12.3. Types of Cases in which Right to Counsel Applies

A. Felonies

Generally. The Sixth Amendment guarantees the right to counsel to any indigent person accused of a felony. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Mays*, 14 N.C. App. 90 (1972); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 11.2(a), at 611 n.12. This right attaches regardless of the punishment that is authorized or imposed for the offense.

Capital felonies. An indigent defendant charged with a capital crime is statutorily entitled to the appointment of two attorneys to represent him or her at trial and in postconviction proceedings. *See* G.S. 7A-450(b1) (trial); G.S. 7A-451(c), (c1) (postconviction).

B. Misdemeanors

Sentence of actual or suspended imprisonment. An indigent person has a Sixth Amendment right to counsel in all misdemeanor cases in which actual imprisonment or a suspended sentence of imprisonment is imposed. The formulation of this right has developed over a series of U.S. Supreme Court decisions. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972) (recognizing basic right in misdemeanor cases); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (in misdemeanor cases, "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel"); *Alabama v. Shelton*, 535 U.S. 654 (2002) (indigent defendant has right to appointed counsel in misdemeanor case if court imposes suspended sentence of imprisonment); *see also North v. Russell*, 427 U.S. 328 (1976) (recognizing that in two-tiered court system, such as North Carolina's district and superior court system, judge at each level must inform indigent defendant of right to counsel if sentence of confinement is to be imposed).

This rule has three effects. First, if the court has not appointed counsel for an indigent defendant and the indigent defendant has not waived counsel, the court is prohibited from imposing an active or suspended sentence of imprisonment. For example, suppose a district court judge refuses to appoint counsel in a misdemeanor case and continues the case to another date, when it will be heard by a second district court judge. If the second judge does not revisit the earlier refusal to appoint counsel and the defendant does not waive counsel, the second judge may not sentence the defendant to an active or suspended term of imprisonment regardless of the evidence presented at trial or sentencing.

Second, if the court imposes a suspended sentence of imprisonment in violation of the defendant's right to counsel, the court in a later proceeding may not revoke the defendant's probation and activate the sentence. This prohibition applies even if the defendant is represented by counsel at the probation revocation hearing. *See Shelton*, 535 U.S. 654; *State v. Neeley*, 307 N.C. 247 (1982) (trial judge may not activate suspended

sentence if, in original proceeding in which suspended sentence was imposed, defendant did not have counsel and had not waived counsel); *accord State v. Barnes*, 65 N.C. App. 426 (1983) (applying *Neeley* to district court case); *State v. Black*, 51 N.C. App. 687 (1981) (to same effect as *Neeley*).

Third, if the court imposed an active or suspended term of imprisonment for a misdemeanor despite the failure to appoint counsel, the conviction should not be available in a subsequent proceeding to impeach, enhance a sentence, or increase the level of an offense. The reason is that when a sentence of imprisonment—actual or suspended—is imposed for a misdemeanor, the case is considered serious enough to require the protection of counsel. As in a felony case, if a conviction is obtained without counsel having been afforded to the defendant, the conviction should be subject to suppression. In this respect, the U.S. Supreme Court's decision in *Shelton*, which held that an indigent defendant has a right to counsel if a suspended sentence of imprisonment is imposed, appears to modify or at least clarify *Nichols v. United States*, 511 U.S. 738 (1994). *Nichols* held that a prior uncounseled misdemeanor conviction could be used to enhance a defendant's sentence in a subsequent proceeding if the defendant did not have a right to counsel at the prior proceeding. After *Shelton*, a prior misdemeanor conviction should not be useable in a subsequent proceeding if the prior conviction resulted in an active or suspended sentence of imprisonment, the defendant did not have counsel, and the defendant did not waive counsel.

Sentence not involving imprisonment. An indigent defendant does not have a Sixth Amendment right to appointed counsel for a misdemeanor if an active or suspended sentence of imprisonment is not imposed. *See Shelton*, 535 U.S. 654; *Scott*, 440 U.S. 367. Thus, under the Sixth Amendment, a court may impose a fine or restitution without affording counsel to an indigent defendant if the court does not include an active or suspended term of imprisonment. For a discussion of the procedures after a failure to pay, including the right to have counsel appointed, see *infra* § 12.3E, Nonpayment of Fine.

G.S. 7A-451(a)(1) provides indigent criminal defendants with a broader right to counsel. It provides for appointed counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars . . . or more, is likely to be adjudged." While it is unclear whether there is a meaningful difference between the statutory language and the constitutional requirements in cases involving imprisonment, the statute appears broader in fine-only cases, providing for counsel when the court imposes a fine of $500 or more.

Legislative note: Effective for offenses committed on or after December 1, 2013, section 18B.13 of the 2013 Appropriations Act (S.L. 2013-360 (S 402), as amended by S.L. 2013-363 (H 112), S.L. 2013-380 (H 936), and S.L. 2013-385 (S 182)), revises the punishment for Class 3 misdemeanors. Among other things, it adds G.S. 15A-1340.23(d) to provide that unless otherwise provided for a specific offense, the punishment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions may consist of a fine only. The potential impact of this change on appointment practices is not yet clear.

C. Juvenile Proceedings

Delinquency. A juvenile who is alleged to be delinquent is entitled to counsel at all proceedings before the juvenile court, including transfer proceedings, adjudications, and disposition hearings. This right is based on both due process and state statute. *See* G.S. 7B-2000(a) (juvenile within jurisdiction of juvenile court has right to appointed counsel in all proceedings); G.S. 7A-451(a)(8) (juvenile has right to counsel at hearing in which commitment to institution or transfer to superior court for felony trial is possible); *In re Gault*, 387 U.S. 1 (1967) (recognizing due process right to counsel in juvenile delinquency proceedings). Juveniles are "conclusively presumed to be indigent," and if they have not retained counsel, counsel must be appointed for them. G.S. 7B-2000(b).

Undisciplined behavior. A juvenile generally has no right to appointed counsel in cases in which he or she is alleged to be undisciplined. *See In re Walker*, 282 N.C. 28 (1972) (counsel not required at hearing on an undisciplined child petition). *But see generally Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (due process may require appointment of counsel in cases where person's liberty is not at stake but where fundamental fairness requires it); N.C. R. CIV. P. 17(b) (appointment of guardian ad litem authorized for children [rule rarely invoked for child alleged to be undisciplined]).

G.S. 7B-2000(a)(ii) gives juveniles the right to appointed counsel in an undisciplined case if alleged to be in contempt of court. However, effective October 1, 2012, the General Assembly rewrote G.S. 7B-2505 and deleted the provision that authorized a court to hold a juvenile in contempt for failing to comply with a court order after being adjudicated undisciplined. 2012 N.C. Sess. Laws Ch. 172 (H 853).

Interrogation of juveniles. Special rules apply to the interrogation of juveniles. *See infra* "Custodial interrogation of juvenile" in § 12.4C, Particular Proceedings.

D. Contempt

Differences between criminal and civil contempt. Criminal contempt is intended to punish a person for a past act in violation of a court order. There are three different types of criminal contempt proceedings:

- summary proceedings for direct criminal contempt;
- plenary proceedings for direct criminal contempt; and
- plenary proceedings for indirect criminal contempt.

In the latter two types of proceedings, an indigent person has a constitutional right to have counsel appointed if imprisonment is imposed.

Civil contempt is intended to coerce a person to comply with a court's order, not to punish for a previous violation. The characterization of contempt as civil or criminal has various procedural consequences. For example, appeal of criminal contempt is to superior court for a trial de novo, and appeal of civil contempt is to the court of appeals. *See* John

L. Saxon, *Using Contempt to Enforce Child Support Orders*, SPECIAL SERIES NO. 17 (UNC School of Government, 2004).

For purposes of appointment of counsel, the differences between civil contempt and plenary proceedings for criminal contempt (whether direct or indirect) are minimal. In all of those proceedings, an indigent person is entitled to have counsel appointed if imprisonment is imposed.

Summary proceedings for direct criminal contempt. The court is not required to appoint counsel when imposing summary measures for direct contempt. *See In re Williams*, 269 N.C. 68 (1967) (summary punishment for direct contempt does not contemplate trial at which person charged with contempt must have counsel).

There are a number of restrictions applicable to these proceedings. First, the contempt must be "direct." *See* G.S. 5A-13 (act must be committed within sight or hearing of presiding official, committed in or in immediate proximity to room where proceedings are being held before court, and likely to interrupt or interfere with matters then before court). For example, a defendant who shouts obscenities at a judge during court proceedings has engaged in direct contempt.

Second, the court must act "summarily"—that is, the court must impose any necessary measures "substantially contemporaneously" with the contempt. G.S. 5A-14(a). If the court delays imposing measures, it must initiate plenary proceedings, discussed below.

Third, before imposing summary punishment, the court must give the defendant summary notice and opportunity to respond and must find facts beyond a reasonable doubt supporting summary measures. *See* G.S. 5A-14(b).

Last, if a person is held in summary criminal contempt by a "judicial official inferior to a superior court judge," such as a district court judge, the person has the right to a de novo review in superior court. G.S. 5A-17. A de novo hearing is a plenary proceeding. *State v. Ford*, 164 N.C. App. 566 (2004). Therefore, the person is entitled to counsel as in plenary proceedings, discussed below.

Plenary proceedings for direct criminal contempt. An indigent person has a right to appointed counsel in plenary proceedings for direct criminal contempt if imprisonment is likely to be imposed. *See* G.S. 7A-451(a)(1); *Hammock v. Bencini*, 98 N.C. App. 510 (1990). A defendant also would appear to be entitled to counsel if the court imposes a suspended sentence of imprisonment. *See supra* § 12.3B, Misdemeanors (defendant entitled to counsel in misdemeanor case if suspended sentence of imprisonment imposed).

Plenary proceedings for direct criminal contempt are required when the judicial official chooses not to proceed summarily (that is, the judge does not proceed immediately) or is not authorized to proceed summarily. *See* G.S. 5A-15; *O'Briant v. O'Briant*, 313 N.C. 432 (1985) (when court does not act immediately to punish act constituting direct

contempt, notice and hearing required); *see also Groppi v. Leslie*, 404 U.S. 496 (1972) (in case alleging contempt of legislative body, due process violated by failure of legislature to give defendant notice and opportunity to respond to contempt charge that was brought two days after alleged contempt).

Plenary proceedings for indirect criminal contempt, including child support and probation violations. An indigent person has the same right to appointed counsel in proceedings for indirect criminal contempt as in plenary proceedings for direct criminal contempt.

Any criminal contempt that is not a direct criminal contempt constitutes an indirect criminal contempt. For example, a contempt committed outside the courtroom, such as a failure to pay child support or a probation violation under G.S. 5A-11(a)(9a), constitutes an indirect criminal contempt, and plenary proceedings are required pursuant to G.S. 5A-15.

Civil contempt. In *McBride v. McBride*, 334 N.C. 124 (1993), the N.C. Supreme Court held that an indigent defendant charged with civil contempt for failing to pay child support may not be incarcerated unless he or she has been appointed counsel or has waived counsel. The court rejected the argument that the right to counsel depends on whether the case is considered civil or criminal, stating that "jail is just as bleak no matter which label is used." 334 N.C. at 130 (citation omitted). Although *McBride* concerned a child support contempt case, its reasoning applies equally to any contempt proceeding in which the defendant is incarcerated. *See* John L. Saxon, McBride v. McBride*: Implementing the Supreme Court's Decision Requiring Appointment of Counsel in Civil Contempt Proceedings*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 94/05 at 1 n.3 (Institute of Government, May 1994).

In *Turner v. Rogers*, ___ U.S. ___, 131 S. Ct. 2507 (2011), the U.S. Supreme Court took a somewhat more limited view of the right to appointed counsel in civil contempt proceedings. It held that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)." *Id.*, 131 S. Ct. at 2520 (emphasis in original). The Court limited its holding, however, to cases in which the opposing party is not represented by counsel and the State provides adequate alternative procedural safeguards for the respondent. The Court found in *Turner* that the State had not satisfied these requirements and the respondent's incarceration without the benefit of counsel violated the Due Process Clause.

North Carolina law does not depend on the above analysis in determining the right to appointed counsel in civil contempt proceedings. Until revisited by the North Carolina appellate courts, *McBride* requires the provision of counsel to an indigent person in a civil contempt proceeding resulting in incarceration unless counsel is waived.

Underlying paternity proceedings. In *Wake County, ex rel. Carrington v. Townes*, 306 N.C. 333 (1982), the court held that an indigent defendant did not have an automatic right

to counsel in a civil paternity action. Rather, the trial court should determine whether the defendant requires counsel in light of all the circumstances. The supreme court suggested that in most instances appointment of counsel is unnecessary.

The court also stated that "an indigent person cannot be sent to jail, in any later proceeding to enforce the support order, unless he had the benefit of legal assistance and advocacy at the proceeding in which paternity was determined." *Id.*, 306 N.C. at 336. It does not appear that any reported decisions have actually enforced such a requirement and, in light of *McBride* (discussed above), the courts may be unreceptive to such an argument. At the time of *Townes*, an indigent defendant charged with civil contempt for failing to pay child support did not have an automatic right to counsel even if sent to jail. *See Jolly v. Wright*, 300 N.C. 83 (1980), *overruled by McBride v. McBride*, 334 N.C. 124 (1993). Now that *McBride* has extended the right to counsel to defendants in civil contempt proceedings resulting in imprisonment, the courts could well conclude that the additional protection suggested by *Townes* is unnecessary. At most, *Townes* may mean that if the defendant in a civil proceeding should have been appointed counsel under the circumstances of the case, the defendant cannot be given a sentence of imprisonment for a later violation of orders from those proceedings.

Post-release supervision contempt. G.S. 143B-720(a) gives the Post-Release Supervision and Parole Commission authority to conduct contempt proceedings, in accordance with the requirements for plenary contempt proceedings under G.S. 5A-15, for a post-release supervision violation by a person on post-release supervision for an offense subject to sex offender registration requirements. In such cases, therefore, a person would appear to have an automatic right to appointed counsel if imprisonment is imposed or likely to be imposed. *See infra* "Parole and post-release supervision revocation and contempt hearings" in § 12.4C, Particular Proceedings.

Industrial Commission contempt proceedings. The North Carolina Industrial Commission has limited civil and criminal contempt powers under G.S. 97-80. IDS has released a memorandum outlining the relevant procedures for appointment of counsel for indigent people appearing in response to a show cause order issued by the Commission. *See* Memorandum from Danielle Carman, IDS Assistant Dir./Gen. Counsel, Appointment and Comp. of Counsel in Indus. Comm'n Contempt Proceedings (Aug. 22, 2012), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/IndustCommissionContemptProceedings.pdf.

E. Nonpayment of Fine

G.S. 15A-1361 through G.S. 15A-1365 establish a procedure for collecting fines in cases in which the court imposes a fine only. Although structured sentencing allows a court to impose fine-only sentences in any case in which community punishment is authorized, including felonies, such sentences are typically imposed in misdemeanor cases only. A defendant's right to counsel depends on the amount of the fine, stage of the proceedings, and procedure followed.

Fine-only sentence. G.S. 15A-1364(a) and (b) provide that a court may impose a fine without an active or suspended term of imprisonment and, if the defendant fails to pay, may issue an order requiring the defendant to show cause why he or she should not be imprisoned. Unless the defendant was unable to comply, the court may impose a term of imprisonment of up to 30 days for nonpayment. This procedure is similar to contempt.

It is unclear whether imprisonment is constitutionally permissible for nonpayment if the defendant was not afforded counsel at the time the fine was imposed. *See generally United States v. Pollard*, 389 F.3d 101, 105–06 (4th Cir. 2004); *United States v. Perez-Macias*, 335 F.3d 421, 428 (5th Cir. 2003). (Under G.S. 7A-451(a)(1), the defendant would be statutorily entitled to counsel at the initial proceeding if the fine is $500 or more. *See supra* "Sentence not involving imprisonment" in § 12.3B, Misdemeanors.) The defendant is entitled to counsel at a show cause hearing for the nonpayment of any fine if a sentence of imprisonment is or is likely to be imposed. *See supra* § 12.3D, Contempt.

Fine and suspended sentence. G.S. 15A-1362(c) permits a court to impose a fine and a specific sentence to be served in the event the fine is not paid. At the time of imposing the sentence, the court also may issue an order requiring the defendant to appear and show cause if he or she fails to pay.

If the court follows this procedure, the court would appear to be required to afford counsel to the defendant at the initial proceeding in which the fine and sentence of imprisonment are imposed. *See supra* "Sentence of actual or suspended imprisonment" in § 12.3B, Misdemeanors. Also, to activate a sentence of imprisonment at a show cause proceeding, the court would need to afford counsel to the defendant.