

COUNSEL ISSUES

NC SUPERIOR COURT JUDGES CONFERENCE
June 17 -19, 2024




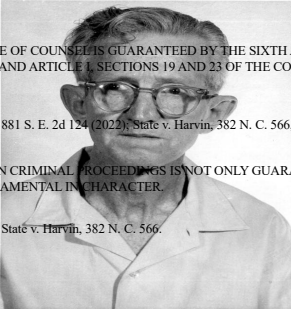
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THE RIGHT TO ASSISTANCE OF COUNSEL IS GUARANTEED BY THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION AND ARTICLE 1, SECTIONS 19 AND 23 OF THE CONSTITUTION OF NORTH CAROLINA.

State v. Atwell, 383 N. C. 437, 881 S. E. 2d 124 (2022); State v. Harvin, 382 N. C. 566, 879 S. E. 2d 147 (2022).

THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS IS NOT ONLY GUARANTEED BUT IS CONSIDERED TO BE FUNDAMENTAL IN CHARACTER.

State v. Atwell, 383 N. C. 437; State v. Harvin, 382 N. C. 566.




2

A DEFENDANT HAS A CONSTITUTIONAL RIGHT IN ALL CRIMINAL CASES TO BE REPRESENTED BY COUNSEL SELECTED AND EMPLOYED BY HIM.

State v. Morris, 275 N. C. 50, 165 S. E. 2d 245 (1969).

AN ELEMENT OF THE RIGHT TO COUNSEL IS THE RIGHT TO RETAIN COUNSEL OF THE ACCUSED'S CHOICE.

State v. Rogers, 219 N. C. App. 296, 725 S. E. 2d 342 (2012).



3

THE UNITED STATES SUPREME COURT HELD IN FARETTA THAT THE SIXTH AND FOURTEENTH AMENDMENTS GUARANTEE THE RIGHT TO ASSISTANCE OF COUNSEL AND FURTHER CONCLUDED THAT A CRIMINAL DEFENDANT LIKEWISE HAS A CONSTITUTIONAL RIGHT TO PROCEED WITHOUT COUNSEL WHEN HE VOLUNTARILY AND INTELLIGENTLY ELECTS TO DO SO.

State v. Lane, 365 N. C. 7, 707 S. E. 2d 210 (2011); State v. Applewhite, 281 N. C. App. 66, 868 S. E. 2d 137 (2021).

EVEN BEFORE FARETTA, IT WAS WELL SETTLED IN NORTH CAROLINA THAT A DEFENDANT HAD A RIGHT TO HANDLE HIS OWN CASE WITHOUT INTERFERENCE BY, OR THE ASSISTANCE OF, COUNSEL FORCED UPON HIM AGAINST HIS WISHES.

State v. Walters, 182 N. C. App. 285, 641 S. E. 2d 758 (2007).



4

THE DEFENDANT'S RIGHT TO REPRESENT HIMSELF IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 23 OF THE NORTH CAROLINA CONSTITUTION.

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

ALTHOUGH HE MAY CONDUCT HIS OWN DEFENSE ULTIMATELY TO HIS OWN DETRIMENT, HIS CHOICE MUST BE HONORED OUT OF RESPECT FOR THE INDIVIDUAL WHICH IS THE LIFEBLOOD OF THE LAW.

State v. Walters, 182 N. C. App. 285, 641 S.E. 2d 758 (2007).



5

SO, WHAT DO YOU DO?

WHICH RIGHT PREVAILS? THE RIGHT TO COUNSEL OR THE DEFENDANT'S RIGHT TO REPRESENT HIMSELF OR HERSELF?



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GIVEN THE SIGNIFICANT IMPORTANCE OF AN ACCUSED'S RIGHT TO COUNSEL, A DEFENDANT MUST CLEARLY AND UNEQUIVOCALLY EXPRESS A DESIRE TO PROCEED PRO SE BEFORE WE WILL DEEM THE RIGHT TO BE WAIVED.

State v. Simpkins, 373 N. C. 530, 838 S. E. 2d 439 (2020).



7

BECAUSE OF THE LEGAL PREEMINENCE OF THE RIGHT TO REPRESENTATION BY COUNSEL AND THE NEED TO MAINTAIN JUDICIAL ORDER, WE HAVE HELD THAT WHILE THE RIGHT TO COUNSEL MAY BE WAIVED ONLY EXPRESSLY, KNOWINGLY, AND INTELLIGENTLY, THE RIGHT TO SELF-REPRESENTATION CAN BE WAIVED BY FAILURE TO ASSERT IT.

State v. Wheeler, 202 N. C. App. 61, 688 S. E. 2d 51 (2010) citing United States v. Singleton, 107 F. 3d 1091 (4th Cir. 1997).



8

A DEFENDANT'S WAIVER OF THE RIGHT TO COUNSEL AND ELECTION TO PROCEED PRO SE MUST BE EXPRESSED CLEARLY AND UNEQUIVOCALLY.

State v. Fulp, 355 N. C. 171, 558 S. E. 2d 156 (2002).




9

IN THIS SCENE,

THE DEFENDANT DID NOT EXPRESS A DESIRE TO WAIVE HIS RIGHT TO COUNSEL.
THE DEFENDANT DID NOT INDICATE THAT HE HAD HIRED COUNSEL.
THE DEFENDANT DID NOT ASK TO REPRESENT HIMSELF.


RIGHT TO COUNSEL NOT WAIVED.
RIGHT TO REPRESENT HIMSELF WAIVED BY NOT ASSERTING IT.



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DO YOU HAVE TO ADVISE A DEFENDANT OF HIS OR HER RIGHT TO SELF-REPRESENTATION?




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NO.

THE RECOGNITION OF A RIGHT UNDER THE CONSTITUTION DOES NOT CARRY WITH IT A CONCURRENT RECOGNITION OF A RIGHT TO BE NOTIFIED OF THE EXISTENCE OF THAT RIGHT.

State v. Hutchens, 303 N. C. 321, 279 S. E. 2d 788 (1981); State v. Ward, 281 N. C. App. 169, 868 S. E. 2d 169 (2022)



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DO YOU WAIVE YOUR RIGHT TO COURT APPOINTED COUNSEL BY HIRING YOUR OWN LAWYER?



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CONCEPTUALLY, IT DOESN'T SEEM TO WORK THAT WAY.



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N. C. GEN. STAT. 7A-450(a) PROVIDES THAT "AN INDIGENT PERSON IS A PERSON WHO IS FINANCIALLY UNABLE TO SECURE LEGAL REPRESENTATION AND TO PROVIDE ALL OTHER NECESSARY EXPENSES OF REPRESENTATION IN AN ACTION."



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A DEFENDANT WHO HAS RETAINED COUNSEL WHO HAS MADE A GENERAL APPEARANCE ON HIS BEHALF IS NO LONGER CONSIDERED INDIGENT WITHIN THE MEANING OF THE STATUTORY FRAMEWORK; UNLESS RETAINED COUNSEL IS ALLOWED TO WITHDRAW FROM THE CASE, THERE IS NO REQUIREMENT TO REDETERMINE DEFENDANT'S STATUS.

State v. Richardson, 342 N. C. 772, 467 S. E. 2d 685 (1996).



16

WHAT HAPPENS IF THE DEFENDANT'S FAMILY HIRES AN ATTORNEY AND THE DEFENDANT ACCEPTS HIM OR HER?



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WE HOLD THAT FROM THIS POINT ON IN THE PRETRIAL PROCEEDING, THE DEFENDANT IS NOT INDIGENT WITHIN THE MEANING OF N. C. GEN. STAT. 7A-450(c), AS HE HAD, THROUGH FAMILY, SECURED PRIVATE REPRESENTATION AND THEREFORE WAS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL.

State v. McDowell, 329 N. C. 363, 407 S. E. 2d 200 (1991).



18

MERE STATEMENTS OF A DESIRE NOT TO BE REPRESENTED BY COURT-APPOINTED COUNSEL DO NOT AMOUNT TO EXPRESSIONS OF THE INTENT TO REPRESENT ONESELF.

State v. Ward, 281 N. C. App. 484, 868 S. E. 2d 169 (2022); State v. Brown, 239 N. C. App. 510, 768 S. E. 2d 816 (2015).



19

HOW DO YOU TAKE A WAIVER OF THE RIGHT TO COUNSEL FROM A DEFENDANT WHO WANTS TO PROCEED PRO SE?

HOW DO YOU DETERMINE THAT THE WAIVER IS MADE KNOWINGLY, VOLUNTARILY AND UNDERSTANDINGLY?



20

YOU MUST COMPLY WITH N. C. GEN. STAT. 15A-1242.



21

WHAT DOES N. C. GEN. STAT. 15A-1242 SAY?

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

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

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments. (1977, c. 711, s. 1.)



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IT'S EASY TO COMPLY. IT'S IN THE BENCHBOOK.
<https://benchbook.sog.unc.edu/>

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?



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THESE SAME QUESTIONS ARE QUOTED IN STATE v. MOORE, 362 N. C. 319, 327-328, 661 S. E. 2d 722 (2008).

- 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?




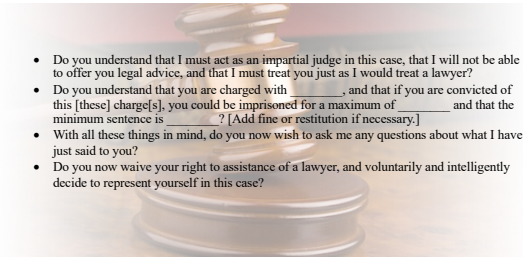
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• Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?

• 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?



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IN MOORE, THE SUPREME COURT OBSERVED THAT “WE TAKE THIS OPPORTUNITY TO PROVIDE ADDITIONAL GUIDANCE TO THE TRIAL COURTS OF THIS STATE IN THEIR EFFORTS TO COMPLY WITH THE ‘THROUGH INQUIRY’ MANDATED BY N. C. GEN. STAT. 15A-1242. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL HAS PUBLISHED A FOURTEEN-QUESTION CHECKLIST ‘DESIGNED TO SATISFY REQUIREMENTS OF’ N. C. GEN. STAT. 15A-1242....”




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26

WHILE THESE SPECIFIC QUESTIONS ARE IN NO WAY REQUIRED TO SATISFY THE STATUTE, THEY DO ILLUSTRATE THE SORT OF THROUGH INQUIRY ENVISIONED BY THE GENERAL ASSEMBLY WHEN THIS STATUTE WAS ENACTED AND COULD PROVIDE USEFUL GUIDANCE FOR TRIAL COURTS WHEN DISCHARGING THEIR RESPONSIBILITIES UNDER N. C. GEN. STAT. 15A-1242.

State v. Moore, 362 N. C. 319, 661 S. E. 2d 722 (2008).




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IN MOST CASES, THE BEST PRACTICE IS FOR TRIAL COURTS TO USE THE 14 QUESTIONS APPROVED IN MOORE WHICH ARE SET OUT IN THE BENCHBOOK.


State v. Jastrow, 237 N. C. App. 325, 334-335, 764 S. E. 2d 663 (2014).



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WHAT IS ENOUGH TO PROVE THAT A DEFENDANT WAIVED HIS RIGHT TO COUNSEL?



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APPELLATE COURTS HAVE PREVIOUSLY STATED THAT WHEN A DEFENDANT EXECUTES A WRITTEN WAIVER WHICH IS IN TURN CERTIFIED BY THE TRIAL COURT, THE WAIVER OF COUNSEL WILL BE PRESUMED TO HAVE BEEN KNOWING, VOLUNTARY AND INTELLIGENT.


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

THE APPELLATE COURTS HAVE ALSO STATED THAT A WRITTEN WAIVER OF COUNSEL IS NO SUBSTITUTE FOR ACTUAL COMPLIANCE WITH N.C. GEN. STAT. 15A-1242.

State v. Hyatt, 132 N. C. App. 697.

OUR SUPREME COURT HAS CONSIDERED A WRITTEN WAIVER AS SOMETHING IN ADDITION TO THE REQUIREMENTS OF N. C. GEN. STAT. 15A-1242, NOT AS AN ALTERNATIVE TO IT.

State v. Hyatt, 132 N. C. App. 697.



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CAN YOU RELY ON ANOTHER JUDGE'S ACTIONS?



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WE DO NOT READ N. C. GEN. STAT. 15A-1242 AS MANDATING THAT THE INQUIRY BE MADE BY THE JUDGE ACTUALLY PRESIDING AT THE DEFENDANT'S TRIAL.

State v. Kinlaw, 152 N. C. App. 84, 566 S. E. 2d 738 (2002).

A THOROUGH INQUIRY INTO THE THREE SUBSTANTIVE ELEMENTS OF THE STATUTE, CONDUCTED AT A PRELIMINARY STAGE OF THE PROCEEDING, MEETS THE REQUIREMENTS OF N. C. GEN. STAT. 15A-1242 EVEN IF IT IS CONDUCTED BY A JUDGE OTHER THAN THE JUDGE WHO PRESIDES AT THE SUBSEQUENT TRIAL.

State v. Kinlaw, 152 N. C. App. 84, 566 S. E. 2d 738 (2002).

IN KINLAW, ANOTHER JUDGE CONDUCTED THE INQUIRY AND THERE WAS NO TRANSCRIPT. ALTHOUGH THERE IS NO TRANSCRIPT OF THE WAIVER PROCEEDING, THERE IS A PRESUMPTION OF REGULARITY ACCORDED TO THE OFFICIAL ACTS OF PUBLIC OFFICERS.



32

THE INQUIRY UNDER N. C. GEN. STAT. 15A-1242 IS MANDATORY, AND FAILURE TO CONDUCT IT IS PREJUDICIAL ERROR.

State v. Thomas, 331 N. C. 671, 417 S. E. 2d 473 (1992).

A JUDGE ERRS BY NOT MAKING THE PROPER INQUIRY.


State v. Moore, 362 N. C. 319, 661 S. E. 2d 722 (2008).



33

YOU CAN DECIDE WHETHER TO RELY ON ANOTHER JUDGE'S ACTIONS WHEN YOU PROBABLY DON'T HAVE A TRANSCRIPT.


THERE IS A RISK INVOLVED.



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CAN YOU DENY A DEFENDANT'S REQUEST TO PROCEED PRO SE BECAUSE HE OR SHE DOESN'T KNOW WHAT HE OR SHE IS DOING?



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DEFENDANT'S TECHNICAL LEGAL KNOWLEDGE IS NOT RELEVANT TO AN ASSESSMENT OF HIS KNOWING RIGHT TO DEFEND HIMSELF.


State v. Lane, 365 N. C. 7, 707 S. E. 2d 210 (2011); State v. LeGrande, 346 N. C. 718, 487 S. E. 2d 727 (1997).

A DEFENDANT NEED NOT HIMSELF HAVE THE SKILL AND EXPERIENCE OF A LAWYER IN ORDER COMPETENTLY AND INTELLIGENTLY TO CHOOSE SELF-REPRESENTATION.

Faretta v. California, 422 U. S. 806, 95 S. Ct. 2575, 45 L. Ed. 2d 562 (1975).

THE SIXTH AMENDMENT DOES NOT PERMIT A TRIAL COURT TO DENY A REQUEST FOR SELF-REPRESENTATION SIMPLY BECAUSE A DEFENDANT WOULD BE BETTER OFF KEEPING HIS LAWYER.

State v. Jastrow, 237 N. C. App. 325, 764 S. E. 2d 663 (2014).



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WHAT ABOUT DEFENDANTS WHO HAVE CAPACITY ISSUES?



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THE UNITED STATES SUPREME COURT REJECTED THE NOTION THAT COMPETENCE TO PLEAD GUILTY OR TO WAIVE THE RIGHT TO COUNSEL MUST BE MEASURED BY A STANDARD THAT IS HIGHER THAN (OR EVEN DIFFERENT FROM) THE DUSKY STANDARD.

State v. Lane, 365 N. C. 7, 20, 707 S. E. 2d 210 (2011)

A HEIGHTENED STANDARD OF COMPETENCE IS NOT REQUIRED TO PROCEED PRO SE.

State v. Lane, 365 N. C. at 20.



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NOR DO WE THINK THAT A DEFENDANT WHO WAIVES HIS RIGHT TO ASSISTANCE OF COUNSEL MUST BE MORE COMPETENT THAN A DEFENDANT WHO DOES NOT, SINCE THERE IS NO REASON TO BELIEVE THAT THE DECISION TO WAIVE COUNSEL REQUIRES AN APPRECIABLY HIGHER LEVEL OF MENTAL FUNCTIONING THAN THE DECISION TO WAIVE OTHER CONSTITUTIONAL RIGHTS.

State v. Payne, 256 N. C. App. 572, 808 S. E. 2d 476 (2017).



39

GRAY-AREA DEFENDANTS

WHAT THE HECK IS A GRAY-AREA DEFENDANT??



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A GRAY-AREA DEFENDANT IS A DEFENDANT "WHOSE COMPETENCE FALLS INTO THE 'GRAY-AREA' BETWEEN DUSKY'S MINIMAL CONSTITUTIONAL REQUIREMENT THAT MEASURES A DEFENDANT'S ABILITY TO STAND TRIAL AND A SOMEWHAT HIGHER STANDARD THAT MEASURES MENTAL FITNESS FOR ANOTHER LEGAL PURPOSE."

State v. Lane, 365 N. C at 21.

BY DEFINITION, A GRAY-AREA DEFENDANT SATISFIES THE DUSKY STANDARD FOR MENTAL COMPETENCE. HOWEVER, IT IS DEBATABLE WHETHER A GRAY-AREA DEFENDANT IS TRULY COMPETENT TO REPRESENT HIMSELF AT TRIAL.

State v. Cureton, 223 N. C. App. 274, 734 S. E. 2d 572 (2012).



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THE CONSTITUTION PERMITS A STATE TO LIMIT A DEFENDANT'S SELF-REPRESENTATION RIGHT BY INSISTING ON REPRESENTATION BY COUNSEL AT TRIAL—ON THE GROUND THAT THE DEFENDANT LACKS THE MENTAL CAPACITY TO CONDUCT HIS TRIAL DEFENSE UNLESS REPRESENTED.

IN SUCH CIRCUMSTANCES, JUDGES MAY TAKE REALISTIC ACCOUNT OF THE PARTICULAR DEFENDANT'S MENTAL CAPACITIES BY ASKING WHETHER A DEFENDANT WHO SEEKS TO CONDUCT HIS OWN DEFENSE AT TRIAL IS MENTALLY COMPETENT TO DO SO.


State v. Lane, 365 N. C. at 21.



42


ALTHOUGH THE HOLDINGS OF LANE AND WRAY INDICATE THAT NORTH CAROLINA COURTS STRONGLY DISFAVOR SELF-REPRESENTATION BY GRAY-AREA DEFENDANTS, NEITHER CASE EXPRESSLY FORBIDS IT.

State v. Cureton, 223 N. C. App. 274, 734 S. E. 2d 572 (2012).



43

DO YOU HAVE TO HEAR THE DEFENDANT'S PRO SE MOTIONS WHEN HE IS REPRESENTED BY COUNSEL?




44

NO.

HAVING ELECTED REPRESENTATION BY APPOINTED DEFENSE COUNSEL, DEFENDANT CANNOT ALSO FILE MOTIONS ON HIS OWN BEHALF OR ATTEMPT TO REPRESENT HIMSELF. DEFENDANT HAS NO RIGHT TO APPEAR BOTH BY HIMSELF AND BY COUNSEL.

Slate v. Williams, 363 N. C. 689, 686 S. E. 2d 493 (2009).



45

DOES A DEFENDANT HAVE A RIGHT TO ACT AS LEAD COUNSEL IN HIS OWN DEFENSE?



46

NO.

A DEFENDANT HAS ONLY TWO CHOICES —TO APPEAR IN PROPRIA PERSONA OR, IN THE ALTERNATIVE, BY COUNSEL. THERE IS NO RIGHT TO APPEAR BOTH IN PROPRIA PERSONA AND BY COUNSEL.

State v. Thomas, 331 N. C. 671, 417 S. E. 2d 473 (1992).



47

HOW DO YOU HANDLE "INTERNATIONAL BITCH ABOUT YOUR LAWYER DAY?"



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WHAT IS THE STANDARD FOR DECIDING WHETHER TO REMOVE A DEFENDANT'S ATTORNEY?



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IT IS A TWO-TIERED STANDARD.



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A TRIAL COURT IS CONSTITUTIONALLY REQUIRED TO APPOINT SUBSTITUTE COUNSEL WHENEVER REPRESENTATION BY COUNSEL ORIGINALLY APPOINTED WOULD AMOUNT TO DENIAL OF DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

State v. Morgan, 359 N. C. 131, 604 S. E. 2d 886 (2004); State v. Thacker, 301 N. C. 348, 271 S. E. 2d 252 (1980); State v. Smith, 241 N. C. App. 619, 773 S. E. 2d 114 (2015).



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N. C. GEN. STAT. 15A-144 PROVIDES THAT THE COURT MAY ALLOW AN ATTORNEY TO WITHDRAW FROM A CRIMINAL PROCEEDING UPON A SHOWING OF GOOD CAUSE.

State v. Thomas, 350 N. C. 315, 514 S. E. 2d 486 (1999); State v. Warren, 244 N. C. App. 134, 780 S. E. 2d 835 (2015).

IN ORDER TO GRANT SUBSTITUTE COUNSEL, A DEFENDANT MUST SHOW GOOD CAUSE, SUCH AS A CONFLICT OF INTEREST, A COMPLETE BREAKDOWN IN COMMUNICATION, OR AN IRRECONCILABLE CONFLICT WHICH LEADS TO AN APPARENTLY UNJUST VERDICT.

State v. Gary, 348 N. C. 510, 501 S. E. 2d 57 (1998); State v. Holloman, 231 N. C. App. 426, 751 S. E. 2d 638 (2013); State v. Covington, 205 N. C. App. 254, 696 S. E. 2d 183 (2010).



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THE DECISION TO SUBSTITUTE COUNSEL RESTS SOLELY IN THE DISCRETION OF THE TRIAL COURT.

State v. Morgan, 359 N. C. 131, 604 S. E. 2d 886 (2004). See also State v. Gary, 348 N. C. 510, 501 S. E. 2d 57 (1998).

IN THE ABSENCE OF A CONSTITUTIONAL VIOLATION, THE DECISION WHETHER APPOINTED COUNSEL SHALL BE REPLACED IS SOLELY FOR THE DISCRETION OF THE TRIAL COURT.

State v. Kuplen, 316 N. C. 387, 343 S. E. 2d 793 (1986); State v. Cozort, 260 N. C. App. 86, 817 S. E. 2d 599 (2018); State v. Gentry, 227 N. C. App. 583, 743 S. E. 2d 235 (2013).



53

AN INDIGENT DEFENDANT HAS NO RIGHT TO REPLACE APPOINTED COUNSEL MERELY BECAUSE THE DEFENDANT IS DISSATISFIED WITH THE PRESENT ATTORNEY'S WORK OR BECAUSE OF A DISAGREEMENT OVER TRIAL TACTICS.

State v. Prevatte, 356 N. C. 178, 570 S. E. 2d 440 (2002); State v. Kuplen, 316 N. C. 387, 343 S. E. 2d 793 (1986); State v. Glenn, 221 N. C. App. 143, 726 S. E. 2d 185 (2012).

A DEFENDANT DOES NOT HAVE THE RIGHT TO INSIST THAT NEW COUNSEL BE APPOINTED MERELY BECAUSE HE HAS BECOME DISSATISFIED WITH THE ATTORNEY'S SERVICES.


State v. Anderson, 350 N. C. 152, 513 S. E. 2d 296 (1999); State v. Cozart, 260 N. C. App. 96, 817 S. E. 2d 599 (2018).



54

TRIAL COUNSEL, WHETHER COURT-APPOINTED OR PRIVATELY EMPLOYED, IS NOT MERELY THE LACKEY OR MOUTHPIECE OF HIS CLIENT.

State v. Prevatte, 356 N. C. 178, 570 S. E. 2d 440 (2002); State v. Robinson, 290 N. C. 56, 224 S. E. 2d 174 (1976)



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THE EFFECTIVENESS OF REPRESENTATION CANNOT BE GAUGED BY THE AMOUNT OF TIME COUNSEL SPENDS WITH THE ACCUSED; SUCH A FACTOR IS BUT ONE CONSIDERATION TO BE WEIGHED IN THE BALANCE.

State v. Anderson, 350 N. C. 152, 513 S. E. 2d 296 (1999).

REPEATED VISITS TO A DEFENDANT'S JAIL CELL AT A PARTICULAR LEVEL OF FREQUENCY ARE NOT NECESSARILY INCIDENT TO DEVELOPMENT OF AN ATTORNEY-CLIENT RELATIONSHIP. AN ATTORNEY IS OBLIGATED TO CONSULT WITH HIS CLIENT WHENEVER THE NEED ARISES.

State v. Hutchins, 303 N. C. 321, 336, 279 S. E. 2d 788 (1981).




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AN ATTORNEY'S FORMER TENURE AS AN ASSISTANT DISTRICT ATTORNEY DOES NOT CREATE A CONFLICT.

State v. Gray, 292 N. C. 270, 233 S. E. 2d 905 (1977).



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THE CONSTITUTIONAL RIGHT TO COUNSEL DOES NOT ENCOMPASS A RIGHT TO HAVE APPOINTED COUNSEL WHO IS WILLING TO ENGAGE IN UNPROFESSIONAL CONDUCT.

State v. Smith, 241 N. C. App. 619, 773 S. E. 2d 114 (2015).



58

IN DETERMINING WHETHER DEFENDANT AND COUNSEL HAVE BECOME EMBROILED IN SUCH AN IRRECONCILABLE CONFLICT THAT INEFFECTIVE REPRESENTATION IS LIKELY TO RESULT, TRIAL COURTS PROPERLY RECOGNIZE THAT IF A DEFENDANT'S CLAIMED LACK OF TRUST IN, OR INABILITY TO GET ALONG WITH, AN APPOINTED ATTORNEY WERE SUFFICIENT TO COMPEL APPOINTMENT OF SUBSTITUTE COUNSEL, DEFENDANTS WOULD EFFECTIVELY HAVE A VETO POWER OVER ANY APPOINTMENT.

State v. Gentry, 227 N. C. App. 583, 592, 743 S. E. 2d 235 (2013) (quoting People v. Crandell, 46 Cal. 3d 833, 860, 760 P. 2d 423, 435-36 (1988)).

THE DEGREE TO WHICH THE DEFENDANT IS RESPONSIBLE FOR AN ALLEGED BREAKDOWN IN COMMUNICATIONS IS HIGHLY RELEVANT TO THE DETERMINATION OF WHETHER SUBSTITUTE COUNSEL SHOULD BE APPOINTED.

State v. Gentry, 227 N. C. App. 583, 743 S. E. 2d 235 (2013).



59

WHEN FACED WITH A REQUEST TO SUBSTITUTE COUNSEL, A TRIAL COURT HAS AN OBLIGATION TO CONDUCT A SUFFICIENT INQUIRY TO DETERMINE IF THE DEFENDANT IS ENTITLED TO THE APPOINTMENT OF SUBSTITUTE COUNSEL.

State v. Williams, 363 N. C. 689, 686 S. E. 2d 493 (2009).

IT IS THE OBLIGATION OF THE COURT TO INQUIRE INTO DEFENDANT'S REASONS FOR WANTING TO DISCHARGE HIS ATTORNEY AND TO DETERMINE WHETHER THOSE REASONS ARE LEGALLY SUFFICIENT TO REQUIRE THE DISCHARGE OF COUNSEL.

State v. Holloman, 231 N. C. App. 426, 751 S. E. 2d 638 (2013).



60

ARE YOU PERMITTED/REQUIRED TO CONDUCT THIS INQUIRY IN AN EX PARTE HEARING?



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A TRIAL COURT DOES NOT HAVE TO AUTOMATICALLY HOLD AN EX PARTE HEARING.

State v. Prevatte, 356 N. C. 178, 570 S. E. 2d 440 (2022).

A DEFENDANT HAS A RIGHT TO PREPARE HIS DEFENSE IN SECRET.

State v. Ballard, 333 N. C. 515, 428 S. E. 2d 178 (1993).

IN OTHER CIRCUMSTANCES, THE SUPREME COURT HAS NOTED THAT "TO EXPOSE THE TESTIMONY AND EVIDENCE SUPPORTING A DEFENDANT'S REQUEST FOR AN INDEPENDENT PSYCHOLOGICAL EVALUATION AND A PSYCHIATRIST'S TRIAL ASSISTANCE LAYS BARE HIS INSANITY OR RELATED DEFENSE STRATEGY."

Ballard, 333 N. C. at 519.



62

CAN A DEFENDANT LOSE HIS RIGHT OF SELF-REPRESENTATION UNDER FARETTA?



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YES.

THE RIGHT OF SELF-REPRESENTATION IS NOT A LICENSE TO ABUSE THE DIGNITY OF THE COURTROOM AND THE TRIAL JUDGE MAY TERMINATE SELF-REPRESENTATION BY A DEFENDANT WHO DELIBERATELY ENGAGES IN SERIOUS AND OBSTRUCTIONIST MISCONDUCT.

State v. McGuire, 297 N. C. App. 69, 254 S. E. 2d 165 (1979); State v. Joiner, 237 N. C. App. 513, 767 S. E. 2d 557 (2014).

DEFENDANT'S ACTUAL DISRUPTION OF THE PROCEEDINGS DEMONSTRATED WHAT WOULD HAVE HAPPENED DURING TRIAL IF DEFENDANT HAD BEEN PERMITTED TO REPRESENT HIMSELF...HIS TRIAL WOULD HAVE BEEN A FARCE.

State v. McGuire, 297 N. C. at 83, State v. Joiner, 237 N. C. App. at 525.



64

N. C. GEN. STAT. 15A-1243 PROVIDES FOR STANDBY COUNSEL:

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 ON HIS OWN MOTION.



65

STANDBY COUSEL:

IS A CREATURE OF STATUTE.

State v. Crudup, 277 N. C. App. 232, 859 S. E. 2d 233 (2021)

WITHIN THE COURT'S DISCRETION TO APPOINT.

State v. Crudup, 277 N. C. App. 232, 859 S. E. 2d 233 (2021); State v. Scraphem, 90 N. C. App. 368, 368 S. E. 2d 643 (1988).



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DO YOU HAVE TO ASK DEFENDANT IF HE WANTS STANDBY COUNSEL?



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NO.

State v. Brincefield, 43 N. C. App. 49, 258 S. E. 2d 81 (1979).



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DOES THE DEFENDANT HAVE TO CONSENT TO THE APPOINTMENT OF STANDBY COUNSEL?



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NO.

State v. McGuire, 297 N. C. 69, 254 S. E. 2d 165 (1979).



70

HOWEVER, THE APPOINTMENT OF STANDBY COUNSEL DOES NOT CORRECT ERRORS IN ADDRESSING RIGHT TO COUNSEL ISSUES.

In re Watson, 209 N. C. App. 507, 706 S. E. 2d 296 (2011).



71

WHAT ARE THE DUTIES OF STANDBY COUNSEL?



72

STANDBY COUNSEL'S DUTIES ARE LIMITED BY STATUTE.

State v. Thomas, 346 N. C. 135, 484 S. E. 2d 368 (1997); 331 N. C. 671, 417 S. E. 2d 473 (1992).

"TO ASSIST THE DEFENDANT WHEN CALLED UPON"

"TO BRING TO THE JUDGE'S ATTENTION MATTERS FAVORABLE TO THE DEFENDANT UPON WHICH THE JUDGE SHOULD RULE UPON HIS OWN MOTION."



73

ALLOWING STANDBY COUNSEL TO ADVOCATE ANY POSITION OVER A PRO SE DEFENDANT'S OBJECTION INTERFERES WITH HIS EXERCISE OF HIS RIGHT TO REPRESENT HIMSELF. A DEFENDANT'S RIGHT TO REPRESENT HIMSELF IS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY THE NORTH CAROLINA CONSTITUTION.

A DEFENDANT APPEARING PRO SE HAS A RIGHT TO HANDLE HIS OWN CASE WITHOUT INTERFERENCE BY, OR THE ASSISTANCE OF, COUNSEL FORCED UPON HIM AGAINST HIS WISHES.

State v. Thomas, 346 N. C. 135, 484 S. E. 2d 368 (1997).



74

CAN A PRO SE DEFENDANT GET AN ATTORNEY AT THE LAST MINUTE?




75

WHEN A DEFENDANT WAITS UNTIL NEAR THE BEGINNING OF HIS TRIAL TO MOVE TO WITHDRAW HIS WAIVER OF THE RIGHT TO COUNSEL, THE BURDEN IS ON THE DEFENDANT TO SHOW GOOD CAUSE FOR THE DELAY.

State v. Rogers, 194 N. C. App. 131, 699 S. E. 2d 77 (2008).

THE TRIAL COURT MUST WEIGH THE CAUSE FOR WHICH THE DEFENDANT REQUESTS TO WITHDRAW HIS WAIVER, WITH DUE CONSIDERATION TO THE DEFENDANT'S TIMING OF HIS MOTION AND THE COURT'S NEED TO CONDUCT ITS BUSINESS IN AN ORDERLY AND TIMELY FASHION.


State v. Rogers, 194 N. C. App. 131, 669 S. E. 2d 77 (2008).



76

THE DEFENDANT DELAYED UNTIL THE DAY HIS CASE WAS SCHEDULED FOR TRIAL BEFORE MOVING TO WITHDRAW THE WAIVER AND HAVE COUNSEL ASSIGNED. IF THIS TACTIC IS EMPLOYED SUCCESSFULLY, DEFENDANTS WILL BE PERMITTED TO CONTROL THE COURSE OF LITIGATION AND SIDETRACK THE TRIAL.


State v. Hoover, 174 N. C. App. 596, 621 S. E. 2d 303 (2005); State v. Clark, 33 N. C. App. 628, 235 S. E. 2d 628 (1977); State v. Smith, 27 N. C. App. 379, 219 S. E. 2d 277 (1975).



77

THE RULING ON A DEFENDANT'S REQUEST FOR ASSIGNMENT OF COUNSEL ON THE DAY OF TRIAL IS JUDGED ON AN ABUSE OF DISCRETION STANDARD.

State v. Rogers, 194 N. C. App. 131.



78

IF A DEFENDANT PROCEEDS TO TRIAL WITH COUNSEL AND ASSERTS HIS RIGHT TO SELF-REPRESENTATION ONLY AFTER THE TRIAL HAS BEGUN, THAT RIGHT MAY HAVE BEEN WAIVED AND ITS EXERCISE MAY BE DENIED, LIMITED OR CONDITIONED. ACCORDINGLY, AFTER TRIAL HAS BEGUN WITH COUNSEL, THE DECISION WHETHER TO ALLOW THE DEFENDANT TO PROCEED PRO SE RESTS IN THE SOUND DISCRETION OF THE TRIAL COURT.

State v. Wheeler, 202 N. C. App. 61, 688 S. E. 2d 51 (2010); State v. Walker, 182 N. C. App. 285, 641 S. E. 2d. 285 (2007).



79

WAIVER VERSUS FORFEITURE



80

THERE IS AN IMPORTANT AND DISTINCT DIFFERENCE.

WAIVER OF COUNSEL IS A VOLUNTARY DECISION BY A DEFENDANT.

State v. Atwell, 383 N. C. 437, 881 S. E. 2d 124 (2022).

A WAIVER IS ORDINARILY AN INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A KNOWN RIGHT OR PRIVILEGE.

State v. Harvin, 382 N. C. 566, 879 S. E. 2d 147 (2022).



81


FORFEITURE OF THE RIGHT TO COUNSEL IS NOT AN EXPRESS CHOICE TO PROCEED PRO SE, BUT RATHER IS A LOSS OF THE RIGHT TO COUNSEL WHICH IS IMPOSED AS A RESULT OF A DEFENDANT'S EGREGIOUS MISCONDUCT.

State v. Atwell, 383 N. C. at 449.

FORFEITURE RESULTS IN THE LOSS OF A RIGHT REGARDLESS OF THE DEFENDANT'S KNOWLEDGE THEREOF AND IRRESPECTIVE OF WHETHER THE DEFENDANT INTENDED TO RELINQUISH THE RIGHT.

State v. Harvin, 382 N. C. at 586.


DIFFERENCE: GIVING AWAY THE RIGHT VS. HAVING IT TAKEN AWAY.



82

EVEN IF A DEFENDANT'S CONDUCT IS HIGHLY FRUSTRATING, FORFEITURE IS NOT CONSTITUTIONAL WHERE ANY DIFFICULTIES OR DELAYS ARE NOT SO EGREGIOUS THAT THEY FRUSTRATED THE PURPOSES OF THE RIGHT TO COUNSEL ITSELF.

State v. Atwell, 383 N. C. at 449.


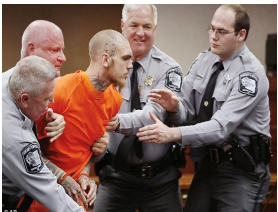


83

THE FIRST GROUP OF FORFEITURE CASES INVOLVES A CRIMINAL DEFENDANT'S DISPLAY OF AGGRESSIVE, PROFANE OR THREATENING BEHAVIOR.

DISRUPTION OF COURT BY PROFANITY AND ASSAULTING HIS ATTORNEY IN COURT.
State v. Montgomery, 138 N. C. App. 521, 530 S. E. 2d 66 (2000).

YELLING OBSCENITIES IN COURT, THREATENING THE JUDGE AND BELLIGERENT BEHAVIOR.
(State v. Joiner, 237 N. C. App. 513, 767 S. E. 2d 557) (2014).



84

SECOND GROUP OF CASES INVOLVES SERIOUS OBSTRUCTION OF THE PROCEEDINGS.

THE SECOND BROAD TYPE OF BEHAVIOR WHICH CAN RESULT IN A CRIMINAL DEFENDANT'S FORFEITURE OF THE CONSTITUTIONAL RIGHT TO COUNSEL IS AN ACCUSED'S DISPLAY OF CONDUCT WHICH CONSTITUTES A SERIOUS OBSTRUCTION OF THE PROCEEDINGS.

State v. Harvin, 382 N. C. 566, 879 S. E. 2d 147 (2022).



85

SOME ACTIONS THAT HAVE BEEN CONSIDERED TO CONSTITUTE THIS TYPE OF BEHAVIOR ARE:

- FIRING MULTIPLE LAWYERS,
- EXCESSIVE DELAY IN HIRING COUNSEL,
- REPORTING ATTORNEYS TO THE BAR,
- MAKING STATEMENTS THAT HE "WAS NOT GOING TO BE TRIED,"
- REFUSING TO SIGN WAIVERS OR TO INDICATE WISHES WITH RESPECT TO COUNSEL,
- ASSERTING NON-SENSICAL JURISDICTIONAL ARGUMENTS OR LEGAL THEORIES.

State v. Blakeney, 245 N. C. App. 452, 782 S. E. 2d 88 (2016).



86

ONCE GIVEN, 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.

State v. Boyd, 205 N. C. App. 450, 697 S. E. 2d 392 (2010); State v. Hyatt, 132 N. C. App. 697, 513 S. E. 2d 90 (1999).

THE BURDEN OF ESTABLISHING A CHANGE OF DESIRE FOR THE ASSISTANCE OF COUNSEL RESTS UPON THE DEFENDANT. (Trial court erred in failing to allow a defendant who had lost his job and now desired to have appointed counsel to withdraw an earlier waiver of appointed counsel.)

State v. Sexton, 141 N. C. App. 344, 539 S. E. 2d 675 (2000).

FORFEITURE OF COUNSEL BY A DEFENDANT HELD TO END AT THE CONCLUSION OF THE TRIAL AND THE FORFEITURE DID NOT CONTINUE THROUGH A RESENTENCING HEARING. (Defendant was represented by counsel on appeal after the trial and before the resentencing).

State v. Boyd, 205 N. C. App. 450.



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THANK YOU

Robert C. Ervin
Superior Court Judge

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