INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

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For more information on all of the topics covered in this outline, see Jessica Smith, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA IN CRIMINAL CASES (UNC School of Government 2003) (provided to all superior court judges by the NC AOC).

I. Introduction. The Sixth Amendment to the federal Constitution guarantees that, in all criminal prosecutions, the accused has the right to assistance of counsel. This guarantee has been interpreted to include the right to effective assistance of counsel. Ineffective assistance of counsel (IAC) claims are commonly asserted in post-conviction motions for appropriate relief. This outline describes the different types of IAC claims and the standards that apply to them.

II. Types of IAC Claims

A. Attorney Error Claims

1. Defined. Attorney error claims, sometimes called *Strickland* claims, are the most common types of IAC claims. Essentially these claims allege that counsel handled the case improperly. For example, a defendant might allege that trial counsel failed to object to evidence, request a jury instruction, or call a witness. A defendant who has plead guilty, who lost an opportunity to plead guilty, or who has rejected a plea offer might allege that his or her counsel was ineffective in connection with the plea process. Additionally, a *Strickland* claim may assert deficient performance of appellate counsel.

2. Standard. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-part test for evaluating attorney error IAC claims. Under the test, a defendant asserting this type of claim must show that: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *See also* State v. Braswell, 312 N.C. 553, 562-63 (1985) (expressly adopting the *Strickland* analysis as applicable to IAC claims under the North Carolina Constitution). In *Strickland* the Court explained that it is not necessary to address both prongs of the analysis if a defendant's showing on any one prong is insufficient and noted as a matter of practicality that it often may be "easier [for a trial court] to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." 466 U.S. at 697.

a. Deficient Performance. Deficient performance means that counsel's conduct fell below an objective standard of

reasonableness. Objectively reasonable performance is performance that is reasonable under prevailing professional norms. Reasonableness is evaluated on a case-by-case basis, taking account of the totality of the circumstances. *Strickland*, 466 U.S. at 688. Note, however, that the United States Supreme Court has held that it is categorically unreasonable for an attorney to disregard specific instructions from a defendant to file a notice of appeal, even where the defendant waives his or her right to appeal as part of a plea agreement, *see* Garza v. Idaho, 139 S. Ct. 738 (2019), and has held that it is categorically unreasonable to give incorrect advice about the deportation consequences of a criminal conviction when the law on the issue is "truly clear." Padilla v. Kentucky, 559 U.S. 356, 366-69 (2010).

i. **Evidence of Deficient Performance.** Evidence that a defendant might present in order to establish deficient performance, could include, for example, testimony by other attorneys regarding prevailing professional norms or current standards of attorney conduct, issued by the North Carolina Indigent Defense Services, the North Carolina State Bar, or the American Bar Association. Missouri v. Frye, 566 U.S. 134 (2012) (codified standards of professional practice are not sole determinants of the standard for counsel's performance but can be "important guides").

ii. **Not a Hindsight Determination.** When determining whether conduct was deficient, the judge should not engage in hindsight. Rather, the judge should consider the objective reasonableness of the conduct in light of the circumstances that existed at the time of the alleged deficient performance. *Strickland*, 466 U.S. at 689; Maryland v. Kulbicki, 577 U.S. 1, 4-5 (2015) (per curiam) (counsel was not deficient by focusing on elements of the defense not related to undermining a method of ballistics analysis that was uncontroversial at the time of trial).

iii. **Presumption of Reasonableness and its Limits.** Because of the difficulties inherent in evaluating the reasonableness of counsel's conduct, the court should indulge a strong presumption that the conduct falls within the wide range of reasonable professional assistance. Buck v. Davis, 580 U.S. 100, 118 (2017) ("*Strickland's* first prong sets a high bar. A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the wide range of professionally competent assistance" (internal quotation omitted)). However, this does not mean that all strategic decisions are insulated from attack. *Id*. at 118-19 (counsel was deficient in punishment phase of capital trial by choosing to pursue argument connecting the defendant's race with his liability for future dangerousness, an argument that would be "patently unconstitutional" if offered by the State). Although it is

true that strategic choices made after a thorough investigation of the law and facts are virtually unchallengeable, *Strickland*, 466 U.S. at 690, strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on the investigation. *See, e.g.*, Andrus v. Texas, 140 S. Ct. 1875, 1882-85 (2020) (counsel was deficient in punishment phase of capital trial where he "performed virtually no investigation" of facts or witnesses relevant to mitigation or of the State's aggravation case); Hinton v. Alabama, 571 U.S. 263, 274 (2014) (per curiam) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.").

b. Prejudice. Even if counsel's performance was deficient, the defendant is not entitled to relief unless he or she establishes that the deficient conduct prejudiced the defense. A trial court making a prejudice determination "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. 695. The United States Supreme Court has held that the requirement of demonstrating prejudice applies even with respect to structural errors, which ordinarily necessitate automatic reversal when preserved and raised on direct appeal, when such errors are raised in the context of an IAC claim in a postconviction proceeding. Weaver v. Massachusetts, 582 U.S. 286, 302 (2017).

i. Defined. When the deficient conduct is in connection with a trial or an appeal, a showing of sufficient prejudice requires the defendant to establish a reasonable probability that but for counsel's error, the result of proceeding would have been different. Lee v. United States, 582 U.S. 357, 364-65 (2017) (so stating with respect to trial). State v. Casey, 263 N.C. App. 510, 522 (2019) (so stating with respect to appeal). The United States Supreme Court has described a "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

When the ineffectiveness is alleged by a defendant who has entered a guilty plea, a showing of sufficient prejudice requires the defendant to establish a reasonable probability that but for counsel's errors, the defendant would not have plead guilty. *Lee*, 582 U.S. at 364-65. When counsel renders deficient performance by advising rejection of a plea offer, a defendant later convicted at trial "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler v. Cooper, 566

U.S. 156, 164 (2012). Essentially the same showing is required in situations where a defendant is convicted at trial following counsel's deficient failure to communicate a formal plea offer to the defendant prior to the offer lapsing. Missouri v. Frye, 566 U.S. 134, 148 (2012).

ii. **Weighing the Evidence.** When the defendant asserts attorney error at trial, determining whether prejudice occurred requires the judge to consider the weight of the evidence.

B. Denial of Counsel Claims

1. **Defined.** In this type of claim, the defendant asserts that he or she was denied counsel at a critical stage of the proceedings. United States v. Cronic, 466 U.S. 648 (1984).
2. **Actual or Constructive Denial.** A denial of counsel may be actual or constructive.
   a. **Actual Denial.** An actual denial of counsel occurs when a defendant has no counsel at all during a critical stage. An actual denial occurs, for example, when the trial judge proceeds with jury selection without defense counsel being present. State v. Colbert, 311 N.C. 283, 285-86 (1984).
   b. **Constructive Denial.** Constructive denial of counsel claims typically arise in two scenarios. First, where no lawyer could provide effective assistance. Such a situation would arise, for example, when counsel is appointed in a complicated case involving multiple charges and multiple witnesses and is given only one day to prepare for trial. *Cf*. *Cronic*, 466 U.S. at 659-60 (describing *Powell v. Alabama*, 287 U.S. 45 (1932) as a constructive denial case).

      The second situation in which constructive denial of counsel claims are asserted is where counsel completely fails to subject the state's case to meaningful adversarial testing. For example, although present in court, counsel makes no meaningful argument to the jury and presents no evidence.
   c. **Standard.** To succeed on an actual denial of counsel claim, the defendant only needs to show that the denial occurred. With this type of IAC claim, prejudice is presumed. *Colbert*, 311 N.C. at 286. Prejudice also is presumed in situations involving a constructive denial of counsel where counsel "fail[s] to function in any meaningful sense as the Government's adversary," whether because of inadequate time to prepare or a failure of substantive advocacy. See *Cronic*, 466 U.S. at 666.

      Not all situations where counsel has inadequate time to prepare result in a presumptively prejudicial denial of counsel, even though such a situation may involve a constitutional violation. In *State v. Johnson*, 379 N.C. 629, 634-36 (2021), the North Carolina Supreme Court held that the trial court's erroneous denial of defense counsel's motion to continue resulted in constitutionally inadequate time to prepare a defense, focusing specifically on defense counsel's lack of time to respond to the State's evidence of certain recorded phone calls which were

provided to the defense only a few days prior to trial. Rather than presuming prejudice the Court conducted an analysis of the issue, finding that the constitutionally inadequate time to prepare negatively affected defense counsel's actual performance at trial and consequently resulted in prejudice that required a new trial on charges for which the error was not harmless. *Id*. at 636-39. This approach of not presuming prejudice when a lack of time to prepare affects only a portion of counsel's performance at a proceeding is supported in United States Supreme Court case law. *Cf. Cronic*, 466 U.S. at 666, n.41 (stating that where defense counsel's overall performance is not in question on the basis of inadequate time to prepare, "particular errors and omissions" should be evaluated under the *Strickland* framework); Bell v. Cone, 535 U.S. 685, 697 (2002) (*Strickland* framework applies when specific elements of counsel's performance are implicated by IAC claim; presumption of prejudice described in *Cronic* applies only when the whole of counsel's performance at a proceeding is implicated). Thus, a trial court evaluating a claim alleging inadequate time to prepare a defense should be mindful of whether the claim calls into question defense counsel's overall performance or merely a portion thereof and, as in *Johnson*, should analyze rather than presume prejudice in the latter case.

C. Conflict of Interest Claims

1. Defined. In a conflict of interest claim, a defendant asserts that counsel was impaired by competing loyalties. These claims arise most commonly in situations of multiple representation, such as when counsel represents co-defendants and the co-defendants' defenses are at odds each other. Conflict of interest claims also can arise in other situations, such as when the defendant's lawyer has been retained to represent a witness for the state. State v. James, 111 N.C. App. 785, 790-92 (1993) (conflict existed where defense counsel represented a key prosecution witness on a concurrent criminal charge unrelated to the case). Note, however, that the North Carolina Supreme Court has been careful to limit application of the conflict of interest IAC framework to situations to which it has direct relevance, State v. Phillips, 365 N.C. 103, 121-22 (2011) (declining to apply *Holloway v. Arkansas* and its progeny to an IAC claim styled as a conflict of interest based on an alleged violation of Rule 3.7(a) of the North Carolina Rules of Professional Conduct (lawyer as witness); applying *Strickland* instead), and that the United States Supreme Court has emphasized that its IAC case law involving conflicts of interest primarily has been developed in the context of multiple representation. Mickens v. Taylor, 535 U.S. 162, 174-76 (2002).

2. Standard. The standard for evaluating a conflict of interest claim depends on how and when the claim was raised, and also depends on the manner in which the original trial judge addressed the claim.

a. Duty to Address Conflict Raised Before or During Trial. When defense counsel timely raises an objection to representation on the basis of a conflict of interest before or during trial, the trial court either must appoint separate counsel or take adequate steps

to ascertain that the risk of conflict is too remote to warrant separate counsel. Holloway v. Arkansas, 435 U.S. 475 (1978). Even where defense counsel does not raise the issue, when the trial court knows or reasonably should know of a "particular conflict," the court "must inquire" into the propriety of the representation. State v. Choudhry, 365 N.C. 215, 220 (2011) (emphasizing that while "a vague, unspecified possibility of conflict" is insufficient to trigger an inquiry, the trial court was required to inquire into potential conflict caused by defense counsel's prior representation of prosecution witness where State raised the issue).

i. **Standard.** In cases where defense counsel objects to representation on the basis of conflict of interest, the trial court must appoint separate counsel or make a determination that the alleged conflict does not imperil the defendant's right to a fair trial after affording the defense an opportunity to make a showing on the issue. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). A trial court's failure to appoint separate counsel or to afford the defense an opportunity to make a showing on the issue is reversible error. *Id*.

   In cases where defense counsel does not raise the issue but the trial court otherwise has notice of the possibility of a conflict of interest, the trial court must make an inquiry into the potential conflict. *Choudhry*, 365 N.C. at 221. While a "full-blown" evidentiary hearing is not mandatory in all such cases, the trial court must use its discretion to determine what form of inquiry is "adequate and sufficient" to inform the defendant of the implications of the potential conflict, determine whether any conflict exists, and, if necessary or appropriate, take a valid waiver of conflict-free representation. *Id*. at 223. If the trial court determines that a conflict exists, it must sufficiently inform the defendant of the implications of the conflict to ensure any waiver thereof is knowing, intelligent, and voluntary. *Id*.

   The North Carolina Supreme Court has held that where the trial court conducts an inquiry into a potential conflict of interest but that inquiry is inadequate or incomplete, the trial court's error is presumptively prejudicial where the defendant can demonstrate that an actual conflict of interest adversely affected defense counsel's performance. *Id.* at 224. This approach is consistent with United States Supreme Court case law limiting the remedy of automatic reversal to situations where a trial court does not address defense counsel's objection to representation on the basis of an alleged conflict of interest, and otherwise requiring proof that a conflict actually affected counsel's performance as a prerequisite for relief. *See generally* Mickens v. Taylor, 535 U.S. 162, 166-74 (2002).

ii. **Waiver.** If a conflict of interest is found, a defendant may waive the right to counsel unimpeded by a conflict of interest.

For information on how to take a waiver in this context, see Counsel Issues, in this Benchbook.

b. Conflict Raised Later. When defense counsel makes no conflict objection before or during trial and the trial court has no reason to believe that a conflict exists, the defendant must show that an actual conflict of interest adversely affected counsel's performance. *Sullivan*, 446 U.S. at 348.

D. Harbison Claims

1. Defined. North Carolina has a special category of IAC claims called *Harbison* claims. A *Harbison* claim alleges that counsel admitted the defendant's guilt to the jury without the defendant's consent. State v. Harbison, 315 N.C. 175 (1985).

2. Standard. It is IAC for defense counsel to admit a defendant's guilt to the jury without the defendant's consent. The only inquiry in these circumstances is whether there was an admission of guilt.

a. Express or Implied Admission. A defendant can make out a *Harbison* claim in connection with either an express or implied admission of guilt by defense counsel. The North Carolina Supreme Court has emphasized that finding IAC on the basis of an implied admission of guilt "should be a rare occurrence." State v. McAllister, 375 N.C. 455, 475 (2020) (finding an implied admission of guilt). *Compare McAllister*, 375 N.C. at 475 (finding an implied admission of guilt), State v. Cholon, 284 N.C. App. 152, 160-61 (2022) (same), *and* State v. Hester, ___ N.C. App. ___, 882 S.E.2d 446 (2022) (same), *with* State v. Mahatha, ___ N.C. App. ___, ___ S.E.2d ___ (2023) (finding no implied admission of guilt), *and* State v. Guin, 282 N.C. App. 160, 171-75 (2022) (same). Courts assessing whether defense counsel has made an implied admission of guilt have examined whether "the only logical inference" that a jury could draw from the statements at issue is that defense counsel is conceding the defendant's guilt on a particular offense. *McAllister*, 375 N.C. at 474-75 (such statements "are the functional equivalent of an outright admission of the defendant's guilt as to a charged offense"); *Mahatha*, ___ N.C. App. at ___, ___ S.E.2d at ___.

b. Admission of Elements. The North Carolina Court of Appeals has held that a *Harbison* error does not necessarily occur where defense counsel admits some but not all of the elements of a charged offense. State v. Crump, 273 N.C. App. 336, 345 (2020) (even if defense counsel made an admission to one element of second-degree forcible sex offense without defendant's consent, no *Harbison* error occurred because counsel "vociferously argued" against the existence of the other elements of the offense); *see also* State v. Wilson, 236 N.C. App. 472, 476 (2014) ("Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error."). Note, however, that the North Carolina Supreme Court has admonished against evaluating the existence of *Harbison* error on the strict basis of "whether

counsel's statements 'checked the box' as to each element of the offense." *McAllister*, 375 N.C. at 475 n.4 (noting that while counsel did not expressly concede that the defendant charged with assault on a female was at least 18 years of age, that element was not in dispute and counsel's statements amounted to an implied admission of guilt).

c. Admission to Charged Offense or a Lesser Included Offense. A *Harbison* error occurs when, without consent, "defense counsel concedes defendant's guilt to either the charged offense or a lesser included offense." *Cf.* State v. Alvarez, 168 N.C. App. 487, 501 (2005) (noting in process of finding no *Harbison* error that "the primary defense to the crimes charged centered on explaining the events as an uncharged drug transaction gone terribly wrong;" finding the objected-to comments were in the context of that central argument and did not concede defendant's guilt to the crimes charged – murder, kidnapping, and armed robbery – or any lesser-included offense); *Wilson*, 236 N.C. App. at 477-78 (no *Harbison* error where trial counsel admitted that defendant committed assault by pointing a gun but defendant was not charged with that offense); State v. Foreman, 270 N.C. App. 784, 789-90 (2020) (no *Harbison* error with respect to attempted first-degree murder charge where defense counsel made a consented-to admission to AWDWISI as AWDWISI is not a lesser included offense of attempted first-degree murder).

3. Current Viability of *Harbison* Claims. In 2004, the United States Supreme Court decided *Florida v. Nixon*, 543 U.S. 175 (2004). That case held that, under federal law, when the defendant alleges IAC due to an admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard. As such, it called the *Harbison* line of cases into question. However, in *State v. Maready*, 205 N.C. App. 1 (2010), the North Carolina Court of Appeals held that *Nixon* did not affect the North Carolina *Harbison* rule.

In 2018, the United States Supreme Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018), holding that a Sixth Amendment violation occurs when trial counsel admits a defendant's guilt over his or her intransigent objection. *McCoy* does not appear to directly affect North Carolina law as the rule from *Harbison* is more stringent than that announced in *McCoy*. *See* Jessica Smith, *Does McCoy v. Louisiana Matter in North Carolina?*, N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Jun. 26, 2018). Note that the Court in *McCoy* found a Sixth Amendment violation on the basis of infringement on the defendant's autonomy to decide the objective of the defense rather than ineffective assistance of counsel but the distinction is of little practical consequence in North Carolina. *Cf.* State v. Crump, 273 N.C. App. 336, 347 (2020) ("*McCoy* did not change our *Harbison* landscape").

4. Best Practices at Trial. Judges are advised to ask--before both opening and closing statements--whether counsel plans to admit guilt. *See McAllister*, 375 N.C. at 477 (while not the sole measurement of consent, "an on-the record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly

and voluntarily consented to an admission of guilt" (internal quotation omitted)). If so, the judge should determine, on the record, whether the defendant consents to this strategy. *See, e.g.*, State v. Moore, 286 N.C. App. 341, 346 (2022) (providing a transcript of the trial court's colloquy with the defendant which, under the facts, established the defendant's knowing and informed consent to counsel's strategy of admitting guilt to lesser included offense during opening statement). Defense counsel may not proceed with this strategy unless the defendant gives explicit consent. If counsel unexpectedly admits guilt during trial, the trial judge should excuse the jury and determine, on the record, whether the defendant consents to the admission. State v. Bryant, 281 N.C. App. 116, 125 (2021) (trial court made adequate *Harbison* inquiry following defense counsel's opening statement which arguably included an implied admission of guilt). If the defendant does not consent, a mistrial may be required.