

POST-CONVICTION: 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 of 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, the defendant might allege that counsel failed to object to evidence, request a jury instruction, or call a witness.
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.
 - 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.
 - 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 or the American Bar Association.
 - ii. **Not a hindsight determination.** When determining whether conduct was deficient, the judge should not engage in hindsight. Rather, the judge should consider the conduct at the time of the alleged deficient performance.
 - 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. However, this does not mean that all strategic decisions are insulated from attack. Although it is true that strategic choices made after a thorough investigation of the law and facts are virtually unchallengeable, strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on the investigation.
 - b. **Prejudice.** Even if counsel's performance was deficient, the defendant is not entitled to relief unless the deficient conduct prejudiced the defense.
 - i. **Defined.** When the ineffectiveness is alleged in connection with a guilty plea, this prong requires the defendant to establish a reasonable probability that

but for counsel's errors, the defendant would not have plead guilty. When the deficient conduct is in connection with a trial, this prong requires the defendant to establish a reasonable probability that but for counsel's error, the result of proceeding would have been different.

- ii. **Weighing the evidence.** When the defendant asserts attorney error at trial, determining whether prejudice occurred invariably requires the judge to consider the weight of the evidence. This determination places the trial judge in more of an appellate role than he or she may be accustomed.

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. Cronin*, 466 U.S. 648 (1984).
2. **Actual or constructive denial.** A denial of counsel may be actual or constructive.
 - i. **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.
 - ii. **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. 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.
 - iii. **Standard.** To succeed on a denial of counsel claim, the defendant only needs to show that the denial occurred. With this type of IAC claim, prejudice is presumed.

C. Conflict of interest claims

1. **Defined.** In a conflict of interest claim, defendant asserts that counsel was impaired by competing loyalties. These claims arise most commonly in situations when counsel represents co-defendants and the co-defendants' defenses are at odds each other. However, conflict of interest claims can arise in other situations, such as when the defendant's lawyer has been retained to represent a witness for the state.
2. **Standard.** The standard for evaluating a conflict of interest claim depends on when the claim was raised.
 - a. **Conflict raised before or during trial.** When defense counsel timely raises 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).
 - i. **Standard.** If the trial court fails to do this, reversible error occurs; no showing of prejudice is required.
 - 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 the section of the Survival Guide on Counsel Issues at pages 4-5.
 - 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, a different rule applies.

- i. **Standard.** In this context, the defendant must show that an actual conflict of interest adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

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.** The North Carolina courts have held that when counsel admits the defendant's guilt to the jury without the defendant's consent, it is per se IAC. Thus, the only inquiry is whether there was an admission of guilt.
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*, ___ N.C. App. ___ (July 6, 2010), the North Carolina Court of Appeals held that *Nixon* did not affect the North Carolina *Harbison* rule.
4. **Best practices at trial.** Judges are advised to ask--before both opening and closing statements--whether counsel plans to admit guilt. If so, the judge should determine, on the record, whether the defendant consents to this strategy. 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. If the defendant does not consent, a mistrial may be required.