RETHINKING UNWAIVABLE CONFLICTS OF INTEREST AFTER *UNITED STATES V. SCHWARZ* AND *MICKENS V. TAYLOR*

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INTRODUCTION

On February 28, 2002, the Second Circuit, in *United States v. Schwarz*,[1] vacated Officer Charles Schwarz's conviction in a highly publicized case of police brutality.[2] The court found that Schwarz's lawyer had such a severe conflict of interest that it was considered unwaivable. Specifically, Schwarz's lawyer belonged to a newly formed firm that had obtained a ten million dollar retainer from the Policeman's Benevolent Association (PBA) and was planning to represent the PBA in a civil suit that had been filed by the victim, Mr. Abner Louima.[3] The Second Circuit held that the trial court's failure to disqualify such a conflicted lawyer was an abuse of discretion that compelled a reversal of Schwarz's conviction. In so holding, *Schwarz* extended the preexisting law of unwaivable conflicts of

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1. United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002).

2. *Id.* at 81. On June 8, 1999, a jury in the Eastern District of New York found Officer Schwarz guilty of conspiring to violate and violating Abner Louima's civil rights by assisting Officer Volpe brutally assault and sodomize Mr. Louima "in the early hours of August 9, 1977 while he was in custody at the 70th Police Precinct in Brooklyn, New York . . . ." *Id.* at 79–80; *see also* United States v. Volpe, 62 F. Supp. 2d 887, 890 (E.D.N.Y. 1999). After the Second Circuit reversed Officer Schwarz's conviction, a retrial was held, and in July of 2002 a jury found Schwarz guilty of perjury but deadlocked on the more serious charge of violation of civil rights. In September of 2002, on the eve of a third trial, Mr. Schwarz pled guilty to perjury and was sentenced to five years in prison. In exchange, the government agreed to drop the civil rights charges of assault and conspiracy and a second perjury count. A striking peculiarity about this plea bargain is that the vow of silence taken by both parties to "stop the war of words over whether former police officer Charles Schwarz helped Justin Volpe sodomize Mr. Louima . . . was memorialized in a sentencing agreement." Mark Hamblett, *Silence Pact in Louima Rare, Hard to Enforce: Sentencing Agreement Bars Both Sides From Claims About Schwarz's Role,* N.Y.L.J., Sept. 24, 2001, at 1.

3. *Schwarz*, 283 F.3d at 81–84.

interest by broadening the category of conflicts in which disqualification of the defendant's attorney is mandatory.

Approximately one month later, in *Mickens v. Taylor*,[4] the Supreme Court held that Walter Mickens's death penalty conviction would not be vacated, despite the fact that Mickens's trial attorney harbored his own serious conflict of interest: the trial attorney had represented the man Mickens was accused of killing up until the day of the murder.[5] The dissent argued that representation by such a conflicted attorney signaled a breakdown in the criminal justice process, a breakdown that required reversal even though Mickens was unable to show how this conflict actually harmed him at trial. However, a five-to-four majority of the Supreme Court held that a mere *theoretical* conflict does not establish an ineffective assistance of counsel claim under the Sixth Amendment.[6] Given the Supreme Court's holding in *Mickens*, *Schwarz* appears out of place, for how could the conflict in *Schwarz* necessitate reversal when the conflict in *Mickens* did not?

This Note investigates the Second Circuit's expansion of the unwaivable conflict doctrine and concludes that not only has a principled expansion of the doctrine been foreclosed by *Mickens*, but that an alternative understanding of the expanded doctrine, one that does not conflict with *Mickens*, is defective both analytically and practically.

Part I of this Note summarizes the background of the two competing Sixth Amendment interests found in the context of unwaivable conflicts: the right to conflict-free counsel and the right to counsel of choice. This section focuses on *United States v. Wheat*, in which the Supreme Court endorsed the disqualification of a defendant's choice of counsel in favor of a court's interest in ensuring that criminal trials are conducted fairly.[7] These pre-trial decisions to override a defendant's proffered waiver of a potential conflict of interest in an effort to maintain the structural integrity of the criminal justice system were the first breed of unwaivable conflicts.

Part II discusses the development of the modern unwaivable conflict of interest, a conflict so severe that a trial court's failure to disqualify an attorney with such a conflict is an abuse of discretion and results in reversal.[8] After canvassing Second Circuit cases, this

4. Mickens v. Taylor, 122 S. Ct. 1237 (2002).

5. *Id.* at 1240. For more information about the consequences of the attorney's conflict in *Mickens* see *infra* note 138. R

6. *Id.* at 1242–43, 1245–46.

7. United States v. Wheat, 486 U.S. 153, 164 (1988).

8. United States v. Fulton, 5 F.3d 605, 611–14 (2d Cir. 1993).

Note posits that until *Schwarz* the universe of unwaivable conflicts was both finite and narrowly defined. Indeed, unwaivable conflicts were only found when the conflict created a *per se* violation of a defendant's Sixth Amendment right to effective assistance of counsel.[9] For this reason the rationales behind finding unwaivable conflicts and *per se* conflicts were inextricably intertwined. Part II also discusses the underlying principles behind *per se* prejudicial errors. In particular, this Part examines the difference between *structural errors*, errors that "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless" and therefore require reversal without any inquiry into the conflict's adverse effect at trial, and *trial errors*, errors that are subject to a harmless-error analysis.[10]

Part III focuses on *Schwarz* and how it expanded the universe of unwaivable conflicts by including conflicts that did not create a *per se* adverse effect. In so doing, *Schwarz* created an alternate avenue by which appellate courts could recognize a structural defect and use it as a means of reversing a conviction. Part III also criticizes the showing of adverse effect in *Schwartz* on the grounds that if structural errors are understood correctly, a harmless-error analysis is irrelevant. Finally, Part III points out that a principled reading of *Schwarz*, a reading which understands the new doctrine of unwaivable conflicts as opening the back door to structural defects, is untenable given the Supreme Court's recent holding in *Mickens*.

This Note concludes by arguing that even if one reads *Schwarz* in such a way that it does not conflict with *Mickens*, *Schwarz* nevertheless creates significant problems for criminal defendants and trial judges. The rationale and limits of *Schwarz*'s extension of unwaivable conflicts are ambiguous and ill-defined. As a result, a trial judge may be encouraged to disqualify a defendant's counsel of choice more frequently, thus diluting a defendant's right to counsel of choice. For the above reasons, this Note advocates a more limited approach to unwaivable conflicts, one which permits reversal only when a conflict creates a *per se* adverse effect.

9. *Id.* (finding that the lawyer's conflict (implicated in the same crime as the defendant) created a *per se* Sixth Amendment violation that could not be waived by the defendant); United States v. Novak, 903 F.2d 883, 890 (2d Cir. 1990) (unlicensed counsel); United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984) (implicated in the defendant's crimes); Solina v. United States, 709 F.2d 160, 168–69 (2d Cir. 1983) (unlicensed counsel).

10. 2 RANDY HERTZ & JAMES S. LIEBMAN, FED. HABEAS CORPUS PRAC. AND PROC. § 31.3 (4th ed. 2001) (quoting Satterwhite v. Texas, 486 U.S. 249, 256 (1988)).

I.
COMPETING SIXTH AMENDMENT INTERESTS

A. Background

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[11] The purpose of the Sixth Amendment right to counsel is to ensure that the adversarial criminal process is both effective and fair.[12] "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[13] For this reason all defendants, when faced with the prospect of criminal prosecution by the state, are entitled to the effective assistance of counsel regardless of their ability to pay.[14]

The right to effective assistance of counsel includes the defendant's right to an attorney free from any conflicts of interest.[15] Every defendant is entitled to the undivided loyalty of his attorney because loyalty is an integral aspect of the lawyer's role. When an attorney "serves two masters," this loyalty is compromised.[16] Consequently, a lawyer who has divided loyalties cannot be trusted to be an effective advocate. Because the right to a lawyer unfettered by conflicts of interest is constitutionally guaranteed, a trial judge commits reversible error if he compels a defendant to be represented by an attorney who harbors an actual conflict of interest.[17]

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11. U.S. CONST. amend. VI.

12. United States v. Wheat, 486 U.S. 153, 158 (1988) (citing United States v. Morrison, 449 U.S. 361, 364 (1981)).

13. Strickland v. Washington, 466 U.S. 668, 685 (1984) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942)); Glasser v. United States, 315 U.S. 60, 69 (1942) ("'[The Sixth Amendment] is one of the safeguards deemed necessary to ensure fundamental human rights of life and liberty . . . .'") (quoting Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)); *see also* Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

14. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

15. Holloway v. Arkansas, 435 U.S. 475, 482 (1978); *Glasser*, 315 U.S. at 70, 75.

16. *Holloway*, 435 U.S. at 482 (citing *Luke* 16:13 (King James)).

17. *Glasser*, 315 U.S. at 70, 76. In *Glasser*, the trial court ordered defense counsel to represent Glasser's co-defendant. Although Glasser initially objected to this appointment, he was silent when the judge ordered the joint representation. Glasser's conviction was overturned because the court found that the "assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Id.* at 70.

Ordinarily, a defendant who attempts to reverse his conviction due to a claim of ineffective assistance of counsel faces a heavy burden. Under the test established by the Supreme Court in *Strickland v. Washington,* a defendant must fulfill two requirements: he must show that his lawyer's performance fell below an objective standard of reasonableness, and he must show that he suffered prejudice as a result of his lawyer's deficient performance.[18] In order to establish prejudice the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[19] However, when an attorney possesses a conflict of interest, there is a substantial risk that the conflicted attorney will not be able to satisfy his duty of loyalty. Given this risk, the Court presumes that the attorney will be ineffective in his representation. In fact, for this very reason, a defendant who endures conflicted representation need not comport with *Strickland*'s stringent requirements.[20] Rather, in order to show prejudice, a defendant need only show that his lawyer suffered an actual conflict and that this conflict adversely affected the lawyer's performance.[21]

In proving that the attorney's conflict resulted in a lapse in representation that adversely affected the defendant, the Second Circuit requires that the defendant show only " 'that some plausible alternative defense strategy or tactic might have been pursued,' and that the 'alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' "[22]

18. *Strickland*, 466 U.S. at 702 (Brennan, J., concurring in part and dissenting in part).

19. *Id.* at 694.

20. Cuyler v. Sullivan, 446 U.S. 335, 348–49 (1980) (citing Glasser v. United States, 315 U.S. 60, 72 (1942)); Holloway v. Arkansas, 435 U.S. 475, 487–91 (1978).

21. *Strickland*, 466 U.S. at 692 ("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's preformance.' "); *Cuyler*, 446 U.S. at 348–49; United States v. Fulton, 5 F.3d 605, 609 (2d Cir. 1993); United States v. Iorizzo, 786 F.2d 52, 58 (2d Cir. 1986). In the Supreme Court's recent decision in *Mickens*, the majority questions the expansive application of the more lenient presumption of prejudice in cases where the conflict does not arise out of multiple representations. Mickens v. Taylor, 122 S. Ct. 1237, 1245–46 (2002). Although the Court did not rule upon the issue, it did cast doubt on the continued use of this rule in conflict situations beyond multiple representations. *See id.*

22. United States v. Levy, 25 F.3d 146, 157 (2d Cir. 1994) (quoting Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993)). The standard for finding "adverse effect" varies among circuits. For example, in *Schwarz*, the Second Circuit stated that the foregone strategy need not be measured by a reasonableness standard. United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (citing United States v. Malpiedi, 62 F.3d 465, 469 (2d Cir. 1995)). The Fourth Circuit, on the other hand, endorsed

The defendant does not need to prove that this alternative strategy would have affected the outcome of the case. The defendant need show only that this strategy was not pursued because of the lawyer's conflict.[23]

Even though a conflicted counsel has the potential to adversely affect the quality of representation, a defendant need not automatically lose his attorney of choice upon a finding of conflict.[24] Rather, a defendant is generally able to waive his right to conflict-free counsel, just as he is able to waive the protections of other constitutional rights, so long as the waiver is knowing and voluntary.[25] Furthermore, a voluntary and knowing waiver prevents a defendant from later overturning his conviction on the basis of his attorney's conflict of interest.[26]

In *Curcio v. United States,* the Second Circuit prescribed a set of procedures by which a district court may establish that a defendant has validly waived his right to conflict-free counsel.[27] Under *Curcio*, the trial court must perform the following steps:

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the district court's holding that the foregone strategy must be a "viable" one. Mickens v. Taylor, 240 F.3d 348, 361–62 (4th Cir. 2001) (en banc), *aff'g* Mickens v. Greene, 74 F. Supp. 2d 586, 603–04, 607 (E.D.Va. 1999), *cert. granted*, Mickens v. Taylor, 535 U.S. 162 (2002). These variations create a significant and unwarranted difference in a defendant's ability to prove adverse effect, and consequently, to obtain a reversal. However, a thorough investigation of both the effects and justifications of these variations is beyond the scope of this Note.

23. *Malpiedi*, 62 F.3d at 469.

24. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978) (holding that a defendant may waive his right to conflict-free counsel) (citing Glasser v. United States, 315 U.S. 60, 70 (1942)); United States v. Blau, 159 F.3d 68, 74–75 (2d Cir. 1998) (finding that defendant validly waived his right to conflict-free counsel because defendant was informed of the potential conflict and made a knowing and intelligent waiver).

25. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835–36 (1975) (waiver of right to counsel); Ross v. Wainwright, 738 F.2d 1217, 1221 (11th Cir. 1984) (waiver of right to competent counsel); United States v. Frye, 738 F.2d 196, 200 (7th Cir. 1984) (waiver of right to trial by pleading guilty); United States *ex rel.* Williams v. DeRobertis, 715 F.2d 1174, 1178 (7th Cir. 1983) (waiver of right to trial by jury); United States v. Hammond, 605 F.2d 862, 863 (5th Cir. 1979) (waiver of right to present witnesses).

26. United States v. Curcio, 680 F.2d 881, 888–90 (2d Cir. 1982).

27. *Id.* Other circuits have similar tests to determine the voluntary and knowing nature of a defendant's waiver. *See, e.g.*, United States v. Hernandez-Lebron, 23 F.3d 600 (1st Cir. 1994); United States v. Allen, 831 F.2d 1487, 1500 (9th Cir. 1987) (agreeing with the Second Circuit in *Curcio* that the defendant should be given time to make his decision as to whether or not to waive his right to conflict-free counsel); United States v. Unger, 700 F.2d 445, 453 (8th Cir. 1983) (holding that although a narrative by the defendant is not required, it is preferred when soliciting the defendant's waiver of his right to conflict-free counsel).

> (i) advise the defendant of the dangers arising from the particular conflict; (ii) determine through questions that are likely to be answered in narrative form whether the defendant understands those risks and freely chooses to run them; and (iii) give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel.[28]

Although a trial court's deviation from these procedures is permitted in unusual circumstances, failure to conduct a *Curcio* hearing normally constitutes grounds for the reversal of a conviction.[29] On the other hand, if the catechism proscribed by *Curcio* is followed, the appellate court will consider the waiver to be voluntary and knowing.[30] Indeed, a valid waiver will bar reversal even if the conflict that arose at trial was not predicted by the judge and explained to the defendant during the *Curcio* hearing. A waiver covers these situations because not all problems that might arise as the result of a conflict are foreseeable during the pre-trial period.[31]

In clearly defining what constitutes a valid waiver, *Curcio* helps safeguard the defendant's ability to waive his right to conflict-free counsel because it enables the trial court to protect against reversal. Consequently, a defendant is often able to prioritize his right to counsel of choice over his right to conflict-free counsel.[32] This right to counsel of choice is often critical for it grants a "criminal

28. United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986) (citing *Curcio*, 680 F.2d at 888–90).

29. United States v. Kliti, 156 F.3d 150, 156–57 (2d Cir. 1998) (reversing defendant's conviction because the trial court failed to question the defendant in accordance with *Curcio*); United States v. Levy, 25 F.3d 146, 159 (2d Cir. 1994) (reversing conviction because the trial court did not follow "this circuit's strict waiver requirements"); United States v. Friedman, 854 F.2d 535, 574 (2d Cir. 1988).

30. This does not mean, however, that the defendant will be prohibited from appealing his conviction if a lawyer lies to the court and client about the nature of his conflict. Under those circumstances, the court will find that there has been no waiver because the real conflict was not the subject of the *Curcio* hearing.

31. United States v. Curcio, 680 F.2d 881, 888 (2d Cir. 1982).

32. Chandler v. Fretag, 348 U.S. 3, 10 (1954) (recognizing that necessary corollary to obtaining right to counsel is that criminal defendant be given reasonable opportunity to employ and consult counsel of choice); House v. Mayo, 324 U.S. 42, 46 (1945) (asserting that defendant's constitutional right to fair trial encompasses aid and assistance of counsel of choice); Betts v. Brady, 316 U.S. 455, 466 (1942) (noting language of Sixth Amendment clearly indicates that defendant has privilege of representation by counsel of choice); Powell v. Alabama, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.").

defendant effective control over the conduct of his defense."[33] The Sixth Amendment recognizes this right because it is the defendant "'who suffers the consequences if the defense fails.'"[34] The Court has noted that "[a]n obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative."[35] Although there has been some contention over the extent of the defendant's right to counsel of choice, it remains a constitutionally recognized interest.[36]

B. Wheat*: A Permissive Stance towards Disqualification*

These two Sixth Amendment rights, the right to counsel of choice and the right to conflict-free counsel, might never come into serious conflict if the defendant could always choose which Sixth Amendment entitlement he wished to pursue. However, the Sixth Amendment right to counsel is intended to do more than protect the defendant, it is also designed to protect the integrity of the criminal adversarial system. Thus, there are times when the institutional interest in preserving the Sixth Amendment right to conflict-free counsel is at odds with a defendant's Sixth Amendment right to counsel of choice. Justice Schaefer of Illinois said, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[37] The clash between these two Sixth Amendment rights is contentious precisely because the defendant's counsel will invariably have a significant impact on the outcome of the defendant's case. In *United States v. Wheat*, the Supreme Court squarely addressed the conflict between these two competing Sixth Amendment interests.

1. Facts of the Case

Petitioner Mark Wheat was indicted for his alleged participation in a marijuana distribution scheme. Shortly before trial, Wheat requested that Eugene Iredale, who had successfully represented two of Wheat's co-defendants, be appointed as his attorney. The government objected to Iredale's appointment, claiming that his representation of the other two co-defendants created a serious

33. United States v. Wheat, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting).

34. *Id.* at 166 (citing Faretta v. California, 422 U.S. 806, 820 (1975) (Marshall, J., dissenting)).

35. *Id.* at 166 (Marshall, J., dissenting).

36. *Id.* at 157.

37. Walter V. Schaefer, *Federalism and State Criminal Trials,* 70 HARV. L. REV. 1, 8 (1956).

conflict of interest.[38] Wheat responded by pointing to the fact that all potentially affected defendants had agreed to waive their right to conflict-free counsel.[39] In light of these waivers, Wheat argued that his Sixth Amendment right to counsel of choice should be respected. The district court denied Wheat's motion to appoint Iredale finding the conflicts of interest irreconcilable.[40]

2. The Supreme Court's Analysis

The Supreme Court granted certiorari to decide when the district court may override a defendant's waiver of his Sixth Amendment right to conflict-free counsel. While the Court recognized the constitutional significance of an individual's right to counsel of choice, it emphasized that this right is not absolute.[41] Qualifications to this right include that a defendant may not insist on an attorney that he cannot afford,[42] nor may a defendant insist upon representation by a particular counsel when to do so would interfere with the administration of a trial.[43] The Court concluded that there is no "flat rule" that the proffer of a waiver will cure all the problems presented by multiple representation.[44]

Instead of providing a flat rule, the Supreme Court directed district courts to balance the defendant's interests in retaining his choice of counsel against the court's independent interest in disqualifying conflicted attorneys. Although the trial court was directed to recognize a presumption in favor of the defendant's choice of counsel, the Supreme Court identified three independent interests that would justify a trial court's decision to override a defendant's waiver.[45] First, a persuasive interest was the "institutional

38. The conflicts cited by the government were conflicts that would arise if either of the co-defendants chose to testify against the petitioner. *Wheat*, 486 U.S. at 154–55.

39. *Id.* at 156. The petitioner also objected to Iredale's disqualification by pointing to the highly speculative nature of the alleged conflicts of interest. *Id.*

40. *Id.* at 156–57.

41. *Id.* at 159.

42. *Id.*

43. United States v. Delia, 925 F.2d 574, 575 (2d Cir. 1991) (stating that "the right to counsel of one's choice does not include a lawyer whose other commitments preclude compliance with a court's reasonable scheduling of cases").

44. *Wheat*, 486 U.S. at 160.

45. *Id.* at 160, 164. A separate concern, not outlined in *Wheat*, is the problem that arises when a defense attorney has first-hand knowledge of facts presented at trial. In these situations, the defense attorney has the potential to act as an unsworn witness. As one court has noted:

> Having experienced the events in question first-hand, the attorney may be able to subtly impart to the jury knowledge of the events without taking an

interest in the rendition of just verdicts in criminal cases."[46] The Supreme Court emphasized that the appearance of fairness in a legal proceeding is important to both the accused and the observing public as well.[47] Second, the Court identified the district court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession."[48] Third, the Court noted there is a "legitimate wish of District Courts that their judgments remain intact on appeal."[49] The Supreme Court claimed that this last interest would not be ameliorated by a defendant's waiver because of "the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel."[50]

3. Adjusting the Balance Between the Two Sixth Amendment Interests

What is most significant about *Wheat* is that it did more than condone the disqualification of a defendant's choice of counsel

oath or being subject to cross-examination. "When an attorney is an unsworn witness, [ ] the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the fact finding process is impaired." United States v. Reale, No. 96 Cr. 1069, 1997 U.S. Dist. LEXIS 6137, at 16 (S.D.N.Y. May 6, 1997) (quoting United States v. Locascio, 6 F.3d 924, 934 (2d Cir. 1993)). In these situations, the defendant does not have the capacity to waive the conflict that has been created, because the defendant is not the party being injured by such a conflict. These kinds of conflicts are beyond the scope of this Note.

46. *Wheat*, 486 U.S. at 160.

47. *Id.*

48. *Id.* The Court has repeatedly modified its position on the ethical standards of the defense attorney. *Wheat* permitted a generalized distrust of the ethics of the defense bar when it claimed that attorneys who are willing to engage in multiple representation of co-defendants can be presumed to be careless in how they inform the defendants of the potential conflicts that such representation may create. *Id.* at 163. However, this same distrust of the defense bar had been rejected in *Cuyler v. Sullivan.* Cuyler v. Sullivan, 466 U.S. 335, 346–47 (1980). *Cuyler* noted that defense counsel was under an ethical obligation to advise the court of any conflicts of interest and, absent such notification, permitted the court to assume that no such conflict existed. *Cuyler*, 466 U.S. at 346–47. While the implications of these frequent revisions in opinion may be significant, they are not within the scope of this Note.

49. *Wheat*, 486 U.S. at 161.

50. *Id.* at 162. In support of this proposition, the Court cites *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). Interestingly, both of these cases dealt with a severely defective waiver. The courts of appeals did not inappropriately disregard the defendant's waiver, but instead, legitimately found the waivers invalid given the presumption against the waiver of constitutional rights in *Glasser.* Therefore, this justification for disqualification provided by *Wheat* was extremely weak.

when "independent interests" are implicated by an *actual* conflict of interest. The Supreme Court expanded a trial court's ability to override a defendant's waiver by authorizing disqualification in situations where the defense counsel's conflict remained merely *potential*.[51] In so doing, *Wheat* recalibrated the scales that previously balanced the two conflicting Sixth Amendment interests. Prior to *Wheat*,

> the question was: Who should bear the risk that the trial judge will err in predicting that defense counsel will have an actual conflict of interest? The Court's conclusion was that when the potential for conflicts is serious, it is constitutionally acceptable to place the risk of error on the defendant.[52]

After *Wheat*, the once extreme measure of disqualifying a defendant's choice of counsel could now occur when the conflict was merely *potential*.

Wheat received wide criticism. The rejection of the defendant's choice of counsel after the defendant proffered a waiver of such conflict was inconsistent with other Supreme Court decisions that "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case."[53] These critics compared the Supreme Court's reasoning in *Wheat* to that of *Faretta v. California*, which held that a defendant has the right to forego his Sixth Amendment right to counsel and represent himself.[54] In *Faretta*, the Supreme Court stated that to "forbid the waiver of a protected right would be to 'imprison a man in his privileges and call it the Constitution,'" and that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[55] *Wheat,* however, gave short shrift to *Faretta*'s rationale.[56] Indeed, *Faretta* was only mentioned by the majority in a footnote which read, "Our holding in Faretta v. California, 422 U.S. 806 (1975), that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily

51. *Wheat*, 486 U.S. at 164 ("The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.").

52. Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1211–12 (1989).

53. Edwards v. Arizona, 451 U.S. 477, 490–91 (1981).

54. Faretta v. California, 422 U.S. 806, 836 (1975).

55. *Faretta*, 422 U.S. at 834 (Brennan, J., concurring) (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970)).

56. *Wheat*, 486 U.S. 153, 159 n.3.

elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel."[57] Thus, many critics believed the Court in *Wheat* chose to ignore *Faretta*'s rationale, which emphasized the importance of a defendant's control over his own defense, and instead supported a system that paternalistically ignored the defendant's own autonomy, dignity, and self-determination by allowing the trial court to usurp the defendant's own determination of how to proceed with his defense.[58]

Other critics took a more middle ground. While they agreed that that there were legitimate institutional interests that could supersede the defendant's interest in counsel of choice, they found *Wheat*'s standards for disqualification overly permissive.[59] These critics argued that the presumption in favor of a defendant's choice of counsel was insufficient and that trial courts should also give deference to the defendant's own assessment of the conflict.[60]

The general concern that trial courts might abuse their discretion by disregarding the defendant's right to counsel of choice was exacerbated by *Wheat*'s endorsement of weak appellate review.[61] *Wheat* stated that appellate courts should afford trial courts wide latitude when evaluating their assessment of the likelihood and severity of the conflict.[62] Yet critics feared that without aggressive appellate review, a trial court would not be reprimanded for failing to give sufficient weight to a defendant's choice of counsel during the pre-trial evaluation of the competing Sixth Amendment interests. Furthermore, weak appellate review meant that close cases would

57. *Id.*

58. Randall Klein, *Sixth Amendment–Paternalistic Override of Waiver of Right to Conflict-Free Counsel at Expense of Right to Counsel of One's Choice*, 79 J. CRIM. LAW & CRIMINOLOGY 735, 745–46 (1988); *see also* Michael E. Lubowitz, *The Right to Counsel of Choice After* Wheat v. United States*: Whose Choice Is It?*, 39 AM. U. L. REV. 437, 464–65 (1990).

59. *See*, *e.g.*, Green, *supra* note 52, at 1252 (proposing guidelines for ruling on disqualification motions, suggesting in particular that the "courts should not undertake unnecessary or unduly intrusive inquiries into defense counsel's potential conflict," and that "courts should give weight to defense counsel's own assessment"); Klein, *supra* note 58, at 737 (arguing that tension between two Sixth Amendment interests must be resolved in favor of criminal defendant's constitutional interest in choice of counsel, and that thorough waiver would ameliorate institutional concerns presented in *Wheat*); Lubowitz, *supra* note 58, at 472 (1990) (arguing that *Wheat*'s proposed rejection of defendant's choice of counsel when either actual or potential conflict exists is overbroad, and that the Court should have reinforced the concept of knowing and voluntary waiver). R

60. Green, *supra* note 52, at 1252. R

61. United States v. Wheat, 486 U.S. 153, 163 (1988).

62. *Id.*

be decided in favor of disqualifying the conflicted counsel. This is because it would be very unlikely for a trial court to be reversed based upon its decision to reject a defendant's proffered waiver after *Wheat* explicitly stated that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest."[63] However, the concerns raised by weak appellate review were in large part ameliorated by the fact that when a trial court did decide to accept a defendant's waiver, it would generally be able to insulate itself from reversal by conducting a thorough *Curcio* (or *Curcio*-equivalent) waiver.[64] Although *Wheat*'s critics claimed that the new system was paternalistic, it was still structurally safe for a trial court to give substantial weight to a defendant's right to counsel of choice during a pre-trial evaluation.

II.
THE UNWAIVABLE CONFLICT

Wheat was understood as a permissive, rather than a mandatory, test.[65] In other words, although *Wheat* authorized trial courts to override a defendant's proffered waiver by pointing to competing Sixth Amendment interests, the Court did not indicate that the failure to disqualify a conflicted attorney could result in reversible error. However, *Wheat* did not foreclose this result as a possibility. Rather, *Wheat* simply did not address a scenario in which a trial court erred by refraining from disqualifying a lawyer.[66] The Second Circuit addressed just such a situation in *United States v. Fulton*.[67] In *Fulton,* the Second Circuit found that the defense counsel's conflict was so severe that it could not be waived. Furthermore, the Court found that the district court abused its discretion in permitting the defendant to proffer a waiver, and that such an abuse of discretion required the reversal of the defendant's conviction.

63. *Id.*

64. *See supra* text accompanying notes 31–36; *supra* note 27. R

65. United States v. Plewniak, 947 F.2d 1284, 1289 (5th Cir. 1991) ("*Wheat* cannot be construed as defining certain conflicts of interest as unwaivable; rather, it stands for the proposition that the decision to accept or reject a waiver rests within the sound discretion of the trial court.").

66. The Supreme Court may not have contemplated such a situation, in part, because it had set forth such a permissive standard for disqualification in *Wheat*. The Supreme Court may have assumed, therefore, that when confronted with conflicts that would implicate the independent Sixth Amendment interest, a trial court would always take the safer course of disqualifying the conflicted attorney.

67. United States v. Fulton, 5 F.3d 605, 614 (2d Cir. 1993).

A. Fulton*: Facts of the Case*

In *Fulton*, the petitioner was on trial for conspiracy to possess and import heroin.[68] During his trial, the government informed the court that Lateju (a government witness) had implicated Fulton's lead trial counsel in the same crime as Fulton.[69] Upon learning this information, the district judge held a side bar interview with Fulton and advised him about his attorney's conflicts.[70] After a short recess, the conflicted defense counsel indicated that Fulton had opted to waive his right to conflict-free counsel.[71] At trial, Fulton was found guilty of both charges. The Second Circuit reversed the defendant's conviction on two grounds, holding that the conflict was a *per se* violation of the Sixth Amendment and that the conflict was unwaivable.

B. The Conflict Created a Per Se *Violation of the Sixth Amendment*

The Second Circuit found that the defense attorney's conflict should have been classified as a *per se* denial of the effective assistance of counsel, thus obviating the "need to prove that the conflict adversely affected the lawyer's performance as required by *Cuyler*."[72]

Ordinarily, in order to obtain a reversal, a defendant must show that a constitutional error was not harmless but that it prejudiced the defendant in some manner.[73] However, "some Constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."[74] In such instances, prejudice ex-

68. *Id.* at 606.

69. *Id.* at 607.

70. *Id.* at 607–08.

71. *Id.* at 608.

72. *Id.* at 611.

73. *See, e.g.*, Neder v. United States, 527 U.S. 1, 8 (1999) (following Chapman v. California, 386 U.S. 18 (1967)); Brecht v. Abrahamson, 507 U.S. 619, 648 (1993); *Chapman*, 386 U.S. at 21–22 (finding that a constitutional error does not automatically require reversal, but that error must undergo harmless error analysis). For a thorough background of *per se* prejudicial errors, see 2 HERTZ & LIEBMAN, *supra* note 10, § 31.3.

74. Satterwhite v. Texas, 486 U.S. 249, 256 (1988); *accord* Sullivan v. Louisana, 508 U.S. 275, 279 (1993); United States v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570, 577–78 (1986); *Chapman*, 386 U.S. at 23.

ists *per se* and reversal is required without any inquiry into the specific harm that a defendant may have suffered.[75]

The difference between these two types of constitutional error was clarified in *Arizona v. Fulminante* when the majority distinguished between *structural* and *trial* error.[76] Structural defects, "defects in the constitution of the trial mechanism," are *per se* prejudicial while trial defects, defects that occur "during the presentation of the case to the jury," must survive a harmless-error analysis in order to warrant reversal.[77] Structural defects occur when there is a denial of constitutional rights that are so basic to a fair trial that the trial can no longer be considered fair. Such rights include: the right to an impartial judge,[78] the right to a trial by jury,[79] the right to a public trial,[80] or as in *Fulton*, the right to counsel,[81] which includes the right to effective assistance of counsel.[82] Structural defects are not subject to the harmless-error analysis because, by their very nature, they infect the entire trial process. These errors must be corrected by a reversal of the conviction without regard for what effect the error might have had on the defendant because the error is considered to have already compromised

75. *Brecht*, 507 U.S. at 629. In *Brecht*, the Supreme Court altered the harmless-error analysis for constitutional errors in habeas corpus cases but left the analysis of *per se* prejudicial errors in tact. *Id.* at 629–30, 638.

76. Arizona v. Fulminante, 499 U.S. 279 (1991).

77. *Id.* at 307–10. The Court states that a harmless-error analysis is fundamental:

> [E]ach of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

Id. at 309–10 (quoting Rose v. Clark, 478 U.S. at 577–78).

78. *See, e.g.*, Edwards v. Balisok, 520 U.S. 641, 647–48 (1997); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); Rose v. Clark, 478 U.S. 570, 578 (1986).

79. *See, e.g.*, Johnson v. United States, 520 U.S. 461, 467–69 (1997); *Rose*, 478 U.S. at 578.

80. *See, e.g.*, *Fulminante*, 499 U.S. at 310; Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984).

81. *See, e.g.*, *Johnson*, 520 U.S. at 468–69 (stating that the "total deprivation of the right to counsel" creates a "structural error"); *Sullivan*, 508 U.S. at 279; Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* Bland v. Cal. Dep't of Corr., 20 F.3d 1469, 1478 (9th Cir. 1995) (finding deprivation of counsel of choice to be structural error that makes harmless-error analysis irrelevant).

82. United States v. Cronic, 466 U.S. 648, 654–57 (1984).

the integrity of the trial process as a vehicle for securing a fair and accurate conviction.[83]

Applying these principles, the court in *Fulton* found that the attorney's conflict created a *per se* adverse effect.[84] Prior to *Fulton*, *per se* Sixth Amendment violations had only been found in the Second Circuit in two discrete instances: "where the defendant's counsel was unlicensed, and when the attorney has engaged in the defendant's crimes."[85] The common feature of these two scenarios is that in each, the defense attorney engaged in a crime. As the Second Circuit stated on more than one occasion, when a person is engaged in a crime, "[that] person cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background. . . . Yet a criminal defendant is entitled to be represented by someone free from such constraints."[86] Although the government had not yet indicted Fulton's attorney, the Second Circuit believed that allegations by the government required that the conflict be treated as if the defense attorney was in fact engaged in the defendant's crime.[87]

In finding that this category of conflicts created a *per se* adverse effect, *Fulton* mandates reversal, even in the face of substantial evidence of the defendant's guilt.[88] Again, this is because the inquiry does not revolve around the prejudice at trial but rather the denial of a basic component of a fair and reliable criminal trial. Such a

83. United States v. Olano, 507 U.S. 725, 735 (1993) ("'[A] criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair . . . .'") (quoting *Rose*, 478 U.S. at 578); *Fulminante*, 499 U.S. at 309–10.

84. United States v. Fulton, 5 F.3d 605, 612 (2d Cir. 1993).

85. *Id.* at 611; United States v. Novak, 903 F.2d 883, 886–87 (2d Cir. 1990) (unlicensed counsel); United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984) (implicated in client's crime); Solina v. United States, 709 F.2d 160, 164 (2d Cir. 1983) (unlicensed counsel). The concern in the first scenario (unlicensed counsel) was that the attorney would fear that the prosecution would uncover his lack of credentials, while the concern in the latter scenario (implicated in client's crime) was that he would fear the discovery of his own criminal activities.

86. *Solina*, 709 F.2d at 164.

87. *Fulton*, 5 F.3d at 612 (stating that if the witness were credible enough for the government to put him on the stand, then there was a reasonable probability that the allegations were true).

88. *Solina*, 709 F.2d at 163 (requiring reversal even though conviction was more than thirteen years old, making a successful retrial unlikely); *Cancilla*, 725 F.2d at 879.

structural defect will upset a conviction regardless of what happened to the particular defendant at trial.[89]

C. The Conflict Was Unwaivable

After holding that the conflict should be considered to have a *per se* adverse effect, the Second Circuit addressed the issue of Fulton's waiver.[90] Surprisingly, the court did not analyze the sufficiency of the waiver under *Curcio*, despite the fact that there were obvious defects in the defendant's proffered waiver.[91] Instead, the Second Circuit focused on the severity of the conflict. The court went through a laundry list of potential conflicts that might arise both before and during trial.[92] The court concluded that "the counsel's fear of, and desire to avoid, criminal charges . . . will affect virtually every aspect of his or her representation of the defendant. . . . Given the breadth and depth of this kind of conflict, we are unable to see how a meaningful waiver can be obtained."[93] Thus, the Second Circuit found that the unwaivable conflict was a basis for reversal because the trial court had abused its discretion by

89. Some scholars have noted that the Supreme Court has recently subdivided the world of *per se* prejudicial errors. The first category consists of structural errors that are found when a fundamental right has been violated and "as to such errors . . . prejudice is not presumed but rather is irrelevant." HERTZ & LIEBMAN, *supra* note 10, § 31.3, at 1380. The second category warrants reversal, not because of the nature of the right that is violated, but rather because of both the probability and insidious nature of the prejudice that a defendant would likely suffer. *Id.* ("Automatic reversal upon finding of these errors . . . occurs not so much because of the fundamentality of the right that was violated, but instead because prejudice is simultaneously so likely to occur and so difficult to prove."). *Id*. However, a thoroughly detailed inspection of the trends of *per se* prejudicial errors is beyond the scope of this Note.

90. *Fulton*, 5 F.3d at 612.

91. *Id.* at 613. The court went beyond what it needed to in order to find Fulton's waiver unacceptable. The defects in Fulton's waiver were such that the court could have invalidated the waiver on the grounds that it unjustifiably violated the procedures set forth in *Curcio*. For example, the defendant was not given independent counsel when considering whether or not to waive his lawyer's conflict (although the assisting attorney was there, perhaps ameliorating this concern); he was given very little time to reflect about how to proceed (only a short recess); and he was not asked to state his understanding of the conflict in his own words, rather his attorney spoke for him. *Id*. at 607–08.

92. *Id.* at 613 (The court recognized that a guilty attorney would discourage cooperation during plea negotiations for fear that his own conduct might be implicated. Additionally, the attorney's cross–examination of the witnesses would be curtailed for fear that additional evidence might be uncovered. Furthermore, the attorney might fear that the defendant knew of his criminal activities, thus affecting his advice as to whether the defendant should take the stand.).

93. *Id.* at 613.

accepting the defendant's waiver instead of disqualifying the defense attorney.[94] The Second Circuit determined that this was reversible error because in allowing the defense counsel to proceed, the trial judge had completely undermined the "federal court's independent interest in the integrity of a legal proceeding and the assurance of a just verdict."[95] In other words, the conflict created a structural defect in the trial process, one that could not be remedied by looking at the specific facts of the case and analyzing the specific harm that had occurred.

D. Fulton *Limits Unwaivable Conflicts to Per Se Violations of the Sixth Amendment*

It must be noted that the holding in *Fulton* was extremely limited. A close reading of *Fulton* reveals that unwaivable conflicts were restricted to conflicts that also created a *per se* violation of the Sixth Amendment.[96] *Fulton* found that the statements made by Lateju created a variable labyrinth of conflicts for Fulton's defense attorney. Waiver would not remedy the situation in part because the potential conflicts were so pervasive. The court distinguished the situation in *Fulton* where "advice as well as advocacy is permeated by counsel's self-interest" from hypothetical situations in which the conflict at issue was more discrete.[97] For example, if a defendant merely waived his right to present a particular defense or a particular line of cross-examination, then a meaningful waiver would be possible.[98] The conflict in those situations could be meaningfully waived in part because it could be meaningfully understood. A meaningful waiver in *Fulton* was impossible precisely because of the breadth and depth of problems that a *per se* conflict creates.[99] The trial judge abused his discretion in accepting the waiver because he failed to perceive that if a conflict is so severe as to have a *per se* adverse effect upon a defendant, then no rational defendant would knowingly waive the conflict. In other words,

94. *Id.* at 614.

95. *Id.* at 612 (citing United States v. Wheat, 486 U.S. 153, 160 (1988)).

96. According to the court:

> As we held above, the conflict in this case resulted in inadequate representation of Fulton per se. It thus undermined both the defendant's Sixth Amendment right to effective assistance of counsel, and the federal court's independent interest in the integrity of a legal proceeding and the assurance of a just verdict.

Id. (citing *Wheat*, 486 U.S. at 160).

97. *Fulton*, 5 F.3d at 613.

98. *Id.*

99. *Id.*

when a conflict creates a *per se* adverse effect, any waiver by the defendant will also be *per se* defective.

This narrow reading of *Fulton* is supported by the court's own imposed limitations of its holding. *Fulton* repeatedly emphasized that the category of conflicts that created a *per se* adverse effect was extremely narrow.[100] Indeed, *Fulton* distinguished the facts of the case from a hypothetical case in which a defense attorney was *falsely* accused of engaging in the defendant's crime. Although such an attorney might still face a degree of conflict in his representation (he would not be able to effectively impeach the witness through cross-examination because to do so might require him to become an unsworn witness), this type of conflict was surmountable if the trial court could determine that the accusation was unfounded.[101] Additionally, *Fulton* distinguished the conflict before it from the conflicts that arise in the context of multiple representation. When the attorney is engaged in a crime, the conflict is always real and is "by its nature, . . . so threatening as to justify a presumption that the adequacy of representation was affected."[102] However, when the attorney is involved in multiple representation of co-defendants, the harm, and indeed the conflict itself, may remain merely potential.[103] In other words, when an attorney engages in a crime, the certainty of the conflict and resulting harm require the courts to find a *per se* denial of the defendant's Sixth Amendment right to counsel and a *per se* defective waiver.

Furthermore, a survey of the post-*Fulton* Second Circuit cases reveals that until *Schwarz*, no other type of attorney conflict was considered severe enough such that the failure to disqualify justified the reversal of a conviction. Granted, there were instances in which the appellate court affirmed a trial court's prospective determination that an attorney's conflicts required disqualification. However, when a defendant claimed that the judge created reversible error by failing to disqualify his attorney, the appellate court invariably found a way to distinguish the case at hand from *Fulton*. Consider the following examples: before his client was sentenced, a lawyer filed a civil suit against his client (the defendant) for the failure to

100. *Id.* at 611 (finding *per se* violations in two limited circumstances: when defendant's counsel is unlicensed, and when the attorney has engaged in defendant's crimes).

101. *Id.* at 613–14.

102. United States v. Cancilla, 725 F.2d 867, 871 (2d Cir. 1984).

103. *Id.*

pay legal fees;[104] the defendant's attorney was implicated in a crime, but one that was sufficiently distinct from the defendant's crime;[105] and the defendant's attorney was implicated in a similar crime, but was unaware of the investigations launched against him.[106] In none of these scenarios did the Second Circuit find that the conflict was so severe that reversal was required. Rather, unwaivable conflicts were only found when conflict created a *per se* adverse effect.[107]

III.
SCHWARZ EXPANDS THE WORLD OF UNWAIVABLE CONFLICTS

In *United States v. Schwarz*, the Second Circuit, whether intentionally or not, broadened the scope of unwaivable conflicts. In *Schwarz,* the appellate court held for the first time that a conflict was unwaivable even though it was not a conflict that created a *per se* adverse effect.

A. Facts of the Case

On August 9, 1997, Abner Louima was sexually assaulted in the bathroom of the 70th Precinct of the New York Police Department.[108] The primary perpetrator, Officer Volpe, pled guilty to the

104. United States v. Luciano, 158 F.3d 655 (2d Cir. 1998) (finding that because defendant could not receive a lower sentence under the guideline, there was no prejudice). The court did not consider whether a lawyer who was willing to enter into such an adversarial relationship with his client might not have violated his duty of loyalty during the trial itself, despite the defendant's claims that the lawyer was requiring additional fees to file motions on his behalf.

105. United States v. Rubirosa, 100 F.3d 943 (2d Cir. 1996) (unpublished opinion) (finding that the defense attorney was implicated in criminal charges, but not ones that were related to the crimes for which the defendant was prosecuted).

106. Reyes–Vejerano v. United States, 276 F.3d 94, 99–100 (1st Cir. 2002) (finding that because the defense attorney was not aware of the DEA's investigation against him, he could not be in the same kind of conflict situation as Fulton's lawyer).

107. Interestingly, the Second Circuit was either unaware of or not forthright about the connection between unwaivable conflicts and *per se* adverse effects. In its analysis of an unwaivable conflict case, the question the Second Circuit asked was whether the conflict is so bad that no rational person would knowingly and intelligently choose to have such person as their lawyer. United States v. Kliti, 156 F.3d 150, 153 (2nd Cir. 1998). *See also* United States v. Schwarz, 283 F.3d 76, 95–96 (2d Cir. 2002); United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994). This question is similar to that proposed by the Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 5 (2000).

108. *Schwarz,* 283 F.3d at 79.

charge of violating Louima's civil rights by sexually assaulting him. Louima, however, had testified that another officer, one that he could not positively identify, was involved in the assault. The government believed that Officer Charles Schwarz was this second officer.

Shortly after the assault, the PBA hired Steven Worth to represent Schwarz.[109] Thereafter, the government filed a motion to disqualify Worth, claiming he possessed severe conflicts of interest. Among these conflicts was the fact that his newly formed firm had obtained a ten million dollar retainer from the PBA and was planning to represent the PBA in a civil suit that had been filed by Louima.[110]

The trial court held two separate hearings to resolve the conflict issue. On September 11, 1998, the trial judge held a hearing in which he advised Schwarz of the risks presented by his attorney's conflicts. With regard to the PBA retainer the judge "informed Schwarz . . . that what occurred in the criminal case could have a significant effect on the civil case and that the testimony in the criminal case would be relevant to the civil case."[111] The court went on to observe that "it would be unrealistic to suppose that the beneficiaries of a ten million dollar contract, which evidently the firm hopes will be renewed in the year 2000, would be indifferent to the welfare of the PBA."[112] Five days later, after appointing independent counsel for Schwarz and giving him time to reflect on his intention to waive these conflicts, the trial court held a full *Curcio* hearing to determine the voluntary and knowing quality of the defendant's waiver.[113] The trial judge entered into a colloquy with Schwarz and elicited a narrative from him regarding his understanding of the potential conflicts that his attorney faced. Schwarz indicated that he understood the conflicts by stating, "I'm also aware of the contract my attorney has with the PBA. I know that there's another conflict with that . . . . There's a concern that possibly my attorney may have another agenda."[114] In short, the trial judge elicited an impeccable *Curcio* waiver from Schwarz.

109. *Id.* at 81.

110. *Id.* at 81–83. Worth had initially been hired by the PBA to represent Schwarz to "avoid conflicts of interest that might arise if the PBA's regular retained law firm were to represent multiple defendants. . . . The government took the position that the conflict resulting from the PBA retainer was so serious that it could not be waived." *Id.* at 81, 83.

111. *Id.* at 83 (citing Hr'g Tr. Dated Sept. 11, 1998, at 12–13).

112. *Id.* at 83 (citing Hr'g Tr. Dated Sept. 11, 1998, at 13).

113. *Id.* at 83 (citing Hr'g Tr. Dated Sept. 16, 1998, at 4).

114. *Id.* at 83–84 (citing Hr'g Tr. Dated Sept. 16, 1998, at 4).

Nevertheless, Schwarz appealed his subsequent conviction on an ineffective assistance of counsel claim. Schwarz argued that his waiver of his lawyer's conflict was invalid because the conflict was so severe that it was unwaivable.[115]

B. The Conflict

The conflict of interest identified by the Second Circuit related to the PBA's interest in the Louima civil suit:

> [T]he PBA's interest in defending against the civil lawsuit, which alleged that the PBA, through its agents . . . participated in a conspiracy to injure Louima and cover it up, [could diverge] from Schwarz's interest in putting on a defense that would implicate anyone other than Volpe as participating in the assault in the bathroom.[116]

Louima had always maintained that the assault in the bathroom involved two police officers. He identified one of these officers as Volpe, but had never been able to affirmatively identify the second officer.[117] Although there were some indications that Louima believed the officer was Schwarz, there was conflicting evidence that implicated a different officer who looked like Schwarz. However, at trial, Worth did not pursue a defense of mistaken identity. Instead, he argued that Officer Volpe was the only police officer in the bathroom. The problem was that this "strategic" decision of Worth's directly benefited his other client, the PBA. Pursuing the look-a-like defense would have had negative implications for the PBA in the civil suit, for it made the argument that Volpe acted as a rogue cop less tenable.

The appellate court found that Worth's decision to forego the mistaken identity defense was the direct result of the PBA retainer. The court stated that Worth had a personal interest in abstaining from pursuing a course to which the PBA might object because he could lose the ten million dollar retainer if the PBA was dissatisfied with his representation.[118] Furthermore, the court found that these duty of loyalty and self-interest conflicts manifested themselves when Worth abandoned the plausible alternative defense strategy

115. *Id.* at 80.

116. *Id.* at 91.

117. Although Louima had identified the second officer as the driver, and Schwarz had been driving the police car earlier in the evening, both Louima and other officers stated that Schwarz and another officer, Weise, looked very much alike. *Id.* at 85, 89.

118. *Id.* at 91, 92.

of a look-a-like defense.[119] For this reason, the court found that Schwarz had satisfied the requirement, set forth in *Cuyler v. Sullivan*, that a defendant show both actual conflict and adverse effect in making out an ineffective assistance of counsel claim due to a conflict of interest.[120]

C. Waiver

The Second Circuit stressed that a valid waiver would ordinarily defeat any claim of ineffective assistance of counsel. The court stated that "where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver."[121] Waivers would only be disregarded in one of two situations: when the conflict was unwaivable, or when the waiver was not knowing and voluntary, despite the existence of a *Curcio* hearing.

Addressing the issue of unwaivable conflicts, the Second Circuit stated that a conflict is unwaivable if no rational defendant would knowingly and intelligently desire that attorney's representation.[122] The court then pointed to *Fulton*'s articulation of the distinction between waivable and unwaivable conflicts.[123] In particular, the court reaffirmed the principle that when an attorney is implicated in the defendant's crime, the "fear of, and desire to avoid, criminal charges. . .will effect virtually every aspect of his or her representation."[124]

The Second Circuit then misconstrued its own analysis in *Fulton*. *Schwarz* wrongly treated *Fulton* as distinguishing between "conflicts that implicate the attorney's self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, [and noted] that the former are 'of a different char-

119. The fact that the *Schwarz* court found this conflict problematic is surprising, for *Fulton* had contemplated a situation in which a defendant, through a waiver of his attorney's conflict, gave up the right to pursue a particular defense, and concluded that this situation did not rise to the level of an unwaivable conflict. *See* United States v. Fulton, 5 F.3d 605, 613 (2d Cir. 1993).

120. *See supra* note 21.

121. *Schwarz*, 283 F.3d at 95. On appeal, Schwarz argued that if the court did find the conflict waivable, then it should still reverse because although he was aware of the PBA retainer, he was not made aware of this specific manifestation of the conflict. However, the Second Circuit rejected this line of reasoning.

122. *Id*.

123. *Id*. at 96.

124. *Id.* (citing United States v. Fulton, 5 F.3d 605, 613 (2d Cir. 1993)).

acter' than the latter."[125] The Second Circuit stated that *Fulton*'s finding of unwaivable conflicts turned upon the self-interested nature of the attorney's conflict. The court then asserted that *Fulton*'s rationale was equally applicable to the "unusual facts" presented in *Schwarz*, even though the conflict in *Schwarz* was not among the narrow category of conflicts that are *per se* violations of the Sixth Amendment under *Fulton*.

Fulton did not rely upon a distinction between "self-interested" versus "ethical" conflicts in the unwaivable conflict analysis. Instead, the *Fulton* court distinguished conflicts that existed when an attorney was engaged in a *crime* from other ethical conflicts. Indeed, the correct reading of *Fulton* can be assessed by looking at the portion of text that *Schwarz* cites in support of its faulty reading. *Fulton* states that "the conflict here involves a bias arising out of counsel's powerful self-interest *in avoiding criminal charges or reputational damage*."[126] The *Schwarz* court disregarded the italicized portion of *Fulton*'s argument, and in so doing disregarded the limitation that *Fulton* had imposed upon its holding. The self-interest in *Fulton* was the interest in avoiding criminal charges. Indeed, it was this highly unusual and significant element of criminality that led the court there to categorize the conflict as a *per se* violation of the Sixth Amendment. The self-interest in *Schwarz*, on the other hand, was merely financial. In finding this financial self-interest to be an unwaivable conflict, *Schwarz*, whether intentionally or not, significantly expanded the universe of unwaivable conflicts. The court's decision implies that although a financial self-interest conflict will not always be problematic, at a certain point such a conflict completely undermines the integrity of the trial process.[127] Thus, although a financial conflict is not itself a *per se* violation of the Sixth Amendment, it can become so extreme that the very fact that a lawyer possesses such a conflict can establish a violation of the Sixth Amendment.

D. New Breed of Unwaivable Conflict

Schwarz's expansion of the class of unwaivable conflicts is in some respects appealing. Serious conflicts of interest exist in situa-

125. *Id.*

126. Fulton, 5 F.3d at 613 (emphasis added).

127. *Schwarz,* 283 F.3d at 96 (The court found that the conflict created by the ten million dollar contract rendered Fulton's rationale of unwaivable conflicts "applicable to the unusual facts of this case . . . . We must assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, Worth would sacrifice Schwarz's interest for those of the PBA.").

tions beyond those described by *per se* violations. Indeed, the ABA's Model Rules of Professional Conduct state that a conflict should be considered non-waivable not only if the conflict is a *per se* violation, but also if a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances."[128] The premise is that when a severely conflicted lawyer continues to represent a defendant, the integrity of the trial is compromised because a defendant's right to effective assistance of counsel is compromised. In these situations, a reversal is warranted not only because of the likelihood of harm to the defendant, but also because of the appearance that the conviction was not fairly acquired. The constitutional violation here creates a structural error as opposed to a trial error, and as a result reversal should be mandatory.

In determining whether a conflict is unwaivable, the inquiry *should* revolve around the severity of the conflict. If this inquiry reveals that a conflict is so severe that it is considered unwaivable, then the conviction should be reversed without regard to the effect that such a conflict produces at trial. Furthermore, the severity of the conflict is not affected by what actually occurs at trial; an unwaivable conflict will not become waivable if it fails to adversely affect the defendant. Because the analysis does not turn on the actual prejudice suffered at trial, but rather the structural harm that the conflict creates, a harmless-error analysis is completely irrelevant.

This is not, however, how *Schwarz* proceeded analytically. *Schwarz* addressed the issue of waiver only after it identified an actual conflict and an adverse effect.[129] It is unclear why the Second Circuit proceeded in this fashion. A skeptic might claim that the intent of the Second Circuit was to remain under the radar of a conservative Supreme Court that is loath to forego a harmless-error analysis. However, it is more likely that the Second Circuit underestimated the significance of finding that an unwaivable conflict that did not create a *per se* adverse effect would still compel reversal despite an impeccable *Curcio* waiver. To be fair to the *Schwarz* court, the irrelevance of the adverse effect showing was not clear in *Fulton* because in that case an adverse effect already existed *per se*.[130] Because there was a finding of both a *per se* conflict and an unwaivable

128. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 5 (2000).

129. *Schwarz,* 283 F.3d at 91–97.

130. *Fulton*, 5 F.3d at 612 ("Lateju's allegations that lead trial counsel was engaged with him in heroin trafficking created an actual conflict of interest of the sort that requires application of the *per se* rule, and therefore, Fulton need not

conflict in *Fulton*, it was unclear if and how these findings were independent of each other. In the end, however, *Schwarz*'s unwaivable conflicts do not make any sense analytically unless they establish structural Sixth Amendment violations that compel reversal without regard to how the conflict adversely affected the defendant at trial; after all, in these situations the defendant had waived his right to be free from such an adverse effect.

E. Mickens *Forecloses the Expansion of Unwaivable Conflicts*

Unfortunately, this alternative approach to unwaivable conflicts, and consequently structural defects, has been foreclosed by the Supreme Court's recent ruling in *Mickens v. Taylor*.[131] In deciding that the conflict in *Mickens* was merely "theoretical" and did not warrant reversal, the Supreme Court signaled its reluctance to recognize new forms of structurally defective conflicts.[132]

1. Facts

Mickens was convicted for the murder and forcible sodomy of Timothy Hall.[133] Mickens petitioned for a writ of habeas corpus, alleging that he was denied the effective assistance of counsel because his court-appointed trial counsel, Mr. Saunders, maintained a conflict of interest during trial: Mr. Saunders represented the victim, Mr. Hall, in a criminal matter up until the day of Mr. Hall's death.[134] Saunders never disclosed this information to Mickens, his co-counsel, or the court, so there was no finding that Mickens had waived his right to conflict-free counsel.[135] Additionally, the trial court failed to inquire into the potential conflict despite the fact that the same judge had dismissed the unrelated charges against Hall three days before appointing Saunders to Mickens's case.[136] The federal district court denied habeas relief, stating that Mickens failed to show that the conflict adversely affected his lawyer's repre-

prove that his representation was adversely affected to establish a Sixth Amendment violation.").

131. Mickens v. Taylor, 122 S. Ct. 1237 (2002).

132. *Id.* at 1243, 1247.

133. *Id.* at 1239.

134. *Id.* at 1239–40.

135. *Id.* at 1240.

136. *Id.* Hall's body was discovered on March 30, 1992, and four days later a juvenile court judge dismissed the charges against him, noting on the docket sheet that Hall was deceased. The one–page docket sheet also listed Saunders as Hall's counsel. On April 6, 1992, the same judge appointed Saunders to represent petitioner. *Id.*

sentation.[137] The question before the Supreme Court was what effect the trial court's failure to inquire into a potential conflict had on the defendant's attempt to obtain a reversal: that is, would the defendant need to show only that his lawyer was subject to a conflict of interest, or would he also have to show that the conflict adversely affected counsel's performance.[138] The *Mickens* majority held that a theoretical conflict, one that was not shown to have adversely affected the defendant, was not sufficient to establish that a defendant had been deprived of his constitutional right to effective assistance of counsel.[139]

2. The Dissent

The dissenting Justices disagreed with the majority's functional trial error approach. The dissenters argued that the structural defect created by this type of conflict caused the judicial system to appear fundamentally unfair, and that the destruction of the perceived fairness of the system required reversal of the conviction. Justice Breyer advocated for a structural approach, arguing that the appearance that the proceeding will not be fundamentally fair "together with the likelihood of prejudice in the typical case, are serious enough to warrant a categorical rule—a rule that does not require proof of prejudice in the individual case."[140] This senti-

137. *Id.*

138. *Id.* The fact that the district court did not find an adverse effect is shocking, for there was ample evidence that Saunders' representation was compromised. Saunders failed to submit evidence that Hall had been involved as a male prostitute. This was particularly damaging because if the sex were consensual then it could not have qualified as felony murder and Mr. Mickens would not be facing the death penalty. Additionally, the trial attorney failed to cross-examine the victim's mother, Ms. Hall, when she testified about her loss, even though he knew that she had filed charges against her son for assault. This failure to find an adverse effect is even more appalling when juxtaposed with the "adverse effect" found in *Schwarz*. In *Schwarz* the defense attorney merely failed to present an alternative defense theory. Under most circumstances, the court would not second–guess this type of strategic choice. Indeed, in a concurring opinion in *Mickens*, Justice Kennedy wrote that "as a reviewing court, our role is not to speculate about counsel's motives or about the plausibility of alternative litigation strategies." *Id.* at 1246. For a discussion on the varying standards of finding adverse effect see *supra* note 22. R

139. *Id.* at 1238, 1241–42, 1245.

140. *Id.* at 1265 (Breyer, J., dissenting) (citing Arizona v. Fulminate, 499 U.S. 279, 310 (1991)). Justice Breyer further wrote:

> The Commonwealth complains that this argument "relies heavily on the immediate visceral impact of learning that a lawyer previously represented the victim of his current client." And that is so. The "visceral impact," however, arises out of the obvious, unusual nature of the conflict. It arises from the fact

ment was reiterated by Justice Stevens who wrote: "'Justice must satisfy the appearance of Justice.' Setting aside Mickens' conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases."[141] In pointing out the structural inequity that Saunders's conflict created, the dissenting Justices were also emphasizing that the Sixth Amendment is more than just a right which springs from defects detected in the outcome of a trial.[142] Rather, "the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings."[143] Interestingly enough, these same arguments were set forth in *United States v. Wheat*, which established the first breed of unwaivable conflicts.[144] Indeed, *Wheat* allowed the subversion of the Sixth Amendment right to counsel of choice absent a showing of actual conflict precisely because of the institutional interests in the apparent fairness of a trial.[145]

In spite of these obvious parallels with precedent, the majority in *Mickens* found that the case did not warrant reversal in the absence of a finding of adverse effect at trial.[146] The Supreme Court

> that the Commonwealth seeks to execute a defendant, having provided that defendant with a lawyer who, only yesterday, represented the victim. In my view, to carry out a death sentence so obtained would invariably "diminis[h] faith" in the fairness and integrity of our criminal justice system. That is to say, it would diminish that public confidence in the criminal justice system upon which the successful functioning of that system continues to depend.

Id. (internal citations omitted).

141. *Id.* at 1253 (Stevens, J., dissenting) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

142. *Id.* at 1262–63 (Souter, J., dissenting).

143. *Id.* at 1253 n. 12 (Stevens, J., dissenting) ("This Court in *Strickland* held that a specific 'outcome–determinative standard' is 'not quite appropriate' and spoke instead of the Sixth Amendment right as one against assistance of counsel that 'undermines the reliability of the result of the proceeding' or 'confidence in the outcome.'").

144. United States v. Wheat, 486 U.S. 153, 160 (1988).

145. *Id.* at 160 ("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.").

146. *Mickens*, 122 S. Ct. at 1245. The majority states that a conflict of interest does not create a Sixth Amendment violation until there is a showing of an adverse effect. "[W]e have used 'conflict of interest' to mean a division of loyalties *that affected counsel's performance*." *Id.* at 1244 n.5 (emphasis in original). It must be noted, however, that if there is not *real* conflict of interest unless there is an *actual effect* on counsel's performance, then the Court should rethink its holding in *Wheat*. Otherwise, the Court is allowing the subversion of a defendant's Sixth Amendment right to counsel for a set of "independent concerns" that are not even of "constitutional" import.

was unwilling to see how Saunders's conflict was so severe that it crossed a line and became structurally, as opposed to functionally, defective. In this way the Court signaled its unwillingness to open the door to new forms of structurally defective conflicts of interest.[147]

After *Mickens*, *Schwarz* cannot be understood as establishing a new breed of unwaivable conflicts that remedy structural defects. Instead, *Schwarz* can only be understood as compelling reversal in situations where the conflict is severe *and* an adverse effect has been established. This reading of *Schwarz* is problematic on many fronts. First, as discussed above, if a conflict is unwaivable because of the way in which it affects the judicial system structurally, then analytically, a requirement of actual harm is out of place.[148] Second, because the justification for reversal is no longer the existence of a structural harm, the impetus behind the Second Circuit's expansion of the category of unwaivable conflicts no longer appears principled. Instead, the conflict in *Schwarz* warrants reversal because it is *severe* and because it *harmed* the defendant. Not only is it extremely difficult for the trial judge to discern which conflicts met the requisite standard of severity, but in addition, a trial judge will not know during the pre-trial disqualification stage whether or not a particular conflict will create actual harm.[149] As the Court stated in *Wheat:*

> [A] district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place,

147. The Supreme Court may have been reluctant to see how this conflict was structurally defective because it did not know how to demarcate the line between structural and functional defects and was worried that finding all successive representations to be structurally defective would cripple small Public Defender Offices. Indeed, in oral argument one Justice asked, "In the U.S.—in the Public Defender's Office, couldn't this situation arise fairly frequently? Sometimes in a small office, somebody in the office would have represented a victim many years before on a totally different matter." Official Transcript at 2, Mickens v. Taylor, 2001 U.S. TRANS LEXIS 64, 122 S. Ct. 1237 (2002) (no. 00–9285). However, there are differences between Mr. Saunders's representation of Walter Mickens and the representation by a lawyer who represented the victim five years previously in an unrelated matter. The majority, however, did not get into the business of differentiating between these two scenarios.

148. *See supra* section II.B.

149. *Wheat*, 486 U.S. at 162–63 ("The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.").

> but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly.[150]

Schwarz creates uncertainty as to when a defendant's proffered waiver may or may not be accepted and, as a result, a trial judge will be less confident about allowing a defendant to go forward with his conflicted, but chosen, counsel. In creating such a system, *Schwarz* resurrects the concerns originally raised in response to *Wheat*. As mentioned above, many critics were concerned that the weak appellate review endorsed by *Wheat* would allow trial courts to undervalue a defendant's right to counsel of choice when making a pretrial evaluation of a potential conflict.[151] This is because when *Wheat* advised that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest" it signaled that a trial court would more likely be reversed for ignoring a potential conflict of interest than for failing to accept a defendant's proffered waiver of such conflict.[152] This concern was in large part ameliorated by the fact that when a trial court decided to accept a defendant's waiver, it was generally able to insulate itself from reversal by conducting a thorough *Curcio* waiver.[153] However, *Schwarz* nearly eviscerates the effectiveness of a defendant's waiver of his lawyer's conflict by creating a system in which a defendant's ability to waive his right to conflict-free counsel turns on what occurs at trial. In so doing, *Schwarz* readjusted the balance between a defendant's choice of counsel and the court's independent interest in disqualifying conflicted attorneys to the detriment of the defendant.

CONCLUSION

One reading of *Schwarz* sees the Second Circuit expanding the universe of unwaivable conflicts by including conflicts that do not create a *per se* adverse effect. Under this reading, *Schwarz* would provide an avenue for structural defects to be remedied by reversal. However in *Mickens,* the Supreme Court held that the conflict held by the petitioner's lawyer did not warrant reversal, despite the fact that a group of experts in legal ethics, acting as amici curiae, asserted that this conflict would be considered unwaivable under the ABA's standards.[154] For this reason, a reading of *Schwarz* in which

150. *Id.* at 162.

151. *See supra* text accompanying notes 53–64.

152. *Wheat*, 486 U.S. at 163.

153. *See supra* text accompanying notes 31–36, 64.

154. Brief of Legal Ethicists and the Stein Center for Law and Ethics as *Amici Curiae* in Support of Petitioner at 15–17, Mickens v. Taylor, 122 S. Ct. 1237 (2002) (no. 00–9285). The amici ultimately argue that the conflict should be considered

structural defects are recognized and remedied without a showing of actual harm is no longer viable. However, the case law that existed prior to *Schwarz* remains good law because in cases such as *Fulton* the adverse effect is already established in that it exists *per se*.

It is important to recognize, however, that *Schwarz* does more than present either a defunct or unprincipled expansion of the unwaivable conflict doctrine. *Schwarz*, as it stands, will jeopardize a defendant's right to counsel of choice. Before *Schwarz*, trial courts were given broad discretion in their decision to either disqualify or accept a proffered waiver. There were only two instances in which this determination was overturned by the appellate court: if the judge accepted a waiver that was not knowing and intelligent or if the judge accepted a waiver when the conflict was unwaivable (because it created a *per se* adverse effect). Although there were instances in which the defendant's right to counsel of choice was not given sufficient weight, trial courts generally took both Sixth Amendment interests seriously. In the wake of *Schwarz*, however, trial courts will no longer feel insulated by a thorough *Curcio* waiver. Instead, trial courts will fear reversal on a much more frequent and unpredictable basis because the line demarcating when it is permissible to accept a waiver and when it constitutes an abuse of discretion is no longer clear. Indeed, because the unwaivable conflict will also require a showing of actual harm, something that does not exist until the actual trial (and thus not until *after* the trial judge has made his decision whether to disqualify), a trial judge has no way to feel confident about a decision to allow a defendant to go forward with his conflicted, but chosen, counsel. Consequently, disqualification will become the safer, and therefore preferred, course of action. As a result, many *waivable* conflicts will be subsumed into the unwaivable category, and many lawyers will be unjustifiably disqualified. In this way, *Schwarz* dilutes a defendant's right to counsel of choice beyond its already weak post-*Wheat* state.

Both because a principled reading of *Schwarz* is in conflict with the Supreme Court's decision in *Mickens*, and because a viable reading results in a subordination of a defendant's right to counsel of choice, *Schwarz* should not become part of the Second Circuit's ju-

unwaivable not only because it created a structural defect, but also because it would be impossible for someone in Saunders's position to provide Mickens with the information he needed in order to make a knowing and voluntary waiver without simultaneously violating a duty of loyalty to another client, in this case Mr. Hall. *Id.* Some argue that after Mickens, this method of insisting on disclosure standards that are impossible for a lawyer to meet is the only viable way to think about the unwaivable conflict doctrine.

risprudence on unwaivable conflicts. Instead, the Second Circuit should continue, as it had before *Schwarz*, to find unwaivable conflicts in the post-conviction stage only when the conflict at issue belongs to that narrow class of conflicts that result in a *per se* violation of the Sixth Amendment.