HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 Dec 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S139/2025
File Title:	Farrugia v. The King
Registry:	Sydney
Document filed:	Form 27E - Appellant's Reply
Filing party:	Appellant
Date filed:	11 Dec 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

S 139 / 2025

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN

FRANK SAMUEL FARRUGIA
Appellant

AND

THE KING
Respondent

APPELLANT'S REPLY

Part I – Form of submissions

1 These submissions are in a form suitable for publication on the internet.

Part II – Reply

2 The respondent's framing of the "conflict rule", and how to establish a breach of it, rests on a flawed premise. In particular, it is not categorically correct (as suggested at RS [19]) that "the relationship between barrister and client" is a "fiduciary" relationship. The focus must be on the particular facts and the "particular rule" that might apply in the relevant circumstances for an identified purpose.[1] This flawed framing distorts the focus of the respondent's remaining arguments – especially the suggestion that evidence of "the instructions given and the advice received are an important part" of the circumstances and "necessarily inform whether there was a real possibility of a conflict between duty and duty" (RS [28]). To the contrary, it is unnecessary and inappropriate to frame consideration of a fair hearing in criminal proceedings by reference to general conceptions of the nature of the relationship between counsel and client – some aspects of which may give rise to fiduciary obligations.

3 The correct focus must be on the conflicting interests of the two co-offenders, and not on "evidence about the scope of the retainer between Senior Counsel and the Appellant, or between Senior Counsel and the Co-Offender" (RS [23]) and evidence of "the Appellant's instructions, the advice he received, whether he obtained independent legal advice, [and] the content of any such advice" (RS [28]) to determine whether the barrister breached a fiduciary duty. The correct approach (reflected in the analysis at AS [31]-[40]) can be distilled by reference to the decision of the Ontario Court of Appeal in *R v Silvini*[2] (referred to at AS [32]) – namely, that "[t]he approach formulated in

[1] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [3]. Cf *Wood v Commercial First Business Limited* [2021] EWCA Civ 471 at [67] (David Richards LJ, Males and Laing LLJ agreeing); *Hopcraft & Anor v Close Brother Limited* [2025] UKSC 33 at [195] (per curiam).
[2] (1991) 5 OR (3d) 545 at 551 (Lacourciere JA).

Silvini requires that the appellant demonstrate: (a) an actual conflict of interest between the respective interests represented by counsel; and (b) as a result of that conflict, some impairment of counsel's ability to represent effectively the interests of the appellant."[3] As explained at AS [41]-[43], there was an "actual conflict" between the appellant's and his co-offender's interests on the issue of parity.

4 Further, accepting for present purposes that "fully informed consent" could "negate what otherwise was a breach of duty",[4] the respondent's arguments ultimately prove too much in light of the kind of "fully informed consent" apparently intended by those arguments to be necessary. Again, the respondent's focus is misplaced insofar as it seeks to shift the onus onto the appellant to prove that "they did not give fully informed consent to the conflict" (RS [35]). There is no authority that supports this approach. Indeed, it is inapposite for several reasons. This includes that, in a case involving an asserted conflict of duty and duty, or what has been described as "serving 'two masters' at the same time in the same matter", the person upon whom the duty is imposed may only be excused where "he has first obtained the informed consent of ***both*** 'masters' to his so acting".[5] This is because "if the same fiduciary acts for two different and unrelated beneficiaries in the same matter or transaction without the ***informed consent of both*** to the double employment, then ***this without more is a conflict*** within the rule".[6]

5 Moreover, "even if informed consents are obtained, they will not absolve the fiduciary from liability to one master if he cannot properly discharge his duties to him because of conflicting duties owed to the other".[7] In this context, Professor Finn points out that what needs to be established – and the correct focus of the analysis – is "a real, an actual, conflict".[8] Although, in some circumstances, a fiduciary's duty to one principal "***necessarily conflicts*** with his duty" to another.[9] Hence, "even if all the beneficiaries have consented to the double employment in the same matter, the fiduciary may still find, in performing his separate employments, that an actual conflict arises between duties owed in each".[10]

---

[3] See *R v Widdifield* (1995) 25 OR (3d) 161 at 173 (Doherty JA) as approved in *R v Neil* [2002] 3 SCR 631 at [39] (Binnie J).
[4] *Maguire v Makaronis* (1997) 188 CLR 449 at 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ).
[5] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [580] (emphasis added).
[6] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [583(1)]; see also *R v Neil* [2002] 3 SCR 631 at [29] (Binnie J).
[7] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [580].
[8] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [582]; and at footnote 9: "The problem of representing adverse or potentially adverse interests can be quite acute in the case of legal advisers, particularly where litigation is a likelihood. To varying degrees in all jurisdictions, Rules of Courts and/or professional practice rules prescribe that parties with potentially adverse interests be separately represented".
[9] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [581] (emphasis added).
[10] Paul Finn, *Fiduciary Obligations* (Republication, 2016), [583(2)].

6 Therefore, the respondent's approach is inconsistent with principle and is ultimately unworkable. The relevant features of a fair hearing do not require express resort to an analysis of fiduciary relations but rather should focus on the roles played by advocates in adversarial proceedings. The possible parallel availability of an elaborate fiduciary conception adds nothing to the objective forensic frame of counsel putting arguments on behalf of a client. In particular, the appellant's ability to establish an error or irregularity in his sentence proceeding should not require him to establish what his co-offender instructed or what, if any, consent his co-offender may have given. Further, as noted above, the parity issue illustrates why "an actual conflict arises" in the circumstances set out at AS [41]-[43]. An analysis of those circumstances also answers the respondent's argument (at RS [34]) that "the Appellant could benefit from factual findings that may be known to him to be incorrect" and that "Senior Counsel could be unfairly impugned". In truth, the appellant's argument only relies on the objective facts which provided a sufficient basis for the Crown's initial submission on parity.

7 RS [41]-[43] cites ***Maclean*** *v Brylewski*[11] without challenging its correctness. However, the respondent's arguments are inconsistent with the reasoning and outcome in that case. In upholding a ground of appeal asserting a denial of procedural fairness, the various members of the Full Court described the vitiating conflict of interest as not being curable by consent.[12] It is in that context that the plurality in *Maclean* applied what the respondent describes as an "inapplicable test" (RS [40]) as a step to finding a denial of procedural fairness caused by a lawyer's conflict of interests. The authorities analysed in the plurality's reasons powerfully explain why the test is not "inapplicable".[13] These same principles (which fasten upon the fairness of the curial process as opposed to the distinction between superior and inferior courts) answer the complaint at RS [43].[14]

8 Ultimately, the appellant's approach relies on the record as being sufficient to establish the "actual conflict" which crystallised upon the Crown's submission on parity. This approach reflects the principle that "[t]o the extent possible, an appellate court should determine an appeal involving complaints about a trial counsel's conduct of a case by examining the record of the trial to determine from the objective circumstances whether the accused has had a fair trial."[15] Consistently with this principle, and contrary to

---

[11] *Maclean* [2025] FCAFC 133 (Jackson and Moore JJ).
[12] See also *Maclean* [2025] FCAFC 133 at [21] (Jackson and Moore JJ), at [68] and [110] (Stellios J).
[13] *Maclean* [2025] FCAFC 133 at [22] (Jackson and Moore JJ) citing with approval *Black v Taylor* [1993] 3 NZLR 403 at 412 (Richardson J).
[14] See *Abse v Smith* [1986] QB 536 at 547 (cited by Richardson J in *Black v Taylor*) where Donaldson MR referred to an "inherent right in all courts" to refuse to hear any individual barrister or solicitor.
[15] *Alkhair v R* (2016) 255 A Crim R 419 at [31] (Macfarlan JA, Rothman and Bellew J agreeing).

RS [46], the appellant does not invoke rule 119 of the Barristers Conduct Rules to invite "speculation and conjecture" about whether there was a breach of that rule.[16] Rather, the rule is an expression of the systemic importance of an advocate's duty to represent a client's best interests without the burden of divided loyalties. In that context, the appellant relies on the objective circumstances emerging from the record (which includes the Crown's considered written submissions on sentence) to show that, on the face of things, there was a disparity of position between the two co-offenders, and this gave rise to an "actual conflict".

9 There should not be an additional onus on the appellant to waive legal professional privilege and to give evidence of confidential instructions in order to establish a denial of procedural fairness. Such a requirement would be inconsistent with the fundamental principle that "no adverse inferences may be drawn from the assertion by a person of a claim to legal professional privilege".[17] This principle coheres with the established public interest justifying protection of the privilege even where "it inhibits or prevents access to potentially relevant information".[18] Relevantly, it is also consistent with commentary in the United States cases which emphasise the undesirability of requiring disclosure of privileged evidence in order to establish conflicting duties and interests.[19]

10 As to materiality, the respondent advances an incorrect counterfactual analysis. The correct analysis must take into account what a barrister *without* the conflict could have done and whether that "could realistically" have resulted in a different outcome. The respondent's argument (at RS [49]) overlooks the simple point that it would have been open to senior counsel to not dispute the Crown's initial submission on parity (see AS [42]). In any event, it would have been open to counsel appearing without a conflict and "acting responsibly and in accordance with their duties" (RS [51]) to embrace, upon appropriate reflection as to the forensic considerations, the objective matters which underpinned the Crown's submission (at CAB 88 [66]). How those matters were to be weighed in the sentencing balance was ultimately an "evaluative and discretionary decision" for the sentencing judge.[20] This Court should find that those matters could realistically have made a difference to the outcome.

---

[16] Especially as the operative principle concerns procedural fairness and not "punishment for misconduct": see *Black v Taylor* [1993] 3 NZLR 403 at 412 (Richardson J) cited with approval in *Maclean* [2025] FCAFC 133 at [19] (Jackson and Moore JJ).
[17] Bankim Thanki et al., *The Law of Privilege* (4th edition, Oxford University Press, 2025) at [1.41].
[18] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [35] (Gleeson CJ, Gaudron and Gummow JJ). See also Greenleaf (Wigmore, ed), *A Treatise on the Law of Evidence*, (16th edition, 1899), vol 1 at [240]-[243].
[19] See *Holloway v Arkansas* 435 US 475, 487 (1978) and footnote 11 (Burger CJ); *Cuyler v Sullivan* 446 US 335 (1980) at footnote 3/1 (Marshall J, dissenting in part).
[20] *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [35].

11 On the issue of remittal, the appellant opposes the NSW Director of Public Prosecutions (**NSW DPP**) being granted leave to intervene for the reasons given in ***Strickland*** *v Commonwealth Director of Public Prosecutions*[21] – in particular, "[h]ere, the Crown appears by the CDPP and so it is for the CDPP and for no one else to represent the community" and "the Crown and the intervener are not as one in relation to the issues which the intervener seeks to agitate". Indeed, the respondent (at RS [53]-[54]) effectively argues that the remittal issue does not arise. And where the NSW DPP advances a wholly different argument on the question of materiality which does not reflect "the issues … joined between the Crown and the accused" it "would be unfairly prejudicial to … require [the appellant] in effect to meet two different cases."[22]

12 Nevertheless, on the second issue, the NSW DPP's emphasis (at [16]) on the "flexibility" given to an appeal court to receive new evidence includes the significant caveat that "an offender is not permitted to run a new and different case". This means that (as held in *Betts*) rejecting "new evidence … inconsistent with the case that [the appellant] ran in the sentencing court … [does] not cause justice to miscarry".[23] Therefore, if the sentence proceeding miscarried due to a vitiating conflict, the appellant should not be bound by the earlier forensic decisions and should be permitted to "run a new and different case". The power to remit under s 12(2) of the *Criminal Appeal Act 1912* (NSW) allows that to occur. Moreover, the NSW DPP's argument as to the unavailability of s 12(2) in appeals under s 5(1)(c) is contrary to what the Court of Criminal Appeal has said in several cases in which the power has been exercised – particularly, where the court "cannot" proceed to resentence because an applicant has been denied a fair hearing.[24] Finally, the authorities do not support the NSW DPP's alternative argument (at [26]-[27]) that the Court has "tended [to use the power in s 12(2)] after forming the opinion required by s 6(3)".[25]

Dated: 11 December 2025

Bret Walker
Fifth Floor St James' Hall
(02) 8257 2527
caroline.davoren@stjames.net.au

Thomas Liu
7 Wentworth Selborne
(02) 8224 3054
tliu@7thfloor.com.au

Thomas Woods
Sir Anthony Mason Chambers
(02) 9373 7447
tf.woods@outlook.com

[21] (2018) 266 CLR 325 at [109]-[111] (Kiefel CJ, Bell and Nettle JJ) and [274] (Edelman J).
[22] *Strickland* (2018) 266 CLR 325 at [109] (Kiefel CJ, Bell and Nettle JJ).
[23] ***Betts*** *v The Queen* [2016] HCA 25; 258 CLR 420 at [2] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).
[24] ***Milsom*** *v R* [2014] NSWCCA 142 at [161] (Beech-Jones J).
[25] See, for example, *Munro v R* [2006] NSWCCA 350 at [25]; *Milsom* [2014] NSWCCA 142 at [130] (Hoeben CJ at CL).