

## COUNSEL ISSUES

Jessica Smith, UNC School of Government (January 2010)

For a more detailed discussion of these and other issues related to counsel, see Jessica Smith, *Selected Counsel Issues in North Carolina Criminal Cases*, ADMIN. OF JUSTICE BULL. NO. 2007/04, UNC School of Government (July 2007), <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0704.pdf>.

### I. The right to counsel and to proceed *pro se*

- A. The sixth amendment to the federal constitution guarantees to a defendant who faces incarceration the right to counsel at all critical stages of the criminal process.
- B. A defendant who has the right to counsel also has the right to proceed *pro se*.
  - 1. The right to proceed *pro se* is not absolute and may be terminated if the defendant engages in serious and obstructionist misconduct. Be cautious when terminating *pro se* representation on this basis. If you do so, make sure that the record reflects the defendant's conduct, and your findings of fact and conclusions of law.
- C. A defendant has only two choices: appear *pro se* or be represented by counsel. A defendant does not have a right to "hybrid" representation to serve as "co-counsel" or "lead counsel."
- D. G.S. 7A-451(a) lists the proceedings for which an indigent defendant has a right to appointed counsel. This list includes, among other proceedings, cases when imprisonment or a fine of \$500 or more is likely to be imposed, hearings on petitions for writ of habeas corpus, certain motions for appropriate relief, and probation revocation and extradition hearings.

### II. The request to proceed *pro se*

- A. A request to proceed *pro se* must be clear and unequivocal in order to trigger a judge's duty to act. However, most judges inquire whenever counsel issues arise.
- B. Once a defendant makes a clear and unequivocal request to proceed *pro se*, it is reversible error to ignore that request. When such a request is made, the judge should engage in the waiver of counsel inquiry, as outlined immediately below.

### III. Taking a waiver of counsel

- A. A waiver of the constitutional right to counsel must be knowing, voluntary, and intelligent.
- B. Indigent defendants
  - 1. Indigent defendants must waive two rights before they can proceed *pro se*: the right to assignment of counsel at state expense and the right to assistance of counsel.
  - 2. Sometimes an indigent defendant wishes to waive only the right to assignment of counsel at state expense. This could occur, for example, when a family member has agreed to hire a lawyer for the defendant.
  - 3. When an indigent defendant waives the right to assigned counsel with the intention of making arrangements for private counsel, you should afford the defendant a reasonable period of time in which to retain counsel.
    - a. If the defendant repeatedly fails to obtain counsel after having waived only the right to assigned counsel, you may consider whether the defendant has forfeited the right to assistance of counsel, discussed below.

- C. To properly take a waiver, you must make a thorough inquiry of the defendant; simply completing the Waiver of Counsel Form, AOC-CR-227 (included as an appendix to this Chapter), is insufficient and will result in reversible error.
1. G.S. 15A-1242 provides that a defendant may proceed *pro se* only after the trial judge makes thorough inquiry and is satisfied that the defendant:
    - Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;
    - Understands and appreciates the consequences of this decision; and
    - Comprehends the nature of the charges and proceedings and the range of permissible punishments.
  2. The inquiry must be of the defendant, not defense counsel, and must be on the record.
  3. The N.C. Supreme Court has indicated that the following questions comply with the statutorily mandated inquiry:
    - Are you able to hear and understand me?
    - Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
    - How old are you?
    - Have you completed high school? College? If not, what is the last grade you completed?
    - Do you know how to read? Write?
    - Do you suffer from any mental handicap? Physical handicap?
    - Do you understand that you have a right to be represented by a lawyer?
    - Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
    - Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
    - Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
    - Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
    - Do you understand that you are charged with \_\_\_\_\_, and that if you are convicted of this [these] charge[s], you could be imprisoned for a maximum of \_\_\_\_\_ and that the minimum sentence is \_\_\_\_\_? [Add fine or restitution if necessary.]
    - With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
    - Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?
- D. Accepting the waiver
1. The only basis for denying a waiver is that it is not knowing, voluntary, and intelligent. A decision to deny a waiver cannot be based on the defendant's ability to present an effective defense, because, for example, he or she has limited education or intellectual functioning.
  2. Memorialize the waiver by completing the Waiver of Counsel Form.

- a. If an indigent defendant is waiving only the right to assigned counsel, make sure that only box 1 is checked.
  - b. If you are taking a waiver from a non-indigent defendant or from an indigent defendant who wishes to waive the right to assigned counsel and to assistance of counsel, box 2 should be checked.
3. A completed Waiver of Counsel form is not a substitute for actual compliance with the waiver procedure, described above.
- E. Competency
1. Sometimes, the defendant's responses during the waiver inquiry raise issues regarding competency.
  2. If a question regarding capacity is raised, conduct a competency hearing.
  3. In *Indiana v. Edwards*, 554 U.S. 164 (2008), the U.S. Supreme Court held that a state may limit a defendant's right to self representation by insisting on representation by counsel at trial when the defendant is competent to stand trial but lacks the mental capacity to conduct the defense unless represented. However, the Court declined to adopt a standard to guide judges in this determination. The law is evolving in this area, and judges faced with this issue should consult recent case updates.
  4. A finding that a defendant is competent to waive counsel is not the same as a finding that a waiver is knowing, voluntary, and intelligent. Once a defendant is found to be competent to waive counsel, the court should engage in a standard waiver of counsel procedure, discussed above.
- F. The "life" of a waiver
1. A waiver is valid until the proceedings are terminated or until the defendant makes known to the court that he or she desires to withdraw the waiver and have counsel assigned.
  2. If a waiver was taken in district court—either at first appearance or at trial—take another waiver in superior court.
  3. If a superior court judge took a waiver pre-trial, that waiver remains valid for trial, even if another judge tries the case.
- G. Withdrawal of a waiver
1. Although the defendant bears the burden of moving for withdrawal of a waiver, because of the difficulties of trying a *pro se* case many judges inquire if it appears that the defendant is reconsidering a waiver.
  2. There is some authority suggesting that you can require a showing of good cause to support a motion to withdraw a waiver made "late in the game."
  3. When you allow a defendant to withdraw a waiver, it may be necessary to grant a continuance, or a recess, to allow counsel to prepare for trial.

#### **IV. Standby counsel**

- A. When a defendant elects to proceed *pro se*, you have discretion to appoint standby counsel.
- B. Standby counsel assists the defendant when called upon to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his or her own motion.
- C. You may appoint standby counsel over the defendant's objection.
- D. If you failed to take a proper waiver of counsel, appointment of standby counsel will not save the case.

#### **V. Forfeiture of the right to counsel**

- A. Waiver of counsel is a knowing, intelligent, and voluntary relinquishment of a right; forfeiture of counsel is an involuntary relinquishment. Forfeiture arises when the defendant's misconduct warrants termination of the right to counsel.
- B. The N.C. appellate courts have warned that judges must engage every reasonable presumption against forfeiture of the right to counsel. If you find forfeiture, make sure that the record clearly reflects the defendant's conduct and your findings of fact and conclusions of law.

#### **VI. Substitution of Counsel**

- A. Non-indigent defendants are entitled to counsel of their own choice and should be afforded a fair opportunity to retain counsel.
  1. This right may not be exercised in a way that frustrates the administration of justice. Thus, it is not error to deny a motion to continue made on the day of trial by a non-indigent defendant who wishes to replace private counsel for no valid reason.
  2. When a defendant timely exercises the right to select counsel and then appears for trial without counsel through no fault of the defendant's (e.g., because counsel has been detained in another court proceeding), a continuance should be granted.
- B. Indigent defendants do not have the right to choose their lawyers.
  1. However, an indigent's appointed counsel should be replaced if continued representation will deprive the defendant of the right to effective assistance of counsel (e.g., when counsel is laboring under a conflict of interest).

#### **VII. Conflict of interest in cases of joint representation**

- A. When the defense raises a conflict of interest objection due to joint representation of co-defendants, it is reversible error for you to fail to act.
- B. In this situation, you must either appoint separate counsel or determine, on the record, that the conflict of interest is too remote to warrant separate counsel.
- C. When a conflict exists, a defendant may waive the right to counsel unimpeded by a conflict of interest.
  1. Many judges ask the following questions to make a record of such a waiver:
    - Do you understand that you are entitled to the right to have the independent judgment of an attorney who is free of any possible conflicts of interests?
    - Do you understand that, because your attorney is jointly representing you and other defendants, your attorney may be prevented from opening possible plea negotiations on your behalf and from a possible agreement for you to testify for the prosecution in exchange for a lesser charge or a recommendation for leniency?
    - Do you understand that you and the other defendants could possibly occupy opposing positions at the trial?
    - Do you understand that your attorney's joint representation may cause the jury to link you with one or more of the other defendants?
    - Do you understand that one or more of the other defendants may choose to testify in his or her defense, and, if so, your attorney will not be able to cross-examine such defendant on your behalf?
    - Do you understand that your attorney may fail or refrain from cross-examining a state's witness about matters helpful to you but harmful to another defendant; and that your attorney may fail to object to the

admission of evidence that might otherwise be inadmissible because it helps another defendant but is harmful to you; and that your attorney may fail or refrain from objecting to evidence harmful to you, but of help to another defendant?

- Do you understand that your attorney may be prohibited from attempting to shift the blame from you in the crime charged to a codefendant because your attorney represents both of you?
  - Do you understand that if you are convicted, the same attorney will be representing you at the sentencing hearing where aggravating and mitigating circumstances will be considered by the court as they may apply to you and any co-defendants also represented by the same attorney?
  - Do you understand that one of the other defendants may plead guilty and thereafter reveal to the state information damaging to you that the attorney received as a result of joint representation?
  - I also advise you that it is not possible for me to enumerate all the possible conflicts of interest that might occur between you and your attorney by virtue of your attorneys' joint representation of you and others. Do you understand that there might be other conflicts of interests?
  - With these things in mind do you have any questions that you want to ask me about any of these things I have said to you?
  - Do you now of your own free will, understandingly and voluntarily waive your right to representation by an attorney who is unhindered by a possible conflict of interest?
  - With this in mind are you now satisfied to have Attorney [name of attorney] represent you and also represent [name(s) of codefendant(s) in this case]?
2. Memorialize any such waiver and ensure that a complete record is made, including your findings of fact and conclusions of law.

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**STATE OF NORTH CAROLINA**

File No.

\_\_\_\_\_ County

In The General Court Of Justice  
 District  Superior Court Division

**STATE VERSUS**

Name Of Defendant

**WAIVER OF COUNSEL**

G.S. 7A-457; 15A-1242

Additional File No.(s) And/Or Offense(s)

**ACKNOWLEDGMENT OF RIGHTS AND WAIVER**

As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

I freely, voluntarily and knowingly declare that:

(check only one)

- 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.
- 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

**SWORN AND SUBSCRIBED TO BEFORE ME**

Date

Date

Signature

Signature Of Defendant

- Deputy CSC
- Assistant CSC
- Clerk Of Superior Court

**CERTIFICATE OF JUDGE**

I certify that the above named defendant has been fully informed in open court of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action:

(check only one)

- 1. without the assignment of counsel.
- 2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

**NOTE: For a waiver of assigned counsel only, both blocks numbered "1" must be checked. For a waiver of all assistance of counsel, both blocks numbered "2" must be checked.**

Date

Signature Of Judge

Name Of Judge (Type Or Print)

## ABSOLUTE IMPASSE

Jessica Smith, UNC School of Government (Nov. 2011).

- I. **Statement of the Absolute Impasse Rule.** As a general rule, some decisions in the course of a criminal trial are made by the defendant and others are made by defense counsel. A defendant decides, for example, whether to testify and whether to plead guilty. Counsel typically decides strategy issues, such as which jurors to strike, which witnesses to call, and whether and how to conduct cross-examination. However, in North Carolina, the doctrine of absolute impasse affects these rules. Under this doctrine, when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control. The seminal North Carolina case on absolute impasse is *State v. Ali*, 329 N.C. 394, 404 (1991), which grounded the rule on the principal-agent nature of the attorney-client relationship.
- II. **Limitations on the Rule.** The absolute impasse rule applies only when the defendant's wishes with regard to trial strategy are lawful. *State v. Williams*, 191 N.C. App. 96, 104-05 (2008) (even if there was an absolute impasse as to jury selection tactics, defense counsel could not defer to the defendant's wishes to engage in racially discriminatory jury selection).
- III. **What Constitutes an Absolute Impasse.** In order for an absolute impasse to occur, the defendant and defense counsel must be locked in controversy regarding a matter of trial strategy, such as whether to strike a prospective juror. However, not all disagreements between a defendant and defense counsel rise to the level of an absolute impasse. Compare *State v. Freeman*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 17, 21-22 (2010) (the defendant and counsel reached an absolute impasse over whether to accept or strike a juror), and *State v. White*, 349 N.C. 535, 567 (1998) (absolute impasse existed as to whether to present certain evidence), with *State v. McCarver*, 341 N.C. 364, 385 (1995) ("we find no indication in the record of 'an absolute impasse' between the client and the defense team as it concerned trial tactics"), *State v. Wilkinson*, 344 N.C. 198, 211-12 (1996) (citing *McCarver* and finding no indication in the record of an absolute impasse), and *Williams*, 191 N.C. App. at 99 (rejecting the defendant's argument that an absolute impasse existed regarding jury selection; while the defendant was dissatisfied with the fact that he was required stand trial at all, he did not have a specific disagreement with counsel regarding the use of peremptory challenges). If the defendant defers to counsel's decision, there is no absolute impasse. *Williams*, 191 N.C. App. at 103-04 (the defendant deferred to defense counsel's decision).
- IV. **Defense Counsel's Duties in the Event of an Absolute Impasse.** When an absolute impasse arises, defense counsel should make a record of the circumstances, his or her advice to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. *State v. Ali*, 329 N.C. 394, 404 (1991). The better practice is to do this on the record in open court. *Id.* (defense counsel made such a record in open court).

V. **Trial Court's Duties in the Event of an Absolute Impasse.** Reversible error occurs if an absolute impasse is brought to the trial judge's attention and the judge fails to require defense counsel to abide by the defendant's wishes. *State v. Freeman*, \_\_ N.C. App. \_\_, 690 S.E.2d 17, 21-22 (2010).

VI. **Illustrative Circumstances in Which the Issue Arises.** In North Carolina, absolute impasse issues have arisen in a variety of contexts, including those listed below.

**A. Jury selection.**

- *State v. Ali*, 329 N.C. 394 (1991) (no error occurred when the defense lawyer brought to the judge's attention an absolute impasse regarding whether to accept a prospective juror and defense counsel yielded to the defendant's desire not to peremptorily challenge the juror).
- *State v. Freeman*, \_\_ N.C. App. \_\_, 690 S.E.2d 17, 21-22 (2010) (when the defendant and trial counsel reached an absolute impasse regarding the use of a peremptory challenge to strike a juror, the trial court committed reversible error by not requiring counsel to abide by the defendant's wishes).
- *State v. Mitchell*, 353 N.C. 309, 323 (2001) (the trial court properly found that the defendant and his counsel had reached an absolute impasse over the tactical decision of whether to attempt to rehabilitate a prospective juror and did not err in excusing the prospective juror for cause and honoring defendant's personal decision not to attempt rehabilitation).
- *State v. Buchanan*, 330 N.C. 202, 207-08 (1991) (trial court properly required counsel to abide by the defendant's decision not to exercise peremptory challenges to remove jurors his lawyers deemed unsuitable).

**B. Whether to Present Evidence.**

- *State v. White*, 349 N.C. 535, 563-64 (1998) (where there was an absolute impasse between the defendant and his counsel over the presentation of mitigating evidence concerning domestic violence while the defendant was growing up, the trial court did not err by following the defendant's wishes and prohibiting counsel from presenting the controversial evidence).
- *State v. Grooms*, 353 N.C. 50, 84-86 (2000) (the trial court did not err by finding that the defendant and defense counsel had reached an absolute impasse over whether to present mitigating evidence during the capital sentencing proceeding and by prohibiting defense counsel from presenting evidence in mitigation).

**C. Examination of Witnesses.**

- *State v. Brown*, 339 N.C. 426, 434-35 (1994) (the trial court properly required counsel to abide by the defendant's wishes regarding examination of witnesses).

**D. Whether to Move for a Mistrial.**

- *State v. Green*, 129 N.C. App. 539, 552 (1998) (trial court followed the defendant's wishes regarding whether to move for a mistrial).

**E. Jury Instructions.**

- *State v. Brown*, 339 N.C. 426, 434-35 (1994) (trial court properly required counsel to abide by the defendant's wishes regarding jury instructions).