REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Alternative Indigent Defense Systems

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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MEMBERS OF THE COMMITTEE

William P. Robinson Jr , Chairman
Elmo G Cross Jr , Vice-Chairman
Thomas W. Moss Jr.
Alan A. Diamonstein
Ralph L. Axselle Jr
Whittington W Clement
Howard P. Anderson
Johnny S. Joannou
Dennis W. Dohnal, Esquire

STAFF

Legal and Research

Division of Legislative Services
Mary P. Devine, Staff Attorney
Mary K. Geisen, Research Assistant
Sherry M. Smith, Executive Secretary

Administrative and Clerical

Barbara H. Hanback, Office of the Clerk, House of Delegates

Report of the
Joint Subcommittee Studying
Alternative Indigent Defense Systems
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January 1, 1989

TO: Honorable Gerald L. Baliles, Governor of Virginia,
and
The General Assembly of Virginia

INTRODUCTION

In 1985, the General Assembly created two joint subcommittees to study the related issues of (i) alternative methods of providing criminal defense services to indigent persons and (ii) the feasibility and desirability of expanding the Public Defender System beyond the then-authorized four pilot programs These joint subcommittees met jointly and issued a joint report See House Document No. 15 and Senate Document No. 11, 1986. The joint subcommittee recommended a 15 percent increase in the maximum fees allowed to court-appointed counsel and creation of a fifth public defender office in Portsmouth. Both recommendations were approved by the 1986 Session of the General Assembly. Also in 1986, the General Assembly approved creation of a sixth public defender office. See Chapter 643, 1986 Acts of Assembly, § 1-12, Item 32. The sixth office was established in Richmond.

Finally, the joint subcommittees recommended and the General Assembly approved continuation of the study of indigent defense systems. The stated purpose of the continued study was to evaluate the effects of implementation of the fee increase and expansion of the public defender system into a core city on the costs, availability and quality of legal representation for indigent criminal defendants Additionally, the joint subcommittee wished to complete its study and formulate recommendations with respect to (i) the particular problems for counsel in capital cases, (ii) the need to establish uniform statewide eligibility standards for court-appointed counsel, (iii) an evaluation of the methods of selecting court-appointed counsel and (iv) an evaluation of the administrative procedures of the Public Defender Commission. See House Joint Resolution No. 51, 1986.

The issues under study are complex. The joint subcommittee was hampered by the unavailability in 1986 of credible data needed to evaluate the effects of their recommendations Further, the constitutional sufficiency of the system used to provide counsel to indigent criminal defendants seeking post-conviction relief in capital cases was being challenged in a class action suit in the U.S. District Court for the Eastern District of Virginia.[1] These factors resulted in another request by the joint subcommittee to continue its deliberations for another year See House Joint Resolution No 189, 1987

During 1987, the Virginia Bar Association Special Committee on Indigent Defendants conducted a comprehensive statewide survey of lawyers and judges to

ascertain their perceptions and identify improvements in the indigent defense system.[2] The Spangenburg Group, Inc , under a grant from the Virginia Law Foundation, began gathering statistical and fiscal data on methods of providing representation to indigent persons in post-conviction proceedings The Giarratano case continued to move through the federal courts. The joint subcommittee was concerned that any changes in the methods currently in use for indigent defendants in post-conviction proceedings might prejudice the Commonwealth's position. Again, the joint subcommittee found it necessary to request continuation of the study to await the results of the Bar Association project and the Spangenburg analysis, as well as the decision of the U.S Court of Appeals in the Giarratano case See House Joint Resolution No 141, 1988

No report was filed in either 1987 or 1988 as no substantive recommendations were made. In 1987, Delegate Owen B. Pickett was elected to the U.S House of Representatives Delegate Thomas W. Moss Jr., of Norfolk was appointed by the Speaker of the House of Delegates from the House Appropriations Committee to replace Mr Pickett Delegate Whittington W Clement of Danville was appointed by the Speaker from the House Appropriations Committee to replace Delegate Franklin P. Hall in 1988. The membership has otherwise remained the same.

The joint subcommittee held three meetings in Richmond during 1988. The Virginia Bar Association Special Committee on Indigent Defendants submitted its final report and recommendations to the joint subcommittee on November 2, 1988. See Appendix A.[3] The Spangenburg Group submitted its report and recommendations on December 6, 1988 See Appendix B.

SUMMARY OF RECOMMENDATIONS

Following a comprehensive review of the available data and recommendations submitted, the joint subcommittee makes the following recommendations:

1. The maximum fees allowed to court-appointed counsel should be increased immediately by 15 percent and additional increases should be enacted which are sufficient to place the Commonwealth at or near the national average of fees paid by 1992; and

2 The Department of Planning and Budget should conduct a multi-agency study of the cost and policy implications of further expansion of the public defender system and modifications in the court-appointed and public defender systems with a view toward recommendation of a cohesive, cost-effective method of providing a constitutionally sufficient system of representation for indigent criminal defendants, and

3 The Office of the Executive Secretary of the Supreme Court of Virginia should implement procedures designed to compensate court-appointed attorneys more fairly and cost effectively, including (i) a requirement that such attorneys certify the hours spent on a case under oath and allowing them compensation for those hours at a specified hourly rate, subject to the statutory maximum, unless reduced by the trial court for reasons specified in writing and (ii) application of a maximum hourly

rate to attorneys appointed for inmates pursuant to § 53.1-40 and attorneys appointed to prepare petitions for habeus corpus in capital cases; and

4. The joint subcommittee should be continued to allow further analysis of the recommendations made by the Virginia Bar Association Special Committee and the Spangenburg Group, particularly as those recommendations relate to continued fee increases for court-appointed counsel, expansion of the public defender system, creation of an appellate defender's office, establishment of a resource center to assist in the preparation of capital murder cases and identification of additional sources of funds to support these recommendations

CONSIDERATIONS AND FINDINGS

A September publication of the Bureau of Justice Statistics reported that Virginia ranks fortieth among the states in per capita costs per indigent case and forty-eighth in average costs per case [4] The 15 percent fee increase approved in 1985 had little effect on Virginia's national ranking with respect to state funding commitment for indigent defense. Patricia Smith of the Spangenburg Group testified that between 1982 and 1986, state expenditures for indigent defense services increased by 60 percent nationally; in Virginia, expenditures increased by only 16 percent.

The joint subcommittee believes this is an unacceptable situation. The Commonwealth is under a constitutional obligation to ensure that counsel are provided to indigent criminal defendants. The joint subcommittee recognizes that the Commonwealth also has an obligation to its citizens to ensure that this obligation is met in a cost-effective manner. Artificially low fees help to contain costs in the short run but create greater problems in the long run. A special panel of the American Bar Association recently reported that less than 3 percent of all government spending in the United States went to support all civil and criminal justice activities in fiscal year 1985. The report notes that "as currently funded, the criminal justice system cannot provide the quality of justice the public legitimately expects and the people working within the system wish to deliver." The report concludes that "[i]nadequate funding inevitably leads to . . . unreasonable caseloads for prosecutors and defense lawyers, possible compromise of prosecutions through plea bargaining, inadequate representation of accused persons, crowded court dockets, . . . jails and prisons.[5]

The Virginia Bar Association Special Committee made two significant observations First, it was noted that ". . there is a disturbing trend in some jurisdictions for attorneys, including the more experienced attorneys, not to volunteer to be included on the court-appointed counsel list or, if they are on the list, to ask to be removed from the list after a number of years of service."[6] The low fees were cited by respondents to the VBA. questionnaire as the major reason for this trend. Second, and far more disturbing to the joint subcommittee, 17.5 percent of the respondents indicated that they had foregone some activity that may have been beneficial to their client <u>because of low fees</u> (emphasis added) [7]

As in 1985, the joint subcommittee believes that a minimum 15 percent increase in the maximum fees is feasible and essential See Appendix C. A preliminary analysis indicates that at least an additional $1 7 million will be needed to implement this recommendation in FY 89 See Appendix D at page 4. The joint subcommittee is aware that additional demands will be made on the Criminal Fund in FY 89 based upon caseload increases above those projected for the biennium. The $1.7 million estimate does not take the caseload increase into account The joint subcommittee recognizes that the adequacy of state expenditures for persons charged with crimes is not a high priority with many citizens of the Commonwealth. Nonetheless, the joint subcommittee believes that it is unjustifiable for the Commonwealth to underfund the system designed to provide constitutionally mandated legal representation to indigent persons who are presumed innocent until found guilty of a crime

In conjunction with the fee increase, the joint subcommittee recommends that the Department of Planning and Budget head a multi-agency study. This study will provide data and analysis to the joint subcommittee on various funding and administrative issues involved in creating a cohesive and cost-effective indigent defense system. See Appendix E. The Public Defender Commission, the Office of the Executive Secretary of the Supreme Court, the Department of Criminal Justice Services and staff for the joint subcommittee and the House Appropriations Committee are asked to work with the Department. The Spangenburg Group may also be available through the American Bar Association Information Program to provide assistance. In addition to the items specifically mentioned in the proposed resolution, the joint subcommittee believes the Department study will necessarily involve the following issues.

The joint subcommittee endorses the Special Committee recommendation to increase the fees for court-appointed counsel until the fees in the Commonwealth approximate the national average cost-per-case. Again assuming no caseload increase, a preliminary analysis suggests that approximately $11 million will be needed to reach the average by 1992. See Appendix D, page 5 Additional revenue sources for the Criminal Fund and, in particular, indigent criminal defense services, must be identified. Nationally, expenditures for state-funded indigent defense systems are increasing by approximately 22 percent annually. Some states[8] are increasing filing fees or court costs to fund the increases. The joint subcommittee briefly discussed the feasibility of utilizing at least a portion of the proceeds of forfeitures and fines currently paid into the Literary Fund pursuant to Article VIII, § 8 of the Constitution of Virginia. The joint subcommittee asks the Department of Planning and Budget to recommend alternative funding sources

In addition, the Department is asked to perform a cost and administrative analysis of the following: (i) expansion of the public defender program into those jurisdictions where it is found to be more cost effective than a court-appointed counsel system, assuming increases in the maximum fees as recommended by the Special Committee, with greater authority being given to the Public Defender Commission to identify those areas in which a public defender office is found to be more cost effective or is needed because of the unwillingness of private attorneys to accept court appointments, and (ii) expansion of the public defender system to a statewide system. Preliminary analysis suggests that the Public Defender System is more effective as the primary indigent defense service when fees for court-appointed counsel are increased by the recommended 15 percent. See Appendix D, page 9

The joint subcommittee was particularly interested in two recommendations made by the Spangenburg Group. The first concerns creation of a state office of appellate defense. See Appendix A, page 71 Additional data on the funding and appropriate administrative structure is needed. In testimony before the joint subcommittee, Pat Smith estimated that the center would require $55,000 for start-up costs and an annual appropriation of $825,000 The joint subcommittee asks the Department to develop a model for consideration. The Spangenburg recommendation relates specifically to direct appeal and post-conviction proceedings in death penalty cases. However, the joint subcommittee believes that creation of such an office will affect the indigent defense system generally Cost savings may be possible in both the public defender and court-appointed counsel systems. The Spangenburg Group suggested that the joint subcommittee consider creation of such an appellate defenders office to handle all criminal appeals. Because of the greater potential for cost savings and administrative efficiency, the joint subcommittee asks the Department to consider such a proposal in its study.

The second recommendation from Spangenburg which has implications for the Department study, is the creation of a fully funded, centrally located resource center. See Appendix B, page 69. Again, the recommendation relates specifically to death penalty cases, but may have implications for the indigent defense system generally. The resources provided at the center will reduce some of the burdens placed on court-appointed counsel and public defenders. Access to services such as brief banks and law school clinical programs will alleviate hardships caused by manpower shortages in public defender offices and time constraints placed on court-appointed attorneys. It was suggested to the joint subcommittee that capital cases are as draining on the public defender system as they are on court-appointed counsel. Currently, the Public Defender offices respond administratively to a capital case by (i) passing additional cases to court-appointed counsel due to the manpower shortage created or (ii) having court-appointed counsel assigned as co-counsel with a public defender to handle the case.

The joint subcommittee believes creation of a resource center is desirable but that further study is needed to assess the costs and policy implications. It may be possible to locate a resource center at one of the law schools in the Commonwealth, thereby minimizing the costs to the Commonwealth. Additionally, it is noted that federal funds may be available to cover that portion of the activities and services of the center attributable to federal habeas corpus proceedings. The joint subcommittee asks the Department to evaluate the effects of creation of a resource center on the total costs to the Commonwealth of providing indigent defense services.

The joint subcommittee hopes to be in a position to finalize its recommendations in time to be considered by the 1990 Session of the General Assembly Therefore, the Department must submit the results of its study to the joint subcommittee prior to July 1. This time frame will give the joint subcommittee an opportunity to review the results and formulate final recommendations for inclusion in the next biennial budget.

Additionally, the joint subcommittee asks that its study be continued to allow further evaluation of the need for adoption of standardized eligibility criteria for court-appointed counsel and modification of the administrative

procedures used to compensate court-appointed attorneys. See Appendix F. In regard to the latter point, the joint subcommittee notes that there are variations among circuits and even among judges within the same circuit. The maximum fees are set by statute.[9] Court-appointed attorneys submit vouchers to the trial judges and the vouchers are forwarded to the Executive Secretary. There is no maximum fee specified in capital cases or for attorneys appointed by circuit judges to assist inmates pursuant to § 53 1-40. The fee is limited to ". . an amount deemed reasonable by the court." The Executive Secretary's Office has implemented a cost management policy which allows payment of the voucher for the amount requested in a capital case, provided that the amount does not exceed $40/hour for attorney time spent out-of-court and $60/hour for in-court time. These hourly rates are the same as those used in the federal courts in Virginia. The joint subcommittee believes the $40/hour rate should apply to the institutional attorneys appointed pursuant to § 53.1-40 as well The joint subcommittee recommends that the Executive Secretary implement such a policy. Further, the joint subcommittee recommends that the vouchers be modified to require the court-appointed attorneys to certify their hours, under oath. Unless a reason is specified and communicated to the attorney, in writing, the court should not be allowed to reduce the hours submitted. This will ensure that to the greatest extent possible, the compensation paid correlates with the work involved in the particular case.

CONCLUSION

Considerable progress has been made. The joint subcommittee is working toward a concensus in developing an appropriate indigent criminal defense system for the Commonwealth. Cost and administrative data must be evaluated to determine the feasibility of implementing the programs being considered. The joint subcommittee believes that intensive study in the next year will develop an efficient, cost-effective policy for providing legal services to indigent criminal defendants.

Respectfully submitted,

William P. Robinson Jr , Chairman
Elmo G. Cross Jr., Vice-Chairman
Thomas W. Moss Jr.
Alan A. Diamonstein
Ralph L. Axselle Jr.
Whittington W. Clement
Howard P. Anderson
Johnny S. Joannou
Dennis W. Dohnal, Esquire

Footnotes

1 Giarratano v. Sielaff (Civil Action No 85-0655-R)

2 The members of the Special Committee were: H. Lane Kneedler, James R. McHenry and James M. Pates, Co-Chairs, and Hon. Ernest Ballou, John R. Fletcher, Murray Janus, Joseph A. Massie, Hon. J Harry Michael, Hon. Norman K. Moon, and Anthony F. Troy.

3 The Defense of Indigents in Virginia: A Concensus for Change, Final Report of the Virginia Bar Association Special Committee on Indigent Defendants, October 1988 ("Final Report"). The full report is available through the Virginia Bar Association.

4 Criminal Defense for the Poor, 1986, Bureau of Justice Statistics Bulletin, U.S. Department of Justice, September 1988.

5 See Criminal Justice in Crisis, American Bar Association, as reported in Criminal Justice Newsletter, December 15, 1988.

6 See Final Report, at 15.

7 Id. at 23.

8 E.g., Louisiana, Alabama, Ohio.

9 § 19.2-163, Code of Virginia.

Appendices

Appendix A	Selected Portions of The Defense of Indigents in Virginia: A Concensus for Change, Final Report of the Virginia Bar Association Special Committee on Indigent Defendants, October 1988. Executive Summary, Committee Report and Consultants Report.
Appendix B	Study of Representation in Capital Cases in Virginia, The Spangenburg Group, November 1988
Appendix C	Suggested Legislation. Fee increase for court-appointed counsel.
Appendix D	Cost Issues Related to Indigent Defense, R. Ronald Jordan, Legislative Fiscal Analyst, House Appropriations Committee, December 6, 1988.
Appendix E	Suggested Legislation: Authority for Department of Planning and Budget to conduct costs analysis.
Appendix F	Suggested Legislation. Authority for continuation of joint subcommittee study.

APPENDIX A

THE DEFENSE OF INDIGENTS IN VIRGINIA: A CONSENSUS FOR CHANGE

FINAL REPORT
OF THE
VIRGINIA BAR ASSOCIATION
SPECIAL COMMITTEE ON INDIGENT DEFENDANTS

EXECUTIVE SUMMARY

OCTOBER, 1988

EXECUTIVE SUMMARY

In the spring of 1985, the Virginia Bar Association ("VBA") was asked by two General Assembly joint subcommittees (which later were merged into one Joint Subcommittee Studying Alternative Indigent Defense Systems) to participate in their ongoing study of the court-appointed counsel and public defender systems of providing legal representation to indigent defendants in the Commonwealth. The VBA responded by appointing this Special Committee on Indigent Defendants (the "Committee").

The Committee began its work by narrowing its focus in three significant ways. First, we focused on only two of the many issues involving legal representation of indigent defendants -- (1) whether that representation is best provided by a court-appointed counsel system, a public defender system, or a combination of the two, and (2) to the extent that a court-appointed system is retained, what the authorized counsel fees should be. Second, we focused on the representation to be provided at trial, not on appeal. Third, since the General Assembly intended to hold public hearings on these and other issues and to retain consultants to assist it in its work, we decided that we could be of greatest assistance to the Joint Subcommittee by conducting a survey of the bench and bar to determine their views on the above issues. That survey, in the form of a questionnaire that was sent to over 4300 of the 12,000 members of the Virginia State Bar, serves as a basis for many of the Committee's findings and recommendations.

Of the 41 cities and 95 counties in the Commonwealth, 11 cities and 12 counties currently are served by public defender's offices. The remaining jurisdictions are served by court-appointed counsel systems. The maximum fees for court-appointed counsel have been increased only once (in 1986) during the past 15 years, and in fact were decreased by approximately four percent in 1983. The current maximum fees authorized for court-appointed counsel are, for a case in district court, $86 for a single charge, and for a case in circuit court, $115 for a misdemeanor punishable by confinement, $230 for a felony punishable by 20 years imprisonment or less, $460 for a felony punishable by more than 20 years imprisonment, and a "reasonable amount" for a capital case.

The Committee's findings are as follows:

- The quality of individual defense counsel representing indigent defendants is adequate; many such counsel are extremely well qualified. But there are problems with the system of providing legal representation to indigent defendants.

- Retained counsel are viewed as being more effective and qualified than either court-appointed counsel or public defenders.

- The fee schedules for court-appointed counsel in non-capital cases, and the fees actually awarded in capital cases, are much too low.

- No detailed guidelines are available to assist judges in setting court-appointed counsel fees.

- No detailed guidelines are available to assist judges in determining the reasonableness of expenses for court-appointed counsel, and court-appointed counsel often are not fully reimbursed for expenses incurred.

- There is a disturbing trend in some jurisdictions for attorneys, including the more experienced attorneys, not to volunteer to be included on the court-appointed counsel list, or if they are on the list, to ask to be removed after a number of years of service.

- Representation provided by some court-appointed counsel may be affected by the low fees.

- Problems exist in the administration of the court-appointed counsel system with regard to how attorneys are determined to be sufficiently experienced and otherwise qualified to be included on the court-appointed counsel list, for what reasons they are removed from the list, and what criteria are in fact used to assign counsel to a particular case.

- The relative costs of the two systems are difficult to compare, especially in a jurisdiction such as Virginia where court-appointed counsel fees are low.

- There is a fairly even split statewide in preferences among attorneys and judges for a particular system, with a preference for the public defender system in urban areas, and for the court-appointed counsel system in rural areas. There was no clear preference for either system in the suburban areas.

Based on the above findings, its survey, its other research, and the experience of its members, the Committee recommends that:

1. The General Assembly should establish a public defender system in those major urban and heavily populated suburban areas of the Commonwealth where it can be demonstrated both that there is a preference for a public defender system and that such a system will be cost effective.

2. The General Assembly should establish a public defender system in rural areas where it can be demonstrated either that (a) there is a strong preference in a rural area for a public defender system and the establishment of such a system in that area clearly will be cost effective, or that (b) there is some other reason why a court-appointed system will not continue to provide adequate representation to indigent defendants in that area (e.g., where there is an insufficient number of local attorneys to provide the necessary assistance to indigent defendants under a court-appointed system).

3. The Virginia State Bar ("VSB"), VBA and the Judicial Conference should develop, and should recommend to the Judicial Council, criteria to assist judges in deciding whether a particular attorney is sufficiently experienced and otherwise qualified to be placed on the jurisdiction's court-appointed counsel list, when an attorney should be removed from that list, and whom to appoint to a particular case. Such criteria could include, for example, certain training and experience requirements before an attorney could be appointed to a serious felony case.

4. Because the trend among attorneys, especially the more experienced attorneys, in some jurisdictions is not to volunteer to be included on the court-appointed counsel list for that jurisdiction, or if they are on the list, to ask to be removed from the list after a number of years of service, the VSB and the VBA should develop incentives to encourage attorneys, including the most experienced attorneys, to volunteer to be included on and remain on the court-appointed counsel list for their jurisdiction, and to take a fair and representative share of court-appointed cases, especially in those jurisdictions where there is an insufficient number of experienced attorneys to be assigned to such cases. Such incentives could include free tuition for a certain number of hours of continuing legal education courses; reimbursement, after a certain number of hours of court-appointed service, of a portion of a court-appointed counsel's legal malpractice insurance premium; or some form of case and docket management that more specifically determines when court-appointed counsel must be in court so they can avoid long waiting periods before their court-appointed case is called.

5. The Committee is deeply concerned that 17.5% of the respondents to its questionnaire indicated that they had foregone some activity that may have been beneficial to their client because of low fees. The Committee recognizes, however, that there may be some ambiguity in both the question and the responses. It could be that certain activities were not

undertaken because they were not truly necessary. To the extent, however, that certain activities are not undertaken because of the current fee schedule or because of a concern that certain expenses would not be reimbursed, the Committee believes that such conduct is unacceptable. The Committee, therefore, recommends that the VSB and VBA jointly investigate whether necessary and potentially beneficial activities on behalf of indigent defendants are indeed not undertaken because of the current fee structure and expense reimbursement practice.

6. The General Assembly should adopt immediately a phased-in program to increase the current fee structure for court-appointed counsel to the national average by 1992. Specifically:

> a. During its 1989 Session, the General Assembly should amend § 19.2-163 to increase the maximum fees payable to court-appointed counsel 15% -- to $100 for a single charge in a district court, $575 for a felony charge in circuit court where the offense is punishable by confinement for more than 20 years, $265 for any other felony charge in circuit court, and $132 for any misdemeanor charge in circuit court where the offense is punishable by confinement in jail.
>
> b. The General Assembly should continue to increase the maximum fees payable to court-appointed counsel each year in an amount sufficient to ensure that, by 1992 and thereafter, Virginia ranks in the upper half of the states with regard to such maximum fees.

7. The Office of the Executive Secretary of the Supreme Court of Virginia should continue to ensure that its hourly rates for court-appointed counsel are at least equal to the hourly rates authorized by the federal courts in the Fourth Circuit.

8. The VSB, the VBA and the Judicial Conference should develop, and recommend to the Judicial Council, criteria to assist judges in determining what fees and expenses, within the statutory maxima prescribed by the General Assembly, to pay or reimburse court-appointed counsel in a given case, including capital cases.

THE DEFENSE OF INDIGENTS IN VIRGINIA: A CONSENSUS FOR CHANGE

FINAL REPORT

OF THE

VIRGINIA BAR ASSOCIATION

SPECIAL COMMITTEE ON INDIGENT DEFENDANTS

OCTOBER, 1988

I. INTRODUCTION

One of the most basic constitutional principles underlying our criminal justice system is that a person accused of a crime is entitled to have counsel represent him at trial and on appeal, and that if the accused cannot afford to retain counsel, the state will appoint and pay for such counsel. This "right to counsel" is embodied in the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Sixth Amendment right to counsel is applicable to state court proceedings through the Fourteenth Amendment due process clause. See Gideon v. Wainwright, 372 U.S. 335 (1963)(Sixth Amendment right to counsel at trial). See also Douglas v. California, 372 U.S. 353 (1963)(equal protection right to counsel on appeals as of right). The right arises not only in felony cases, but also in misdemeanor cases involving actual imprisonment. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

Finally, where the accused has a constitutional right to counsel, such counsel must be "effective." See Strickland v. Washington, 466 U.S. 668 (1984)(trial); Evitts v. Lucey, 469 U.S. 387 (1985)(appeal).

Although the Constitution of Virginia does not contain a specific provision establishing a right to counsel in criminal cases, the Code of Virginia does provide for the appointment of counsel at state expense to represent indigent defendants at trial and on appeal. See Va. Code §§ 19.2-157, 19.2-159, 19.2-163.1 to -163.6, 19.2-326; Dodson v. Director, Dept. of Corrections, 233 Va. 303 (1987).

The Commonwealth provides legal assistance to indigent defendants in two ways. The traditional approach has been for the trial court to appoint private counsel to represent the defendant ("court-appointed counsel" system). Fees of court-appointed counsel are paid from state funds, subject to certain statutory limits. See Va. Code §§ 19.2-157, 19.2-159, 19.2-163. In the early 1970s, however, the General Assembly authorized an alternative method of providing such assistance -- state-funded "public defender offices" administered by a state Public Defender Commission. See Va. Code §§ 19.2-163.1 to -163.6. The Commission recommends to the General Assembly areas in which public defender offices should be established, establishes such offices where authorized to do so, appoints the public defender for each office, authorizes the public defender to employ necessary assistants and other staff, authorizes each office to incur necessary expenses, and establishes the budget for each office. See id. A single public defender office may

serve more than one city or county. The General Assembly first authorized a pilot program of three public defender offices in the early 1970s; that number was expanded to five in the late 1970s. One more office was authorized in 1986, three more in 1987, and two more in 1988, bringing the total to 11 authorized and established public defender offices as of July 1, 1988. Those 11 offices serve 11 cities and 12 counties.

The General Assembly has recognized the importance of providing effective representation to indigent defendants and, for the past several years, a General Assembly joint subcommittee has been studying various aspects of the problem, with primary focus on four issues: (1) whether the Commonwealth should rely on court-appointed counsel or public defenders to provide that representation; (2) to the extent the Commonwealth should rely on public defenders, which localities should be authorized to establish a public defender office and when; (3) to the extent the court-appointed counsel system should be continued, what the authorized fees should be; and (4) how the Commonwealth can continue to ensure that indigent defendants who are sentenced to death receive effective assistance of counsel.

These are difficult issues; they go to the heart of ensuring that our criminal justice system provides the effective assistance of counsel that the Sixth Amendment, the Fourteenth Amendment and the Code of Virginia demand. The Virginia Bar Association was asked by the General Assembly to participate in the study and responded by appointing this Special Committee on Indigent Defendants (the "Committee"). This report is the Committee's Final Report.

II. MAJOR RESEARCH SOURCES

The Committee relied heavily on the following six documents that are included as Appendices to the Committee's Final Report:

(1) the final report of the Committee's consultants ("Consultants' Report") (Appendix A);

(2) a copy of the Committee's Questionnaire, upon which much of the Committee's Final Report and recommendations are based (Appendix B);

(3) selected sections of the Code of Virginia and Acts of Assembly that are relevant to the legal representation of indigent defendants (Appendix C);

(4) a chart showing the staff size and budgets for the 11 public defender offices in the Commonwealth as of July 1, 1988 (Appendix D);

(5) excerpts from the Court-Appointed Counsel Procedures and Guidelines Manual (July 1988 ed.), which is published and distributed by the Office of the Executive Secretary of the Supreme Court of Virginia (Appendix E); and

(6) excerpts from the Guide to Judiciary Policies and Procedures, Vol. VII (May 20, 1988), published by the Administrative Office of the United States Courts (Appendix F).

In preparing this Final Report, the Committee also relied heavily on the following three documents that, because of their length, are not included as Appendices to this Final Report:

(1) The full Court-Appointed Counsel Procedures and Guidelines Manual (July 1988 ed.), which is updated and re-published annually by the Office of the Executive Secretary of the Supreme Court of Virginia and is distributed to all Circuit Court and District Court judges, all clerks of court and all chief magistrates throughout the Commonwealth. This document is available from the Office of the Executive Secretary of the Supreme Court of Virginia.

(2) The Joint Report of the Joint Subcommittees Studying Virginia's Public Defender Program and Alternative Indigent Defense Systems to the Governor and the General Assembly of Virginia, House Doc. No. 15 and Senate Doc. No. 11 (1986), which is available from the General Assembly's Division of Legislative Services.

(3) The Consultants' Crosstabular Report (Nov. 25, 1987), which was prepared by the Committee's consultants and contains a statistical presentation of the responses to all the questions asked in the Committee's questionnaire except those calling for a narrative response. Many of the tables in this report also are contained in the Consultants' Final Report. Copies of the Consultants' Crosstabular Report can be obtained from the Virginia Bar Association.

III. IMPORTANCE OF CONSULTANTS' REPORT; FOCUS OF COMMITTEE'S FINAL REPORT

We begin with two general suggestions for reading and analyzing our Final Report and recommendations. First, read at least pages 1-17 of the Consultants' Report (Appendix A) before proceeding to Section IV of this Final Report. This suggestion cannot be emphasized too strongly. Our consultants have done an excellent job analyzing the data from the responses to the Committee's questionnaire and providing the reader with an overall feel for the general trends and conclusions that can be gleaned from the data. That analysis of the data will not be repeated, except in summary fashion, in this Final Report.

Second, the reader should keep in mind that, while the Committee's questionnaire collected data that will be useful in addressing a number of issues involving legal representation of indigent defendants, this Final Report addresses only two of those issues -- (1) a comparison of the court-appointed counsel system and the public defender system for providing that representation at trial (not on appeal) and (2) the fee paid to trial counsel under a court-appointed system.

IV. BACKGROUND

For the past several years, a joint subcommittee of the Virginia General Assembly -- now the Joint Subcommittee Studying Alternative Indigent Defense Systems ("General Assembly Joint Subcommittee" or "Joint Subcommittee")[1] -- has been studying various issues involving the legal representation of indigent defendants in the Commonwealth. In the spring of 1985, the Virginia Bar Association was asked by the Joint Subcommittee to participate in this study and responded by appointing this Special Committee on Indigent Defendants. The Committee has appeared before the General Assembly Joint Subcommittee at its October 13, 1987, and July 19, 1988, meetings to discuss the Committee's project and to solicit suggestions from members of the Joint Subcommittee on what additional data from the Committee's questionnaire they would find helpful.

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[1]The current members of the Joint Subcommittee are Delegate William P. Robinson, Jr., Chair, Senators Howard P. Anderson, Elmo G. Cross, Jr., and Johnny S. Joannou, Delegates Ralph L. Axselle, Jr., Whittington W. Clement, Alan A. Diamonstein, and Thomas W. Moss, Jr., and Dennis Dohnal, Esquire.

A. Virginia Bar Association Special Committee on Indigent Defendants

The Virginia Bar Association Special Committee has representation from a broad spectrum of the bar, including two members of the state, and one member of the federal, judiciary who have had experience at both the trial and appellate levels.

The Committee began its work by narrowing its focus in three significant ways. First, we focused on only two of the many issues involving legal representation of indigent defendants -- (1) whether that representation is best provided by a court-appointed counsel system, a public defender system, or a combination of the two, and (2) to the extent that a court-appointed system is retained, what the authorized counsel fees should be. Second, we focused on the representation to be provided at trial, not on appeal. Third, since the General Assembly intended to hold public hearings on these and other issues and to retain consultants to assist it in its work, we decided that we could be of greatest assistance to the Joint Subcommittee by conducting a survey of the bench and bar to determine their views on the above issues.

During 1986, the Committee was assisted by Ann McGee, an attorney from Richmond, and by Professor Jeffrey K. Hadden, a member and former Chair of the Sociology Department at the University of Virginia, and a nationally recognized expert in survey techniques, in designing our questionnaire. Despite the length of the questionnaire (48 pages), Professor Hadden felt that, because of the subject matter and the targeted respondents, we would experience a high response rate. His judgment proved to be accurate. See Consultants' Report at 9.

The questionnaire was mailed to over 4,300 of the 12,000 members of the Virginia State Bar in December 1986, with a return date at the end of that month. Questionnaires were sent to all 250 state and federal trial and appellate judges in the Commonwealth, all 121 Commonwealth's Attorneys (and their senior assistants where they could be identified), all nine Public Defenders in the State, all 985 members of the Criminal Law Section of the Virginia State Bar, and a random sample of 2,990 other members of the bar. A statistically significant response was received from all groups surveyed except the "other members" of the Virginia State Bar. See Consultants' Report at 9, 20-23 for a detailed breakdown of the respondents. Thus, while it is fair to conclude that, for the other groups, the answers of the respondents are representative of their entire group, the survey results may not represent the general sentiments of those members of the bar who do not have a significant criminal law practice, since the sample size and response rate for "other members" of the bar were smaller than those for the other groups surveyed. Id. at 9 and 20.

During 1987 and 1988, the Committee was assisted by two consultants, Professor Charles L. Cappell of the Sociology Department at the University of Virginia, a nationally recognized expert in survey analysis who conducted surveys and other research at the American Bar Foundation in Chicago for several years prior to joining the faculty at the University of Virginia, and one of his graduate assistants, John P. Jarvis. In preparing their final report, our two consultants also were assisted by a second graduate student, Marian Borg.

B. General Assembly Joint Subcommittee

The 1985 General Assembly created two joint subcommittees to study various issues involving the legal representation of indigent defendants. House Joint Resolution No. 324, Senate Joint Resolution No. 137, 1985 Va. General Assembly. The two joint subcommittees met jointly and issued a joint report to the General Assembly at its 1986 Session. Joint Report of the Joint Subcommittees Studying Virginia's Public Defender Program and Alternative Indigent Defense Systems to the Governor and the General Assembly of Virginia, House Doc. No. 15, Senate Doc. No. 11 at 3 (1986) (hereinafter "Joint Report"). In that report, the two joint subcommittees made the following four recommendations:

> "1. That a fifth pilot public defender program be established in the city of Portsmouth to allow an evaluation of the cost and the impact of a public defender program in a core city which is experiencing severe availability problems with the court-appointed counsel system;
>
> "2. That the maximum fees allowed to court-appointed counsel for indigent persons be increased by 15% to alleviate the financial hardships placed on these attorneys and to encourage them to continue to make themselves available for court-appointed work...;
>
> "3. That the statutes governing compensation to be paid to attorneys appointed by the court to represent juveniles in certain cases be clarified...; and
>
> "4. That the joint subcommittee studying indigent defense systems be allowed to continue its study to evaluate the effects of implementation of its recommendations and to afford the members an opportunity to (i) address the particular problems faced by counsel appointed for indigent defendants charged with capital offenses and for juveniles, (ii) evaluate the need to develop uniform statewide eligibility standards for court-appointed counsel, (iii) determine the appropriate methods for selecting court-appointed counsel, and (iv)

continue its review and evaluation of the administrative procedures of the public defender program...."

Joint Report, supra, at 3-4.

The recommended public defender office in Portsmouth was authorized by the General Assembly and established by the Public Defender Commission in 1986, and the fees for court-appointed counsel were increased by 15% that same year. See 1986 Va. Acts of Assembly, chs. 425, 643 (Appropriations Act, Item 32); see also 1987 Va. Acts of Assembly, chs. 602 and 621. Furthermore, the current joint subcommittee -- the Joint Subcommittee Studying Alternative Defense Systems[2] -- was established by the 1986 General Assembly and continued in 1987 and 1988. See House Joint Resolution No. 51, 1986 Va. General Assembly; House Joint Resolution No. 189, 1987 Va. General Assembly; House Joint Resolution No. 141, 1988 Va. General Assembly. Since 1986, the Joint Subcommittee has continued the work outlined in its 1986 recommendations, with special emphasis on counsel for indigent defendants charged with capital offenses.

As indicated in Part IV C below, the General Assembly authorized, and the Public Defender Commission established, a public defender office in Richmond in 1986 and offices in Alexandria, Fairfax, and Winchester in 1987, and in Pulaski and Leesburg in 1988. In addition, as indicated in Part IV D below, an additional increase in the maximum fee for major non-capital felonies was authorized by the 1987 General Assembly. Individual members of the Joint Subcommittee supported these changes, but they were not proposed by the Joint Subcommittee itself.

C. Current Status of Court-Appointed Counsel and Public Defender Systems

Virginia provides legal representation to indigent defendants in two ways -- through court-appointed counsel or, in a limited number of jurisdictions, through a public defender office. The two systems are not entirely independent, however. In a jurisdiction having a public defender office, there still will be a need for court-appointed counsel at least for cases in which the public defender has a conflict of interest and for situations where the public defender has a case overload.

The traditional approach to providing legal representation to indigent defendants is the court-appointed counsel system. In the early 1970s, however, the General Assembly created a Public Defender Commission and authorized the Commission to establish three pilot public defender offices in

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[2]The current membership is listed in footnote 1, supra.

the Commonwealth; those offices were established in Staunton (1972), Virginia Beach (1973) and Roanoke (1976). In 1978, the General Assembly authorized the establishment of two more offices; a fourth office was established in 1979 in Petersburg. "The Commission expressed interest in establishing the fifth program in Alexandria or Richmond. However, because of local opposition to the program in each of these jurisdictions, a fifth office..." was not established and funded until 1986. See Joint Report, supra, at 4; 1986 Va. Acts of Assembly, ch. 643 (Appropriations Act, Item 32). In 1986, the General Assembly authorized in the Appropriations Act the establishment of a sixth office, and the fifth and sixth public defender offices were then established in July 1986 in Portsmouth and Richmond. In 1987, three more offices were authorized and established in Alexandria, Fairfax, and Winchester; and in 1988, two more offices were authorized and established in Pulaski and Leesburg.

As of this report, therefore, of the 41 cities and 95 counties in the Commonwealth, the 11 cities and 12 counties listed below are served by 11 public defender offices. A more detailed description of the staff size and 1988-89 budgets of these 11 offices is contained in Appendix D.

	Office Location/ Localities Served	Authorization Va. Acts of Assembly[3]	Date Established
1.	Staunton		
	City of Staunton	1972, ch. 800	Nov 1972
	City of Waynesboro	"	"
	Augusta County	"	"
2.	Virginia Beach		
	City of Virginia Beach	1972, ch. 800	Jan 1973
3.	Roanoke		
	City of Roanoke	1975, ch. 410	Mar 1976
4.	Petersburg		
	City of Petersburg	1978, ch. 698	Jul 1979
5.	Portsmouth		
	City of Portsmouth	1986, ch. 643 (Appropriations Act, Item 32) 1987, chs. 602, 621	Jul 1986

[3]The citations are to the year and chapter of the Virginia Acts of Assembly authorizing the various public defender offices.

6. Richmond		
City of Richmond	1986, ch. 643 (Appropriations Act, Item 32) 1987, chs. 602, 621	Jul 1986
7. Alexandria		
City of Alexandria	1987, chs. 602, 621	Jul 1987
8. Fairfax		
City of Fairfax	1987, chs. 602, 621	Jul 1987
Fairfax County	"	"
9. Winchester		
City of Winchester	1987, chs. 602, 621	Jul 1987
Frederick County	"	"
Clarke County	"	"
Shenandoah County	1988, chs. 758, 774	Jul 1988
Warren County	"	"
10. Pulaski		
City of Radford	1988, chs. 758, 774	Jul 1988
Bland County	"	"
Pulaski County	"	"
Wythe County	"	"
11. Leesburg		
Fauquier County	1988, chs. 758, 774	Jul 1988
Loudoun County	"	"
Rappahannock County	"	"

The remaining jurisdictions in the Commonwealth currently provide legal representation to indigent defendants through court-appointed counsel. With regard to the appointment of such counsel, § 19.2-159 provides, in part, that

> "Except in jurisdictions having a public defender..., counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose practice regularly includes representation of persons accused of crimes and who have indicated their willingness to accept such appointments."

In order to provide Circuit Court and District Court judges and clerks, and magistrates, with guidance in implementing § 19.2-159, the Office of the Executive Secretary of the Supreme Court of Virginia first published in 1984, and has updated annually since that time, a procedures and guidelines manual. Office of the Executive Secretary, Supreme Court of Virginia, Court-Appointed Counsel Procedures and Guidelines Manual at 1 (Jul. 1988 ed.) (hereinafter "Supreme Court Handbook"). The manual contains guidelines for determining indigency and

suggested general procedures for appointing counsel and maintaining a rotation list of eligible counsel. However, there currently are no detailed guidelines available to assist judges in deciding when a particular attorney is sufficiently experienced and otherwise qualified to be included on the jurisdiction's court-appointed counsel list, when an attorney should be removed from that list, or whom to appoint to a particular case.

D. Current Fee Schedule for Court-Appointed Counsel

In 1985, consultants retained by the Virginia State Bar reported that Virginia had the lowest fee schedule for court-appointed counsel in the nation. Joint Report, supra, at 5, citing Abt Associates (Spangenberg, Rose, Smith and Thayer), Analysis of Costs for Court-Appointed Counsel in Virginia at 50 (Apr. 1985) ("Spangenberg Report"). A later analysis prepared for the two 1985 General Assembly joint subcommittees "compared Virginia with nine of those seventeen states having total populations comparable to Virginia and with four of those nine states geographically closest to Virginia. Again, Virginia ranked last" in average cost per indigent defense case. See Joint Report, supra, at 5 and 43-44. That average cost, based on 1982 data, was $111 per indigent case and ranked 48th in the nation. According to the most recent data, the average cost per indigent case increased to $116 (4.5%) in 1986 but still ranked 48th in the nation and last among the groups against which Virginia had been compared in 1985. During that same four-year period (1982-86), the national average increased from $196 to $223 (13.8%) -- over three times the increase in Virginia. Bureau of Justice Statistics, U.S. Department of Justice, Bureau of Justice Statistics Bulletin: Criminal Defense for the Poor, 1986 at 1, 5 and 6 (Sep. 1988) ("1986 Bureau of Justice Statistics Bulletin").

In their 1986 report, the two joint subcommittees "noted that a 100% increase in the maximum fee schedule would be necessary to bring the schedule up to the national average for compensation paid to court-appointed counsel," but recognized "that such an increase is not feasible at this time" and, therefore, recommended a 15% increase. Joint Report, supra, at 4, 6-7 (emphasis added). The joint subcommittees also stated that they:

> "do not believe that the fees for court-appointed counsel should be equal to the fees charged for similar services by the private bar. However, the fees should be sufficient to cover fixed overhead expenses and should not be so artificially low as to discourage qualified counsel from accepting

> appointments. The joint subcommittees recommend that the maximum fees for court-appointed counsel be increased by 15%....
>
> * * *
>
> "The joint subcommittees strongly believe that the minimal fifteen percent increase in the maximum fees allowed to court-appointed counsel is essential if Virginia is to continue to meet its Constitutional obligation to provide counsel for indigent criminal defendants. The joint subcommittees caution that this is only a beginning."

Id. at 7-8.

The recommended 15% increase was enacted by the 1986 General Assembly, 1986 Va. Acts of Assembly, ch. 425, but has been the only across the board increase in court-appointed counsel fees the General Assembly has authorized over the past 15 years. In fact, "[i]n an effort to control the over-all costs of indigent defense services, the General Assembly effective April 6, 1983 reduced the court-appointed fee schedule by approximately 4-4 1/2%....While the reduced fees were in effect for the balance of 1983, the legislature returned them to the original schedule during the 1984 session." Spangenberg Report, supra, at 11, The history of Virginia's court-appointed counsel fee schedule over the past 15 years is as follows:

	Maximum Authorized Fee[4]					
	1973	1980	1983	1984	1986	1987
District Court						
Single Charge	$ 75	$ 75	$ 72	$ 75	$ 86	$ 86
Circuit Court						
Misdemeanor punishable by confinement	100	100	96	100	115	115

[4]See Va. Code §§ 14.1-184 (repealed), 14.1-184.1 (repealed), 19.2-163, as amended by Va. Acts of Assembly: 1973, ch. 316; 1980, ch. 626; 1983, ch. 622 (Appropriations Act, Items 22-25); 1984, ch. 755 (Appropriations Act, Items 21-24); 1986, ch. 425; 1987, ch. 638.

Felony punishable by 20 years or less	200	200	191	200	230	230
Felony punishable by more then 20 years	400	400	382	400	460	500
Capital offense	400	*	*	*	*	*

* "reasonable amount"

Pursuant to § 2.1-204, the Comptroller may not pay any allowance authorized by any court of the Commonwealth until that allowance has been approved by the Supreme Court of Virginia. In addition, all state accounts, including the Criminal Fund from which fees and expenses of court-appointed counsel are paid, are audited by the Auditor of Public Accounts. Thus, the Supreme Court of Virginia has provided that, "[i]n order to comply with prescribed audit procedures, the courts must use a uniform criteria for payment and document the method used to determine the amount to be paid. The uniform criteria for payment is hours of service and the documentation method is the Time Sheet, Form DC-50." Supreme Court Handbook, supra, at 22. See Appendix E. Furthermore, the Supreme Court has "established the policy that the Court will not approve any allowance for court-appointed attorney's fees which exceed sixty dollars ($60) per hour for in-court service and forty dollars ($40) per hour for out-of-court service. Such allowances are naturally subject to any statutory maximum applicable. However, in capital murder cases the court may allow an amount deemed reasonable." Id. at 23. These hourly rates compare favorably with hourly rates authorized in other states but, in practice, are limited in their effect by the statutory maxima listed in the table above. See Joint Report, supra, at 33-35 for a list of rates for court-appointed counsel in other states as of 1985.

Time sheets are required in state District Courts only for second or subsequent charges tried by the same court-appointed counsel; where counsel tries a single charge, he can be compensated up to the statutory maximum of $86 without submitting a time sheet. Id.

In the federal trial courts in Virginia, the hourly rate is the same as the hourly rate established by the Supreme Court of Virginia for court-appointed counsel in state courts -- $60 per hour for in-court service and $40 per hour for out-of-court service. The maxima, however, are much greater -- $3,500 in a felony case and $1,000 in a misdemeanor case. In addition, "[p]ayments in excess of these limitations may be made to provide fair compensation in cases involving extended or complex representation when so certified by a United States district judge or magistrate, as applicable, and approved by the chief judge of the circuit" or his designee. A case is considered

"complex" if it involves unusual factual or legal issues that require more time, skill and effort than normally would be required in an average case; a case is an "extended" case "[i]f more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings...." Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures, Section A, Ch. 2 at 2-18 to 2-19, 2-24 to 2-25 (May 20, 1988) ("Federal Court Policies and Procedures"). See Appendix F.

E. Expenses

Counsel often incur certain expenses in representing indigent defendants, such as fees for investigators and expert witnesses, and travel expenses for out-of-state witnesses. Statutory limits have been set on reimbursement to court-appointed counsel of certain expenses, but for many expenses the reimbursable amount is a "reasonable amount" to be fixed by the court. See Appendix E for a list of the current limits in Virginia on reimbursement of expenses. Expenses incurred by court-appointed counsel for which reimbursement is sought are to be included on the Time Sheet submitted to the Supreme Court. Supreme Court Handbook, supra, at 25-26.

Many respondents to the Committee's questionnaire indicated that counsel often are not fully reimbursed for many of the expenses they incur in a court-appointed case, even a capital case. See Consultants' Report at 91; Consultants' Crosstabular Report supra, Part B at 23-36. In the experience of the Committee, there is a perception among members of the bar that some court-appointed counsel do not incur certain expenses -- e.g., to retain an investigator -- either because the judge in their jurisdiction previously has indicated that counsel will not be reimbursed for such expenses or because they fear that the expense merely will be considered part of the fee awarded by the court. It is not clear to what extent this latter perception reflects reality. The Committee's questionnaire, for example, asked respondents who indicated that the Circuit Court in their jurisdiction reimbursed court-appointed counsel for expenses incurred in a non-capital case, "how are these expenses related to the hourly fee and maximum fee awarded?" Of the 231 respondents answering this question, 92.6% indicated that the expenses awarded "[a]re in addition to fee awarded"; only 4.3% indicated that the expenses "[a]re one factor considered in setting hourly rate and maximum fee." Consultants' Crosstabular Report, supra, Part B at 24; Committee's Questionnaire at 14.

As with fees, there appears to be greater latitude with regard to reimbursable expenses in the federal courts than in the Virginia state courts. See Federal Court Policies and Procedures, supra, at 2-31 to 2-36 (Appendix F); 18 U.S.C.

§ 3006A(e) (which governs the cost of "necessary" investigative, expert and certain other expenses).

Finally, it should be noted that many of the services that are considered "expenses" for court-appointed counsel and for which some counsel have encountered reimbursement problems in some jurisdictions are routinely provided to a public defender. All 11 public defender offices in the Commonwealth, for example, currently have one investigator on staff, and two offices (Richmond and Fairfax) have two investigators. See Appendix D.

V. SUMMARY OF CONSULTANTS' REPORT

The Consultants' Report begins with an "Introduction" (p. 1) and a "Review of Previous Research and Commentary on the Defense of the Indigent" (pp. 2-19), which contains an excellent review of the research and literature on the strengths and weaknesses of both the court-appointed counsel and public defender systems, the relative costs of the two systems, the methods for determining indigency, and the experience and quality of defense counsel under both systems.

Section 1 of the Consultants' Report (pp. 9-19) is a narrative summary of the results of the Committee's questionnaire and covers the following topics: the demographics of the respondents; their preferences for the court-appointed system or the public defender system; the perceived effectiveness, experience, preparedness, and competence of court-appointed counsel and public defenders when measured in the abstract, against one another, and against retained counsel and prosecutors; the number of writs of habeas corpus filed by, and the number of guilty pleas entered by, defendants represented by retained counsel, court-appointed counsel, and public defenders; the methods by which court-appointed systems are administered in the Commonwealth; fee schedules for court-appointed counsel; and the determination of indigency. This section also contains a useful bibliography.

The next six sections contain statistical compilations of the data. Section 2 (pp. 20-23) describes the characteristics of the respondents. Section 3 (pp. 24-47) summarizes the respondents' preferences for the court-appointed or the public defender system. Section 4 (pp. 48-71) presents the data on the perceived effectiveness, experience, preparedness and competence of defense counsel in the two systems. Section 5 (pp. 72-74) presents the data on the number of writs of habeas corpus filed by, and the number of guilty pleas entered by, defendants represented by defense counsel in the two systems. Section 6 (pp. 75-81) summarizes how the court-appointed system is administered throughout the Commonwealth. Section 7 (pp. 82-91) presents the data on reactions to the current (as of the end of

1986) court-appointed counsel fee structure and suggestions for changes in that structure.

Section 8 (pp. 92-122) contains a summary of responses to some of those questions calling for a narrative answer. Section 9 (pp. 123-27) contains data on indigent defense expenditures and caseloads throughout the country.

No attempt will be made here to review in depth the consultants' conclusions or the data and other research supporting their conclusions. The reader is again encouraged to read the Consultants' Report thoroughly before proceeding further with this report.

VI. FINDINGS

The Committee's findings are based on its Consultants' Report, its own independent review of the data obtained through its questionnaire, its other research, a review of the work of the General Assembly Joint Subcommittee, and the individual experience of members of the Committee with the various systems for providing legal representation to indigent defendants.

In general, the Committee finds that most individual court-appointed counsel and public defenders are adequately qualified; some are extremely well qualified. The Committee also finds, however, that the current court-appointed counsel system has serious problems that need to be addressed. The Committee finds that the current fee schedule for court-appointed counsel is much too low. Furthermore, many court-appointed counsel are not fully reimbursed for the expenses they incur and, therefore, may decide not to incur reasonable and prudent expenses. There is also a disturbing trend among some attorneys, especially the more experienced attorneys, in some jurisdictions not to volunteer to be included on the court-appointed counsel list for that jurisdiction, or if they are on the list, to ask to be removed from the list after a number of years of service. Finally, a disturbing percentage of the respondents to the Committee's questionnaire indicated that they had foregone some activity that may have been beneficial to their client because of a low fee.

The Committee also finds that there are administrative problems in many jurisdictions with the current court-appointed system concerning how attorneys are determined to be sufficiently experienced and otherwise qualified to be included on the court-appointed counsel list, for what reasons they are removed from the list, and what criteria are in fact used to assign counsel to a particular case.

The Committee's questionnaire did not explore the relative costs of the court-appointed counsel and public defender systems, but its research and Consultants' Report indicated that if court-appointed counsel are paid adequate fees, the court-appointed counsel system is not substantially less expensive than the public defender system, and that at a certain population level, the public defender system becomes more cost effective than the court-appointed system.

Finally, the Committee finds that there is a split statewide among attorneys and judges in their preferences for the two systems, with a preference for the public defender system in urban areas and a preference for the court-appointed system in most rural areas.

More specifically, the Committee finds that:

1. Quality of Defense Counsel Representing Indigent Defendants Is Adequate:

The Committee finds that, in general, most individual court-appointed counsel and public defenders are adequately qualified; many are extremely well qualified. An overwhelming majority of respondents to the Committee's questionnaire indicated that they believe that both court-appointed counsel and public defenders are sufficiently experienced, prepared and competent. Furthermore, there is little evidence that either court-appointed counsel or public defenders are markedly better qualified than the other group. If there is any preference here, it appears from the Committee's questionnaire that, in general, public defenders tend to be viewed as slightly better qualified. See Consultants' Report, supra, at 12-14, 55-58.

Based on the evidence before it, the Committee further finds that there is insufficient evidence to support a preference for either a court-appointed system or a public defender system based on the quality of individual counsel in either system, and that either court-appointed counsel or public defenders can provide adequate and effective legal representation of indigents if given the appropriate resources.

2. Retained Counsel Are Viewed As More Effective and Qualified Than Either Court-Appointed Counsel or Public Defenders:

Even though both court-appointed counsel and public defenders were viewed by respondents to the Committee's questionnaire as being sufficiently qualified, those same respondents viewed both groups, in general, as not being as well qualified as retained counsel. When asked to compare court-appointed counsel and public defenders with retained counsel on their effectiveness in representing indigents in 13 different procedures (pre-trial motions, bail, investigations, negotiating with the prosecutor, trial, etc.) and on their general level of

experience, preparedness, and competence, approximately 30-64% (depending on the characteristic being measured) saw no difference between the three types of counsel; of the remaining respondents, however, an overwhelming percentage indicated that retained counsel are more qualified than either court-appointed counsel or public defenders, although once again public defenders fared better than court-appointed counsel. See Consultants' Report, supra, at 12-14, 48-58.

The Committee was both concerned about and perplexed by the perceptions of those respondents who saw a major difference in the abilities of the three types of counsel. Many attorneys, for example, serve as retained counsel in some cases and court-appointed counsel in others. Do the perceptions of the respondents mean that counsel are better prepared and more effective when they are retained than when they are court-appointed? There are some attorneys whose criminal practice consists primarily of court-appointed work, with few retained cases. What is the impact of the work of this group on the respondents' perceptions? Are the perceptions merely a generalized view of the work of those who provide legal representation to the poor? The Committee does not have answers to these questions, but believes that they are indicative of problems involving the system of providing legal services to indigent defendants.

3. Fee Schedules for Court-Appointed Counsel in Non-Capital Cases, and Fees Actually Awarded in Capital Cases, Are Much Too Low:

The Committee unanimously finds that the fee schedules in non-capital cases, and the fees actually awarded in capital cases, are much too low, even considering the increases in fees enacted by the General Assembly in 1986 and 1987.

There was an overwhelming consensus among the respondents to the Committee's questionnaire that the current fee schedules in non-capital cases (96.1% to 97.6%, depending on the particular fee schedule) and the fees actually awarded in capital cases (79%) are too low. See Consultants' Report, supra, at 15, 83-84.

4. No Detailed Guidelines Are Available to Assist Judges in Setting Court-Appointed Counsel Fees:

In its Court-Appointed Counsel Procedures and Guidelines Manual, the Supreme Court of Virginia has indicated that the "uniform criterion" for payment of court-appointed counsel is "hours of service." Supreme Court Handbook, supra, at 22. Yet in answer to the Committee's questionnaire, respondents indicated that factors in addition to "billable hours," such as seriousness of the offense, difficulty of the case, experience of counsel, quality of representation, and type of trial, are and should be considered. The Committee agrees that many, if not

all, these factors should be considered in setting the fee for court-appointed counsel, and finds that detailed guidelines currently do not exist for considering these factors.

5. No Detailed Guidelines Are Available to Assist Judges in Determining Reasonableness of Expenses for Court-Appointed Counsel; Court-Appointed Counsel Often Are Not Fully Reimbursed for Expenses Incurred:

In its Court-Appointed Counsel Procedures and Guidelines Manual, the Supreme Court of Virginia has included a list of allowable expenses, with the statutory limit for each expense if one is applicable. Supreme Court Handbook, supra, at 34-38. This list is a helpful compilation of reimbursable expenses and their applicable limits. The Committee finds, however, that detailed guidelines do not exist to assist judges in determining the reasonableness of expenses for which court-appointed counsel request reimbursement.

Furthermore, on the basis of responses to its questionnaire, the Committee finds that counsel often are not fully reimbursed for many of the expenses they incur in a court-appointed case, even a capital case. See Consultants' Report, supra, at 91; Consultants' Crosstabular Report, supra, Part B at 23-26.

6. Disturbing Trend Exists in Some Jurisdictions for Attorneys Not to Volunteer to Be Included on, or to Ask to Be Removed from Court-Appointed Counsel List After Number of Years of Service:

The Committee finds that there is a disturbing trend in some jurisdictions for attorneys, including the more experienced attorneys, not to volunteer to be included on the court-appointed counsel list, or if they are on the list, to ask to be removed from the list after a number of years of service. See Consultants' Report, supra, at 6. The major reasons for this trend appear to be the low fee schedule for court-appointed cases and the feeling among some attorneys that after a number of years of service they should be relieved of the responsibility of remaining on the court-appointed list.

7. Representation by Some Court-Appointed Counsel May Be Affected by Low Fee:

As indicated in Part VI 3 above, an overwhelming percentage of respondents to the Committee's questionnaire believed that the current court-appointed fee schedule is too low. In an effort to determine whether the actual representation of indigents is affected by the low fee, the Committee asked respondents "Have you ever decided to forego some activity that may have been beneficial to your client because of a low fee?" Committee's Questionnaire at 40 (Question 3 a). Of the 405

persons responding, 71 (17.5%) answered "Yes." See Consultants' Report at 15, 82. The range was from a high of 23.5% among those practicing a substantial amount of criminal law to a low of 9.8% among judges with respect to their practice prior to becoming a judge. Id.

The Committee recognizes that while an overwhelming percentage (82.5%) of the respondents indicated that they had not foregone any activity that may have been beneficial to their client because of a low fee, a disturbing percentage (17.5%) indicated that they had foregone some such activity because of a low fee. Some members of the Committee believed that the number may in fact be even higher. The Committee recognizes, however, that there may be some ambiguity in both the question and the responses. First, the question does not refer explicitly to a low court-appointed fee. Second, the question does not ask whether the attorney would consider the foregone activity to have been truly "necessary" or merely something that might have been pursued if greater resources had been available. Several members of the Committee noted that many cases involving minor offenses do not require the same number of investigatory and other preparatory steps as do cases involving major offenses, especially where the defendant has decided to plead guilty. Thus, there are no standard "necessary" expenses; much depends on the circumstances of the particular case. Nonetheless, the Committee is deeply concerned that the responses may indicate that the level of representation provided to indigent defendants by some court-appointed counsel is affected by the amount of the fee awarded.

8. Problems Exist in Administration of Court-Appointed Counsel System:

The responses to the Committee's questionnaire raise a number of issues as to how attorneys are determined to be sufficiently experienced and otherwise qualified to be included on the court-appointed counsel list, for what reasons they are removed from the list, and what criteria are in fact used to assign counsel to a particular case. The Committee finds that there currently are no detailed guidelines available to assist judges in making these decisions. The Committee believes, however, that the issues that exist with regard to how a court-appointed system is administered, even though they will not be easy to resolve in some instances, can be resolved, at least to the point that they should not be a major reason for preferring a public defender system over a court-appointed system. Furthermore, the Committee notes that its questionnaire did not address similar administrative problems with a public defender system -- e.g., the process by which public defenders are hired and retained to ensure sufficient quality in individual public defenders -- and, therefore, it is not possible to compare the respondents' views on the administrative strengths and weaknesses of each system.

9. Relative Costs of the Two Systems Are Difficult to Compare, Especially Where Court-Appointed Counsel Fees Are Low:

In their review of the research, the Committee's consultants conclude that:

> In general during the decade of the 1970s, the cost of providing publicly supported legal representation to indigent defendants has been the fastest growing expense within the criminal justice system, including increases to the cost of corrections....
>
> * * *
>
> Nationwide the average cost per case of providing representation to indigents was $196 in 1982; in the West, the average was $243; in the Northeast $200; in the North Central states $182; in the South $152; and in Virginia $111, a level which ranked Virginia 48th among the states....
>
> While Public Defender systems generally appear to be more expensive than Court Appointed systems, many of the differences can be attributed to the low financial compensation given Court Appointed attorneys. Among the 13 states with exclusive statewide Public Defender systems in 1982, the average per capita cost for those states was $3.37; for the nation as a whole the average was $2.76; for Virginia the per capita cost was $1.64, a level which ranked Virginia 32nd among the states.... Early data on per cap.ta costs showed comparable levels for Public Defender and Court Appointed systems in counties with populations exceeding 100,000; in counties with populations exceeding 400,000, the median cost per capita for Court Appointed systems was greater than that for Public Defender systems....

Consultants' Report at 5-6 (emphasis added)(citations omitted). See also id. at 127. The latest (1986) figures available for Virginia are a per capita cost of $1.75 (40th) for indigent cases and an average cost per case of $116 (48th). 1986 Bureau of Justice Statistics Bulletin, supra at 5.

It is not clear to the Committee whether a court-appointed system or public defender system is in general more expensive. A majority of the Committee, however, believes that the data cited above by the consultants indicating that court-

appointed systems are more expensive than public defender systems in more heavily populated areas probably is correct. The Committee notes, however, that it is difficult to compare the relative costs of the two systems in a jurisdiction such as Virginia where the fees paid to court-appointed counsel are so low.

10. Fairly Even Split Exists Statewide in Preference for Particular System; Urban Areas Prefer Public Defender System, Rural Areas Prefer Court-Appointed System, and Suburban Areas Are Split:

The reader is encouraged at this point to reread pages 9-12 and 24-47 of the Consultants' Report for an analysis of the data supporting the respondents' preferences for a court-appointed system or a public defender system.

The Committee's findings with regard to such preferences are as follows:

a. Overall there is a fairly even split statewide in preferences for each of the two systems, the only exception being the Southeast Virginia area (Fourth and Fifth Congressional Districts), where there is very strong support for the court-appointed system. Consultants' Report, supra, at 9-10, 34, 36.

b. With regard to the urban, suburban, or rural character of a community, the preference depends on whether respondents are being asked whether they prefer a given system for their own jurisdiction, or whether they are being asked in general which system they prefer for urban, suburban, and rural areas. When asked about their preference for their own jurisdiction, respondents in large cities, medium cities, and smaller cities and suburban areas were almost evenly split (51-49%) in their preference for either system; those in rural areas clearly preferred the court-appointed system in their own rural area. When asked in general, however, which system they preferred for urban, suburban, and rural areas, the respondents showed a strong preference for the public defender system in urban areas and a preference for the court-appointed counsel system in rural areas. There was a split in suburban areas, with the strongest support for a court-appointed system coming from the Southeast Virginia area (Fourth and Fifth Congressional Districts) and the Richmond area (Third District), and the strongest support for the public defender system coming from the Norfolk/Virginia Beach area (Second District) and the Central/Southwestern Virginia area (Sixth, Seventh and Ninth Districts). The Chesapeake Bay area (First, Eighth and Tenth Districts) had no clear preference for either system. See Consultants' Report, supra, at 9-12, 37-45.

c. Exposure to a public defender system decreases resistance to such a system and increases the likelihood that a person will favor such a system. The Committee's consultants concluded, for example, that

> "Commonwealth Attorneys from jurisdictions without a Public Defender system generally do not favor that type of system (24%); where their jurisdiction has such a system, the support for the Public Defender system increases to 44%. Judges...favor the Public Defender system over the Court Appointed system for urban areas by a difference of 66% to 34% when they work in a jurisdiction without a Public Defender system. When they are from a jurisdiction with such a system, the difference grows to 81% to 19% now favoring the Public Defender approach."

See Consultants' Report, supra, at 11-12, 47.

VII. RECOMMENDATIONS

Based on the above, the Committee recommends that:

1. The General Assembly should establish a public defender system in those major urban and heavily populated suburban areas of the Commonwealth where it can be demonstrated both that there is a preference for a public defender system in that area and that such a system will be cost effective.

2. The General Assembly should establish a public defender system in rural areas where it can be demonstrated either that (a) there is a strong preference in a rural area for a public defender system and the establishment of such a system in that area clearly will be cost effective, or that (b) there is some other reason why a court-appointed system will not continue to provide adequate representation to indigent defendants in that area (e.g., where there is an insufficient number of local attorneys to provide the necessary assistance to indigent defendants under a court-appointed system).

3. The Virginia State Bar ("VSB"), the Virginia Bar Association ("VBA") and the Judicial Conference should develop, and should recommend to the Judicial Council, criteria to assist judges in deciding whether a particular attorney is sufficiently experienced and otherwise qualified to be placed on the jurisdiction's court-appointed counsel list, when an attorney should be removed from that list, and whom to appoint to a particular case. Such criteria could include, for example, certain training and experience requirements before an attorney could be appointed to a serious felony case.

4. Because the trend among attorneys, especially the more experienced attorneys, in some jurisdictions is not to volunteer to be included on the court-appointed counsel list for that jurisdiction, or if they are on the list, to ask to be removed from the list after a number of years of service, the VSB and the VBA should develop incentives to encourage attorneys, including the most experienced attorneys, to volunteer to be included on and remain on the court-appointed counsel list for their jurisdiction, and to take a fair and representative share of court-appointed cases, especially in those jurisdictions where there is an insufficient number of experienced attorneys to be assigned to such cases. Such incentives could include free tuition for a certain number of hours of continuing legal education courses; reimbursement, after a certain number of hours of court-appointed service, of a portion of a court-appointed counsel's legal malpractice insurance premium; or some form of case and docket management that more specifically determines when court-appointed counsel must be in court so they can avoid long waiting periods before before their court-appointed case is called.

5. The Committee is deeply concerned that 17.5% of the respondents to its questionnaire indicated that they had foregone some activity that may have been beneficial to their client because of low fees. The Committee recognizes, however, that there may be some ambiguity in both the question and the responses. It could be that certain activities were not undertaken because they were not truly necessary. To the extent, however, that certain activities are not undertaken because of the current fee schedule or because of a concern that certain expenses would not be reimbursed, the Committee believes that such conduct is unacceptable. The Committee, therefore, recommends that the VSB and VBA jointly investigate whether necessary and potentially beneficial activities on behalf of indigent defendants are indeed not undertaken because of the current fee structure and expense reimbursement practice.

6. The General Assembly should adopt immediately a phased-in program to increase the current fee structure for court-appointed counsel to the national average by 1992. Specifically:

> a. During its 1989 Session, the General Assembly should amend § 19.2-163 to increase the maximum fees payable to court-appointed counsel 15% -- to $100 for a single charge in a district court, $575 for a felony charge in circuit court where the offense is punishable by confinement for more than 20 years, $265 for any other felony charge in circuit court, and $132 for any misdemeanor charge in circuit court where the offense is punishable by confinement in jail.

b. The General Assembly should continue to increase the maximum fees payable to court-appointed counsel each year in an amount sufficient to ensure that, by 1992 and thereafter, Virginia ranks in the upper half of the states with regard to such maximum fees.

7. The Office of the Executive Secretary of the Supreme Court of Virginia should continue to ensure that its hourly rates for court-appointed counsel are at least equal to the hourly rates authorized by the federal courts in the Fourth Circuit.

8. The VSB, the VBA and the Judicial Conference should develop, and recommend to the Judicial Council, criteria to assist judges in determining what fees and expenses, within the statutory maxima prescribed by the General Assembly, to pay or reimburse court-appointed counsel in a given case, including capital cases.

Respectfully submitted,

Judge Ernest Ballou
John R. Fletcher
Murray Janus
H. Lane Kneedler, Co-Chair
Joseph A. Massie, Jr.
James R. McKenry, Co-Chair
Judge J. Harry Michael, Jr.
Judge Norman K. Moon
James M. Pates, Co-Chair
Anthony F. Troy

Virginia Bar Association
Special Commitee on Indigent Defendants

Final Report

Charles Cappell
Assistant Professor
University of Virginia

John Jarvis
PhD Candidate
University of Virginia

With the assistance of Marian Borg, M.A. Candidate

Prepared at the Social Science Research Lab
Sociology Department
University of Virginia

March 1988

Report of Survey Results on the Provision of Legal Services to Indigent Criminal Defendants

INTRODUCTION

In the winter of 1986 and spring of 1987, the Virginia Bar Association Special Committee on Indigent Defendants conducted a survey of the legal profession in Virginia to help in its evaluation of the public defender (PD) and court appointed attorney (CA) methods of providing legal services to indigent criminal defendants This report is organized into sections, each of which reports the responses to several questions that related to a major substantive issue concerning the various alternatives devised to provide legal services to poor defendants

This introduction is followed by a brief review of previous research and commentary on providing legal representation to the poverty-stricken defendant Following that, the first substantive section contains an overview of the major results The second section begins a more detailed examination by describing various characteristics of the respondents in order to learn who responded to the survey In the third section, the responses to the basic questions concerning the preferred system of representation are presented. The fourth section provides answers to a series of questions concerning the level of competent representation obtained under both the Court Appointed and Public Defender systems Competency is evaluated in terms of the level of experience in criminal law, the level of preparedness, and comparisons of the relative level of competency of Court Appointed and Public Defender attorneys The fifth section presents the answers to a series of questions regarding the frequencies of habeas corpus writs alleging incompetent legal representation and the frequencies of guilty pleas entered by Court Appointed and Public Defender attorneys The sixth section contains opinions regarding the establishment and administration of the lists from which Court Appointed attorneys are selected. The seventh section presents the responses to questions regarding the fee structure accompanying the Court Appointed system. The last section contains verbatim responses to several opened questions regarding the awarding of fees to those attorneys defending indigent clients and to questions soliciting general comments pertaining to the respondent's preferences for various systems

All of these results are presented separately for members of the Virginia judiciary, lawyers specializing in criminal law, lawyers without a criminal law specialization, and a residual category of respondents Additionally, in a few sections responses are aggregated by congressional and geographical regions as well as whether the respondents are members of the Criminal Law Section of the Virginia State Bar

REVIEW OF PREVIOUS RESEARCH AND COMMENTARY ON THE DEFENSE OF THE INDIGENT

We have organized our review of previous research and commentary about the provision of legal services to indigent criminal defendants according to the general concerns identified by the Special Committee's research questionnaire We first in Part A describe what is known from previous inquiries regarding the organization and administration of the Court Appointed and Public Defender systems, next in Part B we review commentary regarding financing and fee structures, in Part C we compare procedures regarding the determination of indigency; and finally in Part D we review what is known about the different results obtained under the different systems developed to provide legal representation to indigent clients

PART A. THE ORGANIZATION AND ADMINISTRATION OF COURT APPOINTED AND PUBLIC DEFENDER SYSTEMS

Silverstein's study, Defense of the Poor (1965) hereafter referred to as Silverstein, identified and evaluated several arguments for and against Court Appointed and Public Defender systems This initial inquiry into the social and legal influences on and consequences of the different organizational forms of providing legal representation to indigent criminal defendants emphasized the relatively large variability within each broad type of system rather than any obvious superiority of one system over the other That study outlined several arguments for and against Court Appointed and Public Defender systems that can be used to summarize not only those original findings but also those that have emerged since then. Two major studies subsequent to Silverstein's benchmark inquiry provide most useful information and are worthy of a more intensive reading by anyone seriously interested in this problem. namely, Robert Hermann, et al , Counsel for the Poor (1977) hereafter referred to as Hermann, and Bureau of Justice Statistics, National Criminal Defense Systems Study (1986) hereafter referred to as NCDSS

Six basic arguments supporting the Court Appointed system were examined in Silverstein's study·

1 The Court Appointed lawyer is in keeping with the traditional definition of the professional attorney, independent and able to give individual attention to each client (Attitude and local legal culture seem to be more important than method of selection- Silverstein. Subsequent research has revealed a high level of antipathy toward Public Defenders from defendants who assume such counsel are really a part of the "system" which is prosecuting them - Hermann, p 153)

2 The Court Appointed system assures that a wide range of attorneys will participate in the defence of indigents rather than creating a specialized bar (System works in fact to focus on the small portion of the bar specialized in criminal work. Only in small counties is a relatively high proportion of the bar involved- Silverstein. Subsequent research points to a feature of one court appointed system, paying a fee to be removed from the list, that appears to remove non-criminal lawyers and, thereby, increases the experience found in the pool available for indigent defense work- Lindquist, 1980)

3 Valuable experience can be earned by younger attorneys who participate in the Court Appointed system. (Some Court Appointed systems have used the most experienced members of the criminal bar (Detroit, for example), others (one-fourth of the 250 counties Silverstein studied) used the Court Appointed system as a training ground for the inexperienced (Silverstein, pp 63-69) Less true for serious cases - Hermann, p 107)

4 The Court Appointed system is bureaucratically simple to operate (Varies with the size and character of the population served and the magnitude of the workload.)

5 The Court Appointed system is cheaper to operate (Generally true in sparsely populated areas, but note that the bar bears the burden of an underfunded system. See Part B below)

6 More lawyers are able to benefit financially under the Court Appointed system. (Not necessarily true, and is a questionable objective of a publicly funded system in any case) (Silverstein, 1965 18-20 In most regions of the country, a large majority (70%) of the counties assign cases to over 50% of the lawyers listed- NCDSS, p 18)

On the opposite side of the ledger, several deficiencies of the Court Appointed system were examined, and a few of these were found to be generally accurate

1 Court Appointed attorneys are likely to be inexperienced, a fact which gives an undo advantage to the prosecutor (Generally true- Silverstein, p 20 Attorneys assigned generally representative of the same pool of those privately retained - Lindquist, 1980 Greater variability found among pool of Court Assigned versus Public Defender pool - Hermann, p 81, and great deal of dissatisfaction with quality of Assigned attorneys, Hermann, pp 88-89

2 The methods of selection are not systematic nor fair to attorneys, either a numerical minority of attorneys is overburdened with cases or judges pick their favorites

3 Attorneys may not be appointed early enough in the process (Silverstein, 1965.20-33)

That early review also included several arguments supporting Public Defender systems, again none of which were found to be universally true

1 Counsel is more experienced and competent (More true for offices in larger cities than for smaller counties, generally true that Defenders are as competent and experienced as Retained, Silverstein, pp 45-46)

2 A higher level of consistency across cases is obtained with Defender systems (Depends on the quality of administration and level of funding of the system, Silverstein, p 47)

3 The Defender system is more economical in metropolitan areas (Generally true, especially for the very large areas Costs per capita of each system become comparable in counties with 100,000 population. Cost advantage of Court Appointed system for smaller populations has to be understood in terms of the low rates paid to attorneys Also found great variability in cost within type of

system, Silverstein, pp 63-69)

4 Better and more consistent efforts are obtained because attorneys are not influenced by their doubts or anticipation of being able to obtain their fee (No evidence found for this assertion, Silverstein, p 48 Other instances observed where Retained Attorneys use delaying procedures to extort fees, Blumberg, 1967)

5 Greater efficiency is achieved because the prosecutors and defense counsel are able to establish a long term cooperative relationship (Defenders seemed to think they had extra access, prosecutors thought they treated Defenders and Retained equally, Silverstein, pp 48-49 A high level of cooperation between Public Defenders and prosecutors does evolve and is not generally detrimental to the defendant, Lichtenstein, 1984 High levels of cooperation occur and are consistent with the practical administrative, rather than adversarial process, of delivering criminal justice, Hermann, pp 162-166)

Several arguments pointing to deficiencies of the Public Defender system have also been addressed

1 Defender systems that assign attorneys to courtrooms rather than to clients result in sequential representation specialized according to the stage of the process This organizational structure fragments and, therefore, adversely affects the quality of legal representation (Gilboy, 1981)

2 Public defenders, because of their repeated involvement with prosecutors, will become coopted by the prosecutorial and court system in order to reduce caseloads (Early studies rendered this interpretation, Blumberg, 1967 More recent studies support a high level of cooperation as administratively efficient and as having no adverse affect on disposition or sentence outcome, Hermann, pp 162-166)

3 Little improvement in quality of representation can be obtained if Public Defender programs are underfinanced - Silverstein, p 47 More recent research concludes that all public based systems as well as privately retained counsel do not consist of highly qualified counsel because of the low levels of compensation- Hermann, Ch. 6

4 Criminal defense work is viewed by the bar at large as low prestige work, public defender work is not going to attract the best legal talent any more than privately provided criminal defense work does Sharp divisions in specialization with little cross-specialization between the corporate business oriented legal practice and criminal law work have been documented in research on the legal profession. (Heinz and Laumann, 1982)

As of 1982, 33 states provide partial or complete funding of indigent defense, remaining 19 states use county funding In 33 states indigent defense systems are organized at the county level alone or in combination with a statewide system or with judicial districts, 13 states have systems organized exclusively at the state level Alaska, Hawaii, Nevada, Wyoming, Colorado, New Mexico, Wisconsin, New York, Vermont, New Hampshire, Connecticut, Rhode Island, New Jersey, Maryland. Preliminary estimates show

that more than 50% of all defendants charged with felonies are classified as indigent Rates of indigency are lower for misdemeanors because eligibility criteria are stricter Larger counties are more likely to use Public Defender systems Counties with populations in the range of 50,000 to 99,999 are equally split between Court Appointed and Public Defender systems, larger counties use the Public Defender systems at rates that increase with the population size Nationwide in 1982, a total of 3 2 million indigent criminal cases were prosecuted (NCDSS, 1986)

PART B COSTS OF THE COURT-APPOINTED AND PUBLIC DEFENDER SYSTEMS

In general during the decade of the 1970s, the cost of providing publicly supported legal representation to indigent defendants has been the fastest growing expense within the criminal justice system, including increases to the cost of corrections The following table illustrates this trend nationally and in Virginia.

Brief Summary of Governmental Commitment to Indigent Client Defense

	Total Employees	October Payroll	Total Expenditures
1971			
Fed.	52	87,000	61,095,000
State	1,030	878,000	17,266,000
Local	2,936	2,474,000	50,969,000
Va.	--	--	--
1979			
Fed.	562	1,076,000	240,232,000
State	3,788	5,855,000	127,892,000
Local	5,205	8,316,000	239,159,000
Va	27	34,000	7,295,000
1985			
Fed.	356	1,000,000	343,261,000
State	6,003	12,307,000	297,555,000
Local	5,733	13,607,000	433,068,000
Va.	29	--	9,484,000

Sources Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics (1983,1986) Washington, D C Government Printing Office

Nationwide the average cost per case of providing representation to indigents was $196 in 1982, in the West, the average was $243, in the Northeast $200, in the North Central states $182, in the South $152, and in Virginia $111, a level which ranked Virginia 48th among the states (NCDSS, pp 29-30)

While Public Defender systems generally appear to be more expensive than Court Appointed systems, many of the differences can be attributed to the low financial compensation given Court Appointed attorneys Among the 13 states

with exclusive statewide Public Defender systems in 1982, the average per capita cost for those states was $3 37, for the nation as a whole the average was $2 76, for Virginia the per capita cost was $1 64, a level which ranked Virginia 32nd among the states (NCDSS, p 22-33) Early data on per capita costs showed comparable levels for Public Defender and Court Appointed systems in counties with populations exceeding 100,000, in counties with populations exceeding 400,000, the median cost per capita for Court Appointed systems was greater than that for Public Defender systems (Silverstein, pp 64-65)

More recent commentary on the costs of Court Appointed counsel consistently characterizes the current fee levels for court-appointed counsel as inadequate (Mounts and Wilson, 1982, Goodpaster, 1986, Smith, 1987) Several recurring arguments can be summarized. Court Appointed attorneys are forced to try cases of indigent defendants thereby loosing money and neglecting their personal practice There is a growing number of experienced attorneys nationwide who are no longer willing to provide services and who are being forced to increase fees to their private clients to make up for the money they loose trying indigent cases (Mounts and Wilson, 1982) In rural areas, the Court Appointed system is a drain on the solo practitioner who cannot delegate the case to a more junior partner, as some lawyers working in large rural law firms can often do (Smith, 1987) Moreover, the quality of defense that Court Appointed attorneys can offer the indigent is often severely limited when funds for expert witnesses are not provided. Much of the difficulty in providing adequate funding for indigent defense has been attributed to changing public opinion that now views any increase in funds awarded to the defense of indigents as "giving" money to criminals rather than as affording a poor, and presumably innocent person, adequate legal defense (Smith, 1987)

PART C DETERMINATION OF INDIGENCY

The basic procedural dilemma consists of whether to enforce strict guidelines that determine indigence or to allow judicial discretion (Silverstein, 1965, Hall and Gradess, 1986, Hiles, 1986, Arango, 1986, Neuhard, 1986) One argument against strict eligibility guidelines is based upon the opinion that a state of indigence is more than just being unable to afford counsel Assets and debts, the seriousness and complexity of the case, the defendant's prior criminal history, and the average hourly fees of attorneys in the given jurisdiction all affect the ability of a defendant to hire private counsel and are not issues that normally would be taken into account if strict indigence criteria were used. Moreover, strict eligibility standards typically deny individuals on the financial borderline the right to an adequate defense Others argue that leaving the determination of indigency to the discretion of the judge often leads to different problems Besides the issue of possible unequal treatment of the accused depending on whose courtroom his case is tried in, it is argued that expecting the judge to make a decision based on complicated financial data is unfair and impractical One approach suggests that a neutral third party with experience in financial matters would be more equipped and impartial in determining the financial status of an individual (Hiles, 1986) A final

issue is raised by a finding from a study of two New York county courts the defendant's ability to make bail often biases judge's decisions in determining indigence, if a defendant is able to make bail, he is often denied indigency status (Hall and Gradess, 1986) Strict guidelines, it is argued, would (theoretically) remove the variability in decision making that is found in different courts

A provocative argument asserts that the only fair system would be one which guarantees free counsel to anyone who wants it (Neuhard, 1986) Such a system would protect the rights of the near poor and eliminate any bias in indigence evaluation. Addressing the counter-argument that such a system would cost the State too much money, Neuhard calculates that since 90% of those defendants who claim indigence are now granted free counsel, the possible addition of 10% more would not increase the costs exorbitantly and would insure counsel to anyone who needs it

PART D EXPERIENCE AND QUALITY OF DEFENSE COUNSEL FOR THE INDIGENT

The arguments surrounding the issue of which type of defense counsel is more effective in representing the indigent client are complex. In general, commentary tends to emphasize the negative consequences of inexperienced counsel, including the criticisms that assigned counsel are often young and inexperienced and tend to "lawyer" the case to death in order to gain experience leading judges to resolve the case without counsel (Neuhard, 1986), that "judges were biased toward appointing incompetent lawyers who were disinclined to go to trial and who often worked for low fees" (Wheeler and Wheeler, 1980, p 322), and that the inclusion of all licensed attorneys on the indigency list regardless of their criminal law expertise inevitably leads to a lack of uniformly adequate representation (Smith, 1987)

On the other hand, no empirical studies we reviewed found statistically significant differences between the conviction and imprisonment rates obtained by Court Appointed versus Public Defender attorneys that could be attributed solely to the type of appointment system. In fact, the most thorough statistical inquiry into this question found no differences between publicly provided or privately retained counsel in obtaining verdicts or sentences once one takes into account variables such as pretrial detention, prior criminal record, and seriousness of the offense (Hermann, 1977 Ch. 6, see also Silverstein, 1965, Cole, 1973, Wheeler and Wheeler, 1980)

It has been argued that Court Appointed system produces a more loyal client-attorney relationship than does the Public Defender system. Working within a public defender system creates pressures for the Public Defenders to develop allegiances to the system rather than to their clients Thus, for instance, they might be more willing to cooperate with the prosecutor in plea bargaining a case or entering a guilty plea in order to expedite as many cases as possible Although this is commonly raised as an objection to the Public Defender system (see Silverstein, 1965, Cole, 1973), one empirical investigation has found that cooperation between the prosecutor and Public Defender has tactical advantages for the defense attorney· "Cooperation on the part of public defenders can be seen as a tactic that actually leads to

the best outcome for a client" (Lichtenstein, 1984 103)

The form in which the Public Defender system is organized has been evaluated in terms of its effectiveness in delivering legal representation with mixed findings Some inefficiencies have been attributed to systems with sequential or specialized assignments in which public defenders are assigned to courtrooms, not clients, an administrative procedure that "may impair case preparation and undermine sound attorney-client relationships" (Gilboy, 1975 1047)

While the empirical record shows that no statistically substantial differences arise from providing representation under one system versus another, striking levels of dissatisfaction with all publicly provided attorneys have been found among defendants (Hermann, 1977 Ch.7) While not based on objective outcomes, defendants perceive that the quality of legal representation is lower if they do not pay for it This can be an extension of the general attitude among those frequenting the criminal courts that governmental intervention, even when ostensibly on their own behalf, places them at a disadvantage compared to the rich. It has also been observed that racial differences between those processing the crime and those who stand accused may exacerbate these cynical attitudes (Hermann, 1977 169)

In general, the empirically measurable quality of publicly provided criminal defense advocacy is not dependent upon the system that delivers it, but more upon the resources, commitment, and informed concern that accompanies whatever system is used.

SECTION 1 SUMMARY OF RESULTS

Demographic Description of the Samples

The total number of respondents (520) was obtained from five samples All 250 State and Federal Judges were sampled and 115 responded (46% of the population), all 121 Commonwealth Attorneys and their senior assistants were sampled and 71 responded (58 6%), all nine Public Defenders were sampled and six responded (66 6%), all 985 members of the Criminal Law Section of the Virginia State Bar were sampled and 157 responded (15 9%) Each of these samples obtained is scientifically credible and, therefore, can be assumed to be representative of the populations from which they were drawn. From the total population of over 12,000 attorneys registered with the Virginia State Bar, a random sample of 2,990 attorneys was drawn and 171 responded (response rate of 5 7%) This low response rate obtained from the general listing of private attorneys signals that we should be very cautious and tentative in making any generalizations about this vast portion of the practicing bar in Virginia. Quite likely, attorneys with at least some criminal law experience responded more frequently than those with no such experience, and there are likely to be other sources of variation in the response rate that make this sample less representative of its population.

The analysis of the various questions aggregates the responses separately for Judges, Commonwealth Attorneys (Com. At), Criminal Private Practitioners (Cri PP), Other Private Practitioners (Oth. PP), and for the remaining Others (Oth) Thus, the reader can make direct comparisons between the opinions and evaluations of the private criminal bar and the judiciary or respondents occupying other legal positions Too few women and minority attorneys responded to make any comparisons along these lines accurate

In general, the respondents to the questionn[illegible] are experienced in criminal law and mature, 40% report having held their current position for 10 or more years, and nearly 85% report having been appointed as defense counsel in the past Just under half of the respondents report being members of the Criminal Law Section. Half of the respondents report that upwards of 60% of the criminal defendants in their jurisdictions are indigent All geographic regions of the state are represented in the sample

Preferences

Overall preferences for Court Appointed or Public Defender systems are split nearly down the middle 53% of the respondents favor Court Appointed systems and 47% favor the Public Defender alternative A similar number, 54%, of the members of the Criminal Law Section favor the Court Appointed model The greatest support for the Court Appointed system is found among Commonwealth Attorneys, 73 4% of those responding favored this type of system. Judges actually preferred the Public Defender system (55 6%) more than the Court Appointed Models (44 4%) The strongest support for the Court Appointed system is found in the 4th Congressional District (87 1%), the weakest support in the 6th Congressional District (36 5%) Geographical comparisons reveal that respondents from the Southeastern regions of the state are more likely to favor the Court Appointed system. Similarly, when

respondents are grouped into four regions based along a urban/rural dimension, those in the most rural areas favor the Court Appointed system (66 1%) over the Public Defender system. Respondents from other regions are evenly divided on the question.

When asked which system they preferred for the urban areas of the state, respondents uniformly preferred the Public Defender system (63 1%) to the Court Appointed system (36 9%) The weakest support for the Public Defender system in urban areas is found among the private criminal bar (55 6%) Respondents from the 4th Congressional District still prefer the Court Appointed system for urban areas (57 1%) For suburban areas, Judges, Public Defenders, and non-criminal private practitioners favored the Public Defender system (60% ave), whereas Commonwealth Attorneys and members of the criminal private bar favored the Court Appointed system (42% ave) Respondents from the Richmond area and from Southeastern Virginia favor the Court Appointed system for suburban areas of the state (63% ave), the remaining respondents favor the Public Defender system (56%) There is complete consensus across all of the categories of respondents in the preference for a Court Appointed system for rural areas of the state

The Elaboration of System Preferences by Region and Current Position

The first detailed elaborations (pp 34-36) describe the respondent's preferences for the different systems in <u>their own jurisdictions</u> aggregated by various geographical areas and by the respondent's current position. These results show that, in general, Judges favor Public Defender systems in higher proportions than the other legal practitioners regardless of the Congressional District in which the respondents reside Commonwealth Attorneys generally favor the Court Appointed system more than any other type of legal practitioner regardless of the Congressional District Criminal Practitioners generally favor the Court Appointed system more than the other Private Practitioners regardless of the District A similar comparison of respondents when they are grouped by regions based on the urban, suburban, or rural character of their location reveals a similar pattern, but with some notable exceptions The highest level of support for the Public Defender system among Commonwealth Attorneys is found among those located in urban areas Judges are not as variable in their responses according to urban-suburban distinctions, even among Judges located in rural areas, 50% favor the Public Defender system. However, when larger contiguous areas are used, Judges do vary The lowest level of support for the Public Defender system is found among Judges in the Richmond and Southeastern areas of Virginia

Thus, in nearly all geographical regions, there exists a difference in preferences depending upon the legal role performed, Judges are more favorably disposed toward the Public Defender system than their counterparts Regional legal culture also seems to affect these preferences, respondents from the Southeastern area showing the highest degree of preference for the Court Appointed system.

The second set of tables (pp 37-39) presents the same type of elaboration by region and position, but now for the respondent's preferences for Public Defender or Court Appointed systems in <u>urban</u> areas There is more of a consensus favoring Public Defender systems in urban areas, the

respondent's region of practice and legal position do not alter the preferences much The Richmond area (Congressional District 3 and Region 1) contains Judges and members of the Criminal Bar least supportive of Public Defender systems for urban areas

Preferences for suburban jurisdictions are elaborated by region and current legal position in the third set of tables (pp 40-42) Patterns of preference for systems in suburban areas vary widely depending on current position and geographical location. Respondents from the Richmond and Southeastern areas of the Commonwealth do provide a source of consistency, they are least disposed toward Public Defender systems Outside of these areas, most Judges prefer the Public Defender system for suburban areas Most Commonwealth Attorneys prefer the Court Appointed system regardless of region, the exception being the Norfolk/ Virginia Beach area. Members of the criminal bar are divided in their preferences depending on their geographical location, those in the Central and Southwestern portions of the Commonwealth favor the Public Defender system, unlike their counterparts in other parts of the state who prefer the Court Appointed systems Members of the non-criminal bar favor the Public Defender systems, except for those located in the Richmond and Southeastern areas

Elaborations were also obtained for the respondent's preferences for systems in rural areas (tables on pp 43-45) There is total consensus and very nearly equal support for the Court Appointed system in rural areas regardless of the legal position held by respondents or their location.

The table on page 46 portrays the support for the two types of systems by respondents categorized both by their Congressional District and by the urban/rural character of their location. We see that while in general legal practitioners from the largest urban areas favor the Court Appointed system by a 52% to 48% margin, respondents from urban areas located in Distri - 5 and 6 prefer the Public Defender system. The frequencies within the cells of this table are too small to derive any reliable generalizations, but some evidence is found of highly localized legal cultures that favor one system over another in spite of the more general preferences found among broader regions of the Commonwealth.

Finally, in this section we present a composite table (p 47) that addresses the question of whether having had some experience with a Public Defender system influences the respondent's preferences We analyzed the preferences of Judges, Commonwealth Attorneys, etc for the two systems taking into account whether they worked in a jurisdiction with a Public Defender system. In general, we can conclude that having viewed or having experienced a Public Defender system makes the respondent more likely to favor such a system. All categories of legal practitioners show an increased preference for a Public Defender system in their own jurisdiction when they have such a system versus those that do not For example, Commonwealth Attorneys from jurisdictions without a Public Defender system generally do not favor that type of system (24%), where their jurisdiction has such a system, the support for the Public Defender system increases to 44% Judges, for example, favor the Public Defender system over the Court Appointed system for urban areas by a difference of 66% to 34% when they work in a

jurisdiction without a Public Defender system. When they are from a jurisdiction with such a system, the difference grows to 81% to 19% now favoring the Public Defender approach. Commonwealth Attorneys show a parallel influence, support for the Public Defender system increases from 61% to 75%, the preferences of Criminal Law Practitioners do not show that type of influence, in fact, support for the Public Defender system decreases slightly The presence of a Public Defender system continues to influence the preferences of Judges for systems in suburban areas, the percent favoring the Public Defender system for suburban areas increases from 57% for those from jurisdictions without a Public Defender system to 81% for those from jurisdictions with such a system. Private practitioners are similarly influenced, but no other category of legal practitioner displays this pattern. Preferences for rural areas are more solidified, experience with a Public Defender system does not increase the preferences of various practitioners for such a system in rural areas

Effectiveness, Experience, Preparedness, and Competency

The first table in Section 4 (p 48) presents counts of the number of times respondents named one of the types of defense counsel (i e Retained, Court Appointed, or Public Defender) as more effective than the rest in carrying out a number (13) of procedures Judges and Commonwealth Attorneys more frequently responded that there were no differences in the effectiveness of the various types of counsel Judges checked no difference an average of 6 96 times out of thirteen, Commonwealth Attorneys averaged 8 checks When differences in effectiveness were noted by Judges and Commonwealth Attorneys, they indicated that privately Retained counsel were more effective (2 84 checks by Judges, 2 72 checks by Commonwealth Attorneys) than Public Defenders (74 checks by Judges, 58 by Commonwealth Attorneys), who in turn were more effective than Court Appointed attorneys (10 checks by Judges, 07 checks by Commonwealth Attorneys) Members of the private criminal bar see the distribution of effectiveness a little differently Most often, these attorneys ranked privately Retained attorneys as the most effective (6 57 checks), they checked no difference in effectiveness an average of 4 87 times Only six Public Defenders responded to the survey, and they generally ranked Public Defenders as more effective (6 80 checks)

In general, when a difference in effectiveness among the types of defense counsels was noted, the privately Retained counsel was viewed as more effective Public defenders appear to be only slightly more effective than Court Appointed attorneys, who were scored lowest in effectiveness by all of the respondents

Questions concerning experience, preparedness, and competency were asked in a comparative format We have summarized these comparisons in three tables, we note that there is substantial variation in the rankings depending upon the type of legal position held by the respondent This makes it somewhat difficult to construct a simple summary statement regarding the overall perceptions of experience, preparedness, and competency levels of the various types of attorneys involved in processing criminal cases However,

when asked simply whether Public Defenders and Court Appointed attorneys have a sufficient or adequate level of experience, preparedness and competency, respondents overwhelming (in the neighborhood of 90%) responded affirmatively (c f the percentages recorded in the main diagonals of the tables on pages 56, 57, 58) In the following discussion, the reader needs to keep in mind that only respondents who worked in jurisdictions with Public Defender systems were asked to rank order Public Defenders vis a vis other types of defense counsel and to prosecutors While approximately 450 respondents compared Court Appointed attorneys to privately Retained attorneys and to prosecutors, only approximately 75 respondents were in a position to compare Public Defenders to the others

The comparisons with respect to levels of experience appear in the table on page 56 Forty-eight percent of the respondents ranked privately Retained counsel as more experienced than Court Appointed counsel, and 50% of the respondents ranked Retained counsel more experienced than Public Defenders Commonwealth Attorneys, however, differed from the other respondents in this ranking, only 28 6% of them ranked Retained counsel more experienced than Court Appointed attorneys, but 75% of them ranked Retained attorneys more experienced than Public Defenders While 21 3% of the respondents ranked Public Defenders more experienced than Retained, only 9 1% of the private criminal practitioners made this same ranking When Court Appointed attorneys were compared to Public Defenders, Public Defenders generally were ranked as having more experience than Court Appointed, but there was substantial disagreement regarding this rank order among the respondents For the entire sample, 38 3% ranked Public Defenders more experienced than Court Appointed, 29 6% ranked Court Appointed more experienced than Public Defenders, with the remainder ranking them equally Members of the private bar differed in this pattern, only 20 6% of the private criminal bar ranked Public Defenders more experienced than Court Appointed attorneys, but 61 5% of the non-criminal private bar ranked Public Defenders more experienced. Respondents overwhelmingly ranked Prosecutors more experienced than either Public Defenders or Court Appointed attorneys, over 40% made these comparisons Judges did not see quite as great a disparity, only 23 8% of the Judges ranked Prosecutors more experienced than Public Defenders The general pattern of responses reveals the view that privately Retained counsel are more experienced than either Court Appointed or Public Defender attorneys Prosecutors are viewed as having a considerable experiential based advantage over their opponents

A similar table was constructed to compare attorneys on the basis of preparedness (c f page 57) Retained counsel were ranked as more prepared than Court Appointed uniformly (40 2% ranked Retained as more prepared than Court Appointed attorneys and only 9% ranked Court Appointed attorneys more prepared than Retained) Generally, Retained were ranked more prepared than Public Defenders as well (30 3%), however, Judges were less likely to so rank Retained and Public Defenders (19%) In fact, Judges were more likely to rank Public Defenders as more prepared than Retained (23 8%) Only 12 5% of the Commonwealth Attorneys so ranked these two types of attorneys, and no one in our sample from either section of the private bar ranked Public Defenders as more prepared than privately Retained counsels In general, Public Defenders were ranked as more prepared than Court Appointed attorneys

(33 3%), but there is a sharp division among the private bar Only 13 8% of the private criminal bar ranked Public Defenders as more prepared than Court Appointed attorneys, whereas 50% of the non-criminal bar ranked them in that fashion Prosecutors were uniformly seen as more prepared than Court appointed attorneys, but Public Defenders apparently are viewed as slightly more prepared than Prosecutors, 27 8% of the respondents ranked them so

A third table (p 58) similarly describes the rankings with respect to the levels of competency of attorneys Retained counsel are generally viewed as more competent than Court Appointed attorneys, 35 6% of the respondents so ranked the two Commonwealth attorneys are less likely to give such an advantage to Retained counsel, only 18 6% responded in this fashion. Fifty percent of the Commonwealth Attorneys, 46 7% of the non-criminal private bar, but only 18 2% of the Judges ranked Retained counsel more competent than Public Defenders Public Defenders were generally ranked as more competent than Court Appointed attorneys, 30 5% of the respondents so ranked the two, but only 12 5% of the private criminal bar did so In general, Prosecutors were ranked as more competent than either Court Appointed attorneys or Public Defenders, Judges were less willing to give such an advantage to the prosecution. only 9 1% of the Judges, compared to 18 3% of the total respondents, ranked Prosecutors more experienced than Public Defenders

Number of Writs of Habeas Corpus and Guilty Pleas

Respondents were asked if they were able to discern a difference in the rates with which writs of habeas corpus were filed and granted against the various types of defense counsel for incompetent legal representation Additionally, respondents were asked to compare the rates of guilty pleas offered by the different types of defense counsel Few respondents (19) were able to compare Public Defenders to the other types of defense counsel with respect to the frequency of filed habeas corpus writs Enough respondents were able to compare the filings against Court Appointed attorneys versus Retained attorneys for us to reach some conclusions Of those able to make such a comparison, 42 3% think more writs are filed against Court Appointed attorneys than Retained, and substantial differences exist in the thinking of Judges (29 2% think so), Commonwealth Attorneys (27 8%), and members of the private criminal bar (67 7%) Most of the respondents think that Court Appointed and Retained counsel plead their clients guilty at about the same rate (70 4%) However, when a difference is perceived, Court Appointed attorneys are viewed as more often entering guilty pleas than Retained counsel (26 7%)

Administration of Court Appointed Systems

In most jurisdictions, the court maintains and administers a list of attorneys from which Court Appointed counsel are drawn. The responses to the survey indicate that a majority of the respondents (61 6%) believe attorneys become eligible to be included on the list by volunteering Other criteria for inclusion on the list, such as whether the attorney is a member of the local bar, whether the attorney has any criminal law experience, whether the attorney has had substantial criminal law experience, or whether the attorney has significant trial experience were not supported by the data In response

to questions about who is actually appointed from these lists, a majority of the respondents (78 6%) say that inclusion on the list suffices for appointment Additional criteria, such as being a member of the criminal bar, having criminal practice experience, or having a substantial amount of trial experience, were not supported as a basis upon which counsel is appointed. In fact, approximately 90% of the respondents indicated that these above criteria are not utilized in making appointments of counsel

In response to questions regarding the actual process of selection utilized, the majority (51 4%) of respondents say that there is a general adherence to rotation. However, a large percentage (47%) say that this rotation is sometimes modified for serious cases Furthermore, 78 7% of the respondents say that a judge sometimes will select a name that is not on the list for particularly serious and difficult cases Finally, 60 6% of the respondents say that a judge has, on his own initiative, removed an attorney from the list from which the appointments are made

Fee Schedules

The adequacy of the fee structures for Court Appointed counsel was also addressed by the survey The majority of the respondents (82 5%) reported that they have not foregone any legal activity due to low fees However, among private criminal practitioners a slightly larger percentage (23 5%) than average reported having foregone some legal activity due to low fees

The survey contained questions asking the respondents to evaluate the fee structures that apply to different kinds of cases For non-capital cases, the overwhelming majority (96 5%) think that the maximum fee level is set too low The Commonwealth Attorneys vary slightly from this high level, but still 90% judge the fee level too low In capital cases, an overall average of 79% of the respondents believed that the awarded fees actually received by counsel were too low Judges were less likely to say that the awarded fees were too low (61 4%) than were Commonwealth Attorneys (86 8%) or private practitioners (88%)

The Elaboration of Views Concerning Fees by Region and Current Position

We further examined respondent views regarding the administration of fees by a detailed examination of responses categorized by the region and current position of the respondent (pp 85-89) Near complete consensus exists across all types of geographical regions and occupational category that no local rules are imposed upon Judges for awarding fees However, among Criminal Practitioners located in large cities, 52% believe that in fact Judges follow local practices not included in the statutes in awarding fees, only 7% of the Judges located in large cities think such practices exist (No consistent practice was mentioned by the respondents For a list of the practices mentioned refer to pp 93-94 of this report) Criminal Practitioners from the Richmond area were also more likely to respond (54%) that Judges follow local practices, as were Criminal Practitioners from Congressional District 8 (60%, but note the small number responding)

Our table on page 90 summarizes the responses regarding which factors are and should be taken into account by the Court in setting fees for

different types of cases The greatest consensus focuses on the criterion of billable hours, a fairly consistent 80-90% of all respondents regardless of current position or whether or not the case is a capital crime think that billable hours are and should be considered. A fairly consistent 80% of respondents regardless of current position think that the difficulty of the case should be considered, but a much lower and fairly consistent 55% percent think that difficulty is considered as a factor The seriousness of the case elicits the next strongest and consistent support, over 70% of the respondents regardless of position think seriousness should be considered. A much lower percentage (approximately 46%) of the Criminal and Other Practitioners think that seriousness is considered, this is especially true of Criminal Practitioners evaluating non-capital cases (30%) Generally, between 60-70% of the respondents regardless of position or type of case think that the quality of service rendered should be a factor in awarding fees, Judges thinking so even more frequently (70%) Judges, more so than Criminal Practitioners (36% to 17%) think quality is taken into account in non-capital cases In capital cases, the percentages increase to (43% for Judges and 26% for Criminal Practitioners Between 50-60% of the respondents think that the number of counts should be and are considered regardless of the position held by the respondent or the type of case Less support was found for using experience or type of trial as criteria in awarding fees A major source of discontent among Criminal Practitioners can be seen, 56% think that experience should be considered in capital cases, but only 32% think it is, and for non-capital cases the difference is even greater, 52% versus 8% Only Judges and Commonwealth attorneys think that the type of trial in capital cases should be taken into account

We can see the sources of dissention among member of the legal community with respect to the types of expenses that are reimbursed to criminal defense attorneys (table on p 91) For every type of expense examined, roughly 20% fewer Criminal Practitioners than Judges reported reimbursement The responses to these questic by Commonwealth Attorneys and Other Private Practitioners more closely resemble the responses of Judges than Criminal Practitioners

Finally, respondents were asked to set the rate of compensation for indigent defense they thought appropriate From a sample of one-third (176) of the respondents, few actually offered an opinion, but from those that did, the following estimates were calculated.

Felony Cases

Maximum Total Fee	
Median.	$1000
Average	$1350
Standard Deviation.	$2050
Range	$250 - 15,000
Respondents	56 out of 176
Maximum Hourly Rate	
Median.	$75
Average	$85
Standard Deviation.	$60
Range	$50 - $300
Respondents	17 out of 176

Capital Cases

Maximum Total Fee

Median.	$5000
Average	$8700
Standard Deviation	$12500
Range	$600 - 50,000
Respondents	27 out of 176

Maximum Hourly Rate

Median.	$100
Average	$115
Standard Deviation.	$100
Range	$50 - $500
Respondents	20 out of 176

16 respondents said there should be no maximum total cap on fees for capital cases

The Determination of Indigency

Section C of the survey contained several questions pertaining to the rules and factors that are used to determine if a criminal defendant qualifies for publicly provided counsel When asked if the general guidelines provided by statute or court rule were adequate, 63 2% of the Judges responded that the rules were quite adequate, but roughly a third of the respondents holding other legal positions thought so They were much more likely to hold the view that the rules were satisfactory but could stand improvement (roughly 50% responding in that way) In general, all respondents thought that income level (90%), levels of fixed payments (68%), medical expenses (66%), and savings (80%) ought to be taken into account in determining indigency, but the percentages above decreased by roughly 20% each when the respondents were asked if each factor is usually taken into account A very slight tendency existed for Judges to more often respond that these factors were taken into account than other respondents

Respondents thought that more guidelines should be available to help in determining indigency (55%), but only 27% of the Judges thought additional guidelines necessary General sentiment favored the General Assembly as the source for these guidelines (66%) Only 34% (but 55% of the Commonwealth Attorneys) favored a state-funded investigator into claims of indigency In general, the respondents answered that no second determination of indigency is made at the Circuit Court level after trial at the District level (79%) In nearly all cases apparently the Judge makes the determination of indigency (89% so responding), and half of the Judges responding reported that they allocated two or fewer hours a month to the determination. Half of the respondents thought that the average Judge would allocate three or fewer hours per month to this task. Tables containing these results do not appear in this report but can be found in Part D of the supplementary Crosstabular Report

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APPENDIX B

STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA

Final Report

November 1988

THE SPANGENBERG GROUP

Newton, Massachusetts

THE SPANGENBERG GROUP

Robert L. Spangenberg
President

Patricia A. Smith
Vice President

William J. Rose
Senior Associate

Amy Salomon
Senior Associate

Laura E. Walker
Research Assistan

Robert M. Weidman
Research Assistant

of Counsel
Prof. Richard J. Wilson
R. Susan Dillard

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Prepared for:

Criminal Law Section
Virginia State Bar
and
Joint Subcommittee Studying
Alternative Indigent Defense
Systems, Virginia
General Assembly

Prepared by:

The Spangenberg Group
West Newton, Massachusetts

Robert L. Spangenberg
Patricia A. Smith
Amy Salomon
Laura E. Walker
Robert M. Weidman
Judith T. Menton

[illegible] West Newton, MA 02165 (617) 969-3820

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

The problems relating to the quality and cost of indigent defense services in the Commonwealth of Virginia have been a matter of concern to the General Assembly, the judiciary and the bar for at least 20 years. Over a dozen studies have been conducted of the system during this period. The focus of attention has repeatedly been the ever increasing costs on the one hand and the concern of court-appointed attorneys that they are substantially under-compensated on the other.

Over a period of years, the Office of the Executive Secretary of the Supreme Court of Virginia has responded to legislative requests to tighten the system in a number of ways including the development of statewide guidelines for the determination of indigency; the development of a computerized management information system to track and analyze court-appointed attorney vouchers; the development of a comprehensive "Court-Appointed Counsel, Procedures and Guidelines Manual"; and the development of screening policies for indigent defendants throughout the Commonwealth.

At the same time, the General Assembly has continued to expand the local public defender system through the Public Defender Commission and raised by 15% the fees for court-appointed counsel. In 1985, the legislature created the Joint Subcommittee Studying Methods of Providing Legal Defense Services to the Indigent. That Joint Subcommittee has remained in existence for the past four years and continues to study the overall problems in providing indigent defense in Virginia.

Members of The Spangenberg Group (Mr. Spangenberg and Ms. Smith) were first contacted in early 1980 and asked to assist in providing information and technical assistance regarding the various problems of indigent defense in the Commonwealth and have remained active in that effort for almost nine years. In May of 1984, while employed at Abt Associates, we were asked by the Virginia State Bar to conduct a study of the then existing indigent

defense system in Virginia and to determine whether or not "there was a crisis in indigent defense services." Specifically the study was intended to:

- Collect all available secondary data on indigent defense services in the Commonwealth of Virginia in order to determine whether or not there is a crisis in not only present funding for indigent defense services, but also the systems for providing same; and
- To conduct such studies of those data as were necessary to determine what change and/or changes were needed to address the situation.

The study was completed in March of 1985 and a final report published in April 1985. The report, "Analysis of Costs for Court-Appointed Counsel in Virginia," pointed out that, by virtually every measure, Virginia was at or near the bottom of all states in per capita expenditures and compensation for court-appointed counsel. We made a series of recommendations regarding possible solutions to the problem.

In the fall of 1985, after forming The Spangenberg Group, we were contacted by staff of the Joint Subcommittees regarding our ability to assist them with their work. Our availability for this assignment was due in part to support provided by the American Bar Association's Bar Information Project, which has been in existence for several years and which is designed to provide technical assistance to state and local organizations concerned about improving their indigent defense systems.

The subcommittees requested information in three general areas: (1) what is being done nationally in the area of indigent defense services, (2) where does Virginia stand with respect to the national picture, and (3) what options are available and at what cost. We were asked to place emphasis on the last inquiry. Specifically we were asked to make a detailed cost projection based on existing Virginia caseload data for:

> a statewide court-appointed system, a court-appointed system with a public defender program in those jurisdictions in which we determined it would be cost

> effective, a statewide public defender system, a statewide public defender program with both a contract system and a court-appointed system providing back-up, a statewide contract system, and a court-appointed system utilizing an independent coordinator rather than a judge to make the appointment.

The report entitled, "Projecting Costs for Various Indigent Defense Systems in Virginia for FY 1986," was presented in October 1985. After providing cost data for each type of system, we presented a list of what we described as the most necessary and critical elements necessary to comply with minimal acceptable standards.

Problems Associated With Capital Representation in Virginia

As far back as December 1983, the Virginia State Bar in a letter to Governor Charles S. Robb stated, "Of particular concern are capital cases, which by definition and circumstances are exceedingly complex and demand the time and attention of competent counsel who must be compensated by more than the present maximum fee of $573." The concern of the State Bar arose in part out of letters it had received from Circuit Court Judges concerned about the difficulty in securing competent court-appointed counsel in capital cases.

During the course of our work in Virginia over the years, we became aware of the special problems relating to representation in capital cases. This particular problem was noted in our April 1985 study when we called for an examination of the present procedures in Virginia for the appointment and compensation of court-appointed counsel in capital cases. By the time of our October 1985 report, the problem of representation in capital cases in Virginia had worsened. In a separate section of the report, we presented the following information:

> The representation of criminal defendants in death penalty cases requires special attention and deserves to be treated separately in this report. Because of the seriousness of the charge, a new body of law has been

> created throughout the country since the death penalty was reinstated several years ago. The necessity for appointed counsel has become overwhelming in terms of the legal requirements and time necessary to handle these cases...
>
> Most recently, Virginia recognized the uniqueness of the problem by removing the maximum cost per case of $600 and placing the establishment of the fee within the discretion of the trial judge. Data reported by the Executive Secretary's Office discloses that there were 91 individual court appointments in Class I felony (potential death penalty) cases during FY 85. The average cost per case amounted to $784.56. This is wholly inadequate. While not all indictments charging the death penalty result in trial, many do. The estimate of experienced criminal practitioners in Virginia is that approximately 1/2 of the Class I felonies actually go to trial...
>
> Sufficient information is not currently available to make a recommendation as to how these cases should be handled in Virginia. Much more information is needed. What we do know, however, is that the whole problem must be separately addressed and that funds for counsel in death penalty cases must be substantially increased.

In its 1986 report to the Governor and the General Assembly, the Joint Committee stated:

> The joint subcommittees also heard testimony that a number of attorneys, otherwise willing to accept court-appointments in criminal cases, are refusing to accept appointments in capital cases. It was noted that in 1984 the General Assembly had deleted the maximum fee for counsel in capital cases and granted the courts discretion in awarding compensation. The joint subcommittees were told that nonetheless a number of judges continue to use the $600 maximum fee as the standard. A majority of the joint subcommittees do not believe that, in general, such a fee is reasonable for capital cases. In comparison, it was noted that the customary fee for privately retained counsel in cases involving the possible loss of a driver's license is in the range of $500 to $700.

The Joint Subcommittees addressed special attention to problems relating to post-conviction representation in capital cases during the meeting of November 5, 1986. The concern in part

arose regarding the litigation then pending in the federal courts of Virginia in the case of Giarratano v. Murray. Staff was requested to prepare a memorandum on current law affecting the right to counsel in post-conviction proceedings being addressed by the Giarratano case.

Impetus for the Current Study

As a result of these ongoing concerns of the Bar and the General Assembly, in the fall of 1987, the Virginia State Bar, through funds obtained from the Virginia Law Foundation, contracted with The Spangenberg Group "to conduct a study of indigent capital defense services (defined as involving the representation of the indigent accused of capital offenses at the trial and post-trial stages, including habeas corpus) in the Commonwealth of Virginia." The three primary tasks to be performed were as follows:

(1) Identification of existing practices elsewhere in the nation;

(2) Description of the current procedures in Virginia, including an assessment of the deficiencies of the current system and recommendation for its improvement. This information would be developed from the following sources:

   (a) Secondary data available through the Office of the Executive Secretary of the Supreme Court, as well as from other sources; and

   (b) A mail survey of judges and criminal defense attorneys; and

(3) Development of a series of options for providing counsel in capital cases in Virginia which draw on the experiences of other states but which are tailored exclusively to unique local circumstances.

The current report is intended to respond to these requirements.

In an October 13, 1987 meeting of the Joint Subcommittee there was considerable discussion regarding the problem of capital case representation. The Joint Subcommittee was particularly concerned

about representation in post-conviction capital cases. Mr. Spangenberg was asked to place special emphasis on this area in the study then underway.

The Joint Subcommittee in House Joint Resolution No. 141 offered on January 26, 1988 placed special emphasis on the need to "further review the alternatives available, particularly for providing counsel in capital cases..."

On November 18, 1988, Ms. Patricia A. Smith of The Spangenberg Group provided preliminary information on the study results to the Joint Subcommittee and this report provides the detail and a set of recommendations to improve capital representation at all levels of the criminal process in the Commonwealth of Virginia.

Methodology of the Study

The methodology of the study was divided into two parts. The first pertained to representation in capital cases generally and the second concentrated on obtaining data from court-appointed and volunteer attorneys on the time and expense involved in providing representation in post-conviction capital cases.

For the first part of the study, two sets of questionnaires were prepared: one for judges and one for attorneys. The judges questionnaire was designed to gather information on the appointment of counsel in capital cases at trial, direct appeal and post-conviction proceedings. The questions included information on the procedures undertaken in selecting counsel for appointment; the rate of compensation allowed; the types of expenses of litigation available and the compensation allowed; available training; the problems, if any, associated with the process at all three levels; and recommendations for improvement in the system. Questionnaires were sent to all judges currently sitting in the Circuit and General District Courts.

The attorney questionnaire requested information on the background and criminal law experience of each attorney,

information on court-appointments in capital cases at trial and on direct appeal; the standards used to select counsel; the rate of compensation allowed; the rate of compensation actually paid; the availability and compensation for the necessary costs and expenses of litigation; the time expended in these cases; the out-of-pocket expenses incurred; available training; specific problems encountered in the system; and specific suggestions for improvement. These questionnaires were sent to all Bar Presidents in Virginia, to members of the Criminal Law Committee of the Virginia Bar Association and to members of the Criminal Law Section of the Virginia State Bar.

The methodology for the second part of our study relating to the time and expense involved in providing post-conviction representation in capital cases was more detailed.

A number of studies similar to the one reported here in Virginia have been previously conducted by The Spangenberg Group. In February 1987, under contract with the American Bar Association Information Program (BIP), The Spangenberg Group conducted a nationwide study of the "Time and Expense Analysis in Post-Conviction Death Penalty Cases." The study design was virtually identical to the current Virginia study and the data contained information on 114 cases reported from 24 different states. Forty-one of these cases involved post-conviction death penalty cases from Florida. In June 1988, under the same BIP contract, The Spangenberg Group conducted a study of the "Time and Expense Analysis in Post-Conviction Death Penalty Cases in North Carolina" for the Administrative Office of the Courts in North Carolina. In that study, data was reported on 25 of the 26 cases that had reached the state post-conviction stage in North Carolina since the death penalty statute was affirmed by the North Carolina Supreme Court in 1979. Two other less formal studies of a similar nature have also been conducted by The Spangenberg Group in Alabama and Georgia in the last two years.

The experience in having conducted these previous studies substantially aided in the design of the methodology of the Virginia time and expense analysis. The first step was to design a written questionnaire to collect the necessary information from private attorneys representing death-sentenced individuals in Virginia since 1977. This survey form was designed with the assistance of a number of private attorneys who have had substantial experience handling post-conviction death penalty cases in Virginia.

The next step in the process was to prepare a list of private attorneys who have provided representation to indigent defendants in post-conviction capital cases in Virginia since 1977. We were aided materially in this process by Ms. Marie Deans of the Virginia Coalition on Jails and Prisons who has for several years undertaken the responsibility of attempting to secure counsel for death row inmates in Virginia in these cases.

Questionnaires were mailed to every private attorney identified through this task in the summer of 1988. Extensive follow-up telephone calls were later made to all non-respondents. During the course of this effort, respondents were able to identify other attorneys or law firms who had also provided representation in these same cases. Follow-up efforts were then conducted to gather this additional data.

Through the questionnaire we collected the time (in hours) expended by private attorneys at each level of the post-conviction process and the amount of compensation received. In addition, we gathered information on the necessary expenses incurred by private attorneys for such litigation both in state and federal courts (e.g., expert witness, investigators and other expenses). We asked a series of questions regarding whether or not attorneys were reimbursed by the state and federal government for expenses and other questions relating to the respondents' views on adequate rates of compensation. We also asked for recommendations on improvements to the system for providing representation in post-

conviction capital cases in Virginia.

The Stages in a Death Penalty Case in Virginia

Capital cases are normally begun in Virginia's General District Court and processed through a preliminary hearing to determine whether or not there is probable cause to "bind over" the defendant to the Circuit Court for trial.

At the Circuit Court level there is a required bifurcated trial in capital cases, the first trial to determine the guilt or innocence of the defendant and in the case of a guilty finding, a second sentencing trial to determine whether or not the defendant will be sentenced to death or to life without parole.

Under constitutional law, upon sentence of death, the defendant is entitled to a direct appeal to the Supreme Court of Virginia. Following affirmance of the sentence by the Supreme Court of Virginia, the defendant may file a discretionary writ of certiorari to the United States Supreme Court. If the writ is denied, the defendant may seek relief through a series of post-conviction petitions in the state and federal courts.

There are several court levels through which a typical post-conviction death penalty case may travel. In Virginia, these levels are as follows, presented in the usual sequence in which the various post-conviction petitions may be filed:

(1) State Circuit Court - petitions for post-conviction relief must be filed in this trial court where the conviction and the death sentence were imposed.

(2) Supreme Court of Virginia - the highest state court where an appeal is taken from the state circuit court's decision regarding a post-conviction petition.

(3) United States Supreme Court - the court where a petition may be filed requesting a review of the decision of the Virginia Supreme Court regarding a state post-conviction petition.

(4) United States District Court (federal) - the court where a federal habeas corpus petition may be filed if relief is denied on a state post-conviction petition in the Virginia Supreme Court.

(5) United States Court of Appeals for the Fourth Circuit - the court that hears an appeal from the decision of the U.S. District Court regarding a writ of habeas corpus.

(6) United States Supreme Court - a final post-conviction petition may be filed in this court requesting a review of the decision of the U.S. Court of Appeals regarding a writ of habeas corpus.

This post-conviction process is substantially the same in every state where the death penalty exists.

The Virginia Coalition of Prisons and Jails informs us that 54 defendants have been sentenced to death in Virginia since the Supreme Court of Virginia affirmed the new death sentence law in 1977. Of that number, 42 reached the state post-conviction level and 12 are either pending on direct appeal before the Supreme Court of Virginia or have not yet reached state post-conviction. Seven individuals have been executed in Virginia and two died while on death row.

Provisions for Appointment and Compensation of Counsel in Capital Cases in Virginia at Trial and Direct Appeal

The Supreme Court of Virginia first authorized the appointment of counsel in 1849 for those defendants accused of capital offenses. In 1940, well before the United States Supreme Court decision in Gideon v. Wainwright, 372 U.S. 335 (1963), Virginia extended the right to counsel by statute, to all felony prosecutions commenced in a court of record. Virginia has also provided the right to counsel in misdemeanor cases where there is a potential for imprisonment consistent with the U.S. Supreme Court decision in Argersinger v. Hamlin, 407 U.S. 25 (1975).

The statutory provisions on the right to counsel at trial are found in Sections 16.1-266 through 16.1-268 and Section 19.2-163 of the Code of Virginia. The right to be represented by a court-appointed attorney paid by the state is restricted by law to those individuals who are indigent and charged with an offense which may be punishable by incarceration or adults who may be subjected to loss of parental rights. Appointment is not required in jailable misdemeanors where the judge has declared in writing prior to trial that any sentence upon conviction will not include imprisonment.

There are also a series of provisions for the appointment of counsel in matters involving juveniles. In abuse and neglect and termination of parental rights cases, a lawyer must be appointed for the juveniles involved pursuant to Section 16.1-266 of the Code. In cases involving children alleged to be in need of services or alleged to be delinquent, an attorney is appointed if the court determines that the child is indigent and his or her parent or guardian does not retain counsel on the child's behalf.

It is clear that any indigent defendant in a capital case in Virginia is entitled to court-appointed counsel as a matter of right both by constitutional and state law at trial and on direct appeal.

Compensation of court-appointed counsel in Virginia is governed by Section 19.2-163 of the Virginia Code. As previously

stated, the General Assembly removed the maximum fee for court-appointed counsel in capital cases and the statute now states that:

> counsel appointed to represent an indigent accused in a criminal case shall be compensated for his services in an amount fixed by each of the courts in which he appears according to the time and effort expended by him in the particular case . . . in a circuit court to defend a felony charge that may be punishable by death an amount deemed reasonable by the court.

Section 19.2-326 of the Virginia Code establishes fee provisions for cases on appeal to the Supreme Court of Virginia at the discretion of the Supreme Court.

Section 19.2-163 also establishes that the "circuit or district court shall direct the payment of such reasonable expenses incurred by such court-appointed as it deems appropriate under the circumstances of the case." In regard to the actual approval of such expenses, the Office of the Executive Secretary has developed a Chart of Allowances with statutory citations and statutory limits, where they are spelled out specifically in the legislation. It is important to note, however, that many necessary expenses such as those for expert witnesses do not have a specific statutory limit and thus are left to the discretion of the court.

Finally, in regard to compensation for court-appointed counsel, the Office of the Executive Secretary has established a maximum suggested hourly rate of $40/hour for out-of-court work and $60/hour for in-court work, subject of course to the discretion of the court in capital cases at trial.

The Right to Counsel in Post-Conviction Death Penalty Cases in Virginia

Section 14.1-183 of the Code of Virginia states:

> Any person who has been a resident of this Commonwealth for a continuous period of six months who, on account of his poverty, is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from

all officers, all needful services and process, without any fees to them therefore, except what may be included in the costs recovered from the opposite party.

There is a second provision in the Code of Virginia relative to the right of counsel in state post-conviction matters which states:

> The judge of a circuit court in whose county or city or state a correctional facility is located shall, on motion of the Commonwealth's attorney for such county or city, when he is requested so to do by the superintendent or warden of a state correctional facility, appoint one or more discrete and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matters relating to their incarcerations.
>
> An attorney so appointed shall be paid directly by the court from the criminal fund reasonable compensation on an hourly basis and necessary expenses based upon monthly reports to be furnished to the court by him. (Section 53.1-40, Code of Virginia.)

These methods of providing representation in state post-conviction death penalty cases were challenged in the United States District Court for the Eastern District of Virginia in the case of Giarratano v. Murray, CA85-0655-R (E.D. Va 1986).

The District Court in Giarratano found specifically that the assistance provided death row inmates under Section 53.1-40 was inadequate both in fact and in law. The court reported that no institutional attorney had in fact helped any death row inmate to file a habeas corpus petition and that seven attorneys were responsible for the overall representation of more than 2,000 prisoners on a part-time basis.

The court in Giarratano said specifically, "the scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as 'talking lawbooks.' Additionally, they do not sign pleadings or make court appearances." See Peterson v. Davis, 421 F. Supp. 1220 (E.D.Va. 1976), aff'd, 562 F.2d 48 (4th Cir. 1977).

In regard to Section 14.1-183, the Court further concluded that because an inmate must already have filed a post-conviction petition before receiving an attorney's assistance, it would come too late, after the critical stages of developing the claim.

Specifically, the court stated, "although such limitations do not appear on the face of the statute, appointments are made under this provision only after a petition is filed and then only if a non-frivolous claim is raised." See Cooper v. Haas, 210 Va. 279, 170 S.E. 2d 5 (1969); Darnell v. Peyton, 208 Va. 675, 160 S.E. 2d 749 (1968).

The District Court in Giarratano concluded:

> To summarize, the pre-petition assistance provided by institutional attorneys is too limited while the post-petition appointment of counsel is untimely. Nor do these provisions viewed together prove adequate. Although ample assistance is provided at trial and on appeal, the requisite aid in preparing the petition itself is absent. The matter of a death row inmate's habeas corpus petition is too important - both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved - to leave it, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

In ordering relief for the plaintiffs, the District Court relied on the U.S. Supreme Court case of Bounds v. Smith, 430 U.S. 817 (1977), in which the Court held that prison authorities are required "to assist inmates in the preparation and filing of meaningful legal papers," by providing prisoners with either adequate law libraries or assistance from legally trained personnel. The order of the District Court in Giarratano stated:

1. The court declares that indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts.

2. The defendants shall develop a system whereby attorneys may be appointed to the death row inmates individually as provided above.

Following this order by Judge Robert R. Merhige, Jr. on December 18, 1986, the Commonwealth of Virginia filed an appeal with the United States Court of Appeals for the Fourth Circuit. On March 18, 1987, the Circuit Court reversed the finding of Judge Merhige and the plaintiffs requested a re-hearing en banc before the U.S. Court of Appeals for the Fourth Circuit. Following a hearing en banc, the full court reinstated Judge Merhige's order on June 3, 1988. The United States Supreme Court has just granted certiorari in the case.

The right to counsel in federal habeas corpus death penalty cases is also evolving. Under 28 U.S.C. Section 2254, a judicial officer may appoint and compensate an attorney in a federal habeas corpus case. For many years, evidence indicates that Virginia and other death penalty states have made only sporadic appointments of counsel, and even less regularly provided compensation for court-appointed counsel in these cases.

However, in the past three years, under the leadership of the United States Judicial Conference, efforts have been undertaken to improve the representation of counsel in federal cases. Under Section 2.14B of the Guide to Judiciary Policies and Procedures, Volume VII, the federal judicial officer may appoint and compensate under the Criminal Justice Act an attorney furnished by a state or local public defender organization, by a legal aid agency, or other private, non-profit organization. The judicial officer may also appoint two counsel to a case pursuant to paragraph 2.11 of the Guidelines.

Further, under paragraph 3.16, the guidelines authorize reasonable employment and compensation of public and private organizations which provide consulting services to appointed and pro bono lawyers in capital federal habeas corpus cases in such areas as records completion, exhaustion of state remedies, identification of issues, review of draft pleadings and briefs, etc. These organizations, commonly referred to as resource centers, have now been organized and financed in part by federal

funds in 13 states including Tennessee, North Carolina, South Carolina, Mississippi, Florida, Georgia and Alabama. Planning for the creation of a resource center has just begun in Virginia.

The Criminal Justice Act itself was amended in 1987 to raise the compensation of court-appointed counsel in federal habeas corpus cases. Under the new amendment to the Act, the United States Judicial Conference is authorized, upon the request of the Chief Judge of the federal district, to establish an alternative hourly maximum rate up to $75 per hour in districts or circuits where a higher rate is warranted. (The regular federal hourly rate is $40 per hour for out-of-court work and $60 per hour for in-court work.) Approximately 17 federal districts have requested and been approved for the $75/hour rate. To date, however, neither federal district in Virginia has requested the higher hourly rate.

Finally, under the CJA, there is a statutory compensation limit for counsel fees of $750 and expenses of $1000. However, these maximums were set by Congress merely to ensure a level of review of the decisions of presiding judicial officers on compensation to be paid to attorneys and others providing services under the CJA. The case and expense maximums were not intended to signal the worth of each case falling within the specified category. The Judicial Conference has instituted procedures to waive these limitations and many federal districts in other states have been urged to waive these limitations in federal habeas corpus death penalty cases.

The right to counsel and compensation of counsel for state and federal habeas corpus death penalty cases in Virginia is in a state of flux, as the preceding discussion shows. State requirements changed with the original decision in Giarratano. Federal requirements changed with the actions of the U.S. Judicial Conference in the past two years.

There is some apparent confusion on the question of the right to compensation and reasonable expenses of counsel appointed by the court in Virginia in post-conviction cases. As the data will

indicate in this report, some counsel have been paid but many more have not. Some counsel have been reimbursed for their reasonable expenses and many have not.

Who is Providing Representation in Capital Cases in Virginia?

Based upon information received during the course of our study, we are able to provide a reasonably accurate assessment of the types of counsel currently providing representation in capital cases at all three stages of the criminal process in Virginia. The Virginia Coalition on Prisons and Jails estimates that over the past several years there have been approximately 45 capital indictments filed in each year. They also report that between April and November 1988 there were approximately 37 capital indictments filed throughout the Commonwealth. If this trend were to continue, it would result in a total of 63 capital indictments in 1988.

The Office of the Executive Secretary reports that they paid vouchers to court-appointed attorneys during FY 1988 in 38 cases. However, we cannot assume that these vouchers represent all of the capital appointments in a given year, and, of course, the total number of capital cases at trial would be slightly higher since public defender programs also handle a few cases.

In terms of appointment of counsel at trial, private attorneys are appointed in the majority of cases. Public defender programs are appointed infrequently because of their current caseloads in other criminal areas. At the present time, there are 11 public defender programs in Virginia serving the courts in 14 counties and nine cities. Private appointed counsel programs exist in the remaining 81 counties and 32 cities. In a later section of this report we will provide data, supplied by attorneys and judges, regarding the process and procedures used in making these appointments at trial.

As a general rule, the court-appointed attorney or public defender who provided representation at trial is re-appointed by the Circuit Court judge for the direct appeal to the Supreme Court of Virginia whenever a sentence of death is imposed. Only when it appears that a conflict exists or appointed counsel can provide some valid reason, is a new private attorney appointed for the direct appeal.

The question of the appointment of counsel at state post-conviction is in a state of flux as a result of the Giarratano decision. Currently, subject to the decision of the United States Supreme Court, counsel is being provided in state post-conviction cases under order of the federal courts in Virginia. Some Virginia lawyers were appointed at state post-conviction in the past, and a few compensated, as indicated elsewhere in this report.

However, prior to the decision in Giarratano, counsel was frequently obtained on a volunteer, pro bono basis. In fact, data obtained in our study disclosed that of 41 post-conviction cases reporting, counsel outside the Commonwealth of Virginia were assisting in providing representation in 24. Most of these counsel were obtained pro bono from large law offices in New York, the District of Columbia and other large cities. Much of the substantial work involved in locating pro bono counsel was performed by the Virginia Coalition on Prisons and Jails in the years prior to Giarratano.

CHAPTER TWO

SURVEY RESULTS OF TRIAL LEVEL REPRESENTATION IN CAPITAL CASES

Analysis of Attorney Responses

The Spangenberg Group fielded a set of questionnaires to all Bar Presidents in Virginia, to members of the Criminal Law Committee of the Virginia Bar Association and members of the Criminal Law Section of the Virginia State Bar. These questionnaires were assigned to gather information from attorneys who had represented indigent defendants in capital cases at trial and direct appeal. Since our response rate was minimal for those attorneys who had represented a client at direct appeal, we have focused this analysis on the trial phase alone.

A total of 53 attorneys returned completed questionnaires. Twenty-one of these attorneys had accepted appointments to represent indigent defendants in a capital case at trial.

The vast majority of the 32 attorneys who had not handled capital cases at trial came from moderate or small sized firms with ten or fewer attorneys. Low fees, enormous time commitments, concern about inexperience, expectations that support would not be available to mount a proper defense, and the limited rewards associated with this kind of work were reported as the major impediments to attorneys' willingness to represent indigent defendants in capital cases.

"In my opinion, the paltry sums paid to court-appointed attorneys in Virginia makes it difficult for sole practitioners and small firms to take capital cases," said one attorney. Another put it more directly: "I cannot afford to subsidize the Virginia criminal justice system. The lack of compensation to court-appointed attorneys is scandalous." A third attorney remarked, "I would accept such an appointment only if the court would provide a state-paid attorney to take over the rest of my practice while I handled the appointments."

One respondent who had never taken an appointment speculated, "I would probably not accept an appointment for a capital case.

The responsibility is too great and the compensation too low to justify taking the time from other fee generating cases. I am also greatly concerned that capital cases never seem to end."

Finally, another attorney was concerned about taking such appointments with limited experience: "I would accept a capital case for trial only as a second chair position to gain experience."

Attorney Time and Compensation

The data collected from the 21 attorneys who had represented indigent defendants in capital cases at trial suggests that the expectations outlined above reflect, in large part, the reality of capital representation in Virginia. Respondents indicated that the most glaring problem for them was limited compensation.

Prior to 1980, the maximum fee allowed in a capital case at trial was $400. Significantly, the Office of the Executive Secretary interpreted the language of the statute to prohibit the payment of any fee above that level, even if authorized by a Circuit Court judge. The maximum fee was removed from the statute in 1980, although the Appropriation Act established a limit of $600. That reservation was removed in 1984 and since that time the total fee allowed is within the discretion of the Circuit Court judge. While Virginia no longer has a statutory limit on these fees, in many cases informal limits are established by Circuit Court judges. Further, the Supreme Court's current policy is not to approve any allowance for attorney's fees which exceed $60 per hour for in-court services and $40 per hour for out-of-court services.

Attorneys in our survey sample reported a broad range of rates. We asked respondents to indicate the number of hours for which they received compensation and the rate of that compensation. Attorneys reported both flat fees and hourly fees for compensation at the trial stage. We additionally asked respondents what they understood to be the rate of compensation for appointed counsel.

More than half of the attorneys reported that they either did not know or believed the amount was set at the discretion of the court.

It is important to note that we were not able to determine when attorneys in our sample had been appointed. Thus, the data reported reflects changing compensation policies over the course of more than ten years. As we will indicate later in this section, compensation rates have improved in recent years, but are still substantially below those of most states.

Table 2-1 lists the 13 cases which reported an actual dollar amount of compensation, either as a flat fee or an hourly rate.

Table 2-1

Attorney Compensation for Capital Representation at Trial

Case	Type of Compensation	Amount of Compensation
1	flat fee	$ 463
2	flat fee	600
3	flat fee	750
4	flat fee	800
5	flat fee	1,000
6	flat fee	1,000
7	flat fee	1,000
8	flat fee	1,400
9	hourly rate	1,588
10	hourly rate	2,500
11	hourly rate	3,500
12	hourly rate	4,500
13	hourly rate	6,000

We can see from this chart that those attorneys who were paid on a per hour basis were all at the high end of the pay range. Attorneys who were paid by the hour reported hourly rates that ranged between $30 and $60 for in-court representation and $30 and $40 for out-of-court work. The critical question, however, is whether or not those attorneys were compensated for every hour that

they provided representation. In many cases we know that attorneys did not submit all of their actual hours since their expectation was that compensation would be severely limited. In many other cases, attorney respondents reported that judges substantially reduced the amount of compensation compared to that requested in the original voucher.

Respondents to the attorney questionnaire were asked to indicate the number of hours they spent on each case and the number of hours for which they received compensation. Only three attorneys in the entire sample reported that they were reimbursed for every hour of representation they provided.

We received very little information on the actual numbers of hours worked in death penalty cases, and the data we did receive had certain problems. For example, data made available by the Office of the Executive Secretary on attorney payments for FY 1988 disclosed that in two-thirds of the cases, two attorneys had been appointed and provided service in a single case. Data provided by court-appointed attorneys in our survey, on the other hand, did not provide information on the time spent and compensation provided by co-counsel.

In addition, some attorneys indicated that they had provided representation only at the preliminary hearing in the General District Court; others stated that they entered a plea to a lesser charge early in the process and several others informed us that they had not kept detailed records of time spent on cases in large measure because they did not expect full payment. Still others simply could not recall the hours spent on the case.

Those limitations acknowledged, the attorneys who did respond to the question on hours reported a range from 44 hours to 800 hours. Information from other states we have surveyed suggests that our data limitations outlined above may produce an artificially low number. In those studies, the amount of attorney hours spent on such cases at the trial phase ranged from 100 to well over 1,500 - with most falling into the 300-500 hour range.

For example, in the Death Penalty Defense unit of the Maryland Public Defender, staff attorney hours spent on death penalty cases at the trial level range between 100 and 1,250 (median 600 hours; average 535 hours). Private panel attorneys hired when the Maryland Public Defender has a conflict of interest spend between 135-891 hours (median 381 hours; average 408 hours). The Florida Public Defender Association has set office standards so that five death penalty cases at the trial level or four capital appeals are equivalent to one full year of staff attorney time. Since a typical public defender attorney in Florida is expected to log 1,950 billable hours in a year, by these calculations each death penalty case at trial could reasonably be expected to consume at least 390 hours of attorney time, and a capital appeal would consume about 490 hours. In the New Jersey Public Defender's Office, attorney time spent on death penalty cases at trial has ranged from 630-1,166 hours out-of-court. Attorneys have spent an average of 120 hours in court on these same cases.

Other studies on the cost of the death penalty at trial have also given estimates as to the amount of time these cases take. For example, the Kansas Legislative Research Department prepared a report in 1987 projecting the cost of re-implementing the death penalty in that state. They based their finding on an estimate that attorneys typically spend 800-1,000 hours on the trial phase, and an additional 800-1,000 hours on the direct appeal. Experts have also estimated that capital murder cases take approximately 3.5 times longer to try than non-capital murder cases, and that the average difference in length between a non-capital trial and a capital trial is 30 days.

We cite these figures from other states to suggest that based on these national findings, attorneys in Virginia can expect to devote a larger number of hours when they accept a capital case than our small data set suggests. Most attorneys we believe will end up spending at least 500 hours and others even more.

Despite limited data on the question of hours spent, we do have some information which indicates that the hourly rate of compensation for each hour worked is very low in Virginia. For example, one attorney reported spending 100 hours on a capital case and receiving a flat fee of $750. In effect, this lawyer received only $7.50 per hour for representation. A second attorney reported working 300 hours for a flat fee of $1,000, receiving effectively only $3.33 per hour. The attorney who reported the highest number of hours spent on any case worked 800 hours and was paid a fee of $463. The effective hourly rate of compensation in this case came to $0.58. For all those reporting a flat fee, the mean effective rate of compensation was $10 per hour. We found only three cases where the per hour rate came close to the current $60/40 limit, at $50 per hour. Those cases, however, reported relatively small numbers of hours spent, with an average of only 87 hours per case. Overall, the effective hourly rate for capital representation at trial in our sample is approximately $13. Again, it should be pointed out that some of these cases go back a number of years when flat fees were commonly accepted.

In addition, respondents indicated that the fees approved are consistently lower than those requested from the trial judge. In 21 out of the 22 cases where attorneys submitted vouchers for approval, they were reduced. Only one attorney (with two cases) received the amount requested. When vouchers were reduced, attorneys report they were given no explanation, except that the court chose to set the fee at that reduced level.

Information on vouchers paid in FY 88 provided by the Administrative Office of the Supreme Court of Virginia indicates that, of the 38 cases reported, the range of payments moved from $150 to $35,419. Attorneys in five cases received payment in excess of $20,000, while attorneys in ten cases were paid less than $1,000. The median payment for the 38 cases was $3,146.

Once again, it becomes difficult to compare these data with our questionnaire results. Of the 38 cases reported, 24

represented the work (and hours) of two attorneys. Voucher information does not include any data on the hours expended, nor whether a higher voucher amount had been reduced by the court. In addition, the questionnaire data covers cases from a broader time period than FY 88. Finally, the voucher information obviously does not include any payments made for those cases in previous years. Analysis of the voucher data suggests, however, that some improvement in fee reimbursements has occurred over the last few years. That improvement, however, still leaves Virginia at or near the bottom for attorney fees paid across the country.

Inadequate fees were the number one problem cited by attorneys in answering the question on problems and recommendations to improve the system of capital representation in Virginia. Respondents frequently maintained that fees must be consistent with private retained attorney rates to attract qualified lawyers to take these difficult cases.

According to one small firm practitioner, "Devoting all the necessary time, at below usual hourly rates, can bankrupt a sole practitioner and destroy small partnerships." He went on to draw a connection between inadequate compensation and inadequate representation: "Those with the most successful practices do not seek appointments, and usually are not appointed. Often those willing to take these cases are not really well qualified."

A sole practitioner commented:

> the state of Virginia looks to see how cheaply it can get by without having the case tossed out for want of due process. The state will spend thousands to prosecute, but only pennies to afford a defense. The state needs to quit putting a price tag on justice and expect lawyers to go through this ordeal for peanuts!

A third attorney indicated that the level of compensation affects the quality of representation: "It excludes a small portion of the qualified bar . . . the wear and tear of such cases creates the attitude among experienced lawyers of 'I've already paid my dues.'"

These sentiments are echoed in a report that the Virginia Bar Association's Special Committee on Indigent Defense completed in March 1988. The Virginia Bar Association prepared this report at the request of the Virginia General Assembly's Joint Subcommittee studying Alternative Indigent Defense Systems in order to evaluate (a) whether a public defender or assigned counsel system provided the best representation in Virginia; and (b) to determine fees for counsel assigned to represent indigent defendants. This report was based on a survey of over 4300 of the 12,000 members of the Virginia State Bar - judges, Commonwealth Attorneys, criminal practitioners, and other private attorneys.

In this survey, respondents were asked specifically if attorney compensation in capital cases was "about right" or "too low." 79.1% of all respondents believed that fees usually awarded for capital representation are too low. Only 20.9% thought they were about right. Respondents therefore suggested increasing attorney fees in capital cases. Suggested maximum fees ranged from $600-$50,000. Suggested maximum hourly rates ranged from $50 per hour to $500 per hour, the median suggested hourly rate being $100 and the average $115.

Respondents also expressed dissatisfaction with the criteria the courts use to guide their discretion in awarding fees. Data from the Virginia Bar Association's survey showed what factors respondents indicated <u>should</u> be taken into account when calculating fee awards in capital cases. These included difficulty of the case (83.5%), seriousness of the offense (73%), the number of billable hours an attorney reports (89.8%), the quality of services provided (65.4%), the number of counts with which the defendant was charged (56.9%), the experience of the attorney (55.4%), and the type of trial held or plea entered in the case (46.7%). Those factors that respondents claimed should be the <u>most</u> important for setting fees were difficulty of the case (31.9%), the number of billable hours an attorney reported (31.9%), the quality of services provided (16.9), and the seriousness of the offense (12.5%).

Qualification Standards, Training and Support Services

While the problem of low fees for court-appointed attorneys in capital trials was the most prominent issue mentioned by respondents to our survey, the attorney questionnaire also revealed a number of other critical areas of concern.

Qualification standards and training were two areas where we found consistent responses in the questionnaires. All respondents indicated that there were no formal standards or specific qualifications for counsel to be eligible to represent indigent defendants in capital cases at trial in Virginia. Rather, they reported the appointing judge generally has discretion in making the choice of counsel. This choice may rest on any number of factors including informal guidelines, based on an attorney's trial experience; a name coming up on the bar rotation list; the choice of an attorney based on willingness to volunteer; or, as one respondent stated, the choice of "whomever the judge can find . . .or cajole."

Specific training to meet the demands of this kind of representation appears to be quite limited. Two-thirds of the respondents were not aware of any available training at all, while a few mentioned Continuing Legal Education (CLE) seminars and two said bar programs were available. A number of respondents called for more training generally: one respondent recommended specific training for the development and use of forensic and sociological data as well as psychological evaluations; another wanted to see better education on the sentencing phase of the trial; and a third recommended better use of, and access to, computerized research services.

Other support services and back-up resources, such as legal consulting services, research assistance, motion and brief preparation and investigative services were reported as largely unavailable by our sample respondents. In the few instances where

such back-up services exist, attorneys indicate that costs are rarely recoverable, and the services themselves are limited.

Respondents also indicated that more resources should be dedicated to securing expert witnesses, investigators and psychiatric consultations. One attorney recommended the establishment of "a network of available expert witnesses."

The frustration with the current system is highlighted by another attorney who said, "the most dedicated lawyer can only do so much with no help - no investigators, no experts." Another remarked, "The Commonwealth has all the resources - forensic lab, investigators, etc. There needs to be parity in resources for defendants."

Finally, to paraphrase a theme we heard often from those attorneys representing defendants in the post-conviction stage, the quality of representation at the trial itself remains a critical issue. If appointed counsel for indigent defendants in capital cases were to be adequately paid and given those resources necessary to provide the best representation possible, then the kinds of problems and errors which come up through post-conviction appeals might be substantially reduced.

Analysis of Judges' Responses

Questionnaires were sent to all Circuit and General District Court Judges in Virginia. As was previously indicated, most capital cases are begun at the General District Court level and proceed through a preliminary hearing to determine whether the case will be bound over to the Circuit Court for trial. Thus we were interested in obtaining information from both judges in the General District and Circuit Courts.

Overall, we received completed questionnaires from 34 judges including 13 from the General District Court and 21 from the Circuit Court. Twenty-seven of the 34 judges indicated that they had both made appointments in capital cases and presided over either preliminary hearings or trial. Of the remaining seven, three indicated that to date, they had neither made appointments nor presided over preliminary hearings or trials. The other four, all Circuit Court Judges indicated that they had presided over trials, but that the original appointment had been made by the General District Court Judge. Our data discloses that, almost without exception, the attorney appointed in the General District Court remains the appointed attorney in the Circuit Court.

We asked all the judges what procedures they followed in appointing counsel for indigent defendants in capital cases at trial (e.g., solicitation of specific attorneys, selective appointment from a special list, by rotation from a regular list, appointment of the public defender office, etc.). Of the General District Court Judge responses, six or almost one-half indicated that they made capital case appointments from their regular list of court-appointed attorneys. Four judges indicated that they selected experienced attorneys from the court-appointed list and three judges stated that a special list was created for capital case appointments.

The majority of Circuit Judges (12 out of 21) who responded to our survey pointed out that they select the most experienced and

competent attorneys from their regular list in capital cases. Four judges indicated that they appoint from their regular list, three from a specialized list and two stated that they appoint the local public defender.

We asked the judges whether or not they had standards, specific qualifications or informal guidelines for counsel to be eligible to represent indigent defendants in capital cases. No judges indicated that they had any written standards. Most indicated that they selected only experienced, competent criminal lawyers. One judge requires that appointed attorneys be former prosecutors. Several indicated that since their jurisdiction was sparsely populated, they knew all of the attorneys - "I know the qualifications of all the members of the bar and I pick over who can and will work."

We asked the trial judges what rate of pay court-appointed attorneys receive for capital appointments and whether it was based upon an hourly rate or flat fee. All of the General District Court Judges indicated that the approved hourly rate for preliminary hearings in capital cases was $40/hour for out-of-court work and $60/hour for in-court work. They further indicated that they were bound by the maximum per case fee of $86 established by statute for any preliminary hearing in General District Court. This is obviously extraordinarily low for any felony case, let alone a capital case. Judges in the Circuit Court answered the same question in a variety of ways. Ten judges simply listed the hourly rate of $60/40. One judge said he pays $175/50 per hour. Eight judges stated that they pay what they feel is reasonable. Two Circuit Judges still believed that there was a maximum fee under the statute of $600.

All judges were asked whether or not they felt the current compensation rates were adequate to attract qualified attorneys in capital cases. Every General District Court judge said no. Among the Circuit Court judges, 13 of the 21 felt the fees were adequate in Circuit Court and ten felt they were not. Among those who felt

that the fees were inadequate, two felt that the hourly rate should be $75, two felt the hourly rate should be $100/75, and one $100/80. One Circuit Court judge stated that "the fee schedule provided sufficient available money to cover the hours, but not the stress and effort." Another judge suggested that attorneys in capital cases "must be paid in accordance with the hourly rate no matter how many hours they were required to put into the case."

We also asked the judges whether or not they had difficulty in finding qualified attorneys to appoint in capital cases. The responses were split with 12 judges indicating yes and 16 indicating no. One judge who answered yes indicated that the more experienced attorneys are now declining appointment due to the time constraints of the case. Another who said yes emphasized the extreme emotional stress of the assignment. Another indicated that more and more, "attorneys dread the long and involved process to final resolution." One other judge who answered yes expressed concern about "the time involved, the minimum fees available and the emotional stress."

Finally, we asked all the judges to describe any significant problems that exist in providing quality representation in capital cases at trial and to suggest any specific recommendations that they might have for improvement in the system.

The recommendations most frequently stated were better compensation for attorneys, better training and more money for experts and other necessary expenses of litigation. One Circuit Court judge stated that:

> Very few attorneys want to do capital cases because it takes so much time and the compensation is dreadfully low. The rest of their practice suffers badly and the attorney is constantly subject to charges of ineffective assistance of counsel. Virginia is far too stingy when it comes to fees for experts and frequently the court-appointed attorney pays the expenses out of his own pocket. Virginia must loosen up the purse strings for attorney fees and expert fees or we will face a series of major law suits against the Commonwealth by court-appointed attorneys in the very near future.

Several other judges pointed out the need for increased and adequate compensation. One commented that, "There should be increased compensation in Virginia across the board for court-appointed cases to allow a greater interest in criminal law among the bar." Several judges pointed out specific problems in post-conviction representation and urged special attention to this problem.

Apart from inadequate compensation, the second most frequent problem identified was the lack of training. One judge suggested at least one full CLE course per year in capital representation as a requirement. Another judge in emphasizing the need for more training noted that "death penalty law is complex and getting more so and the need for better training is essential." Another judge stated that his policy "of pairing an experienced attorney with an inexperienced one is the best training possible, but should be combined with a CLE program developed by the Virginia State Bar." Finally, a Circuit Court judge stated that the "needed training should be broad and thorough covering all aspects of the criminal case with an emphasis on sentencing and post-conviction."

Four judges stated that they felt the problem of capital representation could best be answered by the establishment of a statewide public defender system or a state appellate defender system in Virginia. One said specifically, "I think we must go to a local public defender system with a regional state appellate program." Another stated, "We should substantially expand our public defender system and establish regional resource centers with legal specialists to assist local counsel."

One judge summed up the problem by stating:

> There must be increased pay for counsel, better training, availability of expert witnesses, etc. The availability of qualified attorneys has become a serious problem. Attorneys lose far too much time from their practice and their reputation unfortunately suffers when they take a capital case. The public tends to link the defendant with his lawyer and the least we can do is to provide compensation in such a way as to compensate counsel for his time and the pressure he inevitably feels.

Finally, judges raised a series of other issues including the need for court-appointed attorneys to spend more time in the mitigation phase, the need for the Virginia State Bar to recruit and train more qualified attorneys for capital cases, the specific need for recruiting qualified attorneys at the direct appeal stage, the need for a monitoring and tracking system to assure that all indigent capital defendants have counsel at every stage of the proceedings, and the need for attention to the problem of post-conviction representation generally, and the need to assure that Virginia attorneys are available in these cases so that it is not necessary for capital defendants to go out of state to insure competent representation.

Finally, we received information on a particular capital case which illustrates many of the frustrations and problems associated with the whole system. One court-appointed attorney who had just finished an extraordinarily difficult case wrote to the trial as follows:

> Dear Judge _____:
>
> Enclosed is my itemized statement and expenses as an appointed defense counsel in the above-styled criminal case. Many hundreds of hours were lost and are not included because of my poor record keeping. Additionally, there is another aspect of a capital murder case that is generally unrecognized.
>
> The personal toll for defending Mr. ____ over a fifteen month period is immeasurable. Fifty-three total court appearances and twenty-three calendar days of trial are only half the story. I could write pages on the effect of Mr. ____'s style on the lives of whomever came in contact with him. But essentially, the demands made from a sophisticated career criminal and his attacks on the system required a redirection in my life and accepting the fact that Mr. ____ was my sole client. The last few months before trial I gave up my legal practice and lived off my private income.

In approving the voucher as submitted by the attorney, the trial judge stated:

> I am finally in receipt of the request for payment from the court-appointed counsel in the above matter.

I enclose herewith: (1) Form DC-50; (2) statement of legal services rendered; (3) statement of expenses incurred; and (4) various supporting receipts.

Also, I enclose a copy of Mr. ____'s cover letter of ____. I had requested that Mr. ____ keep accurate records from the beginning and the Commonwealth has benefitted from his failure to do such. There is absolutely no question that his total statement for services is "under-billed" and that the amount I am permitted to allow him or recommend for approval is insufficient.

I can hardly imagine a situation under which a man is more deserving of being paid the sum of ____ as requested, than in the instant case. I only hope that all of the Justices have a complete opportunity to comprehend the record that exists in this case, the unbelievable frustrations involved, and the amount of work performed by all parties involved.

CHAPTER THREE

TIME AND EXPENSE ANALYSIS FOR POST-CONVICTION DEATH PENALTY REPRESENTATION

Since 1977, 42 cases have reached the post-conviction process in Virginia. Of these, one inmate was represented by retained counsel and 41 apparently were represented by court-appointed or pro bono counsel. Of those 41 defendants, 24 were assisted at post-conviction by large, out-of-state law firms, located mainly in Washington D.C. and New York City.

We were able to gather data on the time and expenses of counsel in 34 of the 41 cases. We were unable to secure such data on eight cases although counsel was provided in all of these cases. A number of factors regarding the survey responses have had an impact on our analysis.

First, many of the cases in our sample were still in active litigation at the time of our survey and the time records, therefore, are not totally complete. In some instances, the case had just recently reached the next level and little work had yet been done at that level. In other cases, virtually all of the work had been completed at the current level and the litigants were simply awaiting the court's opinion. Since it was not possible to calculate the amount of time that would be necessary to complete each case at the current level, our figures include only the hours reported for each level. Thus, these figures somewhat underrepresent the number of hours that would have resulted had all the cases at each level been completed.

Second, very few private attorneys reported handling a case through each of the six steps set out in the questionnaire. In a number of cases, the private attorney or law firm reported that they began representation at some later stage in the post-conviction process and did not have specific knowledge of the time expended on the case by other attorneys earlier in the process. Where possible, we tracked down these attorneys and added their time to the case record. Many times, however, we

were simply unable to collect these data. Thus, it is important to note that the data reported in this study are clearly on the conservative side and are in fact less than the total time expended for those cases for which we were unable to gather the additional data.

Third, a number of cases moved through the post-conviction process more than once because one court sent the case back to a lower court for further review. Whenever this occurred, we recorded the total number of hours expended at each level.

Finally, in a few of the cases in the sample, the hours reported were actually documented, either through a formal manual or computerized management information system. In the remainder of the cases, the figures reported represent estimates of the hours required and expenses incurred in providing representation.

The combination of these factors has led us to two conclusions which form the foundation of our analysis:

- The most reliable way to estimate the time involved in litigating a post-conviction case is to analyze the attorney time required <u>at each distinct level</u> of the post-conviction process, rather than to attempt to analyze individual cases moving through the process as a whole.

- The most reliable measure to use in calculating time is the <u>median number of hours</u> required to litigate a case at each level of the post-conviction process. (The median is that value at which there are equally as many responses above it as there are below it in the sample.) This statistic is less likely to be skewed by factors such as incomplete cases and variations in attorneys' experience than the average number of hours.

As we report the Virginia data in the sections to follow, we will also, where appropriate, compare the Virginia figures with those obtained in The Spangenberg Group's national study, the Florida sample in the national study, and the North Carolina study (see Methodology section above).

Attorney Time

Table 3-1 displays the total number of responses, maximum/minimum hours, median hours, and average hours for each court level regarding attorney time for representation in state post-conviction and federal habeas corpus death penalty cases in Virginia.

Table 3-1

ATTORNEY HOURS PER CASE

Responses	State Circuit Ct.	Virginia Sup. Ct.	U.S. Sup. Ct.	Fed.Dist Court	4th Circ. Ct.of App.	U.S. Sup. Ct
No.of Cases	33	27	19	19	10	9
Max. Hours	2000	952	300	2780	1500	520
Min. Hours	50	19	20	100	215	100
Median Hrs.	450	210	120	350	315	265
Average Hrs.	633	235	124	545	511	279

An analysis of this table discloses, for example, that there were 33 cases reporting attorney time at the state circuit court post-conviction level in our survey. The largest number of attorney hours reported on a single case at this stage was 2,000 and the fewest hours reported was 50. The median hours reported for all 33 responses was 450 hours and the average time reported for the 33 cases was 633 hours.

We are not able to identify all the reasons why there is such a substantial range in hours at the various levels of post-conviction review. It is clear that some cases are extremely complex and time-consuming, while others are more routine. Some trial transcripts are several thousands of pages, while others are only a few hundred pages. Experienced practitioners may be more efficient in their work and take less time than attorneys who have never handled such a case before. There were also a few cases in our sample in which the work had just begun at the state

trial court level and the final total of hours spent will be considerably higher. Finally, some respondents indicated that the cases they were handling were under active death warrants. In these circumstances the time commitments are greater, due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.

In reviewing the median hours identified above as the most reliable measure of attorney time in Table 3-1 at each of the six levels, the following information is found.

Table 3-2
MEDIAN ATTORNEY HOURS

Court Level	Number of Cases	Median Hours
State Circuit Ct.	33	450
VA Supreme Court	27	210
U.S. Supreme Court	19	120
Fed. District Ct.	19	350
4th Cir. Ct. of Appeals	10	315
U.S. Supreme Court	9	265
TOTAL		1710

It has been calculated that the typical private attorney devotes approximately 1650 billable hours per year to his or her private law practice. On that basis, the median figure of 450 hours for the state circuit court portion of the process would represent slightly more than 28% of a lawyer's time for a full year just to provide representation at the circuit court level. The total median time estimated for all of the six steps in the post-conviction process would result in more than 100% of an attorney's work year being expended to go through the six stages of the post-conviction process one time.

Table 3-3 provides a comparison of the median hours in Vir-

several different types, particularly civil rights litigation. No case I have ever handled compares in complexity with my post-conviction death penalty case. The death penalty jurisprudence is unintelligible; it is inconsistent and, at times, irrational. In addition, it is evolving. It constantly changes. In short, there is nothing more difficult, more time consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction.

Attorney Fees

As part of our study, we sought to obtain information from the private attorneys in our sample regarding their expectation for compensation when they undertook representation in each case both for state and federal court. We asked a series of follow-up questions regarding whether or not they submitted vouchers for payment of attorney fees and if so, what was the total amount of compensation received.

Attorney Fees for State Post-Conviction Representation

As previously indicated, Section 53.1-40 of the Code of Virginia permits the appointment of counsel for certain inmates of the Commonwealth "regarding any legal matter relating to their incarceration." The statute further states that, "An attorney so appointed shall be paid as directed by the court from the criminal fund reasonable compensation on an hourly basis and necessary expenses based upon monthly reports to be furnished the court by him."

The Office of the Executive Secretary of the Supreme Court of Virginia publishes an annual report setting out the various expenditure items contained in the Criminal Fund. The office reports that the costs of post-conviction representation might potentially be included in three line items: "Habeas Corpus"; "Court Appointed Attorney for Indigent Convicts"; and "Indigent Appeals Attorney Fee and Expenses." Unfortunately, the Office is

ginia to those of the similar studies previously mentioned.

Table 3-3

COMPARISON OF MEDIAN HOURS IN VIRGINIA
TO OTHER SIMILAR STUDIES AT ALL COURT LEVELS

Court Level	Virginia	N.Carolina	National Study	Florida Sample
State Trial Court	450	482	400	500
State Sup. Court	210	92	200	240
U.S. Sup. Court	120	38	65	77
Fed. Dist. Court	350	338	305	388
Fed. Circ. Court	315	387	320	318
U.S. Sup. Court	265	75	180	160
TOTAL	1710	1412	1470	1683

An analysis of Table 3-3 discloses that the total median attorney time for all six post-conviction stages in Virginia is slightly higher than the other three survey samples. The largest discrepancy can be found at both U.S. Supreme Court levels. The time spent at the state circuit and federal district and circuit court levels in Virginia is strikingly similar to that found in the other samples.

While our view has consistently been that the median time is the most reliable measure to use in calculating work hours required in litigation when analyzing a single sample, the average time of the entire sample to perform a task becomes meaningful when comparing different sets of similar samples. Table 3-4 draws a comparison of the average number of hours required to provide representation at each of the six post-conviction levels

for Virginia, North Carolina, the national study, and the Florida sample taken from the national study.

Table 3-4

COMPARISON OF AVERAGE HOURS IN VIRGINIA
TO OTHER SIMILAR STUDIES AT ALL COURT LEVELS

Court Level	Virginia	N.Carolina	National Study	Florida Sample
State Trial Court	633	788	582	763
State Sup. Court	235	356	288	406
U.S. Sup. Court	124	75	133	88
Fed. Dist. Court	545	335	540	516
Fed. Circ. Court	511	384	471	471
U.S. Sup. Court	279	135	270	206
TOTAL	2327	2073	2284	2450

An analysis of Table 3-4 discloses that the total average time for all six stages of the process varies only slightly in each of the four reported samples. While there is clearly some variation at each level, the overall time for the entire case is consistent across all sample respondents.

The attorney time reported for death penalty post-conviction representation in the Virginia study confirms the figures obtained in prior studies. There is simply no other type of criminal case that can compare with the death penalty. We are reminded of a statement made by a private attorney in our national survey:

> I have been involved, both as plaintiff's counsel and defense counsel, in major protracted litigation of

unable to identify in the latter two accounts whether claims were made by private attorneys for state post-conviction representation specifically in death penalty cases. They were able to report that the indigent convicts account, on the other hand, includes only those funds paid to court-appointed attorneys connected with correctional institutions pursuant to Section 53.1-40. While those attorneys are theoretically available to help inmates with certain post-conviction matt rs, as already noted, the District Court in Giarratano reported that no institutional attorney has in fact helped any death row inmate file a habeas corpus petition. The court commented that, indeed, "no pretense is made by the defendants in this case that these few attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates."

We rule out, therefore, the "Court Appointed Attorney for Indigent Convicts," as a source of data regarding attorneys fees in capital post-conviction representation. Some portion of the habeas corpus account does appear to represent such payments and it remains unclear whether, in fact, the indigent appeal account is used for such purposes. Since no system is currently in place to code vouchers according to the type of case, we were unable to determine what percentage of these accounts may have been expended by the state for post-conviction capital cases.

Based on our questionnaire returns, however, we were able to determine that only a small portion of these accounts appears to be used to reimburse appointed private attorneys. The majority of our respondents indicated that they had taken on the original post-conviction assignment purely on a pro bono basis. Others indicated that they were unaware that there was any authority under Virginia law to seek reimbursement for attorney fees. Other respondents said that expectations of low or no reimbursement influenced their decision not to file a voucher for the full amount of time expended on the case. Still others reported that their efforts to seek appointment, and therefore at least partial reim-

bursement of fees, was denied and they proceeded with representation pro bono.

In 75% of the cases at the post-conviction level, we have no information that lawyers were paid by the state; for the remaining cases, our survey indicates that a portion of the lawyers involved received limited compensation.

Table 3-5 displays compensation for attorney time in state habeas corpus death penalty cases. In the 11 cases where we have information that some state compensation was received, Table 5 shows that one attorney (Attorney A) represented four defendants, Attorney B represented two defendants and five additional attorneys represented the remaining cases. The two highest payments reported, both to the same attorney, were $7,880 and $6,006. In both cases, the respondent reported the voucher amount submitted was considerably higher, at $22,780 and $26,019 respectively. The range of compensation drops considerably after these two cases. The low for the entire group was $300, with three cases paid at that level. The median payments for attorneys fees was $700, and the average was $1,939.

Table 3-5

Compensation for Attorney Time in State Habeas Corpus Death Penalty Case

Case	Attorney Compensation	
Case 1	$300	
Case 2	$300	Attorney A
Case 3	$300	Attorney A
Case 4	$500	Attorney A
Case 5	$550	
Case 6	$700	
Case 7	$800	
Case 8	$1000	Attorney A
Case 9	$3000	
Case 10	$6006	Attorney B
Case 11	$7880	Attorney B

In ten out of the 11 cases, respondents provided information on the hours expended at the state habeas corpus level. Table 3-6 displays those hours, the fees reimbursed by the state and an effective hourly rate based on those fees. While there is a considerable range between the dismal low of $.57 per hour and the high of $27.26 per hour, there is no doubt that in those cases where attorneys received some compensation for their time, the effective hourly rate is well below even the overhead level required to run a law office.

Table 3-6

Effective Hourly Rate For Court-Appointed Counsel
At The State Post-Conviction Level

Hours Expended	Fee Paid by the State	Effective Hourly Rate
200	$ 300	$ 1.50
290	300	1.03
525	300	.57
175	500	2.86
400	550	1.37
300	800	2.66
525	1,000	1.90
337	3,000	8.88
263	6,006	22.84
289	7,880	27.26

Attorney Fees for Federal Habeas Corpus Representation

A majority of the private attorneys in the Virginia sample indicated, as they had regarding state post-conviction, that they entered the federal phase of the case strictly on a pro bono basis. However, of the 19 cases that reached the federal habeas corpus level, eight attorneys in seven cases were in fact compensated partially for their attorney time according to data reported by the Defense Services Division of the Federal Administrative Office of the Courts (AOC). (Prior to the adoption of the changes in the Criminal Justice Act and the Guidelines in 1987, there was provision for discretionary appointment and compensation for attorney fees with certain limitations.) Table 3-7 sets out the amount of compensation for federal habeas corpus attorney time reported from both our survey and the federal AOC data.

Table 3-7

COMPENSATION FOR ATTORNEY TIME IN FEDERAL HABEAS CORPUS DEATH PENALTY CASES

Case	Attorney Compensation	
1	$ 500.00	Attorney A
	4350.00	Attorney B
2	500.00	
3	1287.45	
4	4301.49	
5	7864.98	
6	538.55	
7	8282.41	
8	8000.00	

All but one of the payments indicated in Table 3-7 (for case 8) were made prior to the amendments to the CJA Guidelines. Several private attorneys in the sample who have yet to be reimbursed in federal court indicated that they intend in the near future to submit claims for attorney hours recently performed in connection with the federal habeas corpus part of their case.

Attorney Expenses

The questionnaire sent to all court-appointed attorneys in post-conviction death penalty cases in Virginia asked a series of questions regarding expenses of litigation incurred in both state and federal court. Each respondent was asked to report the total expenses for such items as transcripts, travel, expert witnesses, depositions, investigation and other expenses. We also asked what portion of the expenses were reimbursed by the Commonwealth of Virginia or the federal government. Questions also addressed the issue of the expectation of attorneys regarding reimbursement

of expenses when they agreed to undertake the case and recommendations regarding the adequate rate of reimbursement for expenses.

Expenses in State Post-Conviction Cases

Table 8 sets out the number of respondents who reported incurring expenses in state circuit court, the maximum and minimum reported, the median amount and the average amount.

Table 3-8
EXPENSES FOR STATE POST-CONVICTION
DEATH PENALTY CASES

Responses	State Post-Conviction Expenses
No. Responding	30
Max. Amount	$25,500
Min. Amount	$ 232
Median Amount	$ 2500
Average Amount	$ 3686

An analysis of Table 3-8 discloses that the median amount of expenses incurred was $2500 and the average $3686. The total amount of out-of-pocket expenses reported for these 30 cases at the state post-conviction level was $110,585.

Of these 30 reported cases, however, only one third indicated that the state had provided some form of reimbursement for expenses. Table 3-9 sets forth data on these ten cases.

Table 3-9

EXPENSES INCURRED AND REIMBURSEMENT RECEIVED IN STATE POST-CONVICTION CASES

Case Number	Total Expenses	Amount Reimbursed	Percent Reimbursed
1	$ 1670	$ 1670	100%
2	800	800	100%
3	600	600	100%
4	1244	1244	100%
5	1850	1150	62%
6	3788	1592	42%
7	2900	1050	36%
8	1050	300	29%
9	4200	600	14%
10	575	40	7%

An analysis of Table 3-9 indicates that even in those cases where expense reimbursement has been provided by the state, for the most part reimbursement has been only partial. The total amount of expenses reimbursed by the Commonwealth is $9046, or only 8% of the total amount of expenses ($10,585) incurred in the 30 cases in the sample.

A few respondents indicated that they had not expected to be reimbursed for expenses in state court when they accepted the case. A few said they intended to seek reimbursement in the future. Still others indicated either that they had no knowledge that they could be reimbursed or expected that the process would be too cumbersome.

As was the case with attorney fees, much of the information on expenses was estimated by attorneys, many of whom were not planning to seek reimbursement. In our judgment, therefore, the dollar amount reported may be lower than the actual out-of-pocket

disbursements. Further, one of the strongest recommendations made by respondents to this study was that procedures must be instituted to assure that court-appointed counsel are reimbursed for all necessary expenses related to litigation.

Expenses in Federal Habeas Corpus Cases

The data reported for expenses incurred in the federal habeas corpus portion of cases were extremely limited. There were only eight cases in which such expenses were reported, ranging from $150 to $20,000. The average amount of expenses reported was $6417. Reimbursement was reported in only one of these cases, but several attorneys indicated that they intended to seek reimbursement in the near future.

Comments from Private Attorneys

In addition to the time and cost data reported above, a number of private attorneys and law firms in Virginia provided written comments regarding their cases. A sample of the comments is provided below.

> When I agreed to take this case, it was with no realistic expectation of any compensation and, throughout the three years I represented him, I received a total of $20.00 which my client paid me from half of the payment for a television interview, to offset what was probably thousands of dollars of expenses largely out of my pocket.
>
> As there was no compensation expected, and as the case became fairly all-consuming, time tickets were not kept and I can only estimate that I personally spent at least one thousand hours.
>
> * * * *
>
> Having informal caps on attorney fees and expenses places a severe limitation on attorneys. In these cases you must have investigators, law clerks, support help, etc. Money becomes so important in

these cases. It may mean that you will not do everything you should. One of these cases could put a small (two lawyer) firm out of business without compensation.

* * * *

The emotional and time drain in this case was unmatched by any other case I have ever had in my practice. The private bar is about to exhaust its generosity without adequate compensation.

* * * *

These cases can no longer be viewed as an exercise in a lawyer's professional pride. You simply can no longer say that every lawyer has an obligation in these cases. Most of the lawyers appointed in these cases are small practitioners--it is economically ruinous. There are sleepless nights. The experience has ruined my relationship with the prosecutor. The level of compensation is ludicrous. I will not take another case.

* * * *

These are horrible cases--thankless cases. I had no idea how many hours I would have to spend when I got in on the case. There are so many needs in this area that it is mind boggling--money, decent library, computers, tracking, full-time attorneys, investigators, brief bank. With no compensation there is no incentive for a lawyer to take a case. On the other hand, the Attorney General's Office has whatever resources it needs. They will pay whatever it takes. This is grossly unfair.

* * * *

I took this case because the defendant was on death row and no one else would take the case. The defendant was about to be executed without a lawyer. There must be a lawyer appointed for all defendants on death row immediately following the direct appeal. They must be competent and adequately compensated.

* * * *

Recommendations from Respondents

The comments set out above are reflective of the total population of attorneys who generously responded to this survey. In a number of cases, Virginia attorneys were joined by out-of-state attorneys or law firms. In very few cases have any attorneys been compensated for their post-conviction death penalty work in Virginia over the past decade. In addition, expenses are seldom reimbursed. The representation has been, with a few exceptions, a pro bono effort.

At the end of the questionnaire we asked respondents to "Please describe any recommendations that you may have for improved representation in post-conviction capital cases in Virginia." We received a large number of responses to this question and many attorneys had more than one recommendation.

The most frequent responses received and the total number of responses in each category are as follows:

1. Adequate compensation should be paid to post-conviction court-appointed attorneys. 30 responses

In addition to the general question on improvements in the system, there was a further question which asked, "What rate of compensation for attorney fees in post-conviction capital cases do you think is necessary to obtain competent representation?" This question addressed both the issue of hourly rates and maximum amounts per case.

In response to the hourly rate, forty-four attorneys suggested a specific figure which ranged from $40/hour to $125/hour. The range of responses were as follows:

$40 to $59 per hour - 6 responses
$60 to $74 per hour - 12 responses
$75 per hour - 14 responses
$76 to $100 per hour - 2 responses
$100 per hour - 9 responses

Over $100 per hour - 1 response

There were 39 attorneys who answered the question regarding the maximum amount of compensation that should be allowed in an individual case. Of that number, 32 indicated that there should be no maximum amount prescribed, one attorney recommended $10,000, three attorneys $20,000 and three attorneys $25,000.

2. A post-conviction death penalty resource center should be established in Virginia with state and federal funds to provide expert legal consulting and other necessary services to court-appointed attorneys. 21 responses

3. The state should reimburse court-appointed counsel in state post-conviction death penalty cases for all necessary expenses of litigation. 20 responses

4. An effort should be undertaken to recruit a pool of experienced and qualified attorneys in Virginia who would be willing to be appointed in post-conviction death penalty cases assuming adequate compensation and expenses. 15 responses

5. A statewide appellate public defender office should be established in Virginia to be primarily responsible for representation in state and federal post-conviction death penalty cases. 11 responses

A number of other recommendations were suggested by respondents including the need for a statewide brief bank, extensive training in post-conviction death penalty law, the creation of law school clinic programs to assist in representation and substantial efforts to improve representation in death penalty cases at trial.

CHAPTER FOUR

COMPARISON OF VIRGINIA WITH SIMILAR STATES

Comparison of Indigent Defense Systems Generally

In examining existing practices elsewhere in the nation, it is useful to first compare Virginia with the other states in the nation in the area of overall indigent defense services. We have just completed a nationwide study for the United States Department of Justice, Bureau of Justice Statistics, entitled "Criminal Defense for the Poor, 1986," which examined the types of systems, expenditures and caseload for each of the 50 states and the District of Columbia for 1986. This study updated information collected in the first national survey conducted in 1982 for the Bureau of Justice Statistics entitled, "National Criminal Defense Systems Study."

From the 1986 study we learned that assigned counsel systems are the most common type of program, with 52% of the counties in the nation using this type of system. This figure is even higher in the South, where 69% of the counties are served by assigned counsel programs. However, during the 1982-1986 period there was a decrease in the number of counties using assigned counsel systems (from 60% in 1982) and a corresponding increase in the use of public defender and contract programs. Public defender programs increased nationwide from 34% to 37% of all counties. Contract defense programs grew by nearly two-thirds, from almost 7% to 11% of all counties. In the South, the number of counties served by public defender programs stayed roughly the same, the number of assigned counsel counties decreased slightly and the number of contract counties increased.

For purposes of discussion, an assigned counsel system is one where individual private attorneys are appointed by the courts as needed from a list of available attorneys. In public defender programs, a salaried staff of full-time or part-time attorneys is organized to provide defense services to indigent defendants,

through either a contract with a state or local government or as a public agency. A contract attorney system is one in which individual private attorneys, bar associations or private law firms contract with the funding source to provide services for a specified dollar amount.

As noted earlier, there are currently 14 counties in Virginia which are served by 11 public defender programs and 81 counties which use assigned counsel. The number of public defender programs has more than doubled in the last two years, however 85% of the counties in the state continue to be served by private assigned counsel.

In terms of expenditures, Virginia spent $10,122,671 overall for indigent defense services in 1986 for a per capita cost of $1.75. This placed Virginia 40th among the 50 states and the District of Columbia, and at less than one-half of the national average per capita figure of $4.11.

Nationwide costs for indigent defense services increased by approximately 60% from 1982 to 1986 and the per capita costs rose from $2.76 to $4.11. Virginia expenditures, however, rose only by 16%, resulting in a lowering of the national ranking for per capita cost from 32 to 40. The only other state in the country with a smaller percentage increase over the four year period was Arkansas.

In terms of caseload, Virginia provided representation in 87,000 indigent cases in 1986. This represents 15 indigent cases per 1,000 population, which ranks 24th in the nation and is less than the national average of 18 cases per 1,000 population. Some of the factors which affect the incidence of indigent cases per 1,000 population are the crime rate, the incidence of poverty, the definition of the right to counsel, and the standards of indigency in a given jurisdiction.

A comparison of the cost and caseload information for Virginia indicate an average cost per case of $116 in 1986, which resulted in a ranking of 48th. The average cost per case nationwide was $223. The cost per case nationwide rose approximately 15% from

1982 to 1986 for an increase from $196 per case to $223. In Virginia, the cost per case increased only 4.5% from $111 to $116 per case, keeping Virginia's ranking at 48th in the country.

The final comparison to be drawn from the 1986 study relates to maximum fees for court-appointed counsel in Virginia. Those maximums are as follows:

<u>District Court</u>	
Single Charge	$86
<u>Circuit Court</u>	
Misdemeanor punishable by confinement	$115
Felony punishable by 20 years or less	$230
Felony punishable by more than 20 years	$500
Capital Offense	A reasonable amount

The established maximums in this fee schedule are the lowest of any state in the country with one exception. Only in the case of a Circuit Court offense involving punishment by more than 20 years does one state, Arkansas ($450), have a lower maximum fee.

Thus, by all measures, Virginia remains at or near the bottom in expenditures, cost per case and assigned counsel fees for indigent defense. Significantly, as set out above, despite the low ranking in 1982, Virginia has slipped even further behind the rest of the nation by 1986.

In an earlier report prepared for the Virginia State Bar entitled, "Analysis of Costs for Court-Appointed Counsel in Virginia," February 1985, the authors of this report did a comparison of Virginia with other states with similar delivery systems based upon the 1982 national report. The other 11 states had a predominantly assigned counsel system, with all but Maine and North Dakota having a few public defender programs. For purposes of analysis we have updated that table by adding columns for data obtained in the 1986 study.

Table 4-1

Per Capita Cost and Cost Per Case
States with Predominantly Assigned Counsel Programs

State	Per Capita Cost		Ranking of Per Capita Cost		Average Cost Per Case		Ranking of Cost Per Case	
	1982	1986	1982	1986	1982	1986	1982	1986
West Virginia	1.64	2.53	33	30	223	242	16	18
South Dakota	1.96	2.52	25	31	216	367	19	6
North Dakota	1.45	1.81	36	39	206	198	21	26
North Carolina	1.87	2.60	27	29	187	235	25	19
Kansas	1.49	1.73	34	41	181	165	27	34
Washington	3.55	4.75	10	12	180	209	28	23
Alabama	1.09	1.52	42	44	145	192	35	29
Tennessee	0.81	1.62	50	43	144	206	36	24
Texas	0.81	1.97	50	38	141	154	37	39
Georgia	1.04	1.36	44	47	131	138	39	44
Maine	0.97	1.67	47	42	112	187	47	31
Virginia	1.64	1.75	32	40	111	116	48	48

As can be seen in Table 4-1, Virginia's ranking in per capita costs in 1982 exceeded that of West Virginia, North Dakota, Kansas, Alabama, Tennessee, Texas, Georgia and Maine, among the 11 states in the comparison. By 1986, Virginia had fallen below Kansas, Alabama, Tennessee, Georgia and Maine to 40th in the nation. At the same time Virginia's average cost per case remained below all of the other 11 states. It is important to point out that as of 1986, the states of West Virginia, North Dakota, Kansas and Maine did not have the death penalty and South Dakota had no one on death row. Thus in five of the 11 states there was no factoring in of the substantial cost of death penalty cases.

Finally, to complete our comparison we have prepared a table of states to compare Virginia with the 20 states where the entire cost of indigent defense services is paid by state government. An analysis of Table 4-2 for 1986 shows only Missouri, among the 20 states, with per capita costs below those of Virginia. Secondly, Virginia ranks last among these states on a per capita basis.

Virginia also has the lowest fee schedule for court-appointed counsel among all of the state-funded states listed in Table 4-2. Finally, the states of Alaska, Hawaii, Iowa, Maine, Massachusetts, Oregon, Rhode Island, Vermont, West Virginia, and Wisconsin do not have the death penalty; and among the remaining states, Colorado has only three individuals on death row, Connecticut one, New Hampshire none and New Mexico two. Thus 14 out of the 20 states have little or no costs associated with the death penalty.

These comparisons of indigent defense systems are important for a number of reasons, the most important being that they demonstrate that the overall system in Virginia is substantially underfunded. This points out the serious need to address the overall problem, of which capital representation is but one part, as soon as possible. Further, if improvement in capital case representation is to take place, substantial new funds will no doubt have to be appropriated by the General Assembly.

Table 4-2

Per Capita and Average Cost per Indigent Defense Case
State-Funded States, 1986

State	Total Expenditures	Per Capita Expense	Ranking	Average Cost Per Case	Rankin
Alaska	$6,892,400	12.91	2	468	2
Colorado	12,126,270	3.71	21	229	21
Connecticut	9,251,316	2.90	25	138	45
Delaware	2,750,000	4.34	14	153	40
Hawaii	4,382,609	4.13	18	219	22
Iowa	11,536,008	4.05	20	274	11
Maine	1,962,694	1.67	42	187	31
Maryland	20,042,024	4.49	13	196	27
Massachusetts	20,761,822	3.56	22	143	43
Missouri	6,746,272	1.33	49	183	32
New Hampshire	4,329,960	4.22	16	402	5
New Jersey	31,025,000	4.07	19	540	1
New Mexico	6,283,700	4.25	15	269	12
North Carolina	16,480,870	2.60	29	235	19
Oregon	22,432,300	8.31	4	160	37
Rhode Island	2,083,091	2.14	35	254	16
Vermont	2,777,798	5.13	9	177	33
Virginia	10,122,671	1.75	40	116	48
West Virginia	4,848,921	2.53	30	242	18
Wisconsin	20,061,508	4.19	17	261	15

Comparison of Systems for Providing Capital Representation

This section of the report examines the types of system used by each of the 36 death penalty states to provide representation in capital cases. The section is divided into three parts: representation at trial, on direct appeal, and in state post-conviction proceedings.

Capital Representation at Trial

As previously stated, there are three basic systems for providing indigent defense representation at trial, both in capital and all other cases. The systems are: public defender, assigned counsel and contract attorney. Among the 36 death penalty states, all three systems can be found. The following table sets out the type of system currently operating in each of the 36 states. The number one in a column signifies that this system is primarily responsible for providing representation in most of the death penalty cases at trial. The number two signifies that a system is secondary or supplemental.

An examination of Table 4-3 shows that public defenders provide primary representation at trial in 27 of the 36 states. Assigned counsel provide primary representation in 18 of the 36 states and contract attorneys in only two states. In nine of these states, the primary responsibility is shared by public defenders and assigned counsel. This is due to the fact that in these states there are numerous areas without a public defender program. With very few exceptions, where a public defender exists, it is the public defender who is primarily responsible for representation at trial. In ten of the states, Colorado, Connecticut, Delaware, Kentucky, Maryland, Missouri, New Hampshire, New Jersey, New Mexico and Wyoming, there is a statewide public defender responsible for capital representation at trial throughout the state. In Florida, Illinois, Nevada, Pennsylvania and South Carolina, there are

Table 4-3

Type of System for Representation in Capital Trials

	Public Defender	Assigned Counsel	Contract Attorney
Alabama	2	1	
Arizona	1	2	2
Arkansas	2	1	2
California	1	2	
Colorado	1	2	
Connecticut	1	2	
Delaware	1	2	
Florida	1	2	
Georgia	2	1	2
Idaho		1	1
Illinois	1	2	
Indiana	1	1	
Kentucky	1	2	2
Louisiana	1	2	
Maryland	1	2	
Mississippi		1	
Missouri	1	2	
Montana	2	1	2
Nebraska	1	1	
Nevada	1	2	
New Hampshire	1	2	
New Jersey	1	2	
New Mexico	1	2	2
North Carolina	2	1	
Ohio	1	1	
Oklahoma	1	1	2
Oregon	1	1	1
Pennsylvania	1	2	
South Carolina	1	2	
South Dakota		1	
Tennessee	1	1	
Texas		1	
Utah	1	1	
Virginia	1	1	
Washington	1	1	
Wyoming	1	2	

independent public defender programs operating in each county of the state and with very few exceptions are primarily responsible for capital representation at trial.

In a few statewide public defender systems such as Kentucky, Maryland and New Jersey, there is a special statewide unit responsible for capital representation at trial. In some cases, attorneys from the central unit travel around the state to provide representation. In other cases, these attorneys assist local public defenders at trial. In addition, a special unit exists in the Office of the State Public Defender of Ohio to assist local public defenders or assigned counsel in representation at trial.

Direct Appeal in Capital Cases

There are basically four types of systems in this country designed to provide representation on first appeal in capital and non-capital cases. The following material describes these systems.

1. Ad Hoc Assignments - There are several states that provide for the ad hoc appointment of private attorneys on a case by case basis. In some states, all such appointments are made by the State Supreme Court or the Intermediate Appellate Court. In other states, all appointments on direct appeal are made by the trial court. Further, the compensation for private counsel may be specifically set out by statute or court rule, or may be left to the discretion of the appointing authority.

One of the features of this type of system is that there is no state appellate agency available to assure representation on direct appeal and it is generally assumed that appointed trial counsel will continue representation on direct appeal. Examples of death penalty states with this type of system are Alabama, Arkansas, Georgia, Idaho, Mississippi, Montana, South Dakota and Texas.

2. Mixed Systems - In other states where there are local public defenders sharing representation with private attorney programs, statutes or court rules may authorize the appointment of either private counsel or the local public defender (where they exist) and the compensation for the private bar is set in a similar fashion as for ad hoc assignments. There are a few examples in this category where local public defenders are either not authorized to handle direct appeals, do not have money in their budget to do so, or who have determined that for conflict reasons they will not provide representation on direct appeal for defendants that they have represented at trial.

3. Statewide Public Defender Appellate Units - There are 11 death penalty states with a statewide public defender system that has a special appellate unit primarily responsible for representation on direct appeal throughout the state, except in conflict cases. Those states are Colorado, Connecticut, Delaware, Kentucky, Maryland, Missouri, Nevada, New Hampshire, New Jersey, New Mexico and Wyoming. In most of these states, the state public defender also has the ability to refer any particular case to an assigned counsel program, both in a conflict situation and when he or she feels that the unit is overworked and the case can better be handled by a private appointed attorney. In most circumstances, the state public defender is able to provide compensation to the private attorney from a special line item in his or her budget and the state public defender sets the rate of compensation.

All of the examples in this category involve a system that is totally state funded.

4. State Appellate Defender Program - Several states without a statewide public defender system have chosen to establish an independent state appellate defense program which is responsible for representation on direct appeal in most cases. Among the death penalty states, this system exists in California, Illinois, North

Table 4-4

Type of System for Representation on Direct Appeal in Capital Cases

State	Trial Public Defender	Appellate P.D. Statewide Programs	Appellate P.D. Independent	A.C. Trial Attorney	Contract Trial Attorney
Alabama	2			1	
Arizona	1			2	2
Arkansas	2			1	2
California			1	2	
Colorado		1		2	
Connecticut		1		2	
Delaware		1		2	
Florida			1	2	
Georgia	2			1	2
Idaho				1	1
Illinois	2		1	2	
Indiana	1			1	
Kentucky		1		2	2
Louisiana	1			2	
Maryland		1		2	
Mississippi				1	
Missouri		1		2	
Montana	2			1	2
Nebraska	1			1	
Nevada	1	1			
New Hampshire		1		2	
New Jersey		1		2	
New Mexico		1		2	2
North Carolina			1	2	
Ohio	2		1	2	
Oklahoma	2		1	2	2
Oregon			1	2	2
Pennsylvania	1			2	
South Carolina			1	2	
South Dakota				1	
Tennessee	1			1	
Texas				1	
Utah	1			1	
Virginia	1			1	
Washington			1	2	
Wyoming		1		2	

Capital Representation at State Post-Conviction

There are a number of systems employed among the death penalty states for providing counsel at the state post-conviction level. Each of these various systems is described below. Before beginning this discussion, it should be pointed out that seven states (Colorado, Connecticut, Delaware, New Hampshire, New Jersey, Oregon and South Dakota) have yet to have a capital case reach state post-conviction and thus there is no information to supply. Because of the fact that the whole process is in a state of flux, the information we are about to describe is the best information available and may, in a few cases, be subject to further review.

1. Trial Public Defender Representation - In a few states, the local public defender involved in the trial of the case has a primary responsibility to remain as counsel through state post-conviction in a number of cases. Examples include: Arizona, Illinois, Montana, Nebraska, Pennsylvania and Utah. In the majority of states, however, because of the issue of potential conflicts, the local public defender usually handles the case only through direct appeal in state court.

2. Assigned Counsel Attorney or Newly Appointed Assigned Counsel Attorney - In a number of states, the primary responsibility for representation in state post-conviction remains either with the assigned counsel who handled the trial or a new private assigned counsel is appointed. Examples include: Alabama, Arizona, Idaho, Nebraska, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Washington.

3. Contract Trial Attorney or Newly Appointed Contract Attorney - In a few states, the contract attorney who represented the defendant at trial or a newly appointed contract attorney provides representation at the state post-conviction level.

Examples are: Idaho and Montana.

4. Appellate Defender Unit of Statewide Appellate Defender Program - In some states, the appellate defender unit of the statewide appellate defender program is primarily responsible for representation in capital cases at state post-conviction. Examples are: Kentucky, Maryland, Missouri, Nevada, New Mexico and Wyoming.

5. Independent State Appellate Program - In some states, the independent appellate public defender is primarily responsible for representation at the state post-conviction level. Examples are: California, Florida, Illinois, Indiana, North Carolina, Ohio and Oklahoma.

6. Volunteer Counsel - In a few states volunteer counsel is the primary resource for representation in post-conviction capital cases. Examples are: Alabama, Arkansas, Georgia, Louisiana, Mississippi and Texas.

Table 4-5 sets forth the type of system available for representation in state post-conviction capital cases. An analysis of this table discloses that in 13 of the 29 states that have had capital cases reach the state post-conviction level, primary representation is provided either by a statewide public defender appellate unit or an independent state appellate program. In seven states, primary representation is provided by local trial public defender programs. In only six states are volunteer counsel identified as the primary providers of representation and in one of those states, Alabama, primary representation is also provided by private court-appointed counsel.

Table 4-5

System for Representation in State-Postconviction Capital Cases

State	Trial Public Defender	A/C Trial Attorney or New A/C	Contract Trial Attorney or New Contract Attorney	Appellate P.D. Statewide Program	Appellate P.D. Independent	Volunteer Counsel
Alabama		1				1
Arizona	1	1				
Arkansas						1
California		2			1	
Colorado*						
Connecticut*						
Delaware*						
Florida					1	2
Georgia						1
Idaho		1	1			
Illinois	1	2			1	
Indiana		2			1	
Kentucky				1		
Louisiana						1
Maryland				1		
Mississippi						1
Missouri		2		1		
Montana	1		1			
Nebraska	1	1				
Nevada	1	2		1		
New Hampshire*						
New Jersey*						
New Mexico				1		
North Carolina		2			1	
Ohio		2			1	
Oklahoma		2			1	
Oregon*						
Pennsylvania	1	1				
South Carolina		1			2	2
South Dakota*						
Tennessee		1				
Texas						1
Utah	1	1				
Virginia	2	1				
Washington		1				
Wyoming				1		

*Indicates that no capital case has yet to reach the state-postconviction level.

CHAPTER FIVE

RECOMMENDATIONS

The final section of this report sets forth a series of recommendations for improvement in the representation of indigent defendants in capital cases in Virginia at all levels - trial, appeal and post-conviction. These are divided into two parts. The first group includes the primary recommendations which we feel are essential and basic to improving the overall system for capital representation. The recommendations in the second group are important, but not as critical or fundamental as those in the first group.

Primary Recommendations

1. Adequate compensation should be paid to court-appointed counsel in Virginia for all phases of capital representation. Despite confusion and lack of data regarding the compensation of attorneys for capital representation, we are convinced that private court-appointed counsel must be adequately compensated at trial, direct appeal and state post-conviction in capital cases. The current maximum hourly rate of $40 for out-of-court work and $60 for in-court work should be established as the standard fixed rate for all capital case appointments, consistent with the fees paid in the federal courts in the Fourth Circuit. Furthermore, and most important, court-appointed attorneys must be paid for the actual number of hours worked, unless determined to be clearly unreasonable. In such cases, the reasons for any reduction should be spelled out by the judge in writing and a process for administrative review should be established.

2. Expenses for investigative services, expert witnesses, and other necessary expenses of litigation in capital cases should be approved as submitted unless determined to be clearly unreasonable. Court-appointed attorneys can no longer be expected to finance

necessary litigation expenses in capital cases out of their own pockets. Furthermore, court-appointed counsel in capital cases should not have to consider whether or not a necessary expense of litigation will be reimbursed before contracting for the expense. Contractors providing necessary litigation services should be assured that if they perform these services, they will be paid by the state in a timely fashion.

3. Public Defender programs appointed in capital cases should be reimbursed for both their time and expenses from a separate fund established for this purpose. A brief examination of public defender workload and budget in Virginia established the fact that they are unable to adequately provide representation in capital cases at any level given their current staffing and budget. Under these circumstances we have some doubt as to whether or not they should currently be appointed in any capital case. We have studied the effect of capital case representation in public defender offices in a number of jurisdictions around the country and are well aware of the burden of such cases on underfunded offices. There are a number of public defender offices in many jurisdictions that negotiate special funds from their funding source in capital cases. We feel that this must also be done in Virginia if public defender offices are to be expected to continue to handle these cases. Because of the uncertainty of cost and expenses, we recommend that a reasonable public defender hourly rate be established and that the program be reimbursed by the state for all hours devoted to capital cases and for all expenses of litigation, unless determined to be clearly unreasonable.

4. A Death Penalty Resource Center should be established by the state to provide expert legal consulting services and other necessary services to appointed counsel in capital cases at all levels in Virginia. Over the past few years a number of states have established Death Penalty Resource Centers designed to provide

expert legal consulting services to court-appointed counsel in capital cases. Most of the early development in this area centered around statewide public defender programs which created special death penalty units within their program. Kentucky, Maryland and Ohio were among the first to recognize the special needs associated with capital cases and to provide such units for all three levels of representation.

Most recently, the United States Judicial Conference and the Criminal Justice Act Division of the federal courts carried forward these efforts to assure competent representation in federal habeas corpus death penalty cases. Currently thirteen states - Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee and Texas - have begun operation of their state resource centers with a combination of federal, state and private funds. The states of Illinois, Indiana, Missouri, Nevada, Ohio and Pennsylvania are currently preparing similar applications for such centers. This is expected to bring the total number of centers in operation by 1989 to 19.

These resource centers vary somewhat in the types of services provided. Some centers provide back-up resources at all levels of capital representation. Some are primarily limited to post-conviction cases. The services provided include expert legal consulting services to court-appointed attorneys, expert witness lists, tracking of all cases, training, law school clinical programs, computerized legal research and brief banks and newsletters. Some centers also provide direct representation in a few post-conviction capital cases.

We believe that it is essential that such a resource center be created in Virginia. For years, the Virginia Coalition on Jails and Prisons has performed many of these services on almost a volunteer basis. In addition, a small university-based clinical program has recently been started at Washington and Lee Law School in the western part of the state. Despite these outstanding

efforts, a fully funded, centrally located resource center is critically needed in Virginia. This center could be created immediately to provide these much-needed services to attorneys providing capital representation at the trial level. The center's responsibilities could be expanded to include state post-conviction at a later date.

It is our understanding that the federal government has funds to sponsor the center's activities at the federal habeas corpus level and would look favorably on an application for Virginia. What is now necessary is a commitment from the Commonwealth of Virginia to share in the funding of the center.

5. An independent state office of appellate defense should be established to handle most death penalty cases on direct appeal, as well as state post-conviction in capital cases as needed. As previously indicated, 20 of 36 death penalty states have established a state office of appellate defense either as a unit of an existing statewide public defender or as an independent agency. Indiana and Florida have such a program exclusively for post-conviction cases. Experience has shown that such offices, adequately funded, provide a high caliber of representation in capital case appeals.

We strongly urge the creation of such an office in Virginia. While it was not within the purview of this study, we would also recommend that the new independent appellate defender agency be created to provide representation in all criminal cases on appeal subject to conflict and the availability of resources. This office could be created immediately to handle cases on appeal, and could be expanded at a later date, to also handle representation on post-conviction as needed. Because of the potential conflict of local public defenders, we do not recommend that the office be created within the existing Public Defender Commission. We favor rather, the creation of a new independent state appellate defender agency to provide these services.

The five primary recommendations set out above are absolutely essential to the improvement of representation in capital cases in Virginia. We believe that they are all of equal importance and their order of presentation should in no way indicate priority. The following secondary recommendations should also be considered important, but in many cases would naturally follow or be incorporated in the implementation of the five primary recommendations.

Secondary Recommendations

1. A system should be developed throughout the Commonwealth of Virginia to recruit, identify and select competent criminal attorneys who are prepared to provide representation upon appointment for capital cases at each of the three levels of representation.

2. A system should be developed to establish a set of qualification standards for court-appointed counsel in capital cases in Virginia. The standards should include the requirements of experience and expertise in the criminal practice of law and death penalty cases specifically. Consideration should be given to the establishment of separate lists of attorneys qualified to be appointed specifically to death penalty cases at trial, direct appeal, and post-conviction.

3. A systematic and continuous monitoring and tracking system should be developed and implemented through a resource center or other designated defense agency to assure that all capital defendants and death row inmates are represented by competent counsel at all times. This tracking system should be designed to collect and maintain annual statistics regarding the numbers of capital indictments, death sentences, appeals, death row inmates,

and cases in the various stages of state and federal post-conviction.

4. Two attorneys should be appointed in each death penalty case at trial, direct appeal and state post-conviction unless it is obvious that such a need does not apply.

5. A comprehensive and extensive training program should be developed in the state for attorneys who are appointed and seek appointment in capital cases. Special emphasis should be placed on training in post-conviction capital cases.

6. Existing computerized management information systems should be revised and/or new systems developed to collect data specifically on the fees and expenses required by court-appointed attorneys and public defenders in death penalty cases at all three levels of representation in order to provide accurate data for future planning and budgetary analysis. The tracking system recommended above should be compatible and coordinated with these other MIS recording death penalty data.

We have purposefully decided not to make a recommendation regarding a specific type of system that would best meet the needs for capital cases at trial throughout the Commonwealth. We feel that such a recommendation can only be made in light of an appropriate system for representation in criminal cases generally. We are aware that further discussions will continue to occur in this area in the General Assembly and among the judiciary and the bar. What is essential, however, is that any proposed system specifically take into account the uniqueness and importance of capital representation as continued discussions develop.

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SENATE BILL NO . . . . HOUSE BILL NO

A BILL to amend and reenact § 19 2-163 of the Code of Virginia, relating to compensation of court-appointed counsel

Be it enacted by the General Assembly of Virginia:

That § 19 2-163 of the Code of Virginia is amended and reenacted as follows:

§ 19 2-163. Compensation of court-appointed counsel --Counsel appointed to represent an indigent accused in a criminal case shall be compensated for his services in an amount fixed by each of the courts in which he appears according to the time and effort expended by him in the particular case, not to exceed the amounts specified in the following schedule.

1 In a district court, a sum not to exceed ~~eighty-six-dollars-~~ $100 or such other amount as may be provided by law, such amount shall be allowed in any case wherein counsel conducts the defense of a single charge against the indigent through to its conclusion without a requirement for accounting of time devoted thereto, thereafter, compensation for additional charges against the same accused also conducted by the same counsel shall be allowed on the basis of additional time expended as to such additional charges,

2 In a circuit court to defend a felony charge that may be punishable by death an amount deemed reasonable by the court, and to defend a felony charge that may be punishable by confinement in the

state correctional facility for a period of more than twenty years, a sum not to exceed ~~$500~~ $575 ; and to defend any other felony charge, a sum not to exceed ~~$230~~ $265 , and to defend any misdemeanor charge punishable by confinement in jail, a sum not to exceed ~~$115~~ $132 In the event any case is required to be retried due to a mistrial for any cause or reversed on appeal, the court may allow an additional fee for each case in an amount not to exceed the amounts allowable in the initial trial

The circuit or district court shall direct the payment of such reasonable expenses incurred by such court-appointed attorney as it deems appropriate under the circumstances of the case. Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding. The trial judge shall consider any guidelines established by the Supreme Court but shall have the sole discretion to fix the amount of compensation to be paid counsel appointed by the court to defend a felony charge that may be punishable by death.

The circuit or district court shall direct that the foregoing payments shall be paid out by the Commonwealth, if the defendant is charged with a violation of a statute or, by the county, city or town, if the defendant is charged with a violation of a county, city or town ordinance, to the attorney so appointed to defend such person as compensation for such defense.

Counsel representing a defendant charged with a Class 1 felony

may submit to the court, on a monthly basis, a statement of all costs incurred and fees charged by him in the case during that month Whenever the total charges as are deemed reasonable by the court for which payment has not previously been made or requested exceed $1,000, the court may direct that payment be made as otherwise provided in this section

When such directive is entered upon the order book of the court, the Commonwealth, county, city or town, as the case may be, shall provide for the payment out of its treasury of the sum of money so specified If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or the county, city or town, as the case may be. An abstract of such costs shall be docketed in the judgment docket and execution lien book maintained by such court

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APPENDIX D

Cost Issues Related to Indigent Defense

December 6, 1988

Prepared for:
Joint Subcommittee Studying
Alternative Indigent Defense Systems

Prepared by:
R. Ronald Jordan
Legislative Fiscal Analyst
House Appropriations Committee

Overview

At previous meetings, subcommittee members requested information on several cost issues related to indigent defense. The issues are:

- Cost of inmate representation
- Cost of death penalty cases
- Cost of court assigned counsel fee increases proposed by the Virginia Bar Association Special Committee on Indigent Defendants
- The cost effectiveness of a statewide public defender system when compared to the existing indigent defense system using current compensation rates
- The cost effectiveness of a statewide public defender system when compared to the existing indigent defense system using compensation rates proposed by the VBA
- Comparison of the staffing and funding of Public Defenders and Commonwealth's Attorneys

Two other items requested were an identification of the cost break point for a statewide public defender system and cost of a statewide public defender system less overhead cost.

Following is a detailed analysis of these issues in the order they are listed.

Cost of Indigent Inmate Representation

- §53.1-40 of the Code states:

> The judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the Commonwealth's Attorney for such county or city, when he is requested to do so by the superintendent or warden of a state correctional facility, appoint one or more discreet and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration.
>
> An attorney so appointed shall be paid as directed by the court from the criminal fund reasonable compensation on an hourly basis and necessary expenses based upon monthly reports to be furnished the court by him.

Table 1
Indigent Inmate CAA Cost Analysis

Fiscal Year	Defendant Total	Total Costs	Avg Per Defendant
1984	na	$193,853	na
1985	4566	$191,603	$41.96
1986	9686	$272,609	$28.14
1987	8480	$338,645	$39.93
1988	8614	$375,719	$43.62

- As Table 1 shows, the costs of providing representation for indigent inmates has increased from $193,853 in FY 1984 to $375,719 in FY 1988. However, this increase has been inconsistent with number of defendants and average cost per defendant rising and falling from year to year.

Cost of Class 1 Felonies

- Table 2 displays the growth in the court assigned attorney costs for class 1 felony or death penalty cases. Since the removal of the cap on fees for these cases, the average cost per defendant has increased considerably. However, due to problems related to this offense category in the data collection system, the data for FY 1986 and FY 1987 are estimates. These costs include attorneys fees but not related expenses which are grouped within other cost codes and cannot be separated.

Table 2
Class 1 Felony CAA Cost Analysis

Fiscal Year	Defendant Total	Total Costs	Avg Per Defendant
1985	91	$71,395	$784.56
1986	62	$214,457	$3,458.98
1987	102	$254,467	$2,494.77
1988	92	$332,622	$3,615.46

Costs of Fee Increases for CAA

- The final report of the Virginia Bar Association Special Committee on Indigent Defendants, The Defense of Indigents in Virginia: A Consensus for Change, October 1988, found that fee schedules for court appointed counsel in non-capital cases, and fees actually awarded in capital cases, are much too low.

  The Committee unanimously finds that the fee schedules in non-capital cases, and the fees actually awarded in capital cases, are much too low, even considering the increases in fees enacted by the General Assembly in 1986 and 1987.

  There was an overwhelming consensus among the respondents to the Committee's questionaire that the current fee schedules in non-capital cases (96.1% to 97.6%, depending on the particular fee schedule) and the fees actually awarded in capital cases (79%) are too low. See Consultants' Report, supra, at 15, 83-84

- The Special Committee recommended the following:

  The General Assembly should adopt immediately a phased in program to increase the current fee structure for court appointed counsel to the national average by 1992. Specifically:

  a. During its 1989 session, the General Assembly should amend §19.2-163 to increase the maximum fees payable to court appointed counsel 15% -- to $100 for a single charge in district court, $575 for a felony charge in circuit where the offense is punishable by confinement for more than 20 years, $265 for any other felony charge in circuit court, and $132 for any misdemeanor charge in circuit court where the offense is punishable by confinement in jail.

  b. The General Assembly should continue to increase the maximum fees payable to court appointed counsel each year in an amount sufficient to ensure that, by 1992 and thereafter, Virginia ranks in the upper half of the states with regard to such maximum fees.

- Table 3 shows the various projected increases in overall expenditures as a result of raising fees 15% in FY 1989 and 20% each year thereafter until the projected national cost per case average of $271 is reached in FY 1992.

TABLE 3
COURT ASSIGNED COUNSEL FEE INCREASES
REQUIRED TO MEET
PROJECTED 1992 NATIONAL COST PER CASE AVERAGE

***Assumes no caseload increase from FY 1988

CASE TYPE	FY 1988 BASELINE DATA		FY 1989 W/ 15% INCREASE		FY 1990 W/ 20% INCREASE		FY 1991 W/ 20% INCREASE		FY 1992 W/ 20% INCREASE	
	CASE TOTAL	AVG COST PER CASE	TOTAL EXPENDITURE	AVG COST PER CASE	TOTAL EXPENDITURE	AVG COST PER CASE	TOTAL EXPENDITURE	AVG COST PER CASE	TOTAL EXPENDITURE	AVG COST PER CASE	TOTAL EXPENDITURE
Class 1 Felony	92	$3,615.46	$332,622	$4,157 78	$382,515	$4,989 33	$459,018	$5,987 20	$550,822	$7,184 64	$660,986
Class 2 Felony	2001	$405.26	$810,923	$466 05	$932,561	$559 26	$1,119,074	$671.11	$1,342,888	$805.33	$1,611,466
Class 3-6 Felony	7495	$254.45	$1,907,041	$292 62	$2,193,155	$351 14	$2,631,786	$421 37	$3,158,143	$505 64	$3,789,771
Cir Ct Unclas Felony	5284	$258 94	$1,368,261	$297 79	$1,573,500	$357 34	$1,888,200	$428 81	$2,265,840	$514 57	$2,719,008
District Ct Felony	15197	$113.69	$1,727,808	$130 75	$1,986,979	$156 90	$2,384,375	$188 28	$2,861,250	$225 93	$3,433,500
Cir Ct Juv Cases	262	$164.74	$43,162	$189.45	$49,636	$227 34	$59,564	$272 81	$71,476	$327 37	$85,772
J/DR Adl Fel/Juv Vic	782	$116.99	$91,485	$134 54	$105,208	$161 44	$126,249	$193 73	$151,499	$232 48	$181,799
J/DR Adl Mis/Juv Vic	2006	$98.77	$198,132	$113.59	$227,852	$136 30	$273,422	$163 56	$328,107	$196.28	$393,728
J/DR Juv Case	13000	$104.20	$1,354,620	$119.83	$1,557,813	$143 80	$1,869,376	$172 56	$2,243,251	$207.07	$2,691,901
Adult Fel/Juv Victim	815	$108.64	$88,538	$124.93	$101,819	$149.92	$122,182	$179.90	$146,619	$215.88	$175,943
Adult Mis/Juv Victim	2041	$100.42	$204,952	$115 48	$235,695	$138.58	$282,834	$166 29	$339,401	$199 55	$407,281
All Misdemeanors	21287	$109.44	$2,329,700	$125.86	$2,679,155	$151 03	$3,214,986	$181 24	$3,857,983	$217.48	$4,629,580
Ind Apl Atty Fee/Exp	856	$383.52	$328,296	$441.05	$377,540	$529 26	$453,048	$635 11	$543,658	$762.14	$652,390
Indigent Convicts	8614	$43.62	$375,719	$50.16	$432,077	$60 19	$518,492	$72 23	$622,191	$86.68	$746,629
SUBTOTAL	79732	$139.99	**********	$160.98	$12,835,505	$193.18	$15,402,606	$231.82	$18,483,128	$278.18	$22,179,753

INCREASE OVER FY 88				
Dollars	FY 1989 $1,674,196	FY 1990 $4,241,297	FY 1991 $7,321,819	FY 1992 $11,018,444
Percent	15.00%	38.00%	65 60%	98.72%

- The projected national average was calculated using the annualized national per average case cost growth rate of 3.3% between 1982 and 1986. It is important to note that the projection uses a FY 1988 baseline of cases and assumes no increase in caseload. Increases in the caseload will result in a proportionate rise in costs.

- As Table 3 shows, the cost of a 15% increase in FY 1990 is $1,674,196 while the **cost to reach the national average cost per case by 1992 will require an increase of $11,018,444 or 98.72%** over the amount expended in 1988.

Cost Effectiveness of Statewide Public Defender System

General:

- The model developed for the Joint Study Committee by the Spangenburg Group in 1985 provides a means for comparing the cost of the existing system of indigent defense in Virginia with that of a statewide public defender system. It is based on a division of duties that assumes 75% of the total indigent trial cases will be assigned to the public defender system while the remaining 25% will be handled by the private bar due to conflict of interest or public defender overload.

- The model provides a method for determining the costs of public defender offices and private bar for all types of indigent cases. However the cost of class 1 felonies, appeals and indigent inmate cases are treated differently from other cases.

- All calculations are based on the total FY 1988 indigent caseload of both the existing court assigned system and the public defender offices.

Class 1 felony	92
All other felonies	25,707
All juvenile	15,344
All misdemeanors	34,657
Appeals	984
Indigent Convicts	8,614
Total Cases	**85,398**

80% of the felony cases will have a preliminary hearing in a lower court.

Determining Public Defender Office Staffing and Costs:

- Annual per trial attorney caseload standards in the model are as follows:
  Felonies (non-capital).....200
  Misdemeanors.....425
  Juvenile.....250

- Support staffing and costs are calculated at the following rate:
  - 1 investigator for every 8 attorneys
  - 1 secretary for every 4 attorneys
  - Salaries are statewide average for existing public defender offices as of June 30, 1988.
  - Fringe benefits are 21.05% .
  - Overhead or non-personnel services is 10% of total personnel costs.

- Appying the previous standards, it is projected that:
  - 204 trial attorneys will be required to provide representation in the 56,849 public defender cases.
  - The attorneys will require a support staff of 25 investigators and 51 secretaries.
  - **Total costs for a statewide public defender trial unit are estimated to be $9,819,997.**

- The Spangenburg model also proposes that appeals work be split evenly between the private bar and and a public defender appellate unit. Appeals attorney caseloads were established at 35 cases annually per attorney. Support staff is provided at the rate of one secretary for every two attorneys. Overhead is calculated at a 20% rate.

- Applying the above standards, 14 appellate attorneys will be required for the 492 appeals assigned to the public defender system. These attorneys will require a support staff of 7 secretaries. **Total cost of the appeals unit is $737,174.**

- A **central administrative unit** will be required for a statewide public defender system. The model projects these costs at 5.4% of the operating costs of the trial and appeals units or **$570,033.**

- One time **start up costs of 5.8% or $612,258** are also estimated. This estimate was provided by the Virginia Public Defender Commission.

- The **total projected cost** of statewide public defender offices is as follows:

Trial Attorney Unit	$9,819,997
Appellate Attorney Unit	737,174
Administrative Unit	612,258
Total	**$11,127,204**
One time Start Up	612,258

Determining Private Bar Costs:

- As previously noted, the model assumes 25% of the indigent trial cases will be assigned to the private bar and that appeals will be divided evenly between the public defender offices and the private bar. The model also proposes that indigent inmate representation remain exclusively a function of the private bar.

- The number of indigent cases assigned to the private bar in a statewide public defender system, using FY 1988 cases, would be as follows:

Felonies (non-capital)	6,449
Juvenile	3,836
Misdemeanors	8,664
Appeals	492
Indigent Inmates	8,614
Total Cases	**28,055**

- Using the above caseload data and FY 1988 average cost for each of these case types, the **private bar costs under a statewide public defender sytem are estimated at $3,128,449**

Existing System Versus Statewide Public Defender:

- The cost of private bar assignments and public defender offices, when added, constitute the total cost of a statewide public defender system. Using the FY 1988 caseload data, this cost totals $14,255,653.

- Table 4 compares the cost of the present indigent defense system and a statewide public defender system. As the table shows, for FY 1988 a statewide public defender system would cost $545,084 more than the existing system.

Table 4

Cost Comparison of Present System and a Statewide Public Defender System

Using Spangenburg Model

***Assumes no caseload increase from FY 1988

	Avg Cost for Priv Bar	Rate of Increase	Estimated National Average	Rate of Increase	Existing System Costs	Costs with Statewide PD System			Change (+/-) from Existing System Costs
						Pub Def Cost	Priv Bar Cost	Total Cost	
8	$139.99	NA	$238.15	NA	$13,710,569	$11,127,204	$3,128,449	$14,255,653	$545,084
9	$160.98	15%	$246.01	3.3%	$15,384,765	$11,683,564	$3,597,716	$15,281,281	($103,484)
0	$193.18	20%	$254.13	3.3%	$17,951,866	$12,267,742	$4,317,260	$16,585,002	($1,366,864)
1	$231.82	20%	$262.51	3.3%	$21,032,388	$12,881,130	$5,180,712	$18,061,841	($2,970,547)
2	$278.18	20%	$271.18	3.3%	$24,729,013	$13,525,186	$6,216,854	$19,742,040	($4,986,973)

- Table 4 also shows the effect of the Virginia Bar Association increases in court assigned attorney fees proposed through FY 1992. The 15 % fee increase proposed for FY 1990 will result in a statewide public defender system being less expensive than the existing system by $103,484. **As fees increase, the savings shown by a statewide public defender system increase accordingly.** (In order to provide a more realistic comparison, public defender costs were inflated by 5% in each future year.)

- When the fee schedule surpasses the national average, a statewide public defender system would save $4,986,973 over the existing indigent defense system.

- **The cost break point for the existing system and a statewide public defender occurs when fees are increased by 14.07% or when the per case average reaches $159.69.**

Public Defenders and Commonwealth's Attorneys

- As of June 1988, staffing for 121 Commonwealth's Attorneys offices consisted of 229 full time attorneys, 121 part time attorneys and 215 clerical personnel.

- In comparison, the 9 existing Public Defender offices were staffed by 38.52 full time equivalent attorneys, 10.33 investigators and 16.88 clerical personnel.

- Table 5 displays staffing and costs of the Commonwealth's Attorneys offices, existing Public Defender offices and a statewide Public Defender system. However one should use caution in comparing this information since factors such as workload and scope of responsibility may vary significantly.

Table 5
Budget and Staffing Levels

Office	Cost	Atty F/T	Atty P/T	Inv	Cler
Commonwealth's Attorneys	$18.2M	229	121	0	215
Public Defender Existing	$2.5M	38.5	0	10.3	16.8
Public Defender Statewide	$11.1M	218	0	25	51

APPENDIX E

D 12/15/88 Devine C 12/21/88 LL

HOUSE JOINT RESOLUTION NO.....

Requesting the Department of Planning and Budget, with assistance from other agencies and organizations, to study certain indigent criminal defense cost issues.

WHEREAS, defendants in criminal cases have a constitutionally guaranteed right to competent counsel; and

WHEREAS, the costs to the Commonwealth of providing constitutionally sufficient counsel to indigent criminal defendants has increased by 167 percent over the last ten fiscal years; and

WHEREAS, the 1985 Session of the General Assembly created, and subsequently continued, a joint subcommittee to study issues involving the cost and quality of criminal defense services provided to indigent persons; and

WHEREAS, the Joint Subcommittee found that despite recent increases in the maximum fees for court-appointed attorneys in criminal cases, Virginia still ranks forty-eighth among states in the average amount paid for representation in each case; and

WHEREAS, the Joint Subcommittee found that low fees have resulted in a dwindling pool of attorneys who are willing and able to accept court appointment in criminal cases involving indigent defendants, thereby impairing the ability of the Commonwealth to meet the constitutional mandate under the current system to provide legal representation for indigent defendants; and

WHEREAS, the Virginia Bar Association Special Committee on

Indigent Defendants has recommended that the maximum fees allowed to court-appointed counsel be immediately increased by fifteen percent and that further increases be approved to ensure that by 1992 the Commonwealth is allowing court-appointed counsel compensation which approximates the national average; and

WHEREAS, preliminary analysis indicates that, upon implementation of the recommended fee increase, a statewide public defender system will be more cost effective than the court-appointed counsel system; and

WHEREAS, the Virginia Bar Association Special Committee also recommended the creation of a public defender system in those areas of the Commonwealth where it can be shown to be cost effective and where there is a preference or demonstrated need for such a system, and

WHEREAS, the Joint Subcommittee believes a detailed cost analysis is necessary to properly evaluate the indigent defense systems currently used in the Commonwealth and to develop the most cohesive, cost-effective and constitutionally sufficient system for the Commonwealth; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Department of Planning and Budget, in conjunction with the Public Defender Commission, the Executive Secretary of the Supreme Court, the Department of Criminal Justice Services and other affected agencies and organizations, initiate a study to develop and recommend a cohesive, cost-effective plan for the operation of a system of legal representation for indigent criminal defendants. The study should include: (1) analysis of the workload, staffing and salary levels in the existing public defender offices and recommendation of appropriate standards and criteria that can be applied in existing and future

offices statewide, (ii) comparison of the cost effectiveness of private bar, court-appointed representation versus a public defender system within each judicial circuit, (iii) recommendations for implementation of changes in those circuits where a more cost-effective system is identified; and (iv) evaluation of the feasibility and cost effectiveness of establishing a state appellate defender office.

The Department shall periodically report on the progress of the study to the Joint Subcommittee Studying Criminal Defense Systems for the Indigent and shall complete its work and make its recommendations by July 1, 1989.

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D 12/16/88 Devine T 12/19/88 blh

HOUSE JOINT RESOLUTION NO.....

Requesting continuation of the Joint Subcommittee Studying Alternative Indigent Defense Systems.

WHEREAS, the 1985 Session of the General Assembly created a joint subcommittee to study issues involving the cost and quality of indigent defense services; and

WHEREAS, the Joint Subcommittee has recommended increases in the maximum fees awarded to court-appointed counsel and creation of additional public defender offices; and

WHEREAS, over the years the Joint Subcommittee has continued to evaluate the effects of implementation of those recommendations on the cost and availability of legal representation for indigent criminal defendants; and

WHEREAS, the Virginia Bar Association Special Committee on Indigent Defendants has recently completed its study and made its report and recommendations to the Joint Subcommittee; and

WHEREAS, the Spangenberg Group, Inc., an independent consultant providing assistance to the Joint Subcommittee pursuant to a grant from the Virginia Law Foundation, has recently completed its work and submitted a report and recommendations to the Joint Subcommittee regarding provision of counsel in post-conviction appellate proceedings, and

WHEREAS, the Supreme Court of the United States has recently

granted certiorari in a case questioning the constitutional sufficiency of the current system of providing counsel in post-conviction appellate proceedings in capital murder cases; and

WHEREAS, the Joint Subcommittee believes that many of the recommendations made would improve the current indigent defense system in Virginia but could not be implemented without a greater funding commitment and further study; and

WHEREAS, increasing demands are being made on the Criminal Fund, and the Joint Subcommittee believes additional fund sources must be identified; and

WHEREAS, the Joint Subcommittee is requesting the Department of Planning and Budget to provide a cost analysis of the alternative recommendations being considered, in order to provide the Commonwealth with a cohesive, constitutionally sufficient and cost effective indigent defense system; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Subcommittee Studying Indigent Defense Systems be continued to allow further analysis of the recommendations under consideration. The membership of the Joint Subcommittee shall remain the same, with any vacancy being filled in the same manner as the original appointment. The Joint Subcommittee shall complete its work in time to submit its recommendations to the 1990 Session of the General Assembly.

The indirect costs of this study are estimated to be $10,650; the direct costs of this study shall not exceed $6,480.

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