

Criminal Court: The Law You Need to Know Part 2

January 2026

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The Right to Counsel

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RIGHT TO COUNSEL DURING CRIMINAL PROSECUTION

Jessica Smith, UNC School of Government (January 2010)
Updated by Christopher Tyner (May 2025)

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The Right to Counsel

- A defendant who faces incarceration has a Sixth Amendment right to counsel at all critical stages of a criminal prosecution.

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Opportunity to Retain Counsel

- Defendant should be given a “fair opportunity to secure counsel of his own choice.”

Powell v. Alabama, 287 U.S. 45 (1932)

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Indigent Defendants

- Indigent defendants are entitled to appointed counsel

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Indigent Defendants

- G.S. 7A-450. "An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation."
- IDS Rule 1.4. "Indigency Standard. An indigent person is a person who is financially unable to secure legal representation or provide other necessary expenses of representation at the time the expenses are required."
- DAC inmates and juveniles are presumed indigent

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Indigent Defendants

(TYPE OR PRINT IN BLACK INK) In The General Court Of Justice
District Superior Court Division
STATE OF NORTH CAROLINA
Case No.
Continue File(s)

NOTICE TO PERSONS REQUESTING A COURT-APPOINTED LAWYER

1. When answering the questions on the Affidavit Of Indigency (reverse side of this form), please do not discuss your case with the interviewer. The interviewer can be called as a witness to testify about any statements made in his/her presence. Please wait and speak with your lawyer. Do not ask the interviewer for any advice or opinion concerning your case.
2. A COURT-APPOINTED LAWYER IS NOT FREE. If you are convicted or plead guilty or no contest, you may be required to repay the cost of your lawyer as a part of your sentence. The Court may also enter a civil judgment against you, which will accrue interest at the legal rate set out in G.S. 24-1 from the date of the entry of judgment. Your North Carolina Tax Refund or NC Education Lottery winnings may be taken to pay for the cost of your court-appointed lawyer. In addition, if you are convicted or plead guilty or no contest, the Court must charge you an attorney appointment fee and may enter this fee as a civil judgment against you pursuant to G.S. 7A-455.1.
3. The information you provide may be verified, and your signature below will serve as a release permitting the interviewer to contact your creditors, employers, family members, and others concerning your eligibility for a court-appointed lawyer. A false or dishonest answer concerning your financial status could lead to prosecution for perjury. See G.S. 7A-456(a) ("A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class 1 felony").

Other Income (Spouse, Court Order, SSI, Payments, etc.)	\$	Food (including Prior Stamps)	\$
Employment - Spouse	\$	Utilities (power, water, heating, etc. cable, etc.)	\$
Name And Address Of Spouse's Employer		Health Care	\$
		Installment Payments	\$
		Vehicle	\$
		Other	\$
		Car Expenses (gas, insurance, etc.)	\$

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G.S 7A-451

§ 7A-451. Scope of entitlement.

- (a) An indigent person is entitled to services of counsel in the following actions and proceedings:
- (1) Any case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged.
 - (2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes.
 - (3) A motion for appropriate relief under Chapter 15A of the General Statutes if appointment of counsel is authorized by Chapter 15A of the General Statutes and the defendant has been convicted of a felony, has been fined five hundred dollars (\$500.00) or more, or has been sentenced to a term of imprisonment.
 - (4) A hearing for revocation of probation.
 - (4a) A hearing for extension of probation under G.S. 15A-1344(3).
 - (5) A hearing in which extradition to another state is sought.
 - (6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.
 - (7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes.
 - (8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible.
 - (9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes.
 - (10) Retained by Session Laws 2003, c. 13, s. 2(a), effective April 17, 2003, and applicable to all petitions for sterilization pending and orders authorizing sterilization that have not been executed as of April 17, 2003.
 - (11) A proceeding for the provision of protective services according to Chapter 108A, Article 6 of the General Statutes.
 - (12) In the case of a juvenile alleged to be abused, neglected, or dependent under Subchapter 1 of Chapter 78 of the General Statutes.
 - (13) A proceeding to find a person incompetent under Subchapter 1 of Chapter 35A, of the General Statutes.
 - (14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 78-1101.1.
 - (15) An action brought pursuant to Article 11 of Chapter 78 of the General Statutes to terminate an indigent person's parental rights.
 - (16) A proceeding involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes. G.S. 7A-450.1, 7A-450.2, and 7A-450.3 shall not apply to this proceeding.
 - (17) A proceeding involving limitation on freedom of movement or access pursuant to G.S. 130A-475 or G.S. 130A-145.
 - (18) A proceeding involving placement into satellite monitoring under Part 5 of Article 27A of Chapter 14 of the General Statutes.
 - (19) A proceeding involving a review of the sex offender registration requirement as provided in G.S. 14-208.12b.

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G.S 7A-451

§ 7A-451. Scope of entitlement.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

- (1) An in-custody interrogation;
- (2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;
- (3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
- (4) A probable cause hearing;
- (5) Trial and sentencing;
- (6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes;
- (7) In a capital case in which a defendant is under a sentence of death, subject to rules adopted by the Office of Indigent Defense Services, review of any judgment or decree rendered on direct appeal by the Supreme Court of North Carolina pursuant to the certiorari jurisdiction of the United States Supreme Court; and
- (8) In a noncapital case, subject to rules adopted by the Office of Indigent Defense Services, review of any judgment or decree rendered on direct appeal by a court of the North Carolina Appellate Division pursuant to the certiorari jurisdiction of the United States Supreme Court, when the judgment or decree:
 - a. Decides an important question of federal law in a way that conflicts with relevant decisions of the United States Supreme Court, a federal Court of Appeals, or the court of last resort of another state;
 - b. Decides an important question of federal law that has not been, but should be, settled by the United States Supreme Court; or
 - c. Decides a question of federal law in the indigent's favor and the judgment or decree is challenged by opposing counsel through an attempt to invoke the certiorari jurisdiction of the United States Supreme Court.

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Indigent Defendants

- Capital defendants: Entitled to appointment of two attorneys (“lead” and “associate” counsel)

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The Right to Proceed Without Counsel

- A defendant who has the right to counsel also has the right to proceed without counsel and conduct his or her own defense. *Faretta v. California*, 422 U.S. 806 (1975).

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Hybrid Representation?

- Can a defendant ask to be “co-counsel” or “lead counsel” with a lawyer?

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Hybrid Representation?

- No. The defendant has two choices:
 - Be represented
 - Self-representation (pro se)
- Once represented, defendant cannot file motions, etc., on his or her own behalf

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Absolute Impasse

- If defendant and attorney reach an absolute impasse on tactical decisions, the client’s wishes must control
 - Must be lawful
 - Not frivolous

ABSOLUTE IMPASSE
Jessica Smith, UNC School of Government (Aug. 2017)
Updated by Christopher Tyler (Aug. 2025)

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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	

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Gray Area Defendants

- The to right to self-representation can be limited for defendants competent to stand trial but not competent to represent themselves
 - Indiana v. Edwards, 554 U.S. 164 (2008)
- Judge must make a finding that defendant is “unable to carry out the basic tasks needed to present his own defense without the help of counsel”

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The Right to Proceed Without Counsel

- Do you have a duty to inform the defendant of his or her right to proceed pro se?
 - No

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The Right to Proceed Without Counsel

- None of the following constitute a request to proceed pro se:
 - “I want new counsel.”
 - “I’m not happy with counsel.”
 - “I have a problem with counsel.”

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The Right to Proceed Without Counsel

- Must be “clear and unequivocal”
 - “I want to fire my lawyer and be my own lawyer.”
- Best practice: When in doubt, inquire

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Proceeding Without Counsel

- Three ways to lose the right to representation by counsel
 - Knowing, voluntary waiver
 - Forfeiture
 - “Waiver by conduct”*

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Waiver of Counsel

- Waiver must be knowing, intelligent, and voluntary
 - A waiver colloquy under G.S. 15A-1242 satisfies the constitutional requirement

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G.S. 15A-1242

Defendant may be permitted to proceed without counsel only after the judge makes a thorough inquiry and is satisfied that the defendant:

- (1) Has clearly been clearly advised of the right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision;
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

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Thorough 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

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Taking a Waiver

STATE OF NORTH CAROLINA

I freely

1. I understand the charges against me and the consequences of my decision to proceed without counsel.

2. I understand that I have the right to counsel and that I am waiving this right to counsel.

(check)

1. I understand the charges against me and the consequences of my decision to proceed without counsel.

2. Without the assistance of counsel, which includes the right to assigned 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.

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Opportunity to Retain Counsel?

- Cases require “repeated failure” to obtain private counsel before that right is deemed forfeited

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The “Life” of a Waiver

- General rule: A waiver is good until proceedings terminate or the defendant withdraws it

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The “Life” of a Waiver

- In many cases a waiver will have been taken in district court, at first appearance or before a trial
- Best practice: Take another waiver in superior court if defendant indicates a desire to continue without counsel

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The “Life” of a Waiver

§ 15A-1242. Defendant's election to represent himself at trial. A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry . . .

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The “Life” of a Waiver

- A pre-trial waiver by a different superior court judge remains valid throughout the proceedings. State v. Lamb, 103 N.C. App. 646 (1991).

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Withdrawal of a Waiver

- The burden is on the defendant to notify the court if he or she later wants counsel
 - There is Court of Appeals authority to require the defendant to show good cause for “late game” changes of heart

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Withdrawal of a Waiver

- “[J]udges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial.”

State v. Curlee, 251 N.C. App. 249 (2016)

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The Right to Proceed Without Counsel

- Three ways to lose the right to representation by counsel
 - Knowing, voluntary waiver
 - Forfeiture
 - “Waiver by conduct”

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Forfeiture of Counsel

- Forfeiture recognized as an involuntary relinquishment of the right to counsel. State v. Simpkins, 373 N.C. 530 (2020)

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Forfeiture of Counsel

- Two general types of forfeiture described in *State v. Harvin*, 382 N.C. 566 (2022)

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Forfeiture of Counsel

- “Aggressive, profane, or threatening behavior”
 - Assaulting attorney. *State v. Montgomery*
 - Threatening judge. *State v. Joiner*

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Forfeiture of Counsel

- “Serious obstruction of the proceedings”
 - Refusing to obtain counsel despite multiple opportunities
 - Refusing to respond to questions about counsel
 - Continually hiring and firing counsel
 - Prior findings of contempt
 - Frivolous bar complaints
- Many cases cited in Benchbook

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Forfeiture of Counsel

- There is no specific time limit or number of lawyers
 - State v. Atwell, 383 N.C. 437 (2022)
 - Insufficient evidence of forfeiture
 - Delayed over two years...but there were indictment delays, medical issues, and financial issues that explained the delay
 - Five lawyers...but insufficient information in the record about specific reasons for each attorney's withdrawal

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Forfeiture of Counsel

- Other behaviors NOT necessarily supporting forfeiture:
 - Objections to the court's jurisdiction
 - Asking questions out of turn
 - Arguing with the trial judgeState v. Simpkins

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Forfeiture of Counsel

- Appellate case are very fact-specific
- Trial judges should use "every reasonable presumption against forfeiture"
- If you find forfeiture, be sure the record reflects the defendant's conduct and makes adequate findings of fact and conclusions of law

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A Third Pathway: “Waiver by Conduct”

- Continued delay tactics after a warning from the judge
 - Adopted by Court of Appeals in State v. Blakeney, 245 N.C. App. 452 (2016)
 - Never expressly adopted by Supreme Court

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Standby Counsel

- If defendant waives counsel, you have discretion to appoint standby counsel. G.S. 15A-1243
 - You may do so over the defendant’s objection
 - You may decline a defendant’s request for standby counsel

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Substitution of Counsel

- Non-indigent defendant:
 - Entitled to counsel of choice...
 - But not in a way that frustrates administration of justice
- Indigent defendant:
 - Entitled to appointed counsel, but not counsel of choice
 - Still, substitution allowed in certain circumstances

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Substitution of Counsel

- Replacing appointed counsel with retained counsel
 - Permitted unless it would cause “significant prejudice or a disruption in the orderly process of justice”
State v. Goodwin, 267 N.C. App. 437 (2019)

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Withdrawal of Counsel

- You may allow an attorney to withdraw upon a showing of good cause. G.S. 15A-144
 - Trial court discretion
 - No overarching test

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Judgments for Attorney Fees

- Before entering a judgment for attorney fees, give the defendant notice and an opportunity to be heard personally
- Many cases have been remanded for correction of this common error

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