

Right to Counsel: Strategies for the Trial Judge

Michael R Morgan
Superior Court Judge
Wake County

N.C.G.S. Section 7A-456:

(a) A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony

(b) A judicial official making the determination of indigency shall notify the person of the provisions of subsection (a) of this section

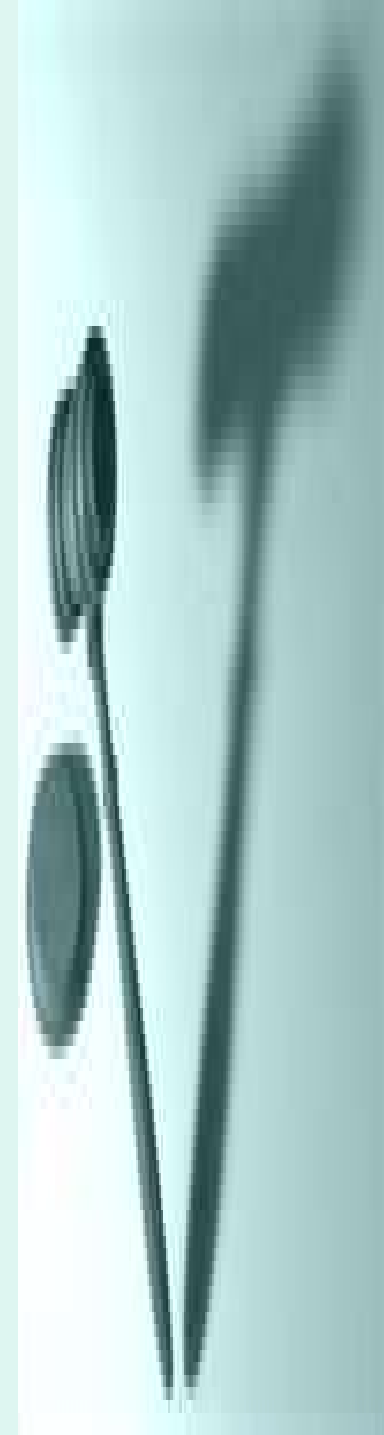




INFORM A DEFENDANT SEEKING COURT-APPOINTED
COUNSEL THAT A FALSE MATERIAL STATEMENT
REGARDING INDIGENCY IS A FELONY

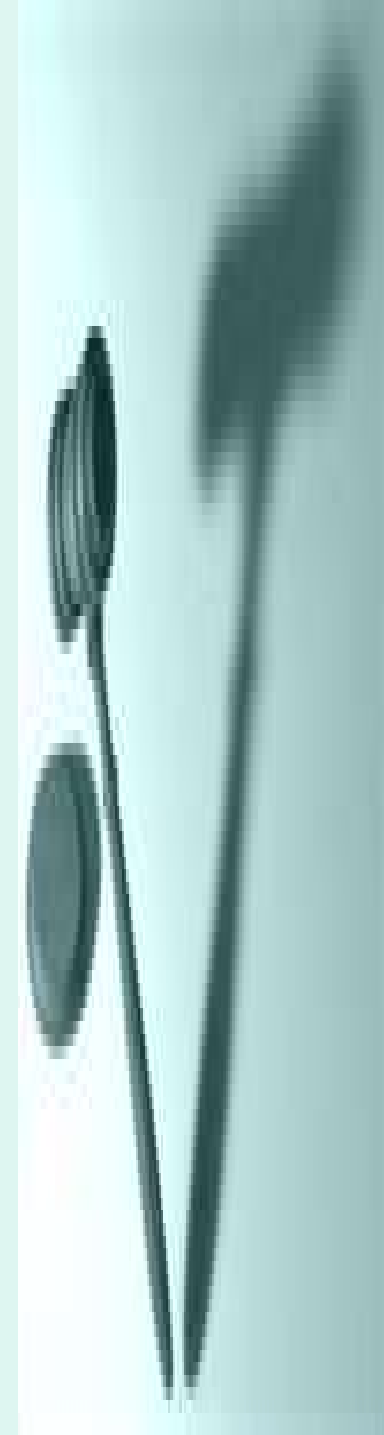
**Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525,
45 L.Ed 2d 562 (1975)**

“The Sixth and Fourteenth Amendments... guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.”



Faretta

“A defendant has a constitutionally protected right to represent himself in a criminal trial.”



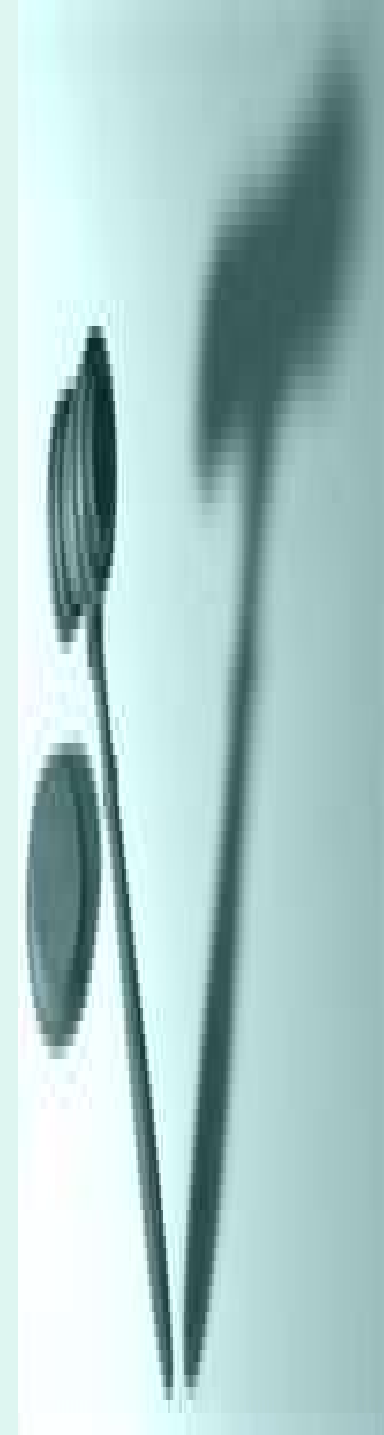


VERIFY ON THE RECORD WHETHER OR NOT
THE DEFENDANT IS A LICENSED ATTORNEY

Faretta

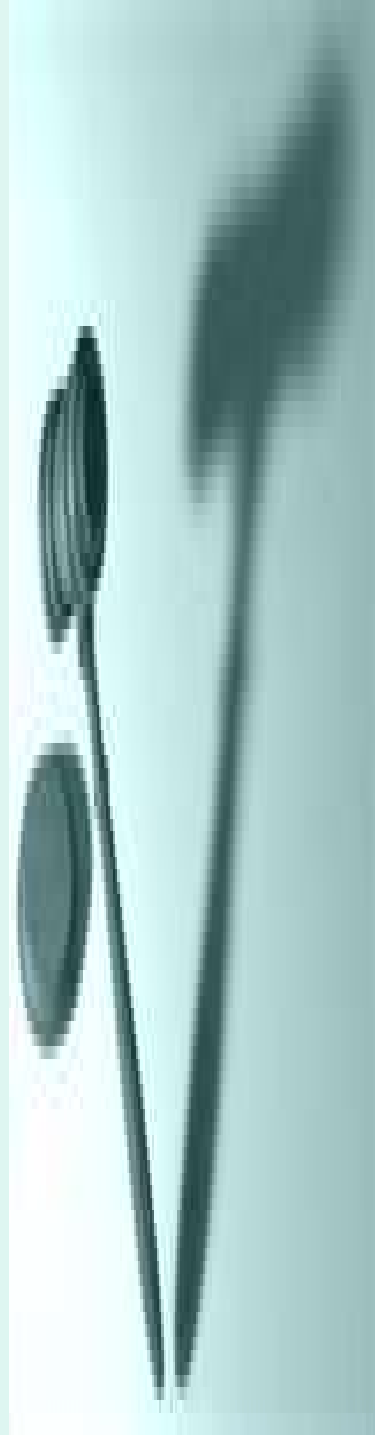
“...forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself...”

“...although he may conduct his own defense ultimately to his own detriment, his choice must be honored...”



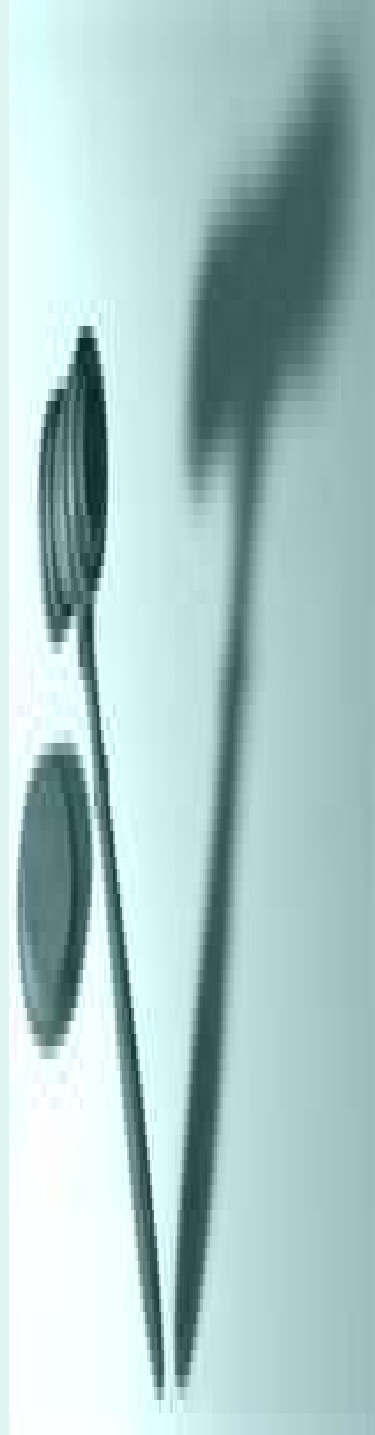
Faretta

“When an accused manages his own defense, he relinquishes...many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must ‘knowingly and intelligently’ forgo those relinquished benefits.”



Faretta

“...[A] defendant...should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”

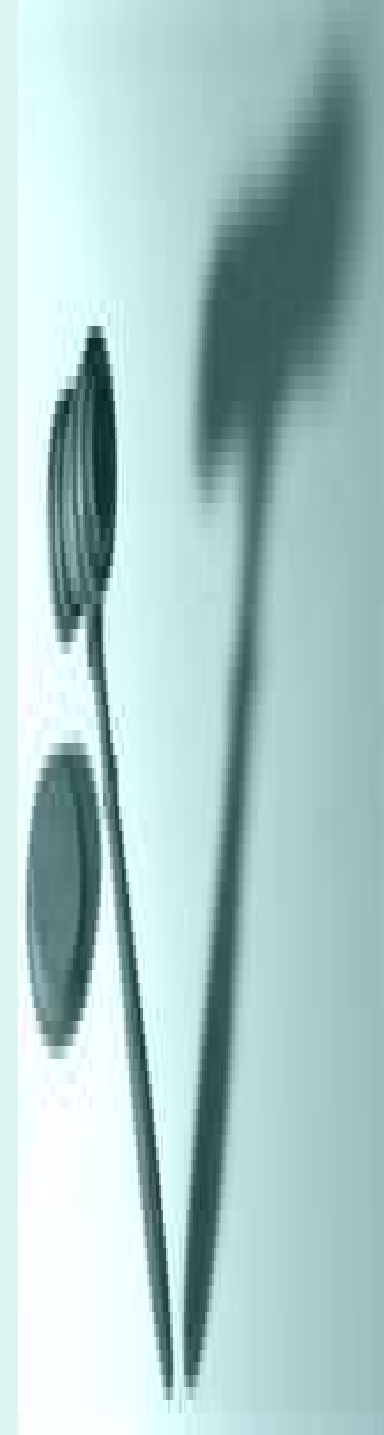




CAREFULLY AND NEUTRALLY ATTEMPT
TO DISSUADE THE DEFENDANT FROM
SELF-REPRESENTATION.

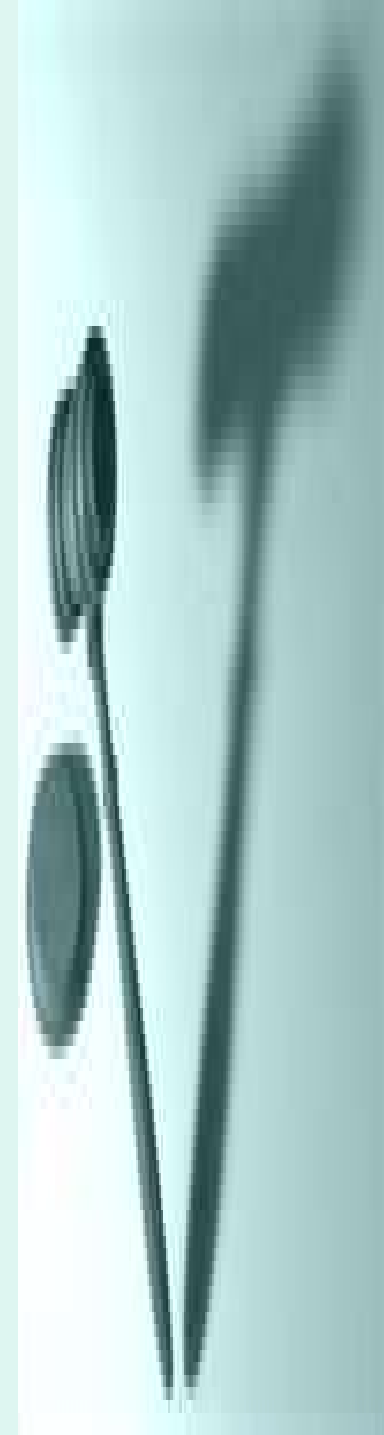
State v. Thomas, 331 N.C. 671 (1992)

- Cites Faretta
- “...a defendant ‘has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.’” [Citing State v. Mems, 281 N.C. 658, 670-671, 190 S.E.2d 164, 172 (1972)]



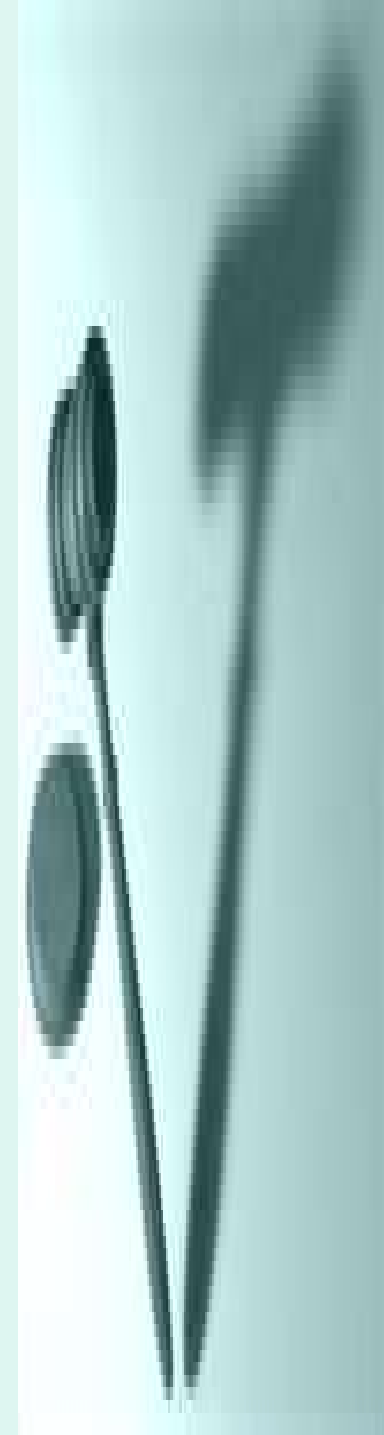
Thomas

“Before allowing a defendant to waive in-court representation by counsel, however, the trial court must insure that constitutional and statutory standards are satisfied.”



Thomas

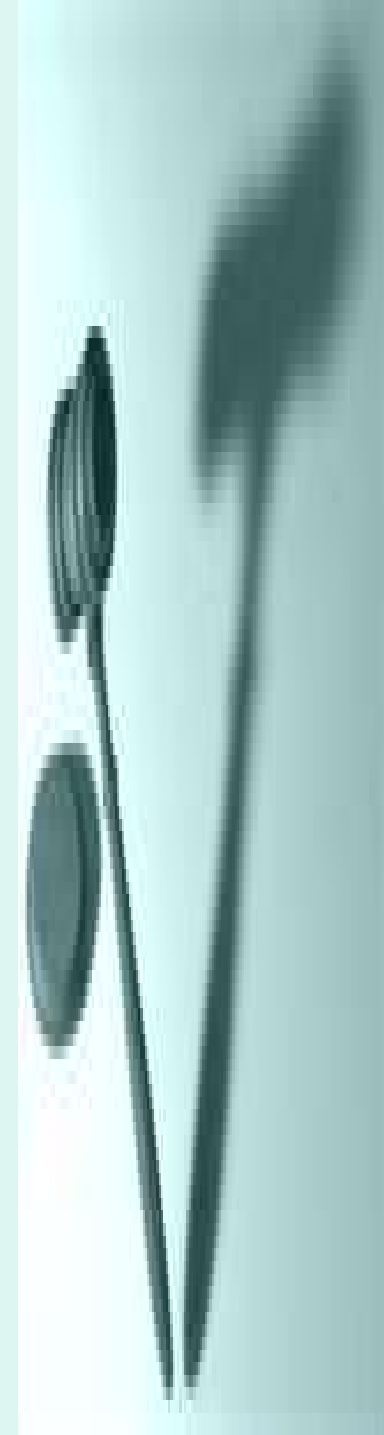
- Waiver of counsel and election to proceed *pro se* must be expressed “clearly and unequivocally”
- Trial court must determine via thorough inquiry whether defendant “knowingly, intelligently and voluntarily” waives counsel
- Inquiry required by N.C.G.S. Section 15A-1242 satisfies constitutional requirements



Thomas

N.C.G.S. Section 15A-1242 inquiry:

- Mandatory
- Failure to follow is prejudicial error
- Perfunctory questioning insufficient
- Must obtain written waiver of counsel



N.C.G.S. Section 15A-1242:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

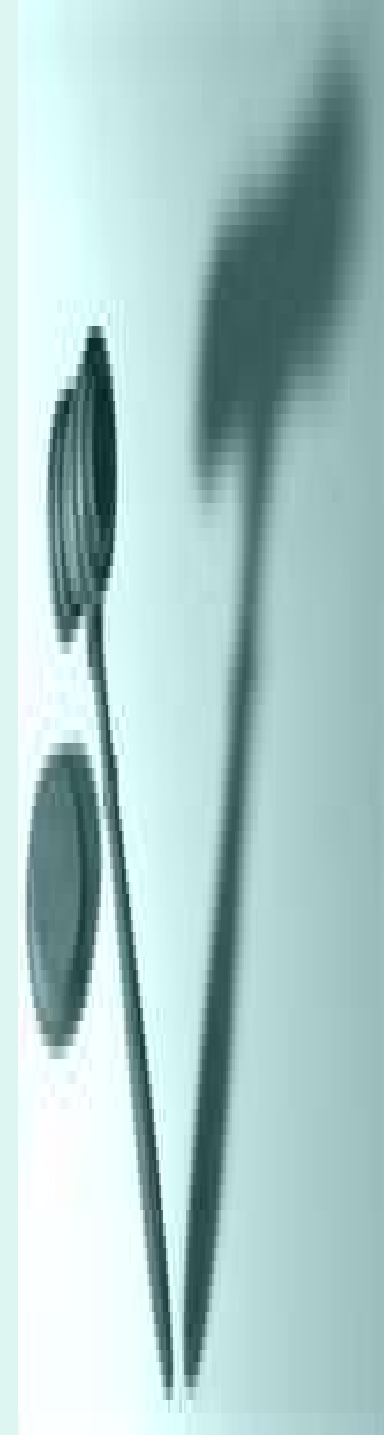


- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.



**State v. LeGrande, 346 N.C. 718, 487 S.E.2d
727 (1997)**

“A defendant’s right to represent himself is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; by Article I, Section 23 of the North Carolina Constitution; and by N.C.G.S. Section 15A-1242.”



N.C.G.S. Section 7A-457:

(a)...Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.



N.C.G.S. Section 7A-757:

(b) If an indigent person waives counsel...and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably, and voluntarily made without undue influence, compulsion or duress, and without promise of leniency.

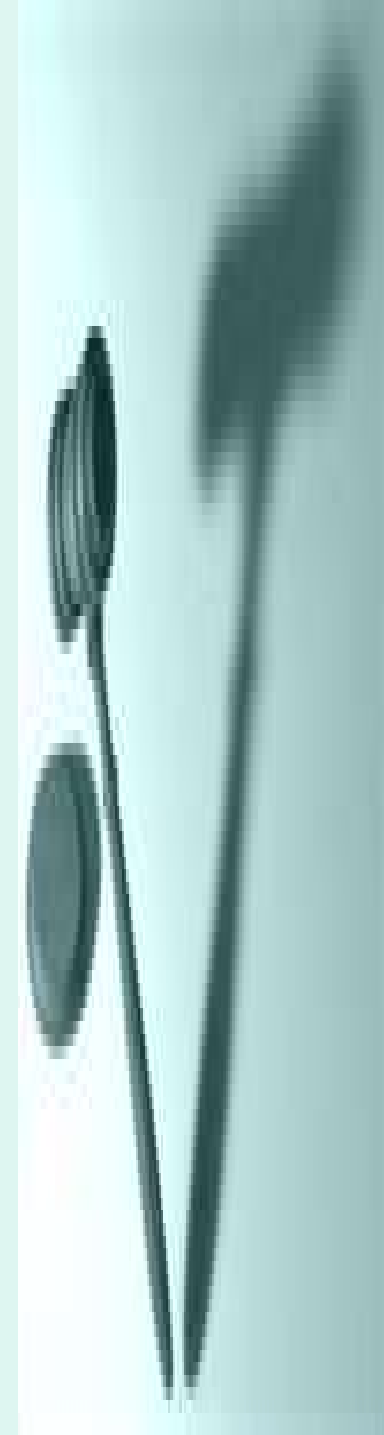




ASK THE QUESTIONS FOUND IN THE BENCH BOOK
DESIGNED TO SATISFY REQUIREMENTS OF N.C.G.S.
SECTIONS 15A-1242 AND 7A-457

State v. Poindexter, 69 N.C. App. 691 (1984)

- *Pro se* defendant can't expect judge to "relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant."
- *Pro se* defendant proceeds "at his peril and acquires... no greater privilege or latitude than would an attorney acting for him."





SO LONG AS IT DOES NOT PREJUDICE THE PROSECUTION, ALLOW *PRO SE* DEFENDANT REASONABLE ACCOMMODATION IN PRESENTING DEFENSE TO ENSURE RIGHT TO BE HEARD

Standards for Trial Judges Governing a *Pro Se* Party's Trial Presentation:

- Majority view--Self-represented litigants treated the same as attorneys
- Minority view--Trial court has a duty to ensure fairness to *pro se* litigant by allowing reasonable accommodation so long as there is no prejudice to the adverse party (Alaska, Connecticut, Minnesota and federal courts)



IF THE JUDGE MAY ASK QUESTIONS OF WITNESSES AT TRIAL:

- ANNOUNCE THIS PROSPECT PRIOR TO TRIAL
- ASK QUESTIONS IN MOST GENERAL FORM

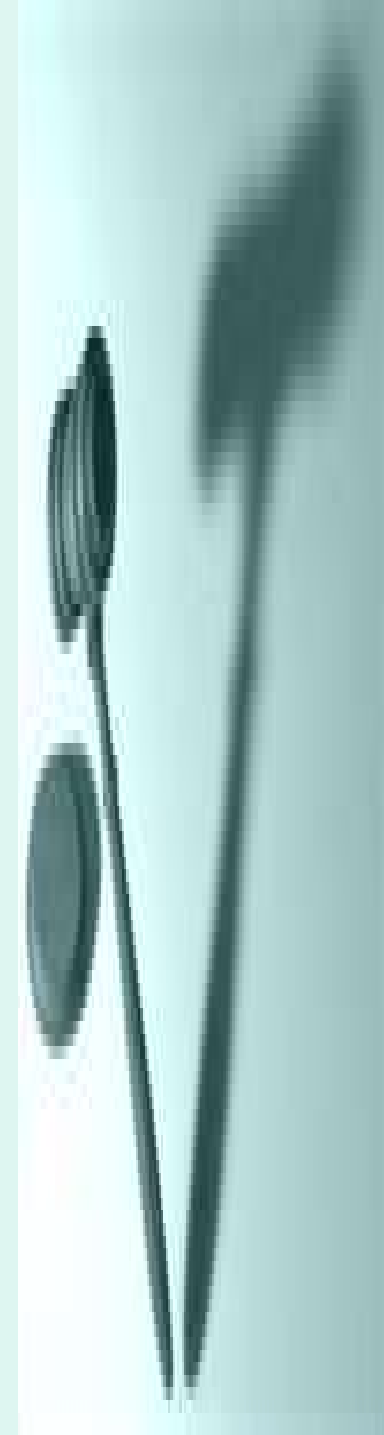


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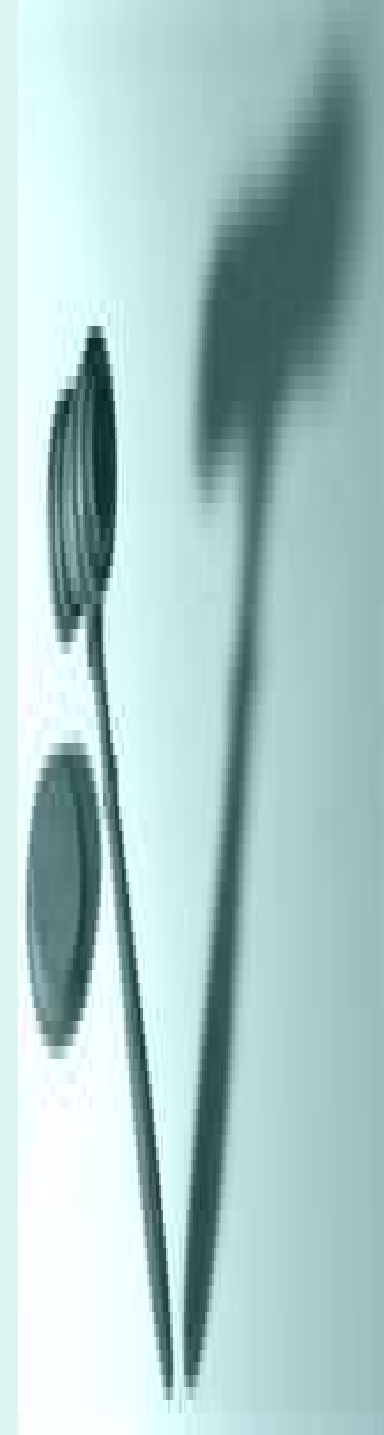
**State v. Wells, 78 N.C. App. 769, 338
S.E.2d 573 (1986)**

- Defendant charged with food stamp fraud
- Defendant signed waiver of counsel form
- Defendant pled “not guilty”
- Defendant represented herself



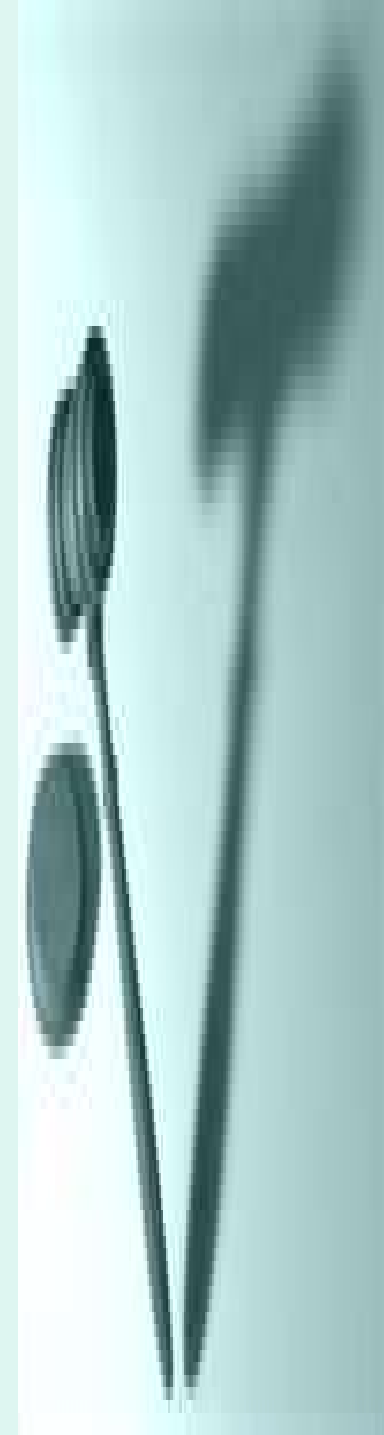
Wells

“While the certified written waiver asserts that defendant has been informed (1) of the charge against her, (2) the nature of and the statutory punishment for each such charge, and (3) the nature of the proceedings against her, the record discloses that the trial court failed to do any of these things.”



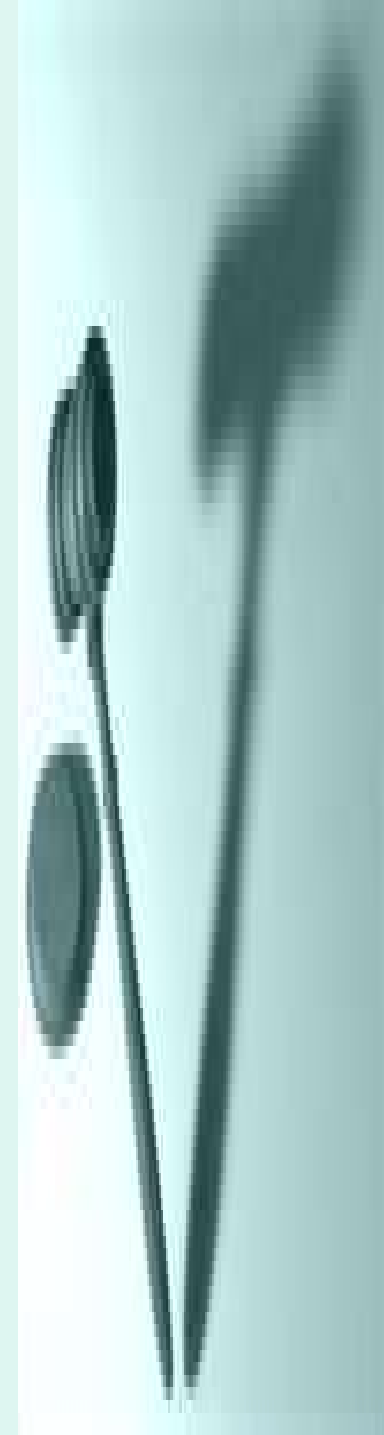
Wells

“A written waiver of counsel is no substitute for actual compliance by the trial court with G.S. 15A-1242.”



**State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d
90 (1999)**

“...our Supreme Court has considered a written waiver as something in addition to the requirements of N.C. Gen. Stat. Sec. 15A-1242, not as an alternative to it.”

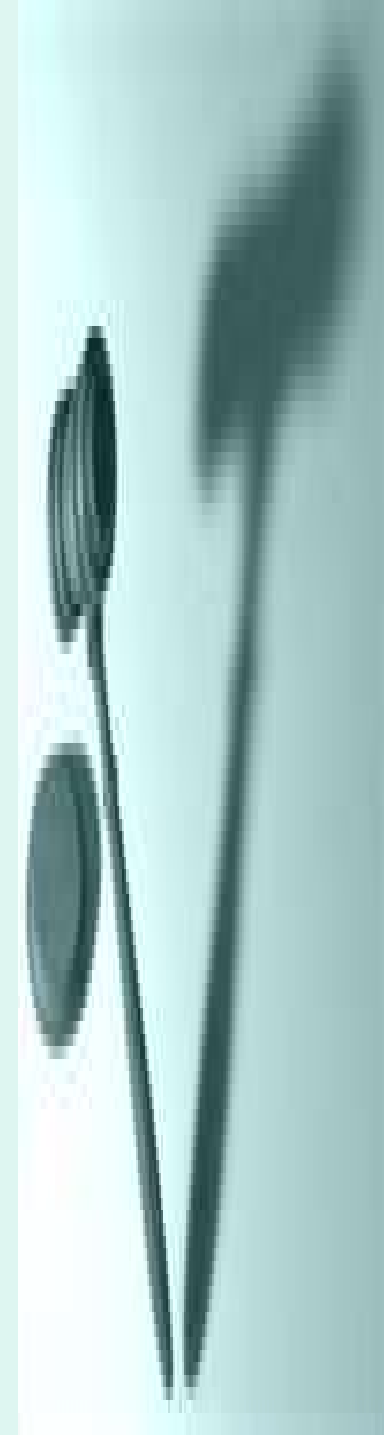




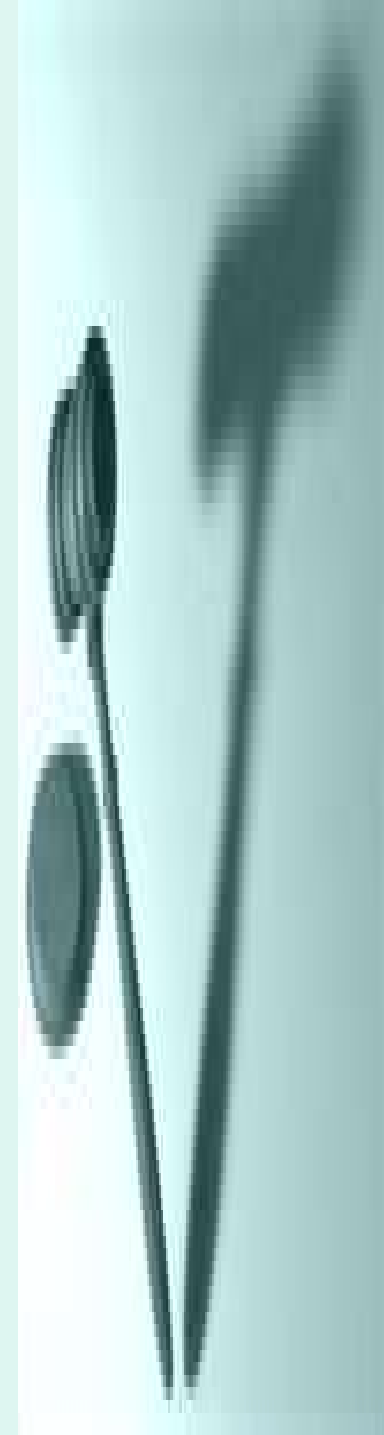
POSE THE WAIVER QUESTIONS TO DEFENDANT
PERSONALLY AND DIRECTLY, EXCLUSIVE OF THE
WAIVER OF COUNSEL FORM

Wells

“We reaffirm our approval of the type of questions and instructions given by the trial court to the defendant in State v. Luker, when a defendant expresses a desire to waive counsel and represent himself. We recommend to the trial bench adherence to that or similar conduct.”

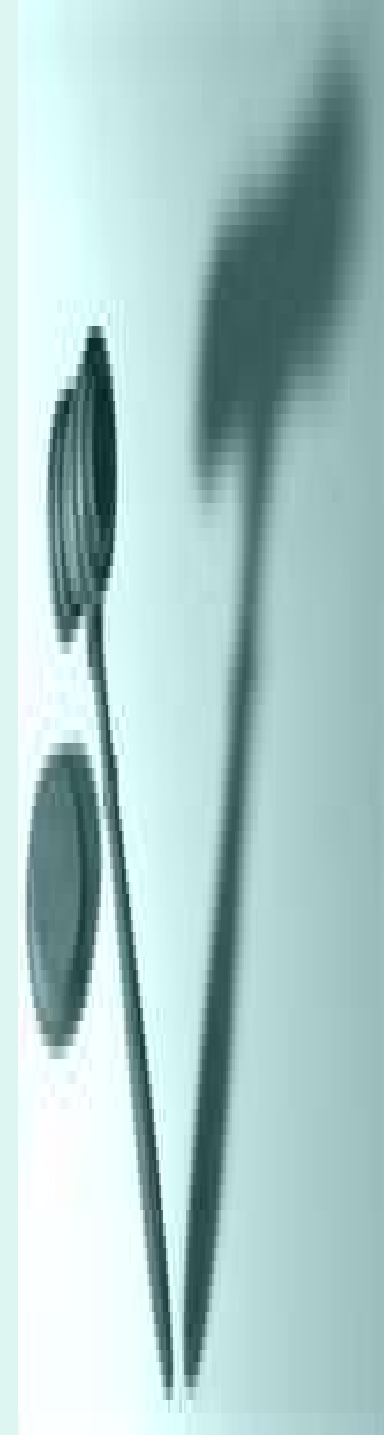


**State v. Luker, 65 N.C. App.644,
310 S.E.2d 63, rev'd on other grounds
311 N.C. 301, 316 S.E.2d 309 (1984)**



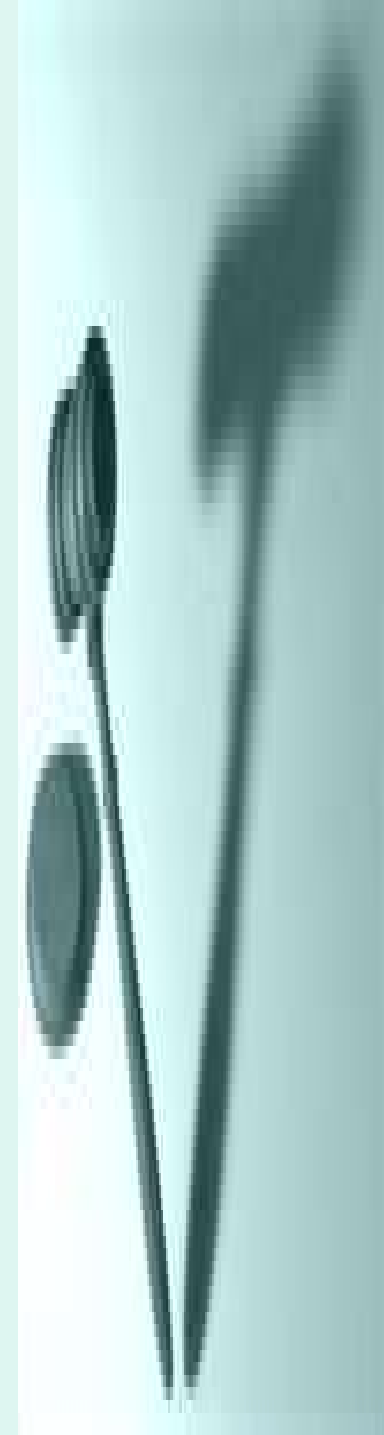
**State v. Proby, 168 N.C. App. 724, 608 S.E.2d
793 (2005)**

“Before a defendant in a probation revocation is allowed to represent himself, the court must comply with the requirements of N.C. Gen. Stat. Sec. 15A-1242.”



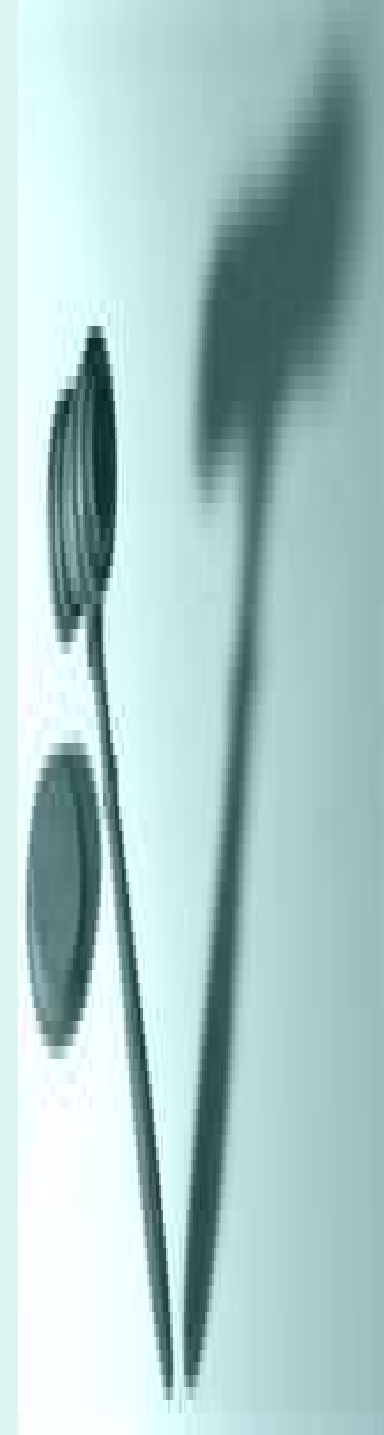
**State v. Hill, 168 N.C. App. 391, 607 S.E.2d
670 (2005), cert den 359 N.C. 324, 611
S.E.2d 839 (2005)**

“...a waiver of the right to counsel at a [probation] revocation hearing is subject to the same procedural safeguards as apply in criminal trials...where the defendant’s election [is] to proceed *pro se*...”



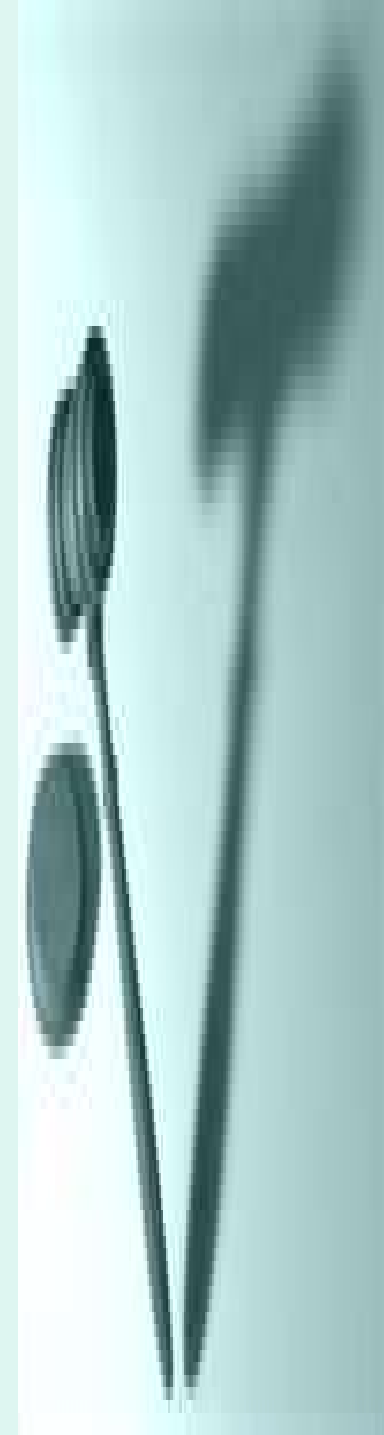
**State v. Callahan, 83 N.C. App 323,
350 S.E.2d 128 (1986), cert den 319 N.C. 225,
353 S.E.2d 409 (1987)**

- Defendant indicted on one count of felonious B&E and one count of felonious larceny
- Defendant stated intention to hire an attorney and signed waiver of right to court-appointed counsel
- At trial, defendant had no counsel
- Judge asked defendant if he was ready to proceed; defendant said he was



Callahan

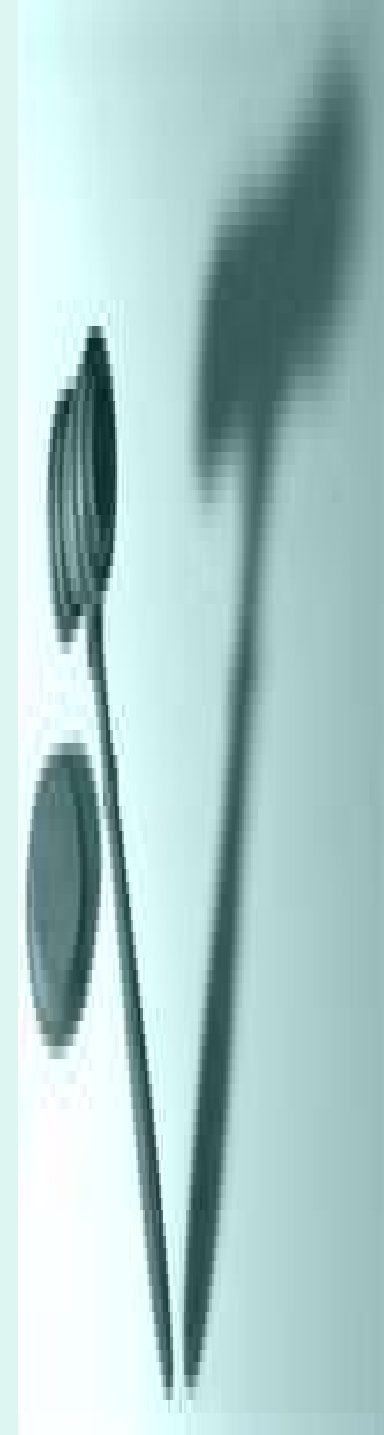
- Record does not show that judge made further inquiry of defendant
- Defendant presented no evidence
- Defendant found guilty of felonious larceny
- Defendant appealed, claiming trial court required him to proceed *pro se* without clearly finding that defendant intended such



Callahan

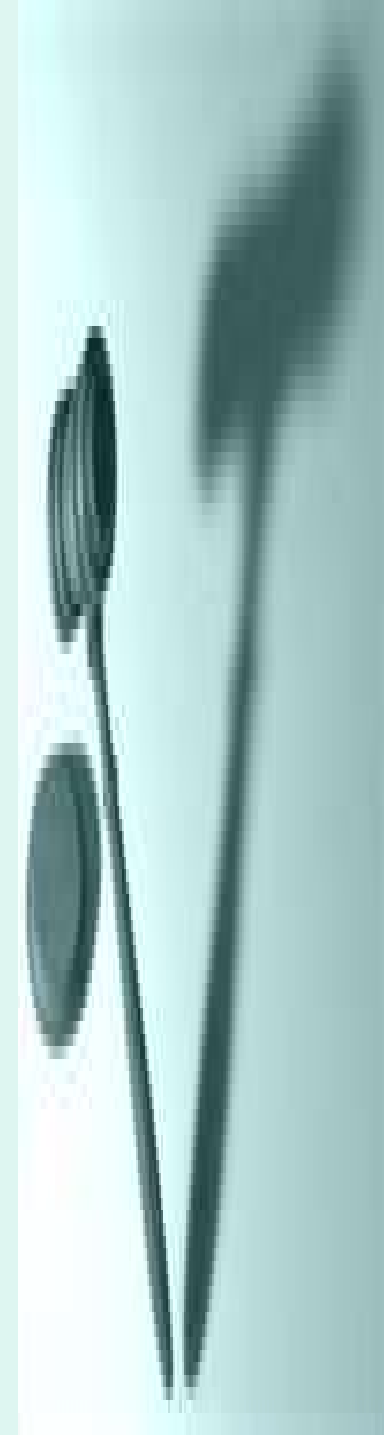
“The record must affirmatively show that the inquiry was made...”

“...the State notes in its brief that the trial court did in fact address defendant pursuant to G.S. 15A-1242 but that the proceedings were not recorded by the court reporter. Consequently, the record is silent...”



Callahan

“Absent a transcription of those proceedings, this Court cannot presume that defendant knowingly and intelligently waived his right to counsel. Accordingly, defendant is entitled to a new trial.”

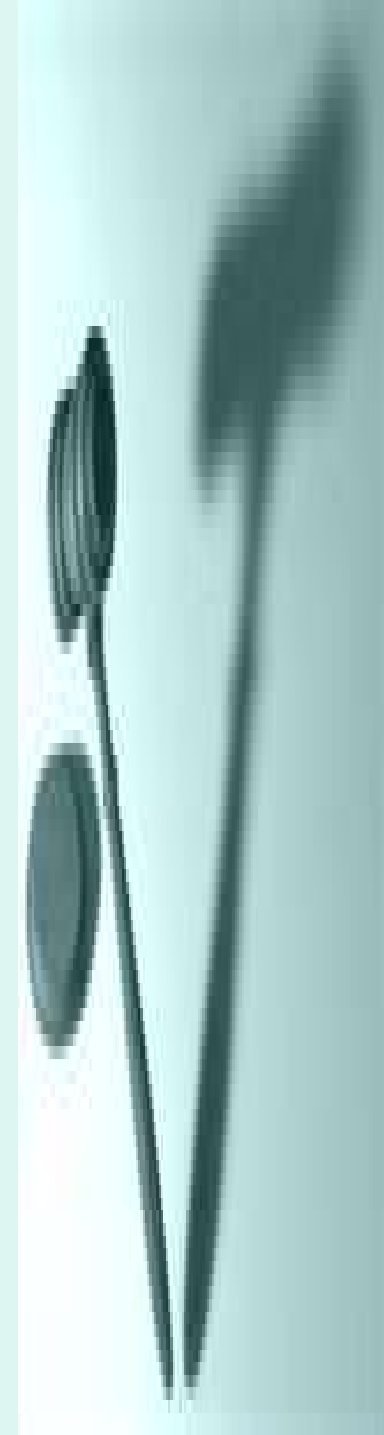




BE SURE ENTIRE COLLOQUY WITH DEFENDANT
REGARDING WAIVER OF COUNSEL IS RECORDED

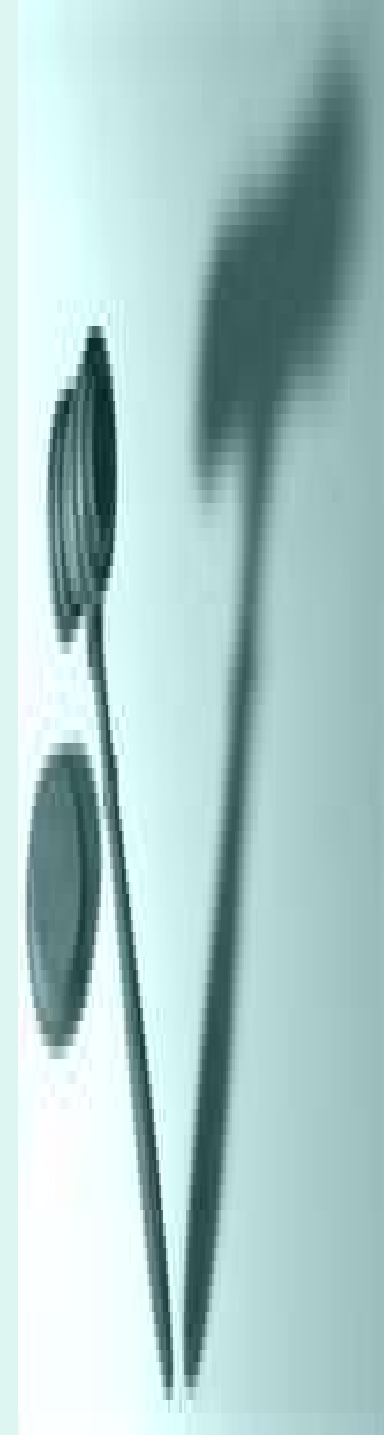
**State v. Hutchins, 303 N.C. 321, 279 S.E.2d
788 (1981)**

“Faretta did not carry with its recognition of the right of self-representation a concurrent recognition of the right to be warned of its existence,” citing State v. Branch, 288 N.C. 514, 220 S.E.2d 495, cert den 433 U.S. 907 (1977)



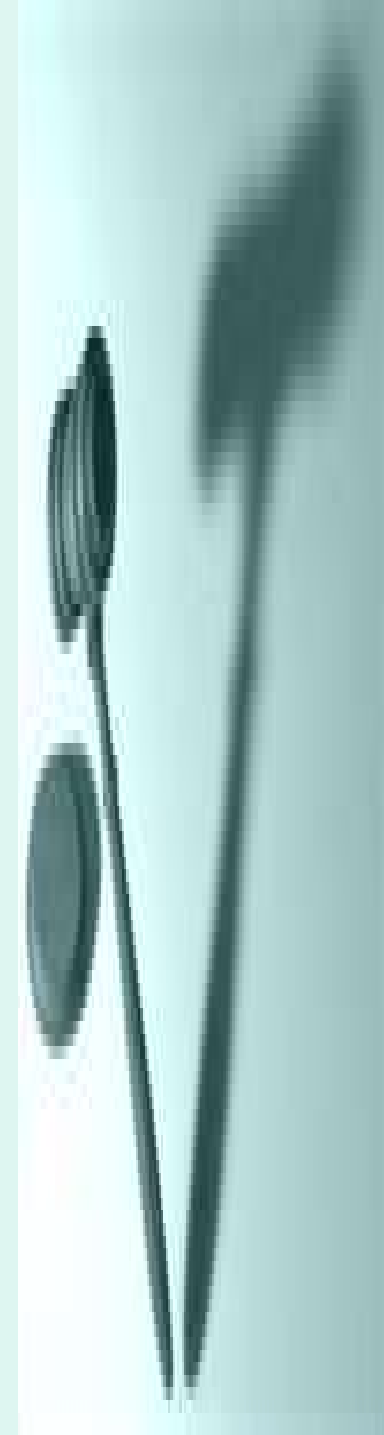
Hutchins

The Sixth Amendment does not impose a constitutional obligation upon a court to inform a criminal defendant of his right to proceed *pro se*.



Critical facts common to Hutchins and Branch:

- Both defendants expressed dissatisfaction with appointed lawyers
- Neither defendant suggested desire to represent self
- Court denied each defendant's motion to discharge appointed lawyer
- After denial of motion, neither defendant forced to accept lawyer

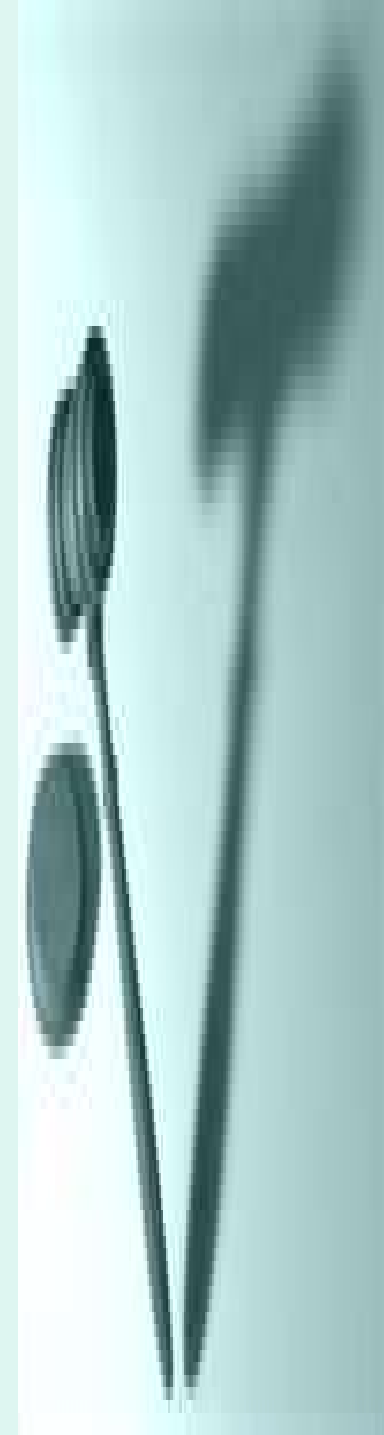




**DON'T FORCE A DEFENDANT TO ACCEPT
THE ASSISTANCE OF COUNSEL**

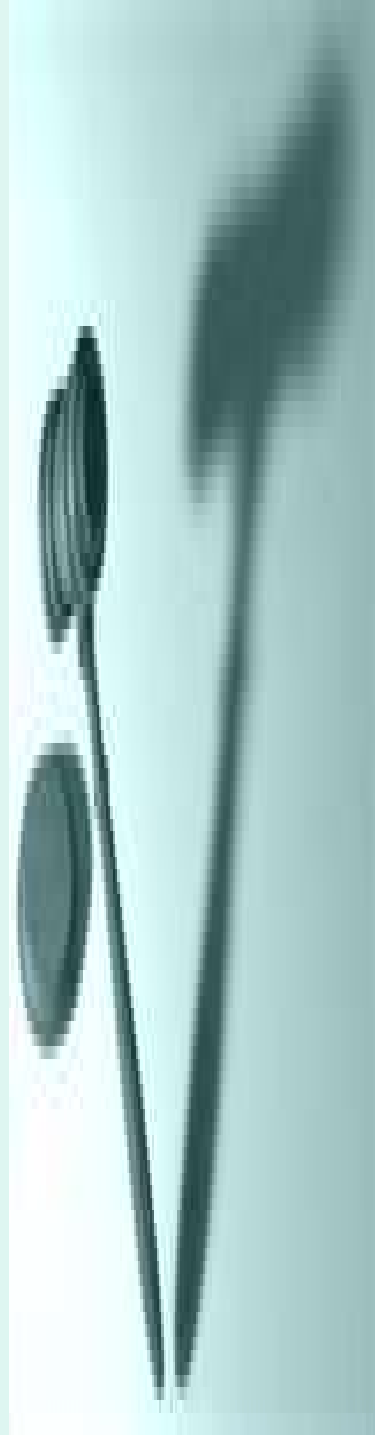
**State v. Gerald, 304 N.C. 511, 284 S.E.2d
312 (1981)**

- Cites State v. Cole, 293 N.C. 328, 237 S.E.2d 814 (1977)
- Cites State v. Swezey, 291 N.C. 366, 230 S.E.2d 524 (1976)



Gerald

“These holdings [of Cole and Sweezy] clearly indicate that although the better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense, it is not reversible error for the court not to do so when there has been no intimation that defendant desired to represent himself.”

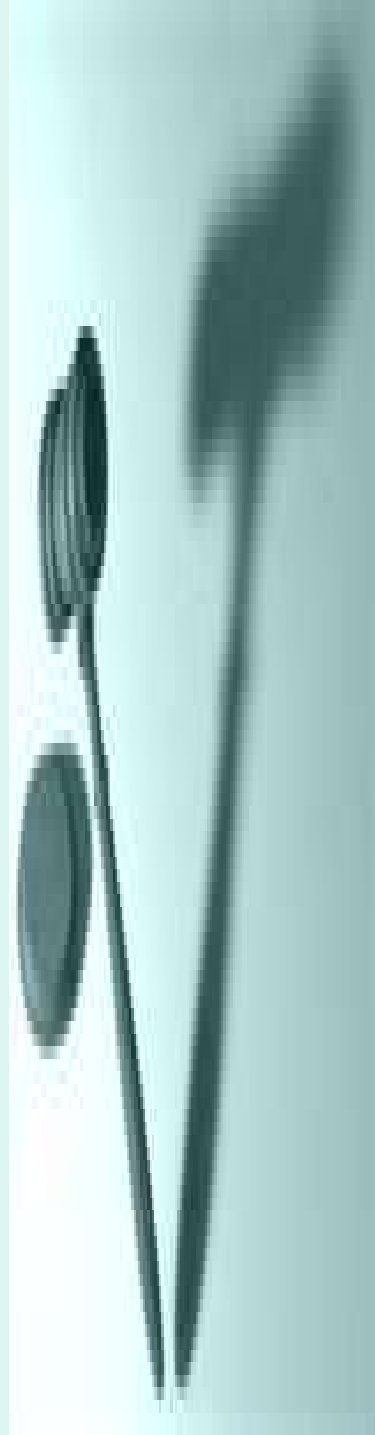




IF DEFENDANT EXPRESSES DISSATISFACTION
WITH COUNSEL, ASK DEFENDANT ABOUT DESIRE
OF SELF-REPRESENTATION

**State v. Montgomery, 138 N.C. App. 521,
530 S.E.2d 66 (2000)**

“A defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel where, through no fault of his own, he is without counsel.”

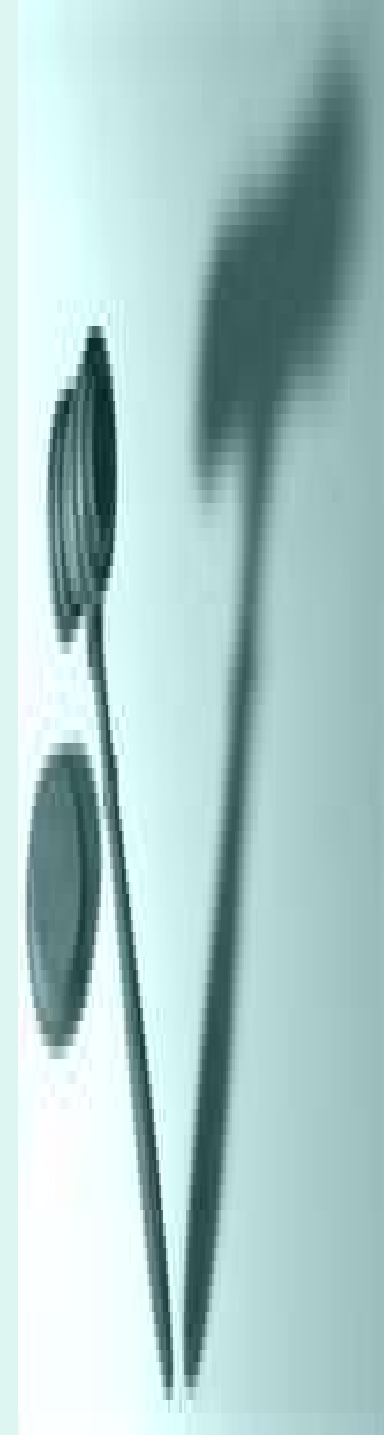




GRANT DEFENDANT A CONTINUANCE TO
OBTAIN COUNSEL, WHEN FEASIBLE AND
APPROPRIATE

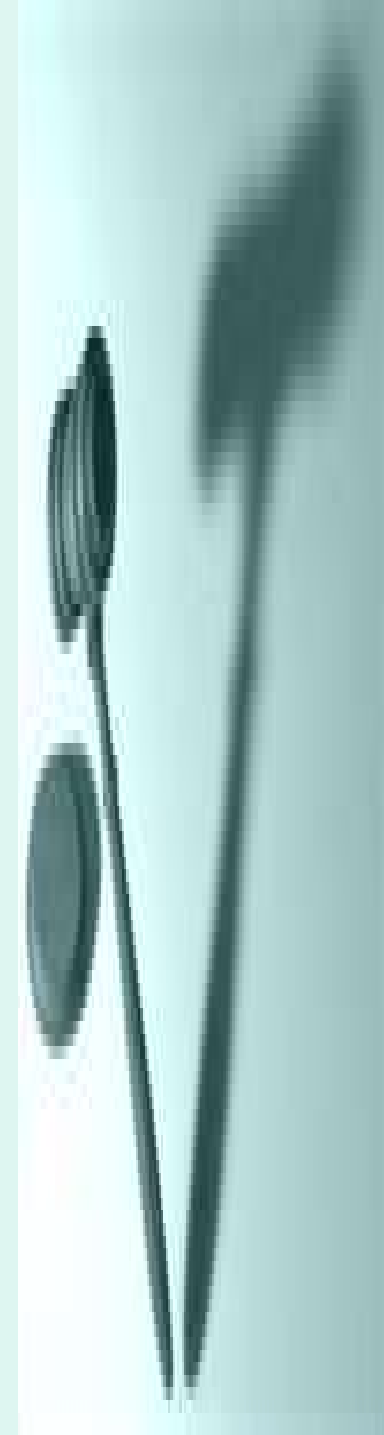
**State v. Dunlap, 318 N.C. 384, 348 S.E.2d
801 (1986)**

- Defendant indicted on charges of first-degree rape and first-degree kidnapping
- Standby counsel gave advice at trial
- Standby counsel made defendant's closing argument
- Defendant found guilty as charged



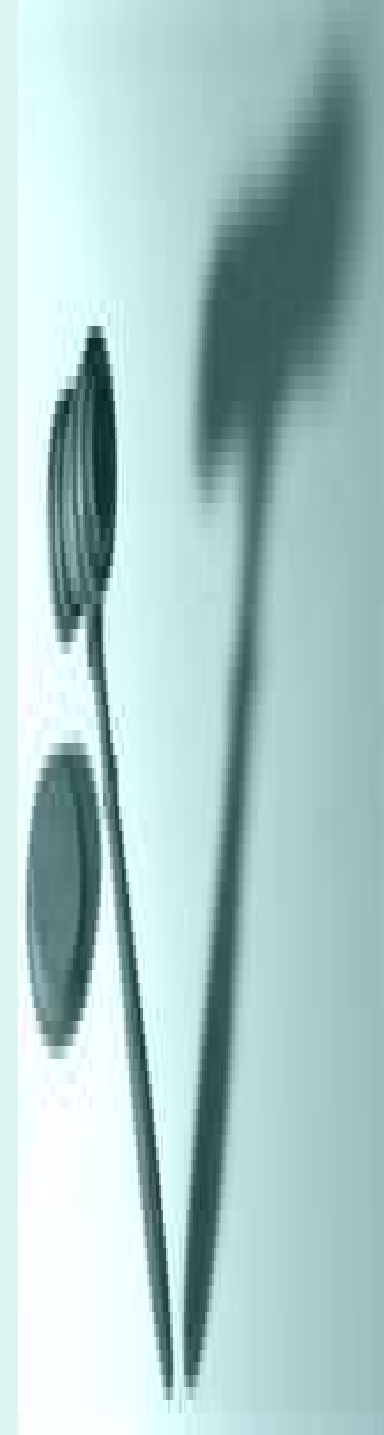
Dunlap

On appeal, defendant contends that the trial judge committed reversible error by not complying with N.C.G.S. Section 15A-1242 before allowing defendant to proceed *pro se*



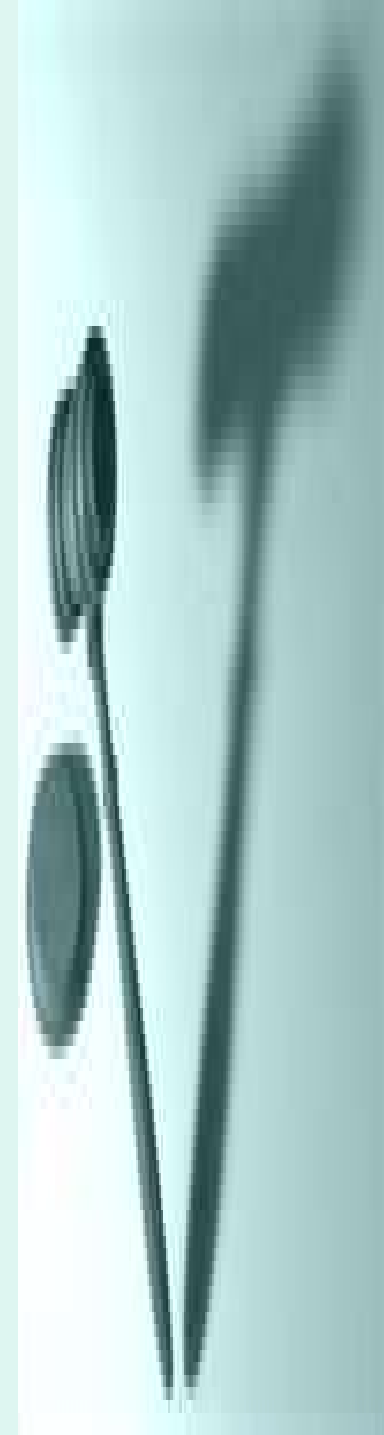
Dunlap

“[T]he trial judge did not make the required inquiry under N.C.G.S. Section 15A-1242.”



Dunlap

“...neither the statutory responsibilities of standby counsel...nor the actual participation of standby counsel...is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.”





**DON'T APPOINT STANDBY COUNSEL IN LIEU
OF N.C.G.S. SECTION 15A-1242 REQUIREMENTS**