

Criminal Court: The Law You Need to Know: Pt. 2

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1

The Right to Counsel

2

The Right to Counsel

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

3

Indigent Defendants

- Indigent defendants are entitled to appointed counsel.

4

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

5

Indigent Defendants

(TYPE OR PRINT IN BLACK INK) In The General Court Of Justice
☐ District ☐ Superior Court Division

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 I felony").

If the employee uses public transportation, state value:		Food (including food stamps)		\$
Other Income (disability, food stamps, etc.)		Utilities (power, water, heating, phone, cable, etc.)		\$
Employment - Spouse		Health Care		\$
Name And Address Of Spouse's Employer		Equipment (furniture, etc.)		\$
		Vehicle - <input type="checkbox"/> Vehicle <input type="checkbox"/> Other		\$
		Car Expenses (gas, insurance, etc.)		\$

6

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).

7

Hybrid Representation?

- Can a defendant ask to be “co-counsel” or “lead counsel” with a lawyer, to make sure counsel abides by his or her wishes?

8

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

9

The Right to Proceed Without Counsel

- Do you have a duty to inform the defendant of his or her right to proceed pro se?

10

The Right to Proceed Without Counsel

- No
- When a defendant expresses the desire to proceed pro se:
 - Warn of the hazards
 - Give the defendant time to think

11

The Right to Proceed Without Counsel

- Which 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.”
 - None of the above

12

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.

13

Taking a Waiver of Counsel

- Waiver must be knowing, intelligent, and voluntary

14

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.

15

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?

NC SUPERIOR COURT JUDGES' BENCHBOOK

School of Government, The University of North Carolina at Chapel Hill, Shea Denning (Ed.)



SCHOOL OF GOVERNMENT

- 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

Right to Counsel - 11

16

Taking a Waiver

STATE OF NORTH CAROLINA

I freely

☐ 1. I understand the rights I am giving up and I understand what I am doing. I am waiving my right to counsel and the right to

☐ 2. I understand the rights I am giving up and I understand what I am doing. I am waiving my right to counsel and the right to

(check one)

☐ 1. I understand the rights I am giving up and I understand what I am doing. I am waiving my right to counsel and the right to

☐ 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.

17

The "Life" of a Waiver

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

18

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

19

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 . . .

20

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).

21

Withdrawal of a Waiver

- The burden is on the defendant to notify the court if he or she later wants counsel
- There is authority to require the defendant to show good cause for “late game” changes of heart
- But also several cases where requiring the defendant to proceed pro se is reversible error

22

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.”

23

Withdrawal of a Waiver

- “It is not improper in such a situation for the trial court to inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel” State v. Curlee, 251 N.C. App. 249 (2016).

24

Forfeiture of Counsel

- Forfeiture is an involuntary relinquishment of the right to counsel as a result of a defendant's egregious misconduct.
 - Assaulting counsel
 - Aggressive, profane, or threatening behavior
 - Delays caused by intentional obstruction

25

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

26

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
- Appointment of standby counsel will not cure a bad waiver

27

Substitution of Counsel

- Non-indigent defendant: You may deny a motion to continue for a defendant who wishes to replace private counsel for no valid reason.
- Indigent defendant: Entitled to counsel, but not counsel of choice

28

Make a Record

- Appellate cases on the line between waiver and forfeiture are very fact specific



29

Closing Arguments

30

Closing Arguments

- You may limit the time of argument to not less than one hour per side for a misdemeanor, and not less than two hours for a felony
- If the defendant introduces no evidence, the defendant gets final argument. Rule 10 of the General Rules of Practice

31

Closing Arguments

- Permissible:
 - All the facts, reasonable inferences, and relevant law
 - May read case law (but no dissents)
 - May inform the jury of the possible punishment (with caution!)
 - First of all, get it right
 - Can't argue "punishment is so severe, you should acquit"

32

Closing Arguments

- Impermissible:
 - Personal opinions and beliefs
 - Abusive behavior or arguments
 - Name calling
 - Derogatory comments about opposing counsel
 - Issues of race when they are irrelevant
 - Information about the court's legal rulings
 - Religious arguments

33

Closing Arguments

- Grossly impermissible (you should intervene even without objection):
 - Comment on defendant’s exercise of jury trial right
 - Comment on defendant’s decision not to testify

34

Harbison Issues

- State v. Harbison, 315 N.C. 175 (1985). Per se ineffective assistance of counsel when defense counsel concedes guilt to the jury without prior consent.
- Be on alert during closing arguments

35

Harbison Issues

- Example: Defendant charged with rape, sexual offense, assault by strangulation, and assault on a female. At closing, defense counsel refers to initial police interview.

36

Harbison Issues

Now, the [State] went to great length to use the defendant's statements. 9:00 at night, surrounded by cops, pulled off the street to make a voluntary statement. He goes in. . . . You heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives.

All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

37

Harbison Issues

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38

Harbison Issues

- The Supreme Court of NC has stated “that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument.” State v. Thompson, 359 N.C. 77 (2004).

39

Closing Arguments

- If arguments are improper, give curative instruction:
“Members of the jury, you are to disregard the prosecutor’s statement that the he believes the witness was lying. It is improper for a lawyer to express a personal belief about a witness’s credibility. You are to disregard this improper statement and not allow it to affect your decision. Do you understand my instruction?”

40

Charging the Jury

41

Charge Conference, G.S. 15A-1231

- Charge conference is mandatory
- Must be recorded
- Must be outside the presence of the jury
- You must inform the parties of:
 - The offenses to be charged
 - Lesser included offenses to be charged
 - What instructions tendered from the parties you will give
 - Any other instructions you will give (if requested)

42

Charge Conference, G.S. 15A-1231

- Discuss the proposed verdict sheet
- Be sure to include a final mandate for each charge
 - Restates the charge, the burden of proof, and the final instruction to the jury on its duty to apply the law to the facts it finds

43

Charge Conference, G.S. 15A-1231

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, committed attempted robbery with a firearm or attempted first-degree rape and that while committing either or both of these offenses the defendant or a person with whom the defendant was acting in concert killed the victim and that the defendant's act or the act of the person with whom Defendant was acting in concert was the proximate because of Dwayne Garvey's death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first-degree murder under the felony murder rule.

44

Charging the Jury

- The judge charges the jury. G.S. 15A-1221(a)(9).
- Instruct the jury that all 12 jurors must agree to a verdict of guilty or not guilty. G.S. 15A-1235(a).
- You have discretion to submit instructions to the jury in writing.
- Recommendation: Follow the Pattern Jury Instructions

45

State v. Austin, 378 N.C. 272 (2021)

“Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact, it could be putting someone in fear or imminent apprehension of contact, threatening contact. But the facts of this case have demonstrated that the—there was actual contact, that's a touching of some form that is nonconsensual and unwanted by the other party.”

46

Concluding Instructions

- Discharge alternates
- Send the jury to the jury room

29. Jury deliberations. G.S. 15A-1221(a)(10).

- During your concluding instructions, instruct the jury: “Your first order of business when you retire to the jury room will be to select one of your members as foreperson to lead you in your deliberations, but do not begin your discussions of the case until you receive the verdict sheet from the bailiff. When you receive the verdict sheet, that will be your signal to begin your deliberations. Once you have agreed unanimously upon a verdict, your foreperson should mark that verdict, date and sign the verdict sheet, and then knock on the door of the jury room as a signal to us that you have arrived at a verdict. You will then be returned to the courtroom to announce your verdict.”

47

Verdict

48

Verdict. G.S. 15A-1237

- Must be in writing
- Signed by the foreperson
- Unanimous
- Returned in open court
- Made a part of the record

49

Verdict. G.S. 15A-1237

We, the jury, return as our unanimous verdict that the defendant is:

(1) Guilty of [name crime]. _____

OR

(2) Not guilty of [name crime]. _____

50

- When the judge is informed that jury has reached a verdict, direct bailiff to bring the jurors into courtroom and seat them in jury box. G.S. 15A-1237(b) (verdict must be returned by the jury in open court); State v. Smith, 299 N.C. 533, 536 (1980) (same).
- Request the foreperson to stand and state his or her name for the record.
 - The following language may be used:
Judge: Would the person selected as your foreperson please stand?
Judge: [Mr./Ms.] Foreperson, for the record, would you please state your name.
- After the foreperson is standing and has stated his or her name for the record, ask the foreperson if the jury has reached a unanimous verdict, telling the foreperson to answer "Yes" or "No."
 - The following language may be used:
Judge: [Mr./Ms.] Foreperson, please answer this question Yes or No. Has the jury reached a unanimous verdict? [When there are multiple verdicts, add: as to each (charge) (case)?]
- If the foreperson answers "No," direct the bailiff to return the jury to the jury room for further deliberations.
 - The following language may be used:
Judge: [Mr./Ms.] Bailiff, you may return the jury to the jury room to continue deliberations.
- If foreperson answers "Yes," ask the foreperson whether the verdict sheet has been completed and whether he or she has signed and dated the verdict

51

Verdict. G.S. 15A-1237

- If there are any issues with the verdict, excuse the jury and consult with counsel about appropriate remedies or instructions

52

Verdict. G.S. 15A-1237

- Hand verdict to clerk
- Instruct the clerk to take the verdict
- “Members of the jury, you have returned as your unanimous verdict that the defendant is [guilty/not guilty]. Is this your verdict, so say you all?”
- “If you all agree to and assent to that verdict, please raise your hands. Let the record reflect . . .”

53

Verdict. G.S. 15A-1238

- Upon request by either party, or in your own discretion, the judge (or the clerk) must poll the jury
 - “Is this your verdict, and do you still assent to it?”
- If polling reveals a lack of unanimity, direct the jury to resume deliberations

54

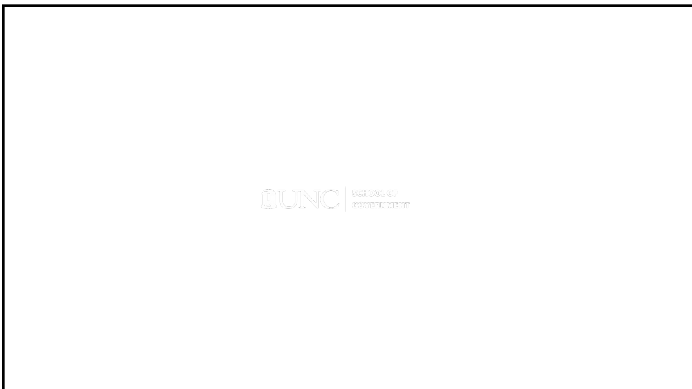
Verdict

- If unanimous, accept the verdict
- Ask about any further business with this jury
 - Aggravating factors
 - Habitual felon
- Make no comment on the verdict (praise or criticism) in the presence of the jury. G.S. 15A-1239
- Thank and discharge the jury

55



56



57