

APPOINTMENT AND PAYMENT OF COUNSEL IN CLASS 3 MISDEMEANOR CASES

Effective for offenses committed on or after December 1, 2013, § 18B.13.(a) of Session Law 2013-360 amends G.S. 15A-1340.23 to provide that, unless otherwise noted, the maximum punishment for a person who is convicted of a Class 3 misdemeanor and who has no more than three prior convictions shall be a \$200 fine. Thus, unless otherwise noted, an indigent defendant who is charged with committing a Class 3 misdemeanor on or after December 1, 2013 and who has no more than three prior convictions shall not be entitled to appointed counsel pursuant to G.S. 7A-451(a)(1). Section 18B.14 of Session Law 2013-360, as amended by §§ 4, 5, and 6 of Session Law 2013-385, reclassifies a number of Class 1 and Class 2 misdemeanors as Class 3 misdemeanors as of the same effective date. As a result of those changes, the Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets that accompanied Session Law 2013-360 reduced IDS' budget by \$2 million each year of the biennium.

The following IDS policy generally applies when the highest charge against a defendant is a Class 3 misdemeanor offense that was committed on or after December 1, 2013. The following policy does not apply when the General Statutes otherwise provide that a Class 3 misdemeanor charge against a defendant who has three or fewer prior convictions is punishable by an active or suspended term of imprisonment, such as a second or subsequent violation of G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol) or G.S. 20-138.2B (operating a school bus after consuming alcohol). It also does not apply when the General Statutes provide that an offense that would otherwise be a Class 3 misdemeanor under some circumstances is a higher class of misdemeanor under other circumstances, such as G.S. 20-28(a) (providing that driving while license revoked is a Class 1 misdemeanor if the person's license was originally revoked for an impaired driving revocation).

Whenever the term "Court" is used in this policy, it means the presiding judge or the clerk of superior court acting pursuant to his or her authority under G.S. 7A-453 or G.S. 15A-601(e).

IDS Policy:

A defendant who is charged with a Class 3 misdemeanor shall not be exposed to an active or suspended term of imprisonment unless the Court finds that the defendant has four or more prior convictions. If the Court does not find that the defendant has four or more prior convictions at the time the Court determines entitlement to counsel and the defendant is not in custody, the Court should not appoint counsel regardless of the defendant's indigency and the case should proceed as a fine only case pursuant to new G.S. 15A-1340.23(d). Consistent with a defendant's rights against self-incrimination under the Fifth Amendment to the United States Constitution, the Court should not ask the defendant about his or her prior convictions. If the Court finds evidence of four or more prior convictions at a later stage in the proceedings, the Court should either appoint counsel if the defendant is indigent and give counsel an appropriate amount of time to prepare a defense or find that the defendant will not receive an active or suspended term of imprisonment.

If a defendant who is not entitled to counsel for a Class 3 misdemeanor is in custody at the time the Court determines entitlement to counsel, the Court should consider modifying the pretrial detainee's conditions of release to allow him or her to be released pending trial without posting a secured bond, such as by imposing one of the conditions set forth in G.S. 15A-534(a)(1) through (a)(3) or, if the defendant is indigent, appoint counsel to represent the pretrial detainee during the period of pretrial confinement on the Class 3 misdemeanor charge to ensure that he or she has

meaningful access to the courts. This type of appointment would constitute a limited appearance pursuant to G.S. 15A-141(3) and G.S. 15A-143. An attorney so appointed would have authority to represent the defendant both for purposes of modifying the conditions of release and in the underlying Class 3 misdemeanor case, but the appointment would end at the time of the defendant's release from custody.

If the Court appoints a private attorney, an attorney who is under contract with IDS, or a public defender office to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has not found that the defendant has four or more prior convictions or is in pretrial custody, the attorney should inform the Court that the appointment is not authorized by North Carolina law and/or file a motion to withdraw. If the Court appoints a private attorney in violation of this policy, IDS shall not compensate that attorney for the case. If the Court appoints an attorney who is under contract with IDS or a public defender office in violation of this policy, IDS shall not award dispositional credit for the case.

If the Court appoints an attorney to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has found that the defendant has four or more prior convictions, the appointed attorney is not expected to go behind the Court's finding and make an independent determination of its validity. However, if the Court appoints an attorney to represent a defendant who is charged with a Class 3 misdemeanor based on a finding that the offense was committed before December 1, 2013, and that finding contradicts the date of the offense on the warrant, the finding is facially invalid and the appointed attorney should file a motion to reconsider whether there are any other grounds to support appointment of counsel including the requisite number of prior convictions or the fact that the defendant is in pre-trial custody.

Effective December 1, 2013, a revised version of form AOC-CR-224 ("Order of Assignment or Denial of Counsel") will be available to facilitate the Court's ability to record whether a defendant who is charged with a Class 3 misdemeanor has more than three prior convictions and whether the defendant is entitled to counsel. A private assigned attorney who is seeking payment for representing a defendant charged with a Class 3 misdemeanor shall attach to his or her fee application the completed form AOC-CR-224 (Rev. 12/13).

Policy effective December 1, 2013. Revised February 4, 2014 and March 4, 2014.

Authority:

G.S. 7A-451(a)(1); 7A-498.3(c); 7A-498.5(f); § 18B.13.(a) of S.L. 2013-360; *Bourdon v. Loughren*, 386 F.3d 88 (2d Cir. 2004) (holding that pretrial detainees have a right to meaningful access to the courts to defend against the criminal charges resulting in their detention).