RIGHT TO COUNSEL DURING CRIMINAL PROSECUTION

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Contents

For a more detailed discussion of these and other issues related to counsel, see Jessica Smith, *Selected Counsel Issues in North Carolina Criminal Cases*, ADMIN. OF JUSTICE BULL. NO. 2007/04, UNC School of Government (July 2007) [hereinafter SELECTED COUNSEL ISSUES]; JOHN RUBIN, PHILLIP R. DIXON JR., AND ALYSON A. GRINE, NORTH CAROLINA DEFENDER MANUAL VOL. 1 PRETRIAL Ch. 12 (2d ed. 2013) [hereinafter DEFENDER MANUAL].

I. The Right to Counsel and to Proceed Without Representation During a Criminal Prosecution. A person has a multifaceted constitutional right to assistance of counsel during the course of a criminal case, including at certain events preceding the commencement of formal adversarial judicial proceedings. *See generally* DEFENDER

MANUAL at 12.4. The focus of this chapter is a criminal defendant's right to assistance of counsel during a criminal prosecution after commencement of formal adversarial judicial proceedings and continuing to judgment and sentencing.

The Sixth Amendment to the federal constitution guarantees to a criminal defendant who faces incarceration the right to counsel at all critical stages of a criminal prosecution. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); *see also* N.C. CONST. art. 1 §§ 19, 23. A defendant who has the right to counsel under the Sixth Amendment also has the right to proceed without counsel and conduct his or her own defense. Faretta v. California, 422 U.S. 806, 807 (1975). Proceeding without counsel commonly is referred to as "self-representation" or proceeding "*pro se*." *See, e.g.*, G.S. 15A-1242 (statute describing requirements for valid waiver of assistance of counsel is titled "[d]efendant's election to represent himself at trial"); State v. Moore, 893 N.C. App. 231, 246 (2023) ("practical effect" of choosing to proceed without counsel is self-representation). Except in cases of self-representation, a defendant does not have the right to be represented by a person who is not a lawyer. Luis v. United States, 578 U.S. 5, 11 (2016); State v. Sullivan, 201 N.C. App. 540, 550 (2009).

A trial court's first involvement with counsel issues typically arises at a defendant's first appearance, where, among other things, the court is responsible for assuring the defendant's right to counsel for future proceedings. G.S. 15A-603. While Article 29 of G.S. Chapter 15A speaks only to first appearance procedures before district court judges, or clerks or magistrates in certain situations where a district court judge is unavailable, a superior court judge may preside over a first appearance in a case initiated by indictment. In cases other than those initiated by indictment, a superior court judge's first involvement with counsel issues may occur at a defendant's arraignment, where the court is responsible for assuring a defendant's right to counsel for future proceedings if he or she appears without counsel. G.S. 15A-942; State v. Sanders, 294 N.C. 337, 343 (1978) (noncompliance with G.S. 15A-942 was reversible error where defendant appeared without counsel at arraignment and on the same day was tried and convicted); *see also* G.S. 15A-1012 (describing limitations on pleas for unrepresented defendants). If a defendant does not request an arraignment, the superior court is responsible for assuring a defendant's right to counsel for future proceedings at the setting where the court enters a not guilty plea on the defendant's behalf. G.S. 15A-942.

A. Sixth Amendment Right to Assistance of Counsel. As noted above, a criminal defendant's constitutional right to assistance of counsel at the critical stages of a criminal prosecution after commencement of adversarial judicial proceedings is grounded in the Sixth Amendment and corollary guarantees of the state constitution. State v. Harvin, 382 N.C. 566, 584 (2022). Courts have repeatedly stressed the importance of the constitutional right to counsel, describing it as "fundamental" and holding that deprivation of the right is structural error that is *per se* prejudicial to the defendant. *See* Luis v. United States, 578 U.S. 5, 11 (2016); State v. Goodwin, 267 N.C. App. 437, 440 (2019).

The right to assistance of counsel during a criminal prosecution includes the right to appointed counsel for defendants who cannot afford to retain counsel. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). *See generally* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.1(a) (4th ed. 2015) [hereinafter LAFAVE].

Generally speaking, the critical stages of a criminal prosecution include pretrial and trial proceedings and end upon judgment and sentencing at the trial level. DEFENDER MANUAL at 12.4. As with sentencing, the Sixth Amendment right to counsel applies to resentencing proceedings, regardless of the procedural

basis for the resentencing. State v. Rouse, 234 N.C. App. 92, 95 (2014) (stating that statutory right to counsel also applies to resentencing under G.S. 7A-451(a)(1)); State v. Doisey, 277 N.C. App. 270, 274-75 (2021) (same). Note that G.S. 15A-601(a) states that a first appearance is not a critical stage of the prosecution. For a fuller discussion of precisely when adversarial judicial proceedings commence and the Sixth Amendment right to counsel attaches, as well as what constitutes a critical stage of a criminal proceeding, see DEFENDER MANUAL at 12.4.

The contours of constitutional rights to counsel in situations other than those covered by the Sixth Amendment are less certain, *see generally* LAFAVE at § 11.1, but are not the focus of this chapter. As a practical matter, many of these situations are covered by statutory provisions or well-developed case law. *See, e.g.*, State v. Coltrane, 307 N.C. 511, 514 (1983) (observing that North Carolina statutes provide broader right to counsel than required under federal constitutional law); State v. Hammonds, 370 N.C. 158, 162 (2017) (describing case law related to recognition of Fifth Amendment right to counsel during custodial interrogation in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

B. Fair Opportunity to Retain Counsel. With respect to retained counsel, the United States Supreme Court has held that a defendant's constitutional right to counsel encompasses a "fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53 (1932); State v. McFadden, 292 N.C. 609, 611 (1977) (quoting *Powell*). Put another way, "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." Luis v. United States, 578 U.S. 5, 11 (2016) (quotation and citation omitted). In *Luis*, the Court held that the defendant's right to counsel was violated where the government, acting under a federal statute, froze certain assets unrelated to the defendant's alleged criminal activity, causing the defendant to be unable to afford to retain counsel. While there is no specific amount of time that must be allowed to a defendant in order to retain counsel, the North Carolina Court of Appeals held in one case that a roughly one-month period provided a defendant charged with misdemeanor offenses a fair opportunity to retain new counsel after his original counsel was allowed to withdraw. State v. Sampley, 60 N.C. App. 493, 495-96 (1983), *denial of habeas corpus aff'd*, 786 F.2d 610 (4th Cir. 1986), *cert denied*, 478 U.S. 1008 (1986); *see also* Ineffective Assistance of Counsel, Section II.B., in this Benchbook (discussing constructive denial of counsel claims on the basis of inadequate time to prepare a defense).

1. Disqualification of Retained Counsel. A defendant's right to retain counsel of his or her choice is not absolute; in certain situations a trial court has discretion to disqualify an attorney from representing a defendant on the basis of an actual or potential conflict of interest, even if the defendant wishes to waive the conflict. *Compare* Wheat v. United States, 486 U.S. 153 (1988) (trial court did not err by disqualifying retained counsel from representing codefendants in drug crime conspiracy), State v. Rogers, 219 N.C. App. 296, 302-04 (2012) (trial court did not err in disqualifying retained counsel who might be called as state's witness to testify to firsthand knowledge arising from his longstanding friendship with the defendant), and State v. Taylor, 155 N.C. App. 251, 261-62 (2002) (trial court did not err in disqualifying retained counsel on the basis that counsel previously represented murder victim in

divorce proceedings against the defendant), *with* State v. Shores, 102 N.C. App. 473, 474-75 (1991) (trial court erred by disqualifying retained counsel at early stage of proceedings on basis of possibility that counsel might be called as a witness at trial; appellate court noted it was conceivable that outcome of certain pretrial hearings would eliminate possibility that counsel would testify). *See also* Ineffective Assistance of Counsel, Section II.C., in this Benchbook (discussing conflict of interest claims). Because an improper denial of a defendant's right to retained counsel of choice is structural error that is reversible *per se*, *Rogers*, 219 N.C. App at 300, a trial court must carefully consider a decision to disqualify counsel on the basis of a conflict the defendant wishes to waive and ensure that a decision ordering disqualification in this circumstance is well supported. *Cf*. Mickens v. Taylor, 535 US. 162, 174-76 (2002) (emphasizing that U.S. Supreme Court case law involving conflicts of interest primarily has been developed in the context of multiple representation, as was the case in *Wheat*).

C. Statutory Right to Appointed Counsel. As discussed above, a person who cannot afford to retain counsel is entitled to appointed counsel at state expense in situations where he or she has the constitutional right to counsel. Statutes and case law commonly refer to a person who cannot afford retained counsel as an "indigent person" or an "indigent defendant" and that terminology is used going forward in this document. *See generally* G.S. Ch. 7A, Subch. IX ("Representation of Indigent Persons"). North Carolina statutory law provides a broader right to counsel for indigent persons than required under federal constitutional law. State v. Coltrane, 307 N.C. 511, 514 (1983).

G.S. 7A-450(a) defines an "indigent person" as "a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation . . .." For a fuller discussion of the procedures related to determining indigency, see DEFENDER MANUAL at 12.5.D.

G.S. 7A-451(a) lists the proceedings for which an indigent person has the right to appointed counsel. This list includes, among other proceedings, cases when imprisonment or a fine of $500 or more is likely to be imposed, hearings on petitions for writ of habeas corpus, certain motions for appropriate relief, and probation revocation and extradition hearings. G.S. 7A-451(b) states that entitlement to the services of counsel in the proceedings listed in G.S. 7A-451(a) "begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process." For a fuller discussion of the provisions of G.S. 7A-451, as well as other statutory rights to counsel not overlapping with the Sixth Amendment right, see DEFENDER MANUAL at 12.4.

1. No Right to Appointed Counsel of Choice. While an indigent defendant has the right to appointed counsel in the proceedings listed in G.S. 7A-451(a), the right to appointed counsel does not entitle a defendant to counsel of his or her choice. State v. Kuplen, 316 N.C. 387, 399 (1986). Thus, where there is no basis for the appointment of substitute counsel, *see* Section VI, below, a defendant who is dissatisfied with his or her appointed counsel has the right to decline the unwanted services of that appointed counsel, but a decision to do so essentially requires the defendant to choose self-representation. *Id*. (a defendant's constitutional rights are not violated by requiring a decision between appointed counsel with whom the defendant is unsatisfied and self-representation). If a

defendant dissatisfied with his or her appointed attorney chooses self-representation, the trial court must take a valid waiver of counsel as discussed in Section III. Note that a dissatisfied defendant's refusal to decide whether he or she wishes to proceed with appointed counsel or self-representation is a circumstance that may require a trial court to conduct a forfeiture of counsel analysis, as discussed below in Section V. State v. Simpkins, 373 N.C. 530, 538 (2020).

2. Two Attorneys in Capital Case. In a capital case, an indigent defendant is entitled to appointment of two attorneys. G.S. 7A-450(b1). IDS Rules refer to these attorneys as "lead counsel" and "associate counsel." See IDS Rule 2A.2(c). The North Carolina Supreme Court has held that G.S. 7A-450(b1) is "clearly mandatory" and a trial court commits reversible error by failing to appoint two attorneys for a capital defendant. State v. Hucks, 323 N.C. 574, 576-581 (1988). A capital defendant does not waive his or her right to two attorneys by failing to request an assistant counsel. *Id*. Rather, the trial court has a duty to act *sua sponte* to appoint two attorneys to a capital defendant. *Id*. Failure to do so is reversible error absent a valid waiver by the defendant. *Id*.

The North Carolina Court of Appeals has held that a capital defendant who is able to afford to retain only one attorney is entitled to appointment of an additional attorney at state expense. State v. Davis, 168 N.C. App. 321, 328-30 (2005) (defendant's family retained counsel on his behalf; trial court committed *per se* reversible error by denying retained counsel's motion for the "necessary expense of an assistant counsel"; observing that the North Carolina Supreme Court in State v. Locklear, 322 N.C. 349 (1988), "assumed the propriety" of appointing an additional attorney in such a situation); *see also* State v. Johnson, 341 N.C. 104, 109-10 (1995) (capital defendant was represented by one attorney retained by his family and another appointed by the court). As with indigent capital defendants, the trial court must appoint an additional attorney regardless of whether a defendant able to retain only one attorney has made a motion for appointment an additional attorney. Failure to do so is reversible error absent a valid waiver by the defendant. *Id*.

If a capital defendant wishes to dismiss one of his or her two attorneys and proceed only with the assistance of the remaining attorney, it is good practice to take a valid waiver of counsel with respect to the additional attorney, though it is not clear that doing so is necessary. *Cf*. Johnson, 341 N.C. 104, 111 (confronting this situation and generally discussing principles related to knowing and voluntary waiver of counsel); State v. Williams, 363 N.C. 689, 699 (2009) (noting that right to two attorneys in a capital case is a statutory rather than constitutional right).

IDS Rule 2A.2(e) states that if a retained attorney is permitted to withdraw from representation of a capital defendant because of a failure to fulfill the financial agreement of the representation, "that attorney is not eligible to be appointed to represent the defendant."

D. Right to Self-Representation (Proceeding *Pro Se*). The United States Supreme Court has held that there is a constitutional right to self-representation under the Sixth Amendment. Faretta v. California, 422 U.S. 806, 819 (1975); *see also* State v. Hutchins, 303 N.C. 321, 337 (1981) ("A criminal defendant has the

right under the sixth amendment to refuse representation by an attorney and to conduct his own defense."); G.S. 15A-1242 (defendant's election to represent himself at trial).

A defendant has only two choices: self-representation or representation by counsel – a defendant does not have a right to a "hybrid" representation where he or she serves as "co-counsel" or "lead counsel." State v. Thomas, 331 N.C. 671, 677 (1992); *see also* State v. Bannerman, 276 N.C. App. 205 (2021) (noting that trial court explained to self-represented defendant that he could not have co-counsel). Thus, a defendant who has chosen to proceed with counsel "cannot also file motions on his own behalf or attempt to represent himself." State v. Williams, 363 N.C. 689, 700 (2009). While a trial court does not err by refusing to rule on a represented defendant's *pro se* motion, there is no prohibition on a trial court considering a motion filed by a defendant personally when the defendant is represented by counsel. State v. Howell, 211 N.C. App. 613, 615 (2011) (trial court did not err by addressing the motion and request for dismissal filed by the defendant when represented by counsel; defendant's counsel, the State, and the trial court all agreed to address the motion, which was argued by defendant's counsel in the hearing); State v. Williamson, 212 N.C. App. 393, 397-98 (2011) (concluding that defendant's attorney adopted the defendant's *pro se* motion when the attorney presented evidence to the trial court supporting the motion; finding that trial court did not err in addressing the motion).

1. Right to Self-Representation not Absolute. The right to self-representation is not absolute and may be terminated, denied, or waived in certain circumstances.

a. Serious and Obstructionist Misconduct. A trial court may terminate a defendant's self-representation if the defendant engages in serious and obstructionist misconduct. *Faretta,* 422 U.S. at 834 n.46; State v. McGuire, 297 N.C. 69, 83 (1979) (so stating and citing *Faretta*); State v. Joiner, 237 N.C. App. 513, 525 (2014) (trial court did not err by terminating defendant's self-representation on basis of serious and obstructionist misconduct). Because of the practical difficulties that arise if it becomes necessary to terminate a defendant's self-representation during trial, it can be prudent to appoint standby counsel, as discussed in Section IV, when a defendant elects to proceed *pro se*. *See, e.g.*, *Joiner*, 237 N.C. App. at 516-18 (trial court activated standby counsel midtrial after properly terminating defendant's self-representation; trial court did not err by denying standby counsel's motion for a mistrial as "[i]t is well established that arguments for a mistrial do not carry great weight when the grounds relied upon arise from a defendant's own misconduct" (internal quotation and citation omitted)).

While a trial court may terminate a defendant's self-representation on the basis of serious and obstructionist misconduct, the North Carolina Supreme Court has held that a trial court is not required to do so whenever a defendant's misconduct justifies termination. State v. Cunningham, 344 N.C. 341, 352 (1996) (trial court did not err by allowing defendant to continue self-representation despite outbursts that necessitated his removal from the courtroom at times); State v. LeGrand, 346 N.C. 718, 725 (1997) (trial court did not err by allowing the

defendant to continue self-representation at capital sentencing proceeding despite his insulting statements to jurors). A trial court that terminates a defendant's self-representation should ensure that the record clearly reflects the defendant's misconduct and includes adequate findings of fact and conclusions of law.

b. "Gray Area" Defendants. In *Indiana v. Edwards*, the United States Supreme Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 554 U.S. 164, 177-78 (2008) (describing these defendants as "gray-area defendants"). Thus, a trial court may refuse to accept an otherwise valid waiver of counsel tendered by a gray-area defendant and may insist that the defendant be represented by counsel.

The Court in *Edwards* declined to articulate a particular standard by which judges should determine whether a defendant falls into the "gray area" of having the competence to stand trial but lacking the competence for self-representation. *Id*. at 78. It observed that trial judges "will often prove best able to make . . . fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." *Id*. at 177. For a detailed discussion of competency to stand trial, see Capacity to Proceed in this Benchbook.

The Court noted that its precedent established that the Constitution does not forbid a State from permitting self-representation by a gray-area defendant and that its holding dealt only with whether a State may prohibit self-representation by such a defendant. *Id*. at 174; *see also* State v. Newson, 239 N.C. App. 183, 194-95 (2015) (*Edwards* is inapplicable where a trial court permits self-representation by a defendant who is competent to stand trial).

Interpreting *Edwards* and related precedent, the North Carolina Supreme Court has explained that where a gray-area defendant requests to proceed *pro se*, the trial court has two choices:

> (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel . . . ; or
>
> (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in [*Edwards*].
>
> State v. Lane, 365 N.C. 7, 22 (2011).

If the trial court grants the motion to proceed *pro se*, no special inquiry is necessitated by *Edwards* and the trial court simply must ensure a constitutionally valid waiver of counsel as in any other case of self-representation. *Newson*, 239 N.C. App. at 194-95. A defendant who is competent to stand trial is competent to waive his or her right to counsel. *Lane*, 365 N.C. at 20 (describing United States Supreme Court precedent on this issue). If the trial court denies the motion to proceed *pro se*, it "must make findings of fact to support its determination that the defendant is 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'" *Id*. at 22 (quoting *Edwards*).

c. Waiver of Right to Self-Representation. The North Carolina Court of Appeals has held that a defendant may waive his or her right to self-representation by failing to assert the right prior to the commencement of trial. State v. Wheeler, 202 N.C. App. 61, 68-69 (2010) (trial court did not err by denying the defendant's mid-trial request to discharge counsel); State v. Ward, 281 N.C. App. 484, 491 (2022) (same). *Wheeler* derived its waiver analysis largely from cases from the United States Court of Appeals for the Fourth Circuit, stating that "if a defendant proceeds to trial with counsel and asserts his right to self-representation only after trial has begun, that right may have been waived, and its exercise may be denied, limited, or conditioned." 202 N.C. App. at 68 (quotation omitted). As an illustration that the commencement of trial is the bright line beyond which a defendant's right to self-representation may be considered waived if not asserted, in *State v. Walters*, 182 N.C. App. 285, 292-93 (2007), the court favorably cited the same Fourth Circuit precedent and held that the trial court erred by requiring the defendant to proceed with counsel where he clearly requested self-representation immediately prior to the commencement of jury selection.

II. The Request to Proceed Pro Se. While there is no prohibition on doing so, a trial court does not have an obligation to proactively inform a defendant of his or her right to self-representation. State v. Hutchins, 303 N.C. 321, 337 (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."). Rather, the trial court's duty to engage in a waiver of counsel inquiry arises when a defendant makes an affirmative statement manifesting his or her desire to proceed without counsel. *Id*. at 338.

A. Clear and Unequivocal Request. A request to proceed without counsel must be clear and unequivocal in order to trigger a judge's duty to act. State v. McGuire, 297 N.C. 69, 81-83 (1979); State v. Atwell, 383 N.C. 437, 447 (2022) (the "triggering act for invoking waiver of counsel" is a defendant's expressed desire for self-representation). In situations involving vague statements by a defendant concerning his or her desire to proceed without counsel or statements of dissatisfaction with defense counsel, the "better practice" is for the trial court to question the defendant to determine whether he or she is in fact making a request to proceed without counsel. *McGuire*, 297 N.C. at 84; State v. Gerald, 304 N.C. 511, 518 (1981). In one case, the North Carolina Court of Appeals held

that the trial court did not err by appointing counsel to a defendant who made contradictory statements about his desire to proceed without counsel by alternately stating that he was reserving his right to counsel and that he wished to have no counsel. State v. Leyshon, 211 N.C. App. 511, 517 (2011).

B. Procedure. Once a defendant makes a clear and unequivocal request to proceed without counsel, it is reversible error to ignore that request, *Faretta,* 422 U.S. at 835, and the judge should engage in the waiver of counsel inquiry, as outlined in Section III. It can be prudent to appoint standby counsel, as discussed in Section IV, when a defendant elects to proceed without counsel. In capital cases, IDS Rule 2A.3(b) requires a trial judge to "immediately notify the IDS Director" if a capital defendant elects to proceed without counsel so that the Director, in his or her discretion, may appoint standby counsel for the defendant.

C. No Claim of Ineffective Assistance. A defendant who proceeds without counsel cannot later assert that the quality of his or her self-representation constituted ineffective assistance of counsel. Faretta v. California, 422 U.S. 806, 834 n.46 (1975); State v. Thomas, 331 N.C. 671, 677 (1992).

III. Taking a Waiver of Counsel.

A. Core Requirement for Waiver. When a defendant has made a clear and unequivocal request to proceed without counsel, the trial court must take a valid waiver of counsel before permitting the defendant to so proceed. State v. Dunlap, 318 N.C. 384, 388 (1986) (valid waiver is a constitutional and statutory requirement). The core requirement of a waiver of the constitutional right to counsel is that it must be knowing, voluntary, and intelligent. State v. Thomas, 331 N.C. 671, 674 (1992).

In *State v. Lindsey*, 271 N.C. App. 118 (2020), the Court of Appeals reversed a defendant's conviction where the trial court's waiver inquiry at an early stage of the case was deficient although a later waiver inquiry immediately before trial fully complied with constitutional and statutory requirements. *Id*. at 132-33 (observing that during the period covered by the deficient waiver the defendant, among other things, argued a motion and confronted plea negotiations, discovery concerns, and evidentiary issues). *Lindsey* illustrates the necessity of taking a valid waiver prior to permitting a defendant to represent him or herself at any critical stage of the criminal proceeding. *See also* State v. Frederick, 222 N.C. App. 576, 581-85 (2012) (prejudicial error to permit the defendant to represent himself at pretrial hearing on motion to suppress without taking valid waiver).

As discussed below, when an indigent defendant wishes to retain counsel, the defendant must waive the right to appointed counsel.

B. Indigent Defendants. An indigent defendant entitled to counsel at state expense must waive two rights before he or she can proceed without counsel: the right to appointment of counsel at state expense and the right to assistance of counsel. State v. McCrowre, 312 N.C. 478, 480 (1984) (trial court erred by requiring defendant to proceed without counsel where the defendant waived right to appointed counsel but did not waive right to assistance of counsel or express intent to proceed without counsel); *Lindsey*, 271 N.C. App. at 130-31 (same). Sometimes an indigent defendant wishes to waive only the right to appointment

counsel at state expense. This could occur, for example, when a family member has agreed to retain an attorney to represent the defendant.

When an indigent defendant waives the right to appointed counsel with the intention of making arrangements for private counsel, the trial court should afford the defendant a reasonable period of time in which to retain counsel. *See* Section I.B (discussing fair opportunity to retain counsel). If the defendant repeatedly fails to obtain counsel after having waived only the right to appointed counsel, the trial court may consider whether the defendant has forfeited the right to assistance of counsel, as discussed below in Section V. State v. Simpkins, 373 N.C. 530, 538 (2020) (stating that "[i]f a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings"); *see also* State v. Schumann, 257 N.C. App. 866, 879-80 (2018) (suggesting that defendant forfeited right to counsel by repeatedly failing to retain counsel despite claiming intent and ability to do so).

1. **Additional Statutory Safeguard.** G.S. 7A-457(a) requires that an indigent defendant's waiver of appointed counsel be in writing and states that the waiver is effective only if the court makes a finding that the "indigent person acted with full awareness of his rights and of the consequences of the waiver." *See Thomas*, 331 N.C. at 675 (describing the directive of G.S. 7A-457(a) that a waiver be in writing as "a further safeguard" of constitutional right to counsel); *see also* IDS Rule 1.6(a) (pertaining to waivers in noncapital cases and restating requirements of G.S. 7A-457(a)); IDS Rule 2A.3(a) (pertaining to waivers in capital cases and restating requirements of G.S. 7A-457(a)). In making this finding, the court must consider, among other things, the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged. G.S. 7A-457(a). The waiver and requisite finding may be memorialized on the Waiver of Counsel Form, AOC-CR-227. The North Carolina Supreme Court has stated that the inquiry required under G.S. 7A-457 is "similar" to the inquiry required for a valid waiver of assistance of counsel under G.S. 15A-1242 and "may be satisfied in a like manner." State v. Fulp, 355 N.C. 171, 176 (2002) (quotation omitted) See Section III.C, below, for a discussion of the waiver inquiry under G.S. 15A-1242. In *State v. Heatwole*, 344 N.C. 1, 18-19 (1996), the court characterized the G.S. 7A-457(a) requirement that a waiver of appointed counsel be in writing as directory rather than mandatory, so long as the trial court complies with the substantive provisions of the statute. *See also Fulp*, 355 N.C. at 176 (same); State v. Jones, 292 N.C. App. 493, 498 (2024) (same, citing *Heatwole* and *Fulp*). Nevertheless, the best practice is to fully comply with the statute by requiring that the waiver be memorialized in writing.

C. Taking a Waiver. To properly take a waiver of assistance of all counsel, the trial court must make a thorough inquiry of the defendant; simply completing the Waiver of Counsel Form, AOC-CR-227, is insufficient and is reversible error. *Thomas*, 331 N.C. at 674 (failure to conduct sufficient waiver inquiry is prejudicial error).

1. **Statutory Requirements.** G.S. 15A-1242 provides that a defendant may proceed without counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

   - Has been clearly advised of the right to the assistance of counsel, including the right to appointed counsel when the defendant is so entitled;
   - Understands and appreciates the consequences of this decision; and
   - Comprehends the nature of the charges and proceedings and the range of permissible punishments.

   Conducting a waiver inquiry in compliance with G.S. 15A-1242 and receiving information from the defendant that the requisite standards have been met satisfies the constitutional requirement that the waiver be knowing, voluntary, and intelligent. The inquiry must be of the defendant, not defense counsel, and must be on the record. State v. Pruitt, 322 N.C. 600, 604 (1988) (bench conference with counsel is insufficient to satisfy G.S. 15A-1242); State v. Callahan, 83 N.C. App. 323, 324-25 (1986) (valid waiver cannot be presumed from silent record). A sufficient inquiry is necessary regardless of a particular defendant's subjective knowledge of the law. State v. Bullock, 316 N.C. 180, 186 (1986) ("Nothing in [G.S. 15A-1242] makes it inapplicable to defendants who are magistrates, or even attorneys or judges."). For a discussion of case law related to what constitutes a thorough inquiry ensuring a defendant's comprehension of the range of potential punishments he or she faces, see *State v. Fenner*, 387 N.C. 330 (2025) (holding that trial court complied with G.S. 15A-1242 despite miscalculating punishment range because both the miscalculation and the actual range were "tantamount to the remainder of [the defendant's] natural life"; noting that because of the complexity of structured sentencing it is prudent for a trial court to ask the State for its own calculation of the punishment range, though the court may not delegate its responsibility for engaging in a proper inquiry) and *State v. Gentry*, 227 N.C. App. 583, 597-600 (2013) (holding that trial court complied with G.S. 15A-1242 despite miscalculating punishment range; defendant was 35 years old and a sentence of 740 months in accordance with the trial court's advice would have resulted in Defendant's incarceration until he reached age 97 whereas a sentence of 912 months in the aggravated range would have resulted in Defendant's incarceration until he reached age 111; both were "tantamount to a life sentence.").

   In *State v. Moore*, 362 N.C. 319, 327 (2008), the North Carolina Supreme Court indicated that the following questions comply with the statutorily mandated inquiry:

   - 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 handicap? Physical handicap?
- 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?

The court explained that while the specific questions listed above are not necessarily required to satisfy G.S. 15A-1242, they illustrate the "thorough inquiry" envisioned by the General Assembly in enacting the statute. *Id*. at 328.

D. Accepting the Waiver. The only basis for denying a waiver is that it is not knowing, voluntary, and intelligent. Thus, a trial court may not deny a waiver based on the defendant's inability to present an effective defense. *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."). Put another way, except for cases involving gray-area defendants (as discussed above in Section I.B.2), a trial court must accept a defendant's knowing voluntary, and intelligent waiver of assistance of counsel and must permit the defendant to proceed with self-representation. State v. Dunlap, 318 N.C. 384, 389 (1986).

As previously noted, the waiver must be memorialized, which may be accomplished by completing the Waiver of Counsel form, AOC-CR-227. This form may be used to memorialize waivers of appointed counsel and waivers of all assistance of counsel. As previously discussed, a completed Waiver of Counsel form does not substitute for a waiver inquiry.

1. Defendant's Intentional Frustration of Waiver Inquiry. The North Carolina Court of Appeals has considered whether trial courts have properly accepted waivers of all counsel in two recent cases involving

defendants who expressed the clear intent to proceed without counsel but then intentionally attempted to frustrate the G.S. 15A-1242 inquiry by refusing to answer the trial court in a straightforward manner or claiming an uncredible lack of understanding of the proceedings or the consequences of waiving counsel. *See* State v. Jastrow, 237 N.C. App. 325, 332-34 (2014) (trial); State v. Faulkner, 250 N.C. App. 412, 415-423 (2016) (probation revocation hearing). In both *Jastrow* and *Faulkner*, the court determined that the defendants made a knowing, voluntary, and intelligent waiver of their right to assistance of counsel, which the trial courts properly accepted. *Id*. *See also* Jonathan Holbrook, *Surviving Your Next Sovereign Citizen,* N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Apr. 11, 2018). Such behavior also may raise a question whether the defendant has forfeited his or her right to counsel by obstruction, as discussed in Section V, thereby rendering the G.S.15A-1242 waiver inquiry moot. *See* State v. Simpkins, 373 N.C. 530, 538 (2020); *State v. Fuller*, ___ N.C. App. ___, 914 S.E.2d 36, 44 (2025) (court's forfeiture analysis considered, among other factors, defendant's conflicting statements about whether he wanted an attorney while refusing to sign a waiver of counsel).

2. **Waiver by Conduct**. The North Carolina Court of Appeals has acknowledged a concept known as "waiver by conduct" that was first articulated in other jurisdictions and does not require a defendant to make an explicit request to proceed without counsel. *See* State v. Blakeney, 245 N.C. App. 452, 464-65 (2016) (identifying *United States v. Goldberg*, 67 F.3d 1092 (3rd Cir. 1995), as a "persuasive" description of the concept). In *Blakeney*, the Court explained that a defendant may be deemed to waive assistance of counsel by engaging in delaying or disruptive behavior, provided the defendant first is warned about the risks of self-representation and that further misconduct will be treated as a request to proceed without counsel. *Id*. Despite language in *State v. Atwell*, 383 N.C. 437, 448 (2022) casting some doubt on the viability of the concept, the Court of Appeals in *State v. Moore*, 290 N.C. App. 610, 633 (2023) and *State v. Jones*, 292 N.C. App. 493, 498 (2024), continued to recognize the possibility of a waiver by conduct. *See also* State v. McGirt, ___ N.C. App. ___, 913 S.E.2d 476 (same; holding that defendant did not waive counsel by conduct since he was not first warned regarding the consequences of the conduct), *temp. stay allowed*, ___ N.C. ___, 913 S.E.2d 444 (2025). The North Carolina Supreme Court has expressly declined to consider whether waiver by conduct is recognized under North Carolina law. State v Simpkins, 373 N.C. 530, 535 n.4 (2020). For further discussion of this issue, see Shea Denning, *Does Waiver by Conduct Remain a Third Way to Lose the Right to Representation?*, N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Apr. 11, 2024) (analyzing *Moore*, *Jones*, and *Atwell*; providing practical suggestions for trial judges confronting defendants engaging in dilatory tactics, including to conduct a waiver inquiry sufficient to satisfy G.S. 15A-1242 in conjunction with warning a defendant of the consequences of misconduct and the risks of self-representation). Behavior that implicates the waiver by conduct concept also may raise a question whether the defendant has forfeited his or her right to counsel by obstruction, as discussed in Section V. *See id*. (noting that trial judges may rely on both forfeiture and waiver by conduct

in cases involving defendants engaging in dilatory tactics); *see also Moore*, 290 N.C. App. at 641 (finding forfeiture regardless of any waiver); *Jones*, 292 N.C. App. at 503 (same).

E. Competency. Sometimes, the defendant's responses during the waiver inquiry raise issues regarding his or her competency or ability to conduct a defense. If a question regarding competency is raised, the trial court should conduct a competency hearing. *See* Capacity to Proceed in this Benchbook. The standard of competency to waive assistance of counsel is the same as the standard of competency to stand trial. Godinez v. Moran, 509 U.S. 389, 398 (1993). That standard is discussed in greater detail in the Capacity to Proceed section of this Benchbook, as are the procedures applicable to situations where competency issues arise. For a discussion of situations where there is a question as to a defendant's ability to conduct his or her own defense, see Section I.D.1.b, above.

A finding that a defendant is competent to waive counsel is not the same as a finding that a waiver is knowing, voluntary, and intelligent. *Godinez*, 509 U.S. at 401. Once a defendant is found to be competent to waive counsel, the court should engage in a standard waiver of counsel procedure, discussed above in Section III.

F. The "Life" of a Waiver.

1. Waiver Entered in District Court. As noted above, a trial court's first involvement with counsel issues in a case often arises at a defendant's first appearance, where a judicial official, usually a district court judge, is responsible for assuring the defendant's right to counsel for future proceedings. G.S. 15A-603. The statute contemplates that a defendant may waive counsel at this early stage of the case. G.S. 15A-603(e) (requiring that a waiver be in writing in accordance with provisions of Article 36 of Chapter 7A); *see also* G.S. 15A-1101 (providing that trial procedure in district court must accord with trial procedure in superior court except for jury trial, recordation, and other provisions that specify their applicability to superior court). In the context of an offense in the original jurisdiction of the superior court, the Court of Appeals held in *State v. Williams*, 65 N.C. App. 498, 504 (1983), that a waiver inquiry in superior court was constitutionally inadequate regardless of the defendant's previous waiver entered at his first appearance in district court. *Williams* construed G.S. 15A-942 as an independent mandate that a superior court judge assure a defendant's right to counsel at arraignment, and if appropriate take a waiver thereof, in "substantially the same manner as at the first appearance in District Court." *Id*. Thus, at least for cases in the original jurisdiction of superior court, a waiver entered in district court appears to be insufficient for subsequent proceedings in superior court and another waiver should be taken.

There is some authority suggesting that a waiver entered in connection with an offense in the original jurisdiction of the district court remains valid for a trial *de novo* in superior court because the trial *de novo* is a continuing part of "one in-court proceeding." State v. Harper, 285 N.C. App. 507, 516-18 (2022); State v. Wall, 184 N.C. App. 280, 284-85 (2007); State v. Watson, 21 N.C. App. 374, 379 (1974). Regardless, because of the limited authority on this issue and the holding in *Williams*, the better practice is for the superior court to take another waiver in cases

on *de novo* appeal where the defendant indicates a continued desire to proceed without counsel.

2. **Waiver Entered in Superior Court.** A waiver taken in superior court is valid until the proceedings are terminated or until the defendant makes known to the court that he or she desires to withdraw the waiver and have counsel. State v. Hyatt, 132 N.C. App. 697, 700 (1999). Notwithstanding language of G.S. 15A-1242 contemplating that a waiver will be taken by "the trial judge," a waiver taken by a superior court judge pre-trial remains valid for trial, even if a different judge presides. State v. Lamb, 103 N.C. App. 646, 648-49 (1991) (G.S. 15A-1242 does not mandate that waiver inquiry "be made by the judge actually presiding at the defendant's trial"). As discussed below, some appellate cases suggest that a defendant who waives counsel at trial but accepts assistance of counsel for purposes of a direct appeal effectively withdraws his or her waiver for purposes of trial court proceedings following the appeal. *See* Section III.F.4.

3. **Resentencing.** As noted above, a resentencing proceeding is a critical stage of prosecution to which the Sixth Amendment right to counsel applies. If a defendant who has not previously waived counsel wishes to proceed without representation at a resentencing proceeding, the trial court must take a valid waiver pursuant to G.S. 15A-1242. State v. Doisey, 277 N.C. App. 270, 274-75 (2021) (trial court erred by not conducting sufficient waiver inquiry at resentencing). If a defendant has previously waived counsel, a question arises as to whether that waiver remains valid at resentencing. In State v. Dorton,182 N.C. App. 34, 38-39 (2007), the Court of Appeals held that the trial court did not err by failing to conduct a waiver inquiry at a resentencing hearing held two days after the defendant waived the right to counsel at an earlier resentencing hearing. However, in a later case considering the duration of a forfeiture of counsel, the Court of Appeals noted the short period of time between the two proceedings in *Dorton* as an important factor supporting the finding that the initial waiver remained valid at the second proceeding. State v. Boyd, 205 N.C. App. 450, 455 n.3 (2010) (distinguishing *Dorton*; holding on other grounds that trial court erred by not conducting sufficient waiver inquiry). Thus, the best practice is for the trial court to make a sufficient waiver inquiry at a resentencing proceeding regardless of whether the defendant previously has waived or forfeited counsel.

4. **Trial Court Proceedings Following Appeal.** Several cases hold that a defendant's forfeiture of counsel at trial does not continue to later trial court proceedings that follow a direct appeal where the defendant has accepted appellate counsel. *See, e.g.*, *Boyd*, 205 N.C. App. at 455 (prior forfeiture did not continue to resentencing following appeal); State v. Boderick, 258 N.C. App. 516, 526 (2018) (prior forfeiture would not continue to new trial following appeal). Though decided in the context of forfeiture, discussion of principles of waiver in these cases posits that accepting appellate counsel withdraws any previous waiver and precludes the waiver from applying at subsequent proceedings. *See Boyd*, 205 N.C. App. at 455. Thus, a new waiver inquiry is necessary where a defendant expresses his or her desire to proceed without representation at a trial court proceeding following representation by appellate counsel.

G. Withdrawal of a Waiver. The defendant bears the burden of moving for withdrawal of a waiver, though the appellate courts have not articulated a comprehensive description of what actions a defendant must take to meet that burden. State v. Hyatt, 132 N.C. App. 697, 700-01 (1999) (so stating). Cases from the North Carolina Court of Appeals indicate that a defendant's request for counsel in open court following a prior waiver of appointed counsel or waiver of all counsel is sufficient to carry this burden, as is the defendant's filing of an affidavit of indigency. State v. Sexton, 141 N.C. App. 344, 346-48 (2000) (treating request for counsel as motion to withdraw prior waiver of appointed counsel); State v. Rogers, 194 N.C. App. 131, 135 (2008) (treating request for appointed counsel as a motion to withdraw prior waiver of all counsel); State v. Elliott, 49 N.C. App. 141, 144 (1980) (filing affidavit of indigency "clearly carried this burden" with respect to withdrawing a waiver of appointed counsel); State v. Clark, 33 N.C. App 628, 629-30 (1977) (defendant filed affidavit of indigency after initially choosing self-representation). As noted above, the Court of Appeals has suggested that a defendant's acceptance of appellate counsel effectively withdraws a prior waiver for purposes of later trial court proceedings.

The court in *Hyatt* held that the defendant's statements at trial indicating that, because he lacked an attorney, he did not know how to question witnesses or prepare an opening statement did not amount to a request to withdraw his previously entered waiver. 132 N.C. App. at 701 (trial court did not have duty to inquire further into defendant's desires related to counsel on basis of these statements). Even when a defendant has not clearly expressed a desire to withdraw a waiver, a trial court may elect to inquire as to the defendant's desire for representation. *Cf*. State v. Watson, 21 N.C. App. 374, 379 (noting that trial court did so). When the trial court allows a defendant to withdraw a waiver, it may be necessary to grant a continuance to allow counsel to prepare for trial. *Cf*. State v. McFadden, 292 N.C. 609, 616 (1977) ("It is implicit in the constitutional guarantees of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense."). *See also* Ineffective Assistance of Counsel, Section II.B., in this Benchbook (discussing constructive denial of counsel claims on the basis of inadequate time to prepare a defense).

There is some authority suggesting that a trial court can require a showing of good cause to support a motion to withdraw a waiver made "late in the game." *See, e.g.*, State v. Smith, 27 N.C. App. 379, 381 (1975); State v. Rogers, 194 N.C. App. 131, 138-40 (2008). The articulation of the good cause required to support such a motion for withdrawal usually refers to a good cause for any delay to the proceedings that would result from granting the motion. *Id*.; *see also* SELECTED COUNSEL ISSUES at 11, n.80 (collecting illustrative cases). The North Carolina Supreme Court does not appear to have squarely addressed whether a defendant must make a showing of good cause for delay when withdrawing a waiver. *See State v. Harvin*, 382 N.C. 566, 582-83 (2022) (recounting the "good cause" analysis applied by a dissenting judge in the lower appellate court but not engaging in such an analysis).

In *State v. Curlee*, 251 N.C. App. 249, 253 (2016), the Court of Appeals discussed the situation where a defendant waives appointed counsel with the intent to retain counsel but later realizes after the case has been continued several times that he or she cannot afford to hire an attorney and therefore wishes to withdraw his or her waiver. In dicta, the court said as follows:

> At that point, judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial. It is not improper in such a situation for the trial court to inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, provided that the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

Id. at 253. The North Carolina Supreme Court's later decision in *State v. Atwell*, 383 N.C. 437, 447-448 (2022) highlights that the approach suggested in *Curlee* is constitutionally sufficient only where an indigent defendant expresses the clear desire not to be represented by appointed counsel if unable to retain counsel. A majority of the court in *Atwell* emphasized that because waiver of counsel must be a "*voluntary* decision," a defendant's unsuccessful efforts to retain counsel cannot be construed standing alone as a manifestation of desire for self-representation. 383 N.C. at 448. Note, however, that if a defendant repeatedly fails to obtain counsel after having waived only the right to appointed counsel, the trial court may consider whether the defendant has forfeited the right to assistance of counsel, as discussed below in Section V. *See also* Shea Denning, *Does Waiver by Conduct Remain a Third Way to Lose the Right to Representation?*, N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Apr. 11, 2024) (noting that the concept of waiver by conduct also may be applicable to such a situation if the defendant has been warned of the consequences of failing to retain counsel, as suggested in *Curlee*, though North Carolina law on the concept is not fully settled in light of *Atwell* and subsequent cases decided by the North Carolina Court of Appeals).

IV. Standby Counsel. When a defendant elects to proceed without counsel, the trial court has discretion to appoint standby counsel. G.S. 15A-1243. The role of standby counsel is defined by statute and is not a typical lawyer-client relationship. *See* State v. Crudup, 277 N.C. App. 232, 237 (2021) (so stating; quoting *State v. Thomas*, 331 N.C. 671, 677 (1992)). Standby counsel assists the defendant "when called upon" and may "bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his [or her] own motion." G.S. 15A-1243. Appointment and compensation of standby counsel must be in accordance with IDS Rules. G.S. 15A-1243; IDS Rule 1.6. As noted above, in capital cases IDS Rule 2A.3(b) requires a trial judge to "immediately notify the IDS Director" if a capital defendant elects to proceed without counsel so that the Director, in his or her discretion, may appoint standby counsel for the defendant.

The trial court may appoint standby counsel over the defendant's objection, see *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975), and has discretion to deny a defendant's request for standby counsel, see State v. Crudup, 277 N.C. App. 232, 239 (2021) (trial court did not err by denying defendant's mid-trial request for standby counsel where defendant otherwise expressed persistent desire to proceed without counsel). If the trial court fails to take a proper waiver of counsel, appointment of standby counsel will not remedy that error. State v. Dunlap, 318 N.C. 384, 389 (1986) (so holding in a case where standby counsel actually participated in the case by advising the

defendant and delivering closing argument); State v. Stanback, 137 N.C. App. 583, 586 (2000); State v. Pena, 257 N.C. App. 195, 208 (2017).

A. Participation of Standby Counsel and Right to Conduct Own Defense. A self-represented defendant's right to conduct his or her own defense requires that he or she "be allowed to control the organization and content of his [or her] own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." State v. Thomas, 134 N.C. App. 560, 565 (1999). Put another way, a self-represented defendant must be afforded "a fair chance to present his [or her] case in his [or her] own way." McKaskle v. Wiggins, 465 U.S. 168, 177 (1984). Given that standby counsel may assist the defendant when called upon, participation by standby counsel that has been approved by the defendant does not impermissibly interfere with a defendant's right to conduct his or her own defense. *See Thomas*, 134 N.C. App. at 565; *see also McKaskle*, 465 U.S. at 176 ("Participation by counsel with a *pro se* defendant's express approval is . . . constitutionally unobjectionable.").

The United States Supreme Court has held that there is "no absolute bar on standby counsel's unsolicited participation" in a proceeding as a constitutional matter but that, "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *McKaskle*, 465 U.S. at 176, 178. Thus, the Court has said that unsolicited participation by standby counsel in the presence of the jury is "more problematic" than such participation outside the presence of the jury. *Id*. at 181. It is good practice for the trial court to inquire whether standby counsel's participation has been requested by the defendant when counsel participates in a proceeding and it is not clear whether the defendant has requested that counsel do so. *See Thomas*, 134 N.C. App. at 565 (trial court so inquired because standby counsel regularly approached the bench with the defendant during bench conferences).

V. Forfeiture of the Right to Counsel. Waiver of counsel is a knowing, intelligent, and voluntary relinquishment of a right; forfeiture of counsel is an involuntary relinquishment. Forfeiture arises when the defendant's egregious misconduct warrants termination of the right to counsel. State v. Simpkins, 373 N.C. 530, 535 (2020).

A. Standard. *Simpkins* was the first North Carolina Supreme Court case to hold that a defendant may forfeit his or her right to counsel. Simpkins favorably recounted analysis from the Court of Appeals in several prior cases. Synthesizing those Court of Appeals holdings while also collecting cases from other jurisdictions, the *Simpkins* court explained that forfeiture may occur where a defendant either seriously obstructs the proceedings or assaults his or her attorney. 373 N.C. at 538; State v. Harvin, 382 N.C. 566, 586-87 (2022) (same). On the issue of obstruction, the court stated as follows:

> If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and

> prevent them from coming to completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel. If the defendant's actions also prevent the trial court from fulfilling the mandate of [G.S.] 15A-1242, the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver.

Simpkins, 373 N.C. at 538; *see also* State v. Patterson, 272 N.C. App. 569, 574 (2020) (interpreting *Simpkins* to require that obstructive conduct delay the proceedings to support finding of forfeiture).

As to an assault on counsel, the court said that forfeiture may occur in situations involving "a defendant who intentionally seriously assaults their attorney. *Simpkins*, 373 N.C. at 538. Subsequent appellate court opinions suggest that this category of forfeiture additionally includes aggressive, profane, or threatening behavior that makes representation of the defendant physically dangerous. *Harvin*, 382 N.C. at 587; *Patterson*, 272 N.C. App. at 574.

Whether a defendant has forfeited the right to assistance of counsel is a highly fact-dependent determination and appellate case law suggests that judges must engage every reasonable presumption against forfeiture. The *Simpkins* court, for example, observed that the defendant's behavior, which included baseless objection to the trial court's jurisdiction, asking questions out of turn, and arguing with the trial court, "was probably very frustrating, and may have been intended to be frustrating" yet did not rise to the level of serious obstruction warranting a finding of forfeiture. In *State v. Atwell*, 383 N.C. 437, 450-51 (2022), the analysis centered on the correctness of the trial court's conclusion that the defendant forfeited assistance of counsel by alternately being appointed counsel and waiving appointed counsel several times over a two-year period while also failing to retain counsel. The North Carolina Supreme Court focused on the degree to which the delay of the defendant's trial actually was caused by the defendant's actions regarding counsel and determined that there was insufficient evidence of intentional obstruction to support the trial court's forfeiture ruling. *Id*. at 453-54. *See also* Brittany Bromell, *N.C. Supreme Court Weighs in, Again, on Forfeiture of Counsel*, N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Feb. 7, 2023) (analyzing *Simpkins*, *Harvin*, and *Atwell*). If a trial court finds forfeiture, it must ensure that the record clearly reflects the defendant's conduct and includes adequate findings of fact and conclusions of law.

Additional recent cases analyzing forfeiture include: *State v. Fuller*, ___ N.C. App. ___, 914 S.E.2d 36, 44 (2025) (defendant forfeited assistance of counsel by repeatedly disrupting trial proceedings, making conflicting statements about whether he wanted an attorney while refusing to sign a waiver of counsel, refusing to acknowledge or work with appointed counsel; and refusing to answer the trial court's questions); State v. McGirt, ___ N.C. App. ___, 913 S.E.2d 476 (defendant did not forfeit assistance of counsel because his firing of attorneys was not "'egregious misconduct' or a flagrant delaying tactic"), *temp. stay allowed*, ___ N.C. ___, 913 S.E.2d 444 (2025); *State v. Jones*, 292 N.C. App. 493, 503 (2024) (defendant forfeited assistance of counsel by engaging in "serious delaying tactics" that stalled the trial for two years); *State v. Smith*, 292 N.C. App. 656, 661-62 (2024) (defendant forfeited assistance of counsel by being combative and interruptive during the majority of his appearances in court, including conduct that was sufficiently egregious to warrant being held in

contempt, and by interacting with appointed counsel in a manner that resulted in the withdrawal of six different attorneys); and *State v. Moore*, 290 N.C. App. 610, 634-41 (2023) (distinguishing *Simpkins*, *Harvin*, and *Atwell* to determine that defendant forfeited assistance of counsel by egregious misconduct, including causing multiple attorneys to withdraw, filing frivolous bar complaints against counsel in coordination with his out-of-state attorney sister whose *pro hac vice* status was revoked, and threatening appointed trial counsel causing her to withdraw mid-trial).

B. The "Life" of a Forfeiture. As noted above, the North Carolina Court of Appeals has held that a forfeiture of counsel at trial does not necessarily extend to later proceedings. State v. Boyd, 205 N.C. App. 450, 455-56 (2010) (defendant's acceptance of appointed appellate counsel "affirmatively ended" his forfeiture of counsel at trial). As with the initial forfeiture analysis, determining the duration of a forfeiture is fact dependent, though a defendant's acceptance of appellate counsel ends forfeiture grounded in conduct preceding the appellate representation. *Id*.; State v. Boderick, 258 N.C. App. 516, 526 (2018).

C. Forfeiture by Gray-Area Defendants. In *State v. Cureton*, the Court of Appeals noted that the United States Supreme Court has not held there to be any constitutional prohibition on finding that a gray-area defendant, see Section 1.D.1.B above, has forfeited his or her right to counsel. 223 N.C. App. 274, 292 (2012) ("Even if defendant could successfully argue that his diminished mental capacity places him in the 'gray-area,' *Indiana v. Edwards* and [*Godinez v. Moran*] make it clear that the constitution does not prohibit the self-representation of a 'gray-area' defendant."). As with any finding of forfeiture, a trial court that determines that a gray-area defendant has forfeited his or her right to counsel should ensure that the record clearly reflects the defendant's conduct and includes adequate findings of fact and conclusions of law.

VI. Substitution of Counsel.

A. Non-Indigent Defendants. As discussed above, non-indigent defendants are entitled to counsel of their own choice and should be afforded a fair opportunity to retain counsel. However, this right may not be exercised in a way that frustrates the administration of justice. State v. Montgomery, 33 N.C. App. 693, 393 (1977). Thus, it is not error to deny a motion to continue made on the day of trial by a non-indigent defendant who wishes to replace private counsel for no valid reason. *Id*. When a defendant timely exercises the right to select counsel and then appears for trial without counsel through no fault of the defendant's (e.g., because counsel has been detained in another court proceeding), a continuance must be granted. State v. McFadden, 292 N.C. 609, 616 (1977) (trial court erred by not granting continuance in such a case).

B. Indigent Defendants. An indigent defendant does not have the right to choose his or her appointed lawyer. However, an indigent defendant's appointed counsel must be replaced if continued representation will deprive the defendant of the right to effective assistance of counsel. State v. Thacker, 301 N.C. 348, 352 (1980).

Substitute counsel must be appointed when original counsel has a conflict of interest that would render his or her representation ineffective. *See* Ineffective Assistance of Counsel, in this Benchbook. Substitute counsel also is required if

original counsel becomes incapacitated or his or her ability to provide competent legal assistance is impaired. State v. Morgan, 359 N.C. 131, 147 (2004). Courts also have said that substitution is necessary where there has been deterioration in communications between the defendant and counsel sufficient to prejudice the defense. *Thacker*, 301 N.C. 348, 353 (1980); State v. Gentry, 227 N.C. App. 583, 587-94 (2013) (discussing but disagreeing with defendant's contention that a "complete breakdown" in communications with appointed counsel entitled defendant to substitute appointed counsel; court noted that to the extent any breakdown in communication existed, the defendant wrongfully caused it). A mere disagreement on trial tactics does not entitle a defendant to substitute appointed counsel. *Thacker*, 301 N.C. at 353; State v. Glenn, 221 N.C. App. 143, 150 (2012).

If the appointment of substitute counsel is not constitutionally required, whether to appoint substitute counsel is a matter within the trial court's sound discretion. State v. Kuplen, 316 N.C. 387, 396 (1986). *See generally* SELECTED COUNSEL ISSUES at 15. If the trial court properly decides not to appoint substitute counsel, the defendant must choose whether to proceed with his or her existing counsel or proceed without counsel and represent him or herself. State v. Moore, 893 N.C. App. 231, 246 (2023) ("practical effect" of choosing to proceed without existing counsel in such a situation is self-representation). Being put to such a choice does not violate a defendant's constitutional rights. *Kuplen*, 316 N.C. at 399. If a defendant chooses to proceed without existing counsel, the trial court should take a valid waiver of counsel. Situations where a defendant refuses to choose how he or she wishes to proceed or refuses to participate in a waiver inquiry may require a trial court to conduct a forfeiture of counsel analysis, as discussed in Section V. State v. Simpkins, 373 N.C. 530, 538 (2020); *see also* Section III.D.1 (discussing a defendant's intentional frustration of a waiver inquiry).

If an indigent defendant wishes to replace his or her appointed counsel with retained counsel, for example through private representation financed by someone else, he or she should be permitted to do so unless the substitution would cause "significant prejudice or a disruption in the orderly process of justice." State v. Goodwin, 267 N.C. App. 437, 441 (2019) (trial court committed reversible error by denying defendant's request to substitute retained counsel for appointed counsel without making a determination as to whether it would cause unreasonable disruption). In *State v. Melton*, 294 N.C. App. 91, 95-98 (2024), *aff'd* __ N.C. __, ___ S.E.2d ___ (2025) (per curiam), the Court questioned the correctness of the standard for substitution described in *Goodwin*, noting that prior to *Goodwin* other Court of Appeals panels applied a balancing test weighing the defendant's right to counsel of his or her choice against the need for speedy disposition of cases and the orderly administration of the judicial process. Nevertheless, the Court found itself bound by *Goodwin* and applied its standard for substitution of appointed counsel with retained counsel. *Id*. at 97.

Though it did not comment on the propriety of the approach, one appellate case noted that a trial court provided a defendant wishing to substitute counsel the opportunity to seek retained counsel but waited to relieve appointed counsel until the defendant was successful in retaining counsel, which he ultimately failed to do. State v. Holloman, 231 N.C. App. 426, 430 (2013) (appointed counsel represented defendant at trial).

A defendant is not entitled to the appointment of substitute counsel when the defendant has wrongfully created a situation where his or her original

appointed counsel must withdraw from representation. State v. Smith, 241 N.C. App. 619, 628-29 (2015) (trial court did not err by failing to appoint substitute counsel where original counsel was allowed to withdraw because the defendant demanded that original counsel engage in unprofessional conduct); *see also* State v. Smith, 292 N.C. App. 656, 660 (2024) (reaching similar result under a forfeiture analysis).

The North Carolina Supreme Court has declined to formulate a specific procedure that a trial court must follow when considering a defendant's motion for substitute appointed counsel. *Thacker*, 301 N.C. at 353. Instead, the Court has said that the extent of a trial court's duty to inquire into the basis for substitution and make associated findings depends on the particular facts of a given case. *Id*. For a discussion of applicable procedure in cases involving a conflict of interest claim raised before or during trial, see Ineffective Assistance of Counsel, Section II.C., in this Benchbook. *See also Thacker*, 301 N.C. at 353 (when faced with a request for appointment of substitute counsel based upon claim of conflict of interest, trial court must satisfy itself that present counsel is competent and that "the nature and degree of the conflict is not such as to render that assistance ineffective"); State v. Holloman, 231 N.C. App. 426, 431-32 (2013) (defendant's statements of dissatisfaction with appointed counsel did not raise conflict of interest issue and therefore did not trigger trial court's responsibility to conduct conflict inquiry).

The issue of substitution of counsel sometimes arises in connection with a defendant's claim of absolute impasse with counsel, see Absolute Impasse, in this Benchbook, but the two analyses are distinct. *Goodwin*, 267 N.C. App. at 441 (so explaining); State v. Ali, 329 N.C. 394, 402-04 (1991) (applying absolute impasse analysis to resolve defendant's claim styled as a denial of counsel Sixth Amendment violation but grounded in facts implicating absolute impasse).

VII. Conflict of Interest in Cases of Joint Representation. When the defense raises a conflict of interest objection due to joint representation of co-defendants, it is reversible error for the trial court to fail to act. *See* Ineffective Assistance of Counsel, Section II.C., in this Benchbook. In this situation, the trial court must either appoint separate counsel or determine, on the record, that the conflict of interest is too remote to warrant separate counsel. *Id*.

When a conflict exists, a defendant may waive the right to counsel unimpeded by a conflict of interest. Many judges ask the following questions to make a record of such a waiver:

- Do you understand that you are entitled to the right to have the independent judgment of an attorney who is free of any possible conflicts of interests?
- Do you understand that, because your attorney is jointly representing you and other defendants, your attorney may be prevented from opening possible plea negotiations on your behalf and from a possible agreement for you to testify for the prosecution in exchange for a lesser charge or a recommendation for leniency?
- Do you understand that you and the other defendants could possibly occupy opposing positions at the trial?
- Do you understand that your attorney's joint representation may cause the jury to link you with one or more of the other defendants?

- Do you understand that one or more of the other defendants may choose to testify in his or her defense, and, if so, your attorney will not be able to cross-examine such defendant on your behalf?
- Do you understand that your attorney may fail or refrain from cross-examining a state's witness about matters helpful to you but harmful to another defendant; and that your attorney may fail to object to the admission of evidence that might otherwise be inadmissible because it helps another defendant but is harmful to you; and that your attorney may fail or refrain from objecting to evidence harmful to you, but of help to another defendant?
- Do you understand that your attorney may be prohibited from attempting to shift the blame from you in the crime charged to a codefendant because your attorney represents both of you?
- Do you understand that if you are convicted, the same attorney will be representing you at the sentencing hearing where aggravating and mitigating circumstances will be considered by the court as they may apply to you and any co-defendants also represented by the same attorney?
- Do you understand that one of the other defendants may plead guilty and thereafter reveal to the state information damaging to you that the attorney received as a result of joint representation?
- I also advise you that it is not possible for me to enumerate all the possible conflicts of interest that might occur between you and your attorney by virtue of your attorneys' joint representation of you and others. Do you understand that there might be other conflicts of interests?
- With these things in mind do you have any questions that you want to ask me about any of these things I have said to you?
- Do you now of your own free will, understandingly and voluntarily waive your right to representation by an attorney who is unhindered by a possible conflict of interest?
- With this in mind are you now satisfied to have Attorney [name of attorney] represent you and also represent [name(s) of codefendant(s) in this case]?

A trial court should memorialize any such waiver and ensure that a complete record is made of the colloquy, waiver, findings of fact. and conclusions of law.

VIII. Entry and Withdrawal of Counsel.

A. Entry. An attorney who enters a criminal proceeding without limiting the extent of his or her representation "undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage." G.S. 15A-143; *see also* State v. Richardson, 342 N.C. 772, 780-82 (1996) (noting that retained attorneys who made a general appearance and never moved to withdraw acknowledged that under G.S. 15A-143 they were obligated to represent the defendant through entry of final judgment regardless of whether they were paid in full); G.S. 15A-141 (describing manner in which an attorney enters a criminal proceeding). An attorney who intends to make a limited appearance must indicate the extent of his or her representation by filing a written notice thereof with the clerk. G.S. 15A-141(3); State v. Bailey, 145 N.C. App. 13, 22-23 (2001) (retained counsel who did not limit his representation

pursuant to G.S. 15A-141(3) was obligated to represent the defendant at all subsequent stages of the case through entry of final judgment where motion to withdraw because of nonpayment was denied).

B. **Withdrawal.** The trial court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause. G.S. 15A-144. The North Carolina Supreme Court has said that whether good cause exists for withdrawal depends on the circumstances of a given case and has declined to set forth any "all-embracing rule" regarding withdrawal. Smith v. Bryant, 264 N.C. 208, 211 (1965). However, as discussed above, an attorney may not continue to represent a defendant where a conflict of interest renders his or her representation ineffective. *See* Ineffective Assistance of Counsel, in this Benchbook. Other than situations where continued representation would result in ineffective assistance of counsel, whether to allow an attorney to withdraw from a case is a matter in the trial court's discretion. State v. Warren, 244 N.C. App. 134, 143 (2015) (denial of motion to withdraw is prejudicial error only where defendant receives ineffective assistance of counsel); State v. Curry, 256 N.C. App. 86, 95-96 (2017) (trial court did not err by denying defense counsel's mid-trial motion to withdraw based upon counsel's contention that he was unable to trust the defendant); State v. Bridges, 290 N.C. App. 81, 84-90 (2023) (trial court did not err by denying defense counsel's motion to withdraw on basis of asserted conflict of interest arising from state's allegation that counsel had improper contact with state's witness; trial court made sufficient inquiry into issue and defendant validly waived any potential conflict).

An attorney who appears for a limited purpose pursuant to G.S. 15A-141(3) "is deemed to have withdrawn from the proceedings, without the need for permission of the court, when that purpose is fulfilled." G.S. 15A-143.

An attorney who contravenes G.S. 15A-143 by making a general appearance and then willfully refusing to appear without first perfecting a withdrawal violates the Rules of Professional Conduct. North Carolina State Bar v. Key, 189 N.C. App. 80, 92 (2008). Such behavior may be grounds for criminal contempt. State v. Key, 182 N.C. App. 624, 629-31 (2007); *see also* Contempt, in this Benchbook. Note that Rule 1.16 of the North Carolina Rules of Professional Conduct describes certain situations where an attorney must withdraw from representation. Comment 3 to Rule 1.16 regarding mandatory withdrawal states that a "lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient" to permit withdrawal. The North Carolina Court of Appeals has held a trial court does not abuse its discretion by allowing counsel to withdraw on the basis of such a statement. State v. Smith, 241 N.C. App. 619, 627 (2015).

IX. **Fees for Appointed Counsel.** Under G.S. 7A-455, a trial court must direct that a civil judgment for the money value of services rendered be appointed counsel be entered against defendants who are convicted, whether at trial or by guilty plea. The value of services must be determined in accordance with IDS Rules and certain factors described by the statute. G.S. 7A-455(b). In addition to the value of services rendered, G.S. 7A-455.1 requires convicted defendants to pay an appointment fee of seventy-five dollars. Before imposing attorney's fees, the trial court must give the defendant notice of the total amount of fees to be imposed and ask the defendant personally whether he or she wishes to be heard on the issue. State v. Friend, 257 N.C. App. 516, 523 (2018) ("Absent a colloquy directly with the defendant on this issue, the requirements of notice

and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard."); State v. Harris, 255 N.C. App. 653, 664 (2017) (defendant must be given notice of the total amount of fees to be imposed; imposition of fees vacated where appointed counsel had not calculated hours worked at the time judgment was entered). For a fuller discussion of attorney's fees for appointed counsel, including requiring the payment of attorney's fees as a condition of probation under G.S. 15A-1343, see DEFENDER MANUAL at 12.9.