

ABSOLUTE IMPASSE

Jessica Smith, UNC School of Government (Aug. 2017).

Contents

I.	Statement of the Absolute Impasse Rule.....	1
II.	Limitations on the Rule.....	1
III.	What Constitutes an Absolute Impasse.	1
IV.	Defense Counsel's Duties in the Event of an Absolute Impasse.	2
V.	Trial Court's Duties in the Event of an Absolute Impasse.	2
VI.	Illustrative Circumstances in Which the Issue Arises.....	2
	A. Jury Selection.....	2
	B. Whether to Present Evidence.....	3
	C. Examination of Witnesses.....	3
	D. Whether to Move for a Mistrial.	3
	E. Jury Instructions.....	3

- 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.** There are several limitations on the absolute impasse rule. First, it 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). Second, it does not apply when the defendant seeks to have counsel assert frivolous claims, *State v. Jones*, 220 N.C. App. 392, 395 (2012) (the absolute impasse rule could not be used to compel counsel to "file frivolous motions and assert theories that lacked any basis in fact" regarding the defendant's claim of police, prosecutorial, and defense attorney misconduct and conspiracy), or pursue a frivolous line of cross-examination. *State v. Ward*, ___ N.C. App. ___, 792 S.E.2d 579, 582-84 (2016) (absolute impasse rule could not be used to require counsel to pursue a frivolous line of questioning; in this case, the defendant wanted counsel to cross-examine the State's DNA expert regarding whether possible mold contamination in the testing laboratory contaminated the testing done in this case; counsel, however, informed the trial court that there was no factual basis for such a claim).
- 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*, 202 N.C. App. 740, 745-46 (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) (“[W]e 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 to 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). When it cannot be determined from the record whether an absolute impasse existed, the issue cannot be addressed on appeal. *State v. Floyd*, ___ N.C. ___, 794 S.E.2d 460, 468 (2016) (holding that the court of appeals erred by granting relief on the defendant’s absolute impasse claim where it could not “be determined from the cold record whether an absolute impasse existed as described”; ruling was without prejudice to the defendant’s right to assert a claim by way of a motion for appropriate relief).
- 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*, 202 N.C. App. 740, 746-47 (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, 402-04 (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*, 202 N.C. App. 740, 745-47 (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, 563-67 (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), *aff'd per curiam*, 350 N.C. 59 (1999).

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).