12.6 Waiver of Counsel

A. *Faretta* Right to Self-Representation

Generally. Implicit in the Sixth Amendment right to counsel is the right to reject counsel and represent oneself. *See Faretta v. California*, 422 U.S. 806 (1975) (criminal defendant has Sixth Amendment right to refuse counsel and conduct his or her own defense); *State v. Thacker*, 301 N.C. 348 (1980). *But cf. Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (declining to recognize constitutional right of self-representation on direct appeal of criminal conviction but also recognizing that appellate courts may allow defendant to represent self).

Any waiver of counsel must be voluntarily and understandingly made. "[T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *Thacker*, 301 N.C. at 354; *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.5(d), at 752–59 (discussing circumstances in which court need not honor defendant's request to proceed pro se).

In some instances, a defendant may waive the right to self-representation by delay in asserting it. *Compare State v. Wheeler*, 202 N.C. App. 61 (2010) (not error for trial court to deny defendant's motion to discharge counsel after defendant waived counsel, then requested appointed counsel for jury selection; court expressly told defendant he would not be permitted to discharge counsel again, and defendant tried to discharge counsel after trial began), *with State v. Walters*, 182 N.C. App. 285 (2007) (no waiver of right to self-representation).

In certain non-criminal cases involving allegations of mental infirmity, North Carolina's statutes appear to require representation by counsel. *See, e.g.*, G.S. 122C-268(d) (in cases in which person is alleged to be mentally ill and subject to in-patient commitment, counsel shall be appointed if person is indigent or refuses to retain counsel although financially able to do so); G.S. 35A-1107 (guardian ad litem for person alleged to be incompetent unless person retains own counsel). *But cf. In re Watson*, 209 N.C. App. 507 (2011) (holding that evidence was insufficient to show that respondent in involuntary commitment proceeding knowingly and voluntarily waived right to counsel; court does not resolve respondent's alternative argument that commitment statutes do not permit self-representation in involuntary commitment proceeding). There are similar provisions concerning juveniles. *See* G.S. 7B-602(b) (in abuse and neglect proceedings, guardian ad litem required under Rule 17 of N.C. Rules of Civil Procedure for parent who is under 18 years of age and not married or otherwise emancipated); G.S. 7B-1101.1(b) (to same effect for termination of parental rights proceedings); G.S. 7B-2000 (appointment of counsel for juvenile in delinquency proceedings); G.S. 7B-2405(6) (no right to self-representation by juvenile in delinquency proceeding at adjudicatory hearing).

For more information on the right to self-representation and related counsel issues, see

Jessica Smith, *Selected Counsel Issues in North Carolina Criminal Cases*, ADMINISTRATION OF JUSTICE BULLETIN No. 2007/04 (UNC School of Government, July 2007), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0704.pdf.

No ineffective assistance of self-representation. A defendant who waives his or her right to counsel and appears pro se has no right to claim ineffective assistance of counsel as to his or her own performance. *See State v. Thomas*, 331 N.C. 671 (1992); *State v. Brunson*, ___ N.C. App. ___, 727 S.E.2d 916 (2012); *cf. State v. Rogers*, 194 N.C. App. 131 (2008) (pro se defendant did not have right to access to legal materials). However, a defendant may have a claim for ineffectiveness based on the performance of counsel before the defendant elected to proceed pro se. *See also infra* "Standby counsel" in § 12.7A, Cases in which Right Arises.

No right to notice of right to self-representation. The trial court has no constitutional obligation to inform a defendant of the right to proceed without counsel. The defendant must affirmatively express a desire to proceed pro se. *See State v. Hutchins*, 303 N.C. 321 (1981) (expression of dissatisfaction with one's attorney is not expression of desire to proceed pro se and does not trigger any duty on part of trial court to determine whether defendant wants to proceed without counsel).

No right to hybrid representation. A defendant must choose between representation by counsel or self-representation. There is no right to appear pro se and by counsel. *See State v. Thomas*, 331 N.C. 671(1992) (defendant has only two choices—to appear pro se or by counsel); *accord State v Porter*, 303 N.C. 680 (1981). A court does not violate an indigent defendant's right to counsel by requiring the defendant to choose between continuing to be represented by his or her current appointed counsel or proceeding pro se; an indigent defendant does not have the right to different appointed counsel unless grounds warrant substitution of counsel. *See State v. Kuplen*, 316 N.C. 387 (1986); *see also supra* § 12.5J, Removal and Withdrawal of Counsel.

A court may refuse to consider a motion filed by a defendant personally when the defendant is represented by counsel. *Compare State v. Williams*, 363 N.C. 689, 700 (2009) (defendant cannot file motions on his or her own behalf while represented by counsel; defense counsel did not adopt motions by stating, "The defendant filed some *pro se* motions. We need rulings on those."), *with State v. Williamson*, 212 N.C. App. 393 (2011) (because counsel adopted defendant's motion by submitting evidence to support it, trial court was not prohibited from ruling on defendant's request to dismiss assault charge), *and State v. Howell*, 211 N.C. App. 613 (2011) (trial court could rule on defendant's motion to dismiss where counsel argued the issue; in addition, trial court and State consented to addressing issue). *See also State v. Glenn*, ___ N.C. App. ___, 726 S.E.2d 185, 193 n.1 (2012) (dismissing defendant's pro se motion for appropriate relief from sentence while represented by counsel on appeal).

These principles do not appear to bar a pro se defendant from obtaining the advice of an attorney outside the proceedings. A N.C. State Bar ethics opinion takes the position that an attorney may give advice to a pro se litigant without making an appearance in the

proceeding and without disclosing or ensuring that the litigant discloses the assistance to the court unless disclosure is required by law or court order. *See* North Carolina State Bar, 2008 Formal Ethics Opinion 3 (2009).

Standby counsel. A defendant who waives the right to counsel may be appointed standby counsel. *See* G.S. 15A-1243. The duties of standby counsel are to: (i) assist the defendant when called on to do so by the defendant; and (ii) bring to the judge's attention matters favorable to the defendant that the judge should rule upon on his or her own motion.

A recently enacted statute may be at odds with the limited role of standby counsel in a narrow situation. Under G.S. 15A-1225.1(e), if the court allows a child to testify remotely, the court must ensure that defense counsel is physically present where the child is testifying and has the opportunity to cross-examine the child witness and communicate privately with the defendant. If the defendant is appearing pro se, however, the statute does not require that the defendant be present. Rather, under G.S. 15A-1225.1(g), if the court has appointed standby counsel to assist the defendant, only standby counsel is permitted to be present where the child testifies. This procedure may violate the prohibition on hybrid representation because it appears to permit standby counsel to conduct the cross-examination of the child and thus act as counsel for a pro se defendant.

For a further discussion of standby counsel, see *infra* "Standby counsel" in § 12.7A, Cases in which Right Arises.

No right to be represented by layperson. *See State v. Sullivan*, 201 N.C. App. 540 (2009).

B. Mandatory Procedures for Waiving Counsel

Constitutional requirements. Before allowing a defendant to proceed pro se, the trial judge must establish two things: (i) that the defendant "clearly and unequivocally" expressed a desire to proceed without counsel, and (ii) that the defendant "knowingly, intelligently, and voluntarily" waived the right to counsel. *See State v. LeGrande*, 346 N.C. 718, 723 (1997); *State v. Thomas*, 331 N.C. 671 (1992) (defendant who equivocated and asked for lawyer as assistant did not waive right to counsel); *State v. Worrell*, 190 N.C. App. 387 (2008) (trial court did not pressure or coerce defendant into accepting appointed counsel and conducted thorough inquiry before defendant voluntarily revoked waiver of counsel); *see also infra* § 12.6C, Capacity to Waive Counsel.

Statutorily-required inquiry. When a defendant indicates a desire to represent himself or herself, the trial judge has a statutory obligation under G.S. 15A-1242 to conduct an inquiry as to whether the defendant knowingly, intelligently, and voluntarily wishes to waive the right to counsel. This statutory inquiry is necessary to safeguard the defendant's constitutional right to counsel. *See State v. Pruitt*, 322 N.C. 600 (1988) (inquiry to be made by trial court under G.S. 15A-1242 is mandatory; failure to make inquiry is reversible error); G.S. 15A-1101 (requirements in G.S. 15A-1242 apply to district court). *But cf. In re P.D.R.*, 365 N.C.533 (2012) (finding that G.S. 15A-1242 does

not apply to waiver of counsel in termination of parental rights proceedings; court does not address whether inquiry is required as matter of due process when respondent seeks to waive right to counsel). [*Legislative note:* Effective for actions pending on or after Oct. 1, 2013, S.L. 2013-129 (H 350) amends G.S. 7B-602 and G.S. 7B-1101.1 to require that waivers of appointed counsel be knowing and voluntary in abuse, neglect, dependency, and termination of parental rights proceedings.]

Before permitting a defendant to proceed pro se, the trial judge must satisfy himself or herself that the defendant:

- has clearly been advised of the right to counsel;
- understands the consequences of his or her decision; and
- comprehends the nature of the charges and the range of possible punishments.

See G.S. 15A-1242; *State v. Rich*, 346 N.C. 50 (1997) (recognizing these requirements); *see also State v. Moore*, 362 N.C. 319 (2008) (trial court failed to make thorough inquiry into defendant's waiver of right to counsel; court sets out checklist of sample questions that trial courts could ask). For a list of the questions cited in *Moore*, see Jessica Smith, *Counsel Issues*, *in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK, (UNC School of Government, Jan. 2010), *available at* http://benchbook.sog.unc.edu/criminal/counsel-issues.

In evaluating a waiver, the court must consider the defendant's age, education, familiarity with English, mental condition, the complexity of the crime charged, and other factors bearing on whether the waiver is knowing and intelligent. *See* G.S. 7A-457(a).

Requirement of written waiver. In addition to the procedure in G.S. 15A-1242 for the taking of waivers, G.S. 7A-457(a) provides that an indigent person's waiver of counsel for in-court proceedings (that is, trial and other court proceedings) must be in writing. (G.S. 7A-457(c) states that waivers of counsel for out-of-court proceedings may be oral or in writing.) *See also* IDS Rule 1.6(a) (waiver in noncapital case must be in writing); IDS Rule 2A.3(a) (waiver of counsel in capital case must be in writing).

The North Carolina Supreme Court has held that in no case may a waiver of counsel be presumed from a silent record. *See State v. Neeley*, 307 N.C. 247 (1982); *State v. Blackmon*, 284 N.C. 1 (1973) (failure to request attorney does not constitute waiver). The Court has also held, however, that a waiver is not necessarily invalid because of the absence of a written waiver. *See State v. Fulp*, 355 N.C. 171 (2002). Together, these principles mean that if there is no written waiver, the State must produce other record evidence affirmatively showing that the defendant validly waived counsel. Even if a written waiver exists, the waiver may be invalid if the court failed to conduct the necessary inquiry or the waiver was otherwise not knowing and voluntary. *See, e.g.*, *State v. Sorrow*, ___ N.C. App. ___, 713 S.E.2d 180 (2011) (although defendant executed two waiver of counsel forms, trial court failed to conduct statutory inquiry; waivers not presumed knowing, intelligent, and voluntary where rest of record indicates otherwise);

State v. Cox, 164 N.C. App. 399 (2004) (error where judge failed to proceed with required statutory inquiry and only directed defendant to execute a written waiver); *State v. Wells*, 78 N.C. App. 769 (1986) (record demonstrated that, contrary to certified written waiver of counsel, trial court did not properly advise defendant before taking waiver); *see also State v. Kinlock*, 152 N.C. App. 84 (2002) (when defendant executes written waiver, which is certified by trial court, waiver of counsel will be presumed to have been knowing, intelligent, and voluntary unless rest of record indicates otherwise), *aff'd per curiam*, 357 N.C. 48 (2003).

Requirement of waiver of appointed and retained counsel. For an indigent defendant to proceed without counsel, he or she must waive both appointed and retained counsel. The AOC waiver of counsel form, AOC-CR-227 (www.nccourts.org/forms/Documents/686.pdf), reflects this requirement by including boxes for waiver of appointed counsel and the assistance of all counsel. A waiver of assigned counsel does not constitute a waiver of the right to the assistance of all counsel, and it is the trial court's responsibility to clarify the scope of any waiver. *See infra* "Improperly requiring defendant to proceed pro se" in § 12.6D, Withdrawal of Waiver of Counsel.

Illustrative cases. The North Carolina courts have frequently addressed the issue of whether a waiver of counsel was knowing, intelligent, and voluntary. In the following recent cases, the courts found a valid waiver:

State v. Jones, ___ N.C. App. ___, 725 S.E.2d 415 (2012) (trial judge explained that defendant could continue with appointed counsel or represent himself and strongly suggested that defendant not proceed pro se; court reviews entire colloquy and finds that trial judge complied with statutory requirements)

State v. Paterson, 208 N.C. App. 654 (2010) (defendant's failure to check appropriate box on waiver form and trial court's failure to inform defendant of charges and potential punishments before defendant executed form did not render waiver invalid; judge later informed defendant of the charges and punishments)

In the following cases, the courts found the purported waiver invalid:

State v. Frederick, ___ N.C. App. ___, 730 S.E.2d 275 (2012) (trial court failed at suppression hearing to adequately advise defendant of the possible maximum punishment before accepting defendant's election to proceed without counsel; statute requires thorough inquiry and specificity for valid waiver)

State v. Ramirez, ___ N.C. App. ___, 724 S.E.2d 172 (2012) (defendant waived only his right to appointed counsel and trial court mistakenly believed defendant had waived right to all counsel)

State v. Watlington, ___ N.C. App. ___, 716 S.E.2d 671 (2011) (trial court allowed defendant to represent himself without completing the required inquiry; defendant's expressions of dissatisfaction with prior counsel and desire to proceed pro se insufficient

to show waiver)

C. Capacity to Waive Counsel

Generally. The U.S. Supreme Court has held that there is only one standard of capacity and that a defendant who is capable of standing trial is capable of waiving the right to counsel. *See Godinez v. Moran*, 509 U.S. 389 (1993). However, evidence relevant to the issue of capacity may bear on the issue of whether the defendant's waiver of counsel is knowing, voluntary, and intelligent. Thus, a defendant who is marginally capable of standing trial, although capable of waiving the right to counsel, may still be incapable of knowingly and intelligently doing so. *See State v. Thomas*, 331 N.C. 671 (1992) (mentally ill defendant who made inconsistent request "to proceed pro se with assistance of counsel" did not knowingly and intelligently waive right to counsel); *State v. Gerald*, 304 N.C. 511 (1981) (mentally ill defendant with IQ of 65, who told judge that courtroom made him dizzy and that he wanted to get proceeding over with, did not intelligently waive right to representation).

Capacity to represent self. The U.S. Supreme Court has held further that states may *require* representation by counsel of defendants who are capable of standing trial but who lack the mental capacity to represent themselves. *See Indiana v. Edwards*, 554 U.S. 164 (2008) (characterizing such defendants as in the "gray-area" between capacity to stand trial and mental fitness to represent themselves). After the issuance of *Edwards*, the North Carolina Supreme Court initially appeared to indicate that a "gray-area" defendant may not proceed without counsel in North Carolina. *State v. Lane* [*Lane I*], 362 N.C. 667 (2008) (remanding to trial court to determine whether defendant was within category of "gray-area" defendants described in *Edwards* and should have been permitted to represent himself); *accord State v. Wray*, 206 N.C. App. 354 (2010) (so construing *Lane I*); *see also In re P.D.R.*, 212 N.C. App. 326 (2011) (finding in reliance on *Lane I* that trial court erred in failing to conduct *Edwards* inquiry before accepting respondent's waiver of counsel in termination of parental rights proceeding), *rev'd on other grounds*, 365 N.C. 533 (2012). Under this approach, in deciding whether to allow a defendant to proceed pro se, the trial judge must determine (1) whether the defendant is capable of proceeding, (2) whether the defendant has the mental capacity to represent himself or herself, and (3) whether the defendant's waiver is knowing and voluntary.

Subsequently, however, the N.C. Supreme Court appears to have made the second inquiry discretionary with the trial judge. Once a trial judge determines that a defendant is capable of proceeding, the judge either may allow the defendant to proceed pro se if the defendant knowingly and voluntarily waives the right to counsel, or may refuse to allow the defendant to proceed pro se if the defendant is not mentally capable of doing so. *State v. Lane* [*Lane II*], 365 N.C. 7 (2011) (setting out these options and finding that the trial court upheld the defendant's rights by allowing him to proceed pro se after determining that his waiver of counsel was knowing and voluntary); *accord State v. Nackab*, ___ N.C. App. ___, 714 S.E.2d 209 (2011) (unpublished) (construing *Lane II* as holding that the U.S. Supreme Court's decision in *Edwards* applies only if the trial court refuses to allow the defendant to proceed pro se; since trial court allowed the defendant to

proceed pro se, *Edwards* was not applicable and the only question was whether the defendant knowingly and voluntarily waived the right to counsel).

A "gray-area" defendant may forfeit the right to counsel if he or she engages in conduct amounting to a forfeiture. *State v. Cureton*, ___ N.C. App. ___, 734 S.E.2d 572 (2012) (trial court did not err in finding defendant forfeited right to counsel where defendant engaged in serious misconduct, e.g., shouted at and insulted his attorneys and spat on and threatened to kill one of them); *cf. State v. Wray*, 206 N.C. App. 354, 362 (2010) (defendant's misbehavior was the same evidence that cast doubt on his capacity to proceed and represent himself and did not amount to serious misconduct associated with forfeiture). For a further discussion of forfeiture issues, see *infra* § 12.6E, Forfeiture of Right to Counsel.

Although the N.C. Supreme Court in *Lane II* declined to adopt a statewide approach to waivers of counsel by "gray-area" defendants and authorized trial judges to decide whether to conduct an *Edwards* inquiry in each case, as a practical matter trial judges may be inclined to conduct a full inquiry to ensure that a defendant is capable of representing himself or herself and receives a fair trial. *See Cureton*, ___ N.C. App. ___, 734 S.E.2d 572, 583–86 (2012) (observing that although not explicitly forbidden, the cases "indicate that North Carolina courts strongly disfavor self-representation by 'gray-area' defendants"; also observing that "it is debatable whether a "gray-area" defendant is truly competent to represent himself at trial").

D. Withdrawal of Waiver of Counsel

Generally. The courts have stated that "[o]nce 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. Hyatt*, 132 N.C. App. 697, 700 (1999).

Despite the seeming restrictiveness of this statement, an indigent defendant who has waived counsel has several opportunities to obtain appointed counsel, discussed below, and the burden on the defendant is ordinarily minimal. Even if the defendant does not explicitly request counsel, the failure of the court on its own initiative to inquire about the defendant's wishes may violate the right to counsel.

Limitations of waiver. For certain proceedings, a waiver of counsel is limited to that proceeding, and the defendant need not affirmatively rescind the waiver for other proceedings. For example, a waiver of counsel for out-of-court proceedings, such as a waiver of the right to counsel at interrogation or at a nontestimonial identification procedure, should have no effect on a defendant's right to counsel at trial and other in-court proceedings. If the defendant waives counsel for all trial-level proceedings, the waiver remains in effect only until conclusion of the trial; it should not apply to subsequent proceedings at which the defendant has a right to counsel, such as probation revocation proceedings or appeal. A waiver of counsel in district court for trial on a misdemeanor also should not be sufficient itself to constitute a waiver of counsel in

subsequent superior court proceedings. *See generally State v. Wall*, 184 N.C. App. 280 (2007) (defendant waived counsel and was tried and convicted in district court; where defendant executed another waiver of counsel at pretrial proceeding in superior court following appeal for trial de novo, trial judge did not need to redo full inquiry before allowing defendant to proceed pro se at trial).

Improperly requiring defendant to proceed pro se. Courts have erred in the following ways in requiring a defendant to proceed without counsel despite a previous waiver of counsel.

First, at several stages of the proceedings, the trial court has a statutory duty to re-inform an unrepresented defendant of his or her right to counsel and determine whether the defendant wishes to proceed without counsel. *See supra* § 12.5C, Advising Defendant of Right to Counsel. The onus is on the court to inquire about counsel at these stages. *See State v. Sanders*, 294 N.C. 337 (1978) (although court had twice denied counsel to defendant on two previous indictments on ground that defendant was not indigent, rulings did not excuse court from inquiring whether defendant was entitled to appointed counsel when he was arraigned on third indictment joined for trial with other indictments); *State v. Anderson*, ___ N.C. App. ___, 721 S.E.2d 233 (2011) (waiver insufficient where defendant executed written waiver at first appearance in district court, for which there was no record of colloquy, and defendant stated he wanted to proceed pro se at subsequent appearance in superior court, where judge did not engage in required statutory colloquy and did not inform defendant he could request appointed counsel; State also indicted defendant as habitual felon between district and superior court appearances), *aff'd per curiam*, 365 N.C. 466 (2012); *State v. Williams*, 65 N.C. App. 498 (1983) (even though defendant had signed waiver of counsel in district court at first appearance, superior court had duty at arraignment to inform defendant of right to counsel as required by G.S. 15A-942).

The judge presiding at trial need not always be the one who conducts this inquiry, however. *See State v. Kinlock*, 152 N.C. App. 84 (2002) (trial judge need not always conduct inquiry regarding waiver of counsel for trial; another judge may do so at pretrial proceeding), *aff'd per curiam*, 357 N.C. 48 (2003); *see also State v. Dorton*, 182 N.C. App. 34 (2007) (no error where trial court failed to inquire at second resentencing hearing whether defendant wished to withdraw a waiver of counsel he executed eight days earlier before the first resentencing hearing; defendant didn't ask to withdraw waiver).

Second, even after a fully informed defendant has waived counsel, the defendant may change his or her mind and request that counsel be appointed. This situation arises most often with defendants who have waived appointed counsel with the intention of retaining counsel and then have been unable to do so. Generally, the court must give the defendant a reasonable opportunity to hire counsel and, if he or she is unable to do so, must honor the defendant's request for appointed counsel. *See State v. Sexton*, 141 N.C. App. 344 (2000) (reversing revocation of probation where trial court failed to honor defendant's request to withdraw initial waiver). *Sexton* suggests that the burden on the defendant is merely to show a change of desire, but other cases (and certain language in *Sexton*)

indicate that the defendant may have to show some level of good cause to withdraw a previous waiver. *See, e.g.*, *State v. Scott*, 187 N.C. App. 775 (2007) (trial court erred in denying defendant's request for appointed counsel where defendant had good cause to withdraw waiver, telling the court he didn't know hiring counsel would cost "that much"); *State v. Hoover*, 174 N.C. App. 596 (2005) (no error for court to deny defendant's motion to withdraw his waiver of counsel where defendant had four counsel appointments, requested change of counsel four times in 18 months, and complained about his standby counsel two weeks before trial; defendant failed to state a clear request to withdraw his waiver and did not provide a reason for the delayed withdrawal request that constituted good cause); *State v. Atkinson*, 51 N.C. App. 683 (1981) (no duty to continue case or appoint counsel where defendant had signed two waivers of counsel, informed court he had financial resources to retain counsel, and only asked for appointed counsel on day of trial; defendant did not show sufficient facts entitling him to withdraw waiver); *State v. Clark*, 33 N.C. App. 628 (1977) (defendant may not delay until trial request for appointed counsel and thereby sidetrack proceedings); *see also State v. Hyatt*, 132 N.C. App. 697 (1999) (finding it unnecessary to articulate any particular standard for request to withdraw waiver of appointed counsel because defendant made no request). These cases appear comparable to those in which the defendant was alleged to have "forfeited" the right to counsel and may be more appropriately analyzed under that standard. *See infra* § 12.6E, Forfeiture of Right to Counsel. However categorized, a denial of a defendant's request for counsel would seem justified only by excessive dilatoriness by the defendant.

Third, except in circumstances amounting to a forfeiture of the right to counsel, a court may not require a defendant to proceed without the assistance of all counsel based on a waiver of appointed counsel only. This principle again comes into play most often when a defendant waives appointed counsel with the intention of retaining counsel and then is unable to do so. In that instance, even if the defendant does not explicitly request that counsel be appointed, the court may not require the defendant to proceed pro se without clarifying that the defendant wishes to waive the assistance of all counsel. Numerous cases have so held. *See, e.g.*, *State v. McCrowre*, 312 N.C. 478 (1984) (error to require defendant to proceed pro se where defendant waived appointed counsel expecting to employ counsel but found himself financially unable to do so); *State v. Seymore*, ___ N.C. App. ___, 714 S.E.2d 499 (2011) (court could not presume that defendant intended to proceed pro se based on waiver of appointed counsel only); *Hyatt*, 132 N.C. App. 697 (although defendant did not ask that counsel be appointed and did not seek to withdraw waiver of appointed counsel, court erred in requiring defendant to proceed pro se; record did not establish that defendant wished to proceed without assistance of all counsel); *State v. Gordon*, 79 N.C. App. 623 (1986) (without clear indication that defendant desired to proceed pro se, trial court erred in requiring defendant to proceed pro se at suppression hearing after defendant dismissed appointed counsel); *State v. White*, 78 N.C. App. 741 (1986) (following *McCrowre*).

E. Forfeiture of Right to Counsel

In limited circumstances, a defendant may be found to have forfeited the right to counsel

and may be required to proceed without counsel even though he or she has not met the standard for waiving counsel.

In *State v. Montgomery*, 138 N.C. App. 521 (2000), an indigent defendant was twice appointed counsel, and he twice dismissed his appointed attorneys and retained private counsel. He then expressed dissatisfaction with his retained attorney, stated in court that he would not cooperate with his retained attorney, and assaulted the attorney by throwing water at him. The trial judge permitted the retained attorney to withdraw but declined to appoint replacement counsel for the defendant. After a continuance for the purpose of permitting the defendant to seek different private counsel, the defendant represented himself at trial. The court of appeals held in this situation that the defendant had "forfeited," not "waived," his right to counsel, and the trial judge was not required to ensure that the defendant had acted "knowingly, intelligently, and voluntarily" before requiring him to proceed pro se. *See also State v. Cureton*, ___ N.C. App. ___, 734 S.E.2d 572 (2012) (trial court did not err in finding defendant forfeited right to counsel where defendant engaged in serious misconduct, e.g., shouted at and insulted his attorneys and spat on and threatened to kill one of them); *State v. Leyshon*, 211 N.C. App. 511 (2011) (defendant forfeited right to counsel where he obstructed and delayed trial proceedings, refusing to recognize court's jurisdiction and refusing to respond to court's inquiries about whether he wanted counsel, among other things); *State v. Quick*, 179 N.C. App. 647 (2006) (after waiving appointed counsel, defendant forfeited right to retained counsel by failing to retain private counsel during eight months before probation revocation hearing); *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 613 (4th Cir. 1986) (court did not violate defendant's right to counsel by refusing to grant continuance to allow defendant additional time to secure counsel; court should consider whether continuance request results from "the lack of a fair opportunity to secure counsel or rather from the defendant's unjustifiable failure to avail himself of an opportunity fairly given"); *cf. supra* § 12.6D, Withdrawal of Waiver of Counsel (discussing cases in which court refused to allow defendant to withdraw waiver of counsel because of defendant's dilatory tactics).

Forfeiture is not appropriate unless the defendant engages in serious misconduct. *See State v. Wray*, 206 N.C. App. 354, 362 (2010) (defendant did not engage "in the kind of serious misconduct associated with forfeiture of the right to counsel"; defendant's misbehavior was the same evidence that cast doubt on his capacity to proceed and capacity to represent himself); *see also generally* 3 LAFAVE, CRIMINAL PROCEDURE § 11.3(c), at 691–95 (discussing doctrine).

A break in a forfeiture of counsel may occur, restoring the defendant's right to be represented to counsel. *See State v. Boyd*, 205 N.C. App. 450 (2010) (break in forfeiture occurred where, following initial trial at which defendant forfeited right to counsel, defendant appealed and accepted appointed counsel; defendant's forfeiture did not continue through his resentencing hearing following his appeal, and judge erred in failing to conduct a new inquiry under G.S. 15A-1242 to determine whether defendant wanted to proceed pro se at resentencing).