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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 11CA434	
Petitioner, NATHAN GAYLE YBANEZ, v. Respondent, THE PEOPLE OF THE STATE OF COLORADO.	▲ **COURT USE ONLY** ▲ Case No. 14SC190
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief does not comply with C.A.R. 28(g) or C.A.R. 28.1 because it exceeds the word and/or page limit. A motion to accept the over length brief has been filed contemporaneously with the brief. The brief contains 14,685 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the Respondent provided under a separate heading before the discussion of the issue, a statement indicating whether Respondent agrees with Petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ John T. Lee

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ISSUES ANNOUNCED BY THE COURT

I. 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.

II. 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.

III. 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.

IV. Whether the court of appeals erred according to *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), in instructing the district court to resentence petitioner to life in prison with no possibility of parole until after forty years.

INTRODUCTION

The defendant, Nathan Ybanez, and his amicus, devote most of their briefing to the argument that the postconviction court erred in rejecting his claim that the trial court should have appointed him a guardian ad litem. That contention is wrong. But equally important, those arguments ignore the question of whether the postconviction court should have even considered that claim. Because the defendant failed to assert his guardian ad litem claim in his petition for postconviction relief, both the district court and the court of appeals erred in reviewing it.

In the event this Court concludes that the defendant did not waive his claim, it should hold that plain error review applies. The defendant takes the position that, if the postconviction court addressed his

guardian ad litem claim, a reviewing court must turn a blind eye to the question of whether an objection was raised when the alleged error occurred. That is not how preservation works. The only way for plain error to serve its purpose of encouraging contemporaneous objections is if it applies to unpreserved trial errors under both direct and postconviction review.

On the legal merits, this case, in its broadest terms, does not present the question of whether the General Assembly should decide, as a prudential matter, that a juvenile in a direct file proceeding should always be appointed a guardian ad litem. The operative question is whether a juvenile in a criminal trial must be appointed *both* an attorney and a separate guardian ad litem. The defendant has not cited a case holding that the Constitution requires that a guardian ad litem must be appointed in a direct file criminal trial involving a mentally competent juvenile who has counsel. That is likely because no court ever has. Rather, consistent with the reality that a juvenile's due process rights are protected by counsel, there is no separate requirement that a juvenile must also have a guardian ad litem.

On the factual merits, the defendant's guardian ad litem claim fares no better. The defendant's arguments turn on the basic refrain that the trial court should have appointed him a guardian ad litem because there was a conflict of interest between him and his father and because in turn, his attorney also had an actual conflict of interest due to being retained by his father. But the record overwhelmingly supports the trial court's factual findings rejecting both contentions.

In a similar vein, the defendant has not established that his attorney acted under an actual conflict of interest. The Rules of Professional Conduct, applicable case law, and the record all foreclose the defendant's claim that there was an actual conflict of interest in this case. The record establishes that the defendant's trial attorney accepted the case only on the condition that he would represent the defendant and not his father. Moreover, though the defendant argues that counsel was unable to live up to that agreement because his own financial interests bound his loyalty to the defendant's father, that argument fatally ignores that the defendant's father was unable to pay counsel after the preliminary hearing and counsel stayed on the case only at the

defendant's insistence and without receiving additional payment. The record amply supports the trial court's conclusion that the defendant's trial attorney did not act under an actual conflict of interest.

Under *Tate*, the defendant is entitled to a sentencing hearing. At the hearing, the trial court should consider whether the defendant's original sentence of life without the possibility of parole remains appropriate.

STATEMENT OF THE CASE

I. The Murder

After months of concern over the defendant's increasingly bad behavior and friendship with EJ and BB, the defendant's mother decided to send him to military school (R.Tr.10/20/99, pp. 104-06). She packed her car with food, water, and the defendant's clothes (R.Tr.10/20/99, pp. 106-07, 116). That same morning, the defendant's father, who was no longer living with the defendant and the defendant's mother, arrived at the house to help take the defendant to military school (R.Tr.10/20/99, p. 106).

But when the defendant's father arrived, he told the defendant that his mother wanted to send him to military school (R.Tr.10/20/99, p. 107). The defendant's father explained to the defendant that he wanted to give him one more chance before sending him to military school, but he wanted the defendant to stop hanging out with his friends (R.Tr.10/20/99, pp. 107-08). After having lunch with his father, the defendant went to work (R.Tr.10/20/99, p. 108).

At work, the defendant's girlfriend visited him (R.Tr.10/20/99, p. 77). The defendant told her that his parents were possibly taking him to military school and that he was "upset" because he did not want to go (R.Tr.10/20/99, p. 77). Later in the afternoon, when BB visited him at work, the defendant told his friend that his father had stopped his mother from sending him to military school that morning, but he was concerned "she was going to try to send him away" when he got home from work (R.Tr.10/20/99, p. 137). The defendant told BB he was "going to kill her" (R.Tr.10/20/99, p. 137). Although the defendant had made similar comments before, this instance was unusual, because the

defendant added that EJ was involved and was "scared shitless" (R.Tr.10/20/99, p. 138).

BB did not hear from the defendant again until 9:00 p.m. (R.Tr.10/20/99, p. 139). In a panicked voice, the defendant told BB over the phone to hurry up and come over to his apartment (R.Tr.10/20/99, pp. 140-41). When BB arrived, he found the defendant scrubbing blood out of the carpet (R.Tr.10/20/99, p. 141). EJ, also at the apartment, told BB to "chill out" (R.Tr.10/20/99, p. 142).

The defendant told BB he killed his mother by hitting her in the head three times with a fire place tool (R.Tr.10/20/99, p. 151). The third time he hit his mother with the tool it went through her skull and got stuck in her head (R.Tr.10/20/99, p. 151). He yanked it out "and that's how blood got on the ceiling" (R.Tr.10/20/99, p. 151).

As they cleaned up the blood, EJ and the defendant told BB that they wanted to make it look like they grabbed their belongings and left town (R.Tr.10/20/99, p. 144). Once they finished, they went to a gas station, and EJ bought a small red gas container and filled it up with gas (R.Tr.10/20/99, p. 146). The plan was to burn and bury the

defendant's mother's body (R.Tr.10/20/99, p. 147). EJ and BB put the defendant's mother's body in her car and left the defendant to dispose of the body (R.Tr.10/20/99, p. 150). In the early morning hours of June 6, 1998, an officer discovered the defendant unloading his mother's dead body from a car at Daniel's Park (R.Tr.10/20/99, pp. 48-51).

At trial, the defense argued that the defendant's actions were driven by EJ (R.Tr.10/21/99, pp. 20-28). The defense argued that because the defendant was only acting at EJs behest, he should be found guilty of murder in the second degree and not the first degree because he did not act after deliberation (R.Tr.10/21/99, p. 28).

II. The Verdict

Following trial, the jury convicted the defendant of murder in the first degree (PR.Vol.1, p. 155). The trial court sentenced him to life without the possibility of parole (PR.Vol.1, p. 155). He never filed a direct appeal.

III. Postconviction Proceedings

Through counsel, the defendant filed a petition for postconviction relief alleging that he received the ineffective assistance of counsel and

that his sentence amounted to cruel and unusual punishment (PR.Vol.2, pp. 170-351). Against his trial counsel, Craig Truman, the defendant asserted "ineffective assistance of counsel on three grounds: (1) that his attorney labored under an actual conflict of interest; (2) that his trial attorney's performance was constitutionally deficient and the deficiency resulted in actual prejudice; and (3) that trial counsel failed to perfect Nathan's right to appeal his conviction [on direct appeal], despite an instruction from Nathan that he do so" (PR.Vol.2, p. 188) (internal parenthetical omitted). Additionally, the defendant contended that his sentence of life without the possibility of parole based on acts committed as a juvenile amounted to cruel and unusual punishment (PR.Vol.2, p. 192).

Although not raised in his original postconviction motion, at the postconviction hearing the defense presented evidence through its expert witness, James Aber, that a guardian ad litem might have mitigated some of the alleged conflicts between the defendant, his attorney, and his father (R.Tr.2/25/09, p. 167). For the first time in his closing brief, the defendant argued that a guardian ad litem should

have been appointed to help him decide whether to have Mr. Truman or the public defender represent him (PR.Vol.3, pp. 544-46).

But at the hearing, the evidence established that when the defendant's father approached Mr. Truman about representing his son, Mr. Truman advised the defendant's father that he would only represent the defendant's interests (R.Tr.2/24/09, p. 38). As such, Mr. Truman never believed his representation of the defendant would be limited (R.Tr.2/24/09, p. 175). Nevertheless, he advised the defendant about the potential conflict, and the defendant consented (R.Tr.2/24/09, p. 175).

Mr. Truman and the defendant's father entered into an engagement letter, where, in addition to costs, Mr. Truman was to receive $45,000 within fourteen days from the engagement letter and an additional $45,000 at a later date (PR.Vol.14, Exhibit WW). Mr. Truman received some funds towards the original payment due (R.Tr.2/23/09, p. 183). But after an initial payment was made and after the preliminary hearing, the defendant's father told Mr. Truman that he would be unable to pay him any more money to represent the

defendant (R.Tr.2/24/09, p. 38; R.Tr.2/26/09, pp. 54-56). The defendant's father explained to Mr. Truman that he would understand if he withdrew from the case (R.Tr.2/26/09, p. 56). Mr. Truman told the defendant that he would "withdraw and ask the public defender to represent him" (R.Tr.2/24/09, p. 38). But because the defendant asked him "to please stay on the case," Mr. Truman agreed (R.Tr.2/23/09, p. 38).

Following a three day hearing, the district court denied the defendant's motion in a written order (PR.Vol.4, pp. 725-42). The trial court rejected the defendant's argument that, because his attorney was hired by his father, the attorney represented the defendant under an actual conflict of interest (PR.Vol.4, p. 729). According to the court, there was no conflict and, even if there was, the defendant waived it (PR.Vol.4, p. 729). The court also found that the defendant's sentence was not unconstitutional (PR.Vol.4, pp. 741-42). However, because the court found that trial counsel did not adequately advise the defendant of his direct appeal right, the court reinstated the defendant's right to file a direct appeal (PR.Vol.4, pp. 719-720).

The trial court's order did not specifically address the guardian ad litem claim. But in the order's conclusion, the trial court denied "all assertions" with the exception that his counsel should have filed a direct appeal[1] (PR.Vol.4, p. 742).

IV. Court of Appeals' decision

The defendant filed a consolidated appeal challenging the postconviction court's order and raising a direct appeal claim challenging his sentence. *See People v. Ybanez*, No. 11CA434 (Colo. App. Feb. 13, 2014) (not published pursuant to C.A.R. 35(f)).

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[1] At the postconviction hearing, Mr. Truman explained that he did not file a direct appeal because there was "very little chance of success," and he believed that the United States Supreme Court would ultimately deem unconstitutional mandatory life without parole sentences for juveniles, and he wanted the defendant to be able to "take advantage of any change in the law" (R.Tr.2/23/09, p. 202). Thus, he believed that his failure to file a direct appeal would allow the defendant to later file a direct appeal, thus entitling him to the benefit of a new sentencing rule (R.Tr.2/23/09, pp. 202-03). *Compare Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) ("[m]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'"), *with People v. Tate*, 2015 CO 42, ¶ 10 (holding that *Miller* does not apply retroactively to cases on collateral review).

A division of court of appeals found that the defendant did not raise his guardian ad litem issue at trial or in his initial Crim. P. 35(c) motion. *Id.* at *3. According to the division, however, because it was "the subject of testimony at the hearing," and "was raised in defendant's posthearing briefing," the defendant preserved the issue for review under plain error. *Id.* The division concluded that the trial court did not err in failing to provide the defendant with a guardian ad litem. *See id.* at *6.

The division also affirmed the trial court's findings that the defendant's attorney did not have an actual conflict of interest and that his performance did not amount to ineffective assistance. *Id.* at *15.

The court vacated the defendant's sentence under *Miller* and remanded the issue for the trial court to resentence the defendant to life in prison with the possibility of parole after forty years. *Id.* at *17.

SUMMARY OF ARGUMENT

The defendant's first argument is that the trial court should have sua sponte appointed him a guardian ad litem. That contention is

untenable for four reasons. First, the defendant waived the claim by failing to present it in his petition for postconviction review. Second, both courts below erred in considering the defendant's claim because it did not present a cognizable constitutional challenge. Third, the defendant's argument wrongly attempts to substitute raising a claim in his postconviction proceedings with objecting to the alleged error when it happened. Plain error applies to unpreserved claims of trial error, regardless of whether the claim is raised on direct or collateral review. Fourth, and in any event, the trial court did not abuse its discretion in failing to appoint a guardian ad litem. A juvenile is not categorically entitled to a guardian ad litem. And given that both the defendant's attorney and the defendant's father were acting on his behalf, a guardian ad litem was not necessary in this case.

The defendant's effort to prove an actual conflict of interest loses the same battle with the record and applicable law. Under the Rules of Professional Conduct, upon the fulfillment of certain conditions, an attorney may receive payment from a third-party to represent a client. Those conditions were met in this case. Additionally, any conflict was

waived. Regardless, though the defendant argues that the record demonstrates a conflict of interest between him and his father, the record completely undermines that contention. Throughout the case, the defendant's father showed that he was doing his best to protect his son's rights. In any event, the record establishes that the defendant's attorney never represented simultaneous interests materially limiting his representation of the defendant. The defendant's attorney did not represent him under an actual conflict of interest.

The defendant is entitled to a new sentencing hearing. Since his sentencing hearing, the United States Supreme Court has determined that mandatory sentencing schemes imposing life without the possibility of parole on juvenile offenders violates the Eighth Amendment. And as this Court has recently explained, the appropriate remedy is to remand the issue to the trial court to determine whether such a sentence is appropriate.

ARGUMENT

I. The defendant forfeited his guardian ad litem claim during the trial proceedings and later waived the claim by failing to raise it in his petition for postconviction relief.

There has never been any dispute that the defendant's postconviction attorneys did not raise his guardian ad litem claim in his petition for postconviction relief. Although the court of appeals was undoubtedly correct that a properly presented postconviction claim alleging an unpreserved trial error should be reviewed for plain error, it incorrectly found that the defendant's guardian ad litem claim was reviewable at all.

Crim. P. 35(c) requires that all claims be raised in the petition for postconviction relief. Failure to raise a claim in the petition waives the claim. That reading is most faithful to the text and best safeguards the Rule's purposes.

In the event this Court concludes the defendant did not waive his claim, the defendant wrongly argues that constitutional harmless error applies because the postconviction court addressed his claim. The

defendant's guardian ad litem claim presents a claim of trial error. And there is no dispute that the defendant never raised that claim to the trial court. There is no basis in the text or policy of the applicable rules to hold that a defendant that raises a forfeited claim in a postconviction proceeding is entitled to a more beneficial standard of review than if he raised the claim on direct appeal. Rather, all of the animating reasons supporting applying a higher burden to forfeited errors apply with more force when a defendant raises an unpreserved claim in seeking postconviction relief.

A. Standard of Review

As the United States Supreme Court has made clear, "[n]o procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ." *United States v. Olano*, 507 U.S. 725, 730 (1993). Even "[t]he most basic rights of criminal defendants are . . . subject to waiver." *Peretz v. United States*, 501 U.S. 923, 936 (1991). That is true

even if the "deprivation thereof would otherwise constitute structural error." *Stackhouse v. People*, 2015 CO 48, ¶ 8.

Although the defendant does not propose a specific standard of review for this issue, this Court reviews issues of waiver *de novo*. *See, e.g., People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010); *see also Tumentsereg v. People*, 247 P.3d 1015, 1019 (Colo. 2011) (reviewing *de novo* what standard of review should apply). The defendant did not present his guardian ad litem claim at trial and specifically argued that the trial court "erred in not having a guardian appointed" for the first time in his closing brief following his postconviction hearing held almost ten years after his trial[2] (PR.Vol.3, p. 543; *see* R.Tr.10/21/99; R.Tr.2/23/09).

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[2] The defendant contends that he raised the "issue multiple times during the Crim. P. 35(c) hearing, including in opening statement, in the testimony of his experts and defense counsel, and in post-trial briefing" (O.B., pp. 18-19). However, defense counsel only mentioned in opening statements that the defendant needed help from a guardian and a lawyer in presenting a general argument challenging the fairness of his trial (R.Tr.2/23/09, pp. 9-10). Defense counsel's argument stopped short of asserting an independent claim that the trial court erred in failing to sua sponte appoint him a guardian ad litem.

B. Under its plain terms, Crim. P. 35(c) requires that all postconviction claims be raised in the original petition for postconviction review.

The text and procedural framework of Crim. P. 35(c) operate to require that all postconviction claims should be raised in the original petition for postconviction relief. Crim. P. 35(c) provides that "every person convicted of a crime is entitled as a matter of right to make application for postconviction review . . ." But the Rule expressly states that the motion must allege one or more of the identified grounds to justify a hearing. *See* Crim. P. 35(c)(2). And the Rule further directs that a petition "shall substantially contain the information identified in Form 4, Petitioner for Postconviction Relief Pursuant to Crim. P. 35(c), as set forth in the Rule's Appendix." *See* Crim. P. 35(c)(3)(II).

Form 4 provides an unequivocal, upfront, and repeated warning that a failure to raise a claim in the initial petition for postconviction relief waives the claim. The Form expressly provides that a defendant "SHOULD RAISE IN THIS PETITION ALL THE CLAIMS FOR RELIEF THAT RELATE TO THE CONVICITON OR SENTENCE

UNDER ATTACK." *See* Form 4 (emphasis in original). It then cautions that "IF YOU DO NOT RAISE ALL CLAIMS HERE, THE COURT MAY NOT HAVE TO ENTERTAIN LATER MOTIONS FOR SIMILAR RELIEF." *Id.* (emphasis in original). At the end of the Form, it again provides that "all claims related to the conviction under attack in this petition must be listed in this petition, or future motions may be denied." *Id.*

The remaining text of the rule further supports the conclusion that all postconviction claims must be raised in the original petition. When a *pro se defendant* files a postconviction motion and requests counsel, the Rule provides that "the court shall cause a complete copy of said motion to be served on the Public Defender." Crim. P. 35(c)(V). If the Public Defender finds no conflict and enters, the Rule expressly allows the addition of "any claims the Public Defender finds to have arguable merit." *Id.* Thus, the fact that Crim. P. 35(c) expressly identifies the situation where additional claims can be added from the initial petition for postconviction relief confirms that in other instances, a defendant may not add claims to his original postconviction motion.

See Holliday v. Bestop, Inc., 23 P.3d 700, 706 n.5 (Colo. 2001) (recognizing the rule of statutory construction "*expressio unius est exclusio alterius*," the expression of one thing implies the exclusion of the other).

More fundamentally, reading Crim. P. 35(c) as requiring a defendant to raise all of his postconviction claims in the petition for postconviction relief is necessary to secure the Rule's intended purposes. As this Court has made clear, the "twin purposes" of Crim. P. 35(c) are "finality and prevention of injustice." *Edwards v. People*, 129 P.3d 977, 983 (Colo. 2006).

First, "[Rule 35(c)] affords every person convicted of a crime the right to seek postconviction review upon the grounds that the conviction was obtained in violation of the Constitution or laws of the United States or the constitution or laws of this state." *Robbins v. People*, 107 P.3d 384, 387 (Colo. 2005). However, a postconviction court need not grant an evidentiary hearing if "the motion, the files, and the record 'clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief.'"

People v. Rodriguez, 914 P.2d 230, 255 (Colo. 1996) (quoting *People v. Trujillo*, 190 Colo. 497, 499, 549 P.2d 1312, 1313 (1976)); *see also People v. Simpson*, 69 P.3d 79, 81 (Colo. 2003) ("To warrant a hearing, a defendant need only assert facts that, if true, would provide a basis for relief") (citing *White v. Dist. Court*, 766 P.2d 632, 636 (Colo. 1988).

Applying Crim. P. 35(c)'s waiver provision to preclude review of claims not raised in the petition for postconviction relief provides necessary incentive for defendants to raise all of their claims before the trial court decides whether to hold a hearing. Although the defendant argues that a reviewing court should address a claim that is raised at a postconviction hearing, that argument critically overlooks that a court can deny a postconviction motion without holding a hearing. *See* Crim. P. 35(c)(IV); *accord, e.g., Trujillo*, 549 P.2d at 1313 (no evidentiary hearing required where defendant's motion for postconviction relief only presented question of law); *People v. Vieyra*, 169 P.3d 205, 209 (Colo. App. 2007) ("Court may also deny a postconviction motion without a hearing if the claims are bare and conclusory and lack supporting factual allegations."). The need to raise all claims before the trial court

issues its order is also significant because the Rule also requires a court to deny (absent certain exceptions) any claim that "could have been" previously brought. *See* Crim. P. 35(c)(VII). Therefore, requiring a defendant to raise all of his claims in his petition for postconviction relief before a trial court decides whether to hold a hearing is essential to the Rule's goal of correcting legitimate constitutional errors because it helps ensure substantive review of a defendant's claims.

Similarly, requiring notice before a hearing also better serves the Rule's aim of correcting injustice where appropriate. "In the criminal justice context, 'the need to find the truth is the paramount interest at stake.'" *People v. Lee*, 18 P.3d 192, 197 (Colo. 2001) (quoting *People v. Cobb*, 962 P.2d 944, 944, 949 (Colo. 1998)). Accordingly, at "all stages of adjudicative proceedings each party is responsible for the thorough and vigorous presentation of that party's position." *People v. Valdez*, 789 P.2d 406, 409 (Colo. 1990). Consistent with those principles, Crim. P. 35(c) expressly provides that the motion must be served on the district attorney. Crim. P. 35(c)(3)(v). At the hearing, the court is allowed to "take whatever evidence is necessary for the disposition of the motion."

Id. Thus, the Rule itself inherently contemplates that a defendant should raise all of his claims before the postconviction hearing in order to give the People notice before a hearing is held. *See, e.g., People v. Muniz,* 622 P.2d 100, 103 (Colo. App. 1980) (noting that prejudicial "gamesmanship" in the context of discovery rules thwarts the goals of "ascertaining truth and achieving justice").

Second, applying the waiver provision to result in waiver is also essential to carry out the Rule's objective of finality. The purpose of the Criminal Rules of Procedure is to avoid unjustifiable expense and delay. *See* Crim. P. 2 (providing that the rules should be "construed to secure simplicity in procedure" and the "elimination of unjustifiable excuse and delay"). The waiver provision of Crim. 35(c) creates an incentive for timely raising and addressing postconviction claims. By taking away that sanction, the defendant's construction of Crim. P. 35(c) significantly undermines the Rule's goal of promoting finality.

The defendant's only response is to seize on dictum from a court of appeals case that "[a]llegations not raised in a Crim. P. 35(c) motion or during the hearing on that motion and thus not ruled on by the trial

court are not properly before this court for review." *See People v. Goldman*, 923 P.2d 374, 375 (Colo. App. 1996); *accord People v. Simms*, 185 Colo. 214, 218, 523 P.2d 463, 465 (1974) ("Since this issue was not raised in either the Crim. P. 35(b) motion or at the hearing, it is not properly before this court for review."). However, on matters of judicial procedure, "[b]oth state constitution and case law recognize the power of the supreme court to promulgate rules governing the criminal practice and procedure of the jurisdiction." *People v. Owens*, 228 P.3d 969, 971 (Colo. 2010); *see also* Colo. Const. art. VI, § 21. And under this Court's Rule, failure to raise a claim in the postconviction motion before the hearing waives the claim. *See* Crim. P. 35(c).

In sum, there is no dispute that the defendant never raised his guardian ad litem claim in his postconviction motion or at any time before his hearing. As such, this Court should hold that the defendant waived his guardian ad litem claim. *See, e.g., People v. Osorio*, 170 P.3d 796, 807 (Colo. App. 2007) (refusing to review postconviction claim because "defendant did not raise this particular issue in his Crim. P. 35(c) motion"); *People v. Kendrick*, 143 P.3d 1175, 1176 (Colo. App.

2006) (same); *see also Stackhouse*, 2015 CO 48, ¶ 8 (holding that an attorney is presumed to know applicable procedural rules that could implicate a defendant's confrontation right, and an attorney is presumed to have made a decision to waive that right by not complying with the rule); *accord Cropper v. People*, 251 P.3d 434, 438 (Colo. 2011); *Hinojos-Mendoza v. People*, 169 P.3d 662, 670 (Colo. 2007) (same).

C. The defendant does not present a claim of constitutional error.

In addition, this Court has repeatedly recognized "in order for an issue which could have been raised on direct appeal to be reviewable in postconviction proceedings, the issue must be constitutional." *See, e.g., Dunlap v. People*, 173 P.3d 1054, 1062 (Colo. 2007); *accord People v. Walker*, 2014 CO 6, ¶ 21 (internal quotation omitted); *People v. Rodriguez*, 914 P.2d 230, 254 (Colo. 1996); *People v. Crawford*, 183 Colo. 166, 167, 515 P.2d 631, 632 (1973). The defendant's guardian ad litem claim presents a claim of statutory and not constitutional error. Both courts below erred in considering the defendant's statutory claim.

D. Plain error applies to unpreserved trial claims addressed in postconviction proceedings.

In the event this Court determines that the defendant did not waive his claim by failing to raise it in his petition for postconviction relief and that it presents a cognizable collateral attack, the defendant incorrectly contends that his claim should be reviewed for constitutional harmless error.

Consistent with the plain language of the Crim. P. 52, this Court has recognized, "harmless error analysis is reserved for those cases in which the defendant preserved his claim for review by raising a contemporaneous objection." *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). Accordingly, this Court has "made clear that if the defendant lodges no objection to the evidence or procedure, then [this Court] consider[s] the error only under the plain error standard." *Id.* at 748. That higher standard applies because under plain error, "reversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time." *Hagos v. People*, 2012 CO 63, at ¶ 23.

Although not yet addressed by this Court, a division of the court of appeals confronted the question of what standard of review applies to "a postconviction claim that is based on an assertion of unpreserved trial error." *People v. Versteeg*, 165 P.3d 760, 763 (Colo. App. 2006). The court explained that in federal courts, "the answer to this question is clear: '[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains.'" *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). As the court correctly reasoned, in Colorado the "cause" requirement was reflected in Crim. P. 35(c)(3)(VII)'s provision mandating postconviction courts to reject any postconviction claim that "could have been presented in an appeal previously brought," absent enumerated exceptions. *Id.* In addition, though the label of "actual prejudice" appeared to impose a higher standard than plain error, "the tests are alike in practice." *Id.*

Moreover, this Court has previously applied plain error in reviewing claims of trial error on postconviction review. In *Rodriguez*,

the defendant "sought postconviction review of his death sentence." 914 P.2d at 246. He alleged "unconstitutional deficiencies in the guilt phase jury instructions on first-degree sexual assault, second-degree kidnapping, aggravated robbery, aggravated motor vehicle theft, conspiracy to commit first-degree murder after deliberation, and complicity." *Id.* at 271. This Court granted postconviction relief because a deficient jury instruction constituted "plain error." *Id.* at 273.

Indeed, it makes little sense to conclude that a defendant that forfeits his objection both at trial and on direct appeal should receive the benefit of a more favorable standard of review by presenting it for the first time in a postconviction proceeding. Rather, as this Court has explained, Crim. P. 52(b) "encourages contemporaneous objections and simultaneously allows appellate courts to correct certain mistakes." *See Martinez v. People*, 2015 CO 16, ¶ 13. The Rule thus requires "[a]dequate, contemporaneous objections [to] ensure fair trials because they 'afford[] the judge an opportunity to focus on the issue and hopefully avoid the error.'" *Id.* (quoting *Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 325 (Colo. 2009).

The defendant's argument frustrates the contemporaneous objection requirement. It also subverts the principles of finality. *See, e.g., Frady,* 456 U.S. at 164-65 ("Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect."). Therefore, this Court should hold that plain error applies to unpreserved trial errors claims presented on postconviction review. *See, e.g., Rodriguez*, 914 P.2d at 273; *People v. Shearer*, 181 Colo. 237, 242, 508 P.2d 1249, 1252 (1973) ("If the failure to properly instruct the jury had been properly raised at the time of trial or in a motion for a new trial or on appeal, we might well have reversed and ordered a new trial. However, . . . [t]his proceeding is not a direct appeal, but a proceeding to review a Crim. P. 35[(c)] motion and hearing for post-conviction relief"); *see also Pena-Rodriguez v. People*, 2015 CO 31, ¶ 15 (recognizing that when a Colorado Rule is similar to its federal counterpart, federal court decisions interpreting the federal rule provide persuasive guidance in interpreting the Colorado rule); *accord Frady*, 456 U.S. 152 at 167-68;

United States v. Pettigrew, 346 F.3d 1139, 1144 (D.C. Cir. 2003) (noting that to succeed on his collateral attack, the defendant "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.") (internal quotation omitted); *Armstrong v. Kemna*, 590 F.3d 592, 606 (8th Cir. 2010) ("Our court has "observed that [procedural bar] 'prejudice' is higher than that required to establish ineffective assistance of counsel under *Strickland*.").

The defendant argues nevertheless that he "could not have raised it before the 35(c) hearing—'for the same reasons that [he] needed a guardian ad litem, [he] was hardly in a position to recognize[] and independently protest the failure to appoint [him] one'" (O.B., p. 18) (quoting, *In re M.F.*, 74 Cal. Rptr. 3d 383, 390 (Cal. Ct. Ap. 2008). But that provides no basis for what standard of review should apply. Under either standard, a court may grant relief where appropriate. *See Hagos*, ¶ 14 (explaining that the purpose of plain error is to allow a court to review and grant appropriate relief for "particularly egregious errors").

In the alternative, the defendant argues his claim is not reviewable for plain error because the failure to appoint him a guardian ad litem constituted structural error. But structural error requires automatic reversal only for violations of "*constitutional rights* [that] are so basic to a fair trial that their infraction can never be treated as harmless error." *Medina v. People*, 163 P.3d 1136, 1141 (Colo. 2001) (emphasis added); *accord Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The defendant's argument that structural error applies fails on the threshold ground that he does not assert a constitutional error. Indeed, one common thread in all of the cases where the United States Supreme Court has found structural error is that the errors in question involved violations of constitutional rights. *See United States v. Gonzalez-Lopez*, 528 U.S. 140 (2006) (choice of counsel); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Gideon v. Wainwright*, 372 U.S. 335

(1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge).

Structural errors not only involve claims of constitutional magnitude, but involve errors that deprive a right so fundamental to trial that "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Gonzalez-Lopez*, 548 U.S. at 146; *accord People v. Bergerud*, 223 P.3d 686, 697 (Colo. 2010) (noting that "complete violations constitute structural errors."). Structural errors are always harmful. But the failure to appoint a guardian ad litem by itself would not always deprive a defendant of a fair trial. Rather, the absence of a guardian ad litem could have no impact on a defendant's right to a fair trial. *See* Amicus Brief, 20th Judicial District, pp. 10-13 (recognizing the differences between the role of defense counsel and a guardian ad litem, and reasoning that "in cases where the parent is unable to act in the best interests of the child, *or* in counsel's case, is unable to represent the child effectively, a guardian ad litem and/or alternate defense counsel should be appointed to ensure that the juvenile's rights are protected") (emphasis added); Amicus Brief, Juvenile Law Center, p. 25

("Undoubtedly, there are many cases where a parent's involvement in a child's defense, especially where the child is facing essentially serious consequences, would be welcome and constructive, and waiving a potential conflict even where the parent hired the child's attorney would be actually [] ethically appropriate"). Thus, the absence of a guardian ad litem does not present a colorable claim of structural error.

II. The appointment of a guardian ad litem is not constitutionally necessary to safeguard a juvenile's rights to a fair trial, and, in any event, the record establishes that a guardian was not required in this case.

The defendant's guardian ad litem claim fails for another reason. It was his burden to prove that the trial court erred in failing to sua sponte appoint him a guardian ad litem. But in asking this Court to find that the trial court erred, the defendant largely asks this Court to consider evidence never presented to the postconviction court. His argument should be rejected on that ground.

Regardless, to the extent this Court considers the evidence presented at the postconviction hearing, the evidence amply established that a guardian ad litem was not necessary. The defendant's argument

turns on his contention that he should have been appointed a guardian ad litem because both his father and his attorney were adverse to his interests. The record refutes both contentions and also his claims of prejudice.

A. Standard of Review

As explained above, the People disagree with the defendant's proposed standard of review because this claim is waived. In the event this Court considers it, it should be reviewed under plain error. *Miller*, 113 P.3d at 750. To constitute plain error, the trial court's "error must be obvious and substantial and so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *People v. Weinreich*, 119 P.3d 1073, 1078 (Colo. 2005).

B. A court is not required to appoint a guardian ad litem for a juvenile.

Pointing to caselaw in the context of the Eighth Amendment reasoning that juveniles categorically lack the maturity of adult offenders, the defendant argues that "[w]ithout a guardian, [his] ability

to participate in his own trial was limited to such an extent that he was effectively deprived of this right" (O.B., p. 27). In support of his claim, the defendant asserts that he was entitled to a guardian ad litem because he was "by [legal] definition incapable of making the critical decisions affecting his legal interests and rights on his own" (O.B., p. 22).

But when it comes to whether a defendant is entitled to a guardian ad litem in a direct file case based on his status as a juvenile, the General Assembly has foreclosed the exact categorical line the defendant argues applies. As with any statute, in reviewing a provision of the direct file statute, the starting point is the language of the statute itself. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). And "[i]f the legislative intent is immediately conveyed by the commonly understood and accepted meaning of the statutory language, a court need look no further and must give effect to the statute as written." *Colby v. Progressive Cas. Ins. Co.*, 928 P.2d 1298, 1302 (Colo. 1996).

Section 19-2-517(5), C.R.S. (2015), provides that a "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" (emphasis added). The word "shall" and its mandatory command "is distinguishable from the 'permissive' or 'discretionary' language of statutes . . ." *E.g.*, *United States v. Wilinson*, 686 P.2d 790, 792 (Colo. 1984); *accord People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986) (noting that "the use of the word 'shall' in a statute is usually deemed to invoke a mandatory connotation"). Affording the statutory language its ordinary meaning, the statue's use of the word "discretion" means that the trial court is not required to decide the issue one way or another. *See Buckmiller v. Safeway Stores, Inc.,* 727 P.2d 1112, 1115 (Colo. 1986) (recognizing that judicial discretion implies the absence of any settled legal standard that controls the controversy at hand); *Streu v. Colorado Springs*, 239 P.3d 1264, 1268 (Colo. 2010) (on matters left to a trial court's discretion, "[i]t is not necessary that we agree with the trial court's decision").

Indeed, the statutes the defendant cites to support his argument only serve to highlight the deficiency of his argument (O.B., p. 22). The statutes conclusively establish, as do other statutes, that the when the

General Assembly wants to create a mandatory entitlement, it says so directly. *See, e.g.,* § 15-18-108, C.R.S. (2015) (providing that in probate actions for certain defined individuals, "the court shall appoint a guardian ad litem for the qualified patient . . ."); § 19-1-111(1), C.R.S. (2015) ("The court shall appoint a guardian ad litem for the child in all dependency or neglect cases under this title); § 19-3-203, C.R.S. (2015) (following a petition alleging abuse or neglect of a minor child, "the court shall appoint a guardian ad litem"); § 27-82-108, C.R.S. (2015) (in an involuntary commitment of drug abuser proceeding, if the court deems that the person's presence in proceeding will be injurious, the "court shall appoint a guardian ad litem to represent the person throughout the proceeding"); § 38-43-102, C.R.S. (2015) (in probate proceedings, "[t]he court shall appoint a guardian ad litem to represent any such parties who may be minors or persons of unsound mind, unless they are represented by their statutory guardians or conservators."). The General Assembly did not create the same requirement in section 19-2-517. There is no legal basis for the defendant's argument that a trial court is required to appoint all

juveniles both an attorney and a guardian ad litem in a direct file case. *See, e.g.*, § 18-1-403, C.R.S. (2015) (providing that all "indigent persons who are charged with or held for the commission of a crime are entitled to legal representation and supporting services at state expense"); § 21-1-104(a), C.R.S. (2015) (requiring public defender to "[c]ounsel and defend"); § 21-2-104(a), C.R.S. (2015) (requiring that, in situations where the public defender has a conflict, alternate defense counsel must "counsel and defend").

The defendant's arguments also fails to square with the limited authority of a guardian ad litem. While he insists he was not competent to make decisions regarding his trial rights and needed a guardian ad litem, his argument fails to take into account that those decisions belong to a defendant alone. *See, e.g., People v. Bergerud*, 223 P.3d 686, 693-94 (Colo. 2010) ("Decisions such as whether to plead guilty, whether to testify, whether to waive a jury trial, or whether to take an appeal are so fundamental to a defense that they cannot be made by defense counsel, but rather must be made by the defendant himself) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). As even the defendant's own

amicus acknowledges, a guardian ad litem "cannot serve as part of the defense team, cure any conflict of interest between defense counsel and the child, or fulfill defense counsel's obligation to advise the child on the waiver of constitutional rights." *See* Amicus Brief, Colorado Office of Child's Representative., p. 5); Amicus Brief, Legal Ethics Professors, p. 4 (recognizing it is counsel's duty "to make informed strategic choices about what defense to pursue").

C. The trial court did not abuse its discretion in failing to appoint the defendant a guardian ad litem.

1. The defendant's argument improperly relies on evidence not before the trial court.

As this Court has made clear, "[d]iscretionary decisions will not be disturbed unless the court's action was manifestly arbitrary, unreasonable, or unfair." *People v. Riggs*, 87 P.3d 109, 114 (Colo. 2004). When reviewing whether a trial court abused its discretion, this Court has sensibly looked to "the circumstances confronting the court at the time." *See, e.g., People v. Crow*, 789 P.2d 1104, 1106 (Colo. 1990). Thus, a reviewing court looks at the evidence known to the court at the time it

was made, and it constitutes error to look at subsequent proceedings. *See, e.g., Moody v. People*, 159 P.3d 611, 614 (Colo. 2007) (holding that the "court of appeals erred in reviewing both the suppression record and the trial proceedings in its review of standing" determined at suppression hearing).

At the outset, in urging this Court to find that the trial court erred in failing to appoint a guardian ad litem sua sponte based on his individualized circumstances, the defendant's argument rests on the wrong evidence. Quite apart from pointing to evidence before the trial court during the defendant's trial and pretrial proceedings, the defendant only presents evidence from the postconviction proceeding regarding others' impressions of the defendant's uncooperativeness with his attorney. Fatally, those opinions are based on the defendant's conduct *outside* the presence of the court. *See, e.g., Moody*, 159 at 614 (holding that an "appeals court may only look to the suppression hearing in reviewing a lower court's ruling on such matters" and not hearings held after the court made its decision); *Crow*, 789 P.2d at 1106 (in "determining whether a court has abused its discretion in denying a

motion for continuance, an appellate court must evaluate the circumstances confronting the court at the time the motion is made, particularly the reasons presented to the trial judge at the time the request is denied") (internal citation omitted); *accord Hudnall v. Sellner*, 800 F.2d 377, 385 (4th Cir. 1986) ("looking only to the record before the district court," litigant's conduct did not reveal "serious a question of his 'mental competence' as to require a collateral judicial inquiry into its existence"). As the defendant offers no availing evidence establishing that the trial court erred in failing to recognize that the appointment of a guardian ad litem was necessary based on his conduct in the presence of the court, he has not established that the trial court abused its discretion. *See People v. Hynes*, 917 P.2d 328 (Colo. App. 1996) (when "respondent has failed to set forth any specific reasons for [an] appointment [of a guardian ad litem] in this case," the court did not abuse its discretion in denying the request).

2. Based on the evidence before it, the trial court did not abuse its discretion in not appointing a guardian ad litem.

Although section 19-5-17 does not require the appointment of a guardian ad litem in first degree murder cases, this Court has recognized "that irrespective of statutory authorization it is proper for a court to appoint a guardian ad litem for a litigant when the court is reasonably convinced that the party is not mentally competent to effectively participate in the proceeding." *People in Interest of M.M.*, 726 P.2d 1108, 1118 (Colo. 1986). In the context of civil proceedings, this Court explained that a court abuses its discretion by failing to appoint a guardian ad litem if a defendant: (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 of making critical decisions; (4) lacks the intellectual capacity to communicate with counsel; or (5) is mentally or emotionally incapable of weighing the advice of counsel on the

particular course to pursue in his or her own interest. *Id.*; *In re Marriage of Sorenson*, 166 P.3d 254, 257 (Colo. App. 2007).

But as the court of appeals recognized in *Sorenson*, the test announced in *M.M.* was based on this Court's construction of C.R.C.P. 17(c). *Sorenson*, 166 P.3d at 257 (explaining that the *M.M.* "court constructed C.R.C.P. 17(c)"). Under C.R.C.P. 17(c), "[t]he court *shall* appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

But under the then-applicable criminal code, "incompetent to proceed" was defined as a "defendant suffering from a mental condition or defect which renders him incapable of understanding the nature and course of the proceedings against him or of participating or assisting in his defense or cooperating with his defense counsel." § 16-8-102(3), C.R.S. (1999).[3] In turn, the code defined "mental condition or defect" to

[3] Similarly, the current statute provides that a person is incompetent to proceed if "as a result of a mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational

cover "only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested only be repeated criminal or otherwise antisocial conduct." § 16-8-102(4.5), C.R.S. (1999).[4] Therefore, in the criminal context, a trial court only abuses its discretion in failing to appoint a guardian ad litem if the juvenile is suffering from a mental condition that demonstrably impairs his perception or understanding of reality.

Under any reasonable standard, the record does not establish that the defendant required the appointment of a guardian ad litem. Although the defendant points to evidence that he was at times

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understanding in order to assist in the defense, or that, as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings." § 16-8.5-101(11), C.R.S. (2015).

[4] Although largely similar, the current statute provides that "mental disease or defect" "means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality . . ." § 16-8-102(4.7), C.R.S. (2015).

uncooperative with his attorney, there was no evidence presented that he was *incapable* of understanding or assisting in his defense or that he lacked the intellectual capacity to make critical decisions or weigh his counsel's advice.

The record instead confirms that the defendant was competent to assist in his own defense. The evidence at trial established that before he started getting in trouble, the defendant received "great grades" (R.Tr.10/20/99, p. 113). At the time of the murder, he was working part-time at Einstein's Bagels (R.Tr.10/20/99, p. 75). And at the postconviction hearing, the evidence revealed that the defendant helped choose his defense theory and understood that it was in his best interest not to testify (R.Tr.2/24/09, p. 153). Mr. Truman also explained that, in his view, the defendant never appeared to act psychotic (R.Tr.2/24/09, p. 82). While the defendant points to his age – one month short of eighteen at the time of trial – there is no support that his age as a matter of law rendered him incapable of assisting in his own defense. Indeed, as the commentary to the Rules of Professional Conduct provide, "children as young as five or six years of age, and certainly those of ten or twelve,

are regarded as having opinions entitled to weight in legal proceedings . . ." Colo. RPC 1.14(f) (discussing the issue in the context of custody). Therefore, as the evidence establishes that the defendant had the capacity to help in his defense, the appointment of a guardian ad litem was not necessary.

The defendant also contends that he should have been appointed a guardian ad litem because his father's interests "were adverse" to his interests (O.B., p. 23). But the record before the trial court established otherwise. While the record provides that the trial court was aware that the defendant murdered his father's wife and was going to be called by the People, the record did not indicate that he was acting adverse to his son's interest. Rather, the filings in the case indicated that, after being told that the defendant had killed his mother, the defendant's father refused to allow the police permission to search the car the defendant used to dispose of her body (PR.Vol.1, p. 52). When the police asked to interview the defendant, the defendant's father denied the officer's request that he sign a waiver allowing them to speak with the defendant (PR.Vol.1, p. 55). Based on the record before it, the trial court

did not err in failing to appoint a guardian ad litem. *See, e.g., Churchill v. Univ. of Colo.*, 2012 CO 54, ¶ 74 ("Significantly, in determining whether a trial court's decision is manifestly arbitrary, unreasonable, or unfair, we ask whether the trial court exceed[ed] the bounds of the rationally available choices—not whether we agree with that decision.").

3. Even considering evidence presented after the defendant's trial, a guardian ad litem was not necessary.

The speculative nature of the defendant's claim is also demonstrated by the fact that it was disproven by the postconviction hearing. The defendant's claim turns on his contention that he needed a guardian ad litem because neither his father nor his attorney were acting in his best interest. But as explained both above and below, the evidence established that both the defendant's father and his attorney acted in his best interest. *See Supra*, pp. 47, 59-62. The defendant's argument fails on this ground as well.

4. A court is also under no duty to affirmatively place on the record every instance it did not exercise its discretion.

The defendant asserts that though the "trial court had clear statutory authority to appoint a guardian" ad litem, the trial court never "held a hearing or once inquired about whether [he] needed a guardian" (O.B., pp. 20-21). In his view, therefore, the "court's failure to exercise discretion is itself an abuse of discretion that requires reversal" (O.B., p. 21) (internal quotation omitted).

Yet the failure to inquire into everything a court could theoretically due during a criminal trial does not, in itself, create an abuse of discretion. Indeed, though the defendant cites to two cases for his contention, both cases involved mandatory duties imposed on trial courts. *See People v. Darlington*, 105 P.3d 230, 232 (Colo. 2005) (holding that a "failure to exercise discretion is itself an abuse of discretion," in a context when the "the trial court is expressly directed to exercise independent judgment in deciding whether to grant charge and sentence concessions"); *In re Bostwick*, No. 05CA2820 (unpublished),

2005 Ohio App. LEXIS 4627, **6-7 (Sep. 26, 2005) (holding that court abused its discretion in failing to inquire whether a guardian ad litem was necessary when it was required to do so by statute and court rule). Those cases do not stand for the proposition that a court must inquire into all issues it theoretically could.

Regardless, in this case the presumption of regularity resolves the defendant's claim. "According to the presumption of regularity, appellate courts presume that the trial judge did not commit error absent affirmative evidence otherwise." *LePage v. People*, 2014 CO 13, ¶ 15. "The effect of this presumption is that the party asserting error must affirmatively show that it occurred." *Id.* at ¶ 16. As "[t]he presumption of regularity dictates that appellate courts should presume that the trial judge did not commit error absent affirmative evidence to the contrary," this Court should reject the defendant's claim. *See id.*; *People v. Velarde*, 200 Colo. 374, 376, 616 P.2d 104, 105 (1980) (recognizing that an appellant bears the burden of providing a reviewing court with a proper record with which it can address his or her appellate claims); *Casias v. People*, 160 Colo. 152, 158, 415 P.2d

344, 349 (1966) ("It is fundamental that this court—or any court—does not settle legal questions on the naked factual assertions of counsel").

D. The defendant has not established plain error.

In any event, to qualify as plain error, an error must also be obvious. *See, e.g., Hagos*, 2012 CO 63, ¶ 14. That means "an error must be so clear-cut that a trial judge should have been able to avoid it without benefit of objection." *People v. Pollard*, 2013 COA 31, ¶ 39, and that it must be "seriously prejudicial," that is, it must have so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the defendant's conviction. *People v. Ujaama*, 302 P.2d 296, 304 (Colo. App. 2012); *see also Hagos*, 2012 CO 63, ¶ 19. The defendant's argument largely turns on facts never presented to the trial court. Thus, any error could not have been obvious.

Any error was also not substantial. While the defendant contends that he was prejudiced because the purported error denied him his right to testify, he is wrong. In *People v. Curtis*, 681 P.2d 504, 509-10 (Colo. 1984), this Court adopted certain procedural safeguards to ensure that

a defendant's waiver of the right to testify was voluntary, knowing, and intelligent. Under *Curtis*, the trial court must communicate five essential elements to the defendant in an on-the-record advisement: (1) that he has a right to testify, (2) that no one can prevent him from doing so, (3) that if he does testify then the prosecution may cross-examine him and (4) ask about any prior felony convictions, and (5) if a felony conviction is disclosed to the jury then the jury will be instructed to consider the felony as it bears on the defendant's credibility. *People v. Harding*, 104 P.3d 881, 885 (Colo. 2005); *Curtis*, 681 P.2d at 514.

In this case, the defendant received a *Curtis* advisement (R.Tr.10/21/99, pp. 7-12). Although the defendant argues that his waiver was not knowing or intelligent because he lacked independent parental guidance, a juvenile can validly waive his or her rights in the absence of a parent or legal guardian. Likewise, the record flatly refutes the defendant's claim. Before the *Curtis* advisement, Mr. Truman advised the court on the record that he had advised the defendant that it was his decision to testify and that he "should feel free to override" his opinion (R.Tr.2/24/09, p. 7). At trial, the defendant

expressly told the court he understood he had an "absolute right to testify" and if he wanted "to testify, no one can prevent [him] from doing so" (R.Tr.10/21/99, pp. 7-8). While he could consider the advice of his attorney and "other persons," he understood the ultimate decision was one for him (R.Tr.10/21/99, p. 9). Significantly, the defendant has never asserted, let alone established, that his father coerced his decision not to testify. Regardless, as the defendant's on the record oral declarations carry a strong presumption of verity*, see People v. Canody*, 166 P.3d 218, 220 (Colo. App. 2007), the record confirms the defendant's waiver was voluntary, knowing, and intelligent (R.Tr.10/21/99, pp. 7-10).

Further, to establish prejudice the defendant would need to prove that he would have testified if properly advised and that his testimony would have likely affected the outcome of trial. *See, e.g.*, *United States v. Dominguez Benitez*, 542 U.S. 74, 81-83 & n.6 (2004) (holding that the omission of an advisement prior to the entry of a guilty plea is not reversible unless there is "a reasonable probability that, but for the error, [the defendant] would not have entered the plea"); *LaVigne v. State*, 812 P.2d 217, 220-22 (Alaska 1991) (requiring defendant to make

initial showing that, absent the error, he would have offered relevant testimony). The defendant has failed to meet both showings here.

Nor is the defendant's argument saved by his suggestion that he needed a guardian ad litem to advise him as to whether he should waive his right to conflict-free counsel (O.B., p. 28). As explained below, no such waiver was necessary because counsel did not operate under a conflict of interest. Moreover, the defendant's argument turns on several levels of attenuation insufficient to establish that any error was substantial. Indeed, as even the public defender recommended that the defendant should hire Mr. Truman if he could (R.Tr.2/26/09, p. 52), a guardian ad litem would have reached the same conclusion. Regardless, reversal for trial error depends on "an outcome-determinative evaluation of the likelihood that the error affected the verdict." *People v. Alfaro*, 2014 CO 19, ¶ 7. The defendant has not established that the appointment of a guardian ad litem would have changed the outcome of trial given the overwhelming evidence of his guilt. Thus, the defendant has failed to establish any prejudice flowing from the trial court's purported error in failing to appoint him a guardian ad litem sua

sponte. *See, e.g., People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011) (finding no plain error because after reviewing the entire record, the Court could not say that "the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction'"); *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) **(**no plain error because the defendant has "not shown" [improper closing argument was] a 'but for' cause" of the verdict).

III. The postconviction hearing confirms that the defendant's trial counsel did not operate under an actual conflict of interest.

The postconviction court found that there was not an actual conflict of interest. That finding is reviewable only for whether it is supported by the record; it is.

A. Standard of Review

The People disagree with the defendant's proposed standard of review in part. As this Court explained in its most recent review of a postconviction court's resolution of a conflict of interest claim, it reviews "conclusions of law de novo," but defers to a "post-conviction court's findings of fact when they are supported by the evidence." *West v.*

People, 2015 CO 5, ¶ 11 (Colo. 2015). Accordingly, where a Crim. P. 35(c) court's findings are supported by the record, and it has applied the correct legal standards, its conclusions will not be disturbed on review. *Kailey v. Colo. Dept. of Corr.*, 807 P.2d 563 (Colo. 1991). Moreover, a district court's denial of a Crim. P. 35(c) motion may be upheld on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the district court. *See People v. Scott*, 116 P.3d 1231, 1233 (Colo. App. 2004); *People v. Gresl*, 89 P.3d 499, 502 (Colo. App. 2003).

The defendant raised his conflict of interest claim in his petition for postconviction relief (PR.Vol.3, pp.182-92).

B. The record confirms the postconviction court's finding that there was no conflict of interest.

A defendant's Sixth Amendment right to effective assistance of counsel includes the right to conflict-free counsel. *See People v. Martinez*, 869 P.2d 519, 524 (Colo. 1994). While a defendant's Sixth Amendment rights can be violated by "representation that is intrinsically improper due to a conflict of interest," *Dunlap*, 173 P.3d at

1070 (quoting *People v. Castro*, 657 P.2d 932, 943 (Colo. 1983)), the mere "possibility of a conflict is insufficient" to establish a Sixth Amendment violation. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Therefore, this Court "distinguishes between actual conflicts, which require an express waiver from the defendant, and potential conflicts, which may or may not require an express waiver." *People v. Nozolino*, 2013 CO 19, ¶ 23.

The court that presides over a Crim. P. 35(c) hearing is the trier of fact and bears the responsibility of determining the weight and credibility to be given to witness testimony. *West*, 2015 CO 5, ¶ 11; *Kailey*, 807 P.2d at 567; *Lamb v. People*, 174 Colo. 441, 446, 484 P.2d 798, 800 (1971). Where the evidence in the record supports the findings and holding of the court, the judgment of the court will not be disturbed on review. *Kailey*, 807 P.2d at 567; *Lamb*, 174 Colo. at 446, 484 P.2d at 800.

Under Colo. RPC 1.8(f), a lawyer is not supposed to accept compensation from a third party for representing a 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 Colo. RPC. 1.6. *See* Colo. RPC 1.8(f). Similarly, Colo. RPC 1.7(b) establishes that 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 interest." However, the Rule provides that the lawyer may still represent a client in that situation if he "reasonably believes the representation will not be adversely affected" and the "client consents after consultation." Colo. RPC 1.7(b).

"A conflict of interest under the Rules of Professional Conduct does not necessarily equate to a violation of the Sixth Amendment right to effective assistance of counsel." *People v. Samuels*, 228 P.3d 229, 240 (Colo. App. 2009). Although the defendant and several of his amici argue that the Rules of Professional Conduct create per se conflicts of interest in the context of a defendant's Sixth Amendment rights, nothing in the Rules indicates an attempt to constitutionalize the Rules. On the contrary, by its own terms, the Rules establish that a "[v]iolation

of a Rule should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached." Colo. RPC. Preamble, pp. 3-9.

Regardless, the record amply supports the postconviction court's conclusion that Mr. Truman was not under an actual conflict of interest. As this Court has explained, an attorney's ability to represent his client is materially limited only when his or her "'ability to champion the cause of the client becomes substantially impaired.'" *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002) (quoting *Rodriguez v. Dist. Ct.*, 719 P.2d 699, 704 (Colo. 1986)). Nothing in the record indicates Mr. Truman's ability to represent the defendant was limited by any improper interest.

From the beginning of his involvement in the case, Mr. Truman advised the defendant's father that, regardless of who paid him, he would only represent the defendant (R.Tr.2/24/09, p. 38). Because of that, Mr. Truman never believed his representation of the defendant would be limited by any duty to the defendant's father or his own financial interest (R.Tr.2/24/09, p. 175). The engagement letter itself reflected that, "[Truman] agree[d] to represent [the defendant] to the

best of [his] ability and to act on [the defendant's] behalf" (PR,Vol.14, Exhibit WW). During his representation of the defendant, Mr. Truman never consulted with the defendant's father about strategy or shared any of the defendant's confidential information (R.Tr.2/24/09, p. 175; R.Tr.2/26/09, p. 57). Accordingly, Mr. Truman never had any allegiance to the defendant's father, and nothing about his representation of the defendant was materially limited by an improper interest (R.Tr.2/24/09, pp. 173-74). Mr. Truman "didn't really care what [the defendant's father] had to do with this case. [His] client was the defendant] and if it had been in [the defendant's] business to go after" his father, Mr. Truman "would have done so" (R.Tr.2/24/10, p. 174).

Although the defendant points to his expert's evidence that an actual conflict existed based on the fee arrangement, and that Truman's allegiance to the defendant's father led him to forgo pursuing a defense that would be embarrassing to him (O.B., p. 37), the postconviction court found that testimony unpersuasive. It was the postconviction court's role to assess the credibility of the witnesses, *see Dunlap,* 173

P.3d at 1061, and it discounted the defense expert's testimony and found Mr. Truman' testimony credible.

Regardless, the factual premise to the defendant's argument is also missing. The defendant's claim turns on the contention that "there was a conflict of interest in this case because defense counsel's loyalty was split between his client [the defendant], and his benefactor, [the defendant's father]" (O.B., pp. 35-36). Although he received part of his retainer, after the preliminary hearing, the defendant's father explained to Mr. Truman that he would not be able to pay him any more money to represent the defendant (R.Tr.2/24/09, p. 38; R.Tr.2/26/09, pp. 54-56). Mr. Truman told the defendant that he would withdraw and allow the public defender to represent him, but because the defendant pleaded with him to "stay on the case," Truman remained (R.Tr.2/23/09, p. 38). After the preliminary hearing, Mr. Truman never received any funds other than money for expenses (R.Tr.2/24/09, p. 175).

In sum, there was no actual or potential conflict of interest. Nothing in Mr. Truman's actions in allowing a third person to pay for his representation of the defendant was improper, and Mr. Truman's

decision to continue to represent the defendant without the possibility of additional payment was laudable. As the record amply supports the trial court's conclusion, it should be affirmed. *See, e.g., Villarreal v. People*, 288 P.3d 125, 126 (Colo. 2012) (affirming when "[t]he record amply supports the trial court's determination that counsel's representation was not deficient").

C. Even assuming a conflict or potential conflict of interest, the defendant waived any conflict.

It is well-established "that a defendant can waive the right to conflict-free counsel so long as the waiver is voluntary, knowing, and intelligent." *Dunlap*, 173 P.3d at 1070. Here, the uncontroverted record provides that Mr. Truman advised the defendant about the potential conflict and obtained the defendant's waiver (R.Tr.2/24/09, pp. 174-75). *See People v. Maestas*, 199 P.3d 713, 718 (Colo. 2009) (finding valid waiver when record itself contained only facts reflecting it was valid). This Court should affirm on this ground as well. *People v. Muckle*, 107 P.3d 380, 383 (Colo. 2005) ("Under the abuse-of-discretion standard, an

appellate court must affirm the trial court's decision if there is any evidence in the record to support the trial court's finding").

The defendant contends, however, that absent "the involvement of the court or an impartial adult, there could be no waiver" (O.B., p. 43). But the only case he cites for that proposition belies his claim. *See People in Interest of J.F.C.*, 660 P.2d 7, 8 (Colo. App. 1982) (recognizing that though a parent's presence is of "critical significance to any knowing and intelligent waiver of a constitutional right by a juvenile," presence alone is not determinative to whether a waiver is knowing and intelligent). Indeed, contrary to the defendant's supposition, while additional advice from an impartial source may be helpful, its presence or lack thereof does not axiomatically control whether a minor's waiver is knowing and intelligent. *See, e.g.*, *People v. N.A.S.*, 2014 CO 65, ¶¶ 21, 24 (holding that juvenile voluntarily spoke with officer when he was not in custody and the totality of circumstances indicated that the officer was not coercive without relying on evidence that the juvenile's parent was not present); *People in Interest of S.A.R.,* 860 P.2d 573, 574 (Colo. App. 1993) ("We decline to hold that a juvenile's waiver of rights

during trial, adjudication of delinquency, or sentencing is necessarily invalid if a parent, guardian, or legal custodian is not present."); *see also Flakes v. People*, 153 P.3d 427, 430 (Colo. 2007) (recognizing that the "direct file statute, located within the Children's Code, exposes juveniles to adult criminal prosecution without a transfer hearing and creates an exception to the general protections offered to juveniles by the Code."). The defendant's argument also ignores that he did have parental presence. The defendant's father discussed the issue with the defendant and even confirmed with the public defender who had originally appeared with the defendant that using Mr. Truman would be the better course (R.Tr.2/26/09, p. 52). And as set forth above, the record reflects that the defendant's father was acting in his son's best interest. The defendant knowingly, voluntarily, and intelligently waived any conflict.

The defendant also argues that the conflict was not consentable as a matter of law. But as explained above, under the applicable rules, any conflict was consentable. Colo. RPC 1.7; Colo. RPC 1.8(f).

The defendant next contends that his waiver was invalid because "the state failed to present any evidence that [he] ever provided informed consent after being sufficiently informed about the nature and potential effect of the conflict" (O.B., p. 44). The defendant asserts that his counsel should have explained to him "all of the limits that his relationship" with his father might place on him (O.B., p. 45). That argument fails as a factual matter. The record provides that Mr. Truman advised the defendant about the potential conflict, and the defendant consented. The defendant's argument also stumbles on its legal merits. While the defendant relies on his expert witness's expert testimony at the postconviction hearing that Mr. Truman should have provided the defendant with concrete examples, there is no basis in the Rules for such a requirement. Rather, the comment to Colo. RPC 1.7 only says that "Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party." Therefore, neither the Rule nor the comment imposes an obligation on an attorney to advise a client of every conceivable situation where the alleged conflict might arise.

In addition, the defendant's argument that Mr. Truman should have advised the defendant on how his performance would be limited by the purported conflict fails on the threshold ground that no potential conflict existed. Mr. Truman was never under an express or implied obligation to represent the defendant's father in any capacity. He was under no duty to advise the defendant about any specific potential limitations about his representation due to his relationship with the defendant's father because no conflict existed. Accordingly, as there were no potential limitations, a specific advisement was not necessary.

D. The defendant is unable to establish prejudice.

1. *Strickland* applies.

Generally, to establish the ineffective assistance of counsel, a defendant must prove that counsel's representation was deficient and that a reasonable probability existed that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Davis*, 759 P.2d 742, 745 (Colo. App. 1988). However, in cases involving a conflict

due to simultaneous representation, a defendant who does not object at trial to counsel's representation can prevail on an ineffective assistance of counsel claim without having to prove prejudice, by showing that an actual conflict of interest adversely affected trial counsel's performance. *Dunlap*, 173 P.3d at 1073, (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980)). Accordingly, "[t]he [*Sullivan*] standard operates as an exception to the normal requirements of *Strickland*, and was announced in the context of an attorney's multiple concurrent representation of defendants." *Dunlap*, 173 P.3d at 1073, n.24.

This Court recently left open the question of whether *Strickland* applies to claims of divided loyalty based on financial interests. *See West*, 2015 CO 5, ¶ 36 n.8. As explained above, because the record supports the postconviction court's finding there was no conflict of interest, this Court need not address the defendant's claim of prejudice. However, if it does, it should hold that the *Strickland* standard applies and not *Sullivan*.

The *Sullivan* exception does not extend to alleged conflicts of interest based on counsel's financial interests. Subsequent to *Sullivan*,

the United States Supreme Court expressed disapproved of "holdings of Courts of Appeals, which have applied [the exception set forth in [*Sullivan*] unblinkingly to all kinds of alleged attorney ethical conflicts," including conflicts that "somehow implicate[s] counsel's personal or *financial interests*." *Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (emphasis added). Such holdings were incompatible with the purpose of the presumed prejudice rule, which was "not to enforce the Canons of Legal Ethics. . . ." *Id.* at 175-76. In concluding that *Strickland* did not apply to the particular situation addressed, *Sullivan* stressed the "high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *West*, 2015 CO 5, ¶ 36 (internal quotation omitted).

However, while a high probability of prejudice must be presumed when an attorney is engaged in multiple representation because the attorney necessarily has equal duties to both, the same is not true when a third party pays for another's counsel. Rather, as in this case, a parent's decision to retain one of the top defense lawyers in the jurisdiction does not necessarily infer a high probability of prejudice to

the juvenile (R.Tr.2/26/09, pp. 49-52). Thus, in the event this Court considers the defendant's claim for prejudice, it should hold that *Strickland* applies. *See, e.g., United States v. Newell*, 315 F.3d 510, 516 (5th Cir. 2002) (stating that *Sullivan*'s standard is "confined to claims . . . that challenge an attorney's divided loyalties due to multiple representation," while "*Strickland*'s two-pronged analysis . . . governs all other attorney-client conflicts"); *Whiting v. Burt*, 395 F.3d 602, 618-19 (6th Cir. 2005) (holding that *Sullivan* applies only to concurrent representation); *Caban v. United States*, 281 F.3d 778, 782 (8th Cir. 2002) (observing, in an opinion filed shortly before Supreme Court's decision in *Mickens*, that recent trend among circuits has been to limit application of the "almost per se rule of prejudice" and that a number of circuits have declared that not all conflicts of interest are well suited to resolution under the strict rule of *Sullivan*; although declining to decide between *Sullivan* and *Strickland* standards, court states that there is much to be said in favor of holding that *Sullivan* rationale does not apply outside context of conflict between codefendants or serial defendants); *Schwab v. Crosby*, 451 F.3d 1308, 1324 (11th Cir. 2006)

("The Court itself emphasized its words 'actively represented,' making clear that the *Sullivan* decision itself covers only active legal representation of conflicting interests").

2. The defendant has not met the *Strickland* standard.

Under the appropriate standard, the defendant has not established that he received ineffective assistance of counsel.

A defendant in a criminal proceeding is entitled to receive the reasonably effective assistance of counsel acting as his diligent and conscientious advocate. *People v. Moody*, 676 P.2d 691, 695 (Colo. 1984) (citing *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973)). However, the standard for making a successful ineffective assistance of counsel claim is very high. *People v. Mills*, 163 P.3d 1129, 1134 (Colo. 2007). The two-part test set forth in *Strickland* governs ineffective assistance of counsel claims. "[R]elief for ineffective assistance of counsel requires a criminal defendant to prove both deficient representation and prejudice." *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003).

The defendant insists that his attorney should have investigated and presented evidence that he killed his mother because his father abused him. But effective advocacy requires the recognition that if there are one or two strong arguments for reversal, these should be presented forcefully and others of less merit eliminated. *People v. Galimanis*, 728 P.2d 761, 763 (Colo. App. 1986). As Mr. Truman testified, he did not pursue the theory because it was unavailing and of marginal relevance considering that the defendant murdered his mother and there was no evidence that his father abused him near the time of the murder. Although Mr. Truman asked the defendant if there was evidence of more abuse that supported a theory that he killed "his mother in some sort of rage," the defendant denied that there was any additional evidence of abuse (R.Tr.2/24/09, pp. 16-17, 153). Therefore, considering that the record confirms that Mr. Truman pursued a competent theory of defense aligned with the charges and evidence in the case, the defendant has not established deficient performance. *See Ardolino*, 69 P.3d at 76 ("Because a challenged action might be considered sound trial strategy under the circumstances of a particular case, judicial

scrutiny of counsel's performance must be highly deferential, evaluate particular acts and omissions from counsel's perspective at the time, and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance") (citing *Strickland*, 466 U.S. at 698)); *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007) ("[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome") (quoting *Ellis v. Hargett*, 302 F.3d 1182, 1189 (10th Cir. 2002)).

Likewise, the defendant is unable to establish that, absent counsel's alleged deficient performance, the result of the proceedings would have been different. Evidence that the defendant suffered some alleged abuse from his parents would not have undermined the People's evidence that the defendant acted after deliberation. Indeed, that evidence could have had the opposite effect of providing the jury with a long-term motive for the murder. Regardless, the People's evidence established that the defendant planned to kill his mother hours before he murdered her. That evidence – coupled with the evidence that he

murdered his mother because she was going to send him to military school – overwhelmingly established that the defendant acted after deliberation. The result of the proceeding would not have been different had the defense presented evidence that the defendant was abused by his parents.[5]

3. The defendant also has not met the *Sullivan* standard.

The defendant is also unable to meet his burden under the adverse-effects test. To meet that test, 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*, 2015 CO 5, ¶ 57. At every turn, the record refutes the defendant's claim of prejudice.

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[5] It bears mention that in testifying that Mr. Truman's performance was deficient, the defendant's expert acknowledged that her opinion was based on defense counsel's assumption that a conflict-free attorney would have developed a defense that the defendant killed his mother because his father abused him (R.Tr.2/23/09, pp. 135-36).

First, the defendant's theory of abuse was not a reasonable defense strategy. The defendant asserts that the defense could have shown that he did not act after deliberation by showing "that years of abuse and trauma caused [him] to uncontrollably snap in a spontaneous eruption of violence" (O.B., p. 39). However, evidence of the defendant's alleged abuse was minor and involved isolated and remote instances that could have been viewed as reasonable parental discipline for the defendant's use of drugs. Regardless, given that the evidence amply established that he planned to murder his mother hours before he did, it was not a reasonable defense strategy to argue that his actions were the result of a sudden and uncontrollable outburst.

Second, the defendant has not shown that the alternative strategy was objectively reasonable under the facts known to counsel at the time the decision not to pursue it was made. Although Mr. Truman suspected and asked the defendant about the possibility of abuse, the defendant denied it (R.Tr.2/24/09, pp. 16-17, 91). Given those circumstances, it was not objectively unreasonable for Mr. Truman not to pursue the alternate strategy. *See, e.g., Johnson v. Cockrell*, 306 F.3d 249 (5th Cir.

2002) (counsel cannot be ineffective for failing to present evidence that the defendant did not disclosed to him); *Housel v. Head*, 238 F.3d 1289 (11th Cir. 2001) (same); *Lingar v. Bowersox*, 176 F.3d 453 (8th Cir. 1999) (same).

Third, and in any event, the record establishes that counsel's failure to pursue the strategy or tactic was not linked to the actual conflict. Defense counsel chose not to pursue that theory because it was not a viable defense. As he explained at the postconviction hearing, the strongest evidence of abuse was based on a fight over the defendant's refusal to quit using marijuana that ended with the defendant's father choking him and breaking his stereo (R.Tr.2/24/09, p. 42; R.Tr.2/26/09, p. 140). However, he worried that evidence would have "been eliminated by a motion in limine," because it was not relevant because evidence of abuse by Person A [would not have] justified the killing of Person B" (R.Tr.2/24/09, pp. 42, 114). Thus, his decision not to present that theory was based on professional judgment. It was not linked to any duties he owed to the defendant's father. Indeed, the defendant's claim that Mr. Truman's alleged conflict of interest prevented him from raising the

defendant's family dynamics is directly belied by the fact that counsel raised that issue during cross-examination of the defendant's father (R.Tr.10/20/99, pp. 114, 117). The defendant has not met the adverse-effects standard.

IV. T*ate* controls the defendant's sentencing claim.

As the defendant acknowledges, this Court's decision in *Tate* resolved the sentencing question before the Court. As he has presented no availing arguments challenging that holding, this Court should remand the defendant's case for a sentencing hearing consistent with *Tate*.

A. Standard of Review

The People agree that "review of constitutional challenges to sentencing determinations is de novo," *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005), including a sentence's constitutional proportionality, *Close v. People*, 48 P.3d 528, 541 (Colo. 2002). The defendant raised his constitutional challenge to his sentence at his resentencing hearing and as a direct appeal claim (R.Tr.5/20/11, p. 5).

B. The People agree that this Court should remand the defendant's sentence under *Tate*.

The Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 132 S. Ct 2455, 2463 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). The United States Supreme Court held in *Miller* that sentencing schemes mandating life without parole for juvenile offenders are unconstitutional. *Id*. at 2460, 2469 ("mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'"); *accord Tate*, 2015 CO 42, ¶¶ 27-35. *Miller* did not, however, categorically ban sentences of life imprisonment for all juvenile offenders where the sentence included the possibility of parole or where the court considered the offender's individual characteristics. 132 S. Ct. at 2469, 2471, 2474-75.

In *Tate*, this Court considered the appropriate remedy for juveniles sentenced to mandatory life without the possibility of parole (LWOP) under the statutory sentencing guidelines for class one felonies

in effect between 1990 and 2006, requiring mandatory sentences of LWOP. *Tate*, 2015 CO 42, ¶ 2. This Court concluded that "the proper remedy after *Miller* is to vacate a defendant's LWOP and to remand the case to the trial court to consider whether LWOP is an appropriate sentence given the defendant's 'youth and attendant characteristics.'" *Id.* at ¶ 36. If the trial court concludes that life without the possibility of parole is unwarranted, it should sentence such defendants to life with the possibility of parole after forty years. *Id.* at ¶ 19. The defendant's sentence should be vacated and remanded to the trial court to resentence the defendant consistent with the mandates in *Tate*.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. The defendant's sentence of LWOP should be vacated and remanded to the trial court for resentencing under *Tate*.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon, **SHANNON WELLS STEVENSON, EMILY L. WASSERMAN, SHERI DANZ, MELISSA HART, AND STANLEY GARNETT**, via Integrated Colorado Courts E-filing System (ICCES) on December 28, 2015.

/s/ Cortney Jones