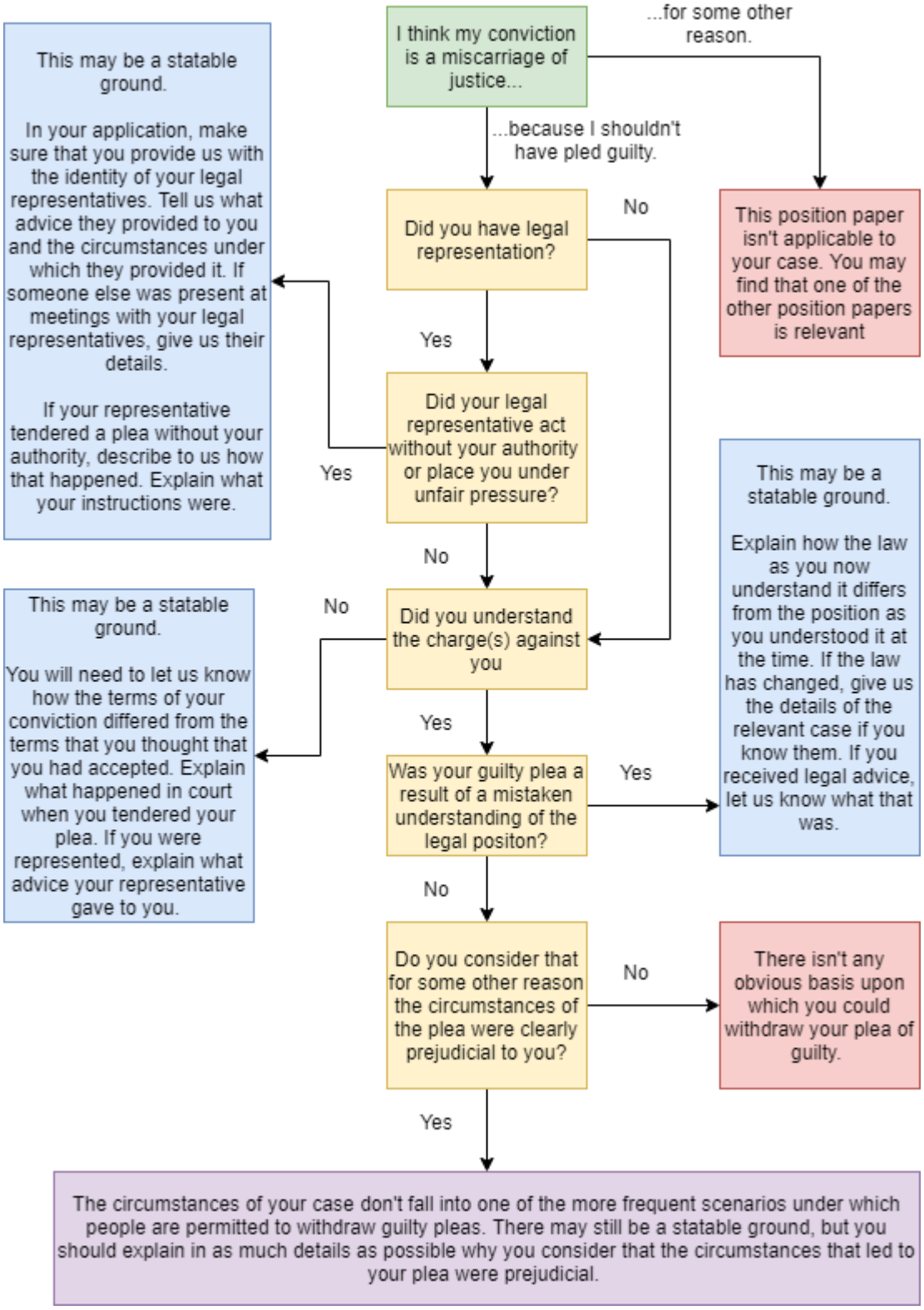
Submission Guidance:

Guilty Pleas

This paper is intended to provide guidance for those thinking of applying to the Commission on the basis that they should not have pled guilty. It sets out, in brief outline, the Commission's understanding of the key principles of law. It then explains the information that the Commission is likely to require in different categories of case. For a fuller explanation of the Commission's understanding of this area of law, see the appended position paper.

Guilty Pleas – in Brief

- The court considers a guilty plea to be a full acceptance of guilt from the accused.
    - It is, however, possible to withdraw a guilty plea in circumstances that are "exceptional"
- There are three main groups of circumstances that may allow an accused to withdraw a guilty plea:
    - Where a lawyer exceeds their authority (eg pleads guilty on behalf of someone who did not want to plead guilty)
    - Where the accused pled guilty under a "real error or misconception" (eg the accused believed, reasonably, that they were pleading guilty to a different charge)
    - Where there is "clear prejudice" to the accused (eg because someone put unfair pressure on the accused to plead guilty)
- If a case has been resolved through a guilty plea, the body of law relating to guilty pleas should be applied. This is true even if the case has characteristics (eg fresh evidence, poor legal representation) that would normally result in a different body of law being applied.


I think my conviction is a miscarriage of justice...
...for some other reason.
...because I shouldn't have pled guilty.
This position paper isn't applicable to your case. You may find that one of the other position papers is relevant
Did you have legal representation?
No
Yes
This may be a statable ground.
In your application, make sure that you provide us with the identity of your legal representatives. Tell us what advice they provided to you and the circumstances under which they provided it. If someone else was present at meetings with your legal representatives, give us their details.
If your representative tendered a plea without your authority, describe to us how that happened. Explain what your instructions were.
Did your legal representative act without your authority or place you under unfair pressure?
Yes
No
This may be a statable ground.
Explain how the law as you now understand it differs from the position as you understood it at the time. If the law has changed, give us the details of the relevant case if you know them. If you received legal advice, let us know what that was.
This may be a statable ground.
You will need to let us know how the terms of your conviction differed from the terms that you thought that you had accepted. Explain what happened in court when you tendered your plea. If you were represented, explain what advice your representative gave to you.
No
Did you understand the charge(s) against you
Yes
Was your guilty plea a result of a mistaken understanding of the legal positon?
Yes
No
Do you consider that for some other reason the circumstances of the plea were clearly prejudicial to you?
No
There isn't any obvious basis upon which you could withdraw your plea of guilty.
Yes
The circumstances of your case don't fall into one of the more frequent scenarios under which people are permitted to withdraw guilty pleas. There may still be a statable ground, but you should explain in as much details as possible why you consider that the circumstances that led to your plea were prejudicial.

Position Paper:

Guilty Pleas

This paper sets out the Commission's approach when dealing with this area of law.

Introduction & Background

1. Generally speaking, a plea of guilty represents a conclusive determination of the propriety of a criminal conviction. As the court put it in the leading case of *Healy v HMA*[1], such a plea is "a full admission of the [charge] in all its particulars". It "would not," that court added, "be in the interests of justice if individuals after they had been sentenced were permitted lightly or easily to withdraw pleas of guilty…merely by asserting that on their part there had never been any real willingness to make the plea." The Scottish court system relies heavily upon guilty pleas to conduct its business efficiently and expeditiously. The majority of criminal cases are resolved in this way. The law acknowledges this by affording a sentence discount, in almost all circumstances[2], to those accused whose early pleas offer the "utilitarian benefit" inherent in avoiding a trial. Maintaining the integrity of such a system of inducement requires, as a matter of practical necessity, the maintenance of pleas already tendered. In addition, it offends against the principle of finality in litigation to permit an accused to change their position in relation to the question at the heart of the criminal process. The policy of the law is accordingly to discourage this outcome.

2. The Scottish legal system has, nonetheless, recognised for over a century the competence of an appeal arising from a case in which the accused has pled guilty. This line of authority stretches back at least to the 1914 case of *Paul v HMA*[3], where the appellant claimed that he had been under a misunderstanding as to the nature of the charge.

[1] 1990 SCCR 110
[2] On this point, see *Du Plooy v HMA* 2003 SLT 1237, *Gemmell v HMA* 2012 SCL 385 and the Commission's "Sentencing" position paper at page 12 *et seq*
[3] 1914 1 SLT 82

3. A number of successful Commission referrals have arisen from guilty plea cases in diverse circumstances. Any early example[4] was a case in which the court mistakenly took an explanation for a failure to pay a fiscal fine timeously as a guilty plea. Another successful early referral[5] concerned an ambiguous response on a similar form. The more recent case of *Duncan Stewart*[6] is the subject of a published case report. The Commission discusses it further below.

4. In seven of the eight cases that the Commission referred to the High Court following its review of convictions arising from the Horizon/Post Office scandal, the accused had pled guilty.[7] The law relating to guilty pleas was central to the Commission's decision in each of these cases.

5. In spite of these examples of successful appeals, reviews of conviction[8] arising from guilty pleas do not often result in referral. Indeed, the Commission refuses a significant majority of such cases at stage 1[9], frequently as a result of the failure of the applications to engage with the principles outlined below.

The Commission's Position

The Applicable Test

6. The cornerstone of the modern law in this area is the decision of the court in *Healy v HMA*. In that case, the applicant claimed that, in spite of the fact that she had discussed with her solicitor the charges against her, she did not fully understand their nature, thus arguing that she had not provided her informed consent. Although the appellant was unsuccessful in her plea, the case established the test that is used in modern practice for evaluating such arguments. In order for such a ground of appeal to succeed, the court in *Healy* held that:

> "…it would have to be shown that the pleas had been tendered under some real error or misconception or in circumstances which were clearly prejudicial to the appellant."

[4] Unreported
[5] Also unreported
[6] 2018 SLT 25
[7] The first group of these cases are reported as *Quarm & others v HMA* [2024] HCJAC 15
[8] The principles outlined in this paper do not apply to reviews of sentence. For more information about sentence cases, see the Commission's corresponding position paper.
[9] Further information about the Commission's stage 1 criteria may be found in the position paper "Referrals to the High Court: The Commission's Statutory Test"

7. In the Commission's understanding of the position, this formulation remains good law. It is not, of course, a complete statement of the legal position. The generality of the language and the use of the disjunctive "or" demonstrate that the court in *Healy* envisaged a variety of circumstances in which justice may be served by permitting an appellant to withdraw a guilty plea. The court returned to this subject in the other leading case, *Reedie v HMA*[10], in which a bench chaired by the Lord Justice Clerk (Gill) made the following observations:

> "A plea of guilty…is not a conditional admission that is subject to reconsideration in light of a subsequent decision of the court (*Dirom v Howdle* 1995 SCCR 368), nor, in our view, in the light of a subsequent verdict in the trial of another party on the same charge. In view of the conclusive nature of such a plea, it can be withdrawn only in exceptional circumstances (*Dirom v Howdle*): for example, where it is tendered by mistake (*MacGregor v MacNeill* 1975 JC 54) or without the authority of the accused (*Crossan v HM Advocate* 1996 SCCR 279). There is little scope, if any, for the withdrawal of a plea that has been tendered on legal advice and with the admitted authority of the accused (*Rimmer, Petitioner*)[11]".

8. As one would expect from the foregoing and from the formulation of the test in *Healy,* guilty plea withdrawal cases tend to fall into one of three broad categories: those in which the plea is tendered without the agreement of the accused; those in which the plea has been the result of some "real error or misconception" on the part of the accused, the accused's representative or the court and those in which the underlying circumstances have caused grave prejudice to the accused. These categories may be usefully subdivided further. Before considering these classes of case, it is useful to consider the manner in which the decisions of the court negatively define the scope of miscarriage of justice in this area.

Situations in Which Pleas May not be Withdrawn

"Pleas of Convenience"

9. "Plea of convenience" is the term sometimes used to describe a guilty plea that the accused has tendered because they consider it expedient to do so, usually in the expectation that the plea will result in a sentence discount. That was the situation in

[10] 2005 SCCR 407
[11] 2002 SCCR 1

the case of *Duncan v HMA*[12], in which the appellant submitted that he had pled guilty for the discount "regardless of accountability for the actual offence." Such an argument is plainly incompatible with the principle central to this area of law that a guilty plea represents a complete and unconditional acceptance of the charge(s). Drawing upon the remarks of the Lord Justice Clerk (Cullen) in *Kerr v Friel*[13], the court in *Duncan* dismissed the appeal. As the Lord Justice Clerk had put it in the earlier case, there was "no question of accused persons being able to come back at a later stage and to invite the court…to withdraw the plea of guilty on the basis that the plea had been 'a plea of convenience'."

Fault on the Part of the Accused

10. As a matter of general principle, the court will not permit an accused person to withdraw a plea in a situation in which they might reasonably have been expected to have avoided or corrected the error that led to it. Such a situation arose in the case of *Pirie v McNaughton*[14], in which the accused had pled guilty to a charge of driving without insurance because he did not believe himself to be insured to drive the vehicle in question. After he had tendered the plea, he established, by checking his insurance certificate, that he was, in fact, insured. Refusing to allow him to withdraw the plea, the court observed that the root of the problem was his own "inattention…to his own duty to give proper instructions to his solicitor." In *Bieniwoski v Ruxton*[15], the accused appears to have been under a misapprehension as to the nature of the charge against him when he submitted a letter pleading guilty to it. When the case called for sentencing, however, the sheriff explained the nature of the charge. The court appears to have taken the failure of the accused to attempt to withdraw the plea at that stage as a factor militating against the conclusion that the plea had been tendered under some real error or misconception. This is in line with the approach of the court in *Healy*, which placed significant reliance upon the fact that the sheriff had gone over the charge with the accused. *Bieniwoski* may be contrasted with the very similar case of *Frost v McGlennan*[16]. The court in *Frost* distinguished it from the earlier case on the basis that the accused had moved the sheriff to allow him to withdraw

[12] 2009 SCCR 293
[13] 1997 SCCR 317. In this bill of suspension, the complainer advised that he had pled guilty in order to secure his release from prison with a view to establishing his own innocence of the charge. The court considered this an attempt to manipulate the court system for his own benefit.
[14] 1991 SCCR 483
[15] 1997 SLT 1173
[16] 1998 SCCR 573

his plea. It would appear to the Commission that it is generally incumbent upon the accused to raise any objections to the terms of the charge during the original process[17].

Error as to Consequences

11. The "real error or misconception" identified in *Healy* must relate to a matter that undermines the status of the plea as a genuine acceptance of guilt. This is demonstrated by *Whillans v Harvie*[18], in which the accused sought to withdraw his plea of guilty on the basis that he had been unaware that disqualification was inevitable for the offence. The court in *Whillans* distinguished the case from *Frost* on the basis that the accused in that latter case had been labouring under an error with regard to the nature of the charge. In Whillans, by way of contrast, the error had no bearing on the question of acceptance of guilt.

Situations in Which Pleas May be Withdrawn

Lack of Authority

12. Where an agent enters a plea on behalf of an accused person, that plea must reflect the terms of the instructions. In *MacGregor v MacNeill*[19], a solicitor had tendered a plea of guilty in the absence of the accused. The solicitor acknowledged his mistake on the following day. The High court subsequently held that the conviction should be quashed.

Error or Misconception

13. The circumstances under which the court will consider a "real error or misconception" to be established are most easily understood with reference to the negative definition outlined in the foregoing subsection. It is, in practice, difficult to argue that there was such an error where the court has confirmed the plea with the accused. It is,

[17] This line of authority does not sit easily with the earlier decision of the court in the case of *Boyle v HMA* 1976 JC 32, in which the appellant, a soldier, had confessed out of the blue to a robbery and then pled guilty to that charge as a device to avoid imprisonment in a military prison for a separate disciplinary offence. The parties to the appeal were agreed that he was certainly not guilty of the offence and ought never to have been charged. The Crown not only conceded that there had been a miscarriage of justice, but "categorically and formally asserted" that one had taken place. The court appears to have considered itself bound by this. Within the context of the law as outlined in *Healy*, it could be argued that the importance to the interests of justice of defending legal finality was in *Boyle* exceptionally outweighed by the need to correct the appellant's improper manipulation of the legal process.
[18] 2010 SCCR 878
[19] 1975 JC 57

nonetheless, not impossible to make such a submission. A rare example of a successful argument to this effect may be found in *Slater v HMA*[20], in which the High Court agreed that the terms under which the sheriff took the plea[21] from the unrepresented applicant were likely to have caused confusion, and quashed the conviction on that basis.

Error as to Law/ Change of Law

14. A distinct class of "error" cases arises in situations in which the accused has pled guilty while labouring under a misconception as to the applicable law. This is most frequently the result of advice from legal representatives that was either erroneous at the time or rendered so by a subsequent decision of the court. Situations such as this are particularly likely to arise in the Commission's caseload. This is because there may be a significant delay between the conclusion of criminal proceedings and the initiation of a Commission review.

15. In *Dirom v Howdle*, the accused sought to have quashed a conviction resulting from a guilty plea to a charge under the Dangerous Dogs Act 1991. She argued that if her solicitor had been aware of the decision of the court in another, at the time of the plea unpublished, case dealing with the same section, he "*might* have offered different advice…on the basis that she *might* have had a defence". In declining to pass the bill, the court noted that the solicitor did not require access to the decision in the other case to advise the complainer that she was entitled to put the defence. Although the complainer may have been "in error as to the effect of the law", the circumstances were not sufficiently "special" to justify granting her the remedy she sought.

16. In *McLean v HMA*[22], the court refused an appeal following the decision in *Cadder v HMA* in which the appellant argued that he would not have been advised to plead guilty if he had known that his police statement was inadmissible. The court on that occasion stated that there was "no practice…under which an accused person, having tendered a plea of guilty following a judicial ruling, can have his conviction set aside if that ruling is subsequently overturned."

[20] 1987 SCCR 745
[21] The court was assisted in determining this case by a transcript of the proceedings. These are not always available.
[22] 2011 SCCR 507

17. The Commission's *Stewart* referral provides a counterpoint to *Dirom* and *McLean.* The appellant had pled guilty to a charge under s3ZB of the Road Traffic Act 1988 of causing death whilst driving when disqualified and uninsured. At the time, the authorities suggested that that offence did not require fault (in relation to standard of driving) on the part of the driver. The Crown, defence and sheriff proceeded on this basis. There was no suggestion that the appellant had been at fault in respect of the quality of his driving. Subsequently, the Supreme Court held that an element of fault was necessary to constitute the offence. The court in *Stewart* first distinguished the comments in *McLean* on the basis that any change in that instance was to the adjective rather than substantive law. The court acknowledged that the legal professionals had been entitled at the time of the guilty plea to the view that the law did not favour the applicant's position. It considered that this amounted to a substantial error or misconception, and quashed the conviction.

18. Accordingly, it appears to the Commission that a change to the substantive law *may* render an earlier plea a "real error or misconception". What is required, however, is something more than the sort of judicial clarification of an area of law that had become available subsequent to the plea in *Dirom.*

Prejudicial Circumstances

19. On its face "circumstances…clearly prejudicial to the appellant" is apt to cover a wide variety of circumstances. In practice, however, such circumstances are usually engineered by the behaviour of legal representatives exerting undue influence/ coercive pressure. A stark example[23] of this may be found in the decision of the court in *Gallagher v HMA*[24]. The appellant in that case had not previously indicated any intention to plead guilty. She met her solicitor for the first time on the morning scheduled for her trial, having previously had one meeting with his partner. Their meeting took place on the pavement outside the court. Minutes before the case was due to call, the solicitor advised his client that she would have to plead guilty. If she did not, he intended to withdraw from acting. The court on that occasion held that the accused had not been provided with a proper opportunity to consider the implications of the plea, and that the circumstances were thus "clearly prejudicial".

[23] An equally stark, if less extensively reasoned, example may be found in in *McGough v Crowe* 1996 SCCR 226, in which a solicitor, already acting for a co-accused, persuaded a suggestible 16 year old to instruct him and allow him to tender a plea of guilty on the 16 year old's behalf while tendering a plea of not guilty on behalf of the existing client. The court considered this to be a miscarriage of justice.
[24] 2010 SCCR 636

20. *Blockley v Cameron*[25], which followed *Gallagher,* was decided primarily as a "prejudice" case, but also contained elements of "error". A solicitor, who had viewed CCTV of a fracas involving his client, advised the client, who had not, that he did not believe that it would support her plea of self-defence. On that basis, the accused pled guilty. The discussion took place shortly before the hearing was due to start in a corridor outside the court. During the appeal process, the solicitor accepted that the CCTV was open to interpretation in a way consistent with his client's innocence. He also accepted that it would have been "better" if his client had seen the CCTV before tendering the plea. Drawing together all of the relevant factors, the court held that the circumstances of the case were exceptional and the prejudice to the accused clear.

21. *McGarry v HMA*[26] had some similarities with *Gallagher*. The accused had failed to engage with her defence team when called upon to do so, leading counsel to request psychiatric opinion on her fitness to stand trial. The court considered, nonetheless, that the defence ought to have attempted to take instructions at an earlier stage. When counsel withdrew from acting, the solicitor instructed another advocate who was not available for the trial diet that had been fixed already. He nonetheless advised the appellant that as the Legal Aid Board had granted sanction for counsel, he considered that conducting the trial was beyond his competence. The newly-instructed advocate negotiated a plea deal with the Crown. It became clear to the solicitor that the appellant did not accept the accuracy of the terms of the negotiated plea. On the day that the trial was due to commence, the solicitor advised the applicant that he could not conduct the trial, but nor could he ethically tender on her behalf a plea of guilty in the terms discussed. He accordingly withdrew from acting. The sheriff, who had not been informed of the poor state of preparation or the appellant's mental health difficulties, took a strict line on case management. He informed the (now unrepresented and visibly distressed) appellant that she could have 10 minutes in which to consider her position. Holding the case to be exceptional and the circumstances clearly prejudicial, the court described the sheriff's conduct in this regard as "inappropriate". It was more heavily critical of the behaviour of the defence solicitor.

[25] 2013 SCCR 181
[26] [2022] HCJAC 18

22. A useful contrast to *McGarry* may be found in *Giblin v Procurator Fiscal Glasgow*.[27] In that case, the legal representative had withdrawn from acting due to issues with funding and the accused had mental health issues. The Sheriff Appeal Court noted, however, that the presiding sheriff had taken care to ensure that the accused had understood the plea. There thus appeared to be no error or misconception. Although the court acknowledged that appearing in court unrepresented was daunting, it was not enough, even when taken with the mental health difficulties, to establish that the circumstances had been prejudicial to the accused.

Interaction with Other Grounds of Review

23. As a generality, the existence of a guilty plea will lead the court, and hence the Commission, to apply the body of law discussed in the instant paper preferentially over any other body of appeal law that might otherwise appear relevant. By way of example, in the Commission referral of *Kalyanjee v HMA*[28], the Commission had considered during its review new evidence relating to the mental state of the appellant, going so far as to apply in its statement of reasons the test applicable to fresh evidence cases. In the judgment arising from that referral, the court observed that the task confronting it was not, as would be the case in a fresh evidence appeal[29], to compare the new material with the evidence available at trial. It was instead obliged to apply the test in *Healy*, which, necessarily, entailed a consideration of the circumstances under which the plea came to be tendered. That is not to say that the court is not entitled to hear new evidence in the course of an appeal in a guilty plea case. The court in *Kalyanjee* heard from a number of additional experts. Such evidence may have a bearing on the appeal. It is simply that the test to be applied in determining whether or not there has been a miscarriage of justice is not the test that would usually be applied in "fresh evidence" cases.

24. In a similar vein, the court in *Pickett v HMA*[30] held that the law relating to defective representation is of no application in a case resolved by way of guilty plea. That is, again, not to say that the standard of representation is irrelevant in such cases. As noted in the previous section, the conduct of the representative may be highly significant to the question as to whether or not there has been a miscarriage of justice. It is again simply that the test to be applied is that in *Healy* rather than that

[27] [2024] SAC (Crim) 6
[28] 2014 SCCR 397
[29] On this topic generally, see the corresponding position paper
[30] 2007 SCCR 389

in *Anderson v HMA*.[31] In other words, it will be necessary in such a case to show that the conduct of the representative exceeded his authority, caused the client to fall into material error or otherwise caused clear prejudice.

25. The only possible divergence from this general pattern would appear to the Commission to be cases in which the claim of miscarriage of justice rests upon a plea in bar of trial not taken during the pre-trial process. In such a case, the basis of an appeal is a submission to the effect that the applicant ought not to have been called upon to plead at all. One could argue as a matter of sequencing that this ought to take precedence over an analysis of the circumstances surrounding the plea that *ex hypothesi* ought not to have been made. If it could be established, for example, that an accused person lacked the capacity to plead at the time of the guilty plea, then it is not clear what is to be gained from any further enquiry as to circumstances. That situation may be largely academic[32] in the sense that an individual lacking the capacity to plead is likely to satisfy the *Healy* test in some way or another. Of more interest is the position relating to miscarriage of justice brought about by oppression. This would, ordinarily, be a plea in bar of trial, although it is competent to raise it as a miscarriage of justice[33]. The English Court of Appeal has held[34] in relation to the analogous doctrine of abuse of process that a conviction may be quashed as unsafe notwithstanding a guilty plea. Such a contention is particularly forceful in a situation in which the behaviour of the authorities is such as to amount to an "affront to justice". In a case of this nature, the public interest in quashing a conviction could be seen to outweigh the policy considerations outlined in *Healy*, and thus to remove the rationale for maintaining a guilty plea notwithstanding any admission of factual guilt. In *Quarm v HMA*, the Commission referred to the court six convictions on this basis, notwithstanding the fact that the accused in five of the cases had pled guilty. The court allowed each appeal, although it should be noted that, as a result of Crown concessions in each case, the point was not the subject of debate.

[31] 1996 SCCR 114
[32] A similar situation arose in *Duzgun v HMA* 2020 SLT 427, although the court in that case concluded, relying upon the recollections of the solicitor and a post-trial report, that the appellant probably had capacity.
[33] On this point, see *Bakhjam v HMA* 2018 JC 127 and, more generally, the Commission's "Oppression" position paper
[34] *R v Togher* [2001] 1 Cr. App. R. 33

Specific Considerations

26. Where an applicant applies to the Commission for a review of conviction having previously tendered a plea of guilty, they should explain to the Commission why they believe that there are exceptional circumstances justifying the acceptance of his case for review. If they fail to do so, it is unlikely that their case will be accepted for a stage 2 review.

27. In considering whether an applicant may have suffered a miscarriage of justice following upon a conviction resulting from a guilty plea the Commission is likely to require the defence papers in order to ascertain the applicant's instructions, the advice they received in relation to their guilty plea and the circumstances in which they pled guilty. It may also need to interview the legal representatives to gather their recollections.

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