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SELECTED COUNSEL ISSUES IN NORTH CAROLINA CRIMINAL CASES

■ Jessica Smith

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I. Introduction

This bulletin discusses a criminal defendant's right to proceed *pro se* and various legal issues regarding waiver and forfeiture of counsel in North Carolina criminal cases. It also covers legal issues related to standby counsel and substitution of counsel, and provides practical pointers for trial judges when all of these issues arise.

UNC SCHOOL OF GOVERNMENT

The University *of* North Carolina *at* Chapel Hill
Institute of Government
Master of Public Administration Program

II. The Right to Proceed *Pro Se*

A criminal defendant who has the right to counsel also has the right to refuse counsel and proceed *pro se*.[1] To be clear, a defendant has only two choices: to appear *pro se* or to be represented by counsel.[2] A defendant does not have a right to "hybrid" representation, whereby he or she serves as "co-counsel" or "lead counsel."[3] Thus, once a defendant elects to be represented by counsel, he or she may not file motions or attempt to argue motions in court.[4] If a defendant decides to proceed *pro se*, the defendant cannot later assert that the quality of his or her own representation constituted ineffective assistance of counsel.[5] Although a criminal defendant has a right to proceed *pro se*, the trial court has no constitutional duty to inform the defendant of that right.[6] Notwithstanding this rule, some judges believe that when issues regarding counsel arise, the better practice is to inform defendants of the right to proceed *pro se*.[7]

The right to self-representation is not absolute. As the United States Supreme Court has stated: "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[8] Put another way, "[t]he right of self-representation is not a license to abuse the dignity of the courtroom."[9] A twist on this issue arises when defendants argue on appeal that because of their courtroom conduct, the trial court erred by allowing them to proceed *pro se*. This argument has not been successful. For example, in *State v. Cunningham*,[10] the defendant contended on appeal that he lost his right to represent himself after his own outburst caused him to be removed from the courtroom several times. The North Carolina Supreme Court disagreed, holding that "[i]f the defendant because of his conduct lost his right of self-representation, he was not prejudiced when the court did not enforce the rule against him. He was allowed to continue representing himself, as he wanted."[11] A similar issue was raised in *State v. LeGrande*,[12] where the defendant argued that the trial judge erred by failing to revoke his right to represent himself. In that case, the conduct at issue involved the defendant calling the jurors the "antichrists" and declaring that they could "kiss his natural black ass in the window of Heilig-Meyers," that they could "pull the switch and let the good times roll," and that he would meet them in hell where they would be required to worship him. Citing *Cunningham*, the court rejected this claim.[13]

Practical Pointers for the Trial Judge:

- *A defendant may proceed pro se or be represented by counsel; a defendant has no right to hybrid representation.*
- *Although a trial judge is not required to inform a defendant of his or her right to proceed pro se, some judges think that the best practice is to inform the defendant of this right when counsel issues arise.*
- *The right to proceed pro se is not absolute; before taking action against a defendant*

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[1]. Faretta v. California, 422 U.S. 806 (1975); *see also* State v. Thacker, 301 N.C. 348, 353-54 (1980); State v. Gerald, 304 N.C. 511 (1981). For a discussion of a defendant's constitutional right to counsel, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (School of Government, UNC-Chapel Hill 2003). For an indigent defendant's statutory right to appointed counsel, see G.S. 7A-451(a). Finally, an additional reference is Chapter 12 of the N.C. DEFENDER MANUAL, available on-line at: http://www.ncids.org.

[2]. State v. Thomas, 331 N.C. 671, 677 (1992).

[3]. *Thomas*, 331 N.C. at 675-77 (defendant sought to proceed as lead counsel of a defense team which was to include licensed appointed lawyers); *see also* State v. Poindexter, 69 N.C. App. 691, 698 (1984) ("While defendant had a right to counsel and a right to appear *pro se*, he had no right to appeal *pro se* and by counsel, simultaneously"). The prohibition on hybrid representation bars a court from allowing a defendant to proceed *pro se* while simultaneously appointing counsel to represent the defendant for a limited purpose, such as determining the defendant's competency to waive counsel. State v. Thomas, 346 N.C. 135 (1997).

[4]. State v. Hewson, __ N.C. App. __, 642 S.E.2d 459, 468-69 (2007) (trial judge did not err in refusing to hear the defendant's *pro se* motion for change of venue when the defendant was represented by counsel).

[5]. *Farretta,* 422 U.S. at 834 n. 46; *Thomas*, 331 N.C. at 677.

[6]. State v. Hutchins, 303 N.C. 321, 337 (1981).

[7]. *See infra* n.21

[8]. *Farretta,* 422 U.S. at 834 n.46.

[9]. *Id.*; *see also* State v. McGuire, 297 N.C. 69, 83 (1979).

[10]. 344 N.C. 341 (1996).

[11]. *Id.* at 352.

[12]. 346 N.C. 718 (1997).

[13]. *Id.* at 725.

who abuses that right, the trial judge should make sure that the record reflects the serious misconduct that has occurred.

III. The Election to Proceed *Pro Se*

An election to proceed *pro se* must be expressed "clearly and unequivocally."[14] The North Carolina Supreme Court has stated that this requirement helps courts to "avoid confusion and prevent gamesmanship by savvy defendants sowing the seeds for claims of ineffective assistance of counsel."[15] An election has not been clearly and unequivocally made when the defendant (1) merely requests substitute counsel;[16] (2) requests to participate as "lead counsel" or to proceed *pro se* "with assistance of counsel";[17] (3) reports a problem or dissatisfaction with counsel;[18] or (4) asks to proceed *pro se* but other statements make that request ambiguous.[19] Likewise, in a case in which a capital defendant was represented by private counsel and an appointed lawyer, the defendant's statement that he wished to dismiss private counsel did not constitute a request to proceed *pro se*.[20] Although the better practice in most of these circumstances would be to inquire of the defendant whether he or she wishes to proceed *pro se*, failure to do so is not reversible error.[21] If a defendant clearly and unequivocally expresses a desire to proceed *pro se*, a trial judge's failure to respond will result in reversible error.[22]

Practical Pointers for the Trial Judge:

- *If a defendant makes a clear and unequivocal request to proceed pro se, the trial judge should conduct the required waiver of counsel inquiry (see section IV, below).*
- *Even if the defendant's statements about his or her desire to proceed pro se are ambiguous, it is best to clarify the defendant's concerns and intentions on the record.*

IV. Taking a Waiver

Once a defendant clearly and unequivocally states that he or she wishes to proceed *pro se*, the trial court must ensure that the defendant's waiver of the right to counsel is knowing, intelligent and voluntary.[23] In order to do this, the trial court must conduct a "thorough inquiry."[24] The inquiry required by G.S.

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14. State v. Flowers, 347 N.C. 1, 17 (1997); State v. Carter, 338 N.C. 569, 581 (1994); State v. Williams, 334 N.C. 440, 454 (1993) (defendant did not clearly and unequivocally assert his right to proceed *pro se*), *vacated on other grounds,* North Carolina v. Bryant, 511 U.S. 1001 (1994); *Thomas*, 331 N.C. at 673.

15. *Thomas*, 331 N.C. at 674; *see also Williams,* 334 N.C. at 454 (rule that the right to proceed *pro* se must be clearly and unequivocally raised "is required to prevent defendants from manipulating trial courts by recording an equivocal request at trial and then arguing on appeal, as appropriate, either that they have been denied the right to represent themselves or that they did not make a knowing waiver and have therefore been denied the right to counsel"; "[w]e refuse to place trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules") (quotation omitted).

16. *Williams*, 334 N.C. at 455 (noting that the court has repeatedly so held and citing cases on point).

17. *Thomas*, 331 N.C. at 678 (defendant's repeated requests to appear as "leading attorney" at the head of "assistant" counsel did not amount to a clear and unequivocal expression of a desire to proceed *pro se*).

18. State v. Gerald, 304 N.C. 511, 519 (1981) (rejecting the contention that a G.S. 15A-1242 inquiry is required whenever a defendant indicates a problem with counsel).

19. *Williams*, 334 N.C. at 456 (so holding); State v. McGuire, 297 N.C. 69, 82-83 (1979) (same).

20. State v. Johnson, 341 N.C. 104, 111-12 (1995) (noting that the defendant did not express any dissatisfaction with his court-appointed lawyer and did not ask that the court-appointed lawyer be removed).

21. *Gerald*, 304 N.C. at 518 ("better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense"); *McGuire,* 297 N.C. at 84 ("better practice . . . would have been for the court to have questioned defendant . . . at the time he made the vague statements concerning his desire to defend himself").

22. State v. Walters, __ N.C. App. __, 641 S.E.2d 758 (2007).

23. *Farretta,* 422 U.S. at 835; Thacker, 301 N.C. at 354; *see also Thomas,* 331 N.C. at 674; State v. Love, 131 N.C. App. 350, 354 (1998), *aff'd*, 350 N.C. 586 (1999); State v. Hardy, 78 N.C. App. 175, 179 (1985).

24. G.S. 15A-1242; *Thomas,* 331 N.C. at 674; *Carter,* 338 N.C. at 581.

15A-1242 satisfies these constitutional requirements.[25] That statute provides:

> 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.

The inquiry under G.S. 15A-1242 is mandatory and failure to follow the statute is prejudicial error.[26] The inquiry must be of the defendant, not of defense counsel,[27] and "perfunctory questioning" is insufficient.[28] However, neither the statute nor the case law sets out specific guidelines regarding how the statutorily mandated inquiry must be conducted.[29] On appeal, the critical inquiry is "whether the statutorily required information has been communicated in such a manner that the defendant's decision to represent himself is knowing and voluntary."[30] The Superior Court Bench Book suggests that the following questions satisfy the requirements of G.S. 15A-1242 and G.S. 7A-457 (discussed below):

1. Are you able to hear and understand me?
2. Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
3. How old are you?
4. Have you completed high school? college? If not, what is the last grade you completed?
5. Do you know how to read? write?
6. Do you suffer from any mental handicap? physical handicap?
7. Do you understand that you have a right to be represented by a lawyer?
8. 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?
9. 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?
10. 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?

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25. *Carter*, 338 N.C. at 581; *Thomas,* 331 N.C. at 674; *Thacker,* 301 N.C. at 355 ("we hold that compliance with the dictates of G.S. 15A-1242 fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary"); State v. Flowers, 347 N.C. 1, 17 (1997) (waiver after compliance with G.S. 15A-1242 was valid); *see also* State v. Phillips, 149 N.C. App. 310, 318 (2002) (waiver was valid where trial judge complied with G.S. 15A-1242); State v. King, 158 N.C. App. 60, 64 (2003) (same).

26. *Thomas,* 331 N.C. at 674; State v. Pruitt, 322 N.C. 600, 604 (1988) (new trial for failure to take proper waiver); State v. Dunlap, 318 N.C. 384, 389 (1986) (new trial because judge did not comply with G.S. 15A-1242); State v. Bullock, 316 N.C. 180, 185-86 (1986) (new trial required when trial judge failed to comply with G.S. 15A-1242); State v. McCrowre, 312 N.C. 478, 481 (1984) (defendant entitled to a new trial where the trial judge did not conduct the G.S. 15A-1242 inquiry); State v. Cox, 164 N.C. App. 399, 401 (2004) (same); State v. Stanback, 137 N.C. App. 583, 585-86 (2000) (failure to follow G.S. 15A-1242 amounted to plain error); State v. Godwin, 95 N.C. App. 565, 572 (1989) (allowing defendant to speak for himself without conducting G.S. 15A-1242 inquiry was reversible error); State v. Lyons, 77 N.C. App. 565, 568 (1985) (judge's failure to advise the defendant of the consequences of her decision to proceed *pro se* or the nature of the charges and proceedings and the range of possible punishments required reversal); State v. Michael 74 N.C. App. 118 (1985) (court's failure to follow requirements of G.S. 15A-1242 required a new trial).

27. *Pruitt*, 322 N.C. at 604 (bench conference with counsel did not satisfy the statutory requirements).

28. *Thomas,* 331 N.C. at 674 (quotation omitted).

29. *Carter*, 338 N.C. at 583.

30. *Id.*

11. 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?
12. 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.)
13. With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
14. Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?[31]

If the trial judge complies with G.S. 15A-1242 and is satisfied that the defendant knowingly and voluntarily chooses to waive counsel and proceed *pro se*, the trial judge must allow the defendant to proceed without counsel.[32] On the other hand, having conducted the inquiry mandated by G.S. 15A-1242, a judge may deny the defendant's request to proceed *pro se*, if the judge concludes that the waiver does not satisfy the constitutional requirements that it be knowing, intelligent and voluntary.[33] A decision to deny a waiver cannot be based on the defendant's ability to present an effective defense, because, for example, he or she has limited education, limited intellectual functioning, or no access to legal materials.[34] As the North Carolina Supreme Court has stated:

> The right protects individual free choice and therefore must be honored even though its exercise may undermine the objective fairness of a proceeding. . . . [A]lthough the defendant may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the life-blood of the law. . . . [A] defendant who clearly elects to represent himself must be permitted to do so upon the sole condition that he make a knowing and voluntary waiver of the right to counsel. Nor does a defendant need the skill of a lawyer to knowingly waive counsel. Such a waiver will be found if the defendant has been made aware of the benefits of counsel and understands the consequences of foregoing those benefits.[35]

In one case, the court of appeals held that the fact that a defendant was seventeen years old and had only a ninth grade education did not establish, in the absence of other evidence, that the defendant was unable to understand the nature of the proceedings against him or his decision regarding waiving counsel.[36] By contrast, in *State v. Gerald*,[37] the North Carolina Supreme Court stated in dicta that it was "overwhelmingly apparent . . . that defendant could not have been allowed to take over his own defense."[38] In that case, the defendant was twenty-six years old, had the equivalent of a third grade reading and comprehension level, had an I.Q. of 65, functioned within a range of mild mental retardation, and had a history of mental illness, including auditory hallucinations.[39]

In some cases, this inquiry may raise questions about competency to waive counsel. The standard of competency for waiving counsel is the same as the standard of competency to stand trial.[40] Thus, when

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31. 1 NORTH CAROLINA TRIAL JUDGES' BENCH BOOK: SUPERIOR COURT chapter 6, pp. 12-13 (Institute of Government 1999). Obviously, follow-up inquiries may be required depending on the responses to these questions. For example, if the defendant indicates that he or she is taking medication, a judge would want to know, among other things, what the medication is, what it is being taken for, whether it is prescription or non-prescription medication, and whether the defendant is taking the medication according to package or prescription directions.

32. *Dunlap*, 318 N.C. at 389.

33. State v. Reid, 151 N.C. App. 379, 386 (2002) (trial judge did not err in refusing to accept the defendant's waiver).

34. *Williams*, 334 N.C. at 454; *see also Gerald,* 304 N.C. at 518 ("the issue is not whether the defendant has the skill and training to represent himself adequately"); State v. LeGrande, 346 N.C. 718, 726 (1997) ("The Court in *Farretta* made it clear that a defendant's technical legal knowledge is not relevant to the determination of whether he knowingly waives the right to counsel.").

35. *Williams*, 334 N.C. at 454 (quotations and citations omitted).

36. State v. Fulp, 355 N.C. 171, 180 (2002).

37. 304 N.C. 511 (1981).

38. *Id.* at 519.

39. *Id.* at 518.

40. Godinez v. Moran, 509 U.S. 389 (1993). The United States Supreme Court has held that the standard for

issues regarding competency arise, the trial judge should follow usual policy for obtaining a competency evaluation before counsel is removed at the defendant's request.[41] Note that a finding that a defendant is competent to waive counsel is not the same as a finding that the waiver is knowing and voluntary.[42] If a defendant has been allowed to proceed *pro se*, the trial court cannot, over the defendant's objection, appoint counsel for the limited purpose of litigating the defendant's capacity to knowingly and intelligently waive the right to counsel.[43]

The Administrative Office of the Courts (AOC) has developed a form, AOC-CR-227 (rev. 6/97), to be used by a trial judge when a defendant wishes to waive counsel. The form is available on-line at: http://www.nccourts.org/Forms/Documents/686.pdf.

A waiver will not be presumed from a silent record.[44] However, when a defendant executes a written waiver that is then certified by the trial court, the waiver will be presumed to have been knowing, voluntary and intelligent.[45] This presumption can and has been overcome.[46] Thus, reversible error has been held to occur when the trial judge signs a form indicating that the procedure had been followed, but the transcript of the proceeding shows the trial judge failed to comply with the procedure, either entirely or in part.[47] As the appellate courts have stated: "A written waiver of counsel is no substitute for actual compliance by the trial court with G.S. 15A-1242."[48] At the same time, the lack of a written waiver will not require reversal where the record otherwise shows that the judge conducted the G.S. 15A-1242

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competence is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational understanding of the proceedings against him." *Id.* (quotations omitted). The statutory test for competency in North Carolina is essentially the same. *LeGrande*, 346 N.C. at 724.

41. *Compare LeGrande*, 346 N.C. at 722-25 (concluding that the trial judge's inquiry regarding whether to allow the defendant to proceed *pro se* was sufficient, when the trial judge referred the defendant for a mental evaluation as to competency to proceed and to waive counsel) *with* State v. Rich, 346 N.C. 50, 63 (1997) (trial judge did not err in taking waiver of counsel without ordering a competency evaluation). *See also Thomas*, 331 N.C. 671 (in connection with counsel waiver, the trial judge committed the defendant to Dorothea Dix Hospital for a competency evaluation).

A court is not required to make a competency determination in every case in which a defendant seeks to waive the right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence. *Godinez,* 509 U.S. at 402 n.13.

42. *Id.* at 401 & n.12. As the United States Supreme Court has explained:

> The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.

Id. (citations omitted).

43. *Thomas*, 346 N.C. 135.

44. State v. Brown, 325 N.C. 427, 428 (1989) (dealing with waiver of right to assistant counsel in a capital case); State v. Warren, 82 N.C. App. 84, 85 (1986) ("waiver cannot be inferred from a silent record"); *see also* State v. Callahan, 83 N.C. App. 323, 324-25 (1986) (although the State noted in its appellate brief that the trial judge addressed the defendant pursuant to G.S. 15A-1242, the proceedings were not recorded by the court reporter and there was no mention of a completed waiver form: "Consequently, the record is silent as to what questions were asked of defendant and what his responses were. Absent a transcription of those proceedings, this Court cannot presume that defendant knowingly and intelligently waived his right to counsel").

45. *See* State v. Hyatt*,* 132 N.C. App. 697, 703 (1999); State v. Warren, 82 N.C. App. 84, 89 (1986); *Love*, 131 N.C. App. at 355.

46. *See Hyatt,* 132 N.C. App. at 703; State v. Evans, 153 N.C. App. 313, 315-16 (2002).

47. *See* State v. Hardy, 78 N.C. App. 175, 179 (1985) (case was vacated and remanded when although the trial judge signed a certification indicating that the statutory procedure had been followed, the transcript showed that was not the case); State v. Wells, 78 N.C. App. 769, 773 (1986) (new trial ordered when, although certified written waiver stated that the trial judge made all necessary inquiries, the record disclosed otherwise); *Hyatt,* 132 N.C. App. at 703-04 (trial judge failed to inform the defendant of anything); *Evans*, 153 N.C. App. at 315 (reversing and remanding where the trial judge failed to make second and third inquiries required by G.S. 15A-1242).

48. State v. Cox, 164 N.C. App. 399, 402 (2004); *Evans*, 153 N.C. App. at 315; *Hyatt,* 132 N.C. App. at 703; *Wells,* 78 N.C. App. at 773.

inquiry.[49] Additionally, a defendant's bare assertion in open court and not while testifying that the trial court did not comply with G.S. 15A-1242 is insufficient to rebut the presumption of validity.[50]

In North Carolina, criminal defendants are entitled to counsel in probation revocation hearings.[51] A waiver of counsel for purposes of a probation revocation hearing must comply with G.S. 15A-1242.[52]

Practical Pointers for the Trial Judge:

- *Always conduct a G.S. 15A-1242 inquiry of the defendant; do not simply complete AOC-CR-227.*
- *Conduct the inquiry on the record.*
- *The purpose of the inquiry is not to determine whether the defendant can effectively present his or her case; the inquiry is limited to whether the waiver is made knowingly, intelligently, and voluntarily.*
- *Develop a standard "statement" to warn the defendant of the hazards of proceeding pro se.*
- *Memorialize the defendant's waiver by completing AOC-CR-227.*
- *Allow a recess for the defendant to reconsider the decision to waive counsel.*
- *If the defendant's request raises issues of competency, order an evaluation and determine competency before deciding whether to remove counsel.*

49. State v. Heatwole, 344 N.C. 1, 17-19 (1996) (lack of written waiver did not require reversal where record revealed that trial judge made the required inquiry).

50. State v. Wall, __ N.C. App. __ (June 19, 2007) (during a discussion with the trial judge about the defendant's intentions with respect to an appeal, the defendant stated that he had not been properly informed of the potential sentences the charges carried).

51. G.S. 15A-1345(e).

52. State v. Whitfield, 170 N.C. App. 618, 621 (2005) (waiver complied with G.S. 15A-1242); State v. Proby, 168 N.C. App. 724, 726 (2005) (waiver was sufficient); State v. Debnam, 168 N.C. App. 707, 709 (2005) (reversed and remanded because of improper waiver); State v. Hill, 168 N.C. App. 391, 396 (2005) (judge's inquiry at probation revocation hearing satisfied mandates of G.S. 15A-1242); *Evans*, 153 N.C. App. at 615-16 (reversed and remanded because of improper waiver).

V. Indigent's Waiver of the Right to Appointed Counsel

G.S. 7A-457 governs an indigent defendant's waiver of the right to appointed counsel. A waiver of appointed counsel must be obtained if an indigent defendant wishes to be represented by private retained counsel. A waiver of appointed counsel also must be obtained before an indigent defendant can be allowed to proceed *pro se*. G.S. 7A-457 provides in relevant part:

> (a) 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 in accordance with rules adopted by the Office of Indigent Defense Services. 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.[53]

The inquiry under G.S. 7A-457 is similar to the inquiry required under G.S. 15A-1242 and may be satisfied in a similar manner.[54]

Form AOC-CR-227 is drafted to allow for either a waiver of assigned counsel only or a waiver of the right to all assistance of counsel, which includes the right to assigned counsel. For an indigent defendant to proceed *pro se*, the defendant must waive the right to all assistance of counsel.

Although G.S. 7A-457 provides for a written waiver of counsel from an indigent defendant, the North Carolina Supreme Court has stated that "this section has been construed as directory, not mandatory, so long as the provisions of the statute

53. IDS Rule 1.6(a) pertains to waivers in non-capital cases and "restates the requirements for a valid waiver in G.S. 7A-457(a) and is intended to continue current practice and procedure." Commentary to IDS R. 1.6(a). IDS Rule 2A.3(a) pertains to waivers in capital cases and parallels Rule 1.6(a).

54. State v. Fulp, 355 N.C. 171, 176 (2002); *Heatwole,* 344 N.C. at 18. See section IV above, discussing the requirements for taking a waiver.

have otherwise been followed."[55] Clearly, however, the best practice would be to obtain a written waiver. Additionally, although the statute requires the trial judge to 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,"[56] the trial court does not need to make specific findings as to these factors or specifically state that it considered them.[57]

If an indigent defendant waives the right to appointed counsel with the intention of making arrangements for private counsel, he or she should be afforded a reasonable period of time in which to retain counsel.[58] One typical problem that arises in this scenario is that the day of trial arrives and the defendant informs the court that he or she has not retained counsel. The defendant then requests either that the trial court "get someone" to help with the case or that he or she be granted a continuance to secure private counsel. May the trial judge deny the defendant's request and call the case for trial, finding that the defendant waived the right to counsel? In general, the answer to this question is no, because while the defendant has waived the right to appointed counsel, the defendant has not waived the right to all assistance of counsel. In fact, in precisely this situation, the North Carolina Supreme Court held that denying the defendant's request to "get someone" to help him and requiring him to proceed *pro se* was error, concluding that there was "no evidence that defendant ever intended to proceed to trial without the assistance of some counsel."[59] This does not mean, however, that a judge is without tools to deal with a defendant who seeks to "game" the system and obstruct the administration of justice. Where the defendant's conduct constitutes "gamesmanship," issues of forfeiture of counsel may arise and, when faced with a late request to withdraw a waiver, the trial judge may require a showing of good cause.[60]

Practical Pointers for the Trial Judge:

- *Do not allow an indigent defendant to proceed with retained counsel without taking a waiver of appointed counsel.*

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55. *Fulp,* 355 N.C. at 176-77; *see also Heatwole,* 344 N.C. at 18.

56. G.S. 7A-457(a); State v. McCrowre, 312 N.C. 478, 480-81 (1984).

57. *Fulp,* 355 N.C. at 176-77 (the fact that the judge did not expressly and specifically state in his findings of fact that he considered the defendant's age, education, familiarity with the English language, mental condition and complexity of the crime did not warrant reversal).

58. State v. Quick, __ N.C. App. __, 634 S.E.2d 915, 917 (2006).

59. *McCrowre*, 312 N.C. at 480; *see also* State v. White, 78 N.C. App. 741, 742-46 (1986) (at arraignment, after the defendant's private counsel was allowed to withdraw for non-payment of her fee, the defendant waived his right to appointed counsel and was granted a continuance to secure counsel; when the case came on for trial, the defendant appeared for trial without counsel and the trial judge proceeded as if the defendant had waived his right to all assistance of counsel; the appellate court ordered a new trial, concluding that nothing in the record indicated that the defendant wished to proceed to trial without the assistance of some counsel, rather the record indicated the contrary); State v. Graham, 76 N.C. App. 470, 471-75 (1985) (the defendant waived the right to assigned counsel and was given a continuance to allow him to retain private counsel; when the case came on for trial, the defendant was unrepresented and the trial proceeded; ordering a new trial, the court of appeals held that there was no evidence that the defendant intended to proceed to trial without any counsel, and that in fact the record revealed otherwise; it also noted that there was nothing on the record suggesting that defendant's failure to retain counsel was due to his own negligence or lack of diligence).

60. *Quick*, 634 S.E.2d at 917 ("As to the retention of private counsel, 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 of his choosing where, through no fault of his own, he is without counsel. A defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial. 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.") (quotations and citations omitted); *see also Graham*, 76 N.C. App. at 475 (defendant who waived appointed counsel stating he would get private counsel then appeared for trial, after a continuance, unrepresented; holding that the trial court erred by proceeding with a *pro se* defendant because the defendant only had waived his right to appointed counsel; noting however that when the defendant appeared unrepresented for trial, indicating that he had "[r]an into a little problem" in retaining private counsel, the trial court made no inquiry and thus the court "[h]ad no basis for concluding that defendant's failure to retain counsel was due to his own negligence or lack of diligence"). For additional case law, see section VII discussing, in part, withdrawal of waivers made "late in the game" and section IX, discussing forfeiture of counsel.

- *When an indigent defendant waives the right to appointed counsel and expresses an intent to secure private counsel, inform the defendant of the consequences if she or she fails to obtain counsel within the time allowed.*
- *Do not allow an indigent defendant to proceed pro se without making sure the defendant has waived both the right to appointed counsel and the right to assistance of counsel.*
- *Conduct the waiver of appointed counsel as you would a standard waiver under G.S. 15A-1242.*
- *Memorialize the waiver of appointed counsel by completing AOC-CR-227.*
- *If the defendant waives the right to appointed counsel expressing a desire to secure private counsel and then fails to do so, make a record of the defendant's explanation for this failure.*

VI. Proceedings Covered by the Waiver

A waiver of counsel "is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him."[61] Although G.S. 15A-1242 states that a defendant may be permitted to proceed at the trial of his or her case without counsel only after "the trial judge" makes the required inquiry, a pretrial waiver taken by one judge is valid for trial, even if a different judge presides over the trial. As one decision stated:

> Although [G.S.] 15A-1242 states that the "trial judge" must make the inquiry into the defendant's choice to represent himself, we do not read the statute as mandating that the inquiry be made by the judge actually presiding at the defendant's trial. A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of the proceeding, meets the [statutory] requirements . . . even if conducted by a judge other than the judge who presides at the subsequent trial.[62]

Questions also arise as to whether a waiver taken in district court is sufficient for later superior court proceedings. Consider first cases within the original jurisdiction of the superior court, where a waiver was taken at first appearance in district court. *State v. Williams*[63] suggests that in this situation, the superior court judge should take a new waiver, after informing the defendant of his or her right to counsel in compliance with G.S. 15A-942 and 15A-603. In *Williams,* the defendant waived representation at first appearance in district court. When the defendant appeared unrepresented at arraignment in superior court, the judge had the defendant complete a waiver form. After the defendant was convicted, he appealed. On appeal, the court held that the waiver at arraignment was insufficient. The court noted that G.S. 15A-942 requires that when a defendant appears at arraignment without counsel, the court must inform the defendant of the right to counsel, give the defendant the opportunity to exercise that right, and take any action necessary to effectuate that right.[64] It held that when a trial judge is required in a pre-trial proceeding to inform a defendant of his or her right to counsel, the judge must do so "in substantially the same manner as at first appearance in District Court."[65] Citing G.S. 15A-603 (the provision governing counsel issues in first appearances district court), the court concluded:

> [A] defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by G.S. 15A-603. Where the defendant nevertheless wishes to waive counsel, the court must find that G.S 15A-603 has been complied with before a valid waiver can be made.[66]

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61. State v. Hyatt, 132 N.C. App. 697, 700 (1999).

62. State v. Lamb, 103 N.C. App. 646, 648-49 (1991) (waiver obtained in pretrial hearing by one superior court judge was good for trial presided over by another superior court judge); *see also* State v. Kinlock, 152 N.C. App. 84 (2002).

63. 65 N.C. App. 498 (1983).

64. The statute also provides that if the defendant does not request an arraignment, in addition to entering a plea of not guilty on the defendant's behalf, the court "shall also verify that the defendant is aware of the right to counsel, that the defendant has been given the opportunity to exercise that right, and must take any action necessary to effectuate that right on behalf of the defendant." G.S. 15A-942.

65. 65 N.C. App. at 504.

66. *Id.* G.S. 15A-603 provides:

Another situation where this question arises is when the defendant waives counsel in district court, is tried and convicted, and then appeals for trial *de novo* in superior court. At least one older case decided before enactment of G.S. 15A-1242 held that because the trial in district court and the trial in superior court on appeal are considered to be one proceeding, a second waiver is superior court is not required.[67] Additionally, the more recent case of *State v. Wall*[68] can be read as suggesting that this rule continues to apply. Notwithstanding these cases and in light of the *Williams* case discussed above, the best practice is to secure another waiver in cases on *de novo* appeal if the defendant indicates a continued desire to proceed without counsel.

(a) The judge must determine whether the defendant has retained counsel or, if indigent, has been assigned counsel.

(b) If the defendant is not represented by counsel, the judge must inform the defendant that he has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of assistance to the defendant in advising him and acting in his behalf. The judge must inform the defendant of his right to be represented by counsel and that he will be furnished counsel if he is indigent. The judge shall also advise the defendant that if he is convicted and placed on probation, payment of the expense of counsel assigned to represent him may be made a condition of probation, and that if he is acquitted, he will have no obligation to pay the expense of assigned counsel.

(c) If the defendant asserts that he is indigent and desires counsel, the judge must proceed in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes.

(d) If the defendant is found not to be indigent and indicates that he desires to be represented by counsel, the judge must inform him that he should obtain counsel promptly.

(e) If the defendant desires to waive representation by counsel, the waiver must be in writing in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes except as otherwise provided in this Article.

67. State v. Watson, 21 N.C. App. 374, 379 (1974) (G.S. 7A-457 "does not require successive waivers in writing at every court level of the proceeding. The trial in the district court and the further trial of the case in the superior court on appeal together constituted one in-court proceeding.").

68. __ N.C. App. __ (June 19, 2007).

Finally, one case held that a waiver made for a resentencing was good for a second resentencing hearing held two days later, after the State filed a motion to re-open.[69]

Practical Pointers for the Trial Judge:

- *If a defendant appears before you without counsel, do not assume a waiver has been taken—check the file.*
- *If you have any questions about the validity of the waiver, inquire about another waiver.*
- *If the case is before you for a trial de novo from district court and the defendant waived counsel in district court, it is best to inquire about another waiver in superior court.*
- *Even if a waiver was taken at first appearance in district court, you should advise the defendant of his or her rights in compliance with G.S. 15A-942 and 15A-603 and take another waiver.*
- *Because of the difficulties of trying a case pro se, consider inquiring of a defendant who has waived counsel pre-trial to see if he or she has changed his or her mind about the decision to proceed pro se.*

VII. Withdrawal of a Waiver

What happens when the case is called for trial or is mid-trial and the defendant realizes that proceeding *pro se* wasn't such a good idea? As noted above, a waiver of counsel "is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him."[70] It is the defendant's responsibility to notify the court that he or she has had a change of mind.[71] To satisfy this burden, the defendant must move or request the court

69. *State v. Dorton*, __ N.C. App. __, 641 S.E.2d 357 (2007) (two days after the defendant was resentenced, he was brought back into court for a second resentencing hearing; defendant waived counsel six days prior to the first resentencing hearing; because the defendant never moved to withdraw that waiver, the trial judge did not err by failing to inquire, during the second resentencing, about withdrawal).

70. *Hyatt*, 132 N.C. App. at 700; *see also Watson,* 21 N.C. App. at 379.

71. *Dorton*, __ N.C. App. __, 641 S.E.2d 357; *Hyatt,* 132 N.C. App. at 700; *Watson,* 21 N.C. App. at 379.

to withdraw a waiver.[72] In *State v. Sexton*,[73] the court of appeals held that a request for appointment of counsel made after a valid waiver had been taken sufficiently notified the trial judge of the defendant's desire to withdraw the waiver. By contrast, in *State v. Hyatt*,[74] the court of appeals held that a defendant's statements at trial that he did not have a lawyer and thus did not know how to question jurors or prepare an opening statement, "d[id] not equate to a motion or request to withdraw his previous waiver."[75]

Several cases indicate that a request to withdraw a waiver made "late in the game," should not be granted unless the defendant shows good cause. For example, in *State v. Smith*,[76] the defendant waited until the day his case was scheduled for trial before moving to withdraw his waiver and have counsel assigned. The trial court rejected the defendant's motion and the defendant appealed. Affirming, the court of appeals held:

> If this tactic is employed successfully, defendants will be permitted to control the course of litigation and sidetrack the trial. At this stage of the proceeding, the burden is on the defendant not only to move for withdrawal of the waiver, but also to show good cause for the delay. Upon his failure to do so, the signed waiver of counsel remains valid and effective during trial.[77]

Smith was followed by *State v. Watts.*[78] When that case came on for trial on May 19, 1976, the defendant informed the court that he had discharged his attorney earlier that month. The court entered an order allowing the attorney to withdraw, granted a continuance after the defendant indicated that he was not ready for trial because he had been unable to retain new counsel, and took a waiver of counsel. At the time, the court cautioned the defendant that when the case was called again for trial, it would proceed regardless of whether the defendant had a lawyer or not. When the case was called again for trial in July 1976, the defendant moved to withdraw his waiver of counsel. The motion was denied and the defendant appealed. The court of appeals affirmed, stating that the "Defendant failed to show good cause, or any cause whatsoever, for the delay in moving to withdraw the waiver of his right to have assigned counsel."[79] The "good cause" standard continues to be articulated in the case law.[80]

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72. *Hyatt,* 132 N.C. App. at 701 ("a criminal defendant must move or request the trial court to withdraw a previous waiver of counsel"); *Dorton,* __ N.C. App. __, 641 S.E.2d 357 (citing *Hyatt*).

73. 141 N.C. App. 344 (2000).

74. 132 N.C. App. 697 (1999).

75. *Id.* at 701.

76. 27 N.C. App. 379 (1975).

77. *Id.* at 381; *see also* State v. Hoover, 174 N.C. App. 596, 598 (2005) (quoting *Smith*).

78. 32 N.C. App. 753 (1977).

79. *Id.* at 755; *see also* State v. Clark, 33 N.C. App. 628, 629-30 (1977) (defendant waited until the day of trial to move to withdraw his waiver).

80. *Compare Sexton*, 141 N.C. App. 344 (a request to withdraw a waiver of assigned counsel was "for good cause" where the defendant had explained to the trial judge that he had lost his job), *with Hoover*, 174 N.C. App. 596 (the defendant had four counsel appointments and requested change of counsel four times in approximately eighteen months; two weeks before trial, he complained about the performance of his standby counsel, which the trial judge treated as a request for appointment of counsel and denied; the appellate court found no error, concluding that not only had the defendant failed to clearly state a request to withdraw his waiver, but also he failed "to provide a reason for the delay in requesting the withdrawal constituting 'good cause.'") *and* State v. Atkinson, 51 N.C. App. 683, 684-86 (1981) (after the defendant waived the right to assigned counsel, the defendant appeared for trial unrepresented, told the court that he was financially able to hire a lawyer and asked for a continuance; when the case came on for trial two days later the defendant, again unrepresented, said he was financially able to hire a lawyer; the court granted the defendant a 30-minute continuance so that the defendant could contact a lawyer; five minutes before the trial, the defendant asked the court to get him a lawyer because he could not afford one; citing *Smith* and *Watts*, the court held that the defendant "did not meet his burden of showing sufficient facts entitling him to a withdrawal of the waiver of the right to counsel, nor did he show good cause for delay, and the court correctly refused to entertain his dilatory tactics further") *and Hyatt,* 132 N.C. App. at 701 (noting that *Smith* held that the burden is on the defendant not only to move for withdrawal but also to show good cause for the delay). *See also* State v. Phillips, 149 N.C. App. 310, 319-320 (2002) (trial court did not err in denying the defendant's request for a 45-day continuance to allow the defendant to secure counsel; the defendant had waived the right to counsel the day before, he had approximately five month's time before trial to retain a lawyer, and the defendant declined the trial court's offer to delay trial for several hours so that the defendant could hire a lawyer).

Practical Pointers for the Trial Judge:

- *If the defendant seeks to withdraw a waiver "late in the game," you may require that good cause for the delay be shown.*

VIII. Standby Counsel

When a defendant proceeds *pro se*, the trial court has the option of appointing standby counsel pursuant to G.S. 15A-1243. That statute provides:

> When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion. Appointment and compensation of standby counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services.[81]

A judge may appoint standby counsel even over a defendant's objection.[82] A judge's decision regarding appointing standby counsel will be reviewed under an abuse of discretion standard.[83] Many judges exercise their discretion and appoint standby counsel. This can be particularly helpful if the defendant later withdraws his or her waiver of counsel. Additionally, many judges find that having standby counsel facilitates trial of the case. However, a trial judge has no duty to inquire of the defendant as to whether he or she wishes to have standby counsel.[84]

The duties of standby counsel are limited by statute to assisting the defendant when called upon and to bringing "to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion."[85] Allowing standby counsel to advocate any position over a *pro se* defendant's objections interferes with the *pro se* defendant's right to represent him or herself.[86] Additionally, as our state supreme court has recognized, "Because 'standby counsel' is a creature of legislation, with duties limited by statute, defendant does not benefit from a typical lawyer-client relationship. He thus cannot claim ineffective assistance on the part of standby counsel beyond the limited scope of the duties assigned to such counsel by the statute or the defendant or voluntarily assumed by such counsel."[87]

Additionally, the appointment of standby counsel cannot "save" a case in which the judge has failed to take a proper waiver of counsel. Put another way: "neither the statutory responsibilities of standby counsel, [G.S.] 15A-1243, 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."[88]

Practical Pointers for the Trial Judge:

- *Appointing standby counsel is rarely a bad idea and can be helpful in the event the defendant later withdraws his or her waiver of counsel.*
- *Appointing standby counsel will not "save the case" if you have failed to take a proper waiver.*

IX. Forfeiture of the Right to Counsel

Although cases sometimes confuse the terms, waiver is different from forfeiture. As discussed above, a waiver of counsel involves a knowing, voluntary, and intelligent relinquishment of the right to counsel. Forfeiture of the right to counsel involves an

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81. IDS Rule 2A.3(b) provides that "If a capital defendant has elected to proceed without the assistance of counsel, the trial judge shall immediately notify the IDS Director, who may appoint, in his or her discretion, standby counsel to assist the defendant . . . ." Rule 1.6(b) provides that in non-capital criminal cases "if the defendant has elected to proceed without the assistance of counsel, the trial judge in his or her discretion may determine that standby counsel should be appointed to assist the defendant." The commentary to Rule 1.6(b) states that "[f]or non-capital criminal cases, the above rule restates the provisions on appointment of standby counsel in G.S. 15A-1243 and is intended to continue the current practice and procedure."

82. *Farretta*, 422 U.S. at 835 n.46.

83. State v. Seraphem, 90 N.C. App. 368, 371-72 (1988) (trial judge did not abuse his discretion in appointing standby counsel).

84. State v. Brincefield, 43 N.C. App. 49, 52 (1979).

85. *Thomas,* 331 N.C. at 677 (quoting G.S. 15A-1243).

86. State v. Thomas, 346 N.C. 135 (1997).

87. *Thomas,* 331 N.C. at 677.

88. State v. Pruitt, 322 N.C. 600, 603 (1988) (quoting State v. Dunlap, 318 N.C. 384, 389 (1986)); *see also* State v. Stanback, 137 N.C. App. 583, 586 (2000).

involuntary relinquishment of the right.[89] Typically, forfeiture is understood to occur when the defendant's misconduct results in a relinquishment of the right. There are only a few cases on point in North Carolina.

State v. Montgomery,[90] is a commonly cited North Carolina case involving forfeiture of counsel. The facts of that case are as follows. In January 1997, the defendant was found to be indigent and assistant public defender Thurston Fraizer was appointed as his counsel. One month later, the defendant's family retained George Laughrun to represent him. Then, in August 1997, Laughrun successfully moved to withdraw; a month later, the public defender again was appointed to represent the defendant. In December 1997, private attorney Thomas Duncan filed a notice of appearance as defendant's counsel. On February 16, 1998, the day of trial, Duncan moved for a continuance, explaining that he had been retained by the defendant's girlfriend and that the defendant no longer wished to be represented by him. The court denied the motion to withdraw, informed the defendant of his right to proceed *pro se,* and told him that he was not entitled to appointment of another lawyer. The next day, the defendant appeared in court, reiterated his objection to Duncan's representation, and disrupted the court with profanity, leading to a finding of contempt. On February 23, 1998, the defendant appeared before another judge. Duncan again unsuccessfully sought to withdraw, at which point the defendant again became disruptive and again was found in contempt. Trial was set for February 25, 1998. While in the courtroom on the day of trial, the defendant threw water in Duncan's face. The defendant again was found in contempt, and was charged with simple assault on Duncan. Duncan was allowed to withdraw, the case was continued until March 30, 1998, and the trial judge stated that the defendant had "effectively waived his right to appointment of counsel." In April 1998, the defendant appeared before yet another judge, this time with attorney Thurston Fraizer, who stated that he had been appointed to represent the defendant in connection with the simple assault case involving Duncan and that the defendant required representation in the present case. The judge refused to appoint Fraizer but allowed him to serve as standby counsel. After the defendant was convicted, he appealed, arguing that the trial judge had erred in requiring him to proceed *pro se*. The court of appeals disagreed, finding that the defendant had forfeited his right to counsel. It stated:

> A forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[] to justify a forfeiture of defendant's right to counsel. A defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial and a defendant who is abusive towards his attorney may forfeit his right to counsel.[91]

Applying that rule to the case at hand, the court found that the defendant was afforded ample time over fifteen months to obtain counsel, he twice was appointed counsel, he twice release appointed counsel and retained private counsel, he twice was disruptive in the courtroom, causing a delay of the trial, and he assaulted one of his lawyers causing additional delay. The court concluded: "Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned."[92] Thus, it held that the defendant had forfeited his right to counsel and no inquiry under G.S. 15A-1242 was required.

Following *Montgomery,* the court of appeals again found that a forfeiture had occurred in *State v. Quick,*[93] a case involving an appeal from a probation revocation. *Quick* involved the following facts. On December 10, 2001, counsel from the public defender's office was appointed to represent the defendant on the revocation. After the defendant was found in violation, the trial judge continued him on probation, with modified conditions. Then, on June 11, 2003, the probation officer filed another violation report. On September 2, 2003, the defendant appeared in court and signed a waiver of his right to appointed counsel, indicating that he would hire private counsel. After some delay, caused in part by the defendant's failure to appear, a hearing on the violation was held in March 2004. The trial judge inquired as to the status of defendant's counsel. The defendant indicated that he was unsure of counsel's schedule. At a later hearing on a motion to reconsider and for appropriate relief, defense counsel indicated that the first time that the defendant tried to contact him was on the day before the hearing. At the March 2004 hearing, the defendant was found in violation

89. State v. Montgomery, 138 N.C. App. 521, 524 (2000) (discussing the difference between the concepts).

90. *Id.*

91. *Id.* at 524-25 (quotations and citation omitted).

92. *Id.* at 525.

93. __ N.C. App. __, 634 S.E.2d 915 (2006).

and his sentence was activated. On appeal, the court rejected the defendant's argument that his right to counsel had been violated. It held:

> The defendant was given a reasonable time to retain counsel. We hold that defendant's failure to retain counsel over roughly eight months amounts to an obstruction and delay of the proceedings. Defendant both knowingly and voluntarily waived his right to appointed counsel and, through his own acts, forfeited his right to proceed with the counsel of his choice.[94]

For a discussion of termination of self-representation by a defendant who engages in misconduct, *see supra* section II.

Practical Pointers for the Trial Judge:

- *Proceed with caution when finding a forfeiture of counsel; specifically, make sure the record fully reflects the defendant's conduct warranting forfeiture.*

X. Substitution of Counsel

Non-indigent defendants are entitled to counsel of their own choosing,[95] and should be afforded a fair opportunity to retain counsel.[96] However, this right may not be exercised in a way that frustrates the administration of justice. Thus, a trial court does not err when it denies a motion to continue, made on the day of trial, by a non-indigent defendant who wishes to replace private counsel.[97] As the court of appeals has stated: "The right of the accused to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in the courts and deprive the courts of their inherent power to control the same."[98] On the other hand, when the defendant timely exercises his or her right to select counsel and then appears for trial without counsel through no fault attributable to the defendant, a continuance should be granted.[99]

While indigent defendants have a right to counsel in most criminal cases, they do not have the right to choose their lawyers.[100] Thus, an indigent defendant's options are to accept representation by appointed counsel, or to proceed *pro se*.[101] The one exception to this rule is when allowing appointed counsel to continue his or her representation would lead to a denial of the right to effective assistance of counsel.[102] The trial court is "constitutionally required" to arrange for substitute counsel "whenever representation by counsel originally appointed would amount to a denial of defendant's right to effective assistance of counsel."[103] Thus, when a defendant

94. *Id.* at 918; *see also* State v. Bullock, 316 N.C. 180, 186 (1986) (in a case ordering a new trial because the trial judge failed to comply with G.S. 15A-1242, the court noted that it was not dealing "with a situation where the record shows that a criminal defendant, capable of employing counsel, has attempted to prevent his trial by refusing to employ counsel and also refusing to waive counsel and respond to the inquiry required by [the statute]").

95. There is, however, no right to be represented by someone who is not a lawyer. State v. Phillips, 152 N.C. App. 679, 683 (2002).

96. State v. Montgomery, 33 N.C. App. 693, 696 (1977).

97. *Id.* at 696-97.

98. *Id.*; *see also* State v. McFadden, 292 N.C. 609, 616 (1977) ("an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial").

99. *McFadden*, 292 N.C. at 611-12 (defendant timely retained counsel but on the day of trial appeared without counsel because retained counsel was trying a federal case).

100. State v. Cunningham, 344 N.C. 341, 351 (1996) ("An indigent defendant does not have the right to an attorney of his choice."); *Dunlap*, 318 N.C. at 389; State v. Kuplen, 316 N.C. 387 (1986); *Thacker*, 301 N.C. at 351-52.

101. *Dunlap*, 318 N.C. at 389 (a defendant's right to assigned counsel does not include the right to counsel of choice, and "in the absence of justification for dismissal of assigned counsel, the defendant has the choice of accepting the services of assigned counsel or proceeding *pro se*"). Of course, an indigent defendant could opt for private representation financed by someone else.

102. State v. Hutchins, 303 N.C. 321, 336 (1981) ("Absent a showing of a sixth amendment violation, the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court."); State v. Poindexter, 69 N.C. App. 691, 697 (1984) (an indigent defendant "is not . . . entitled to substitute counsel unless representation by counsel originally appointed would amount to a denial of defendant's right to effective assistance of counsel"); *see also Flowers*, 347 N.C. at 17 (trial court properly denied indigent defendant's request for new appointed counsel in a capital case where there was no evidence of ineffectiveness).

103. *Thacker,* 301 N.C. at 352. For an extensive discussion of the various types of ineffective assistance of

reports a problem with counsel, the trial judge should conduct an inquiry out of the presence of the jury to determine the nature and extent of the problem.[104] The most obvious situation in which substitute counsel would be constitutionally required is when it becomes apparent that appointed counsel is laboring under a conflict of interest. It could also occur, however, when defense counsel has suffered a medical problem, rendering counsel unfit to continue representation.[105] On the other hand, substitute counsel is not required merely because the defendant does not like appointed counsel,[106] prefers counsel of a different race[107] or gender, is unhappy with counsel's services,[108] or disagrees with counsel over trial tactics.[109] When appointed counsel is removed for reasons related to ineffectiveness, appointment of new counsel should be done in accordance with the rules of the Indigent Defense Services (IDS)[110] and the trial court should ensure that a complete record is made justifying the decision to remove counsel. And finally, even if new counsel is not constitutionally required, a trial judge may, in his or her discretion, grant a request to replace appointed counsel.[111]

Occasionally, an indigent defendant will proceed with court-appointed counsel and then decide "late in the game" that he or she wishes to waive the right to court-appointed counsel and proceed with private counsel. Several appellate cases have upheld a trial court's denial of a defendant's motion to continue for these purposes, when the facts revealed that the defendant had been dilatory in taking steps to obtain private counsel before the scheduled court date.[112]

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counsel claims, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (School of Government, UNC-Chapel Hill 2003).

104. *Cf. Gerald*, 304 N.C. at 519.

105. State v. Morgan, 359 N.C. 131, 146-47 (2004) ("We are satisfied that the trial court, faced with the prospect of having an impaired or incapacitated second chair counsel representing defendant in a capital trial, reasonably understood that it was constitutionally required to remove [the] attorney . . . . Realizing that [the attorney's] . . . current medical condition could affect her ability to provide competent legal assistance and thereby interfere with defendant's constitutional right to effective assistance of counsel, the trial court justifiably and properly removed her.").

106. *Flowers,* 347 N.C. at 17 (1997) (trial judge did not err in denying capital defendant's request for substitute counsel where facts showed that the defendant "simply did not like his court-appointed counsel").

107. State v. Sweezy, 291 N.C. 366, 373 (1976) (trial court did not err by refusing to discharge counsel based on the defendant's request for "black lawyers").

108. State v. Hutchins, 303 N.C. 321, 335 (1981).

109. *Thacker,* 301 N.C. at 352-53 ("[A] mere disagreement over trial tactics . . . does not entitle defendant to have new counsel appointed for him."); *Hutchins,* 303 N.C. at 335. Note that when a disagreement over trial tactics rises to the level of an "absolute impasse," the lawyer is required to yield to the client's wishes. See State v. Ali, 329 N.C. 394 (1991). For a discussion of tactical disagreements between defendants and counsel, see ROBERT L. FARB, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 100-02 (School of Government. UNC-Chapel Hill 2004).

110. G.S. 7A-452(a) (court determines whether a person is indigent and entitled to counsel but appointment is per IDS rules). IDS rules for appointment of counsel are available on the IDS web page: www.ncids.org.

111. State v. Kuplen, 316 N.C. 387, 396 (1986).

112. State v. Gant, 153 N.C. App. 136, 142-43 (2002) (on the day of the sentencing hearing, the defendant moved to remove his appointed counsel and for a continuance to retain private counsel; the defendant offered no evidence indicating that he had taken steps to retain counsel in the month after he decided to "fire" his court-appointed counsel; the court held that "[s]ince defendant failed to timely act on his right to obtain private counsel, the trial court did not err in denying defendant a continuance due to the court's interest in the speedy disposition of his criminal charges"); State v. Chavis, 141 N.C. App. 553, 562 (2000) (trial court did not err in denying the defendant's motion to continue made on the day of trial for a continuance to employ private counsel; the private counsel the defendant wanted to employ was not in the courtroom at the time and there was no evidence that the defendant had made financial arrangements with this or any other private attorney; the defendant did not point to any conflict he had with his appointed attorney and the case had been rescheduled twice due to various conflicts); State v. Little, 56 N.C. App. 765 (1982) (trial court did not err in denying the defendant's day-of-trial motion to continue so that he could replace his court-appointed lawyer with privately retained counsel where the defendant had been dilatory in securing private counsel).

Practical Pointers for the Trial Judge:

- *Remember that while non-indigents have the right to counsel of choice, indigent defendants do not have the right to appointed counsel of choice.*
- *An indigent defendant is entitled to new counsel only when continued representation by appointed counsel would deny the defendant his or her right to effective assistance of counsel; however, you may, in your discretion, replace counsel at the defendant's request.*
- *When an indigent defendant expresses unhappiness with appointed counsel, take sufficient steps to satisfy yourself that there are no issues of ineffectiveness; if there are, remove counsel and appoint new counsel.*
- *Beware of non-indigent defendants who seek to exercise the right to counsel of choice for the purpose of delay.*

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