North Dakota Law Review

Volume 75 | Number 4 Article 7

1999

Criminal Procedure - Counsel for Accused - Waiver of the Sixth Amendment Right to Counsel: The North Dakota Supreme Court Rules That a Knowing and Intelligent Waiver Requires Awareness of Dangers and Disadvantages of Self-Representation

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CRIMINAL PROCEDURE—COUNSEL FOR ACCUSED—WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL: THE NORTH DAKOTA SUPREME COURT RULES THAT A KNOWING AND INTELLIGENT WAIVER REQUIRES AWARENESS OF DANGERS AND DISADVANTAGES OF SELF-REPRESENTATION

State v. Wicks, 1998 N.D. 76, 576 N.W.2d 518

I. FACTS

In 1996, Johannah Wicks was living with her boyfriend, Kelly Overby, a convicted drug felon.[1] During a March 29, 1996, probation search of Overby's residence, Morton County Deputy Brent Slade found a "snow seal," which is a folded piece of paper used to carry powdered drugs, in a pair of blue jeans in the bathroom.[2] Slade gave the snow seal, which contained a powdered substance, to the designated evidence custodian, Burleigh County Deputy Trent Wangen, who believed the powdered substance was methamphetamine.[3] Deputy Wangen asked Wicks if she wanted to talk about the powdered substance, to which Wicks responded, "It is mine."[4] The North Dakota State Laboratory determined the substance was indeed methamphetamine,[5] and Wicks was charged on December 13, 1996, with Possession of a Controlled Substance, a class C felony under section 19-03.1-23(6) of the North Dakota Century Code.[6]

On December 20, 1996, Wicks completed an application for appointed defense Services; based on the application, the court found her

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1. State v. Wicks, 1998 N.D. 76, ¶ 2, 576 N.W.2d 518, 519.
2. *Id.*
3. *Id.*
4. *Id.* ¶ 3.
5. *Id.*
6. *Id.* Section 19-03.1-23(6) of the North Dakota Century Code provides:

> It is unlawful for any person to willfully, as defined in section 12.1-02-02, [to] possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter, but any person who violates section 12-46-24 or 12-47-21 may not be prosecuted under this subsection. Except as provided in this subsection, any person who violates this subsection is guilty of a class C felony. If the person is in or on, or within one thousand feet [300.48 meters] of the real property comprising a public or private elementary or secondary school or a public vocational school, the person is guilty of a class B felony. Any person who violates this subsection regarding possession of one-half ounce [14.175 grams] to one ounce [28.35 grams] of marijuana is guilty of a class A misdemeanor. Any person, except a person operating a motor vehicle, who violates this subsection regarding possession of less than one-half ounce [14.175 grams] of marijuana is guilty of a class B misdemeanor. Any person who violates this subsection regarding possession of less than one-half ounce [14.175 grams] of marijuana while operating a motor vehicle is guilty of a class A misdemeanor.

N.D. CENT. CODE § 19-03.1-23(6) (1997).

to be indigent and appointed Robert Martin to be her attorney.[7] A few days before trial, Wicks filed a disciplinary complaint against Martin with the disciplinary board of the supreme court.[8] Wicks believed that such a complaint would preserve a record for a later claim of ineffective assistance of counsel.[9]

On June 3, 1997, Martin advised the trial court that he had learned that Wicks had filed a disciplinary action against him, causing him to request leave to withdraw as her attorney.[10] Wicks expressed a desire to proceed but thought that Martin would be representing her.[11] Wicks insisted she had no idea the filing of a disciplinary complaint would result in Martin's withdrawal.[12] Wicks remarked, "I didn't know that. They didn't tell me that. I was told for a point of appeal I should have on the record that I was dissatisfied because there was no motions filed. And I had asked him to file motions."[13] The court asked if her "drugger" boyfriend (referring to Kelly Overby) was giving her legal advice.[14] Wicks admitted he had given her some advice.[15] Describing the episode as an "absolutely ridiculous" situation Wicks brought on herself, the district court allowed Martin to withdraw.[16] In doing so, the court advised Wicks that she would have to represent herself.[17] Wicks, in apparent disbelief asked, "I am going to have to represent myself? I don't have a clue on what to do, I am going to be found guilty"; to which, the court replied, "That's probably very likely."[18]

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7. Brief for Appellant at 1, State v. Wicks, 1998 N.D. 76, 576 N.W.2d 518 (No. 970259). Wicks attempted to retain another attorney from Jamestown, North Dakota, but the Jamestown attorney told Wicks he did not have enough time to prepare the case and told her to stay with Martin. *Wicks*, ¶ 4, 576 N.W.2d at 519.

8. *Wicks*, ¶ 5, 576 N.W.2d at 519. Wicks had indicated that she wanted to file a motion to suppress evidence but had never discussed this with Martin. Brief for Appellee at 4, State v. Wicks, 1998 N.D. 76, 576 N.W.2d 518 (No. 970259). The record did not indicate whether Wicks had ever attempted to contact Martin, but Martin had advised Wicks that the deadline for filing such motions had passed. *Id.*

9. *Wicks*, ¶ 5, 576 N.W.2d at 519.

10. *Id.* Wicks claimed that she did not understand that filing the disciplinary complaint against Martin would make Martin withdraw. *Id.; see also* Brief for Appellee at 4, *Wicks* (No. 970259). After Martin moved to withdraw, the State objected to any delay in the trial:

> Your honor, the defendant has been . . . trying to get this matter delayed, continued, however you want to put it. This was simply another action of her part to do that. The State has our witnesses here, the jury is here, and the defendant has put herself in this position . . . [S]he obviously knew this might happen. She attempted to retain counsel . . . .

Wicks, ¶ 6, 576 N.W.2d at 519.

11. *Wicks*, ¶ 7, 576 N.W.2d at 520.

12. *Id.*

13. *Id.*

14. *Id.* ¶ 8.

15. *Id.*

16. *Id.* ¶ 9.

17. *Id.*

18. *Id.* ¶¶ 10-11.

In light of the fact that Wicks was representing herself, the State asked to be allowed to negotiate a plea agreement with her.[19] After ten minutes of negotiation, the parties failed to reach a plea agreement.[20] It appears that Wicks and the State discussed the issue of a jury trial, because once the record resumed, Wicks was asked if she wished to waive her right to a jury trial.[21] The court asked Wicks what she wanted to do, to which Wicks responded, "[t]o waive the jury trial."[22]

After a bench trial lasting less than twenty-five minutes, the district court concluded that the evidence established guilt beyond a reasonable doubt and convicted Wicks on the charge of possession of a controlled substance, methamphetamine.[23] On August 1, 1997, Wicks was sentenced to three years of commitment to the North Dakota Department of Corrections, with two years suspended.[24]

On appeal, Wicks argued ineffective assistance of counsel, denial of her right to counsel, and abuse of discretion based on the district court's failure to grant a continuance.[25] In considering whether Wicks was denied her right to counsel when the district court excused her appointed counsel on the day of the trial, the North Dakota Supreme Court *held* that the trial court denied Wicks her right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 12 of the North Dakota Constitution.[26]

II. LEGAL BACKGROUND

A. DEVELOPMENT OF THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT

The Sixth Amendment of the United States Constitution provides that in all criminal prosecutions, "the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[27] The United States Supreme Court originally construed this provision to mean that in federal courts, counsel must be provided for defendants unable to employ counsel unless the defendant competently and intelligently waived that right.[28] Between *Powell v. Alabama*[29] in 1932 and *Gideon v.*

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19. *Id.* ¶ 12.
20. *Id.*
21. *Id.* Wicks had attempted to discuss the waiver with her Jamestown attorney, but the attorney had left the office. *Id.*
22. *Id.*
23. *Id.* ¶ 13.
24. *Id.* ¶ 14.
25. *Id.* ¶ 15.
26. *Id.* ¶ 29, 576 N.W.2d at 522.
27. U.S. CONST. amend. VI.
28. Johnson v. Zerbst, 304 U.S. 458, 463 (1938). *See generally* Patton v. United States, 281 U.S.

Wainwright[30] in 1963, the United States Supreme Court struggled with the question of whether the federal constitutional right to counsel was to be made obligatory upon the states by the due process clause of the Fourteenth Amendment.[31]

1. *The Pre-Gideon Approach to the Sixth Amendment Right to Counsel*

In *Powell v. Alabama*, the defendants, seven blacks charged with the rape of two white girls, were found guilty and sentenced to death in an Alabama state court.[32] The defendants were found to be ignorant and illiterate, and they were all residents of other states.[33] None of the defendants was allowed the opportunity to employ counsel or to communicate with relatives who might assist in finding counsel for him.[34]

The Supreme Court held that the defendants were denied the right to counsel and a fair trial.[35] In reaching this decision, the Court stated that the necessity of counsel was so vital and imperative to the procurement of a fair trial that the failure on the part of the trial court to make an effective appointment of counsel was a denial of due process within the meaning of the Fourteenth Amendment.[36] The Court therefore established that in a capital case in which the defendant is unable to employ counsel and is incapable of adequately making his or her own defense because of ignorance, feeble-mindedness, or illiteracy,[37] it is the

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276, 310 (1930) (stating that when there is no constitutional or statutory mandate, and no public policy prohibiting it, an accused may waive any privilege which he or she is given the right to enjoy).

29. 287 U.S. 45 (1932).

30. 372 U.S. 335 (1963).

31. Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963).

32. Powell v. Alabama, 287 U.S. 45, 49-50 (1932). Under the Alabama rape statute, the jury, which determined the punishment for rape, could impose a sentence ranging from 10 years imprisonment to death. *Id.* at 50.

33. *Id.* at 52.

34. *Id.*

35. *Id.* at 58.

36. *Id.* at 71. The 14th Amendment to the United States Constitution in relevant part provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

37. *Powell*, 287 U.S. at 69. The Court wrote:

> [E]ven the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. If

duty of the trial court, whether requested or not, to assign counsel for him or her as a necessary requisite of due process of the law.[38]

However, the Court unambiguously stated that it was not holding that appointment of counsel by the trial court was a necessary requisite of due process in all criminal prosecutions or under all circumstances.[39] Rather the Court carefully tailored its opinion around the surrounding circumstances and limited the obligations of state courts to appoint counsel to indigent defendants in capital cases.[40]

In *Johnson v. Zerbst,*[41] the Court dealt with a criminal case in federal court in which the accused pled not guilty, stated that he had no lawyer, and, upon an inquiry by the trial court, stated that he was ready for trial.[42] He was subsequently convicted of possessing and uttering[43] counterfeit money.[44] In reversing the conviction, the Court held that the Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless the accused has waived the right to assistance of counsel.[45]

The Court defined "waiver" as an intentional relinquishment or abandonment of a known right to counsel which must depend, in each case, upon the particular facts and circumstances, including the background, experience, and conduct of the accused.[46] The Court further

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> that fact be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id.

38. *Id.* at 71.

39. *Id.* at 70.

40. *Id.* at 71; *see also* White v. Maryland, 373 U.S. 59, 59-60 (1963) (holding that since a preliminary hearing is a critical stage in a criminal proceeding, presence of counsel was required for defendant facing the death penalty); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (holding that denial of right to counsel to defendant charged with capital crime violated due process because the *Powell* decision required counsel at all stages of a capital case and, since arraignment is a critical stage in the criminal process in Alabama, failure to have counsel at this stage violated defendant's constitutional rights); Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948) (finding that while capital cases require appointment of counsel, whether the 14th Amendment requires state trial courts to appoint counsel to procure a fair trial in other cases depends on the facts of each case); Bute v. Illinois, 333 U.S. 640, 648 (1948) (recognizing that had the charges been capital charges, the trial court would have been required, both by state statute and the decision of the Court interpreting the 14th Amendment, to appoint counsel); Tompkins v. Missouri, 323 U.S. 485, 487 (1945) (citing *Powell,* stating that, at least in capital cases, appointment of counsel is a necessary requisite of due process of law); Williams v. Kaiser, 323 U.S. 471, 476 (1945) (citing *Powell's* statement that, at least in capital cases, appointment of counsel is a necessary requisite of due process of law).

41. 304 U.S. 458 (1938).

42. Johnson v. Zerbst, 304 U.S. 458, 460 (1938). The defendant contended on appeal that he was ignorant of his right to counsel and incapable of preserving his legal and constitutional rights during trial. *Id.* at 467.

43. To "utter" counterfeit money means to put or send in circulation an instrument and declare or assert, directly or indirectly, that it is good or genuine. BLACK'S LAW DICTIONARY 1547 (6th ed. 1990).

44. *Johnson,* 304 U.S. at 460.

45. *Id.* at 463.

46. *Id.* at 464. For subsequent Supreme Court cases supporting the waiver standard see generally

held that the trial court has the responsibility, consistent with the standard set forth, of determining whether there is an intelligent and competent waiver of the right to counsel by the accused.[47] Therefore, the Court held that while an accused may waive the right to counsel,[48] whether there is a proper waiver should be determined by the trial court and that determination should appear on the record.[49]

The Court in *Zerbst* therefore declared that the jurisdiction of the federal trial court to convict and sentence is dependent upon its compliance with the Sixth Amendment guaranty of assistance of counsel.[50] The trial court's ability to adjudicate a case may be lost if it fails to provide counsel for an accused who is unable to obtain counsel but has not intelligently waived his or her right.[51] Thus, under *Zerbst,* if the trial court fails to comply with the requirements of the Sixth Amendment, it can no longer proceed with the trial and any subsequent conviction of the accused is void.[52]

Godinez v. Moran, 509 U.S. 389 (1993) (finding that a defendant's ability to represent himself has no bearing upon his competence to waive his right to counsel and choose self-representation); Patterson v. Illinois, 487 U.S. 285 (1988) (determining that waiver must reflect an intentional abandonment of a known right made with open eyes); Moran v. Burbine, 475 U.S. 412 (1986) (concluding that a waiver decision must be voluntary in the sense that it is the product of a free and deliberate choice and the waiver must have been made with a full awareness of both the nature of the right and the consequences of the decision to waive that right); Tague v. Louisiana, 444 U.S. 469 (1980) (determining that waiver must be knowing and intelligent); North Carolina v. Butler, 441 U.S. 369 (1979) (holding that a decision to waive counsel must be voluntary, knowing, intelligent, and understanding); Argersinger v. Hamlin, 407 U.S. 25 (1972) (determining that a waiver decision must be knowing and intelligent); Boyd v. Dutton, 405 U.S. 1 (1972) (concluding that a decision to waive counsel must be voluntary and knowing); Boykin v. Alabama, 395 U.S. 238 (1969) (holding that a decision to waive counsel must be intelligent and understanding); Carnley v. Cochran, 369 U.S. 506 (1962) (determining that a decision to waive counsel must be intelligent and understanding); United States v. Morgan, 346 U.S. 502 (1954) (holding that a waiver of counsel in federal trials must be competently and intelligently made); Bute v. Illinois, 333 U.S. 640 (1948) (holding that a decision to waive counsel must be voluntary, competent, and understanding); Carter v. Illinois, 329 U.S. 173 (1946) (concluding that a waiver must be an intelligent and conscious choice); Rice v. Olson, 324 U.S. 786 (1945) (concluding that a decision to waive counsel must be intelligent and understanding); Adams v. United States, 317 U.S. 269 (1942) (allowing waiver of the right to counsel if the accused's decision is made intelligently and competently with open eyes); Walker v. Johnston, 312 U.S. 275 (1941) (setting aside a guilty plea made without assistance of counsel because the defendant's waiver of right to counsel was not voluntary).

47. *Johnson*, 304 U.S. at 465.

48. The Court pointed out that trial courts should indulge every reasonable presumption against waiver of fundamental constitutional rights and that acquiescence in the loss of constitutional rights should not be presumed by the courts. *Id.* at 464.

49. *Id.* at 465.

50. *Id.* at 468.

51. *Id.* The Court stated:

> Since the Sixth Amendment constitutionally entitles one charged with crime, to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.

Id. at 467-68.

52. *Id.* at 468; *see also* Carnley v. Cochran, 369 U.S. 506, 515 (1962) (stating that the principles

In *Betts v. Brady*,[53] the Supreme Court heard the appeal of a defendant, convicted in Maryland state court, who was unable to employ counsel due to lack of funds.[54] When he requested that counsel be appointed for him, the trial judge refused, stating that it was the practice of the county to appoint counsel for indigent defendants only for murder and rape prosecutions.[55]

The defendant appealed his subsequent conviction to the United States Supreme Court, which affirmed.[56] The Court held that the Sixth Amendment applied only to trials in federal courts and that the specific guarantees found in the Sixth Amendment are not made obligatory upon the states through incorporation by the due process clause of the Fourteenth Amendment.[57]

The Court did, however, state that a denial by states of rights or privileges embodied in the first eight amendments may, in certain circumstances, operate to deprive a litigant of due process of law in violation of the Fourteenth Amendment, but such a denial must be tested by an appraisal of the totality of facts on a case-by-case basis.[58] The Court reasoned that to deduce from the due process clause of the Fourteenth Amendment a rule binding upon the states in all circumstances would impose a "requirement without distinction" between criminal charges of differing magnitudes upon all courts, despite variations in their jurisdiction.[59]

Rather than deciding that the Fourteenth Amendment made the right to counsel guarantees of the Sixth Amendment obligatory upon the states, the Court formulated a case-by-case approach by which the Fourteenth Amendment is to be used as a prohibition against convictions that are offensive to the common and fundamental ideas of fairness and

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declared in *Johnson v. Zerbst* are equally applicable to asserted waivers of the right to counsel in state criminal proceedings); Von Moltke v. Gillies, 332 U.S. 708, 720-24 (1948) (stating that in order for a waiver to be valid, such waiver must be made with a broad understanding of the whole matter, and that the defendant in this case did not have such an understanding); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-76 (1942) (allowing waiver of the right to counsel if the accused knows what he or she is doing and the choice is made with open eyes).

53. 316 U.S. 455 (1942).

54. Betts v. Brady, 316 U.S. 455, 456-57 (1942).

55. *Id.* at 457. The defendant was indicted for robbery in the Circuit Court of Carroll County, Maryland. *Id.* at 456.

56. *Id.* at 473.

57. *Id.* at 461-62.

58. *Id.* at 462.

59. *Id.* at 473. The Court reasoned that a situation that may constitute a denial of fundamental fairness shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of a denial of fundamental fairness. *Id.* Hence, the Court believed that the incorporation of Sixth Amendment right to counsel upon the states through the 14th Amendment posed the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, which ignore qualifying factors that should be taken into account in each case. *Id.* at 462. Therefore, the Court believed that a "less rigid and more fluid" approach was necessary for dealing with the 14th Amendment's due process guarantee. *Id.*

right.[60] In reaching this conclusion, the Court found that in light of the common law practice, as well as current state constitutional and statutory provisions dealing with the right to counsel, it has been the judgment of the people, their representatives, and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.[61] The Court also found that the legislature may determine when and to what extent a defendant had a right to appointment of counsel.[62]

Therefore, in the light of the evidence, the Court was unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states to furnish counsel in every case.[63] Rather, courts have the power to appoint counsel when such an appointment seems to be required in the interest of fairness.[64] Finally, the Court was quick to point out that the Fourteenth Amendment is not an "inexorable command," by which no trial of any offense, or in any court, can be

60. *Id.* For cases demonstrating circumstances that necessitated the need for assistance of counsel to procure a fair trial in non-capital cases, see generally Moore v. Michigan, 355 U.S. 155 (1957) (holding that the youth, immaturity and limited education of the defendant as well as the complexity of the charge necessitated assistance of counsel); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956) (holding that the defendant's youth and immaturity and the technicality of the crime charged necessitated assistance of counsel); Massey v. Moore, 348 U.S. 105 (1954) (finding that insanity or mental abnormality of defendant necessitated assistance of counsel); Gibbs v. Burke, 337 U.S. 773 (1949) (stating that a fair trial test necessitates an appraisal before and during the trial of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness); Uveges v. Pennsylvania, 335 U.S. 437 (1948) (holding that where the gravity of the crime and other factors such as the age and education of the defendant render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, assistance of counsel, absent a valid waiver, is required under the 14th Amendment); Townsend v. Burke, 334 U.S. 736 (1948) (determining that an unrepresented defendant was overreached by the prosecutor's submission of misinformation to the court or was prejudiced by the court's questionable misreading of record); Wade v. Mayo, 334 U.S. 672 (1948) (holding that youth and immaturity necessitated assistance of counsel).

61. *Betts*, 316 U.S. at 464-72. The Court analyzed the relevant data on the subject afforded by constitutional and statutory provisions in the colonies and states prior to the inclusion of the Bill of Rights as well as the current constitutional, statutory, and judicial history of the states to determine whether the right to counsel was a right fundamental to a fair trial. *Id.* at 465-67. The Court found that, in light of the common law practice, it was evident that the constitutional provisions in state constitutions to the effect that a defendant should be "allowed" counsel or should have a right "to be heard by himself and his counsel," or that a defendant might be heard by either or both, at his or her election, were intended to do away with the rules which denied representation by counsel in criminal prosecutions. *Id.* at 466. However, the Court did not believe that either the common law or the Sixth Amendment right to counsel provision, in light of the statutory and constitutional protections provided by the individual states, were aimed to compel the state to provide counsel for the defendant in all criminal prosecutions. *Id.*

62. *Id.* at 471. The Court found that statutes in force in the original 13 states at the time of the adoption of the Bill of Rights revealed that the matter of appointment of counsel for defendants was dealt with by statute rather than by constitutional provision. *Id.* at 467. The Court also found that the contemporary legislation of the states exhibited a great deal of diversity of policy. *Id.* The Court reasoned that because states dealt with the issue of appointment of counsel in a variety of ways, from constitutional provisions to legislative regulation, it was up to the judgment of the people and their legislatures to determine when a defendant had the right to appointed counsel in criminal trials. *Id.* at 471.

63. *Id.* at 464-72.

64. *Id.*

fairly conducted and justice afforded if the defendant is not represented by counsel.[65]

2. *Sixth Amendment Right to Counsel Guarantee Made Obligatory Upon the United States: Gideon v. Wainwright*

In *Gideon v. Wainwright*,[66] the petitioner was charged with breaking and entering with the intent to commit a misdemeanor, a felony under Florida state law.[67] The petitioner asked the court to appoint counsel, and the court denied the request because, under Florida law, it could only appoint counsel in capital cases.[68] The Supreme Court granted certiorari asking counsel whether "this Court's holding in *Betts v. Brady* [should] be reconsidered?"[69]

In reconsidering *Betts*, the Court accepted the assumption, which it made in *Betts*, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the states by the Fourteenth Amendment.[70] However, the Court disagreed with the *Betts* Court's conclusion that the Sixth Amendment's guarantee of counsel is not one of those fundamental rights.[71] The Court further stated that the decision in *Betts* represented an abrupt break with well-considered precedents.[72]

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65. *Id.* at 473. In his dissent, Justice Black stated that it was his belief that the 14th Amendment made the Sixth Amendment applicable to the states. *See id.* at 473-77 (Black, J., dissenting); *see also* Gibbs v. Burke, 337 U.S. 773, 780-82. (1949) (stating that the Constitution does not guarantee every person charged with a serious crime in a state court the right of assistance of counsel regardless of the circumstances). However, where the ignorance, youth, or other incapacity of the defendant made a trial without counsel unfair, the defendant was deprived of his liberty contrary to the 14th Amendment if he or she went to trial without counsel. *Gibbs*, 337 U.S. at 780-82.

66. 372 U.S. 335 (1963).

67. Gideon v. Wainwright, 372 U.S. 335, 336-37 (1963).

68. *Id.* at 337.

69. *Id.* at 338.

70. *Id.* at 342.

71. *Id.*

72. *Id.* at 343-44. The Court found that 10 years before its *Betts* decision, it had declared that "the right to the aid of counsel is of this fundamental character." *Id.* at 342-43 (quoting Powell v. Alabama, 287 U.S. 45, 68 (1932)). The Court cited other cases in which the Court itself discussed the fundamental nature of the right to counsel to a fair trial. *Id.* at 343. For example, the Court cited *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936), which stated: "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the 14th Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *Gideon*, 372 U.S. at 343. The Court also quoted *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), which stated: "The assistance of counsel is one of the safeguards of the Sixth Amendment deemed essential to insure fundamental human rights of life and liberty. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Gideon*, 372 U.S. at 343 (citing Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940)). Therefore, given the Court's prior precedents, Justice Black found the conclusion that the right to counsel is of a fundamental nature to be unmistakable. *Id.*

In restoring the established constitutional principles promulgated to achieve a fair system of justice, the Court stated that reason and reflection demand recognition that in the adversary system of justice, any person who is haled into court and who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him or her.[73] Therefore, in finding that previous precedents established the fundamental nature of the right to counsel to a fair trial, the Court overruled the decision it had previously reached in *Betts*.[74] The Court declared that the Sixth Amendment's guarantee of counsel in all criminal prosecutions was made obligatory upon the states by the Fourteenth Amendment and that indigent defendants, like Gideon, in state criminal prosecutions have the right to have counsel appointed.[75]

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73. *Id.* at 344. Justice Black reasoned further that:

> [G]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money to hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id.

74. *Id.* at 339.

75. *Id.* at 339-40, 342 (citing Palko v. Connecticut, 302 U.S. 319, 324-25, 326 (1937)); *see* McKaskle v. Wiggins, 465 U.S. 168, 176-83 (1984) (defining the role of the stand-by counsel and imposing two limits on stand-by counsel's unsolicited participation: 1) the defendant must be entitled to preserve actual control over the case presented to the jury and 2) stand-by counsel's participation must not be allowed to destroy the jury's perception that the defendant is representing himself); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he or she was represented by counsel at trial); *see also* Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (adopting actual imprisonment as the line defining the constitutional right to appointment of counsel and holding that the Sixth and 14th Amendments require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him or her the right to the assistance of appointed counsel in his or her defense, thereby modifying the *Argersinger* possible imprisonment rule); Faretta v. California, 422 U.S. 806, 819 (1975) (holding, as a corollary to the Sixth Amendment right to counsel, that the defendant also has a right to self-representation if the defendant knowingly and intelligently elects to proceed pro se); Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (holding that the right to counsel attaches at or after initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, or arraignment); United States v. Wade, 388 U.S. 218, 224-40 (1967) (construing the Sixth Amendment guarantee to assistance of counsel to apply to critical stages of the proceedings). In *Wade*, the Court stated that in addition to counsel's presence at trial, the accused is guaranteed that he or she not stand alone against the state at any stage of the prosecution, formal or informal, in or out of court, when counsel's absence might derogate the accused's right to a fair trial. *Wade*, 388 U.S. at 224-40. *But see Faretta*, 422 U.S. at 834 n.46 (recognizing that a defendant's right to self-representation is not a license to abuse dignity of the courtroom and that the court may appoint "stand-by counsel" to aid the accused); Gilbert v. California,

However, in an effort to draw a line defining the constitutional right to appointment of counsel, the United States Supreme Court would subsequently hold in *Scott v. Illinois*[76] that the Sixth and Fourteenth Amendments require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him or her the right to assistance of appointed counsel in his or her defense.[77] In addition, the Court modified its prior holding in *Argersinger v. Hamlin*,[78] in which the Court had held that an indigent criminal defendant had the right to appointed counsel if he or she faced the possibility of imprisonment,[79] by holding that actual imprisonment was the line defining when an indigent criminal defendant must be afforded assistance of appointed counsel.[80]

B. THE DEVELOPMENT OF THE RIGHT TO COUNSEL UNDER NORTH DAKOTA LAW

Article I, section 12 of the North Dakota Constitution provides that in criminal prosecutions, "the party accused shall have the right to appear and defend in person and with counsel."[81] This language differs from the Sixth Amendment, which provides "[t]he accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."[82]

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388 U.S. 263, 267 (1967) (finding that the taking of handwriting samples was not a critical stage of the criminal proceeding, hence defendant was not entitled to assistance of counsel). For a perspective on the Sixth Amendment and a historical analysis of developments in the right to counsel under the Sixth Amendment, see ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE (1992). For an overview of the accused's right to counsel, see generally 21 AM. JUR. 2d *Criminal Law* §§ 732-763, 976-992, 1185-1241 (1998).

76. 440 U.S. 367 (1979).

77. Scott v. Illinois, 440 U.S. 367, 374 (1979).

78. 407 U.S. 25 (1972).

79. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

80. *Scott*, 440 U.S. at 373-74. In *Scott*, the defendant was charged with shoplifting, which had a maximum penalty of one year in jail, a $500 fine, or both. *Id.* at 368. The defendant, an indigent, was fined $50 for his offense, but he argued that the holding of *Argersinger* required the state to provide counsel whenever imprisonment is an authorized penalty. *Id.* The Court rejected this argument by stating that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment. *Id.* at 373. Therefore, the Court held that the right to counsel only requires that no indigent criminal defendant may actually be sentenced to a term of imprisonment unless he or she has counsel appointed for his or her defense. *Id.* at 374.

81. N.D. CONST. art. I, § 12. For statutory provisions granting North Dakota citizens the right to counsel, see N.D. CENT. CODE § 12.1-04.1-26(2) (1997) (stating that counsel will be appointed to individuals who lack sufficient resources to retain counsel in a proceeding for modification or termination of an order of commitment to a treatment facility initiated by the individual in which the status of that individual may be adversely affected); N.D. CENT. CODE § 27-20-26 (Supp. 1999) (granting juveniles the right to representation by legal counsel at all stages of any proceeding and, if a needy person unable to employ counsel, the court will provide counsel); N.D. CENT. CODE § 29-01-06 (1997) (granting specific rights to defendants in all criminal prosecutions, including the right to appear and defend in person and with counsel); *see also* N.D. R. CRIM. P. 44 (1999) (stating that "absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense" and granting a defendant who is unable to employ counsel a court appointed attorney at the defendant's expense).

82. *See* State v. Ott, 375 N.W.2d 171, 177 (N.D. 1985).

The North Dakota Supreme Court has traditionally recognized that the right to counsel is a right fundamental to a fair trial.[83] Consequently, section 12 of the North Dakota Constitution has been viewed with special regard to its intrinsic value, exercised independently of any compulsion under federal law or the federal constitution.[84]

Thus, it has long been held in North Dakota that in the absence of an effective waiver of the right to counsel, freely and voluntarily made, lack of counsel will render a judgment null and void and requires reversal and remand for a new trial.[85] In order for a waiver of counsel to be valid, the court has stated that there must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible.[86] The question of whether an accused has freely and understandingly waived his or her right to counsel is one of fact.[87] Therefore, a waiver of the right to counsel cannot be presumed from a silent record.[88] Rather, the record must show, or there must be evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer.[89]

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83. *Id.* at 178; *see also* State v. Heasley, 180 N.W.2d 242, 247 (N.D. 1970) (citing legislative expressions that set forth the minimum standard to be followed in order to afford a defendant his right to counsel); State v. O'Neill, 117 N.W.2d 857, 861 (N.D. 1962) (citing legislative expressions that set forth the minimum standard to be followed in order to afford a defendant his right to counsel); State v. Whiteman, 67 N.W.2d 599, 607 (N.D. 1954) (declaring that the North Dakota Constitution guarantees one accused of crime the right to appear and defend in person and with counsel).

84. *Orr*, 375 N.W.2d at 176-78. Justice Levine, writing for the majority, explained further that Explanatory Note to Rule 44 of the North Dakota Rules of Criminal Procedure, which stated that counsel would be appointed only when required under the holding of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), did not indicate any intention that in North Dakota the right to counsel guaranteed by section 12 was to be limited by or to the holdings of the United States Supreme Court, since there was no evidence in the minutes of the Rules Committee or otherwise to demonstrate such an intent. *Id.* at 178 n.6. Justice Levine stated further that there is no such analogous policy or practice stated with regard to the relationship between the Sixth Amendment and section 12. *Id.* Further, as Justice Levine subsequently pointed out, the North Dakota Supreme Court has often recognized that the North Dakota constitution may afford broader rights than those granted under the federal constitution. *Id.* (citing City of Bismarck v. Altevogt, 353 N.W.2d 760 (N.D. 1984); California v. Ramos, 459 U.S. 1301 (1982) (holding that states are free to provide greater protection in their criminal justice system than federal constitution requires)). *But see Orr*, 375 N.W.2d at 180-81 (VandeWalle, J., concurring specially) (concurring in the result but stating that the court should reserve for another day whether Article I, section 12 provides greater protection than the Sixth Amendment).

85. *See* State v. Cummings, 386 N.W.2d 468, 469 (N.D. 1986) (citing *Orr*, 375 N.W.2d at 178); *Orr*, 375 N.W.2d at 178 (concluding that uncounseled convictions are too unreliable to support the sanction of imprisonment); State v. McKay, 234 N.W.2d 853, 856 (N.D. 1975) (holding that lack of counsel will render a judgment void and require reversal of conviction); State v. Magrum, 38 N.W.2d 358, 360 (N.D. 1949) (finding that failure to provide an attorney for a defendant in some instances renders judgment against the defendant void).

86. *See Magrum*, 38 N.W.2d at 361; *see also Whiteman*, 67 N.W.2d at 611 (holding that the choice was not free and responsible because the defendant did not refuse counsel).

87. *See Whiteman*, 67 N.W.2d at 611; *see also* Stone v. State, 171 N.W.2d 119, 127 (N.D. 1969) (stating that a court must adduce and determine from the facts whether there was an intentional relinquishment or abandonment of the defendant's right to the assistance of counsel).

88. *See O'Neill*, 117 N.W.2d at 863.

89. *Id.* Before an accused is asked whether or not he or she desires the aid of counsel, he or she

1. *The North Dakota Supreme Court's Application of the Waiver Standard*

There are three major cases in North Dakota that have served as guides to determine whether a waiver is intentional.[90] First, in *State v. Magrum*,[91] a 1949 case, the North Dakota Supreme Court held that the defendant did not freely and understandingly waive his right to assistance of counsel even though he refused the assistance of counsel.[92]

Magrum was taken into custody and held incommunicado by the sheriff in connection with the murder of Carl Wilson.[93] Magrum was not allowed to communicate with his family or to inform them of his arrest.[94] In addition, he was not given an opportunity to find, whether on his own or with the help of others, assistance of counsel.[95] On the evening he was arrested, Magrum was taken before the magistrate and charged with first degree murder.[96]

Magrum was apparently promised that if he pled guilty to murder, his sentence would be light.[97] Based upon this apparent promise, and after being asked if he would like to hire an attorney, to which he replied in the negative, Magrum pled guilty.[98] Under these circumstances, the court found that his choice was "beclouded" by duress, promises, and misleading advice, compelling the court to order the judgment and sentence against the defendant vacated.[99]

Likewise, in the 1954 case of *State v. Whiteman*,[100] the court determined that the defendant did not freely and understandingly waive his right to counsel.[101] The defendant, a Native-American with only a grade school education, pled guilty to first degree murder after being beaten

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should first be fully informed of his or her rights. State v. Heasley, 180 N.W.2d 242, 250 (N.D. 1970). To prevent the inquiry about counsel from becoming an idle ceremony devoid of any substance or purpose, the court listed four inquiries that the trial court needed to make:

> 1) inform the accused of his right to counsel and of a indigent defendant's right to a court appointed counsel at public expense; 2) ask the accused if he desires aid of counsel; 3) if the accused desires counsel, inquire into his financial condition; and 4) if the accused is financially unable to employ counsel of his own choice, appoint competent counsel to represent him at the expense of the county.

Id. at 250.

90. *Stone*, 171 N.W.2d at 127.
91. 38 N.W.2d 358 (N.D. 1949).
92. State v. Magrum, 38 N.W.2d 358, 366 (N.D. 1949).
93. *Id.* at 361-66.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. 67 N.W.2d 599 (N.D. 1954).
101. State v. Whiteman, 67 N.W.2d 599, 610 (N.D. 1954).

by police officers and repeatedly threatened.[102] In addition to the atmosphere in the police station, there was also an apparent threat of mob violence that led the defendant to believe that he had no alternative but to waive counsel and plead guilty.[103] The court found that the defendant was compelled to waive counsel through intimidation, threats, and even violence.[104] As a result of these subverting factors, the court held that the defendant had no alternative but to waive counsel, and it accordingly reversed his conviction.[105]

Finally, in *State v. O'Neil,*[106] a 1962 case, the court held that the defendants failed to prove that they did not waive their right to assistance of counsel in a free and understanding manner.[107] The court found no evidence of inducement and coercion.[108] Rather, the defendants pled guilty after repeatedly telling the court that they did not desire an attorney.[109]

In *O'Neill*, the court found that the fact that the defendants signed written confessions reciting details of the crimes charged with no evidence of inducement or coercion, coupled with the fact the defendants repeatedly refused counsel, indicated an understanding and intelligent choice to waive counsel.[110] Thus, the court found that the defendants' responses indicated an understanding of the questions asked by the court which amounted to an intelligent and understanding waiver of counsel.[111]

2. *The "Functional" Waiver*

The court has also found that defendants may make "functional" waivers of their rights. In *State v. Harmon,*[112] the defendant argued that he did not waive his right to assistance of counsel because the trial court failed to advise him of the dangers of proceeding pro se and because the record showed no "unequivocal statements" by him indicating a desire

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102. *Id.* at 600-07.
103. *Id.* at 602-07.
104. *Id.*
105. *Id.*
106. 117 N.W.2d 857 (N.D. 1962).
107. State v. O'Neill, 117 N.W.2d 857, 863 (N.D. 1962).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*; *see also* State v. Gustafson, 278 N.W.2d 358, 362-63 (N.D. 1979) (holding that the defendants' silence reflected an intelligent waiver based upon the actions and responses of defendants' in both the pre-trial and trial settings); State v. Heasely, 180 N.W.2d 242, 247, 250 (N.D. 1969) (holding that the defendant's appearance on his own behalf was involuntary and therefore he did not intelligently and understandingly waive his rights).
112. 1997 N.D. 233, 571 N.W.2d 815.

to proceed pro se.[113] Justice Sandstrom, writing for the court, concluded that counsel was made available to Harmon and that he was made aware of the "dangers and disadvantages of self-representation," thereby indicating that he knowingly and intelligently waived his right to representation.[114] The court consequently reaffirmed past precedent by stating that a knowing and intelligent waiver of the right to counsel depends upon the facts and circumstances of each case and requires that the defendant be made aware of the dangers and disadvantages of self-representation so the record establishes that the defendant knows what he or she is doing and his or her choice is made with open eyes.[115]

Harmon had claimed he had a conflict of interest and an irreconcilable difference on trial strategy with his court-appointed counsel.[116] The trial court initially denied the defendant's request to appoint substitute counsel, but Harmon continued to request appointment of substitute counsel.[117] Finally, the trial court relieved Harmon's appointed counsel of actively representing him but required counsel to appear in a stand-by role.[118] At trial, Harmon initially represented himself, but he later allowed stand-by counsel to participate.[119]

The court ruled that Harmon's refusal of services of appointed counsel and his continued request for substitute counsel was the "functional"[120] equivalent of a waiver of the right to counsel that was knowing

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113. State v. Harmon, 1997 N.D. 233, ¶ 15, 571 N.W.2d 815, 819.

114. *Id.* ¶ 23, 571 N.W.2d at 822. Harmon was charged with gross sexual imposition, felonious restraint, and terrorizing. *Id.* ¶ 2, 571 N.W.2d at 817.

115. *Id.* ¶ 22, 571 N.W.2d at 821.

116. *Id.* ¶ 2, 571 N.W.2d at 817.

117. *Id.* ¶¶ 4-5, 571 N.W.2d at 817-18; *see* State v. Klein, 1997 N.D. 25, ¶ 22, 560 N.W.2d 198, 202 (stating that the matter of substitution of appointed counsel is committed to the sound discretion of the trial court and, absent a showing of good cause for the substitution, a refusal to substitute is not an abuse of discretion); State v. Foster, 1997 N.D. 8, ¶ 14, 560 N.W.2d 194, 197 (stating that "[a]bsent a showing of good cause to justify defendant's request for substitution of counsel, a trial court's refusal to grant such a request is not an abuse of discretion").

118. *Harmon*, ¶ 5, 571 N.W.2d at 817; *see* Carey v. State of Minnesota, 767 F.2d 440, 441-42 (8th Cir. 1985) (per curiam) (stating that a criminal defendant does not have an absolute right to counsel of his or her own choosing); State v. DuPaul, 527 N.W.2d 238, 241 (N.D. 1997) (ruling that an indigent defendant has no right to appointed counsel of his or her choosing).

119. *Harmon*, ¶¶ 6-7, 571 N.W.2d at 818; *see* State v. Hart, 1997 N.D. 188, ¶ 7, 569 N.W.2d 451, 454 (citing McKaskle v. Wiggins, 456 U.S. 168 (1984) in elaborating on the role of stand-by counsel).

120. *See* United States v. Willie, 941 F.2d 1384, 1391 (10th Cir. 1991) (finding that the choice between finishing trial with admittedly competent counsel or proceeding pro se did not deny defendant right to counsel); Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir. 1988) (holding that appellant's decision to seek the removal of his appointed counsel, after being cautioned that no replacement would be appointed, was the functional equivalent of voluntary waiver of his right to counsel in the sense that it was not a waiver forced upon him); United States v. Gallop, 838 F.2d 105, 109 (4th Cir. 1988) (refusing to proceed with able counsel without good cause is a voluntary waiver); United States v. Sarsoun, 834 F.2d 1358, 1363 (7th Cir. 1987) (holding that failure to cooperate with court implied waiver of the right to counsel); United States v. Grosshans, 821 F.2d 1247, 1251 (6th Cir. 1987) (stating that defendant knowingly waived the right to counsel when she refused to obtain an attorney, intended to represent herself, and was aware of the disadvantages of self-representation, as evidenced by numer

and intelligent because Harmon's conduct demonstrated that he was aware of the "dangers and disadvantages of self-representation."[121] The court made this determination based on the following facts: 1) Harmon had several previous contacts with the criminal justice system; 2) Harmon was made aware that he would not be given special consideration in matters concerning the rules of the court; 3) Harmon was very involved with the case, was literate, and directed correspondence to the court; and 4) Harmon rejected his appointed counsel but would ask for assistance from stand-by counsel at times during his trial.[122] In light of these considerations, the court concluded that Harmon was aware of the "dangers and disadvantages of self-representation."[123]

In so holding, the court stated that although lack of a specific on-the-record determination is not necessarily fatal, trial courts should be careful to make specific, on-the-record determinations about whether a defendant unequivocally, knowingly, and intelligently waived his or her right to counsel.[124] Therefore, while Harmon's decision to represent himself may have been an error in judgment, this error did not foreclose his decision to waive counsel from being knowing and intelligent.[125]

III. CASE ANALYSIS

Writing for the court, Chief Justice VandeWalle explained that Wicks did not waive her right to counsel and was thereby denied her right to counsel under Article I, section 12 of the North Dakota Constitution and

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ous motions filed pro se); Johnstone v. Kelly, 808 F.2d 214, 216 (2d Cir. 1986) (concluding that a defendant's persistent requests to represent himself constituted a knowing, voluntary, and unequivocal waiver of his right to counsel); McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir. 1985) (concluding that defendant's insistence that counsel be removed was the functional equivalent of a knowing and intelligent waiver of counsel); United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983) (concluding that defendant's persistent, unreasonable demand for dismissal of counsel and appointment of new counsel was the functional equivalent of a knowing and voluntary waiver of counsel); Mckee v. Harris, 649 F.2d 927, 934 (2d Cir. 1981) (holding that since good cause did not exist for assignment of new counsel, defendant's failure to choose between alternatives presented by the trial judge constituted a knowing, voluntary, and intelligent waiver); Wilks v. Isreal, 627 F.2d 32, 35-36 (7th Cir. 1980) (finding that when the defendant did not like his appointed counsel but did not want to proceed pro se after trial judge gave him the choice of the two alternatives, failing to make a choice constituted a voluntary and knowing waiver of counsel); United States v. Weninger, 624 F.2d 163, 167 (10th Cir. 1980) (finding that defendant's refusal to hire a lawyer constituted a knowing and intelligent waiver of the right to assistance of counsel); United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979) (finding that defendant's persistence in refusing to accept any counsel except that of his own choosing and this insistence on proceeding pro se could only be construed as a knowing and intelligent waiver).

121. *Harmon*, ¶¶ 19-21, 571 N.W.2d at 820-21; *see* United States v. Fazzini, 871 F.2d 635, 642 (7th Cir. 1989) (finding a knowing and intelligent waiver even though "the record shows that the defendant never clearly stated that he waived his right to counsel [and] on several occasions the defendant insisted that he was being forced to proceed pro se by the court and would have preferred to have new counsel appointed").

122. *Harmon*, ¶ 23, 571 N.W.2d at 822.

123. *Id.*

124. *Harmon*, ¶ 23 n.1, 571 N.W.2d at 822 n.1.

125. *Id.* ¶ 23, 571 N.W.2d at 822 (citing Godinez v. Moran, 509 U.S. 389, 400 (1993)).

the Sixth and Fourteenth Amendments of the United States Constitution.[126] The court held that the record in this case revealed that Wicks was compelled to represent herself in the criminal trial by the convergence of four events: 1) the filing of the disciplinary complaint; 2) the subsequent withdrawal of her appointed attorney; 3) her inability to secure other representation; and 4) the trial court's refusal to grant a continuance.[127]

Although the filing of the disciplinary complaint was the catalyst for what followed, the court found that it was apparent from the record that the "forced waiver" was not made with an awareness of the "dangers and disadvantages" of self-representation.[128] Hence, Wicks did not make a knowing choice to represent herself, because she unwittingly created a conflict of interest with her attorney which caused him to withdraw.[129]

The court found that this case marked a unique contrast from its decision in *Harmon,* in that Harmon claimed he had irreconcilable differences with his appointed counsel and repeatedly requested newly appointed counsel.[130] The court concluded that Harmon had functionally waived his right to counsel because counsel was made available and Harmon was aware of the "dangers and disadvantages of self-representation."[131] Unlike Harmon, Wicks was willing to proceed with her appointed attorney and was not aware of the consequences of filing a disciplinary complaint.[132] The district court believed the conflict compelled it to allow the withdrawal of Wicks' appointed attorney, which in turn compelled the trial court to force Wicks to proceed pro se.[133]

Despite the conflict of interest created by Wicks' filing of the disciplinary complaint, the court ruled that, on the face of the record, such a conflict was not irreparable.[134] The court did recognize that this case placed Martin's ethical obligation to his client at odds with the client's Sixth Amendment right to representation at trial.[135] But the court was more troubled by the implication that the disciplinary complaint was used as a "sword" to delay and frustrate the judicial process.[136]

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126. State v. Wicks, 1998 N.D. 76, ¶ 29, 576 N.W.2d 518, 522.
127. *Id.* ¶ 18, 576 N.W.2d at 520-21.
128. *Id.* ¶ 18, 576 N.W.2d at 521.
129. *Id.* ¶ 19.
130. *Id.* ¶ 21.
131. *Id.* (citing State v. Harmon, 1997 N.D. 233, ¶ 17, 571 N.W.2d 815, 817).
132. *Id.* ¶ 22.
133. *Id.*
134. *Id.*
135. *Id.* ¶ 23.
136. *Id.* (citing Neal v. Grammar, 975 F.2d 463, 467 (8th Cir. 1992)).

The Court examined Rule 1.7 of the North Dakota Rules of Professional Conduct[137] as part of its discussion of the implications of the conflict of interest created by the filing of the disciplinary complaint.[138] The court looked to the comment to Rule 1.7 that notes that paragraphs a) and b) address situations in which "the lawyer is absolutely prohibited from undertaking or continuing representation of the client."[139] However, the court pointed to the comment to Rule 1.7, which instructs that paragraph c) addresses the situation in which the lawyer's own interest or responsibilities to another client or third person might adversely affect the representation of the client.[140] In such a situation, the lawyer may still undertake representation of the client if the lawyer reasonably believes there will be no adverse effect and the client consents to continued representation.[141]

Further, the court noted that while there are many reasons for a valid disciplinary complaint to be filed against an attorney, many other complaints are dismissed because they are groundless.[142] Consequently, the court believed that if the filing of a disciplinary complaint could stop the prosecution of a criminal defendant, the administration of justice would come to a halt.[143] As the court was quick to point out, a disciplinary complaint against an appointed attorney cannot be used as an instrument to create an irreconcilable conflict of interest to delay and frustrate the judicial process.[144]

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137. N.D. R. PROF. CONDUCT 1.7 (a)-(c) (1999). The rule states:

Rule 1.7. Conflicts of interest: general rule

a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:

1) The lawyer reasonably believes the representation will not be adversely affected; and

2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involve.

Id.

138. *Wicks*, ¶ 23, 576 N.W.2d at 521; *see* N. D. R. PROF. CONDUCT 1.7 (a)-(c) (delineating three separate and distinct conflict of interest situations).

139. *Wicks*, ¶ 24, 576 N.W.2d at 522.

140. *Id.* (citing N.D. R. PROF. CONDUCT 1.7 cmt. (1999)).

141. *Id.*

142. *Id.* ¶ 25 (citing ANNUAL REPORT OF THE NORTH DAKOTA JUDICIAL SYSTEM 30 (1996)).

143. *Id.*

144. *Id.* The court cited *Farm Credit Bank of St. Paul v. Brakke*, 512 N.W.2d 718, 720 (N.D. 1994), in which the court held that the fact that the trial judge was being sued by the party in the

The court recognized that when a continuance is sought to retain or replace counsel, the right to select counsel must be balanced against the public's interest in the orderly administration of justice.[145] The court found that in such cases, trial courts have the discretion to determine whether or not to grant a continuance.[146] Therefore, in exercising its discretion, the trial court may consider the time required and permitted for trial preparation and the diligence of the moving party.[147]

The court found that when the trial court became aware of the disciplinary complaint, even if the trial court did not want to grant a continuance, it still had a variety of other options at its disposal that it should have explored.[148] For instance, the court stated, considering Wicks' expectation and willingness to proceed with Martin as her attorney, the trial court could have denied Martin's request for withdrawal and proceeded to trial.[149] The court may also have considered whether Martin and Wicks would have been willing to go to trial with Martin as stand-by counsel.[150] If neither of these options were satisfactory, the trial court could have allowed Martin to withdraw and, as a last resort,

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pending action did not require recusal because doing so would allow litigants to eliminate unsatisfactory judges merely by suing them. *Id.*

145. *Id.* ¶ 26 (citing Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984) (quoting Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981)). The absence of counsel in a criminal case may entitle the defendant to a continuance. 17 AM. JUR. 2D *Continuance* § 82 (1990). However, in order to obtain a continuance, the defendant must show that the absence was attributable to some unforeseeable cause. *Id.* Therefore, a continuance may be denied when counsel's absence is brought about by some act or omission on the part of the accused. *Id.*

146. *Wicks*, ¶ 26, 576 N.W.2d at 522; *see* State v. Foster, 1997 N.D. 8, ¶ 14, 560 N.W.2d 194, 197 (noting distrust of appointed counsel is not sufficient to secure a substitution); State v. DuPaul, 527 N.W.2d 238, 243 (N.D. 1995) (stating the "trial court has no duty to appoint a specific counsel, or to continually seek new counsel for a capricious and difficult defendant"); *see also* United States v. Swinney, 970 F.2d 494, 499 (8th Cir. 1992) (holding that a federal district court did not abuse its discretion by denying a defendant's request for a continuance and substitution of counsel where the relationship with counsel, although not meaningful, did not reflect irreconcilable conflict). While trial courts do have considerable discretion in granting a continuance, their discretion is somewhat limited by the Sixth Amendment. 17 AM. JUR. 2d *Continuance* § 83. However, the accused's right to select his or her counsel cannot be manipulated in order to obstruct the orderly procedure for trials or to interfere with the administration of justice. *Id.*

147. *Wicks*, ¶ 27, 576 N.W.2d at 522 (citing United States v. Ware, 890 F.2d 1008, 1010 (8th Cir. 1989)); *see also Urquhart*, 726 F.2d at 1319 (holding that trial court did not violate a prisoners Sixth Amendment right to counsel in denying a request for a continuance when the question of a continuance was not presented until the day of trial). For a general discussion of a trial court's discretion in granting continuances in criminal trials and the circumstances surrounding when a motion for continuance can be granted or denied, see 17 AM. JUR. 2D *Continuance* §§ 82-88.

148. *Wicks*, ¶ 28, 576 N.W.2d at 522.

149. *Id.*

150. *Id.*, 576 N.W.2d at 522-23; *see also* McKaskle v. Wiggins, 465 U.S. 168, 176-83 (1984) (defining the role of the stand-by counsel and imposing two limits on stand-by counsel's unsolicited participation: 1) the defendant must be entitled to preserve actual control over the case presented to the jury, and 2) stand-by counsel's participation must not be allowed to destroy the jury's perception that the defendant is representing himself); Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (recognizing that a defendant's right to self-representation is not a license to abuse dignity of the courtroom and that the court may appoint "stand-by counsel" to aid the accused).

granted a continuance to allow Wicks the opportunity to arrange for new counsel.[151]

Instead of exploring these options, the trial court, believing in the existence of an irreparable conflict, allowed Martin to withdraw and forced Wicks to proceed pro se.[152] Under the facts of this case, the court held that Wicks did not knowingly and intelligently waive her right to counsel.[153] Therefore, the actions of the trial court were a denial of Wicks' right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 12 of the North Dakota Constitution.[154] Accordingly, the court reversed Wicks' conviction and remanded the case for a disposition consistent with the court's opinion.[155]

IV. IMPACT

Shortly after its decision in *Wicks*, the North Dakota Supreme Court decided another case in which a defendant asserted that he was denied his right to counsel.[156] In *State v. Poitra*,[157] the court held that although an indigent defendant is not entitled to appointed counsel of his or her choice,[158] the record before it did not establish that the trial court explored other options for the defendant's representation.[159] Therefore, the court declined to equate the defendant's request for removal of court-appointed counsel and his later inability to hire counsel to the functional equivalent of a knowing and intelligent waiver of counsel.[160]

The effect of the *Harmon-Wicks-Poitra* line of cases on North Dakota law is articulated in the concurring opinion of Justice Sandstrom in *Poitra*, in which he declared that the decision reached in *Harmon* should not be read as eliminating the need for a defendant to request

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151. *Wicks*, ¶ 28, 576 N.W.2d at 523.

152. *Id.* ¶¶ 28-29.

153. *Id.* ¶ 19, 576 N.W.2d at 521.

154. *Id.* ¶ 29, 576 N.W.2d at 523.

155. *Id.* ¶ 30. On remand, Johannah Wicks, represented by Brenda A. Neubauer, pled guilty and was sentenced to one year in jail with six months suspended and was given credit for six months served. State v. Wicks, Cr. No. 96-K-3451 (judgment Sept. 4, 1998). Wicks was also placed on probation for 18 months. *Id.*

156. State v. Poitra, 1998 N.D. 88, ¶ 6, 578 N.W.2d 121, 123. Defendant Linus Poitra wrote the trial court in June 1997 stating that he no longer wanted the services of his appointed counsel because he felt counsel was unqualified. *Id.* ¶ 3, 578 N.W.2d at 122. Poitra tried to hire his own attorney but did not have enough money to obtain one. *Id.* ¶ 4. At trial, the court noted that Poitra was representing himself and made no further inquiry about his self-representation. *Id.* ¶ 5, 578 N.W.2d at 123.

157. 1998 N.D. 88, 578 N.W.2d 121.

158. State v. Poitra, 1998 N.D. 88, ¶ 13, 578 N.W.2d 121, 124 (citing State v. Foster, 1997 N.D. 8, ¶ 14, 560 N.W.2d 194).

159. *Id.* (citing State v. Wicks, 1998 N.D. 76, ¶ 28, 576 N.W.2d 518).

160. *Id.*

self-representation unequivocally and for the trial court to determine whether a defendant's unequivocal request is knowing and intelligent.[161] Indeed, it is clear that a waiver of the right to counsel must be an intentional relinquishment or abandonment of a known right which must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.[162] In addition, the North Dakota Supreme Court has long held that a valid waiver cannot be presumed from a silent record.[163] Instead, the record must show that an accused was offered counsel but intelligently and understandingly rejected such an offer.[164] Therefore, *Harmon's* recognition of a "functional" waiver should be limited to situations in which a defendant refuses to choose between the right to counsel and the right to self-representation.[165]

The persuasive impact of the decision in *Wicks* reaffirms that a trial court must establish on the record that a defendant's "waiver" of counsel was knowing and intelligent, requiring awareness of the "dangers and disadvantages of self-representation."[166] Accordingly, even though the decision to grant a continuance remains within the discretion of the trial court, the *Wicks* decision directs trial courts to explore other options before allowing appointed counsel to withdraw, thereby forcing a defendant to proceed pro se before determining whether the defendant truly understands the dangers and disadvantages of self-representation.[167]

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161. State v. Poitra, 1998 N.D. 88, ¶¶ 16-19, 578 N.W.2d 121, 124-5 (Sandstrom, J., concurring).

162. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

163. State v. O'Neill, 117 N.W.2d 857, 863 (N.D. 1962).

164. *Id.*; *see* Stone v. State, 171 N.W.2d 119, 127 (N.D. 1969) (stating that a court must adduce and determine from the facts whether an intentional relinquishment or abandonment of right to counsel had taken place); State v. Whiteman, 67 N.W.2d 599, 611 (N.D. 1954) (holding that the choice to waive counsel was not free and responsible because the defendant did not refuse counsel).

165. *Poitra*, ¶ 18, 578 N.W.2d at 125. Poitra tried to hire his own attorney but did not have enough money to obtain one. *Id.* ¶ 4, 578 N.W.2d at 122. At trial, the court noted that Poitra was representing himself and made no further inquiry about his self-representation. *Id.* ¶ 5, 578 N.W.2d at 123. Likewise Wicks had sought to obtain her own attorney but still intended to go to trial with Martin even after filing the disciplinary complaint, the consequences of which she did not comprehend. State v. Wicks, 1988 N.D. 76, ¶ 22, 576 N.W.2d 518, 521. The trial court believed the conflict compelled it to grant the withdrawal motion and proceeded to force Wicks to represent herself without inquiring into any other options aside from self-representation. *Id.* ¶¶ 22-29.

166. *See Wicks*, ¶ 18, 576 N.W.2d 520-21.

167. *See id.* ¶¶ 23-29, 576 N.W.2d at 521-23; *Poitra*, ¶ 12, 578 N.W.2d at 124.