PUBLIC DEFENDERS AND RELATED MATTERS

REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL
to
THE GOVERNOR
and
THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
RICHMOND
1965

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PUBLIC DEFENDERS AND RELATED MATTERS

REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL

Richmond, Virginia, December 13, 1965

To:

HONORABLE A. S. HARRISON, JR., *Governor of Virginia*

and

THE GENERAL ASSEMBLY OF VIRGINIA

In *Gideon v. Wainwright,* 372 U. S. 335, the United States Supreme Court in 1963 held that an indigent defendant in a serious criminal prosecution in a state court has the right to have the court appoint an attorney to represent him. Since this decision the American Bar Association, local bar associations and court officials have been searching for means to provide adequate legal assistance to indigent persons and to improve the existing methods of so doing. In addition, studies have been undertaken to find means to release more readily on bail persons charged with minor crimes to enable them to return to their jobs and families and avoid confinement in jail for long periods awaiting trial. Many states have tried different systems of appointing counsel and for releasing persons on bail or recognizance, and some constructive changes have resulted.

Realizing the importance of these and related subjects, Governor Harrison by letter of June 29, 1964, requested the Virginia Advisory Legislative Council to study them. A portion of this letter follows:

COMMONWEALTH OF VIRGINIA
Governor's Office
Richmond

June 29, 1964

The Honorable E. E. Willey, Chairman
Virginia Advisory Legislative Council
c/o The Honorable John B. Boatwright, Jr.
State Capitol
Richmond, Virginia

Dear Senator Willey:

..... I, therefore, respectfully request the Virginia Advisory Legislative Council to make a study and report on the need of a public defender system, of a statute specifying the time at which counsel should be appointed to defend indigents accused of felonies, the method of making such appointments, the length of time which should elapse between the appointment of counsel and the time of trial, the necessity of a revision of the Virginia recidivist statute, and such other matters as may come to the Council's attention in connection with this study.

I would hope the study and report could be concluded by November 1, 1965.

Sincerely yours,

/s/ A. S. Harrison, Jr.

On July 15, 1964, Governor Harrison requested the Council to increase the scope of its study to include the matter of greater use of recognizance and the advisability of regulating professional bondsmen. A copy of his letter follows:

COMMONWEALTH OF VIRGINIA

Governor's Office

Richmond

July 15, 1964.

The Honorable E. E. Willey, Chairman
Virginia Advisory Legislative Council
c/o The Honorable John B. Boatwright, Jr.
State Capitol
Richmond, Virginia

Dear Senator Willey:

On June twenty-ninth I addressed a request to you as Chairman of the Virginia Advisory Legislative Council for a study relating to the problems attendant to trial of persons charged with felonies. The administration of criminal justice also involves the question of bail in appropriate cases.

I am advised that the Department of Justice currently is engaged in a study of the advisability of using recognizance instead of bail in certain criminal cases.

I shall appreciate the Virginia Advisory Legislative Council enlarging the scope of the Public Defenders Study to include the matter of greater use of recognizance, and the advisability of the regulation of professional bondsmen by an appropriate agency.

With kind regards, I am

Sincerely yours,

/s/ A. S. Harrison, Jr.

The Council selected Joseph C. Hutcheson of Lawrenceville, member of the Senate and member of the Council, to serve as Chairman of the Committee to make the initial study and report to it. The following were chosen to serve with Senator Hutcheson on this Committee: Russell M. Carneal, member of the House of Delegates and a practicing attorney, Williamsburg; Joseph Curtis, Dean, Marshall-Wythe School of Law, College of William and Mary, Williamsburg; Ernest H. Dervishian, a practicing attorney, Richmond; Robert C. Fitzgerald, member of the Senate and a practicing attorney, Falls Church; J. Segar Gravatt, county judge and a practicing attorney, Blackstone; William J. Hassan, Commonwealth's Attorney, Arlington; E. W. Hening, Jr., Judge, Tenth Judicial Circuit, Richmond; W. Moscoe Huntley, Judge, Hustings Court, Richmond; Sterling Hutcheson, retired Judge of the United States District Court, Boydton; Ligon L. Jones, Judge, Third Judicial Circuit, Hopewell; Robert C. Nusbaum, a practicing attorney, Norfolk; Albert L. Philpott, member of the House of Delegates and a practicing attorney, Bassett; and C. Stuart Wheatley, a practicing attorney, Danville.

William T. Muse, Dean, T. C. Williams School of Law, Richmond, was appointed to serve on this Committee but asked to be excused because of the pressure of other business.

The Committee elected Albert L. Philpott Vice-Chairman. John B. Boatwright, Jr. and Frank R. Dunham served as Secretary and Recording Secretary, respectively, to the Committee.

The Committee carefully considered the problems presented to it, held a public hearing in Richmond after wide publicity was given thereto and heard presentations from the American Bar Association, from Mr. Daniel J. Freed of the United States Department of Justice and from many other interested parties. After careful study and consideration, the Committee made its report to the Council. The Council has reviewed the report of the Committee and makes the following recommendations:

RECOMMENDATIONS

1. The system of appointing attorneys to represent indigent persons charged with felonies presently used in this State should be continued, but this system should be augmented and improved in the following manner: The Virginia State Bar should establish in each circuit a circuit director of court appointed attorneys. Such circuit director should be elected in the same manner that members of the Council of the Virginia State Bar are elected. His term of office should be for three years and he should receive his expenses, and a $25 per diem not to exceed $600 per annum, while engaged in the work of his office. His duties should be as follows:

(a) To provide each court within the circuit a list of attorneys competent and willing to be appointed as counsel in defense of indigent defendants;

(b) To examine the qualifications of attorneys willing to be appointed in such cases; and

(c) To confer with the judges of the various courts in the circuit concerning the appointment of such counsel in order to coordinate appointments so that the load of cases is spread evenly among the members of the Bar competent to represent defendants in criminal cases.

Such circuit directors should report to the Secretary of the Virginia State Bar, whose duty it would be to keep such records, make such suggestions and reports as may be required from time to time by the Virginia State Bar, coordinate and supervise the work of the circuit directors, and make recommendations to the Council of the Virginia State Bar for improving the system and services of court appointed attorneys.

2. The definition of an indigent as set forth in § 19.1-241.3 of the Code should remain the same.

3. Every person charged with a felony not free on bail or otherwise should be brought before the judge of a court not of record not later than the next day on which such court sits; he should then be advised by the court of his right to counsel and the amount of his bail. At this time, if appropriate, the statement of indigence provided for in § 19.1-241.3 of the Code should be executed.

4. An attorney should be appointed to represent an indigent person charged with a felony at the time of his first appearance before a court.

5. In felony cases where a defendant with sufficient means to employ an attorney refuses to do so, and the court appoints an attorney to represent him, such attorney's fees should be determined by the court on a quantum meruit basis. If the defendant is convicted, the court would enter judgment against the defendant. If the defendant is acquitted, the

attorney may recover for his services by instituting a civil proceeding against the defendant.

6. In regard to the recidivist statutes, further study should be made of the system of sentencing in the State and of other relevant matters to determine whether the recidivist statutes should be repealed or further amended. We recommend that a resolution be presented to the 1966 Session of the General Assembly to continue the study of the problems of fixing punishment in criminal cases and of post-conviction proceedings generally, with the thought of possible changes in dealing with habitual criminals. This is a very involved matter and all matters relating to these questions should be included in this study. Such problems as the possible enactment of a statute similar to the post-conviction statute of North Carolina or of the Uniform Post-Conviction Act adopted by the National Conference of Commissioners on Uniform State Laws should be considered. Also, Maryland has recently enacted a statute creating certain agencies to assist courts in sentencing and treating habitual criminals. This also is worthy of consideration.

As an interim measure we suggest the following amendments to the existing recidivist statutes:

(a) Since the records of conviction in a hearing under the recidivist statutes are necessary, the present system of the clerk of the court of conviction supplying to the Superintendent of the State Penitentiary only an abstract of the judgment of conviction is not workable. A certified copy of the order of trial and the sentencing order should be supplied to the Superintendent of the Penitentiary and Code § 19.1-296 should be amended accordingly.

(b) Code § 53-296 should be clarified to remove the antiquated provision for a "bystander" jury to try recidivist cases.

(c) Determination of unrecorded matters of fact contesting the validity of a prior conviction in a recidivist hearing should be referred back to the court of trial for determination and certification. Code § 53-296 should be amended to so provide.

(d) Code § 53-296 should be amended further to eliminate the maximum sentence period for persons twice committed to a penitentiary.

7. Professional bondsmen should be required to register with and obtain a license from the Department of Professional and Occupational Registration. A certificate of good moral character issued by the judge of the circuit or corporation court of the principal place of business of the applicant should accompany the application for registration. A registration fee not in excess of one hundred dollars per year is suggested. This fee may be reduced if the expenses of administration can be reduced or other moneys become available.

(a) The supervisory powers of the Department should include the requiring of monthly reports not later than the tenth of each month which report shall list bonds issued and the security therefor.

(i) Failure to file such reports within thirty days would result in the automatic suspension of license; such license might be reinstated after hearing by the Director. Mere lateness would call for a penalty of twenty-five dollars.

(ii) Falsifying such reports would be a misdemeanor and a conviction would operate to revoke a license.

(b) In addition to registration fees, in case of bond forfeitures, a fee should be added and made payable to the Department for financing the program.

(c) Upon the suspension or revocation of a bondsman's license, outstanding bonds should remain in force.

(d) The powers of local governments to impose license taxes on professional bondsmen would not be affected.

The provisions of a statute carrying out these recommendations should be effective January one, ninteen hundred sixty-seven.

8. Other statutes required to improve bail and bonding procedures are the following:

(a) A provision that professional bondsmen be prohibited from being designated in writing or otherwise as agent of the person bonded for the purpose of employing an attorney to represent such person.

(b) A provision against conveying or encumbering any real estate posted by a bondsman as security for a bonding business without the approval of the court in which the bondsman obtained his certificate of good moral character and without notice to the Department of Professional and Occupational Registration.

(c) A provision that bail bonds run from the time posted until termination of all criminal proceedings in reference to the offense charged, including appeal to and all proceedings in a court of record.

(d) A provision to authorize county and municipal judges in their discretion and under their direction to permit committing magistrates to release persons charged with misdemeanors on their own recognizance. A provision should also be enacted making it a misdemeanor and punishable as such for a defendant to fail to appear for trial in a misdemeanor case when released on his own recognizance.

(e) The revision of §§ 19.1-109 and 19.1-110 is necessary in order to conform these sections to the preceding recommendations.

REASONS FOR RECOMMENDATIONS

Defense of Indigent Persons

1. Available systems for legal representation of indigent persons charged with felonies have been thoroughly examined. It is our conclusion that the system of court appointed attorneys presently in use in this State is by far the best system for such representation. However, the Council believes that this system as it now exists can be improved by better administration and a concentrated effort to obtain more qualified and willing court appointed attorneys. The responsibility of administering this system should be vested in the Virginia State Bar and we recommend that liaison between the court and the bar be maintained by an attorney in each circuit elected by the bar thereof in the same manner as are members of the Council of the Virginia State Bar. This person would be known as the circuit director of court appointed attorneys. He would take no part in the trial of any case. However, because of his experience, he will be acquainted with lawyers who have criminal trial experience and can advise the court of attorneys to be appointed. In addition, in the event that any attorney feels that he is overworked or an undue burden has been placed upon him, the circuit director can consult with the court and work out the matter. His duties would be to provide the court with a

list of competent and willing attorneys after he has examined their qualifications, confer with judges concerning the appointment of counsel and effectuate the fair allocation of the work load among competent members of the bar.

Such circuit director would not have to devote his full efforts and time to his duties, and his compensation would be based on a reasonable per diem while engaged in such business, which the Council recommends to be twenty-five dollars, his total compensation not to exceed six hundred dollars per year. The maximum allowance is based on a projected twenty-four full work days per year. Necessary expenses would also be payable.

As a coordinator of the program, the Secretary of the Virginia State Bar should require the circuit directors to file with him statistical data about attorneys in each circuit showing the frequency of their appointments, the length of time they have been engaged in the practice of law, the principal type of practice in which they engage and the manner in which they have handled cases assigned to them. The Secretary should compile these statistics, tabulate and distribute them. In addition, using these statistics, he could make recommendations to the Council of the Virginia State Bar and to the circuit directors for improving the system.

2. The definition of an indigent as set forth in § 19.1-241.3 of the Code was thought to be excellent and such definition should be retained. While it might be improved we have not seen, nor been informed of, a better definition. It has the further advantage of the gloss put upon it by our courts over the past. Minor changes in the form of the statement to be made by an indigent are recommended to clarify it.

3. The sooner counsel can be appointed to represent an indigent accused the better it is for the accused and the attorney. Early appointment of counsel for such persons enables the attorney to be in a better position to protect the rights of the accused and to become better informed of his duties and his case. Often accused persons are jailed on felony charges and some time elapses before they have knowledge of their right to have counsel appointed to represent them. In order to expedite the process we recommend that every accused person jailed for any felony be brought before a court not of record on the next day on which the court sits after he is put in jail and at that time be advised of the amount of his bail and his right to counsel. If such person states that he has no attorney to represent him and is financially unable to employ one, then the statement of indigence set forth in § 19.1-241.3 can be executed and an attorney quickly appointed.

4. The question of when an attorney for an indigent person charged with crime should be appointed received considerable study. It was determined that such an attorney should be appointed at the time of the first appearance of the person charged before any court. It was pointed out that under the federal procedure an appointment of an attorney at three o'clock in the morning for the purpose of attending a hearing for the setting of bail, which, in fact, might delay the setting of such bail, was deemed unnecessary by the federal courts. This may well be, but the Council desires to be certain that an attorney will be appointed at least at the time of the first hearing held for a defendant before any court.

The accompanying statutes set the time for the appointment of an attorney to represent an indigent person charged with a felony as "before any hearing of any nature". It is our belief that the setting of bail by a justice of the peace is not embraced within the term "a hearing of any nature" and appointment of an attorney at this time is unnecessary. The

appointment of counsel should be made prior to any judicial hearing which involves the question of guilt. The bail hearing does not involve a determination, even remotely, of guilt or innocence. Thus the appointment of counsel in the justice of the peace stage is not, and should not, be required.

5. Under Virginia law a person charged with a felony must have an attorney whether he wants one or not. To discourage the unnecessary use of court appointed attorneys by persons who are financially able to employ such but who refuse to do so, it was thought wise to enact a provision directing the court to determine the amount of such fees on a quantum meruit basis, and issue an order of judgment against such defendant for the amount thereof.

The question of the adequacy of fees for court appointed attorneys came to our attention. While we feel the fees presently provided by statute for court appointed attorneys are inadequate to compensate them for their time and effort, we make no recommendations on this matter at this time because we believe other matters come first. While this system is not intended to enrich lawyers, it should not force them to operate at a loss. The time required for investigation of a case, conferring with witnesses, preparing for trial, the actual trial, and subsequent appeals must be taken by someone. However, we feel the amount contributed by the attorney far outweighs the compensation allowed him.

Recidivist Statutes

6. Serious and mature consideration was given to the functioning of the present recidivist statutes. These statutes were enacted for the purpose of preventing the release from the State Penitentiary of persons prone to crime who, because of one or more prior felony convictions, have shown little or no intention of mending their ways, and appear apt to continue their life of crime when released. In short, persons who have been convicted more than once for a felony receive extra time in the penitentiary not as punishment for the latest crime committed but because of their status as habitual criminals.

The trial of persons under the recidivist statutes has become more and more expensive to the State and occupies more and more time of the two judges of the Tenth Circuit who are charged with the duty of trying such cases. It is our view that the whole system of dealing with recidivists should be studied with a view to the possible repeal and elimination of these statutes; extra punishment might be imposed at the time of original conviction. This, of course, would call for the record of prior convictions to be presented at the trial. In view of this, it might be that judges should be charged with the duty of sentencing prisoners and this function removed from the jury, which would then return a verdict of guilty or not guilty only. On the other hand means might be found to accomplish such sentencing effectively within our present jury system. As a result, we propose that a resolution be presented to the 1966 Session of the General Assembly directing the Virginia Advisory Legislative Council to study the problems of post conviction proceedings, the method of determining punishment in felony cases, the possible repeal of the present recidivist statutes and related matters.

For the interim there are certain amendments to the existing recidivist statutes which would expedite the trial and facilitate the work of the judges trying such cases. A discussion of the recommended changes in the present recidivist statutes follows:

(a) Since records of conviction are necessary for recidivist proceedings, the present system whereby the clerk of the court of conviction supplies to the Superintendent of the Penitentiary only an extract of the judgment is not workable. A certified copy of the order of trial and the sentencing order (where they are separate due to presentence report procedure) should be supplied to the Superintendent of the Penitentiary. Code § 19.1-296 should be amended in the second sentence thereof to require the clerk of the court in which the recidivist was originally convicted to transmit to the Superintendent a certified copy or copies of the order of trial and a certified copy of the complete final order of judgment.

(b) Since the present statute provides that a jury "of bystanders" shall be empaneled to inquire whether the convict is the same person mentioned in the several records, a question can arise as to the validity of such a jury. Although a jury of twelve bystanders was approved by the Virginia Supreme Court of Appeals in *King* v. *Lynn, Supt.*, 90 Va. 345, and this procedure was impliedly approved in *Tyson* v. *Hening*, 205 Va. 389, the "bystander" jury seems a little antiquated. The present practice is to call twelve jurors from a regular panel, but no strikes are afforded either the State or the defense. Code § 53-296 should be clarified by deleting the words "of bystanders" after the word "jury", thus permitting a regular criminal jury of twenty to be called, with each side exercising the usual four strikes, and thus providing a jury of twelve as in felony cases generally.

(c) Since the lawyer for the recidivist frequently raises questions as to the validity of a prior conviction based on unrecorded matters of fact, the court trying the alleged recidivist is unable to make a fair determination of such allegations without requiring the presence of persons who participated in the trial which is being attacked. As an example, a recidivist could allege that he was not effectively represented by counsel, that he was not represented by counsel, that he was not advised of his right to a jury trial, that his case was not tried in open court and other matters that frequently arise in habeas corpus cases. This could require the judge, clerk, Commonwealth's attorney, defense attorney, sheriff and others to come to Richmond to testify to refute the allegations made by the recidivist. Taking these people away from their duties is a waste of time and effort and an unwarranted expense. Accordingly, determination of such unrecorded matters of fact should be referred back to the court of trial for determination and certification. This is similar to the procedure followed in habeas corpus cases pursuant to Virginia Code § 8-598 (2nd paragraph), as amended in 1958. Code § 53-296 should be amended by adding an additional paragraph to so provide.

(d) The present five year maximum penalty for second offenders as provided by Code § 53-296 is not sufficient for the more heinous crimes. The judge sentencing the recidivist should have unrestricted discretion regarding both second and third offenders.

Professional Bondsmen

7. Professional bondsmen are presently subject to regulation by the courts in which their bonds are posted; in addition, some localities have enacted ordinances taxing and regulating bondsmen. The assets which the bondsman lists as security for bonds which he writes are checked by the courts, with the result that the judges must act as bookkeepers.

It is our opinion that if professional bondsmen were required to register with the Department of Professional and Occupational Registration after obtaining a certificate of good moral character from the judge

of the court of record in the principal place of business of the applicant, judges could be relieved of these clerical duties by turning them over to the Department. In this way, judges will have more time for their judicial duties and the Department can take over the responsibility of ensuring, on a State-wide basis, that professional bondsmen comply with the requirements of law. Bondsmen frequently operate in a number of jurisdictions and the judge of a single county or city cannot know of their operations outside of his jurisdiction.

As noted above, the Department, if vested with the duties proposed, would be in a position to check on the manner in which bondsmen execute their responsibilities. The statutes do not set forth these responsibilities in sufficient detail and there is no penalty provided for failure to carry out these responsibilities.

(a) Accordingly, we recommend that bondsmen be required to make monthly reports to the Department within ten days after the close of each month, setting forth the bonds issued and the security therefor.

(i) The monthly reports are important in order to provide the Department with current information on the amount of outstanding bonds and the property securing them. Therefore, these reports must be filed on time. If they are not, but are merely late by a few days, a twenty-five dollar penalty is suggested for late filing up to thirty days. Any lateness over thirty days would cause automatic suspension of the bondsman's license. The bondsman could then apply for reinstatement.

(ii) Lateness in making a report or failure to make a report is one thing, but making a false report is a serious matter. There is some doubt as to the penalty for this at the present time. Thus, we recommend that any bondsman making a false report be guilty of a misdemeanor and his license revoked upon conviction, in addition to other penalties.

(b) We have been informed that the cost of the program we contemplate would be between ten and fifteen thousand dollars a year. An annual registration fee not to exceed one hundred dollars is proposed to finance this program, in part. The remainder of the cost should be defrayed by a requirement that whenever a bond is forfeited, an additional cost in the amount of five dollars be imposed in the forfeiture proceedings and that such sum be transferred to the Department (this would not apply in traffic cases as there is presently a specific statute—§ 14.1-200.1—on this subject). If sufficient funds become available in this manner, the Department would be empowered to reduce the one hundred dollar license fee pro tanto.

(c) While it may become necessary to suspend or revoke a bondsman's license, such action should not affect outstanding bonds. The persons who have paid the premium thereon have done so in good faith and should not be affected by the action of the bondsmen.

(d) As noted above, local governments may impose license taxes on professional bondsmen. Our proposals do not affect this.

Statutes to embrace the foregoing should be made effective January one, nineteen hundred sixty-seven, as it will take some time for the Department to make an orderly transition to the new method. Also, the bondsmen should be afforded ample opportunity to comply with these requirements.

8. (a) We have been informed that certain abuses have arisen in that bondsmen act as agents of persons bonded for the purpose of employing counsel to represent such persons. This is close to the forbidden practice of running and capping. The bondsman, by virtue of his relationship with jailers and court officials, is in a position to violate this prohibition and every precaution should be taken to prevent it. Accordingly, we recommend that bondsmen be prohibited under penalty of a misdemeanor and revocation of license from being designated in writing, or otherwise, as agent of the person bonded for the purpose of employing an attorney for such person. This can be accomplished by a statutory provision that bondsmen shall be prohibited from receiving any compensation directly or indirectly for entering into bond, other than premiums authorized by law.

(b) Many bondsmen list real estate among their assets which they use as security in writing bonds. However, there is no prohibition, once the list of assets has been filed, against the bondsman selling or mortgaging the property so listed; this could result in the list of assets being of no value and the bonds thus written having no assets behind them. Accordingly, we recommend that where real estate is listed by a bondsman as one of the assets used as security for the bonds he writes, a prohibition against selling or encumbering such real estate be imposed. The release of a parcel of property would be effected by application to the court in which the bondsman obtains his certificate of good moral character, after notice to the Department.

(c) It is the common understanding that a bond which allows a person to be released from custody is intended to run from that time until the termination of proceedings in the circuit or corporation court or the filing of an appeal to the Supreme Court of Appeals. We have been told that there have been cases in which a defendant charged with a misdemeanor and released on bond had his bond cancelled after his trial in the court not of record and had to obtain a new bond for the appeal to the court of record. We recommend a statute to clarify this beyond question and make such a provision a condition of the bond.

(d) In our judgment, the time has come when certain individuals with ties in their community, even though arrested on a misdemeanor, should be released on their recognizance without having to give bond. Programs of this nature have been tried in several states and, when properly applied, have appeared to work well. We do not think a person charged with a serious misdemeanor or who would be likely to commit the same offense again if released, should be released on his own recognizance. Nonetheless, we believe a person charged with a minor misdemeanor, should be released on his own recognizance when such release is deemed advisable. It is recommended that county and municipal judges be authorized to issue directions to committing magistrates permitting such releases when certain factors and circumstances exist. No statute can set forth the administrative details for this program, but the county or municipal judges, if authorized by law, have the competence and experience to apply a program of this kind with good results. We exclude from this category traffic cases, for the common practice there is to post bond when both the officer and the accused understand that the accused will not appear for trial.

If the system of releasing persons charged with misdemeanors on their own recognizance without surety provides effective, this system might subsequently be expanded to include persons charged with certain felonies. For instance, felonies not involving violence might be a starting point.

If the use of recognizance is to be expanded as contemplated, a penalty will have to be provided for the defendant who is released on his recognizance but who does not appear for trial. Accordingly, we recommend that failure to appear for trial in such cases be a separate misdemeanor and punishable as such. This statute would apply to traffic cases, when bond is not posted, as well as to all other misdemeanors.

(e) Code §§ 19.1-109 and 19.1-110 appear to need rewording and updating if the preceding recommendation is to become effective. These changes are minor and self-explanatory.

CONCLUSION

We are hopeful that the adoption of the foregoing recommendations will lead to the improvement of the method of appointing attorneys for indigent persons accused of felonies and facilitate the quicker release of persons charged with misdemeanors from jail pending their trial. It should expedite the administration of justice, particularly for the indigent. We take some pride in the effectiveness of our present system of providing counsel for the indigent. On the whole, it has worked well. The proposed changes are designed to make it work better. We recognize the splendid efforts and sacrifices the Bar is making to provide attorneys for indigent individuals in felony cases. The system we recommend will facilitate their efforts.

The release of persons charged with minor misdemeanors should be made easier so that they can return to their jobs and homes pending their trial. If they have lived in their community for any time and are well known we trust that judges will release them where possible on their own recognizance. If the judges in their wise discretion determine such is inadvisable, we have tried to make it easier for persons to obtain bonds for their release.

As stated in our report the question of recidivist statutes poses many problems and we trust that a full and complete study of this matter can be undertaken.

A resolution and bills to effectuate the recommendations made herein are attached.

We acknowledge our indebtedness to the able and distinguished individuals who formed the Committee and to those members of the bar and others who gave it the benefit of their advice.

Respectfully submitted,

Edward E. Willey, *Chairman*
Tom Frost, *Vice-Chairman*
C. W. Cleaton
John Warren Cooke
John H. Daniel
Charles R. Fenwick
J. D. Hagood
Edward M. Hudgins
Charles K. Hutchens
J. C. Hutcheson
Lewis A. McMurran, Jr.
Charles D. Price
Arthur H. Richardson
William F. Stone

A BILL to amend the Code of Virginia by adding a section numbered 14.1-200.2, relating to the disposition of a part of forfeited bonds posted to guarantee the appearance before courts of certain persons charged with crimes.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding a section numbered 14.1-200.2 as follows:

§ 14.1-200.2. Whenever there are proceedings to forfeit a bond posted to secure the appearance before a court of a person charged with a crime, and such bond is forfeited to the Commonwealth, there shall be added to all other costs, penalties, fines and forfeitures assessed or assessable against the person posting such bond, the sum of five dollars to defray, in part, the cost of administration of Chapter 26 of Title 54. All sums so assessed shall be collectible as other costs due the State and shall be paid into the State treasury; the sums so collected are hereby appropriated to the Department of Professional and Occupational Registration for the purpose of administering the act regulating professional bondsmen.

As used in this act, the word "bond" includes money, securities, real estate, or any other security of whatever nature given to secure the appearance in court of a person charged with the commission of a crime; provided, however, that nothing in this act shall apply to any offense for which, upon conviction, additional costs are imposed under the provisions of § 14.1-200.1.

A BILL to amend and reenact §§ 19.1-109, 19.1-110 and 19.1-124 of the Code of Virginia, relating to admitting to bail of persons charged with certain crimes by arresting officers and justices of the peace and certain fees to be paid commissioners and clerks therefor.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.1-109, 19.1-110 and 19.1-124 of the Code of Virginia be amended and reenacted as follows:

§ 19.1-109. A person arrested on a capias to answer, or hear judgment on, a presentment, indictment or information for a misdemeanor, other than such as is mentioned in § 18.1-336 or on an attachment, other than an attachment to compel the performance of a judgment or of an order or decree in a civil case, may be admitted to bail by the officer who arrests him, the officer taking a recognizance in such sum, not being less than two hundred dollars unless by general or special order of the court a less sum be authorized, as he, regarding the case and estate of the accused, may deem sufficient to secure his appearance before the court from which the process issued at the time required thereby. The officer shall return the recognizance to the court on or before the return day of such process. If without sufficient cause he fail to make such return, he shall forfeit twenty dollars. *

§ 19.1-110. A justice of the peace before whom a person is brought charged with a misdemeanor * may, pending examination before him, or upon committing such person for trial, admit him to bail; provided, * *that notwithstanding any other provision of law, the judge of a county or municipal court may himself, or may authorize and direct any justice of the peace or bail commissioner within his jurisdiction to release, without any monetary guarantee or surety therefor, any person brought before him charged with a misdemeanor other than a violation of the traffic laws, upon the written promise of such person to appear to answer for the offense with which he is charged at a prescribed place and time. The judge of the county or municipal court shall prescribe the requirements to be observed by the justices of the peace and bail commissioners within his jurisdiction in so releasing persons.*

In addition any judge of a municipal or county court or the judge of a court of record in * *any* city or county may authorize a justice of the peace to admit * *a* person charged with *a* felony to bail. If the offense be a felony, * he shall not be let to bail by any justice of the peace, nor shall any person in jail under an order of commitment be admitted to bail by any justice of the peace, except the one committing him, nor in a less sum than was required by such order.

Any person released on his own recognizance who fails to appear at the prescribed place and time shall be guilty of a misdemeanor and punished as provided by law.

§ 19.1-124. The fee of the commissioner or clerk for admitting a person to bail *or releasing a person upon his recognizance under § 19.1-110* shall be two dollars. In no case shall the payment of such fee be made out of the State Treasury.

A BILL to amend and reenact §§ 19.1-241.1, 19.1-241.2 and 19.1-241.3 of the Code of Virginia, and to repeal § 19.1-241, relating to court appointed attorneys to represent persons charged with the commission of certain crimes, and the time at which such persons shall be first brought before certain courts.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.1-241.1, 19.1-241.2 and 19.1-241.3 of the Code of Virginia be amended and reenacted, as follows:

§ 19.1-241.1. * *In any case in which a person is* charged with * a felony *and appears for any hearing before any court without being represented by counsel, such court shall, before proceeding with the hearing, appoint an attorney at law to represent him and provide such person legal representation throughout* every stage of the proceeding against him. *

§ 19.1-241.2. *Every person charged with the commission of a felony not free on bail or otherwise shall be brought before the judge of a court not of record on the first day on which such court sits after the person is charged. At this time,* the judge * shall inform the accused of his right * *to counsel and the amount of his bail. The accused shall be allowed* a reasonable opportunity to employ counsel of his own choice *or if appropriate, the statement of indigence provided or in § 19.1-241.3 of the Code shall be executed.*

§ 19.1-241.3. * *At the first appearance of any person charged with a felony before a court,* the judge thereof shall ascertain, before * *such hearing* whether or not the defendant is represented by counsel. If the defendant is not represented by counsel, the court shall ascertain by oral examination of the defendant and other competent evidence whether or not the defendant is indigent within the contemplation of law; and if the court *thereby* determines * that such defendant is indigent as contemplated by law, the court shall provide the defendant with a * statement which shall contain the following:

"I have been advised *this* ..... *day of* ....., *19*..... by the (name of court) court of my rights to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel of my own choosing and I hereby request * *the* court to appoint counsel for me."

.....(signature of accused.)

The defendant shall execute the said statement under oath, and the said court shall appoint competent counsel to represent the defendant in the proceedings against him. The order of appointment of counsel and the executed statement herein provided for shall be filed with, * *and* become a part of, the record of such proceedings. * Counsel so appointed shall represent the defendant at * *any* preliminary hearing and at other stages of the proceedings until relieved or replaced in the manner provided by law.

2. § 19.1-241 of the Code of Virginia is repealed.

A BILL to amend and reenact § 19.1-241.5 of the Code of Virginia, relating to compensation for court appointed attorneys in criminal cases.

Be it enacted by the General Assembly of Virginia:

1. That § 19.1-241.5 of the Code of Virginia be amended and reenacted as follows:

§ 19.1-241.5. Counsel appointed to represent the defendant upon a felony charge shall be compensated for his services in an amount fixed by each of the courts in which he appears, except that in no event shall the payment for services rendered in the proceedings before * *a* court not of record exceed the sum of twenty-five dollars.

If a person charged with a felony has sufficient financial means to employ an attorney but refuses to do so and asks the court to appoint an attorney to represent him, the fee of such attorney shall be as set by the court on a quantum meruit basis and, if the defendant be acquitted, collected by such attorney in the same manner as any other fee. If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be paid such attorney out of the fund for criminal charges and such amount shall be taxed against the defendant as a part of the costs of the prosecution, and if collected, the same shall be paid to the Commonwealth; an abstract of such costs shall be docketed and indexed as in other criminal cases, in the judgment docket and execution lien book maintained by the clerk of the court of such city or county in whose office deeds are admitted to record.

A BILL to amend and reenact § 19.1-296 of the Code of Virginia, relating to transportation to the penitentiary of persons sentenced to the penitentiary and other related matters.

Be it enacted by the General Assembly of Virginia:

1. That § 19.1-296 of the Code of Virginia be amended and reenacted as follows:

§ 19.1-296. Every person sentenced by a court to confinement in the penitentiary shall, as soon as may be, be conveyed to the penitentiary in the manner hereinafter provided. The clerk of the court in which the person is sentenced shall forthwith transmit to the superintendent of the penitentiary * *an abstract* of the judgment *and, within thirty days from the date of the judgment shall forthwith transmit to the superintendent of the penitentiary a certified copy or copies of the order of trial and a certified copy of the complete final order,* and if he fail to do so he shall forfeit one hundred dollars. Upon receiving such copy the superintendent of the penitentiary shall dispatch a guard to the county or corporation with a warrant directed to the sheriff authorizing him to deliver the convict, whose duty it shall be to take charge of the person and convey him to the penitentiary. If because of the number of persons to be conveyed to the penitentiary or because there is reason to apprehend an attempt to rescue, the superintendent shall deem it necessary he may dispatch more than one guard and make provision for the employment by the guard of persons to assist him in the performance of his duty. The superintendent shall be entitled to receive from the State Corporation Commission such certificates of transportation as he may require in executing the provisions of this section, and other expenses incurred by him in the execution thereof he shall pay, the same to be allowed him in the settlement of his accounts; provided, that the superintendent may in any proper case require the sheriff of any county or the sergeant of any corporation to deliver such convict at a * *place* designated by the superintendent, to be there delivered to his authorized agent, and for such services the court of such county or corporation shall allow the sheriff or sergeant a reasonable compensation, to be paid out of the State treasury.

A BILL to amend and reenact § 53-296 of the Code of Virginia, relating to additional confinement for certain convicts sentenced to like punishment.

Be it enacted by the General Assembly of Virginia:

1. That § 53-296 of the Code of Virginia be amended and reenacted as follows:

§ 53-296. When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury * shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, * he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.

If the Circuit Court of the city of Richmond cannot, on the evidence available, make a determination of the convict's allegation of illegality of his prior conviction by reason of unrecorded matters of fact relative to his prior conviction, the Circuit Court of the city of Richmond may certify such question for hearing and determination to the court of said conviction which court shall conduct a hearing and make a finding of fact and determination of such unrecorded matters of fact, sending a certified copy of its order to the Circuit Court of the city of Richmond.

A BILL to amend the Code of Virginia by adding in Chapter 4 of Title 54 an article numbered 2.1, containing a section numbered 54-52.3, to authorize the Council of the Virginia State Bar to facilitate the defense, under certain conditions, of persons charged with certain crimes and to impose certain duties upon the Secretary of the Bar in connection therewith.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding an article numbered 2.1 in Chapter 4 of Title 54 containing a section numbered 54-52.3, as follows:

Article 2.1

Defense of Certain Indigent Persons

§ 54-52.3. (a) The Council of the Virginia State Bar shall establish in each judicial circuit of the State a Circuit Director of Attorneys appointed under §§ 19.1-241.1 through 19.1-241.6, to defend indigent persons charged with certain crimes. Such Director shall be elected in the same manner as members of the Council. Each such Director shall serve for a term of three years, receive a per diem of twenty-five dollars for each day spent in the discharge of his duties but not more than six hundred dollars in any one year, and be reimbursed for expenses incurred in the discharge of his duties.

(b) Such Director shall:

Provide each court of record and not of record, having jurisdiction in criminal cases, with a list of names and addresses of attorneys in his circuit competent and willing to be appointed to defend indigent persons;

Confer with the judges of such courts in his circuit concerning the appointment of counsel to defend indigent persons and the equitable apportionment of assignments among counsel appointed to defend indigent persons charged with criminal offenses; and

Perform such related duties as the Council directs.

(c) Each Director shall make reports to the Secretary of the Bar at such times as he requires. The Secretary shall maintain such records, make such reports and perform such duties in connection with the administration of this section as the Council directs to the end that the defense of indigent persons charged with the commission of crimes may be improved and made more effective.

A BILL to amend the Code of Virginia by adding in Title 54 a chapter numbered 26 containing sections numbered 54-899 through 54-911, relating to regulation of professional bondsmen by the Department of Professional and Occupational Registration; providing for the issuance of certificates; providing for the collection of certain fees; providing for the revocation or suspension of certificates of registration; and prohibiting certain acts; and to amend and reenact § 58-371.2, as amended, of the Code of Virginia relating to the issuance of revenue licenses to professional bondsmen by counties and cities.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding in Title 54 a chapter numbered 26 consisting of §§ 54-899 through 54-911, and to amend and reenact § 58-371.2, as amended, of the Code of Virginia, the new and amended sections being as follows:

CHAPTER 26

§ 54-899. No person, firm, corporation, partnership, association or other legal entity shall engage, for compensation, in the business of posting bonds or security or other thing of value securing the presence in court for trial on a criminal charge of a person charged with a crime, hereinafter referred to as a professional bondsman or bondsman, without first obtaining a license so to do issued by the Department of Professional and Occupational Registration. Such license shall be issued annually for a fee of one hundred dollars. Upon the issuance of a license, an identification card shall be issued to each bondsman licensed hereunder and another card to each of the agents employed by such licensed bondsman.

§ 54-900. The application for such license shall be in writing, verified by oath of the applicant, and shall state the name of the applicant, the residence of each person connected with the management of such business, a statement of all assets and liabilities whether listed as security for bonds or not, the address of the principal place of business, the courts in which the applicant intends to post bail bonds, a detailed description and the location of all real or personal property to be used to secure any bonds posted, which property would be subject to appropriate process of the court for the satisfaction of any bonds forfeited, and if previously engaged in such business, a complete financial statement certified under oath and a designation of all places where such business was conducted within the preceding twelve months. Every such application shall be accompanied by a certificate of the applicant's good moral character issued by the judge of the circuit, corporation or hustings court of the county or city of the applicant's residence or principal place of business.

§ 54-901. Every license shall expire on December thirty-one of each year. The Department of Professional and Occupational Registration shall issue a new license for each ensuing year in the absence of any reason or condition warranting the refusal of granting a license, upon the written request of the applicant and the payment of the fee therefor.

§ 54-902. The holder of a license shall file with the Department of Professional and Occupational Registration on the tenth of each and every month a written report verified under oath, setting forth all bonds in effect during the previous calender month, the names of the courts in which posted, the names and addresses of the persons for whom posted,

the amounts, the dates such bonds were posted and the security for such bonds.

§ 54-903. The filing of any report after the due date but not more than thirty days thereafter shall subject the bondsman so filing to a penalty of twenty-five dollars payable to the Department of Professional and Occupational Registration.

§ 54-904. Nothing herein shall be construed to affect the payment of any occupational or other tax imposed or levied by any county, city or town in which a bail bonding business is conducted.

§ 54-905. If any license issued hereunder is suspended or revoked, any bonds issued by the holder thereof outstanding at the time of the revocation or suspension shall remain in effect until the proceedings for which such bonds are posted have been terminated.

§ 54-906. (a) Any license issued hereunder shall be revoked in case of:

(1) The filing of any material false information with the Department of Professional and Occupational Registration.

(2) The designation in writing or otherwise of a bail bondsman as agent of a person bonded for the purpose of employing an attorney to represent such person.

(3) The encumbering of any real or personal property posted by a bondsman as security for his bonding business, without the prior release in writing of such property by the court in which the bondsman obtained his certificate of good moral character and without prior notice in writing to the Department of Professional and Occupational Registration.

(4) Conviction of a felony or of any misdemeanor involving moral turpitude or the willful filing of a false report under this chapter.

(b) Failure to file any report or other information required by the Department within thirty days of the date it is due or requested shall operate to suspend the license issued by the Department.

§ 54-907. All bonds issued by a bondsman shall be deemed to contain a provision that the bond shall be in effect from the time issued until all proceedings have been concluded in the court not of record or if an appeal is taken to a court of record until proceedings have been concluded therein or if an appeal has been taken to the Supreme Court of Appeals, until proceedings in that court have been concluded.

§ 54-908. Any property of any bondsman listed with the Department as security for bonds posted pursuant to § 54-902 shall be subject to appropriate processes of the court for the satisfaction of any forfeited bonds entered into by the bondsman.

§ 54-909. No bondsman shall have outstanding at any one time bonds in excess of eighty per centum of the value of the property listed as security pursuant to § 54-902. Should the Department determine that the outstanding bonds of any bondsman exceed eighty per centum of his listed securities, it shall suspend the license of such bondsman until the ratio has been attained or until the bondsman has listed additional security with the Department.

§ *54-910. Violation of any provision of this chapter shall constitute a misdemeanor unless some other penalty is provided by some other provision of law in which event the provisions of this chapter shall be cumulative.*

§ *54-911. All hearings by the Department of Professional and Occupational Registration shall be subject to Chapter 1.1 of Title 9. of the Code of Virginia. Nothing herein shall affect the operations of a surety company authorized to do business in this State.*

§ 58-371.2. *On and after the effective date of this Act,* the governing body of any county or city may by ordinance require that every person who shall, for compensation, enter into any bond or bonds for others, whether as a principal or surety, shall obtain a revenue license the amount of which shall be prescribed in such ordinance; and no such professional bondsman or his agent shall enter into any such bond or bonds in any such county or city until he shall have obtained such license. * No such license shall be issued by the authorities of any such county or city unless and until the applicant shall have * *a current license issued by the Department of Professional and Occupational Registration pursuant to* § *54-899 of the Code of Virginia.* A license granted to a professional bondsman in any such county or city shall authorize such person to enter into such bonds in such county or city.

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No person shall be licensed hereunder either as a professional bondsman or agent for any professional bondsman, when such person, or his or her spouse, holds any office as justice of the peace, magistrate, clerk or deputy clerk of any court.

The suspension or revocation of the license of a professional bondsman by the Department of Professional and Occupational Registration or the failure of a professional bondsman to have a current license issued by such Department, shall not result in the revocation of any revenue licenses issued hereunder by any county or city, but it shall prohibit any such bondsman from entering into any bonds as principal or surety until such license is reinstated.

Any ordinance enacted pursuant to the provisions of this section may provide for revocation of licenses for failure to comply with the terms of such ordinance and may in addition prescribe penalties for violations thereof.

Nothing in this section shall be construed to apply to guaranty, indemnity, fidelity and security companies doing business in Virginia under the provisions of §§ 38.1-269 to 38.1-657.

2. This act shall be in effect on and after January one, nineteen hundred sixty-seven.

SENATE JOINT RESOLUTION NO.

Directing the Virginia Advisory Legislative Council to continue its study of the possible revision of the recidivist statutes and related matters.

Whereas, at the request of the Governor, the Virginia Advisory Legislative Council in nineteen hundred sixty-four undertook a study of the establishment of a public defender system for indigent persons charged with felonies and of related matters, among which was the possible revision of the Virginia recidivist statutes, and

Whereas, the Council in considering changes in the recidivist statutes found that other questions were involved including the method of fixing punishment in felony cases; and

Whereas, the Council found that such questions were so basic that they were worthy of a separate study; now, therefore, be it

Resolved by the Senate, the House of Delegates concurring, That the Virginia Advisory Legislative Council is directed to continue the study of dealing with recidivists and habitual criminals, the feasibility of placing authority to sentence convicted felons in the hands of judges and removing such authority from the jury, and generally to study all problems of post-conviction proceedings and related matters. All agencies of the State shall assist the Council in its study. The Council shall complete its study and make its report to the Governor and the General Assembly not later than September one, nineteen hundred sixty-seven.