

## **Guidelines for Counsel Appointed by Indigent Defense Services for Claims Investigated by the North Carolina Innocence Inquiry Commission**

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The North Carolina Innocence Inquiry Commission (Commission) was established through the enactment of G.S. § 15A-1460-1475 to provide an independent, balanced, expeditious, and non-adversarial truth-seeking forum for credible claims of actual innocence submitted by felons convicted in North Carolina State courts. It is anticipated that an independent, non-adversarial investigative approach will maximize the probability of meeting the truth-seeking objective. To this end, both defense and prosecuting attorneys will have minimal roles in the investigation conducted by the Commission and its staff, although attorneys involved in the original prosecution and defense of the case may be consulted during investigation.

Claims which are particularly suited for review by the Commission include:

- Claims supported by new evidence which was not presented to a jury, but has been raised in a post-trial motion which was denied without a hearing. This includes evidence which may contain biological significance and for which a motion for testing has previously been denied without a hearing.
- Claims supported by new evidence which is procedurally barred by post-trial motion rules.
- Claims which may be supported by records or documents which can not be obtained without subpoena and the focused review by Commission staff will aid in expeditiously obtaining a subpoena.
- Claims supported by some new evidence of innocence which has never been considered by a jury or by a judge in a post-trial hearing which would benefit from consideration of the cumulative post-trial evidence in the case, including new evidence presented through previous MARs.
- Claims which may require special witness or victim handling, such as a recantation in a child sex abuse case, in order to maximize credibility.

There is one exception to the general rule of limited involvement by defense attorneys in the inquiry process. The statute reads that “[n]o formal inquiry into a claim of innocence shall be made by the Commission unless the Director or the Director’s designee first obtains a signed agreement from the convicted person in which the convicted person waives his or her procedural safeguards and privileges, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding all inquiry requirements of the Commission.” G.S. § 15A-1467(b). In addition, “[t]he convicted person shall have the right to advice of counsel prior to the execution of the agreement and, if a formal inquiry is granted, throughout formal inquiry.” G.S. § 15A-1467(b).

The convicted person may retain counsel, apply for court appointed counsel, or represent himself/herself by signing a waiver of representation. If the convicted person chooses to apply for court appointed counsel, the Commission Chair shall determine indigency status and the Office of Indigent Defense Services shall assign counsel if necessary. G.S. § 15A-1467(b) and North Carolina Innocence Inquiry Commission Rules and Procedures, Article 5(A)(1).

The initial responsibility of the appointed counsel is to advise the convicted person regarding the waiver of rights and their obligation to cooperate with the investigation. The waiver of rights only applies to matters relating to the convicted person's claim of innocence. However, it encompasses any and all procedural safeguards and privileges which might otherwise impede complete investigation of the convicted person's claim of innocence. These include the right against self-incrimination, attorney-client privilege, spousal privilege, patient-physician privilege, priest-penitent privilege, and any other type of privileged communication.

"If counsel represents the convicted person, then the convicted person's counsel must be present at the signing of the agreement." G.S. § 15A-1467(b). The convicted person's signature shall be notarized, and the original copy of the agreement shall be delivered to the Commission staff. North Carolina Innocence Inquiry Commission Rules and Procedures, Article 5(B)(2).

Once the waiver is signed, the advice "throughout formal inquiry" is essentially limited to advice about whether full cooperation with the inquiry process is advisable and availability to answer questions regarding the inquiry process. Counsel should advise the convicted person that "[i]f, at any point during an inquiry, the convicted person refuses to comply with the requests of the Commission or is otherwise deemed to be uncooperative by the Commission, the Commission shall discontinue the inquiry." G.S. § 15A-1467(g).

The convicted person may have been working with an attorney or other individual post-conviction who has not been appointed to advise him/her during the inquiry process, particularly in the case of claims previously investigated by The North Carolina Center on Actual Innocence. Appointed counsel is encouraged to discuss with the convicted person if there are individuals that should be consulted regarding the case.

The Commission inquiry process is designed as an extraordinary process for those who are completely and factually innocent of the crimes for which they were convicted. It is also designed to provide disincentives and penalties if used by those who are not completely and factually innocent. "Evidence of criminal acts . . . disclosed during formal inquiry or Commission proceedings shall be referred to the appropriate authority." G.S. § 15A-1468(d). Therefore, if at some point during the inquiry process, it becomes clear that continued investigation into the convicted person's claim of innocence is not in their best interests, appointed counsel may advise the convicted person to remove themselves from the inquiry process and pursue other avenues of post-conviction relief.

It should be noted that "[a] claim of factual innocence asserted through the Innocence Inquiry Commission shall not adversely affect the convicted person's rights to other post-conviction relief." G.S. § 15A-1470(b). "Evidence favorable to the convicted person disclosed through formal inquiry or Commission proceedings shall be disclosed to the convicted person and the convicted person's counsel, if the convicted person has counsel." G.S. § 15A-1468(d).

This evidence may be helpful in future post-conviction motions. In addition, the assertion of a claim of innocence through the Commission does not preclude the simultaneous pursuit of appeal or post-conviction relief in State or Federal courts.

Appointed/retained counsel, as well as the district attorney, will not be permitted to attend hearings of the Commission. All such hearings are exempt from public meeting laws and will be closed to the public unless the Commission decides otherwise. However, if a case is referred by the Commission to a three judge panel, all “supporting records for the Commission’s conclusion that there is sufficient evidence of factual innocence to merit judicial review, including all files and materials considered by the commission and a full transcript of the hearing before the Commission, shall become public at the time of referral to the superior court.” G.S. § 15A-1468(e).

If the Innocence Inquiry Commission concludes there is sufficient evidence of factual innocence to merit judicial review, and the convicted person is indigent, counsel will be appointed to represent the convicted person at the hearing. G.S. § 15A-1469 (e). The appointed counsel may be the same or different counsel from the appointment for the waiver and inquiry process.

A hearing before a three-judge panel will resume the adversarial format, with the District Attorney representing the State and appointed counsel representing the convicted person. Ideally, evidence of innocence will be compelling enough that the State will not oppose a motion to dismiss.