CHAPTER FIFTEEN
Right to Counsel
TABLE OF CONTENTS

15

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RIGHT TO COUNSEL

I. WHEN THE RIGHT TO COUNSEL ATTACHES

A. FEDERAL CONSTITUTION

1. Sixth Amendment - "Assistance of Counsel"

In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963).

a. When Right to Counsel Attaches

The Sixth Amendment right to counsel attaches at or after the time adversary judicial proceedings have been initiated against accused. Kirby v. Illinois, 406 U.S. 682, 688, 92 S. Ct. 1877, 1881 (1972).

Hatcher v. State, 414 N.E.2d 561, 563 (Ind. 1981) (the filing of an information or indictment begins formal criminal process). See Ind. Code § 35-34-1-1.

The threat of imprisonment determines whether defendant has a right to counsel. If no counsel and no waiver of right, defendant cannot be sentenced to prison. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972).

Glover v. U.S., 531 U.S. 198, 121 S. Ct. 696 (2001) (any amount of jail time has Sixth Amendment significance, *citing* Argersinger v. Hamlin).

Rothgery v. Gillespie County, 554 U.S. 191, 128 S.Ct. 2578 (2008) (a criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel).

(1) Offense Specific

In contrast to the Indiana Constitution (discussed below), the Sixth Amendment right to counsel is offense specific and only applies to offenses that have been charged, and to uncharged offenses that are the same under the test of Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180 (1932). If each offense contains an element that the other does not, they are different offenses under Blockburger.

Texas v. Cobb, 121 S.Ct. 1335 (2001) (where defendant was charged with burglary but not with murder committed in course of burglary, and had lawyer on burglary case, right to counsel did not attach to murder until charges were filed).

Leonard v. State, 73 N.E.3d 155 (Ind. 2017) (the right to counsel does not apply to future charges, so defendant's incriminating statement to an uncover officer

posing as a hitman was admissible in subsequent prosecution for conspiracy to commit murder).

b. Applicable to States

The Sixth Amendment's guarantee of the right to counsel is applicable to state court proceedings under the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963).

The failure to appoint counsel is a unique constitutional defect, rising to the level of a jurisdictional defect, which warrants special treatment on review. Lackawanna County D.A. v. Coss, 121 S. Ct. 1567 (2001).

c. Misdemeanor Cases

Absent a knowing and intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at his trial. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972).

Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764 (2002) (where the State does not provide counsel at trial, the Sixth Amendment does not permit activation of a suspended jail sentence for a probation violation).

Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158 (1979) (Sixth Amendment right to counsel in misdemeanor cases limited to cases where defendant is actually sentenced to jail).

Nichols v. U.S., 511 U.S. 738,114 S. Ct. 1921 (1994) (uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction).

Compare United States v. Bryant, 136 S. Ct. 1954 (2016) (defendant's uncounseled tribal court convictions for domestic battery could be used as predicate convictions in a subsequent prosecution for Domestic Assault Within Indian Country – 18 U.S.C. § 117(a) – and subject defendant to a five-year sentence because the Indian Civil Rights Act of 1968 provides indigent clients with a right to counsel only in cases where the sentence exceeds one year).

2. Critical Stage of the Proceeding

The right to counsel attaches at any "critical stage" in the criminal proceeding. Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999 (1970), such as where counsel's absence might derogate from the accused's right to fair trial. Callis v. State, 684 N.E.2d 233 (Ind. Ct. App. 1997). The proper test for determining whether particular proceeding is "critical stage," to which assistance of counsel guarantee applies, is whether the defendant is confronted with intricacies of law or advocacy of public prosecutor or prosecuting authorities. Id.

a. Examples

Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877 (1972) (generally, prior to formal charges being filed, there is no right to counsel).

Montejo v. Louisiana, 129 S.Ct. 2079, 2085 (2009) (*citing* Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964)) (custodial interrogation is always a critical stage).

Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982) (non-custodial interrogation of suspect before filing of charges does not implicate the right to counsel).

U.S. v. Mandujano, 425 U.S. 564, 96 S. Ct. 1768 (1976) (no right to counsel before a grand jury under the Sixth Amendment; no Miranda warnings required).

B. WHEN RIGHT TO COUNSEL ATTACHES UNDER INDIANA CONSTITUTION

Article 1, Section 13 of the Indiana Constitution contemplates the right of accused to consult with counsel at every stage of the proceedings. Hoy v. State, 225 Ind. 428, 75 N.E.2d 915, 917 (1947). The right to be heard by counsel under this provision is "not limited to the right to be heard by counsel at trial." Batchelor v. State, 189 Ind. 69, 125 N.E. 773, 776 (1920).

"In all criminal prosecutions, the accused shall have the right ... to be heard by himself and counsel..." Ind. Const. Art. 1 § 13.

The right to counsel under Article 1, Section 13 provides greater protection because, unlike the Sixth Amendment, "it attaches earlier - upon arrest, rather than only when 'formal proceedings have been initiated' as with the federal right." State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016) (*quoting* Taylor v. State, 689 N.E.2d 699, 703-04 (Ind. 1997)).

Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250, 255 (1951) (the right to counsel in a criminal prosecution is self-executing).

Pirtle v. State, 263 Ind. 16, 323 N.E.2d 634 (1975) (person asked to consent to search while in police custody entitled to assistance of counsel before giving consent, including right to have appointed counsel if person cannot afford it).

Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949) (before Miranda v. Arizona, Indiana recognized right to counsel during custodial interrogation under Art. 1, § 13).

1. All Critical Stages

The right to counsel at all critical stages is fundamental. Critical stages are: (1) parts of proceeding where incrimination may occur; or (2) where opportunity for effective defense may be seized or be foregone. Manley v. State, 410 N.E.2d 1338 (Ind. Ct. App. 1980).

Guajardo v. State, 544 N.E.2d 174 (Ind. Ct. App. 1989) (guarantee of assistance of counsel assures aid of counsel when accused confronted with both intricacies of law and advocacy of public prosecutor).

Greenlee v. State, 477 N.E.2d 917 (Ind. Ct. App. 1985) (accused has the right to counsel at any stage of the prosecution where incrimination may occur and the opportunity for effective defense must be seized or foregone).

2. Applies in Felony and Misdemeanor Cases

Defendants have the right to counsel regardless of the penalty imposed. Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947); Webb v. Baird, 6 Ind. 13, 18 (1854); and Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764 (2002).

The right to counsel must and does exist in misdemeanor cases to the same extent and under the same rules it exists in felony cases. Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250, 253 (1951).

3. When Right to Counsel Does Not Attach

a. Identification Lineups Before Charges Filed

Little v. State, 475 N.E.2d 677 (Ind. 1985) (counsel not required where defendant not yet charged, even though he was a prime suspect).

Randall v. State, 474 N.E.2d 76 (Ind. 1985) (at time of photo array defendant not charged with crime; no right to counsel).

Bray v. State, 443 N.E.2d 310 (Ind. 1982) (defendant, while under indictment for crime A, was placed in lineup relating to crime B; no charges yet filed against defendant for crime B; held, no right to counsel).

Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042 (1978) (trial court did not err in denying defendant's motion to suppress videotape lineup. Identification proceeding preserved on videotape is not "critical stage" within meaning of U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967)).

b. Other Physical Tests

No right to counsel at procedures for taking of fingerprints, hair samples, handwriting exemplars, etc. Pearson v. State, 441 N.E.2d 468 (Ind. 1982).

Gillie v. State, 465 N.E.2d 1380 (Ind.1984) (hair and handwriting sample).
White v. State, 431 N.E.2d 488 (Ind.1982) (blood and saliva samples).
Frances v. State, 262 Ind. 353, 316 N.E.2d 364 (1974) (fingerprints).

PRACTICE POINTER: Although the Federal and Indiana Constitutions may not require that an accused person be given the right to counsel when blood, hair, handwriting, and other samples are taken, counsel should still try to be present for these and analogous procedures because of the risk that law enforcement officers or other persons may seek to obtain damaging admissions from the defendant during the procedures. At a minimum, advise the client not to talk to anyone about the case and not to make any other damaging admissions.

c. Psychiatric Examinations

Psychiatric examination of defendant by State's expert is not a critical stage requiring presence of counsel. Esmond v. State, 20 N.E.3d 213 (Ind. Ct. App. 2014). So long as the testimony of State's expert goes to defendant's mental capacity at the time of the crime and as it pertains to his ability to understand the charges and assist his counsel, and not to his guilt or punishment, the defendant has no right to presence of counsel during the examination under either the Sixth Amendment or Article 1, Section 13. See Taylor v. State, 659 N.E.2d 535 (Ind. 1995) and Williams v. State, 555 N.E.2d 133 (Ind. 1990).

d. Pre-Sentence Interview with Probation Officer

Because a presentence interview with a probation officer is not a critical stage of the proceedings, the defendant need not have the assistance of counsel at that interview. Emerson v. State, 724 N.E.2d 605 (Ind. 2000); Lang v. State, 461 N.E.2d 1110 (Ind. 1984).

e. Initial Hearings for Determining Probable Cause

No right to counsel where, as in Indiana, initial hearing is non-adversarial determination of probable cause. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975); May v. State, 502 N.E.2d 96 (Ind. 1986).

f. Selection of Special Judge

Selection of a special judge is not a "critical stage" requiring presence of counsel. Selection process not adversarial or fact-finding proceeding and does not constitute confrontation between defendant and State.

> Staley v. State, 633 N.E.2d 314 (Ind. Ct. App. 1994) ("If a defendant, unaided by counsel, makes a choice which results in his selection of a judge who ultimately proves to be partial or biased such that he is deprived of a fair trial, protection remains for him under [the] Due Process Clause.").

g. Firing of Attorney during Pre-trial Period

Taylor v. State, 944 N.E.2d 84 (Ind. Ct. App. 2011) (defendant failed to show that he was deprived of right to counsel during critical stage of proceedings where during pre-trial period he fired his attorney, unequivocally requested to proceed pro se, and was later appointed counsel for trial after his 11th hour request).

C. POLICE INTERROGATION (RIGHT TO COUNSEL vs. RIGHT TO SILENCE)

Different rules apply to reinterrogation depending on whether the suspect invoked his or her right to counsel or right to silence.

> Carter v. State, 634 N.E.2d 830 (Ind. Ct. App. 1994) (after requisite Miranda advisements are given, if the accused indicates he wishes to remain silent, all interrogation must cease, and if accused requests attorney, all interrogation must cease until attorney is present).

After police read suspect his Miranda rights, the suspect may:

(1) waive rights and agree to talk;

> North Carolina v. Butler, 441 U.S. 369, 372-376, 99 S. Ct. 1755 (1979) (waiver need not always be express; in some cases, waiver of rights can be clearly inferred from actions and words of person being interrogated).

(2) assert right to counsel, triggering Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981); or

(3) assert right to silence, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

1. Notifying Suspect of Attorney's Attempt to See Him

a. Indiana Constitution

Indiana Constitutional guarantees of the right to counsel and the privilege against self-incrimination in Article 1 § 13 are violated where police fail to inform a suspect of a lawyer's efforts to contact him in person, and do not honor counsel's request to be present during any questioning. Police have a duty to inform a custodial suspect when an attorney is present at station, but "totality of the circumstances" test used to determine if statements by defendant must be suppressed. Factors to consider include: (1) whether attorney had previous relationship with custodial suspect; (2) clearness and consistency in defendant's waiver; (3) whether a written waiver has been signed; and (4) whether the record displays anything representing a request for counsel. Malinski v. State, 794 N.E.2d 1071 (Ind. 2003).

PRACTICE POINTER: Based on Malinski's narrow opinion, law enforcement apparently still is not required to inform a custodial suspect that an attorney has tried to reach him by phone. Malinski v. State, 794 N.E.2d 1071, 1078 (Ind. 2003); Ajabu v. State, 693 N.E.2d 921 (Ind. 1998).

b. Federal Constitution

The federal constitution does not require police to inform a suspect who has not requested an attorney that one is present. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986).

2. "Sixth Amendment" Right to Counsel and Reinterrogation

"The purpose of the Sixth Amendment counsel guarantee is to protect the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged crime." McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 2208 (1991) (cleaned up).

a. Does Not Prevent Questioning on Other Crimes

Invocation of Sixth Amendment right to counsel is "offense specific" and does not preclude police officers from reinitiating an interrogation of a suspect concerning different or future charges. McNeil v. Wisconsin, 111 S. Ct. 2204, 2208-09 (1991).

The Sixth Amendment right to counsel is offense specific and only applies to offenses that have been charged, and to uncharged offenses that are the same under the test of Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180 (1932). If each offense contains an element that the other does not, they are different offenses.

> Texas v. Cobb, 121 S. Ct. 1335 (2001) (where defendant was charged with burglary but not with murder committed in course of burglary and had lawyer on burglary case, right to counsel did not attach to murder until charges were filed).

Article 1, Section 13 of the Indiana Constitution provides more protection than Texas v. Cobb (*supra*). Under the Indiana Constitution, the right to counsel also attaches to police questioning about offenses that are inextricably intertwined with the charge on which counsel is already representing the defendant. Jewell v. State, 957 N.E.2d 625 (Ind. 2011).

Leonard v. State, 86 N.E.3d 406 (Ind. Ct. App. 2017) (right to counsel on pending charges did not shield defendant from police questioning about his plan to murder a witness against him in the pending prosecution).

PRACTICE POINTER: Advise all your clients: (1) not to talk to the police about their pending cases, or about other cases, without counsel present; and (2) to tell the police that they do not wish to talk to them about their pending cases or other cases without counsel present. Some wise lawyers, immediately upon entry into the case, prepare a letter to the police (with a copy to the court's file) for their client to sign, putting the client's invocation of the privilege against self-incrimination and right to counsel into written form and advising the police not to seek a waiver of the right to counsel or the privilege against self-incrimination from the defendant.

b. Does Not Guarantee Right to Effective Assistance of Counsel

Oberst v. State, 935 N.E.2d 1250 (Ind. Ct. App. 2010) (counsel's failure to stop defendant from confessing to police during interview that counsel attended did not constitute ineffective assistance because when defendant confessed, criminal proceedings had not been initiated, so defendant had no right to counsel, and, thus, no right to effective assistance of counsel; defendant's attorney happened to be at the police station regarding another case for a different client and eventually joined defendant's interview).

But cf. Rodenbush v. State, 17 N.E.3d 934 (Ind. Ct. App. 2014) (Oberst did not control; although defendant gave statement to police before charges were filed, trial court had conducted defendant's hearing, so defendant had right to counsel at time he was advised by attorney to give statement to police).

c. Jail-House Plants

Law enforcement may use "jail-house plants" (or other informants) to surreptitiously interrogate defendants in custody. But when the defendant has already been charged with an offense, the Sixth Amendment right to counsel attaches, precluding such interrogation on the ***charged*** offenses, unless the defendant makes a valid waiver.

Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, (1964) (use of undercover agent or informer to obtain inculpatory statements after arraignment and retention of lawyer improper).

United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980) (right to counsel violated by informant in same cell block as defendant. Police had asked informant to listen for statements by defendant but not to initiate conversations or question defendant. Informant paid for his testimony, but Court found that testimony should be suppressed); see also Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477 (1985).

But see

Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394 (1990) (undercover agent posing as inmate need not give Miranda warnings to suspect who is in jail awaiting trial on charge unrelated to crime being investigated. Mathis v. United States, 391 U.S. 1 (1968) and related cases distinguished because defendant here did not know he was speaking to government agent. Massiah v. United States, 377 U.S. 201 (1964) and related cases not applicable because suspect here had not been charged for the crime

and therefore no Sixth Amendment rights had attached. Decision partly relied on no police dominated atmosphere existing. See Brennan, J., concurring (questioning analysis if suspect had previously asserted his right to counsel)).

Kuhlman v. Wilson, 477 U.S. 436, 106 S. Ct. 2616 (1986) (6A right to counsel not violated when informer in cell only listened to spontaneous statements and took no action that was designed deliberately to elicit incriminating statements. Defendant must show some action beyond listening that was designed to deliberately elicit incriminating remarks).

3. "Fifth Amendment" Right to Counsel and Reinterrogation

a. Invocation of Fifth Amendment Right to Counsel Must Occur during Custodial Interrogation

A Fifth Amendment request for counsel requires some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police. McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204 (1991).

U.S. v. LaGrone, 43 F.3d 332 (7th Cir. 1994) (5th Amendment right to counsel attaches, and can be invoked, only in context of custodial interrogation).

(1) Consequences

After assertion of right to counsel:

(1) all interrogation must cease immediately;

(2) police cannot reinterrogate the suspect until counsel is made available to the accused or the accused initiates further communication, exchanges or conversations with police.

Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486 (1990) (suspect who has invoked right to counsel cannot be questioned regarding any offense unless suspect has reinitiated contacts with officers; Edwards demands presence of counsel at re-interrogation; consultation not enough).

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981) (once suspect asserts right to counsel, current investigation must cease, and he may not be approached for further interrogation on the particular case until counsel has been made available to him).

b. Prevents Questioning on Other Crimes – 14-day Rule

The Edwards rule applies to all later custodial reinterrogation, regardless of subject matter. Claiming the right to counsel prevents questioning as to other crimes in a police-initiated conversation. McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204 (1991). But police can re-initiate the interrogation after a fourteen-day break in custody. Maryland v. Shatzer, 130 S. Ct. 1213 (2010).

Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093 (1988) (once a suspect claimed right to counsel after Miranda warnings and has not been furnished counsel, he may not while in custody be questioned even with regard to a different and unrelated

crime even though officers did not know of his previous claim, unless under Edwards v. Arizona he initiates further conversation and waives his right. Giving of Miranda warnings regarding second crime not sufficient).

Carr v. State, 934 N.E.2d 1096 (Ind. 2010) (defendant made statements suggesting he voluntarily waived his right to counsel and would speak with officers, but such statements occurred after defendant had unambiguously requested counsel and officers continued questioning; defendant's waiver or equivocation would not have occurred had detective scrupulously honored requests for counsel by immediately ceasing further communication until attorney was present; confession should have been suppressed); see also Bean v. State, 973 N.E.2d 35 (Ind. Ct. App. 2012).

NOTE: For an in-depth discussion of ambiguous assertions of rights during interrogation, see IPDC Confessions Manual, 2021 ed. available on website.

4. Indiana - State Should Notify Counsel Prior to Interrogation

The Indiana Supreme Court has disapproved of custodial interrogation without prior notice to counsel. However, failure to provide such notice apparently does not affect the admissibility of any statement made by the client.

"It should be noted that although not *per se* impermissible, we do not approve of the practice of custodial interrogation without prior notice to counsel. Without it, the accused's right to effective representation may be jeopardized." Kern v. State, 426 N.E.2d 385, 387 (Ind. 1981).

Walls v. State, 368 N.E.2d 1373, 1375 (Ind. Ct. App. 1977) (giving notice would be a "better, fairer and safer practice" and would ease heavy burden of proving a waiver of defendant's rights).

Kern v. State, 426 N.E.2d 385 (Ind. 1981) (specific acknowledgement by defendant that he knew that counsel had been appointed and that he nevertheless knowingly waived his presence is a strong factor supporting findings of a voluntary waiver and a voluntary confession; incriminating statements made by defendant were properly held admissible by trial court).

Martin v. State, 779 N.E.2d 1235 (Ind. Ct. App. 2002) (counsel not contacted but signed waiver of rights showed voluntariness).

Finney v. State, 786 N.E.2d 764 (Ind. Ct. App. 2003) (where defendant unmistakably evidenced his desire to deal with authorities only through his attorney, trial court abused its discretion in denying defendant's motion to strike police officer's testimony regarding statement defendant made to him; officer's question re: why defendant fled was impermissible police-initiated interrogation).

PRACTICE POINTER: A prosecutor talking to defendant in absence of attorney could be subject to disciplinary action. See Indiana Rules of Professional Conduct, Rule 4.2.

D. RIGHT TO COUNSEL IN VARIOUS PROCEEDINGS

1. Detainer and Extradition

a. Extradition

Indiana Code § 35-33-10-3(11), the Uniform Criminal Extradition Act, provides that a person arrested shall be informed of his right to demand legal counsel before being delivered over to agent of demanding state.

b. Detainer

Defendant entitled to the same "procedural protections" afforded to defendants extradited. Cuyler v. Adams, 449 U.S. 433, 101 S. Ct. 703 (1981).

> Daher v. State, 572 N.E.2d 1304 (Ind. Ct. App. 1991) (inmate subject of proceeding under Interstate Agreement on Detainers entitled to procedural protections: (1) informed of the demand for his surrender; (2) of the crime with which he was charged; (3) ***his right to have an attorney***; and (4) his right to have a hearing).

2. Challenging Grand Jury's Probable Cause Finding

Kaley v. United States, 134 S. Ct. 1090 (2014) (while right to hire counsel of choice is "vital interest" and at "the root meaning" of the 6th Amendment, there is no such right to counsel - whether chosen or not - to challenge a grand jury's finding of probable cause; ex parte proceedings are adequate for such proceedings and power to find probable cause vests solely in grand jury).

Compare Luis v. United States, 136 S. Ct. 1083 (2016) (freezing defendant's assets unconnected to alleged crime to ensure funds were available to later pay fines and restitution, which prevented defendant from hiring her own lawyer, denied defendant's fundamental right to hire lawyer of her choice).

3. Initial Hearings

Unless evidence is taken, a guilty plea entered, or any factual determination other than the mere review of probable cause for arrest takes place, the initial hearing itself is not a critical stage requiring the presence of counsel under the Sixth Amendment. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975). No case or statute interprets the Indiana Constitution to require representation by counsel at the first appearance or initial hearing. However, the Indiana Supreme Court has held the right to counsel attaches much earlier, at the time of arrest, than the federal right, which does not attach until "formal proceedings have been initiated." State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016) and Taylor v. State, 689 N.E.2d 699, 703-04 (Ind. 1997). To date, the Indiana Supreme Court has not addressed whether Article 1, § 13 of the Indiana Constitution requires counsel at an initial hearing. Arguably, an accused should be entitled to counsel at the first appearance hearings where the trial court determines under Criminal Rule 26(B) whether the accused presents a substantial risk of flight or danger to himself or others.

4. Pretrial Proceedings

Under Sixth Amendment analysis, determining whether a pretrial proceeding is a critical

stage requiring presence of counsel depends on whether potential substantial prejudice to defendant's rights inheres in particular confrontation, and on ability of counsel to avoid that prejudice. Staley v. State, 633 N.E.2d 314 (Ind. Ct. App. 1994).

a. Polygraph Exams

Pretrial polygraph exams and post examination questioning are critical stages, Greenlee v. State, 477 N.E.2d 917 (Ind. Ct. App. 1985); Williams v. State, 489 N.E.2d 594 (Ind. Ct. App. 1986).

But see State v. Wroe, 16 N.E.3d 462 (Ind. Ct. App. 2014) (when defendant signed polygraph stipulation, 6A right to counsel had not attached because he was neither detained nor charged; to extent right to counsel under Art. 1, § 13 sometimes attaches before charges are filed, defendant waived right by signing stipulation, which contained clear provision regarding waiver of right to counsel).

Callis v. State, 684 N.E.2d 233 (Ind. Ct. App. 1997) (finding no 6A right to counsel because pre-indictment polygraph exam and interview occurred prior to commencement of criminal proceeding, distinguishing Greenlee and Casada v. State, 544 N.E.2d 189 (Ind. Ct. App. 1989)).

Kochersperger v. State, 725 N.E.2d 918 (Ind. Ct. App. 2000) (though not represented by counsel at time of examination, defendant was fully advised of his right to counsel prior to executing stipulation and knowingly and voluntarily waived such right by signing advice of rights form). See also Holden v. State, 149 N.E.3d 612 (Ind. Ct. App. 2020) (although stipulation did not tell defendant that attorney would be appointed if he could not afford one, it did advise him he had a right to counsel defendant did not argue that his waiver of counsel was unknowing or involuntary).

Caraway v. State, 891 N.E.2d 122 (Ind. Ct. App. 2008) (disagreeing with Kochersperger (*supra*) and holding that defendant's right to counsel attached immediately prior to detective's request to sign polygraph stipulation agreement).

b. Grand Jury Proceedings

Ind. Code § 35-34-2-5 (grand jury target has right to be represented by counsel).

c. Pretrial Hearings

Clark v. State, 577 N.E.2d 620 (Ind. Ct. App. 1991) (pretrial motion to suppress State's identification evidence was critical stage of prosecution and allowing the hearing to proceed without defendant's counsel present denied fundamental due process).

5. Guilty Pleas

Critical stages are "proceedings between an individual and agents of the State (whether formal or informal, in court or out, that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." Rothgery v. Gillespie County, 128 S. Ct. 2578, 2591 n.16 (2008) (cleaned up). Thus, plea bargaining is a critical stage requiring the assistance of counsel.

Missouri v. Frye, 132 S. Ct. 1399 (2012) (because plea negotiation is critical stage,

defense attorneys have a duty to inform their clients about favorable plea offers; failure to do so constitutes ineffective assistance of counsel under 6A). See also Hood v. State, 546 N.E.2d 847 (Ind. Ct. App. 1989).

Lafler v. Cooper, 132 S. Ct. 1376 (2012) (where defendant's conviction and sentence are worse than offer defendant rejected because of counsel's ineffectiveness, trial court has discretion to fashion remedy, ranging from enforcing original plea offer to providing no remedy, i.e., leaving intact conviction and sentence that resulted from trial).

Woods v. State, 48 N.E.3d 374 (Ind. Ct. App. 2015) (where defendant testified that trial attorney did not communicate a plea offer found in attorney's file after attorney had passed away and the circumstances of the case corroborated defendant's testimony, defendant proved that he was denied effective assistance of counsel; reversed and remanded to place defendant in same position as when prosecutor offered plea).

Carillo v. State, 982 N.E.2d 461 (Ind. Ct. App. 2013) (guilty plea counsel did not render deficient performance for failing to ask defendant about his citizenship status where counsel had no reason to believe defendant was not a citizen).

Schmid v. State, 972 N.E.2d 949 (Ind. Ct. App. 2012) (where no firm offer was ever made to defendant by the prosecution, trial counsel was not ineffective for not communicating the informal discussions she had with the prosecutor and judge to defendant).

Jervis v. State, 28 N.E.3d 361 (Ind. Ct. App. 2015) (trial counsel was not ineffective for failing to advise defendant to accept a plea agreement which would have limited his sentence to fifty years, but where after being tried and convicted of murder, he was sentenced to sixty years; because defendant always maintained his innocence, even at his post–conviction hearing, he cannot demonstrate that he would have accepted the plea had trial counsel recommended that he do so).

Wright v. Van Patten, 128 S. Ct. 743 (2008) (state court did not unreasonably interpret clearly established federal law when it ruled that defendant was not denied effective assistance of counsel by counsel participating in guilty plea hearing by speaker phone; while United States v. Cronic, 466 U.S. 648 (1984) presumes prejudice if defendant is denied counsel at critical stage, it, "regrettably" did not "clearly establish' the full scope of the defendant's right to the presence of an attorney.").

Lyles v. State, 382 N.E.2d 991 (Ind. Ct. App. 1978) (defendant' election of whether to plead guilty or stand trial may not be intelligently or voluntarily made without consultation with counsel).

6. Habitual Offender

Defendant has right to counsel in habitual offender proceeding. Koehler v. State, 499 N.E.2d 196 (Ind. 1986); Chewning v. Cunningham, 368 U.S. 443, 82 S. Ct. 498 (1962).

Barnett v. State, 83 N.E.3d 93 (Ind. Ct. App. 2017) (lack of counsel at habitual offender amendment hearing did not violate right to counsel; attorney could have raised issue of timeliness of amendment at any up to and including trial).

Black v. State, 79 N.E.3d 965 (Ind. Ct. App. 2017) (defendant was denied right to counsel during hearing on State's amendments to add more severe charges, which was critical stage of Level 2 felony robbery and conspiracy case; hearing was not an initial hearing, but rather continued proceeding that began over a year earlier; defendant was confronted with intricacies of law and advocacy of prosecuting authorities, thus, hearing was a critical stage and defendant was entitled to counsel; however, error was harmless because defendant had ample time and opportunity to object or move to dismiss the amendments).

7. Probation Revocation

a. Indiana

Entitled to representation by counsel in probation revocation hearings. Ind. Code § 35-38-2-3(f). See also Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992).

b. Federal

Right to counsel determined on a case-by-case basis. Depends on: (1) complexity of case; (2) whether defendant denies violation; and (3) ability to represent self. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973).

Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254 (1967) (where sentence has not previously been determined, counsel is required).

8. Parole Revocation

a. Indiana

The Parole Board does not have to appoint counsel in each case or have a full-blown trial on every charge of parole violation.

Hawkins v. Jenkins, 268 Ind. 137, 374 N.E.2d 496, 500 (1978) (it is sufficient if the Board notifies the parolee of the hearing and its purpose, affords him an opportunity to speak and renders a written decision informing him of the outcome). See Ind. Code § 11-13-3-10 and Ind. Code § 35-50-6-1.

But see Russell v. Douthitt, 261 Ind. 428, 304 N.E.2d 793, 794 (1973) ("In our opinion, 'on a case-by-case basis' means that those involved in parole revocation can take no other course than to appoint counsel in all cases and to have a full-blown trial for every alleged charge of parole violation").

b. Federal

Appointment of counsel is decided on a case-by-case basis. Counsel should be provided where the parolee makes a request for counsel based on timely and colorable claim that: (1) they have not committed the alleged parole violation; or (2) there are substantial reasons which justified or mitigated the violation. Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 1763-64 (1973).

9. Direct Appeal

a. Indiana

Indiana requires appointment of counsel for criminal appeals. State ex rel. Grecco v. Allen Circuit Court, 238 Ind. 571, 153 N.E.2d 914 (1958).

Kling v. State, 837 N.E.2d 502 (Ind. 2005) (when State Public Defender client elects to proceed with belated direct appeal under Ind. R. Post-Conviction Relief 2, the State Public Defender should represent client in filing PC2 motion, at the hearing on the motion, and on appeal from any denial of the motion. If the motion is granted, the trial court has a duty to appoint a county appellate public defender to pursue the belated appeal or belated motion to correct errors).

b. Federal

Equal protection requires assistance of counsel on direct appeal. Douglas v. California, 372 U.S. 353, 83 S. Ct. 814 (1963). There is no constitutional right to self-representation on the first appeal as of right. Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000).

The federal constitution does not require states to provide appellate review of criminal convictions but having provided such an avenue the state may not deny equal justice to indigent defendants. The due process and equal protection clauses require appointment of counsel to indigent defendants, convicted on their pleas, who seek access to first-tier state appellate review. Halbert v. Michigan, 125 S. Ct. 2582 (2005).

c. Probation Revocation

In contested felony probation revocation proceeding, the judge shall immediately advise defendant that he is entitled to an appeal and pauper counsel, if necessary, under Indiana Criminal Rule 11. Gosha v. State, 873 N.E.2d 660 (Ind. Ct. App. 2007). Because Rule 11 only applies to contested felony probation revocation proceedings, there is no right to appellate pauper counsel when a defendant admits the probation violations. Id.

10. Sentencing

Sentencing is a critical stage in a criminal proceeding under the Sixth Amendment. Mosley v. State, 908 N.E.2d 599 (Ind. 2009).

Armstrong v. State, 932 N.E.2d 1263 (Ind. Ct. App. 2010) (harmless error for trial court to permit counsel to withdraw her appearance and insisting that the sentencing hearing proceed without counsel; lack of counsel during sentencing hearing could not have contributed to defendant's conviction and sentence was defined by plea agreement).

11. State Post-Conviction Relief

a. Required - First Petition

Under Post-Conviction Relief Rule 1, Section 9(a), the State Public Defender must represent indigent petitioners on post-conviction proceedings filed under PCR 1 in the trial court and on appeal.

Murphy v. State, 477 N.E.2d 266 (Ind. 1985) (appointment of local public defender instead of the State Public Defender was harmless error; it did not deny defendant effective assistance).

b. Second Petition

Robinson v. State, 493 N.E.2d 765 (Ind. 1986) (trial court did not err by failing to refer defendant's second pro se PCR petition to public defender for representation. Under PC 1 §4(c), court has discretion to summarily deny second petition if court finds it raises same issues as first petition).

12. Federal Habeas

Federal habeas corpus rules require appointment of counsel if evidentiary hearing is required. Rule 8(c), Federal Habeas Corpus Rules.

Martel v. Clair, 132 S.Ct. 1276 (2012) (in denying capital habeas petitioner's request for substitute counsel, the District Court used the correct "interest of justice" standard, which is already used in non-capital cases).

Wickliffe v. Duckworth, 574 F. Supp. 979 (N.D. Ind. 1983) (adequate representation rendered by jail house lawyer on issues extensively briefed in state proceeding).

Harbison v. Bell, 556 U.S. 180 (2009) (indigent death row inmate who failed in attempt to obtain federal habeas corpus relief entitled to federally appointed counsel to pursue state clemency claims).

13. Juvenile Delinquency Proceedings

Juvenile is entitled to assistance of counsel at every stage of the juvenile proceeding. Bridges v. State, 260 Ind. 651, 299 N.E.2d 616, 617 (1973).

In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967) (due process clause of Fourteenth Amendment requires counsel for juveniles at delinquency hearings).

Indiana Code § 31-32-2-2(1) and Indiana Code § 31-32-4 provide for counsel in juvenile proceedings.

Though a child charged with a delinquent act is entitled to be represented by counsel per Indiana Code 31-32-4-1, counsel for a child in a juvenile delinquency proceeding must be appointed under Indiana Criminal Rule 25(B):

(1) When there is a request to waive the child to a court having criminal jurisdiction; or
(2) When a parent, guardian, or custodian of the child has an interest adverse to the child; or
(3) Before convening any hearing in which the court may find facts (or the child may admit to facts) on the basis of which the court may impose the following:

(a) Wardship of the child to the Department of Correction;
(b) Placement of the child in a community based correctional facility for children;
(c) Confinement or continued confinement of the child in a juvenile detention center following the earlier of an initial or detention hearing;

(d) Placement or continued placement of the child in a secure private facility following the earlier of an initial or detention hearing;

(e) Placement or continued placement of the child in a shelter care facility following the earlier of an initial or detention hearing; or

(f) Placement or continued placement of the child in any other non-relative out of home placement following the earlier of an initial or detention hearing; or unless or until a valid waiver has been or is made under subsection (C) below

Ind. Crim. Rule 25(B).

After the appointment of counsel under Criminal Rule 25, "any waiver of the right to counsel shall be made in open court, on the record and confirmed in writing, and in the presence of the child's attorney." Crim. R. 25(C).

Failure to comply with Indiana Criminal Rule 25 results in reversal of any outcome from the court proceedings where the child was without counsel. See, e.g., J.G. v. State, 83 N.E.3d 1263 (Ind. Ct. App. 2017).

a. Delinquency Proceedings

Woolf v. State, 545 N.E.2d 590, 592 (Ind. Ct. App. 1989) (appointment of counsel for child who is alleged to be delinquent is not conditioned on child's indigency; rather, court should consider only whether child has attorney and whether child has waived his right to counsel). See Ind. Code § 31-32-4-2.

D.H. v. State, 688 N.E.2d 221 (Ind. Ct. App. 1997) (juvenile who had counsel present for trial but not during disposition hearing received remand for new disposition).

b. Waiver Hearings

Adams v. State, 411 N.E.2d 160 (Ind. Ct. App. 1980) (failure to appoint counsel at hearing on motion to waive jurisdiction of juvenile court is reversible error).

R.W. v. State, 901 N.E.2d 539 (Ind. Ct. App. 2009) (because juvenile and mother were not provided the opportunity for meaningful consultation before they waived his right to counsel at the initial hearing at which juvenile admitted allegations, juvenile was denied right to counsel).

N.M. v. State, 791 N.E.2d 802 (Ind. Ct. App. 2003) (defendant did not knowingly or voluntarily waive her right to counsel under I.C. § 31-32-5-1 because neither she nor her mother was informed that counsel would be appointed to represent her if they were unable to afford counsel).

A.S. v. State, 923 N.E.2d 486 (Ind. Ct. App. 2010) (Although juvenile and mother signed advisement, which explained their rights, the court found there was not a valid waiver because the juvenile and mother never affirmatively stated they intended to proceed pro se, nor was there evidence they understood the dangers of self-representation).

c. Probation Revocation

In re Jennings, 176 Ind. App. 277, 375 N.E.2d 258 (1978) (child has right to counsel at probation revocation hearing).

14. Contempt Proceedings

a. Indiana

Due process of law mandates that one charged with criminal contempt be afforded notice of the charges against him, and the right to be represented by counsel. Skolnick v. State, 388 N.E.2d 1156, 1164 (Ind. Ct. App. 1979).

(1) Exception - Direct Contempt

Right to counsel does not attach when trial judge compelled to convict and punish summarily for direct criminal contempt. Skolnick v. State, 388 N.E.2d 1156, 1164 (Ind. Ct. App. 1979).

See Ind. Code § 34-47-2 (direct contempt, disturbing court)

(2) Contempt in Child Support Cases

Moore v. Moore, 11 N.E.3d 980 (Ind. Ct. App. 2014) (where the possibility exists that an indigent defendant may be incarcerated for contempt for failure to pay child support, he or she has a right to appointed counsel and to be informed of that right prior to commencement of the contempt hearing).

In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987) (this is so regardless of whether a private person or the State initiates the contempt proceedings). See also Marks v. Tolliver, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005).

b. Federal - Right Attaches if Requested

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. *We think this includes the assistance of counsel, if requested*..." Harris v. United States, 382 U.S. 162, 167, 86 S. Ct. 352, 355 (1965).

Whether counsel is required for contempt is subject to analysis under Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973).

(1) Exception - Direct Contempt

The right to counsel does not attach when a trial judge is compelled to convict and punish summarily for direct criminal contempt. In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 509 (1948).

15. Infractions

a. General Rule - No Right to Counsel

Wirgau v. State, 443 N.E.2d 327 (Ind. Ct. App. 1982) (no right to counsel where proceeding is civil in nature, even where fine is $3,500).

b. Exception - Possible Jail Term

Phillips v. State, 433 N.E.2d 800 (Ind. Ct. App. 1982) (where jail term may be imposed, right to counsel attaches).

16. Paternity

The right to counsel exists in a paternity hearing. Kennedy v. Wood, 439 N.E.2d 1367 (Ind. Ct. App. 1982).

In re: T.M.Y., 725 N.E.2d 997 (Ind. Ct. App. 2000) (allowing estoppel argument where alleged father paid support for two years, noting appellant only made general reference to right to counsel).

17. Termination of Parental Rights / Involuntary Adoption

Appointment of counsel is mandatory in proceedings to terminate parental rights, unless counsel has been obtained or knowingly and voluntarily waived. Ind. Code § 31-32-4-1(2); Ind. Code § 31-32-4-3(a); and Ind. Code § 31-32-2-5.

A parent's statutory right to counsel under Indiana Code § 31-32-2-5 continues through all stages of the CHINS or TPR proceeding, which includes the direct appeal. In re I.B., 933 N.E.2d 1264, 1267 (2010).

Baker v. Marion Cnty. Office of Family & Children, 810 N.E.2d 1035, 1038 (Ind. 2004) (right to counsel in every termination case is not constitutionally guaranteed; due process may require counsel where trial court's assessment of certain factors indicates appointment of counsel is necessary; rather than incur the time and money to litigate eligibility for public counsel in each case, Indiana has chosen, by statute, to provide counsel in termination proceedings to all parents who are indigent).

Tillotson v. Clay Cnty. Dep't of Family & Children, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002) (proper representation by counsel during termination proceeding significantly decreases the risk of an inaccurate result).

In re I.B., 933 N.E2d 1264 (Ind. 2010) (when mother failed to appear at termination hearing and hearing regarding appointment of appellate counsel following termination of parental rights, counsel could not effectively or ethically represent that she wanted to file an appeal).

In re Adoption of A.G., 64 N.E.3d 1246 (Ind. Ct. App. 2016) (those whose parental rights may be terminated, including parents in adoption proceedings, have the right to counsel; thus, the trial court abused its discretion in letting Mother's counsel to withdraw from an adoption proceeding).

A parent may waive the right to counsel in juvenile court proceedings, if the parent does so knowingly, intelligently, and voluntarily. Ind. Code § 31-32-5-5.

In re G.W.B., 776 N.E.2d 952, 954 (Ind. Ct. App. 2002) (Father did not knowingly, intelligently, and voluntarily waive his right to counsel in TPR proceeding where trial court did not advise father of his right to counsel, the right to pauper counsel, and the serious consequences of self-representation.).

a. Involuntary adoptions

The rights afforded by the involuntary termination of parental rights statutes apply in adoption proceedings where the petitioners seek to adopt over the objections of one or both of the natural parents. Taylor v. Scott, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991); In re McClure, 549 N.E.2d 392, 394 (Ind. Ct. App. 1990).

18. Nonsupport Proceedings

In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987) (there is no right to counsel in civil nonsupport proceeding unless contempt proceeding is initiated).

But see Turner v. Rogers, 564 U.S. 431, 448 (2011) (holding that "Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year).").

19. Child In Need of Services

Indiana requires the appointment of counsel for an indigent parent in a CHINS case. Indiana roots this right in both statutory law and the due process clause of the Fourteenth Amendment.

Formerly, such an appointment was a matter of discretion, but in In re G.P., 4 N.E.3d 1158, (Ind. 2014), the Indiana Supreme Court made clear that appointment of counsel in CHINS cases is ***not*** discretionary:

> "[T]o the extent any case law holds that a trial court has discretion to appoint counsel for an indigent parent in a CHINS proceeding, those cases are not correct on that point. Section 31-34-4-6 is an explicit provision of just such a statutory right, though subject to its own internal qualifications, and is consistent with the operation of the rest of the statutory scheme. And it exists independently of—though informed and influenced heavily by—any constitutionally compelled right to counsel pursuant to the Due Process Clause of the Fourteenth Amendment."

Id. at 1163.

> Holmes v. Jones, 719 N.E.2d 843, 846 (Ind. Ct. App. 1999) ('the pauper counsel statute creates an independent right to counsel for indigent litigants').
>
> Lassiter v. Dep't of Social Servs. of Durham Cnty., N.C., 452 U.S. 18, 33, 101 S. Ct. 2153 (1981) ('In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.' 'Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well.').

"Reading the juvenile statutes collectively, [I.C. § 31-32-4-1] provides that parents in TPR proceedings are entitled to be represented by counsel, along with '[a]ny other person designated by law.' And one such person "designated by law" - designated by [I.C. § 31-34-

4-6] specifically—is the indigent parent who requests a court-appointed attorney in a CHINS proceeding and is found by the trial court to be indigent. To the extent the trial court "may" appoint counsel to represent a parent in another proceeding, it would be pursuant to Ind. Code § 31-32-4-3. It does *not* have discretion in a circumstance falling under [I.C. § 31-34-4-6]." In re G.P., 4 N.E.3d 1158, 1163 (Ind. 2014).

Mathews v. Eldridge, 424 U.S. 319 (1976) (in CHINS cases, U.S. Supreme Court has not mandated a right to counsel; when determining if there is a right to counsel in CHINS cases under federal law, U.S. Supreme Court has used the Fourteenth Amendment Due Process analysis laid out in Mathews v. Eldridge, which has been applied on a case-by-case basis; Mathews requires the balancing of three (3) factors: (1) the private interests that will be affected by the state action; (2) the risk of an erroneous deprivation of the private interest caused by the action at issue; and (3) the government's interest).

DCS must advise about the right to counsel. Ind. Code § 31-34-4-6(a)(2)(a) provides:

"(a) The department shall submit written information to a parent, custodian, or guardian of a child who is alleged to be abused or neglected regarding the following legal rights of the parent, custodian, or guardian . . . (2) The right to: (A) be represented by an attorney. . ."

More generally, for all civil actions, Indiana Code § 34-10-1-1 and -2 allow a person to seek indigent status and ask the trial court for appointed counsel, which a trial court may assign "under exceptional circumstances." Ind. Code § 34-10-1-2(b)(2).

In re Adoption of A.M.K., 698 N.E.2d 845 (Ind. Ct. App. 1998) (court may annul the order appointing counsel if the indigent person is guilty of improper conduct).

II. RIGHT TO COUNSEL OF ONE'S CHOICE

The right to counsel of defendant's choice is an essential component of the Sixth Amendment right to counsel, and denial of right may rise to level of constitutional violation. Barham v. State, 641 N.E.2d 79 (Ind. Ct. App. 1994).

Lewis v. State, 730 N.E.2d 686 (Ind. 2000) (no error for trial court to deny a continuance to allow private counsel time to prepare for trial, where the defendant delayed several months before retaining counsel and public defender was ready to go to trial without a continuance).

A. CHOICE OF COURT-APPOINTED COUNSEL

An indigent defendant does not have an absolute right to counsel of his own choosing. Alexander v. State, 449 N.E.2d 1068, 1071 (Ind. 1983). See also Morris v. Slappy, 461 U.S. 1 (1983).

1. Defendant May Refuse Counsel

Services of court-appointed attorney may not be forced upon an indigent defendant but if defendant refuses to be represented by the appointed counsel, he must find some method to employ his own counsel or proceed in *propria persona*. State v. Irvin, 291 N.E.2d 70 (Ind. 1973).

Luck v. State, 466 N.E.2d 450, 451 (Ind. 1984) (absent showing of bias or conflict of interest, if defendant refuses to be represented by his appointed counsel, defendant must

find some method to employ own counsel or proceed pro se).

Sherwood v. State, 717 N.E.2d 131 (Ind. 1999) (where defendant was competent to stand trial and made knowing, voluntary and intelligent waiver of his right to counsel, and was denied control over trial strategy and the case presented to the jury, the trial court's imposition of hybrid representation on the defendant violated the 6th Amendment).

Faretta v. California, 422 U.S. 806, 819 (1975) (6A grants to the accused personally the right to make his own defense at trial). But see Martinez v. Court of Appeal of California, 528 U.S. 152, 120 S. Ct. 684 (2000) (criminal defendant has no federal constitutional right to self-representation on appeal)

2. Timely Request for Change of Counsel

Request for new counsel must be timely made. A request during or just before the start of trial may be denied on the grounds that defendant may not disrupt the criminal justice system by continually moving for change of counsel. Huffman v. State, 543 N.E.2d 360 (Ind. 1989), *overruled on other grounds by* Street v. State, 567 N.E.2d 102 (Ind. 1991).

Jefferson v. State, 484 N.E.2d 22 (Ind. 1985) (fourteen days prior to trial too late where trial had already been delayed by defendant and excuse for delay was weak).

Luck v. State, 466 N.E.2d 450 (Ind. 1984) (three weeks prior to trial too late where trial had been set for six months and no evidence presented by defendant to detail reasons for discontent with attorney). But see Faretta v. California, 422 U.S. 806, 835 (1975) (pro se request "weeks before trial" was timely).

Alexander v. State, 449 N.E.2d 1068 (Ind. 1983) (bare allegation of lack of communication between accused and his attorney insufficient to show abuse of discretion; failure to deny untimely request requires showing of harm to accused because of something attorney did or did not do).

See IPDC Pretrial Manual, Chapter 12, Continuances.

3. Request for Self-Representation Must be Unequivocal

Wheeler v. State, 15 N.E.3d 1126 (Ind. Ct. App. 2014) (asking for ***either*** a new lawyer or self-representation was not unequivocal request).

Faretta v. California, 422 U.S. 806 (1975) (defendant's motions and letters did not constitute an unequivocal request for self-representation).

Dowell v. State, 557 N.E.2d 1063 (Ind. Ct. App. 1990) (request unequivocal when defendant was asked twice if he wanted to represent himself and each time responded affirmatively)

B. CHOICE OF PRIVATELY RETAINED COUNSEL

1. Defendant's Right to Choose

Provided a defendant is financially able, he is entitled to counsel of his choice. Lindley v. State, 426 N.E.2d 398, 400 (Ind. 1981). Defendants in criminal cases have the constitutional right to counsel of their choice. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932).

a. Not Absolute

Right to counsel of one's choice not absolute. Smith v. State, 452 N.E.2d 160, 163 (Ind. Ct. App. 1983).

German v. State, 373 N.E.2d 880 (Ind. 1978) (court may refuse to allow defendant to replace his counsel during or immediately before trial).

(1) May Not Delay Proceedings

Parr v. State, 504 N.E.2d 1014 (Ind. 1987) (the accused should have the opportunity to secure counsel of his choice when he is financially able to do so, but he must exercise the right of selection at appropriate stage of proceeding).

Magley v. State, 263 Ind. 618, 335 N.E.2d 811 (1975) (person may not hire and fire counsel if the purpose is to delay the proceedings), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997).

(2) Not Licensed in State (Pro hac vice)

In Indiana, the standards for admission *pro hac vice* are given in Rule 3, Section 2 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys.

Sparks v. State, 537 N.E.2d 1179 (Ind. 1989) (no abuse of discretion by limiting out-of-state attorney's participation in defendant's defense; attorney not allowed privilege of examining witnesses or arguing to court; however, allowed to sit at counsel table during trial and confer with defendants and lead attorney, and offer insight and advice).

Butler v. State, 668 N.E.2d 266 (Ind. Ct. App. 1996) (where attorney was not authorized to practice in Indiana and was not authorized to appear in instant case, he was per se incapable of providing Indiana criminal defendant with his constitutional right to effective assistance of counsel).

CAUTION: According to Mallory v. State, 954 N.E.2d 933 (Ind. Ct. App. 2011), Butler was ***overruled*** by Maldonado v. State, 355 N.E.2d 843, 850 (Ind. 1976), and Merida v. State, 383 N.E.2d 1043, 1044 (Ind. 1979). That interpretation is highly questionable. First, neither the language of Maldonado nor Merida suggests that Butler was *overruled*. Further, while a later Indiana Supreme Court case (which post-dates Maldonado and Merida) declined to extend Butler to require reversal of convictions, the case did not overrule Butler. See Anderson v. State, 699 N.E.2d 257 (1998), infra. Moreover, Butler was cited with approval by another Court of Appeals panel in in Taylor v. Finnan, 955 N.E.2d 785, 788 (Ind. Ct. App. 2011), which was decided after Mallory.

Little v. State, 819 N.E.2d 496 (Ind. Ct. App. 2004) (defendant waived claim that he received ineffective assistance because he proceeded to trial with knowledge that defense counsel had failed to comply with Indiana Admission & Discipline Rule 3 and was unauthorized to practice law in Indiana; counsel's representation of defendant at a pre-trial hearing while counsel was suspended from Illinois bar did not amount to a per se violation of defendant's right to counsel under state & federal constitutions).

Talley v. State, App., 736 N.E.2d 766 (Ind. Ct. App. 2000) (distinguishing Butler, Court noted that defendant was represented both by attorney from out-of-state and co-counsel who was licensed to practice in Indiana; also, out-of-state counsel filed motion to appear *pro hac vice*).

Cole v. U.S., 162 F.3d 957 (7th Cir. 1998) (counsel was not ineffective per se because counsel had not been admitted to practice in federal district in which defendant was tried).

Anderson v. State, 699 N.E.2d 257 (Ind.1998) (no authority or reason to expand Butler to require reversal based on conviction by unlicensed prosecutor).

Collins v. State, 14 N.E.3d 80 (Ind. Ct. App. 2014) (defendant was not deprived of his right to counsel where he was represented by certified legal intern at his guilty plea hearing; intern was supervised by a licensed attorney at all relevant times, and he informed defendant of his legal intern status).

2. Continuance to Obtain Private Counsel

Dickson v. State, 520 N.E.2d 101, 105 (Ind. 1988) (affirmed trial court's denial of continuance when defendant moved to replace his public defender with private counsel who would only accept the case on the condition that a continuance would be granted to allow him to prepare for trial. Defendant did not allege his constitutional right to be represented by counsel of his choice had been violated; private counsel had not entered an appearance).

Parr v. State, 504 N.E.2d 1014 (Ind. 1987) (no error in denying continuance for defendant to obtain private counsel. At hearing on motion for continuance, defendant stated he was unsure whether he had sufficient funds to obtain private counsel).

Smith v. State, 452 N.E.2d 160, 165 (Ind. Ct. App. 1983) (in determining whether a defendant was unconstitutionally denied Sixth Amendment right to counsel of his choice by trial court's refusal to grant a continuance, the Court of Appeals would use a balancing test).

Washington v. State, 902 N.E.2d 280 (Ind. Ct. App. 2009) (distinguishing Barham v. State, 641 N.E.2d 79 (Ind. Ct. App. 1994), defendant was not entitled to a continuance to obtain private counsel sought on the day of trial when the only attorney to file an appearance was the assigned public defender).

3. Failure to Grant Request for Counsel of Choice

a. Untimely Request - Must Show Prejudice

The denial of an untimely request for change of counsel is not error unless the defendant shows that he was prejudiced. Vacendak v. State, 431 N.E.2d 100, 105 (Ind. 1982).

b. Reversible Error

When court unreasonably or arbitrarily interferes with accused's right to retain counsel of choice, conviction cannot stand, regardless of whether defendant has been prejudiced.

Barham v. State, 641 N.E.2d 79, 84 (Ind. Ct. App. 1994) (denial of 6th Amendment right to counsel where court interfered unreasonably and arbitrarily with defendant's

right to retain counsel of choice by denying his private counsel's appearance; defendant had identified private counsel who was willing to represent him).

Reversible error to preclude defendant from replacing appointed counsel with a private attorney of his own choice.

People v. Young, 565 N.E.2d 309, 311 (Ill. App. 1990) (reversible error to preclude defendant from replacing counsel where, on the morning of the first day of trial, public defender informed court defendant wished to replace him with private counsel. Defendant had received bail money four (4) days earlier and intended to use it to hire private counsel, and private counsel advised court he was "available and willing" to enter his appearance).

c. Associate of Chosen Counsel

United States v. Sellers, 645 F.3d 830 (7th Cir. 2011) (court must consider all circumstances surrounding a request for continuance; when retained counsel has unprepared associate appear in his place, a continuance should be granted because the inconvenience of pushing back trial a month or so is outweighed by defendant's interest in having counsel of his choice).

C. REQUEST TO WITHDRAW BY COUNSEL

In a criminal case, the request of defense counsel to withdraw calls for consideration of:

- the basic right to counsel, Ind. Const. Art. 1, § 13;
- Ind. Code § 35-36-8-2;
- Indiana Rules of Professional Conduct, Rule 1.16.

See Conn v. State, 535 N.E.2d 1176, 1181 (Ind. 1989).

1. No Unilateral Right

Attorney may not withdraw without proof of cause and/or consent of client and permission of the court. State ex rel. Neeriemer v. Daviess Circuit Court, 236 Ind. 624, 142 N.E.2d 626 (1957).

2. Ind. Code § 35-36-8-2

a. 30 Days Before Omnibus - For Any Reason

Indiana Code § 35-36-8-2(a) provides: "Counsel for a defendant charged with a felony or misdemeanor may withdraw from the case for any reason, including failure of the defendant to fulfill an obligation with respect to counsel's fee, at any time up to thirty (30) days before the omnibus date."

b. Within 30 Days of, and After Omnibus - Upon Showing

Indiana Code § 35-36-8-2(b) provides:

However, the court shall allow counsel for the defendant to withdraw from the case at any time within thirty (30) days of, and at any time after, the omnibus date if there is a showing that:

(1) counsel for the defendant has a conflict of interest in continued representation of the defendant;

(2) other counsel has been retained or assigned to defend the case, substitution of new counsel would not cause any delay in the proceedings, and the defendant consents to or requests substitution of the new counsel.

(3) The attorney-client relationship has deteriorated to a point such that counsel cannot render effective assistance to the defendant;

(4) the defendant insists upon self-representation and the defendant understands that the withdrawal of counsel will not be permitted to delay the proceedings; or

(5) there is a manifest necessity requiring that counsel withdraw from the case.

Smith v. State, 779 N.E.2d 6 (Ind. Ct. App. 2002) (trial court abused its discretion by denying defense counsel's motion to withdraw, which placed the attorney in an untenable position. The attorney gave the client notice of her intent to withdraw in writing before she filed her motion).

Strong v. State, 633 N.E.2d 296 (Ind. Ct. App. 1994) (denying defense counsel's motion to withdraw was not error, where counsel learned on day before trial that he was representing confidential informant in another criminal case; no prejudice to defendant's case, as there was no indication counsel knew anything of his other client's involvement in this case, had gained any confidential information as result of representation, or was prevented from defending defendant in any way because of other representation).

Boesel v. State, 596 N.E.2d 261 (Ind. Ct. App. 1992) (trial court abused discretion by allowing defendant's third court appointed counsel to withdraw following voir dire and after jury was impaneled; even when court frustrated by defendant's lack of cooperation and even when withdrawal may be possible under I.C. § 35-36-8-2(b)(3)).

Bronaugh v. State, 942 N.E.2d 826 (Ind. Ct. App. 2011) (trial court may refuse a motion to withdraw if it finds there will be a delay in the administration of justice).

Conn v. State, 535 N.E.2d 1176, 1181 (Ind. 1989) (withdrawal permitted where co-counsel in state of readiness, additional week left for further preparation, and counsel was party to dissolution action set for hearing on same trial date).

c. Client Fails to Meet Financial Obligations to Counsel

The client's failure to pay the attorney does not exempt the attorney from professional norms.

> Williams v. State, 508 N.E.2d 1264, 1267 (Ind. 1987) ("While we appreciate counsel's frustration in having to represent a client who had breached an employment agreement, it does not justify his apparent refusal to invest any time in preparing an adequate defense for Williams once the motion to withdraw was denied.").

3. Indiana Rules of Professional Conduct

Rule 1.16(a)(2) allows withdrawal where the lawyer's mental or physical condition materially impairs the lawyer's ability to represent the client. See also Rule 6.2 (Accepting

Appointments).

III. INDIGENCY AND THE RIGHT TO COUNSEL

A. COUNSEL AT STATE'S EXPENSE

The right to counsel includes the right of indigent defendant in criminal prosecution to have counsel provided at state's expense. Gideon v. Wainwright, 372 US. 335, 83 S. Ct. 792 (1963); Redmond v. State, 518 N.E.2d 1095 (Ind. 1988); Lowery v. State, 471 N.E.2d 258 (Ind. 1984).

1. Failure to Request

Mitchell v. State, 417 N.E.2d 364 (Ind. Ct. App. 1981) (defendant's failure to directly request pauper counsel is not controlling; lay defendant cannot be expected to know what to do).

B. INDIGENCY DETERMINATION

1. Province of Judge

The decision to appoint pauper counsel lies within the exclusive province of the trial court. Poe v. State, 445 N.E.2d 94, 96 (Ind. 1983). The court's duty to appoint counsel arises at any stage of the proceedings when defendant's indigency causes him to be without assistance of counsel. Although there is no specific financial guideline for determination of indigency, the determination must be made based on as thorough an examination of defendant's total financial picture as is practical. Shively v. State, 912 N.E.2d 427 (Ind. Ct. App. 2009).

In making this determination, the court shall consider the defendant's assets, income, and necessary expenses. See Ind. Code § 35-33-7-6.5(a). The court may consider that a person's eligibility for federal need-based public assistance programs constitutes sufficient evidence to establish that a person is indigent. Ind. Code § 35-33-7-6.5(b).

Moore v. State, 273 Ind. 3, 401 N.E.2d 676, 679 (1980) (trial court must appoint counsel if defendant legitimately lacks financial resources to employ an attorney without imposing substantial hardship on self or family).

Bradford v. State, 550 N.E.2d 1353 (Ind. Ct. App. 1990) (although defendant was employed, court should have appointed counsel; from reviewing record, defendant obviously did not have assets nor sufficient disposable income to hire counsel).

2. Showing Required

Record must show adequate determination of factual question of defendant's ability to afford counsel. Moore v. State, 401 N.E.2d 676, 678-79 (Ind. 1980); Mitchell v. State, 417 N.E.2d 364, 368 (Ind. Ct. App. 1981); Reese v. State, 953 N.E.2d 1207 (Ind. Ct. App. 2011).

(a) Determination must be based on as thorough examination of defendant's total financial picture as is practical.
(b) The record must show a balancing of assets against liabilities and a consideration of the amount of defendant's disposable income or other resources reasonably available to him after payment of fixed obligations.

Graves v. State, 503 N.E.2d 1258 (Ind. Ct. App. 1987) (defendant's ability to post bond is

not determinative of non-indigency but only a factor to be considered in deciding whether he can afford a lawyer).

3. Transferring Assets to Become Indigent

State ex rel. Nicholas v. Criminal Ct. of Marion Co., 240 Ind. 205, 162 N.E.2d 445, 447 (1959) (lower court found relatrix had sufficient funds to prosecute an appeal, but transferred them to her sister; held, that the lower court had discretion to deny defendant's motion because she did not have "clean hands").

4. Right to Defense Interpreter

Arrieta v. State, 878 N.E.2d 1238 (Ind. 2008) (while trial court must always provide an interpreter at government expense for a non-English-speaking criminal defendant who has not established indigency; non-indigent defendants are not entitled to court appointed attorneys or expert witnesses; it is only when the defendant is without financial ability to exercise right to counsel that it must be provided by the government at no cost to him).

C. DETERMINATION DEFENDANT CAN PAY COSTS - WHERE COUNSEL IS APPOINTED

1. Factors to Consider

Ind. Code § 33-40-3-7(a)

(a) if a defendant or a child alleged to be a delinquent child is receiving publicly paid representation, the court shall consider:

(1) the person's independently held assets and assets available to the spouse of the person or the person's parent if the person is unemancipated;

(2) the person's income;

(3) the person's liabilities; and

(4) the extent of the burden that payment of costs assessed under section 6 of this chapter would impose on the person and the dependents of the person.

2. Finding of Ability to Pay

Under Indiana Code § 33-40-3-6(a), at any stage of a prosecution for a felony or a misdemeanor the court may make a finding of ability to pay the costs of representation.

Parish v. State, 989 N.E.2d 831 (Ind. Ct. App. 2013) (defendant should have been required to use the equity in his $130,000 home before being appointed counsel at public expense).

Reese v. State, 953 N.E.2d 1207 (Ind. Ct. App. 2011) (trial court erred in denying defendant's request for court-appointed counsel where it was apparent from the record that defendant lacked the resources to employ an attorney).

Shively v. State, 912 N.E.2d 427 (Ind. Ct. App. 2009) (trial court erroneously failed to carefully consider defendant's financial situation in either of the pretrial hearings in which it denied appointment of counsel).

Gilmore v. State, 953 N.E.2d 583 (Ind. Ct. App. 2011) (defendant's obstreperous conduct

is not a proper consideration in determining whether defendant is indigent).

3. Collection of Funds

Costs collected shall be deposited into the supplemental public defender services fund. Ind. Code § 33-40-3-6(b).

4. Costs Required to be Paid

Pursuant to Indiana Code § 33-40-3-6:

(a) If at any stage of a prosecution for a felony or a misdemeanor the court makes a finding of ability to pay the costs of representation under section 7 of this chapter, the court shall require payment by the person or the person's parent, if the person is a child alleged to be a delinquent child, of the following costs in addition to other costs assessed against the person:

(1) Reasonable attorney's fees if an attorney has been appointed for the person by the court.

(2) Costs incurred by the county as a result of court appointed legal services rendered to the person.

NOTE: Indiana Code § 33-40-5-4(2)(B) authorizes the Indiana Public Defender Commission to adopt guidelines and standards about the issuance and enforcement of orders requiring defendant to pay for the costs of court appointed legal representation.

5. Indigent cannot be Imprisoned for Failure to Pay

When fines or costs are imposed upon an indigent, defendant shall not be imprisoned for failure to pay the fine. Indigency hearings are required both as to the imposition of fines (Ind. Code § 35-38-1-18(a)), and costs (Ind. Code § 33-19-2-3(a)). A defendant's financial resources to pay fines or costs are best determined not at initial sentencing but at the conclusion of incarceration. Whedon v. State, 765 N.E.2d 1276 (Ind. 2002).

But see Briscoe v. State, 783 N.E.2d 790 (Ind. Ct. App. 2003) (while Whedon may suggest that a hearing on indigency be held following incarceration, Ind. Code § 35-38-1-18(a) and Ind. Code § 33-19-2-3(a) clearly mandate a hearing at the time of sentencing).

6. Cash Bond Cannot be used for Appeal

A cash bail may not be withheld and applied to the costs and appellate public defender fees not yet incurred. Hendrix v. State, 615 N.E.2d 483 (Ind. Ct. App. 1993). However, Indiana Code § 35-33-8-3.2(a)(2), authorizes the retention of cash or securities to be used for the payment of fines, costs, fees, and restitution.

Sandoval v. State, 70 N.E.3d 889 (Ind. Ct. App. 2017) (violation of statutory authority to order bond held in trust toward potential public defender fees).

IV. WAIVER OF RIGHT TO COUNSEL

A. IN GENERAL

The accused has a constitutional right to defend himself at trial if his waiver of right to counsel is knowing and intelligent. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975); Geiger v. State, 688 N.E.2d 1298 (Ind. Ct. App. 1997); and Jones v. State, 783 N.E.2d 1132 (Ind. 2003).

A defendant does not have a federal constitutional right to represent himself on appeal. Martinez v. Court of Appeal of California, 528 U.S. 152, 120 S. Ct. 684 (2000).

Courts are to indulge every reasonable presumption against waiver of the right to counsel. Hatcher v. State, 414 N.E.2d 561, 564 (Ind. 1981).

1. Waiver

Waiver must be "an intentional relinquishment or abandonment of a known right or privilege." This standard applies equally to an alleged waiver of right to counsel whether at trial or at a critical stage of pre-trial proceedings. Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232 (1977).

Seniours v. State, 634 N.E.2d 803 (Ind. Ct. App. 1994) (under Indiana law, strict standard will be applied to determination of whether defendant waived right).

a. Standards

(a) Waiver must appear on record.
(b) Waiver must be knowing, voluntary and intelligent.
(c) Court must be satisfied that accused is aware of right to counsel and the pitfalls of self-representation.

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938); Russell v. State, 270 Ind. 55, 383 N.E.2d 309 (1978).

(1) Voluntary, Knowing, and Intelligent

A court's failure to ascertain the voluntariness of a decision to proceed without counsel at probation revocation requires reversal. Bell v. State, 695 N.E.2d 997 (Ind. Ct. App. 1998).

(2) Warning of Pitfalls of Self-Representation

Although a defendant in probation revocation proceeding was not advised of the pitfalls of self-representation, the trial court nevertheless properly determined, on record, that defendant knowingly, intelligently, and voluntarily waived his right to counsel. Greer v. State, 690 N.E.2d 1214 (Ind. Ct. App. 1998) and Hammerlund v. State, 967 N.E.2d 525 (Ind. Ct. App. 2012).

(3) Unconstitutional Waiver Not Subject to Harmless Error Analysis

See Bumbalough v. State, 873 N.E.2d 1099 (Ind. Ct. App. 2007).

b. Competency to Waive

Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379 (2008) (Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves).

Sturdivant v. State, 61 N.E.3d 1219 (Ind. Ct. App. 2016) (no error in granting defendant's request for self-representation despite indicators of mental illness; because trial court was in best position to judge defendant's competency and there was no evidence she was suffering from severe mental illness despite her bizarre statements and "incorrect and unusual legal arguments" – trial court's decision to allow her to conduct her own defense was not clearly erroneous).

Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680 (1993) (competence to waive counsel is the same as competence to stand trial or to plead guilty, but to plead guilty or waive counsel requires knowledge and voluntariness).

Westbrook v. Arizona, 384 U.S. 150, 86 S. Ct. 1320 (1966) (although defendant received hearing on issue of his competence to stand trial, he was entitled to hearing or inquiry into issue of his competence to waive his constitutional right to assistance of counsel; where it did not appear he had received such hearing judgment in murder case should be vacated and case remanded for reexamination of whether trial judge fulfilled his duty to determine whether a knowing and intelligent waiver of counsel occurred).

Drake v. State, 895 N.E.2d 389 (Ind. Ct. App. 2008) (sparse record, coupled with defendant's questionable mental capacity, leads to conclusion that trial court should have inquired further as to defendant's background, education and abilities).

Ricketts v. State, 108 N.E.3d 416 (Ind. Ct. App. 2018) (no clear error in denying defendant's request for self-representation because "he had had mental and emotional health issues that the trial court concluded would likely intensify as trial approached, generating a distinct possibility that [he] would come 'undone' under the pressure.").

2. Waiver by Conduct

a. No Waiver by Defendant's Failure to Secure Counsel

Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (1970) (judge had written four letters and made two telephone calls to defendant reminding him of date of trial and asking for name of counsel and received no response, and at trial defendant, who was not indigent, indicated he desired to be represented by counsel but had been unable to obtain counsel, trial judge should not have proceeded with trial when defendant was without counsel and trial court did not establish a clear waiver of his constitutional right).

Seniours v. State, 634 N.E.2d 803 (Ind. Ct. App. 1994) (failure to secure counsel when trial court "bent over backwards" to accommodate defendant and comply with due process did not constitute waiver of right to counsel, where court failed to make required apprisements and no evidence in record defendant waived right knowingly, intelligently, and voluntarily).

Marshall v. State, 180 N.E.3d 411 (Ind. Ct. App. 2022) (waiver of right to counsel was

not knowing, voluntary, and intelligent where trial court did not inform defendant of any of the dangers and disadvantages of self-representation when he indicated at pretrial conference, he wished to proceed pro se).

Matter of Cox, 680 N.E.2d 528 (Ind. 1997) (judge violated Code of Judicial Conduct by misrepresenting law to defendant and forcing her to choose between proceeding involuntarily without counsel or exercising her right to counsel and facing contempt and incarceration).

Hoffereth v. State, 856 N.E.2d 137 (Ind. Ct. App. 2006) (where judge forced defendant to go to trial without an attorney and over his objections, case remanded for a new trial in which defendant's right to counsel is treated with greater concern and less disdain).

Poynter v. State, 749 N.E.2d 1122 (Ind. 2001) (where defendant repeatedly asserted, he was going to retain private counsel at initial hearing and pre-trial conferences, but failed to do so, case remanded; even though defendant had 5½ months to retain counsel, trial court never advised defendant of dangers and disadvantages of self-representation).

Puckett v. State, 843 N.E.2d 959 (Ind. Ct. App. 2006) (counsel withdrew prior to sentencing when defendant resisted his advice; defendant appeared pro se during sentencing, but record was void of any evidence that defendant knowingly and voluntarily waived his right to be represented by counsel at his sentencing hearing).

Taylor v. State, 944 N.E.2d 84 (Ind. Ct. App. 2011) (defendant's request to proceed pro se was unequivocal where he told judge he wanted to fire his lawyer "so I can go pro se" and his subsequent pro se filings indicated he exercised his sixth amendment right to proceed pro se).

Houston v. State, 553 N.E.2d 117 (Ind. 1990) (court assumed from defendant's refusal to cooperate with appointed counsel he had elected to waive right to counsel; record showed court's express offer of proceeding pro se or with counsel and defendant's express refusal of counsel).

Henson v. State, 798 N.E.2d 540 (Ind. Ct. App. 2003) (although defendant received no warnings about dangers of proceeding pro se, exceptional circumstances found in defendant's *citing* a perceived conflict of interest with public defender's office; record indicated assigned counsel spoke about decision to defend himself prior to his decision; defendant as a prisoner had prior legal experience and his decision to proceed pro se appeared tactical in nature). See also Mynatt v. State, 42 N.E.3d 567 (Ind. Ct. App. 2015).

b. Absence from Trial Not Waiver

Carr v. State, 591 N.E.2d 640 (Ind. Ct. App. 1992) (defendant's failure to appear at trial does not reflect a knowing, voluntary, and intelligent waiver of counsel; court erred in finding waiver). See also Hawkins v. State, 982 N.E.2d 997 (Ind. 2013).

Jackson v. State, 868 N.E.2d 494 (Ind. 2007) (where defendant advised of his trial date, a defendant's intentional and inexcusable absence from trial can serve as a knowing, voluntary, and intelligent waiver of the right to counsel).

c. Obstreperous Behavior Alone Not Sufficient for Waiver

Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and thus, as a waiver of the constitutional right to counsel.

Gilmore v. State, 953 N.E.2d 583 (Ind. Ct. App. 2011) (defendant did not waive his right to counsel through obstreperous behavior because he was never warned there would be a waiver if the behavior persisted).

Vonhoene v. State, 165 N.E.3d 630 (Ind. Ct. App. 2021) (defendant did not forfeit counsel by moving for continuance on morning of trial to secure counsel; er statements before her trial that she did not know how to secure court-appointed counsel triggered trial court's duty to further inquire as to eligibility for pauper appointment).

Kowalskey v. State, 42 N.E.3d 97 (Ind. Ct. App. 2015) (at time of appointment of third public defender, defendant warned further obstreperous behavior might result in finding of waiver of counsel; defendant's subsequent letter to court asking for production of video evidence, while stating did not want new attorney, insufficient to support finding of knowing and intelligent waiver).

d. Spanish Advisements

Belmares-Bautista v. State, 938 N.E.2d 1229 (Ind. Ct. App. 2010) (court found defendant waived his right to counsel when he signed a Spanish-language document explaining his rights, and then choosing to proceed pro se, even though there was no English translation in the record).

B. ADVISEMENTS REQUIRED PRIOR TO WAIVER

1. Guidelines/Showing for Waiver

To establish waiver, the court should follow guidelines set forth in Dowell v. State, 557 N.E.2d 1063 (Ind. Ct. App. 1990).

NOTE: The guidelines in Dowell v. State, 557 N.E.2d 1063 (Ind. Ct. App. 1990), while appropriate and preferable, are not mandatory. Guidelines should be followed to establish waiver, but do not constitute rigid mandate of inquiries which must be made; guidelines not retroactive. See Leonard v. State, 579 N.E.2d 1294 (Ind. 1991); Henson v. State, 798 N.E.2d 540 (Ind. Ct. App. 2003) and Marshall v. State,

2. Colloquy

The waiver of the right to counsel at trial must follow a colloquy between judge and defendant on nature of offense charged, possible punishments, possible defenses, and "all other facts essential to a broad understanding of the matter." Von Moltke v. Gillies, 332 U.S. 708, 68 S. Ct. 316 (1948) and Boyd v. Dutton, 405 U.S. 1, 92 S. Ct. 759 (1972). To determine if the defendant knowingly, intelligently and voluntarily made a timely and unequivocal waiver of counsel, the trial court should inquire, on the record, whether the defendant clearly understands: (1) the nature of the charges against her, including any

possible defenses; (2) the dangers and disadvantages of proceeding pro se and the fact that she is held to the same standards as a professional attorney; and (3) that a trained attorney possesses the necessary skills for preparing for and presenting a defense. Wright v. State, 168 N.E.3d 244, 263-64 (Ind. 2021).

Catt v. State, 437 N.E.2d 1001 (Ind. Ct. App. 1982) (defendant was told he was charged with a misdemeanor when charge was, in fact, a felony; held, waiver of counsel was not knowing and intelligent).

Castel v. State, 876 N.E.2d 768 (Ind. Ct. App. 2007) (reversible error where trial court failed to inform defendant of her right to counsel at misdemeanor OWI trial).

Drake v. State, 895 N.E.2d 389 (Ind. Ct. App. 2008) (when determining whether a knowing and intelligent waiver of counsel occurred, court should consider: (1) the extent of the court's inquiry into the defendant's decision; (2) other evidence in the record that establishes whether defendant understood the dangers and disadvantages of self-representation; (3) defendant's background and experience; and (4) the context of defendant's decision to proceed pro se).

a. Exception - Prior Contact with System

Jackson v. State, 441 N.E.2d 29 (Ind. Ct. App. 1982) (defendant may be shown to have understood risks and penalties and possibility of sophisticated defense without advisement as to all the dangers of self-representation where he has had prior contact with criminal justice system). Henson v. State, 798 N.E.2d 540 (Ind. Ct. App. 2003).

3. Must be Clear and Unambiguous

The State bears the burden of showing that the accused was informed of his right to assistance of counsel and the perils of self-representation in clear, unambiguous language. Wallace v. State, 361 N.E.2d 159 (Ind. Ct. App. 1977) (*citing* Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966)). See also Silvers v. State, 945 N.E.2d 1274 (Ind. Ct. App. 2011).

A.A.Q. v. State, 958 N.E.2d 808 (Ind. Ct. App. 2011) (even though trial court's advisement fell below "better practices," juvenile and his parents knowingly and intelligently waived the juvenile's right to counsel).

a. Mere Advisement of Right to Counsel Inadequate

Merely making defendant aware of his constitutional right to counsel insufficient. Mitchell v. State, 417 N.E.2d 364 (Ind. Ct. App. 1981).

Hatcher v. State, 414 N.E.2d 561 (Ind. 1981) (defendant who was orally informed that he was entitled to have attorney represent him at a post-indictment lineup, but who was not asked if he wanted representation, did not waive his right, although he did not request the presence of an attorney).

b. Point Out Dangers and Pitfalls

Defendant must be made aware of consequences of choice to waive counsel so that he makes choice with "eyes wide open." United States v. Bailey, 675 F.2d 1292 (D.C. Cir.

1982). See also Kirkham v. State, 509 N.E.2d 890 (Ind. Ct. App. 1987).

Hart v. State, 79 N.E.3d 936 (Ind. Ct. App. 2017) (because the trial court failed to advise defendant about the dangers of self-representation, his waiver of counsel was not knowing, intelligent, and involuntary, so his conviction for invasion of privacy was reversed).

Balfour v. State, 779 N.E.2d 1211 (Ind. Ct. App. 2002) (defendant's right to counsel was violated when trial court forced defendant to trial pro se without advising him of the dangers and disadvantages of self-representation).

Moreno v. State, 760 N.E.2d 240 (Ind. Ct. App. 2001) (generally, judge can require uncooperative defendant to proceed to trial pro se, but not where judge did not conduct adequate inquiry into waiver or give proper warnings).

Graves v. State, 503 N.E.2d 1258, at 1262 (Ind. Ct. App. 1987) (if defendant waives counsel, trial judge must establish record showing defendant was made aware of consequences of waiver).

Rice v. State, 874 N.E.2d 988 (Ind. Ct. App. 2007) (defendant who was not advised of consequences of self-representation prior to pleading guilty unrepresented did not voluntarily waive right to counsel).

Hagy v. State, 639 N.E.2d 693 (Ind. Ct. App. 1994) (where 19-year-old high school dropout was not advised of dangers of self-representation before probation violation hearing, waiver was not knowing and intelligent).

Parish v. State, 989 N.E.2d 831 (Ind. Ct. App. 2013) (waiver of counsel invalid where trial court did not advise defendant of dangers and disadvantages of self-representation).

J.W. v. State, 763 N.E.2d 464 (Ind. Ct. App. 2002) (juvenile court erroneously conducted fact-finding hearing by allowing defense counsel to withdraw after juvenile informed court that he wished to have counsel during hearing; juvenile was never adequately advised of nature, extent, and importance of right to counsel and dangers of self-representation).

However, court need not specifically advise defendant of all adverse effects of waiver.

Engle v. State, 467 N.E.2d 712 (Ind. 1984) (court does not need to specifically tell defendant that waiver of right to counsel may result in an inability to investigate case or that legal materials will not be provided to a *pro se* defendant by court).

Cooper v. State, 900 N.E.2d 64 (Ind. Ct. App. 2009) (where defendant unequivocally expressed desire to waive counsel and admit probation violation, his waiver was knowing and intelligent despite trial court's failure to advise him of pitfalls of self-representation).

Butler v. State, 951 N.E.2d 255 (Ind. Ct. App. 2011) (when probationer who proceeds pro se chooses to admit rather than challenge his alleged PV, his knowing, intelligent, and voluntary waiver of counsel may be established even without warning of pitfalls of self-representation) (*citing* Greer v. State, 690 N.E.2d 1214 (Ind. Ct.

App. 1998)).

Hopper v. State, 957 N.E.2d 613 (Ind. 2011) (when defendant pleads guilty *pro se*, there is no mandatory advisement regarding pitfalls of self-representation; rather, this will only be considered as one factor in considering voluntariness of waiver).

NOTE: To the extent that Hopper states that plea negotiations are not a "critical stage" under the Sixth Amendment, it was implicitly *overruled* by Lafler and Frye. Lafler v. Cooper, 132 S. Ct. 1376 (2012), and Missouri v. Frye, 132 S. Ct. 1399 (2012).

V. *PRO SE* REPRESENTATION - STANDBY COUNSEL - HYBRID REPRESENTATION

A. *PRO SE* REPRESENTATION

1. Sixth Amendment Right

The accused in a criminal case has a constitutional right to proceed without the assistance of counsel. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

a. Right to Control Case Presented to Jury

The core nature of the Faretta right is the right to control the case presented to the jury. Imposition of hybrid counsel who controls the case over the defendant's objection violates the Sixth Amendment right.

Sherwood v. State, 717 N.E.2d 131 (Ind. 1999) (where defendant was competent to stand trial and made knowing, voluntary and intelligent waiver of his right to counsel, and was denied control over trial strategy and the case presented to the jury, the trial court's imposition of hybrid representation on the defendant violated 6A).

Cf. McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984) (defendant's 6A right to conduct his own defense not violated by unsolicited actions of standby counsel which was held within reasonable bounds and defendant was allowed to present his case his own way).

McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (6A guarantees defendant who maintains his innocence the right to choose objective of his defense and insist that counsel refrain from admitting guilt, even if counsel's experienced-based view is that confessing guilt offers the best chance to avoid death penalty).

b. Pre-Requisites

(1) Defendant Must be Competent to Stand Trial

The standard for competence to waive the right to counsel and proceed *pro se* is the same as the standard for competence to stand trial. Godinez v. Moran, 509 U.S. 389 (1993), and Sherwood v. State, 717 N.E.2d 131 (Ind. 1999).

(2) May Not be Competent to Waive if Mentally Ill

The constitution does not forbid states from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Indiana v. Edwards, 554 U.S. 164; 128 S. Ct. 2379 (2008), *judgment aff'd by* Edwards v. State, 902 N.E.2d 821 (Ind. 2009). Trial judges are in the best position to make a first-hand evaluation of a defendant's mental and emotional state, and appellate courts are reluctant to second-guess their conclusions.

Sturdivant v. State, 61 N.E.3d 1219 (Ind. Ct. App. 2016) (no error in granting defendant's request for self-representation despite indicators of mental illness; because trial court was in the best position to judge defendant's competency and there was no evidence she was suffering from severe mental illness - despite her bizarre statements and "incorrect and unusual legal arguments" – trial court's decision to allow her to conduct her own defense was not clearly erroneous).

Ricketts v. State, 108 N.E.3d 416 (Ind. Ct. App. 2018) (no error in denying defendant's right to self-representation where he informed trial court prior to trial that he had been diagnosed with several mental illnesses and his medications were no longer effective, which he admitted could have a potential adverse effect on his ability to defend himself).

(3) Waiver Must be Knowing, Voluntary, and Intelligent

Waiver of counsel must be knowing, voluntary, and intelligent. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975); Sherwood v. State, 717 N.E.2d 131 (Ind. 1999).

The Supreme Court has emphasized that a lack of legal skill has "no bearing" on whether a defendant may represent himself. Godinez v. Moran, 509 U.S. 389, 400 (1993); Faretta, 422 U.S. at 836 (defendant's "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.").

But see Wright v. State, 168 N.E.3d 244 (Ind. 2021) (holding defendant "lacked the requisite intelligence to properly waive the right to counsel" based on his "limited experience navigating the legal system . . . deficient knowledge of criminal law and procedure, and . . . no apparent defenses or trial strategy" especially considering State's "much stronger interest in ensuring a fair trial in this capital-turned-LWOP case."), *cert. denied*.

(4) Defendant Must Be Willing and Able to Abide by Rules of Procedure and Courtroom Protocol

The right to proceed pro se may be overridden if the defendant is unwilling or unable to abide by rules of procedure and courtroom protocol. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

Hotep El v. State, 113 N.E.3d 795 (Ind. Ct. App. 2018) (trial court did not err in denying defendant's request for self-representation where defendant engaged in deliberately obstructive behavior that threatened to undermine the proceedings of

his case by claiming to be a "sovereign citizen").

Love v. State, 113 N.E.3d 730 (Ind. Ct. App. 2018) (under the totality of the circumstances, defendant's self-representation should have been terminated where although defendant had many physical ailments, he was still able to effectively communicate and conduct his defense, and he repeatedly used his ailments to delay and disrupt the proceedings).

c. Absolute Right Prior to Trial

The right to *pro se* representation is absolute only prior to trial. Koehler v. State, 499 N.E.2d 196, 198 (Ind. 1986).

Kelley v. State, 470 N.E.2d 1322 (Ind. 1984) (the filing of motions pro se does not constitute a request to proceed *pro se* or with hybrid representation).

Minneman v. State, 466 N.E.2d 438 (Ind. 1984) (court need not grant continuance to defendant who elects to dismiss counsel and proceed pro se morning of trial).

Russell v. State, 383 N.E.2d 309 (Ind. 1978) (right to pro se representation must be asserted by clear and unequivocal request within reasonable time before first day of trial).

Pro se representation is within the trial court's discretion after trial has begun.

Koehler v. State, 499 N.E.2d 196 (Ind. 1986) (within trial court's discretion to allow defendant to begin to represent himself mid-trial).

Averhart v. State, 470 N.E.2d 666 (Ind. 1984) (request made during trial untimely).

Dixon v. State, 437 N.E.2d 1318 (Ind. 1982) (request for self-representation on morning of trial was per se untimely).

A trial court does not have to advise the defendant of the right to pro se representation. Dobbins v. State, 721 N.E.2d 867, 872 (Ind. 1999).

d. Request must be Clear and Unequivocal

The right for pro se representation must be asserted by clear and unequivocal request within a reasonable time before the first day of trial. Russell v. State, 383 N.E.2d 309 (Ind. 1978). The trial court is in the best position to evaluate the sincerity and clarity of a request to proceed pro se. The defendant's vacillation is evidence of equivocation. Stroud v. State, 809 N.E.2d 274 (Ind. 2004)

Wright v. State, 168 N.E.3d 244, 266-68 (Ind. 2021) (although waiver of counsel was knowing and voluntary, it was not unequivocal because defendant's "acknowledged preference for either private counsel or his original attorney indicates no strong autonomy interest").

e. Failure to Secure Counsel Not Waiver

Where a defendant seeks to frustrate the justice system by employing deliberate delaying

tactics, the court may use other powers at its disposal, such as the contempt power, rather than proceeding with trial.

Seniours v. State, 634 N.E.2d 803 (Ind. Ct. App. 1994) (failure to secure counsel in face of repeated warnings from the court did not constitute waiver of right to counsel, where trial court failed to make requisite apprisements and there was no evidence in the record that defendant waived his right to counsel knowingly, intelligently, and voluntarily).

f. Hearing Required

When an accused decides to proceed pro se, the trial court must determine if the right to counsel is made knowingly and voluntarily. Kirkham v. State, 509 N.E.2d 890, 892 (Ind. Ct. App. 1987). To properly make determination, trial court must conduct a hearing to determine defendant's competency to represent himself and to make a record of waiver of his right to counsel. Record must establish that the defendant "was made aware of the nature, extent, and importance of the right and the consequences of waiving it." Id.

Coleman v. State, 630 N.E.2d 1376 (Ind. Ct. App. 1994) (at hearing to determine defendant's competency to represent himself, trial court may inquire into defendant's educational background, familiarity with legal procedures and general mental capabilities, but no specific requirement to explore each of those areas is imposed upon trial court).

Spears v. State, 621 N.E.2d 366 (Ind. Ct. App. 1993) (without hearing on record and additional advisement, Waiver of Counsel and Demand to Proceed *Pro Se* forms were inadequate to ensure defendant made knowing and voluntary waiver of right to counsel; although defendant signed both forms, it was impossible to determine if information informs was explained to him and, if so, by whom).

g. Rules of Evidence and Procedure Applicable

Lock v. State, 273 Ind. 315, 403 N.E.2d 1360 (1980) (defendant who files motions on his own behalf may be cross-examined on the content at least where the insanity defense is asserted).

Smith v. State, 267 Ind. 167, 368 N.E.2d 1154 (1977) (pro se defendant may be held to rules of evidence and rules of trial procedure).

Dack v. State, 457 N.E.2d 600 (Ind. Ct. App. 1983) (defendant who proceeds pro se will not be given special consideration; held to same rules of procedure as trained counsel).

h. Pro Se Representation in Joint Trial

Holifield v. State, 572 N.E.2d 490 (Ind. 1991) (not reversible error for trial court to permit one defendant in joint trial to proceed pro se, especially in view of uncontradicted evidence supplied by State; although defendant's pro se representation was inept at times, possibly to point of self-incrimination, the other defendants were represented by counsel throughout trial).

i. Involuntary Termination of Pro Se Representation

The trial judge may terminate self-representation by a defendant who deliberately engages in serious or obstructionist misconduct. German v. State, 373 N.E.2d 880 (Ind. 1978).

> Savage v. Estelle, 924 F.2d 1459 (9th Cir. 1990) (defendant elected to proceed pro se but had a severe speech impediment which made it difficult for him to articulate his defense; held, trial court's denial of defendant's wish to represent himself was proper, because the jury never perceived him as representing himself. He was physically incapable of doing so).

The trial court could constitutionally remove a disruptive pro se defendant from proceedings and allow stand-by counsel to take over. Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057 (1970).

j. Reasserting the Right to Counsel

When a defendant abandons his pro se defense after the start of trial, the appellate court considers the following factors to determine whether the trial court abused its discretion in not appointing counsel: 1) the defendant's prior history in the substitution of counsel and in the desire to change self-representation to counsel-representation; 2) the reasons set forth in defendant's request; 3) the length and stay of trial proceedings; 4) any disruption or delay in the trial proceedings which might be expected to ensue if the request is granted; and 5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. Koehler v. State, 499 N.E.2d 196, 198-99 (Ind. 1986).

> Davis v. State, 130 N.E.3d 638, 642 (Ind. Ct. App. 2019) (no error in denying request for counsel one year after defendant requested to proceed pro se because defendant had been "fully advised" of difficulties of proceeding pro se a year before trial, and he did not waver in his decision to proceed pro se until day of trial; despite trial court's denial of request for counsel, defendant effectively defended against charges; "Not only did he manage to impeach the victim during cross-examination, but he also was found not guilty on two of the three charges the State brought against him.").
>
> Koehler v. State, 499 N.E.2d 196 (Ind. 1986) (defendant proceeded pro se before a jury and found guilty of battery; before habitual criminal hearing began, trial court denied defendant's request that his standby counsel take over the defense: held defendant denied right to counsel in habitual proceeding. Holding limited to special situation in which defendant with standby counsel already at his side desires to turn over his defense under circumstances which do not disadvantage any of the other participants in the trial).
>
> Goble v. State, 766 N.E.2d 1, 5 (Ind. Ct. App. 2002) (abuse of discretion in denying request to have standby counsel take over during trial).
>
> Miller v. State, 789 N.E.2d 32, 39 (Ind. Ct. App. 2003) (error to refuse defendant's request that standby counsel conduct voir dire), *aff'd on reh'g*, 795 N.E.2d 468.

k. Delay Tactic

A request for self-representation need not be granted if it is intended merely as a tactic for delay.

United States v. Flewitt, 874 F.2d 669 (9th Cir. 1989) (trial court reversed, as defendant's failure to engage in meaningful discovery, failure to make use of available resources, and general failure to prepare for trial were not permissible reasons to terminate self-representation); see also Stroud v. State, 809 N.E.2d 274 (Ind. 2004).

l. Motion for New Trial

If defendant requests an attorney at the time of the motion for a new trial, absent bad faith, she is entitled to have one appointed even though she waived her right to counsel and represented herself at trial. Menefield v. Borg, 881 F.2d 696 (9th Cir. 1989).

m. Direct Appeal

There is no constitutional right to self-representation on direct appeal. Martinez v. Court of Appeals, 528 U.S. 152 (2000). In this context, the reasoning is that defendant's autonomy interests that survive a conviction at trial are less compelling than a State's continued interest in the fair and efficient administration of justice. Wright v. State, 168 N.E.3d 244 (Ind. 2021).

n. Attorney as *Pro Se* Defendant

Attorneys who elect to go pro se are not entitled to also retain co-counsel. Schumm v. State, 866 N.E.2d 781 (Ind. Ct. App. 2007).

B. STANDBY COUNSEL

1. Appointment – Factors to Consider

The suggested practice is to appoint standby counsel to a person who wants to represent themself. Koehler v. State, 499 N.E.2d 196 (Ind. 1986); German v. State, 268 Ind. 67, 373 N.E.2d 880 (1978).

Jackson v. State, 441 N.E.2d 29, 33 (Ind. Ct. App. 1982) (appointment of standby counsel appropriate prophylactic device when defendant assumes burden of conducting own defense).

There is no absolute right to have standby counsel present during a trial when a defendant elects to proceed pro se. Sidener v. State, 446 N.E.2d 965 (Ind. 1983).

In ruling on a defendant's request to change from self-representation to representation with standby counsel, a trial court should consider:

1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to standby counsel;
2) the reasons set forth in defendant's request;
3) the length and stage of trial proceedings;

4) any disruption or delay in trial proceedings that might be expected to ensue if the request is granted; and
5) the likelihood that defendant could effectively defend against the charges if required to continue to act as his or her own attorney.

Miller v. State, 789 N.E.2d 32 (Ind. Ct. App. 2003), *aff'd on reh'g*, 795 N.E.2d 468; Goble v. State, 766 N.E.2d 1 (Ind. Ct. App. 2002); Maisonet v. State, 579 N.E.2d 660 (Ind. Ct. App. 1991).

Radcliff v. State, 579 N.E.2d 71 (Ind. 1991) (no abuse of discretion refusing defendant's request to go pro se with attorney serving as "standby counsel," particularly where defendant conducted himself in belligerent manner).

2. Appointment Over Defendant's Objection

A trial judge may appoint standby counsel even over the defendant's protest, so long as the defendant retains actual control over his or her defense and his or her appearance before the jury as a pro se defendant is not undermined. Sherwood v. State, 717 N.E.2d 131 (Ind. 1999). However, a defendant's right to proceed pro se can be violated if standby counsel destroys the jury's perception that the defendant is representing him- or herself. A defendant's right to proceed *pro se* is violated if the pro se defendant is not allowed to preserve actual control over the case he or she chooses to present to the jury. Hill v. State, 773 N.E.2d 336 (Ind. Ct. App. 2002). See 8 Ind. Law Encyc. Criminal Law § 334.

Wright v. State, 168 N.E.3d 244 (Ind. 2021) (recognizing that Art. 1, § 13 provides broader rights than 6A but does not address right of self-representation or provide "unlimited right" to pro se defendant to conduct their own trial proceedings; right of self-representation does not preclude appointment of standby counsel over defendant's objection to protect public interest in fairness and integrity of the proceedings, especially when defendant faces severe penalty as LWOP).

3. Role

a. Provide Access to Legal Materials

Role of standby attorney is, in part, to provide access to legal materials. Reed v. State, 491 N.E.2d 182 (Ind. 1986).

Engle v. State, 467 N.E.2d 712 (Ind. 1984) (pro se defendant need not be furnished the materials from any other source).

PRACTICE POINTER: Get the judge (and, ideally, the pro se defendant) to clarify the scope of your role as standby counsel on the record. Standby counsel's duties might be discussed on the record at the time of appointment. But a written order of appointment is unlikely to be specific or contemplate all ways in which standby counsel could participate. The judge might even not fully understand what standby counsel is supposed to do. File a motion requesting clarification and include a proposal of what you think the proper functions should be, keeping in mind that most pro se defendants' complaints about standby counsel's performance are for failure to act instead of over participation. For an example of a proposed appointment order, see 24 S. Cal. Rev. L. & Soc. Just. 133, 236-37 (2015).

b. Assistance During Trial

Role of standby counsel clearly includes the duty of communicating with court outside presence of jury. McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984).

PRACTICE POINTER: Standby counsel should be prepared as if there were no pro se request. While no court has clearly delineated the role of standby counsel, the duty to prepare is implied by the right of the court to terminate *pro se* representation if the conduct of the defendant becomes disruptive. German v. State, 373 N.E.2d 880 (Ind. 1978).

Koehler v. State, 499 N.E.2d 196 (Ind. 1986) (limits a trial court's discretion to refuse to allow a defendant to withdraw pro se request in situations where standby counsel has been appointed and there is no disadvantage to other participants).

Goble v. State, 766 N.E.2d 1, 5 (Ind. Ct. App. 2002) (abuse of discretion in denying request to have standby counsel take over during trial).

Miller v. State, 789 N.E.2d 32, 39 (Ind. Ct. App. 2003) (error to refuse defendant's request that standby counsel conduct voir dire), *aff'd on reh'g*, 795 N.E.2d 468

C. HYBRID REPRESENTATION OR JOINT COUNSEL

1. No Constitutional Right

There is no constitutional right to hybrid representation. Myers v. State, 510 N.E.2d 1360 (Ind. 1987); Averhart v. State, 470 N.E.2d 666 (Ind. 1984); and Henson v. State, 798 N.E.2d 540 (Ind. Ct. App. 2003).

Hunt v. State, 459 N.E.2d 730 (Ind. 1984) (no right to act as "joint counsel" in one's own defense, by examining some witnesses, while allowing counsel to examine others; whether to permit defendant to act as co-counsel entirely within discretion of trial court).

However, a pro se defendant may request standby counsel to take part in the proceedings. See McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984).

Henson v. State, 798 N.E.2d 540 (Ind. Ct. App. 2003) (although counsel conducted voir dire and closing arguments, court found that constituted pro se representation as defendant "remained the captain of his defense team"; thus, trial court did need to establish valid waiver of his right to counsel).

2. Rarely Granted

Indiana courts reluctant to grant co-counsel status to a defendant. Carter v. State, 512 N.E.2d 158, 162 (Ind. 1987).

3. Waiver of Ineffective Assistance of Counsel Claim

Defendant who chooses to take control of every aspect of his own defense with hybrid representation waives ineffective assistance of counsel claim. Carter v. State, 512 N.E.2d 158 (Ind. 1987).

4. Cannot be Forced on Defendant Who Validly Waives Right to Counsel

Sherwood v. State, 717 N.E.2d 131 (Ind. 1999) (where defendant was competent to stand trial and made knowing, voluntary and intelligent waiver of his right to counsel, and was denied control over trial strategy and the case presented to the jury, the trial court's imposition of hybrid representation on the defendant violated 6A).

5. Defendant Not Entitled to Advisement of *Pro Se* Dangers in Hybrid Representation

Cihonski v. State, 779 N.E.2d 1180 (Ind. Ct. App. 2003) (because hybrid representation took place instead of self-representation, trial court was not required to give defendant standard advisements on dangers of proceeding pro se).

D. LAY ASSISTANCE OR LAY COUNSEL

Defendant has no constitutional right to lay assistance or lay counsel at trial or on appeal. Kimble v. State, 451 N.E.2d 302, 307 (Ind. 1983).12

VI. CONFLICT OF INTEREST

A. MULTIPLE REPRESENTATION

Criminal defendant has right under Sixth Amendment to conflict-free representation by counsel. Multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See, e.g., Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3120 (1987) and Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980).

Townsend v. State, 533 N.E.2d 1215 (Ind. 1989) (no presumption arose that representation of co-defendants by lawyers from public defender's staff resulted in impermissible conflict of interest, where there was no showing of sharing of confidences, or any evidence of strategy decisions being made in deference to other's interest).

Important issue is whether such conflictive situations were raised prior to or at trial, or only after trial concluded.

1. Existence of Potential Conflicts Raised Prior to or During Trial - Holloway Test

Where trial court fails properly to respond to defense counsel's motion for separate counsel, either by granting motion or by ascertaining remoteness of risk of a conflict at a separate hearing, reversal of defendant's conviction is automatic, even in the absence of any showing of prejudice. Holloway v. Arkansas, 435 U.S. 475, 489, 98 S. Ct. 1173 (1978).

2. Conflicts Raised After Trial - Cuyler Test

a. Two-Part Test

To establish reversible IAC due to a conflict where no timely objection was made at trial, defendant must demonstrate that: (1) an actual conflict of interest exists; and (2) the conflict adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708 (1980); Wilson v. State, 525 N.E.2d 619 (Ind. Ct. App. 1988); and Latta v. State, 743 N.E.2d 1121 (Ind. 2001).

Aubrey v. State, 478 N.E.2d 70 (Ind. 1985) (to show 6A violation due to conflict of interest, defendant must show his counsel actively represented conflicting interest and establish that this adversely affected his lawyer's performance).

(1) "Actual Conflict" Existed

If actual conflict and resulting adversity can be shown, then prejudice need not be demonstrated. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980).

An "actual conflict of interest" precisely means a conflict ***that affected*** counsel's performance, as opposed to a mere theoretical division of loyalties. Mickens v. Taylor, 535 U.S. 162, 171 (2002) (clarifying Wood v. Georgia, 450 U.S. 261, 273 (1981)).

Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) (conflict exists where one attorney represents co-defendants, and one defendant agrees to provide evidence against the other in return for an advantageous plea bargain).

(2) Conflict Adversely Affected Adequacy of Legal Representation

Petitioner need not show that result of trial would have been different without the conflict of interest, only that the conflict had some adverse effect on counsel's performance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Burse v. State, 515 N.E.2d 1383 (Ind. 1987).

Tate v. State, 515 N.E.2d 1145 (Ind. Ct. App. 1987) (attorney represented co-defendants who were pointing the finger at each other; adverse effect found in counsel's failure to cross-examine when fingers were pointed).

Williams v. State, 529 N.E.2d 1313, 1316 (Ind. Ct. App. 1988) (attorney's advancing argument that co-defendant, also represented by same attorney, was less culpable, impaired representation; reversed).

Cf.

Whittle v. State, 542 N.E.2d 981 (Ind. 1989) (defendant, one of five co-defendants jointly represented, not singled out as more culpable; immunity granted to two of five was done without counsel's involvement; no IAC).

Jackson v. State, 992 N.E.2d 926 (Ind. Ct. App. 2013) (because defendant cited no evidence to substantiate conflict-of-interest claim that trial counsel was "helping" the State, trial court had no duty to inquire about potential conflict).

b. One-Part Test

Resneck v. State, 499 N.E.2d 230 (Ind. 1986) (once a petitioner shows that his trial counsel actively represented conflicting interests, he has established constitutional predicate for IAC claim).

3. Waiver of Conflict

Client's waiver is not always effective to cure conflict of interest.

Wheat v. U.S., 486 U.S. 153, 108 S. Ct. 1692 (1988) (court may reject waiver where there is "serious potential" for conflict of interest at trial).

See also Jones v. State, 151 N.E.3d 790 (Ind. Ct. App. 2020) (holding defendant's waiver of potential conflicts with respect to counsel's joint representation of codefendants did not preclude his later assertion of ineffective assistance claim based on actual conflict).

B. INTERFERENCE IN ATTORNEY-CLIENT RELATIONSHIP

1. Eavesdropping

State v. Taylor, 49 N.E.3d 1019 (Ind. 2016) (law enforcement and prosecutor's eavesdropping on suspect's pre-interrogation consultation with his lawyer betrayed public trust and violated federal and state right to counsel).

2. Preventing Consultation at Trial

Denying defendant opportunity to consult with counsel during overnight recess denied effective assistance of counsel. Geders v. U.S., 425 U.S. 80, 96 S. Ct. 1330 (1976).

Once defendant becomes a witness by testifying, denying defendant opportunity to consult with counsel during 15-minute recess does not deny defendant effective assistance of counsel. Perry v. Leeke, 488 U.S. 272, 109 S. Ct. 594 (1989).

3. Pretrial Transfers and the Right to Counsel

Challenges to pretrial transfers not conforming to statutory rules, on grounds they allegedly impeded access to counsel, have been generally unsuccessful. Parr v. State, 504 N.E.2d 1014 (Ind. 1987).

Hurley v. State, 446 N.E.2d 1326 (Ind. 1983) (transfer to another jail was due to disruptive behavior of defendant, not to an effort to deny access to counsel).

4. Requiring Defendant's Lawyer to Testify

Requiring defendant's lawyer to testify is not *per se* material interference with his function as an advocate.

a. Case Law

Strong v. State, 538 N.E.2d 924, 926 (Ind. 1989) (not error for trial court to swear in defendant's lead counsel and require him to read portion of his prior interview with child witness; attorney's testimony occurred outside presence of jury during competency hearing, testimony was not sole basis for finding of competency, and defendant's co-counsel remained and actively participated).

O'Neill v. State, 597 N.E.2d 379, 386 (Ind. Ct. App. 1992) (not reversible error for trial court to: 1) order defense counsel and prosecutor to clerk's office to compare original of a

prior felony conviction against photocopy, and 2) require defendant's counsel to testify to authenticity of document outside presence of jury, even though there was no other co-counsel to object to defense counsel's testimony; court noted it would not encourage trial courts to require testimony of defense counsel; Judge Barteau, dissenting in part, because unwilling to countenance spectacle of defense counsel being both investigator for State and its inculpating witness, while leaving client totally unrepresented).

United States v. Freeman, 519 F.2d 67 (9th Cir. 1975) (when counsel testified, trial judge appointed a defense counsel *pro tempore*).

b. Ethics

Indiana Rules of Professional Conduct, Rule 3.4 provides in pertinent part:

> A lawyer shall not:
>
> (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Indiana Rules of Professional Conduct, Rule 3.7(a) provides in part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

5. Attorney-Client Correspondence

"Confidential correspondence" is sealed correspondence between an inmate and attorneys, most government officials, courts, and representatives of the public news media. The term includes "legal mail," a term of art evolving from Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974). See also Averhart v. Shuler, 652 F. Supp. 1504, 1511 (7th Cir. 1987).

All legal mail is confidential correspondence, but not all confidential correspondence is legal mail. Kindred v. Duckworth, 9 F.3d 638 (7th Cir. 1993). Prison officials may open privileged mail to check for contraband, or to remove money which will be placed on the prisoner's books. The inmate has a due process right to be present when his legal mail is opened. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974). Prison officials may also read mail when there is some reasonable suspicion that it presents a danger to the security of the institution or to another person.

Without a showing of prejudice, intrusions by the prosecution into the attorney-client relationship are not *per se* violations of the Sixth Amendment.

Malinski v. State, 794 N.E.2d 1071, 1081 (Ind. 2003) (detectives secretly examined and copied confidential correspondence between incarcerated defendant and his attorneys,

leading to the discovery of other evidence; trial court's decision to treat this as a 'discovery violation' and to bar use of the documents at trial for any purpose but not barring the use of evidence discovered as a result, was "adequate to shield Malinski from any prejudice.")

State v. Taylor, 49 N.E.3d 1019 (Ind. 2016) (law enforcement and prosecutor's eavesdropping on suspect's pre-interrogation consultation with his lawyer betrayed public trust and violated federal and state right to counsel).

PRACTICE POINTER: Incarcerated clients are generally powerless to keep their personal possessions secure, whether from law enforcement or from other inmates. Make sure your clients are aware of the risks involved with keeping copies of discovery materials and confidential correspondence in jail. A cellmate who has examined your client's discovery materials may be in a good position to concoct a story about the defendant making a detailed confession to the crime, in hopes of obtaining favorable treatment in his own case.

6. Other Examples of Interference in Attorney-Client Relationship

Other interference constituting actual or constructive denial counsel includes the following:

Herring v. New York, 422 U.S. 853 (1975) (barring summations in bench trials).
Brooks v. Tennessee, 406 U.S. 605 (1972) (requiring defendant be first defense witness).
Ferguson v. Georgia, 365 U.S. 570 (1961) (barring direct examination of defendant).