

[CAPTION]

**NOTICE OF INTENT TO PROCEED *PRO SE* AND WAIVER OF RIGHT
TO COUNSEL**

The Defendant, [insert name], files his Notice of Intent to Proceed *Pro Se* and Waiver of Right to Counsel. In support of the Notice, the Defendant alleges and states the following:

1. The Defendant has a right to representation by legal counsel under the Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Moore v. State, 273 Ind. 3, 401 N.E.2d 676 (1980).

2. Concomitant to such right of representation is the right of a criminal defendant to waive the assistance of counsel and to represent himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Russell v. State, 270 Ind. 55, 383 N.E.2d 309 (1978).

3. Waiver of counsel must be made voluntarily, knowingly and intelligently. Johnson v. Zerbt, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); Morgan v. State, 417 N.E.2d 1154 (Ind.Ct.App. 1981). Such waiver may not be implied from a silent record. Wallace v. State, 361 N.E.2d 159 (Ind.Ct.App. 1977). The Court must advise a criminal Defendant of the right to assistance of counsel and the disadvantages of self-representation in clear and unambiguous language. Mitchell v. State, 417 N.E.2d 364 (Ind.Ct.App. 1981); McDandal v. State, 390 N.E.2d 216 (Ind.Ct.App. 1979).

4. In Sherwood v. State, 717 N.E.2d 131 (Ind. 1999), a violation of the Sixth Amendment was found where a competent Defendant, subsequent to a knowing, intelligent, and voluntary waiver of counsel, was denied control over trial strategy and the manner in which the case was presented to the jury.

5. The right to *pro se* representation is absolute prior to trial. Koehler v. State, 499 N.E.2d 196, 198 (Ind. 1986). However, the right to *pro se* representation must be asserted by clear and unequivocal request within a reasonable prior time prior to the first day of the trial. Russell v. State, 383 N.E.2d 309 (Ind. 1978).

6. Defendant must be and is competent to proceed *pro se*. Edwards v. State, 902 N.E.2d 821 (Ind. 2009).

7. Defendant has previously advised the Court of his intent to proceed *pro se* in open Court and renews his notice of such intent in this document.

WHEREFORE, Defendant notifies this Court and the State of Indiana of his intent to waive his right to counsel and to proceed *pro se*. Defendant requests that the Court schedule this matter for hearing regarding such request, and for all just and proper relief.

I swear or affirm under the penalties for perjury that the foregoing representations are true.

[Insert name of Defendant], Defendant

REFERENCES

U.S. Constitution, 6th Amendment

Article 1, Section 13 of the Indiana Constitution

CASE LAW

Blinn v. State, 441 N.E.2d 49 (Ind.Ct.App. 1982) (trial court must thoroughly examine facts and circumstances before compelling Defendant to proceed unassisted at trial; merely making Defendant aware of his constitutional right to counsel is insufficient; rather, trial court has a duty to establish record showing that Defendant's waiver of counsel was knowing, voluntary and intelligent).

Eaton v. State, 894 N.E.2d 213 (Ind.Ct.App. 2008) (record did not establish that the defendant waived his right to counsel, and even assuming waiver, he was not adequately advised of the pitfalls of self-representation before waiver and admission of guilt). See also Hagy v. State, 639 N.E.2d 693 (Ind.Ct.App. 1994).

Brickert v. State, 673 N.E.2d 493 (Ind.Ct.App. 1996) (trial court did not err in denying Defendant's motion for continuance on day of trial, requiring him to proceed *pro se*, where circumstances unequivocally established that Defendant had delayed hiring an attorney for over a year in an attempt to frustrate judicial process).

Broome v. State, 687 N.E.2d 590 (Ind.Ct.App. 1997) (when Defendant is represented by counsel and attempts to file a *pro se* motion, it is within the trial court's discretion to accept it, respond to it or strike it; because trial court's ability to ignore *pro se* motion falls within its discretion, there was no error in ignoring Defendant's request), *disapproved of on other grounds by* Voss v. State, 856 N.E.2d 1211, 1220 n. 6 (Ind. 2006).

Carter v. State, 512 N.E.2d 158 (Ind. 1987) (where Defendant was granted hybrid representation, defined public defender's responsibilities and had final say on trial decisions, Defendant waived right to allege IAC).

Geiger v. State, 688 N.E.2d 1298 (Ind.Ct.App. 1997) (when Defendant decides to proceed *pro se*, record must demonstrate that Defendant is fully aware of the nature, extent and importance of the right he has waived and the possible consequences thereof).

Kimberling v. State, 556 N.E.2d 1331 (Ind.Ct.App. 1990) (trial court violated Defendant's right to counsel under Indiana Constitution Article 1, Section 13 by forcing Defendant to proceed *pro se* after court appointed counsel withdrew due to Defendant's failure to cooperate).

But see Indiana v. Edwards, 128 S.Ct. 2379 (2008) (the federal constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves).

Edwards v. State, 902 N.E.2d 821 (Ind. 2009) (on rehearing after reversal and remand by the U.S. Supreme Court in Indiana v. Edwards, *supra*, the Indiana Supreme Court held that the record supports trial court's finding that Defendant suffered from a severe mental illness to the point where he was not competent to conduct trial proceedings by himself; trial court's ruling prohibiting Defendant from

proceeding pro se did not violate article I, section 13 of the Indiana Constitution, which guarantees an accused the right "to be heard by himself and by counsel.").

Drake v. State, 895 N.E.2d 389 (Ind.Ct.App. 2008) (trial court does not have to order a competency evaluation every time a defendant asserts his or her right to proceed without counsel; but, the sparse record, coupled with Defendant's questionable mental capacity, leads to conclusion that trial court should have inquired further in Defendant's background, education and abilities; thus, Defendant did not make a voluntary, knowing and intelligent waiver of his right to counsel).

Hopper v. State, 957 N.E.2d 613 (Ind. 2011) (rehearing granted to revise earlier ruling; trial courts are not always required to advise a defendant pleading guilty pro se of the pitfalls of self-representation).