portion of the transcript recited by defendant. Boone admitted on redirect to loving defendant, to maintaining regular communication with defendant, and to not wanting any harm to come to him. (21T 82-33 to 83-17). Notably, Boone testified on direct that she had only met Duffy three times; she testified on cross-examination that she went to Duffy's office only to pay legal fees; that she had last paid in 2014; and that they had no further communications. (21T 4-25 to 5-19; 95-10 to 22). In contrast, she told the jury on redirect that she had spoken with defendant about the trial; that defendant had told her what other witnesses had testified to; and that she "may have" told him what she expected to say on the stand. (21T 96-11 to 97-21). While defendant alleges that he was prejudiced by Duffy's purported relationship with Boone, any prejudice from Boone's testimony stemmed from defendant's relationship with Boone and her resulting bias towards him.

Here, defendant has not shown that counsel had any divided loyalties, either because he was loyal to Alicia Boone or because he was interested in self-

preservation. Boone hired and paid defendant's trial counsel to represent defendant. (21T2-25 to 5-15; 21T82-25 to 83-4). However, it remains undisputed that this was the extent of Boone's interaction with defendant's counsel. Boone testified that she never discussed any facts of the case with defendant's trial attorney, and that Duffy flatly refused to discuss the case with her. (21T5-17 to 19). On these facts, both the Appellate Division and the PCR court correctly held that Boone testified that she did not even communicate with defendant's trial counsel from the time she paid his legal fees to the time of the trial, a period of several years, and that their interactions "were limited in nature." (21T95-10 to 22, Da149). Moreover, there was no attorney-client relationship between Boone and Duffy; Boone also testified that "she hired her own lawyer" on Duffy's recommendation. (Da149). Boone's payment of Duffy imposed no material limitations on the trial counsel's responsibilities to defendant. Therefore, no conflict of interest exists.

Even assuming *arguendo* that a conflict of interest existed, defendant has failed to show that he was prejudiced in any way by counsel's performance. Counsel cross-examined Boone and the State's eighteen other witnesses at length. He recalled Boone to explain a bruise on defendant's leg that the State alleged was an injury from the altercation that killed Christopher Sharp. He gave a forceful, lengthy summation and even highlighted Boone's testimony

because it was favorable to defendant; in contrast, the State barely discussed Boone and instead focused on the testimony offered by Tori Evelyn, who was at the party and had stepped outside while the stabbing took place. He called into question the testimony of young Ayanna Boone, who claimed to have seen defendant retrieve a knife from his bedroom.

The wild theories and alternative strategies proffered by defendant to bolster his claim that Duffy was laboring under a conflict of interest simply demonstrate that Duffy set forth the best defense he could – and the only logical response to the evidence adduced by the State. The Appellate Division here found that Duffy "stridently endeavored to undermine the incriminating portions of Boone's police statements." Id. at 562. The lower court noted that Duffy's "lengthy parries" during his cross-examination of Boone "prompted the State to respond with extensive questioning on redirect." Ibid. For the foregoing reasons, the Appellate Division properly determined that defendant's claim is without merit, and this Court must affirm that finding.

POINT III

AS DEFENDANT FAILED TO ESTABLISH A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE, THE TRIAL COURT PROPERLY FOUND THAT HE WAS NOT ENTITLED TO AN EVIDENTIARY HEARING (Da159)

"A petitioner must establish the right to [post-conviction relief] by a preponderance of the credible evidence." Preciose, 129 N.J. at 459 (1992)(citations omitted). To meet this standard, "specific facts must be alleged and articulated, which, if believed would provide a court with an adequate basis on which to rest its decision." R. 3:22-8; State v. Mitchell, 156 N.J. 565, 579 (1992).

R. 3:22-1 et. seq. does not require a trial court to conduct an evidentiary hearing on a petition for post-conviction relief, and while a trial court may require oral argument concerning the petition, no statutory or procedural requirement exists to hear such an argument. State v. Parker, 212 N.J. 269 (2012). See also State v. Marshall, 148 N.J. 89, 158 (1997), certif. denied, 522 U.S. 850 (1997); Cummings, 321 N.J. Super. at 170 (App. Div. 1999).

Although Rule 3:22-1 does not require evidentiary hearings to be held on PCR petitions, Rule 3:22-10 recognizes judicial discretion to conduct such hearings. State v. Russo, 333 N.J. Super. 119 (App. Div. 2000), citing Marshall, 148 N.J. 89 (1997). However, only if there are disputed issues of material facts

regarding entitlement to PCR should an evidentiary hearing be conducted. State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999).

The New Jersey Supreme Court specifically addressed the propriety of an evidentiary hearing in Marshall:

> We observe, however, that there is a pragmatic dimension to the PCR court's determination. If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the Petitioner is entitled to post conviction relief, or that the Petitioner's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, then an evidentiary hearing need not be granted.
>
> [Marshall, 148 N.J. at 158 (citations omitted).]

Pursuant to Preciose, claims of ineffective assistance of counsel may be properly raised for the first time in a petition for post-conviction relief. Preciose, 129 N.J. at 460. However, the mere raising of such a claim does not, in and of itself, entitle a petitioner to an evidentiary hearing. Id. at 462. Moreover, "trial courts should ordinarily grant evidentiary hearings… if a Petitioner has presented a prima facie claim in support of post-conviction relief." Ibid. The Supreme Court continued:

> To establish a prima facie claim of ineffective assistance of counsel, a Petitioner must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668, 694 (1984) and United States v. Cronic, 466 U.S. 648

> (1984), which we adopted in State v. Fritz, 105 N.J. 42 (1987).
>
> [Id. at 463; Cummings, 321 N.J. Super. at 170.]

Both the Appellate Division and the PCR court properly determined that there were no disputed issues of material fact in this case that lie outside the record. The PCR court noted that "[t]he record below is clear relative to the issues raised in this PCR." Kearney, 479 N.J. Super. at 555. The Appellate Division correctly ruled that defense counsel was not hamstrung by a conflict of interest in the instant matter, and any allegation to the contrary was little more than a bald assertion. Defendant does not provide with any level of specificity what additional facts, if any, would be adduced at an evidentiary hearing or how they would be of use to the trial court in determining the merits of his claim. Therefore, the Appellate Division properly affirmed the finding of the PCR court that defendant was not entitled to an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the denial of defendant's petition for post-conviction relief.

Respectfully submitted,
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