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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. SCOTT ALLEN JONES, Defendant and Appellant.	C029333 (Super. Ct. No. 94F1672)

An indigent criminal defendant has no constitutional right to the appointment of a particular attorney. I conclude, however, that once an indigent defendant establishes an attorney-client relationship with his court-appointed counsel, and counsel is willing and able to continue that representation, the state constitutional right to counsel of choice forecloses a California court, except in narrow circumstances, from removing that attorney because of a potential conflict of interest if the defendant objects and is willing to make appropriate waivers.

 SEE CONCURRING OPINIONS

Those narrow circumstances are flagrant attorney misconduct or incompetence, attorney incapacity, significant prejudice to the defendant, or serious circumstances that undermine the integrity of the judicial process and the orderly administration of justice.

The state constitutional right to counsel of choice in the retained context envisions a choice *to hire* a particular attorney, while that right in the appointed context envisions a choice *to continue* with the appointed attorney. Thus, an indigent criminal defendant in an established attorney-client relationship has the same right to waive a potential conflict regarding his appointed attorney as a nonindigent defendant has regarding his retained attorney.

I find that none of the narrow circumstances apply here; and that the trial court erred in removing appointed counsel for a potential conflict, over the defendant's objection and without allowing him a chance to waive that conflict. I also conclude that because defendant did not pursue a timely writ to rectify this error, the standard of harmless error applies, and the error was harmless here.

As a prelude to my discussion, I briefly note the following.

Defendant Scott Allen Jones was charged with murder. Appointed counsel Gary Roberts (Roberts) represented defendant from the outset and this relationship continued for over two years, including the litigation of several significant pretrial issues. When the trial court found that Roberts had a potential

conflict of interest, the court removed Roberts as defendant's counsel. Defendant adamantly opposed this removal. The trial court did not give defendant a chance to waive any conflicts.

Roberts had formerly represented a client that Roberts wished to investigate as a possible suspect on the murder charge facing defendant. This former representation had been minimal, it was completely unrelated to defendant's case, and it involved no information that could be used in defendant's case. New counsel was appointed for defendant, and the case subsequently proceeded to trial.

A jury convicted defendant of first degree murder. On appeal, defendant contends the trial court violated his constitutional right to counsel by removing Roberts as his attorney over his objection. I agree as the contention pertains to the state constitutional right to counsel of choice. I find the error harmless, however.

DISCUSSION

1. The Conflict Facts and Procedural Background

Boyd Wagner, 92, was murdered in his home in February 1992. Defendant, a neighbor of Wagner's, was arrested and charged with the murder in March 1994. Roberts was appointed at this time to represent defendant. At the time, Roberts's law office served as the public defender's office.

The case against defendant was built on circumstantial evidence, including DNA evidence from a disputed pair of pants found in defendant's bedroom. Roberts engaged in extensive

pretrial litigation on DNA issues, as well as issues concerning discovery, suppression and other evidentiary matters.

On February 29, 1996, nearly two years into his representation of defendant, Roberts informed the trial court ex parte that Michael Wert (Wert) was a "very speculative" suspect in the case. There was animosity between defendant and Wert over a romantic relationship Wert had had with defendant's wife. Apparently Wert had tried to assault defendant. According to Roberts, Wert had a motive to "frame" defendant. Roberts had once represented Wert on a minor, unrelated matter. Roberts's last contact with Wert had been "a long time ago."

Roberts also raised another theory, the possible involvement of Joshua F. and Derrick L., as part of a larger group, in the murder. Roberts at this point did not "have any idea" whether Joshua F. was involved in the Wagner murder, and apparently felt the same about Derrick L.'s possible involvement. When Roberts's office was the public defender's office, one of his colleagues had represented Joshua F. and Derrick L. separately in brief, pro forma juvenile proceedings unrelated to the Wagner murder.

Roberts told the court that neither he nor his office had received any communication from Joshua F., Derrick L., or Wert that could be used in defendant's case or that would present any problem in representing defendant.

After discussing the issues of conflict and waiver with defendant, and noting that Wert may have to waive as well at some point, the trial court appointed an independent attorney

to advise defendant on these issues. Defendant opted to continue with Roberts as his counsel. Roberts said he was fully ready, willing and able to continue that representation. The trial court concluded that no change of counsel was necessary.

Two weeks later, on March 14, 1996, Roberts informed the court ex parte that he had spoken with two people knowledgeable in the area of conflicts of interest. They saw no conflict regarding Michael Wert, Joshua F., or Derrick L., because no relevant confidential communications were at issue in any way. As to Joshua F. and Derrick L., there were essentially no communications. As to Wert, there were perhaps one or two jail holding cell conferences with Roberts. Roberts assured the court that no attorney-client confidences involving him or his office and any of these three people "have been used, or would be used, or will be used in [defendant's] case."

Roberts's representation of Wert posed the only representational issue worth discussing. The nature of that representation was as follows. A month and a half before Roberts was appointed as defendant's attorney, he had represented Wert. Wert had violated his probation on a drug offense by "walking away." Roberts negotiated a deal that if Wert admitted the probation violation, the authorities would not pursue the walk-away escape charge. Wert took the deal and went to prison for four years. Roberts received a call from Wert's wife after having been appointed defendant's attorney; she wanted to know whether the walk-away charge had been dismissed.

Roberts wrote a letter to Michael Wert in prison in June 1994 confirming the dismissal.

Roberts assured the trial court that he did "not feel inhibited to any degree in pursuing the defense of [defendant] because of any concerns . . . regarding [his] prior representation of Mr. Wert."

At another ex parte proceeding approximately three months later, Roberts informed the trial court that he had discovered that Wert had been released from the Shasta County Jail after posting a substantial bail just a few days before Wagner's murder. This provided a suspicious chronology and a robbery motive for Wert, in addition to the animosity and physical confrontations between Wert and defendant (these confrontations included Wert's attempt to assault defendant, defendant's alleged assault of Wert, and Wert's brother's alleged assault of defendant).

Roberts again assured the trial court that nothing that he would use against Wert in defendant's case had resulted from his previous attorney-client relationship with Wert. The trial court suggested that defendant might complain that Roberts had not adequately investigated Wert because Roberts had formerly represented him. Roberts also noted that he had a pending job offer. Roberts stated that he would not abandon defendant over the job offer, and that his prospective employer had said it "would be very accommodating" if he had professional responsibilities with defendant's case in the transition. Defendant wanted Roberts to continue as his counsel, stating

"I don't want to lose [Roberts]. Gone this far, you know." Roberts had noted at the March 14 hearing that it would be emotionally and legally devastating for defendant to "have some other lawyer step in in this case."

The trial court took the matter under submission. Two days later, on June 26, 1996, the court ruled that Roberts had a conflict of interest and that new counsel would be appointed.

Defendant immediately sought and was granted an ex parte hearing.

At the ex parte hearing, Roberts explained that it was unlikely that Michael Wert would be called to testify in this case. The trial court was more concerned that Wert's status as a former client of Roberts would somehow hinder Roberts's investigation of Wert. Defendant noted that if the Wert defense were never raised, he would lose Roberts as his attorney over nothing. Defendant said he did not want to pursue Wert as a suspect. The trial court responded that defense counsel controlled this aspect, and had to pursue Wert if that was in the best interests of the defense. Roberts was removed as defendant's counsel, and new counsel was appointed.

"Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."[1]

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[1] *People v. Bonin* (1989) 47 Cal.3d 808, 835 (*Bonin*).

"Conflicts spring into existence in various factual settings."[2] For example, a conflict may arise when an attorney represents a defendant in a criminal matter and formerly represented a person who is a witness in that matter, or, as here, who is a potential suspect in that matter.[3] "Such a conflict springs from the attorney's duty to provide effective assistance to the defendant facing trial and his fiduciary obligations to the witness [or potential suspect] with whom he . . . had a professional relationship."[4]

"'Few precepts are more firmly entrenched than that the fiduciary relationship between attorney and client is of the very highest character [citations] and, even though terminated, forbids (1) any act which will injure the former client in matters involving such former representation or (2) use against the former client of any information acquired during such relationship. [Citation.] Under the promulgated rules governing professional conduct, which apply in criminal and civil cases alike [citation], the ethical prohibition against acceptance of adverse employment involving prior confidential information includes *potential as well as actual use* of such previously acquired information. [Citation.]'"[5]

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[2] *Bonin, supra,* 47 Cal.3d at page 835.

[3] *Bonin, supra,* 47 Cal.3d at page 835.

[4] *Bonin, supra,* 47 Cal.3d at page 835, citing *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 538 (*Leversen*).

[5] *People v. Thoi* (1989) 213 Cal.App.3d 689, 699, quoting *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 675 (*Yorn*);

There has never been an issue here that Roberts would injure Wert, Joshua F., or Derrick L., "in matters involving [Roberts's or his office's] former representation" of these three people. Roberts represented Wert on a minor, unrelated matter involving a violation of probation before Roberts was appointed defendant's counsel. Roberts's office made a brief, pro forma appearance on Joshua F.'s behalf in an unrelated juvenile matter. And the record discloses that any representation of Derrick L. did not even rise to either of these levels.

More importantly here, the record shows that Roberts could not have used against Joshua F., Derrick L., or Wert, any information acquired during Roberts's or his office's relationship with them. As to Joshua F. and Derrick L., the record shows there was essentially no substantive information communicated. As to Wert, the record is clear there was no information acquired during their attorney-client relationship that Roberts could have used against Wert in defendant's case.

From defendant's perspective, the record shows that Roberts's representation of Wert would not have hampered his representation of defendant. Roberts assured the trial court that he did not feel hindered in any way in investigating Wert and presenting him as a suspect on the murder charge facing defendant. Roberts reiterated that he did not feel inhibited

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accord, *Leversen, supra,* 34 Cal.3d at page 538; Rules of Professional Conduct, rule 3-310(E); Business and Professions Code section 6068, subdivision (e).

to any degree in pursuing defendant's defense because of his prior representation of Wert.

The law, however, presumes a conflict where there has been a substantial attorney-client relationship with the former client, especially where relevant confidential information might have been imparted; this presumption includes the potential, as well as actual, use of confidential information.[6] The record does not display this variety of conflict. As for Joshua F. and Derrick L., the record shows no substantial attorney-client relationship between them and Roberts's office. As for the attorney-client relationship of Wert and Roberts, that relationship, like the relationship in *Vangsness*, "was minimal and dealt with matters unrelated to . . . the [defendant's] proceeding."[7] The record does not show any relevant confidential information that might have been imparted during Roberts's representation of Wert for use in defendant's case. Similar to the conclusion reached in *Vangsness*, "we see no basis to presume th[at] [Roberts] possess[ed] 'relevant confidential information' obtained from [Wert] in the face of [Roberts's] staunch denial."[8]

Although there was no actual or presumed conflict at the time the trial court removed Roberts as defendant's counsel over his objection, potential conflict hung in the shadows

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[6] *Vangsness v. Superior Court* (1984) 159 Cal.App.3d 1087, 1090 (*Vangsness*).

[7] *Vangsness, supra,* 159 Cal.App.3d at page 1090.

[8] *Vangsness, supra,* 159 Cal.App.3d at page 1090.

as to Wert. Had Roberts's investigation of Wert ripened into a viable defense theory, Roberts may have begun to feel uneasy about vigorously pursuing Wert, his former client, and Wert himself may have been called to the stand at some point. It bears repeating, though, that the attorney-client relationship of Roberts and Wert was minimal and dealt with matters that had no relevance to the current proceeding. So long as Roberts did not do anything to injure Wert in matters involving the former representation, and did not use against Wert any information acquired during their attorney-client relationship (and the record shows this would have been the case), Roberts was on solid ground as to Wert. As for the view from defendant's position, he could have waived any potential conflicts involving the effectiveness of Roberts's investigation or trial examination of Wert. Although the record shows that defendant wanted to so waive, the trial court denied him that chance and removed Roberts as defendant's counsel.

2. The California Standard Governing a Judge's Discretion to Remove Potentially Conflicted Counsel and Application of that Standard

Under both the federal and state Constitutions, a defendant in a criminal case has a right to the effective assistance of counsel.[9]

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[9] United States Constitution, Sixth Amendment; California Constitution, article I, section 15; *Bonin, supra,* 47 Cal.3d at pages 833-834.

The right to the effective assistance of counsel includes the right to conflict-free counsel and the right to counsel of choice.[10] In the retained attorney context, the right to counsel of choice encompasses the right to choose a particular attorney to hire.[11] In the appointed attorney context, an indigent criminal defendant does not have a right to choose a particular attorney to be appointed;[12] but an indigent defendant in California does have a right to choose to continue representation with an appointed counsel in an established attorney-client relationship unless certain circumstances are present.[13] The question is how a California court is to reconcile sometimes competing considerations between the right to conflict-free counsel and the right to counsel of choice.

In *Wheat v. United States*, the United States Supreme Court concluded that trial courts have broad discretion under the federal Constitution's right to counsel (Sixth Amendment) to remove (recuse) a criminal defense attorney

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[10] *Bonin, supra,* 47 Cal.3d at page 834; *People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*); *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612-613 (*Maxwell*); *People v. Peoples* (1997) 51 Cal.App.4th 1592, 1597 (*Peoples*).

[11] *Courts, supra,* 37 Cal.3d at page 789; *Maxwell, supra,* 30 Cal.3d at pages 613-614.

[12] *Harris v. Superior Court* (1977) 19 Cal.3d 786, 795-796 (*Harris*); *Alexander v. Superior Court* (1994) 22 Cal.App.4th 901, 915.

[13] *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561-562 (*Smith*); *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697 (*Cannon*); *Maxwell, supra,* 30 Cal.3d at pages 613-615; *People v. Daniels* (1991) 52 Cal.3d 815, 846 (*Daniels*).

facing a potential conflict regardless of a defendant's desire to waive the conflict.[14] *Wheat* concluded that the Sixth Amendment is concerned more with effective representation than with preferred representation, and giving trial courts broad discretion on this issue avoids them being "whipsawed" by assertions of error no matter which way they rule.[15] As the *Wheat* court put it: "[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."[16]

Thus, the United States Supreme Court, in construing the Sixth Amendment to the federal Constitution, has emphasized the right to conflict-free counsel where it collides with the right to counsel of choice.

In contrast, in a long line of decisions that started before *Wheat* and have continued after it, the California Supreme Court has concluded that while California judges have discretion to remove, over objection, a criminal defense attorney in order to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment

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[14] *Wheat v. United States* (1988) 486 U.S. 153, 162-164 [100 L.Ed.2d 140] (*Wheat*).

[15] *Wheat, supra,* 486 U.S. at pages 159, 161.

[16] *Wheat, supra,* 486 U.S. at page 159.

of court proceedings, that discretion is "severely limited."[17] The narrow circumstances in which removal may occur are "flagrant" attorney misconduct or incompetence, attorney incapacity, "significant prejudice" to the defendant, or serious circumstances that undermine "the integrity of the judicial process" and the "orderly administration of justice."[18]

The basis for this "severely limited" discretion was articulated in the 1966 state Supreme Court decision in *Crovedi* as "a value additional to that [of] insuring reliability of the guilt-determining process. [The concern is] not only with the state's duty to insure 'fairness' in the trial, but also with the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command."[19] "[T]hat desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself

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[17] *People v. McKenzie* (1983) 34 Cal.3d 616, 629-630 (*McKenzie*); *Cannon, supra,* 14 Cal.3d at page 697; *Maxwell, supra,* 30 Cal.3d at pages 613-615; *Daniels, supra,* 52 Cal.3d at page 846; see also *People v. Crovedi* (1966) 65 Cal.2d 199, 206-208 (*Crovedi*); *Smith, supra,* 68 Cal.2d at pages 559, 561-562; *Ingram v. Justice Court* (1968) 69 Cal.2d 832, 840-841 (*Ingram*); *People v. Durham* (1969) 70 Cal.2d 171, 190-191 (*Durham*); *People v. Lucev* (1986) 188 Cal.App.3d 551, 556-557 (*Lucev*).

[18] *McKenzie, supra,* 34 Cal.3d at pages 629-630; *Cannon, supra,* 14 Cal.3d at page 697; *Maxwell, supra,* 30 Cal.3d at pages 613-615; *Daniels, supra,* 52 Cal.3d at page 846; *Crovedi, supra,* 65 Cal.2d at page 208; *Smith, supra,* 68 Cal.2d at page 559; *Peoples, supra,* 51 Cal.App.4th at page 1599; *People v. Smith* (1970) 13 Cal.App.3d 897, 907.

[19] *Crovedi, supra,* 65 Cal.2d at page 206.

or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."[20]

This principle of "severely limited" discretion to involuntarily remove criminal defense counsel "manifests a value seeking to insure respect for the dignity of the individual" and implicates the concept of due process in the right of counsel.[21] "The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of . . . constitutional rights."[22] In short, a "'[d]efendant's confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible,'" so long as the defendant is fully informed about and waives his right to conflict-free counsel.[23]

This principle of "severely limited" discretion has been applied not only to retained counsel but to appointed counsel as well, most prominently in the state high court's decision in *Smith.*[24] *Smith* recognized that *Crovedi* involved retained counsel, while the case before it involved appointed counsel.

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[20] *Crovedi, supra,* 65 Cal.2d at page 208.

[21] *Crovedi, supra,* 65 Cal.2d at page 206; *Lucev, supra,* 188 Cal.App.3d at page 556.

[22] *People v. Ortiz* (1990) 51 Cal.3d 975, 982 (*Ortiz*).

[23] *Courts, supra,* 37 Cal.3d at page 789, quoting *Maxwell, supra,* 30 Cal.3d at page 615; *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 956-958 (*Alcocer*); *People v. Burrows* (1990) 220 Cal.App.3d 116, 119-126 (*Burrows*).

[24] *Smith, supra,* 68 Cal.2d at pages 559, 561-562; see *Durham, supra,* 70 Cal.2d at pages 190-191; *Cannon, supra,* 14 Cal.3d at page 697; *Daniels, supra,* 52 Cal.3d at page 846.

Smith also recognized that an indigent defendant has no right to the appointment of any particular attorney.[25] In the context of this distinction between retained and appointed counsel, the *Smith* court recognized a right to counsel of choice in the appointed context involving an established attorney-client relationship (i.e., a right to continued representation) and stated:

"[W]e must consider whether a court-appointed counsel may be [removed], over the defendant's objection, in circumstances in which a retained counsel could not be removed. A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary: it involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. . . . It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship

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[25] *Smith, supra,* 68 Cal.2d at page 561; see *People v. Hughes* (1961) 57 Cal.2d 89, 98-99, cited by *Smith*.

to an unwarranted and invidious discrimination arising merely from the poverty of the accused."[26]

Subsequent state Supreme Court decisions have briefly noted *Smith*'s recognition of the right to counsel of choice (i.e., right to continued representation) in the context of an appointed counsel in an established attorney-client relationship.[27] In *Cannon*, the state Supreme Court characterized *Smith* as "mak[ing] it abundantly clear that the involuntary removal of any attorney [appointed or retained] is a severe limitation on a defendant's right to counsel and may be justified" only in certain narrowly defined circumstances.[28] A state Supreme Court decision issued nearly three years after *Wheat--Daniels*--quoted with approval this passage from *Cannon.*[29]

These state Supreme Court decisions on the "severely limited" judicial discretion to involuntarily remove defense counsel are tethered to the state constitutional right to counsel provision, though not exclusively so.[30] For example, in *Crovedi*--the decision which first articulated the dignity-affirming value underlying what would become the "severely limited" principle--the court characterized the issue before

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[26] *Smith, supra,* 68 Cal.2d at pages 561-562, see also page 559.

[27] *Ingram, supra,* 69 Cal.2d at pages 840-841; *Durham, supra,* 70 Cal.2d at pages 190-191.

[28] *Cannon, supra,* 14 Cal.3d at page 697.

[29] *Daniels, supra,* 52 Cal.3d at page 846.

[30] California Constitution, article I, section 15.

it as "whether defendant Crovedi was denied his right to the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution, and article I, section 13 [now § 15], of the state Constitution."[31] *Smith*, which extended the *Crovedi* value to the appointed attorney context of continued representation, noted that defendant Smith's argument was based on the right to counsel provisions of the federal and state Constitutions; and *Smith* couched its conclusion in the generally phrased "constitutional guarantee of the defendant's right to counsel . . . ."[32] *Cannon*, in characterizing *Smith*, noted "that the involuntary removal of any attorney is a severe limitation on a defendant's right to counsel . . . ."[33]

Most significantly for purposes of focusing on the state Constitution is the state high court's decision in *Maxwell*. *Maxwell* was one of the first decisions, if not the first, to articulate expressly the "severely limited" principle, and it did so in a discussion that cited only the state constitutional right to counsel provision as its constitutional component.[34] Finally, in *Daniels*, a case decided almost three years after

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[31] *Crovedi, supra,* 65 Cal.2d at page 201.

[32] *Smith, supra,* 68 Cal.2d at pages 554, 562, quotation at 562.

[33] *Cannon, supra,* 14 Cal.3d at page 697.

[34] *Maxwell, supra,* 30 Cal.3d at pages 612-613.

Wheat, the state Supreme Court noted approvingly the "severely limited" principle, citing *Smith*, *Cannon* and *Maxwell.*[35]

It is not a novel concept for the federal and state constitutional right to counsel provisions to be construed differently. It is true the two provisions are phrased similarly and are often construed similarly--the federal provision states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense"; and the state provision currently states, "The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense. . . ."[36] But these provisions, or their California predecessors, have been construed differently in significant ways, most notably as to the categories of crimes or of criminal proceedings they cover.[37]

The example of the distinct nature of California's constitutional provision that is most relevant for our purposes is the following one. To establish a constitutional violation of the federal right to counsel's included right to conflict-free counsel, a defendant who fails to object at trial must show

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[35] *Daniels, supra,* 52 Cal.3d at pages 846-847.

[36] United States Constitution, Sixth Amendment; California Constitution, article I, section 15; see *Bonin, supra,* 47 Cal.3d at pages 833-834; *People v. Mattson* (1959) 51 Cal.2d 777, 795 (*Mattson*); see also 5 Witkin and Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, section 146, page 231.

[37] See 5 Witkin and Epstein, California Criminal Law, *supra*, section 147, pages 232-234; *Mattson, supra,* 51 Cal.2d at page 795; see former California Constitution, article I, section 13; see now California Constitution, article I, section 15.

that an *actual* conflict of interest *adversely affected* his lawyer's performance.[38] To show a violation of the corresponding right under the state Constitution, a defendant need only demonstrate a *potential* conflict, so long as the record supports an "'*informed speculation*'" that the asserted conflict adversely affected counsel's performance.[39] California's greater solicitude to the right to conflict-free counsel is consistent with its greater solicitude to the right to counsel of choice, so long as the defendant is fully informed about the conflict and the right to conflict-free counsel and knowingly and intelligently waives these, including any appellate issues of ineffective representation arising from the conflict.[40]

In short, the highest court of our state, citing in part the right to counsel provision of the state Constitution, has "severely limited" the discretion of California judges to involuntarily remove criminal defense counsel for potential conflicts, where the defendant is fully informed about the conflicts and the right to conflict-free counsel and knowingly

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[38] *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348 [64 L.Ed.2d 333]; *People v. Frye* (1998) 18 Cal.4th 894, 998 (*Frye*).

[39] *Frye, supra,* 18 Cal.4th at page 998, italics added; *People v. Mroczko* (1983) 35 Cal.3d 86, 104-105; see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354-355 (*Raven*).

[40] *Alcocer, supra,* 206 Cal.App.3d at pages 956, 957-958, 963; *Burrows, supra,* 220 Cal.App.3d at pages 122-126; *Bonin, supra,* 47 Cal.3d at page 837.

and intelligently waives these.[41] I believe we are bound under *Auto Equity Sales, Inc. v. Superior Court* to follow these high court decisions.[42]

Two California Court of Appeal decisions have done just that; they have declined to follow *Wheat*, and have noted, citing *Maxwell* and the independent right to counsel provision in the state Constitution, that a trial court's power to remove a conflicted counsel over the defendant's objection is severely limited.[43] These decisions view *Wheat* as engaging in a "paternalistic treatment of a defendant."[44] There is no need to subordinate a defendant's right to counsel of his choice to his right to a conflict-free attorney, they say.[45] The choice is up to the defendant, provided he is fully informed of the conflicts and his right to conflict-free counsel, and knowingly and intelligently waives these (including the waiver of the right

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[41] *Maxwell, supra,* 30 Cal.3d at pages 612-613, 619; *McKenzie, supra,* 34 Cal.3d at pages 629-630; *Cannon, supra,* 14 Cal.3d at page 697; *Daniels, supra,* 52 Cal.3d at page 846; *Crovedi, supra,* 65 Cal.2d at page 208; *Smith, supra,* 68 Cal.2d at pages 559, 561-562; *Bonin, supra,* 47 Cal.3d at page 837; see also *Lucev, supra,* 188 Cal.App.3d at pages 556-557 (discussing these high court decisions).

[42] *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

[43] *Alcocer, supra,* 206 Cal.App.3d at pages 956-958; *Burrows, supra,* 220 Cal.App.3d at pages 119, 123-126; see also California Constitution, article I, section 15; *Lucev, supra,* 188 Cal.App.3d 551, 556-557; *Peoples, supra,* 51 Cal.App.4th at pages 1597-1599; *Raven, supra,* 52 Cal.3d at pages 354-355.

[44] *Alcocer, supra,* 206 Cal.App.3d at page 956.

[45] See e.g., *Alcocer, supra,* 206 Cal.App.3d at pages 956-958.

to appeal any issues arising from the conflict, which includes the issue of counsel competence as it relates to the conflict).[46]

These two appellate decisions also cite two California Supreme Court cases decided after *Wheat* that reaffirm a defendant's right to waive a conflict of interest and that strongly imply that a trial court should uphold a fully informed waiver.[47] As one of these Supreme Court decisions explains, "the defendant may choose the course he wishes to take" with respect to continuing with potentially conflicted counsel, after being fully informed about the potential conflict.[48]

In contrast then to the United States Supreme Court, the California Supreme Court and the Court of Appeal, citing in part the independent right to counsel provision in the state Constitution, have emphasized the right to counsel of choice where there is a potential conflict, so long as the defendant is fully informed about the conflict and the right to conflict-free counsel and knowingly and intelligently waives these.[49]

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[46] *Alcocer, supra,* 206 Cal.App.3d at pages 956, 961-962.

[47] *Bonin, supra,* 47 Cal.3d at page 837; *People v. Easley* (1988) 46 Cal.3d 712, 729.

[48] *Bonin, supra,* 47 Cal.3d at pages 836-837, quotation at page 837.

[49] *Maxwell, supra,* 30 Cal.3d at pages 612-613, 619; *McKenzie, supra,* 34 Cal.3d at pages 629-630; *Cannon, supra,* 14 Cal.3d at page 697; *Daniels, supra,* 52 Cal.3d at page 846; *Crovedi, supra,* 65 Cal.2d at page 208; *Smith, supra,* 68 Cal.2d at pages 559, 561-562; *Bonin, supra,* 47 Cal.3d at page 837; *Alcocer, supra,* 206 Cal.App.3d at pages 956-958; *Burrows, supra,* 220 Cal.App.3d at pages 119-126; see also *Lucev, supra,* 188 Cal.App.3d at pages 556-557 (discussing the high court decisions).

The defendant "may choose the course he wishes to take"[50] and is "master of his own fate"[51] (assuming defense counsel is willing and able to continue representation), except where there is "flagrant" attorney misconduct or incompetence, attorney incapacity, "significant prejudice" to the defendant, or serious circumstances that undermine "the integrity of the judicial process" and the "orderly administration of justice."[52]

I conclude that once an indigent criminal defendant establishes an attorney-client relationship with his court-appointed counsel, and counsel is willing and able to continue that representation, the state constitutional right to counsel of choice forecloses a California court, except in the narrow circumstances just noted, from removing that attorney because of a potential conflict if the defendant objects and is willing to make appropriate waivers.

The trial court here did not give defendant the chance to knowingly and intelligently waive the potential conflict. The record does not show that any of the narrow exceptions apply. And any potential conflicts here were not out of line with the kinds of conflicts that California courts have allowed criminal

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[50] *Bonin, supra,* 47 Cal.3d at page 837.

[51] *Alcocer, supra,* 206 Cal.App.3d at page 957; *Burrows, supra,* 220 Cal.App.3d at page 125.

[52] *Maxwell, supra,* 30 Cal.3d at page 615; *Cannon, supra,* 14 Cal.3d at page 697; *Crovedi, supra,* 65 Cal.2d at page 208; *Peoples, supra,* 51 Cal.App.4th at page 1599; *People v. Smith, supra,* 13 Cal.App.3d at page 907.

defendants to waive to continue with their counsel. In *Alcocer*, for example, the appellate court allowed the defendant to waive a conflict in which his counsel was also representing the likely key prosecution witness against the defendant.[53] The waivable conflict in *Vangsness* is almost identical to that in *Alcocer.*[54] In *Burrows*, the appellate court allowed the defendant to waive a conflict in which his counsel had represented a codefendant at the preliminary hearing.[55] And in *In re Darr*, the appellate court noted that waiver was available even though defendant's counsel was simultaneously representing the defendant and a key prosecution witness against the defendant, *and* the witness had probation revocation proceedings pending against him and had been implicated by his sister in the charges against the defendant.[56]

I conclude the trial court violated defendant's state constitutional right to counsel of choice by removing Roberts as defendant's appointed counsel over defendant's objection, without allowing defendant the opportunity to waive the potential conflict. I now consider the effect of this error.

3. Effect of Error

The state Supreme Court has concluded that when a criminal defendant is deprived of the right to retained

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[53] *Alcocer, supra,* 206 Cal.App.3d at page 955.

[54] *Vangsness, supra,* 159 Cal.App.3d at pages 1089, 1091.

[55] *Burrows, supra,* 220 Cal.App.3d at pages 118-119.

[56] *In re Darr* (1983) 143 Cal.App.3d 500, 508, 510, 515.

counsel of choice, reversal is required regardless of whether the defendant in fact had a fair trial.[57] Since the high court has also held in *Bonin* that the constitutional right to the assistance of counsel "protects the defendant who retains his own counsel to the same degree and in the same manner as it protects the defendant for whom counsel is appointed, and recognizes no distinction between the two,"[58] it follows that this standard of per se reversal would also apply to the defendant who has been deprived of the right to appointed counsel of choice that I have recognized here--i.e., the right to continue with an already appointed counsel.

The state high court has not, however, expressly considered whether on appeal this standard of reversal per se applies if the defendant declines to pursue timely writ relief to overturn the trial court's erroneous removal of counsel. I conclude that it does not. Rather, in such circumstances, reversal on appeal is only warranted if the defendant has been prejudiced.

I start once again with the *Crovedi* decision. As noted, *Crovedi* first articulated the dignity-based value underlying what would become the right-to-counsel-of-choice removal principle in California; this principle "severely limits" a court's discretion to remove criminal defense counsel over

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[57] *Courts, supra,* 37 Cal.3d at page 796; *Ortiz, supra,* 51 Cal.3d at page 988; see also *People v. Gzikowski* (1982) 32 Cal.3d 580, 589; *Crovedi, supra,* 65 Cal.2d at page 205; see *Burrows, supra,* 220 Cal.App.3d at page 125.

[58] *Bonin, supra,* 47 Cal.3d at page 834.

the defendant's objection.[59] That dignity-based value is one of ensuring that the state does not unreasonably interfere with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.[60]

Crovedi also cautioned, however, in the words of another Supreme Court decision characterizing it, that the right to counsel of choice "is not absolute: [the right] must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case."[61] The narrow circumstances under which a California court may involuntarily remove a criminal defense counsel, as delineated previously, embody this admonition.

Limiting the standard of per se reversal on appeal to defendants who have properly but unsuccessfully sought timely writ relief to overturn a trial court order erroneously removing their counsel also embodies this admonition. It does so by assuring the orderly and expeditious administration of justice is reasonably accommodated with the right to counsel of choice.

This requirement of seeking timely writ relief provides a practical, sensible approach to implement California's more

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[59] *Crovedi, supra,* 65 Cal.2d at page 206.

[60] *Crovedi, supra,* 65 Cal.2d at pages 206, 208.

[61] *People v. Byoune* (1966) 65 Cal.2d 345, 346; *Crovedi, supra,* 65 Cal.2d at page 206.

exacting standard of limiting the discretion of trial courts to remove conflicted defense counsel over the criminal defendant's objection. The requirement preserves California's greater solicitude to the right to counsel of choice, while simultaneously ameliorating the "no-win" situation faced by trial courts when ruling on conflicted counsel removal (the so-called "whipsaw" effect that figured prominently in the *Wheat* analysis, with appellate error being asserted either as to conflict or as to removal).

Affording defendant a right to reversal per se on appeal when he has declined to obtain timely writ review to correct an erroneous removal of his counsel does not ensure orderly and expeditious judicial administration. Nor, as a practical matter, does it advance defendant's right to counsel of choice. This is because he is saddled with an unwanted attorney through trial and chances are slim that upon retrial he will be represented by the counsel he wanted all along.[62]

Requiring a defendant to pursue timely writ relief provides an effective and efficient remedy for an erroneous removal of counsel while preserving a defendant's right to reversal per se on appeal if the court determining the writ errs in failing to reinstate erroneously removed counsel.

This approach is analogous to the approach taken with respect to an allegedly biased or disqualified judge, where

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[62] See *People v. Phillips* (1985) 169 Cal.App.3d 632, 639 (*Phillips*).

the writ process is enshrined because the remedy of nullifying the judgment on appeal is neither speedy nor adequate.[63]

Interlocutory orders affecting a criminal defendant's constitutional right to counsel--including the limited right to appointed counsel of defendant's choice--have been treated consistently for decades as properly reviewable in writ of mandate proceedings.[64]

Requiring a defendant to seek timely writ relief to preserve an appellate standard of per se reversal has been recognized favorably in both the state Supreme Court and the Court of Appeal.

The relevant Supreme court decision is *People v. Pompa-Ortiz* and its characterization of another high court decision, *People v. Chavez.*[65] *Pompa-Ortiz* concluded that non-jurisdictional errors in preliminary hearing procedures--in

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[63] See 2 Witkin, California Procedure (4th ed. 1996), Courts, sections 165-166, pages 222-225.

[64] *Yorn, supra,* 90 Cal.App.3d at page 673; see e.g., *Harris, supra,* 19 Cal.3d 786 and *Drumgo v. Superior Court* (1973) 8 Cal.3d 930 (limited right to appointed counsel of defendant's choice); *Smith, supra,* 68 Cal.2d 547 (power to remove appointed counsel); *Maxwell, supra,* 30 Cal.3d 606 (right to retained, conflicted counsel of defendant's choice); *Vangsness, supra,* 159 Cal.App.3d 1087 (allegedly conflicted appointed counsel); *Alcocer, supra,* 206 Cal.App.3d 951 (allegedly conflicted retained counsel); *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1 (defense counsel sought to withdraw); *Magee v. Superior Court* (1973) 8 Cal.3d 949 (defendant's right to associate out-of-state counsel); see also *Phillips, supra,* 169 Cal.App.3d at page 639.

[65] *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*); *People v. Chavez* (1980) 26 Cal.3d 334 (*Chavez*).

that case, the denial of an open preliminary hearing--were no longer subject to the standard of per se reversal, but were to be reviewed under the appropriate standard of harmless error; reversal is required, said *Pompa-Ortiz*, only if the defendant was deprived of a fair trial or otherwise suffered prejudice as a result of the preliminary hearing error.[66] *Pompa-Ortiz* characterized this approach in the following terms: "The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects."[67]

Pompa-Ortiz noted that the high court had followed this approach in other contexts. It gave as one example the decision in *Chavez*, summarizing that decision as follows: "[W]here error in refusing representation by attorney of choice, correctable on pretrial [writ] application (*Harris v. Superior Court* (1977) 19 Cal.3d 786 [161 Cal.Rptr. 762, 605 P.2d 401]), was held to compel reversal after judgment only upon a showing of prejudice[]."[68] *Chavez* applied a standard of harmless error to a superior court's error in summarily denying a defendant's request to have the appointed attorney who represented him

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[66] *Pompa-Ortiz, supra,* 27 Cal.3d at pages 522, 529.

[67] *Pompa-Ortiz, supra,* 27 Cal.3d at page 529.

[68] *Pompa-Ortiz, supra,* 27 Cal.3d at page 529.

at the preliminary hearing reappointed for the trial (this attorney-client relationship had not been a continuing one).[69]

The relevant Court of Appeal decision is *Phillips.*[70] *Phillips* concluded the trial court had erred in prematurely recusing an appointed defense counsel without adequately considering the views of the attorney and the defendant. The *Phillips* court applied a standard of harmless error, noting in part: "[Defendant failed] to pursue timely procedural avenues which could have provided a remedy. Specifically, [defendant] did not seek to correct the court's error by petitioning for an extraordinary writ before trial. [Citations.] Additionally, our Supreme Court has intimated the issue may not be cognizable on appeal in the absence of a showing of prejudice [citing *Pompa-Ortiz*]."[71]

Here, defendant did not pursue a timely writ to overturn the trial court's order erroneously removing attorney Roberts. Although at the time this pursuit was not deemed an express prerequisite to preserve the standard of per se reversal on appeal, the path of writ review of orders affecting a defendant's constitutional right to counsel was a well-worn

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[69] *Chavez, supra,* 26 Cal.3d at pages 340-341, 344-349.

[70] *Phillips, supra,* 169 Cal.App.3d 632.

[71] *Phillips, supra,* 169 Cal.App.3d at page 639, citing *Pompa-Ortiz, supra,* 27 Cal.3d at page 529.

and consistent one.[72] Moreover, the court in *Pompa-Ortiz* overruled an existing standard of per se reversal and applied the standard of harmless error to the defendant before it on appeal.[73] Defendant, then, is subject to the appropriate standard of harmless error here.[74]

Defendant has not shown he was prejudiced by the trial court's erroneous removal of attorney Roberts. When Roberts was removed, defendant was consulted about his choice of a new attorney. Defendant received his choice, an attorney who had represented him in a previous prosecution and who was an experienced criminal defense practitioner. The trial court apparently agreed to pay the new attorney more than the going appointed rate, to give defendant the attorney he wanted. Defendant has never maintained that new counsel was anything but fully competent. There has been no showing that defendant questioned the ability or desire of his new appointed counsel to represent his best interests. Nor has there been any showing of disagreement or lack of rapport between defendant and new counsel. A year and a half lapsed between the removal of attorney Roberts and the beginning of defendant's trial; during

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[72] See *Yorn, supra,* 90 Cal.App.3d at pages 673-674, and *Phillips, supra,* 169 Cal.App.3d at page 639, and cases cited therein.

[73] *Pompa-Ortiz, supra,* 27 Cal.3d at pages 529-530.

[74] See *Pompa-Ortiz, supra,* 27 Cal.3d at pages 522, 529-530; *Chavez, supra,* 26 Cal.3d at pages 344-349; see also *People v. Flood* (1998) 18 Cal.4th 470, 482-491.

this period, defendant was being represented by his new counsel. In short, it appears the trial court provided defendant with an equally effective appointed counsel. Defendant has shown no prejudice on which to reverse here.[75]

Nor may defendant claim his counsel was ineffective in failing to pursue a writ, thereby foreclosing the possibility of the standard of per se reversal being applied in his appeal. To establish ineffective assistance of counsel, a defendant must initially show that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms.[76] Counsel did not perform unreasonably in this respect. The state constitutional right to counsel of choice as encompassing a right to continue with already appointed counsel, and the requirement of seeking timely writ review to preserve the standard of per se reversal on appeal, while implied or intimated in prior decisions, had not previously been delineated explicitly.

4. *CALJIC No. 2.28*

Defendant contends the trial court erred prejudicially by instructing the jury with CALJIC No. 2.28 that the defense had "cheated" by unlawfully hiding from the prosecution and the court its intention to introduce evidence of defendant's belt and pant size. I disagree.

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[75] See *Chavez, supra,* 26 Cal.3d at pages 348-349.

[76] *People v. Scott* (1997) 15 Cal.4th 1188, 1211 (*Scott*).

This matter concerns the central piece of evidence in this case--the pair of blue jeans found in defendant's bedroom on his bed. Defendant initially told a detective that the jeans were his, and that he had recently worn them to work. DNA testing of microspatters of blood and tissue found on the jeans resulted in a positive match with the DNA of the victim, Boyd Wagner. An expert opined that the spatters on the jeans had occurred in close proximity to the source of the spatters.

The waist size on the jeans was 34 inches. The defense sought to show that defendant wore jeans with a 36-inch waist at the time of the Wagner incident.

On the day the prosecution rested its case, defense counsel informed it and the court that he intended to present a belt to corroborate testimony regarding the 36-inch waist theory; the wear marks on the belt, and its buckle configuration, supposedly supported this theory. Defense counsel later sought also to present a photograph of defendant wearing the belt.

The prosecution maintained that the defense had failed to previously disclose this evidence in violation of the discovery provisions of Penal Code sections 1054.3 and 1054.7; these sections generally require the defense to disclose to the prosecution physical evidence and the names and addresses of trial witnesses "at least 30 days prior to the trial." (All further section references are to the Penal Code.)

After hearings were held, the trial court allowed the defense to present this evidence, subject to the following instruction pursuant to CALJIC No. 2.28:

“The prosecution and the defense are required to disclose to each other before trial evidence which each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of trial. Delay in the disclosure of the evidence may deny a party sufficient opportunity to subpoena necessary witnesses or to produce evidence that may exist to rebut the noncomplying party’s evidence.

“Disclosures of evidence are required to be made at least 30 days in advance of the trial. Any new evidence discovered within 30 days of the trial must be disclosed immediately. In this case, the defense failed to timely disclose evidence discovered during the course of the trial, to wit: the testimony of Frank Jones, Wilma Jones, Jamie Jones, and Diane Davis as it relates to the belt, the defendant’s pant[] size, the photograph of the defendant, and the jeans seized by the Sheriff’s Department.

“Although the defense’s failure to timely disclose evidence was without lawful justification, the Court has under the law . . . permitted the production of this evidence during the trial.

“The weight and significance of any delayed disclosures are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matter already established by other credible evidence.”

CALJIC No. 2.28 embodies the discovery disclosure provisions of section 1054.1 (required disclosures to defense), section 1054.3 (required disclosures to prosecution), and section 1054.7 (disclosure deadline of 30 days before trial, except any new evidence discovered within 30 days of trial must be disclosed immediately). CALJIC No. 2.28 also embodies one of the discovery enforcement mechanisms set forth in section 1054.5, subdivision (b), that can be applied to parties who have not complied with section 1054.1 or section 1054.3: "[T]he court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."[77]

Defendant makes a series of arguments that reduce to one contention: the trial court erred in instructing with CALJIC No. 2.28 because it found the defense had not committed any discovery violation. This is not an accurate reading of the record.

For this reading, defendant cites to statements from the trial court, including: "[I]t was brand new information to everybody on the [defense] team. It's not something [defense counsel] could have, and I would never impugn [defense counsel] of doing this to begin with. It's not something he would have isolated himself from by saying go find evidence and don't tell me about it until it's the best time to tell me[]"; and, "I am certainly of a mind that neither [defense counsel] nor any

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[77] *People v. Bohannon* (2000) 82 Cal.App.4th 798, 806-807, footnote 10.

of the defense team were aware of this until February 10th [the day before the prosecution rested]. Certainly [the defense investigator, Diane Davis] is someone who has testified in this court many times and whose word I put great stock in. If Miss Davis is going to tell me February 10th was when she got it, I don't have a problem believing that at all. . . . [¶] . . . [¶] . . . I am of the mind no one on [the defense] team knew about it and even extended to Mr. Jones, Senior [Frank Jones, defendant's father; also Wilma Jones, his mother; and Jamie Jones, his estranged wife], knew about it."

The record shows, however, that in these statements the trial court was referring to the belt and possibly the photograph of defendant wearing the belt; the court was not referring to *testimony* regarding these items, the jeans at issue, or defendant's pant size, testimony that could be corroborated by the belt and photo. The record can be read to show that the defense did untimely disclose this testimony.

The record shows the following statements: "MR. GAUL [prosecutor; responding to the issue of the belt initially being raised just prior to the prosecution resting]: . . . We have made requests for discovery. [Defense counsel's] represented to me he doesn't have any. He doesn't have any witnesses that he's planning on presenting[]"; "MR. SWARTZ [defense counsel]: We had intended to put this evidence [i.e., pant size evidence] in with just regular testimony from witnesses. . . . [¶] . . . [¶] I found out about the belt as I said during the course of trial[]"; "MR. SWARTZ: The defense is saying we found out about

one particular piece of evidence [i.e., the belt] to support our position. THE COURT: [¶] You are saying that you knew that [this] pair of pants could not have been [defendant's] years ago because they were the wrong size? [¶] MR. SWARTZ: We had evidence to that effect, yes. [¶] THE COURT: And nobody has broached that to the [P]eople and said, hey, man, this guy doesn't wear 34's, he wears 36's, these couldn't be his pants? [¶] MR. GAUL: That's never happened[]"; and, "MR. GAUL: . . . I sure hope the Court is going to give me an instruction this evidence should have been presented. [¶] THE COURT: You are singing to the choir on that one. . . . It's obviously evidence that is way overdue and should have been produced. It wasn't for whatever reasons."

The trial court also noted during these interchanges that it had never been suggested previously that the jeans were not defendant's; and that the prosecution had presented its case on this assumption and was now placed in an awkward position.

In line with this distinction between the belatedly disclosed testimony regarding defendant's pant size, pant accessories, and the jeans at issue, and the newly discovered belt and photo to corroborate that testimony, the trial court instructed with CALJIC No. 2.28 that "the defense failed to timely disclose evidence discovered during the course of the trial, to wit: The *testimony* of Frank Jones, Wilma Jones, Jamie Jones, and Diane Davis as it relates to the belt, the defendant's pant[] size, the photograph of the defendant, and the jeans seized by the Sheriff's Department." (Italics added.)

The instructional phrase "discovered during the course of the trial" is not entirely accurate regarding the testimony, unless "discovered" means "disclosed" in the legal vernacular. Nevertheless, this phrase, by essentially stating that defendant had not discovered the testimony until trial, rather than sometime before as the record can be read to show, inured to defendant's benefit by making his untimely disclosure not so untimely. I cannot say the trial court abused its discretion in giving CALJIC No. 2.28.[78]

Defendant also contends that the criticism of defense counsel which is at the heart of CALJIC No. 2.28 is especially inappropriate here because the trial court had improperly removed the original defense attorney (attorney Roberts). However, defendant's case did not go to trial for over a year and a half after Roberts was removed; as everyone knew, moreover, the jeans were the key piece of evidence in the case.

Finally, although defendant does not actually fault his new counsel's performance, he maintains that if CALJIC No. 2.28 was appropriately given, that would necessarily mean that defense counsel performed either negligently or in bad faith.

Even assuming for the sake of argument defendant's premise, I would not reverse on this point. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable,

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[78] See Penal Code section 1054.5, subdivision (b); *People v. Wimberly* (1992) 5 Cal.App.4th 773, 791-793.

and that he was prejudiced--i.e., a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant; a reasonable probability is a probability sufficient to undermine confidence in the outcome.[79]

Defendant cannot demonstrate this prejudice. There was the damning DNA evidence found on the jeans. The jeans were found in defendant's bedroom on his bed. Statements from defendant and from his estranged wife confirmed the jeans were defendant's.

The victim, Wagner, was killed sometime between Thursday, February 20, and Saturday, February 22, 1992; defendant was a neighbor of Wagner's. Robbery appeared to be the motive. Shoeprints left that Thursday or Friday were found leading away from Wagner's porch; these prints had the same class characteristics as the Converse tennis shoes defendant was wearing when he was located shortly thereafter by the police.

Upon learning of the shoeprints, defendant told detectives he had chased his mother's dog across Wagner's property. However, the shoeprint expert testified the prints were left by someone moving in a very casual or normal walking motion, rather than walking aggressively or rapidly or running.

Found in a metal tub that Wagner used as a trash can was an empty 40-ounce bottle of Budweiser beer with the lid screwed on, wrapped in a paper bag. This was the brand of beer defendant drank and the manner in which he drank it.

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[79] *Scott, supra,* 15 Cal.4th at pages 1211-1212.

After learning of this beer bottle, defendant told detectives that about a month before the Wagner incident he had been driving in a car and had thrown an empty beer bottle onto Wagner's property which may have landed in the trash tub. The trash collector testified, however, that he would have normally picked up the trash the Tuesday just before the Thursday-Saturday time frame at issue; the collector was always careful to empty the tub because Wagner had once complained when he missed it.

Wagner had incurred, among other injuries, a wedge-shaped, gaping, chop-like cut to the right shoulder; this was probably caused by a long, heavy bladed instrument. Wagner's screen door had been cut with a sharp instrument, and the door frame had been shattered with a blow of significant force. Defendant's father made long-bladed, leather-handled knives out of chain saw bars; he had given one to defendant as a Christmas present two months prior to the Wagner incident. Defendant's knife was never found; he first told detectives his knife was in a shed, but later conceded this was untrue. He then told detectives he had sold the knife to someone named "Darrell" in a bar; questions were raised regarding this account.

In light of the evidence against defendant, there is not a reasonable probability defendant would have fared any better had CALJIC No. 2.28 not been given.

DISPOSITION

The judgment is affirmed.

DAVIS, Acting P.J.

RAYE, J.

I concur in the result though my reasons differ from those set forth in the lead opinion.

On the question of whether the court erred in relieving defendant's appointed counsel, I agree there was no actual or presumed conflict of interest. As to the potential that a conflict might arise in the future, I agree with the lead author that the potential existed but disagree with the principles that control when a potential conflict arises. Rejecting the Attorney General's argument that the controlling principles are those articulated in *Wheat v. United States* (1988) 486 U.S. 153, 162-164 [100 L.Ed.2d 140, 150-152] (*Wheat*), the lead opinion concludes that we are bound instead by California Supreme Court decisions interpreting the right to counsel provisions of the California Constitution. I do not agree that the "severely limited" principles articulated in *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561-562, *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697, and other cases decided prior to *Wheat* necessarily retain their vitality in light of *Wheat*. The lead opinion reads the decisions of the California Supreme Court as recognizing a state constitutional right of different dimension than the federal right discussed in *Wheat*. Ultimately, our Supreme Court may so conclude, but in my view, none of the cases cited in the lead opinion stands clearly for such a proposition.

Ultimately, however, this quibble over which constitutional principles apply is of no moment. In my view, even under the "lower" standard articulated in *Wheat*, the trial court erred.

Wheat does not give the trial court carte blanche to substitute its judgment for that of an attorney's client when potential conflicts of interest arise. The attorney in *Wheat* represented three clients involved in a far-flung drug distribution conspiracy. Two of his clients offered to plead guilty to criminal charges. Shortly thereafter and only days before the scheduled commencement of his trial, a third participant in the conspiracy, Wheat, sought to retain the attorney as trial counsel. The Government objected to the proposed substitution, noting, among other things, the likelihood that one of the attorney's other two clients, Bravo, would be called as a witness in the case against Wheat, and the other, Gomez-Barajas, was yet free to withdraw his guilty plea, in which case Wheat might be a witness in a future prosecution against him. All three defendants were willing to waive any and all conflicts of interest, actual and potential, but the Supreme Court agreed with the Government that such waivers were not binding on the trial court.

The facts of our case do not remotely resemble those of *Wheat*. The potential for conflict in *Wheat* was real and immediate; the attorney had been intimately involved in the defense of two other defendants in cases arising from the same series of criminal acts. The attorney's involvement with Wheat, on the other hand, was slight. He was retained at the last

minute; Wheat had theretofore been represented by another counsel who, it appears, was willing and able and, indeed, had been expected to represent him in the impending trial.

Here, the potential conflict was speculative. Defendant and his attorney enjoyed an attorney-client relationship of nearly two years' duration. His attorney was intimately involved in every aspect of the defense. Unlike the situation in *Wheat*, the conflict did not stem from simultaneous representation of other defendants in the same criminal transaction but from a brief involvement in representing Wert in a completely unrelated probation violation case. No confidential information had been exchanged, and there was no indication the attorney's prior representation of Wert was of any value in his representation of defendant. The conflict finding was premised on the speculation that defendant "might" offer a defense implicating Wert and defendant's attorney "might" feel uneasy about pursuing his former client and "might" not vigorously pursue investigation and cross-examination of the client. Whatever the strength of these potential conflicts, defendant was eager to waive them. His waiver should have been accepted.

In *Wheat*, the Supreme Court framed the issue narrowly: "The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy." (*Wheat*, *supra*, 486 U.S. at p. 159.) We are

confronted with a different issue. To paraphrase *Wheat*, our question involves the extent to which a defendant's right to his chosen attorney is qualified by the fact that the attorney has represented another defendant in a completely unrelated criminal case. There may be limitations on a defendant's right to choice of counsel under such circumstances, but nothing in *Wheat* supports the denial of counsel based on speculation that counsel will not abide by his professional responsibilities.

The more difficult issue presented is the appropriate standard for assessment of prejudice when a court errs in removing counsel. Reasoning that since a rule of per se reversal applies to a defendant who is improperly deprived of the right to retained counsel, the lead opinion asserts the same rule should apply to a defendant whose appointed counsel is inappropriately removed. However, according to the lead author, a rule of reversal per se should only apply if defendant seeks but is ultimately unsuccessful in pursuing writ relief; otherwise, traditional harmless error principles apply.

This novel approach is also a thoughtful one; timely pursuit of writ relief affords an appellate court the opportunity to correct error early in the process without upsetting a verdict and necessitating another trial. However, the rule is not supported by the authorities cited and is perhaps better suited to imposition by the Legislature than by this court. More significantly, as applied to removal of appointed counsel, it is based on a faulty premise: that a rule

of per se reversal applies in the absence of timely pursuit of writ relief.

There are, of course, many similarities between the right of the indigent to continue with counsel appointed for him and the right of the more affluent to retain counsel of choice. But there are differences. The California Supreme Court has never applied a rule of per se reversal to improvident removal of appointed counsel. The cases cited in the lead opinion as support for a rule of per se reversal all involved retained counsel. *People v. Courts* (1985) 37 Cal.3d 784 (*Courts*) involved the right of a defendant to retain counsel to replace his appointed counsel. In *People v. Crovedi* (1966) 65 Cal.2d 199 (*Crovedi*), the court replaced the defendant's retained counsel with appointed counsel. In *People v. Gzikowski* (1982) 32 Cal.3d 580, the defendant was denied a continuance to retain counsel when one of his attorneys withdrew and the remaining attorney considered herself too inexperienced to try a death penalty case. *People v. Ortiz* (1990) 51 Cal.3d 975 involved the unusual circumstance of a defendant who was denied the right to discharge his retained counsel.

A defendant has a fundamental right to representation by a retained counsel selected by him. An indigent defendant does not have the right to choice of appointed counsel. "The right to employ counsel of one's own choosing 'is based on a value additional to that insuring reliability of the guilt-determining process. Here we are concerned not only with the state's duty to insure "fairness" in the trial, but also with the state's

duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.'" *Courts*, *supra*, 37 Cal.3d at pp. 789-790, quoting *Crovedi*, *supra*, 65 Cal.2d at p. 206.)

The right of an individual to apply whatever resources are at his command to the retention of a particular counsel differs from the right of an individual to continue with a counsel selected for him by the court. We apply a bright line rule restricting interference with selection of retained counsel and impose the extreme sanction of per se reversal in cases of violation. Similar but different public policies are implicated when the court removes appointed counsel. Even if the same standard controls a trial court's discretion in removing both retained and assigned counsel, it does not necessarily follow the same standard of reversible error should apply.

The reversible per se rule does not advance the truth-finding function of our justice system. Like the exclusionary rule, it serves an ancillary function: It reflects the value we place on the right that has been violated, viz. the right of individuals to apply whatever resources they can assemble to retain counsel of their choice. Few legal violations warrant the imposition of such a heavy sanction. Until our Supreme Court rules otherwise, I would not extend it to cases involving the removal of assigned counsel. Our focus in those cases should be on the effectiveness of the representation actually provided and the reliability of the verdict rather than the

violation of the individual's desire to continue with the same counsel. (See *People v. Chavez* (1980) 26 Cal.3d 334, 349; *People v. Phillips* (1985) 169 Cal.App.3d 632, 638-639.)

A person in defendant's circumstances is not without a remedy. Although the lead opinion's qualified rule of per se reversal is unwarranted, writ relief is nonetheless available to redress an improvident removal of appointed counsel. Moreover, a defendant who can demonstrate prejudice from the court's error would be entitled to relief on appeal. Here, defendant did not seek writ relief and there is nothing to suggest that his defense was hampered by the change in counsel. Accordingly, I concur with my two colleagues in concluding the trial court judgment should be affirmed.

RAYE, J.

CALLAHAN, J.

I concur in the affirmance of defendant's conviction. I write separately to express my endorsement of the United States Supreme Court's standard for evaluating actual and potential conflicts in *Wheat* v. *United States* (1988) 486 U.S. 153, 163 [100 L.Ed.2d 140, 151] (*Wheat*). I also write to defend the trial court's judicious and carefully thought-out decision to recuse Gary Roberts from continuing to represent defendant, a decision which I find to be well reasoned and within the court's discretion. I believe the trial court correctly concluded that Roberts's thorny and complicated relationship to a former client/potential third party suspect justified his recusal from the case, especially since the conflict was brought to light at an early stage of the proceedings.

Under the federal and state Constitutions, a criminal defendant has a right to the assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Holland* (1978) 23 Cal.3d 77, 86.) Embraced within that right is the right to representation which is both effective and free of conflicting interests. (*People v. Bonin* (1989) 47 Cal.3d 808, 834 (*Bonin*).) This constitutional guaranty applies to defendants with appointed counsel "to the same degree and in the same manner" as to those with retained counsel. (*Ibid.*) Effective assistance of counsel can be seriously compromised when a lawyer's "conflict of interest deprives the client of undivided loyalty and effort." (*Maxwell* v. *Superior Court* (1982) 30 Cal.3d 606, 612 (*Maxwell*).)

An indigent defendant has no constitutional right to representation by a particular court-appointed lawyer. (*Morris* v. *Slappy* (1983) 461 U.S. 1, 12-14, [75 L.Ed.2d 610, 620-621].) Once the attorney-client relationship is established, however, trial courts should exercise their power to remove counsel "with great circumspection." (*People* v. *McKenzie* (1983) 34 Cal.3d 616, 630 (*McKenzie*).) Thus, a trial judge cannot throw appointed counsel off the case based on a subjective perception that counsel is "incompetent" (*Smith* v. *Superior Court* (1968) 68 Cal.2d 547, 562), or summarily refuse to reappoint the same attorney for trial who represented the defendant at the preliminary hearing without giving the latter a chance to explain his preference for continued representation (*People* v. *Chavez* (1980) 26 Cal.3d 334, 346-348). However, when an ethical conflict on the part of defense counsel rears its ugly head, the policy of judicial noninterference with counsel of choice must be balanced against other considerations. At this point, two constitutional rights appear headed on a collision course: the defendant's right to defend himself with an attorney of his own choosing and his right to effective assistance of counsel, which includes the "correlative right to representation that is free from conflicts of interest." (*Wood* v. *Georgia* (1981) 450 U.S. 261, 271 [67 L.Ed.2d 220, 230].)

In conflict cases, the approaches taken by the United States Supreme Court and some intermediary California appellate courts appear to diverge. The United States Supreme Court has clearly indicated that where the two rights collide, the right

to effective (i.e., conflict-free) counsel prevails. While recognizing that the right to counsel of choice is a component of the right to counsel, the *Wheat* court has declared that the "essential aim of the [Sixth] 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." (486 U.S. at p. 159 [100 L.Ed.2d at p. 148].) Accordingly, *Wheat* gives trial courts broad discretion to recuse a defense attorney facing a conflict of interest, even in cases where the defendant offers to waive his right to conflict-free counsel. Although there is "a presumption in favor of [defendant's] counsel of choice . . . that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious *potential* for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." (486 U.S. at p. 164 [100 L.Ed.2d at p. 152], italics added.)

Two notable California cases, *People* v. *Burrows* (1990) 220 Cal.App.3d 116 (*Burrows*) and its progenitor *Alcocer* v. *Superior Court* (1988) 206 Cal.App.3d 951 (*Alcocer*), have flatly rejected the *Wheat* approach in favor of a rule that requires trial courts to permit a conflicts waiver except under the most flagrant of circumstances. Characterizing *Wheat* as "paternalistic," these cases place a higher priority on the defendant's right to continue with chosen counsel than on his right to conflict-free assistance of counsel. (*Burrows, supra,* at p. 122, *Alcocer,*

supra, at p. 956.) They attempt to avoid the clash between these two important constitutional rights by allowing the defendant to waive the conflict, a waiver which includes the right to raise the conflict as part of any subsequent ineffective assistance argument on appeal. (*Alcocer*, *supra*, at pp. 961-962.)

I do not subscribe to Justice Davis's view that we must reject *Wheat* under the mandate of *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455. However eloquent Justice Gilbert's master-of-his-own-destiny presentation in *Alcocer* may be, I do not believe it is mandated by anything the California Supreme Court has said thus far.

Maxwell is the first true California Supreme Court conflicts case in this area. There, the defendant wanted to continue to be represented by an attorney who had entered into a contract for commercial use of defendant's life story. The court, tracing the enhanced recognition of the right to chosen counsel over the years, determined that private retained counsel could not be removed over defendant's objection and willingness to make an informed conflicts waiver. (30 Cal.3d at pp. 616-622.) Nothing in *Maxwell* can be read to create a rule that ethical conflicts may always be waived, or that trial courts no longer had the authority to protect a defendant's Sixth Amendment rights in an appropriate case by recusing counsel, even where defendant is willing to enter into a conflicts waiver. On the contrary, the court was careful to note that where "substantial risks of conflict" are brought to the court's

attention and a knowing, intelligent, and unconditional waiver was not possible, the trial court "may then protect the record and defendant's right to effective assistance of counsel by requiring counsel's withdrawal." (*Id*. at p. 620.)

Maxwell was followed by *Wheat*. Noting that trial courts presented with conflicts situations "face the prospect of being 'whipsawed' by assertions of error no matter which way they rule" (*Wheat, supra,* 486 U.S. at p. 161 [100 L.Ed.2d at p. 150]), *Wheat* proclaimed that courts "must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (*Id*. at p. 163 [100 L.Ed.2d at p. 151].)

Bonin, the California Supreme Court case which *Alcocer* touts as a departure from *Wheat,* is not authority for the proposition that trial courts are duty-bound to accept a conflicts waiver, especially since it involved a situation in which the defendant claimed his right to counsel was violated by *allowing* conflicted counsel to represent him without obtaining a waiver. *Bonin* presents the obverse of the situation here, in which conflicted counsel was *removed* without allowing a waiver.

It is true the *Bonin* court imposed a duty on the trial court to inquire into possible conflicts and to act in response to what it discovers. (47 Cal.3d at pp. 836-837.) In dictum, the court declared that, "If the court has found that a conflict

of interest is at least possible, the defendant may, of course, decline or discharge conflicted counsel. But he may also choose not to do so: 'a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests.' [Citations.]" (*Bonin, supra,* at p. 837.) *Bonin* goes on to say that if the trial court violates these duties and allows conflicted counsel into the case, the court commits error under *Wood v. Georgia, supra,* 450 U.S. 261 [67 L.Ed.2d 200], an error which results in reversal only if defendant can show that the conflict adversely affected his counsel's performance. (*Bonin, supra,* at pp. 837-838.)

Significantly, *Bonin* does not distance itself from *Wheat's* flexible standard in recusing counsel for ethical conflicts, nor does it announce a waiver-whenever-possible rule. In fact, *Bonin* quotes *with approval* the declaration in *Wheat* that, where the right to effective (i.e., conflict-free) counsel and the right to counsel of choice clash, the Sixth Amendment tends to favor the former over the latter. (47 Cal.3d at p. 834, quoting *Wheat, supra,* 486 U.S. at p. 163 [100 L.Ed.2d at p. 148].)

In light of this historical background, I cannot accept *Alcocer*'s outright rejection of *Wheat* under the banner of what is perceived to be a more protective right to counsel clause in the state Constitution. The *Alcocer* court cites *People* v. *Easley* (1988) 46 Cal.3d 712 (*Easley*) to support its conclusion. But *Easley* was a case in which counsel with an actual conflict was allowed to represent the defendant without a knowing and intelligent waiver. *Easley* applied a slightly more rigorous

standard for determining prejudice than that which existed under federal law for determining whether the conflict required reversal of the judgment. (*Id*. at pp. 725, 729, fn. 17.)

It is therefore surprising that *Alcocer* would extract from *Easley* a rule which exalts a defendant's right to *chosen* counsel above his right to effective, *conflict-free* counsel. In fact, I believe Justice Abbe had it exactly right in his dissent in *Alcocer*, wherein he declared that there was no reason not to apply the *Wheat* rule in California, whose constitutional guaranty of the right to counsel is virtually identical to its federal counterpart. (*Alcocer*, *supra*, 206 Cal.App.3d at pp. 964-965 (dis. opn. of Abbe, J.).)

I have no quarrel with the concept deducible from *Bonin* and *Maxwell* that there are instances in which an ethical conflict can be intelligently waived in order to accommodate a defendant's choice of counsel. However, it is too great a leap to distill from these cases a rule which *compels* the trial court to offer and accept waivers of a conflict of interest absent extreme or "flagrant" circumstances, the parameters of which are so ill-defined as to be incapable of consistent enforcement.

There are, quite simply, too many conflicts situations which may potentially endanger a defendant's right to effective counsel, and do not lend themselves to the facile solution proposed by *Alcocer*. Worse still, a trial court attempting to navigate "between the Scylla of denying a defendant the right to determine his own fate and the Charybdis of violating his right to counsel" (*Maxwell*, *supra*, 30 Cal.3d at p. 621) faces the

prospect of a reversal on appeal regardless of which path it chooses.

For all of these reasons, I subscribe to *Wheat*'s view that trial courts enjoy broad discretion in recusing appointed counsel when an ethical conflict jeopardizes a defendant's Sixth Amendment rights. Like all grants of discretion, it is not without limits. As *Bonin* points out, "[c]onflicts spring into existence in various factual settings." (47 Cal.3d at p. 835.) Because judicial interference in the attorney-client relationship is to be undertaken with great circumspection (*McKenzie*, *supra*, 34 Cal.3d at p. 630), counsel cannot be removed for trivial, petty, or imagined conflicts. Likewise, where the court determines that the defendant is able and willing to make an informed and intelligent waiver, it may allow counsel with a potential conflict to continue. (*Bonin*, *supra*, at p. 837.)

However, there are conflicts situations, not necessarily falling into the "flagrant" variety postulated by the lead opinion, in which trial courts should not be required to solicit or accept a conflicts waiver. This case presents an excellent example.

II

"'It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent . . . . By virtue of this rule an attorney is precluded from assuming any

relation which would prevent him from devoting his entire energies to his client's interests.'" (*Santa Clara County Counsel Attys. Assn.* v. *Woodside* (1994) 7 Cal.4th 525, 548, quoting *Anderson* v. *Eaton* (1930) 211 Cal. 113, 116.) This duty of loyalty survives the termination of the attorney-client relationship. (*Yorn* v. *Superior Court* (1979) 90 Cal.App.3d 669, 675.) As a general rule, an attorney's duty of loyalty to an existing client is not capable of being divided. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2001) ¶ 3:188, p. 3-62, and cases cited.) Thus, where the attorney's duty of loyalty to a present client clashes with the same duty to a former client, the attorney is placed in an untenable conflict of interest, *regardless* of the likelihood that the lawyer could use the former client's confidences against him.

Here, defendant, who was charged with murder in the bludgeoning death of an elderly neighbor, was represented by an appointed attorney, Gary Roberts. Just a month before defendant was arrested, Roberts had represented Michael Wert involving a probation violation matter relating to drugs.[1] In fact, there was a period of a "few months" where the two representations overlapped.

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[1] To complicate matters, Roberts had also represented Wert's brother on a bad check charge, an accusation which he managed to have dismissed.

Wert certainly had a motive to frame defendant for the murder. There had been serious "bad blood" between the two men -- Wert had a live-in romantic relationship with defendant's wife, and defendant had allegedly assaulted Wert.

In February 1996, Roberts informed the trial court that Wert was only a "very speculative" potential suspect in the murder. At the time, he did not see anything in his former representation of Wert that would present a problem in representing defendant. In March, the court appointed an independent attorney to advise defendant on the conflict issues; after being so advised, defendant chose to continue with Roberts.

However, the Wert angle turned far more ominous when Roberts returned to court in June and reported that, upon examining the court file, he discovered that Wert was bailed out of jail just days before the murder and had posted a $5,000 bond. According to Roberts "[t]hat immediately clicked a light on in my head because the DA [district attorney] has been telling me all along the motive for the murder . . . was robbery or burglary. And the theory was that this old guy kept stacks of cash around his house." Roberts went on to explain "[I]f, in fact, my defense were to be that Wert did this, I might want to play into their robbery theory, and weave it in[to] my defense. In other words, *I might want to catch their robbery theory and throw it back to them by saying, you are darn right, the motive for this homicide was robbery. Wert did the robbery. Wert did the homicide. Wert had just bailed out of jail, needed to pick*

the money up to pay his bail bondsman. It all makes sense." (Italics added.) Roberts also discovered that Wert had his car impounded, and was found in the possession of a stolen weapon and several grams of methamphetamine, indicating "he was dealing." Roberts also learned there was a drug dealer living down the street from defendant, and if it could be established that the dealer was supplying Wert "that would blow this case way out for [defendant]," because it would place Wert on the same street as the victim through his relationship with the dealer. Roberts was concerned that if the robbery could be tied to a network of drug dealers on the same street with whom Wert could be linked, it was quite possible "they are continuing to protect Michael Wert" by pinning the murder on defendant.

In marked contrast to his attitude in February, Roberts told the court the situation with Wert was "very troublesome" and made him "very uneasy."

Complex and nettlesome repercussions of the Wert conflict abounded. For example, as the court observed, if defendant were found guilty of murder in the present trial without raising Wert as a potential suspect, defendant might very well argue posttrial that Roberts did not vigorously investigate this avenue of defense because Roberts's loyalties were divided, a possibility which Roberts "absolutely agree[d]" was a problem. Second, if the "Wert defense" were to become viable and Wert were called to testify, Roberts would be put in the position of cross-examining his own former client, one whom he represented in close temporal proximity to the crime.

Wert's future behavior was also unpredictable. Although the lead opinion implies the Wert problem could be solved by obtaining a waiver from defendant of Roberts's conflict, obtaining such a waiver from *Wert* was out of the question. If Roberts were to raise Wert as a potential suspect, there loomed the disturbing prospect that Wert could file suit against Roberts or file a complaint to the State Bar on the ground that Roberts had breached his fiduciary duty to a former client. Would this possibility cause Roberts, consciously or subconsciously, to pursue the "Wert defense" less vigorously than a defense lawyer unencumbered by conflict? No one knew.

At the time, neither Roberts nor defendant could know where the investigative path would lead. What was clear, however, was that Roberts could not even begin to pursue the investigation without the albatross of an ethical conflict hung around his neck. Although it was true, as defendant stated at the hearing, that if the Wert defense did not pan out he would have lost Roberts over nothing, the important point was that by merely opening inquiry into such a defense Roberts was stepping into an ethical quagmire. And, as the trial court correctly pointed out, as long as defendant was represented by counsel, the tactical decision of pursuing a third party culpability line of defense was Roberts's to make.

When the trial court made its ruling, the case was still at an early stage. Jury trial was more than a year away. There was plenty of time for new counsel to get up to speed. Had the court acquiesced to defendant's desire to continue with Roberts,

the case would be dogged by the possibility that the situation could mushroom into an irreconcilable and unwaivable conflict, requiring Roberts's removal in mid-trial. Such an event would have wreaked havoc on defendant's right to effective assistance of counsel. On appeal from the ensuing conviction, is there any doubt that the court's failure to remove Roberts at a safe point in the proceedings could be viewed as having, for practical purposes, crippled defendant's Sixth Amendment rights?

In the words of *Wheat*, the trial court had to resolve this sticky dilemma "not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. . . . These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics." (*Wheat*, *supra*, 486 U.S. at pp. 162-163 [100 L.Ed.2d at p. 151].) Thus, waivers, even intelligent ones, do not always provide a ready solution.

Both before and after *Wheat,* California courts have recognized that "'the court's power and duty to ensure fairness and preserve the credibility of its judgment extends to recusal even when an informed defendant, for whatever reason, is cooperating in counsel's tactics.'" (*McKenzie*, *supra*, 34 Cal.3d at p. 630, quoting *Maxwell*, *supra*, 30 Cal.3d at p. 619, fn. 10.) Furthermore, the trial court retains discretion to reject a

proferred waiver where an unacceptable conflict on the part of defense counsel threatens the integrity of the judicial process. (*People* v. *Peoples* (1997) 51 Cal.App.4th 1592, 1597-1599.)

In my view, Roberts's divided loyalties with respect to Wert and defendant presented such a conflict. The court could properly determine that Roberts's recusal was required in order to protect defendant's right to effective assistance of counsel. Moreover, unlike my colleagues, I conclude the court had no duty to entertain or solicit a waiver of the conflict from defendant before removing Roberts and replacing him with effective, conflict-free counsel.

_____CALLAHAN_____, J.