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Sixth Amendment--Paternalistic Override of Waiver of Right to Conflict-Free Counsel at Expense of Right to Counsel of One's Choice

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SIXTH AMENDMENT—PATERNALISTIC OVERRIDE OF WAIVER OF RIGHT TO CONFLICT-FREE COUNSEL AT EXPENSE OF RIGHT TO COUNSEL OF ONE'S CHOICE

Wheat v. United States, 108 S. Ct. 1692 (1988).

I. INTRODUCTION

A criminal defendant in a federal court¹ has a sixth amendment right "to have the Assistance of Counsel for his defence."² The Court has interpreted this right to include a right to counsel free from conflict of interest,³ although, the defendant may choose to waive this constitutional safeguard.⁴ However, "the power to *wave* a constitutional right does not carry with it the right to insist upon its opposite."⁵ In other words, a defendant does not have a constitutional right, arising out of its waiver, to counsel with a conflict of interest. If a defendant is to argue for a right protecting his choice of an attorney with a conflict of interest, that right must arise independently of its waiver.⁶

Appropriately, the Court in *Wheat v. United States*⁷ accepted the notion that the sixth amendment encompasses an interest "to select

¹ Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (The right to effective assistance of counsel is made applicable to the states through the fourteenth amendment.).

² U.S. Const. amend. VI. The Court has further explained that "it has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (citations omitted).

³ See *Glasser v. United States*, 315 U.S. 60, 68 (1942) ("[W]e are clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right . . . means less than this, a valued constitutional safeguard is substantially impaired.").

⁴ See *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1977) ("By inquiring in *Glasser* whether there had been a waiver, the Court also confirmed that a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests.").

⁵ *Faretta v. California*, 422 U.S. 807, 841 (1975) (Burger, C.J., dissenting) (emphasis in original) (citing *Singer v. United States*, 380 U.S. 24, 34-35 (1965)).

⁶ See *id.* at 819 n.15 (1975) (recognizing an independent right under the sixth amendment to self-representation).

⁷ 108 S. Ct. 1692 (1988).

and be represented by one's preferred attorney."⁸ The Court outlined the parameters of this interest and determined that it is not absolute.⁹ In an attempt to place attorneys with conflicts into the class of unprotected choices, the Court stressed the importance of effective assistance¹⁰ and the dangers of multiple representation.¹¹ The obvious rejoinder to these concerns is the proffer of a waiver.¹² The Court rejected, however, a "cure" by waiver as a "flat rule in favor of counsel of choice."¹³ Consequently, in order to justify its decision, the Court explained that federal courts have an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."¹⁴

The Court should have rejected a "flat rule" in favor of federal court concerns in the same manner as it rejected a "flat rule" in

⁸ *Id.* at 1697. The government had argued in its brief that "choice of counsel" is not and never has been recognized under the sixth amendment. Brief for the United States at 6, *Wheat v. United States*, 108 S. Ct. 1692 (1988)(No. 87-4). Because the Court recognized an interest on which to base one's choice of an attorney with a conflict, the Court's inquiry should have focused on the effect of a valid waiver on such a choice.

⁹ *Wheat*, 108 S. Ct. at 1697. The Court referenced several situations which limit one's "choice." For instance, a defendant cannot insist upon representation by those not members of the bar, those who he cannot afford, and those who do not want to offer their services. *Id.* However, these instances are more accurately described as absolute limitations on the available set of advocates from which to choose. Defendants, on the other hand, are *not* precluded from selecting and keeping an attorney with multiple representation, even though "a possible conflict inheres in almost every instance of multiple representation." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). If the system allows a defendant to pick an attorney from an available pool of advocates, the system should respect the choice made. Instead, the Court in *Wheat* acknowledged a constitutional interest in choosing one's own counsel but failed to protect that choice. See *Wheat*, 108 S. Ct. at 1700.

¹⁰ *Wheat*, 108 S. Ct. at 1697. The Court explained that the interest in selecting one's own attorney is secondary to the primary concern for effective advocacy. *Id.* This is an unnecessary distinction. The defendant in *Wheat* did not claim ineffective assistance of counsel. Rather, irrespective of the counsel which the defendant received, *Wheat* claimed that he was entitled to different counsel, solely on the grounds of an independent right to choose his own counsel. *Id.* at 1695. Again, *Wheat* did *not* argue that the failure of the trial court to appoint substitute counsel rendered his original counsel ineffective. While the "essential aim" of the sixth amendment may be to "guarantee an effective advocate," *id.* at 1697, an independent aim of the sixth amendment is to protect the defendant's interest in being represented by his or her *chosen* attorney. Thus, the string of cases cited by the majority which are concerned with effective counsel are not on point. *Id.* at 1697 (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984); *Jones v. Barnes*, 463 U.S. 745 (1983); *Morris v. Slappy*, 461 U.S. 1 (1983)).

¹¹ *Wheat*, 108 S. Ct. at 1697.

¹² Not only is multiple representation not *per se* violative of sixth amendment concerns, effective assistance is waivable. See *Faretta*, 422 U.S. at 835.

¹³ *Wheat*, 108 S. Ct. at 1697.

¹⁴ *Id.*

favor of individual concerns. Therefore, in order to overcome the "presumption in favor of counsel of choice,"¹⁵ the Court should have examined more closely the relationship between individual concerns, institutional concerns, and a valid waiver. This Note argues that a paternalistic procurement of a valid waiver recognizes individual concerns and alleviates many institutional concerns. The tension created when a trial court attempts to override such a waiver exists between a criminal defendant's sixth amendment interest in choice of counsel and an institutional interest in the appearance of adequate representation. This Note concludes that this tension must be resolved in favor of the criminal defendant's constitutional interest. Further, this Note considers the probable treatment of waivers on appeal and how the likely result would undermine the strength of the majority opinion. Finally, this Note will examine the parameters of a proper waiver.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Mark Wheat, along with thirteen other defendants, allegedly participated in an elaborate drug distribution scheme.¹⁶ Specifically, the government charged Wheat with conspiracy and possession with intent to distribute in excess of 1,000 pounds of marijuana.¹⁷

Attorney Eugene Iredale represented two defendants charged in the conspiracy, Juvenal Gomez-Barajas and Javier Bravo.¹⁸ After the trial court acquitted Gomez-Barajas of drug charges, Iredale negotiated a settlement on other charges for which Gomez-Barajas offered to plead guilty to tax evasion and illegal importation of merchandise.¹⁹ By the time Wheat's case was set for trial, the district court had not yet accepted Gomez-Barajas' plea.²⁰

On August 22, 1985, five days prior to petitioner's scheduled trial, Bravo pleaded guilty to one count of transporting marijuana.²¹ Following Bravo's guilty plea, Iredale notified the district court that petitioner had requested his representation.²² Both Bravo and Gomez-Barajas agreed to waive their right to counsel unhindered by

¹⁵ *Id.*

¹⁶ *United States v. Wheat*, 813 F.2d 1399, 1400-01 (9th Cir. 1987), *aff'd*, 108 S. Ct. 1692 (1988).

¹⁷ *Id.*

¹⁸ *Wheat*, 108 S. Ct. at 1694.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1695.

²² *Id.*

conflict of interest.²³ Also, the district court indicated that, unless the prosecution had any objection,²⁴ it had no objection to Iredale's representation of petitioner.²⁵ The district court, however, did instruct the parties to prepare arguments for the following Monday, one day prior to petitioner's scheduled trial.²⁶

Indeed, on the following Monday, the prosecution objected to Iredale's representation of petitioner.²⁷ The prosecution objected on the grounds that Iredale's current representation of both Gomez-Barajo and Bravo constituted serious conflicts of interest.²⁸ First, the government claimed that Iredale's representation of Gomez-Barajas created a potential for conflict.²⁹ The government contended that, since the trial court had not yet accepted Gomez-Barajas' plea³⁰ and he could have potentially stood trial, the prosecution could have called the petitioner to testify against Gomez-Barajas.³¹ The government argued that Wheat could offer testimony as to the size and sources of Gomez-Barajas' income.³² To buttress this argument, the government mentioned that witnesses at Gomez-Barajas' first trial referred to Wheat over thirty times.³³

The government's second claim concerning a potential for conflict involved Iredale's client, Bravo.³⁴ The government notified Iredale of its intention to call Bravo as a witness to testify against petitioner.³⁵ However, "[t]he parties dispute[d] whether the government originally planned to call Bravo as a witness in Wheat's trial or decided to call Bravo in order to manufacture conflicts to keep

²³ *United States v. Wheat*, 813 F.2d at 1401.

²⁴ The prosecution voiced concern regarding Iredale's representation of Bravo but qualified its position stating, "[t]he government has not specifically made any plans to call him (Bravo) as a witness but that is, of course, always a potential." Brief for Petitioner at 11, *Wheat v. United States*, 108 S. Ct. 1692 (1988)(No. 87-4)(citations omitted).

²⁵ The district court stated that: "[i]f the clients have no objection and he (prosecutor) had no objection, I can't conceive that I would." *Id.* (citations omitted).

²⁶ *Wheat*, 108 S. Ct. at 1695.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* However, in their brief and argument before the Supreme Court, the government offered no explanations as to why the trial court might refuse the plea in the first instance. *Id.* at 1702 (Marshall, J., dissenting).

³¹ *Id.* at 1695. The government did not, however, schedule Gomez-Barajas as a witness at petitioner's trial. *Id.*

³² *Id.*

³³ *United States v. Wheat*, 813 F.2d 1399, 1401 (9th Cir. 1987), *aff'd*, 108 S. Ct. 1692 (1988).

³⁴ *Wheat*, 108 S. Ct. at 1695.

³⁵ *Id.*

Iredale out of Wheat's case."³⁶ The petitioner argued that Bravo could not impeach him because Bravo did not know him.³⁷ Hence, the petitioner concluded that no conflict of interest would arise.³⁸

In response to the government's two proposed scenarios involving a conflict of interest, Wheat emphasized his constitutional right under the sixth amendment to counsel of his choice.³⁹ Furthermore, Wheat stressed that all potentially conflicting defendants had agreed to waive their respective rights to conflict-free counsel.⁴⁰ Also, Wheat asserted that the government's proposed scenarios were highly speculative.⁴¹

After commenting on the late timing of the motion to substitute attorneys, the district court found that a conflict of interest existed and subsequently denied the motion.⁴² Proceeding to trial with his original counsel,⁴³ Wheat was convicted on one count of conspiring to possess more than 1,000 pounds of marijuana with intent to distribute, and on five counts of possessing marijuana with intent to distribute.⁴⁴

On appeal, the Ninth Circuit affirmed petitioner's convictions.⁴⁵ The court of appeals held that the lower court did not abuse its discretion in denying the motion for substitution,⁴⁶ even where defendants waived their rights to conflict-free counsel.⁴⁷ The court

³⁶ *United States v. Wheat*, 813 F.2d at 1401.

³⁷ *Wheat*, 108 S. Ct. at 1695.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1696. The district court ruled that:

[B]ased upon the representation of the Government in [its] memorandum that the Court really had no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is denied.

Id. (quoting Joint Appendix at 100-01, *Wheat v. United States*, 108 S. Ct. 1692 (1988)(No. 87-4).

⁴³ "[Petitioner's] counsel repeatedly asked the court to allow Iredale to take over the case or at least to permit him to cross-examine the principal government witness as he did at the former trial." Brief for Petitioner at 26, *Wheat v. United States*, 108 S. Ct. 1692 (1988)(No. 87-4).

⁴⁴ *Wheat*, 108 S. Ct. at 1696.

⁴⁵ *United States v. Wheat*, 813 F.2d at 1405.

⁴⁶ *Id.* at 1402. The court of appeals found that the lower court had not abused its discretion in balancing two rights under the sixth amendment: "1) the qualified right to be represented by counsel of one's choice, and 2) the right to a defense conducted by an attorney who is free of conflicts of interest." *Id.* at 1401.

⁴⁷ *Id.* at 1404. The court of appeals justified deferring to lower courts, when a sixth amendment right to conflict-free counsel is waived, on two grounds. First, defendants may not be able to appreciate the significance of a waiver. *Id.* at 1403. Second, there is a

also decided not to remand the case for an evidentiary hearing.⁴⁸

The Supreme Court granted certiorari due to disagreement among the courts of appeals as to when a district court may override a defendant's waiver⁴⁹ of his sixth amendment right to conflict-free counsel.⁵⁰

III. THE MAJORITY OPINION

Writing for the majority,⁵¹ Chief Justice Rehnquist attempted to balance these two sixth amendment concerns stating:

[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.⁵²

The Court began by tracing the historical development of the sixth amendment right to counsel and the various ways in which it has been circumscribed.⁵³ The majority then emphasized that the question presented concerned the degree to which one's right to counsel is qualified by conflict-free counsel.⁵⁴ Accordingly, the Court delineated the relationship between the courts and the protection against conflict of interest.⁵⁵ Then, the Court addressed the prospect of defendants waiving this right which the judicial system is designed to protect.⁵⁶

The Court criticized the petitioner's argument that waiver by all affected parties "cures" the judiciary's concerns for effective representation and the appearance of a fair trial.⁵⁷ The Court went on to state that, although there is a presumption in favor of one's choice of counsel, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."⁵⁸ The Court then noted Federal Rule of Criminal Pro-

"possib[ility] [of] manipulation of testimony resulting from agreements between various clients, lawyers, and possible third persons not before the court." *Id.*

⁴⁸ *Id.* at 1402.

⁴⁹ *Wheat v. United States*, 108 S. Ct. 66 (1987). Such an override effectively sacrifices the defendant's sixth amendment interest in counsel of his choice.

⁵⁰ *Wheat*, 108 S. Ct. at 1696.

⁵¹ Justices Kennedy, O'Connor, Scalia, and White joined Chief Justice Rehnquist.

⁵² *Wheat*, 108 S. Ct. at 1696.

⁵³ *Id.* at 1697.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

cedure 44(c) which directs trial judges to take appropriate measures to ensure that defendants receive a fair trial that "does not contravene the Sixth Amendment."⁵⁹

The majority reasoned that part of a district court's purpose for investigating multiple representation may be self-serving.⁶⁰ Namely, the Court said, trial courts want their judgments to remain intact on appeal.⁶¹ If the district court grants a waiver, it faces challenges on the grounds of ineffective counsel.⁶² On the other hand, denial of the waiver can result in the very type of proceeding at bar.⁶³

Given these judicial concerns for the appearance of a fair trial and protection for lower court judgments, the Court examined the situations in which a court may "decline a proffer of waiver, and insist that defendants be separately represented."⁶⁴ The Court emphatically stated that there can be "no doubt" as to the district court's ability to decline a waiver when there is an actual conflict of interest.⁶⁵ The Court then recognized the rarity of actual, pretrial conflicts and the difficulty in predicting potential conflicts.⁶⁶ Without more, the Court concluded that district courts "must be allowed substantial latitude" in refusing waivers if a serious potential for conflict exists.⁶⁷

After expressing the ability of district courts to override these waivers, the Court examined whether the refusal of petitioner's waiver was within the discretion of the district court.⁶⁸ The Court agreed with the government's contention that Iredale's representation of Wheat could create a conflict when the government called Bravo to testify at Wheat's trial.⁶⁹ Also, if Gomez-Barajas went to trial, Wheat's "probable testimony . . . would create an ethical di-

⁵⁹ FED. R. CRIM. P. 44(c). In this case, the majority reasoned that the "appropriate measure" to take was to deny the motion for substitution and prevent a potential conflict of interest. *Wheat*, 108 S. Ct. at 1698. For the text of rule 44(c), see *infra* note 141.

⁶⁰ *Wheat*, 108 S. Ct. at 1698.

⁶¹ *Id.*

⁶² *Id.* The Court pointed out, but did not pass judgement on, the fact that waivers do not necessarily protect the lower court's judgment. *Id.* Courts of appeals have been willing to hear argument concerning ineffective assistance of counsel based upon conflict of interest, even where defendants waived their constitutional protection of such conflict. See *infra* note 155 and accompanying text.

⁶³ *Wheat*, 108 S. Ct. at 1698.

⁶⁴ *Id.* It is clear that the majority did not go so far as to say that defendants may never select and keep an attorney burdened by a conflict of interest.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1699.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

lemma for Iredale.”⁷⁰ Thus, the Court concluded that the district court’s denial of petitioner’s waiver was “within its discretion and did not violate petitioner’s Sixth Amendment rights.”⁷¹

IV. JUSTICE MARSHALL’S DISSENT

Justice Marshall, joined by Justice Brennan, prefaced his dissent by stating the principles with which he and the majority agreed.⁷² He agreed with the majority that defendants have the right, under the sixth amendment, to counsel of their choice.⁷³ Further, he agreed that there is a presumption in favor of the choice made, although choices made may be circumscribed in several respects.⁷⁴ Further, Justice Marshall conceded that a serious conflict hinders the prospect of a fair trial and that judges may justifiably “reject a defendant’s choice of counsel.”⁷⁵ Even with these broad principles in common, Justice Marshall disagreed with the more narrow conclusion of the majority that district courts have broad discretion in denying a defendant’s waiver of his sixth amendment right to conflict-free counsel.⁷⁶

Justice Marshall attacked the majority’s conclusion for limiting appellate review to an “abuse of discretion” standard.⁷⁷ Justice Marshall argued that this approach is insufficient considering “the nature of the trial court’s decision [and] the importance of the interest at stake.”⁷⁸ First, Justice Marshall pointed out that the nature of the decision is a “mixed determination of law and fact.”⁷⁹ In that regard, citing *Cuyler v. Sullivan*,⁸⁰ Justice Marshall contended that determinations as to whether an attorney had represented conflicting interests at trial and determinations concerning the potential for conflict are “not different in any relevant respect.”⁸¹ Hence, he concluded, neither are entitled to any deference.⁸²

Second, Justice Marshall argued that deference is inappropriate

⁷⁰ *Id.*

⁷¹ *Id.* at 1699-1700.

⁷² *Id.* at 1700 (Marshall, J., dissenting).

⁷³ *Id.* (Marshall, J., dissenting).

⁷⁴ *Id.* (Marshall, J., dissenting).

⁷⁵ *Id.* (Marshall, J., dissenting).

⁷⁶ *Id.* (Marshall, J., dissenting).

⁷⁷ *Id.* at 1701 (Marshall, J., dissenting). Justice Marshall agreed that the prediction of future conflict is a difficult one; however, appellate courts can take this into consideration upon review. *Id.* (Marshall, J., dissenting).

⁷⁸ *Id.* (Marshall, J., dissenting).

⁷⁹ *Id.* (Marshall, J., dissenting).

⁸⁰ 446 U.S. 335 (1980).

⁸¹ *Wheat*, 108 S. Ct. at 1701 (Marshall, J., dissenting).

⁸² *Id.* (Marshall, J., dissenting).

when a constitutional right is at stake.⁸³ He said, "[t]he trial court simply does not have 'broad latitude' to vitiate this [sixth amendment] right [to counsel of one's choice]."⁸⁴ As a result, Justice Marshall suggested that trial courts "should make findings on the record to facilitate review, and an appellate court should scrutinize closely the basis for the trial court's decision."⁸⁵

Justice Marshall then stated that under the majority's deferential standard, and certainly under his proposed standard, the government failed to overcome the presumption in favor of petitioner's counsel of choice.⁸⁶ He reasoned that there was no "threat" of conflict of interest.⁸⁷ Finally, had a conflict of interest arisen, the district court could have ordered Iredale to remove himself from the conflict.⁸⁸

V. JUSTICE STEVENS' DISSENT

Justice Stevens, joined by Justice Blackmun, agreed with Justice Marshall that the majority "exaggerate[d] the significance of the potential conflict."⁸⁹ Justice Stevens, however, agreed with the majority on the point of deference.⁹⁰ Justice Stevens based his dissent on the availability of Iredale as additional counsel⁹¹ and the "informed and voluntary character"⁹² of the waiver.⁹³ For these reasons, said Justice Stevens, the district court "abused its discretion and de-

⁸³ *Id.* (Marshall, J., dissenting).

⁸⁴ *Id.* (Marshall, J., dissenting).

⁸⁵ *Id.* (Marshall, J., dissenting).

⁸⁶ *Id.* at 1702 (Marshall, J., dissenting).

⁸⁷ *Id.* (Marshall, J., dissenting). Justice Marshall dismantled the government's allegation that Iredale's representation of Gomez-Barajas posed a serious potential for conflict. According to Justice Marshall, Gomez-Barajas would not likely have gone to trial; and even if he had, there is no indication that Wheat had any information concerning the charges of tax evasion or illegal importation of merchandise. *Id.* (Marshall, J., dissenting). Similarly, Justice Marshall discounted the potential for conflict regarding Iredale's other client, Bravo. *Id.* at 1702-03 (Marshall, J., dissenting). In this scenario, Bravo would testify, but he would not incriminate Wheat because they did not know each other. In fact, Bravo's testimony never did refer to Wheat. *Id.* (Marshall, J., dissenting).

⁸⁸ *Id.* at 1703 (Marshall, J., dissenting). Petitioner's motion requested either substitution or addition of counsel. *Id.* (Marshall, J., dissenting).

⁸⁹ *Id.* at 1704 (Stevens, J., dissenting).

⁹⁰ *Id.* (Stevens, J., dissenting).

⁹¹ Justice Stevens contended that a request for addition of counsel was before the court as well as a request for substitution. *Id.* (Stevens, J., dissenting).

⁹² *Id.* (Stevens, J., dissenting). Justice Stevens pointed out that existing counsel gave "sound advice concerning the waiver." *Id.* (Stevens, J., dissenting).

⁹³ *Id.* (Stevens, J., dissenting). Justice Stevens also felt that the majority did not give enough weight to the fact that all three defendants made informed waivers of their right to conflict-free counsel. *Id.* (Stevens, J., dissenting).

prived this petitioner of a constitutional right of such fundamental character that reversal is required."⁹⁴

V. ANALYSIS

The defendant's argument in *Wheat* revolved around a motion for substitution of attorneys to which the prosecution objected on the ground that there was a potential conflict of interest. When confronted with this obstacle, defendant Wheat waived his right to conflict-free representation.⁹⁵ Nevertheless, the district court denied Wheat's motion for substitution of attorneys.⁹⁶ The court of appeals found that the district court, in an attempt to balance the defendant's two sixth amendment rights,⁹⁷ did not abuse its discretion in denying the motion.⁹⁸ The Supreme Court then granted certiorari to determine how much discretion trial courts have in overriding waivers of conflict of interest.⁹⁹

A. INDIVIDUAL CONCERNS

The Court did not define the amorphous "presumption in favor of choice of counsel."¹⁰⁰ By not doing so, the Court avoided the significant weight behind this proposition. When an attorney with a conflict is made available for choosing and when a defendant makes such a selection, the defendant is exercising his fundamental right to *freedom of choice*.¹⁰¹ In this regard, the majority did not consider ap-

⁹⁴ *Id.* (Stevens, J., dissenting).

⁹⁵ *Id.* at 1701 n.1 (Marshall, J., dissenting.) In fact, as Justice Marshall pointed out, all defendants potentially affected by the conflict had waived their right. *Id.* (Marshall, J., dissenting). It is assumed throughout this Note that such waiver by all parties is a necessary prerequisite to allowing any defendant to proceed with counsel burdened by a potential conflict.

⁹⁶ *Id.* at 1696.

⁹⁷ *United States v. Wheat*, 813 F.2d 1399, 1402 (1987), *aff'd*, 108 S. Ct. 1692 (1988). These were the right to be represented by one's choice of counsel and the right to a defense conducted by an attorney who is free from conflicts of interest. *Id.*

⁹⁸ *Id.* Although the prosecution's activities were in the form of objection to the motion for substitution, the motives are the same as if the prosecution had brought its own motion for disqualification. As stated in petitioner's brief, these arguments may be "simply to gain the disqualification of talented defense counsel in order to make the prosecution easier." Brief for Petitioner at 38, *Wheat v. United States* 108 S. Ct. 1692 (1988)(No. 87-4)(quoting J. BURKOFF, *CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY* 7-20 (1987)). See also Margolin & Coliver, *Disqualifying Defense Counsel*, 20 AM. CRIM. L. REV. 227, 229 (1982)("If the government's disqualification challenge succeeds, the best qualified lawyers . . . may be removed from the case.").

⁹⁹ *Wheat*, 108 S. Ct. at 1696.

¹⁰⁰ *Id.* at 1697.

¹⁰¹ The Court found this consideration paramount in *Faretta v. California*, 422 U.S. 806 (1975)(recognizing the right to proceed *pro se*). See also *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982)(disqualification of counsel found not to protect defendant's

propriate language from *Faretta v. California*,¹⁰² thus failing to appreciate the weight of Wheat's position.¹⁰³ In *Faretta*, the defendant had the right to effective assistance of counsel.¹⁰⁴ That Court held that he also had the right to waive such protection, to relinquish his appointed counsel, and to represent himself.¹⁰⁵ Finding an independent right under the sixth amendment to self-representation, the Court in *Faretta* recognized that "[t]he Constitution does not force a lawyer upon a defendant."¹⁰⁶

Similarly, in *Wheat*, the defendant had the right to conflict-free representation; yet, the defendant could waive this protection. If the waiver was valid, the defendant would have proceeded to trial with an attorney who had a potential conflict. By not entitling Wheat to keep the lawyer made available for his choosing, any lawyer other than the one he chose was used against his desire, and, in effect, forced upon him.¹⁰⁷

The Court in *Wheat* should have given more weight, based on these individual concerns,¹⁰⁸ to a defendant's election to waive his

sixth amendment right to choice of counsel); *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975)(case remanded to allow defendant opportunity to waive right to conflict-free representation in order to recognize "crucial factor" of sixth amendment right); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975)(case remanded to allow opportunity for waiver after analogy made to choice to proceed *pro se*).

¹⁰² 422 U.S. 806 (1975).

¹⁰³ This is not surprising considering that the dissent in *Faretta*, in which Justice Rehnquist joined, would have applied reasoning similar to that in *Wheat* to deny the absolute right to proceed *pro se*. "I believe that trial courts should have discretion under the Constitution to insist upon representation by counsel if the interests of justice so require." *Faretta*, 422 U.S. at 836 n.1 (Burger, C.J., dissenting).

¹⁰⁴ *Id.* at 835.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 814-15 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

¹⁰⁷ If, however, the defendant could not have chosen an attorney with a conflict to begin with, he would have chosen another attorney, again by his own free choice. Moreover, "it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want." *Id.* at 832. Further:

[i]t is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decision of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. *An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not "his" defense.*

Id. at 820-21 (emphasis added).

Most importantly "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Id.* at 833. "Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding." *Id.* at 834 n.45.

¹⁰⁸ Although somewhat overlapping, these individual concerns include freedom of

right to conflict-free counsel in favor of counsel of his choice.¹⁰⁹ Granted, the waiver of conflict-free counsel does not give rise to an absolute right to conflict of interest representation. Nonetheless, it is the prerequisite of a waiver,¹¹⁰ the ability to opt out of conflict-free representation, which enables the defendant to effectuate his choice of representation. Therefore, "[w]hat were contrived as protections for the accused should not be turned into fetters. . . . [T]o deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."¹¹¹

There are other, less ethereal, factors which support the "presumption" in favor of one's choice of counsel.¹¹² Often, a defendant may prefer to hire a particular attorney who charges a lesser fee but delivers superior representation.¹¹³ Other times, a defendant may merely want to seize the opportunity for an exceptionally talented lawyer.¹¹⁴ Moreover, defendants may seek multiple representation as a defense tool.¹¹⁵ Finally, the presence of an attorney gives

choice, the criminal defendant's fundamental interest in not having counsel forced upon him and the ability of the defendant to use constitutional safeguards at his option.

¹⁰⁹ The majority gave "inadequate weight to the informed and voluntary character of the clients' waiver of their right to conflict-free representation." *Wheat v. United States*, 108 S. Ct. 1692, 1704 (1988) (Stevens, J., dissenting).

¹¹⁰ Hence, the defendant cannot merely assert an unintelligent choice for a conflict of interest attorney. The defendant must first satisfy a paternalistic protection designed to alleviate such unintelligent decisions. Therefore, the decision in *Wheat* is doubly paternalistic.

¹¹¹ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942).

¹¹² See generally Margolin & Coliver, *supra* note 98, at 251-57 (1982).

¹¹³ Cost alone is justification for choosing a particular attorney. When a defendant is faced with choosing between a more expensive attorney without a conflict and a cheaper attorney with a conflict, the defendant would likely engage in a cost-benefit analysis in making his or her decision. Decisions regarding quality of representation and comparative prices are made often, regardless of conflicts. Cf. *Cuyler v. Sullivan*, 446 U.S. 335, 337 (1980) (third co-defendant unable to pay for his own lawyer so he shared lawyers with other two co-defendants). But see Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 160 (1978).

¹¹⁴ This was clearly one of the prime motivational factors in *Wheat*. "Eugene Iredale, the lawyer the petitioner hired for the jury trial, has been recognized for his professional excellence as a criminal defense lawyer. In his own community Iredale is recognized as a 'super star.' He has broad trial and appellate experience including two arguments before this court." Brief for Petitioner at 33 n.23, *United States v. Wheat*, 108 S. Ct. 1692 (1988) (No. 87-4) (citations omitted).

¹¹⁵ The paradigm situation which often leads to multiple representation occurs in a conspiracy trial. Justice Frankfurter noted that:

[a] conspiracy trial presents complicated questions of strategy for the defense. There are advantages and disadvantages in having separate counsel for each defendant or a single counsel for more than one. *Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.*

strength to an individual's choice when issues of conflict confront the court.¹¹⁶ When a defendant makes a motion for substitution, as did Wheat, he or she is most often going to be counseled by an attorney as to whether the choice is prudent.¹¹⁷

B. INSTITUTIONAL CONCERNS

1. *The Appearance of a Fair Trial*

One institutional concern which the Court mentioned in *Wheat* is that trials should "appear fair to all who observe them."¹¹⁸ This concern cuts in two directions. If a defendant properly waives constitutional safeguards and is represented by an attorney with a conflict of interest, the result may be considered by many observers as fair¹¹⁹ and by others as unfair.¹²⁰ Those who consider trials tainted

Glasser v. United States, 315 U.S. 60, 92 (1942)(Frankfurter, J., dissenting)(emphasis added).

Attempts at insuring against reciprocal recrimination may conflict with alleged institutional concerns for stringent prosecutions, but these attempts are often the result of the prisoner's dilemma. When each co-defendant is offered leniency in exchange for testimony, the prosecution forms the setting for a classic dilemma. Each defendant thinks that testifying will reduce his or her own sentence. However, the likely result is that each defendant will suffer under the testimony of the other. Therefore, these defendants may choose, instead, to avoid reciprocal adverse testimony. That way, neither will incriminate the other which may result in avoiding conviction, or at the least a lesser sentence than would have been imposed in the event of reciprocal recrimination. For a discussion of whether such agreements between defendants are ethical, see Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1 (1979). Whether a single attorney is necessary to avoid reciprocal recrimination is beyond the scope of this Note.

¹¹⁶ "[W]e generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and necessarily rely in large measure upon the good faith and good judgment of defense counsel." *Burger v. Kemp*, 107 S. Ct. 3114, 3120 (1987)(quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980)).

¹¹⁷ "When a considered representation regarding a conflict in clients' interests comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation." *Holloway v. Arkansas*, 435 U.S. 475, 486 n.9 (1978). Thus, although not expressly listed in *Wheat* as strengthening the presumption in favor of one's choice of counsel, it is clear that the statements of an attorney concerning the propriety of representation buttress the individual interests involved. The Court in *Wheat* apparently ignored any value of Iredale's assessment of potential conflicts and his ability to be loyal to Wheat. In fact, the majority cynically noted: "[n]or is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them." *Wheat v. United States*, 108 S. Ct. 1692, 1699 (1988).

¹¹⁸ *Wheat*, 108 U.S. at 1697. The majority unfortunately did not engage in any substantive analysis of the scope of this concern for institutional integrity.

¹¹⁹ See, e.g., *United States v. Washington*, 797 F.2d 1461, 1467 (9th Cir. 1986)(defendant, accused of twelve counts related to prostitution, had employed attorney who previously worked for the Justice Department; yet, the court held that such representation did

by conflict as unfair appear to have a strong point.¹²¹ However, other Supreme Court decisions regarding conflict of interest representation belie this concern.¹²²

not create an appearance of impropriety sufficient to override the defendant's sixth amendment right to counsel). The court in *Washington* stated:

[w]e have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the integrity of the judicial process to justify overriding the Sixth Amendment rights. It is easy to express vague concerns about public confidence in the integrity of the judicial process. . . . We are unwilling to sacrifice a defendant's Sixth Amendment right to counsel of his choice on such an unsubstantiated premise. Indeed, *for all we as judges know in a vacuum, the public very well may have greater confidence in the integrity of the judicial process assured that a criminal defendant's right to counsel of his choice will not be lightly denied.*

Id. (emphasis added).

Furthermore, respect for the choice of the individual and his right to make such a choice may be considered by many to be the "fair" result. It is the application of a paternalistic override in the face of a voluntary, knowing, and intelligent waiver which may be considered by these observers as "unfair." Moreover, as Justice Marshall stated in *Wheat*, "lodging the selection of counsel with the defendant generally will promote the fairness and integrity of criminal trials." *Wheat*, 108 S. Ct. at 1700 (Marshall, J., dissenting). Additionally:

[i]f the defendant reveals that he is aware of and understands the various risks and pitfalls, and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally, that he nevertheless chooses to hazard those dangers, we would regard his waiver as knowing and intelligent and allow his choice to "be honored out of that respect for the individual which is the lifeblood of the law."

United States v. Curcio, 680 F.2d 881, 888-89 (2d Cir. 1982)(quoting *Faretta v. California*, 422 U.S. 806, 834 (1975))(citation omitted).

Lastly, "the defendants' choice of joint representation, may sometimes seem woefully foolish to the judge. But . . . the choice is mainly theirs; the judge . . . is not to assume too paternalistic an attitude in protecting the defendant from himself." *United States v. Curcio*, 694 F.2d 14, 25 (2d Cir. 1982)(emphasis added).

¹²⁰ See *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)("[T]he court should not be required to tolerate an inadequate representation of a defendant. Such representation . . . invites disrespect for the integrity of the court."). See also *United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982)("The likelihood of public suspicion outweighs Hobson's interest in being represented by the attorney [of his choice].").

¹²¹ As strong as the argument to protect a defendant from himself and inadequate representation may be, it loses considerable weight when viewed in light of an intentional decision by a defendant to waive such protection by exercising his free choice. What remains after a valid waiver is the legitimate concern for protecting the system from the defendant and not undermining the integrity of the court system. However, and perhaps singly persuasive, the defendant is not merely waiving a constitutional safeguard, he is affirmatively asserting a constitutional right to his choice of counsel. This constitutional interest should not be overcome by an argument, however persuasive, concerning systemic integrity.

¹²² First and foremost, the Court has recognized that conflict of interest representation is not *per se* improper. The Court has stated that:

[r]equiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases certain advantages might accrue from joint representation.

In *Holloway v. Arkansas*,¹²³ the Court held that ineffective assistance is presumed when "a trial court improperly requires joint representation over timely objection."¹²⁴ However, in *Cuyler v. Sullivan*,¹²⁵ the Court concluded that *Holloway* did not "suggest[] the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case."¹²⁶ In fact, in *Cuyler*, the defendant proceeded to trial under a cloud of conflict of interest; yet, the Court held that a possible conflict of interest was "insufficient to impugn a criminal conviction."¹²⁷ Instead, the Court established a test requiring the defendant to "establish that an actual conflict of interest adversely affected his lawyer's performance."¹²⁸ Therefore, because of the deference accorded to trial courts by the decision in *Wheat*, instead of waiting to see if a potential conflict becomes an actual conflict, a trial court is permitted to presume that such representation is so inimicable to the right to effective assistance that it should not be allowed.¹²⁹

Holloway v. Arkansas, 435 U.S. 475, 482 (1977)(emphasis added). See also *Burger v. Kemp*, 107 S. Ct. 3114, 3120 (1987)(recognizing possible benefits of representation tainted by a potential conflict).

¹²³ 435 U.S. 475 (1977).

¹²⁴ *Id.* at 498.

¹²⁵ 446 U.S. 335 (1980).

¹²⁶ *Id.* at 346. Thus, in state court proceedings, the appearance of impropriety, unfairness, and potentially unethical representations are not enough to compel protection of a defendant or the system.

¹²⁷ *Id.* at 350. In *Cuyler*, two privately retained lawyers represented the respondent as well as two other co-defendants. *Id.* at 337. Respondent's lawyers decided not to put on a defense and to rest at the conclusion of the state's case. *Id.* at 338. Respondent averred that the reason for this tactic was to not expose defense witnesses testifying in the upcoming trials. *Id.* at 350. Granted, comparison of *Cuyler* to *Wheat* is indirect because the *Cuyler* decision is post-conviction and *Wheat* is preventive. Yet, the value of an "appearance of fairness," as a factor justifying override of a waiver, becomes limited once its application and scope is further defined.

¹²⁸ *Id.*

¹²⁹ Thus, the *Wheat* decision empowers a trial court to presume what the defendant, on appeal, cannot. This is especially troubling considering the difficulty of showing that a lawyer "actively represented conflicting interests" which "adversely affect his lawyer's performance." *Burger v. Kemp*, 107 S. Ct. 3114, 3120 (1987). The Court has noted that:

[s]uch a test is not only unduly harsh, but incurably speculative as well . . . [I]t is often an impossible task. As the Court emphasized in *Holloway*: "[I]n a case of joint representation of conflicting interest the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing. . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's option, tactics, and decision in plea negotiations would be virtually impossible."

Cuyler, 446 U.S. at 355, 357 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978)(emphasis in original).

Finally, the relationship between conflict of interest representation and the "appearance of a fair trial" manifested itself in the recent decision, *Burger v. Kemp*.¹³⁰ The decision in *Burger* further increased the burden on a defendant to prove claims of ineffective counsel based upon a conflict of interest during trial. The Court concluded, *arguendo*, that the presence of an *actual* conflict did not harm the advocacy of the defendant's lawyer.¹³¹ If the potential for conflict in *Burger* was examined at pretrial, surely the impending representation would not have appeared fair to all who observed the trial.¹³² Thus, the Court in *Burger* did not preserve the appearance of a fair trial, contrary to the *Wheat* Court's stated intent to protect it.

If a court permits a defendant to make a valid waiver of conflicts and proceed to trial with his or her desired attorney, this institutional concern for the "appearance of a fair trial" can be reconciled with these other cases. In each of these decisions, except *Wheat*, the defendant was responsible for the extent conflicts would play a part in his trial. If the defendant objected to multiple representation, he could demand separate counsel.¹³³ If he did not object at trial, not only was the state trial court not obligated to intervene,¹³⁴ but the defendant would also have the burden to show inadequate representation.¹³⁵ If it is "fair" to place these obligations and burdens on the defendant, it would be consistent to protect the defendant's waiver of conflict at trial.¹³⁶

¹³⁰ 107 S. Ct. 3114 (1987).

¹³¹ *Id.* at 3121. To assume an actual conflict and then to require a showing of harm is to engage in precisely the type of determination which the Court expressly admonished in *Cuyler*. *Cuyler v. Sullivan* 446 U.S. 335, 355 (1980). See *supra* note 127 and accompanying text for a discussion of *Cuyler*.

¹³² In *Burger*, petitioner had been indicted along with another, both of whom were assisted at trial by the same attorney. *Burger v. Kemp* 107 S. Ct. 3114, 3119 (1987). Each defendant sought to emphasize the culpability of the other to avoid the death penalty. *Id.* Yet on the second appeal to the Georgia Supreme Court, petitioner's attorney dropped the lesser culpability argument. *Id.* at 3120. For this and other reasons, petitioner sought to overturn his death sentence based upon a claim of ineffective assistance due to a conflict of interest. *Id.* at 3118. The Court, however, found otherwise stating:

[t]here was undoubtedly a conflict of interest between Burger and Stevens because of the nature of their defenses. But this inherent conflict between two participants in a single criminal undertaking cannot be transformed into a Sixth Amendment violation simply because the community might be aware that their respective attorneys were law partners.

Id. at 3122 (emphasis added).

¹³³ *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

¹³⁴ *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980).

¹³⁵ *Burger v. Kemp*, 107 S. Ct. 3114, 3121 (1987).

¹³⁶ Thus, the criminal defendant would control all aspects of how potential conflicts of interest might affect his prosecution. This interpretation of what constitutes "fairness" is consistent with other areas of criminal law involving constitutional safeguards

2. The Importance of Ethically Conducted Trials

The Court in *Wheat* noted the importance of ethically conducted trials as another concern for federal courts.¹³⁷ There are two prongs to this factor. The first is a court's concern to protect the individual's right to conflict-free representation. The second is the interest in the obvious appearance of adequate representation.¹³⁸ There is a way to make representation of conflicting interests permissible in the first instance—consent by the client after full disclosure by his attorney.¹³⁹

Concerning the first prong, if the defendant does not consent to multiple representation and he complains before trial, the trial

and proper waivers. Most significant is the right to self-representation. At first glance, it probably does not appear fair to allow a layman to make such a choice and proceed without counsel. The Court has explained that:

[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense. . . . Without [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 69 (1932). However, because the right to effective counsel can be waived, an effective waiver does justice to the previously enunciated concerns.

An interesting distinction between the right to proceed *pro se* and the right to an attorney with a conflict of interest is the way in which each decision is likely to affect a defendant's trial. Whereas a decision to proceed *pro se* will most likely render less than effective representation as a whole, a decision to proceed with an attorney is more likely to be based on a defendant's counselled, strategic evaluation of the offsetting benefits. Therefore, allowing a defendant to proceed *pro se* will more likely disadvantage a criminal defendant while a decision to "abuse" the system can enable the criminal defendant to glean some advantages from conflict of interest representation. Perhaps, this distinction is a weighty factor in *Wheat*. The Court appears apprehensive to give a criminal defendant an extra defense tool at the expense of third party perceptions of the system and at the expense of securing convictions.

¹³⁷ *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988).

¹³⁸ *Wheat*, 108 S. Ct. at 1697-98. In support of this contention, the Court cited the ABA Model Code of Professional Responsibility, which provides: "[A] lawyer may represent multiple clients if it is *obvious* that he can *adequately represent* the interest of each and if each *consents* to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1983)(emphasis added). Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983)(It is for the lawyer to decide whether he reasonably believes that he can render adequate representation.); But see AMERICAN TRIAL LAWYER'S CODE OF CONDUCT Rule 2.4 (1980)(As long as a defendant consents, there is no requirement for the appearance of adequate representation.).

¹³⁹ Of course the permutations of ethical scenarios can wreak havoc on the simplicity of this notion. However, the ABA Model Code of Professional Responsibility demonstrates an understanding that a defendant has the right to make his own defense. See *infra* note 146. For a discussion of whether a valid waiver also satisfies the concern for adequate representation, see Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982) [hereinafter *Conflicts of Interest*].

court must protect his right to conflict-free representation.¹⁴⁰ Thus, in order to regulate multiple representation, the Court discussed Federal Rule of Criminal Procedure 44(c),¹⁴¹ which directs trial judges to take action in cases involving multiple representation. One option which the trial court may take is to order separate representation. However, the court is directed to take action only when necessary to "protect each defendant's right to counsel."¹⁴² Fittingly, the trial judge may obtain a knowing, intelligent and voluntary waiver as an alternative, appropriate measure under Rule 44(c).¹⁴³ When a criminal defendant validly waives the potential conflict, no further action need be taken to "protect" the defendant.¹⁴⁴ Rule 44(c) then operates, rightly so, as a check on whether the defendant understands his position. If it appears that he does not, only then should the judge order separate representation.

The second prong regarding ethical proceedings is the obvious appearance of adequate representation.¹⁴⁵ This concern, although similar to the concern for the appearance of a fair trial, is strengthened by its ethical foundation. Although the Court did not define what is meant by "adequate representation," it appears that the majority referred to the existence of a potential conflict which is likely to arise in the course of the trial and eventually prejudice the defendant's proceedings.

Use of this factor as a basis for overriding a defendant's waiver and choice of counsel is troubling in several respects. Ethics are designed primarily to protect the individual.¹⁴⁶ To enforce a pater-

¹⁴⁰ *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

¹⁴¹ Rule 44(c) provides:

the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

FED. R. CRIM. P. 44(c) (emphasis added).

¹⁴² *Id.*

¹⁴³ See FED. R. CRIM. P. 44(c) advisory committee note. Cf. *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir.), cert. denied, 459 U.S. 854 (1982) ("The goal of 44(c) is the protection of the defendant's right to counsel. . . . Thus, the chosen method for dealing with a potential conflict, in the absence of an acceptable waiver, is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel.") (emphasis added).

¹⁴⁴ The Court subtly refers to the willingness of courts of appeals to entertain claims arguing ineffective assistance of counsel even where conflict-free representation was waived. See *infra* notes 153-160 and accompanying text.

¹⁴⁵ See *supra* note 138.

¹⁴⁶ Some commentators claim that the sole purpose of ethical standards is to protect the client. See, e.g., Moore, *Conflicts of Interest*, *supra* note 139, at 286. The ABA Model Code of Professional Responsibility provides:

nalistic role of ethics over the objections of the individual defendant is to vitiate the choice of individuals to ethically consent to conflict of interest representation. Moreover, reliance on this ethical consideration should not overcome the constitutional interest at stake.¹⁴⁷ Furthermore, most defendants would not choose to intelligently waive their protection unless they and their lawyers felt it was in their own best interests. Thus, reliance on ethical impropriety to overcome a constitutional presumption ignores any perceived benefits of the defendant's chosen representation.¹⁴⁸ Finally, another troubling aspect of the Court's insistence upon an institutional override is that the serious prospect or appearance of an unfair and unethical trial does not *mandate* separate representation. Thus, an independent trial judge can substitute his or her own perception of the potential conflict, along with his or her independent concern for ethically conducted trials, for that of the individual. Yet, another judge, viewing the identical fact situation, can decide that such representation is not so seriously flawed as to require separate counsel or to deny a motion for substitution.¹⁴⁹

3. *The Rendition of Just Verdicts*

The institutional concern for the "rendition of just verdicts"¹⁵⁰

[t]he continued existence of a free and democratic society depends upon the recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible for only through such law does the dignity of the individual attain respect and protection.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1983)(citations omitted).

¹⁴⁷ Justice Marshall stated in *Wheat* that "[t]he interest at stake in this kind of decision is nothing less than a criminal defendant's sixth amendment right to counsel of his choice." *Wheat*, 108 S. Ct. at 1701 (Marshall, J., dissenting). Furthermore, ethical proscriptions are held to constitutional scrutiny. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)(ethical rule against certain advertisements can be violative of the first amendment).

¹⁴⁸ Of course, it is possible that some criminal defendants will proffer a waiver for irrational reasons, yet do so knowingly and intelligently. In these circumstances, the majority has its strongest arguments regarding the appearance of fairness and ethical representation. It is more likely that criminal defendants would be disinclined to deliberately place themselves into precarious situations. Yet, in any event, an absolute acceptance of valid waivers permits a defendant to exercise strategic judgment buttressed by a constitutional interest; while, the majority rule apparently ignores the offsetting benefits of conflict of interest representation.

¹⁴⁹ Thus, although not expressly stated, the decision in *Wheat* creates an option for the trial judge. This appears then to be more protective of the system and the powers of trial judges than protective of constitutional rights and fairness to the criminal defendant. Separating out concerns for the individual severely limits the viability of the majority decision. This separation can be more clearly seen regarding the probable treatment of waivers on appeal. See *infra* notes 153-60 and accompanying text.

¹⁵⁰ *Wheat*, 108 S. Ct. at 1698.

is harder to analyze because the Court did not define "just" verdicts. This could mean results which are the product of representation approved by the defendant. Or, they could refer to those results which are shielded on review by a paternalistic rule like that in *Wheat*. Most likely, the Court was referring to the latter.¹⁵¹ However, it should make no difference. A just verdict is a verdict which is reliable.¹⁵² The real issue, then, is whether conflict of interest, though effectively waived, should be grounds for ineffective assistance of counsel claims on appeal.

Deciding this issue relates directly to "the legitimate wish of District Courts that their judgments remain intact on appeal."¹⁵³ If the lower court acquiesces to multiple representation, a defendant may later justifiably complain of ineffective assistance of counsel.¹⁵⁴ However, this later appeal should be successful only when the defendant proffered an *improper* waiver of the conflict at trial. Thus, the Court should not have elected to avoid discussion of the rare cases in which ineffective assistance claims were entertained in the face of a waiver.¹⁵⁵

¹⁵¹ There is an alternative, albeit cynical, interpretation of the Court's concern for "just verdicts." Quite possibly, the availability of multiple representation might enhance a defendant's chances of "beating the system." Co-defendants may get together with the same lawyer and decide to plead a joint defense or both may exercise their fifth amendment right to not incriminate oneself and quash an investigation. This has the effect of "stonewalling" a prosecution. See *supra* note 115. Thus, where the prosecution may otherwise have had one or both defendants testify against the other and thereby acquire conviction, stonewalling can have the effect of protecting defendants who, without multiple representation would most likely have been "justly" convicted.

¹⁵² See, e.g., *Strickland v. Washington*, 466 U.S. 668, 685-87 (1984).

¹⁵³ *Wheat*, 108 S. Ct. at 1698. The Court stated with approval the "accuracy" of the court of appeals predicament. "[T]rial courts confronted with multiple representations face the prospect of being whip-sawed' by assertions of error no matter which way they rule." *Id.* The Court referred to the two separate sixth amendment concerns affected by conflict of interest representation. *Id.* at 1698. The defendant is exercising his right to choice of counsel; but, when the counsel chosen has a conflict, such representation may affect a defendant's right to conflict-free counsel. *Id.* In order to resolve this predicament for the trial court, the Supreme Court gave the lower court discretion to overcome the presumption in favor of choice of counsel. *Id.* at 1698-99. This result, however, is no less of a "whip-saw" than the prior situation. See *infra* notes 161-162 and accompanying text.

¹⁵⁴ The burden on the defendant to show an actual conflict which adversely affected his representation is quite cumbersome, under the newly enunciated standard in *Burger v. Kemp*, 107 S. Ct. 3114 (1987). In this regard, the trial court's decision is relatively secure on appeal. If the potential for conflict is so grave, and the lower court is concerned about its judgment, the trial court can require a sufficient waiver to alleviate subsequent claims based upon ineffective assistance. See *infra* notes 162-169 and accompanying text.

¹⁵⁵ *Wheat*, 108 S. Ct. at 1698 (citing *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 436-37 (7th Cir. 1983) and *United States v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974)). Ironically, the issue in *Tonaldi* revolved around

In fact, a determination of this issue would have had a great impact on the consistency of the majority opinion.¹⁵⁶ On appeal, a defendant may argue that although he or she waived the potential conflicts, a conflict arose which nevertheless prejudiced his or her representation. If the defendant made a valid waiver pretrial, this argument should fail.¹⁵⁷ Consequently, the defendant's trial would

sufficiency of waiver, not whether ineffective assistance claims can be brought in the face of a valid waiver. *Tonaldi*, 716 F.2d at 437. In fact, the court of appeals held that the petitioner had validly waived his right to conflict of interest, even though the conflict later manifested itself in the course of trial. *Id.* at 438. In *Vowteras*, the court refused to allow a defendant to repudiate his waiver absent an actual conflict which prejudiced his result. *Vowteras*, 500 F.2d at 1211. This implies that a defendant would be allowed a second chance to avoid conviction.

The Court hinted at the prospect of ineffective assistance claims even in the face of a valid waiver.

[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Wheat*, 108 S. Ct. at 1698 (quoting *Glasser v. United States*, 315 U.S. 60, 70 (1942)).

Although the quoted language from *Glasser* is a fundamental concept, the context in which the *Glasser* court used it referred to a presumption against an implied waiver.

Glasser never affirmatively waived the objection he initially advanced. Under these circumstances to hold that *Glasser* freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.

Glasser, 315 U.S. at 70, 72 (emphasis added).

The issue is not whether ineffective assistance claims may be argued in the face of waiver. Rather, the issue is whether the defendant sufficiently waived his right to conflict-free counsel. If he did not, only then should the defendant argue ineffective assistance of counsel based upon an insufficiently waived conflict of interest representation. Most importantly, if the defendant later claims that he did not validly waive conflicts at trial, the validity of the waiver rests on the determination of the trial judge. Therefore, the trial judge should not be heard to complain about these appeals if the source of the problem is the discretion of the court itself.

¹⁵⁶ When the majority spoke of fairness to both the defendant and the system, it chose a paternalistic holding to protect both the individual from himself and the system from the individual. See *Wheat*, 108 S. Ct. at 1698. Thus, the weight behind the decision is supported by an assertion to preserve fairness for the individual.

¹⁵⁷ Justice Blackmun has explained that:

[a] judge can avoid the problem [of subsequent appeals based upon a conflict of interest] by questioning the defendant, at an early stage of the criminal process, in any case presenting a situation that may give rise to conflict, in order to determine whether the defendant is aware of the possible conflict and whether he has waived his right to conflict-free representation.

Burger v. Kemp, 107 S. Ct. 3114, 3129 (1987) (Blackmun, J., dissenting). See also *United States v. Krebs*, 788 F.2d 1166, 1172, 1173 (6th Cir. 1986) (defendant signed an affidavit waiving right to "any conceivable—actual or potential—conflict" and may not, on appeal, "invoke the constitutional right which he chose to waive."); *United States v. Zajac*, 677 F.2d 61, 63 (11th Cir. 1982) (waiver, if valid, obviates need to decide claim of ineffective assistance based upon conflict); *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975) ("[R]ecordation of waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack . . . on sixth amendment grounds.").

not appear fair, and certainly the verdict would not seem fair. The obvious rejoinder by the majority would be that this subsequent appearance of unfairness is just what the decision in *Wheat* is designed to prevent. This retort serves to reiterate the institutional concern for integrity of the system but it debases a claim protecting the individual from himself.¹⁵⁸

In this five to four decision, no Justice advocated the absolute waiver rule presented in this Note. As explained, it is reasonably clear why the majority did not.¹⁵⁹ Justice Marshall's reluctance can be found in his remarks indicating the virtual impossibility of a valid waiver.¹⁶⁰ Therefore, his approach regarding appeals would be that, because a waiver can not truly be made, any conflict which adversely affected a defendant's representation should be overturned. This approach would be consistent in protecting both the individual from himself and the system from the individual. However, this approach eliminates the sanctity of the waiver and gives a criminal defendant a second chance.

The approach advocated in this Note strikes a delicate yet consistent balance between the prospective stances of the majority and Justice Marshall. If the defendant makes a valid waiver, subject to the broad discretion of the trial court, the waiver must be accepted. The waiver then acts as a bar against appeals based upon conflicts of interest. This stance supports a level of paternalism by requiring a stringent waiver; yet, it also respects the defendant's right to make his or her own defense by keeping a chosen attorney. This approach also protects the institutional concern that a trial court's decision will remain intact on appeal.

Because the Court avoided the issue of waiver on appeal, the assertion that trial courts face being "whip-sawed"¹⁶¹ is misleading. Assuming a valid waiver, allowing a defendant to secure conflict of interest representation would effectuate both sixth amendment

¹⁵⁸ Once exposed as the true basis for the holding in *Wheat*, protection of the system is not enough to override an already paternalistically invoked waiver and a constitutional right to one's choice of counsel.

¹⁵⁹ See *supra* notes 156-58 and accompanying text.

¹⁶⁰ Justice Marshall has argued that:

[t]he determination that the defendant has made an informed choice of counsel would not, of course, establish a waiver that would prevent him from subsequently raising any claim of ineffective assistance of counsel based on a conflict of interest. The dangers of infringing the defendants' privilege against self-incrimination and their right to maintain the confidentiality of the defense strategy foreclose the type of detailed inquiry necessary to establish a knowing and intelligent waiver. Furthermore, the inquiry would take place at such an early stage of the proceedings that not all possible conflicts might be anticipated.

Cuyler v. Sullivan, 446 U.S. 335, 354 n.1 (1979)(Marshall, J., dissenting).

¹⁶¹ *Wheat*, 108 S. Ct. at 1698.

rights: the right to conflict-free counsel, which is satisfied by a valid waiver, and the interest in keeping one's chosen counsel. It is the overriding of a valid waiver that effectuates only one of these sixth amendment concerns. Thus, the issue which can affect the "legitimate wish" of trial courts is whether, in the trial court's determination, the defendant made an effective waiver at trial.¹⁶²

C. THE PARAMETERS OF AN EFFECTIVE WAIVER

As mentioned throughout this Note, a defendant may waive his right under the sixth amendment to conflict-free representation.¹⁶³ In order for this waiver to be of any consequence, it must be proper.¹⁶⁴ In order for a waiver to be proper, it should be knowing and intelligent.¹⁶⁵ Because multiple representation involves other parties which may be affected by the conflict, all parties must waive their respective rights to conflict-free representation.¹⁶⁶ If the waiver is proper, then the defendant would be barred from arguing, on appeal, ineffective assistance based upon a conflict of interest.¹⁶⁷ The Court in *Wheat* noted several problems in assessing conflicts of interest.¹⁶⁸ Therefore, for these reasons, and for many of the institutional concerns discussed earlier, it would be proper to accord

¹⁶² See *supra* note 157. Therefore, whether the legitimate wish of trial courts will be granted is within their own discretion.

¹⁶³ *Glasser v. United States*, 315 U.S. 60, 68 (1942). See *supra* note 3 and accompanying text. Cf. *Michigan v. Moseley*, 423 U.S. 96, 108-09 (1975) (White, J., concurring) ("Unless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case.").

¹⁶⁴ Since the defendant would essentially be waiving his or her right to effective assistance as defined by the sixth amendment, the trial court should take appropriate steps to protect this right. The Court has explained that:

[t]his protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Johnson v. Zerbst, 304 U.S. 458, 465 (1938). See also *United States v. Unger*, 700 F.2d 445, 453 (8th Cir. 1983) (judges have the "weighty responsibility" to determine whether waivers of conflict are valid).

¹⁶⁵ See *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 437 (7th Cir. 1983).

¹⁶⁶ See *Wheat v. United States*, 108 S. Ct. 1692, 1701 n.1 (1988) (Marshall, J., dissenting) (each of the parties waived their rights). Also, it is possible that a defendant may be coerced into joint representation to protect a stronger co-defendant. Thus, the waiver should also be voluntary.

¹⁶⁷ For instance, compare the right to effective counsel which can be waived in favor of self-representation. "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

¹⁶⁸ *Wheat*, 108 S. Ct. at 1699.

trial courts broad discretion in determining whether a defendant has made a proper waiver.¹⁶⁹ However, it is one thing to say that trial courts have broad discretion to determine the validity of waivers. It is quite another thing to say that trial courts have the discretion to override what trial judges themselves have determined to be valid waivers.

VI. CONCLUSION

The Court in *Wheat* has handed down a decision that will make it very difficult for defendants to present their *own* defense. The majority based its paternalistic decision on the federal court system's concerns for ethically conducted trials and the appearance of a fairness.¹⁷⁰ But in order to reach its conclusion, the Court had to override the constitutional presumption in favor of one's choice of counsel. In the process, the Court overrode several individual concerns, the greatest of which is freedom of choice. Framing the issue as one of proper waiver, the Court could have salvaged many individual concerns and addressed many, if not all, institutional concerns. In fact, if a proper waiver is accepted, trial courts would avoid being "whip-sawed" and could, at the same time, satisfy both the institutional concern for reliable verdicts and the individual concern for choice of counsel.

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¹⁶⁹ See *id.* at 1704 n.* (Stevens, J., dissenting). A discussion of the factors to be used by the court in determining a proper waiver of conflicts of interest is beyond the scope of this Note. For a discussion of the difficulties in procuring a valid waiver and a conclusion advocating an absolute bar on conflict of interest representation in a criminal trial. See Geer, *supra* note 113, at 140-62; Moore, *Conflicts of Interest*, *supra* note 139, at 271-86.

¹⁷⁰ *Wheat*, 108 S. Ct. at 1697.