

CLASS 3 MISDEMEANORS & RECLASSIFICATION AS INFRACTIONS

IDS PRESENTATION TO NC COURTS COMMISSION

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This Presentation Will Cover:

- Right to appointed counsel in misdemeanor cases
- IDS' FY11 misdemeanor reclassification study
- Misdemeanor changes General Assembly enacted during 2013 session and problems that have resulted
- IDS' recommendation for 2015 session

RIGHT TO APPOINTED COUNSEL IN MISDEMEANOR CASES

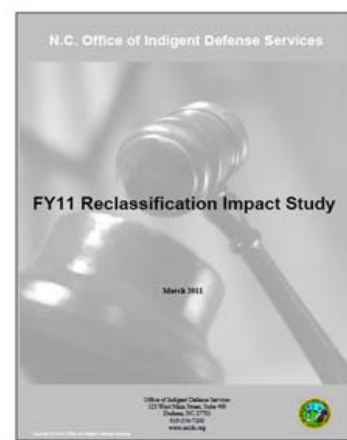
Statutory and Constitutional

- G.S. 7A-451(a)(1) : An indigent person is entitled to services of counsel in any case in which imprisonment or fine of \$500 or more is likely to be adjudged
- *Alabama v. Shelton*, 535 U.S. 654 (2002): A suspended sentence that may ultimately result in deprivation of an indigent criminal defendant's liberty may not be imposed unless defendant was afforded counsel
- Thus, if actual or suspended term of imprisonment is possible outcome in case, an indigent defendant is entitled to appointed counsel at state expense
- But if worst possible outcome for defendant is fine of less than \$500, there is no right to appointed counsel

IDS' FY11 RECLASSIFICATION STUDY

S.L. 2009-451, §15.17

- In S.L. 2009-451, §15.17, General Assembly directed IDS to consult with other system actors and formulate proposals aimed at reducing future costs, including possible reclassification of some minor misdemeanor offenses that rarely or never result in jail sentences



<http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY11ReclassificationImpactStudy.pdf>

IDS' FY11 Reclassification Study

- As a result of that directive, IDS studied the cost savings that would be generated by reclassifying 31 misdemeanor statutes as infractions, as well as the case outcomes for those misdemeanors

IDS Reclassification Study Statutes					
# of Charges	Code	Type	Class	Offense Description	NC General Statute
5,856	5470	T	2	ALLOW UNLICENSED TO DRIVE	20-34
184,566	5441	T	2	NO OPERATORS LICENSE	20-7(A)
18,425	5493	T	2	LICENSE NOT IN POSSESSION	20-7(A)
7,307	5455	T	2	FAIL COMPLY LIC RESTRICTIONS	20-7(E)
2,152	5469	T	2	EXPIRED OPERATORS LICENSE	20-7(F)
3,194	6207	M	ranges	FISHING WITHOUT A LICENSE	113-270.18(A)
600	6202	M	ranges	FISHING WITHOUT A LICENSE-NR	113-270.18(A)
816	6343	M	ranges	RECREATIONAL FISH W/O LICENSE	113-174.1(A)
216,908	5418	T	1	DWLR	20-28(A)
50,646	2666	M	2	SIMPLE WORTHLESS CHECK	14-107(D)(1)
74	2650	M	2	OBTAIN PROPERTY WORTHLESS CHK	14-106
287,435	5450	T	2	SPEEDING	20-141.1(1)
4,827	5407	T	2	NO REGISTRATION CARD	20-57(C)
187,320	5461	T	2	EXPIRED REGISTRATION CARD/TAG	20-111(2)
3,760	5485	T	2	DR/ALLOW REG PLATE NOT DISPLAY	20-111(1)
25,600	5491	T	2	DRIVE/ALLOW MV NO REGISTRATION	20-111(2)
48,281	5556	T	2	FICT/CNCL/REV REG CARD/TAG	20-111(2)
5,672	5569	T	2	FAIL TO SIGN REGISTRATION CARD	20-57(C)
7,321	4721	T	2	CANCL/REVOK/SUSP CERTIF/TAG	20-111(2)
8,820	4722	T	2	FICT/ALT TITLE/REG CARD/TAG	20-111(2)
630	5558	T	2	ALTERED REG CARD/TAG	20-111(2)
4,275	5538	T	3	GIVE/LEND/BORROW LIC PLATE	20-111(3)
1477	2649	M	2	FAIL RETN PROP RENTD PUR OPT	14-168.4
1051	2640	M	2	FAIL TO RETURN RENTAL PROPERTY	14-167
79	2302	M	1	MISDEMEANOR CONVERSION	14-168.1
13,016	5421	T	2	FAIL TO NOTIFY DMV ADDR CHANGE	20-7.1
510	5503	T	2	REG/TITLE ADDRESS CHANGE VIO	20-67
82,895	5494	T	1	OPERATE VEH NO INS	20-313(A)
1,714	5489	T	2	NO LIABILITY INSURANCE	20-309
1,798	5565	T	1	PERMIT OPERATION VEH NO INS	20-313
18,085	5596	T	2	WINDOW TINTING VIOL	20-127(D)

IDS' FY11 Reclassification Study

- 17 statutes were originally selected for study:
 - Large number of charges pursuant to them
 - Large percentage of charges ended in dismissals
 - Low likelihood of objection to reclassification because, e.g., offense is victimless crime
 - Conference of DAs did not object to statutes IDS selected (but expressed some LEO safety concerns about window tinting violations)
- 14 other statutes were added to IDS' study because so closely related to original 17 that likely candidates for "charge shifting" – e.g.:

14-107(D)(1)	Simple worthless checks
14-106	Obtaining property in return for worthless check, draft, or order
- In addition to 31 misdemeanor statutes identified by IDS, study examined 13 other misdemeanors that Sentencing and Policy Advisory Commission recommended for reclassification as infractions

Study Findings (based on FY09 data)

- NC court system (not IDS) handled large number of cases involving the 31 statutes selected by IDS:
 - 977,750 cases where defendant was charged with violating at least one selected statute (but faced other charges that may have required appointment of counsel)
 - 489,136 cases where defendant was charged with violating only one selected statute (and did not face other charges that may have required appointment of counsel)
 - 199,873 cases where defendant was charged with violating multiple selected statutes (so all statutes violated would have to be reclassified to impact right to counsel)

Study's Findings (based on FY09 data)

- Majority of those cases ended in dismissals:
 - Cases charged pursuant to 12 selected statutes ended in dismissals at least 75% of the time
 - Cases charged pursuant to 21 selected statutes ended in dismissals at least 50% of the time
 - For all but 2 selected statutes (DWLR and misdemeanor conversion), less than 1% of cases ended in active time

Study's Estimated Cost Savings

- Excluding DWLR cases, reclassification as infractions of all other statutes selected by IDS would have generated savings of approximately \$2.25 million in appointed attorney fees
 - Based on previous higher PAC rate of \$75 per hour
 - At current district court rate of \$55 per hour, projected savings would be closer to \$1.65 million
- Projected savings reduced dramatically if only some of the 31 statutes reclassified as infractions
- DWLRs excluded because more than 70 ways to have license revoked in NC, including prior DWIs and failures to comply, and IDS would not recommend reclassification of DWLRs based on prior DWIs
 - IDS requested data from DMV to quantify savings from reclassifying DWLRs based on failures to comply (not DWIs) but was told there would be a \$15,000 charge
- If 13 additional statutes recommended by Sentencing Commission were also reclassified, almost \$1 million in additional savings on appointed counsel
 - Again based on previous higher PAC rate of \$75 per hour; closer to \$730,000 at current \$55 rate

2013 MISDEMEANOR CHANGES

2013 Legislative Session

- Effective for offenses committed on or after December 1, 2013, § 18B.13.(a) of S.L. 2013-360 amended G.S. 15A-1340.23 to provide that, unless otherwise noted, maximum punishment for person convicted of Class 3 misdemeanor with no more than 3 prior convictions is \$200 fine
 - Thus, unless otherwise noted, indigent defendants charged with committing Class 3 misdemeanor on or after December 1, 2013 with no more than 3 prior convictions not entitled to appointed counsel pursuant to G.S. 7A-451(a)(1)
- S.L. 2013-360, § 18B.14, as amended by §§ 4, 5, and 6 of S.L. 2013-385, also reclassified number of Class 1 and 2 misdemeanors as Class 3 misdemeanors or infractions

The 31 Selected Statutes Today

- Of the 31 offenses that IDS recommended to be reclassified as infractions:
 - 20 were Class 1 or 2 Misdemeanors that are now Class 3
 - 1 was already a Class 3 and was not changed
 - 1 was a Class 2 and was not changed
 - 9 extremely minor offenses are now infractions
 - 6 Ch. 20 motor vehicle infractions (e.g., license not in possession)
 - 3 Ch. 113 fishing without license infractions (e.g., fishing without license)
- Additional changes were made to other statutes not studied by IDS

FY14 Savings (changes effective for 7 months of FY)

- Difficult to measure savings from something that did not happen (i.e., counsel was not appointed or paid)
 - Misdemeanor demand fluctuates from year to year
 - IDS' FY13 misdemeanor spending was unusually low before Class 3 changes
 - Least serious misdemeanor cases may require less than average per-case misdemeanor costs for counsel
 - Meaningful analysis will be time consuming and will have to be based on ACIS data
- Very preliminary analysis of IDS' maximum savings from misdemeanor reclassification during FY14 is approximately \$375,000
- Annualized, that could result in approximately \$900,000 in savings in FY15 if all stars align

Implementation Challenges

- Tying right to appointed counsel (determined at beginning of cases) to number of defendants' prior convictions (determined at end of cases for sentencing purposes) has been extremely challenging to implement:
 - Judges often do not know number of prior convictions when appointment decision has to be made
 - Prosecutors often do not have time to run record checks before a defendant's first appearance
 - Defendant who has 3 or fewer prior convictions at beginning of case may pick up additional charges and have 4 or more prior convictions at time of sentencing
 - Court can appoint counsel later if jeopardy has not attached (through commencement of trial or acceptance of plea) or punishment is limited to fine

Implementation Challenges

- Defendants may be in pretrial custody for Class 3 misdemeanor
 - If an indigent defendant is in pretrial confinement on Class 3 misdemeanor charge, s/he should receive appointed counsel pursuant to case law holding that inmates have right of meaningful access to courts
 - *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)
 - IDS policies allow courts to appoint counsel to ensure access to courts during time period of pretrial confinement (limited appearance)

Revised Assignment of Counsel Form

(AOC-CR-224)

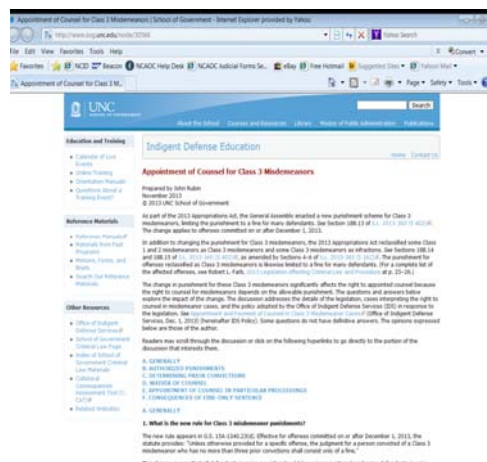
I. ASSIGNMENT OF COUNSEL	
<p>From the petition heard in this matter, the affidavit made by the applicant named above, and the inquiry made by the Court, which is documented in the record, it is determined that the applicant is not financially able to provide the necessary expenses of legal representation, and (check one):</p>	
<p><input type="checkbox"/> 1. is charged with a felony, a misdemeanor other than a Class 3, or a Class 3 misdemeanor that was committed before December 1, 2013, or is a petitioner or respondent in a proceeding or action listed in G.S. 7A-451(a); it is ORDERED that the applicant is indigent and is entitled to the services of counsel as contemplated by law; and that the attorney named below or the public defender in this judicial district shall provide representation.</p>	<p>Box #1: Offenses committed before 12/1/13</p>
<p><input type="checkbox"/> 2. is charged with a Class 3 misdemeanor that was committed on or after December 1, 2013, and (check one):</p> <p><input type="checkbox"/> a. the Court has found that the defendant has more than three prior convictions; it is ORDERED that the applicant is indigent and is entitled to the services of counsel as contemplated by law;</p> <p><input type="checkbox"/> b. the Court has not found at this time that the defendant has more than three prior convictions, the defendant is in custody, the Court does not intend at this appearance to modify the defendant's conditions of release to allow the defendant to be released pending trial without posting a secured bond, and the defendant has a constitutional right to meaningful access to the courts; it is ORDERED that the applicant is indigent and is entitled to the services of counsel as contemplated by law; and that the attorney named below or the public defender in this judicial district shall provide representation that is limited pursuant to G.S. 15A-141(3) and 15A-143 to the time period of the applicant's pretrial confinement on the Class 3 misdemeanor charge.</p>	<p>Box #2.a.: Offenses committed after 12/1/13 and more than 3 priors</p> <p>Box #2.b.: Offenses committed after 12/1/13 but defendant is in custody (limited appointment)</p>
<p>It is further ORDERED that the defendant shall be represented by:</p> <p><input type="checkbox"/> the attorney named below. <input type="checkbox"/> the public defender in this judicial district.</p>	
<p>Name of Appointed Attorney (if Applicable)</p>	<p>Next Court Date</p>
<p>Date</p>	<p>Signature</p>
<p><input type="checkbox"/> Judge <input type="checkbox"/> Clerk of Superior Court <input type="checkbox"/> Asst. CSC <input type="checkbox"/> Deputy CSC <input type="checkbox"/> Magistrate</p>	

Errors on Assignment Forms

- IDS requires assignment form to be attached to fee applications in Class 3 misdemeanor cases so we can determine if we have authority to pay
- Especially in high-volume urban counties, District Court Judges are extremely busy and have limited time to make appointment findings, so there have been a lot of errors
 - IDS does not go behind facially valid findings about prior convictions to make any determination of their accuracy
 - BUT, we return fee applications to judges if findings on CR-224 are facially invalid (e.g., 15 CR file number and judge checked box for offense committed before 12/1/13)
 - Causing additional strain for judges, clerks, attorneys, and IDS staff
- Taxpayers have lost more in overall court system efficiency than IDS has saved in appointed counsel costs

Clearing the Confusion?

- SOG has published answers to a number of Frequently Asked Questions about appointments in Class 3 misdemeanor cases:
<http://www.sog.unc.edu/node/30566>
- But there are still a lot of unsettled legal questions (e.g., whether someone charged with multiple Class 3 misdemeanors who is facing an aggregate fine of \$500 or more is entitled to counsel)



May Just Delay Appointment of Counsel

- What happens if indigent defendant is convicted of Class 3 fine-only misdemeanor and cannot pay the fine?
- IDS has heard that some judges are issuing show cause orders and appointing counsel at that point
- So, in some cases, appointment of counsel is just delayed and not eliminated

IDS' Funding Already Cut

- As a result of the misdemeanor changes during 2013 session, the 2013 Appropriations Act reduced IDS' budget by \$2 million each year of biennium
- So, IDS' budget has already been cut by more than full projected savings at current PAC rates (\$1.65 million) if all 31 offenses were reclassified as infractions
- Any further reclassification should not result in further funding reductions for IDS, but would help IDS meet \$2 million reduction already imposed

Treating Fine Only Cases as Infractions is Better Policy

- If a defendant's conduct only warrants a fine, it should not be treated as criminal
- People convicted of Class 3 misdemeanors suffer from all the collateral consequences of a criminal conviction (e.g., employment, housing, licensing, etc.), and should receive assistance of counsel if indigent

Collateral Consequences

- Search of Class 3 misdemeanors in C-CAT produced 55 pages of possible collateral consequences that may be triggered
- For example, a person who is convicted of Class 3 misdemeanor of simple possession of marijuana cannot be employed in position involved with preparation, sale, distribution, or dispensing of alcoholic beverages for 2 years
- So, a college student who is convicted of possession of 1 marijuana joint cannot wait tables at a restaurant or bar to help pay for her education for 2 years?



IDS' RECOMMENDATION FOR 2015 LONG SESSION

IDS' Recommendation

- Reclassify remaining selected offenses in IDS' study as infractions without regard to prior convictions
 - Do not tie right to counsel to prior convictions!
- Because infractions are assigned IF file numbers, it is clear to everyone that there is no right to counsel and that IDS has no authority to pay for the representation
- Implementing this recommendation would help IDS meet \$2 million annual reduction that has already been imposed; it should not serve as basis for reducing IDS' budget even further

QUESTIONS?

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