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SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL

Scope

This Special Material addresses issues that may arise when a defendant expresses the desire to waive counsel or appears without counsel after being directed to obtain representation. In these situations, the trial court must identify accurately the situation that is presented, make the required inquiry and make proper findings.

When a defendant affirmatively wishes to waive counsel, an inquiry must be conducted to determine whether the defendant's waiver is voluntarily and understandingly made. This includes assuring that the defendant understands the benefits of being represented by counsel and the disadvantages of proceeding without counsel. The waiver inquiry must also explore the defendant's competence for self-representation. The Committee concluded that defendants who lack competence to represent themselves cannot execute a valid waiver of the right to counsel. A suggested inquiry, suggested findings, and commentary relating to waiver of counsel are found in Part I.

A defendant may also be found to have forfeited the right to counsel. Forfeiture may occur in situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. A trial court must warn a defendant that, if the defendant persists in specific conduct, the court will find that the right to counsel is forfeited. The court must also engage in a colloquy designed to assure that the defendant understands the benefits of being represented by counsel and the disadvantages of proceeding without counsel. As with the express waiver of counsel, the inquiry must also explore the defendant's competence for self-representation. The court should make a clear ruling when the court deems the right to counsel to have been forfeited and make factual findings to support that ruling. A suggested inquiry, suggested findings, and commentary relating to forfeiture of counsel are found in Part II.

What makes these cases difficult is that a constitutional right of the defendant is in question regardless of how the case is resolved. The defendant has the right to be represented by counsel but also has the right to waive counsel and proceed pro se. Further, the Wisconsin Supreme Court has reaffirmed the rule that Wisconsin trial courts must evaluate a defendant's competence to proceed pro se whenever defendants seek to

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represent themselves. Part III discusses the considerations relating to evaluation of competence for self-representation.

Parts IV and V consider related issues: the appointment and role of standby counsel; and so-called hybrid representation, which occurs when a represented defendant seeks to engage in self-representation only during certain stages of the trial.

Attempts to waive counsel, conduct that may result in forfeiture of counsel, and attempts at self-representation are often connected with the problems confronting defendants who do not qualify for State Public Defender representation who nevertheless cannot afford to retain private counsel. Courts have the inherent power to appoint counsel in some situations. This is discussed in Part VI.

I. Express Waiver of Counsel

A. Suggested Inquiry

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE PROCEEDINGS BEFORE ACCEPTING THE WAIVER. THE FOLLOWING ARE EXAMPLES OF AREAS THAT SHOULD BE THE SUBJECTS OF INQUIRY. ANSWERS INDICATING THE NEED FOR MORE INFORMATION SHOULD BE PURSUED. QUESTIONS SHOULD BE PHRASED IN A WAY THAT ENCOURAGES STATEMENTS FROM THE DEFENDANT THAT GO BEYOND SIMPLE "YES" AND "NO" ANSWERS.[1]

- Age

- Education and vocational training

- Present employment and employment history

- Present mental health condition and mental health history

- Present alcohol use and history of alcohol use

- Present medication or drug use

- Difficulty in understanding the court

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IF THE DEFENDANT UNDERSTANDS THE PROCEEDINGS, THE COURT MUST ASSURE THAT THE DEFENDANT UNDERSTANDS THE RIGHT TO COUNSEL AND UNDERSTANDS THE BENEFITS OF BEING REPRESENTED.[2]

1. "Do you want to be represented by a lawyer?"

2. "Do you understand that you have a constitutional right to be represented by a lawyer in this case?"

3. "Do you understand that you have the right to hire your own lawyer?"

4. "If you do not have enough money to hire your own lawyer, you may be entitled to have a lawyer appointed to represent you. Do you understand that?"[3]

5. "You are charged with ____________________, which carries a maximum penalty of imprisonment for __________ years and a fine of __________, or both. If you are represented by a lawyer, he or she may discover information or facts which would be helpful in your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty. I want you to take this into consideration in deciding whether or not you want a lawyer to represent you."

"The trial will continue under the same legal rules that would apply if you had a lawyer. If you represent yourself, you will have to follow these rules. Because you are not trained in the law, this will make it hard for you to challenge the evidence presented by the state and hard for you to present any evidence that you want to present."

"If you decide to testify you will be sworn as a witness and can give testimony while you are acting as a witness. You will be asked questions by the other side at that time. However, you cannot try to testify while acting as your own lawyer."

6. "Do you understand that a lawyer may be able to help you present your case and that it will be very difficult for you to do a good job being your own lawyer?"

7. "Do you now wish to reconsider your decision not to have a lawyer?"

8. "Has anyone told you that you should not ask for appointment of a lawyer to represent you?"

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9. "Has anyone made any promises or any threats or has anyone used any influence or pressure of any kind or force of any kind to get you not to ask for the appointment of a lawyer?"

IF THE DEFENDANT INDICATES A CHANGE OF MIND AND NOW WANTS TO BE REPRESENTED BY A LAWYER, THE COURT SHOULD REFER THE CASE TO THE STATE PUBLIC DEFENDER OR ALLOW THE DEFENDANT TO SEEK PRIVATE COUNSEL.

IF THE DEFENDANT AFFIRMS THE DESIRE TO WAIVE COUNSEL, THE COURT SHOULD INQUIRE INTO THE DEFENDANT'S COMPETENCE FOR SELF-REPRESENTATION. INQUIRY INTO THE FOLLOWING AREAS IS RECOMMENDED; THE INFORMATION MAY HAVE BEEN ELICITED BY QUESTIONS ALREADY ASKED.[4]

- Level of education

- Level of literacy

- Ability to communicate in the courtroom

- Physical or psychological disability that may affect the ability to communicate in the courtroom

B. Use Of A Written Form

A standard form for a waiver of counsel has been adopted by the Judicial Conference. See, Waiver of Right To Counsel, CR-226.

Section 971.025(1) provides: "In all criminal actions and proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference . . ." The form may be supplemented with additional material. § 971.025(2).

Despite the fact that the use of the form is required, case law continues to require that the trial court conduct a colloquy to assure that a waiver of counsel is knowing and voluntary.

A proper integration of the colloquy and the form is illustrated by State v. Polak, 2002 WI App 120, 254 Wis.2d 585, 646 N.W.2d 845. The waiver of counsel was found to be supported by an adequate colloquy, the court noting that "we place particular

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emphasis on the written waiver of counsel form, used in conjunction with the oral colloquy, because that form unequivocally states Polak's awareness of the assistance an attorney could provide and that an attorney might discover helpful things unknown to Polak." Polak, ¶19. The court observed that the form was not used as a substitute for the colloquy, but to supplement it.

C. Suggested Findings

1. Waiver of Counsel Accepted

AFTER THE COURT HAS CONDUCTED THE FOREGOING INQUIRY AND IF THE DEFENDANT PERSISTS IN THE REFUSAL TO BE REPRESENTED BY COUNSEL AND APPEARS TO BE COMPETENT TO REPRESENT HIMSELF OR HERSELF, THE COURT SHOULD MAKE FINDINGS OF FACT THAT INCLUDE FINDINGS ON THE FOLLOWING TOPICS:

- that the defendant understands the proceedings, understands the nature and seriousness of the charge, and understands the maximum penalties that can be imposed if the defendant is convicted;

- that the defendant understands that a lawyer may be of assistance, understands that a lawyer may be appointed if the defendant is indigent, and understands the disadvantages of self-representation;

- that the defendant voluntarily and freely waives the right to be represented by counsel and is making a deliberate choice to proceed without counsel; and

- that the defendant has the minimal competence necessary to try to represent himself or herself because [refer to the court's evaluation of the four factors identified in Pickens].

PROPER FINDINGS SHOULD CONCLUDE WITH AN EXPRESS STATEMENT THAT THE COURT CONCLUDES THAT THE DEFENDANT'S REQUEST FOR SELF-REPRESENTATION IS GRANTED.[5]

THE COMMITTEE SUGGESTS THAT A BRIEF INSTRUCTION BE GIVEN TO THE JURY IN A CASE WHERE THE DEFENDANT HAS WAIVED COUNSEL. SEE WIS JI-CRIMINAL 70.

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2. Waiver of Counsel Denied[6]

DENIAL OF A WAIVER OF COUNSEL MUST BE SUPPORTED BY ONE OF THE FOLLOWING FINDINGS: (1) THAT THE DEFENDANT DOES NOT UNDERSTANDINGLY AND VOLUNTARILY WAIVE COUNSEL; (2) THAT THE DEFENDANT DOES NOT UNDERSTAND THE DISADVANTAGES OF SELF-REPRESENTATION; OR (3) THAT THE DEFENDANT LACKS THE MINIMAL COMPETENCE NECESSARY TO TRY TO REPRESENT HIMSELF OR HERSELF.

PROPER FINDINGS SHOULD CONCLUDE WITH AN EXPRESS STATEMENT THAT THE COURT CONCLUDES THAT THE DEFENDANT'S REQUEST FOR SELF-REPRESENTATION IS DENIED, SUPPORTED BY FINDINGS OF FACT THAT INCLUDE FINDINGS ON THE BRACKETED MATERIAL THAT APPLIES:

- the defendant does not understand the seriousness of the charge and the maximum possible penalties; or

- the defendant does not understand that a lawyer may be of assistance and that a lawyer may be appointed if the defendant is indigent; or

- the defendant does not understand the disadvantages of self-representation; or

- the defendant does not possess the minimal competence necessary to try to represent himself or herself because [refer to the court's evaluation of the four factors identified in Pickens].[7]

D. Commentary

The questions in Part I. A. are recommended for use whenever it is necessary to accept an express waiver of counsel. The defendant's answers to the recommended questions will undoubtedly suggest additional questions that should be asked to enable the court to make a full and complete determination that the defendant understands the proceedings and the right to have a lawyer, including one appointed at public expense if the defendant is indigent. A voluntary waiver of counsel will not be inferred from a silent record.[8]

The questions assume that the defendant has made clear the intention to proceed without counsel. While the burden is on the court to make a record, the Committee believes that the defendant should always have the opportunity to discuss the matter with a lawyer (e.g., with a public defender if one is available.)[9]

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Pickens v. State[10] held that a valid waiver of counsel in a self-representation case requires that the record reflect the following:

(a) the deliberate choice to proceed without counsel;

(b) awareness of the seriousness of the charges and the possible penalties; and

(c) awareness of the difficulties and disadvantages of self-representation.

Pickens, 96 Wis.2d 549, 563.

While the Pickens decision recommended that a colloquy with the defendant address these issues, the Wisconsin Supreme Court later mandated that they be covered. In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the court stated:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The waiver of counsel inquiry has been modified in light of Klessig to explicitly address each of the required issues, including the disadvantages of self-representation.

II. Forfeiture of Counsel

A. Suggested Inquiry

THE COURT SHOULD IDENTIFY THE CONDUCT OF THE DEFENDANT THAT THE COURT BELIEVES PROVIDES A BASIS FOR FINDING A FORFEITURE OF THE RIGHT TO COUNSEL AND THEN ADDRESS THE DEFENDANT AS FOLLOWS:

"If you continue to engage in this conduct, the court will find that you are giving up your right to be represented by a lawyer. If that happens, the trial will continue and you will not have a lawyer to represent you.

1. "Do you understand that?

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"You are charged with ____________________, which carries a maximum penalty of imprisonment for __________ years and a fine of __________, or both. If you are represented by a lawyer, he or she may discover information or facts that would help your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty.

2. "Do you understand?

"The trial will continue under the same legal rules that would apply if you had a lawyer. If you represent yourself, you will have to follow these rules. Because you are not trained in the law, this will make it hard for you to challenge the evidence presented by the state and hard for you to present any evidence that you want to present.

"If you decide to testify, you will be sworn as a witness and can give testimony while you are acting as a witness. You will be asked questions by the other side at that time. However, you cannot try to testify while acting as your own lawyer.

3. "Do you understand that a lawyer may be able to help you present your case and that it will be very difficult for you to do a good job being your own lawyer?"

B. Suggested Findings

AFTER THE COURT HAS MADE THESE STATEMENTS AND ASKED ALL THE QUESTIONS AND IF THE DEFENDANT PERSISTS IN THE CONDUCT, THE COURT THEN, ON THE RECORD, SHOULD MAKE FINDINGS OF FACT THAT INCLUDE THE FOLLOWING TOPICS:

- that the defendant understands the charge, understands that a lawyer may be of assistance, and understands that the disadvantages of self representation; and

- that the defendant has refused to waive counsel expressly, but that the defendant has engaged in the following conduct: (describe conduct or refer to the conduct described in the colloquy with the defendant) ; and

- that this conduct has seriously disrupted the fair administration of justice in that: (describe the effects of the defendant's conduct) ; and

- that this requires the court to conclude that the defendant has forfeited the right to counsel.

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C. Commentary

"Forfeiture" of counsel refers to situations where the defendant does not expressly waive counsel but, by conduct, gives up the right to representation. Other terms used to describe this situation are "constructive waiver," "waiver by conduct," and "waiver by operation of law." The term "forfeiture of counsel" is used here because it emphasizes that what is occurring is the loss of a right without the express waiver that is usually required. These situations often involve defendants who have difficulty getting along with counsel and thus may present questions whether to grant a motion to discharge counsel or a motion by counsel to withdraw.

In State v. Newton, [decided sub nom. State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996)], the Wisconsin Supreme Court held that "there may be situations . . . where a circuit court must have the ability to find that a defendant has forfeited his right to counsel" [199 Wis.2d 721, 757] and found that the case before it presented that situation: "There can be no doubt from the record that Newton's behavior was manipulative and disruptive and that his continued dissatisfaction was based solely upon a desire to delay." 199 Wis.2d 721, 754. The court noted that a similar forfeiture situation was presented in State v. Woods, 144 Wis.2d 710, 424 N.W.2d 730 (Ct. App. 1988).

The Newton decision recommended that "trial courts in the future, when faced with a recalcitrant defendant," follow four steps spelled out in the dissenting opinion before finding that a defendant has forfeited counsel[11]:

(1) provide explicit warnings that, if the defendant persists in specific conduct, the court will find that the right to counsel is forfeited;

(2) engage in a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;

(3) make a clear ruling when the court deems the right to counsel to have been forfeited; and

(4) make factual findings to support the court's ruling.

To implement this four-step approach, the Committee recommends the statements and questions set forth in Part II. A. A finding that the right to counsel is forfeited will mean that the defendant will proceed without a lawyer. Where counsel is waived expressly, an inquiry into competence for self-representation is required. [See discussion

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in Section I.] It is not clear that an inquiry into competence for self-representation is required or would be appropriate where the right to counsel is forfeited rather than expressly waived.

In State v. Coleman, 2002 WI App 100, 253 Wis.2d 693, 644 N.W.2d 383, the court found that grounds for forfeiture of counsel were not established. There were three significant omissions: no specific warning that firing his attorneys would result in forfeiture of his right to counsel; no colloquy to determine understanding of the difficulties of proceeding without counsel; and, no clear ruling that Coleman had forfeited his right to counsel. The trial court was also deficient in not making a finding that Coleman was competent to represent himself. SM-30 is referred to as a "helpful discussion." Coleman, footnote 3.

III. Self-Representation

Defendants in criminal cases have the right, under both the United States[12] and Wisconsin Constitutions,[13] to represent themselves. Where there has been a clear[14] and timely[15] request to exercise this right, the trial court must conduct a careful inquiry covering several different concerns. The trial court must first assure that there is an intelligent and voluntary waiver of the right to be represented by counsel. (As discussed in Part I.) Self-representation cases also often present situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. (As addressed in Part II.) A finding of competence for self-representation is required where the defendant has forfeited the right to counsel, just as it is where there is an express waiver of counsel. State v. Coleman, 2002 WI App 100, 253 Wis.2d 693, 644 N.W.2d 283.

In addition to the waiver inquiry, the court must assure that the defendant understands the disadvantages of self-representation. The trial court is also required to inquire whether defendants are "competent" to represent themselves. This requirement has been reaffirmed by the Wisconsin Supreme Court in 1997 and 2005. (See State v. Klessig and State v. Ernst, below.)

The leading Wisconsin case on self-representation is Pickens v. State.[16] Pickens held that a valid waiver in the self-representation case requires that the record reflect the following:

(a) the deliberate choice to proceed without counsel;

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(b) awareness of the seriousness of the charges and the possible penalties; and

(c) awareness of the difficulties and disadvantages of self-representation.

Pickens, 96 Wis.2d 549, 563.

While the Pickens decision recommended that a colloquy with the defendant address these issues, the Wisconsin Supreme Court later mandated that they be covered. In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the court stated:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The waiver of counsel inquiry[17] has been modified in light of Klessig to explicitly address each of the required issues, including the disadvantages of self-representation.

In State v. Ernst, 2005 WI 107, _21, 283 Wis.2d 300, 699 N.W.2d 92, the Wisconsin Supreme Court held: "We conclude that the Klessig colloquy requirement was and is a valid use of the court's superintending and administrative authority, . . . and that such a rule does not conflict in any way with the United States Supreme Court's decision in Tovar . . ." The reference is to Iowa v. Tovar, 541 U.S. 77 (2004), where the court held that a valid waiver of the Sixth Amendment right to counsel did not require specific advice from the court that waiver of counsel might result in a viable defense being overlooked and losing the opportunity for an independent opinion on whether pleading guilty is a wise choice.

A. Understanding the Disadvantages of Self-Representation

The disadvantages of self-representation are to a significant degree the mirror image of the benefits of representation by counsel that are described in the waiver of counsel inquiry. The additional factors that should be covered include the general conclusion that self-representation is not wise (the old adage that "the lawyer who represents himself has a fool for a client" was used several times by the trial court in the Pickens case) and the more specific caution that the rules governing courtroom procedures will be applied during the trial and that the defendant will be expected to abide by them. In Pickens, the trial court gave the following advice:

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> Do you understand that this is a courtroom, we operate under certain legal rules, and you will be expected to comply with those. I will perhaps give some latitude because you are not trained in the law, but you will have to, even though you are not educated in the law, try your lawsuit in accordance with those rules. Do you understand that?

Pickens, 96 Wis.2d 549, 560-61.

It may be advisable to elaborate upon some of these matters by explaining the following:

(1) that the judge will not represent the defendant or protect the defendant's interests in the same manner a lawyer would;

(2) that if the defendant wishes to testify, the defendant must be sworn as a witness and submit to cross-examination – the defendant cannot try to "testify" while acting in the "lawyer" capacity;

(3) that valid objections to questions will be sustained despite the fact that lack of legal training will make it difficult for the defendant to conduct direct or cross-examination in the proper way.

In State v. Clutter, 230 Wis.2d 472, 477, 602 N.W.2d 324 (Ct. App.1999), the court addressed the risks that are involved with a decision to proceed pro se:

> Inherent in a defendant's decision to represent himself is the risk that a defense not known to him will not be presented during trial. When a defendant undertakes pro se representation that is the risk he knowingly assumes. If his strategy in proceeding pro se results in a valid defense being waived, it reflects the hazards of his decision to waive counsel. To rescue this defendant from the folly of his choice to represent himself would diminish the serious consequences of the decision he made when he elected to waive counsel.

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B. "Competence" for Self-Representation

Even if there has been a valid waiver of counsel and the defendant understands the disadvantages of self-representation, the trial court must assure that the defendant has the "competence" or capacity for self-representation. This is not the same as "competency to stand trial."[18] "Thus, despite the fact that a defendant has been found competent to stand trial, it may, nevertheless, be determined that he lacks the capacity to represent himself." Pickens v. State, 96 Wis.2d 549, 568.

In State v. Klessig, 199 Wis.2d 397, 544 N.W.2d 605 (Ct. App. 1996), the court of appeals eliminated the requirement for an inquiry into competence for self-representation, holding that law "changed when the United States Supreme Court decided Godinez v. Moran, 113 S. Ct. 2680 (1993)." In Godinez, the court concluded that the only inquiry into competence required for a waiver of the right to counsel was the competence necessary to stand trial. The court of appeals' Klessig decision concluded:

> Once a defendant has been found competent to stand trial, a trial court may not engage in further or heightened competency requirements addressing the defendant's possession of skills, intelligence or experiences that would be sufficient to permit him to adequately represent his best interests at trial. 199 Wis.2d 397, 405.

The Wisconsin Supreme Court reversed the court of appeals in State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), reaffirming the Pickens holding that competency for self-representation is different from competency to stand trial:

> We thus reaffirm the holding in Pickens as still controlling on the issue of competency. In Wisconsin, there is still a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial. . . . Accordingly, the circuit court's determination of a defendant's competency to proceed pro se must appear in the record.

The court of appeals had held that the Pickens requirement no longer applied because the United States Supreme Court decision in Godinez v. Moran established that there was a single standard for competency – if a defendant was competent to stand trial that defendant could represent himself without further inquiry into his ability to do so. The Wisconsin Supreme Court concluded that Godinez was concerned with minimal requirements and allowed states to impose higher standards as a matter of state law. The

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court said its reaffirmation of the higher Pickens standard "stems from the independent adoption of the higher standard by the state as allowed under Godinez."

Wisconsin, with its reaffirmed Pickens standard, is in the minority in recognizing a requirement of "competence" for self-representation. The majority view in the country apparently stresses the awareness of the disadvantages of proceeding pro se – if the defendant understands the disadvantages but wishes to go ahead, self-representation should be allowed. For example, the ABA Standards for Criminal Justice refer to "competence to represent oneself" but define it in terms of understanding the consequences of the decision to proceed without a lawyer.[19]

The Pickens court recognized that the determination of competence for self-representation "must necessarily rest to a large extent upon the judgment and experience of the trial judge" and that "the trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result." 96 Wis.2d 549, 569.

Factors to consider in determining whether the defendant "possesses the minimal competence necessary to conduct his own defense" include:

(1) education

(2) literacy

(3) fluency in English

(4) any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.

Pickens v. State, 96 Wis.2d 549, 569; reaffirmed in State v. Klessig, 211 Wis.2d 194, 212.

CAUTION: Persons of average intelligence are entitled to represent themselves. A request for self-representation "should be denied only where a specific problem of disability can be identified which may prevent a meaningful defense from being offered, should one exist." Pickens, 96 Wis.2d 549, 569. Technical legal knowledge, as such, is not relevant to an assessment of a knowing exercise of the right to defend oneself. Faretta v. California, 422 U.S. 806, 836 (1975).

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The cases dealing with self-representation recognize the difficult position of the trial judge. The difficulty is due to the fact that the defendant has a constitutionally-protected right on either side of the issue. The court addressed this in Klessig, stating that if the defendant's competence for self-representation is not established, "the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel. However, if the defendant knowingly, intelligently, and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself." State v. Klessig, 211 Wis.2d 194, 203-04. Complete and proper findings are extremely important in these cases.[20] If the request for self-representation is granted, the record must reflect that the defendant:

1. understands the seriousness of the charge and the maximum possible penalties;

2. understands that the defendant has the right to be represented by a lawyer;

3. understands that if the defendant is indigent, a lawyer will be appointed at public expense;

4. understands the advantages of being represented by counsel and the disadvantages of self-representation; and

5. has the minimal competence necessary to try to conduct his or her own defense. These matters are reflect in the suggested findings included in Part I. A.

If the request for self-representation is denied, the Committee has concluded that, based on the Klessig decision, the waiver of counsel must be denied. That is, the right to waive counsel, in Wisconsin, depends on a finding that the defendant is competent to proceed pro se. A defendant who is not competent to proceed pro se, cannot waive counsel. The suggested findings included in Part I. B. reflect this conclusion.

IV. Appointment of Standby Counsel

"Standby counsel" refers to the appointment of a lawyer to assist the defendant whose request for self-representation has been granted.

The authority to appoint standby counsel is recognized as included in the inherent powers of the trial court.[21] The U.S. Supreme Court first addressed the issue in Faretta v. California:[22]

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> Of course, a State may – even over objection by the accused – appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

422 U.S. 806, 835 n.46.

In McKaskle v. Wiggins,[23] the Court elaborated as follows:

> Accordingly, we make explicit today what is already implicit in Faretta: A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

465 U.S. 168, 184.

The proper role of standby counsel was also discussed in McKaskle v. Wiggins. The question was whether the standby counsel is limited to a "seen but not heard" sort of assistance: Is counsel to participate only upon the defendant's request or may counsel directly participate in the trial, unsolicited by the defendant?

The Court held that unsolicited participation by standby counsel does not impermissibly infringe on the defendant's right to self-representation. Two general limits on standby counsel were recognized:

(1) defendants are entitled to preserve actual control over the case they choose to present to the jury; and

(2) participation by standby counsel should not be allowed to destroy the jury's perception that defendants are representing themselves.

Specific actions which do not infringe upon the right to self-representation include:

(1) any actions taken at the specific or implied invitation of the defendant;

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(2) assistance in overcoming routine procedural or evidentiary obstacles (e.g., introducing evidence or objecting to testimony);

(3) ensuring the defendant's compliance with basic rules of courtroom protocol and procedure.

McKaskle v. Wiggins, 465 U.S. 168, 183.

The Wisconsin Supreme Court elaborated upon the role of standby counsel in Contempt in State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987). The defendant Lehman had fired four attorneys appointed by the State Public Defender and the fifth was allowed to withdraw. The State Public Defender refused to appoint another attorney and the court granted Lehman's request to appear pro se. However, the trial court appointed a lawyer to serve as standby counsel. The Supreme Court clarified that "courts possess the inherent power to appoint counsel," including standby counsel, and to order the county to pay the cost. "The decision to appoint standby counsel in this case was based, as it should be, on a determination that the needs of the Trial Court and not the Defendant, would be best served by doing so." 137 Wis.2d 65, 77 [emphasis in original]. The court emphasized that "the chief purpose of the appointment of counsel in cases like the present one is to serve the interests of the trial court. . . ." 137 Wis.2d 65, 78.

The Lehman decision was reaffirmed in State v. Newton [decided sub nom. State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996)]. The court again emphasized that appointment of standby counsel is based on the needs of the trial court to help the trial proceed in an orderly fashion and is not tied to the defendant's right to counsel. 199 Wis.2d 721, 756. In both Lehman and Newton, the court expressly noted that it was not dealing with possible constitutional claims in a situation where a defendant who, having waived (or forfeited) counsel, made a request for standby counsel which was denied by the trial court.

V. "Hybrid" Representation

Occasionally defendants seek to conduct portions of their own defense while they are represented by counsel. For example, Wisconsin cases have involved requests that a represented defendant be allowed to make opening statements or closing arguments. It has been claimed that the right to self-representation requires that defendants be allowed to represent themselves and be represented by counsel in the same case.

The United States Supreme Court has held that the Sixth Amendment to the U.S. Constitution does not require trial courts to permit "hybrid" representation. McKaskle v.

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Wiggins, 465 U.S. 168, 183. The Wisconsin Supreme Court has reached the same conclusion with respect to a claim based on the Wisconsin Constitution. Moore v. State, 83 Wis.2d 285, 265 N.W.2d 540 (1978). In Moore, the trial court's refusal to allow the represented defendant to examine witnesses was upheld. Also see Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981), where the defendant was not permitted to make a closing argument in addition to the one made by counsel.[24]

A danger in allowing represented defendants partially to represent themselves is illustrated by what happened in State v. Johnson, 121 Wis.2d 237, 358 N.W.2d 824 (1984). Johnson presented his own opening statement but did not testify. The prosecutor responded in his own opening to emphasize that Johnson's statement was not testimony and not evidence. The defendant claimed on appeal that this was unfair comment on his right not to testify. The court of appeals affirmed the conviction and adopted a "partial waiver" rule for this sort of situation which allows a limited prosecutorial comment in response to the defendant's statement. But the court noted the dilemma that the situation presents to both the prosecutor and the trial judge. 121 Wis.2d 237, 245.

VI. Court Appointment of Counsel for Defendants Who Do Not Qualify Under State Public Defender Guidelines

It is increasingly common for trial courts to be confronted with defendants who do not meet the financial criteria of the Office of the State Public Defender but who cannot afford to retain private counsel. These defendants may not wish to waive counsel expressly. And their inability to obtain counsel may result in continuances where, upon returning again without counsel, defendants may find their conduct characterized as that which justifies a finding of forfeiture of counsel. There are other negative effects as well, such as reluctance by prosecutors to discuss the case with unrepresented defendants. This can result in delay and even in the unavailability of plea concessions or sentence recommendations that would be freely offered if counsel was present.

There is a provision for court review of the public defender's indigency determination. Under § 977.07(3), a court "may review any indigency determination upon its own motion or the motion of the defendant and shall review any indigency determination upon the motion of the district attorney or the state public defender." Review under this authority is limited to examining the public defender's application of the legislative criteria and the accompanying mathematical computations. State v. Dean, 163 Wis.2d 503, 510, 471 N.W.2d 310 (Ct. App. 1991)

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Trial courts also have inherent power to appoint counsel for defendants who do not meet the criteria for appointment of counsel by the Office of the State Public Defender. In State v. Dean, 163 Wis.2d at 513, the court stated:

> The legislature cannot limit who is constitutionally entitled to an attorney. The creation of the public defender's office is not the exclusive means for assuring counsel to indigents and did not negate the inherent power of the court to appoint when the public defender declines to act. Douglas Co. v. Edwards, 137 Wis.2d 65, 77, 403 N.W.2d 438, 44 (1987). The trial court therefore is required to go beyond the public defender's determination that a defendant does not meet the legislative criteria and determine whether the "necessities of the case" and the demands of "public justice and sound policy" require appointing counsel. See Sparkman [v. State], 27 Wis.2d 92, 98, 133 N.W.2d 776, 780 (1965).

Dean held that the burden of proof lies with the defendant to convince the court that appointment of counsel is necessary despite the defendant's failure to meet the public defender's indigency criteria. The decision identified the following considerations that relate to the trial court's decision:

(1) The defendant must present evidence of his or her assets, income, liabilities and attempts to retain counsel.[25]

(2) The court is not required to conduct an independent inquiry but must ask enough questions to decide the issue. The court cannot restrict itself to the criteria mandated by the legislature in § 977.07(2) but should consider all evidence that is relevant to the defendant's present ability to retain counsel.

(3) In deciding, the court must consider whether the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community. It must disregard the public defender's established cost of retained counsel in Wis. Adm. Code sec. SPD 3.02(1).[26]

Aside from the procedurally-oriented considerations, the basic question is whether the "necessities of the case" and the "demands of public justice and sound policy" require appointment of counsel.

COMMENT

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SM-30 was originally approved by the Committee in 1974 and included material now found in SM-25 (Judge's Duties at Initial Appearance) and SM-31 (Waiver of Preliminary Examination). A version of SM-30 dealing only with waiver of counsel was originally published in 1987. The 1997 revision added the sections on forfeiture of counsel and court appointment of counsel and combined material formerly found in SM-30A. This revision involved general updating and was approved by the Committee in December 2005.

Part I of this Special Material is designed to be used whenever it is necessary to accept a waiver of counsel. Depending on the situation, additional issues will also have to be dealt with. If the defendant wishes to waive counsel and enter a guilty plea, SM-30 should be followed by SM-32, Accepting A Plea Of Guilty.

Part I includes a series of questions recommended for use whenever it is necessary to accept a waiver of counsel. The record must reflect a voluntary and intelligent waiver whenever the defendant wishes to go ahead with a "critical stage" of the proceeding without representation. [The right to counsel under the Sixth Amendment to the United States Constitution applies to all critical stages of the proceedings that follow the filing of the criminal charge. See, for example, United States v. Wade, 388 U.S. 218, 87 Sup.Ct. 1926, 18 L.Ed.2d 1149 (1967); Jones v. State, 63 Wis.2d 97, 216 N.W.2d 224 (1974).] Thus, the inquiry may be necessary at the preliminary examination, the entry and acceptance of a plea, trial, or sentencing. The waiver is usually accompanied by a request that the defendant be allowed to represent himself, making additional inquiry necessary.

Part II deals with a problem referred to as forfeiture of counsel. See LaFave and Israel, Criminal Procedure, Sec. 11.3(c), West, 1984. This is intended for those situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. In State v. Newton, 199 Wis.2d 721, 757, 546 N.W.2d 406 (1996), the Wisconsin Supreme Court held that "there may be situations . . . where a circuit court must have the ability to find that a defendant has forfeited his right to counsel."

Federal cases have held that the right to counsel may be waived by a defendant who fails to retain counsel within a reasonable time when he is financially able to do so. United States ex rel. Baskerville v. Deegan, 428 F.2d 714 (2d Cir. 1970); United States v. McMann, 386 F.2d 611 (2d Cir. 1967). The Wisconsin Supreme Court has addressed this issue once, reversing a trial court's order requiring a defendant to proceed to trial despite the fact that his lawyer did not show up. In State v. Keller, 75 Wis.2d 502, 249 N.W.2d 773 (1977), the court found the record insufficient to indicate that the defendant had in fact knowingly waived his right to counsel and reversed the conviction. The court did not spell out what the trial court should do in a situation where the defendant has not obtained counsel but does not wish to waive the right to be represented. Related, but distinguishable, are cases involving the choice of counsel. Several decisions deal with the issue of abuse of discretion in denying a continuance when the defendant makes a late request to change counsel. See State v. Wedgeworth, 100 Wis.2d 514, 302 N.W.2d 810 (1981); Mulkovich v. State, 73 Wis.2d 464, 243 N.W.2d 198 (1976); Phifer v. State, 64 Wis.2d 24, 218 N.W.2d 354 (1974); Rahhal v. State, 52 Wis.2d 144, 187 N.W.2d 800 (1971). The court in Keller acknowledged that forcing a defendant to go to trial without counsel is drastically different from forcing him to go to trial with a competent counsel not his first choice. (See the discussion of forfeiture of counsel in Section II.)

1. Specific questions are not suggested to emphasize that trial judges should tailor the inquiry to fit

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the case at hand and the judge's preferences. Some or all of the questions may be eliminated altogether if a similar inquiry has already been conducted to, for example, set bail. Examples of specific questions on these topics are included in SM-32, Accepting A Plea Of Guilty. Additional questions will often be suggested by the defendant's responses. And, the Committee recommends that the questions be designed to elicit more than one-word answers from the defendant. This is especially important in the context of an inquiry into waiver of counsel.

In State v. Ruszkiewicz, 2000 WI App 125, 237 Wis.2d 441, 613 N.W.2d 893, the court found a waiver of counsel to be valid, despite the trial court not following the procedure recommended by SM-30. However, the decision noted that "SM-30 sets out suggested procedures and colloquies that trial courts should follow." Ruszkiewicz at ¶29.

2. But see note 9, below, suggesting that the best person to discuss the advantages of being represented by counsel is a lawyer.

3. A valid waiver of counsel does not require the trial court to advise the defendant of the right to have counsel appointed at county expense where he does not qualify under the State Public Defender guidelines. State v. Drexler, 2003 WI App 169, 266 Wis.2d 438, 669 N.W.2d 182. Also see the discussion in Sec. VI, this SM.

4. The areas listed may have already been explored in the inquiry into the defendant's ability to understand the proceedings. They are restated here because they reflect the four factors identified in Pickens as relevant to deciding whether the defendant "possesses the minimal competence necessary to conduct his own defense": education; literacy; fluency in English; and "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury."

5. The Committee recommends that the finding specifically refers to the four factors identified in the Pickens decision: education, literacy, fluency in English, and physical or psychological disability affecting the ability to communicate in the courtroom. Identification of more specific aspects of the competency for self-representation is difficult. As noted in the Klessig decision, the "determination must rest to a large extent upon the judgment and experience of the trial judge." 211 Wis.2d 194, 212 [quoting Pickens].

6. For appellate decisions affirming the denial of a request to proceed pro se see the following: Hamiel v. State, 92 Wis.2d 656, 285 N.W.2d 639 (1979): request was made on the morning trial was to begin and competent counsel was available; Laster v. State, 60 Wis.2d 525, 211 N.W.2d 13 (1973): request was actually to change counsel, not to proceed pro se; Browne v. State, 24 Wis.2d 491, 129 N.W.2d 175 (1964): request was to dismiss appointed counsel and defendant lacked the capacity to intelligently waive counsel.

7. The Committee recommends that the finding specifically refers to the four factors identified in the Pickens decision: education, literacy, fluency in English, and physical or psychological disability affecting the ability to communicate in the courtroom. Identification of more specific aspects of the competency for self-representation is difficult. As noted in the Klessig decision, the "determination must rest to a large extent upon the judgment and experience of the trial judge." 211 Wis.2d 194, 212 [quoting Pickens].

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8. Pickens v. State, 96 Wis.2d 549, 292 N.W.2d 601 (1980). Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), is the leading U.S. Supreme Court decision on the procedure to be used in recording a waiver of counsel. Though it was a plurality opinion, its holding is consistent with decisions of the Wisconsin Supreme Court that both preceded and followed it. In State ex rel. Drankovich v. Murphy, 248 Wis. 433, 438, 22 N.W.2d 540 (1946), the court held that the trial judge had the duty to protect the accused's right to counsel by assuring, on the record, that the accused "knew he had the right to counsel and voluntarily rejected it." In a later plea of guilty case, the court outlined the general nature of the inquiry that a trial court should make:

> 1. To determine the extent of the defendant's education and general comprehension.
>
> 2. To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries.
>
> 3. To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty.
>
> 4. To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused.
>
> 5. To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him.
>
> Finally, the trial judge should be certain that the record itself reflects the fact that careful consideration was given to the foregoing propositions.

State ex rel. Burnett v. Burke, 22 Wis.2d 486, 494, 126 N.W.2d 91 (1964).

The courts have not transformed the requirements of Von Moltke and Burnett into any specific colloquy; flexibility in approach is allowed, as long as the "knowing and voluntary" nature of the decision is apparent on the record. Pickens v. State, 96 Wis.2d 549, 561-64, 292 N.W.2d 601 (1980).

9. This suggestion assumes that a staff public defender is present in court and able to talk to the defendant right away. It is premised on the Committee's conclusion that the best way for a defendant to be informed of the value of representation by counsel is to have a discussion with a lawyer. In many areas of the state, lawyers on the staff of or provided by the State Public Defender are available to speak with unrepresented defendants before the initial appearance. Rather than the judge trying to provide a lengthy explanation of the right to counsel, it is preferable simply to give the defendant a chance to discuss the matter with an attorney.

10. 96 Wis.2d 549, 292 N.W.2d 601 (1980).

11. 199 Wis.2d 721, 757, n.18. The four steps are outlined in the dissent at 199 Wis.2d 721, 765.

12. The Sixth Amendment to the United States Constitution does not expressly recognize the right to represent oneself, but the Supreme Court has found that the right ". . . to make one's defense

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personallyCis thus necessarily implied by the structure of the Amendment." Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

13. Article I, Section 7, of the Wisconsin Constitution explicitly recognizes the right to self-representation: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel. . . ." Cases have recognized the state constitutional right for many years. See Dietz v. State, 149 Wis. 462, 479, 136 N.W. 166 (1912). The reference to "by himself and counsel" (emphasis added) has been held not to require "hybrid" representation – pro se and by counsel – in a single case. See discussion at note 24, below.

14. Cases involving self-representation often involve defendants who are dissatisfied with retained or appointed counsel. It is important to clarify whether a defendant is seeking to dismiss or change his present lawyer or actually seeking to represent himself. See Laster v. State, 60 Wis.2d 525, 539, 211 N.W.2d 13 (1973).

15. The question of "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se?" was addressed in Hamiel v. State, 92 Wis.2d 656, 285 N.W.2d 639 (1979). The court upheld the trial court's denial of a request to proceed pro se when the request was made just as the trial was to begin. The court held that the right to proceed pro se, like the right to be represented by counsel "cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the orderly administration of justice." 92 Wis.2d 656, 672. The factors for the trial court to consider in exercising discretion were identified:

> Where the request to proceed pro se is made on the day of trial or immediately prior thereto, the determinative question is whether the request is proffered merely to secure delay or tactical advantage. In such a situation, the trial court should determine if the request could have been made earlier, and if so, why not. If the defendant cannot show good cause as to why a demand was not made at an earlier appearance before the court, and if an adjournment would result from a granting of the defendant's self-representation request, the trial court must weigh the defendant's constitutional guarantee to a fair trial as well as the convenience of the witnesses, jurors, and the court schedule when exercising its discretion to approve or deny the request.

92 Wis.2d 656, 673.

16. 96 Wis.2d 549, 292 N.W.2d 601 (1980).

17. See section I., supra.

18. Procedures and legal standards relating to competency to stand trial are discussed in SM-50, Competency to Proceed.

19. See Standard 6-3.6, The Defendant's Election To Represent Himself or Herself At Trial, and Commentary. ABA Standards For Criminal Justice.

20. In State v. Marquardt, 2005 WI 157, 286 Wis.2d 204, 705 N.W.2d 878, the court affirmed a trial court finding that the defendant was not competent to represent himself. The circuit court had referred to the seriousness of the charges, the complexity of the case and evidence of the defendant's

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mental illness. See ¶63. The supreme court concluded that "the medical and psychological opinions in this case identified a emmber of specific problems that could have prevented Marquardt from meaningfully presenting his own defense." ¶69.

21. In Contempt in State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987), the Wisconsin Supreme Court recognized that appointment of standby counsel for a pro se defendant was within the inherent power of the trial court. The court emphasized that in cases like the one before it in Lehman, the appointment of standby counsel is to serve the interests of the court – to help assure that the trial proceeds in an orderly fashion. 137 Wis.2d 65, 78.

The ABA Standards for Criminal Justice recommend the following standard for the appointment of standby counsel:

> Standard 6-3.7 Standby counsel for pro se defendant
>
> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

22. 422 U.S. 806, 95 S.Ct. 252, 45 L.Ed.2d 562 (1975).

23. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

24. The text of the Wisconsin constitutional provision (see note 13, supra) offers some support for the argument that "hybrid representation" is required in that it refers to "the right to be heard by himself and counsel. . . ." (emphasis added). However, the argument was expressly rejected in Moore v. State, 83 Wis.2d 285, 298-300, 265 N.W.2d 540 (1978).

25. Forms have been created by the Office of Director Of State Courts to facilitate this determination. See "Petition For Appointment Of Counsel, Affidavit Of Indigency And Order," Form GF-152, 4/97.

26. In State v. Nieves-Gonzales, 2001 WI App 90, 242 Wis.2d 782, 625 N.W.2d 913, the court found that the trial court applied the federal poverty guidelines incorrectly in denying counsel to the defendant. Those guidelines should be considered, though not every defendant with income less than the guidelines is entitled to court-appointed counsel. "W]here a trial court denies a motion for court-appointed counsel after the defendant has shown that she or he has no assets and a household income well below the federal guidelines, a trial court should set forth findings explaining why it has determined the defendant can nevertheless afford counsel." Nieves-Gonzales, ¶8.

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