

Self-Represented Criminal Defendants

Allen Baddour

Resident Superior Court Judge, District 15B

The Right to Counsel (...and, to represent oneself)

6th Amendment Right to counsel.

A defendant also has the right to self-representation

... IF

- Knowing, voluntary, intelligent waiver

AND

- Possesses capacity to proceed representing himself

NCGS§ 15A-1242. Defendant's election to represent himself at trial

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.

NCGS § 7A-457. Waiver of counsel; pleas of guilty

An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel

This series of questions complies with the requirements and may be found in the NC Superior Court Judges Benchbook:

- Are you able to hear and understand me?
 - Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
 - How old are you?
 - Have you completed high school? College? If not, what is the last grade you completed?
 - Do you know how to read? Write?
 - Do you suffer from any mental or physical disability?
 - Do you understand that you have a right to be represented by a lawyer?
 - Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
 - Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
 - Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
 - Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
 - Do you understand that you are charged with _____, and that if you are convicted of this [these] charge[s], you could be imprisoned for a maximum of _____ and that the minimum sentence is _____? [Add fine or restitution if necessary.]
 - With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
 - Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?
-

Capacity to represent oneself:

In Indiana v. Edwards, 554 U.S. 164 (2008), the U.S. Supreme Court held that a state may limit a defendant's right to self-representation by insisting on representation by counsel at trial when the defendant is competent to stand trial but lacks the mental capacity to conduct the defense unless represented.

Standby Counsel

For self-represented defendant, consider standby counsel (Discretionary. May be done over objection of defendant or with defendant's consent. Be clear that "hybrid" representation is not permitted. Anticipate requests to move from standby to appointed.)

Standby counsel:

- May alert judge to issues the judge may consider ex mero motu
- May advise/consult with defendant (anticipate how this will work in practice; discuss with defendant and attorney)
- May not question witnesses, make objections, pick the jury, etc

Non-compliance or non-responsive:

Some defendants may refuse to answer questions, sign waiver, etc.

NCGS 7A-457 requires indigent defendant to sign waiver of counsel in writing.

Defendant who refuses to answer questions (do you understand that if you cannot afford a lawyer, the court can appoint one for you?).

- Explain purpose of question (cannot go forward in case until a determination is made about counsel)
- Offer time to consider issues and return to the case later in the day or continue case
- For this situation, offer an affidavit of indigency
- Conduct on the record. Document.

Defendant who is or may be indigent but **refuses to sign waiver**

- Cases indicate that waiver is not invalid simply because it is not in writing (presumed valid if in writing)
- Directory, not mandatory
- See *State v Fulp*, 355 N.C. 171

"Furthermore, although in *Thomas* the Court stated that there must be a written waiver of the right to counsel for an indigent defendant, [331 N.C. at 675, 417 S.E.2d at 476](#), in *Heatwole* we concluded that a waiver was not invalid simply because there was "no written record of the waiver," [344 N.C. at 18, 473 S.E.2d at](#)

318. "While [N.C.G.S. § 7A-457\(a\)](#) provides for a written waiver of counsel from an indigent defendant, this section has been construed as directory, not mandatory, so long as the provisions of the statute have otherwise been followed." *Id.* (citations omitted). "Directory" has been defined in *Black's Law Dictionary* as "[a] provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed." *Black's Law Dictionary* 460 (6th ed. 1990).

Forfeiture of right to counsel

Defendant may **forfeit right to counsel** for a variety of reasons. This is a determination for the court to make, with due caution.

In *State v. Quick*, this Court held a defendant forfeited his right to counsel because he signed a waiver of appointed counsel form and did not retain private counsel during the eight months leading up to his probation revocation hearing. [Quick, 179 N.C. App. 647, 650, 634 S.E.2d 915, 918](#) (2006).

In *State v. Montgomery*, this Court held a defendant forfeited his right to counsel, "when he had fifteen months to obtain counsel, twice released his appointed counsel and retained private counsel, caused the trial to be delayed because he was disruptive in the courtroom on two occasions, and refused to cooperate with his private counsel and assaulted him." [Montgomery, 138 N.C. App. 521, 525, 530 S.E.2d 66, 69](#)).

Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel. [Id at 524, 69](#).