

**Appeals without Court Action:
Advising Clients Who Request to go *Pro Se* and Motions to Withdraw**
By Kenneth Lund and Joseph Ehmann
Milwaukee Room, 11:30-12:15

A. Closing a Case without Court Action.

1. Basis or reason

- No issues of arguable merit and client agrees
- Arguable issue identified but client declines to pursue
- Disagreement on the merits
- Client does not want public defender representation
- Other (e.g. client disappears/absconds)

2. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994).

- Closing case without court action expressly authorized when counsel and client agree to close case.
- Waiver of appeal rights must be knowing and voluntary but no particular procedure required.
- Counsel responsible for informing client of appeal rights.
- “Information for Clients” sheet sufficient for advisement of NM but unclear whether it is enough for all rights.
- Document conversations and conclusions w/ confirmation letter to client.

B. *Pro Se* Appeals

1. No federal constitutional right to self-representation on appeal

- *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000).
- Sixth Amendment rt. to counsel does not apply on appeal. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

2. Wisconsin Constitution

- Article I, § 7, “In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel....”
- Article I, § 21, (2) “In any court in this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney....”

3. *State v. Thornton*, 2002 WI App 294, 259 Wis.2d 157

- Distinguishes waiver of right to appeal (*Flores*) from waiver of right to counsel on appeal.
- Knowing and voluntary waiver of right to counsel on direct appeal requires that defendant be made aware “(1) of the *Flores* rights (to an appeal, to the assistance of counsel for the appeal, and to opt for a no-merit report); (2) of the danger and disadvantages of proceeding pro se; and (3) of the possibility that if appointed counsel is permitted to withdraw, successor counsel may not be appointed to represent the defendant in the appeal.” *Id.* at ¶ 21.

- The “necessary ‘colloquy’ may be accomplished via written communication with the defendant, initiated either by the court or by counsel seeking to withdraw.” Id. at ¶ 22.
 - “If counsel moves to withdraw prior to the filing of a notice of appeal, the motion must be directed to the circuit court..., and a more traditional oral colloquy between defendant and the court should be employed.” If a motion to withdraw is filed in the COA, case may be remanded to circuit court for a hearing. Id. at ¶¶ 22-23.
 - Impact of *State v. Todd E. Peterson*, 2007AP1867-CR, Dist. II, 8/20/08, applying 6th Amendment analysis to postconviction stage of direct appeal.
4. Competency to proceed *pro se*.
- *Indiana v. Edwards*, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008)(States can require higher standard for self-representation than for trial).
 - *Thornton*, citing *State v. Klessig*, 211 Wis.2d 194 (1997), notes “that ‘persons of average ability and intelligence’ should be permitted to represent themselves, and we should only deny or delay the acceptance of an otherwise proper waiver if ‘specific problem or disability can be identified.’” 259 Wis. 2d at p. 175-76, ¶ 23.

C. Motions to Withdraw

1. Wisconsin Stat. Rule 809.30(4)
 - Motion filed prior to filing Notice of Appeal must be filed in the circuit court. Motion filed after filing NOA must be filed in the court of appeals.
 - Must be served on client and, in private bar-appointed cases, on the Intake Unit of SPD Appellate Division in the Madison Appellate Office.
 - SPD has 20 days to inform court whether successor counsel will be appointed. Court decides whether defendant waives right to counsel.
 - Confidentiality—*See State ex rel. Ford v. Holm*, 2004 WI App 22, 269 Wis.2d 810, at ¶ 25, n. 7 (“we agree with the SPD that ‘*Thornton* should not be construed to require the filing of a motion to withdraw which explains the reasons that a client has elected to proceed *pro se*.’” Counsel should not breach confidentiality, particularly with respect to “counsel’s assessment of the merits of the client’s case.”).
2. When?
 - Pro se—?
 - Conflict—maybe (but call us first, only proper for actual conflict).
 - Difficult client—generally, no, but extreme cases may implicate forfeiture of right to counsel.
 - Can’t find client—no.
 - Dispute over merits—? E.g. *Ford* (II), 2006 WI App 176, 296 Wis.2d 119 (valid issue client declines to pursue; no right to partial no-merit report).
3. Consequences
 - If you file a motion, make sure you get a hearing and that a fully informed waiver occurs. If a court later rules a waiver to be invalid, your client (and you) are placed back to the point at which the invalid waiver occurred.— i.e. you are back on the case and must resume your representation.