12.7 Right to Effective Assistance of Counsel

A. Cases in which Right Arises

Generally. "A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561 (1985). If the defendant has a constitutional right to counsel, then he or she has a constitutional right to effective assistance of counsel based on the constitutional provision establishing the defendant's right to counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984) (Sixth Amendment right to counsel includes right to effective assistance of counsel); *Evitts v. Lucey*, 469 U.S. 387 (1985) (right to counsel on appeal includes right to effective assistance of that counsel); *see generally* 3 LAFAVE, CRIMINAL PROCEDURE § 11.7(a), at 808–14. If the defendant has a statutory right to counsel, he or she has a comparable statutory right to effective assistance of counsel (discussed further below in "Statutory right to effective assistance" in this subsection A.).

IDS has developed performance guidelines for attorneys for various proceedings, at www.ncids.org/Attorney/Standards_Guidelines.html?c=Information%20for%20Counsel,%20Standards%20And%20Performance%20Guidelines. The preface to the noncapital criminal trial level guidelines states that the guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims, but they provide a useful review of the responsibilities of counsel during different parts of the proceedings. *Cf. Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (restatements of professional conduct, such as ABA Guidelines, can be useful guides to whether an attorney's conduct was reasonable).

Appointed and retained counsel. If a defendant has a right to counsel, the same standards of effectiveness apply whether the defendant is represented by appointed or retained counsel. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); 3 LAFAVE, CRIMINAL PROCEDURE § 11.7(b), at 815–16.

Capital trials. In capital trials, North Carolina law gives an indigent defendant the right to a second attorney. *See* G.S. 7A-450(b1). Since a defendant's right to second counsel in a capital case is statutory, the denial of second counsel would not violate a defendant's Sixth Amendment right to counsel. (A defendant would still be able to obtain relief because the denial of a defendant's statutory right to second counsel, or limitations on second counsel's participation that amount to a denial of the statutory right to counsel, would be reversible error. *See State v. Hucks*, 323 N.C. 574 (1988).)

The constitutional analysis of second counsel's role must be different, however, for claims of ineffective assistance, such as attorney incompetence, admissions of guilt without client consent (*Harbison* error, discussed below in subsection C.), and conflicts of interest. A capital defendant has a constitutional right to counsel and therefore a constitutional right to be represented effectively. Since the two lawyers appointed to represent a capital defendant share responsibilities, the actions or inactions of both determine the effectiveness of the representation received by the defendant. To take an extreme example, suppose one attorney handles the guilt-innocence phase and the second

the sentencing phase, but the second attorney does nothing to prepare for sentencing and the defendant is sentenced to death. The overall representation received by the defendant is constitutionally deficient regardless of which attorney is constitutionally required and which attorney is only required by statute. *See also State v. Matthews*, 358 N.C. 102 (2004) (reversible error for one of capital defendant's attorneys to admit defendant's guilt to lesser offense without defendant's consent); *Frye v. Lee*, 89 F. Supp. 2d 693 (W.D.N.C. 2000), *aff'd*, 235 F.3d 897 (4th Cir. 2000) (defendant alleged *Strickland* ineffectiveness by his two attorneys, and neither the district court nor the Fourth Circuit questioned the viability of such an argument regarding second counsel).

Standby counsel. Many courts are unreceptive to the possibility of a claim of ineffective assistance of standby counsel. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 11.5(f), at 764–65 & n.106 (noting conflicting authority). Such a claim may arise in limited circumstances, however. In *State v. Thomas*, 331 N.C. 671, 677 (1992), the N.C. Supreme Court indicated that a defendant may claim ineffectiveness of standby counsel regarding "the limited scope of the duties assigned to such counsel by the statute or the defendant or voluntarily assumed by such counsel."

In addition to the N.C. Supreme Court's statement in *Thomas*, a number of decisions have recognized the possibility of a claim of ineffective standby counsel in limited circumstances, although courts may differ regarding the circumstances they would accept. *See United States v. Schmidt*, 105 F.3d 82, 90–91 (2d Cir. 1997) (stating that it might consider a claim of ineffectiveness by standby counsel if counsel assumed expanded role as defendant's trial counsel; also finding in alternative that standby counsel's performance was reasonable); *United States v. VanHoesen*, 636 F. Supp. 2d 155 (N.D.N.Y. 2009) (to same effect as *Schmidt*); *Jelinek v. Costello*, 247 F. Supp. 2d 212, 265–67 (E.D.N.Y. 2003) (court reviews several federal and state decisions and finds that "[i]n an appropriate case, a defendant who proceeds pro se may make out a claim that he received ineffective assistance of standby counsel"; court also observes that "[e]ven those circuits most hostile to the idea of a claim of ineffective assistance of standby counsel refuse categorically to reject the possibility of such a claim succeeding"); *State v. Surber*, 723 S.E.2d 851, 863 (W. Va. 2012) ("To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently *within the limited scope of the duties assigned to or assumed by counsel.*" (citation omitted)) (emphasis in original); *State v. Pugh*, 222 P.3d 821, 826 (Wash. Ct. App. 2009) ("In general, a criminal defendant who exercises his constitutional right to self-representation cannot later claim ineffective assistance of counsel, because the defendant assumed complete responsibility for his own representation. But our Supreme Court has suggested that a criminal defendant may claim ineffective assistance of standby counsel if standby counsel violated a limited duty or obligation owed to the pro se defendant." (citation omitted)); *People v. Michaels*, 49 P.3d 1032, 1055–56 (Cal. 2002) (court finds that federal decisions have "left open the possibility that on different facts the federal court might allow a pro se defendant to challenge the performance of standby counsel"; using language similar to North Carolina Supreme Court's opinion in *Thomas*, court holds that defendant may raise ineffectiveness claim based on breach of limited authority and

responsibility that standby counsel has assumed); *see also State v. McDonald*, 22 P.3d 791 (Wash. 2001) (recognizing right to conflict-free standby counsel).

If counsel is ineffective before the defendant elects to proceed pro se, there is no question that the defendant may claim ineffectiveness for that counsel's performance. *See Downey v. People*, 25 P.3d 1200 (Colo. 2001) (in addition to finding that defendant may assert claim of ineffective assistance of standby counsel in limited circumstances, court notes that defendant may maintain claim for ineffective assistance of counsel for any acts or omissions that might have occurred before defendant elected to proceed pro se). And, in cases in which standby counsel assumes a greater role than appropriate, a defendant may have a claim that standby counsel interfered with the defendant's right to self-representation. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984).

Statutory right to effective assistance. If a defendant has a statutory right to counsel, he or she generally has a statutory right to effective assistance of counsel. *See In re Bishop*, 92 N.C. App. 662, 664–65 (1989) (court holds that statutory right to counsel in proceeding to terminate parental rights includes right to effective assistance of counsel; otherwise, statutory right to counsel would be "empty formality"); *Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D. 2001) ("We will not presume that our legislature has mandated some 'useless formality' requiring the mere physical presence of counsel as opposed to effective and competent counsel." (citation omitted)); *Lozada v. Warden, State Prison*, 613 A.2d 818, 821 (Conn. 1992) (court discusses statutory right to counsel and finds that "[i]t would be absurd to have the right to appointed counsel who is not required to be competent"); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.7(a), at 814 (where state has constitutional obligation to conduct proceedings, ineffectiveness of counsel may deprive defendant of right to contest proceedings and thus violate due process even if defendant has no constitutional right to counsel). *But cf.* G.S. 15A-1419(c) (stating that ineffective assistance of postconviction counsel, afforded by North Carolina statute, does not constitute good cause to excuse grounds listed in G.S. 15A-1419(a) for denial of motion for appropriate relief).

Under G.S. 7A-451(a)(18), an indigent defendant has the right to appointed counsel in a proceeding involving placement into satellite monitoring. The court of appeals has stated, however, that a defendant cannot raise an ineffective assistance of counsel claim in such cases because ineffective assistance of counsel claims may be raised in criminal cases only and satellite-based monitoring is not a criminal punishment. *See State v. Wagoner*, 199 N.C. App. 321 (2009), *aff'd per curiam*, 364 N.C. 422 (2010); *accord State v. Miller*, 209 N.C. App. 466 (2011) (so stating for appeals from SBM determinations). These decisions are inconsistent with the above-cited decisions in other civil contexts recognizing a right to effective assistance of counsel.

B. Deficient Performance

It is impossible to review in depth here the various situations in which a claim of ineffectiveness may arise. For purposes of this discussion, cases involving ineffectiveness claims are divided into two basic categories—cases in which the defendant ordinarily

must show prejudice to prevail (discussed in this subsection) and cases in which prejudice is presumed or at least is not part of the standard for judging ineffectiveness (discussed *infra* in § 12.7C, Presumptive Prejudice, and § 12.7D, Conflicts of Interest).

***Strickland* standard.** The most common ineffectiveness claims involve allegations of attorney incompetence or error. Generally, the defendant must show: (i) that the attorney's performance was deficient in that it lay outside the range of professionally competent assistance, and (ii) that the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668 (1984). To establish prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *Compare, e.g., State v. Hunt*, ___ N.C. App. ___, 728 S.E.2d 409 (2012) (counsel's performance was deficient but not prejudicial when he opened the door to other crimes evidence), *review granted*, ___ N.C. ___, 738 S.E.2d 360 (2013), *with State v. Surratt*, ___ N.C. App. ___, 717 S.E.2d 47 (2011) (attorney's failure to object to inadmissible testimony by social worker about alleged sexual abuse was deficient and prejudicial and required new trial), *vacated* ___ N.C. ___, 732 S.E.2d 348 (2011) (vacating court of appeals opinion without prejudice to filing of motion for appropriate relief alleging ineffective assistance of counsel).

In some instances, counsel's errors or omissions may be so egregious as to warrant a presumption of prejudice without any further showing. *See infra* § 12.7C, Presumptive Prejudice.

Failure to investigate or prepare. Attorneys are probably most likely to be found ineffective when they fail to investigate or prepare a case. Courts reviewing ineffective assistance of counsel claims usually give considerable deference to *informed* strategic or tactical choices by lawyers. *See Strickland*, 466 U.S. 668, 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Ineffectiveness is more likely to be found where an attorney failed to obtain the necessary background information to make an informed choice. *See, e.g., Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (counsel's conduct fell below standard of reasonableness when he failed to investigate and present mitigating evidence of defendant's mental health, background, and military service); *Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel ineffective for failing to examine readily-available prosecution file containing mitigating evidence); *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel ineffective for failing to investigate mitigating evidence); *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) ("Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities."); *Deluca v. Lord*, 77 F.3d 578 (2d Cir. 1996) (counsel ineffective for failing to investigate mental disturbance defense); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1 (3d ed. 1993) (defense counsel has duty to investigate).

Preparation and investigation do not render strategic or tactical decisions completely immune from review, however. If, for example, after investigating the case an attorney

settles on an outlandish or implausible strategy when other options are superior, an ineffectiveness claim may succeed. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 11.10(c), at 964–65; *cf. Knowles v. Mirzayance*, 556 U.S. 111 (2009) (defense counsel not ineffective for recommending, in sentencing phase of first degree murder trial, that defendant withdraw insanity defense where the same jury had rejected similar testimony in guilt phase and strongest testimony was no longer available; counsel is not required to raise a defense that is "almost certain to lose").

Failure to make suppression motion. *See State v. Gerald*, ___ N.C. App. ___, 742 S.E.2d 280 (2013) (finding on direct review of conviction that counsel was ineffective for failing to make suppression motion); *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (to same effect).

Failure to inform client of plea offer and consequences. Lawyers have sometimes been found ineffective when they have misinformed the client of the consequences of accepting a plea offer and entering a guilty plea. *See Hill v. Lockhart*, 474 U.S. 52, 56, 59 (1985) (guilty plea not knowing and voluntary where defendant enters plea on advice of counsel and advice is not "within the range of competence demanded of attorneys in criminal cases"; defendant still must show prejudice—that is, "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *Ostrander v. Green*, 46 F.3d 347, 354–56 (4th Cir. 1995) (prejudice found based on erroneous advice of counsel regarding plea), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996), *aff'd*, 521 U.S. 151 (1997).

Similarly, an attorney may be found ineffective if his or her advice led to the improvident *rejection* of a plea offer by a defendant. *See Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1385 (2012) (prejudice inquiry focuses on whether "there is a reasonable probability that the plea offer would have been presented to the court . . ., 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").

Lawyers also may be found ineffective if they fail altogether to inform the client of a plea offer. Counsel must communicate to the defendant formal plea offers from the prosecution. *See Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012) (counsel rendered ineffective assistance by allowing a plea offer to expire without informing the defendant or allowing him to consider the offer); *State v. Simmons*, 65 N.C. App. 294, 300 (1983) (holding that "a failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances"); *compare State v. Martin*, 318 N.C. 648 (1986) (no relief warranted; defendant offered insufficient evidence that prosecutor had made definite plea offer); *State v. Johnson*, 126 N.C. App. 271 (1997) (finding under circumstances of case that counsel's failure to timely inform prosecutor of defendant's acceptance of plea offer did not warrant relief).

In light of the U.S. Supreme Court's decisions in *Lafler* and *Frye*, the remedy of a new

trial (ordered by the North Carolina Court of Appeals in *Simmons* for counsel's failure to inform the defendant of the State's plea offer) may be insufficient to cure the prejudice to the defendant; a defendant may be entitled to the terms of the earlier plea offer. *See Lafler* (describing potential remedies for ineffective assistance of counsel causing defendant to reject earlier plea offer); *Frye* (describing remedies when counsel fails to communicate plea offer to defendant). For a further discussion of counsel's obligations in advising clients about entering a guilty plea, see 2 NORTH CAROLINA DEFENDER MANUAL Ch. 23 (Guilty Pleas) (UNC School of Government, 2d ed. 2012).

Advice about immigration and other significant "collateral" consequences. The courts have sometimes distinguished between direct and collateral consequences in assessing counsel's obligation to advise clients about the impact of a criminal conviction. *See, e.g., State v. Goforth*, 130 N.C. App. 603, 605 (1998) (noting that, "[g]enerally, an attorney is not required to advise his [or her] client of the myriad 'collateral consequences' of pleading guilty"). In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court refused to apply this distinction to advice about immigration consequences. Because of the importance of immigration consequences and their close connection to the criminal process, the Court concluded that defense counsel has an obligation to advise noncitizen clients about immigration consequences, whether characterized as direct or collateral.

The *Padilla* court described a two-step approach. One, if the immigration consequences are clear—as they were in *Padilla*, where the defendant was facing virtually mandatory deportation if convicted—counsel must advise a noncitizen client of the consequences of conviction. In that instance, the failure to advise, as well as the giving of incorrect advice, falls below expected professional norms. Two, if the immigration consequences of a guilty plea are unclear, counsel at least must advise a noncitizen client that a conviction may carry adverse immigration consequences. *Cf. Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013) (*Padilla* not retroactive); *State v. Alshaif*, ___ N.C. App. ___, 724 S.E.2d 597 (2012) (to same effect).

Practice note: As a practical matter, the two-step approach adopted in *Padilla* requires that counsel investigate a noncitizen's circumstances to determine whether potential immigration consequences are clear or unclear. Only then will counsel have sufficient information to satisfy the obligation of appropriately advising a noncitizen client. For a detailed discussion of the immigration consequences of a conviction, see SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA (UNC School of Government, 2008), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals"). The immigration consequences manual is not a substitute, however, for independent research and consultation with an immigration expert as needed.

The approach taken in *Padilla* may apply to other significant consequences of a conviction, whether characterized as direct or collateral. Thus, effective assistance of counsel may require the giving of advice about sex offender registration and monitoring requirements as a result of a criminal conviction. *See Bauder v. Dep't of Corr.*, 619 F.3d 1272 (11th Cir. 2010) (relying on *Padilla* and finding counsel's performance deficient

based on counsel's incorrect advice about the potential for civil commitment as a result of the defendant's guilty plea to stalking of a minor). The North Carolina courts have held that sex offender registration and monitoring requirements are collateral matters for purposes of evaluating the taking of a guilty plea by a judge (*see State v. Bare*, 197 N.C. App. 461 (2009)), and that a defendant does not have a right to effective assistance of counsel for a satellite monitoring determination (*see supra* "Statutory Right to Effective Assistance" in § 12.7A, Cases in which Right Arises); but, the courts have not specifically addressed counsel's obligation to advise clients about sex offender registration and monitoring requirements.

Attorneys also may be found ineffective for misadvice to a client about collateral consequences. *See State v. Goforth*, 130 N.C. App. 603 (1998) (advice of attorney who failed to accurately answer defendant's question about collateral consequence of plea was deficient).

Counsel may obtain more information about collateral consequences by consulting the Collateral Consequences Assessment Tool (C-CAT), an online tool available at http://ccat.sog.unc.edu/.

C. Presumptive Prejudice

For certain ineffective assistance of counsel claims, outcome-determinative prejudice need not be shown. Prejudice is presumed. *See United States v. Cronic*, 466 U.S. 648, 658–59 (1984); *Bell v. Cone*, 535 U.S. 685 (2002); 3 LAFAVE, CRIMINAL PROCEDURE § 11.8 (referring to these claims as involving state interference and other extrinsic factors); JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES § 1.04 (UNC School of Government, 2003) (referring to these cases as involving actual or constructive denials of counsel); *see also infra* § 12.7D, Conflicts of Interest. Some of the violations discussed here may be considered as involving ineffective assistance of counsel or the denial of other rights, such as due process, the right to confront one's accusers and present a defense, and the right to counsel itself.

Absence of counsel and restrictions on assistance. Prejudice need not be shown when counsel either was totally absent, or was prevented from assisting the accused, during a critical stage. *See Cronic*, 466 U.S. 648, 659 & n.25; *see also Geders v. United States*, 425 U.S. 80 (1976) (constitutional denial of counsel where lawyer was not permitted to consult with defendant during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (constitutional denial of counsel to deny defense counsel opportunity to make closing argument in either jury or nonjury case); *State v. Colbert*, 311 N.C. 283 (1984) (reversal of conviction required where defense lawyer was late to court and judge started jury selection without him).

Failure to subject State's case to meaningful adversarial testing. Prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. 648, 659; *accord Bell*, 535 U.S. 685 (reaffirming *Cronic*, but finding on facts presented that attorney performance did not amount to failure to subject

case to meaningful adversarial testing and should be analyzed under *Strickland* standard).

***Harbison* error.** North Carolina presumes prejudice where defense counsel concedes the defendant's guilt on any element of an offense without the defendant's consent. *See State v. Harbison*, 315 N.C. 175 (1985) (trial counsel conceded defendant's guilt to a lesser included offense without defendant's consent; reversible error per se). This type of error can be viewed as one type of failure to subject the State's case to meaningful adversarial testing. For a further discussion of *Harbison* error, see 2 NORTH CAROLINA DEFENDER MANUAL § 23.7C (Concessions of Guilt during Trial), § 28.6 (Admissions of Guilt During Opening Statement), and § 33.6 (Admissions of Guilt During Closing Argument) (UNC School of Government, 2d ed. 2012).

Inability of fully competent lawyer to provide effective assistance. On some occasions, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. 648, 659–60. For example, prejudice may be presumed where the trial court improperly denies a defense motion for a continuance and counsel does not have adequate time or opportunity to prepare. *See Powell v. Alabama*, 287 U.S. 45 (1932) (defendant must not be stripped of right to have sufficient time to consult with counsel and prepare defense); *State v. Rogers*, 352 N.C. 119 (2000) (defense counsel had insufficient time to prepare defense and was presumptively ineffective). *Compare, e.g.*, *State v. Tunstall*, 334 N.C. 320 (1993) (refusal to grant continuance did not interfere with defendant's ability to consult with counsel).

Forfeiture of legal proceeding. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (attorney failed to file notice of appeal despite defendant's request; where attorney error results in forfeiture of legal proceeding, prejudice presumed).

D. Conflicts of Interest

Generally. The right to effective assistance of counsel includes the right to conflict-free counsel. *See Wood v. Georgia*, 450 U.S. 261 (1981); *State v. Bruton*, 344 N.C. 381 (1996). There are two basic standards for conflict-of-interest cases, discussed below. The cases interpreting these standards may be a poor guide, however, to what is ethically advisable. As one commentator has noted, the unwillingness of a court to overturn a conviction on appeal because of a conflict of interest "says little about the ethical propriety of the lawyer's conduct." ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS at 234 (Rodney J. Uphoff ed., American Bar Association 1995). IDS rules require appointed counsel to make timely, reasonable efforts to determine whether representation involves a conflict of interest. *See* IDS Rule 1.7(a1) (identification of conflicts in noncapital cases); IDS Rule 2A.2(d1) (capital cases).

The conflict problems a criminal defense lawyer may encounter are discussed in more detail in Appendix 12-1 to this chapter.

Automatic reversal. If counsel brings a conflict to the trial court's attention and the trial court fails to inquire into the conflict, prejudice is presumed without a further showing and reversal is automatic. *See Holloway v. Arkansas*, 435 U.S. 475 (1978); *accord State v. Gray*, ___ N.C. App. ___, 736 S.E.2d 837 (2013); *cf. State v. Hunt*, ___ N.C. App. ___, 728 S.E.2d 409 (2012) (majority finds that voir dire of witness by trial judge was sufficient inquiry into possible conflict of interest and that full-blown evidentiary hearing was not required), *review granted*, ___ N.C. ___, 738 S.E.2d 360 (2013). Reversal likewise is required if after timely objection the trial court improperly requires continued representation. *Holloway*, 435 U.S. at 488. The court must grant counsel's motion to withdraw unless the possibility of conflict is "too remote" to warrant new counsel. *Id.*, 435 U.S. at 484.

Holloway involved a conflict based on counsel's simultaneous representation of co-defendants, but courts have held that the automatic reversal rule applies to other conflicts. *See, e.g., Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997); *United States v. Cook*, 45 F.3d 388 (10th Cir. 1995) (stating that "a defendant's right to counsel free from conflicts of interest 'is not limited to cases involving joint representation of co-defendants . . . but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person'" (citation omitted)), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001); *see also State v. Ballard*, 180 N.C. App. 637 (2006) (attorney represented defendant and a potential defense witness who had testimony that was exculpatory as to defendant but could implicate that witness in another matter; defendant's waiver of conflict-free counsel not knowing, voluntary, and intelligent). *But cf. State v. Phillips*, 365 N.C. 103 (2011) (holding that constitutional conflict of interest rules apply to multiple representation, either simultaneous or successive, but finding that alleged conflict in this case—that defense counsel could potentially be called as a witness to impeach testimony of State's witness—was properly addressed under *Strickland* standard of ineffectiveness; court also suggests in note 5 that record disclosed that alleged conflict did not adversely affect counsel's performance, the standard for assessing the impact of a conflict under *Cuyler*, discussed below).

Conflicts adversely affecting counsel's performance. If counsel fails to bring a conflict to the trial court's attention, the defendant must show that any conflict adversely affected trial counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980). This standard is more difficult to meet than the *Holloway* standard but, since a showing of prejudice is not specifically required, may be easier to satisfy than the *Strickland* standard. *See Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996) (counsel ineffective where he jointly represented two defendants and failed to pursue plea bargain for less culpable defendant); *Griffin v. McVicar*, 84 F.3d 880 (7th Cir. 1996) (writ of habeas corpus granted where counsel pursued weaker of two defenses because pursuit of alternative defense would jeopardize co-defendant).

After *Mickens v. Taylor*, 535 U.S. 162 (2002), a defendant must make this showing (that the conflict adversely affected counsel's performance) even if the trial court knew or should have known of the potential conflict. Under *Cuyler* and *Mickens*, the trial court must inquire if it is aware of a conflict. *See also State v. James*, 111 N.C. App. 785, 791

(1993) (trial judge erred in not conducting inquiry into conflict of which it was aware; when potential conflict is raised, trial judge must "take control of the situation" (citation omitted)). However, unless defense counsel has brought the conflict to the court's attention, a defendant does not get the benefit of the automatic reversal rule for the court's failure to inquire. (*Mickens* also clarified that to satisfy the *Cuyler* standard, a defendant need not show that an "actual" conflict existed that adversely affected counsel's performance; a conflict adversely affecting trial counsel's performance is the same as an actual conflict.) In *State v. Bunch*, 192 N.C. App. 724 (2008), the court of appeals stated that a defendant is not entitled to relief for his or her counsel's alleged conflict of interest if not raised by counsel, but the case is better interpreted as holding that a defendant is not automatically entitled to relief for the trial court's failure to inquire into a conflict not raised by counsel. *See State v. Mims*, 180 N.C. App. 403 (2006) (stating principles more clearly).

Cuyler, like *Holloway*, involved a conflict arising out of simultaneous representation of co-defendants, but courts have applied the *Cuyler* standard to other conflicts. *See State v. Choudhry*, 365 N.C. 215 (2011) (prosecutor, not defense counsel, brought to trial court's attention potential conflict that defense counsel previously represented a State's witness; judge's subsequent inquiry was insufficient to establish valid waiver by defendant, but defendant did not show actual conflict of interest adversely affecting counsel's performance requiring reversal); *State v. James*, 111 N.C. App. 785 (1993) (defense counsel represented prosecution witness in a separate matter); *State v. Loye,* 56 N.C. App. 501 (1982) (defendant's attorney under investigation for his own participation in criminal conduct involving defendant); *United States v. Nicholson*, 475 F.3d 241 (4th Cir. 2007) (simultaneous representation of defendant and second criminal client, whom defendant claimed had threatened to kill defendant). *But cf. Mickens v. Taylor*, 535 U.S. 162, 174–76 (2002) (noting that U.S. Supreme Court has not decided whether *Cuyler* rule applies to conflicts other than those arising from joint representation); *State v. Phillips*, 365 N.C. 103 (2011) [see parenthetical note regarding *Phillips* under "Automatic reversal," above].

E. Raising Ineffective Assistance of Counsel Claims on Direct Appeal

Ineffective assistance claims are typically raised through a postconviction motion for appropriate relief. *See State v. House*, 340 N.C. 187 (1995) (stating general rule that ineffectiveness claims are appropriate subject of motion for appropriate relief); *State v. Harbison*, 315 N.C. 175 (1985). Most ineffectiveness claims cannot be raised on direct appeal because the record on appeal is insufficient to determine the claim. *See, e.g., State v. Morganherring*, 347 N.C. 408 (1997) (remanding for evidentiary hearing in superior court because record on appeal was insufficient to determine ineffectiveness claim); *State v. Thomas*, 327 N.C. 630 (1990) (using supervisory powers to remand to superior court for findings necessary to determine ineffectiveness claim); *State v. King*, ___ N.C. App. ___, 721 S.E.2d 336 (2012) (dismissing without prejudice *Harbison* claim that trial counsel admitted defendant's guilt without consent). *But see, e.g., State v. Boyd*, 209 N.C. App. 418 (2011) (court finds record adequate to consider claim that counsel was ineffective in failing to object to video of defendant's statement to police, introduced by State on rebuttal after defendant testified; court denies claim as well as alternative request

that court dismiss claim without prejudice to right to raise issue in motion for appropriate relief).

However, the North Carolina Supreme Court has indicated that ineffectiveness claims that can be raised on direct appeal—that is, those that are apparent on the record and require no further investigation or hearing to develop—must be raised or will be waived. *See State v. Fair*, 354 N.C. 131, 167 (2001) (so holding but also noting that "defendants likely will not be in a position to adequately develop many IAC [ineffective assistance of counsel] claims on direct appeal"). In light of the U.S. Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003) (under federal law defendant may raise ineffectiveness claim in collateral proceeding even though defendant could have but did not raise claim on direct appeal), the state supreme court may be willing to reconsider its position. *See State v. Lawson*, 159 N.C. App. 534 (2003) (noting inconsistency between *Massaro* and *Fair* and inefficiencies created by *Fair*). Until then, appellate counsel is obliged to review the record for possible ineffectiveness claims that might be cognizable on direct appeal.