

# Right to Counsel Issues

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## Ineffective Assistance Claims

- Strickland* attorney error claims
- Harbison* Claims
- Denial of counsel claims
- Conflict of interest claims

## Question # 1

- Defendant is on trial for PWISD cocaine, Sale of cocaine, PDP, and Habitual Felon. During closing argument, defense counsel says:

"D. could get four months on the paraphernalia. I agree you can find him guilty of that one; it's open and shut. But there was no proof of sale or intent to distribute, and you should find him not guilty of those."

**DA:** Objection! I want to be heard at the bench.

## Answer # 1

***St. v. King, 218 N.C. App. 384 (2012)***

- Though clearly a strategic decision, such a statement concedes defendant's guilt to the charge of possession of drug paraphernalia

## *Harbison* Claims

Alleges that counsel admitted the defendant's guilt to the jury, without the defendant's consent, in violation of the defendant's right to effective assistance. *State v. Harbison*, 315 N.C. 175 (1985)

## *Harbison* Claims

- NC courts have held that when counsel admits defendant's guilt to the jury without defendant's consent, it is **per se IAC**. *State v. Harbison*, 315 N.C. 175 (1985)
- The only inquiries are whether there was an unauthorized admission of guilt or whether defense counsel exceeded the scope of the defendant's consent

## *Harbison Claims*

### **Best practices at trial**

- Ask—before opening & closing statements--whether counsel plans to admit guilt to any offense or a lesser-included
- If yes, determine, on the record, whether defendant consents to the strategy

## *Harbison Claims*

### **Best practices at trial**

- Defense counsel can't proceed unless defendant gives explicit consent on the record
- If counsel unexpectedly admits guilt, excuse jury & determine whether defendant consents to the admission; if not may → **mistrial**

## Question # 2

- Defendant is on trial for 2d degree Rape, 2d degree Sex Offense, Assault by Strangulation, and AOF. During closing argument, defense counsel argues:
  - "You heard (the D.) admit things got physical. He admitted he did wrong. God knows he did...Put aside your feelings about the violence that occurred. You can't convict him of the rape and sexual assault and strangulation based on the evidence. Find him not guilty those."

**DA:** Objection! I want to be heard at the bench.

## Answer # 2

***St. v. McAllister, 375 N.C. 455 (2020)***  
 Implied Admission of Guilt = Harbison Error

## Question # 3

- Defendant is on trial for first-degree statutory sex offense, crime against nature, and indecent liberties. During closing argument, defense counsel states:

"The minor was 15 and was in high school. The defendant didn't know that. The minor lied. The defendant told the officer the truth about what happened. He gave the minor oral. The defendant didn't lie to the police. He told police what happened between them. I ask you to find him not guilty."

**DA:** Objection! I want to be heard at the bench.

## Answer # 3

*St. v. Cholon, 284 N.C. App. 152 (2022)*

Implied admission of guilt  *Harbison* error

## Harbison Claims

### What is not (necessarily) a *Harbison* Error:

- Admission to one element of an offense
- Admission of guilt to another crime that is not a lesser-included offense
- Admitting guilt in a capital case after informing the client of that strategy and the client will not respond (?)

## Question # 4

- During jury selection, defense counsel approaches and explains that he and the defendant are unable to agree about accepting a certain juror. The defendant is asking to personally address the court about the issue.

What should you do?

## Absolute Impasse



## Answer # 4

- When defense counsel & a fully informed criminal defendant reach an **absolute impasse** as to tactical decisions, the client's wishes must control. *State v. Ali*, 329 N.C. 394, 404 (1991) (noting principal-agent nature of the attorney-client relationship)



## Absolute Impasse

**What's an Absolute Impasse?** Defendant and counsel must be locked in controversy regarding a matter of trial strategy.

- ✓ Jury selection
- ✓ Whether to testify or present evidence
- ✓ Examination of witnesses
- ✓ Defenses
- ✓ Whether to move for mistrial
- ✓ Jury instructions
- ✓ Whether to plead guilty
- ✓ Whether to appeal

## Absolute Impasse

**Your Duties.** If brought to your attention that such an impasse exists, you must require defense counsel to abide by defendant's wishes

**Defense Counsel's Duties.** Make a record of the circumstances, advice to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. The better practice is to do this on the record in open court

# Absolute Impasse



## Question # 5

- Two of the defendant's prior attorneys were allowed to withdraw due to breakdown of the relationship. The defendant then waives all counsel and is appt'd. standby counsel. After expressing problems researching the law and investigating his case from jail several times, D. states on the day of trial his desire to have full representation. Standby counsel needs a continuance to do.

What should you do?

## Answer # 5

### *St. v. Harvin, 382 N.C. 566 (2022)*

[T]he defendant's behavior in requesting the removal of two counsel, seeking to proceed pro se, and then deciding that he needed the help of counsel to vindicate his rights at trial—while remaining polite, cooperative, and constructively engaged in the proceedings—was not “the type or level of obstructive and dilatory behavior which [would] allow the trial court . . . to conclude that [the] defendant had forfeited the right to counsel

## Waiver vs. Forfeiture

### Waiver of Counsel

Knowing, intelligent, and voluntary relinquishment of the right to counsel

### Forfeiture of Counsel

Involuntary relinquishment of the right to counsel due to egregious misconduct

## Forfeiture of Counsel

Involuntary relinquishment  
relinquishment of right to  
counsel



Serious  
obstruction of  
the proceeding  
or assaulting  
their attorney

## Forfeiture of Counsel

- Use advance warnings when possible
- Document the reasons for withdrawal of prior counsel or D.'s inability to retain counsel
- Tread cautiously!



## Forfeiture of Counsel

- Must be a clear record of D.'s misconduct
- Make findings of fact and legal conclusions
- Age of case and # of attys. is NOT dispositive



## Question # 6

- D.'s motion to remove his first atty. was allowed. Her second atty. withdrew. The third atty. withdrew shortly after that. A fourth atty. was appointed and withdrew 1.5 months later. Six months later, the fifth attorney withdrew. There were multiple waivers of counsel signed and D. also attempted to hire her own atty., without success. She asks for a sixth appt.'d. atty.

What should you do?

## Answer # 6

### *State v. Atwell, 383 N.C. 437 (2022)*

Defendant's behavior did not rise to the level of egregious misconduct which could justify the trial court's determination that she had involuntarily surrendered her right to counsel. Defendant never engaged in aggressive, profane, or threatening behavior, show[ed] any contempt for the trial court's authority.

## Forfeiture of Counsel

### Forfeiture

- Making representation physically dangerous for atty by assault, threats, harassment
- Profane or threatening behavior that disrupts the proceedings
- Repeated refusal to answer whether he wants an attorney
- Refusing to participate in the case
- Hiring/firing multiple attys. or refusing to retain one after multiple opportunities\*

### No Forfeiture

- Having attorneys withdraw (even multiple ones)
- Being unable to retain an attorney after good faith effort\*
- Being frustrating, dense, or slow
- Challenging the court's jurisdiction, conspiracy theories or other unfounded beliefs
- Speaking out of turn
- Arguing with and questioning the court or counsel

## Question # 7

- D. waives appointed counsel and hires a private lawyer. The week of trial, D. wishes to fire that lawyer and hire different private counsel. The trial court allows the withdrawal but warns D. that the trial will proceed that week. D. ultimately cannot hire the second private lawyer. D. asks for new counsel to be appointed. The trial court declines to do so and requires D. to proceed pro se.

Problem?

## Answer # 7

***State v. Blakeney, 245 N.C. App. 452 (2016)***

Waiver of Appointed Counsel **≠** Waiver of all Counsel

## Waiver of Counsel

Knowing, voluntary  
relinquishment  
relinquishment of  
right to counsel



### 15A-1242 Colloquy

- 1) Advised of right to counsel
- 2) Understands and appreciates consequences of decision
- 3) Understands nature of charges and possible punishments

(a "thorough inquiry")

## Waiver of Counsel Colloquy – G.S. 15A-1242

Are you able to hear and understand me?

Are you under the influence of any substances?

Age, education, literacy?

Any handicaps or disabilities?

Do you understand you have the right to a lawyer,  
including at the State's expense?

Understand the court will not give you advice on  
defenses, jury instructions, objections, or other legal  
issues?

Understand the court will treat you as if you  
were a lawyer?

Understand the nature of charges and the  
possible punishments?

Do you have any questions?

Do you now waive the right to the assistance  
of a lawyer and voluntarily and intelligently  
decide to represent yourself?



## "Gray-area" Defendants

### ***Indiana v. Edwards*, 554 U.S. 164 (2008)**

TC may limit a D's right to self representation by insisting on representation by counsel when D is competent to stand trial but lacks the mental capacity to conduct the defense unless represented

## "Gray-area" Defendants

### ***St. v. Cureton* (NCA 2012):**

The constitution does not prohibit self-representation by a "gray-area" defendant

Capable to proceed is judged by the same standard as capable of proceeding pro se

## Question # 8

- Local police charge the D. and he is on trial. Officers from that department testify against D. At the charge conference, D. explains he is concerned that his lawyer isn't acting in his best interests, because his lawyer also represents the police in his capacity as a part-time city attorney. D. admits he's known about this for a year and doesn't wish to question his lawyer about it.

What should you do?

## Question # 8

***St. v. Lynch, 271 N.C. App. 532 (2020)***

If defense counsel advises the police, that is an unwaivable conflict

The trial court erred in failing to further investigate the issue

## Conflict of Interest

**Standard.** The standard for evaluating a conflict of interest claim depends on when the claim was raised

**Conflict raised before or during trial.** 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

- Defendant might be able to waive the conflict

## Conflict of Interest

**Standard.** The standard for evaluating a conflict of interest claim depends on when the claim was raised

**Conflict raised later.** Defendant must show that an actual conflict of interest adversely affected counsel's performance