
21.4 Right to Allocution

A. Purpose

Allocution, or a defendant's right to make a statement on his or her own behalf before the pronouncement of a sentence, was a right granted to a defendant at common law. *State v. Miller*, 137 N.C. App. 450, 460 (2000). The purpose of common law allocution was to give the defendant the opportunity "to present legal grounds why sentence ought not be pronounced." *State v. Green*, 336 N.C. 142, 191 (1994) (citing *State v. Johnson*, 67 N.C. 55 (1872)). The grounds included that the defendant "was not the person convicted, he had the benefit of clergy, he was insane, or, if a woman, she was pregnant." *Green*, 336 N.C. 142, 191. The purpose of modern-day allocution is "to afford defendant an opportunity to state any further information which the trial court might consider when determining the sentence to be imposed." *See State v. Rankins*, 133 N.C. App. 607, 613 (1999). For a thorough discussion of the purposes of allocution in modern times, see *State v. Chow*, 883 P.2d 663 (Haw. Ct. App. 1994).

B. Basis of Right

Federal constitution. The U.S. Supreme Court has not decided whether a defendant who affirmatively requests to speak at sentencing has the right to do so under the U.S. Constitution. *See McGautha v. California*, 402 U.S. 183, 219 n.22 (1971), *vacated on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972); *Hill v. United States*, 368 U.S. 424 (1962); *see also United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000); *Green v. French*, 143 F.3d 865 (4th Cir. 1998).

Federal circuit courts are split on whether the federal constitution grants a defendant this right. *Compare, e.g., Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992) (recognizing a due process right to allocution at sentencing), *and Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) ("[W]hen a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant the defendant's request."), *with United States v. Li*, 115 F.3d 125, 132 (2d Cir. 1997) (the right to allocution "is a matter of criminal procedure and not a constitutional right"), *and United States v. Fleming*, 849 F.2d 568, 569 (11th Cir. 1988) ("[T]he right to allocution is *not* constitutional." (emphasis in original)).

State constitution. The N.C. Supreme Court has held that capital defendants have no constitutional right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding. *See State v. Moseley*, 338 N.C. 1 (1994); *State v. Green*,

336 N.C. 142 (1994). Additionally, no state constitutional right to allocution has been recognized in noncapital cases. The question has been raised in previous cases but not specifically decided by North Carolina's appellate courts. *See, e.g., State v. Miller*, 137 N.C. App. 450 (2000); *State v. Rankins*, 133 N.C. App. 607 (1999).

Statutory right to allocution in misdemeanor and noncapital felony cases. G.S. 15A-1334(b) codifies the common law right of allocution and expressly gives a defendant in misdemeanor and noncapital felony cases the right to "make a statement in his own behalf" at the sentencing hearing. *State v. Miller*, 137 N.C. App. 450 (2000). The defendant must request the opportunity to speak before the pronouncement of sentence or the right is lost. *See State v. Rankins*, 133 N.C. App. 607 (1999) (defendant was properly denied the opportunity to address the court where the request came after the jury had returned its verdict and the trial judge had already imposed sentence).

Neither the constitution nor G.S. 15A-1334 requires the trial judge to address the defendant personally and ask whether he or she wishes to make a statement. *See Hill v. United States*, 368 U.S. 424 (1962) (a defendant has no federal constitutional right to be asked if he or she wishes to address the court before sentencing); *State v. Poole*, 305 N.C. 308, 325 (1982) ("While it may be the better practice for the trial court specifically to inquire if the defendant wishes to speak prior to sentencing, our statute does not command this practice."); *cf.* FED. R. CRIM. P. 32(i)(4)(A)(ii) (before imposing sentence a federal sentencing judge must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence"). However, if the defendant requests an opportunity to address the court before being sentenced and he or she is denied the right to allocute under G.S. 15A-1334(b), a new sentencing hearing must be ordered. *See Miller*, 137 N.C. App. 450; *see also State v. Flake*, ___ N.C. App. ___, 790 S.E.2d 752 (2016) (unpublished); *State v. Ferrell*, 233 N.C. App. 599 (2014) (unpublished).

A new sentencing hearing will also be ordered if a trial judge impermissibly chills the defendant's right to allocution. *See State v. Jones*, ___ N.C. App. ___, 802 S.E.2d 518, 526 (2017) (new sentencing hearing awarded where trial judge acknowledged defendant's explicit request to allocute but then made a series of negative comments and "abruptly entered judgment without giving the defendant an opportunity to speak"); *State v. Griffin*, 109 N.C. App. 131, 133 (1993) (finding defendant's right to speak under G.S. 15A-1334(b) was effectively chilled by trial judge's comment that it "would be a big mistake" for defendant to testify at the sentencing hearing).

Practice note: Counsel should discuss with the defendant the advantages and disadvantages of allocution. The U.S. Supreme Court has observed that even "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *See Green v. United States*, 365 U.S. 301, 304 (1961). On the other hand, a defendant may do harm to his or her cause by speaking. *See State v. Divinie*, 229 N.C. App. 197 (2013) (unpublished) (noting that the exercise of the right to speak entails risk and finding that the trial judge, in ordering consecutive sentences, was entitled to take into account defendant's apparent lack of remorse

evidenced by the statements he made at sentencing). Moreover, should the case be reversed and a new trial granted, any admissions the defendant makes may be used against him or her. *See* Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787 (1997).

Allocution in capital cases. The N.C. Supreme Court has held that defendants in North Carolina have no common law or statutory right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding. *See State v. Moseley*, 338 N.C. 1 (1994); *State v. Green*, 336 N.C. 142 (1994). The only remnant of the common law right of allocution in capital cases in North Carolina "is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered." *Green*, 336 N.C. 142, 192.

Since G.S. 15A-1334(b), by its own terms, is restricted to noncapital cases, it does not apply when the defendant is charged with a capital offense. *See Green*, 336 N.C. 142. The statute applicable to capital sentencing proceedings, G.S. 15A-2000(a)(4), has no provision for a defendant to make an unsworn statement of fact or to testify without being subject to cross-examination. It merely provides that a defendant or defense counsel has the right to "present argument for or against sentence of death." *See State v. Ray*, 137 N.C. App. 326, 331 (2000).

Although no absolute right of allocution in capital cases is recognized in North Carolina, the trial judge nevertheless may be willing to grant a defendant's request to make a statement. *See, e.g.*, *Moseley*, 338 N.C. 1 (finding no error where trial judge failed to afford the capital defendant the opportunity to allocute even though defendant's motion for allocution had been granted before jury selection, because the defendant failed to remind the judge to allow him to speak at the appropriate time); *State v. Reeves*, 337 N.C. 700 (1994) (trial judge did not express an opinion on a fact to be proved when he allowed the capital defendant's request to allocute but required him to speak from a position that was a greater distance from the jury than the distance from which the attorneys argued).

Practice note: If, after weighing the risks detailed in the previous practice note, you believe that it would be helpful for a capital jury to hear your client speak during the sentencing phase—for example, to express remorse or plead for leniency—you should make a motion to allow the defendant to address the jury. You should cite the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution as well as article I, sections 19 and 23 of the N.C. Constitution and argue that it is important for the defendant to be allowed to speak for himself or herself to the jury because it is the jurors who must make the ultimate decision whether to impose the death penalty. You also can argue that the Criminal Justice Section of the American Bar Association has recommended that the "offender should be permitted the right of allocution" at the sentencing hearing. *See* ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING THIRD EDITION, Standard 18-5.17 (1994). A sample motion to permit allocution is available on the Office of Indigent Defense Services website in the Capital Trial Motions Index, under the Beginning of Sentencing Phase heading (Motion to Allow Defendant to Address the Jury).

Additional resources. For further discussion of the history of the right to allocate and the informative results of a survey of judges' views on allocution, see Mark W. Bennet & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735 (2013).