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DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO Case Number: 98CR264 The Honorable Nancy A. Hopf and The Honorable Richard B. Caschette	♦COURT USE ONLY♦
Petitioner/Defendant: NATHAN GAYLE YBANEZ v. **Respondent/Plaintiff:** PEOPLE OF THE STATE OF COLORADO	Case No. 2014SC190
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief contains 12,346 words. Mr. Ybanez has filed a Motion for Enlargement of Word Count with this brief to accommodate the extra words over the 9,500 word limit otherwise applicable under C.A.R. 28(g).

This brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standards of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Shannon Wells Stevenson

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ISSUES PRESENTED FOR REVIEW

Whether the court of appeals properly applied plain error review to the defendant's claim that a guardian *ad litem* should have been appointed, when there was no objection at trial or the initial Crim. P. 35(c) motion.

Whether a child charged as an adult with first-degree murder, whose parent is a victim of the crime and a prosecution witness, is entitled to a guardian *ad litem* to assist with his defense and to advise him regarding the waiver of his constitutional trial rights.

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.

Whether the court of appeals erred according to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in instructing the district court to resentence petitioner to life in prison with no possibility of parole until after forty years.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

When he was sixteen years old, Petitioner Nathan Ybanez was charged as an adult with the first-degree murder of his mother. After just one day of evidence, Nathan was found guilty and received the harshest sentence available—mandatory life in prison without the possibility of parole. Neither defense counsel nor the trial court advised Nathan of his right to appeal, and no appeal was filed.

Several years later, pursuant to Colo. R. Crim. P. 35(c), Nathan requested a new trial based on the ineffective assistance of his counsel and the failure of the trial court or counsel to appoint or request a guardian *ad litem*. He also asserted that his life sentence violated both the Colorado and United States Constitutions. The district court largely denied Nathan's motion, but did find his counsel ineffective for failing to appeal, and reinstated Nathan's right to a direct appeal.

Nathan pursued his direct appeal and his appeal from the denial of his 35(c) motion. The court of appeals denied Nathan relief based on the court's failure to appoint a guardian or on the ineffective assistance of counsel. It recognized, however, that the intervening decision of the United States Supreme Court in *Miller v. Alabama* rendered Nathan's sentence unconstitutional and remanded for a mandatory resentencing to life in prison with the possibility of parole after forty years. Nathan petitioned for certiorari, which this Court granted.

STATEMENT OF FACTS

I. The Conflicted Roles of Roger Ybanez and Defense Counsel.

When he was sixteen years old, Nathan Ybanez was charged as an adult with the first-degree murder of his mother. (V.1:76; Tr.6/11/98;3:1-6.)[1] In the years leading up to the homicide, Nathan lived in Highlands Ranch with his parents, Roger and Julie Ybanez. He attended tenth grade at Highlands Ranch High School and worked part-time at Einstein's Bagels. (V.1:25; Tr.2/26/09;140:5-7.) His entire criminal history consisted of an underage drinking ticket, and he had no history of any acts of violence.

The evidence that Nathan was involved in the homicide was not disputed. To prevail on charges of first-degree murder, however, the state needed to establish that Nathan acted "intentionally" and "after deliberation," rather than in an emotional outburst. Despite Roger's initial belief that Nathan must have "just lost it," (V.18:1812), the state relied on testimony from Roger to provide the evidence of deliberation and to negate any suggestion that Nathan had acted impulsively. Specifically, the state called Roger to prove that Nathan had a typical upbringing,

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[1] The record on appeal consists of 20 volumes. Volumes 1-4 are consecutively paginated. Volumes 6-7 are CDs containing dated transcripts. Volumes 8-20 are exhibits. References to transcripts in Volumes 6-7 are identified by date, page and line number (e.g., Tr.10/20/99;22:10-23:2). References to volumes 1-4 and 8-20 are by volume and, as appropriate, tab, page and/or line numbers (e.g., V1:76 refers to volume 1, page 76).

that the Ybanez home was normal, and that Nathan had become a bad kid during his adolescence. (Tr.10/20/99;102:1-12, 112:4-114:23.)

It was instantly apparent that Roger played critical and conflicting roles in Nathan's defense. Roger was the primary surviving victim of Nathan's crime. Colo. Const. art. II, § 16a (designating "surviving immediate family members" as victims under the victims' bill of rights). And, from the outset, he was identified as the prosecution's key witness to testify about Nathan's upbringing and the Ybanez household. (V.14:BBB 1127; Tr.2/23/09;204:18-206:12, 207:15-21.)

At the same time, Roger also acted as Nathan's parent and legal guardian, and in that role, retained Nathan's lawyer. He executed an engagement letter in which defense counsel agreed to represent Nathan for a flat-fee of $90,000, half of which Roger would pay up-front, and half of which would be due at a later date. (V.14:WW ¶ 3.) Under this agreement, Roger paid a substantial portion of the first payment, but continued to owe the balance of the first payment, as well as the entire second payment, throughout the proceedings.[2]

[2] At some point after the preliminary hearing, Roger informed defense counsel that he did not have the money to continue to pay defense counsel. (Tr.2/26/09; 55:3-18.) Despite being owed a portion of the first installment, and the entire second installment, defense counsel remained on the case. (*Id.* at 55:21-25.)

From the outset, defense counsel knew that Roger was a victim of the crime. He soon also learned that the state had identified Roger as a witness to testify against Nathan about the dynamics of the Ybanez family. (V.14:BBB 1127; Tr.2/23/09;204:18-206:12, 207:15-21.) Defense counsel understood that Roger's roles as victim, prosecution witness, parent, and defense financier created a conflict of interest. (Tr.2/24/09;37:19-38:4; Tr.2/25/09;36:3-18.)

And that conflict only got worse. Prior to the preliminary hearing, defense counsel received in discovery evidence that Nathan had been abused by both of his parents and that the Ybanez household was in turmoil. The discovery contained statements from many witnesses about this abuse. (V.15:124 & 146 ("When [Nathan] was younger, his father would beat him."); *id.* at 263 ("[Nathan's] mom and dad had hit him."); *id.* at 265 ("[Nathan's] father hit him."); *id.* at 268 ("[Nathan's] dad beat him up."); *id.* at 124 & 146 ("[Nathan] always keeps a bat in his room to protect himself from his father."); V.20:3032 ("[Eric] Jensen's parents were concerned that Nathan was being abused."); V.18:1670 ("[Nathan's] dad . . . physically abused him as well as mentally."); V.17:1371 (At the time of the homicide, Nathan yelled at his mother "[y]ou're not going to hurt me anymore[!]"); V.15:268 ("[Nathan's] parents did weird controlling things."); *id.* at 271 ("Roger was verbally abusive to . . . Nathan."); *id.* ("Roger had gone into

Nathan's bedroom and destroyed Nathan's property . . . ."); *id.* at 276 ("Roger told Nathan that his mom didn't want him anymore").) The discovery further reflected that Nathan had been hospitalized at a mental health facility (Tr.2/23/09;211:10-13); that Nathan had attempted to run away; and that the family had been twice referred to Social Services—all within the year prior to the homicide. (V.18:1882-83 (After a runaway attempt, "Nathan said he is unable to live at home with his parents . . . Nathan requested Social Services be contacted for relocation, unable to function at home."); *see also* V.17:1109 ("Both [the Jensen] family and [the Baker] family have tried to get Social Services involved in Nathan's family.").) This evidence was not just found in the discovery—both Nathan and Roger confirmed the abuse to defense counsel. (Tr.2/23/09;210:12-19, 213:3-4.)

Despite the potential for this evidence to support a theory that Nathan had not deliberated his crime, defense counsel investigated none of it. He did not interview even one of the seven witnesses that had provided information of Nathan's abuse. (Tr.2/23/09;244:4-17.) He did not obtain any records from Social Services or attempt to interview anyone there. (*Id.* at 213:5-19.) And he did not seek Nathan's medical records from his recent hospitalization at Centennial Peaks, nor seek to speak with any health care provider about Nathan. (*Id.* at 211:10-24.)

II. The Trial Proceedings.

The impact of the conflicted roles of Roger and defense counsel became overwhelming at trial. At defense counsel's request, and despite Roger's adverse roles as victim and prosecution witness, the district court excused Roger from its sequestration order so that Roger could remain with Nathan throughout the trial to act as his guardian. (Tr.2/23/09;188:18-24; Tr.10/20/99;4:19-5:3.)

In its case-in-chief, the state used Roger to paint a picture that the Ybanez home was a normal, middle class home, and that any problems were caused by Nathan's bad behavior as a teenager. (Tr.10/20/99;100:1-111:22.) Even based on his review of discovery and Roger's own admissions, defense counsel knew that this testimony was false. But he conducted only the most superficial of cross-examinations. He did not raise any of the facts regarding Nathan's abuse, and did nothing to discredit or impeach Roger's demonstrably false testimony about Nathan's typical upbringing in a normal home. (*See* Tr.2/25/09;139:3-8, 144:4-145:12, 158:9-11.)

Defense counsel also did nothing to rebut the state's argument that Nathan acted after deliberation. He conducted no cross-examination of four of the ten prosecution witnesses (Tr.10/20/99;2-3), and only minimally examined the other six. He did not make a single trial objection, even allowing the state to present a

witness solely to describe the decedent's good character. (Tr.2/25/09;95:1-6, 99:15-20, 124:16-125:2, 133:4-12.) He did not a call a single witness or introduce any other evidence to show that Nathan's actions were spontaneous or to contradict Roger's false depiction of Nathan's childhood or the Ybanez home. (*See* Tr.10/20/99;2-3; Tr. 2/25/09;99:5-14.)

Finally, both Roger and defense counsel consulted with Nathan as to whether he should testify on his own behalf, and each encouraged him not to do so. (Tr.2/24/09;155:19-24; Tr.2/25/09;238:24-239:4.) With their advice, Nathan decided not to testify, leaving Roger's testimony unchallenged. (Tr.10/21/99;11:9.)

In closing, defense counsel inexplicably adopted Roger's testimony that the only problem in the Ybanez household was Nathan. He portrayed Roger and Julie as good and loving parents, and explained that Roger and Julie "did the best they could" which is "all a parent can do." (Tr.10/21/99;27:2-5.) He minimized any evidence of abuse or conflict by treating it as a baseless story that Nathan's friends invented to turn him against his parents. (*Id.* at 36:21-24.) Defense counsel repeatedly asked the rhetorical question, "What's wrong with Nathan Ybanez?" (*id.* at 30:15-16, 30:19, 31:12), and posited that "[Nathan is] running with a bad crowd, but that's not the answer here. That's too simplistic. There's more to it."

(*Id.* at 30:17-19.) But he never explained what the "more" was, and—incredibly—agreed with the state that Nathan must have a "hole in his soul." (*Id.* at 34:7.)

After only one day of evidence, Nathan was convicted of first-degree murder. He was sentenced to a mandatory term of life imprisonment without the possibility of parole. Defense counsel failed to file a direct appeal, and did not even advise Nathan of his right to do so. (V.4:739-740.)

It was apparent to the court from the outset that Roger was serving in conflicting roles.[3] Nevertheless, neither the court nor defense counsel ever recommended, suggested, or inquired about appointing an independent guardian to assist Nathan or to guarantee protection of his constitutional rights. (Tr.2/24/09;41:3-7.) Nor did they ever mention this option to Nathan. (*Id.*) Nor did the court or defense counsel ever raise defense counsel's conflict of interest, although it was obvious that Nathan had not hired defense counsel himself. (V.4:729 (noting that, as a juvenile, Nathan could not enter into a contract and had no funds of his own).)

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[3] In addition to the obvious conflicts created by Roger's multiple roles, the court file reflected that Nathan's intake officer immediately recommended that he be appointed a guardian. (V.1:25.) It further reflected that, upon learning of the death of his wife, and before seeing Nathan for the first time after the homicide, Roger told sheriff's deputies "I know I can't talk to him. I'm liable to beat the shit out of him." (V.18:1828.) Later, during Nathan's statement to law enforcement, Roger stormed out of the room calling Nathan a "sick little fuck." (*Id.* at 1836.)

III. The Rule 35(c) Proceedings.

In 2007, Nathan sought post-conviction relief, asserting error based on the failure to appoint a guardian, ineffective assistance of counsel, and the unconstitutionality of his sentence. He presented evidence supporting his claims at a four-day hearing.

The evidence confirmed the conflicts of both Roger and defense counsel. It demonstrated that Roger was—simultaneously—a victim of the crime, a prosecution witness, and Nathan's guardian. Roger admitted that "[i]t's a difficult position to be in, to try to be involved in all three of those roles." (Tr.2/25/09;243:13-20.)

The evidence also showed that defense counsel knew that he was conflicted because he was hired and paid by Roger. Defense counsel testified that, over a year before trial, he orally advised Nathan that a conflict existed:

> When I first met with [Nathan], I told him that his father had asked me to come see him to help him. I told him that while his father was asking me to do that, that I did not represent his father, I represented him. That my job was to do what was best for Nathan Ybanez, not for Roger Ybanez or the family. I told [Nathan] as a result of Julie Ybanez being the victim here, that Roger Ybanez had a conflict.

(Tr.2/24/09;37:19-38:4.) Defense counsel did not, however, explain to Nathan how his retention by the victim and a hostile prosecution witness created a conflict,

or how this conflict could hinder his representation. He did not advise Nathan he could have an independent lawyer or guardian to ensure protection of his interests and rights. (*Id.*) And he never obtained a written waiver, or made any record of a waiver with the court. (*Id.*)

Nathan's ethics expert, Marcy Glenn, offered unrebutted testimony that defense counsel's conflict violated Colorado Rules of Professional Conduct 1.7 and 1.8. Although such conflicts can be consented to in certain circumstances, she testified that this conflict became unconsentable when defense counsel received discovery revealing facts diametrically opposed to Roger's proposed testimony against Nathan. (Tr.2/23/09;81:4-9, 89:2- 92:18, 114:8-12, 119:15-21, 123:11-18; *see also* Tr.2/25/09;96:9-15.) Ms. Glenn further testified that, even if the conflict could have been waived, it was not because trial counsel sought no written waiver. (Tr.2/23/09;97:13-18; *see also id.* at 190:4-8.) And, although the circumstances giving rise to the conflict were in plain view of the trial court, no advisement of Nathan's purported waiver was placed on the record.

Finally, Nathan presented expert testimony concerning trial counsel's deficient performance. Jim Aber, Nathan's criminal defense expert, testified that family dynamics are always relevant in matricide cases and that, in this case, there was ample evidence in the discovery to warrant investigation into the Ybanez

family dynamics. (Tr.2/25/09;99:23-100:3, 110:21-111:4.) Mr. Aber detailed the powerful exculpatory evidence defense counsel would have discovered had he conducted even a modest investigation. (*Id.* at 115:12-117:15.) For example, the Social Services records would have revealed that Nathan was "afraid to go home" and that Roger "tried to strangle him." (Tr.2/23/09;213:5-19; V.13:HH.) And the Centennial Peaks records contained almost 100 pages of admissible, defense-oriented proof of Nathan's abusive home life, Nathan's thoughts about suicide at age 12, and a recommendation that the family seek counseling. (*See, e.g.,* V.13:GG 3845-50, 3858-59; Tr.2/26/09;138:21-145:22, 151:5-25.) Defense counsel did not find any of this information, however, because he did not look. This failure, Mr. Aber testified, was "appalling" and "incredibly below the standards" of a competent and effective attorney. (Tr.2/25/09;111:17-112:12.)

IV. The District Court's Decision.

The district court largely rejected the motion. The court determined that Nathan's counsel had no conflict of interest and, in any event, Nathan had waived it. (V.4:729.) The court also rejected, without analysis, Nathan's argument that the failure to appoint a guardian necessitated a new trial. (*Id.* at 742.) Contrary to this Court's precedent, the district court also rejected Nathan's claim that an effective waiver could occur only with the assistance of the court or a guardian,

and only if that waiver was placed on the record. (*Id.* at 729.) The district court also rejected Nathan's constitutional challenge to section 18-1-105(4), C.R.S. (1999), which mandated a sentence of life in prison without the possibility of parole. (*Id.* at 741.)

The court did, however, rule that Nathan's trial counsel had been ineffective by failing to file an appeal and reinstated Nathan's right to a direct appeal. (*Id.* at 739-40.) To effectuate that right, the court then re-sentenced Nathan to a mandatory term of life in prison without the possibility of parole, and he proceeded with his direct appeal. (Tr.5/20/11;13:8-15; V.4:829.)

V. The Court of Appeals' Decision.

Nathan challenged the district court's rulings in a consolidated appeal from his original conviction and the denial of his 35(c) motion. (V.4:743, 821, 848.)

The court of appeals first concluded that neither the failure to appoint a guardian nor trial counsel's failure to request a guardian constituted an abuse of discretion or a due process violation. The court reasoned that: (1) Nathan was almost 18 at the time of trial; (2) he was assisted by his father and a lawyer; and (3) there was nothing to suggest to the trial court that he was mentally incompetent. *People v. Ybanez*, No. 11CA434, slip op. at 5 (Colo. App. Feb. 13, 2014).

The court next determined that trial counsel's conflict of interest was "potential" rather than "actual" and that the conflict had been waived by Nathan. (*Id.* at 13-14.) To reach this conclusion, the court relied heavily on trial counsel's subjective view that he did not feel conflicted and did not consult Roger about strategy. (*Id.*) The court further held that, because there was no actual conflict, there was no need for additional disclosures, and no need to place a waiver on the record. (*Id.* at 15.)

Finally, the court of appeals agreed that Nathan's sentence was no longer constitutional after *Miller v. Alabama*. The court instructed the district court to resentence Nathan to life in prison with no possibility of parole until after forty years. (*Id.* at 16-17.)

SUMMARY OF THE ARGUMENT

Any child charged with the most serious crime recognized by our laws, and facing a mandatory life sentence in prison, should have both a guardian and a lawyer who can act in the best interest of the child without regard to their own interests. Nathan Ybanez did not get these protections. As a result, after only one day of evidence, this child—who had not previously committed a single act of violence—was convicted of first-degree murder, and received a mandatory sentence to life in prison without the possibility of parole. This conviction violates

"that fundamental fairness essential to the very concept of justice," and must be reversed.

Nathan is first entitled to a new trial because, despite his obvious lack of an unbiased guardian, neither the court nor defense counsel ever suggested, inquired, or advised Nathan that the court could appoint an independent guardian to act in his best interests. The trial court had clear statutory authority to appoint such a guardian, but failed to even conduct a hearing on this issue. The failure to conduct a hearing, and the failure to appoint a guardian, each constituted an abuse of the court's discretion. This failure resulted in proceedings so fundamentally unfair that they violated Nathan's constitutional rights. With no independent guardian to protect him from the influence of his conflicted guardian and counsel, Nathan could not meaningfully participate in his own defense, nor could he knowingly and intelligently waive his constitutional rights to conflict-free counsel and to testify on his own behalf. These errors require a new trial.

Nathan is also entitled to a new trial because he received ineffective assistance from his conflicted counsel. The unrebutted evidence established that defense counsel, having been hired and paid by Roger, labored under an unwaivable conflict. In light of his professional and financial relationship with Roger, defense counsel's ability to properly pursue a defense based on Roger's

abuse of Nathan was materially limited. To prevail on a claim for ineffective assistance where defense counsel is conflicted, Nathan need only show that the conflict had an "adverse effect" on defense counsel's representation. The unrebutted expert testimony was that defense counsel's failure to investigate the allegations of abuse was not just an "adverse effect," but "appalling" and "incredibly below the standards" of an effective attorney.

Finally, under this Court's recent decision in *People v. Tate*, Nathan's sentenced must be vacated and the case remanded for an individualized hearing on whether Nathan should receive a sentence to life in prison without the possibility of parole or the alternative mandatory sentence to life with the possibility of parole after forty years. This remand, however, violates the United States and Colorado Constitutions. No juvenile should be sentenced to life in prison without the possibility of parole under any circumstances, and a sentence to life in prison with the possibility of parole only after forty years cannot be mandatory—it must be imposed only after an individualized hearing.

ARGUMENT

I. NATHAN IS ENTITLED TO A NEW TRIAL BECAUSE HE WAS NOT APPOINTED AN INDEPENDENT GUARDIAN.

Standard of review and preservation. The district court determined that the trial court did not abuse its discretion when it failed to appoint a guardian for

Nathan, and thus that Nathan was not entitled to a new trial. Because this denial of a new trial was based on a legal error, it is reviewed de novo. *People v. Hill*, 228 P.3d 171, 173 (Colo. App. 2009). Whether the trial court should have appointed a guardian under § 19-2-517(8), C.R.S. (2014) is reviewed for an abuse of discretion.[4]

This Court *sua sponte* granted certiorari on the issue of "whether the Court of Appeals properly applied plain error review" to this issue. The court of appeals, however, reviewed this issue as a properly-preserved post-conviction claim, as well as an issue raised on direct appeal, and it applied the "plain error" standard only to the review of the direct appeal. (*Ybanez*, slip op. at 3.) In either instance, however, plain error does not apply.

Plain error review applies only to claims that have not been properly preserved. An issue is properly preserved if it is raised to the district court. *People v. Finney*, 2012 COA 38, ¶¶ 27-28, *aff'd,* 2014 CO 38. In this case, Nathan raised this issue multiple times during the 35(c) hearing, including in the opening statement, (Tr.2/23/09;9:24-10:1, 13:23-14:19); in the testimony of his experts and defense counsel, (Tr.2/23/09;99:21-103:14; Tr.2/25/09;163:16-168:8;

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[4] At the time of Nathan's trial, this section was codified as § 19-2-517(5), C.R.S. (1998).

Tr.2/24/09;40:23- 41:7); and in post-trial briefing, (V.3:543-546). The district court recognized that Nathan made this argument and rejected it. (V.4:727, 742.) Because the issue was presented to and ruled on by the district court, the issue was properly preserved for review by this Court. *People v. Gallegos*, 975 P.2d 1135, 1137 (Colo. App. 1998), *aff'd as modified*, 2 P.3d 716 (Colo. 2000); *cf. People v. Goldman*, 923 P.2d 374, 375 (Colo. App. 1996) (issues not raised in 35(c) motion *or* during the hearing are not preserved).

The plain error standard does not apply to this issue on direct appeal, either, for two reasons. *First*, given the nature of this claim, Nathan could not have raised it before the 35(c) hearing—"For the same reasons that [petitioner] needed a guardian ad litem, [he] was hardly in a position to recognize[ ] and independently protest the failure to appoint [him] one." *In re M.F.*, 74 Cal. Rptr. 3d 383, 390 (Cal. Ct. App. 2008) (final alteration in original) (internal quotation marks omitted), *superseded by statute on other grounds*, Cal. Stats. 2008 Ch. 181 Sec. 1; *see People v. Simpson*, 69 P.3d 79, 81 (Colo. 2003) (no suggestion that request for guardian must be raised before 35(c) proceeding). Indeed, the state did not even

argue in the post-conviction proceeding that this issue had been waived or could be reviewed only for plain error. (*See* V.4:600-616.)[5]

Second, failure to provide Nathan a guardian in this case was a structural error to which plain error review does not apply. *See* I.C, *infra*; *People v. Miller*, 113 P.3d 743, 749 & n.9 (Colo. 2005). Regardless, because the facts of this case presented a glaring need for a guardian, and because the absence of a guardian impacted every aspect of the proceedings, Nathan is entitled to a new trial even if plain error review applies. *See* I.C, *infra*.

Discussion. Section 19-2-517(8) provides that "[t]he court in its discretion may appoint a guardian ad litem for a juvenile charged by the direct filing of an information in the district court or by indictment pursuant to this section." The purpose of a guardian is to protect the interests of a party who cannot fully protect his or her own interests. *See In re Marriage of Hartley*, 886 P.2d 665, 675 (Colo. 1994) ("The GAL's sole duty is to protect all of the interests of the child . . . , including the child's liberty interests."); § 19-1-103(59), C.R.S. (2014). As a result, a guardian should be appointed whenever the court is reasonably convinced that a party cannot effectively participate in the proceedings or protect his own

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[5] The fact that Nathan had a lawyer is of no moment here, because defense counsel was operating under a conflict of interest, and asking the court to appoint a guardian would have been contrary to counsel's interests. *See* II.A, *infra*.

interests. *See In re Marriage of Sorensen*, 166 P.3d 254, 256-57 (Colo. App. 2007).

In this case, Nathan, a 17-year old with no prior experience with the criminal justice system, was on trial for the first-degree murder of his mother and facing a mandatory sentence of life in prison without the possibility of parole. The trial court was aware that his father—a victim of the crime—was simultaneously acting as a prosecution witness and as Nathan's guardian throughout the proceedings. It was also aware that Nathan would have to make numerous critical decisions in the proceedings, including whether to waive his constitutional right to testify. Under these circumstances, the trial court's failure to conduct a hearing or to appoint a guardian for Nathan was an abuse of discretion and violated Nathan's constitutional rights. Because this failure led to a trial that was fundamentally unfair, this Court should vacate Nathan's conviction and remand for a new trial.

A. The trial court abused its discretion under § 19-2-517(8).

1. The trial court abused its discretion by failing to consider whether Nathan needed a guardian.

The trial court had clear statutory authority to appoint a guardian for Nathan, and pre-trial services recommended that it do so. But, despite its knowledge that Nathan's mother was dead, that his father was a victim of the crime who would testify against Nathan, and that Nathan would need to make numerous critical

decisions, including whether to waive his constitutional rights, the trial court never even considered whether a guardian was necessary in this case and never held a hearing or once inquired about whether Nathan needed a guardian. Under these circumstances, the court's "failure to exercise discretion is itself an abuse of discretion" that requires reversal. *People v. Darlington*, 105 P.3d 230, 232 (Colo. 2005); *In re Bostwick*, No. 05CA2820, 2005 WL 2374933, at *3 (Ohio Ct. App. Sept. 26, 2005) (court abused its discretion by failing to inquire whether juvenile needed an independent guardian where his father's statements revealed a potential conflict of interest).

2. The trial court abused its discretion because a juvenile is legally incompetent to make critical decisions.

Even if the court had considered the issue, however, its failure to appoint a guardian under these extreme facts would necessarily constitute an abuse of discretion. Section 19-2-517(8) provides no guidelines as to how a trial court should exercise its discretion in a direct file proceeding, nor are there any Colorado cases interpreting this statute. The courts have, however, articulated the factors governing appointment of guardians for adults in civil proceedings. In those cases, a court must appoint a guardian where the litigant "(1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; (2) is incapable of making critical decisions; (3) lacks the intellectual capacity to

communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own interest." *Sorensen*, 166 P.3d at 257 (citing *People in Interest of M.M.*, 726 P.2d 1108, 1120 (Colo. 1986)). Any test for appointment of a guardian for a juvenile in a direct-file criminal proceeding must be less onerous. *See Haynes v. People*, 265 P.2d 995, 996 (Colo. 1954) (criminal statute "should be construed in such manner as to give protection to a defendant that is at least equal to that afforded a party in a civil suit"). Nevertheless, Nathan easily satisfied several of the *Sorenson* criteria, any of which would have required appointment of a guardian.

As a juvenile, Nathan was by definition incapable of making the critical decisions affecting his legal interests and rights on his own. *See* § 13-22-101, C.R.S. (2014) (person under 18 lacks competence to enter into contracts, manage estates, sue and be sued, or make decisions regarding his or her own body); § 19-2-511(1), C.R.S. (2014) (juvenile cannot waive Fifth Amendment rights "unless a parent, guardian, or legal or physical custodian of the juvenile was present" and both are advised of the juvenile's rights); *Nicholas v. People*, 973 P.2d 1213, 1219 (Colo. 1999) ("[J]uveniles have less capacity than adults and therefore need special assistance . . . ."), *superseded by statute on other grounds*, Laws 1999, Ch. 258, Sec. 1. Even the state conceded that Nathan did not have the

legal capacity to waive the conflict created by Roger's hiring of defense counsel. (V.3:393.)

In addition to his legal incapacity to make critical decisions about whether to waive his constitutional rights, Nathan satisfied other *Sorenson* criteria. His own counsel admitted that he had concerns about Nathan's lack of cooperation and level of honesty. (Tr.2/24/09;39:2-13; *see also* Tr.2/25/09;237:15-238:2). He was concerned about Nathan's naiveté about the potential negative ramifications of discussing the case with third parties. (Tr.2/24/09;124:17-125:8.) Roger testified that Nathan had difficulty understanding the proceedings and the magnitude of the decisions he was making. (Tr.2/25/09;251:14-252:3 ("lots of what was going on went in one ear of Nathan and right out the other"; Nathan "was not able to comprehend what was going on").)

Nathan's need for a guardian was not cured by the presence of either Roger or defense counsel. Roger, whose interests were adverse to Nathan's in multiple ways, could not protect Nathan's interests, and in fact was incentivized to act contrary to his interests. *People in Interest of J.F.C.*, 660 P.2d 7, 8 (Colo. App. 1982) ("[I]t is not sufficient to have the presence of a parent when that parent is unable to function in the adviser role or if the parent's interests are adverse to that of the child."); § 19-1-111(2)(a), C.R.S. (2014) (allowing for appointment of GAL

in delinquency proceedings when there is a conflict between the parent and child). Because he was hired by Roger, defense counsel labored under this same conflict, *see* II.A *infra*, and could not satisfy the role of a guardian because a guardian serves a different purpose than a lawyer. *M.M.*, 726 P.2d at 1120.

Given the gravity of the crime Nathan was charged with, the magnitude of the potential consequences, his relative youth, his inexperience with the criminal justice system, the seriousness of the decisions he was required to make throughout trial, and the patent adversity between Nathan and Roger, there can be no doubt that Nathan satisfied the *Sorenson* criteria, and the failure to inquire about and appoint Nathan a guardian was an abuse of discretion.

3. "Mental competence" cannot be the determinative factor when deciding whether to appoint a guardian in a direct-file proceeding.

If this Court concludes that Nathan did not satisfy the more onerous *Sorenson* factors because, as the court of appeals held, Nathan was "mentally competent," then it must determine whether section 19-2-517(8) required a guardian. Below, the state argued that a guardian should be appointed only if the juvenile defendant is "mentally incompetent." (Ans. Br. 20-21.) While mental competence may provide an appropriate standard in adult civil cases, it does not adequately protect a juvenile because it fails to account for the unique

characteristics of youth that distinguish juveniles from adults and disregards this state's policy of protecting the rights and interests of juvenile defendants.

"Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness[,] and recklessness." *Miller v. Alabama*, 132 S.Ct. 2455, 2467 (2012) (alteration in original) (internal citation and quotation marks omitted). Both criminal and civil laws in Colorado reflect this "understanding that juveniles have less capacity than adults and therefore need special assistance." *See Nicholas*, 973 P.2d at 1218-19 (Colo. 1999).[6] This need for additional assistance is particularly acute when a juvenile is facing criminal prosecution because "due to their immaturity and limited mental capacity" juveniles are less capable of "understand[ing] their legal rights," *People v. Simpson*, 51 P.3d 1022, 1025 (Colo. App. 2002), *rev'd on other grounds*, 69 P.3d 79 (Colo. 2003), and are also "more vulnerable . . . to negative influences and outside pressures, including from their family." *People v. Lucero*, 2013 COA 53, ¶ 8, *cert. granted*, 13SC624 (omission in original) (quoting *Miller*, 132 S. Ct. at 2464) (internal quotation marks omitted); *see also Graham v. Florida*, 560 U.S. 48, 78 (2010) (the unique "features that distinguish juveniles from adults . . . put them at a significant disadvantage in

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[6] To this end, the law provides juveniles the mandatory protection of a guardian in civil proceedings, C.R.C.P. 17(c), dependency and neglect proceedings, § 19-1-111(1), and in custodial interrogations, § 19-2-511.

criminal proceedings"). Indeed, the legislature has recognized that "a child involved in the commission of an offense should be afforded protective counseling concerning his or her legal rights from one whose interests are not adverse to those of the child." *People v. Legler*, 969 P.2d 691, 694 (Colo. 1998) (discussing § 19-2-511(1)).

Should this Court fashion a different test for the appointment of guardians in direct file proceedings, the test cannot be based on a juvenile's mental competence alone; it must account for the specific characteristics of youth and our state's policy of ensuring appropriate protections for juveniles in criminal proceedings. *Simpson*, 51 P.3d at 1028 ("[E]ven if a juvenile is charged in adult court, it does not follow that he or she must be treated as an adult in all respects."). Taking these factors into account, the record in this case amply demonstrates Nathan's need for a guardian. Indeed, if a guardian was not required in this case, it is difficult to imagine how a court could ever abuse its discretion by failing to appoint one.

B. The trial court violated Nathan's constitutional rights by failing to appoint a guardian.

"The due process clauses of the United States and Colorado constitutions guarantee every criminal defendant the right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25. The court's failure to appoint a guardian in this case affected every aspect of

this case, leading to a trial that was fundamentally unfair and that violated several of Nathan's constitutional rights.

The right to a fair trial is multifaceted. One aspect is the defendant's right to participate in his own trial and assist in his own defense. *LaChappelle v. Moran*, 699 F.2d 560, 564 (1st Cir. 1983) ("A central principle derived from the confrontation clause is the defendant's right to participate in his own defense."). A defendant is deprived of this right when he cannot understand the proceedings against him. *See Drope v. Missouri,* 420 U.S. 162, 171-72 (1975); *Gonzalez v. Phillips*, 195 F. Supp. 2d 893, 902-03 (E.D. Mich. 2001) ("A person who is physically present, but cannot understand the proceedings has been denied due process.").

Without a guardian, Nathan's ability to participate in his own trial was limited to such an extent that he was effectively deprived of this right. As a juvenile, Nathan's ability to understand the proceedings and effectively assist his attorney was already limited. *Miller*, 132 S.Ct. at 2468 (recognizing that the "incompetencies associated with youth" include "incapacity to assist [your] own attorneys"). The absence of an independent guardian was even worse in this case because of the influence that Roger wielded throughout the process and the impact of his conflicting roles on Nathan's decisions regarding his own constitutional

rights. For example, defense counsel testified that he advised Nathan of the conflict created when Roger hired him. Even if this conflict could be waived, which it could not (*infra*, II.B), Nathan needed an unbiased guardian to ensure he could properly assess this conflict and decide whether to waive his right to conflict-free counsel.

Similarly, after Roger testified falsely about the Ybanez household and whether he had ever abused Nathan, Nathan had to decide whether to waive his right to testify. Before making this decision, he consulted with Roger, who remained in the courtroom acting as Nathan's guardian throughout trial, and with defense counsel, who was hired by Roger. (Tr.2/25/09;238:25-239:7; Tr.2/24/09;156:11-19.) Nathan needed a guardian in this situation to help him identify whether it was in his best interest to testify, regardless of the impact on Roger. "If criminal trials are to be perceived as fair . . ., it is important that the public know that persons accused of crimes have not been silenced at trial by undue influence . . . ." *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984). Given Roger's conflicting roles, the Court cannot be sure that Nathan was free from undue influence or that there was a valid waiver of his rights. *See id.* at 515 ("courts indulge every reasonable presumption against waiver"); *cf.* § 19-2-511(1) (juvenile cannot waive right to remain silent absent guardian).

The deprivation of impartial assistance, especially where Nathan was receiving advice from a conflicted parent, rendered the trial fundamentally unfair, and violated Nathan's Fifth and Sixth Amendment rights.

C. Nathan is entitled to a new trial.

As discussed above, the trial court abused its statutory discretion and violated Nathan's constitutional rights by denying him a guardian. Regardless of how this error is characterized, Nathan is entitled to a new trial. The court's failure to appoint a guardian negatively affected every aspect of the case—there was no one to ensure that Nathan's interests were pursued during the investigatory phase, no one to raise the issue of Roger's and defense counsel's conflicts of interest, and no one to ensure that Nathan's interests were communicated to counsel. *See* Office of the Child Representative Amicus Br. § II.A. Because the failure to appoint a guardian rendered the entire proceeding fundamentally unfair, a new trial is the only adequate remedy.

This is true if the error is viewed as an abuse of statutory discretion. *See M.F.*, 74 Cal. Rptr. 3d. at 388-90; *Bostwick*, 2005 WL 2374933, *1-3 (reversal required when court abused discretion by failing to appoint GAL in delinquency proceeding). It is also true if the error is a constitutional error and regardless of whether it could have been raised to the trial court. The court's failure to appoint a

guardian was a structural error that requires automatic reversal. *People v. Miller*, 113 P.3d at 749 (A structural error is a defect that "affect[s] the framework within which the trial proceeds."). Even if this error does not rise to the level of a structural error, a new trial is nevertheless the appropriate remedy. Where, as here, a claim of constitutional error is properly preserved, harmless error is the applicable standard of review. *People v. Miller*, 113 P.3d at 749. Nathan is entitled to a new trial under this standard because the pervasive impact the lack of a guardian had on the fairness of the trial was not harmless beyond a reasonable doubt. Finally, even if this Court determined that the issue was not preserved, Nathan is still entitled to a new trial under plain error review because the error here was both obvious and substantial. *Id.* at 750.

II. NATHAN IS ENTITLED TO A NEW TRIAL BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review and Preservation. In his post-conviction proceeding, Nathan asserted that he had been deprived of his Sixth Amendment right to counsel because his defense counsel was conflicted and failed to investigate viable defenses regarding Nathan's abuse, to cross-examine Roger Ybanez at trial, and to otherwise develop any coherent defense theory. (V.3:517, 526-536, 538-543, 548-550.) The post-conviction court found there was no conflict, and that, in any event, the conflict had been waived. (V.4:729.) Because it found no conflict, the

court reviewed counsel's performance under *Strickland v. Washington*, 466 U.S. 668 (1984), and found that counsel was not ineffective. (*Id.* at 726, 739.) The court of appeals agreed that there was no actual conflict, and that any potential conflict had been waived. (*Ybanez*, slip op. at 13-16.) The court of appeals also affirmed the determination that defense counsel was not ineffective under *Strickland*. (*Id.* at 9, 10 n.1.)

Whether a conflict exists is a question of law that is reviewed de novo. *West v. People*, 2015 CO 5, ¶ 11; *People v. Hagos*, 250 P.3d 596, 613 (Colo. App. 2009). Whether a waiver of the right to conflict-free counsel is knowing and intelligent presents a mixed question of law and fact that is reviewed de novo. *See People v. Stanley*, 56 P.3d 1241, 1244 (Colo. App. 2002). Similarly, whether counsel's performance was constitutionally inadequate also presents a mixed question of law and fact that is reviewed de novo. *People v. Newmiller*, 2014 COA 84, ¶ 18.

A. Nathan demonstrated a conflict and an adverse effect on counsel's performance.

Every criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. "The right to effective assistance of counsel includes the right to conflict-free counsel." *West*, ¶ 5. "This right may be violated . . . by representation that is intrinsically improper

due to a conflict of interest." *People v. Castro*, 657 P.2d 932, 943 (Colo. 1983), *overruled on other grounds*, *West*, ¶ 29. "The need for defense counsel to be completely free from a conflict of interest is of great importance and has a direct bearing on the quality of our criminal justice system." *Allen v. Dist. Ct.*, 519 P.2d 351, 352-53 (Colo. 1974).

Applying *Cuyler v. Sullivan*, 446 U.S. 335 (1984), this Court recently clarified that a defendant can demonstrate ineffective assistance if he can "show by a preponderance of the evidence both a conflict of interest *and* an adverse effect resulting from that conflict." *West*, ¶ 3. Unlike cases where no conflict is alleged, the defendant need not establish the prejudice required by *Strickland*. Rather, to demonstrate "adverse effect," he need only show that there was (1) an alternative strategy or tactic that counsel could have pursued, (2) that the foregone tactic was objectively reasonable, and (3) that the failure to pursue the tactic was linked to the conflict. *Id.* at ¶ 57. This test is satisfied because of the abundant and unrebutted evidence that defense counsel's relationship with Roger created a conflict of interest and that the conflict adversely affected defense counsel's performance.

1. There was a conflict of interest where a defendant's parent, who was a victim of the crime and a prosecution witness, paid for the defendant's attorney.

A conflict of interest exists when there is a risk the client's representation "may be materially limited by the lawyer's responsibilities to . . . a third person, or by the lawyer's own interests." Colo. RPC 1.7(b) (1998); *see West*, ¶¶ 26, 62 (conflict of interest exists in situations "inherently conducive to and productive of divided loyalties" or where counsel's loyalties are "inconsistent with each other").

In this case, the evidence established that defense counsel had a conflict. Defense counsel was hired and paid by Roger—who was a victim of the crime, who was a witness for the prosecution, who acted as Nathan's legal guardian, and who would have been significantly and adversely impacted if defense counsel had investigated and presented the evidence of Nathan's abuse. (Tr.2/23/09;191:25-192:3, 240:4-8; Tr.2/25/09;233:23-236:8, 247:1-9.) At the time he was retained, or shortly thereafter, defense counsel identified this conflict—he knew Roger was a victim of the crime, knew that he was acting as Nathan's guardian, and knew that the state intended to call Roger to testify to "background information on Nathan and the Ybanez family" to establish that Nathan's actions had been deliberate. (Ex. BBB 1127; 2/23/09;187:6-10, 204:18- 206:12, 207:16-21.) As soon as he reviewed the discovery, defense counsel saw the evidence of abuse and turmoil

perpetrated by Roger in the Ybanez household. And indeed, he was told about this abuse by both Nathan and Roger.

"Courts 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 v. Georgia*, 450 U.S. 261, 268-69 (1981). "One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against [the third party] or from taking other actions contrary to the [third party's] interest." *Id.* at 269; *Amiel v. United States*, 209 F.3d 195, 198-99 (2d Cir. 2000) (conflict of interest exists when "counsel abdicate[s] his duty of loyalty by permitting a third party who paid his fees to influence his professional judgment"); ABA Model Code of Prof'l Responsibility EC 5-23 (1980) ("A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers.").

As the evidence at the 35(c) hearing established, these are precisely the risks that manifested. Both Roger and defense counsel admitted that there was a conflict. Roger testified that being a victim, witness, and guardian "put [him] in a conflict personally" and that it was "a difficult position to be in, to try to be involved in all three of those roles." (Tr.2/25/09;243:1-20.) Defense counsel

testified that he sought a waiver from Nathan early in the case, specifically because he knew that there is a conflict when "one person hires a lawyer to represent another" and because he recognized that "as a result of Julie Ybanez being the victim here, Roger Ybanez had a conflict" with Nathan. (Tr.2/24/09;36:3-14, 37:16-38:12; 39:19-41:7.)

Nathan also presented unrebutted expert testimony that this conflict violated two Rules of Professional Conduct and was so pronounced as to be unconsentable. Nathan's expert, Marcy Glenn, testified that defense counsel violated Rules 1.7 and 1.8 of the Rules of Professional Conduct. As Ms. Glenn testified, Rule 1.8, "Conflict of Interest: Prohibited Transactions," forbids a lawyer from receiving payment from a third party, and Rule 1.7 forbids the representation of a client if it "may be materially limited by the lawyer's responsibilities to … a third person, or by the lawyer's own interests." Colo. RPC 1.7(b) (1998); Colo. RPC 1.8 cmt. (1998) (representation must comply with the requirements of Rule 1.7).[7]

Ms. Glenn explained that there was a conflict of interest in this case because defense counsel's loyalty was split between his client Nathan, and his benefactor,

[7] Although both Rules 1.7 and 1.8 provide for some circumstances in which these conflicts can be waived, as explained below, Nathan did not have the legal capacity to waive this conflict, and the conflict was so pronounced as to be unconsentable. *See* Section II.B, *infra*.

Roger, and Nathan's and Roger's interests were necessarily inconsistent and irreconcilable. To avoid a first-degree murder conviction, Nathan had to raise doubt that his actions were deliberate. (Tr.10/20/99;28:2-5; Tr.2/24/09;44:8-10.) Nathan therefore had an interest in his counsel thoroughly investigating any facts that could help to raise this doubt, including facts that his parents were abusive and his family dynamics dysfunctional.[8] (Tr.2/25/09;173:23-174:1 ("[T]he entire family dynamics of what was going on with Nathan preceding this homicide are relevant and important to be brought out.").)

Nathan's interest in pursuing the investigation of this defense, however, necessarily conflicted with Roger's interest in preventing the investigation of his own potentially criminal, and certainly embarrassing, conduct. *See Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) ("[T]he evil [of a conflict of interest] . . . is in what the advocate finds himself compelled to *refrain* from doing . . . ."); *Wood*, 450 U.S. at 272-73 (finding conflict where employer, who hired attorney for its

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[8] Family dynamics are particularly important in a matricide case, and must be investigated regardless of what statements the client makes. (Tr.2/25/09;112:13-113:6, 119:7-18.) Because there are many reasons why a child would not admit to abuse or other family problems, such statements do not discharge counsel's obligations to investigate. *See* ABA Standards of Criminal Justice § 4-4.1 (4th ed.) ("The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

employees, had interest in establishing precedent that was inconsistent with the interest of its employees). Based on the diametrically opposed interests of Nathan and Roger, Ms. Glenn testified that there was an unwaivable conflict because there was a substantial risk that counsel's loyalty to Roger could foreclose alternatives that would otherwise have been available to him. (Tr.2/23/09;81:5-9, 137:19-138:3)

The state offered no expert testimony that this situation did not create a conflict. The only evidence that there was no conflict was defense counsel's self-serving testimony that, despite the fact that Roger owed him substantial sums of money, he did not think that he had a conflict or that his representation of Nathan was materially limited. (Tr.2/24/09;173:22-25, 175:1-16.) As he explained, his "client was Nathan" and he did not have "any allegiance to [Roger] whatsoever." (*Id.* at 174:2-11.) The post-conviction court and the court of appeals relied exclusively on this testimony in determining that there was no conflict. *See* (*Ybanez*, slip op. at 13-14.) This was error. After-the-fact testimony by trial counsel is inherently unreliable because "even the most candid persons may be able to convince themselves that they actually would not have used [a] strategy or tactic." *United States v. Nicholson*, 611 F.3d 191, 213 (4th Cir. 2010) (quoting *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir. 1995)). As this Court recently

recognized, "attorneys systematically understate both the existence of conflicts and their deleterious effects." *West*, ¶ 51 (internal quotation marks omitted). Therefore, it was "unnecessary—and even inappropriate—to accept and consider evidence of any benign motives for the lawyer's tactics, including the lawyer's testimony about his subjective state of mind." *Nicholson*, 611 F.3d at 213; *West*, ¶ 62.

The record was replete with evidence of the conflict created by Roger's hiring of defense counsel. The only evidence to the contrary—defense counsel's own self-serving testimony that he did not feel conflicted—has been discredited by this Court.

2. The conflict had an adverse effect on Nathan's representation.

To establish adverse effect, a 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*, ¶ 57. In this case, these requirements are satisfied by the unrebutted evidence that defense counsel failed to conduct even the most basic investigation of the allegations of abuse and turmoil in Nathan's home. They are further satisfied by

counsel's failure to properly advise and document Nathan's purported waiver of his right to conflict-free counsel, as discussed in the next section.

Investigating the allegations of abuse and family turmoil was a plausible defense strategy. To succeed at trial, Nathan needed to combat the state's assertion that he acted after deliberation. This required providing the jury with an explanation for why he killed his mother. (Tr.2/25/09;104:4-10.) One potential explanation was that years of abuse and trauma caused Nathan to uncontrollably snap in a spontaneous eruption of violence.

Investigating this theory was a plausible strategy. *Lopez v. Scully*, 58 F.3d 38, 42 (2d Cir. 1995) (A "plausible alternative defense strategy" is one "which a zealous advocate would reasonably pursue under the circumstances."). At the 35(c) hearing, everyone agreed that, in a matricide case, family dynamics are critical. Mr. Aber testified that "[w]hen someone murders a parent, the family dynamics are totally relevant and have to be investigated." (Tr.2/25/09;99:25-100:3.) Even defense counsel acknowledged that it is important to understand the family dynamics in a matricide case and that a competent lawyer representing a defendant in a matricide case would "investigate the family dynamics to try to understand why a parent has been killed by a child." (Tr.2/23/09;206:22-207:10; 246:14-249:6.)

Investigating the allegations of abuse was objectively reasonable based on the facts known to defense counsel. Whether an alternative defense tactic is objectively reasonable depends on a multitude of factors, including the charge against the defendant, the evidence and information available to the attorney, and the likelihood that pursuing such a tactic would damage the defendant's credibility. *West*, ¶ 60. In this case, evidence on each of these factors established that investigating Nathan's family dynamics was objectively reasonable.

Nathan was a juvenile facing a mandatory life sentence and was entitled to a thorough investigation of any and all possible defenses to the allegation that he acted after deliberation. Because this was a matricide case, Nathan's interest in having counsel investigate the family dynamics was further heightened, as the dynamics were certain to feature prominently in the case. (Tr.2/23/09;206:22-207:3.) The evidence available to defense counsel—including multiple witness statements, referrals to social services, references to Nathan's stay in a mental hospital, and Nathan's and Roger's own admissions of the abuse—all strongly suggested the need to investigate this defense. Finally, there was no evidence presented of *any* downside to Nathan of pursuing this investigation, especially since Nathan was under no obligation to testify.

Based on these facts, Mr. Aber testified that investigating the allegations of abuse and dysfunctional family dynamics was a strategy with significant merit that should have been pursued. (Tr.2/25/09;132:2-9, 173:23-174:14.) Indeed, he characterized the failure to investigate as "appalling" and "incredibly below the standards" of a competent and effective attorney. (*Id.* at 111:17-112:12.)

The failure to investigate the allegations of abuse was linked to counsel's conflict of interest. "An alternative strategy or tactic is inherently in conflict with counsel's other loyalties or interests if the two are inconsistent with each other." *West*, ¶ 62 (internal quotation marks omitted).

Despite all of the references to abuse and family discord in the discovery, defense counsel did not conduct any investigation into any area that might embarrass Roger. Specifically, despite many references by various witnesses to a history of physical and emotional abuse, defense counsel did not interview a single fact witness. Defense counsel also never sought medical records from Centennial Peaks Hospital, where Nathan had been treated just months prior to the homicide. Finally, defense counsel ignored the family's referrals to Social Services.

The only credible explanation presented for why defense counsel failed to undertake this investigation is that it would have required defense counsel to investigate and ultimately expose information that would discredit and embarrass

Roger.[9] Defense counsel knew this information would likely be revealed, as Roger had already admitted to him that he had choked Nathan not long before the homicide. Pursuing this defense was "going to be embarrassing or problematic for Roger Ybanez who is footing the bill here . . . [a]nd anything that would embarrass Roger Ybanez, [defense counsel] didn't do." (Tr.2/25/09;117:22-118:9.)

Nathan established by a preponderance of the evidence that investigating the abuse and turmoil in the Ybanez home was a plausible defense strategy; that it was objectively reasonable based on facts known to defense counsel; and that defense counsel's failure to pursue it was linked to the conflict presented by his relationship with Roger Ybanez.

B. Nathan could not and did not waive the conflict.

The state argued that Nathan waived the conflict in this case pursuant to Rules 1.7 and 1.8. This argument fails for multiple, independent reasons, including that (1) Nathan was not legally competent to consent to the conflict; (2) the conflict was unwaivable; and (3) the state failed to satisfy its burden because there was no record made of the waiver.

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[9] Defense counsel's self-serving statements that he relied on Nathan's denial of abuse do not excuse his failure to investigate, because he knew family dynamics were likely to be important and the duty to investigate all potential defenses exists regardless of what the defendant says. (Tr.2/23/09;206:22 to 207:3.)

First, Nathan was a minor at the time of trial, and thus legally incompetent. *See* § 13-22-101, C.R.S. (2014). While a minor may waive a constitutional right under certain circumstances, such a waiver is valid only if the minor has had an opportunity to consult with an independent adviser. *See People in Interest of J.F.C.*, 660 P.2d 7, 8 (Colo. App. 1982). "[O]f critical significance to any knowing and intelligent waiver of a constitutional right by a juvenile is the presence of the parent. . . . However, it is not sufficient to have the presence of a parent when that parent is unable to function in the adviser role or if the parent's interests are adverse to that of the child." *Id.* Absent the involvement of the court or an impartial adult, there could be no waiver.

Second, even if Nathan were competent to waive his right to conflict-free counsel, this conflict was unwaivable. Rule 1.7(c) establishes that a conflict of interest cannot be waived if "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation." As ethics expert Ms. Glenn testified, any disinterested attorney would recognize that an attorney hired and paid by Roger would be materially limited in his ability to represent Nathan because of the financial relationship with Roger and because of the conflict between Nathan and Roger. (Tr.2/23/09;81:4-9, 83:16-84:18.) In addition to being split between two masters, the relationship between

Nathan and defense counsel was further compromised by Nathan's distrust of and resentment towards his abusive father, which defense counsel acknowledged limited his ability to represent Nathan. (Tr.2/25/09;8:6-10:7.) There could be no reasonable belief that counsel's representation would be unaffected, and the conflict was unwaivable.

Third, even if Nathan could have consented to the conflict, the state failed to present any evidence that Nathan ever provided informed consent after being sufficiently informed about the nature and potential effect of the conflict. "The burden of affirmatively demonstrating a waiver of such a fundamental right [as conflict free counsel] rests upon the prosecution and will not be presumed from a silent record." *Castro*, 657 P.2d at 944. A "valid waiver is shown only if the prosecution establishes that the defendant was aware of the conflict and its likely effect on the attorney's ability to offer effective representation and that the defendant thereafter voluntarily, knowingly and intelligently relinquished his right to conflict-free representation." *Id.* at 945-46.

Although defense counsel testified that he advised Nathan of the conflict, the waiver was never placed on the record, nor did it sufficiently advise Nathan of the potential effects of the conflict. When there is a "potential conflict," the lawyer must "in plain terms, describe the specific ways in which the conflict may affect

the attorney's ability to effectively represent the defendant at various stages of the pending litigation." *Id.* at 946 n.10. To meet this requirement, defense counsel should have clearly explained to Nathan all of the limits that his relationship with Roger might place on his representation of Nathan:

> [Defense counsel] should have gotten very specific about what this conflict could have kept him from doing, what alternatives it could have foreclosed, what somebody looking at this from the outside might be concerned about if [defense counsel] were going to represent Nathan, the possibility that [defense counsel] might not have been able to meaningfully cross-examine [Roger] . . . , the possibility that [defense counsel] might not have felt comfortable developing a defense theme that Nathan Ybanez came from a very troubled home and was subject to a very difficult, some might say abusive, relationship with his father . . . – that Nathan Ybanez might have been afraid of his father.

(Tr.2/23/09;91:4-23.) By his own admission, defense counsel explained none of these things. (Tr.2/24/09;37:19-40:3.) At most, he made a general statement acknowledging that a conflict existed. (*Id.* at 37:19-38:4.) He then promptly downplayed the importance of the conflict by explaining that Nathan was the client. *Id.* This is not sufficient to satisfy the requirement that Nathan was informed about the conflict.

Even more critically, however, no evidence of this purported waiver was placed on the record, nor did defense counsel have a single note in his file

reflecting a waiver. Under identical circumstances with *adult* defendants, this Court has refused to find a waiver. *See Castro*, 657 P.2d at 944 ("waiver of such a fundamental right . . . will not be presumed from a silent record"); *People v. Miera*, 183 P.3d 672, 678-79 (Colo. App. 2008).

Finally, defense counsel's failure to adequately advise Nathan regarding the conflict and place the waiver on the record is additional evidence of the adverse effect necessary to establish ineffective assistance of counsel. The law and expert testimony at the hearing established the obligation of defense counsel and the court to adequately advise defendants of conflicts and to detail their potential consequences. They also require that such waivers be put on the record in court. The failure to follow these steps constitutes an adverse effect in and of itself. *People v. Delgadillo*, 275 P.3d 772, 779 (Colo. App. 2012) (finding conflict adversely affected representation because trial counsel failed to put conflict waiver on the record).

C. *Strickland* does not apply, but even under *Strickland*, defense counsel was ineffective.

As explained above, to prove ineffective assistance, Nathan needed to establish only the existence of a conflict and an adverse effect. *See West*, ¶ 28. Defense counsel's shortcomings in this case are so egregious, however, that they also satisfy the more onerous *Strickland* standard—that there is a reasonable

probability that, but for counsel's deficient performance, the result would have been different. 466 U.S. at 694.

1. *Strickland* does not apply.

The United States Supreme Court has created two tests for determining whether counsel was ineffective: *Sullivan* and *Strickland*. *See West*, ¶ 36 n.8. *Sullivan* applies where the claim of ineffective assistance is based on a conflict of interest. *Strickland* applies where there is no conflict of interest, and the claim of ineffective assistance is based on counsel's deficient performance.

The state argued below that *Sullivan* does not apply to conflicts based on financial interest. (Ans. Br. at 42-44.) This is wrong. The United States Supreme Court has already determined that *Sullivan* governs claims of ineffective assistance based on conflicts arising from a third-party's payment of legal fees. *Wood*, 450 U.S. at 271-74 (applying *Sullivan* to a claim for ineffective assistance where an employer hired a lawyer to represent its employees); *see Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (recognizing that *Wood* used the *Sullivan* framework).

Although the Supreme Court later noted in *Mickens* that certain lower courts were applying *Sullivan* too broadly, 535 U.S. at 175, *Mickens* discussed *Wood* at length without ever suggesting that *Sullivan* did not apply to the conflict at issue there. And, after *Mickens*, courts around the country have continued to follow

Wood and apply *Sullivan* to claims of ineffective assistance based on third-party payment conflicts. *E.g., Amiel*, 209 F.3d at 198-99; *Lomax v. Missouri*, 163 S.W.3d 561, 564-65 (Mo. Ct. App. 2005); *see West*, ¶ 34 n.7 (relying on the rationale of *Wood* to explain why *Sullivan* was not limited to cases of concurrent representation of co-defendants). Based on this jurisprudence, it is clear that *Sullivan* applies to the conflict asserted here.

2. Even under *Strickland*, defense counsel was ineffective.

Under *Strickland*, a defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. 466 U.S. at 694. In this case, defense counsel's shortcomings fell so "incredibly below the standards" of a competent attorney, that they satisfy this standard, too. (Tr.2/25/09:111:17-24, 117:16-21, 127:8-14, 138:21-139:8, 154:10-159:1, 161:17-162:11 (expert testimony that defense counsel was ineffective).)

Chief among defense counsel's deficiencies was his complete failure to investigate a potential defense that Nathan snapped due to a lifetime of abuse. "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.'" *People v. White*, 514 P.2d 69, 71 (Colo. 1973) (quoting ABA Standard 4.1). Counsel's performance is deficient when he fails to investigate

mitigating evidence. *See Jacobs v. Horn*, 395 F.3d 92, 101-06 (3d Cir. 2005) (finding ineffective assistance under *Strickland* where trial counsel failed to investigate and present mental health evidence to support lack of intent defense). Without investigation, "defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client." *White*, 514 P.2d at 71.

In this case, despite all of the evidence of abuse and turmoil in the discovery, defense counsel did not conduct a single witness interview or request a single record to assess this defense. As a result of his failure to investigate, defense counsel missed evidence that he admitted could have helped Nathan's defense, including that there was so much family turmoil that Nathan had contemplated suicide as a young child. (Tr.2/23/09:246:14-249:6); *Miller*, 132 S.Ct. at 2469 (citing the fact that defendant considered suicide at a young age as an important and potentially mitigating fact).

Without this evidence, the state's case that Nathan acted after deliberation went almost entirely uncontested. Defense counsel did not cross-examine multiple witnesses; did not make a single trial objection; and did not even challenge the testimony of Roger Ybanez—which counsel knew to be false—that the Ybanez household was normal. As a result, defense counsel could not explain to the jury

why Nathan, a child with no history of violence and no clear motive, nevertheless participated in this violent crime. The failure to investigate and resulting inability to attack the state's theory of the case—that Nathan acted after deliberation—constitutes ineffective assistance of counsel under *Strickland*. *See Ard v. Catoe*, 642 S.E.2d 590, 597-98 (S.C. 2007) (ineffective assistance where adequate investigation would have precluded the prosecution from "attack[ing] the defense theory as convincingly as it did"). Had defense counsel pursued this course, there is a reasonable probability that the jury would have acquitted Nathan of first-degree murder.

III. NATHAN'S SENTENCE IS UNCONSTITUTIONAL.

If this Court concludes that Nathan is entitled to a new trial, it need not reach this issue. If not, then it must review the court of appeals' instruction that Nathan be resentenced to life in prison with the possibility of parole after forty years. Under this Court's recent decision in *People v. Tate*, 2015 CO 42, ¶ 51, Nathan's case must be remanded for a new sentencing hearing to determine whether the appropriate sentence is life without the possibility of parole (LWOP) or life with the possibility of parole after forty years (LWPP). Nathan, however, challenges this remand on two grounds. First, it violates Article II, section 20 of the Colorado

Constitution. Second, it violates the Eighth Amendment to the United States Constitution.

Standard of Review and Preservation. Nathan argued at his resentencing hearing that LWOP was an unconstitutional sentence. (Tr.5/20/11;5:5-6:6, 9:14-23.) "Review of constitutional challenges to sentencing determinations is de novo." *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005), *as modified on denial of reh'g* (June 27, 2005).

A. Under *Tate*, Nathan must receive an individualized sentencing hearing.

At the time he was convicted, Colorado law instructed that Nathan receive a mandatory LWOP sentence. In this proceeding, Nathan challenged the constitutionality of that sentence. While this case was pending before the court of appeals, the United States Supreme Court announced its decision in *Miller v. Alabama*, holding that the Eighth Amendment to the United States Constitution prohibited mandatory LWOP sentences for juveniles. Following *Miller v. Alabama*, the court of appeals vacated Nathan's sentence and ordered that he be resentenced to LWPP. (*Ybanez*, slip op. at 17.)

In the meantime, this Court reached its decision in *Tate*. In that case, the Court addressed juveniles who had received LWOP sentences during the same period as Nathan. The Court determined that, for those juveniles still on direct

appeal, mandatory LWOP sentences must be vacated and they should receive individualized re-sentencings on whether they should receive LWOP or LWPP.

Because Nathan's case is currently on direct appeal, he should receive this individual resentencing. However, as discussed below, Nathan also challenges the constitutionality of such a resentencing.

B. LWOP for juveniles violates the Colorado Constitution.

In *Miller v. Alabama*, the United States Supreme Court did not reach the question of whether an LWOP sentence categorically violates the United States Constitution for juveniles; however, in *Tate*, this Court determined that LWOP was not categorically prohibited for juveniles by the United States Constitution. Nathan contends here, however, that this sentence is categorically prohibited by the Colorado Constitution.

Article II, section 20 of the Colorado Constitution provides more protection from "cruel and unusual punishments" than does the Eighth Amendment, even though the provisions are identically worded. *People v. Young*, 814 P.2d 834, 841-43 (Colo. 1991), *superseded by statute on other grounds*, Laws 1993, Ch. 292 Sec. 8. Accordingly, this Court must "engage in an independent analysis of state constitutional principles." *Id.* at 842; *People v. Rister*, 803 P.2d 483, 495 (Colo.

1990) (Quinn, J., dissenting) (the court "has an affirmative duty to engage in an independent analysis of state constitutional principles").

A sentencing scheme that includes the possibility of an LWOP sentence for a juvenile violates Colorado's constitutional prohibition on "cruel and unusual punishments." LWOP sentences for juveniles violate the prohibition on "cruel and unusual punishments" because they are "offensive to contemporary standards of decency," as measured by "contemporary community values." *People v. Davis*, 794 P.2d 159, 172 (Colo. 1990), *overruled on other grounds*, *People v. Miller*, 113 P.3d 743 (2005). In 2006, the citizens of Colorado amended the sentencing statute to eliminate LWOP sentences for juveniles. In doing so, they clearly expressed that such sentences are offensive to Coloradans' contemporary standards of decency, and therefore, violate the prohibition against cruel and unusual punishments. *See* § 18-1.3-401(4)(b), C.R.S. (2014); *Davis*, 794 P.2d at 172 ("Since contemporary community values are the test, [the citizens'] view must be accepted as the standard by which to measure a claim that [a sentence is] offensive to contemporary standards of decency in Colorado.").

Tellingly, when outlawing the imposition of LWOP sentences for juvenile offenders, the legislature made specific findings concerning the "contemporary community values" of Coloradans concerning such sentences:

> (1) The general assembly hereby finds that:
> ....
> (c) Because of their level of physical and psychological development, juveniles who are convicted as adults may, with appropriate counseling, treatment services, and education, be rehabilitated to a greater extent than may be possible for adults whose physical and psychological development is more complete when they commit the crimes that result in incarceration;
>
> (d) A sentence to lifetime imprisonment without the possibility of parole for a juvenile who is convicted as an adult of a class 1 felony condemns the juvenile to a lifetime of incarceration without hope and, in most cases, without education or rehabilitation services, and results in the irredeemable loss of a person to society.
>
> (2) The general assembly finds, therefore, that it is not in the best interests of the state to condemn juveniles who commit class 1 felony crimes to a lifetime of incarceration without the possibility of parole. Further, the general assembly finds that it is in the interest of justice to recognize the rehabilitation potential of juveniles who are convicted as adults of class 1 felonies by providing that they are eligible for parole after serving forty calendar years of their sentences.

Laws 2006, Ch. 228 Sec. 1. This declaration by the legislature—particularly its findings that LWOP sentences for juveniles are "not in the best interests of the state" and are contrary to "the interest of justice"—leaves no doubt that Colorado's "contemporary standards of decency" preclude such sentences. This Court should therefore follow the "judgment of the legislature and of the people" on the suitability of LWOP for juveniles. *See Davis*, 794 P.2d at 172.

C. Both LWOP and mandatory LWPP violate the Eighth Amendment to the United States Constitution.

In *Tate*, this Court determined that the United States Constitution did not prohibit an LWOP sentence for juveniles after an individualized sentencing hearing, nor did it prohibit a mandatory LWPP sentence. *Tate*, ¶¶ 37, 51. Although these issues have now been resolved by this Court, they have not been resolved by the United States Supreme Court. *Miller*, 132 S.Ct. at 2469. Nathan raises these arguments in order to preserve them for review by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, Petitioner Nathan Ybanez respectfully requests that this Court vacate his conviction and remand this case for a new trial. In the alternative, he requests that the Court vacate his sentence and remand for an individualized resentencing that precludes the possibility of an LWOP or mandatory LWPP sentence.

Dated: June 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 29, 2015, a true and correct copy of the foregoing was filed and served via ICCES on:

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ADDENDUM

1. § 19-2-517, C.R.S. (1998)

2. Colo. RPC 1.7 (1998)

3. Colo. RPC 1.8 (1998)

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nile offender (§ 19-1-103 (23.5)) that would require one of the previous adjudications to be based on a felony. People in Interest of R.R., 43 Colo. App. 208, 607 P.2d 1013 (1979).

The violent juvenile offender statute does not create a separate and distinct offense; rather, it is a dispositional statute associated with the underlying delinquent act and thus does not violate this constitutional guarantee of equal protection. People in Interest of D.G., 725 P.2d 1166 (Colo. App. 1986).

Juvenile's right to equal protection was not violated by trial court's refusal to grant juvenile, who was charged as being a violent juvenile offender, five rather than four peremptory challenges where juvenile failed to show that there was unequal treatment within the class of violent juvenile offenders. Although an aggravated juvenile offender is entitled to five peremptory challenges under former § 19-2-804 (4)(b)(I) (now 19-2-601 (3)(b)(I)), the elements constituting an aggravated juvenile offender differ from those constituting a violent juvenile offender. People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

Although violent juvenile offender was granted four rather than the five peremptory challenges awarded to an aggravated juvenile offender, violent juvenile offender's right to equal protection was not violated where the elements constituting an aggravated juvenile offender differ from those constituting a violent juvenile offender. People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

19-2-517. Direct filing - repeal. (1) (a) A juvenile may be charged by the direct filing of an information in the district court or by indictment only when:

(I) The juvenile is fourteen years of age or older and is alleged to have committed a class 1 or class 2 felony; or

(II) The juvenile is fourteen years of age or older and:

(A) Is alleged to have committed a felony enumerated as a crime of violence pursuant to section 16-11-309, C.R.S.; or

(B) Is alleged to have committed a felony offense described in article 12 of title 18, C.R.S., except for the possession of a handgun by a juvenile, as set forth in section 18-12-108.5, C.R.S.; or

(C) Is alleged to have used, or possessed and threatened the use of, a deadly weapon during the commission of felony offenses against the person, which are set forth in article 3 of title 18, C.R.S.; or

(D) Is alleged to have committed vehicular homicide, as described in section 18-3-106, C.R.S., vehicular assault, as described in section 18-3-205, C.R.S., or felonious arson, as described in part 1 of article 4 of title 18, C.R.S.; or

(III) The juvenile has, within the two previous years, been adjudicated a juvenile delinquent for a delinquent act that constitutes a felony, is sixteen years of age or older, and allegedly has committed a crime defined by section 18-1-105, C.R.S., as a class 3 felony, except felonies defined by section 18-3-403 (1) (e), C.R.S.; or

(IV) The juvenile is fourteen years of age or older, has allegedly committed a delinquent act that constitutes a felony, and has previously been subject to proceedings in district court as a result of a direct filing pursuant to this section or a transfer pursuant to section 19-2-518; except that, if a juvenile is found not guilty in the district court of the prior felony or any lesser included offense, the subsequent charge shall be remanded back to the juvenile court; or

(V) The juvenile is fourteen years of age or older, has allegedly committed a delinquent act that constitutes a felony, and is determined to be an "habitual juvenile offender". For the purposes of this section, "habitual juvenile offender" is defined in section 19-1-103 (61).

(b) The offenses described in subparagraphs (I) to (V) of paragraph (a) of this subsection (1) shall include the attempt, conspiracy, solicitation, or complicity to commit such offenses.

(2) Notwithstanding the provisions of section 19-2-518, after filing charges in the juvenile court but prior to the time that the juvenile court conducts a transfer hearing, the district attorney may file the same or different charges against the juvenile by direct filing of an information in the district court or by indictment pursuant to this section. Upon said filing or indictment in the district court, the juvenile court shall no longer have jurisdiction over proceedings concerning said charges.

(3) (a) Whenever criminal charges are filed by information or indictment in the district court pursuant to this section, the district judge shall sentence the juvenile as follows:

(I) As an adult; or

(II) To the youthful offender system in the department of corrections in accordance with section 16-11-311, C.R.S., if the juvenile is convicted of an offense described in sub-

paragraph (II) or (V) of paragraph (a) of subsection (1) of this section; except that, if a person is convicted of a class 1 or class 2 felony, any sexual offense described in section 18-6-301 or 18-6-302, C.R.S., or part 4 of article 3 of title 18, C.R.S., or a second or subsequent offense described in said subparagraph (II) or (V) for which such person received a sentence to the department of corrections or to the youthful offender system, such person shall be ineligible for sentencing to the youthful offender system; or

(III) Pursuant to the provisions of this article, if the juvenile is less than sixteen years of age at the time of commission of the crime and is convicted of an offense other than a class 1 or class 2 felony, a crime of violence as defined under section 16-11-309, C.R.S., or an offense described in subparagraph (V) of paragraph (a) of subsection (1) of this section and the judge makes a finding of special circumstances.

(b) Subparagraph (II) of paragraph (a) of this subsection (3) and this paragraph (b) are repealed, effective June 30, 1999.

(c) The district court judge may sentence a juvenile pursuant to the provisions of this article if the juvenile is convicted of a lesser included offense for which criminal charges could not have been originally filed by information or indictment in the district court pursuant to this section.

(4) In the case of any person who is sentenced as a juvenile pursuant to subsection (3) of this section, section 19-2-908 (1) (a), regarding mandatory sentence offenders, section 19-2-908 (1) (b), regarding repeat juvenile offenders, section 19-2-908 (1) (c), regarding violent juvenile offenders, and section 19-2-601, regarding aggravated juvenile offenders, shall apply to the sentencing of such person.

(5) The court in its discretion may appoint a guardian ad litem for any juvenile charged by the direct filing of an information in the district court or by indictment pursuant to this section.

Source: L. 96: Entire article amended with relocations, p. 1640, § 1, effective January 1, 1997.

Editor's note: This section was formerly numbered as 19-2-805.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

District attorney may properly invoke concurrent jurisdiction of district court under former § 19-1-104 (4)(b)(II) and former § 19-1-103 (9)(b)(II) in deciding to proceed against a person between the ages of 16 and 18 in district rather than juvenile court. Myers v. District Court, 184 Colo. 81, 518 P.2d 836 (1974).

Former § 19-1-104 (4)(b)(II) (similar provisions now found in this section) is not an ex post facto law. Myers v. District Court, 184 Colo. 81, 518 P.2d 836 (1974).

And does not deny due process or equal protection. The broad discretion granted to a district attorney by subsection (4)(b)(II) does not deny due process and equal protection of the laws. Myers v. District Court, 184 Colo. 81, 518 P.2d 836 (1974).

Former § 19-1-104 (4)(b)(II) (similar provisions now found in this section) does not punish a prior adjudication of delinquency, but rather, it provides a mechanism whereby a person between the ages of 16 and 18 may be treated as an adult if such person has a record of juvenile delinquency and is alleged to have committed a felony. Myers v. District Court, 184 Colo. 81, 518 P.2d 836 (1974).

District attorney may properly invoke concurrent jurisdiction of district court under former § 19-1-104 (4)(b)(II) (similar provision now found in this section) and former § 19-1-103 (9)(b)(II) in deciding to proceed against a person between the ages of 16 and 18 in district rather than juvenile court. Myers v. District Court, 184 Colo. 81, 518 P.2d 836 (1974); People v. Thorpe, 641 P.2d 935 (Colo. 1982).

Allegation of the commission of a violent felony, and not conviction, triggers district court's subject matter jurisdiction under plain language of former § 19-2-805 (1)(a)(II)(A) (now in this section). People v. Hughes, 946 P.2d 509 (Colo. App. 1997).

District attorney has sole discretion in charging as adult or juvenile. The statutory scheme of former § 19-1-104 (4) (now this section) is clear and vests the determination whether a person shall be charged as an adult or a juvenile solely in the discretion of the district attorney. People v. Thorpe, 641 P.2d 935 (Colo. 1982).

And hearing not required prior to criminal prosecution. A quasi-judicial hearing is not required to be held by the district attorney as a precondition to his determination that a child 14 years of age or older alleged to have committed a crime of violence defined as a class 1 felony shall be prosecuted in a criminal proceeding. People v. Thorpe, 641 P.2d 935 (Colo. 1982).

The district attorney may not directly file charges in district court where the identical charges were initially filed in juvenile court and a transfer hearing is pending. (Decided prior to amendment of § 19-2-104 (1)(b) specifically authorizing direct filing under such circumstances.) J.D.C. v. District Court Eightnth. Jud. Dist., 910 P.2d 684 (Colo. 1996).

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21 Colo. Law. 469 (1992). For formal opinion of the Colorado Bar Association Ethics Committee on Preservation of Client Confidences in View of Modern Communications Technology, see 22 Colo. Law. 21 (1993).

Prevailing rule is that it will be presumed that confidences were reposed where an attorney-client relationship has been shown to have existed. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Ethical obligation to preserve client confidences continues after termination of attorney-client relationship. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Trustee in bankruptcy succeeds to a debtor's right to assert or waive the attorney-client privilege. In re Inv. Bankers, Inc., 30 Bankr, 883 (Bankr. D. Colo. 1983).

Crime-fraud exception to attorney-client privilege recognized. The code of professional responsibility recognizes the crime-fraud exception to the attorney-client privilege and work-product doctrine. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982).

Bald assertion insufficient to warrant disqualification of district attorney. Bald assertion by defendant that he made confidential statements to the prosecutor during the existence of a prior attorney-client relationship was insufficient to warrant disqualification of the district attorney. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

An accused seeking to disqualify a prosecutor because of prior representation of a co-defendant by a member of the prosecutor's former firm must show that either the prosecutor or the firm member, by virtue of the prior professional relationship with the co-defendant, received confidential information about the accused which was substantially related to the pending criminal action. McFarlan v. District Court, 718 P.2d 247 (Colo. 1986).

It is no abuse of discretion for court to order public defender to withdraw from a defendant's case where public defender's prior representation of a prosecution witness and his present representation of defendant created a conflict of interest. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986); People v. Reyes, 728 P.2d 349 (Colo. App. 1986).

Prior employment of plaintiff's attorney by defendant does not disqualify the attorney where the instant case is not substantially related to any matter in which the attorney previously represented the defendant. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1984).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client, aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister 814 P.2d 801 (Colo. 1991).

An attorney must disclose information to the court in camera if ordered to do so. People v. Salazar, 835 P.2d 592 (Colo. App. 1992).

Applied in People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Smith, 778 P.2d 685 (Colo. 1989).

Rule 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

Source: Committee comment amended October 17, 1996, effective January 1, 1997.

COMMENT

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is

undertaken, in which event the representation should be declined.

If such conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict, but only after consultation which involves full disclosure of the possible effect of such dual representation on the exercise of the lawyer's independent professional judgment on behalf of each client. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it

may be improper to do so in cases pending at the same time in the appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8 (f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

COMMITTEE COMMENT

The rule adopted is identical to Model Rule 1.7 except for section (c) which the Committee felt was necessary in order to provide more protection for a client whose consent is sought as a way of resolving a conflict of interest between the lawyer and client. The addition states that consent should not be obtained from a client in a situation in which a disinterested lawyer would advise the client not to agree to the representation.

For a discussion of the ethical ramifications of sexual relationships between a lawyer and a client see the committee comment to Rule 8.4.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993).

Annotator's note. Since Rule 1.7 is similar to DR 5-101, DR 5-102, DR 5-104, DR 5-105, and DR 5-107 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility, relevant cases construing those provisions have been included in the annotations to this rule.

Where counsel simultaneously represented company's interests as well as those of company's employees for a substantial period of time and the representation continued through the emergence of conflicts, counsel could continue to represent company because the company and the former clients, the employees, through counsel, con-

Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Castro, 657 P.2d 932 (Colo. 1983); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. McDowell, 718 P.2d 541 (Colo. 1986).

Cases Decided Under Former DR 5-107.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

Rule 1.8. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is informed that use of independent counsel may be advisable and is given a reasonable opportunity to seek the advice of such independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse or as one who has a cohabiting relationship shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

COMMENT

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Relationships Between Lawyers

Paragraph (i) applies to related and cohabiting lawyers who are in different firms. Such lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Limiting Liability

This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

COMMITTEE COMMENT

Section (a)(2) of the Model Rule was amended by the Committee because it was felt that the Model Rule was not clear enough when it stated simply that a client should be given "reasonable opportunity" to consult with independent counsel in a conflict situation such as (a) contemplates. The Committee version adds the clarifying precaution that a client in such a situation should be told that "the use of independent counsel may be advisable."

Section (h) allows a lawyer to limit liability where such limitation is lawful and has been negotiated with a client who is independently represented.

Finally, both the rule (section i) and the comment thereto were amended to add "a cohabiting relationship" to the list of familial relationships in which disclosure and consent are needed prior to representation.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993).