

**FINAL REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING**

# **Alternative Indigent Defense Systems**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



## **HOUSE DOCUMENT NO. 48**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
1991**

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Senator Elmo G. Cross, Jr., *Vice-Chairman*  
Delegate Alan A. Diamonstein  
Delegate Thomas W. Moss, Jr.  
Delegate Whittington W. Clement  
Delegate G. Steven Agee  
Senator Howard P. Anderson  
Senator Johnny S. Joannou  
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## Background on Subcommittee Activities

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 subcommittees met jointly and issued a report published as House Document No. 15 and Senate Document No. 11, 1986. The subcommittees recommended a fifteen 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<sup>1</sup>, later 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. House Joint Resolution No. 51 (1986) also allowed the subcommittee to study and formulate recommendations on (i) the particular problems for counsel in capital cases, (ii) the need to establish uniform statewide eligibility standards for court-appointed counsel, (iii) the methods of selecting court-appointed counsel and (iv) the administrative procedures of the Public Defender Commission.

The issues under study are complex. The unavailability in 1986 of credible data needed to evaluate the effects of its 1985 recommendations hampered the subcommittee. 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.<sup>2</sup> These factors resulted in House Joint Resolution No. 189 (1987), which continued the study for another year.

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<sup>1</sup> See Chapter 643, 1986 Acts of Assembly, § 1-12, Item 32.

<sup>2</sup> *Giarratano v. Sielaff* (Civil Action No. 85-0655-R).

During 1987, the Virginia Bar Association Special Committee on Indigent Defendants conducted a comprehensive statewide survey of lawyers and judges to ascertain their perceptions of the indigent defense system and identify ways to improve it. The Spangenburg Group, Inc., a consulting firm from Newton, Massachusetts, under a grant from the Virginia Law Foundation, began gathering statistical and financial 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 in the case. Again, the subcommittee, through House Joint Resolution No. 141 (1988), 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.

In 1989, the subcommittee filed a report (House Document No. 40) with the Governor and the General Assembly. The subcommittee recommended and the General Assembly approved another fifteen percent increase in the maximum fees allowed to court-appointed counsel. Additionally, the public defender system was expanded. Page County was added to the existing office serving Clarke, Frederick, Shenandoah and Warren and the City of Winchester. Four new offices were authorized for Suffolk, Danville, Bedford (county and city) and for the City of Franklin and Counties of Isle of Wight and Southampton. These offices were expanded or added in response to local initiatives and not recommendations of the subcommittee.

Upon recommendation of the subcommittee, the 1989 General Assembly also authorized the Department of Planning and Budget to 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 counsel and public defender systems (House Joint Resolution No. 279, 1989). The Department was asked to make recommendations for a cohesive, cost-effective method of providing a constitutionally sufficient system of representation for indigent criminal defendants. Again the subcommittee was continued to further analyze the need and methods for obtaining future fee increases for court-appointed counsel and expansion of the public defender system. The subcommittee wanted to work in conjunction with the Department of Planning and Budget study and the Virginia Bar Association, particularly with regard to creation of some system of assistance for appellants in capital cases. Following the decision in the *Giarratano* case, the subcommittee felt that further review was needed of the desirability of creating an appellate defenders office and/or a resource center to assist in the preparation of capital murder cases.

Reports were not filed in either 1987 or 1988 as no substantive recommendations were made. The Department of Planning and Budget filed its report in 1989 (House Document No. 44, 1990). Because the Department's report was requested by the subcommittee, a separate subcommittee report was not filed.

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 on the subcommittee. Delegate Whittington W. Clement of Danville was appointed by the Speaker from the House Appropriations Committee to replace Delegate Franklin P. Hall in 1988. Following the retirement of Delegate Ralph ("Bill") Axselle in 1989, the Speaker appointed Delegate G. Steven Agee from the House Committee for Courts of Justice. The membership has otherwise remained the same.

The joint subcommittee held three meetings in Richmond during 1989 and two during 1990.

## **Committee Deliberations and Findings**

### **I. Public Defender System**

The bulk of the work done in 1989 focused on the Department of Planning and Budget study. In addition to the issues referred to in House Joint Resolution No. 280 (1989), the subcommittee specifically asked the Department to make recommendations regarding the administration of the public defender commission, administration of a statewide public defender system and creation of a statewide capital resource center in lieu of a state appellate defender office. The committee is grateful to the Department and all those who assisted with the study, particularly to Robert A. Watts, Jr., a senior evaluation analyst with the Department who served as spokesman for the Department before the subcommittee.

The subcommittee made several findings and recommendations with regard to the public defender system.<sup>3</sup> Appropriate workload standards,

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<sup>3</sup>See House Document No. 44 (1990) for a discussion of the issues, findings and conclusions.

staffing levels and salary levels were recommended. The subcommittee urged the Public Defender Commission to adopt the recommended adjusted workload standards to determine appropriate staffing levels in both new and existing public defender offices. To facilitate implementation of this recommendation, the subcommittee recommended funding for thirty-seven new positions within the public defender system needed to maintain then-existing per attorney workload levels and an additional eleven positions needed to reduce the per attorney workloads to a level the Department determined would be appropriate. Although the cost for the thirty-seven positions would be approximately \$3 million over the biennium, the reduction in workload and preserved efficiency resulting from the other eleven new positions would net an approximate savings of \$3 million over the same period. The 1990 General Assembly provided funding for fifty additional positions with a total appropriation of \$3.2 million for the biennium. However, because of current budgetary constraints and required spending reductions, all of these positions have not yet been filled.

The 1990 General Assembly also approved an amendment to the duties of the public defenders. Upon recommendation of the subcommittee, the requirement that public defenders assist the courts in verifying that a defendant is indigent was deleted.<sup>4</sup> The subcommittee believed this requirement unnecessarily tied up public defenders and their investigators. More significantly, the public defender could be faced with a conflict of interests if called to testify against a client in a proceeding in which the accuracy of the indigency forms is questioned. The determination of indigency is best made independently by court personnel.

The subcommittee also considered a number of changes in the way in which the Commission operates. The Department found that using court-appointed counsel as the primary indigent defense system is currently cost-effective; however, this is due in large part to the low fees paid to court-appointed counsel. The Department concluded that if increases in those fees of twenty percent for two consecutive fiscal years were adopted,<sup>5</sup> then a shift to a statewide public defender system should be considered.<sup>6</sup> The Commission on the Future of Virginia's Judicial System recommended that "appropriately staffed and funded" public defender offices be established in each judicial circuit as the primary indigent defense system.<sup>7</sup> However, because of the fiscal situation currently facing the Commonwealth, the subcommittee believes that the court-appointed counsel system be retained as the primary

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<sup>4</sup>House Bill No. 214, Chapter 734 *Acts of Assembly* (1990).

<sup>5</sup>See, Cost Issues Related to Indigent Defense, Appendix D to House Document 40 at page 4.

<sup>6</sup>See House Document No. 44, page 22.

<sup>7</sup>*Courts in Transition: Report of the Commission on the Future of Virginia's Judicial System*, May 1, 1989, p. 20.

indigent defense system since it is more cost-effective. The subcommittee strongly believes that greater financial support from the Commonwealth is needed if Virginia's primary indigent defense system is to remain constitutionally sufficient.<sup>8</sup>

The subcommittee rejected a suggestion that the Commission adopt the role of advocate for further expansions of the public defender system. Creation of new offices requires support from the local bench and bar and administrative personnel of the court system. The public defenders in areas lacking that support are at a severe disadvantage. The subcommittee believes that the Commission should, however, continue to facilitate the creation of new offices. For example, in early 1990, the Chairman of the subcommittee wrote to the General Assembly members in each of the areas identified by the Department of Planning and Budget as areas in which significant cost savings could result from use of a public defender advising them of the Department's findings. In the summer of 1990, the Executive Director of the Commission wrote a similar letter to the presidents of the local bar associations in those areas. The subcommittee believes that the Commission can serve an important role in developing the local support needed. The Commission should continue to actively encourage those areas in which a public defender system could alleviate quality, availability or expense problems.

In addition, upon recommendation of the subcommittee, the 1990 General Assembly authorized the members of the Public Defender Commission to receive a \$50 per diem, "...plus reasonable and necessary expenses, for each day or portion thereof in which the member is engaged in the business of that body."<sup>9</sup> The subcommittee believes that significant increases in the demands made upon members of the Commission justify their compensation. When this study began in 1985, there were only four pilot public defender offices; today there are seventeen. Since 1989 alone, six new offices have been added, while others were expanded.<sup>10</sup> Furthermore, additional input from Commission members will be needed as the recommendations of the Department are implemented.

Following the Department's report, the subcommittee recommended that the Public Defender Commission adopt administrative and management procedures relating to (i) creation of uniform job descriptions and salary scales and ranges designed to make positions within the public defender

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<sup>8</sup>This issue is discussed further in Part III on page 9.

<sup>9</sup> See House Bill No. 213, Chapter 733, 1990 *Acts of Assembly* and § 2.1-20.3, *Code of Virginia*.

<sup>10</sup>In 1990, a new office was created for Halifax, Lunenburg and Mecklenburg Counties as recommended by the subcommittee and a new office was added for Fredericksburg and Stafford and Spotsylvania Counties, and the Staunton-Waynesboro office was expanded to cover Buena Vista, Lexington, Staunton and Waynesboro and Augusta and Rockbridge Counties.

offices more attractive with respect to amount and potential for individual professional growth; (ii) adoption of mechanisms for collecting workload information by number of defendants and expanding automated systems for case tracking; (iii) the availability of appropriate training and in-service legal education programs; and (iv) co-operating with the Office of the Executive Secretary in the development of appropriate means to assess the cost of indigent defense services. The Commission has implemented or is working to implement these procedures (see Appendix B).

## II. Appellate Defense

In June of 1989, on a 5-4 vote, the United States Supreme Court rendered its opinion in *Murray v. Giarratano*.<sup>11</sup> The Court reversed the decision of the Fourth Circuit and held that Virginia need not provide indigent death row inmates with counsel in post-conviction proceedings.

The plurality opinion of Chief Justice Rehnquist relied on the Court's decision in *Finley v. Pennsylvania* ("neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the state to appoint counsel for indigent prisoners seeking post-conviction relief"). The holding was based on the Court's prior determinations that post-conviction review (i) is not constitutionally required of the states and (ii) is essentially a civil procedure "designed to overturn a presumptively valid criminal judgment."<sup>12</sup>

Heightened procedural safeguards frequently required by the Court in capital cases were held not to be required outside of the trial phase where guilt is determined and sentence imposed. The plurality holds that the right to counsel to assure "meaningful access" to the courts is required only on direct appeal, and death row inmates are not entitled to additional procedural safeguards to pursue discretionary appeals of the conviction.

The dissent distinguished *Finley*. First, the dissent objected on the grounds that the petitioners in *Giarratano* are facing the death penalty. The high rate of success in the federal courts on petitions for habeus corpus in death cases was noted in defense of this distinction. Second, the dissent noted distinctions between Virginia and Pennsylvania procedure, making post-conviction review more significant in Virginia. The dissent refers to Virginia's contemporaneous objection rule and the Virginia Supreme Court's practice of reviewing only assigned error in support of this distinction.<sup>13</sup> Finally, the

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<sup>11</sup> \_\_\_ U.S. \_\_\_, 109, S. Ct. 2765.

<sup>12</sup>Concurring opinion of Justice O'Connor, *Id.* at 2772.

<sup>13</sup>*Id.*, footnote 14 at 2779.



dissent suggested that a death row inmate faced with the emotional trauma of impending death and the complexity of the law in capital cases is “incapable of performing the mental functions necessary to adequately pursue his claims” (quoting the opinion of the U.S. District Court). The dissent concluded by suggesting that the savings resulting from a reduction in multiple filings would outweigh the minimal costs of providing counsel to death row inmates in post-conviction proceedings.

**State Appellate Defender.** While such representation is not constitutionally required, the subcommittee remains concerned over the availability and quality of representation afforded indigent appellants, particularly in capital cases. The Department of Planning and Budget evaluated the desirability of establishing a statewide appellate defender office as suggested by the Spangenburg Group.<sup>14</sup> The Department concluded that “...[a]lthough the issue is clouded to some degree by the low fees paid to private bar counsel, even with additional increases in those fees it would be cheaper to continue the present system.”<sup>15</sup> Reluctantly, the subcommittee concurs in this analysis and does not recommend any change at this time. In the alternative, the Department suggested that the Public Defender Commission “...examine the feasibility of regionalizing appellate cases, and attaching regional appellate specialists to one or more existing public defender offices...”<sup>16</sup> Due to mandated budget reductions, the Commission has delayed implementation of this suggestion. However, the subcommittee believes that this is a project worth pursuing as funds and personnel become available and encourages the Commission to do so.

**Capital Resource Center.** With regard to capital cases, the Spangenburg Group also suggested creation of a fully funded, centrally located capital resource center.<sup>17</sup> Virginia is now the only Southern state which imposes the death penalty that does not have such a resource center. In March 1987, the U.S. Judicial Council amended the Criminal Justice Act to encourage the creation of these resource centers by providing federal funding.<sup>18</sup> Beginning in 1989, a committee of the Virginia Bar Association, with encouragement from the subcommittee, explored the feasibility of creating a capital resource center. F. Claiborne Johnston, Jr., president of the VBA testified before the subcommittee on October 24, 1990, that creation of the center involves due process issues and not pro- or anti-death penalty issues. In the view of the VBA, the center is needed to secure competent representation and educate those providing representation in the intricacies of capital litigation in order to improve the quality of representation.

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<sup>14</sup> See House Document No. 40 (1989) at page 7.

<sup>15</sup> House Document No. 44 (1990) at page 18.

<sup>16</sup> *Id.* at page 23.

<sup>17</sup> House Document No. 40, page 7.

<sup>18</sup> “State post-conviction representation of defendants sentenced to death,” *Judicature*, April-May 1989.

Upon application of the VBA, in June of 1990, the Virginia Law Foundation approved a grant of approximately \$90,000 in IOLTA funds, contingent upon appropriate federal funding. The Law Foundation cannot provide permanent funding, however, and it is anticipated that funding by the General Assembly will be needed during the next biennium. The Foundation grant expires June 30, 1991, but it may be possible to extend the grant for one additional year. The federal funding source is anxious to see a resource center in Virginia and has "basically earmarked" the money for Virginia.<sup>19</sup>

In addition to funding, the project requires the concurrence of the federal judges in Virginia. The Western District judges have given their approval and the VBA continues to work with the Eastern District.

An application for designation of the center as a non profit, 501(c)3 corporation is pending. The center will have at least one investigator and three or four full-time attorneys who will provide assistance primarily to post-conviction defense counsel, although trial counsel will not be denied help. Appendix C outlines the anticipated organization and structure of the center. Private, retained counsel will also be allowed access. Access will be limited to defense counsel, however, to avoid potential conflicts arising if staff of the center were helping both sides of the same case. The subcommittee believes the federal funding program requires this limitation on access. Prosecutors will be represented on the Board of the Center and will be allowed to participate in educational programs sponsored by the center.

In order to limit costs, it is hoped that the center would be located at one of the law schools in the state. The school would provide physical space as well as a valuable personnel pool in the students. William and Mary has expressed an interest in housing the center.

The subcommittee believes that a capital resource center will fill an existing gap in capital litigation. The VBA is commended for its efforts to date and encouraged to proceed. State funds are not needed to get the center up and running but will be required at a ratio of 5:1 to the federal funding when the IOLTA grant expires. The subcommittee recommends that future General Assemblies appropriate the necessary funds to operate a resource center such as that currently contemplated by the VBA proposal.

The primary goal of the resource center must be to address due process concerns in post-conviction capital proceedings. Opponents of resource centers created in other states point to the strong anti-death penalty bias apparent in the work product and activities of the center personnel. They question the logic of appropriating state funds to attack a presumptively valid

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<sup>19</sup>Testimony of Karen L. Ely-Pierce, October 24, 1990.

conviction obtained using state resources. The focus of the resource center should not be to overturn such convictions at all costs, but to ensure that they are obtained in a constitutional manner. The subcommittee is convinced that appropriate operational guidelines will be promulgated. The individuals who have expressed a willingness to serve on the board of directors<sup>20</sup> have the requisite knowledge and experience of the due process issues involved to ensure that such guidelines are adopted and followed. This subcommittee does not contemplate a vast administrative empire being created. Rather, the center should coordinate activities and make existing resources available. Concerns about expansion of the resource center into another bureaucratic layer within the criminal justice system will be best addressed by future General Assemblies in the budgetary and policy-making process.

### III. Fees for Court-Appointed Counsel

*The Commonwealth is under a constitutional obligation to ensure that counsel are provided ...[and] to ensure that this obligation is met in a cost-effective manner. ...[But] inadequate 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.*<sup>21</sup>

In 1985, the subcommittee cautioned the General Assembly that the recommended fifteen percent fee increase was "...only the beginning."<sup>22</sup> Notwithstanding the increases approved in 1985 and 1989, in comparisons with the other forty-nine states, Virginia continues to rank at the bottom with respect to compensation paid court-appointed attorneys.

Court-appointed counsel in the juvenile courts fare the worst. The \$100 per charge maximum fee is the lowest in the nation, by a significant amount. While approximately half the states have maximum fees applicable in juvenile cases, Maryland's \$250 cap is the next lowest after Virginia. The subcommittee continues to believe that the compensation system for court-appointed counsel should be proportionate to the demands made on the attorney and little correlation exists between misdemeanor proceedings and juvenile court proceedings. The attorney must frequently make three appearances in the juvenile and domestic relations district court on one case for the detention, adjudication and dispositional hearings.

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<sup>20</sup> See page 3 of Appendix C.

<sup>21</sup> House Document No. 40, p. 5.

<sup>22</sup> See House Document No. 15 and Senate Document No. 11 (1986).

A twenty percent increase in the fees for juvenile court cases was recommended by the subcommittee during the 1990 Session.<sup>23</sup> The subcommittee recognized the difficulty of finding the \$800,000 needed to fund the increase. Nonetheless, the cost is justified by the critical nature of the work done by counsel in these cases to identify appropriate services and treatment for children and families and the protracted nature of the proceedings.

House Bill No. 211 was carried-over by the House Appropriations Committee for consideration during the 1991 Session. Due to the current fiscal situation in the Commonwealth, the subcommittee is not optimistic about the chances for enactment of the increase. But the subcommittee remains hopeful that as soon as the necessary funds become available, the General Assembly will provide the necessary funding. The Commonwealth must avoid a system of compensating those who volunteer to provide legal assistance to persons who are constitutionally entitled to representation at state expense which imposes upon those volunteers a requirement that they subsidize the state's obligation.

The subcommittee also recommended in 1990 that the maximum fees for court-appointed counsel in criminal cases be increased by twenty percent. House Bill No. 212 was similarly carried-over by the House Appropriations Committee. For all the reasons expressed in the prior reports of the subcommittee, the fee increase should be approved and implemented as soon as possible. The subcommittee believes that attorneys will continue to provide competent legal assistance to those who cannot afford to pay, notwithstanding the low fees; but these attorneys, who ensure that the Commonwealth meets the constitutionally mandated obligation to provide counsel, should not be asked to subsidize the system indefinitely.<sup>24</sup>

## Conclusions

Much has been accomplished by the subcommittee over the last six years. Through its work, awareness has grown of the need for the Commonwealth to ensure cost-effective and competent representation to indigent criminal defendants and juveniles. Prosecutors and the defense bar have worked with the subcommittee to achieve this result. Expenditures made now result in cost savings later. As the quality of representation improves at the trial and direct appeal levels, the time and expense involved in collateral

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<sup>23</sup> See House Bill No. 211.

<sup>24</sup> On June 15, 1989, the Council of the Virginia State Bar approved a resolution requesting the General Assembly "...to increase its biennial appropriation for the defense of the criminally indigent substantially..."

attacks on a criminal conviction decline. Improvements have been made in both the court-appointed counsel and the public defender systems.

Fees paid to court-appointed counsel have been increased, but further increases are needed. The significant problems experienced in certain areas of the state in finding experienced trial counsel have been alleviated somewhat by the fees increases and by the rapid expansion of the public defender system. Localities throughout the state recognize that use of public defenders provides a viable solution to availability and cost problems experienced under the court-appointed counsel system. In addition, the Public Defender Commission is more responsive and efficient than it was. These recommendations derive from the work of the subcommittee in expanding awareness and in recommending improvements in workloads and salaries of the offices and in administrative procedures of the Commission.

Together with the general improvements in the existing systems of providing defense systems, the subcommittee believes creation of a capital resource center will help address the unique problems facing defense counsel in capital cases. By providing a forum for discussion of each of these problems, the subcommittee has brought Virginia closer to a long-term solution.

Respectfully submitted,

Delegate William P. Robinson, Jr., *Chairman*  
Senator Elmo G. Cross, Jr., *Vice-Chairman*  
Delegate Alan A. Diamonstein  
Delegate Thomas W. Moss, Jr.  
Delegate Whittington W. Clement  
Delegate G. Steven Agee  
Senator Howard P. Anderson  
Senator Johnny S. Joannou  
Dennis W. Dohnal, Esquire

## Appendices

Appendix A	House Joint Resolution No. 279 (1989) House Joint Resolution No. 33 (1990)
Appendix B	Memorandum to subcommittee from O.P. Pollard, Executive Director, Virginia Public Defender Commission (October 24, 1990)
Appendix C	Capital Resource Center Fact Summary

LD9021555

## HOUSE JOINT RESOLUTION NO. 279

Offered January 18, 1989

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

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Patrons—Robinson; Senator: Anderson

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Referred to the Committee on Rules

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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.

1990 SESSION

LD4021555

HOUSE JOINT RESOLUTION NO. 33

Offered January 16, 1990

Continuing the Joint Subcommittee Studying Alternative Indigent Defense Systems.

Patrons—Robinson; Senator: Anderson

Referred to the Committee on Rules

WHEREAS, House Joint Resolution No. 279, passed during the 1989 Session of the General Assembly, approved continuation of the joint subcommittee to allow further review of the alternatives for ensuring the availability of court-appointed counsel at all necessary phases of a criminal case and to assess the need for and feasibility of expanding the public defender system; and

WHEREAS, the Department of Planning and Budget has submitted to the joint subcommittee a cost analysis of the alternatives under consideration; and

WHEREAS, the Virginia Bar Association has created an ad hoc committee to coordinate public and private efforts needed to create a Death Penalty Resource Center in Virginia to facilitate the defense of capital cases; and

WHEREAS, the joint subcommittee believes that continuation of the study is needed to (i) further evaluate the need for increased compensation for court-appointed counsel, particularly counsel appointed for a child in the juvenile court, (ii) assess the impact of changes in the operation of the public defender system as recommended by the joint subcommittee and the need for further expansion of the public defender offices, and (iii) assist the Bar Association in its efforts to create a Death Penalty Resource Center; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Subcommittee Studying Alternative Indigent Defense Systems be continued. 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 Governor and the 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

The indirect cost of the study are estimated to be \$13,115; the direct costs of this study shall not exceed \$4,860.

Official Use By Clerks

Agreed to By
The House of Delegates
without amendment [ ]
with amendment [ ]
substitute [ ]
substitute w/amdt [ ]

Agreed to By The Senate
without amendment [ ]
with amendment [ ]
substitute [ ]
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Date: \_\_\_\_\_

Date: \_\_\_\_\_

Clerk of the House of Delegates

Clerk of the Senate

October 24, 1990

TO: JOINT SUBCOMMITTEE STUDYING ALTERNATIVE  
INDIGENT DEFENSE SYSTEMS

FROM: OVERTON P. POLLARD, EXECUTIVE DIRECTOR  
PUBLIC DEFENDER COMMISSION

RE: RECOMMENDATIONS CONTAINED IN HOUSE DOCUMENT #44  
(1990)

The Report of The Department of Planning and Budget entitled "Indigent Defense Systems in Virginia" presented to the 1990 session of the General Assembly (House Document #44) contains various recommendations for the efficient delivery of defense services, and expansion of the system, as well as other suggestions for overall improvement in the administration of justice. The recommendations and some of the steps taken to implement same are set forth herein.

**Recommendation 1:** The Public Defender Commission should develop objective workload standards for public defender attorneys, and use those standards to determine an appropriate staffing level in existing and future offices. The standards should take into consideration types of defendants, number of preliminary hearings on felony charges, numbers of misdemeanor appeals, number of felony appeals, and number of jury trials.

Implementation: The adjusted caseload standard set forth on page iii of House Document 44 is being used as a guide for increasing the staffs in existing Public Defender Offices as well as determining the appropriate staffing level for new offices. Since the report was prepared, offices have been established in Danville, Halifax, and Fredericksburg. Additionally, the Staunton Office has been enlarged to include three new jurisdictions (Buena Vista, Lexington, and Rockbridge County). Projected caseload increases have been factored in, but large geographical areas comprising some jurisdictions, court scheduling procedures, and other factors such as heavy felony dockets, large numbers of jury trials, etc., cause some difficulty in our efforts to use objective standards. Capital cases will obviously impact those offices handling same.

**Recommendation 2:** The Public Defender Commission, in cooperation with the Office of the Executive Secretary of the Supreme court of Virginia, should develop a method for tracking the fees paid to court appointed counsel in each jurisdiction, with the goal of recommending areas in which new public defender offices would be more cost effective than continuing the court appointment system.



Additionally, an annual report focused on the activities of the Public Defender Commission, and including potential areas for future expansion, should be developed and shared with the Governor, Senate Finance Committee, House Appropriations Committee, and the Senate and House Courts of Justice Committees.

Implementation: The Office of the Executive Secretary of the Supreme Court of Virginia has the capability, at this time, to "track" fees paid to court-appointed counsel in each jurisdiction. There are some problems, however, comparing court-appointed costs and our cost reporting methods. For instance, in the Public Defender Offices, single defendants are listed only once, even though that defendant may be represented in both the General District and Circuit Courts as well as appeals to the Court of Appeals and the Virginia Supreme Court. Each Court reports to the Supreme Court Executive Secretary's Office, and each time a matter is reported, a defendant is counted. The problem is most pronounced in capital cases when attorneys submit partial bills. Each time a payment is made, it is counted as a defendant. Nevertheless, we believe that once our case management and statistical software is installed, we will be able to retrieve information which is comparable to that available in the Supreme Court Executive Secretary's Office, so that proper comparison can be made and adequate statistics for determining the potential cost effectiveness of proposed new offices will be available.

We will attempt to provide a meaningful annual report for the 1991 Session of the General Assembly covering the activities of the Commission as well as some statistical information relative to the caseloads in the existing offices. Should the Subcommittee want us to focus on any particular areas for expansion or characteristics of the existing offices, we would be happy to comply.

**Recommendation 3:** Additional Public Defender Offices should be considered in jurisdictions where they will be less costly than continuing the court appointment system. While issues other than cost efficiency are important, the following ten jurisdictions would have the most impact on reducing indigent defense costs:

Arlington-Falls Church	Norfolk
Prince William-Manassas	Chesterfield-Colonial Heights
Newport News	Henrico
Lynchburg Area	Lee-Scott-Wise
Fredericksburg Area	Tazewell-Buchanan-Russell- Dickenson

Implementation: Letters have been sent to the Presidents of Bar Associations in all of the ten areas, and copies of House Document #44 have been provided to them. The Fredericksburg

office opened on July 1, serving, in addition to the City of Fredericksburg, the Counties of Spotsylvania and Stafford. The Lynchburg area has shown considerable interest, a panel discussion being scheduled with the Lynchburg Bar next week. The Newport News Bar has previously considered the desirability of a Public Defender Office, but, for the time being, has determined that the court-appointed system is more suitable. Some interest from the judiciary has been shown in Chesterfield. At this time, however, no definite plans have been formulated for possible expansion in 1991. Although not listed among the ten jurisdictions, the bar association for the City of Salem and Roanoke County has expressed considerable interest in extending the System to serve those jurisdictions.

**Recommendation 4:** Should the General Assembly approve additional 20% increases in the fees paid to court appointed counsel in Fiscal Years 1990-1991 and 1991-1992, the establishment of a statewide public defender system should be strongly considered.

Implementation: Although needed and recommended by the Joint Subcommittee, current budgetary constraints would presumably prevent increases in fees in the current biennium. It would accordingly seem appropriate to continue expansion of the Public Defender program in those areas where support for offices has been shown and where cost effectiveness is a factor or the availability of court-appointed counsel is lacking. The Commission feels that its mission can best be accomplished by responding to requests from areas desiring establishment of Public Defender Offices.

**Recommendation 5:** The current system of providing appellate counsel to indigent defendants appears to be cost effective in relation to establishing a statewide appellate defense office. However, the Public Defender Commission may wish to examine the feasibility of regionalizing appellate cases, and attaching regional specialists to one or more existing public defender offices within a region.

Implementation: Because of budgetary constraints, no effort has been made to implement this recommendation other than to continue to receive input on the advisability of appellate specialists. An attempt was made to start with an appellate specialist working out of the Administrative Office in Richmond, but funds, for the time being, are not available.

**Recommendation 6:** Staff of the Public Defender Commission should collect monthly workload information using numbers of defendants rather than numbers of charges as the basis for determining workload.

Implementation: For some time, we have been assembling information using both the numbers of defendants and the numbers of charges. The Department of Criminal Justice Services has been assisting our staff with a case management software system which will also provide statistical information for future planning. We anticipate the software for this system being installed in several of the offices within the next 30 days. (See Implementations to Recommendations 1 and 2.)

**Recommendation 7:** The Public Defender Commission, with assistance from the Department of Personnel and Training, should develop uniform job descriptions and salary scales and ranges for all its employees.

Implementation: The Commission has both Salary and Personnel Committees. We have met with representatives from the Department of Personnel and Training as well as the Compensation Board in an effort to provide some uniformity in job descriptions and salaries. Most of our offices have only Public Defenders, Assistant Public Defenders, and Secretaries, but we do have Senior Assistant Public Defenders and Administrative Assistants in our larger offices. A list of salary ranges is attached.

**Recommendation 8:** The Public Defender Commission, with assistance from the Department of Criminal Justice Services, should develop a case tracking system for use in all public defender offices. Additionally, the expanded use of office automation systems should be encouraged in all offices.

Implementation: All our offices are equipped with computers which have the capacity for case tracking systems. As noted in Recommendation 6, the Department of Criminal Justice has been rendering service to us in this regard.

**Recommendation 9:** The Public Defender Commission should increase the availability of continuing legal education for public defenders and assistant public defenders, and should examine ways to cooperate with local private bar associations in the development of seminars focused on current issues in the practice of criminal law.

Implementation: We have had two annual seminars for Public Defenders, Assistant Public Defenders, and at one of the sessions, we included investigators. Public Defenders are encouraged to become involved in local bar association CLE

activities, and several Public Defenders have already appeared on CLE programs. We agree wholeheartedly with the concept of local bar involvement, and we are exploring ways for our training abilities to be utilized by those attorneys in private practice who accept indigent cases.

**Recommendation 10:** The Public Defender Commission should examine the potential use of paralegal staff and clerical staff in lieu of investigative staff in those offices where investigative staff are performing functions other than investigations.

Implementation: One duty which had been imposed on some investigators was assistance in the determination of indigency, and this has been removed by changes to the legislation. A proposed budget for 1990-92 included "Sentencing Specialists" for our larger offices, but because of the need to reduce expenditures, we will postpone employment of persons in those positions, at least until July 1991, when it is hoped that we might be able to employ one or two persons. In the meantime, we will explore the possible use of some investigators for preparing sentencing alternatives.

**Recommendation 11:** The Public Defender Commission and staff can play a more active role in the development of policies related to legal defense strategies, appeals, and in policies related to how court costs are determined for indigent clients. Additionally, central office staff of the Public Defender Commission should play a more visible and active role in training staff in the public defender offices in relation to state policies regarding travel and purchasing, budget development time frames, and monthly reporting procedures. Finally, input from the public defender offices regarding budget development should be actively sought by central office staff.

Implementation: All of these recommendations are being implemented in some fashion. The Commission realizes that often a Public Defender is selected, office space is provided, and equipment is purchased, but there is very little knowledge of basic State procedures. We are attempting to incorporate some office management procedures in the annual seminars, and an extensive "Practices and Procedures Manual" draft is being presented to the Commission at its meeting on November 19 for approval. Efforts are being made to provide timely expenditure information to our offices to enable them to plan within each office's budget. We intend to have more input from the public defenders in the planning stages.

PUBLIC DEFENDER COMMISSION SALARY RANGES

PUBLIC DEFENDERS

\$45,000 - \$74,524

SENIOR ASSISTANT PUBLIC DEFENDERS

\$32,500 - \$42,231

ASSISTANT PUBLIC DEFENDERS (FULL-TIME)

\$26,200 - \$40,258

INVESTIGATORS

\$20,000 - \$42,727

ADMINISTRATIVE ASSISTANTS

\$17,500 - \$25,750

SECRETARIAL

\$13,390 - \$22,023

**CAPITAL RESOURCE CENTER FACT SUMMARY**

There is presently an organized effort underway, sponsored by the Virginia Bar Association, to establish a Capital Resource Center (Center) in Virginia, pursuant to the Criminal Justice Act. The motivating factor behind the effort is what is perceived to be the overwhelming need to provide more competent counsel to represent the habeas corpus petitioners who have been convicted of state capital crimes. The effort is not based on any "pro" or "anti-death" position; rather, the effort is focused on basic due process concerns and the necessity of providing such individuals with the effective assistance of counsel in an extremely specialized area. Virginia is the only southern state of some sixteen in which the death penalty can be imposed which does not have such a facility.

The Center would serve the primary function of securing representation and educating the private criminal defense bar in the intricacies of death penalty post-conviction representation. Its overall goal would be to improve such representation. In order to meet this goal, the Center would: a) recruit and train attorneys who would then be available for appointment in capital cases; b) maintain a list of qualified experts to assist in litigation; c) maintain a brief and pleading bank; d) monitor and track post-conviction capital cases; e) provide advice and assistance to private attorneys via the Center legal staff; and f) present seminars in the area of death penalty law.

It is anticipated that the Center would be affiliated with

one or more Virginia law schools. The University of Virginia, University of Richmond, and College of William and Mary have been approached regarding their possible roles. Representatives from each school indicated an interest, although space limitations restrict their abilities to actually house the Center. It is foreseen, however, that these schools, and possibly others, will at least work in conjunction with the Center by way of clinical placements of students at the Center and by providing research and resource facilities to the Center staff. The Washington and Lee law school already has a related program in place on which the University desires to concentrate its efforts.

In addition to its primary educational function, the Center would provide direct representation in a limited number of cases (e.g. two to three federal habeas corpus cases per year). Such direct representation will benefit the staff attorneys, by allowing them to apply what they teach and keep current in practice skills.

The Resource Center staff will consist of an Executive Director/Attorney, three staff attorneys, a project coordinator, an administrative assistant, an investigator and two secretaries. These positions would be full-time and the salaries would be approximately as follows:

Executive Director/Attorney:	\$55,000
Project Coordinator:	\$40,000
Staff Attorneys:	(3 @) \$38,000
Investigator:	\$30,000
Administrative Assistant:	\$25,000
Secretaries:	(2 @) \$20,000

(Position descriptions are available.)

The proposal also contemplates the creation of a 501(c)(3) governing corporation with a fifteen member Board of Directors. The directors would represent a cross-section of the defense bar, prosecution, the judiciary and the lay community. The composition of the proposed Board is thus intended and designed to represent all interests involved in the matter, given the primary motivation of ensuring that due process rights and concerns are protected and promoted. Accordingly, the following individuals, among others, have been approached and indicated their willingness to serve as Directors:

- a) The Honorable Robert F. Horan, Jr.  
Commonwealth's Attorney for Fairfax County  
and the Cities of McLean and Vienna,  
Virginia;
- b) Anthony F. Troy, Esquire  
Former Attorney General of the Commonwealth  
of Virginia and private practitioner;
- c) D. Eugene Cheek, Esquire  
Former State Prosecutor and presently engaged  
in private practice;
- d) The Honorable Robert C. Scott, Senator  
Virginia General Assembly and presently  
engaged in private practice;
- e) The Honorable Ernest Ballou-Senior Judge,  
Virginia Circuit Court (Roanoke, Virginia);
- f) Gerald T. Zerkin, Esquire  
Private practitioner with extensive  
experience in capital cases; and
- g) Raymond Lupold, Esquire  
Former Special State Prosecutor and presently  
engaged in private practice.

Additional individuals will be approached, including several members of the community who will be selected by the remaining



Board members in order to achieve as well-balanced a governing body as possible.

The President of the Virginia Bar Association, F. Claiborne Johnston, Jr., has appointed an ad-hoc committee consisting of Stephen A. Northup, Dennis Dohnal, Gerald Zerkin, Karen Ely-Pierce and Kelley Brandt to facilitate establishment of the Resource Center. With the assistance of this committee, the Virginia Bar Association submitted a request for IOLTA funds to the Virginia Law Foundation on May 4, 1990. This grant has been approved and provides \$89,000.00 for the representation of defendants in state habeas corpus. A proposal is currently being prepared for submission to the Administrative Office of the United States Courts to secure funding pursuant to the CJA for representation of defendants in federal habeas corpus cases. That proposal will request approximately \$450,000, which, in addition to the \$89,000 in state funds, allows for a total annual budget of approximately \$539,000.

The parties involved have been assured that the IOLTA monies to be provided will be sufficient to obtain the federal compliment which will be necessary to fund the project for its first year. Since IOLTA does not generally provide organizations with long-term funding, the Center will likely be expected to seek alternate state funding after the first or second year of operation. It is anticipated that efforts will be made to obtain such state funding from the state legislature, once it has been established that the Center is a worthwhile effort.

In addition to the Virginia Bar Association, the Virginia State Bar, through the Board of Governors of the Criminal Law Section, has endorsed the project ("Attachment A" letters from Craig Cooley, Esquire, Chairman). Furthermore, the Honorable Harry L. Carrico, Chief Justice of the Virginia State Supreme Court, has also indicated his support ("Attachment B") and the Virginia Attorney General's Office, through representatives who appeared before a special legislative subcommittee that addressed the issue, has indicated that it has no objection.

Nevertheless, it is required, before federal funding can be obtained, that the Judicial Plans of both the Eastern and Western Districts of Virginia be amended to allow for establishment of the Center. The required standard form amendment would detail the various requirements for operation of the Center, including, but not limited to, various logistical arrangements and reporting requirements by which the Center would provide representation, maintain brief banks, and perform such other tasks as may be necessary to insure adequate representation to those deemed financially eligible.

Such a Center, and the proposed Amendments to the respective Plans, do not involve the creation of a federal public defender program and it is not the purpose of the Center to provide assistance in the defense of federal capital cases; rather only in relation to capital cases arising in the state system. In this regard, it is noted that a federal public defender office is not authorized by legislation or procedure, even if one were to

be instituted in the Eastern or Western Districts of Virginia, to provide representation in the post-conviction stage of state capital cases. Thus, the two offices, if instituted, would perform entirely separate functions.

It is assumed, however, that a federal public defender office, if instituted, would benefit from the existence of the proposed Center, including the expertise and educational programs associated with such a program.