ADVANCE SHEET HEADNOTE
June 24, 2024

2024 CO 50

No. 22SC759, *People v. Lopez*—Right to Counsel—Conflict of Interest.

In this case, the supreme court considers whether a defendant who argues, for the first time on appeal, that his constitutional right to conflict-free counsel was violated by the simultaneous prosecution of defense counsel and defendant by the same prosecutor must prove that an actual conflict of interest adversely affected his representation.

To answer this question, the court must decide whether to adopt the division's analysis in *People v. Edebohls*, 944 P.2d 552, 556–57 (Colo. App. 1996), in which the division concluded that pending criminal charges against defense counsel in the same district in which counsel was representing a defendant created an actual conflict of interest that, absent a valid waiver, required reversal

The court now concludes that *Edebohls* has been superseded by subsequent case law, which has limited the categories of errors deemed to mandate reversal without a showing of prejudice (i.e., structural errors). Accordingly, the court

concludes that the proper framework for analyzing a conflict like that at issue here is the framework set forth in its decision in *West v. People*, 2015 CO 5, ¶ 65, 341 P.3d 520, 534, which requires a court to determine whether the case falls within one of the few scenarios that the Supreme Court has said support a presumption of prejudice and, if not, whether the defendant has shown both a conflict of interest and an adverse effect resulting from that conflict.

Accordingly, the court reverses the judgment of the division below and remands this case for findings in accordance with the standards set forth in this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 50

Supreme Court Case No. 22SC759
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA287

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Matthew Rodolfo Vansant Lopez.

Judgment Reversed
en banc
June 24, 2024

Attorneys for Petitioner:
Philip J. Weiser, Attorney General
Frank R. Lawson, Assistant Attorney General
Denver, Colorado

Attorneys for Respondent:
McClintock Law Firm, LLC
Elizabeth A. McClintock
Colorado Springs, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE MÁRQUEZ, joined by **JUSTICE HART**, dissented.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 We granted certiorari to consider whether a defendant who argues, for the first time on appeal, that his constitutional right to conflict-free counsel was violated by the simultaneous prosecution of defense counsel and defendant by the same prosecutor must prove that an actual conflict of interest adversely affected his representation.

¶2 To answer this question, we must decide whether (1) to adopt the division's analysis in *People v. Edebohls*, 944 P.2d 552, 556–57 (Colo. App. 1996), in which the division concluded that pending criminal charges against defense counsel in the same district in which counsel was representing a defendant created an actual conflict of interest that, absent a valid waiver, required reversal; or (2) to require, instead, a showing that an actual conflict of interest existed and adversely affected a defendant's representation, as we have required in cases involving different forms of attorney conflicts.

¶3 We now conclude that *Edebohls* has been superseded by subsequent case law, which has limited the categories of errors deemed to mandate reversal without a showing of prejudice (i.e., structural errors). Accordingly, we conclude that the proper framework for analyzing a conflict like that at issue here is the framework set forth in our decision in *West v. People*, 2015 CO 5, ¶ 65, 341 P.3d 520, 534. Under this framework, unless a matter falls within one of the limited

scenarios in which the Supreme Court has presumed prejudice, *see, e.g.*, *Holloway v. Arkansas*, 435 U.S. 475, 487–91 (1978); *United States v. Cronic*, 466 U.S. 648, 658–60 (1984), a defendant must show both a conflict of interest and an adverse effect resulting from that conflict, *West*, ¶ 65, 341 P.3d at 534.

¶4 Accordingly, we reverse the judgment of the division below and remand this case for findings in accordance with the standards set forth in this opinion.

I. Facts and Procedural History

¶5 Matthew Rodolfo Vansant Lopez met the victim, K.H., in Colorado Springs. Shortly after their initial encounter, K.H. and Lopez had a text exchange in which the two discussed K.H.'s going to Lopez's home to clean his house for a fee. After K.H. told Lopez the cost, Lopez responded that he did not really need his place cleaned but that he could get K.H. some cash, "just for the pleasure of [her] company." K.H. agreed to go to Lopez's home on the condition that there would be no "tricks."

¶6 Lopez subsequently drove K.H. to his home and after showing her his gun collection, propositioned her for sex. K.H. declined, but Lopez then said, "[Y]ou know I'm going to rape you, right?" K.H. tried unsuccessfully to escape, and Lopez sexually assaulted her for two hours. Thereafter, Lopez drove K.H. to a rescue mission, after threatening to harm her and her family if she told anyone what had happened.

¶7 After arriving at the mission, K.H., who was visibly upset and crying, approached a shelter supervisor and told the supervisor that she had been raped. The supervisor called the police, and K.H. was subsequently taken to a hospital where she underwent a Sexual Assault Nurse Examiner examination. K.H. also talked to the police and identified Lopez as her assailant.

¶8 With the information that K.H. had provided, the police obtained a search warrant and executed it at Lopez's residence, where they found, among other things, two suspected explosive devices. The police arrested Lopez, and the El Paso County District Attorney's Office (the "DA") charged him with, as relevant here, two counts of sexual assault, one count of second degree kidnapping, one count of possession of an incendiary device, and two crime of violence counts.

¶9 Thereafter, Lopez retained Dennis Hartley, a private criminal defense attorney, as counsel, and Hartley represented Lopez from August 2017 through the end of Lopez's trial in October 2018.

¶10 As pertinent here, at the time he entered his appearance as Lopez's counsel, Hartley was being prosecuted by the same DA that was prosecuting Lopez. Specifically, five months before becoming Lopez's attorney, Hartley had been charged with misdemeanor driving under the influence ("DUI"), and the DA was still prosecuting that case at the time Hartley appeared on Lopez's behalf. Then, three months after Hartley entered his appearance for Lopez, he received another

summons in El Paso County, this time for driving under restraint ("DUR"). The DA prosecuted that case, as well.

¶11 Shortly after the DUR charge was filed against Hartley, he pleaded guilty to the DUI charge and was sentenced to ten days work release followed by thirty days in-home detention and twenty-four months of supervised probation. Because of this conviction, the court also revoked a deferred judgment that Hartley had received in 2015 for another misdemeanor DUI, and it imposed a concurrent sentence, identical to the one described above. The DA thus became responsible for prosecuting any violation of the conditions of Hartley's sentence while continuing to prosecute the DUR charge.

¶12 A few days after entering into the DUI plea agreement and with the DUR charge still pending, Hartley, acting on Lopez's behalf, moved for a continuance of a scheduled motions hearing in Lopez's case, and he asked to approach the bench so that he could "explain this a little bit." Because the court's recording system was not working, however, the court noted that it had no way to record a bench conference that day. The court then asked whether Hartley had discussed "this" with the prosecution (the court did not indicate in open court what "this" was). After Hartley said that he had, the court asked whether Hartley had discussed "this" with Lopez (again, the court did not elaborate). Hartley responded, "He understand[s]." The court then instructed Hartley to approach

and indicated that they could make a record later if need be. Upon completion of this unrecorded bench conference, the court found good cause to continue the motions hearing.

¶13 Approximately six weeks later, while Lopez's case was still in its pretrial phase, Hartley received another DUR summons, and three weeks after that, he filed a motion to continue the jury trial in Lopez's case. In this motion, Hartley asserted, among other things, that during an incident in his home, he had sustained a serious injury that required surgery and that he was unable to walk and was still hospitalized.

¶14 The day after Hartley filed this motion, the trial court conducted a hearing at which another attorney covered for Hartley. This attorney reiterated Hartley's request for a continuance, noting that Hartley was likely to be hospitalized for a significant period of time. The court found good cause to continue Lopez's trial.

¶15 Several months later, Hartley resumed his representation of Lopez. At this point, the DA was still supervising Hartley's probation and prosecuting the two pending DUR charges against him. Apparently in light of these facts, the court made the following inquiry at a motions hearing:

> THE COURT: Mr. Hartley, have you gone through the advisement slash conflict waiver issues with Mr. Lopez?
>
> MR. HARTLEY: What conflict waiver? Oh, yes.

> THE COURT: Okay. And Mr. Lopez, you're aware of current circumstances, and you're perfectly fine again continuing with representation by Mr. Hartley?
>
> MR. LOPEZ: Yes, Your Honor.
>
> THE COURT: Excellent. Thank you, very much.

¶16 The case proceeded, and just days before Lopez's trial was to begin, Hartley and the DA agreed to a global disposition to resolve each of the charges still pending against Hartley. Under this disposition, Hartley agreed to plead guilty to one of the outstanding DUR charges, to the revocation and re-grant of probation in his second DUI case, and to a controlling sentence of 180 days of in-home detention, with his prior supervised probation to continue.

¶17 The trial in Lopez's case began, and on the second day of trial, one of the trial prosecutors indicated that he had a matter that he needed to address. The following bench conference then occurred, apparently outside of Lopez's earshot:

> [PROSECUTOR]: I have orders from [District Attorney] May to ask the Court to advise the defendant that Mr. Hartley's criminal case was concluded, and that he is serving a sentence right now, and that we would be the authority prosecuting any violation of the in home detention sentence. That's all I have.
>
> THE COURT: Did we or did we not previously address this issue, and get some sort of waiver or conflict issue letter indicating this from Mr. Hartley?
>
> [PROSECUTOR]: Yeah, quite a long time ago.
>
> THE COURT: And it['s] different you now say because the situation transitioned from possible prosecution to where the prosecution

decides whether to pursue probation violation charges and of course there is no current probation violation allegation, right?

[PROSECUTOR]: Correct.

THE COURT: Now, what is [it] you think we need? Is it just a written letter, or something on the record?

[PROSECUTOR]: I think Mr. Hartley saying he advised his client. I didn't think we needed to do anything.

THE COURT: Okay.

[PROSECUTOR]: But that is the position of the office.

THE COURT: I got you. Okay. Mr. Hartley, how do you want to deal with this?

MR. HARTLEY: He's been advised. He knows that I'm on probation.

THE COURT: Did you advise him of the potential conflict, which has not yet arisen, which is his attorney could find himself opposite the prosecution if there were to be any probation violations?

MR. HARTLEY: Yeah.

THE COURT: So that's the allegation of conflict. Have you discussed that with him?

MR. HARTLEY: Sure.

THE COURT: And he announced that he has no concerns with you as his lawyer?

MR. HARTLEY: No, none whatsoever.

THE COURT: All right.

[PROSECUTOR]: That works for me.

THE COURT: All right. Thanks folks.

¶18 Nothing in the record indicates that the court addressed Hartley's conflict of interest directly with Lopez. Nor does it appear that the conflict was ever addressed in open court in Lopez's presence.

¶19 The trial proceeded for another three days without any further inquiries into Hartley's conflict, and the jury ultimately found Lopez guilty of all of the charges except kidnapping. The court subsequently sentenced Lopez to a controlling term of twenty years to life.

¶20 Thereafter, Lopez, now represented by appellate counsel, filed a notice of appeal. Before Lopez filed briefs in his appellate proceeding, Hartley was disbarred for, among other things, being convicted twice for DUI and once for another alcohol-related driving offense and for not reporting those convictions to the appropriate disciplinary authorities, as he was required to do. At that point, Lopez filed a motion in the court of appeals seeking a limited remand. In this motion, Lopez recited much of the procedural history set forth above, and he said that although he had been told at the start of Hartley's representation that Hartley had a DUI and had lost his driver's license, he had not been informed of any of Hartley's ongoing cases or that Hartley was on in-home detention at the start of Lopez's trial. In addition, Lopez asserted that when the trial court had asked him during the above-described conference about his knowledge of Hartley's "current

circumstances," he thought that the court was asking about Hartley's medical issues.

¶21 Lopez's appellate counsel then observed that the record on appeal does not show any advisement to Lopez concerning Hartley's conflict of interest, although it appeared that both the trial court and the prosecution were aware of that conflict. Nor did the record indicate that conflict-free counsel had ever been appointed to ensure that Lopez had properly been advised or that Lopez had made a knowing, voluntary, and intelligent waiver of the conflict before proceeding to trial. Appellate counsel thus requested a limited remand to determine (1) whether, during the unrecorded bench conference described above, the trial court, the prosecution, and Hartley had discussed Hartley's conflict; and (2) what information concerning the conflict should have been included in the record. Counsel further noted that such a limited remand would allow her to determine whether the trial court had a letter demonstrating that Lopez had been advised of the conflict issue and had waived that conflict. Counsel made clear that it was her intent to raise on appeal a denial of Lopez's right to conflict-free counsel if the record was sufficient after the limited remand.

¶22 The court of appeals granted Lopez's motion and ordered that Lopez file his opening brief within fourteen days after any supplemental or settled record was filed with the court.

¶23 The case was then remanded, and the trial court held a status conference to address the court of appeals' remand order. At this conference, however, neither the trial court nor Hartley could recall the details of the unrecorded bench conference, although the court stated that it did not "necessarily believe" that that conference had anything to do with the conflict of interest issue. For his part, Hartley testified that he had advised Lopez of the conflict of interest issue multiple times, both in court and in his office, but he had no documentation of those discussions. He further indicated that he did not know whether a conflict letter existed because any such letter would be in his case file, which was in a storage facility. And he testified that he recalled "[a]bsolutely nothing" about the unrecorded bench conference described above.

¶24 The case was then recertified to the court of appeals, and Lopez proceeded to argue that his conviction should be reversed because (1) Hartley had represented him while acting under a conflict of interest; and (2) Lopez did not knowingly, voluntarily, or intelligently waive that conflict. A division of our court of appeals agreed with Lopez, reversed his conviction, and remanded the case for a new trial. *People v. Lopez*, 2022 COA 97, ¶ 19, 521 P.3d 691, 696.

¶25 Relying on *Edebohls*, 944 P.2d at 556, the division determined that Hartley had "labored under an actual conflict of interest" because he might have feared that the prosecutor would take offense at a vigorous defense of Lopez and become

more ardent in prosecuting Hartley. *Lopez*, ¶ 12, 521 P.3d at 695. Accordingly, the division opined that the trial court had an obligation to inquire into the propriety of Hartley's continued representation, including "explaining to the defendant, on the record, the nature of the conflict" and seeking from him a response, also on the record, indicating his understanding of the right to conflict-free counsel and a description of the conflict at issue. *Id.* at ¶ 13, 521 P.3d at 695. The purpose of such an inquiry would have been to ensure that Lopez knew the specific nature of the conflict at issue. *Id.* Here, however, the trial court did not conduct such an inquiry. *Id.*

¶26 In so concluding, the division rejected the People's argument that to be granted relief, Lopez had to show that a conflict existed and that it had adversely affected Hartley's performance. *Id.* at ¶¶ 15, 18, 521 P.3d at 695–96. In the division's view, "the impact on the zeal with which a defense attorney in this position represents a client cannot be measured." *Id.* at ¶ 17, 521 P.3d at 696. Moreover, requiring a defendant to prove an adverse effect would place "an extremely high burden" on a defendant's effort to protect his constitutional rights. *Id.* at ¶ 18, 521 P.3d at 696. The division thus adhered to *Edebohls*, reversed the trial court's judgment, and remanded the case for a new trial. *Id.* at ¶¶ 18–19, 521 P.3d at 696.

¶27 The People petitioned this court for certiorari review, and we granted their petition.

II. Analysis

¶28 We begin by setting forth the applicable standard of review. We then proceed to address the proper test for addressing attorney conflicts, and after concluding that the division applied an incorrect legal standard, we address the appropriate remedy.

A. Standard of Review

¶29 The question of the standard to be applied in assessing attorney conflicts like that at issue here presents a question of law that we review de novo. *See Ronquillo v. People*, 2017 CO 99, ¶ 13, 404 P.3d 264, 267 (stating that the supreme court reviews questions of law, like the governing standard in a case, de novo).

B. Legal Standard for Addressing Attorney Conflicts

¶30 The People contend that the division below erred in applying the *Edebohls* standard. They assert, instead, that a defendant who argues a denial of the constitutional right to conflict-free counsel based on the simultaneous prosecution of defense counsel and the defendant by the same prosecutor must prove that a conflict of interest adversely affected his representation. We agree.

¶31 In *Edebohls*, 944 P.2d at 556–59, a division of our court of appeals considered whether pending criminal charges against defense counsel in the same district in

which the defendant's case was being prosecuted created an actual conflict of interest that, absent a valid waiver, required reversal. Relying on *People v. Castro*, 657 P.2d 932, 944–45 (Colo. 1983), *overruled on other grounds by West*, ¶ 2, 341 P.3d at 523, in which this court had ruled that a lawyer representing both a defendant and the district attorney who was prosecuting the defendant was necessarily adversely affected, the division first concluded that the circumstances in the case before it created an actual conflict of interest. *Edebohls*, 944 P.2d at 556. In support of this determination, the division observed that in these circumstances, defense counsel may be "'subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense' of defendant and become more ardent in the prosecution of defense counsel." *Id.* (quoting *Castro*, 657 P.2d at 945).

¶32 The division proceeded to delineate the procedure to be followed when the trial court is advised that defense counsel has such a conflict:

> The court should first inquire whether defense counsel has advised the defendant about the right to conflict-free representation and has explained the nature of the particular conflict at issue, including the risks associated with continued representation. If defense counsel indicates this has not occurred, counsel should be required to do so. To protect the client-attorney relationship, such consultations need not be presented on the record or in open court.
>
> In the trial court's discretion, it may appoint temporary advisement counsel to counsel the defendant concerning the right to effective assistance of counsel and the risks associated with proceeding in spite of defense counsel's conflict of interest.

Id. at 556–57 (citation omitted).

¶33 The division went on to conclude that Edebohls had been inadequately advised of the conflict and its risks and therefore had not validly waived his right to conflict-free representation. *Id.* at 557. The division further concluded:

> The violation of a defendant's right to conflict-free representation cannot be viewed as harmless error. When an actual conflict of interest is shown, we need not attempt to calculate the amount of prejudice attributable to the conflict. If a defendant demonstrates that his or her attorney labored under an actual conflict of interest during the trial, a showing of actual prejudice is not a condition for relief. Indeed, such a showing is frequently impossible.

Id. at 559. The division thus reversed Edebohls's conviction. *Id.*

¶34 Although as set forth above, *Edebohls* mandated reversal without a showing of prejudice if a defendant established an actual conflict of interest and the absence of a valid waiver, Supreme Court case law at the time *Edebohls* was decided supported a presumption of prejudice (and thus automatic reversal) for ineffective assistance of counsel in only four scenarios. *See Cronic*, 466 U.S. at 658–60; *Holloway*, 435 U.S. at 484, 487–91.

¶35 Specifically, in *Holloway*, 435 U.S. at 476–77, the Supreme Court considered whether co-defendants who were represented by the same attorney and whose timely motions for appointment of separate counsel were denied had been deprived of the effective assistance of counsel. The Court concluded that the summary denial of counsel's motion requesting separate counsel on the ground that the simultaneous representation of co-defendants raised a conflict of interest

deprived co-defendants of the effective assistance of counsel. *Id.* at 484. The Court then determined that this error required the reversal of the defendants' convictions, even absent a showing of prejudice. *Id.* at 487–91. In so ruling, the Court observed, "[A] rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Id.* at 490. To the contrary, a harmless error inquiry in such circumstances "would require, unlike most cases, unguided speculation." *Id.* at 491.

¶36 In *Cronic*, 466 U.S. at 649–50, the Supreme Court considered whether the appointment of a young, inexperienced attorney in a complex trial in which the attorney was given only twenty-five days to prepare amounted to ineffective assistance of counsel requiring automatic reversal. Recognizing that the right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing," *id.* at 656, the Court observed that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated," *id.* at 658. The Court recognized, however, three circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified": (1) the complete denial of counsel at a critical stage

of the proceedings; (2) counsel's complete failure to subject the prosecution's case to meaningful adversarial testing; and (3) when the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 658–59.

¶37 If none of the foregoing four scenarios existed, then a defendant seeking to establish that a conflict of interest deprived him of the effective assistance of counsel was required to show that an actual conflict of interest adversely affected his lawyer's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 346–48 (1980).

¶38 In the decades since *Edebohls* was decided, both the Supreme Court and this court have declined to extend the circumstances in which prejudice from an attorney's conflict of interest is presumed and, if anything, have *narrowed* the class of cases in which an error may be deemed structural, requiring automatic reversal.

¶39 In *Mickens v. Taylor*, 535 U.S. 162, 164 (2002), for example, the Supreme Court considered what a defendant was required to show to establish a Sixth Amendment violation when the trial court failed to inquire into a potential conflict of interest about which it knew or reasonably should have known. The alleged conflict in that case stemmed from the fact that Mickens's court-appointed counsel had briefly represented the victim in an unrelated case, a fact that the trial court knew or should have known. *Id.* at 164–65. Distinguishing *Holloway* on the ground

that counsel in the case before it did not question his ability to represent Mickens effectively, the Court concluded that Mickens was required to establish that the alleged conflict affected his counsel's performance. *Id.* at 173–74. In so ruling, the Court observed that Mickens's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance made "little policy sense." *Id.* at 172. The Court added, "The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Id.* at 173.

¶40 Thereafter, in *Weaver v. Massachusetts*, 582 U.S. 286, 294–96 (2017), the Court discussed the doctrine of structural error, which requires reversal absent a showing of prejudice, and identified three rationales for deeming an error structural and not amenable to harmless error review: (1) when the right at issue is not designed to protect a defendant from erroneous conviction but instead protects some other interest (e.g., a defendant's right to conduct their own defense); (2) when the effects of an error are simply too hard to measure (e.g., when a defendant is denied the right to select their own attorney); and (3) when the error always results in fundamental unfairness (e.g., if an indigent defendant is denied counsel or the court fails to give a reasonable doubt instruction).

¶41 Consistent with these narrow circumstances, the Supreme Court has found error to be "structural" and thus subject to automatic reversal in only a limited

class of cases, namely, when (1) a defendant was completely denied counsel; (2) a biased trial judge presided over a case; (3) there was racial discrimination in the selection of a grand jury; (4) a defendant was denied the right of self-representation at trial; (5) a defendant was denied the right to a public trial; and (6) the trial court gave a defective reasonable doubt instruction. *Neder v. United States*, 527 U.S. 1, 8 (1999) (compiling cases).

¶42 Our case law has followed a similar path. For example, in *West*, ¶ 1, 341 P.3d at 523, we considered whether a defendant alleging ineffective assistance of counsel based on an alleged conflict of interest arising from counsel's concurrent or successive representation of witnesses against the defendant needed to show a separate adverse effect in addition to a conflict of interest in order to establish a basis for reversal. We concluded that such a showing was required. *Id.* at ¶ 3, 341 P.3d at 523–24. In so ruling, we recognized that in *Castro*, 657 P.2d at 944–45, on which *Edebohls* had relied, we had said that an attorney who labors under a real and substantial conflict of interest "cannot avoid being adversely affected." *West*, ¶ 2, 341 P.3d at 523 (quoting *Castro*, 657 P.2d at 945). We observed, however, that this language could not be reconciled with the Supreme Court's holding in *Mickens*, and we thus overruled *Castro*. *Id.* We then proceeded to conclude that to prevail on an ineffective assistance claim predicated on trial counsel's alleged conflict of interest arising from concurrent or successive representation of trial

witnesses against a defendant, "a defendant must show by a preponderance of the evidence both a conflict of interest *and* an adverse effect resulting from that conflict." *Id.* at ¶ 65, 341 P.3d at 534. We further concluded that to establish an "adverse effect," a defendant must

> (1) identify a plausible alternative defense strategy or tactic that trial 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.

Id.

¶43 In addition, we have cited with approval both the Supreme Court's recitation of the narrow categories of cases in which an error may be deemed structural, as well as the Court's statement in *Weaver* of the rationales justifying a conclusion that an error is structural. *See, e.g.*, *James v. People*, 2018 CO 72, ¶ 15, 426 P.3d 336, 339–40; *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119.

¶44 In light of the foregoing development of the law, and particularly our decision in *West* overruling *Castro*, on which *Edebohls* had heavily relied, we conclude that the rule set forth in *Edebohls* has been superseded by our and Supreme Court case law that followed it.

¶45 Accordingly, and mindful of the fact that the range of errors now deemed structural and requiring automatic reversal is narrow, we conclude that the proper framework for analyzing a conflict like that at issue here is that set forth in our

decision in *West*. Thus, a court must first determine whether the case falls within one of the few scenarios that the Supreme Court has said support a presumption of prejudice, namely, whether (1) the trial court summarily rejected a pretrial motion from defense counsel alleging a conflict; (2) the defendant was completely denied counsel at a critical stage of the proceedings; (3) counsel completely failed to subject the prosecutor's case to meaningful adversarial testing; or (4) the circumstances were such that no counsel could render effective assistance of counsel. Absent those scenarios, a defendant must show both a conflict of interest and an adverse effect resulting from that conflict. To show such an adverse effect, a defendant must (1) identify a plausible alternative defense strategy or tactic that trial 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. Finally, we conclude, in accordance with *Mickens*, 535 U.S. at 171, that a defendant who establishes that a conflict of interest actually affected the adequacy of his representation need not show prejudice to obtain relief.

¶46 In so concluding, we acknowledge that much of the above-described case law has involved cases of simultaneous representation of multiple defendants or of defendants and prosecution witnesses. We are not persuaded, however, by

Lopez's contention that we should adopt a different standard in this case, which concerns a personal conflict, from that employed in the simultaneous representation cases, which involve professional conflicts. Lopez has not cited any persuasive authority indicating why we should treat the different types of conflicts differently, and we are aware of none.

¶47 Moreover, adopting Lopez's position would require us to ignore the development of the law discussed above, and we are not at liberty to do so.

¶48 Having thus adopted the standard that applies in these types of cases, we feel compelled to express our concern regarding how the trial court and Hartley handled the alleged conflict in this case. Specifically, it is not at all clear to us that Lopez was properly and fully informed of the nature of the conflict at issue. *See People v. Martinez*, 869 P.2d 519, 525 (Colo. 1994) (stating that to waive the constitutional protection of conflict-free counsel, a defendant must be fully advised of existing or potential conflicts and that the prosecution must show "(1) that the defendant was aware of the conflict and its likely effect on the defense attorney's ability to offer effective representation, and (2) that the defendant thereafter voluntarily, knowingly, and intelligently relinquished his right to conflict-free representation"). Indeed, as far as the record reveals, it appears that everyone in the courtroom, except perhaps Lopez, was fully informed of the possible conflict. And it is no answer to say that Hartley represented that he had

advised Lopez of the conflict issues, without disclosing the specifics of what he said and when, and without any documentation or other record of such advisements.

¶49 On these facts, we perceive no basis to conclude that Lopez voluntarily, knowingly, and intelligently waived his right to conflict-free counsel. Accordingly, notwithstanding the People's suggestion to the contrary, we conclude that the substantive issue presented is properly before us.

C. Remedy

¶50 Having set forth the proper standard to be applied and having concluded that the division applied an outdated and incorrect standard, we must decide the appropriate remedy.

¶51 As noted above, the division had previously remanded this case to allow for further factual development, particularly to determine whether (1) any conflict of interest may have been discussed during the unrecorded bench conference described above and (2) a letter existed informing Lopez of the conflict. The record remains insufficient, however, regarding the facts necessary to apply the standard that we have adopted today.

¶52 Accordingly, we conclude that a remand is necessary to allow for the development of a factual record that would enable the courts below to apply the appropriate standard.

III. Conclusion and Remand Order

¶53 For these reasons, we conclude that absent the four scenarios that the Supreme Court has said support a presumption of prejudice, the proper framework for analyzing a conflict like that at issue here is the framework set forth in our decision in *West*. Because this case did not involve any of the Supreme Court's presumed prejudice scenarios, Lopez was required to show both a conflict of interest and an adverse effect resulting from that conflict, in accordance with the standards set forth above.

¶54 Because the record is insufficient to allow us to conduct this analysis here, we remand this case with instructions to return the case to the trial court to develop a sufficient factual record and to determine whether Lopez has shown that an actual conflict of interest adversely affected his representation. If the court concludes that Lopez has met this burden, then the judgment shall be reversed, subject to any further appeals, and the prosecution may re-try Lopez. If the court concludes that Lopez has not met this burden, then the judgment shall stand affirmed, subject to Lopez's right to pursue a further appeal.

¶55 Accordingly, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE MÁRQUEZ, joined by **JUSTICE HART**, dissented.

JUSTICE MÁRQUEZ, joined by JUSTICE HART, dissenting.

¶56 "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Colo. RPC 1.7 cmt. 1. Accordingly, the Colorado Rules of Professional Conduct forbid a lawyer from representing a client whenever "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer." Colo. RPC 1.7(a)(2).

¶57 This case requires us to review an uncommon but particularly grave form of attorney conflict, where defense counsel is under prosecution by the same district attorney's office that is prosecuting defense counsel's client. A division of the court of appeals confronted this situation in *People v. Edebohls*, 944 P.2d 552 (Colo. App. 1996). In that case, the defendant was represented by an attorney who had been criminally charged by the same district attorney's office prosecuting the defendant himself. *Id.* at 556. The division observed that such an attorney may be reluctant to mount a vigorous defense against the very office prosecuting the case against them. *Id.* Accordingly, the division concluded that an actual conflict of interest exists under such circumstances. *Id.* Moreover, the division held that where such an actual conflict is not knowingly and intelligently waived, the violation of a defendant's right to conflict-free representation is not harmless; indeed, a "reviewing court cannot reliably determine to what extent the decisions

were based on legitimate tactical considerations and to what extent they were the result of impermissible considerations." *Id.* at 559 (quoting *United States v. DeFalco*, 644 F.2d 132, 137 (3d Cir. 1979)). Thus, the division reversed the defendant's conviction. *Id.*

¶58 The majority now rejects the approach taken in *Edebohls* and instead concludes that conflicts of this nature must be reviewed in the same manner as more typical conflicts arising from multiple representation. But the framework applied by the majority (requiring a demonstration of a specific, adverse effect on a client's representation) fails to account for the unique nature of the actual conflict here. I would instead conclude that where, as here, an *Edebohls*-like actual conflict is not knowingly, voluntarily, and intelligently waived by a defendant, that actual conflict results in per se ineffective assistance of counsel and requires automatic reversal.[1] Because I believe the attorney's personal conflict in this case resulted in per se ineffective assistance of counsel, I would affirm the division's judgment and reverse Lopez's conviction, albeit under somewhat different reasoning. I therefore respectfully dissent.

---

[1] I note that I consider the issue presented in today's case to have been preserved at trial for appeal. Accordingly, this case does not implicate plain error review of unpreserved structural errors, which I have discussed elsewhere. *See Stackhouse v. People*, 2015 CO 48, ¶ 32, 386 P.3d 440, 449 (Márquez, J., dissenting); *People v. Garcia*, 2024 CO 41, ¶ 61, __ P.3d __ (Márquez, J., dissenting).

I. *Edebohls*-Like Conflicts Should Be Viewed as Resulting in Per Se Ineffective Assistance of Counsel

¶59 The majority reasons that our decision in *West v. People*, 2015 CO 5, 341 P.3d 520, establishes the proper framework for analyzing an *Edebohls* conflict: namely, the two-step approach announced in *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Maj. op. ¶¶ 37, 45. I disagree for two reasons. First, *Sullivan* concerned conflicts involving representation of multiple clients. 446 U.S. at 337. Our analysis in both *West* and *Ybanez v. People*, 2018 CO 16, 413 P.3d 700, was expressly limited to that particular context—concurrent representation of multiple clients. *West*, ¶ 36 n.8, 341 P.3d at 530 n.8 ("Our analysis today concerns only *Sullivan*'s application to alleged conflicts arising from multiple representation."); *Ybanez*, ¶ 29, 413 P.3d at 707 (noting that the holding in *West* was limited "to the conflicts arising from multiple representation," and again declining to decide whether the *Sullivan* standard "applies to conflicting loyalties or interests apart from those implicated by multiple representations"). Neither case addressed the type of conflict presented here. Second, the rationale underlying the *Sullivan* approach in the multiple representation context does not extend to the kind of personal conflicts presented in *Edebohls* and this case, which are uniquely prejudicial.

¶60 To begin, I acknowledge that, in professional conflict cases involving multiple representation, requiring a defendant to show adverse effect from the conflict makes good policy sense. In *Sullivan*, the Supreme Court explained: "Since

a possible conflict inheres in almost every instance of multiple representation," reviewing courts cannot simply "presume that the possibility for conflict has resulted in ineffective assistance of counsel" because such a presumption would preclude multiple representation even in cases where the arrangement would actually benefit the represented parties. 446 U.S. at 348.

¶61 *Edebohls*-style personal conflicts, however, present different considerations. This type of conflict carries the unique risk that defense counsel will elevate their personal interests (indeed, potentially their own liberty interests) over those of their client.

¶62 Consider the facts of this case, where defense counsel faced not one, but four separate criminal charges—brought by the same office prosecuting Lopez—during his representation of Lopez. Defense counsel's second conviction resulted in a two-year supervised probation sentence, a term that ultimately spanned the duration of Lopez's trial. After additional criminal charges, defense counsel agreed to a global disposition that resulted in a sentence of one hundred eighty days of in-home detention. This sentence commenced shortly before Lopez's trial and ran concurrently with defense counsel's ongoing probation.[2] As a result,

[2] Defense counsel was ultimately disbarred for, among other violations, failing to report to the Office of Attorney Regulation two of the criminal convictions he incurred during his representation of Lopez. *People v. Hartley*, No. 19PDJ043, 2019 WL 3251124, at *1 (Colo. O.P.D.J. July 18, 2019).

during Lopez's trial, defense counsel was under particular scrutiny for any missteps that might amount to a probation violation warranting revocation or further prosecution for violation of the in-home detention. Under these circumstances, defense counsel was not simply weighing whether a particular trial strategy would privilege one client over another, as is the risk in multiple representation cases. Instead, he would have been acutely aware that irritating the prosecution might lead to further restraint on his own freedom. In other words, "[t]his was a scenario fraught with the real potential of impairing an attorney's zealous advocacy on behalf of a client." *State v. Cottle*, 946 A.2d 550, 560 (N.J. 2008).

¶63 Unlike the multiple concurrent representation cases examined in *Sullivan*, *West*, and *Ybanez*, I struggle to imagine a scenario where a client would remain wholly unaffected, let alone benefit, from representation by a "defense attorney at the mercy of the very prosecutor's office trying his client." *Cottle*, 946 A.2d at 560, 564 (holding that, under New Jersey's state constitution, an *Edebohls*-style conflict constitutes a per se conflict of interest that presumptively prejudices a defendant, requiring reversal absent a valid waiver). Instead, such conflicts are rife with risk and thus are inherently prejudicial. As such, the rationale underpinning *Sullivan* does not support a requirement to show a specific adverse effect in the circumstances presented here.

¶64 Requiring a defendant to show a specific adverse effect from the conflict is also impractical in cases like this. In professional conflict cases involving multiple representation, the clients' interests likely diverge only as to discrete legal theories or arguments, which makes it relatively easy for courts to "determine whether the counsel pursued that path that worked to the disadvantage of the particular defendant challenging counsel's performance." 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.9(d), Westlaw (4th ed. database updated Dec. 2023). But in the *Edebohls* scenario, defense counsel's personal conflict permeates the entire representation. Counsel is forced to balance his obligation to zealously advocate for his client with preserving his own interests by avoiding antagonizing the prosecutor's office in *any* way. This pressure seems more "likely to have a widespread influence not focused on a particular action or inaction of counsel." *Id.* In such cases, "the prejudice flowing from 'the restraints placed on an attorney's advocacy and independent judgment' is difficult, if not impossible, to measure." *Cottle*, 946 A.2d at 563 (quoting *State v. Bellucci*, 410 A.2d 666, 672 (N.J. 1980)).

¶65 In other words, an *Edebohls* conflict is uniquely prejudicial because it pervades the *entirety* of the representation. "[I]t is not difficult to imagine that [an attorney facing an *Edebohls* conflict] might not have had the zeal to engage in a bruising battle with the very prosecutor's office that would be weighing his fate."

Id. at 559. By disincentivizing zealous representation, *Edebohls* conflicts undermine our confidence in *every* action undertaken by a conflicted attorney. And "no convicted defendant should wonder whether his fate was sealed because his attorney's duty of zealous advocacy was compromised by fear for his own wellbeing." *Id.* at 563.

¶66 Attorneys already "struggle to serve two masters" when, in the multiple representation context, they must choose between the professional loyalties owed to each of their clients. *Glasser v. United States*, 315 U.S. 60, 75 (1942). That struggle becomes immeasurably more difficult when the conflict is not between the outcomes of different clients' cases, but between securing a client's freedom and preserving the lawyer's own. It is "axiomatic that '[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client.'" *In re Storey*, 2022 CO 48, ¶ 38, 517 P.3d 1243, 1253 (quoting Colo. RPC 1.7 cmt. 10). Yet in an *Edebohls* conflict, where the attorney faces criminal jeopardy and likely a threat to their career, the attorney "surely ha[s] no personal incentive—even if it were in his client's best interest—to take on the office that he would need to help him." *Cottle*, 946 A.2d at 559. In sum, *Edebohls* conflicts are uniquely and exceptionally prejudicial.

¶67 At least one commentator has observed that "[m]uch can be said for adopting . . . a standard of per se ineffectiveness" in cases where "counsel herself

is the subject of an ongoing investigation or has some other special relationship with the prosecution that might lead counsel to place that relationship above the best interests of his client." LaFave, *supra*. This is both because (1) the *Sullivan* approach is poorly suited to the task of reviewing *Edebohls*-style personal conflict claims and (2) such conflicts are uniquely prejudicial. Accordingly, I would hold that such conflicts render an attorney's representation per se ineffective, requiring automatic reversal without application of the *Sullivan* standard. Because I would affirm the judgment of the court of appeals, I respectfully dissent.