

Chapter 12: Right to Counsel

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Dealing with Conflicts in Criminal Defense Representation (paper presented at May 2002 Public Defender Conference; updated Jan. 2004)

Chapter 12: Right to Counsel

The assistance of counsel is so vital to the proper functioning of the criminal justice system that it has been “deemed necessary to insure the fundamental human rights of life and liberty.” *Gideon v. Wainwright*, 372 U.S. 335, 353 (1962). This chapter addresses the scope of the right to the assistance of counsel. Section 12.1 identifies the constitutional and statutory sources of the right. Section 12.2 discusses the consequences of a violation. Section 12.3 reviews the types of cases in which a person has a right to counsel. Section 12.4 discusses the stages of a criminal case in which a person has the right to have counsel present. Section 12.5 discusses the procedures for appointing counsel. Section 12.6 addresses a defendant’s right to waive counsel and proceed pro se (that is, represent himself or herself without counsel). Section 12.7 describes the law on ineffective assistance of counsel. Section 12.8 addresses the attorney-client relationship and the lawyer’s role and responsibilities within that relationship. Finally, section 12.9 discusses the rules on repayment of attorneys fees, known as recoupment in North Carolina.

12.1 Scope of Right to Counsel

A. Right to Appointed Counsel

A person has a right to have counsel appointed at state expense in various proceedings. The principal sources of the right to counsel are as follows:

- In criminal prosecutions, from the initiation of formal proceedings through judgment at the trial level, a person has a Sixth Amendment right to counsel for all felonies and most misdemeanors. Other constitutional provisions give a criminal defendant the right to counsel in proceedings outside that time frame. For example, the Fifth Amendment protects a person from being interrogated by the police without counsel before the initiation of formal proceedings, while Due Process and Equal Protection give a person the right to counsel on a first appeal of right.
- In proceedings that are not characterized as criminal but may result in a deprivation of liberty or other important right, Due Process may give a person a right to counsel. *See generally Lassiter v. Dep’t of Social Services*, 452 U.S. 18 (1981). A common situation in North Carolina in which a person has a Due Process right to counsel is in civil contempt proceedings, usually for failure to pay child support.
- In certain criminal and non-criminal proceedings in which the right to counsel is not constitutionally guaranteed, North Carolina statutory law guarantees a person the right to counsel. The following discussion deals primarily with criminal and quasi-criminal proceedings, such as juvenile proceedings. For a listing of civil proceedings in which a person has a right to counsel, such as involuntary commitment and termination of parental rights proceedings, *see* Rules of the Commission on Indigent Defense Services (hereinafter “IDS Rules”), Rule 1.1 commentary, posted at

www.ncids.org (also reprinted in North Carolina Rules of Court: State, published by West, and Annotated Rules of North Carolina, published by LexisNexis).

- The North Carolina State Constitution also guarantees the right to counsel, but it is not clear whether those provisions extend beyond federal constitutional and state statutory rights. *See* North Carolina Constitution, Art. I, § 19 (“No person . . . shall be deprived of his life, liberty, or property, but by the law of the land.”); Art. I, § 23 (“In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense . . .”).

In most of the above proceedings, a person is entitled to counsel at state expense only if he or she is indigent. In some instances—for example, a proceeding in which a juvenile is alleged to be delinquent—a person is entitled to have counsel appointed regardless of whether he or she is indigent. *See infra* § 12.5D (discussing indigency requirement).

B. Right to Retained Counsel

The right to appear by retained counsel is at least as broad as the right to appear by appointed counsel. The right to retained counsel is based on both statutory and constitutional grounds. *See* G.S. 15-4 (“[e]very person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense”); *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969) (defendant has constitutional right in every criminal case to retain and appear by counsel of his choice); *see also* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (hereinafter “LAFAVE”) § 11.1(a), at 458–59 (2d ed. 1999).

If a person is convicted without having waived the right to both appointed and retained counsel—for example, the person executes a waiver of appointed counsel but not of retained counsel—the conviction may be challenged as a violation of the person’s right to counsel. *See infra* § 12.6B (discussing waiver requirements).

C. Right to Other Expenses of Representation

An indigent person is entitled not only to the appointment of counsel but also to funds for “other necessary expenses of representation,” such as experts and investigators. G.S. 7A-450(b). This right is based on both statutory and constitutional grounds. For a discussion of applying for funds for experts and other assistance in noncapital cases, *see* NC Defender Manual, Vol. 1, Ch. 5. Since the issuance of that chapter, the procedure in capital cases for applying for funds for experts and investigators has changed. *See* IDS Rules 2D.1 through 2D.4 (in capital cases, counsel applies to IDS for funds for experts).

A person who is able to retain counsel may still be considered indigent for purposes of paying for experts and other expenses of representation and may be entitled to obtain state funds for such services. *See infra* § 12.5F.

12.2 Consequences of Denial of Counsel

A. Suppressing Prior Uncounseled Conviction

Convictions Obtained without Counsel. The state may not rely on a prior, uncounseled conviction in a later proceeding—to impeach the defendant, raise the level of an offense, or enhance a sentence—if the defendant was entitled to counsel, had no counsel, and did not waive counsel. *See* G.S. 15A-980; *Custis v. United States*, 511 U.S. 485 (1994); *see also* G.S. 20-179(o) (in sentencing for impaired driving, court may not consider prior impaired driving conviction obtained in violation of right to counsel).

The onus of raising the invalidity of a conviction is on the defendant. If the defendant fails to raise the issue, he or she waives the right to contest the conviction’s use in that proceeding. *See State v. Thompson*, 309 N.C. 421, 426, 307 S.E.2d 156, 160 (1983) (“Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal.”); G.S. 15A-980(b) (defendant waives right to suppress use of prior conviction based on denial of counsel if he or she does not move to suppress).

Raising Violation in Current Proceeding. The defendant is entitled to challenge the use of a prior uncounseled conviction in the case in which the state proposes to use it—that is, the defendant may “collaterally” attack the conviction. The courts permit this procedure because the failure to provide counsel to an indigent defendant is considered a unique defect. *See Custis v. United States*, 511 U.S. 485 (1994) (so holding; also noting that earlier cases even considered such a violation to be jurisdictional defect that rendered conviction void). Other types of violations—for example, a guilty plea that is not knowing or voluntary (a *Boykin* violation) or deficient performance of counsel—ordinarily cannot be raised in the proceeding in which the conviction is proposed to be used. The defendant must seek to vacate the conviction by filing a motion for appropriate relief in the case in which the conviction was entered. *See Custis, supra*; *State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417 (2003) (defendant could not collaterally attack, based on deficient performance of counsel, conviction used by state as predicate felony for habitual felon status); *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846 (1994) (defendant could not collaterally attack, based on *Boykin* violation, conviction used by state as predicate felony for habitual impaired driving).

Custis did not specifically address whether a defendant could collaterally attack in the current proceeding a prior conviction obtained in violation of the right to retained counsel. However, the waiver of appointed and retained counsel are closely related, and most questions may be resolved by reference to the record of the previous proceedings without the taking of extensive additional evidence, a point of importance to the *Custis* court. Thus, a defendant should be able to raise all denial-of-counsel challenges collaterally.

Timing of Motion. There appear to be two methods for challenging in the current

proceeding the use of a prior conviction. Under one or the other method, a defendant tried in superior court may be able to challenge the use of a prior conviction at the time offered by the state. Unless there are strategic reasons for waiting, however, the safer course is to challenge the conviction's use before trial in superior court. (In misdemeanor cases in district court, a challenge to the use of a prior uncounseled conviction may always be made at trial. *See* NC Defender Manual, Vol. 1, § 14.6A.)

One method for challenging a prior uncounseled conviction is to move to suppress under G.S. 15A-980. That statute authorizes motions to suppress for a denial of counsel in accordance with the requirements for motions to suppress generally. The suppression statutes provide generally that a defendant must move to suppress evidence prior to trial except in specified circumstances. *See* G.S. 15A-975. It is not clear, however, that the legislature intended to require the defendant to move to suppress an uncounseled conviction prior to the phase of the proceedings in which the conviction is offered. Thus, if the state intends to offer a prior conviction at sentencing, it may be permissible under G.S. 15A-980 for the defendant to move to suppress at the outset of the sentencing proceeding, after the defendant has been found guilty of the current offense. *See also* G.S. 15A-1340.14(f), -1340.21(c) (if motion to suppress prior conviction pursuant to G.S. 15A-980 is made during sentencing stage of case, court may grant continuance of sentencing hearing); G.S. 20-179(o) (in deciding on sentence for impaired driving, court must allow defendant opportunity to present evidence that prior impaired driving conviction was obtained in violation of right to counsel). An even stronger argument can be made that a defendant charged with being a habitual felon may move to suppress an uncounseled conviction at the outset of the habitual felon phase, which is based on a separate indictment from the trial of the underlying felony. *See generally State v. Hensley*, 156 N.C. App. 634, 637–38, 577 S.E.2d 417, 420 (2003) (suggesting that defendant may challenge prior conviction at habitual felony sentencing).

Alternatively, the defendant may simply be able to object to the use of a prior conviction at the time the state seeks to offer it in evidence. *See State v. Thompson*, 309 N.C. 421, 427, 307 S.E.2d 156, 161 (1983) (“The defendant may challenge the evidence of prior convictions prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State”; decision discusses G.S. 15A-980, which had been enacted but had not yet become effective).

Proof of Violation. To establish that an uncounseled conviction was obtained in violation of the right to counsel, the defendant must show that he or she (i) was entitled to counsel, (ii) had no counsel, and (iii) did not waive counsel. *See* G.S. 15A-980.

G.S. 15A-980(c) and cases interpreting it state that the defendant must also show that he or she was indigent. *See State v. Rogers*, 153 N.C. App. 203, 569 S.E.2d 657 (2002) (mere assertion by defendant that he could not afford attorney at time of prior conviction was insufficient to prove indigency); *State v. Brown*, 87 N.C. App. 13, 359 S.E.2d 265 (1987) (state permitted to impeach defendant with prior conviction; defendant failed to prove he was indigent at time of conviction). This requirement is unobjectionable when the defendant claims that he or she was improperly denied the right to appointed counsel.

But, the defendant also has a right to be represented by retained counsel, and the courts have found violations when the trial court has required the defendant to proceed pro se without a proper waiver of assistance of all counsel. *See infra* § 12.6D.

B. Suppressing Illegally Obtained Evidence

For evidence taken in violation of a defendant's right to counsel—for example, a statement taken by police in violation of the Fifth Amendment right to counsel or an identification at a police lineup in violation of the Sixth Amendment right to counsel—the defendant may move to suppress the evidence and prevent its use in the current proceeding. *See infra* § 12.4C (discussing stages of case in which defendant has right to counsel and in which violation may require suppression); *see also* NC Defender Manual, Vol. 1, § 14.6 (discussing procedure for suppressing illegally obtained evidence).

C. Precluding Sentence of Imprisonment

A defendant has a right to counsel in misdemeanor prosecutions if the court imposes an active or suspended sentence of imprisonment. *See Alabama v. Shelton*, 535 U.S. 654 (2002). Accordingly, if the defendant is improperly denied counsel, the court is precluded from imposing either an active or suspended sentence of imprisonment. Further, if the court imposes a suspended sentence of imprisonment in violation of the defendant's right to counsel, the court may not activate the defendant's sentence at a probation revocation proceeding regardless of whether the defendant is represented at the revocation proceeding. *See infra* §12.3B.

D. Vacating Uncounseled Conviction

Generally, an uncounseled conviction is automatically subject to reversal. *See Satterwhite v. Texas*, 486 U.S. 249 (1988) (discussing impact of various types of right-to-counsel violations). Where the evil caused by a denial of counsel is limited to the erroneous admission of evidence—for example, the admission of identification testimony obtained in violation of a defendant's right to counsel at a post-indictment lineup—a reviewing court may engage in harmless error analysis. *See id.*; *see also Coleman v. Alabama*, 399 U.S. 1 (1970) (remanding case to lower court to determine whether denial of counsel at preliminary hearing was harmless beyond reasonable doubt).

12.3. Types of Cases in which Right to Counsel Applies

A. Felonies

Generally. The Sixth Amendment guarantees the right to counsel to any indigent person accused of a felony. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Mays*, 14 N.C. App. 90, 187 S.E.2d 479 (1972); *see also* 3 LAFAVE § 11.2(a), at 492 n.10. This right attaches regardless of the punishment that is authorized or imposed for the offense.

Capital Felonies. An indigent defendant charged with a capital crime is statutorily entitled to the appointment of two attorneys to represent him or her at trial and in postconviction proceedings. *See* G.S. 7A-450(b1) (trial); G.S. 7A-451(c) (postconviction).

B. Misdemeanors

Sentence of Actual or Suspended Imprisonment. An indigent person has a Sixth Amendment right to counsel in all misdemeanor cases in which actual imprisonment or a suspended sentence of imprisonment is imposed. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (in misdemeanor cases, “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel”); *Alabama v. Shelton*, 535 U.S. 654 (2002) (indigent defendant has right to appointed counsel in misdemeanor case if court imposes suspended sentence of imprisonment); *see also North v. Russell*, 427 U.S. 328 (1975) (recognizing that in two-tiered court system, such as North Carolina’s district and superior court system, judge at each level must inform indigent defendant of right to counsel if sentence of confinement is to be imposed).

This rule has three effects. First, if the court has not appointed counsel for an indigent defendant and the indigent defendant has not waived counsel, the court is prohibited from imposing an active or suspended sentence of imprisonment. For example, suppose a district court judge refuses to appoint counsel in a misdemeanor case and continues the case to another date, when it will be heard by a second district court judge. If the second judge does not revisit the earlier refusal to appoint counsel and the defendant does not waive counsel, the second judge may not sentence the defendant to an active or suspended term of imprisonment regardless of the evidence presented at trial or sentencing.

Second, if the court imposes a suspended sentence of imprisonment in violation of the defendant’s right to counsel, the court in a later proceeding may not revoke the defendant’s probation and activate the sentence. This prohibition applies even if the defendant is represented by counsel at the probation revocation hearing. *See Shelton, supra*; *State v. Neeley*, 307 N.C. 247, 297 S.E.2d 389 (1982) (trial judge may not activate suspended sentence if, in original proceeding in which suspended sentence was imposed, defendant did not have counsel and had not waived counsel); *accord State v. Barnes*, 65 N.C. App. 426, 310 S.E.2d 30 (1983) (applying *Neeley* to district court case); *State v. Black*, 51 N.C. App. 687, 277 S.E.2d 584 (1981) (to same effect as *Neeley*).

Third, if the court imposed an active or suspended term of imprisonment for a misdemeanor despite the failure to appoint counsel, the conviction should not be available in a subsequent proceeding to impeach, enhance a sentence, or increase the level of an offense. The reason is that when a sentence of imprisonment—actual or suspended—is imposed for a misdemeanor, the case is considered serious enough to require the protection of counsel. As in a felony case, if a conviction is obtained without

counsel having been afforded to the defendant, the conviction should be subject to suppression. In this respect, the U.S. Supreme Court's decision in *Shelton, supra*, which held that an indigent defendant has a right to counsel if a suspended sentence of imprisonment is imposed, appears to modify or at least clarify *Nichols v. United States*, 511 U.S. 738 (1994). *Nichols* held that a prior uncounseled conviction could be used to enhance a defendant's sentence in a subsequent proceeding if the defendant did not have a right to counsel at the prior proceeding. After *Shelton*, a prior conviction should not be useable in a subsequent proceeding if the prior conviction resulted in an active or suspended sentence of imprisonment.

Sentence not Involving Imprisonment. An indigent defendant does not have a Sixth Amendment right to appointed counsel for a misdemeanor if an active or suspended sentence of imprisonment is not imposed. *See Shelton, supra; Scott, supra*. Thus, under the Sixth Amendment, a court may impose a fine or restitution without affording counsel to an indigent defendant if the court does not include an active or suspended term of imprisonment. For a discussion of the consequences of failing to pay, *see infra* § 12.3E

G.S. 7A-451(a)(1) provides indigent criminal defendants with a broader right to counsel. It provides for appointed counsel in "any case in which imprisonment or a fine of five hundred dollars . . . or more, is likely to be adjudged." While it is unclear whether there is a meaningful difference between the statutory language and the constitutional requirements in cases involving imprisonment, the statute appears broader in fine-only cases, providing for counsel when the court imposes a fine of \$500 or more.

C. Juvenile Proceedings

Delinquency. A juvenile who is alleged to be delinquent is entitled to counsel at all proceedings before the juvenile court, including transfer proceedings, adjudications, and disposition hearings. This right is based on both Due Process and state statute. *See* G.S. 7B-2000(a) (juvenile within jurisdiction of juvenile court has right to appointed counsel in all proceedings); G.S. 7A-451(a)(8) (juvenile has right to counsel at hearing in which commitment to institution or transfer to superior court for felony trial is possible); *In re Gault*, 387 U.S. 1 (1967) (recognizing Due Process right to counsel in juvenile delinquency proceedings). Juveniles are "conclusively presumed to be indigent," and if they have not retained counsel, counsel must be appointed for them. G.S. 7B-2000(b).

Undisciplined Behavior. A juvenile generally has no right to appointed counsel in cases in which he or she is alleged to be undisciplined. *See In re Walker*, 282 N.C. 28, 191 S.E.2d 702 (1972); *but see generally Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (Due Process may require appointment of counsel in cases where person's liberty is not at stake but where fundamental fairness requires it); Rule 17(b), North Carolina Rules of Civil Procedure (appointment of guardian ad litem authorized for children, but rule rarely invoked for child alleged to be undisciplined).

A juvenile has the right to appointed counsel in an undisciplined case if he or she is alleged to be in contempt of court. *See* G.S. 7B-2000(a)(ii). The same presumption of

indigency applies as in delinquency proceedings. *See* G.S. 7B-2000(b).

Interrogation of Juveniles. Special rules apply to the interrogation of juveniles. *See infra* § 12.4C.

D. Contempt

Differences between Criminal and Civil Contempt. Criminal contempt is intended to punish a person for a past act in violation of a court order. There are three different types of criminal contempt proceedings:

- Summary proceedings for direct criminal contempt;
- Plenary proceedings for direct criminal contempt; and
- Plenary proceedings for indirect criminal contempt.

In the latter two types of proceedings, an indigent person has a constitutional right to have counsel appointed if imprisonment is imposed.

Civil contempt is intended to coerce a person to comply with a court's order, not to punish for a previous violation. The characterization of contempt as civil or criminal has various procedural consequences. For example, appeal of criminal contempt is to superior court for a trial *de novo*, and appeal of civil contempt is to the court of appeals. *See* Trudy Allen Ennis & Janet Mason, *The Use of Contempt to Enforce Child-Support Orders in North Carolina*, SPECIAL SERIES NO. 1 (Institute of Government, April 1986) (new edition forthcoming).

For purposes of appointment of counsel, the difference between civil contempt and plenary proceedings for criminal contempt (whether direct or indirect) are minimal. In all of those proceedings, an indigent person is entitled to have counsel appointed if imprisonment is imposed.

Summary Proceedings for Direct Criminal Contempt. The court is not required to appoint counsel when imposing summary measures for direct contempt. *See In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967) (summary punishment for direct contempt does not contemplate trial at which person charged with contempt must have counsel).

There are a number of restrictions inherent in these proceedings. First, the contempt must be "direct." *See* G.S. 5A-13 (act must be committed within sight or hearing of presiding official, committed in or in immediate proximity to room where proceedings are being held before court, and likely to interrupt or interfere with matters then before court). For example, a defendant who shouts obscenities at a judge during court proceedings has engaged in direct contempt.

Second, the court must act "summarily"—that is, the court must impose any necessary measures "substantially contemporaneously" with the contempt. G.S. 5A-14(a). If the court delays imposing measures, it must initiate plenary proceedings, discussed below.

Third, before imposing summary punishment, the court must give the defendant summary notice and opportunity to respond and must find facts beyond a reasonable doubt supporting summary measures. *See* G.S. 5A-14(b).

Plenary Proceedings for Direct Criminal Contempt. An indigent person has a right to appointed counsel in plenary proceedings for direct criminal contempt if imprisonment is likely to be imposed. *See* G.S. 7A-451(a)(1); *Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990). A defendant also would appear to be entitled to counsel if the court imposes a suspended sentence of imprisonment. *See supra* § 12.3B (defendant entitled to counsel in misdemeanor case if suspended sentence of imprisonment imposed).

Plenary proceedings for direct criminal contempt are required when the judicial official chooses not to proceed summarily (that is, the judge does not proceed immediately) or is not authorized to proceed summarily. *See* G.S. 5A-15; *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985) (when court does not act immediately to punish act constituting direct contempt, notice and hearing required); *Groppi v. Leslie*, 404 U.S. 496 (1972) (in case alleging contempt of legislative body, Due Process violated by failure of legislature to give defendant notice and opportunity to respond to contempt charge that was brought two days after alleged contempt).

Plenary Proceedings for Indirect Criminal Contempt. An indigent person has the same right to appointed counsel in proceedings for indirect criminal contempt as in plenary proceedings for direct criminal contempt.

Any criminal contempt that is not a direct criminal contempt constitutes an indirect criminal contempt. For example, a contempt committed outside the courtroom, such as a failure to pay child support or a probation violation under G.S. 5A-11(a)(9a), constitutes an indirect criminal contempt, and plenary proceedings are required pursuant to G.S. 5A-15.

Civil Contempt. In *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993), the state supreme court held that an indigent defendant charged with civil contempt for failing to pay child support may not be incarcerated unless he or she has been appointed counsel or has waived counsel. The court rejected the argument that the right to counsel depends on whether the case is considered civil or criminal, stating that “jail is just as bleak no matter which label is used.” 334 N.C. at 130, 431 S.E.2d at 19. Although *McBride* concerned a child support contempt case, its reasoning applies equally to any contempt proceeding in which the defendant is incarcerated. *See* John L. Saxon, “*McBride v. McBride*: Implementing the Supreme Court’s Decision Requiring Appointment of Counsel in Civil Contempt Proceedings,” ADMINISTRATION OF JUSTICE MEMORANDUM No. 94/05 at 1 n.3 (Institute of Government, May 1994).

Underlying Paternity Proceedings. In *Wake County, ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95 (1982), the court held that an indigent defendant did not have an automatic right to counsel in a civil paternity action. Rather, the trial court should

determine whether the defendant requires counsel in light of all the circumstances. The supreme court suggested that in most instances appointment of counsel is unnecessary.

The court also stated that “an indigent person cannot be sent to jail, in any later proceeding to enforce the support order, unless he had the benefit of legal assistance and advocacy at the proceeding in which paternity was determined.” *Id.*, 306 N.C. at 336, 293 S.E.2d at 98. It does not appear, however, that any reported decisions have actually enforced such a requirement and, in light of *McBride* (discussed above), the courts may be unreceptive to such an argument. At the time of *Townes*, an indigent defendant charged with civil contempt for failing to pay child support did not have an automatic right to counsel even if sent to jail. *See Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). Now that *McBride* has extended the right to counsel to defendants in civil contempt proceedings resulting in imprisonment, the courts could well conclude that the additional protection suggested by *Townes* is unnecessary.

E. Nonpayment of Fine

G.S. 15A-1361 through -1365 establish a procedure for collecting fines in cases in which the court imposes a fine only. Although structured sentencing allows a court to impose fine-only sentences in any case in which community punishment is authorized, including felonies, such sentences are typically imposed in misdemeanor cases only. A defendant’s right to counsel depends on the amount of the fine, stage of the proceedings, and procedure followed.

Fine-only sentence. G.S. 15A-1364(a) and (b) provide that a court may impose a fine without an active or suspended term of imprisonment and, if the defendant fails to pay, may issue an order requiring the defendant to show cause why he or she should not be imprisoned. Unless the defendant was unable to comply, the court may impose a term of imprisonment of up to 30 days for nonpayment.

If the court follows this procedure, which is comparable to contempt, an indigent defendant does not appear to be constitutionally entitled to counsel at the time the fine is imposed. Under G.S. 7A-451(a)(1), however, the defendant would appear to be statutorily entitled to counsel if the fine is \$500 or more. *See supra* § 12.3B (sentences not resulting in imprisonment). The defendant is also entitled to counsel at the show cause hearing if a sentence of imprisonment is imposed. *See supra* § 12.3D (right to counsel in civil or indirect criminal contempt proceedings if imprisonment imposed).

Fine and suspended sentence. G.S. 15A-1362(c) permits a court to impose a fine and a specific sentence to be served in the event the fine is not paid. At the time of imposing the sentence the court may also issue an order requiring the defendant to appear and show cause if he or she fails to pay.

If the court follows this procedure, the court may have to afford counsel to the defendant at the initial proceeding in which the fine and sentence of imprisonment are imposed. *See supra* § 12.3B (right to counsel if suspended sentence imposed). Also, to activate a

sentence of imprisonment at a show cause proceeding, the court would need to afford counsel to the defendant.

12.4 Stages of Criminal Case in which Right to Counsel Applies

The right to counsel in a criminal case encompasses various proceedings. The Sixth Amendment right to counsel attaches once adversarial judicial proceedings have commenced and applies to any critical stage thereafter. Other constitutional provisions and state statutes afford the defendant the right to counsel at additional proceedings, both before and after the initiation of judicial proceedings.

A. When Right to Counsel Attaches

Sixth Amendment Right to Counsel after Commencement of Judicial Proceedings.

The Sixth Amendment right to counsel attaches upon commencement of adversarial judicial proceedings against the defendant, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); accord *State v. Tucker*, 331 N.C. 12, 33, 414 S.E.2d 548, 560 (1992). The question of when judicial proceedings commence is generally a matter of concern in assessing the lawfulness of police procedures—for example, whether the defendant had a Sixth Amendment right to counsel during interrogation or at a lineup.

Generally, when a defendant is arrested for a felony (with or without a warrant) before being indicted, the Sixth Amendment right to counsel attaches at first appearance. See *State v. Tucker, supra* (taking of statement by police after first appearance violated Sixth Amendment right to counsel; statement suppressed); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983) (taking of statement after arrest and before first appearance did not violate Sixth Amendment); *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (first appearance itself not critical stage). If the defendant is indicted before being arrested, the Sixth Amendment right to counsel attaches on return of the indictment. See *Kirby, supra*.

In misdemeanor cases, judicial proceedings probably commence upon the defendant’s first appearance in district court. See 3 LAFAYETTE § 11.2(b), at 498; ROBERT L. FARB, ARREST, SEARCH & INVESTIGATION 207 (Institute of Government, 3d ed. 2003).

Statutory Right to Counsel before Commencement of Proceedings. G.S. 7A-451(b) provides that the right to counsel attaches immediately after arrest, and it lists certain proceedings at which counsel must be provided. However, the North Carolina courts have interpreted the statute with respect to at least some of the listed proceedings, such as lineups, as not affording a defendant a greater right to counsel than provided by the Sixth Amendment. See *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), vacated on other grounds, 428 U.S. 902 (1976). However, other statutes specifically provide a defendant with a statutory right to counsel at certain proceedings before attachment of the Sixth Amendment right to counsel. See *infra* § 12.3C.

Fifth Amendment Right to Counsel before Commencement of Proceedings.

Criminal defendants have a right under the Fifth and Fourteenth Amendments to the United States Constitution to have counsel present during a custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Once judicial proceedings have begun and the defendant invokes his or her right to counsel, the Sixth Amendment also protects the defendant from interrogation without counsel present. *See infra* § 12.3C.

B. Critical Stages after Commencement of Proceedings

Sixth Amendment Right at Critical Stages at Trial Level. After commencement of judicial proceedings, a defendant has a Sixth Amendment right to counsel at all critical stages. A “critical stage” includes any proceeding where potential substantial prejudice to the defendant’s rights inheres in the particular proceeding and the assistance of counsel would help avoid that prejudice. *See Coleman v Alabama*, 399 U.S. 1 (1970); *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976). Critical stages include both pretrial and trial proceedings, but generally end upon judgment and sentence at the trial level. *But cf. Mempa v. Rhay*, 389 U.S. 128 (1967) (trial judge placed defendant on probation without fixing term of imprisonment; subsequent probation revocation proceeding at which judge determined and imposed sentence was form of deferred sentencing, and defendant had Sixth Amendment right to counsel); 3 LAFAVE § 11.2(b), at 499 (certain post-verdict motions made immediately after conclusion of trial are extension of trial proceedings and should be treated as subject to Sixth Amendment).

Other Constitutional and Statutory Rights. Constitutional provisions other than the Sixth Amendment afford defendants additional rights to counsel after judgment and sentence at trial. For example, a person has a Due Process right to counsel for a first appeal of right. A defendant has statutory rights to counsel after judgment and sentence at the trial level, including the right to counsel for probation revocation proceedings, postconviction motions, and additional appeals. *See infra* § 12.3C.

C. Particular Proceedings

Listed below are various criminal proceedings where, as a matter of constitutional law or statute, a defendant in North Carolina is entitled to counsel.

Lineup after Judicial Proceedings Have Commenced. This is a critical stage, and the defendant has a Sixth Amendment right to counsel. *See United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *see also State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974) (recognizing that defendant does not have Sixth Amendment right to counsel where lineup occurs before adversarial judicial proceedings have commenced; also stating that G.S. 7A-451(b)(2), which gives defendant right to counsel at pretrial identification procedures, was apparently intended to be consistent with U.S. Supreme Court’s interpretation of Sixth Amendment), *vacated on other grounds*, 428 U.S. 902 (1976); FARB, *supra*, at 212 (defendant has Sixth Amendment right to counsel when appearing in lineup or showup at or after adversary judicial proceedings have begun); *compare United States v. Ash*, 413 U.S. 300 (1973) (no Sixth

Amendment right to counsel at photographic identification procedure).

If a violation occurs, the identification must be suppressed. Further, an in-court identification by a witness who took part in an illegal pretrial lineup must be excluded unless the state demonstrates by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the illegal pretrial procedure. *See State v. Hunt*, 339 N.C. 622, 646–47, 457 S.E.2d 276, 290 (1994).

A pretrial identification procedure conducted before the commencement of judicial proceedings may violate Due Process and be subject to suppression if it was unduly suggestive and created a risk of misidentification. *See NC Defender Manual*, Vol. 1, § 14.4A, B (discussing pretrial identifications).

Deliberate Elicitation of Information by Police after Judicial Proceedings Have Commenced. This is a critical stage, and the defendant has a Sixth Amendment right to counsel. *See Fellers v. United States*, ___ U.S. ___, 124 S. Ct. 1019 (2004); *Michigan v. Jackson*, 475 U.S. 625 (1986); *Massiah v. United States*, 377 U.S. 201 (1964); *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992); *see also* FARB, *supra*, at 206 (officers’ deliberate efforts, by themselves or through informant, to elicit information, by interrogation or simple conversation, from defendant about pending charge after adversarial judicial proceedings have begun “is always a critical stage”). If a violation occurs, the defendant’s statements must be suppressed. *See also* 3 LAFAVE § 9.5(a), at 386, § 9.5(b) at 389 (fruit-of-poisonous tree doctrine bars evidence discovered as result of statements taken in violation of Sixth Amendment right to counsel).

Custodial Interrogation by Police at Any Time. The defendant has a right to counsel based on the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001); G.S. 7A-451(b)(1). If a *Miranda* violation occurs, the defendant’s statements must be suppressed. *See also NC Defender Manual*, Vol. 1, § 14.3E (although fruit-of-poisonous tree doctrine applies to involuntary confessions in violation of Due Process and confessions obtained in violation of right to counsel, it may not apply to all derivative evidence obtained as result of *Miranda* violation); *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2003) (reviewing conflicting circuit court decisions and holding that fruit-of-poisonous tree doctrine applies to and bars use of physical evidence uncovered as result of *Miranda* violation), *cert. granted*, ___ U.S. ___, 123 S. Ct. 1788 (2003).

Custodial Interrogation of Juvenile. In addition to Fifth and Sixth Amendment protections, juvenile interrogation rights apply to any person under 18. *See G.S. 7B-2101; State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983) (juvenile is defined as person under 18 years of age under former G.S. 7A-517(20), now codified as G.S. 7B-101(14); juvenile interrogation rights therefore apply to suspect 16 or 17 years of age even though suspect is old enough to be prosecuted as adult in superior court); *see also NC Defender Manual* Vol. 1, § 14.3B, Juvenile Warnings. A juvenile’s statements taken in violation of these statutory rights are subject to suppression. *See Fincher*, 309 N.C. at 11, 305 S.E.2d at 692.

Nontestimonial Identification Procedures. The defendant has a statutory right to counsel at nontestimonial identification procedures conducted under G.S. 15A-271 through -282, such as the taking of fingerprints or blood. *See* G.S. 15A-279(d); *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980) (recognizing right but finding no violation); *compare Gilbert v. California*, 388 U.S. 263 (1967) (taking of handwriting exemplar not critical stage under Sixth Amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (no right to counsel at taking of blood sample); *State v. Wright*, 274 N.C. 84, 161 S.E.2d 581 (1974) (nontestimonial identification procedures involving physical characteristics are generally not subject to Sixth Amendment; however, when accused is required to perform act, such as repeating of words, for purpose of identification by victim, procedure may be critical stage under Sixth Amendment). The statutory right does not apply to nontestimonial procedures lawfully conducted by law enforcement without a nontestimonial identification order. *See State v. Coplen*, 138 N.C. App. 48, 530 S.E.2d 313 (2000) (upholding denial of motion to suppress results of gunshot residue test that was based on probable cause and exigent circumstances).

If the defendant's statutory right to counsel is violated, any statements made by the defendant during the proceeding must be suppressed; however, suppression of the results of the identification procedure is not required. *See* G.S. 15A-279(d); *Coplen, supra*.

Chemical Analysis in Impaired Driving Cases. *See* G.S. 20-16.2(a)(6) (statutory right to confer with counsel if testing would not be delayed for more than 30 minutes); *State v. Rasmussen*, 158 N.C. App. 544, 582 S.E.2d 44 (2003) (recognizing statutory right to counsel but finding no violation); *compare State v. Howren*, 312 N.C. 454, 323 S.E.2d 335 (1984) (chemical test for impairment not critical stage under Sixth Amendment).

Competency Evaluation. The North Carolina Supreme Court has held that the defendant does not have a Sixth Amendment right to have counsel present at a competency evaluation (although the mental health facility or trial court may permit counsel to attend). *See State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998). Statements made by the defendant may still be subject to suppression under the Fifth and Sixth Amendments. *See* NC Defender Manual, Vol. 1, § 2.9 & Supplement.

Extradition Proceedings. A defendant has a statutory right to counsel at extradition proceedings. *See* G.S. 7A-451(a)(5) (appointed counsel must be provided to indigent person whose extradition to another state is sought); *compare State v. Taylor*, 354 N.C. 28, 550 S.E.2d 141 (2001) (Sixth Amendment right to counsel did not attach to out-of-state extradition proceedings; adversary criminal judicial proceedings had not yet commenced).

Bail Hearing. An indigent person is statutorily entitled to appointed counsel at a hearing to reduce bail or fix bail if bail was earlier denied. *See* G.S. 7A-451(b)(3). If the bail hearing is conducted by audio-visual transmission, the defendant must be allowed to communicate fully and confidentially with his or her attorney. *See* G.S. 15A-532(b) (defendant who has counsel must be permitted to consult with counsel); *see also* Douglas L. Colbert, THIRTY-FIVE YEARS AFTER *GIDEON*: THE ILLUSORY RIGHT TO COUNSEL AT

BAIL PROCEEDINGS, 1998 U. ILL. L. REV. 1 (1998) (arguing that defendants should have right to counsel when bail is initially set).

Probable Cause Hearing. An indigent person has a Sixth Amendment right to appointed counsel at a probable cause hearing at which the court determines whether the state has sufficient evidence to proceed. *See Coleman v. Alabama*, 399 U.S. 1 (1970) (probable cause hearing is critical stage; although hearing is not constitutionally required, defendant has constitutional right to counsel if one is held); *State v. Cobb*, 298 N.C. 604, 243 S.E.2d 759 (1978) (probable cause hearing is critical stage); G.S. 7A-451(b)(4), 15A-611(c); *see also Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment violated by identification of defendant at preliminary hearing in absence of counsel). A hearing before a magistrate to determine whether there was probable cause for an arrest (called an initial appearance in North Carolina) is not a critical stage. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); G.S. 15A-511 (describing function of initial appearance).

Arraignment/Entry of Plea. *See Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment is critical stage); *White v. Maryland*, 373 U.S. 59 (1963) (plea of guilty made without counsel and then later revoked inadmissible at trial); *see also* G.S. 15A-942 (person who appears at arraignment must be informed of right to counsel); G.S. 15A-1012 (defendant may not be called upon to plead until he or she has had opportunity to retain counsel, has been assigned counsel, or has waived counsel).

Pretrial Evidentiary Hearing. *See Pointer v. Texas*, 380 U.S. 400 (1965) (pretrial hearing where evidence is presented is critical stage).

Trial and Sentencing. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel for felonies); *Scott v. Illinois*, 440 U.S. 367 (1979) (right to counsel for trial of misdemeanor where actual imprisonment imposed); *Alabama v. Shelton*, 535 U.S. 654 (2002) (right to counsel for trial of misdemeanor where suspended sentence of imprisonment imposed); *see also* G.S. 7A-451(a)(1), (b)(5). For a further discussion of the right to counsel for felonies and misdemeanors, *see supra* § 12.3A, B.

In *State v. Lambert*, 146 N.C. App. 360, 553 S.E.2d 71 (2001), the court of appeals held that a defendant did not have the right to counsel at a resentencing hearing at which the only issue was the modification of a condition of probation. This ruling is questionable, particularly in light of the holding in *Shelton* that a defendant has the right to counsel where a suspended sentence of imprisonment is imposed.

Capital Trial. A defendant is statutorily entitled to two attorneys in a capital case. *See* G.S. 7A-450(b1); IDS Rule 2A.2(b)-(d) (describing when second lawyer is appointed). Failure to appoint a second attorney is reversible error. *See State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988).

Probation Revocation Hearing. A defendant has a statutory right to counsel at a probation revocation hearing. *See State v. Coltrane*, 307 N.C. 511, 299 S.E.2d 199 (1983) (court finds that statute was intended to go beyond federal constitutional right to

counsel); G.S. 7A-451(a)(4), 15A-1345(e); *see also State v. Neeley*, 307 N.C. 247, 297 S.E.2d 389 (1982) (judge may not activate suspended sentence if defendant was not represented by counsel and did not waive counsel when suspended sentence and probation were imposed). The failure to provide counsel for an indigent defendant may also violate Due Process. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights).

Direct Appeal. A defendant has a constitutional right, based on Due Process, to appointed counsel on a first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *see also Douglas v. California*, 372 U.S. 353 (1963) (denial of Equal Protection to fail to afford counsel to indigent defendant for first appeal of right). A defendant has broader statutory rights to counsel. *See* G.S. 7A-451(b)(6); IDS Rule 3.1 & Commentary.

Certiorari Petition. Although a defendant does not have a constitutional or statutory right to counsel for certiorari petitions to the U.S. Supreme Court, the state supreme court has found that appellate counsel has a duty to file such a petition, at least in a capital case. *See In re Hunoval*, 294 N.C. 740, 247 S.E.2d 230 (1977) (court disciplines attorney for refusing to file cert. petition for client sentenced to death; court rejects attorney's argument that he was not an eleemosynary institution—that is, a charitable institution—and that he could not be required to file cert. petition without pay); IDS Rule 2B.4(a) (directing appointed counsel to file cert. petition in capital case unless relieved of responsibility by IDS).

MAR in Noncapital Case. In postconviction proceedings in noncapital cases, an indigent person has a statutory right to counsel if he or she has been convicted of a felony, fined \$500 or more, or been sentenced to a term of imprisonment. *See* G.S. 7A-451(a)(3) (setting forth general right); G.S. 15A-1420(b1)(2) (judge shall review motion for appropriate relief in noncapital case and enter order with respect to appointment of counsel); *compare Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners [in noncapital cases] have a constitutional right to counsel when mounting collateral attacks upon their convictions, . . . and we decline to so hold today.”). Although North Carolina's statutes clearly give a defendant a right to counsel in the indicated circumstances, the statutes are not entirely clear about the timing of appointment. Generally, counsel is not appointed to assist an indigent person in filing the initial motion for appropriate relief in a noncapital case (although judges sometimes appoint counsel to investigate and prepare the initial motion when they believe there are compelling circumstances). In light of the language of G.S. 15A-1420(b1)(2), an argument can be made that once an indigent person files a motion for appropriate relief, appointment of counsel is required; however, most judges probably do not appoint counsel if they summarily deny the motion. At a minimum, appointment of counsel would appear to be required for any hearing on a motion for appropriate relief, including hearings involving issues of law alone and evidentiary hearings. *See generally* G.S. 7A-451(a)(3) (right to counsel at “proceedings” in indicated cases); G.S. 15A-1420(c)(1) (party entitled to hearing on questions of law or fact arising from motion; judge may direct counsel for parties to appear for conference on any prehearing matter); G.S. 15A-1420(c)(4) (defendant entitled to counsel for evidentiary hearing).

On direct appeal in a noncapital case, appellate counsel who has been appointed to represent an indigent defendant may apply to the Appellate Defender for authorization to litigate a motion for appropriate relief related to the appeal. *See* IDS Rule 3.2(f).

MAR in Capital Case. An indigent person convicted of a capital offense and sentenced to death is statutorily entitled to the appointment of two postconviction counsel to prepare, file, and litigate a motion for appropriate relief. *See* G.S. 7A-451(c); *compare Murray v. Giarratano*, 492 U.S. 1 (1989) (four members of Court find no constitutional right to counsel to seek state postconviction relief in capital case; fifth member of Court concurs in judgment because no prisoner had actually been denied counsel in such proceedings).

State Writ of Habeas Corpus. An indigent person is entitled to have counsel for a hearing on a state writ of habeas corpus. *See* G.S. 7A-451(a)(2).

Standby Counsel for Pro Se Defendant. Standby counsel may be appointed to assist a person who has elected to proceed pro se. *See* G.S. 15A-1243.

Retained Counsel. A defendant's right to appear by retained counsel is at least as broad as the right to the assistance of appointed counsel. *See supra* § 12.1B (right to retained counsel).

12.5 Appointment of Counsel

A. Role of Court and IDS in Appointing Counsel

In 2000, the General Assembly passed the Indigent Defense Services Act ("IDS Act"), which created the Office of Indigent Defense Services ("IDS") and granted it broad authority to manage the indigent defense program in North Carolina. (The governing board of the IDS Office is the IDS Commission, and both the Office and Commission are collectively referred to here as IDS.) With respect to the appointment of counsel, the IDS Act left some determinations with the court and transferred others to IDS. IDS has adopted comprehensive rules describing the appointment process and the responsibilities of the court and IDS.

The IDS Act recognizes a basic division in authority concerning the appointment of counsel. Whether a person is indigent and entitled to have counsel appointed at state expense is determined by the court, but once it is determined that a person has a right to counsel, counsel is appointed in accordance with IDS rules. *See* G.S. 7A-452(a). The court retains the power to remove an attorney if warranted, in which case new counsel would be appointed in accordance with IDS rules. *See Ivarsson v. Office of Indigent Defense Services*, 156 N.C. App. 626, 577 S.E.2d 650 (2003); *see also infra* § 12.5J (removal of counsel).

The responsibilities that accompany the court's determination of entitlement to counsel

are discussed *infra* §§ 12.5B through D. The procedure for selecting counsel depends on the case and judicial district involved. For the great mass of criminal cases—noncapital cases at the trial level in districts without a public defender office—the IDS rules leave the selection of counsel with the court in accordance with local bar plans. *See* Introduction to Part I of IDS rules (because of sheer volume of noncapital cases at trial level—almost 120,000 in fiscal year 1999-2000—court will continue for foreseeable future to appoint counsel at trial level in districts without public defender office or contract counsel). For other categories of criminal cases, IDS has assumed a more direct role in selecting counsel. The procedures for selecting counsel in the various categories of cases are discussed *infra* § 12.5G.

B. Determination of Entitlement to Counsel

Determination by Court. In most cases, a judge determines at the defendant's first court appearance whether the defendant is entitled to appointed counsel. As part of that process, the court must

- advise the defendant of his or her right to counsel (*see infra* § 12.5C),
- determine whether the defendant is indigent (*see infra* § 12.5D), and
- decide whether the defendant is entitled to counsel in the particular case (*see supra* § 12.3 for a discussion of types of cases).

Preliminary Determination of Entitlement. In some instances, IDS (through the Capital Defender, a chief Public Defender, or other designee) may preliminarily assign counsel to a defendant, pending a determination of indigency and entitlement to counsel by the court. Such preliminary assignments (discussed *infra* § 12.5G) may occur as follows:

- In districts with a Public Defender office, the chief Public Defender may preliminarily assign an attorney from his or her office to represent the defendant.
- In capital cases, the Capital Defender may assign provisional counsel until the court determines that the defendant is entitled to counsel and the Capital Defender identifies and appoints qualified counsel.
- In cases in which a defendant is in custody and has no counsel, IDS's designee may preliminarily assign counsel to the defendant.

See also G.S. 122C-270(a) (in involuntary commitment cases for which they are responsible, special counsel determines indigency subject to redetermination by judge).

C. Advising Defendant of Right to Counsel

At several stages of the proceedings, the court must advise the defendant of the right to counsel. Failure to do so may affect the validity of any waiver of counsel (*see infra* § 12.6 for requirements for valid waiver) and consequently the validity of the proceedings. (Law enforcement also must advise a criminal defendant of the right to counsel in certain instances—for example, at a custodial interrogation or certain nontestimonial

identification procedures. *See supra* § 12.4C.)

Initial Appearance. Upon arrest the defendant must be taken before a judicial official, usually a magistrate, and the magistrate must advise the defendant of the right to communicate with counsel and friends. *See* G.S. 15A-511(b)(2). In some instances, the failure to advise the defendant of this right could result in dismissal of the charges. *See* NC Defender Manual, Vol. 1, § 1.10 (in DWI case, failure to advise defendant of right to communicate with counsel and friends may require dismissal of charges).

First Appearance. At a defendant's first appearance before a judge, which is statutorily required in felony cases, the judge must: (i) determine whether the defendant has retained or been assigned counsel; (ii) if the defendant is unrepresented, inform the defendant of the right to counsel and right to appointed counsel if he or she is indigent; (iii) appoint counsel if necessary; and (iv) if the defendant desires to proceed without counsel, obtain a written waiver. *See* G.S. 15A-603.

Probable Cause Hearing. If a defendant appears without counsel, the court must inquire whether the defendant has executed a written waiver of counsel. If not, the court must take "appropriate action," such as appointing counsel or providing the defendant an opportunity to retain counsel. *See* G.S. 15A-611(c).

Arraignment. If a defendant appears without counsel, the court must inform the defendant of the right to counsel and must "accord the defendant an opportunity to exercise that right." If the defendant has waived arraignment, the court must take steps to verify that the defendant is aware of the right to counsel. *See* G.S. 15A-942.

Entry of Plea. A defendant may not be called upon to plead unless the court determines that his or her right to counsel has been honored. *See* G.S. 15A-1012; *see also* G.S. 15A-1022(a)(5) (in accepting guilty plea, court must determine that defendant, if represented by counsel, is satisfied with representation).

Trial. If a defendant expresses the desire to proceed pro se at trial, the court must inform the defendant of the right to counsel, and before permitting the defendant to proceed pro se, must be sure that he or she understands the consequences of that decision, the nature of the charges being prosecuted, and the range of permissible punishments. *See* G.S. 15A-1242. The trial judge need not always be the judge who conducts this inquiry; the defendant may waive trial counsel at an earlier pretrial proceeding. *See State v. Kinlock*, 152 N.C. App. 84, 566 S.E.2d 738 (2002) (waiver of trial counsel at pretrial proceeding was valid, and trial judge did not need to repeat inquiry at trial; judge at pretrial proceeding had conducted appropriate inquiry, defendant had waived counsel, and at trial defendant never indicated desire for counsel), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003).

D. Determining Indigency

Definition. G.S. 7A-450(a) provides the basic definition of indigency: "An indigent

person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation.”

For most cases, the defendant must be indigent to obtain counsel at state expense. *See* G.S. 7A-450; *compare* G.S. 7B-2000 (juvenile in delinquency case presumed indigent); G.S. 35A-1107 (attorney is appointed as guardian ad litem in incompetency proceeding unless respondent retains counsel).

The standard for indigency is necessarily a flexible one, depending not only on the defendant’s resources but also on the anticipated expenses of litigation. There are only a few decisions addressing the standard, and the specific dollar amounts cited in older cases may not be particularly useful as a guide today. *See State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972) (trial court erred in finding that defendant was not indigent when there was no record evidence contradicting his affidavit of indigency); *State v. Wright*, 281 N.C. 38, 187 S.E.2d 761 (1972) (defendant who earned \$149 per month, had car payments of \$56 per month, had debts of \$4,000, and had savings of approximately \$50, was indigent); *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973) (evidence that defendant was a painter capable of earning \$60 per week when he was able to obtain work, and that he had made little effort to secure counsel, did not support finding that defendant was not indigent); *see also* G.S. 7A-498.5(c)(8) (authorizing IDS to adopt standards for determining indigency).

Time of Determination of Indigency. Indigency may be determined or redetermined at any stage of the proceedings. *See* G.S. 7A-450(c); *see also State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978) (although defendant may not have been indigent when first two indictments were returned, court was not excused from advising defendant of right to counsel and inquiring about indigency when defendant was arraigned on third indictment; that defendant was able to retain counsel on appeal after conviction did not show he was not indigent when tried); *State v. Hoffman*, 281 N.C. 727, 738, 190 S.E.2d 842, 850 (1972) (an indigent person is “one who does not have available, *at the time they are required*, adequate funds to pay a necessary cost of his defense”) (emphasis added).

When a defendant’s personal resources are sufficiently depleted to demonstrate indigency, he or she may be eligible for state funding of the remaining necessary expenses of representation. *See infra* § 12.5F (effect of retaining counsel on indigency and ability to obtain state funds for expenses of representation).

Partial Indigency. North Carolina has a statute on “partial indigency,” which provides that the court may require an individual who is able to do so to pay part of his or her legal expenses. *See* G.S. 7A-455(a). The statute is actually a “recoupment” statute, however. It does not appear to authorize a court to require a person to pay a portion of the legal fees up front. It only permits the court to impose such an obligation at the conclusion of the proceedings if the defendant is convicted. *See infra* § 12.9 (discussing recoupment).

E. \$50 Appointment Fee

In contrast to the partial indigency statute discussed above, G.S. 7A-455.1 represented an effort to require criminal defendants who were appointed counsel to make an up-front contribution to the expenses of their representation. The statute assessed a \$50 appointment fee against a criminal defendant, although if the defendant failed to pay the court could not deny counsel, hold the defendant in contempt, or impose other sanctions. *See* G.S. 7A-455.1(d).

In *State v. Webb*, ___ N.C. ___, 591 S.E.2d 505 (2004), the court struck down the portion of the statute requiring payment of the fee from defendants who are not convicted. It also struck the part of the statute seeking payment of the fee in advance. The court found that these provisions violated Art. I, Sec. 23, of the North Carolina Constitution, which prohibits the imposition of costs against a criminal defendant unless found guilty. The appointment fee may be assessed against a defendant, however, after conviction or plea of guilty or no contest. For a further discussion of the impact of *Webb*, go to www.ncids.org and look under IDS Rules & Procedures.

F. Effect of Retaining Counsel on Right to Appointed Counsel

Generally. The North Carolina courts have held that if a person retains counsel and counsel makes a general appearance, it is presumed that the person is no longer indigent for appointment-of-counsel purposes. Even if the defendant runs out of money and stops paying the attorney, the court may require the retained attorney to continue representing the defendant throughout the proceedings at the trial level. The state is not required to take over payments to the attorney. *See State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685 (1996) (court not required to appoint and pay counsel who had been retained by indigent defendant’s family when family stopped paying lawyer; unless court permits retained counsel to withdraw, there is no requirement to redetermine indigency); *see also infra* § 12.5I (discussing obligations of retained and appointed counsel unless permitted to withdraw).

The presumption that a person is not indigent would not apply if counsel makes a limited appearance. *See* G.S. 15A-143 (attorney who appears for limited purpose is deemed to have withdrawn without need for court’s permission when purpose is fulfilled); *State v. Hoffman*, 281 N.C. 727, 738, 190 S.E.2d 842, 850 (1972) (defendant could afford to pay for counsel at interrogation; ability to pay costs of subsequent proceedings would be determined at those subsequent proceedings).

Payment of Other Expenses. A defendant represented by retained counsel still may be considered indigent for purposes of obtaining funds for other expenses, including the cost of experts. *See State v. Boyd*, 332 N.C. 101, 109, 418 S.E.2d 471, 475–76 (1992) (“That defendant had sufficient resources to hire counsel does not in itself foreclose defendant’s access to state funds for other necessary expenses of representation—including expert witnesses—if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises.”).

In capital cases, if a defendant retains counsel, the defendant is presumed not to be indigent and appointment of second counsel is not required. *See State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991).

Withdrawal of Waiver of Appointed Counsel. A different question arises if an indigent person waives the right to appointed counsel with the intention of hiring counsel but then is unable to do so. The defendant may be able to withdraw the waiver and obtain appointed counsel. *See infra* § 12.6D (withdrawal of waivers).

G. Selection of Counsel by Appointing Authority

The process for selecting counsel varies with the type of case and district in which the case arises.

Noncapital Cases in Districts without Public Defender Office. The court ordinarily appoints attorneys on a case-by-case basis. Attorneys must qualify to be on the appointed list in accordance with the local bar plan. IDS also may enter into contracts with attorneys to handle cases. *See* IDS Rule 1.5.

Noncapital Cases in Districts with Public Defender Office. Appointments are in accordance with the plan adopted by the Public Defender and approved by IDS. In some public defender districts, appointments are made by the Public Defender; in others, appointments are made by the court from a list of attorneys approved by the Public Defender in consultation with the local bar. IDS also may enter into contracts with attorneys to handle cases in the district. *See* IDS Rule 1.5.

A Public Defender may preliminarily appoint his or her office to represent a person pending a determination by the court that the person is indigent and entitled to counsel. *See* G.S. 7A-452(a).

Capital cases. For appointment purposes, a “capital” case is defined as any case that includes a charge of first-degree murder or an undesignated degree of murder. *See* IDS Rule 2A.1. In those instances, whether the case arises in a district with a Public Defender’s office or without one, the Capital Defender (as the IDS director’s designee) appoints first and second counsel from a list of counsel maintained by the Capital Defender. *See* IDS Rule 2A.2.

Before appointing trial counsel, the Capital Defender may appoint provisional counsel for a capital defendant. The purpose of the provisional appointment is to provide a capital defendant with the benefit of counsel as soon as possible. *See* IDS Rule 2A.2(a).

Appeals. For all appeals in which a person is entitled to appointed counsel (except appeals in involuntary commitment cases, which ordinarily are handled by counsel appointed to the case in district court), the Appellate Defender is appointed, who either handles the case within that office or appoints counsel from a list of attorneys approved by the Appellate Defender. *See* IDS Rule 3.2 (noncapital criminal and non-criminal

cases); IDS Rule 2B.2 (capital cases).

Ordinarily, to avoid potential conflicts, the Appellate Defender does not appoint trial counsel as counsel on appeal. The Appellate Defender may authorize appellate counsel to file a motion for appropriate relief in conjunction with an appeal. *See* IDS Rule 3.2(f).

Standby Counsel. In noncapital cases in which the defendant elects to proceed pro se, the court determines whether standby counsel should be appointed and then selects counsel. *See* G.S. 15A-1243; IDS Rule 1.6(b) & commentary. In capital cases, the court notifies IDS, which may select standby counsel. *See* IDS Rule 2A.3(b).

In-Custody Defendants. G.S. 7A-453 and IDS Rule 1.3(b) contain special provisions for expedited appointment of counsel for incarcerated defendants who do not have a lawyer in noncapital cases. The extent to which these provisions are actually being followed is unclear, however.

The statute provides that in districts designated by IDS, the custodian of a person who has been in custody for more than 48 hours and who does not have counsel shall notify IDS's designee. In Public Defender districts, the Public Defender is IDS's designee. The Public Defender may notify the court of the defendant's status or may preliminarily appoint his or her office to represent the defendant pending a determination by the court of entitlement of counsel.

In districts not designated by IDS, which currently are all districts without a Public Defender office, the custodian of a person who has been in custody for more than 48 hours and who does not have counsel shall notify the clerk of superior court. The clerk has the responsibility of notifying the court of the person's status or preliminarily appointing counsel pending a determination by the court. The commentary to IDS Rule 1.3 emphasizes the importance of this procedure: "If the clerk does not appoint counsel for an in-custody defendant, it is particularly important for the clerk to alert a district court judge, especially in cases involving probation violations, orders for arrest for failing to appear, surrenders by sureties, and misdemeanors in those judicial districts that do not routinely hold first appearances. In those cases, a defendant's first-scheduled court date may be several days or even weeks after he or she is taken into custody. If counsel is not appointed until that first court date, the case will likely have to be continued to a later date, resulting in inefficient use of court time, longer pretrial custody for defendants, and greater demands on limited jail resources."

H. Choice of Counsel by Defendant

Appointed Counsel. Generally, an indigent person does not have the right to counsel of his or her choosing. *See State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296 (1999) (where defendant is appointed counsel, he or she may not demand counsel of choice); *accord State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2001). In some circumstances, however, an indigent person may be entitled to have different counsel appointed. *See infra* § 12.5J (discussing removal of counsel).

Retained Counsel. Generally, a defendant has the right to retained counsel of his or her choice. *See State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969); *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000); *see also infra* § 12.5J (discussing removal of counsel). The court must allow a defendant reasonable time to hire counsel of choice. *Compare State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977) (trial court erred in refusing to continue case to allow defendant to retain new counsel after previous counsel withdrew from case; there was nothing in record to indicate that defendant exercised right to select counsel in manner to disrupt or obstruct proceedings) *with State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 342 (1982) (“A defendant’s right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice”; trial court did not err in denying continuance to allow defendant, who wanted appointed counsel removed, to hire counsel); *see also* 3 LAFAVE § 11.4(c), at 559–64 (discussing need to balance authority of trial court to manage trial schedule and right of defendant to hire counsel of choice).

I. Scope of Counsel’s Obligations after Appointment

Unless removed or permitted to withdraw (*see infra* § 12.5J), counsel who is appointed to represent an indigent client, or who makes a general appearance on behalf of a retained client, is obligated to represent the client until entry of judgment at the trial level. *See* G.S. 15A-143 (attorney who makes general appearance undertakes to represent defendant until entry of final judgment at trial stage); IDS Rule 1.7(a) (unless permitted by court to withdraw, counsel appointed to represent indigent defendant must represent client until final judgment at trial level); Revised Rule of Professional Conduct 1.16 cmt. 3 (court approval generally required before lawyer may withdraw from pending litigation). Thus, if counsel is appointed to handle a misdemeanor in district court and the client wishes to appeal for a trial de novo in superior court, counsel’s obligations would continue through judgment in superior court unless removed or permitted to withdraw.

To a limited extent, appointed counsel’s obligations may extend beyond entry of judgment at the trial level. Thus, counsel must advise the client of the right to appeal and must enter notice of appeal if the client requests it. *See* IDS Rule 1.7(a). Filing a notice of appeal does not constitute an appearance, and does not make the attorney counsel of record, on appeal of a superior court judgment. *See* North Carolina Rules of Appellate Procedure, Rule 33(a) (attorney not recognized as appearing in case unless he or she signs record on appeal, motion, brief, or other document permitted by rules to be filed in appellate division), Rule 4(a) (notice of appeal filed with clerk of superior court); *but see* G.S. 122C-270(e), -289 (in involuntary commitment cases, attorney assigned to represent indigent respondent in district court is required to perfect and conclude any appeal). Counsel also is authorized to file a “ten-day” motion for appropriate relief under G.S. 15A-1414, which permits motions up to ten days after entry of judgment on grounds such as the verdict was against the weight of the evidence. *See also* 3 LAFAVE § 11.2(b), at 499 (certain post-verdict motions made immediately after conclusion of trial are extension of trial proceedings and should be treated as subject to Sixth Amendment).

J. Removal and Withdrawal of Counsel

If counsel is removed or permitted to withdraw, new counsel is appointed in accordance with the assignment of counsel procedures for that case and district. *See supra* § 12.5G.

Removal of Counsel. Although a defendant does not have the right to appointed counsel of choice, the court must engage in an adequate inquiry into a defendant's request for the replacement of appointed counsel. The court must appoint different counsel if continued representation by original counsel would result in ineffective assistance of counsel, involve a conflict of interest, or otherwise violate the defendant's Sixth Amendment right to counsel. *See State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980) (substitute counsel required "whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel"); *see also State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1986) ("In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense."); *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 529 (1976) (substitute counsel warranted if good cause shown, such as conflict of interest, complete breakdown in communication, or irreconcilable conflict between counsel and client that would result in unjust verdict). Even if substitution of counsel is not required, a court has the discretion to grant a defendant's request for substitute counsel. *See State v. Kuplen*, 316 N.C. 387, 396, 343 S.E.2d 793, 798 (1986) (court has discretion to grant defendant's request to replace appointed counsel although replacement may not be constitutionally required).

A motion to disqualify counsel may come from the prosecutor, but motions by an adversary should be scrutinized carefully by the court. *See State v. Yelton*, 87 N.C. App. 554, 556–57, 361 S.E.2d 753, 755 (1987) (opposing counsel may raise objection but not as technique for harassment). IDS may request that an appointed attorney be removed, but the ultimate decision remains with the court. *See, e.g.*, IDS Rule 2A.5(b) (capital trials).

In limited circumstances—for example, because of a significant conflict of interest—a court may remove retained or appointed counsel over the client's objection. *See Wheat v. United States*, 486 U.S. 153 (1986) (court may override waiver of conflict of interest and replace counsel preferred by defendant); *State v. Taylor*, 155 N.C. App. 251, 574 S.E.2d 58 (2002) (court did not abuse discretion in finding that conflict existed requiring disqualification of retained counsel); *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987) (court erred in disqualifying retained counsel over defendant's objection); *State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499 (1985) (indigent defendant had right to continue to be represented by appointed counsel that he had confidence in and was satisfied with; court's removal of counsel was not for any judicially-approved reason), *aff'd on other grounds*, 316 N.C. 350, 341 S.E.2d 561 (1986); *see also Morris v. Slappy*, 461 U.S. 1 (1983) (court did not violate defendant's Sixth Amendment right to counsel by refusing to grant continuance; although denial of continuance necessitated that new

public defender take place of public defender who had been handling case, new public defender was fully prepared to try case).

Withdrawal of Counsel. Possible grounds for an attorney's request to withdraw may vary and are not reviewed here. *See, e.g.*, G.S. 15A-144 (counsel may move to withdraw for good cause); Revised Rule of Professional Conduct 1.16 (describing when counsel may and must move to withdraw). In moving to withdraw, counsel must be mindful of maintaining the confidentiality of client information. *See* Revised Rule of Professional Conduct 1.16 cmt. 3 (lawyer may need to keep confidential facts that would constitute explanation of reasons for motion to withdraw). Ordinarily, it should be sufficient for counsel to indicate to the court the general basis for moving to withdraw. A trial court may hold an in camera hearing if necessary to inquire further but must remain wary of infringing on confidential attorney-client information. *See Holloway v. Arkansas*, 435 U.S. 475, 487 & n.11 (1978); *State v. Yelton*, 87 N.C. App. 554, 557, 361 S.E.2d 753, 756 (1987).

Replacement of Counsel without Court Order. Under some Public Defender appointment plans, if the Public Defender assigns a case to an attorney and the attorney has not appeared or otherwise accepted the case, the attorney may decline the assignment and return the case to the Public Defender for reassignment without making a motion to the court to withdraw. Attorneys should check their local plan for the requirements in their district.

Once an attorney is appointed, may another attorney in the office substitute for that attorney without the court's permission? If a specific attorney has been appointed, the answer appears to be no. *See State v. Carter*, 66 N.C. App. 21, 23, 311 S.E.2d 5, 7 (1984) ("In any criminal case where the defendant is found to be indigent and receives the services of court-appointed counsel it is only the specifically named counsel (and not the law firm or associates) that has the delegated right and duty to appear and participate in the case."); RPC Ethics Opinion 58 (July 14, 1989) (another member of firm may substitute for appointed attorney if substitution does not prejudice client and court and client consent). This requirement would not appear to apply to Public Defender offices since the office itself (or the chief Public Defender on behalf of the office) is typically appointed and then appears through assistant public defenders.

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, 271 S.E.2d 252 (1980). 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.” *State v. Thacker*, 301 N.C. at 353–54, 271 S.E.2d at 256; *see also* 3 LAFAVE § 11.5(d) at 581–86 (discussing circumstances in which court need not honor defendant’s request to proceed pro se).

In certain non-criminal cases involving allegations of mental infirmity, North Carolina’s statutes appear to require appointment of counsel or a guardian ad litem. *See* 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); G.S. 108A-105(b) (if judge determines that disabled adult lacks capacity to waive counsel, guardian ad litem must be appointed). There are similar provisions concerning juveniles. *See* G.S. 7B-601 (guardian ad litem for juvenile in abuse and neglect proceedings); G.S. 7B-1101 (in termination of parental rights proceedings, guardian ad litem where parent is minor); G.S. 7B-2000 (appointment of counsel for juvenile in delinquency and contempt proceedings).

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, 417 S.E.2d 473 (1992). 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* § 12.7A (discussing ineffective assistance and standby counsel).

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, 279 S.E.2d 788 (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, 417 S.E.2d 473 (1992) (defendant has only two choices—to appear pro se or by counsel); *accord State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (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, 343 S.E.2d 793 (1986); *see also supra* § 12.5J (discussing grounds for replacement of counsel).

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 upon to do so by the defendant; and (ii) to bring to the judge’s

attention matters favorable to the defendant that the judge should rule upon on his or her own motion.

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, 487 S.E.2d 727, 729 (1997); *State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992) (defendant who equivocated and asked for lawyer as assistant did not waive right to counsel); *see also infra* § 12.6C (defendant also must be competent 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, 369 S.E.2d 590 (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 apply to district court). 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, 484 S.E.2d 394 (1997).

In evaluating a waiver, the court must consider the defendant’s age, education, familiarity with English, and 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, 297 S.E.2d 389 (1982); *State v. Blackmon*, 284 N.C. 1, 199 S.E.2d 431 (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, 558

S.E.2d 156 (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 State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (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, 566 S.E.2d 738 (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, 577 S.E.2d 620 (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, 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* § 12.6D (discussing when it is improper to require defendant to proceed pro se).

C. Competence to Waive Counsel

The United States Supreme Court has held that there is only one standard of competence, and that a defendant who is competent to stand trial is competent to waive the right to counsel. *See Godinez v. Moran*, 509 U.S. 389 (1993). However, evidence relevant to the issue of competence may bear on the issue of whether the defendant's waiver of counsel is knowing, voluntary, and intelligent. Thus, a defendant who is marginally competent to stand trial, although competent to waive the right to counsel, may still be incapable of knowingly and intelligently doing so. *See State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (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, 284 S.E.2d 312 (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).

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, 513 S.E.2d 90, 93 (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.

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. The onus is on the court to inquire about counsel at these stages. *See State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (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); *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 778 (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); *see also State v. Kinlock*, 152 N.C. App. 84, 566 S.E.2d 638 (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, 577 S.E.2d 620 (2003). For a list of stages of proceedings where a defendant must be informed of the right to counsel, *see supra* § 12.5C.

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, 539 S.E.2d 675 (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 State v. Atkinson*, 51 N.C. App. 683, 277 S.E.2d 464 (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, 235 S.E.2d 884 (1977) (defendant may not delay until trial request for appointed counsel and thereby sidetrack proceedings); *Sexton, supra* (noting that record reflected that defendant's request for appointed counsel was for good cause); *see also State v. Hyatt*, 132 N.C. App. 697, 513 S.E.2d 90 (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 found to have "forfeited" the right to counsel and may be more appropriately analyzed under that standard. *See infra* § 12.6E. 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. *See State v. Hyatt, supra* (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. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (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. White*, 78 N.C. App. 741, 338 S.E.2d 614 (1986) (following *McCrowre*); *State v. Gordon*, 79 N.C. App. 623, 339 S.E.2d 836 (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).

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, 530 S.E.2d 66 (2001), 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* 3 LAFAVE § 11.3(c), at 547–49 (discussing

doctrine); *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 of choice; 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”); *compare supra* § 12.6D (discussing cases in which court refused to allow defendant to withdraw waiver of counsel because of defendant’s dilatory tactics).

12.7 Right to Effective Assistance of Counsel

A. Cases in which Right Arises

Generally. “A defendant’s right to counsel includes the right to the effective assistance of counsel.” *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). If the defendant has a constitutional right to counsel, then he or she has a constitutional right to effective assistance of counsel based on the constitutional provision establishing the defendant’s right to counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984) (Sixth Amendment right to counsel includes right to effective assistance of counsel); *Evitts v. Lucey*, 469 U.S. 387 (1985) (right to counsel on appeal includes right to effective assistance of that counsel); *see generally* 3 LAFAVE § 11.7(a), at 614–19. If the defendant has a statutory right to counsel, he or she has a comparable statutory right to effective assistance of counsel (discussed further below).

Appointed and Retained Counsel. If a defendant has a right to counsel, the same standards of effectiveness apply whether the defendant is represented by appointed or retained counsel. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); 3 LAFAVE § 11.7(b), at 619–20.

Capital Trials. In capital trials, North Carolina law gives an indigent defendant the right to a second attorney. *See* G.S. 7A-450(b1). A recent publication states that since the right to second counsel in capital cases is statutory—and the constitutional right to effective assistance depends on the existence of a constitutional right to counsel—“a capital defendant cannot successfully base a constitutional claim of ineffectiveness on the role of additional counsel.” *See* JESSICA SMITH, *INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES 3* (School of Government, 2003). This statement could be read as suggesting that the conduct of second counsel cannot be considered in determining whether the defendant received constitutionally effective representation. In conversations with the author, however, she has indicated to me that she did not intend such a broad conclusion. Part of the confusion may derive from the author’s use of the term “ineffective assistance of counsel” to refer to various Sixth Amendment violations, including the denial of counsel. *See* SMITH at ix.

Certainly, since a defendant’s right to second counsel in a capital case is statutory, the denial of second counsel does not violate a defendant’s Sixth Amendment right to counsel. (A defendant would still be able to obtain relief because the denial of a

defendant's statutory right to second counsel, or limitations on second counsel's participation that amount to a denial of the statutory right to counsel, would be reversible error. *See State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988)). The constitutional analysis of second counsel's role must be different, however, for claims more typically thought of as involving ineffective assistance, such as attorney incompetence, admissions of guilt without client consent (*Harbison* error), and conflicts of interest. A capital defendant has a constitutional right to counsel and therefore a constitutional right to be represented effectively. Since the two lawyers appointed to represent a capital defendant share responsibilities, the actions or inactions of both determine the effectiveness of the representation received by the defendant. To take an extreme example, suppose one attorney handles the guilt-innocence phase and the second the sentencing phase, but the second attorney does nothing to prepare for sentencing and the defendant is sentenced to death. Certainly, the overall representation received by the defendant is constitutionally deficient regardless of which attorney was constitutionally required and which only statutorily required. *See also State v. Matthews*, ___ N.C. ___, 591 S.E.2d 535 (2004) (reversible error for one of capital defendant's attorneys to admit defendant's guilt to lesser offense without defendant's consent).

The cases cited in Smith's book would not preclude a court from considering the role played by second counsel in evaluating whether the defendant received constitutionally effective representation. As Smith observes, the U.S. Supreme Court has held that a defendant does not have a constitutional right to effective assistance of counsel if he or she does not have a constitutional right to counsel. *See SMITH* at 2 & n.7. In those cases, however, the defendant had no constitutional right to counsel whatsoever. The Court did not suggest that in cases in which a defendant has a constitutional right to counsel, the actions of other members of the defense team are insulated from review.

The cited North Carolina cases (*see SMITH* at 3 nn.11–13) concern restrictions on second counsel's assistance; they do not involve typical claims of ineffectiveness. *See State v. Call*, 353 N.C. 400, 545 S.E.2d 190 (2001); *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995); *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). In all three cases, the constitutional argument concerned whether the trial court had unduly limited the participation of second counsel—in *Call*, by ruling that only one of the defendant's attorneys could object to witness testimony; in *Frye*, by ruling that only one of the defendant's attorneys could conduct voir dire; and in *Locklear*, by failing to continue a motions hearing to allow second counsel additional time to prepare. The court held only that the defendant had no constitutional right to second counsel; therefore, he could not claim that the limitations on second counsel's participation violated his constitutional right to counsel. The opinions do not suggest that the actions or inactions of second counsel may not be considered on the separate question of whether the defendant received constitutionally effective representation.¹ Further, although the court found that

1. In *Call* and *Frye*, there is no mention of the term ineffectiveness; and although the defendant in *Locklear* sought to characterize his claims as involving ineffective assistance, he pointed to no deficiencies in the representation he received. In contrast, in subsequent federal habeas proceedings in *Frye*, the defendant specifically alleged *Strickland* ineffectiveness by his two attorneys, and neither the district court nor the Fourth Circuit questioned the viability of such an argument regarding second counsel. *See Frye v. Lee*, 89 F. Supp. 2d 693, *aff'd*, 235 F.3d 897 (4th Cir. 2000).

the limitations on second counsel's participation did not violate the defendant's right to counsel, the court seemed to appreciate that such limitations could have a bearing on the overall effectiveness of representation. Thus, in each case the court considered whether the limitations unduly interfered with the attorneys' ability to represent their client and found that they had not. *See Call* (trial court ruling that only one of defendant's attorneys could object to testimony of witnesses did not prohibit or prevent counsel from communicating, prompting, or consulting with one another); *Frye* (trial court's ruling that only one of defendant's attorneys could conduct voir dire did not prevent second attorney from prompting first attorney to object as necessary); *Locklear* (court finds nothing in record to indicate that one or both attorneys were not prepared to argue motions).

Standby Counsel. The North Carolina Supreme Court has suggested that in limited circumstances a defendant may claim ineffectiveness of standby counsel. *See State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 478 (1992) (defendant may not claim ineffectiveness of standby counsel except regarding "the limited scope of the duties assigned to such counsel by the statute or the defendant or voluntarily assumed by such counsel"). The Smith book states that the quoted portion of *Thomas* is inconsistent with the North Carolina Supreme Court's decision in *Locklear* and with "ample federal authority holding that an IAC [ineffective assistance of counsel] claim cannot be asserted under the Sixth Amendment with regard to standby counsel." SMITH at 3–4. I do not believe the law is so clear.

The court in *Locklear* dealt only with a capital defendant's rights regarding second counsel; and, as discussed above, the case focused on whether the limitations on second counsel's participation violated the defendant's right to counsel. The court did not address the general topic of standby counsel or the specific question of whether standby counsel may be found ineffective.

The cited federal decisions do not rule out the possibility of claims for ineffective assistance of standby counsel. One of the two cited decisions was, again, a case involving restrictions on counsel's participation. The court held that placing reasonable limits on the role of standby counsel, which the trial court was not obligated to provide in the first instance, was not an abuse of discretion. The case did not involve a claim that standby counsel's ineffective conduct prejudiced the defendant. *See United States v. Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998). The other decision, although rejecting the claim on the facts presented, stated that it might consider a claim of ineffective standby counsel in other circumstances. *See United States v. Schmidt*, 105 F.3d 82, 90–91 (2d Cir. 1997) (stating that it might consider a claim of ineffectiveness by standby counsel if counsel assumed expanded role as defendant's trial counsel; also finding in alternative that standby counsel's performance was reasonable).

Other decisions have reached the conclusion that the case law leaves the door open to claims of ineffective standby counsel in limited circumstances, although courts may differ regarding the circumstances they would be willing to accept. *See Jelinek v. Costello*, 247 F. Supp. 2d 212, 265–67 (S.D.N.Y. 2003) (court reviews several federal and state decisions and finds that "[i]n an appropriate case, a defendant who proceeds pro

se may make out a claim that he received ineffective assistance of standby counsel”; court also observes that “[e]ven those circuits most hostile to the idea of a claim of ineffective assistance of standby counsel refuse categorically to reject the possibility of such a claim succeeding”); *People v. Michaels*, 49 P.3d 1032, 1055–56 (Cal. 2002) (court finds that federal decisions have “left open the possibility that on different facts the federal court might allow a pro se defendant to challenge the performance of standby counsel”; using language similar to North Carolina Supreme Court’s opinion in *Thomas*, court holds that defendant may raise ineffectiveness claim based on breach of limited authority and responsibility that standby counsel has assumed); *see also State v. McDonald*, 22 P.3d 791 (Wash. 2001) (recognizing right to conflict-free standby counsel).

If counsel is ineffective before the defendant elects to proceed pro se, there is no question that the defendant may claim ineffectiveness for that counsel’s performance. *See Downey v. People*, 25 P.3d 1200 (Co. 2001) (in addition to finding that defendant may assert claim of ineffective assistance of standby counsel in limited circumstances, court notes that defendant may maintain claim for ineffective assistance of counsel for any acts or omissions that might have occurred before defendant elected to proceed pro se). And, in cases in which standby counsel assumes a greater role than appropriate, a defendant may have a claim that standby counsel interfered with the defendant’s right to self-representation. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984).

Statutory Right to Effective Assistance. If a defendant has a statutory right to counsel, he or she has a statutory right to effective assistance of counsel. *See In re Bishop*, 92 N.C. App. 662, 664–65, 375 S.E.2d 676, 678 (1989) (court holds that statutory right to counsel in proceeding to terminate parental rights includes right to effective assistance of counsel; otherwise, statutory right to counsel would be “empty formality”); *Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D. 2001) (“We will not presume that our legislature has mandated some ‘useless formality’ requiring the mere physical presence of counsel as opposed to effective and competent counsel.”); *Lozada v. Warden, State Prison*, 613 A.2d 818, 838 (Conn. 1992) (court discusses statutory right to counsel and finds that “[i]t would be absurd to have the right to appointed counsel who is not required to be competent”); *see also* 3 LAFAYETTE § 11.7(a), at 618–19 (where state has constitutional obligation to conduct proceedings, ineffectiveness of counsel may deprive defendant of right to contest proceedings and thus violate Due Process even if defendant has no constitutional right to counsel); *but cf.* G.S. 15A-1419(c) (stating that ineffective assistance of postconviction counsel, afforded by North Carolina statute, does not constitute good cause to excuse grounds listed in G.S. 15A-1419(a) for denial of motion for appropriate relief).

B. Deficient Performance

It is impossible to review in depth here the various situations in which a claim of ineffectiveness may arise. For purposes of this discussion, cases involving ineffectiveness claims are divided into two basic categories—cases in which the defendant ordinarily must show prejudice to prevail (discussed in this section) and cases in which prejudice is

presumed or at least is not part of the standard for judging ineffectiveness (discussed *infra* § 12.7C, D).

Strickland Standard. The most common ineffectiveness claims involve allegations of attorney incompetence or error. Generally, the defendant must show: (i) that the attorney’s performance was deficient, in that it lay outside the range of professionally competent assistance, and (ii) that the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668 (1984). To establish prejudice, the defendant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

In some instances, counsel’s errors or omissions may be so egregious as to warrant a presumption of prejudice without any further showing. *See infra* § 12.7C.

Failure to Investigate or Prepare. Attorneys are probably most likely to be found ineffective when they fail to investigate or prepare a case. Courts reviewing ineffective assistance of counsel claims usually give considerable deference to informed strategic or tactical choices by lawyers. *See Strickland*, 466 U.S. at 690 (“strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable”). Ineffectiveness is more likely to be found where an attorney failed to obtain the necessary background information to make an informed choice. *See, e.g., Wiggins v. Smith*, ___ U.S. ___, 123 S. Ct. 2527 (2003) (counsel ineffective for failing to investigate mitigating evidence); *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (“Although we generally give great deference to an attorney’s informed strategic choices, we closely scrutinize an attorney’s preparatory activities.”); *Deluca v. Lord*, 77 F.3d 578 (2d Cir. 1996) (counsel ineffective for failing to investigate mental disturbance defense); *see also* ABA Standards for Defense Function, Standard 4-4.1 (3d ed. 1993) (defense counsel has duty to investigate).

Preparation and investigation do not render strategic or tactical decisions completely immune from review, however. If, for example, after investigating the case an attorney settles on an outlandish or implausible strategy when other options are superior, an ineffectiveness claim may succeed. *See* 3 LA FAVE § 11.10(c), at 717–19.

Failure to Inform Client of Plea Offer and Consequences. Lawyers have sometimes been found ineffective when they have misinformed the client of the consequences of entering a guilty plea. *See Hill v. Lockhart*, 474 U.S. 52, 56, 59 (1985) (guilty plea not knowing and voluntary where defendant enters plea on advice of counsel and advice is not “within the range of competence demanded of attorneys in criminal cases”; defendant still must show prejudice—that is, “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”); *Ostrander v. Green*, 46 F.3d 347, 354–56 (4th Cir. 1995) (prejudice found based on erroneous advice of counsel regarding plea).

Lawyers have also been found ineffective when they have failed altogether to inform the client of a plea offer. *See State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983)

(counsel failed to inform defendant of plea offer; new trial ordered); *Barentine v. United States*, 728 F. Supp. 1241, 1251 (W.D.N.C. 1990) (“[w]here defense counsel has failed to inform a defendant of a plea offer, or where defense counsel’s incompetence results in a defendant’s deciding to go to trial rather than pleading guilty, the federal courts have been unanimous in finding that such conduct constitutes a violation of the defendant’s Sixth Amendment constitutional right to effective assistance of counsel”; court also cites state cases, including *Simmons*, finding ineffectiveness for failure of counsel to advise client of plea offer), *aff’d*, 908 F.2d 968 (4th Cir. 1990); compare *State v. Martin*, 318 N.C. 648, 350 S.E.2d 63 (1986) (no relief warranted; defendant offered insufficient evidence that prosecutor had made definite plea offer); *State v. Johnson*, 126 N.C. App. 271, 485 S.E.2d 315 (1997) (finding under circumstances of case that counsel’s failure to timely inform prosecutor of defendant’s acceptance of plea offer did not warrant relief); see also generally 3 LAFAVE § 11.6(c), at 613 (failure to consult with client regarding substantive right may be considered either ineffective assistance or violation of substantive right by counsel’s usurpation of control over decision).

If counsel fails to inform his or her client of a plea offer or misinforms the client, the court potentially could require the state to reinstate the plea. The remedy of a new trial (ordered by the North Carolina Court of Appeals in *Simmons*, *supra*) may not be sufficient. See *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994); see also *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988) (to obtain relief, defendant not required to show that trial court would have accepted plea agreement), *vacated on other grounds*, 492 U.S. 902 (1989).

C. Presumptive Prejudice

For certain ineffective assistance of counsel claims, outcome-determinative prejudice need not be shown. Prejudice is presumed. See *United States v. Cronin*, 466 U.S. 648, 658–59 (1984); *Bell v. Cone*, 535 U.S. 685 (2002); 3 LAFAVE § 11.8 (referring to these claims as involving state interference and other extrinsic factors); SMITH, *supra*, § 1.04 (referring to these cases as involving actual or constructive denials of counsel); see also *infra* § 12.7D (conflicts of interest). Some of the violations discussed here may be considered as involving ineffective assistance of counsel or the denial of other rights, such as Due Process, the right to confront one’s accusers and present a defense, and the right to counsel itself.

Absence of Counsel and Restrictions on Assistance. Prejudice need not be shown when counsel either was totally absent, or was prevented from assisting the accused, during a critical stage. See *Cronin*, 466 U.S. at 659 & n.25; see also *Geders v. United States*, 425 U.S. 80 (1976) (constitutional denial of counsel where lawyer was not permitted to consult with defendant during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (constitutional denial of counsel to deny defense counsel opportunity to make closing argument in either jury or nonjury case); *State v. Colbert*, 311 N.C. 283, 316 S.E.2d 79 (1984) (reversal of conviction required where defense lawyer was late to court and judge started jury selection without him).

Failure to Subject State’s Case to Meaningful Adversarial Testing. Prejudice is presumed “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronic*, 466 U.S. at 659; accord *Bell*, *supra* (reaffirming *Cronic*, but finding on facts presented that attorney performance did not amount to failure to subject case to meaningful adversarial testing and should be analyzed under *Strickland* standard).

Harbison Error. North Carolina presumes prejudice where defense counsel concedes the defendant’s guilt on any element of an offense without the defendant’s consent. See *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (trial counsel conceded defendant’s guilt to a lesser included offense without defendant’s consent; reversible error per se). This type of error can be viewed as one type of failure to subject the state’s case to meaningful adversarial testing.

Inability of Fully Competent Lawyer to Provide Effective Assistance. On some occasions, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Cronic*, 466 U.S. at 659–660. For example, prejudice may be presumed where the trial court improperly denies a defense motion for a continuance, and counsel does not have adequate time or opportunity to prepare. See *Powell v. Alabama*, 287 U.S. 45 (1932) (defendant must not be stripped of right to have sufficient time to consult with counsel and prepare defense); *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000) (defense counsel had insufficient time to prepare defense and was presumptively ineffective); compare *State v. Tunstall*, 334 N.C. 320, 432 S.E.2d 331 (1993) (refusal to grant continuance did not interfere with defendant’s ability to consult with counsel).

Forfeiture of Legal Proceeding. See *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (attorney failed to file notice of appeal despite defendant’s request; where attorney error results in forfeiture of legal proceeding, prejudice presumed).

D. Conflicts of Interest

Generally. The right to effective assistance of counsel includes the right to conflict-free counsel. See *Wood v. Georgia*, 450 U.S. 261 (1981); *State v. Bruton*, 344 N.C. 381, 474 S.E.2d 336 (1996). There are two basic standards for conflict-of-interest cases, discussed below. The cases interpreting these standards may be a poor guide, however, to what is ethically advisable. As one commentator has noted, the unwillingness of a court to overturn a conviction on appeal because of a conflict of interest “says little about the ethical propriety of the lawyer’s conduct.” RODNEY J. UPHOFF, ED., *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 234 (Criminal Justice Section, ABA 1995). The conflict problems a criminal defense lawyer may encounter are discussed in more detail in the attached paper.

Automatic Reversal. If counsel brings a conflict to the trial court’s attention and the trial court fails to inquire into the conflict, prejudice is presumed without a further showing and reversal is automatic. See *Holloway v. Arkansas*, 435 U.S. 475 (1978); see

also *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993). Reversal likewise is required if after timely objection the trial court improperly requires continued representation. *Holloway*, 435 U.S. at 488. The court must grant counsel's motion to withdraw unless the possibility of conflict is "too remote" to warrant new counsel. *Id.*, 435 U.S. at 484.

Holloway involved a conflict based on counsel's simultaneous representation of co-defendants, but courts have held that the automatic-reversal rule applies to other conflicts. See, e.g., *Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997); but cf. *Mickens v. Taylor*, 535 U.S. 162, 174–76 (2002) (noting that U.S. Supreme Court has not decided whether *Cuyler* rule, discussed below, applies to conflicts other than those arising from multiple representation).

Conflicts Adversely Affecting Counsel's Performance. If counsel fails to bring a conflict to the trial court's attention, the defendant must show that any conflict adversely affected trial counsel's performance. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980). This standard is more difficult to meet than the *Holloway* standard, but since a showing of prejudice is not specifically required, may be easier to satisfy than the *Strickland* standard. See *Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996) (counsel ineffective where he jointly represented two defendants and failed to pursue plea bargain for less culpable defendant); *Griffin v. McVicar*, 84 F.3d 880 (7th Cir. 1996) (writ of habeas corpus granted where counsel pursued weaker of two defenses because pursuit of alternative defense would jeopardize co-defendant).

After *Mickens, supra*, a defendant must make this showing even if the trial court knew or should have known of the potential conflict. Unless counsel has brought the conflict to the court's attention, a defendant does not get the benefit of the automatic-reversal rule for the court's failure to inquire. (*Mickens* also clarified that to satisfy the *Cuyler* standard, a defendant need not show that an "actual" conflict existed that adversely affected counsel's performance; a conflict adversely affecting trial counsel's performance is the same as an actual conflict.)

Cuyler, like *Holloway*, involved a conflict arising out of multiple representation, but courts have applied the *Cuyler* standard to other conflicts. See *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993); *State v. Loye*, 56 N.C. App. 501, 289 S.E.2d 860 (1982); but cf. *Mickens, supra* (noting that U.S. Supreme Court has not decided question).

E. Raising Ineffective Assistance of Counsel Claims on Direct Appeal

Ineffective assistance claims are typically raised through a postconviction motion for appropriate relief. See *State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995) (stating general rule that ineffectiveness claims are appropriate subject of motion for appropriate relief); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). Most ineffectiveness claims cannot be raised on direct appeal because the record on appeal is insufficient to determine the claim. See *State v. Morganherring*, 347 N.C. 408, 494 S.E.2d 597 (1997) (remanding for evidentiary hearing in superior court because record on appeal was

insufficient to determine ineffectiveness claim); *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990) (using supervisory powers to remand to superior court for findings necessary to determine ineffectiveness claim).

However, the North Carolina Supreme Court has indicated that ineffectiveness claims that can be raised on direct appeal—that is, those that are apparent on the record and require no further investigation or hearing to develop—must be raised or will be waived. *See State v. Fair*, 354 N.C. 131, 167, 552 S.E.2d 500, 525 (2001) (so holding but also noting that “defendants likely will not be in a position to adequately develop many IAC [ineffective assistance of counsel] claims on direct appeal”). In light of the U.S. Supreme Court’s decision in *Massaro v. United States*, 538 U.S. 500 (2003) (under federal law defendant may raise ineffectiveness claim in collateral proceeding even though defendant could have but did not raise claim on direct appeal), the state supreme court may be willing to reconsider its position. *See State v. Lawson*, ___ N.C. App. ___, 583 S.E.2d 354 (2003) (noting inconsistency between *Massaro* and *Fair* and inefficiencies created by *Fair*). Until then, appellate counsel is obliged to review the record for possible ineffectiveness claims that might be cognizable on direct appeal.

12.8 Attorney-Client Relationship

A. Control and Direction of Case

The ABA Standards for the Defense Function state that “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.” Standard 4-5.2(a). The decisions reserved for the client, with the advice of counsel, are: (i) what plea to enter; (ii) whether to accept a plea bargain; (iii) whether to waive jury trial; (iv) whether to testify; and (v) whether to appeal. (Under North Carolina law, a defendant may not waive the right to a jury trial in superior court, and a defendant who is sentenced to death may not waive the right to direct appeal.)

According to the ABA standards, strategic or tactical decisions—such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence to introduce—are the province of counsel. *See* Standard 4-5.2(a); *see also State v. Luker*, 65 N.C. App. 644, 310 S.E.2d 63 (1983) (citing standards on this issue), *aff’d in part, rev’d in part*, 311 N.C. 301, 316 S.E.2d 309 (1984). The standards further provide that where feasible and appropriate, the attorney should consult with the client about such decisions. *See* Standard 4-5.2(b); *see also* Rules 1.2, 1.4 of North Carolina Revised Rules of Professional Conduct (attorney should reasonably consult with client about means by which client’s objectives are to be accomplished, keep client reasonably informed about status of matter, and promptly comply with reasonable requests for information); *Gov’t of Virgin Islands v. Weatherwax*, 77 F.3d 1425 (3d Cir. 1996) (relying on *Strickland*, court states that important strategic and tactical decisions should be made only after lawyer consults with client).

Our Supreme Court has cited the ABA standards with approval but, based on its view that the attorney-client relationship is one of principal-agent, has taken the position that ultimately the attorney must carry out the client's wishes. Thus, although tactical decisions normally are for the attorney to make, "when counsel and a fully informed defendant client reach an absolute impasse as to . . . tactical decisions, the client's wishes must control." *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991) (choice of juror); accord *State v. Brown*, 339 N.C. 426, 451 S.E.2d 181 (1994) (trial strategy).

The *Ali* opinion advises that where there is an absolute impasse over strategy between the attorney and client, the attorney "should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189; see also ABA Standard 4-5.2(c) & commentary (advising that record should be made in manner that protects client confidentiality, such as memorializing matter in file). If the client's wishes are completely irrational, counsel may want to consider moving for a competency evaluation since one component of competence to stand trial is the ability to assist rationally in the defense. See NC Defender Manual, Vol. 1, Ch. 2.

B. Special Needs Clients

North Carolina's Revised Rules of Professional Conduct and the ABA Standards state that, to the extent possible, an attorney should seek to give mentally impaired or juvenile clients the same control over their case as fully functional adults. See North Carolina Revised Rule of Professional Conduct 1.14 (clients with diminished capacity); ABA Standards for Juvenile Justice, Standard 3.1. The North Carolina rules state that if the lawyer believes that a client is too young or too impaired to make informed choices in his or her best interest, the lawyer may take reasonably necessary protective action, including seeking appointment of a guardian ad litem. See Revised Rule of Professional Conduct 1.14(b) & cmt. 7 (rule authorizes attorney to seek guardian ad litem but comment recognizes that in many circumstances such an appointment may be more expensive or traumatic for client than warranted); ABA Standards for Juvenile Justice, Standard 3.1(b)(ii)(c). The ABA juvenile justice standards recommend that, if appointment of a guardian is not possible, the lawyer should take the course of action that "a competent responsible person in the juvenile's position" would likely decide to take. ABA Standards for Juvenile Justice, Standard 3.1(b)(ii)(c)[3]; see also Revised Rule of Professional Conduct 1.14 cmt. 7 (in considering alternatives for client with diminished capacity, lawyer should be aware of any law that requires lawyer to advocate for least restrictive action on behalf of client).

Counsel should make accommodations to overcome communication barriers created by youth or mental or physical disability. Such accommodations may include seeking the assistance of an expert. See generally ABA Standard on Defense Function 4-3.1 commentary (establishment of attorney-client relationship with client with mental disability).

One component of competence to stand trial is the ability of the defendant to assist in his

or her defense. Consequently, in appropriate circumstances, counsel should consider seeking a competency determination. *See* NC Defender Manual, Vol. 1, Ch. 2.

12.9 Repayment of Attorneys Fees

A. Contribution vs. Reimbursement

There are essentially two different types of procedures utilized by states to obtain repayment of the costs of providing counsel to indigent defendants—contribution and reimbursement. *See* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-7.2 & commentary (3d ed. 1992).

“Contribution” refers to situations in which the defendant makes a contribution to the cost of counsel, usually of a small, fixed amount at the beginning of the proceedings. The \$50 appointment fee, described *supra* § 12.5E, is a form of contribution.

“Reimbursement,” called recoupment in North Carolina, applies to situations in which the defendant is ordered after the proceedings to pay for the representation provided. North Carolina primarily uses recoupment to recover the attorneys fees paid by the state to an appointed attorney or, if the defendant was represented by a public defender or other IDS-employed attorney, the monetary value of legal services provided. The following discussion deals with those cost-recovery procedures.

B. Constitutionality of Recoupment Procedures

Cost recovery statutes must meet the standards established by the U.S. Supreme Court in *Fuller v. Oregon*, 417 U.S. 40 (1974). The requirements are as follows:

1. The procedures must guarantee the right to counsel without cumbersome obstacles.
2. The imposition of the burden of repayment may not be made without notice and a meaningful opportunity to be heard.
3. The entity deciding whether to require repayment must take cognizance of the person’s resources, the other demands on his or her own and family’s finances, and the hardships the person or family will endure if repayment is required. The purpose of this inquiry is to assure that repayment is not required as long as the person remains indigent.
4. The person must not be exposed to more severe collection practices than an ordinary civil debtor.
5. The person cannot be imprisoned for failing to pay as long as default is attributable to his or her poverty.

North Carolina’s recoupment statutes have been found to satisfy these constitutional requirements. *See Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984) (North Carolina’s statutes and court decisions interpreting them meet the facial constitutional requirements established by the U.S. Supreme Court). In individual cases, however, orders related to

recoupment have sometimes been stricken as unconstitutional or in violation of statutory requirements. *See infra* § 12.9E.

C. Types of Cases Subject to Recoupment

Adult Criminal Cases. G.S. 7A-455 authorizes recoupment from an adult defendant in a criminal case if he or she is convicted. *See also State v. Bass*, 53 N.C. App. 40, 280 S.E.2d 7 (1980) (recognizing conviction requirement). Because the statute requires a “conviction,” there are some instances in which the court may not be able to assess fees even though the defendant does not completely prevail—for example, when a defendant receives a PJC or is charged with a criminal offense and is found responsible for an infraction. *See also State v. Rogers*, ___ N.C. App. ___, 587 S.E.2d 906 (2003) (indigent defendant could not be held responsible for attorneys fees at trial level when conviction was reversed on appeal for ineffective assistance of counsel). Recent cases in other contexts suggest that a “conviction” includes an adjudication of guilt or plea of guilty or no contest without formal entry of judgment, but it is not clear from those cases that it would be permissible to assess attorneys fees for a PJC. *See, e.g., State v. Graham*, 149 N.C. App. 215, 562 S.E.2d 286 (2002) (PJC constitutes prior conviction for purposes of determining defendant’s sentence for subsequent offense). Although G.S. 7A-455 precludes a court from entering a fee judgment against a person who is placed on probation pursuant to a deferred prosecution agreement, which does not constitute a conviction, many prosecutors may condition deferred prosecution on the defendant’s agreement to repay attorneys fees. *See generally* G.S. 15A-1341(a1) (person who receives deferred prosecution may be placed on probation as provided in probation article); G.S. 15A-1343(e) (authorizing attorneys fees as condition of probation).

Criminal and Other Cases Involving Minors and Dependent Adults. Recoupment is also authorized in criminal and certain civil proceedings involving minors or dependent adults. G.S. 7A-450.1 through -450.4 authorizes recoupment from a parent or guardian of the costs of an attorney or guardian ad litem appointed for a minor or dependent adult. Under these statutes, whether to require a parent or guardian to repay fees is within the court’s discretion, except that G.S. 7A-450.1 bars recoupment if the person for whom an attorney or guardian ad litem is appointed prevails. The statutes governing the particular proceeding may place additional limits on recoupment.

The principal types of case in which a parent or guardian may be found liable for attorneys fees under G.S. 7A-450.1 through -450.4, are:

- criminal cases (*see also* G.S. 7A-455(d));
- juvenile delinquency proceedings (*see also* G.S. 7B-2002);
- abuse, neglect, and dependency proceedings (*see also* G.S. 7B-603(c));
- termination of parental rights proceedings (*see also* G.S. 7B-603(c)); and
- involuntary commitment proceedings (*see also* G.S. 122C-224.1).

Counsel for Adult Parents. It is unclear whether recoupment is authorized for the fees for counsel provided to an adult in abuse, neglect, and dependency proceedings and

termination of parental rights proceedings. The applicable statute, G.S. 7B-603(c), states on the one hand that a parent may be held responsible for counsel fees if the child is found to have been abused, neglected, or dependent or the parent's rights are terminated, thus suggesting that a parent may have to pay for counsel fees for representation provided to the parent. On the other hand, the statute also states that the court should follow the procedures for recoupment in G.S. 7A-450.1 through -450.4, which only establish a method for recouping fees expended for representation of a minor or dependent, thus suggesting that a parent may only have to pay for counsel services in those instances.

Cases not Subject to Recoupment. No other appointed cases are covered by North Carolina's statutes. Thus, although the state incurs appointed counsel expenses in other non-criminal proceedings, such as civil contempt, involuntary commitment, and incompetency proceedings, no statute specifically authorizes recoupment.

It may be permissible for the courts to order recoupment when a person is convicted of criminal contempt, such as when a person willfully fails to pay child support in violation of a court order, because a finding of criminal contempt could be viewed as a conviction. *But cf. State v. Reaves*, 142 N.C. App. 629, 544 S.E.2d 253 (2001) (adjudication of criminal contempt is not prior conviction under structured sentencing); *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503, 169 S.E.2d 867 (1969) (criminal contempt is *sui generis*—that is, one of kind). For civil contempt, however, there is no statute authorizing recoupment of attorneys fees. See John L. Saxon, *McBride v. McBride*: Implementing the Supreme Court's Decision Requiring Appointment of Counsel in Civil Contempt Proceedings, Administration of Justice Memorandum 94/05 at 6 & n.45 (1994).

D. Methods of Recoupment

There are essentially three recoupment methods, discussed below.

Judgment. G.S. 7A-455(b) provides for entry of judgment against a convicted defendant for the amount of fees found to be due. Although it may use the collection procedures available to other judgment creditors, the state typically does not execute on attorneys fee judgments. Instead, the state recovers the amount due under the judgment through the interception of tax refunds. See G.S. 105A-1 through -16 (Setoff Debt Collection Act). The judgment also becomes a lien against the defendant's real property as provided in G.S. 7A-455(c). In criminal cases involving an adult criminal defendant, entry of judgment is required when the statutory requirements are met; in other cases subject to recoupment, entry of judgment is in the court's discretion.

Condition of Probation. In criminal cases, the court may make repayment of attorneys fees a condition of probation. See G.S. 15A-1340.37(c) (repayment to state of attorneys fees is permissible form of restitution); G.S. 15A-1343(e) (authorizing repayment of attorneys fees as condition of probation). When a person receives an active sentence of imprisonment, the court may recommend repayment of attorneys fees as a condition of work release or post-release supervision. See G.S. 148-33.2(c), -57.1(c); *State v. Wingate*,

149 N.C. App. 879, 561 S.E.2d 911 (2002) (permissible for court to recommend to Department of Correction that repayment of attorneys fees be made condition of work release).

Order to Pay Clerk. G.S. 7A-455(a) and (c) provide in criminal cases that if a person is partially indigent and is convicted, the court may order the person to pay a portion of the fees incurred to the clerk of court. It is unclear to what extent, if at all, this method of recovery is being used. The procedure appears to be a recoupment procedure because it can be used only if a person is convicted. It does not appear to authorize the court to require payment by a partially indigent person earlier in the proceedings. (Another statute, G.S. 7A-450(d), requires a person who has been found indigent to advise the court if he or she becomes financially able to secure legal representation. Presumably, the court then may require the person to retain counsel, although it is unclear how often this statute is used.)

In noncriminal cases in which recoupment is authorized and the court requires repayment, the responsible person pays the amount due to the clerk of court, and judgment is entered only if payment is not made within 90 days. *See* G.S. 7A-450.3.

E. Violations of Constitutional and Statutory Requirements

Although North Carolina's recoupment procedures have been found constitutional, individual orders have been stricken as unconstitutional or in violation of statutory requirements. Errors may include:

- Failing to afford the person an opportunity to be heard before imposing the recoupment obligation (either as a judgment or as a condition of probation). *See State v. Crews*, 284 N.C. 427, 201 S.E.2d 840 (1974) (record failed to show that defendant had notice of and opportunity to be heard on recoupment judgment; judgment vacated without prejudice to state's right to reapply); *State v. Washington*, 51 N.C. App. 458, 276 S.E.2d 470 (1981) (to same effect); *State v. Stafford*, 45 N.C. App. 297, 262 S.E.2d 695 (1980) (notice in affidavit of indigency of potential for entry of civil judgment not sufficient; even if notice had been sufficient, defendant was not afforded opportunity to be heard).
- Fixing an amount not supported by the evidence. *See generally State v. Killian*, 37 N.C. App. 234, 238, 245 S.E.2d 812, 815 (1978) (restitution order "must be supported by evidence" and "reasonably related to the damages incurred").
- Imposing unduly burdensome financial obligations as a condition of probation. *See generally State v. Hayes*, 113 N.C. App. 172, 437 S.E.2d 717 (1993) (defendant's probation could not be conditioned on payment of more than \$3,000 per month in restitution, as defendant clearly would be unable to pay that amount); *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988) (on appeal of probationary judgment, court holds that trial court was not authorized to condition probation on payment of total restitution of \$500,000 over five years, which was greater than defendant was able to pay), *aff'd per curiam*, 323 N.C. 703, 374 S.E.2d 866 (1989); *see also* G.S. 15A-1340.36(a) (in determining amount of restitution, court must assess defendant's

- ability to make restitution); G.S. 15A-1343(e) (court not required to make repayment of attorneys fees a condition of probation if extenuating circumstances exist).
- Revoking a person's probation and activating his or her sentence for failing to pay a financial obligation without regard to the person's ability to pay. *See generally* *Bearden v. Georgia*, 461 U.S. 660 (1983) (unconstitutional for court to revoke probation and imprison person for failure to pay if he or she is unable to do so); *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984) (person cannot be imprisoned for failing to repay attorneys fees as long as default is attributable to his or her poverty); *State v. Hill*, 132 N.C. App. 209, 510 S.E.2d 413 (1999) (trial court erred in revoking probation without considering defendant's disability, which was reason for defendant's failure to make restitution as ordered); STEVENS H. CLARKE, *LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA* 24–26 (2d ed. 1997) (discussing cases recognizing that probation may not be revoked for inability to pay and questioning North Carolina cases placing burden of proof on defendant to show inability to pay).