ABSOLUTE IMPASSE

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

Contents

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, 250 N.C. App. 254, 258-59 (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). The Court of Appeals has indicated that in some situations a defendant may

waive an absolute impasse claim by failing to timely notify defense counsel or the trial court of the defendant's wishes concerning a strategic decision. State v. Holliday, 289 N.C. App. 667, 675 (2023) (suggesting that the defendant had waived the right to have his wishes control an alleged absolute impasse on whether to subpoena an out-of-state witness by not making his insistence on the subpoena clear to defense counsel or the trial court until the first day of trial when the case had been pending for two years).The Court of Appeals also has held that the rule is limited to the trial court level and does not apply in the context of appellate counsel. State v. Womble, 297 N.C. App. 547, 552-53 (2024).

Note that whether a defendant and defense counsel have reached an absolute impasse on trial strategy is a distinct analysis from whether the trial court must permit a defendant to substitute or dismiss defense counsel. State v. Goodwin, 267 N.C. App. 437, 441 (2019) (trial court committed reversible error by denying defendant's request for new counsel on grounds that the absolute impasse standard had not been met; defendant did not assert that he and defense counsel were at an impasse but rather that he was entitled to counsel of his choice). *See generally* Right to Counsel During Criminal Prosecution (discussing standards for substituting or dismissing defense counsel).

III. What Constitutes an Absolute Impasse.

A. Disagreement on Trial Strategy. 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. State v. Mitchell, 353 N.C. 309, 323 (2001) (absolute impasse existed as to whether to attempt to rehabilitate juror during voir dire); State v. White, 349 N.C. 535, 567 (1998) (absolute impasse existed as to whether to present certain evidence); 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); *see also* State v. Holliday, 289 N.C. App. 667, 674 (2023) ("[N]o actual impasse exists . . . when the record fails to disclose any disagreement between the defendant and counsel with respect to *trial tactics*."). Not all disagreements between a defendant and defense counsel rise to the level of an absolute impasse. *See, e.g.*, State v. Strickland, 283 N.C. App. 295, 303 (2022) (no absolute impasse existed where the defendant, among other complaints, viewed defense counsel's cross-examinations and objections as insufficient); State v. McCarver, 341 N.C. 364, 385 (1995) (finding no absolute impasse despite defense counsel's statements that "[t]wo or three times this morning [defendant] wanted me to stop the trial and I refused . . . . I would like the Court to know that, if I may. I will not let [defendant] run this case. He knows that. He does not control the defense, he can make suggestions."); State v. Ward, 281 N.C App. 484, 487 (2022) (no absolute impasse existed where the defendant expressed general dissatisfaction with and desire to fire defense counsel during trial), State v. Curry, 256 N.C. App. 86, 97-98 (2017) (no absolute impasse existed where trial counsel sought to withdraw on grounds that the attorney-client relationship had been destroyed by the defendant's lack of veracity but record showed no disagreement regarding trial tactics); *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. State v. Wilkinson, 344 N.C. 198, 211-12 (1996) (no absolute impasse

existed where during colloquy with the trial court the defendant voiced his satisfaction with the court directing defense counsel to proceed with presenting evidence that the defendant, prior to the colloquy and against defense counsel's advice, said was unnecessary to present); *Williams,* 191 N.C. App. at 103-04 (the defendant deferred to defense counsel's decision); *see also* State v. Henderson, ___ N.C. App. ___, 916 S.E.2d 58, 65 (2025) (no absolute impasse existed where the defendant and defense counsel had an initial disagreement as to how to present certain evidence, defense counsel advised the trial court of the disagreement, the court addressed the issue through a colloquy with the defendant, the evidence was presented in the manner defense counsel wished, and the defendant did not raise further concerns thereafter when the trial court offered the opportunity to do so).

B. Fully Informed Defendant. The statement of the rule in *Ali* refers to an absolute impasse between defense counsel and a "fully informed criminal defendant," 329 N.C. at 404, though the Court did not elaborate on what it means for a defendant to be fully informed for purposes of the rule. Later cases suggest that a fully informed defendant is one who has been made aware of and understands the potential consequences of the decision to override his or her attorney's suggested strategy. State v. Mitchell, 353 N.C. 309, 323 (2001) (so framing this requirement). *See also* State v. Dawkins, 265 N.C. App. 519, 523 (2019) (rejecting the defendant's argument that he was not fully informed regarding his decision to reject defense counsel's advice to stipulate to a prior felony conviction; counsel read the stipulation to the defendant and advised him to sign it to prevent the State from introducing prejudicial evidence proving the prior conviction but the defendant refused, at no point expressing a lack of understanding or a desire for more information).

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); State v. Jackson, 292 N.C. App. 616, 619 (2024). The better practice is to do this on the record in open court. *Ali*, 329 N.C. at 402 (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, 369 N.C. 329, 341 (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); *Jackson*, 292 N.C. App. at 621 (citing *Floyd* and finding record insufficient to assess alleged absolute impasse on appeal).

V. Trial Court's Duties in the Event of an Absolute Impasse.

A. Conduct Colloquy with Defendant. Though *Ali* did not describe a specific procedure for a trial court to follow when the court becomes aware of a potential absolute impasse between a defendant and defense counsel, subsequent appellate opinions suggest that the court should conduct a colloquy exploring the issue with the defendant. *See, e.g.*, State v. Mitchell, 353 N.C. 309, 323 (2001) (trial court discussed impasse with the defendant and questioned the defendant on the record about his desire to override defense counsel's advice); State v. White, 349 N.C. 535, 567 (1998) (noting that the trial court's colloquy revealed that an absolute impasse existed and the defendant was fully informed about his

decision to override defense counsel's advice; trial court properly required defense counsel to abide by the defendant's wishes); *see also* State v. Freeman, 202 N.C. App. 740, 746 (2010) (noting, in process of holding that trial court erred by not directing that defendant's wishes control an absolute impasse, that the court refused to discuss the matter with the defendant despite defense counsel informing the court of the defendant's desire to be heard). A colloquy helps the trial court determine whether an absolute impasse exists, allows the defendant to express his or her wishes concerning the tactical matter at issue, provides an opportunity for the court to inform the defendant of the consequences of a decision to override his or her attorney's advice, and helps develop the record for appellate review. *See, e.g.*, State v. Grooms, 353 N.C. 50, 84 (2000) (colloquy showed that absolute impasse existed and the defendant was fully informed about his decision to override defense counsel's advice); State v. Brown, 339 N.C. 426, 435 (1994) (trial court "correctly applied" *Ali* by ensuring that the defendant was fully informed about defense counsel's opinion and the consequences of overriding it); State v. Ward, 281 N.C. App. 484, 490 (2022) (colloquy showed that no absolute impasse existed despite the defendant expressing dissatisfaction with defense counsel's choices concerning whether to call certain witnesses).

B. Require Defense Counsel to Abide by Defendant's Wishes. If a trial court determines that an absolute impasse exists, the court must order defense counsel to abide by the defendant's wishes concerning the matter at issue. *Grooms*, 353 N.C. at 84 (trial court properly prohibited defense counsel from presenting certain evidence, in accordance with defendant's wishes); State v. McNeill, 371 N.C. 198, 262 (2018) (same, citing *Grooms*); *Freeman*, 202 N.C. App. at 746 (trial court erred by allowing defense counsel's decision to control over defendant's wishes concerning jury selection); *see also* State v. Dawkins, 265 N.C. App. 519, 524 (2019) (because the defendant's wishes control when a defendant and defense counsel reach an absolute impasse, the trial court did not err by rejecting stipulation to habitual felon status that was proposed by defense counsel but the defendant refused to sign)

At least when the underlying tactical issue involves a fundamental right, 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. *Freeman*, 202 N.C. App. at 746-47 (reversible error for trial court to allow defense counsel's decision not to use a peremptory strike to control over the defendant's desire to use the strike; effect of trial court's error was tantamount to failing to permit defendant to use a peremptory strike, which caselaw holds to be prejudicial error). *Cf.* State v. Jackson, 292 N.C. App. 616, 623 (2024) (noting in a case involving an alleged impasse concerning the presentation of documentary evidence that the North Carolina Supreme Court has not specifically classified a trial court's failure to properly address an absolute impasse as a form of structural error).

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. Whether to Stipulate.

- State v. Dawkins, 265 N.C. App. 519, 523 (2019) (the trial court did not err in a felon in possession case by finding that the defendant and defense counsel had reached an absolute impasse over whether to stipulate to the defendant's status as a convicted felon and rejecting defense counsel's proposed stipulation which the defendant refused to sign).

D. 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).

E. 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).

F. 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).