IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Plaintiff-Appellee, vs. DAVID J. DUFFY, Defendant-Appellant.	Arizona Supreme Court No. CR19-0386-PR Court of Appeals No. 2-CA-CR-2018-0071 Cochise County Superior Court No. CR2017-00136

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

Carol Lamoureux, No. 031262
Law Office of
HERNANDEZ & HAMILTON, PC
455 West Paseo Redondo
Tucson, Arizona 85701
(520) 882-8823
carol@hernandez-hamilton.com
Attorney for *Amicus Curiae*
Arizona Attorneys for Criminal Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Arizona Constitution

United States Constitution

Court Rules

INTRODUCTION

The Sixth Amendment of the United States Constitution, article 2, § 24 of the Arizona Constitution, and Rule 6.1, Ariz. R. Crim. P., guarantee a criminal defendant the right to a conflict-free attorney. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Maricopa Cty. Pub. Def.'s Office v. Superior Court*, 187 Ariz. 162, 165 (App. 1996) ("The guarantees of the Sixth Amendment include the right to an attorney with undivided loyalty."). In the instant case, Duffy was deprived of his constitutional right to conflict-free counsel when his trial attorney represented both him and his co-defendant at trial, to his detriment.

The conflict arising from the joint representation was so obvious that the prosecutor felt duty-bound to alert the trial court to the issue. Despite repeated warnings by the prosecutor—who was familiar with the facts of the case—that joint representation presented a conflict of interest, the trial court deferred to trial counsel's avowal that there was no conflict, without further inquiry. Upon learning of the potential conflict, the trial court had an affirmative duty to inquire further into the propriety of joint representation in this case, and to ensure the "validity of Duffy's purported waiver of his constitutional right to conflict free counsel," but it failed to do so. *State v. Duffy*, 453 P.3d 816, ¶ 7 (App. 2019).

On appeal, Duffy asserted "the trial court commit[ted] fundamental error in allowing joint representation of the co-defendants." OB ¶ 9. The Court of Appeals

(COA) correctly concluded that Duffy's claim was reviewable on direct appeal, and held that trial court failed to "conduct an adequate inquiry into the property of joint representation in this case or the validity of Duffy's purported waiver of his constitutional right to conflict-free counsel. *Duffy*, ¶ 7. Because this the COA opinion with respect to the joint representation issue was correctly decided, this Court should deny the State's petition for review. Alternatively, it should affirm the COA's opinion.

Interests of *Amicus Curiae*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ submits this brief in support of Mr. Duffy because the constitutional right to conflict-free counsel is of immense importance to Arizona defendants. The COA's opinion protects this fundamental right by clarifying a trial court's duty to

inquire directly with a defendant when a party raises a plausible claim that joint representation may pose a conflict of interest in violation of his Sixth Amendment right to conflict-free counsel. AACJ also has an interest in the continued integrity of Arizona's criminal justice system. The COA's opinion strengthens this integrity by ensuring a criminal defendant's constitutional right to conflict-free counsel will be jealously guarded when courts are confronted with and alerted to possible conflicts of interest.

REASONS TO DENY REVIEW

I. Duffy's conflict of interest claim was plainly reviewable on direct appeal

The State maintains that this case presents an opportunity to "clarify whether a claim that defendant was denied effective assistance of counsel due to a conflict of interest of his attorney . . . can be addressed on direct appeal." PR, pg. 6. In doing so, it misrepresents the nature of Duffy's conflict of interest claim. Duffy did not—as the State contends—ask the COA to determine whether his trial counsel's conflict of interest rendered him ineffective. Such a claim would have plainly been precluded from direct review. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002).

Instead, Duffy asked—and the COA resolved—the question of whether the trial court's failure to inquire into trial counsel's possible conflict of interest, in the face of the prosecutor's repeated objection to the joint representation, violated his Sixth Amendment right to conflict-free counsel. *Duffy*, ¶ 6. Such a claim, while

technically born from trial counsel's inadequate joint representation, arises separately from the trial court's failure to adequately protect the essential rights of the accused when faced with actual notice of a prospective risk of conflict. *See Holloway v. Arkansas*, 435 U.S. 475, 484 (1978); *cf. Mickens v. Taylor*, 532 U.S. 162, 194 (2002) (Souter, J., dissenting) ("prospective risk of conflict subject to judicial notice is treated differently from a retrospective claim that a completed proceeding was tainted by conflict, although the trial judge had not been derelict in any duty to guard against it"). Where, as here, it is alleged that the trial court's failed to fulfill a duty of care or obligation to protect a defendant's constitutional rights, direct review is available. *State v. Baker*, 217 Ariz. 118, ¶ (App. 2007) (resolving claim that trial court failed to ensure jury trial waiver was knowing, voluntary, and intelligent on direct appeal); *State v. Buntling*, 226 Ariz. 572 (App. 2011).

It remains clear after *Sprietz* that claims based on a trial court's failure to protect a defendant's constitutional right—including so-called "*Cuyler* claims" premised upon the trial court's derelict of duty—are reviewable on direct appeal.[1] *Spreitz* only mandated that all ineffective assistance of counsel claims must be

[1] *Cuyler v. Sullivan* addressed two types of claims based on trial counsel's conflict of interest—one based on a trial court's failure to inquire into a timely objection to multiple representation conflict, a la *Holloway*, and another premised on the ineffective assistance he received as a result of the conflict. 446 U.S. 335 (1980). The former, which requires no inquiry into outside facts, is suitable for review on direct appeal, whereas the latter, which typically requires consideration of facts outside the record, is not.

brought in post-conviction proceedings rather than on direct appeal. 202 Ariz. 1, ¶ 9. It did not preclude the COA from reviewing Sixth Amendment violations stemming from a trial court's error on direct appeal. Indeed, even the State acknowledges that this Court has since addressed claims that the trial court violated a defendant's Sixth Amendment right to conflict-free counsel on direct review. AB pg. 8, *citing State v. Tucker*, 205 Ariz. 157 (2003) and *State v. Moore*, 222 Ariz. 1, ¶¶ 81-82 (2009). The COA correctly concluded that *Sprietz* has no impact on the appealability of Duffy's conflict of interest claim, and that he could "challenge such a constitutional infirmity on direct appeal." *Duffy*, 453 P.3d 816, ¶¶ 11-12. This case simply does not present a novel question with respect to the availability of direct review.

II. The COA Opinion is Correct on the Merits with Respect to Duffy's Joint Representation Claim

A. The COA's holding that the trial court, having been alerted to a potential conflict of interest, had a duty to assess the propriety of joint representation and Duffy's purported waiver is in lockstep with United States and Arizona Supreme Court precedent

Though a trial court is not ordinarily obligated to inquire into potential conflicts of interest in all cases, once alerted to a possible conflict, it has a duty to

assess the propriety of joint representation. *Cuyler*, 446 U.S. at 347 (when trial court "knows or reasonably should know" conflict may exist, must initiate inquiry); *Wheat*, 486 U.S. at 160. In this case, the prosecutor's "timely objection to multiple representation" at Duffy's arraignment triggered the trial court's duty to inquire into the nature of the situation. *Cuyler*, 446 U.S. at 346, *citing Holloway*, 435 U.S. at 483-84; *see also Mickens*, 535 U.S. at 186 (Stevens, J., dissenting) (trial court's duty to inquire into potential conflict "triggered either via defense counsel's objection . . . or some other 'special circumstances' whereby the serious potential for conflict was brought to the attention of the trial court judge"). At that time, the possibility that trial counsel's joint representation of Duffy and his co-defendant might present a conflict of interest was "sufficiently apparent," such that the court was obligated to inquire further. *Wood*, 450 U.S. 261.

The prosecutor's objection in this case was plainly a "special circumstance" that put the trial court on notice to the fact that it could no longer assume "that multiple representation entail[ed] no conflict or that [Duffy's] lawyer and his clients knowingly accept[ed] such risk of conflict as may exist." *Cuyler*, 446 U.S. at 346-47; *Holloway*, 435 U.S. at 346. The fact that he was concerned enough about the joint representation in this matter that he felt duty bound to raise it with the trial court should have *compelled* the court to obtain more information about the potential conflict. Instead, the trial court ignored the prosecutor's repeated warnings that the

case presented "obviously competing defenses," and deferred to retained counsel's opinion that there was no conflict. Arraignment, Tr. 3/6/17, pg. 4; Hearing, Tr. 4/3/17, pg. 5. It also concluded Duffy had waived any conflict based solely on trial counsel's avowal that he had signed a waiver, without even inquiring with Duffy as to whether that waiver was desired, let alone knowing or intelligent.

Though the trial court set a review hearing, on this record, it is clear it did not actually "inquire" into the potential conflict whatsoever. Instead it simply "defer[red] to counsel." *Id.* Such deference in the face of the prosecutor's representation that the case presented "obviously competing defenses," was an inadequate assessment of the propriety of joint representation. Where, as here, a prospective risk of conflict comes to the trial court's attention *before* an actual conflict ripens, the court must inquire into the specific facts and assess the potential risk. The COA correctly determined that the trial court's limited assessment of the joint representation failed to satisfy its duty to "jealously guard" Duffy's constitutional right to conflict-free counsel. *Duffy*, ¶ 17; *Holloway*, 435 U.S. at 1178-79 ("[T]he failure, in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of 'assistance of counsel.'")

B. The COA's clarification of the "steps a court must take" to establish a valid waiver of the right to conflict-free counsel is a logical application of this Court's directive in *Martinez-Serna* and is wholly consistent with Arizona law

A criminal defendant may generally waive a number of important constitutional rights, including his Sixth Amendment right to counsel. *See State v. Martinez-Serna*, 166 Ariz. 423, 425 (1990). However, because such a waiver is "a matter of grave concern," this Court has repeatedly emphasized that such waiver must be knowing, voluntary, and intelligent. *State v. Brown*, 212 Ariz. 225, ¶ 15 (2006); *State v. LaGrand*, 152 Ariz. 483, 487 (1987). Consistent with this principle, Rule 6.1(c) of the Arizona Rules of Criminal Procedure provides that a defendant may only waive his right to counsel "in writing and if the court finds that the defendant's waiver is knowing, intelligent, and voluntary."

Included in a defendant's Sixth Amendment right to counsel is the right to be represented by an attorney with undivided loyalty—one who is free from any conflicts of interests. *Wood*, 450 U.S. at 271 (right to conflict-free representation is correlative right of constitutional right to counsel); *Maricopa Cty. Pub. Def.'s Office*, 187 Ariz. at 165. Given that trial courts have a duty to ensure a defendant's waiver of his constitutional right to counsel is knowing, voluntary, and intelligent, and the right to conflict-free counsel is encompassed within that right, it follows that courts also have a duty to ensure a defendant's waiver of a *conflict of interest* is knowing, intelligent, and voluntary.

Though this Court has never expressly articulated "the particular steps a court must take" to establish a valid waiver of conflict-free counsel, it has directed that

such right may only be deemed waived if it is shown that the defendant "knowingly waive[d] his sixth amendment rights in the manner required by *Johnson v. Zerbst*, 304 U.S. 457 (1938)." *Martinez-Serna*, 166 Ariz. at 425; *State v. Jenkins*, 148 Ariz. 463 (1986) (waiver of conflict requires "knowing waiver as required by *Johnson v. Zerbst*"); *State v. James*, 141 Ariz. 141 (1984) ("Waiver is found using the *Johnson*. . . knowing and intelligent waiver . . . standard."). *Johnson* directs that the right to counsel can only be waived upon "intelligent and competent waiver by the accused," and imposes the "serious and weighty responsibility upon the trial judge" to "determine whether such waiver exists." 304 U.S. at 464-65 ("[W]hether there is a proper waiver should be clearly determined by the trial court.")

Here, the COA followed this Court's directive and applied *Johnson*'s "knowing and intelligent waiver" standard to assess whether the trial court's inquiry into Duffy's waiver was sufficient. *Carnley v. Cochran*, 369 U.S. 506 (1962) (burden is on trial court to determine clearly, on the record, that waiver intelligent and competent). In doing so, it correctly concluded that the trial court's limited inquiry failed to satisfy its "serious and weighty responsibility . . . of determining whether there [was] an intelligent and competent waiver" by Duffy. *Duffy*, ¶ 24.

And though *Johnson* does not expressly articulate what the trial court must do to fulfill that "weighty responsibility," Arizona courts have since elaborated on this duty in the context of waivers of the right to counsel. To be valid, a constitutional

waiver must be apparent from the record, *State v. Avila*, 127 Ariz. 21, 25 (1980), and would require "active court involvement to determine if a criminal defendant has constitutionally waived the right to counsel." *State v. McLemore*, 230 Ariz. 571, ¶ 22 (App. 2012). It would also "require that the court advise the defendant of the "dangers and disadvantages" of retaining potentially conflicted counsel and to ensure that the defendant understands them. *State v. Cornell*, 179 Ariz. 314 (1975). The COA's adoption of these standards in evaluating the adequacy of the trial court's inquiry into whether Duffy had waived his right to conflict-free counsel in the instant case was legally sound and wholly consistent with Arizona law. Applying that standard here, it is unavoidable that the trial court "erroneously failed to ascertain whether Duffy validly waived his constitutional right to conflict-free counsel." *Duffy* ¶ 27.

The dissent rejects the majority's adoption of a "colloquy" requirement and instead suggests that Duffy's presence at the hearing, coupled with his silence in the face of his retained counsel's avowals that he had waived any potential conflict, were enough to establish that he had been "fully advised with regard to the situation" and had knowingly waived his right to conflict-free counsel. *Duffy*, ¶ 50. But courts have repeatedly refused to presume a valid waiver of a constitutional right from a defendant's inaction. *Avila*, 127 Ariz. at 25 (waiver not be presumed from silent

record); *Baker*, 217 Ariz. 118, ¶ 8 ("We cannot presume a valid waiver of a jury right based on a silent record."); *Barker*, 407 U.S. 514.

Before courts can conclude that a valid waiver of a conflict of interest has occurred in "any proceeding involving the surrender of Constitutional rights, it must appear from the record that the waiver was knowingly, intelligently, and voluntarily made." *Avila*, 127 Ariz. At 25. Here, defense counsel's avowal of a written waiver failed to satisfy this necessary condition. *Baker*, 217 Ariz. 118, ¶ 15 (simply stating a waiver occurred, without more, "is the functional equivalent of a silent record).

The dissent also takes issue with the majority's directive that courts must engage in a "personally colloquy with the defendant to determine the existence of a conflict or the fact of waiver," and contends that "no such obligation is imposed by the United States Constitution, the Arizona Constitution, or binding caselaw." *Duffy* ¶ 45, 52. This Court has frequently held that such a colloquy is necessary to ensure a defendant understands the nature of the constitutional rights he is giving up in other contexts. *Brown*, 212 Ariz. 225; *State v. Morales*, 215 Ariz. 59 (2007) (requiring plea-type colloquy with respect to stipulation to prior convictions for purposes of sentencing enhancement); *Avila*, 127 Ariz. 21; *State v. Rose*, 231 Ariz. 500, 508 (2013) (trial judge has duty to inquire into defendant's competence when judge "is aware" he might be under influence of substance capable of impairing ability to making knowing and intelligent waiver of constitutional rights).

Indeed, Arizona law *does* require a colloquy in evaluating waivers of the constitutional right to counsel—a right which encompasses the right to conflict-free counsel. *See Cornell*, 179 Ariz. at 324 (requiring courts to warn defendants of dangers and disadvantages of waiving right to counsel). Though the dissent characterizes the majority's holding as one that breaks new ground or announces an entirely new constitutional right, it really is no more than an extension of the longstanding principle that trial courts have a duty to ensure a defendant's waiver of a fundamental constitutional right is knowingly and intelligently made. The COA's opinion is thus consistent with Arizona law and established constitutional principles. The State's petition for review should be denied.

C. The COA correctly concluded that the trial court's failure to meaningfully inquire into the propriety of the joint representation in the fact of an actual conflict of interest warranted reversal.

Cuyler made clear that the trial court is obliged to take reasonable prospective action whenever a timely objection is made, and that its failure to do so will result in reversal if it turns out that an actual conflict existed and adversely affected counsel's performance. 446 U.S. at 346; *Wood*, 450 U.S. at 272 n. 18 ("[Cuyler] *mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'").

Here, trial counsel's joint representation presented an actual conflict that plainly interfered with Duffy's constitutional right to conflict-free and loyal counsel.

See Matter of Shannon, 179 Ariz. 52 (1994); *Martinez-Serna*, 166 Ariz. at 425. Trial counsel owed a duty of loyalty to both his clients—co-defendants with different defenses and culpability. That concurrent and competing sense of loyalty gave rise to conflict because it materially limited trial counsel's ability to represent Duffy effectively and "forclose[d] alternatives that would [have] otherwise be available to" him. ER 1.7. For example, his simultaneous duty to Matias materially precluded him from pointing the finger at her, even though doing so would have resulted in a much stronger defense for Duffy. Trial counsel's representation of Duffy was materially limited as a result.

Trial counsel's conflict of interest and the adverse effect it had on his representation of Duffy is so apparent from the record, that the COA could reasonably conclude, as a matter of law, that he was laboring under an actual conflict of interest that had an adverse effect on his representation of Duffy. *See Tucker*, 205 Ariz. 157, ¶ 27; *cf. Cuyler*, 446 U.S. at 346 (unconstitutional multiple representation never harmless error). Thus, it correctly concluded remand was not required.

CONCLUSION

AACJ requests that this Court deny the State's petition for review. Alternatively, should this Court decide to accept review, it should affirm the COA on the conflict of interest issue.

RESPECTFULLY SUBMITTED this 16th day of January, 2020.

BY /s/
CAROL LAMOUREUX
Law Office of Hernandez & Hamilton, PC

Attorney for *Amicus Curiae*
Arizona Attorneys for Criminal Justice