IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID JOSEPH DUFFY,
Appellant.

No. 2 CA-CR 2018-0071
Filed November 1, 2019

Appeal from the Superior Court in Cochise County
No. CR201700136
The Honorable James Conlogue, Judge

VACATED AND REMANDED

COUNSEL

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OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich specially concurred and Judge Brearcliffe concurred in part and dissented in part and in the result.

E C K E R S T R O M, Judge:

¶1 David Duffy appeals his convictions and sentences for conspiracy, transportation of marijuana for sale, and possession of drug paraphernalia. For the reasons that follow, we vacate and remand.

Facts and Procedural History

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). In January 2017, a sergeant with the Arizona Department of Public Safety was monitoring traffic on a highway. He received a call from a Border Patrol agent, who had seen a green sports utility vehicle (SUV) driving suspiciously close behind another car. The sergeant then began watching for the vehicles the Border Patrol agent had described.

¶3 Shortly afterward, the sergeant saw two vehicles matching the agent's description: a green SUV following a red sedan at an unsafe distance in the right lane. He followed the SUV and paced it traveling approximately five miles per hour over the posted speed limit. He also observed the SUV make an abrupt lane change, cutting off another car that was traveling in the left lane, which was forced to change lanes to avoid a collision. Unbeknownst to the sergeant, the Border Patrol agent was driving that car. The agent had followed the SUV and pulled up near it to see if any suspicious people or bundles were visible in the back.

¶4 After the SUV made another abrupt lane change, the sergeant conducted a traffic stop based on the SUV's unsafe following distance, violation of the speed limit, and first abrupt lane change. He found Duffy in the driver's seat and Duffy's codefendant, Dora Matias, in the passenger seat. Once the driver's side window was open, the sergeant was able to see burlap-wrapped bundles through the tinted back windows of the SUV. Based on his experience, he suspected the bundles contained marijuana, and he placed Duffy and Matias under arrest. Later testing revealed the bundles contained over 240 pounds of marijuana.

¶5 A grand jury charged Duffy and Matias each with conspiracy, possession and transportation of marijuana for sale, and unlawful possession of drug paraphernalia. They stood trial together, represented by the same retained counsel, and the jury found them guilty on all counts. The trial court sentenced Duffy to three concurrent prison terms, the longest of which is six years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Joint Representation

¶6 Duffy contends the trial court erred in allowing the same attorney to represent both Duffy and his codefendant, Matias, during the trial despite the prosecutor's repeated warnings that this constituted a conflict of interest.[1] The state counters that Duffy essentially describes a claim for ineffective assistance of counsel, which cannot be raised on direct appeal.

¶7 We review alleged violations of a defendant's Sixth Amendment right to counsel de novo. *State v. Boggs*, 218 Ariz. 325, ¶ 50 (2008). For the reasons that follow, we conclude that, to the extent Duffy claims the trial court erred in allowing joint representation during his trial, we may properly address that claim on appeal. We further conclude that the trial court, having been alerted to the potential conflict between Duffy and Matias, erred by failing to conduct an adequate inquiry into the propriety of joint representation in this case or the validity of Duffy's purported waiver of his constitutional right to conflict-free counsel. Finally, we conclude that Duffy has satisfied his burden of establishing that his trial counsel had an actual conflict of interest that adversely affected his

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[1]At Duffy's arraignment, the prosecutor told the trial court: "I have a real concern about one attorney representing both codefendants in a case where there is obviously competing defenses." Then, at a review hearing on the issue, the prosecutor reiterated his concern as follows:

> I think that I have an obligation to protect the rights of the defendants. That is pretty much equal to that of defense counsel. I take that obligation seriously. That's why I raise the issue here.
>
> I believe there are competing interests. I believe there is at least a potential for adverse defenses in this matter, especially if it were to go to trial, and I think that there are circumstances under which it's inappropriate to even consider a waiver of the conflict.
>
> I am not going to express an opinion whether this is one, but I presented it to the Court and leave it to your discretion, Your Honor.

representation of Duffy, requiring that his conviction be vacated and his case remanded for a new trial.[2]

Availability of Direct Appeal

¶8 The state is correct that, if Duffy believes particular decisions, acts, or omissions of his defense attorney at trial rendered his counsel ineffective, such a claim must be raised in a petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P., and may not be addressed by this court on direct appeal regardless of its merit. *State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002). However, this rule does not preclude Duffy from challenging on direct appeal the trial court's failure to discharge its duty to protect Duffy's constitutional right to conflict-free counsel.

¶9 As the United States Supreme Court has explained, a trial court's "duty of seeing that the trial is conducted with solicitude for the essential rights of the accused" includes the duty to "protect the right of an accused to have the assistance of counsel" during trial. *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) (quoting *Glasser v. United States*, 315 U.S. 60, 71 (1942)).[3] That right—which is enshrined in the Sixth Amendment of the United States Constitution, article II, § 24 of the Arizona Constitution, and Rule 6.1, Ariz. R. Crim. P.—includes the right to an attorney free from

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[2]We recognize that, as to Duffy's codefendant, another panel of this court found her claims regarding joint representation not ripe and meritless. *State v. Matias*, No. 2 CA-CR 2018-0073, ¶¶ 5-10 (Ariz. App. Mar. 25, 2019) (mem. decision). However, Duffy has a greater grievance related to the issue of joint representation: he has plausibly argued he was harmed by being tethered to Matias at trial, whereas she arguably benefitted from the joint representation. That representation prevented Duffy's defense counsel from pursuing defenses available only to Duffy and adverse to Matias. We also note that the *Matias* panel decided not to give its decision precedential weight.

[3]In *Glasser*, which our supreme court has called "[t]he leading case on conflict of interest," *State v. Kruchten*, 101 Ariz. 186, 199 (1966), the United States Supreme Court set aside the verdict and ordered a new trial for a criminal defendant whose "fundamental and absolute" right to counsel under the Sixth Amendment had been denied. *Glasser*, 315 U.S. at 76. The Court determined the trial court had denied that right by appointing the same counsel to represent both the defendant and his codefendant even after "the possibility of the inconsistent interests" of the codefendants "was brought home to the court." *Id.* at 71.

conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, . . . there is a correlative right to representation that is free from conflicts of interest."); *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.").

¶10 The United States Supreme Court instructs that, where trial counsel has "focused explicitly on the probable risk of a conflict of interests"—as the prosecutor undoubtedly did in this case—the trial court must "take adequate steps to ascertain whether the risk [is] too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484; *see also Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) ("*Holloway* requires state trial courts to investigate timely objections to multiple representation."). A trial court's failure to discharge this duty "deprive[s] [defendants] of the guarantee of 'assistance of counsel.'" *Holloway*, 435 U.S. at 484.

¶11 As the dissent in *Holloway* clarified, the majority's approach in that case was "not premised on an ultimate finding of conflict of interest or ineffective assistance of counsel." *Id.* at 492 (Powell, J., dissenting). Rather, the Court presumed prejudice from the judge's failure to conduct a "requisite inquiry," "equating that failure with a violation of the Sixth Amendment guarantee." *Id.*; *see also Cuyler*, 446 U.S. at 345 (explaining *Holloway* "held that the trial court's error unconstitutionally endangered the right to counsel"). Thus, a defendant may challenge such a constitutional infirmity on direct appeal without reference to the competence or particular acts or omissions of his counsel, even if the effectiveness of his counsel may also be subject to review in subsequent Rule 32 proceedings.

¶12 The state argues that the appealability of this claim is controlled by our state supreme court's holding in *Spreitz*. There, the court mandated that all claims challenging the conduct of trial counsel must be brought in Rule 32 proceedings rather than on direct appeal. *Spreitz*, 202 Ariz. 1, ¶ 9. In so doing, it clarified or disapproved of its prior cases that had addressed such claims piecemeal. *Id.* ¶ 11. But those cases all involved claims that particular decisions, behaviors, or failures of trial counsel rendered their assistance ineffective. None involved claims that the trial court had erred. *Id.* ¶¶ 2-3, 11 ("modify[ing] and clarify[ing]" *State v. Tison*, 142 Ariz. 454 (1984), *State v. Carriger*, 132 Ariz. 301 (1982), and *State v. Watson*, 114 Ariz. 1 (1976); "disapprov[ing] of" *State v. Scrivner*, 132 Ariz. 52 (App. 1982)).

¶13 We recognize that when the record supports a plausible claim that the trial court erred in allowing conflicted counsel to represent a defendant, the record might also support a parallel claim of ineffective assistance of counsel. Our courts, however, have had no difficulty distinguishing the two. In *State v. Tucker*, 205 Ariz. 157 (2003), issued a year after *Spreitz*, the supreme court reached on appeal the merits of Tucker's claim that the trial court violated his right to the assistance of conflict-free counsel. *Id*. ¶¶ 19-37. In so doing, the court declined to address those arguments that sounded as ineffective assistance of counsel and for which a record had not been developed. *Id.* ¶ 26.

¶14 Our conclusion finds support in Arizona jurisprudence predating the *Spreitz* rule as well. That jurisprudence has routinely addressed conflict claims on direct appeal. As discussed, *Spreitz* identified and disapproved of particular cases, most of which involved ineffective-assistance-of-counsel claims that had been raised piecemeal. But the court neither mentioned nor disapproved of its own prior cases in which direct appeal was effectively sought by defendants raising the specific claim here: that a trial court had erroneously required or allowed conflicted joint representation, in violation of the Sixth Amendment. *See, e.g.*, *State v. Martinez-Serna*, 166 Ariz. 423, 424-26 (1990); *State v. Davis*, 110 Ariz. 29, 31 (1973); *State v. Cox*, 109 Ariz. 144, 145 (1973); *State v. Bush*, 108 Ariz. 148, 150 (1972); *State v. Belcher*, 106 Ariz. 170, 170, 172 (1970).

¶15 Thus, the rule articulated in *Spreitz* applies only to claims of counsel incompetency. In *State v. Jenkins*, our supreme court had previously clarified that such claims are distinct from claims of "conflict of interest due to multiple representation of co-defendants." 148 Ariz. 463, 465-66 (1986). The latter claims are governed by *Cuyler* and do not require proof of prejudice. *Id.* For this reason, the *Spreitz* rule does not extend to claims, like the one Duffy presents here, that the trial court failed to protect a criminal defendant's right to counsel by meaningfully investigating timely objections to joint representation. We hold, in conformity with both federal and state authority, that such a claim may still be raised on direct appeal.[4] We therefore turn to the merits of that claim on the record before us.

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[4] This understanding of *Spreitz* conforms to general scholarly understandings of the procedural problem. George L. Blum, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendants and Defense Counsel – State Cases Concerning Waiver of Conflict: Form and Context of Waiver, Duty of Court and Counsel, Responsibilities of Defendant, Impact of Applicable Rules and Regulations, Colloquy Related to Waiver, and Discretion and*

Adequacy of the Trial Court's Inquiry

¶16 When a trial court "knows or reasonably should know" that a conflict may exist,[5] it must initiate an inquiry. *Cuyler*, 446 U.S. at 347; *see also Wheat v. United States*, 486 U.S. 153, 160 (1988) ("[A] court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel."); *Wood*, 450 U.S. at 272 (when "*possibility* of a conflict of interest [is] sufficiently apparent," this "impose[s] upon the court a duty to inquire further"); *United States v. Allen*, 831 F.2d 1487, 1494 (9th Cir. 1987) ("Trial courts presented with a possible conflict have an affirmative duty to protect a defendant's rights, which duty arises when the possibility of conflict is 'brought home to the court.'" (citation omitted) (quoting *Holloway*, 435 U.S. at 485)).[6]

¶17 In this case, the prosecutor's cautionary comment at the arraignment was sufficient to trigger the trial court's duty to inquire. *Wood*, 450 U.S. at 272-73 ("Any doubt as to whether the court should have been aware of the problem is dispelled by the fact that the State raised the conflict problem explicitly and requested that the court look into it."). In apparent recognition of this duty, the court scheduled a review hearing to address the issue of joint representation. We must therefore determine whether, at that hearing, the court satisfied its duty of "jealously guarding" Duffy's rights. *Glasser*, 315 U.S. at 71.

¶18 Our review of the record compels a conclusion that the trial court failed to meet this standard. At the review hearing, defense counsel insisted that there was "no cognizable issue for this case" because both defendants were identically situated, had "essentially . . . a common

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Analysis of Court, 19 A.L.R.7th Art. 3, § 3 (originally published 2016) ("When a defendant alleges that trial court's failure to inquire about a possible conflict of interest led to the deprivation of a constitutional right during a criminal prosecution, the claim is proper for direct appeal.").

[5]This "is not to be confused with when the trial court is aware of a vague, unspecified possibility of conflict, such as that which 'inheres in almost every instance of multiple representation.'" *Mickens v. Taylor*, 535 U.S. 162, 168-69 (2002) (quoting *Cuyler*, 446 U.S. at 348).

[6]The situation differs when the trial court is not alerted to the possibility of a conflict and there is no reason that the court should know about it. In such instances, the court bears "no affirmative duty to inquire" into joint representation. *Cuyler*, 446 U.S. at 348.

defense agreement," and had signed a waiver after being adequately advised of their rights. The prosecutor responded that the case presented "competing interests" and "a potential for adverse defenses," especially if it proceeded to trial. He warned that "there are circumstances under which it's inappropriate to even consider a waiver of the conflict," although he stopped short of opining on whether the conflict in this case was unwaivable. Without inquiring any further, and based entirely on the foregoing exchange, the court found: "It appears that the defendants have been fully advised with regard to this situation." The court then stated: "I will defer to [defense] counsel. I am required [to] do that in any event, but I would, even if not required." The court did not directly address either defendant.

¶19 A criminal defendant may generally waive his constitutional right to conflict-free counsel. *Holloway*, 435 U.S. at 483 n.5 ("[A] defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests."); *see also Martinez-Serna*, 166 Ariz. at 425.[7] However, the "[w]aiver of a constitutional right is a matter of grave concern," and "a constitutional waiver is not valid unless the defendant manifests 'an *intentional* relinquishment or abandonment of a *known* right or privilege.'" *State v. LaGrand*, 152 Ariz. 483, 487 (1987) (emphasis added in *Montano*) (quoting *Montano v. Superior Court*, 149 Ariz. 385, 392 (1986) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))). Put otherwise, "[a] defendant's waiver of his Sixth Amendment rights must be knowing, voluntary, and intelligent," *State v. Brown*, 212 Ariz. 225, ¶ 15 (2006), "which depends in

[7]Conflicts that are "so egregious that no rational defendant would knowingly and voluntarily desire the [conflicted] attorney's representation," *United States v. Martinez*, 143 F.3d 1269, 1270 (9th Cir. 1998) (quoting *United States v. Lussier*, 71 F.3d 456, 461 (2d Cir. 1995)), or that are "so severe as to undermine the integrity of the judicial system," *United States v. Rico*, 51 F.3d 495, 508 (5th Cir. 1995), have been held to be unwaivable. *E.g.*, *United States v. Schwarz*, 283 F.3d 76, 95-97 (2d Cir. 2002) (where defense counsel had significant financial interest in defendant losing at trial); *United States v. Fulton*, 5 F.3d 605, 608, 612-13 (2d Cir. 1993) (where defendant's trial counsel was implicated in related crime, leaving him concerned not only with defendant's interests, but also with his own "personal reputation, and more than that, the potential that he himself might be accused of a crime"). However, this is a "very narrow category" of conflicts, and "lesser conflicts, such as an attorney's representation of two or more defendants . . . are generally waivable." *United States v. Perez*, 325 F.3d 115, 126-27 (2d Cir. 2003).

each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,'" *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting *Zerbst*, 304 U.S. at 464).

¶20 Jurisprudence controlling on this court has applied this standard not only to the complete waiver of counsel, but also to the waiver of the Sixth Amendment right to conflict-free counsel. *See, e.g.*, *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948) (record must support that defendant "intelligently and understandingly" waived Sixth Amendment right to counsel, which entitles defendant to counsel's "[u]ndivided allegiance and faithful, devoted service"); *Tucker*, 205 Ariz. 157, ¶ 33 (citing *Von Moltke*); *Martinez-Serna*, 166 Ariz. at 424-26 (reversing conviction where defendant did not knowingly waive right to separate counsel and actual conflict adversely affected representation); *see also Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) (to be valid, defendant's waiver of "right to conflict-free counsel . . . must have been given knowingly and intelligently").[8]

¶21 Arizona courts have not articulated the particular steps a court must take to establish that a defendant has knowingly, voluntarily, and intelligently waived his right to conflict-free counsel.[9] But our supreme

[8] Indeed, there appears to be unanimous federal circuit court consensus that a criminal defendant's waiver of the Sixth Amendment right to conflict-free counsel must be knowing, voluntary, and intelligent. *E.g.*, *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 200 (D.C. Cir. 2013); *Noe v. United States*, 601 F.3d 784, 791 (8th Cir. 2010); *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 68-69 (1st Cir. 2009); *Perez*, 325 F.3d at 125, 127-28; *United States v. Newell*, 315 F.3d 510, 519-22 (5th Cir. 2002); *Wilson v. Moore*, 178 F.3d 266, 279-80 (4th Cir. 1999); *United States v. Alred*, 144 F.3d 1405, 1411 (11th Cir. 1998); *United States v. Migliaccio*, 34 F.3d 1517, 1526-27 (10th Cir. 1994); *Gomez v. Ahitow*, 29 F.3d 1128, 1133-34 (7th Cir. 1994); *United States v. Straughter*, 950 F.2d 1223, 1234 (6th Cir. 1991); *United States v. Laura*, 667 F.2d 365, ¶ 26 (3d Cir. 1981).

[9] In *Tucker*, as here, the state raised a question about a possible conflict of interest. The trial court held a hearing on the matter, finding the defendant had "waived any violation of his Sixth Amendment rights." 205 Ariz. 157, ¶¶ 20-22. However, our supreme court did not address the issue of waiver because—although the trial court had personally addressed the defendant at the hearing and asked him three direct questions—the state conceded that the record was inadequate to establish the validity of the

court has specifically held such a waiver must conform to the same standards set forth when a defendant seeks to waive counsel altogether. *See Martinez-Serna*, 166 Ariz. at 425 (court must establish valid waiver "in the manner required by *Johnson v. Zerbst*"); *see also Wood*, 450 U.S. at 271 (right to conflict-free counsel sounds as species of right-to-counsel claim). In the latter context, a trial court must both warn a defendant of "the dangers and disadvantages of self-representation" and "ensure" that the defendant understands them. *State v. Cornell*, 179 Ariz. 314, 323-24 (1994) (citing standards set forth in *Faretta v. California*, 422 U.S. 806, 835 (1975)); *see also State v. Dann*, 220 Ariz. 351, ¶ 24 (2009) (requiring both court warning and defendant understanding); *State v. Hampton*, 208 Ariz. 241, n.3 (2004) (courts should conduct "on-the-record colloquy" with defendant as to "risks of self-representation" (quoting *United States v. Goldberg*, 67 F.3d 1092, 1099, 1100-01 (3d Cir. 1995))). If we follow our supreme court's directive to apply the same standards here, a valid waiver would require that the court advise the defendant of the "dangers and disadvantages" of retaining potentially conflicted counsel and ensure that the defendant understands them. *Cf. Tucker*, 205 Ariz. 157, n.4 (accepting state's concession that record was insufficient to establish valid waiver even where trial court tersely alerted defendant to potential conflict and defendant specifically responded that he nonetheless wished to proceed with his counsel).

¶22 Our nation's federal courts have similarly required a direct exchange between the trial court and defendant once the duty to inquire has been triggered. For example, in *United States v. Migliaccio*, the Tenth Circuit reasoned that "the court's participation is integral to a valid waiver" of the right to conflict-free counsel. 34 F.3d 1517, 1527 (10th Cir. 1994). In particular, it clarified that "the trial judge should affirmatively participate in the waiver decision by eliciting a statement in narrative form from the defendant indicating that he fully understands the nature of the situation and has knowingly and intelligently made the decision to proceed with the challenged counsel." *Id.* (quoting *United States v. Winkle*, 722 F.2d 605, 611 (10th Cir. 1983)). In *Lewis v. Mayle*, notwithstanding evidence that a defendant had signed a written waiver and discussed the potential conflict with his attorney, the Ninth Circuit still found the record inadequate because the trial court "had only a cursory discussion" with the defendant and failed to establish that he "understood 'any of the specific ramifications of his waiver.'" 391 F.3d 989, 995-97 (9th Cir. 2004) (quoting *Lockhart*, 250 F.3d at 1233). *See also United States v. Alred*, 144 F.3d 1405, 1411 (11th Cir.

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defendant's waiver. *Id.* ¶ 22 & n.4. *See also* Blum, *supra* (collecting cases, and providing none from Arizona).

1998) (waivers of conflict-free counsel "not to be lightly or casually inferred" and require defendant's "thorough consultation with the trial judge" (quoting *United States v. Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978), and *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), respectively)).

¶23 In recognition of cases such as these and the risks to a defendant's Sixth Amendment rights arising from joint representation, our federal courts have adopted a rule of criminal procedure uniformly requiring trial courts to "promptly inquire about the propriety of joint representation" and "personally advise each defendant of the right to the effective assistance of counsel, including separate representation." Fed. R. Crim. P. 44(c)(2); *see also* Fed. R. Crim. P. 44(c) advisory committee's note to 1979 amendment (explaining rationale for rule). In conducting that inquiry, "the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest." Fed. R. Crim. P. 44(c) advisory committee's note to 1979 amendment (quoting *Garcia*, 517 F.2d at 278).

¶24 Given the instruction provided by our state's highest court, confirmed by settled federal practice, we can only conclude that the unchallenged statement of the defendant's attorney would not be sufficient, standing alone, to establish a defendant's knowing, voluntary, and intelligent waiver of his right to conflict-free counsel.[10] In evaluating

[10]Our dissenting colleague suggests *Cuyler* and *Wood* require nothing more than what occurred here. *Infra* ¶¶ 47-52. He overlooks that neither case purports to describe what a proper inquiry must entail. Indeed, both cases suggest such an inquiry would involve more than what occurred here. In *Cuyler*, to the extent the Supreme Court addressed the nature of the required inquiry at all, it contemplated that the trial court might "personally advise" the defendant, as now established in the federal rule. 446 U.S. at 346 n.10 (quoting then-proposed Fed. R. Crim. P. 44(c)). In *Wood*, the potential conflict at issue involved joint representation by an attorney whose primary loyalty was to defendants' former employer, the owner of the "adult" theater and bookstore where the employees had been convicted of distributing obscene materials. 450 U.S. at 263, 266-68. There, the Supreme Court addressed "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise." *Id.* at 268-69. Under those circumstances, the Court could not have intended that the mere assurances of conflicted counsel would be sufficient to prove a valid waiver.

whether a valid waiver has occurred, we are mindful that the burden of proving the existence of a knowing, voluntary, and intelligent waiver "is on the government." *Allen*, 831 F.2d at 1498 (citing *Barker v. Wingo*, 407 U.S. 514, 529 (1972)); *see also Barker*, 407 U.S. at 529 (stating that, in its cases concerning waiver of fundamental rights, Supreme Court has "placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made").[11]

¶25 Notably, the state has not argued on appeal that Duffy waived his right to conflict-free counsel in a manner that meets constitutional standards. This is a correct concession. Here, the trial court deferred entirely to the defense attorney who had been retained to represent both Duffy and his codefendant. Although Duffy was present at the review hearing, the court did not address him in any way to advise him of the hazards of self-representation, to confirm the accuracy of his counsel's representations, or to establish Duffy's understanding of either. Indeed, the court failed even to establish that Duffy desired to waive his right to conflict-free representation. The court thus failed to satisfy its "serious and weighty responsibility . . . of determining whether there [was] an intelligent and competent waiver" by Duffy. *Glasser*, 315 U.S. at 71 (quoting *Zerbst*, 304 U.S. at 465).[12]

¶26 The avowals of Duffy's defense counsel that both his clients had signed a waiver were not sufficient. While it is true that "[t]rial courts appropriately and 'necessarily rely in large measure upon the good faith and good judgment of defense counsel,'" *Burger v. Kemp*, 483 U.S. 776, 784 (1987) (quoting *Cuyler*, 446 U.S. at 347), the situation differs materially when, as here, the prosecutor has specifically alerted the court to the presence of potential conflicting defenses. The state argues—quoting from *Cuyler*, 446 U.S. at 347—that "trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." But, as the omitted

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[11] The dissent apparently overlooks this settled principle when it contends Duffy should bear the burden of demonstrating "that he did not in fact sign a written waiver of the potential conflict of counsel." *Infra* ¶ 57.

[12] Trial courts have "substantial latitude" to refuse even valid waivers of conflicts of interest "not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 U.S. at 163.

portion of the quotation makes clear, this is only true "[a]bsent special circumstances." *Id.* at 346. "[T]imely objections to multiple representation," like those repeatedly raised by the prosecutor in this case, are precisely the sort of "special circumstances" that make it inappropriate for a trial court to defer entirely to defense counsel, as the court did here. *Id.* at 346-47.

¶27 Our dissenting colleague suggests that Duffy's presence at the hearing, coupled with his failure to affirmatively contradict his defense counsel, should be dispositive. *See infra* ¶¶ 48-50. But the United States Supreme Court has instructed us that "presuming waiver of a fundamental right from inaction" is "inconsistent with [its] pronouncements on waiver of constitutional rights." *Barker*, 407 U.S. at 525 (footnote omitted). Instead, we must "indulge every reasonable presumption against waiver of fundamental constitutional rights" and "do not presume acquiescence in the loss of fundamental rights." *State v. Anderson*, 96 Ariz. 123, 131 (1964) (citing *Zerbst*). We therefore find that the trial court in the present case erroneously failed to ascertain whether Duffy validly waived his constitutional right to conflict-free counsel. Because the court deferred entirely to retained defense counsel and failed to directly ascertain from Duffy that his purported waiver was valid, the court did not satisfy its duty to meaningfully investigate the possible conflict of interest repeatedly raised by the state.

Duffy's Burden of Proof

¶28 The right to conflict-free counsel "is so important that, unlike with other Sixth Amendment claims, when a defendant alleges an unconstitutional actual conflict of interest, 'prejudice must be presumed,' and harmless error analysis does not apply." *Lockhart*, 250 F.3d at 1226 (citations omitted) (quoting *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000)). However, our finding that the trial court failed to meaningfully inquire into the potential conflict of interest raised by the prosecutor does not end our analysis. Because Duffy did not object to the conflict at trial, in order to be entitled to relief, he must also demonstrate that the conflict existed and that it "adversely affected counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 168, 170-74 (2002); *see also Martinez-Serna*, 166 Ariz. at 425.[13] Once such a showing is made, prejudice will be presumed. *Mickens*,

[13]The situation is different "where counsel is forced to represent codefendants over his timely objection," in which case reversal is automatic

535 U.S. at 173 (*Cuyler* standard "requires proof of effect upon representation but (once such effect is shown) presumes prejudice").

1. Actual Conflict

¶29 "[W]hether an actual conflict arises depends upon 'the nature of the other client represented by defense counsel.'" *Martinez-Serna*, 166 Ariz. at 425 (quoting *Jenkins*, 148 Ariz. at 467). When one attorney "simultaneously represented two clients who were implicated in the same [crime]," one of whom was "placed 'at odds with [a] co-defendant[] who [was] in fact more culpable,'" the existence of an actual conflict is clear. *Lockhart*, 250 F.3d at 1230 (quoting *Allen*, 831 F.2d at 1496, and finding "no question" that defendant successfully established "actual conflict" in such circumstances). This is such a case.

¶30 As our supreme court has explained, "[t]o establish an actual conflict, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued," *State v. Moore*, 222 Ariz. 1, ¶ 82 (2009), except that it "was inherently in conflict with the attorney's other loyalties or interests," *Martinez-Serna*, 166 Ariz. at 425 (quoting *Jenkins*, 148 Ariz. at 466). Importantly, "[h]e need not show that the defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative." *Id.*

¶31 In this case, as in *Martinez-Serna*, Duffy's counsel "also represented a co-defendant who had made a statement that exculpated [Duffy] and inculpated [her]self." 166 Ariz. at 425. When interviewed on the day of her arrest, Matias confessed that she was aware the bundles in the green SUV contained marijuana, having "traveled to the place where the marijuana was picked up with the intention to pick up the marijuana." She stated she had arranged the pickup and expected to receive one thousand dollars per bale. Matias also told police that, although Duffy was driving, he "didn't know" about the arrangements she was making to pick up and transport the marijuana. During his post-arrest interview, Duffy told police the same thing: he had not known about the arrangements, which Matias made in Spanish—a language he did not understand.

¶32 Thus, as in *Martinez-Serna*, plausible alternative strategies in this case could have included plea bargaining in exchange for Duffy's testimony against Matias and "shifting the emphasis (and, hopefully, the

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"unless the trial court has determined that there is no conflict." *Mickens*, 535 U.S. at 162 (citing *Holloway*, 435 U.S. at 488).

blame) to the co-defendant," Matias. *Id.* As Duffy himself argues on appeal, his defense "should have been" that Matias arranged to pick up and transport the marijuana without Duffy's knowledge and then "set him up" and "lied to him." But, as in *Martinez-Serna*, Duffy's counsel "could not realistically pursue any of these possible alternatives or others while also representing [Matias]" because "[t]o do so would have substantially impaired counsel's representation of [Matias]." *Id.* Thus, as in *Martinez-Serna*, we conclude that Duffy's counsel had an actual conflict of interest. *Id.*

2. Adverse Impact

¶33 Duffy is not required to demonstrate that his attorney's conflict caused his conviction or that separate representation would have led to his acquittal. *See id.* at 426. Nor must Duffy prove that the conflict was the cause of any particular actions or inactions by his counsel. *Lockhart*, 250 F.3d at 1231. Rather, he need only show that his counsel's "'behavior seems to have been influenced' by the conflict," *id.* (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994)), and "that some effect on counsel's handling of particular aspects of the trial was likely," *id.* (quoting *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992)); *see also Jenkins*, 148 Ariz. at 467 ("To establish adverse effect, defendant would only have to show that his attorney's conflict reduced his effectiveness.").[14]

¶34 "The central question that we consider in assessing a conflict's adverse effect is 'what the advocate [found] himself compelled to refrain from doing' because of the conflict." *Lockhart*, 250 F.3d at 1231 (alteration in *Lockhart*) (quoting *Allen*, 831 F.2d at 1497); *see also Holloway*, 435 U.S. at 490 ("[I]n a case of joint representation of conflicting interests[,] the evil . . . is in what the advocate finds himself compelled to *refrain* from doing."). And, "a conflict gives rise to an adverse effect when it 'prevent[s] an attorney . . . from arguing . . . the relative involvement and culpability of his

[14]As our supreme court has emphasized, Duffy is not required to prove prejudice. *Jenkins*, 148 Ariz. at 466. This is because "adverse effect and prejudice are distinctly different," and "adverse effect is a less burdensome requirement than prejudice." *Id.* at 467. In this way, Duffy's claim is distinct from any claim he may have for ineffective assistance of counsel, which would require him to demonstrate—in the Rule 32 context—that his attorney's performance was both objectively deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006).

clients in order to minimize the culpability of one by emphasizing that of another.'" *Lockhart*, 250 F.3d at 1231 (alterations in *Lockhart*) (quoting *Wheat*, 486 U.S. at 160). Here, Duffy's counsel was unable to emphasize Matias's involvement in the crime in order to minimize Duffy's. *See id.*

¶35 In this case, as in *Martinez-Serna*, because he also represented Matias, counsel could neither explore the possibility of a plea bargain for Duffy nor attempt to place the blame on Matias. 166 Ariz. at 425. Without these alternatives, counsel's only sound strategy was to present the implausible defense that both Duffy and Matias were "set up"—a defense that flatly contradicted Matias's statements to police on the night of her arrest and other evidence presented by the state. As Duffy puts it, "The defense attorney never once suggested that [Matias] lied or in any way deceived [Duffy]. He could not, as he had a loyalty to both" defendants, who were both his clients. When an actual conflict of interest dictates a united defense and precludes other plausible alternatives in this way, the conflict has had an adverse effect on a defendant's representation. *Id*.

¶36 Thus, although he failed to object to the joint representation at trial, Duffy has "show[n] on appeal that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Allen*, 831 F.2d at 1495 (quoting *Cuyler*, 446 U.S. at 348). We must therefore vacate and remand. *Id.*

Motion to Suppress[15]

¶37 Before trial, Duffy moved to suppress all evidence obtained as a result of the traffic stop on the ground that the stop was unlawful. In particular, Duffy maintained that no probable cause justified the stop because the sergeant's allegations of traffic violations were not credible. Duffy further maintained that the Border Patrol agent, who was driving alongside the green SUV in an attempt to look inside, "intentionally drove erratically to induce Mr. Duffy to commit traffic violations thereby providing the pretextual basis for a traffic stop" by the sergeant.[16] The trial court denied Duffy's motion, a ruling Duffy argues was an abuse of discretion.

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[15]We address this question because it could occur on retrial.

[16]Duffy also moved to suppress the search of the burlap bundles on the ground that there was no odor of marijuana or other evidence to corroborate the sergeant's belief that the bundles contained narcotics. Duffy has abandoned this argument on appeal.

¶38 "We will not reverse the denial of a motion to suppress absent a clear abuse of discretion." *State v. Gutierrez*, 240 Ariz. 460, ¶ 6 (App. 2016). Duffy has not established such abuse here.

¶39 Law enforcement's stop of a vehicle qualifies as a seizure under the Fourth Amendment and must be reasonable. *Id.* ¶ 7 (citing U.S. Const. amend. IV). However, it is constitutionally permissible for a police officer to stop and detain "any person for an actual or suspected violation of Title 28" (i.e., the Arizona traffic code), *State v. Fikes*, 228 Ariz. 389, ¶ 4 (App. 2011) (citing A.R.S. § 28-1594), so long as the officer's suspicion that the person has committed the traffic violation is "articulable" and "reasonable," *State v. Salcido*, 238 Ariz. 461, ¶ 7 (App. 2015). In reviewing a claim that law enforcement officers lacked the reasonable suspicion required for an investigatory stop, we defer not only to the trial court's factual findings, but also to "the inferences drawn by the [trial] court and the officers on the scene." *Gutierrez*, 240 Ariz. 460, ¶ 7 (alteration in *Evans*) (quoting *State v. Evans*, 235 Ariz. 314, ¶ 8 (App. 2014)).

¶40 At the suppression hearing in this case, the sergeant testified he saw the green SUV commit three violations of the Arizona traffic code: following another car at an unsafely close distance; exceeding the posted speed limit; and changing lanes in an unsafe manner. *See* A.R.S. §§ 28-730(A), 28-701(A), 28-729(1). He further testified that these traffic violations prompted him to stop the SUV. Given this testimony, it was not an abuse of discretion for the trial court to find that the sergeant "observed violations of the traffic law," which allowed him to make the traffic stop. Whether the sergeant's testimony at the suppression hearing was credible was a question for the trial court. *State v. Moreno*, 236 Ariz. 347, ¶ 5 (App. 2014) ("When reviewing a ruling on a suppression motion, 'we defer to the trial court's factual findings, including findings on credibility and the reasonableness of the inferences drawn by the officer.'" (quoting *State v. Moran*, 232 Ariz. 528, ¶ 5 (App. 2013))).

¶41 Duffy claims the record "shows that the accounts of the stop differ," but this is not true of the record before the court at the suppression hearing. The Border Patrol agent testified at that hearing that he did not drive or behave in a manner that could have forced Duffy to make the "evasive" maneuvers he claims on appeal. Although Duffy requested a continuance to follow up regarding potential witnesses, he presented no new evidence on the second day of the suppression hearing and did not testify himself. The only evidence he cites on appeal to support his claim that there were differing accounts of the traffic stop is his own testimony at trial, which we may not consider. *Id.* ¶ 2 ("In reviewing a trial court's denial

of a motion to suppress, we view the facts in the light most favorable to upholding its ruling, considering only the evidence presented at the suppression hearing.").

Disposition

¶42 For the foregoing reasons, we vacate Duffy's convictions and sentences. We remand this case for further proceedings consistent with this opinion.

E P P I C H, Presiding Judge, specially concurring:

¶43 Although a very close question, I concur that the prosecutor's concerns as expressed to the trial court in this case, although somewhat lacking in specificity, were nonetheless sufficient to distinguish this case from the general risk of conflict that "inheres in almost every instance of multiple representation." *Mickens*, 535 U.S. at 169 (quoting *Cuyler*, 446 U.S. at 348). Indeed, although the prosecutor took no position as to whether the conflict was sufficiently severe so as to preclude the possibility of waiver,[17] the only reasonable conclusion to be drawn from his remarks was that this matter warranted inquiry by the court, whether to assess the extent of the potential conflict or to determine whether Duffy wished to waive any conflict. For the reasons discussed above, I fully concur that defense counsel's avowal of a written waiver was an inadequate substitute for a personal colloquy with the accused.[18]

¶44 I write separately to acknowledge that trial judges are understandably reluctant to conduct the type of inquiry contemplated here outside of post-conviction proceedings, due to legitimate concerns involving the confidentiality of attorney-client communications, the revelation of trial strategy, and defendants' choice of counsel. Nevertheless where, as here, a defendant purports to desire to waive any conflict, an adequate colloquy that merely ensures the accused understands the risk of

[17] Nothing in the record in this case supports a finding of non-waivable conflict. Accordingly, I do not join in any suggestion to the contrary in the opinion.

[18] Our dissenting colleague places great weight upon Duffy's failure to spontaneously object to his attorney's characterization of the conflict and waiver issue. However, Duffy's silence is of little significance, given that represented parties are typically discouraged from directly addressing the court absent invitation to do so.

proceeding, the right to conflict-free counsel and the voluntary nature of the waiver can be conducted without unduly impinging upon the attorney-client relationship.

B R E A R C L I F F E, Judge, concurring in part and dissenting in part and in the result:

¶45 In the case of joint representation, the majority imposes an obligation on the trial court, as a matter of constitutional imperative, to engage in a personal colloquy with the defendant as to his waiver of any conflict of counsel. It does so notwithstanding that no such obligation is imposed by the United States Constitution, the Arizona Constitution, or binding case law. The inquiry the trial judge engaged in here, when he was alerted to counsel's potential conflict, was sufficient to establish Duffy's conflict waiver. Consequently, I respectfully dissent from this court's reversal of the convictions and remand, although I concur in the opinion as to the suppression ruling.

¶46 At the outset, the majority acknowledges that this court, albeit by a differently composed panel, has already addressed Duffy's co-defendant Dora Matias's identical claims and found them wanting. *See State v. Matias*, No. 2 CA-CR 2018-0073, ¶¶ 5-10 (Ariz. App. Mar. 25, 2019) (mem. decision). Matias's claims were denied as being inappropriately raised on direct appeal. *Id.* ¶ 7. Without directly stating its disagreement with the holding in that decision, the majority couches its departure from it as compelled by different facts. But the cited factual distinctions make absolutely no difference to its legal analysis. Duffy's claims should meet the same fate as Matias's and await redress in the Rule 32 post-conviction relief process.[19] Ariz. R. Crim. P. 32. Nonetheless, this dissent will largely assume, without agreeing, that this matter is appropriate for examination on direct appeal.

¶47 The majority acknowledges that no Arizona case has "articulated" the particular steps a trial court must follow before it may

[19]The majority also places significance on the fact that *Matias* was an unpublished decision versus a published opinion ("We also note that the *Matias* panel decided not to give its decision precedential weight."). There are a variety of reasons why a decision of this court will not be published, including that the law is already established such that there is no need for publication absent departure from precedent. *See* Ariz. R. Sup. Ct. 111(b)(1) and (3).

accept a defendant's waiver of conflict-free counsel. The United States Supreme Court has, however, and that inquiry does not require the step of personal colloquy that the majority here imposes. As is clear in two of the principal cases the majority itself relies on, the Supreme Court has only ever demanded that the trial court inquire into the conflict when the conflict is evident or is brought to its attention and determine whether any potential conflict exists or exists but has been waived. *See Wood v. Georgia*, 450 U.S. 261, 273-74 (1981); *see also Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980). The court here engaged in just such an inquiry and found any potential conflict waived.

¶48 The purported potential conflict of Duffy's trial counsel was first raised by the state at Duffy's and Matias's contemporaneous March 2017 arraignments. Both Duffy and Matias were present with their retained—not appointed—counsel, Nicolas Brereton. Brereton and Ivan Abrams, members of the same law firm, appeared as counsel of record for each defendant. The state asserted that it had a "real concern about one attorney representing both co-defendants in a case where there [are] obviously competing defenses." After the trial court took each defendant's plea of not guilty, set a joint-trial date, and concluded the arraignments, it stated that: "[t]he State has raised an issue related to joint representation, and at some point in time, we'll need to inquire into that. I would certainly think sooner rather than later would be appropriate." The court then asked Brereton for his "thoughts in that regard," and he agreed that it would be a "good idea." The court then addressed Duffy and Matias directly, stating: "Mr. Duffy, Ms. Matias, I am sure that counsel can review that with you," and it then set a hearing in early April to discuss the joint representation.

¶49 At the April hearing, at which Duffy and Matias were present, the trial court asked Duffy's and Matias's counsel, Abrams, to state his position on the matter of the joint representation and conflict. Specifically, in discussing the state's earlier raised concern, Abrams stated that "the facts, as they pertain to both defendants, are identical. The statements that both defendants have made to counsel without going further, are identical. They appear to have a common defense, common defense strategy, and essentially we have a common defense agreement." He further stated that "given the two clients have signed a waiver, we've explained to them not only do they have the ability to waive any potential conflict, but they have the right to gain independent counsel to get further advice on the issue of waiver."

¶50 Then, when the trial court pressed the state for its position, the prosecutor stated:

> there is at least a potential for adverse defenses in this matter . . . and I think that there are circumstances under which it's inappropriate to even consider a waiver of the conflict. *I am not going to express an opinion whether this is one*, but I presented it to the Court and leave it to your discretion. (Emphasis added.)

Throughout his retained counsel's avowals to the court and the state's argument, Duffy did not gainsay his attorney's representation about his signed waiver, although he had every opportunity to do so. The court then found, seemingly based on counsel's avowals and lack of any interjection by Duffy and Matias themselves, that the defendants had been "fully advised with regard to this situation." The court then took no action to interfere with Duffy's and Matias's selection of counsel.

¶51 The majority relies in part on *Cuyler v. Sullivan*, in which the Supreme Court recognized that:

> nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. *Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.*

446 U.S. at 346-47 (internal citations omitted) (emphasis added). *Cuyler* tells us that courts are not to infer the existence of conflict based solely on joint representation. *Id.* at 347. There must be something more. *Id*. The majority posits that the prosecutor's expression of concern was that "more." While certainly the state brought a potential conflict to the trial court's attention, in the end the state took no position as to whether a conflict even existed in the case, let alone whether it could be effectively waived. But, even if the state's alerting the court to the possible conflict was sufficient at first to overcome the *Cuyler* presumption of the absence of conflict, certainly Duffy's counsel's statement—that Duffy had signed a waiver of any conflict—was sufficient to return the court to repose. That is, it was

sufficient to allow the court, as it did, and in accord with *Cuyler*, to find no impermissible conflict of interest.

¶52 In *Wood v. Georgia*, also relied upon by the majority, the U.S. Supreme Court first identified the procedure necessary to allay any concern about a client's acquiescence to a potentially conflicted defense counsel. 450 U.S. at 273-74. In remanding the case to the trial court to conduct a conflict inquiry, the Court directed that the trial court:

> should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, *and that there was no valid waiver of the right to independent counsel*, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

Id. (emphasis added). Here, of course, once the trial court was alerted to a potential conflict of interest by the prosecutor, it undertook the very inquiry called for by *Wood*. The court set a separate hearing after alerting the defendants that it would concern their counsel's potential conflict, the defendants were both present at that hearing, and the court expressly questioned defendants' counsel about the state's concern. The prosecutor, who had first raised the issue—and who presumably knew the facts of the case at least as well as the defense attorney and likely better than the trial judge himself—was unable or unwilling to claim that the possible conflict he feared was unwaivable. After that hearing, the court determined that Duffy had waived any conflict. This should have been the end of it. But the majority holds that a court has a constitutional obligation to go beyond the presumption recognized in *Cuyler* and the process of inquiry called for by *Wood* and engage in a personal colloquy with the defendant to determine the existence of a conflict or the fact of waiver.

¶53 With regard to relevant, binding case law, the majority cites *State v. Martinez-Serna*, 166 Ariz. 423 (1990), and *Johnson v. Zerbst*, 304 U.S. 458 (1938), as general support for its proposition that a personal colloquy is constitutionally required.[20] Neither requires it. In *Martinez-Serna*, the

[20]Because no law in Arizona, or procedure laid out by either our supreme court or the United States Supreme Court, requires a personal colloquy, the majority goes out hunting among the federal circuits for such

Arizona Supreme Court reversed a conviction because the joint representation there presented a conflict and "the record [did] not show that petitioner consented to the conflict, as may sometimes be permitted under Rule 1.7(b)." 166 Ariz. at 425. In *Johnson*, a habeas corpus proceeding, the Supreme Court determined that "petitioner was convicted without enjoying the assistance of counsel." 304 U.S. at 469. It then reversed the District Court's denial of his habeas petition and, because the trial court had not made any findings with regard to Johnson's waiver of his right to counsel, it remanded the case back to the trial court. *Id.* The Court stated that "If—on remand—the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to counsel . . . he will therefore be entitled to have his petition granted." *Id.*

¶54 In both *Martinez-Serna* and *Johnson*, the record failed to reflect the defendant's waiver of the cited conflict. *Martinez-Serna*, 166 Ariz. at 425; *Johnson*, 304 U.S. at 469. Here, though, the record reflects just such a waiver by Duffy. Because that record was made, the trial judge was justified in relying on it and allowing Duffy to go forward with his counsel of choice. The law requires nothing more to be done than what was done here.

¶55 As stated above, although this dissent assumes that Duffy's claim of conflict is appropriately raised on direct appeal, the practical problem with addressing it now is similar to the problem our supreme court noted in *State v. Tucker*, 205 Ariz. 157, ¶ 26 (2003). In *Tucker*, the court identified impediments faced in addressing this type of claim on direct appeal rather than in a Rule 32 proceeding. *Id.* There, the defendant couched his claim concerning his trial counsel's conflict of interest as a failure of the trial court to grant the state's objection to his attorney's representation rather than as one of ineffective assistance of counsel. *Id.* ¶ 19. The state had raised the issue of Tucker's trial counsel's potential conflict and moved the court to "determine counsel." *Id.* ¶ 20. The court held a hearing and found no actual conflict of interest. *Id.* ¶¶ 21-22.

¶56 On appeal, as he had below, Tucker claimed that his trial counsel's former representation of a potential witness in his case was a

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a mandate, finds it, and then imposes it on Arizona. I will not spend the time to address those non-binding cases here. Suffice it to say that the majority's new procedure *might* make sense and *might* not impose any great burden on trial courts, but it is not our place to make the law, regardless of what some majorities on some federal court panels may do.

conflict of interest and that the trial court erred in not dismissing his attorney. *Id.* ¶ 22. Our supreme court noted that, because that former client was not in fact called as a witness, no conflict actually arose. *Id.* ¶ 25. Tucker argued, however, that the witness was not called because the attorney chose not to investigate the possibility of naming the witness as a third-party defendant because of the conflict of interest. *Id.* But, the court noted, this argument presented a problem of proof: there was simply no record of why trial counsel did not call the witness. *Id.* ¶ 26. It was possible, the court recognized, that trial counsel did not pursue the defense that would have required his testimony because he and Tucker decided the evidence would not have supported the defense. *Id.* The court determined that the true reason for the failure to call the witness "can only be developed at an evidentiary hearing in a post-conviction relief proceeding." *Id*. Consequently, it dismissed those discrete claims. *Id.* ¶ 33.

¶57 Similarly here, given the nature of direct appeal, Duffy is unable to present proof that he did not in fact sign a written waiver of the potential conflict of counsel as he represented below. If the majority here were to reject this claim on appeal, and if there was no informed, signed, written waiver of the conflict, we would find that out soon enough in a post-conviction-relief proceeding. No doubt the circumstances of, or even the very existence of, such a waiver would prominently come before the trial court. If a waiver existed, but was not executed with informed consent, then a Rule 32 claim would likely appropriately lie. If no waiver in fact existed and defense counsel misled the court, then Rule 32 relief and other disciplinary proceedings would seemingly be justified. But given the majority's reversal of Duffy's conviction, if, as avowed, there was an informed, signed, written waiver of any potential joint-representation conflict and if, indeed, Duffy agreed with and directed his counsel's efforts at his first trial, then this court's reversal of the jury's verdict and the concomitant burdens imposed on the taxpayers by a retrial will have been unjustified.

¶58 No court can say as a matter of law that Duffy's trial counsel was doing anything other than pursuing a trial strategy that Duffy and his co-defendant (and girlfriend) Matias agreed upon, based on the facts as Duffy understood them, in line with their signed, written waivers. Until there is actual evidence to the contrary, we should do nothing more than assume that, having gotten a result he did not like, Duffy is merely seeking to avoid his conviction. Certainly we cannot say that the trial judge abused his discretion, which is the standard we apply. *State v. Jones*, 185 Ariz. 471, 482 (1996) ("We will overturn a trial court's decision on a motion to

withdraw [for conflict of interest] only if the trial court abused its discretion."). I would affirm the convictions and sentences in full.