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To: Tony Rand, Chair, Post-Release Supervision and Parole Commission; Anne Precythe, Division of Community Corrections; Karen Bozard, Division of Community Corrections; Clerks of Superior Court; Public Defenders

Cc: Thomas K. Maher, IDS Director; Jennifer Howard, IDS Contracts Administrator; Matt Osborne, AOC Assistant Legal Counsel; Troy Page, AOC Assistant Legal Counsel; Cynthia Easterling, AOC Court Services Administrator

From: Danielle M. Carman, IDS Assistant Director/General Counsel

Re: Appointment of Counsel in Post-Release Supervision and Parole Preliminary Revocation Hearings Before a Hearing Officer, and Post-Release Supervision and Parole Revocation Hearings and Criminal Contempt Proceedings Before the Post-Release Supervision and Parole Commission

Date: November 19, 2012

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This memorandum outlines new procedures for the appointment and payment of counsel at post-release supervision and parole<sup>1</sup> preliminary revocation hearings before a hearing officer, as well as post-release supervision and parole revocation hearings and criminal contempt hearings before the North Carolina Post-Release Supervision and Parole Commission (hereinafter “Commission”), pursuant to Session Law 2012-188. That Session Law amends G.S. 143B-720 to authorize the Commission to conduct revocation and criminal contempt hearings via videoconference.<sup>2</sup>

Preliminary revocation hearings before a hearing officer are conducted “reasonably near the place of the alleged violation or arrest and within seven working days of the arrest.” *See* G.S. 15A-1368.6(b), (c), (d) and 15A-1376(b), (c), and (d). All videoconference hearings before the Commission will be conducted at one of seven Division of Adult Correction facilities in one of six North Carolina counties that have diagnostic centers: Western Youth Institution in Burke County, Craven Correctional Institution in Craven County, Polk Correctional Institution in Granville County, Piedmont Correctional Institution in Rowan County, Central Prison and North Carolina Correctional Institution for Women in Wake County, and Neuse Correctional Institution in Wayne County. It is IDS’ understanding that there are currently approximately two

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<sup>1</sup> Parole revocations may continue to occur for offenses that were committed before Structured Sentencing went into effect on October 1, 1994 and for defendants who were convicted of impaired driving and sentenced under G.S. 20-179.

<sup>2</sup> While the Session Law does not become effective until December 1, 2012, the Commission has already begun conducting videoconference hearings on a pilot basis.

revocation hearings before the Commission per month in which the defendant requests and receives appointed counsel, although those numbers likely will increase significantly as a result of the Justice Reinvestment Act, and that there is currently approximately one criminal contempt hearing per month.

At this time, IDS relies solely on private assigned counsel to handle indigent cases in Burke, Craven, Granville, Rowan, and Wayne counties. In those counties, the judges and clerks appoint counsel from local indigent rosters. There is a public defender office in Wake County, and that office would either handle the revocation or contempt hearing in house or assign an outside attorney. However, during the 2011 legislative session, the General Assembly directed IDS to issue Requests for Proposals (“RFPs”) for contracts for all indigent cases throughout the state that are currently handled by private attorneys. The first contracts will go into effect on December 1, 2012 in two of the six counties where videoconference hearings may be held—*i.e.*, Granville and Wake—but IDS has not yet issued RFPs in the remaining four counties—*i.e.*, Burke, Craven, Rowan, and Wayne.

**I. Entitlement to Counsel:**

G.S. 148-62.1 provides as follows:

Any parolee or post-release supervisee who is an indigent under the terms of G.S. 7A-450(a) may be determined entitled, in the discretion of the Post-Release Supervision and Parole Commission, to the services of counsel at State expense at a parole revocation hearing at which either:

- (1) The parolee or post-release supervisee claims not to have committed the alleged violation of the parole or post-release supervision conditions; or
- (2) The parolee or post-release supervisee claims there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, even if the violation is a matter of public record or is uncontested, and that the reasons are complex or otherwise difficult to develop or present; or
- (3) The parolee or post-release supervisee is incapable of speaking effectively for himself;

and where the Commission feels, on a case by case basis, that such appointment in accordance with either (1), (2) or (3) above is necessary for fundamental fairness.

If the parolee or post-release supervisee is determined to be indigent and entitled to services of counsel, counsel shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services.

The IDS Office has not yet adopted formal rules to govern the appointment of counsel in these revocation hearings. However, this memo outlines the procedures that should be followed, which were developed in consultation with legal staff at the Administrative Office of the Courts and the elected Clerks in two of the counties where videoconference hearings will be held.

G.S. 143B-720(a) provides as follows:

The Commission shall also have the authority to punish for criminal contempt for willful refusal to accept post-release supervision or to comply with the terms of post-release supervision by a prisoner whose offense requiring post-release supervision is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes. Any contempt proceeding conducted by the Commission shall be in accordance with G.S. 5A-15 as if the Commission were a judicial official.

G.S. 5A-15 governs plenary proceedings for direct criminal contempt, and G.S. 5A-12 provides that a person who commits criminal contempt is subject to imprisonment for up to 30 days and/or a fine not to exceed \$500. G.S. 7A-451(a)(1) further provides that an indigent person is entitled to counsel in any case in which imprisonment or a fine of \$500 or more is likely to be adjudged.

## **II. Appointment of Counsel:**

### **A. Preliminary Revocation Hearings Before Hearing Officer:**

Preliminary revocation hearings may be held in any North Carolina county. In Granville and Wake Counties, IDS has added the preliminary revocation hearings before the hearing officer to the low-level felony contract category. Once contracts are in place in the rest of the State, those case types will be handled in the same manner. In the meantime, IDS will ask the Clerks of Superior Court to assign private attorneys from the local low-level felony roster.

As individual cases arise, the hearing officer designated by the Commission should determine whether an alleged post-release supervision or parole violator (“violator”) is indigent by having the violator complete a notarized affidavit of indigency (form AOC-CR-226). The hearing officer should then complete form AOC-G-311 to determine whether the violator is entitled to counsel based on the considerations outlined in G.S. 148-62.1. If the violator is found indigent and entitled to counsel, the hearing officer should submit the original CR-226 and G-311 forms to the Clerk of Superior Court in the county in which the preliminary hearing is to be held.<sup>3</sup> Regardless of whether there is already an established local CR or CRS file for the violator in the hearing county, the Clerk in the hearing county should assign a local “R” file number<sup>4</sup> and appoint counsel—either the local public defender office, an attorney who is under contract with IDS, or private assigned counsel if IDS has not yet entered into contracts in the county—by completing Part II. of form AOC-G-311 and adding the “R” file number to the form. The Clerk

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<sup>3</sup> If the hearing officer determines that the violator is not entitled to counsel, there will be nothing filed with the Clerk’s office for the preliminary hearing.

<sup>4</sup> Current Rule of Recordkeeping 9.6, Comment A, provides that “[t]he trial courts have nothing to do with these [post-release supervision and parole] violations.” That comment is in the process of amendment, and will provide that the Clerk should follow procedures promulgated by IDS for records of these proceedings. The AOC’s Court Services Division will notify Clerks when the amended rule has been published. These procedures specify the assignment of a local “R” file number (rather than a CR or CRS number, as normally would be assigned under Rule 9) for several reasons, including that many defendants facing revocation or contempt were incarcerated for multiple convictions that spanned multiple counties, and that a CR or CRS number would require potentially misleading entries in ACIS for a proceeding that does not occur before the courts.

should then file the original CR-226 and G-311 forms under the “R” file number and forward copies of the G-311 appointment form to the hearing officer (at the address he or she provides), the assigned attorney, and the violator (at his or her current location). The Clerk should also index the “R” file in VCAP in the name of the State versus the defendant using the applicable issue code on form G-311.

**B. Revocation Hearings Before Commission:**

In Granville and Wake Counties, IDS has added revocation hearings before the Commission to the low-level felony contract category. Once contracts are in place in the remaining four counties—*i.e.*, Burke, Craven, Rowan, and Wayne—those case types will be handled in the same manner. In the meantime, IDS will ask the Clerks of Superior Court in each of those counties to assign private attorneys from the local low-level felony roster.

As individual cases arise, the Commission should determine whether the violator is indigent by having the violator complete another notarized affidavit of indigency (form AOC-CR-226) or by deeming the violator indigent based on the hearing officer’s prior determination of indigency for the preliminary hearing. The Commission should then complete form AOC-G-311 to determine whether the violator is entitled to counsel based on the considerations outlined in G.S. 148-62.1. If the violator is found indigent and entitled to counsel, the Commission should submit an un-certified photocopy of the notarized CR-226 and the original G-311 form to the Clerk of Superior Court in the county in which the revocation hearing is to be held.<sup>5</sup> Regardless of whether there is already an established local CR or CRS file for the violator in the hearing county, the Clerk in the hearing county should assign a local “R” file number<sup>6</sup> and appoint counsel—either the local public defender office, an attorney who is under contract with IDS, or private assigned counsel if IDS has not yet entered into contracts in the county—by completing Part II. of form AOC-G-311 and adding the “R” file number to the form. The Clerk should then file the CR-226 (original or photocopy) and the original G-311 form under the “R” file number and forward copies of the G-311 appointment form to the Commission Chair (at 4222 Mail Service Center, Raleigh NC 27699), the assigned attorney, and the violator (at his or her current location). The Clerk should also index the “R” file in VCAP in the name of the State versus the defendant using the applicable issue code on form G-311.

**C. Contempt Hearings Before Commission:**

In Granville and Wake Counties, IDS has added the contempt hearings to the misdemeanor contract category. Once contracts are in place in the remaining four counties—*i.e.*, Burke, Craven, Rowan, and Wayne—those case types will be handled in the same manner. In the meantime, IDS will ask the Clerks of Superior Court in each of those counties to assign private attorneys from the local misdemeanor roster.

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<sup>5</sup> If the Commission deems the violator indigent based on the hearing officer’s prior determination, the Commission should still forward a copy of the previously completed affidavit of indigency to the Clerk in the hearing county. As with the preliminary hearings discussed above, if the Commission determines that the violator is not entitled to counsel, there will be nothing filed with the Clerk’s office for the revocation hearing.

<sup>6</sup> See footnote 4. If the revocation hearing is held in the same county as the preliminary hearing, the Clerk should assign a different “R” file number for the filings associated with the revocation hearing.

As individual cases arise, the Commission should determine whether an alleged contemnor (“contemnor”) is indigent by having the contemnor complete a notarized affidavit of indigency (form AOC-CR-226). The Commission should then complete form AOC-G-311 to determine whether the contemnor is entitled to counsel. If the contemnor is found indigent and entitled to counsel, the Commission should submit the original CR-226 and G-311 forms to the Clerk of Superior Court in the county in which the contempt hearing is to be held.<sup>7</sup> Regardless of whether there is already an established local CR or CRS file for the contemnor in the hearing county, the Clerk in the hearing county should assign a local “R” file number<sup>8</sup> and appoint counsel—either the local public defender office, an attorney who is under contract with IDS, or private assigned counsel if IDS has not yet entered into contracts in the county—by completing Part II. of form AOC-G-311 and adding the “R” file number to the form. The Clerk should then file the original CR-226 and G-311 forms under the “R” file number and forward copies of the G-311 appointment form to the Commission Chair (at 4222 Mail Service Center, Raleigh NC 27699), the assigned attorney, and the contemnor (at his or her current location). The Clerk should also index the “R” file in VCAP in the name of the State versus the defendant using the applicable issue code on form G-311.

### **III. Payment of Appointed Counsel or Determination of Value of Services by Contractor or Public Defender:**

#### **A. Preliminary Revocation Hearings Before Hearing Officer:**

##### **1. Private Assigned Counsel Cases:**

If a private attorney has been assigned to handle the case, after the preliminary hearing, the attorney should complete the non-capital criminal case fee application (form AOC-CR-225) and utilize the “other” options in the original charge, disposition, and judgment and sentencing sections. On the fee application, the attorney should report the county where the hearing was held and the “R” file number that appears on the G-311 appointment form for the preliminary hearing. The attorney should also attach itemized time sheets setting forth the time spent on the case. The hearing officer should then verify the length of the hearing, which should be reported as “time in court,” and forward the fee application and time sheets to the Clerk in the hearing county.

The Clerk in the hearing county (or his or her designee), acting as the Court, should set an appropriate fee award at the applicable standard hourly rate (currently \$60 per hour for a preliminary revocation hearing). The Clerk should not order or docket a judgment for attorney fees or the attorney appointment fee for a preliminary hearing because it is not a final revocation and because the Clerk is not in a position to give the violator notice of the fee or an opportunity to be heard. For the same reasons, the Clerk should not order recoupment of fees through work release earnings or other means. *See Fuller v. Oregon*, 417 U.S. 40 (1974) (holding that the

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<sup>7</sup> If the Commission determines that the violator is not entitled to counsel, there will be nothing filed with the Clerk’s office for the contempt hearing.

<sup>8</sup> See footnote 4.

burden of repayment cannot be constitutionally imposed without notice and a meaningful opportunity to be heard).

The sole purpose for filing form AOC-CR-225 in these cases is to enable payment of the appointed attorney, not to recoup fees from the violator. Thus, on page two of the AOC-CR-225 fee application form, the clerk should check box 3 under Judgment #1 and write “no recoupment from defendant,” and should cross through Judgment #2. The Clerk should then clock date the original fee award and file it with the original appointment paperwork under the “R” file number associated with the preliminary hearing, index the fee award in VCAP with an issue code of PPAF,<sup>9</sup> and forward a copy of the fee award to IDS Financial Services Office for payment.

## 2. Public Defender and Contractor Cases:

If a public defender or contractor has been assigned to handle the case, after the preliminary hearing, the public defender or contractor should report the disposition to IDS via the online Public Defender Disposition Reporting System or the online Contractor Case Reporting System, as applicable. Again, because no judgment for attorney fees should be ordered or docketed, the public defender or contractor does not need to complete a fee application for recoupment purposes, and no recoupment of attorney fees or the attorney appointment fee should be ordered through work release earnings or other means.

### B. Revocation Hearings and Contempt Hearings Before Commission:

#### 1. Private Assigned Counsel Cases:

If a private attorney has been assigned to handle the case, after the applicable hearing, the attorney should complete the non-capital criminal case fee application (form AOC-CR-225) and utilize the “other” options in the original charge, disposition, and judgment and sentencing sections. On the fee application, the attorney should report the county where the hearing was held and the “R” file number that appears on the G-311 appointment form for the revocation or contempt hearing. The attorney should also attach itemized time sheets setting forth the time spent on the case. The Commission Chair should then verify the length of the hearing, which should be reported as “time in court,” and forward the fee application and time sheets to the Clerk in the hearing county.

The Clerk in the hearing county (or his or her designee), acting as the Court, should set an appropriate fee award at the applicable standard hourly rate (currently \$60 per hour for a revocation hearing and \$55 per hour for a contempt hearing). Again, because the Clerk is not in a position to give the violator or contemnor notice of the fee or an opportunity to be heard, the Clerk should not order or docket a civil judgment for attorney fees or the attorney appointment fee, and should not order recoupment of fees through work release earnings or other means. *See Fuller v. Oregon*, 417 U.S. 40 (1974).

As above, the sole purpose for filing form AOC-CR-225 in these cases is to enable payment of the appointed attorney, not to recoup fees from the violator or contemnor. Thus, on page two of

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<sup>9</sup> AOC is currently reprogramming VCAP to implement this issue code and the issue codes on form G-311.

the AOC-CR-225 fee application form, the Clerk should check box 3 under Judgment #1 and write “no recoupment from defendant,” and should cross through Judgment #2. The Clerk should then clock date the original fee award and file it with the original appointment paperwork under the “R” file number associated with the revocation hearing, index the fee award in VCAP with an issue code of PPAF, and forward a copy of the fee award to IDS Financial Services Office for payment.

2. Public Defender and Contractor Cases:

If a public defender or contractor has been assigned to handle the case, after the applicable hearing, the public defender or contractor should report the disposition to IDS via the online Public Defender Disposition Reporting System or the online Contractor Case Reporting System, as applicable. Again, because no judgment for attorney fees should be ordered or docketed, the public defender or contractor does not need to complete a fee application for recoupment purposes, and no recoupment of attorney fees or the attorney appointment fee should be ordered through work release earnings or other means.

**IV. Questions:**

If you have questions about the following procedures, please feel free to contact Whitney Fairbanks at (919) 354-7200 or [Whitney.B.Fairbanks@nccourts.org](mailto:Whitney.B.Fairbanks@nccourts.org). Clerks with questions about recordkeeping or VCAP entries should contact their Court Services Analysts.