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

This brief contains 7,865 words. Mr. Ybanez has filed a Motion for Enlargement of Word Count with this brief to accommodate the extra words over the 5,700 word limit otherwise applicable under C.A.R. 28(g).

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

/s/ Shannon Wells Stevenson

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INTRODUCTION

Throughout these proceedings, the state has argued that any problem caused by Roger's conflict was cured by the presence of defense counsel, and that any problem caused by defense counsel's conflict was cured by the presence of Roger. But a conflicted lawyer cannot cure a parent's conflict, and a conflicted parent cannot cure a lawyer's conflict. Indeed, as borne out by the events of this case, the involvement of both Roger and defense counsel amplified the conflict, leaving Nathan unable to protect his constitutional rights to effective assistance of counsel, to testify in his own behalf, and to participate in his own defense.

The violation of these rights rendered this trial a "fundamental miscarriage of justice," in which Nathan's lawyer told the jury that he must have "a hole in his soul." Unwilling to pursue any defense that might implicate Roger, defense counsel provided no explanation for Nathan's conduct, leaving the jury no choice but to convict Nathan of first degree murder.

As a seventeen year-old with no prior experience with the criminal justice system, yet charged with our state's most serious crime, Nathan was entitled to an independent guardian, an unconflicted lawyer, and a trial court attentive to the protection of his constitutional rights. Because he received none of these protections, his conviction must be reversed.

ARGUMENT

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

A. This Argument Is Preserved.

The state asserts the court of appeals erred in reviewing Nathan's guardian claim because it was not specifically presented in his post-conviction motion. However, as the court of appeals recognized, the post-conviction court rightly considered this claim because Nathan presented it through argument to the court, hearing testimony, and post-hearing briefing. If this Court finds the claim was not properly presented to the post-conviction court, the state has nonetheless waived its waiver argument because it never objected to the claim in the post-conviction proceedings. Thus, the claim is preserved, and should be reviewed for an abuse of discretion.

1. Nathan's guardian claim is preserved.

The failure to appoint a guardian for Nathan—a minor whose father was a victim of the crime and a prosecution witness—was an abuse of discretion. Nathan presented this error multiple times to the post-conviction court: during opening statement (R.Tr.2/23/09;9:24-10:3, 13:23-14:19); through testimony of Nathan's experts, defense counsel, and father (R.Tr.2/23/09;99:21-103:14, 184:4-185:20, 196:25-197:6; R.Tr.2/24/09;40:23-41:7; R.Tr.2/25/09;91:21-92:3, 163:16-168:8,

234:6-234:15); and in a separate section of his post-hearing brief (PR.V.3:519, 541, 543-546). The state responded to the argument by cross-examining witnesses about the need for a guardian and addressed the claim in its post-hearing briefing. (*See* I.A.2, *infra*.) The post-conviction court rejected the claim. (PR.V.4:727, 740, 742.) Because Nathan raised the issue to the court, and the state responded to the issue, and the post-conviction court ruled on this issue, the court of appeals correctly determined that Nathan's guardian claim was preserved. *People v. Ybanez*, No. 11CA434, slip op. at *2-3 (Colo. App. Feb. 13, 2014); *People v. Gallegos*, 975 P.2d 1135, 1137 (Colo. App. 1998) (post-conviction court properly reviewed a claim not specifically asserted in the post-conviction motion where "[t]he issue was raised at the hearing" and "[t]he prosecution has failed to demonstrate that it was prejudiced in any manner"), *aff'd as modified*, 2 P.3d 716 (Colo. 2000).

The state maintains Nathan waived his guardian claim by not specifically presenting it in his initial 35(c) motion. In advancing this argument, the state cites four inapplicable subsections of the Colo. R. Crim. P. 35(c), and Criminal Procedure Form 4, a form in the appendix to the Colorado Rules of Criminal Procedure.

Although neither Rule 35 nor Form 4 addresses the waiver of claims, the state relies on them to argue that any claim not presented in an initial 35(c) motion

is waived. But none of the cited portions of the Rule require a defendant to raise every ground for relief in the 35(c) motion, and case law establishes that it is unnecessary to do so. For example, in *Sanchez-Martinez v. People*, this Court found the trial court properly addressed and ruled on the constitutionality of the petitioner's guilty plea, even though the 35(c) hearing had been granted on the basis of new evidence. 250 P.3d 1248, 1251, 1254, 1257 (Colo. 2011).[1]

The state also argues that Form 4 precludes addition of new claims argued during a 35(c) hearing. Form 4 tells a defendant he "should" include all claims, and failure to do so "may" result in an inability to raise the claims later. The language in Form 4 establishes no absolute bar to adding arguments developed at a 35(c) hearing, and in any event, forms are not law. *See* C.R.C.P. Appendix Introductory Statement (forms are "intended for illustration only").

Finally, the state does not cite, and Nathan is not aware of, a single Colorado case finding a claim waived after it was presented to and addressed by a post-

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[1] Nathan acknowledges that Rule 35(c) and case law establish that if a defendant fails to raise a cognizable claim in his 35(c) motion, that motion may be denied without a hearing. This rule is inapplicable to this case, however, because it says nothing about adding new claims or arguments after a hearing has been granted.

conviction court, simply because it was not specified in an original 35(c) motion.[2] This should not be the first case to do so. Instead, the Court should construe a 35(c) motion like a civil complaint, which can be amended to conform to the evidence. C.R.C.P. 15(b). Federal courts apply F.R.C.P. 15, which governs amendments to complaints, to post-conviction motions. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 704-05 (2004) (recognizing that the Supreme Court has "assumed Rule 15(b)'s applicability to habeas petitions" and calling the Rule's use in habeas proceedings "noncontroversial"). Because Nathan's claim was sufficiently presented to the district court, it was preserved and is properly before this Court.

2. Because it failed to raise the issue in the post-conviction proceedings, the state has waived its waiver argument.

Besides being wrong, the state's waiver argument was itself waived when the state failed to raise the argument to the post-conviction court.

During post-conviction proceedings, the state raised no objection that Nathan's guardian claim was improperly asserted. Instead, the state responded to the guardian claim on the merits during cross-examination and briefing. It cross-examined Nathan's ethics expert regarding the discretionary nature and ethics of appointing a guardian. (R.Tr.2/23/09;106:10-112:5). It examined defense counsel

[2] The state's cases all involve 35(c) motions that were denied without a hearing. (AB 25.)

about the discretionary nature of the guardian statute, the types of cases where a guardian is mandated, and the purpose served by a guardian in a direct file case. (R.Tr.2/24/09;150:8-151:8.) It cross-examined Nathan's ineffective assistance expert on the discretionary nature of the statute. (R.Tr.2/25/09;168:17-169:2.) Finally, it thoroughly briefed the issue after the hearing, arguing that neither the statute nor the rules of ethics required the appointment of a guardian, and that defense counsel was not ineffective for failing to request a guardian. (PR.V.4:574, 592, 594-596.) Because the state failed to argue that Nathan waived the issue, and instead addressed the merits, the state waived its waiver argument. *See People v. Sporleder*, 666 P.2d 135, 139 (Colo. 1983) (holding the government waives an argument where it does not oppose the defendant's motion on that basis during the proceedings below); *see also United States v. Moody*, 564 F.3d 754, 760-61 (5th Cir. 2009) ("[T]he government never argued that [the defendant] waived the issue, so the government has waived its potential waiver argument.").[3]

[3] For these reasons, the state's argument on the importance of "notice" are not persuasive. (AB 23-24.) The state did not object to presentation of the guardian claim and it thoroughly responded to it in the post-conviction proceeding. Without any demonstration of prejudice, the state cannot credibly make general appeals to the importance of notice. *See Gallegos*, 975 P.2d at 1137.

B. The District Court Abused Its Discretion By Failing to Inquire Into and Appoint Nathan a Guardian.

In his opening brief, Nathan established that the trial court was authorized to appoint him a guardian, and was obligated to conduct a hearing and appoint one, given the specific facts before it. While the trial court has substantial discretion in making this determination, refusing to even inquire into the need for a guardian was not among the court's "rationally available choices." Rather, this failure was an abuse of discretion and violated Nathan's constitutional rights.

1. Where a statute gives a court discretion, its decisions are still reviewed for an abuse of that discretion.

The state first appears to assert that, because § 19-2-517(8), C.R.S. (2014), provides a trial court with discretion to appoint a guardian in a direct file proceeding, the trial court can always decline to do so.[4] (AB 35-40.) In support of this, the state cites *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986) and *Streu v. City of Colorado Springs*, 239 P.3d 1264 (Colo. 2010). These cases make abundantly clear, however, that even where a statute or rule affords a district court discretion, the court must apply any criteria developed by the courts and may

[4] Section 19-2-517(8) was added to the Children's Code in H.B. 96-1005 as Section 19-2-517(5). Counsel listened to approximately 27 hours of audio recordings of the legislative hearings discussing this bill. There was no discussion regarding this particular subsection.

not act in a manifestly unreasonable, arbitrary, or capricious manner. *Buckmiller*, 727 P.2d at 1115-16; *Streu*, 239 P.3d at 1268. The state concedes as much by applying this very standard in arguing that the trial court did not abuse its discretion. (AB 40.)[5]

2. Given the circumstances before it, the trial court abused its discretion by failing to inquire and appoint Nathan a guardian.

The state argues that Nathan relies on evidence not before the trial court to support his claim to a guardian. (AB 40-42.) This is not so. The argument is based on the facts in plain view of the trial court:

- Nathan was a juvenile with no prior criminal history;
- Nathan was charged in a direct-file proceeding with the most serious crime recognized under Colorado law;
- Nathan faced a mandatory sentence of life in prison without the possibility of parole;
- Nathan's mother had died;
- Nathan's father was the primary victim of his crime;

[5] The state wrongly contends that Nathan has argued that a trial court must appoint a guardian in every direct file case. (AB 35-36.) In most instances, a juvenile charged as an adult will have a conflict-free parent to act as his guardian, and there will be no need for an independent guardian. Nathan argues only that the trial court erred in failing to appoint a guardian under these unique circumstances.

- Nathan's father was a key witness endorsed by the prosecution;
- Nathan's father acted as his guardian during the proceedings; and
- Nathan had private counsel that he could not have retained himself.

In light of this extreme set of facts, it was manifestly unreasonable for the trial court to not even inquire about the need for an independent guardian, especially considering the relatively small burden such an inquiry would have placed on the court. (20th Judicial Dist. Atty. Amicus Br. 9-14.)[6]

The state also argues that these facts did not matter because the trial court had no facts to suggest Nathan was not mentally competent. (AB 43-47.) But, as Nathan and his amici have shown, mental competence does not determine when a *child* needs a guardian. All of the statutes providing guardians for children are concerned with the limitations children have in legal proceedings, with whether a child has a parent available to assist, and with whether the child has a conflict with the parent. (OCR Amicus Br. 8-9, 11-14.) By focusing exclusively on mental

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[6] The state argues that the trial court need not put on the record each time it declines to exercise its discretion, and that the "presumption of regularity" requires this Court to assume there was no error. (AB 49-51.) But the presumption of regularity applies only when: (1) the record contains affirmative evidence that no error occurred; or (2) the defendant fails to present any evidence that there was an error. Here, the record does not establish that the trial court correctly applied its discretion in considering the appointment of a guardian, and Nathan presented evidence of facts known to the trial court sufficient to rebut any presumption that no error occurred.

competence, the state ignores the common-sense truth universally recognized by our courts—children are highly susceptible to the influence of their parents, even parents that abuse them. (*Id.* 6-7 (citing cases).)

The state also argues the trial court did not abuse its discretion because a guardian has only limited authority. (AB 39-40.) But in this case, a guardian would have had precisely the authority and responsibility needed—to advise the trial court of the evidence of abuse in the discovery, of Roger's conflicted role as victim and prosecution witness, and of defense counsel's conflicted role because he was paid by Roger. A guardian could have advocated that representation by defense counsel was not in Nathan's best interest *even if that is what Nathan wanted*. At a minimum, a guardian would have ensured that Nathan was properly advised about the conflict, and the limitations it might put on defense counsel's representation.

Finally, the state argues that there was no need for a guardian because Roger was not adverse to Nathan. (AB 47-48.) But Roger candidly admitted this adversity, testifying that he was conflicted in trying to fill his multiple roles, and defense counsel himself told Nathan that Roger was conflicted. The evidence admitted in the post-conviction hearing confirmed the conflict and proved Roger had compelling interests in protecting himself that were adverse to Nathan's interest in a full investigation of all his possible defenses. This conflict required the

appointment of a guardian, regardless of whether Roger acted adverse to Nathan in every instance.

C. Plain Error Does Not Apply.

The state argues that, if this Court does review Nathan's guardian claim, it may do so only for plain error. This is wrong for several reasons. First, the argument is waived. Second, the claim should be reviewed as a properly asserted post-conviction claim that need not have been raised at all in the trial court. Third, in addition to being an abuse of discretion under the statute, (I.B, *supra*), the failure to appoint a guardian in this case was an error of constitutional magnitude. This rises to the level of structural error requiring automatic reversal, or, at a minimum, constitutional error that was not harmless, thereby warranting a new trial.

1. The state has waived its argument for plain error review.

The state never argued in the post-conviction proceeding that Nathan's guardian claim was subject to plain error review because he did not raise the issue during his trial. (*See* PR.V.4:600-616.) Thus, the state's argument is waived.

2. Nathan's guardian claim was properly raised in his post-conviction proceeding.

In his opening brief, Nathan established that the very circumstances that created his need for a guardian prevented him from raising the issue to the trial

court. (OB 18-23.) The state does not contest or even address this point. Nevertheless, it asserts that the claim may be reviewed only for plain error. The failure to object at trial, however, does not preclude raising the objection in a post-conviction proceeding where the very nature of the error prevents objection at trial and where the claim is best reviewed in the post-conviction context. Thus, plain error review does not apply to Nathan's guardian claim.

Our courts have often allowed claims like Nathan's to be asserted in the post-conviction court in the first instance. For example, claims of ineffective counsel can rarely be raised at trial. *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) ("A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal . . . ." (internal citation omitted)). For these reasons, Colorado has determined that such claims should typically <u>not</u> be raised on direct appeal. Colo. R. Crim. P. 35(c)(3)(VIII); *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003) ("In light of the considerations potentially involved in determining ineffective assistance, defendants have regularly been discouraged from attempting to litigate their counsels' effectiveness on direct appeal.").

This Court has extended this logic to other claims as well, holding that there is no contemporaneous objection requirement where a defendant contests the validity of his waiver of a right to a jury trial or to testify:

> [A]pplication of the contemporaneous objection and plain error review standards based on the defendant's failure to object during his own advisement make little sense. The very premise of such an advisement is that a defendant may not understand the nature of the right or the consequences of waiving it. Hence, it is illogical to oblige a defendant to object contemporaneously to the trial court's advisement.

Moore v. People, 2014 CO 8, ¶ 18; *People v. Walker*, 2014 CO 6, ¶ 11. In addition, these arguments may be raised in post-conviction proceedings and cannot be reviewed on direct appeal because they "likely will require a post-conviction court to look beyond the trial court's advisement into facts that the defendant brings forward that are not contained in the direct appeal record." *Moore*, ¶ 17; *Walker*, ¶¶ 11, 13.

Just as a criminal defendant may not know that he is receiving ineffective assistance of counsel or an inadequate advisement, Nathan could not recognize that he was in need of a guardian for the very reasons that he needed a guardian. The state does not contest this. (*See* AB 31.) Nor could this issue be reviewed on direct appeal, as the trial record did not contain all the facts concerning the necessity of a

guardian or the impact of failing to appoint one. This Court should hold that Nathan's guardian claim was properly raised in his post-conviction proceeding.

The state cites *People v. Versteeg*, 165 P.3d 760, 763-65 (Colo. App. 2006), and *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996), in support of its position that unpreserved trial error can be reviewed only for plain error in a post-conviction proceeding. Both of these cases, however, concerned jury instruction errors. Unlike this case, there is no reason why contemporaneous objections to jury instructions cannot be made, or why review in a post-conviction proceeding is preferable to review on direct appeal.[7]

Because Nathan could not be expected to object at trial or to develop a complete record on the failure to appoint a guardian, this Court should not apply plain error; it should review the court's failure to appoint a guardian for an abuse of discretion, and as a constitutional error, as described below.

3. The failure to appoint a guardian is a constitutional error that is either structural or not harmless.

In his opening brief, Nathan showed that the failure to appoint him a guardian violated his constitutional rights to a fair trial, to participate in his own defense, and to testify in his own behalf. (OB 26-29.) He also showed that the failure to appoint a guardian in this case was a structural error that "infect[ed] the

[7] And, of course, this case is also on direct appeal.

entire trial process," and "necessarily render[ed] [the] trial fundamentally unfair." *People v. Boykins*, 140 P.3d 87, 93 (Colo. App. 2005); (OB 29-30).

In response, the state baldly asserts that, because the authority to appoint a guardian is statutory, Nathan has no claim of constitutional error. (AB 26, 33.) But statutory rights can implicate constitutional rights because "a defendant's due process rights are violated if he or she does not receive that which state law provides." *People v. Vieyra*, 169 P.3d 205, 208 (Colo. App. 2007) (rejecting the state's argument that a defendant was not entitled to post-conviction relief regarding jury selection because the right to preemptory challenges is not constitutional) (quoting *People v. Reynolds*, 159 P.3d 684, 688 (Colo. App. 2006)).

And here, a guardian was required in this case to avoid multiple constitutional errors. The court's failure to appoint a guardian for Nathan (or even inquire into the propriety of appointing him one) was structural error because it robbed Nathan of the protective measures of state law and violated his constitutional guarantee to a fair trial. While the state is correct that the "the failure to appoint a guardian ad litem by itself would not always deprive a defendant of a fair trial," (AB 33), Nathan advances no categorical rule. Instead, under the circumstances of this case, Nathan was deprived of non-conflicted assistance. His only "guardian" was his father, who was a victim and a prosecution witness.

Likewise, Nathan's lawyer was operating under an actual conflict of interest. (II.A, *infra*). The failure to appoint a guardian meant Nathan had no independent guidance regarding his constitutional rights to conflict-free counsel, to participate in his defense, and to testify in his own defense. As a minor facing life in prison for first degree murder with a conflicted father and lawyer, the lack of a guardian was a structural error that rendered Nathan's trial fundamentally unfair and requires automatic reversal. *See People v. Miller*, 113 P.3d 743, 749 (Colo. 2005).

Even if the lack of a guardian was not structural error, it was constitutional error that warrants a new trial, unless the state can prove beyond a reasonable doubt that the error was harmless. *People v. Harris*, 43 P.3d 221, 230 (Colo. 2002) ("If there is a reasonable probability that [the criminal defendant] could have been prejudiced by the error, the error cannot be harmless."). Nowhere in its answer brief does the state argue that the lack of a guardian was harmless. And it was not harmless: the deprivation of a guardian's non-conflicted assistance violated Nathan's Fifth and Sixth Amendment rights, thereby establishing "a reasonable probability" that Nathan was prejudiced. Under either constitutional standard—automatic reversal for structural errors or harmless error review of constitutional errors—Nathan is entitled to a new trial.

D. Even If Plain Error Applies, the Failure to Appoint a Guardian Was Plain Error.

The court of appeals was incorrect to apply plain error to Nathan's direct appeal of his guardian claim because of the unique nature of the error. (*See* I.C.2, *supra*). However, even if this Court applies plain error review, the trial court's failure to appoint a guardian was plain error.

The plain error standard is "calculated to temper the contemporaneous-objection requirement in the interests of permitting an appellate court to correct particularly egregious errors." *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987). Plain errors are those that are both "obvious and substantial," *Miller*, 113 P.3d at 750, or that "otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Nathan was a minor with no criminal history facing life in prison without the possibility of parole. His father, who was a victim of the crime and a prosecution witness, hired his attorney, acted as his guardian, and advised him on his defense. These facts alone were sufficient to require the appointment of an independent guardian, yet the court failed to *even inquire*. Nathan was imprisoned for life

without the benefit of non-conflicted assistance. That error is obvious, substantial, and particularly egregious; it warrants a new trial.[8]

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

"The right to effective assistance of counsel includes the right to conflict-free counsel." *West v. People*, 2015 CO 5, ¶ 15. In his 35(c) hearing, Nathan presented unrebutted evidence that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. Where these criteria are established, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), requires no further evidence of prejudice. Thus, Nathan is entitled to a new trial.

A. Nathan's Counsel Had an Actual Conflict of Interest.

In its answer brief, the state does not address the case law cited in the opening brief or the arguments made by Nathan's amici establishing a conflict of interest. Instead, the state argues this Court must defer to the post-conviction court's finding of fact that there was no conflict. Nathan agrees that the post-conviction court's findings of fact are afforded deference when supported by

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[8] In arguing that the failure to appoint a guardian was not plain error, the state contends that Nathan was not prejudiced by the lack of a guardian. But "prejudice" is not an element of plain error. *See Moore*, 925 P.2d at 268-69. Additionally, the state's contention that Nathan's *Curtis* advisement negates the "substantial" nature of the error is not persuasive. Just as Nathan could not object to the lack of a guardian, he also could not comprehend the nature of his waiver without an unconflicted lawyer or guardian.

competent evidence. But whether a conflict of interest exists is a question of law that is reviewed de novo. *People v. Hagos*, 250 P.3d 596, 613 (Colo. App. 2009) ("We review de novo the trial court's determination of whether an actual conflict existed.").[9]

In this case, the undisputed facts developed at the hearing established that defense counsel had an actual conflict:

- defense counsel was hired and paid by Roger in violation of ethical Rule 1.8(f);
- defense counsel knew that Roger was a victim of the crime, a key prosecution witness for the state, and Nathan's only guardian;
- Roger felt conflicted by his multiple roles in the case;
- discovery revealed evidence that Nathan had been abused by Roger, and Roger admitted that he had abused Nathan;
- defense counsel advised Nathan that Roger was conflicted;

[9] The state argues that there was not even a potential conflict because Roger's involvement with Nathan's representation was limited to paying his legal fees. (AB 61.) This is contradicted by Rule 1.8 and the fact that defense counsel sought a waiver of the conflict from Nathan because he knew that there is a potential conflict when "one person hires a lawyer to represent another." (R.Tr.2/24/09;36:3-14, 37:16-38:12, 39:19-41:7.)

- Nathan needed a full investigation of defenses to the state's claim he acted after premeditation, including investigation of family dynamics and past abuse;
- Roger had an interest in limiting such an investigation because it would have revealed abuse and contradicted his account of the family's and Nathan's history;
- ethics expert Marcy Glenn testified that defense counsel had a conflict of interest because of Nathan and Roger's conflicting interests; and
- defense expert Jim Aber testified that defense counsel had a conflict of interest because he was retained by Roger, who was a prosecution witness and a victim of the crime.

(OB 4-12.)

The state does not and cannot refute these facts. Nor did the state offer any expert testimony rebutting the opinions of Nathan's two expert witnesses. Instead, the sole support for the state's argument was defense counsel's self-serving testimony that he did not feel conflicted. *See Ybanez*, slip op. 13-14. That testimony, however, should not have been considered because "attorneys systematically understate both the existence of conflicts and their deleterious effects." *West*, ¶ 51; *see also United States v. Nicholson*, 611 F.3d 191, 213 (4th

Cir. 2010) ("after-the-fact testimony by [the conflicted] lawyer . . . is not helpful" (alterations in original)); (OB 37-38). Defense counsel's own testimony is "unnecessary—and even inappropriate" when evaluating a conflict of interest. *Nicholson*, 611 F.3d at 213.[10]

Without defense counsel's testimony that he was not conflicted, the post-conviction court's only factual finding is that Roger was not defense counsel's client. (PR.V.4:729.) But the lack of a client relationship between defense counsel and Roger does not mean that there was no conflict of interest. Rule 1.8 presumes that third-party fee arrangements create conflicts of interest even in the absence of an attorney-client relationship. *See also Wood v. Georgia*, 450 U.S. 261, 268-69 (1981) (there are "inherent dangers when a criminal defendant is represented by a lawyer hired and paid by a third party"); (OB 34-35; Ethics Profs. Amicus Br. 10-13).

The state's argument that there was no conflict of interest because Roger told defense counsel he could not pay defense counsel his full fee must also be rejected. Rule 1.8(f) says nothing about the amount or timing of payment. Colo. RPC 1.8 (1998). Rather, it creates a blanket prohibition against third-party fee

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[10] Indeed, based on this factual record, even under the clear error standard, reversal would be required.

arrangements unless the requirements of rules 1.8(f) and 1.7 are satisfied. Colo. RPC 1.7, 1.8 (1998). The rule recognizes that economics are a powerful motivator, and that payment by a third-party can create a conflict of interest by dividing loyalties if the interests of the defendant and the interests of the payer are inconsistent. *See* Colo. RPC 1.7, 1.8.

Here, Nathan and Roger's interests were not just inconsistent, they were directly adverse. (OB 35-37.) Roger's initial payment of a portion of defense counsel's fee established Roger as defense counsel's benefactor. And although Roger later said he could not continue to pay defense counsel, there is always a possibility of additional payment. Either because Roger had already paid defense counsel a substantial amount, or because Roger owed and might pay additional fees, defense counsel had a reason to avoid embarrassing or discrediting Roger.

B. The Conflict of Interest Had an Adverse Effect.

To show that a conflict of interest had an adverse effect, a defendant must (1) identify an alternative defense strategy; (2) show the strategy was objectively reasonable under the facts known to counsel at the time; and (3) establish that counsel's failure to pursue the strategy was linked to the conflict. *West*, ¶ 57.

The undisputed evidence at the 35(c) hearing established that investigating the numerous allegations of abuse and turmoil in the Ybanez household was an

alternate defense strategy that was objectively reasonable under the facts known to defense counsel at the time. According to unrebutted expert testimony, not only was conducting such investigation reasonable, but the failure to investigate was "appalling" and "incredibly below the standards" of a competent attorney. (R.Tr.2/25/09;111:17-112:12.) Even defense counsel conceded that a competent attorney defending a child charged with matricide should investigate the family's dynamics. (R.Tr.2/23/09;206:22-207:10, 246:14-249:6.) The state had no expert witness testify that conducting such an investigation was an unreasonable strategy or that defense counsel's lack of investigation was reasonable.

Because it has no evidence to rely on, the state cites several cases to support its argument that conducting an investigation into the family dynamics was objectively unreasonable. In each of these cases, however, counsel undertook a reasonable investigation and found nothing to suggest further investigation was warranted. *See Johnson v. Cockrell*, 306 F.3d 249, 252 (5th Cir. 2002) (finding defense counsel *did* "adequately investigate[]" defendant's alternative theory by spending "hours interviewing [defendant's] family members at length" over a period of time about an expansive "laundry list" of topics); *Housel v. Head*, 238 F.3d 1289, 1294-95 (11th Cir. 2001) (under *Strickland v. Washington*, 466 U.S. 668 (1984), no ineffective assistance for failure to investigate where counsel

"contacted every person" named by defendant in recounting life story and found no information indicating a traumatic upbringing); *cf. Lingar v. Bowersox*, 176 F.3d 453, 461 (8th Cir. 1999) (under *Strickland,* no ineffective assistance for failure to investigate where counsel "had no reason to suspect or know of any abuse").

By contrast, Nathan's defense counsel undertook no investigation, despite the many references to turmoil and abuse in the Ybanez family contained in the discovery. As the evidence at the hearing established, he did not interview a single fact witness; he sought no medical records or to interview any physicians from Centennial Peaks Hospital, a mental health facility that treated Nathan a few months before the homicide; and he never investigated the family's multiple referrals to Social Services.

The state also argues that Nathan cannot demonstrate an alternate defense strategy that was objectively reasonable because it would not have been reasonable to argue to the jury that Nathan's conduct resulted from years of abuse. But defense counsel could never have made this determination without first investigating the relevant evidence. Furthermore, Nathan's expert testified that this argument should have been presented to the jury, (R.Tr.;2/25/09 100:11-101:22), and the only evidence to the contrary was the self-serving testimony of defense

counsel—no expert testified that it would not have been reasonable to present this theory to the jury.

Given the nature of the crime, the evidence of abuse in the Ybanez household, and the fact that Nathan had never previously committed a violent crime, it was an objectively reasonable strategy to investigate the family dynamics and objectively unreasonable not to do so. Defense counsel's decision to forego this strategy is logically linked to his interest in appeasing Roger, his employer, because of the likelihood that the proposed investigation would have uncovered information that discredited and embarrassed Roger.[11]

Thus, the *Sullivan* standard is satisfied. *See West*, ¶ 57. There was an actual conflict of interest. Investigating the allegations of abuse and turmoil in the Ybanez family was an alternative strategy that was objectively reasonable based on the facts known to defense counsel at the time. And counsel's failure to do so is explained by the conflict of interest.

[11] The state argues that the cross-examination of Roger shows defense counsel had no allegiance to Roger. A review of the transcript discredits this assertion. The transcript contains no mention of Roger choking Nathan, despite Roger admitting to defense counsel that he had choked Nathan, and instead shows Roger reciting his demonstrably false tale about a normal house where the only problems were related to Nathan meeting Eric Jensen and Brett Baker. (*See, e.g.,* R.Tr.;10/20/99;100-125.)

C. Nathan Satisfied *Sullivan* and Is Entitled to a New Trial.

The state argues that *Sullivan* does not apply to conflicts caused by third-party fee arrangements. This is wrong—the United States Supreme Court has analyzed ineffective assistance claims based on third-party fee arrangements under *Sullivan*. But even if the claim is evaluated under *Strickland*, defense counsel's representation was constitutionally deficient, and Nathan is entitled to a new trial.

1. The United States Supreme Court has applied *Sullivan* to conflicts caused by third-party fee arrangements.

In *Wood*, the United States Supreme Court relied on *Sullivan* to analyze a conflict created by a third-party fee arrangement. (*See* OB 47-48.) Rather than address *Wood*, the state relies on dicta in *Mickens v. Taylor*, 535 U.S. 162, 169-72, 174 (2002), suggesting that *Sullivan* might not apply to all conflicts. *Mickens* did not, however, criticize *Wood*'s reliance on *Sullivan* to analyze a conflict created by a third-party fee arrangement. Furthermore, although *Mickens* criticized lower courts for applying *Sullivan* too broadly, none of the cases *Mickens* criticized involved third-party fee arrangements. *Id.* at 174.

The state also attempts to avoid this Supreme Court precedent by relying on four federal appellate cases. It argues these cases show that *Sullivan* applies only to situations involving multiple representations, and not to conflicts caused by third-party fee arrangements. None of the cases cited demand this result. Moreover, none

of the cases involve conflicts arising from third-party fee arrangements, and the state overstates the holding of each:

- *United States v. Newell* involved a conflict based on concurrent representation; thus, its statements about the limits of *Sullivan* are dicta. 315 F.3d 510, 516 (5th Cir. 2002).
- *Whiting v. Burt* involved an allegation that appellate counsel, who was also trial counsel, raised no ineffective assistance claim on appeal because doing so was contrary to his interests. 395 F.3d 602 (6th Cir. 2005). *Whiting* held that *Strickland* governed this claim because (1) any prejudice was not obvious, and (2) the effect of the conflict was not difficult to prove. *Id.* at 619. Colorado has not adopted such a test, and even if it had, this test does not require that *Strickland* apply to conflicts created by third-party fee arrangements.
- In *Caban v. United States*, the Eighth Circuit explicitly stated that it would "refrain from adopting either [*Sullivan* or *Strickland*] as the law of [the Eighth Circuit] for non-notice conflict cases not involving multiple or serial representation." 281 F.3d 778, 783-84 (8th Cir. 2002).

- Evaluating a conflict of interest unrelated to payment of fees, *Schwab v. Crosby*, 451 F.3d 1308, 1324 (11th Cir. 2006), holds merely that the scope of *Sullivan* remains an open question with the United States Supreme Court.

The state also fails to address the cases cited in Nathan's opening brief holding that *Sullivan* does apply to conflicts other than those involving multiple representations, including cases involving third-party fee arrangements. *See, e.g.*, *United States v. Adams*, 588 F. App'x 811, 816 n.1 (10th Cir. 2014) (citing *United States v. Flood*, 713 F.3d 1281, 1286 (10th Cir. 2013)); (OB 4 (citing additional cases)).

2. There is no principled reason that *Sullivan* should not apply to conflicts caused by third-party fee arrangements.

The state argues that *Sullivan* should not apply to financial conflicts. Not only does this argument contradict Supreme Court precedent, but there is no principled or logical reason to draw this distinction.

First, the state's argument is based on the faulty premise that all a defendant must do under *Sullivan* is allege any potential conflict of interest, and then the defendant is entitled to a presumption of prejudice. This is not the law. *Sullivan* requires the defendant prove that counsel was laboring under an actual conflict of interest and that the conflict adversely affected counsel's performance. *See*

Sullivan, 446 U.S. at 348-50 ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."); *West*, ¶¶ 28, 57. It is not until the defendant proves an actual conflict of interest and an adverse effect on representation that the presumption of prejudice applies.

If a defendant establishes an adverse effect, the fact that the conflict was created by a third-party fee arrangement rather than concurrent representation does not provide a reasoned basis for rejecting the *Sullivan* presumption of prejudice. (Ethics Profs. Amicus Br. 6-7.) A defendant has a constitutional right to representation that is free from conflict. This right does not depend on the source of the conflict, and neither should the presumption of prejudice.

The state's suggested bright line rule that *Sullivan* does not apply to financial conflicts of interest should also be rejected because it is incompatible with *Sullivan* and *West*, which recognize that in some situations, *Strickland* is "inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *West,* ¶ 24. A presumption of prejudice is needed where, due to a conflict of interest, counsel rejects a defense strategy, and despite there being a high likelihood of prejudice, it is difficult to prove that it is outcome-determinative. *See Sullivan*, 446 U.S. at 349-50; *West*, ¶ 53. Conflicts of interest, regardless of source,

can present this situation, and absent a presumption of prejudice, defendants are denied their Sixth Amendment right to counsel.

Sullivan provides the proper standard for evaluating Nathan's ineffective assistance of counsel claim, and Nathan is entitled to a new trial under this test.

3. Defense counsel was ineffective under *Strickland*.

Nathan disagrees that *Strickland* provides the proper test in this case, but even under *Strickland*, defense counsel was ineffective.

The state argues that defense counsel was not ineffective under *Strickland* because an attorney does not render ineffective assistance by choosing an unsuccessful strategy. But the problem here is not that defense counsel chose an unsuccessful strategy, it is that he failed to investigate a potentially viable defense and so could not make a reasonable decision about trial strategy. (OB 48-50.) Had defense counsel investigated the allegations of abuse in the Ybanez house, there is a reasonable probability that he could have answered the question he posed to the jury: "What is wrong with Nathan Ybanez?" (R.Tr.10/21/99;30:9-20.) And armed with an answer, there is a reasonable probability the jury would have acquitted Nathan of first degree murder.

The state also contends that, regardless of the evidence presented, a jury would have convicted Nathan of first degree murder. While Nathan was involved

in the crime, the state's argument overstates the strength of the evidence of premeditation. The state attempts to paint Nathan as a ruthless killer by describing him hitting his mother with a fire poker, (AB 7), but the testimony shows it was Eric Jensen who repeatedly beat the victim in the head. (R.Tr.10/20/99;151:12-17.) And although Nathan commented to friends that he wanted to kill his mother, it was "not unusual" for him to make similar statements, and then not act on them. (R.Tr.10/20/99;137:15-19; *see also id.* at 78:20-25.) Furthermore, the haphazard attempt to clean up the crime scene and dispose of the body, and the lack of an escape plan further discredits the argument that this crime was premeditated. (*Id.* at 142:1-143:1, 147:24-148:11.) The state succeeded because defense counsel did not challenge the state's case and did not explain why Nathan lashed out in violence. The jury was looking for an explanation for why Nathan did this, and had it received one, there is a reasonable probability that Nathan would have been convicted of second degree murder rather than first.

D. Nathan Could Not and Did Not Waive His Right to Conflict-Free Counsel.

The state argues that Nathan could and did voluntarily waive his rights to conflict-free counsel, but neither case law nor the record supports this argument.

First, the state fails to establish that defense counsel's conflict was waivable. Under Rule 1.7(c), a conflict of interest cannot be waived if "a disinterested lawyer

would conclude that the client should not agree to the representation under the circumstances of the particular situation." Colo. RPC 1.7(c). The state does not explain why defense counsel's conflict was waivable. (AB 64.) Nor does the state rebut the opinions of Nathan's amici and ethics expert that any disinterested attorney would recognize that an attorney hired by Roger would be materially limited in his defense of Nathan. (Ethics Profs. Amicus Br. 13-14; R.Tr.2/23/09;81:4-9, 83:16-84:18.) If the state is arguing the conflict was waivable because defense counsel believed he was unaffected by the conflict, that is not the test. *See* Colo. RPC 1.7(c).

Second, improperly assuming that the conflict of interest was waivable, the state argues that Nathan's purported waiver was valid. In making this argument, the state fails to address the argument that the waiver needed to be on the record. (OB 45-46; 20th Judicial Dist. Atty. Amicus Br. 15-18.) Because there is no record of any waiver, this should be the end of the inquiry. *See People v. Castro*, 657 P.2d 932, 944 (Colo. 1983) ("waiver of such a fundamental right . . . will not be presumed from a silent record"), *overruled on other grounds*, *West*, ¶ 29.

Instead, assuming that no record of the waiver was needed, the state argues that there was no need for Nathan to have the assistance of an impartial adult or the court in order to waive his constitutional right to conflict-free counsel. The state's

cases do not support this. *People v. N.A.S.*, 2014 CO 65, suggests that the presence of an impartial parent is important when evaluating whether a juvenile's statements are made voluntarily. *Id.* at ¶ 20 (presence of the juvenile's impartial father and uncle were factors favoring a finding of voluntariness). The state's other cases are inapplicable because none involve a situation where a juvenile is left with no impartial advisor. For example, in *People in Interest of S.A.R.*, the court held that no parental presence was required for a juvenile to waive his right to testify where he was "actively represented by counsel," "he received a comprehensive advisement from the court," and had previously discussed his right to testify with his family. 860 P.2d 573, 573-74 (Colo. App. 1993).

The state also contends that Nathan had a parent to assist him. This argument overlooks the obvious fact that Roger's interests conflicted with Nathan's because he was a victim of the crime, a prosecution witness, and an admitted abuser of Nathan. Thus, Roger's involvement only heightens the need for an independent advisor or court involvement in the waiver. (20th Judicial Dist. Atty. Amicus Br. 12; JLC Amicus Br. 16-22). The state's argument that Roger was acting in Nathan's best interest is contradicted by Roger's own testimony admitting he was conflicted. (R.Tr.2/25/09;243:13-20.)

Third, even if Nathan could have waived the conflict, he was not provided sufficient information to do so. The state argues that all that is required for an attorney to obtain a "knowing waiver" is for the attorney to inform the client that payment is coming from a third-party. (AB 65.) Yet, case law establishes that a knowing waiver of the constitutional right to conflict-free counsel requires more. Specifically, a defendant must be advised of and *understand* the effect of the conflict on the attorney. *See Castro*, 657 P.2d at 945-46 & n.10 (prosecution must establish "that the defendant was aware of the conflict and its likely effect on the attorney's ability to offer effective representation"); (*see also* R.Tr.2/23/09;97:13-18, 190:4-8; Ethics Profs. Amicus Br. 14-15). For all of these reasons, Nathan could not and did not waive the conflict.

III. NATHAN'S SENTENCE IS UNCONSTITUTIONAL.

According to the state, if this Court does not grant Nathan a new trial, then it should apply the rule announced in *People v. Tate*, 2015 CO 42. The state provides no counter to the arguments raised in the opening brief that the sentencing rule in *Tate* violates Article II, section 20 of the Colorado Constitution. (OB 52-54.)

Additionally, following *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), there remains a question of whether a life sentence where parole is not available until after 40 years violates the United States Constitution. *See Montgomery*, 136

S. Ct. at 736 (a state may cure a *Miller* violation by allowing for the possibility of parole and citing Wyo. Stat. Ann. § 6–10–301(c), which allows for parole after 25 years). The possibility of parole "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* Mandatory life with parole only after 40 years remains a disproportionate sentence because it fails to provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (citing *Graham v. Florida*, 130 S. Ct. 2011, 2016 (2010)).[12]

CONCLUSION

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

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[12] Nathan's own case is illustrative of the fact that 40 years is disproportionate. During his time in prison, Nathan has greatly matured. He has successfully launched a campaign to publish the artwork and poetry of prisoners and recently independently briefed and argued a case to the Colorado court of appeals. *See* https://cojudicial.ompnetwork.org/shows/14ca1120.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 13, 2016, a true and correct copy of the foregoing was filed and served via ICCES on:

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