

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Plaintiff-Appellee,

vs.

DAVID JOSEPH DUFFY,

Defendant-Appellant.

No.CR19-0386-PR

Court of Appeals
No. 2-CA-CR-18-0071

Cochise County Superior Court
No. CR2017-00136

**SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS
FOR CRIMINAL JUSTICE IN SUPPORT OF DUFFY**

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ARGUMENTS¹

I. **The Trial Court’s Bare-Boned Inquiry into Defense Counsel’s Joint Representation Failed to Ascertain Whether Duffy Validly Waived His Constitutional Right to Conflict-Free Counsel**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be represented by an attorney without conflicts of interest. *See Holloway v. Arkansas*, 435 U.S. 475 (1978); *see also Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”). However, because the effect of the Sixth Amendment guarantee is “to grant a right, not to impose an obligation,” a defendant may choose to forgo conflict-free representation *if* “he knows what he is doing and his choice is made with eyes open.” *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942); *see also United States v. Curcio*, 680 F.2d 881, 886 (2d Cir. 1982) (“Just as a defendant may waive the Sixth Amendment protections accorded him by electing to forgo counsel entirely, so may he waive his right to separate representation in a multidefendant prosecution.”). To this end, our courts have repeatedly held that defendants can waive constitutional rights, so long as it is established that such waivers were knowingly, intelligently, and voluntarily made. *See State v. Martinez-*

¹AACJ provided its statement of interest in its brief in support of Duffy’s response to the State’s Petition for Review, filed on January 16, 2020. *See AACJ’s Amicus Curiae Br.*, pgs. 2-3.

Serna, 166 Ariz. 423, 425 (1990) (standard for measuring effective waiver of constitutional right is set forth in *Johnson v. Zerbst*); *see also Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (waiver is intentional relinquishment or abandonment of known right or privilege, and whether waiver occurs depends upon particular facts and circumstances of a case, including background, experience, and conduct of accused); *Brady v. United States*, 397 U.S. 742, 748 (1970) (waivers of constitutional rights “not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences”).

In some contexts, a trial court has an affirmative obligation to safeguard a criminal defendant’s right to conflict-free counsel. *Wheat v. United States*, 486 U.S. 153, 161 (1988) (trial courts have “independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment”); *Glasser v. United States*, 315 U.S. 60, 71 (1942) (“Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.”). One such context in which the obligation arises is when a trial court learns of a joint representation that raises the possibility of a conflict of interest. *See Holloway*, 435 U.S. at 485-86; *see also*

Cuyler v. Sullivan, 446 U.S. 335, 346 (1980) (“*Holloway* requires state courts to investigate timely objections to multiple representation”).

Here, the prosecutor’s notification to the trial court that defense counsel’s joint representation presented a potential conflict of interest was a “special circumstance,” which triggered the trial court’s duty to inquire further. *See Cuyler*, 446 U.S. at 346-47; *see also Wood*, 450 U.S. at 272. At that point, the trial court’s obligation was two-fold. First, it had a duty to inquire into whether the joint representation presented a conflict and whether the defendants had waived said conflict. *See Wood*, 450 U.S. at 272-73 (by raising potential conflict and requesting that trial court look into it, State triggered court’s “duty to inquire”); *see also United States v. Aiello*, 814 F.2d 109, 113 (2d Cir. 1987) (Sixth Amendment “imposes a duty upon a trial court to inquire”). Second, it had a duty to determine whether Duffy’s purported waiver of any potential conflict was sufficient—*i.e.*, whether he possessed “sufficient awareness of the relevant circumstances and likely consequences” of the conflict, such that his waiver could be deemed to have been voluntary, knowing, and intelligent. *Brady*, 397 U.S. at 748; *see also Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (“It is reasonably clear under (Supreme Court) cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case ‘upon the particular facts and

circumstances surrounding that case, including the background, experience, and conduct of the accused”), *quoting Johnson*, 304 U.S. at 464.

The trial court fulfilled neither of those duties here. Even though this Court has yet to articulate the precise steps a court must take to establish a valid waiver of the right to conflict-free counsel, it is plain that the trial court’s wholly deferential waiver determination was contrary to established law: specifically, the “high standar[d] of proof for the waiver of constitutional rights [set forth by the Supreme Court in] *Johnson v. Zerbst*.” *Berghuis v. Thompkins*, 560 U.S. 370, 395 (2010); *see also State v. Duffy*, 247 Ariz. 537, ¶¶ 19-24 (2019).

At the very least, the trial court was obligated to conduct *some* further inquiry into the nature of the prosecutor’s concern about the joint representation, “whether to assess the extent of the potential conflict or to determine whether Duffy wished to waive any conflict.” *Duffy*, 247 Ariz. 537, ¶ 43 (Eppich, P.J., specially concurring). Instead, the trial court made no attempt whatsoever to confirm with Duffy that he had been advised of the dangers of joint representation, let alone to determine whether he had, in fact, signed a written waiver of his right to conflict-free counsel. Given the constitutional nature of the right Duffy was purportedly seeking to waive, the trial court was on notice of its obligation to ascertain whether said waiver was freely, intelligently, and knowingly made. *See State v. Avila*, 127 Ariz. 21, 25 (1980); *State v. Bunting*, 226 Ariz. 572, ¶ 11 (App. 2011) (trial court’s

failure to conduct colloquy to ascertain whether defendant’s submission on the record was freely, intelligently, and voluntarily made was fundamental error); *cf.* *State v. McLemore*, 230 Ariz. 571, ¶ 21 (App. 2012) (“The case law *requires* active court involvement to determine if a criminal defendant has constitutionally waived the right to counsel”) (emphasis added).

A. When a trial court has been alerted to a potential conflict of interest stemming from joint representation, defense counsel’s avowal that the defendant had waived any conflict, without more, is insufficient to establish a valid waiver of the right to conflict-free counsel

The dissent opined that the trial court was entitled to rely solely upon retained counsel’s avowal that there was no conflict presented in the case, and that Duffy had otherwise waived his constitutional right to conflict-free counsel. *Duffy*, 247 Ariz. 537, ¶ 47. However, such reliance is not enough to ensure that a purported constitutional waiver is valid, particularly where, as here, the trial court had been notified of a potential conflict. *See Holloway*, 435 U.S. at 484; *see also United States v. Lawriw*, 568 F.2d 98, 101 (8th Cir. 1977) (noting that because “it has become increasingly apparent that dual representation is fraught with risk of conflict and should be approached with caution by the parties and by counsel,” the “responsibility for avoiding such risks lies heavily both with the trial court” and counsel).

Any joint representation in a criminal case should be viewed with some skepticism by trial courts and the parties because it presents a significant risk that a conflict of interest will arise. *See Ariz. Sup. Ct. R. 42, ER 1.7, cmt. 22 to 2003*

amend. (“The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.”). In a case of joint representation, “the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process.” *Holloway*, 435 U.S. at 490. As the United States Supreme Court explained in *Holloway*:

Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, . . . it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution. . . . [A] conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Id. at 489-90.

Of course, avoiding a conflict of interest is, first and foremost, the responsibility of the defense attorney. However, because trial courts also have an independent duty to protect a defendant’s right to conflict-free counsel, *see Glasser*, 315 U.S. 60, and because of the inherent problems that frequently arise in joint representation cases, court oversight is also necessary to ensure the fairness of legal proceedings and that defendants are adequately protected. *Cf. Wheat*, 486 U.S. at 160 (“[N]ot only the interest of a criminal defendant but the institutional interest in

the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.”); *see also* Steven J. Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court’s Headache*, 5 HOFSTRA L. REV. 315, 334 (1977) (discussing trial court’s obligation to “make sure that there is an intelligent and competent waiver by the accused of his rights,” including right to conflict-free counsel).

Relying solely on defense counsel’s assurances is especially problematic in cases where, as here, “the prosecutor has specifically alerted the court to the presence of potential conflicting defenses.” *Duffy*, 247 Ariz. 537, ¶ 26; *see also Singley v. United States*, 548 A.2d 780, 783-85 (D.C. App. 1988) (by bringing possible conflict of interest on part of defense counsel to trial court’s attention, prosecutor triggered court’s duty to inquire into potential conflict and whether there was a valid waiver of said conflict). Furthermore, in some circumstances, even the most diligent attorney may be unaware of facts giving rise to a potential conflict. *See* Fed. R. Crim. P. 44(c), cmt. to 1979 amend; *see also Lawriw*, 568 F.2d at 104 (“Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver.”). Once a potential conflict has been brought to the trial court’s attention, “[r]equiring a meaningful inquiry by the trial court serves both the defendant and the prosecution because it offers a greater likelihood that possible conflicts of interest

can be identified” and addressed before prejudicial error occurs. *Lawriw*, 568 F.2d at 104.

II. This Court Should Articulate the Particular Steps a Trial Court Must Take to Establish that a Defendant has Knowingly, Voluntarily, and Intelligently Waived his Right to Conflict-Free Counsel

Once notified of a possible conflict of interest, trial courts have a duty to conduct a hearing to investigate that potential conflict, and to advise the defendant of the rights he would be giving up by agreeing to joint representation. *See Mickens v. Taylor*, 535 U.S. 162, 168-74 (2002). However, it is not entirely clear what specific steps a trial court must take to fulfill this duty. *Cf. Duffy*, 247 Ariz. 537, ¶ 21.

At a minimum, this Court should require trial courts to (1) inquire about the facts of the potential conflict; (2) address the defendants personally and advise them of the dangers and disadvantages of joint representation; (3) seek confirmation from each defendant on the record that he or she understands the possible conflict of interest and the perils of such conflict; and (4) ascertain whether the defendants still wish to proceed with joint counsel. *See, e.g.*, Fed. R. Crim. P. 44(c), cmt. to 1979 amend.; *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States v. Tatum*, 943 F.2d 370, 379 (4th Cir. 1991) (when risk of conflict of interest is brought to trial court’s attention, court has “responsibility to investigate further, to advise the defendant personally, and to receive a knowing waiver if that is the expressed wish

of the defendant); *cf. Avila*, 127 Ariz. at 24 (requiring trial court to warn defendant of rights that are waived by submitting to bench trial).

Though the advice regarding the dangers of joint representation should be flexible depending on the facts of the case, trial courts should provide sufficient warning of the potential risks “so the defendant ‘knows what [he] is doing and [the] choice is made with open eyes.’” *McLemore*, 230 Ariz. 571, ¶ 22, quoting *Faretta v. California*, 422 U.S. 806, 835 (1975). Courts should also consider advising defendants of specific examples of disadvantages and conflicts of joint representation that might arise, including that:

1. joint representation might hinder counsel’s advice with respect to whether a defendant should accept or reject a plea offer conditioned upon him testifying against the co-defendant;
2. defenses might be available to one defendant that would conflict with those available to the other;
3. conflicts might arise with respect to particular decisions that need to be made during trial, such as whether either or both defendants could take the stand, or whether one or both defendants would need to be cross-examined to protect the other defendant; and
4. conflicts might also arise with respect to whether particular witnesses should be called, whether certain questions should be asked of those witnesses, and whether cross-examination might be curtailed.

See Holloway, 435 U.S. at 489-90; *Cuyler*, 446 U.S. at 352 n.2 (while “court’s inquiry need not take any particular form,” it “must at least affirmatively advise the

defendants that joint representation creates potential hazards which the defendants should consider before proceeding with the representation”).

After apprising the defendants of the risks of joint representation, the trial court should ask each defendant on the record whether he understands the risks and whether he still wishes to proceed with joint counsel. *See Avila*, 127 Ariz. at 25 (“as in any proceeding involving the surrender of Constitutional rights,” a waiver of conflict-free counsel is not valid unless it “appear[s] from the record that the waiver was knowingly, intelligently and voluntarily made”); *cf. State v. Hampton*, 208 Ariz. 241, ¶ 7 n.3 (2004) (requiring on-the-record colloquy explaining “risks and consequences of waiving the right to counsel”); *see also* American Bar Association (ABA) Criminal Justice Standards for the Defense Function 4-1.7(e) (4th ed. 2017) (noting that in instances of permissible multiple representation, clients should be fully advised that lawyer may be unable to continue if conflict develops, informed written consent should be obtained, and “*such consent should be made on the record with appropriate inquiries by counsel and the court*”) (emphasis added).

If, after addressing the defendants directly, the trial court is satisfied that each defendant understands the pitfalls of joint representation and the risks of waiver, and each defendant expresses his desire to move forward with potentially conflicted counsel in a clear manner on the record, the waiver may be regarded as knowing and intelligent. *Curcio*, 680 F.2d at 888-89. A colloquy requirement of this nature is

consistent with the standard that this Court requires when a defendant seeks to waive his right to counsel altogether. *See Duffy*, 247 Ariz. 537, ¶ 21; *see also State v. Cornell*, 179 Ariz. 314, 324 (1994) (requiring trial court to warn defendant of dangers and disadvantages of self-representation before accepting waiver of right to counsel). It also comports with “settled federal practice.” *Duffy*, 247 Ariz. 547, ¶¶ 22-24 (discussing federal cases); *see also* Fed. R. Crim. P. 44(c).

III. Reversal of Duffy’s Convictions and Remand for a New Trial is Required Because an Adverse Conflict of Interest is Apparent from the Record

The State argues that a remand should have been ordered to allow the trial court to conduct a retrospective inquiry “to confirm or dispel whether Duffy waived his right.” (State Supp. Br., pg. 7). However, the Court of Appeals did not err in reversing Duffy’s conviction because it is clear from the record that trial counsel was operating under an actual conflict of interest², and it is impossible to ascertain from the record whether Duffy had, in fact, knowingly, voluntarily, and intelligently waived said conflict. *Cf. Noguera v. Davis*, 290 F.Supp.3d 974 (D. Cal. 2017) (clearly established federal law holds that actual conflict of interest arises when “attorney represents multiple clients with divergent interests”).

²The State does not contend that there was no conflict of interest; instead, it merely argues that the record supports the trial court’s “implicit conclusion that Duffy did, in fact, waive his right to conflict-free counsel.” (State’s Supp. Br., pg. 7.)

Contrary to the State's assertion, the Court of Appeals did not apply *Holloway's* "automatic reversal rule" in this case. *See Duffy*, 247 Ariz. 537, ¶ 28 (noting that because Duffy failed to object to conflict at trial, he was required to demonstrate that a "conflict existed and that it 'adversely affected counsel's performance'"). Instead, the COA applied *Mickens* and *Cuyler*, which presume prejudice upon proof that a conflict existed and adversely affected the representation. *Id.*; *see also Mickens*, 535 U.S. at 170-73 (when claim is that trial court failed to conduct inquiry into potential conflict which it knew or should have known about, defendant must show conflict of interest affected counsel's performance).

Here, remand is unnecessary because it is clear from the record that a conflict of interest existed and adversely affected trial counsel's representation of Duffy, and no valid waiver of Duffy's right to conflict-free counsel was obtained. *See Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004) (reversing and remanding for new trial where trial court failed to ascertain whether defendant sufficiently understood consequences of signed waiver, and where there was an actual conflict of interest that adversely affected trial counsel's performance); *Noguera*, 290 F.Supp.3d at 1010 (reversing and remanding for new trial where record was sufficient to determine that counsel operated under actual conflict of interest in representing defendant); *cf. Martinez-Serna*, 166 Ariz. at 426 (reversing and remanding for new

trial where it was clear from record that trial counsel's joint representation had adverse impact on defendant's representation).

CONCLUSION

For these reasons, AACJ requests that this Court adopt the holding of the COA, reverse Duffy's convictions, and remand for a new trial with non-conflicted counsel.

RESPECTFULLY SUBMITTED this 30th day of July, 2020.

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