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| COURT OF APPEALS, STATE OF COLORADO<br>Case Number: 2011CA434 | |
| DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO<br>Case Number: 98CR264<br>The Honorable Nancy A. Hopf and<br>The Honorable Richard B. Caschette | ♦COURT USE ONLY♦ |
| **Petitioner/Defendant:**<br>NATHAN GAYLE YBANEZ<br><br>v.<br><br>**Respondent/Plaintiff:**<br>PEOPLE OF THE STATE OF COLORADO | Case No. 2014SC190 |
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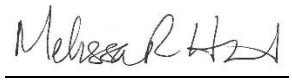
**BRIEF OF AMICI CURIAE LEGAL ETHICS PROFESSORS**

## Certificate of Compliance

Undersigned counsel certifies that this amicus brief complies with all applicable requirements of C.A.R. 28 and 32. This brief contains 4471 words as measured by the word-count function of Microsoft Word. The undersigned acknowledges that the brief may be stricken if it fails to comply with any applicable requirements of C.A.R. 28 or 32.



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## STATEMENT OF THE ISSUE

Whether a lawyer's conflict of interest constitutes ineffective assistance of counsel where: (1) he received payment to represent a child from the child's parent, who is a victim of the crime and a prosecution witness; (2) he failed to put a waiver of the conflict on the record, as required by this court's authority; and (3) he failed to conduct any investigation of the parent's abuse of the child and presented no evidence of this abuse at trial.

## INTEREST OF AMICUS CURIAE

Amici are law professors who teach and write about legal ethics, the Rules of Professional Conduct ("RPC"), and conflict of interest issues. The 35 professors who have signed on to this brief recognize that interpretation of ethical standards in one state is likely to have repercussions in other states when similar issues arise there. Amici are therefore concerned for the proper interpretation of the Colo. RPC and the judicial precedent that defines the impact of a violation of those rules. Amici's names and institutional affiliations are included in Appendix A.

## STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case, including the nature of the case, proceedings below, statement of the facts, and disposition in the lower courts.

## ARGUMENT

Nathan Ybanez's trial counsel was operating under an actual conflict of interest that adversely affected his representation of his client and as such constituted ineffective assistance of counsel. That conflict did not result, as characterized by the Court of Appeals, simply from the fact that counsel was being paid by a third party. Nor did it result merely from the fact that counsel was retained and was being paid by the parent of a minor. Instead, the actual conflict at issue in this representation was that trial counsel was retained and was being paid by Nathan's father, Roger, who was 1) a victim of the crime, 2) one of the prosecution's main witnesses against Nathan, and 3) an alleged perpetrator of mental and physical abuse that had left Nathan desperate and should have formed the basis of Nathan's defense. Because of this conflict, Nathan's counsel never conducted any investigation into the possibility of using the abuse and turmoil in Nathan's family as a defense to the charges of first degree murder for which he was ultimately convicted. Instead, he accepted Roger's characterization of the Ybanez home life as normal and stable, and of his client as the sole problem in the family environment. Nathan was thus

deprived of counsel who conducted an investigation adequate to allow him even to make informed strategic choices about what defense to pursue. Under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *West v. People*, 341 P.2d 520 (2015), Nathan is entitled to a new trial with effective counsel.

The facts of this case are so unique that it is helpful to start with a brief restatement of the circumstances of the conflict.

When he was sixteen years old, Nathan was charged as an adult with first-degree murder for the killing of his mother. There was no dispute that Nathan was involved in his mother's death. To avoid a conviction for first-degree murder, he had to show that he did not have the requisite level of intent.

Roger Ybanez, Nathan's father, retained Nathan's lawyer. It is clear that the lawyer knew that he was obligated to inform Nathan that payment by a third party might create a conflict because he orally advised Nathan that such a conflict might exist. He did not, however, explain to Nathan what the conflict might be and his description of the conflict as simply one of a third-party payer was grossly incomplete and inherently misleading. Trial counsel did not explain to Nathan that his father was, as a matter of law, a victim of Nathan's crime; that his father was going to be a prosecution witness against his son; that the abusive relationship between father and son – a material aspect of a possible defense – might be a source of conflict; or, importantly, that counsel did not intend to investigate, let alone raise

a defense implicating Roger. Moreover, trial counsel sought no written waiver of the conflict created by his receipt of payment from the father under these circumstances.

The discovery provided to Nathan's lawyer at the outset of his representation of Nathan included evidence that Nathan's home was in turmoil and that he had been physically and emotionally abused by both of his parents. Discovery included evidence that Nathan had recently spent time at a psychiatric hospital, that he had run away repeatedly, and that he had been slammed against a wall and had things thrown at him by his father. Nathan's lawyer conducted no investigation into the nature of this abuse and whether it could have contributed to a spontaneous emotional outburst that led to his mother's death. Despite compelling evidence suggesting it would be appropriate to do so, he did not conduct any witness interviews or seek any additional evidence concerning the abuse, the hospital stay, or Nathan's fragile mental state.

At trial, Nathan's father was one of the main witnesses for the prosecution. He testified in particular that Nathan had a typical upbringing in a "normal" home. Nathan's counsel did not cross-examine Roger to counter this picture in any way. Instead, Nathan's attorney conceded Roger's point – that Nathan was the only problem in the house – and argued to the jury that Nathan must have a "hole in his

soul." (Tr.10/21/99 34:7.) Nathan was convicted of first degree murder after just one day of testimony.

These circumstances present exactly the type of attorney conflict that warrants application of the *Sullivan* ineffective assistance standard. Applying that standard, Nathan's trial counsel had an actual conflict that materially limited his ability to effectively represent his client. The conflict was not consentable under Colo. RPC 1.7(c), and even if it had been consentable, counsel did not provide the kind of information necessary to permit Nathan to consent to the conflict. As a result of the conflict, trial counsel's representation of his client was adversely affected, and that adverse effect flowed directly from counsel's divided loyalties.

## I. *Cuyler v. Sullivan* Provides the Appropriate Test for Ineffective Assistance in this Case

The ineffective assistance of counsel in this case was the result of an actual conflict of interest between trial counsel's obligation to his client, Nathan Ybanez, and two conflicting interests: his own personal interest in securing payment for the representation from Roger, and, relatedly, his responsibility to a third person—Roger. Because the ineffective assistance was based on the adverse effect of the attorney operating under a conflict of interest, the correct standard for determining whether Nathan is entitled to a new trial is that adopted by the Supreme Court in

*Cuyler v. Sullivan*, 446 U.S. 335 (1980). Under *Sullivan*, Nathan is entitled to a new trial because his attorney was operating under an actual conflict of interest that adversely affected the representation.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). In general, this right is violated only if the defendant can demonstrate that the deficiencies in counsel's performance had a likely prejudicial impact on the outcome of the case. *Id.* at 692. In some circumstances, however, prejudice is presumed. One of those circumstances is "when counsel is burdened by an actual conflict of interest" and that conflict adversely affected counsel's performance. *Id. (citing Sullivan*, 446 at 345-350).

As both the United States Supreme Court and this Court have explained, the reason for a near-presumption of prejudice when a defendant is represented by counsel laboring under a conflict of interest is that "[i]n those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Id. See also West v. People*, 341 P.2d 520 532 (2015). Given this underlying rationale for the presumption, there is no reason to distinguish client conflicts, such as the simultaneous representation of codefendants, from personal interest or third-person conflicts in assessing

ineffective assistance of counsel. All constitute disloyalty to clients and in each circumstance it is extremely difficult to measure the effect of the divided loyalties with any precision. The *Sullivan* standard should apply in this case. This conclusion is supported by the Colo. RPC, which do not distinguish between, on the one hand, a lawyer's responsibilities to clients and, on the other hand, the personal interest of the lawyer or counsel's responsibilities to a third person for purposes of defining a conflict of interest.

At the Court of Appeals, the state argued that Sullivan should not apply to this case because it involved a personal financial conflict rather than a client conflict. In making this argument, the state relied on dicta from *Mickens v. Taylor*, 535 U.S. 162, 175 (2002). In *Mickens*, the Supreme Court cautioned that not all attorney conflicts present the same high probability of prejudice and difficulty proving that prejudice as the conflict presented by the multiple concurrent client representation that was at issue in *Sullivan*. The Court noted that it is "an open question" whether the *Sullivan* presumption of prejudice should be applied in circumstances beyond concurrent representation. *Id.* at 176. As this Court recognized quite recently, the answer to that question is one that has not been resolved in Colorado. *West* at 530, n.8. In answering the question, this Court should not create a bright-line rule that limits *Sullivan* to client-based conflicts. Instead, the appropriate analysis is whether the circumstances of a particular case "constitute the 'actively conflicting interests"

necessary to demonstrate a Sixth Amendment violation under *Sullivan*." *Id*. at 530. As this case demonstrates, personal conflicts as well as those based on obligations to third persons can present the same "actively conflicting interests" as client conflicts.

From the very beginning of the representation, Nathan's trial counsel appears to have essentially ignored the very obvious defense that Julie Ybanez was killed, not in a premeditated, deliberate act, but in an impetuous outburst tha was the result of the abusive and chaotic environment in the Ybanez home. Counsel did not speak to any witnesses about the multiple references to abuse that were included in the discovery provided to him by the state. He did not speak with anyone at the psychiatric hospital in which Nathan had been confined just months before the murder. Instead, he accepted Roger's characterization of the family environment as normal and of the psychiatric hospital as merely a "drug rehab" center. As the U.S. Supreme Court has explained, the problem that arises when counsel is operating under an actual conflict is that "we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests" of someone other than the client. *Wood v. Georgia*, 450 U.S. 261, 272 (1981). Certainly the facts of this dispute demonstrate how difficult this assessment can be.

Rather than draw any bright-line rule withholding the *Sullivan* analysis from any class of conflicts as a whole, the Court should "wrestl[e] with the individual

circumstances of each case to determine whether they are more or less like the conflicts as to which the Supreme Court found the *Sullivan* prophylaxis necessary." *West*, 341 P.3d 537, n. 3 (Coats, J., dissenting). The circumstances of this case certainly demonstrate "a comparably high probability of, and comparably high difficulty of proving, prejudice" to those presented by the joint representation in *Sullivan*. *Id.* at 537.

## II. Trial Counsel Had an Actual Conflict

Application of the *Sullivan* standard requires first an assessment of whether trial counsel was operating under an actual conflict of interest. In this case, Nathan's trial counsel was clearly operating under a concurrent conflict of interest under Colo. RPC 1.7. The court below erroneously evaluated the conflict only under Rule 1.8(f), which sets out the requirements for an attorney being paid by a third party. The actual conflict, however, was much more than a straightforward third-party payer situation and it should have been evaluated as such. Examination of the conflict at issue under Rule 1.7 demonstrates that it was likely not a conflict to which Nathan could have consented under the Rules. Even if the conflict was consentable, counsel did not provide sufficient information for Nathan to offer the *informed* consent required.

### 1. The conflict in this case was more than simply a Colo. RPC 1.8(f) issue and the Court of Appeals' failure to consider the application of Colo. RPC 1.7 obscures the gravity of the actual conflict in this case given the specific facts

The Court of Appeals incorrectly analyzed the conflict question exclusively as an application of Colo. RPC 1.8(f), which sets out the requirements for third-party payment of legal fees. Opinion at 11-14. Although it is certainly the case that numerous "[c]ourts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party," *Wood*, 450 U.S at 268-69, the conflict at issue here was more than simply the fact that Nathan's counsel was being paid by someone else. Because the conflict at issue here was much more than a matter of third-party payment, it should have been evaluated under Colo. RPC 1.7, which applies more broadly to concurrent conflicts of interest.[1]

The version of Colo. RPC 1.8(f) in force at the time provided in relevant part that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consent[s] after consultation. . ." The comment to the Rule explains that, while it will sometimes be "sufficient for the

[1] Because Nathan's trial counsel had a concurrent conflict of interest under Rule 1.7, this case does not require the Court to consider whether a conflict always exists when 1.8(f) is triggered. Nor does it present any challenge to the appropriateness in the run of cases of parents paying for their children's attorneys.

lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third party payer," still if "the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7." Colo. RPC 1.8, Comment 12.

In this case, simply obtaining the client's consent regarding the fact of third-party payment and the identity of the payer was not sufficient. This fee arrangement presented a conflict of interest not because Nathan's father retained and paid for the representation but because there was a significant risk that counsel's representation of Nathan would be materially limited by his personal relationship with Nathan's father, Roger, who not only was a victim of the crime, but who had retained him, who had an interest not to be implicated in the case as an abuser, and to whom he looked for payment in the case. Under Rule 1.7, counsel was therefore required to forego the representation unless it was a consentable conflict for which he obtained his client's informed consent.

Before the Court of Appeals, the state argued that there was no concurrent conflict because counsel was not actually paid any additional attorney's fees after the preliminary hearing in the case. This argument fails to recognize when the conflict—and its consequent adverse effects—arose. Nathan's lawyer failed, from the beginning of the representation, to conduct any investigation into the turmoil and abuse that characterized Nathan's home life. His early failure to investigate

was certainly compounded by his performance at trial, but it was this early failure that led to his inadequate defense. And the record demonstrates that the conflict should have been apparent to counsel when he was still expecting payment from Roger.

Counsel knew within the first month of the representation that Roger would be a witness for the prosecution. (Tr. 2/23/09 206:6-12) He received the discovery, which included evidence of Roger's abuse of Nathan, before the preliminary hearing. (Tr. 2/24/09 113:6-12) He did not find out that he would likely not be paid any additional funds until after the preliminary hearing. (Tr. 2/24/09 123:1-6) As soon as counsel realized he was retained and was being paid for his work by a victim of the crime, who was a prosecution witness and who had allegedly abused his client—a material fact in a plausible defense strategy Nathan could have advanced—his obligations under Rule 1.7 were triggered.

Moreover, trial counsel's conflict was more than simply his desire to be paid for the representation. Roger Ybanez sought out and retained trial counsel. Colo. RPC 1.7 acknowledges a lawyer's responsibility to a third person, and whatever the scope and meaning of that responsibility may be, surely a lawyer owes a third person who hires and pays him a responsibility of respectful professional treatment, which is inconsistent with treating the third person as a potential abusing

criminal. Thus, throughout the representation, counsel was laboring under a conflict of interest that required him to comply with Colo. RPC 1.7.

2. **The conflict in this representation was not consentable**

Under Rule 1.7(c), an attorney must forego a representation that involves a concurrent conflict if "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation." No disinterested defense counsel could have reasonably believed that he could provide Nathan with appropriate representation while receiving payment from and being responsible to a parent who was a victim of the crime, and who was not only a prosecution witness but also implicated as an alleged abuser in his son's plausible defense strategy, which counsel had a duty to investigate given the evidence available to him.

As contemplated by Colo. RPC 1.8(f), sometimes attorney-client relationships in which counsel is retained by and paid for by a third-person—for example, a parent—are consentable. Here, the conflict was not consentable because Roger was a victim of the crime, a key prosecution witness, and a person materially implicated as an abuser in the client's alternative defense strategy. In particular, no client would have agreed to the representation had counsel advised him, as he was duty-bound to do, that he did not intend to investigate and raise Roger's abuse of Nathan as a defense. Under these specific circumstances, any

disinterested lawyer would have concluded that Nathan should not agree to the representation and therefore the conflict was not consentable.

### 3. Even assuming the conflict in this representation was consentable, counsel did not obtain the requisite consent

Even assuming *arguendo* it was reasonable for trial counsel to conclude that he could represent Nathan while being paid by Roger in light of the deep actual conflict between Nathan and Roger, he did not provide Nathan sufficient information about the conflict to permit Nathan to consent.

The Court of Appeals described the consultation that counsel had with Nathan about the concurrent conflict as follows: "In his first meeting with defendant, Truman told defendant that Roger had asked him to 'come see [defendant] to help him,' but that he represented defendant and not Roger and that his job was to do what was best for defendant, not for his father." Opinion at 14. That was the extent of the consultation that counsel had with his client and that the court below concluded was sufficient to permit Nathan's consent. To the contrary, as the defense expert correctly explained at the 35(c) hearing, Nathan should have been provided with significantly more information about the impact his counsel's conflict might have on the representation.

Under the version of the Rules in force at the time of this representation, Rule 1.7 required an attorney to obtain his client's "consent[] after consultation." The

Rule defined consultation as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Colo. RPC Rule 1.0. Trial counsel's statement to Nathan does not meet this requirement. Trial counsel did not explain to Nathan that his father was going to be a prosecution witness, that his father was a victim of his crime under Colorado law, or that his father's abuse of Nathan could play a part in a defense strategy. Most egregiously, counsel never explained to Nathan that he did not intend to investigate Roger's abuse, and did not intend to cross-examine Roger's harmful testimony to Nathan's defense. He provided Nathan with essentially no factual information that might have helped Nathan to understand the extent and significance of the actual conflict. Moreover, Nathan was never advised that he had the right to have a court appointed public defender represent him or that Roger had an interest in retaining and agreeing to pay for counsel who shared his own view of the case—that Roger was a good father and that his abuse of Nathan had nothing to do with the crime—and who would therefore be less likely to purse a defense that would impugn Roger's conduct, even though such a defense might be in Nathan's interest. Nathan could not have consented to the conflicted representation, as required by the Rules, because he was not given the information necessary to do so.

Under all of these circumstances, *Sullivan*'s first prong—that defense counsel was operating under an actual conflict of interest—is plainly met in this case.

## III. Trial Counsel's Conflict Adversely Affected His Representation of Nathan Ybanez in that He Failed to Investigate an Objectively Reasonable Defense and his Failure to Investigate Flowed from his Divided Loyalties

This Court recently adopted a three-pronged test for assessing adverse effect in applying *Sullivan*. First, the defendant must "(1) identify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict." *West*, 341 P.3d at 533. Applying the *West* test to the circumstances of this case, it is apparent that trial counsel's conflict had an impermissible adverse effect on the representation.

There was no dispute in this case as to whether Nathan Ybanez participated in his mother's murder. The only question was whether he possessed the requisite intent to be convicted of first-degree murder. Discovery provided to trial counsel by the prosecution revealed significant evidence that Nathan Ybanez was physically and emotionally abused by his parents and in particular by his father, Roger. Further investigation would have uncovered even more evidence of this abuse, but counsel conducted no such investigation. Per *West*'s first prong, a plausible alternative defense strategy would have been to document Nathan's abuse by his parents to

show that his conduct was not premediated but rather the result of being raised in an abusive household.

The facts of this case easily satisfy *West*'s second prong. The discovery provided to counsel by the prosecution at the outset of the representation rendered Nathan's abuse not only an "objectively reasonable" defense strategy but indeed a compelling one. Given the facts known to counsel at the time, he was duty-bound to investigate the abuse further. The abuse defense was objectively reasonable even under the limited facts that trial counsel had from the discovery material and it would have become even more compelling if he had conducted any investigation. Particularly concerning is that counsel never spoke to the staff at Centennial Peaks Hospital, where Nathan was hospitalized just a few months before the homicide. The records of his stay at this mental health facility and the testimony of staff there would have shown how desperate circumstances were in the Ybanez home.

Conducting an investigation into the abuse and mental turmoil Nathan suffered, however, would have required him to disbelieve and investigate the person who was paying his bills, and indeed to accuse that person of criminal conduct. Trial counsel never looked into any of this evidence because he decided, without conducting any investigation at all, not to pursue a defense that would malign the person paying his bills, satisfying *West*'s third prong. If he had investigated, he

might have been able to make an informed choice between two possible defenses: Nathan was distraught and Nathan was just along for the ride, but having never conducted the necessary and reasonable investigation given the facts known to him at the time, counsel was never in a position to make this informed choice.

The Court of Appeals concluded that trial counsel made a "plausible strategic choice," Op. at 16, but trial counsel could not have made an informed, let alone plausible, strategic choice about whether to pursue the abuse defense because he did not do any investigation of the abuse defense. Trial counsel's divided loyalties led him to eschew even the investigation of the objectively reasonable alternative defense. Having not conducted the necessary investigation, counsel was not in a position to make an informed plausible choice between alternative options.

Moreover, as this Court found in *West*, "[r]esearch indicates that attorneys 'systematically understate both the existence of conflicts and their deleterious effects.' An adverse effect therefore becomes too difficult for a defendant to prove because the inquiry relies largely on the attorney's interpretations of his decisions amid the conflict." 341 P.3d at 532 (*citing* Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 48 (2009)). In light of this reality, the Supreme Court has noted that "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978).

The same is true in assessing strategy beyond negotiations. Accordingly, the Court of Appeals' reliance on counsel's testimony that he did not labor under a conflict of interest was erroneous as a matter of law.

## CONCLUSION

The right to conflict-free counsel is one of the central promises of the Sixth Amendment. Because a criminal defendant is entitled to an attorney whose loyalties are undivided, the courts have long recognized the near presumption of prejudice that attaches when trial counsel is found to have been operating under a concurrent conflict of interest in representing a criminal defendant. This near presumption is an essential prophylactic in situations, like those presented here, where both the likelihood of prejudice and the difficulty of proving it are so high: we may never know why counsel did not investigate a plausible defense strategy supported by the evidence before him, but we do know that counsel's representation was tainted by an actual conflict of interest that adversely affected his representation of his client. For these reasons, amici respectfully submit that this Court should reverse the decision of the Court of Appeals and grant Nathan Ybanez a new trial with the conflict-free representation to which he is constitutionally entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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