

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

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

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

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

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

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

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

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

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

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

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