

CAPITAL CASE MANAGEMENT FOR SUPERIOR COURT JUDGES
APPOINTMENT OF COUNSEL
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“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, be it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

I. APPOINTMENT OF TRIAL COUNSEL

A. Statutory Authority

(1) Pursuant to the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, the Office of Indigent Defense Services (“IDS”) was given responsibility for the appointment of counsel in all capital cases pending on or after July 1, 2001.

(2) The IDS Act authorized the “Rules of the North Carolina Commission on Indigent Defense Services (“IDS Rules”), which are set forth in the North Carolina Rules of Court published by West.

(3) The IDS Act applies to “all capital offenses and all non-capital criminal charges brought contemporaneously with or subsequently joined with a capital offense.” IDS Rule 2A.1(a).

(4) Pursuant to the IDS Rules, a capital offense is defined as “any first-degree murder charge or charge of murder where the degree is undesignated, except cases in which the defendant was under 18 years of age at the time of the offense and not potentially punishable by death.” IDS Rule 2A.1(a).

(5) The exception is based on the United States Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005), a case in which the Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the imposition of the death penalty on defendants who were under eighteen years old at the time their crimes were committed.

B. Appointment of Provisional Counsel

(1) IDS Rule 2A.2(a) authorizes the appointment of a lawyer on a “provisional basis” prior to the defendant’s first appearance. The rule states: “Upon learning that a defendant has been charged with a capital offense, the [Capital Defender] may immediately appoint a lawyer

on a provisional basis to conduct a preliminary investigation and determine whether a defendant is indigent and needs appointed counsel.”

(2) Provisional counsel is authorized “to take steps to protect the capital defendant’s rights pending appointment of trial counsel by the [Capital Defender]. . . .” IDS Rule 2A.2(a).

(3) The commentary to IDS Rule 2A.2(a) states that “This provision, allowing for designation of provisional counsel, is in recognition of the importance of affording counsel to capital defendants as soon as possible.”

C. Defendant’s First Appearance

(1) At the defendant’s first appearance in district court, the court determines whether the defendant is indigent pursuant to N.C. Gen. Stat. § 7A-450.¹ *See also* IDS Rule 2A.2(b).

(2) If the defendant is found to be indigent and eligible to have counsel appointed to represent him or her, the clerk faxes the “Notice And Determination Of Counsel In First-Degree Murder (Or Undesignated Degree Of Murder) Cases At The Trial Level” form to the Office of the Capital Defender.² IDS Rule 2A.2(b).

D. Appointment of First Trial Counsel

(1) After receiving notice that the defendant is indigent, the Capital Defender³ appoints an attorney who is on the Capital Roster as “lead” or “associate” trial counsel to represent the defendant. IDS Rule 2A.2(c). Some attorneys are qualified to be on the Capital Roster as lead and associate trial counsel.

¹N.C. Gen. Stat. § 7A-450(c) states that “The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent defendant is entitled to representation.”

²The form is AOC-CR-427 Rev. 6/11.

³Although IDS Rule 2A.2, entitled “Appointment of Trial Counsel,” gives the authority to appointment counsel to the “IDS Director,” the IDS Rules state that “[w]henver the term ‘IDS Director’ is used in these rules and appendix, it means the Director of the Office of Indigent Services or his or her designee.” The Capital Defender is the IDS Director’s designee for capital cases.

(2) Factors that the Capital Defender considers in appointing counsel to represent a capital defendant include, but are not limited to, the following: The circumstances surrounding the victim's death, the number of victims, the defendant's prior record, the existence of any aggravating circumstances, the experience and reputation of the attorneys on the Capital Roster from that county, and the likelihood that the State will seek the death penalty.

(3) A copy of the appointment is faxed to the Clerk of Superior Court, the Office of the District Attorney and appointed counsel. The defendant is also sent a copy of the appointment via U.S. Mail.

(4) The commentary to IDS Rule 2A.2(c) states that "where practicable, either lead or associate defense counsel shall be a member of the bar in that **judicial division**."⁴

E. Rule 24 and the Appointment of Second Trial Counsel

(1) Rule 24 of the General Rules of Practice states that there "shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death." In order to seek the death penalty, the State must present evidence of at least one aggravating circumstance. If the State is authorized to seek the death penalty at the hearing, a second attorney must be appointed to represent the defendant. *See also* N.C. Gen. Stat. § 15A-7A-450(b1) (stating that "An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed . . ."); *State v. Brown*, 325 N.C. 427, 383 S.E.2d 910 (1989) (holding that the appointment of a second attorney in a capital case is mandatory).

(2) If the second attorney appointed will serve as lead trial counsel, the Capital Defender is required to appoint that attorney from the roster of attorneys who are eligible to serve as lead trial counsel. If the second attorney appointed will serve as associate trial counsel, the Capital Defender is required to appoint that attorney from the roster of attorneys who are eligible to serve as associate trial counsel. IDS Rule 2A.2(d).

(3) Rule 24 authorizes the appointment of second counsel prior to the pretrial conference. It states that "This rule does not affect the rights of the defense . . . to request, or the court's authority to grant, any relief authorized by law, including but not limited to the appointment of assistant counsel, in advance of the pretrial conference."

(4) IDS Rule 2A.2(d) also authorizes the appointment of second counsel prior to the Rule 24 hearing. The rule states: "Upon request by and consultation with the current appointed lawyer, the [Capital Defender] may appoint a second lawyer for a capital defendant prior to a declaration at a hearing pursuant to Rule 24 of the General Rules of Practice that the case will be prosecuted capitally. . . ." However, the Capital Defender may appoint a second lawyer prior to the Rule 24 hearing only if "the IDS Director finds good cause justifying an earlier appointment."

⁴The State of North Carolina is divided into eight judicial divisions.

IDS Rule 2A.2(d).

(5) Before appointing second counsel, the Capital Defender is required to consult with the first attorney appointed to represent the defendant to solicit his or her opinion regarding the appointment of second counsel. IDS Rule 2A.2(d).

(6) The commentary to IDS Rule 2A.2(d) states that “where practicable, either lead or associate defense counsel shall be a member of the bar in that **judicial division**.”

(7) A copy of the appointment of second counsel is faxed to the Clerk of Superior Court, the Office of the District Attorney and appointed counsel. The defendant is also sent a copy of the appointment of second counsel via U.S. Mail.

F. Appointment of Second Counsel When First Counsel Retained

(1) N.C. Gen. Stat. § 7A-450(c) states that “The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which the defendant is entitled to representation.”

(2) If the defendant or a third party has retained an attorney to represent the defendant, the defendant is still eligible to have a second attorney appointed to represent him or her if the court were to find that the defendant does not have sufficient funds to retain a second attorney. *See State v. Davis*, 168 N.C. App. 321, 608 S.E.2d 74 (2005) (holding that a defendant charged with capital murder who has retained an attorney is entitled to the appointment of a second attorney, if the court finds him or her to be indigent).

G. Appointment of Retained Counsel Prohibited

(1) Pursuant to IDS Rule 2A.2(e), “If a retained attorney becomes unable to continue representing a capital defendant because the defendant or any third party can not fulfill the terms of the financial agreement between the attorney and the defendant or any third party, the retained attorney may file a motion to withdraw.”

(2) If the court allows the retained attorney to withdraw from the case, “that attorney is not eligible to be appointed to represent the defendant.” IDS Rule 2A.2(e).

H. Appointment of New Counsel When Attorney Allowed to Withdraw

(1) N.C. Stat. § 15A-144 authorizes the court to allow an attorney to withdraw from a criminal proceeding “upon a showing of good cause.”

(2) If an attorney is allowed to withdraw from a capital case, or a case which has been declared non-capital, the clerk is required to fax a copy of AOC-CR-427 Rev. 6/11 to the Office of the Capital Defender.

(3) After receiving a copy of AOC-CR-427 Rev. 6/11, the Capital Defender appoints new counsel.

(4) If an attorney who was originally appointed to represent a defendant in a first-degree murder case, or a case in which the degree of murder is undesignated, is allowed to withdraw from a case after the defendant was indicted on some lesser offense, the Capital Defender is still responsible for appointing new counsel.

I. Appointment of Standby Counsel in Capital Cases

(1) If a capital defendant is permitted by the court to proceed *pro se* pursuant to *Faretta v. California*, 422 U.S. 806 (1975), the Capital Defender is authorized to appoint standby counsel. IDS Rule 2A.3(b) states: “If a capital defendant has elected to proceed without the assistance of counsel, the trial judge shall immediately notify the [Capital Defender], who may appoint, in his or her discretion, standby counsel to assist the defendant. . . .” *See also* N.C. Gen. Stat. § 15A-1243 (stating that appointment of standby counsel “shall be in accordance with rules adopted by the Office of Indigent Defense Services”).

(2) IDS Rule 2A.3(b) is silent on whether one or two attorneys should be appointed as standby counsel.

II. REMOVAL OF COUNSEL

A. Case Declared Non-Capital

(1) If a case is declared non-capital after a second attorney has been appointed, “one of the appointed attorneys shall move to withdraw.”⁵ IDS Rule 2A.5(c).

(2) Counsel are required to consult with the Capital Defender before deciding which attorney will file a motion to withdraw. IDS Rule 2A.5(c).

(3) After the court rules on counsel’s motion to withdraw, counsel is required to notify the Capital Defender of the court’s ruling on the motion. IDS Rule 2A.5(c).

(4) The commentary to IDS Rule 2A.5(c) states that, if a case is declared non-capital within thirty days of a scheduled trial date and it would be difficult for one attorney to assume responsibility for preparing the entire case, “the [Capital Defender] generally will approve both attorneys continuing the representation at the trial.” In some instances in which a case was declared non-capital more than thirty days prior to the scheduled trial date, judges have recommended that, in the interest of justice, both attorneys be allowed to continue representing the defendant.

⁵This provision became effective on March 26, 2010.

B. Substitution of Counsel

(1) IDS Rule 2A.5(b) states that “For good cause, the [Capital Defender] may request *ex parte*⁶ that a judge of a court of competent jurisdiction replace lead or associate counsel previously appointed with new counsel selected by the [Capital Defender].”

(2) The commentary to IDS Rule 2A.5(b) states that the factual basis for “good cause” does not have to give rise to a claim of ineffective assistance of counsel. Rather, ‘Each case must be examined on an individual basis. In the absence of a constitutional violation, the decision about whether appointed counsel shall be removed is a matter solely for the discretion of the court.’ Commentary to IDS Rule 2A.5(b) (quoting *State v. Kuplin*, 316 N.C. 387, 396, 343 S.E.2d 793, 798 (1986)).

(3) If the judge determines that the attorney is providing ineffective assistance of counsel or that the attorney has an unwaivable conflict of interest, “substitution is required as a matter of law.” Commentary to IDS Rule 2A.5(b).

⁶In *State v. Flood*, 672 S.E.2d 543, 2009 N.C. LEXIS 13, the trial court denied the Capital Defender’s request for an *ex parte* hearing pursuant to IDS Rule 2A.5(b). After reviewing the defendant’s Emergency Petition for Writ of Certorari, the North Carolina Supreme Court granted the defendant’s petition and remanded the case “with instructions for the trial court to hold an *ex parte* hearing on defendant’s motion to remove his counsel. . . .”