

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

**CAPITAL REPRESENTATION OF
INDIGENT DEFENDANTS**

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



HOUSE DOCUMENT NO. 60

**COMMONWEALTH OF VIRGINIA
RICHMOND
1999**



COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

Senator Ken Stolle
Chairman

Rich Savage
Director

December 8, 1998

To: The Honorable James S. Gilmore III, and
Members of the Virginia General Assembly:

House Joint Resolution 190, agreed to by the 1998 General Assembly, directed the Virginia State Crime Commission to conduct a study on the system for representation of indigent capital defendants and to submit its findings and recommendations to the Governor and 1999 session of the General Assembly.

In fulfilling this directive, a study was conducted by the Virginia State Crime Commission in 1998. I have the honor of submitting herewith the study report.

Respectively submitted,

A handwritten signature in black ink, appearing to read 'Ken Stolle', written over a horizontal line.

Kenneth W. Stolle
Chairman

KWS:hvk

VIRGINIA STATE CRIME COMMISSION
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Vice-Chairman

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From the Senate

Senator Janet D. Howell

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Delegate A. Donald McEachin

Delegate Brian J. Moran

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Sheriff Terry W. Hawkins

The Honorable Robert J. Humphreys

The Honorable William G. Petty

Attorney General's Office

The Honorable Mark L. Earley

Executive Summary



Virginia State Crime Commission

Capital Representation of Indigent Defendants

January 1999

In 1998, the Virginia General Assembly passed House Joint Resolution 190 directing the Virginia State Crime Commission as lead agency - in conjunction with the Office of the Executive Secretary of the Supreme Court, the Virginia State Bar, the Virginia Bar Association and the Public Defender Commission - to study the capital representation system for indigent defendants in the Commonwealth. Specifically, HJR 190 requested that the Crime Commission evaluate:

- The quality of capital representation of indigent defendants in Virginia;

- The standards for qualification of counsel promulgated pursuant to Code of Virginia §19.2-163.8; and
- The feasibility of requiring the public defender offices to defend all indigent capital murder defendants who request representation throughout the Commonwealth.

Findings

Generally, the Crime Commission found that:

- The overall state of the system for representation of indigent capital defendants is good. Also, the pool from which court appointed counsel is drawn is now large enough that the standards for qualification as court appointed counsel can be enhanced without causing the system for indigent capital representation to suffer from a lack of available attorneys.
- The Public Defender Commission does not currently evaluate attorneys on the basis of whether they have demonstrated "proficiency and commitment to quality representation" as required by the standards promulgated pursuant to Code of Virginia § 19.2-163.8(E).

Executive Summary

- The existing public defender system would not be able to absorb the workload that would be created by requiring it to represent all indigent capital defendants in Virginia. The cost of developing a statewide capital representation unit for indigents would require an initial expenditure of \$ 1,448,180.
- The creation of a single unit for representation of indigent capital defendants would likely result in ethical conflicts in situations in which one crime resulted in multiple indigent capital defendants.
- Further, a traveling cadre of public defenders would be unfamiliar with local environments, which would mean that local counsel would also be needed.
- Finally, an inconsistency between the number of people charged with capital crimes and the number of people indicted on capital offenses exists in Virginia. This inconsistency is a result of situations in which a person is charged with a capital crime, and that charge is later reduced or amended. This situation results in court appointed counsel being paid the capital defense rate for the duration of a trial in which the defendant is not charged with a capital crime.

Recommendations

Based on these findings, the Crime Commission recommends:

- The Virginia State Bar, in conjunction with the Public Defender Commission revise the standards for qualification as court appointed counsel with the purpose of enhancing the caliber of attorneys available for appointment in capital cases.
- The Public Defender Commission, in conjunction with the Virginia State Bar explore and implement means of ensuring that all attorneys who are available for appointment to capital cases are competent to represent capital defendants. (However, these means should not require local bar associations to act as peer review groups for court appointed attorneys.) The Virginia State Bar and the Public Defender Commission should make it known to judges that, at present, judges provide the only subjective review of attorneys who are listed as available for appointment in capital cases.
- The Commonwealth not establish a statewide capital defense unit that would be charged with the representation of all indigent capital defendants.

Executive Summary

- The § 19.2-71 Code of Virginia be amended to prohibit police officers from filing capital charges without first obtaining authorization from the attorney for the Commonwealth.
- The Virginia Sentencing Commission, Virginia's Commonwealth Attorney Offices, and the Supreme Court of Virginia revise their record keeping requirements to foster consistency in reporting information on capital crimes.

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Introduction

Authority for Study

During the 1998 session of the Virginia General Assembly, Delegate Clifton A. Woodrum sponsored House Joint Resolution 190 directing the Virginia State Crime Commission - in conjunction with the Office of the Executive Secretary of the Supreme Court, the Virginia State Bar, the Virginia Bar Association and the Public Defender Commission - to study the capital representation system for indigent defendants in the Commonwealth. *See Appendix A.*

Section 9-125 of the **Code of Virginia** establishes and directs the Virginia State Crime Commission "to study, report, and make recommendations on all areas of public safety and protection." Section 9-127 of the **Code of Virginia** provides that "the Commission shall have the duty and power to make such studies and gather information in order to accomplish its purpose, as set forth in Section 9-125, and to formulate its recommendations to the Governor and the General Assembly." Section 9-134 of the **Code of Virginia** authorizes the Commission to "conduct private and public hearings, and to designate a member of the Commission to preside over such hearings." The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of the capital representation system for indigent defendants.

Members Appointed to Serve

At the May 19, 1998 meeting of the Crime Commission, Chairman Senator Kenneth W. Stolle of Virginia Beach selected Delegate Raymond R. Guest, Jr. to chair the Governmental Affairs Subcommittee studying the capital representation system for indigent defendants in the Commonwealth. The following Crime Commission members were selected to serve on the Subcommittee:

Delegate R. Creigh Deeds
The Honorable Mark L. Earley
Delegate A. Donald McEachin
The Honorable William G. Petty
Senator Kenneth W. Stolle, ex-officio

Introduction

Report Organization

The remaining sections of this report present the results of the Virginia State Crime Commission's analysis of capital representation of indigent defendants. Section II provides an overview of the report's study design. Section III presents background information concerning capital representation of indigent defendants in Virginia. Study objectives and issues are discussed in Section IV, and the report's findings and recommendations are laid out in Section V.



Study Design

A workgroup was convened to study, report and make recommendations to the Crime Commission on the capital representation system for indigent defendants in the Commonwealth. This workgroup was chaired by the Honorable William G. Petty, Commonwealth's Attorney for the City of Lynchburg. The membership of the workgroup included representation from the Public Defender Commission, Public Defender Offices, Commonwealth's Attorney Offices, the Supreme Court of Virginia, the Virginia Capital Representation Resource Center, the criminal defense bar, and academia. The workgroup also sought the input of the Virginia Bar Association, and the Virginia Trial Lawyers Association. The Attorney General's designee to the Crime Commission, Frank Ferguson, provided assistance as well.

The workgroup, in conjunction with Crime Commission methodologist Larry Schack, surveyed all of the circuit court judges in Virginia regarding their opinions about the current state of indigent capital representation in the Commonwealth. This survey, which contained both closed and open ended questions, was responded to by approximately sixty percent of the judges. *See Appendix B.*

Members of the workgroup used information from the survey, from independent state sources and relied on their own collective experience to study and develop recommendations on the current state of the system for representation of indigent capital defendants.

Background

Statutory procedures on the right to representation by a lawyer and appointment of counsel for indigents are found in §§ 16.1-266 through 16.1-268 and §§ 19.2-157 through 19.2-163 of the **Code of Virginia**. A person appearing in court has the right to legal representation and may choose to obtain his/her own counsel. The accused may also waive his/her right to legal representation. The right to be represented by a court-appointed attorney 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 by court order. An indigent is defined as a person who requests legal counsel but is unable to provide for full payment of a lawyer's fee without causing undue financial hardship to him/herself or his/her family.

Present law requires that all defendants requesting court-appointed counsel provide a written financial statement to support the claim of indigency. To expedite decisions on appointment of counsel, the guidelines include a presumption of indigency where the person is a current recipient of a public assistance program for the indigent. If a person is not presumptively eligible, the court reviews the financial statement. Information on net income and assets is to be listed on the statement along with any exceptional expenses which might prohibit the defendant from hiring private counsel. The guidelines then provide courts with monetary amounts to use in determining whether or not counsel should be appointed; however, the guidelines provide that, in exceptional circumstances, the judge may appoint counsel as long as the judge states in writing the reasons for so doing.

After the decision has been made to appoint counsel for an indigent defendant, the court must select an attorney and confirm the appointment. Section 19.2-159 of the **Code of Virginia** states in part...“Except in jurisdictions having a public defender pursuant to Article 4 (§ 19.2-163.1 et. seq.) of Chapter 10 of Title, § 19.2, 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 capital cases, the Public Defender Commission periodically provides to each Circuit Court Judge and to each Chief District Court Judge a current statewide list (divided by circuit) of attorneys qualified to represent indigent defendants charged with capital murder or sentenced to death.

Section 19.2-163.7 of the **Code of Virginia** provides that, in any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint one or more attorneys from the list or lists established by the Public Defender Commission pursuant to § 19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. If



Background

the sentence of death is affirmed on appeal, the court shall, upon request, appoint counsel from the same list, or such other list as the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. Notwithstanding the requirements of § 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the list or lists, but who otherwise qualifies under the standards established and maintained by the Commission.

Pursuant to **Code of Virginia** § 19.2-163.8(E), the Public Defender Commission, in conjunction with the Virginia State Bar, has adopted standards for the qualifications of appointed counsel in capital cases¹. As required by statute, these standards take into account, to the extent practicable, the following criteria: license or permission to practice law in Virginia; general background in criminal litigation; demonstrated experience in felony practice at trial and on appeal; experience in death penalty litigation; and demonstrated proficiency and commitment to quality representation.

While **Code of Virginia** § 19.2-163.8 does not require more than one attorney to be appointed in capital cases, the standards strongly encourage the appointment of two attorneys for trial, appellate and habeas corpus proceedings. Thus, the standards often refer to “lead counsel” and “co-counsel.”² In addition, the standards recommend that if a public defender is appointed as either “lead” or “co-counsel,” the other attorney should be appointed from the private bar. The full text of the standards for the qualifications of appointed counsel in capital cases, as promulgated by the Public Defender Commission, is provided in *Appendix C*.

Virginia is currently served by twenty public defender offices.³ In the just over one hundred jurisdictions without public defender offices, the courts appoint local attorneys in private practice to represent indigent defendants in capital as well as all other criminal cases requiring court-appointed counsel. In these jurisdictions, courts routinely appoint two private attorneys in capital cases. In localities served by public defender offices, courts often appoint a private attorney in addition to the public defender to represent indigent defendants in capital cases. Though practices vary by

¹ The term “capital case,” as used in the standards, means a case tried to a jury wherein the sentencing phase was held pursuant to **Code of Virginia** § 19.2-264.2.

² The term “lead counsel,” as used in the standards, would also include an attorney acting as sole counsel in a case.

³ Public defender offices are located in Alexandria, Bedford, Charlottesville, Danville, Fairfax, Franklin, Fredericksburg, Halifax, Leesburg, Lynchburg, Martinsville, Petersburg, Portsmouth, Pulaski, Richmond, Roanoke, Staunton, Suffolk, Virginia Beach and Winchester.

Background

jurisdiction, courts in localities with public defender offices sometimes appoint two private attorneys without a public defender in capital cases. This situation usually arises in response to the present workload of a public defender office or the presence of a conflict that would prevent the such office from taking the case.



Study Objectives & Issues

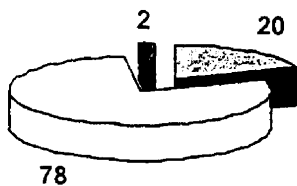
House Joint Resolution 190 directed the Virginia State Crime Commission as lead agency, in conjunction with the Office of the Executive Secretary of the Supreme Court, the Virginia State Bar, the Virginia Bar Association and the Public Defender Commission, to study the capital representation system for indigent defendants in the Commonwealth. Specifically, HJR 190 requested that the Crime Commission evaluate:

- The quality of capital representation of indigent defendants in Virginia;
- The standards for qualification of counsel promulgated pursuant to **Code of Virginia §19.2-163.8**; and
- The feasibility of requiring the public defender offices to defend all indigent capital murder defendants who request representation throughout the Commonwealth.

Findings & Recommendations

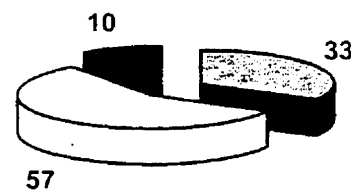
Finding 1. The Crime Commission conducted a survey of all circuit court judges concerning the issues set forth in HJR 190. The Crime Commission received a sixty percent response rate and found there was no significant difference in responses across jurisdictions (i.e., urban, rural, suburban), nor did the rate vary according to the length of service of the judges. 98% of responding judges indicated that the level of expertise and performance of counsel in capital cases meets or exceeds that which would be expected from competent counsel; 90% indicated that the overall quality of public defender capital representation in their jurisdictions is excellent or good; and 95% indicated that the overall quality of appointed private counsel capital representation is excellent or good.⁴ Collectively, the comments that judges provided to the open-ended questions included in the survey focused on enhancing the standards for qualification of attorneys in capital cases, improving the court-appointed attorney compensation structure and addressing the manpower and workload issues within the public defender offices.

Quality of Capital Representation - Overall



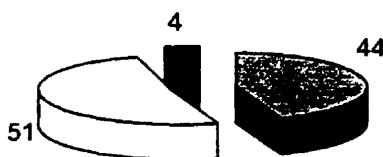
Exceeds the Level of Expertise
 Meets the Level of Expertise
 Falls Below the Level of Expertise

Quality of Capital Representation - Public Defenders



Excellent Good Fair

Quality of Capital Representation - Private Counsel



Excellent Good Fair

Source: Surveys concerning capital representation of indigent defendants were forwarded to one hundred and forty six (146) Virginia circuit court judges. Of those 146, ninety seven (97) were returned to the Virginia State Crime Commission -- a 66% response rate.

⁴ See survey results included in appendix attached hereto.



Findings & Recommendations

Finding 2. Code of Virginia § 19.2-163.8 authorizes the Public Defender Commission (PDC), in conjunction with the Virginia State Bar (VSB), to adopt standards for the appointment of counsel in capital cases. The statute requires that the standards, to the extent practicable, take into consideration the following criteria: license or permission to practice law in Virginia; general background in criminal litigation; demonstrated experience in felony practice at trial and appeal; experience in death penalty litigation; familiarity with the requisite court system; current training in death penalty litigation; and demonstrated proficiency and commitment to quality representation.

In order to ensure an adequate pool of attorneys qualified to represent capital defendants, the PDC, in conjunction with the VSB, purposely drafted the standards to be broad with the intention that the standards would be strengthened over time. The HJR 190 workgroup determined that an adequate pool of qualified attorneys now exists and that the time has come to revise the standards. Utilizing information gleaned from the judges' survey responses and attorneys' comments, the workgroup--taking into consideration available statistical data and relying on its own collective expertise--formulated recommendations for revisions to the standards. In general, these recommendations seek to enhance the standards by requiring more trial experience and specialized training for both lead and co-counsel and narrowing the time frame in which such experience and training must take place for trial, appellate and habeas corpus counsel.

Recommendation 1. The Public Defender Commission, in conjunction with the Virginia State Bar, should consider the suggested revisions detailed below that follow with the purpose of enhancing the qualifications for appointed counsel in capital cases.⁵

FEBRUARY 22, 1992

STANDARDS FOR THE QUALIFICATIONS OF APPOINTED COUNSEL IN CAPITAL CASES

Pursuant to Section 19.2-163.8(E) of the Code of Virginia of 1950 as amended, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets

⁵The Crime Commission recognizes that the desire for enhanced qualifications must be balanced against the need for an adequate pool of attorneys qualified for appointment in capital cases. While both Delegate Guest and Delegate Deeds agree that a high degree of training and experience is necessary to adequately defend a capital defendant, they express concern that the recommended way in which the standards for qualification as court appointed capital defense counsel are to be enhanced will result in a reduction in the pool of attorneys available for appointment to represent capital defendants in rural areas, and that such a reduction will result in a decrease in the quality of the rural indigent capital defense system.

Findings & Recommendations

forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases.⁶ While Section 19.2-163.7 of the **Code of Virginia**, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings. Thus, the standards often refer to “lead counsel”⁷ and “co-counsel.” If a public defender is appointed as either “lead” or “co-counsel,” the other attorney should be appointed from the private bar.

A. TRIAL COUNSEL:

1. Court-appointed “lead counsel” must:

- a. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*
- b. Have at least five years of criminal litigation practice with demonstrated competence.

Consider including “experience as ‘lead counsel’ (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum of at least five years imprisonment” as demonstration of competence.

- c. Have had, within the past two years, some specialized training in capital litigation.

Consider increasing the amount of training required and/or adding a recency requirement with respect to training (in the context of available training programs that would satisfy such enhanced requirements).

- d. Have at least one of the following qualifications:

- i. Experience as “lead counsel” in the defense of at least one capital case;
- ii. Experience as “co-counsel” in the defense of at least two capital cases;
- iii. ~~Experience as “lead counsel” (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.~~

Consider adding a recency requirement (i.e., requiring that potential lead counsel have tried a specific number of capital cases within a certain period of time) and increasing the number of capital cases in which potential lead counsel is required to have participated.

⁶ Whenever the term “capital case” is used, it shall mean a case tried to a jury wherein the sentencing phase was held pursuant to Section 19.2-264.2.

Consider revising the definition of “capital case” as used in the standards to refer to a case in which the death penalty was sought and the case was tried to conclusion.

⁷ Whenever the term “lead counsel” is used, this would also include an attorney acting as sole counsel in a case.



Findings & Recommendations

Consider removing A(1)(d)(iii) from this section of the standards and adding it to A(1)(c) above as a means of demonstrating competency.

- e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.
- f. Have demonstrated proficiency and commitment to quality representation.

2. Court-appointed "co-counsel" must:

- a. Meet all of the requirements of "lead counsel" except 1(b) and 1(d).

Consider removing 1(b) from these exceptions.

- b. Have at least one of the following qualifications:

- ~~i. Experience as "lead counsel" or "co-counsel" in a murder trial;~~
- ~~ii. Experience as "lead" or "co-counsel" in at least two criminal jury trials.~~

Consider revising 2(b) to remove 2(b)(i) and 2(b)(ii) and to require instead "experience as 'lead counsel' (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment."

B. APPELLATE COUNSEL - Attorneys qualifying as court appointed "lead counsel" under Section A(1) automatically qualify as "lead" appellate counsel. Other appointed appellate counsel must meet the following requirements:

Consider whether automatic qualification is appropriate.

Consider striking the word "lead" before appellate counsel in paragraph above as there is no distinction between lead and co-appellate counsel.

- 1. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.
- 2. Have briefed and argued the merits in:
 - a. At least three criminal cases in an appellate court; or
 - b. The appeal of a case in which the death penalty was imposed.
- 3. Have had, within the past two years, some specialized training in capital case litigation and be familiar with the rules and procedure of appellate practice.

Consider including a recency requirement with respect to appellate experience.

Consider enhancing the appellate experience requirement.

C. HABEAS CORPUS COUNSEL

- 1. Habeas Corpus "Lead Counsel" must satisfy one of the following requirements:

- a. Be qualified as "lead counsel" pursuant to Section A(1) and possess familiarity with Virginia as well as federal habeas corpus practice.

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Consider requiring training specifically in the area of habeas corpus practice.⁸

- b. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences.

Consider adding recency requirement with respect to experience and training.

2. Habeas Corpus "Co-Counsel" must satisfy one of the following requirements:
 - a. Service as lead or co-counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the last three (3) years; or
 - b. Have at least seven (7) years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.

Note: Unless otherwise specified in the standards, the recency requirements suggested in the revisions refer to training and litigation experience during the last three (3) years.

Recommendation 2. The Public Defender Commission, in conjunction with the Virginia State Bar, should explore additional methods to ensure that all attorneys who are approved for appointment in capital cases are competent to represent capital defendants. Special consideration should be given to developing a subjective review or evaluation component that would measure whether an attorney has demonstrated "proficiency and commitment to quality representation"⁹ prior to placement on the list.

Recommendation 3. The Public Defender Commission, in conjunction with the Virginia State Bar, should inform judges in a letter that, at present, the Public Defender Commission does not evaluate an attorney on the basis of whether the attorney has demonstrated "proficiency and commitment to quality representation" and that it is ultimately the court who must decide whether an attorney meets this standard.

⁸ Training specifically in the area of habeas corpus practice is not provided on a regular basis at this time. If such a training requirement is approved by the Public Defender Commission and Virginia State Bar, additional funding to the Capital Representation Resource Center, Public Defender Commission or Virginia State Bar would be required.

⁹ Standards for the Qualifications of Appointed Counsel in Capital Cases Section A(1)(f).



Findings & Recommendations

Finding 3. In an attempt to address the current absence of a subjective element in the process of approving attorneys for appointment in capital cases, the workgroup considered incorporating a peer review component that would require local judges and/or bar associations to recommend or at least approve attorneys prior to their placement on the list. The workgroup determined that, because judges are, by statute, afforded discretion in the appointment of attorneys, endorsement by judges is not necessary; presumably, a judge would not appoint an attorney in a capital case whom he or she would not be willing to recommend or endorse for inclusion on the list. The workgroup determined that requiring the recommendation or approval of a local bar association would be cumbersome and difficult to implement and, therefore, not feasible.

Recommendation 4. The standards for qualification as court appointed counsel in capital cases should not be revised to include a peer review component. The workgroup recommends against requiring local bar associations to give approval to attorneys before they can be appointed to the court appointed counsel list.

Finding 4. Pursuant to the requirements of HJR 190, the workgroup considered the feasibility of requiring public defenders to represent indigent defendants in all capital cases. Based on the fact that there are only twenty public defender offices across the Commonwealth serving forty-seven jurisdictions, the workgroup determined that these existing offices would not be able to absorb the workload that would be created by requiring that they defend all capital cases and that it would be too costly to consider statewide expansion of the public defender system for capital representation.

The workgroup then considered the feasibility of creating a capital defense unit within the Public Defender system. An attorney from the unit would act as lead counsel and co-counsel would be appointed from the local bar. The Public Defender Commission has indicated that the cost associated with this unit could not be absorbed by the present system and has estimated that a minimum of \$1,448,130 in additional funding would be required for the first year of operation. It would cost an estimated additional \$1,314,030 for each year of operation thereafter.¹⁰ This estimate reflects minimum salaries for each grade and does not take into consideration additional costs required to properly equip the necessary personnel.

In addition, the workgroup recognized that the utilization of such a unit would raise conflict issues in the context of capital cases involving multiple defendants and

¹⁰ This estimate does not include adjustments for inflationary pressures, salary regrades, etc.

Findings & Recommendations

that ethical issues might also arise if the workload of public defender offices became unmanageable.

In light of the additional funds that would be required, the continued need for co-counsel from the local bar and the ethics issues that might be raised, the workgroup declined to endorse the concept of a capital representation unit.

Recommendation 5. The Commission recommends against the establishment of a statewide capital defense unit and/or the use of public defenders offices for the representation of all indigent capital defendants in the Commonwealth of Virginia.¹¹

Finding 5. The workgroup collected and reviewed statistical data provided by the Department of Corrections, Virginia Criminal Sentencing Commission, Supreme Court of Virginia, Public Defender Commission and Compensation Board regarding the annual number of capital cases. The Department of Corrections provided data on the number of capital convictions for fiscal years 1992 through 1998. The Sentencing Commission provided information for fiscal years 1992 through 1997 with respect to the number of capital indictments and convictions. The Supreme Court provided data on the number of capital defendants whose court-appointed attorneys were paid from the criminal fund for fiscal years 1996 and 1997 and up to the present. The Public Defender Commission provided information on the number of capital charges for fiscal years 1993 through 1998. The Compensation Board provided data, broken down by jurisdiction and self-reported by Commonwealth's Attorneys, on the number of capital murder cases commenced for calendar years 1995 through 1997.

The workgroup discovered discrepancies in the numbers provided by these different sources. In part these inconsistencies can be attributed to a lack of uniformity of calculation across the organizations. However, the workgroup concluded that the significant discrepancy between annual capital charges and capital indictments could be attributed in large part to the practice of initially charging all defendants involved in a case with a capital crime then subsequently dropping the capital charges against all but one defendant in the case.¹²

The workgroup discussed the concept of requiring prosecutors to "sign off" on a particular case before capital charges are brought to avoid the situation where multiple

¹¹ The workgroup chairman, the Honorable Donald S. Caldwell, does not concur in this recommendation. He believes further study into the use of a public defender capital defense unit is warranted.

¹² In 1996, 80 people were indicted on capital charges, however 123 capital defendants had attorneys paid from the court-appointed fund. In 1997, 71 people were indicted on capital charges, however 111 capital defendants had attorneys paid from the court-appointed fund.



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defendants are charged with a capital crime when only one person can be convicted of such. Some members of the workgroup indicated that, if legislation were proposed to require this of prosecutors, it should be clear that failure to “sign off” would not be a fatal defect in the case.

Recommendation 6. The following change should be made to the **Code of Virginia** to eliminate situations in which court appointed counsel are being paid capital defense rates to represent defendant’s that are accused of non-capital crimes as follows:

§ 19.2-71. Who may issue process of arrest.

A. Process for the arrest of a person charged with a criminal offense may be issued by the judge, or clerk of any circuit court, any general district court, any juvenile and domestic relations district court, or any magistrate as provided for in Chapters 3 (§ 19.2-26 et seq.) and 4 (§ 19.2-49 et seq.) of this title.

B. No law enforcement officer shall seek process for arrest for the offense of capital murder as defined by § 18.2-31 from any officer authorized to issue criminal warrants without first obtaining authorization from the Attorney for the Commonwealth. Failure to comply with the provisions of this section shall not be (i) a basis upon which a warrant may be quashed or deemed invalid; (ii) deemed error upon which a conviction or sentence may be reversed or vacated; or (iii) a basis upon which a court may prevent or delay execution of sentence.

Recommendation 7. The Virginia Sentencing Commission, the State Compensation Board, and the Supreme Court of Virginia should revise their respective record keeping policies on capital crimes to foster consistency in the reporting structure.¹³

¹³ Currently these three groups maintain their information for different periods and assign different meanings to similar terms. This prohibits any statistically accurate interpretation of the data.

Acknowledgements

The members and staff of the Virginia State Crime Commission extend special thanks to the following individuals, agencies and organizations for their cooperation and valuable assistance in connection with this study:

Michael C. Allen, Esquire

Breck Arrington, Virginia Bar Association

Mandy Burnett, Virginia Trial Lawyers Association

The Hon. Donald S. Caldwell, Office of the Roanoke City Commonwealth's Attorney

Dawn Chase, *Virginia Lawyers Weekly*

Steven L. Dalle Mura, Supreme Court of Virginia

Dennis W. Dohnal, Esquire

Frank S. Ferguson, Office of the Attorney General

Jessie French, Division of Legislative Services

Richard Goemann, Fairfax Public Defender's Office

Roger D. Groot, Washington and Lee School of Law

Robert E. Lee, Jr., Virginia Capital Representation Resource Center

Overton P. Pollard, Public Defender Commission

Brenda C. Spry, Portsmouth Public Defender's Office

James A. Willett, Office of the Manassas Commonwealth's Attorney

Gerald Zerkin, Esquire



Appendix A

Study Resolution.

HOUSE JOINT RESOLUTION NO. 190

Directing the Virginia State Crime Commission, in conjunction with other agencies, to study the capital representation system for indigent defendants in the Commonwealth.

Agreed to by the House of Delegates, February 17, 1998

Agreed to by the Senate, March 10, 1998

WHEREAS, §19.2-163.7 of the Code of Virginia provides that in any case in which an indigent defendant charged with a capital offense requests representation, an attorney is appointed from a list established by the Public Defender Commission; and

WHEREAS, the Code of Virginia requires the Public Defender Commission, in conjunction with the Virginia State Bar, to establish qualifications that an attorney must meet in order to be placed on a list for appointment; and

WHEREAS, a circuit court judge may appoint counsel who is not on a list if the attorney is qualified according to the standards established by the Public Defender Commission and the Virginia State Bar; and

WHEREAS, the Public Defender Commission was created by the 1972 General Assembly to establish an alternative means of providing legal counsel for indigent defendants; and

WHEREAS, there are now nineteen public defender offices in the Commonwealth; and

WHEREAS, in those jurisdictions not served by a public defender office, Virginia's traditional court-appointed system is in place; and

WHEREAS, indigent defendants charged with capital offenses are represented by the private bar; and

WHEREAS, the economic cost of such representation can be considerable; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Crime Commission, in conjunction with other agencies, be directed to study the capital representation system for indigent defendants in the Commonwealth. The Virginia State Crime Commission shall be the lead agency in the study with the Office of the Executive Secretary of the Supreme Court, the Virginia State Bar, the Virginia Bar Association, and the Public Defender Commission. The study shall evaluate (i) the quality of capital representation of indigent defendants in Virginia, (ii) the standards for qualification of counsel promulgated pursuant to §19.2-163.8, and (iii) the feasibility of requiring the public defender offices to defend all indigent capital murder defendants who request representation throughout the Commonwealth.

The Virginia State Crime Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1999 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Survey of Virginia's circuit court judges, questions and response frequencies.

Survey Summary

This survey consists of three sections: standards for qualification and quality of capital representation of indigent defendants; the feasibility of requiring public defender offices to defend all indigent capital murder defendants who request representation through the Commonwealth; and general information to help us to better classify your answers. Please complete each item on this survey, either writing in the information requested or selecting the applicable boxes as they apply.

Standards for Qualification and Quality of Capital Representation of Indigent Defendants in Virginia

- (1) First of all, would you say that the standards for qualification for court appointed attorneys in capital cases adopted in 1992 improved the quality of representation indigent capital murder defendants receive?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes	47	56%
<input type="checkbox"/> No	8	10%
<input type="checkbox"/> Don't Know/Not Sure	28	34%

- (2) Thinking still about these standards, in your opinion are they too strict, about right, or too lenient?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Too Strict	1	1%
<input type="checkbox"/> About Right	66	79%
<input type="checkbox"/> Too Lenient	4	5%
<input type="checkbox"/> Don't Know/Not Sure	12	15%

- (3) Turning now to the representation of indigent defendants, generally do you think the quality of representation afforded indigent capital murder defendants in Virginia exceeds the level of expertise and performance that one would expect from competent counsel, meets this level of expertise and performance, or falls below this level of expertise and performance?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Exceeds the level of expertise and performance	16	20%
<input type="checkbox"/> Meets the level of expertise and performance	62	78%
<input type="checkbox"/> Falls below the level of expertise and performance	2	2%



Appendix B

(4) Is there a public defender office in your jurisdiction?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes (Continue with Question 5, p. 3)	45	54%
<input type="checkbox"/> No (Skip to Question 6, p. 3)	38	46%

(5) Generally speaking, how would you rate the performance of your jurisdiction's public defender(s)? Would you say that overall the quality of public defender capital representation in your jurisdiction is excellent, good, fair, or poor?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Excellent	14	33%
<input type="checkbox"/> Good	24	57%
<input type="checkbox"/> Fair	4	10%
<input type="checkbox"/> Poor	--	--

(6) Generally speaking, how would you rate the performance of appointed private counsel's capital representation in your jurisdiction? Would you say that overall the quality of appointed private counsels' capital representation in your jurisdiction is excellent, good, fair, or poor?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Excellent	35	44%
<input type="checkbox"/> Good	40	51%
<input type="checkbox"/> Fair	3	4%
<input type="checkbox"/> Poor	1	1%

(7) Would you say that the bar in your jurisdiction contains an adequate number of attorneys who are qualified to represent indigent defendants charged with capital murder or sentenced to death?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes	70	84%
<input type="checkbox"/> No	13	16%

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Feasibility of Using Public Defenders to Represent All Indigent Capital Murder Defendants

- (8) On another subject, since 1992, a list of attorneys qualified to represent indigent capital murder defendants has been maintained by the Virginia Public Defender Commission. Are you familiar with this list?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes (Continue with Question 9)	78	95%
<input type="checkbox"/> No (Skip to Question 10, p. 4)	4	5%

- (9) When appointing attorneys to represent indigent capital defendants, have you ever appointed attorneys from this list?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes	58	82%
<input type="checkbox"/> No	13	18%

- (10) Do you believe the quality of representation in capital cases in your jurisdiction would improve, worsen, or stay about the same if the Virginia Public Defender Commission assisted in providing representation for indigent capital defendants?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Improve	14	20%
<input type="checkbox"/> Worsen	13	19%
<input type="checkbox"/> Stay About the Same	43	61%

- (11) Pursuant to Section 19.2-155, prosecutors from another jurisdiction may be specially appointed to try cases in which the office of the elected Commonwealth's Attorney has a conflict. In your opinion, does the quality of prosecution improve, worsen, or stay about the same when specially appointed prosecutors handle these cases?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Improve	8	13%
<input type="checkbox"/> Worsen	4	6%
<input type="checkbox"/> Stay About the Same	51	81%

- (12) And why is that?



Appendix B

General Information

- (13) I have just a few more questions to help us classify your answers. Would you say that your jurisdiction is predominantly urban, suburban, or rural?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Urban	30	38%
<input type="checkbox"/> Suburban	26	33%
<input type="checkbox"/> Rural	23	29%

- (14) Including 1998, what is your length of service as a circuit court judge?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> 5 or less	26	31%
<input type="checkbox"/> 6 to 10 years	24	29%
<input type="checkbox"/> 11 to 15 years	21	25%
<input type="checkbox"/> 16 years or more	12	15%

- (15) Since 1993, have you presided over at least one case involving an indictment charging capital murder?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes (Continue with Question 16, p. 5)	60	72%
<input type="checkbox"/> No (Skip to Question 25, p. 6)	23	28%

- (16) Please indicate the number of these cases you have presided over since 1993.

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> 1 or 2	32	55%
<input type="checkbox"/> 3 or 4	18	31%
<input type="checkbox"/> 5 or 6	6	10%
<input type="checkbox"/> 7 or more	2	4%

- (17) Since 1993, have you presided over a capital murder trial at which the defendant was represented by appointed private counsel?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes (Continue with Question 18)	50	83%
<input type="checkbox"/> No (Skip to Question 19)	10	17%

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(18) Please indicate the number of these cases you have presided over since 1993.

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> 1 or 2	30	70%
<input type="checkbox"/> 3 or 4	9	21%
<input type="checkbox"/> 5 or 6	3	7%
<input type="checkbox"/> 7 or more	1	2%

(19) Since 1993, have you presided over one or more capital murder cases in which counsel was privately retained?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> Yes (Continue with Question 20)	19	33%
<input type="checkbox"/> No (Skip to Question 21)	39	67%

(20) Please indicate the number of these cases you have presided over since 1993.

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> 1 or 2	17	94%
<input type="checkbox"/> 3 or 4	1	6%
<input type="checkbox"/> 5 or 6	--	--
<input type="checkbox"/> 7 or more	--	--

(21) Of the capital murder cases over which you have presided, please specify how many were eventually resolved short of a trial on the merits of guilt or innocence?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> 1 or 2	34	85%
<input type="checkbox"/> 3 or 4	5	12%
<input type="checkbox"/> 5 or 6	--	--
<input type="checkbox"/> 7 or more	1	3%

(22) How many defense attorneys do you usually appoint to each capital murder case?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> 1	--	--
<input type="checkbox"/> 2	55	98%
<input type="checkbox"/> 3 or more	1	2%



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- (23) If there is a public defender office in your jurisdiction, do you usually appoint the public defender only or do you usually appoint the public defender plus a private attorney to represent indigent capital defendants?

	<i>Frequency</i>	<i>Percent</i>
<input type="checkbox"/> No public defender office in my jurisdiction (Skip to Question 25)	28	48%
<input type="checkbox"/> Public Defender Only (Skip to Question 25)	9	16%
<input type="checkbox"/> Public Defender Plus Private Attorney (Skip to Question 25)	5	9%
<input type="checkbox"/> Depends Upon Particular Case (Continue with Question 24)	16	28%

- (24) Please give some examples in the space below.

- (25) The following space is provided for additional comments you may have about the standards for court appointed attorneys in capital cases adopted in 1992, the quality of representation afforded indigent defendants charged with capital murder or sentenced to death, and/or any other comments you might have. (*Attach additional sheets if necessary.*)

Optional Sometimes we need to get in touch with respondents to ask another question or two, or to clarify your answers. Could you please provide your name and office phone number below?

Name: _____

Phone: _____

THANK YOU FOR YOUR TIME AND COOPERATION.

PLEASE RETURN
(USING THE ENCLOSED, POSTAGE PAID ENVELOPE) TO:

VIRGINIA STATE CRIME COMMISSION
SUITE 915, GENERAL ASSEMBLY BUILDING
RICHMOND, VIRGINIA 23219

ATTENTION: SUSAN B. WILLIAMS

The full text of the standards for the qualifications of appointed counsel in capital cases, as promulgated by the Public Defender Commission, follows.

Pursuant to §19.2-163.8 E of the Code of Virginia, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases.* While §19.2-163.7 of the Code of Virginia, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings. Thus, the standards often refer to "lead counsel"*** and "co-counsel." If a public defender is appointed as either "lead" or "co-counsel," the other attorney should be appointed from the private bar.

A. TRIAL COUNSEL

1. Court-appointed "lead counsel" shall:

- a. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.
- b. Have at least five years of criminal litigation practice with demonstrated competence.
- c. Have had, within the past two years, some specialized training in capital litigation.
- d. Have at least one of the following qualifications:
 - (1) Experience as "lead counsel" in the defense of at least one capital case;
 - (2) Experience as "co-counsel" in the defense of at least two capital cases;
 - (3) Experience as "lead counsel" (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.
- e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.
- f. Have demonstrated proficiency and commitment to quality representation.

2. Court-appointed "co-counsel" must:

- a. Meet all of the requirements of "lead counsel" except as set forth in subdivisions 1 b and 1 d.
- b. Have at least one of the following qualifications:
 - (1) Experience as "lead counsel" or "co-counsel" in a murder trial;
 - (2) Experience as "lead" or "co-counsel" in at least two criminal jury trials.



B. APPELLATE COUNSEL

Attorneys qualifying as court appointed "lead counsel" under subsection A 1 automatically qualify as "lead" appellate counsel. Other appointed appellate counsel must meet the following requirements:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.
2. Have briefed and argued the merits in:
 - a. At least three criminal cases in an appellate court; or
 - b. The appeal of a case in which the death penalty was imposed.
3. Have had, within the past two years, some specialized training in capital case litigation and be familiar with the rules and procedure of appellate practice.

C. HABEAS CORPUS COUNSEL

1. Habeas corpus "lead counsel" shall satisfy one of the following requirements:
 - a. Be qualified as "lead counsel" pursuant to subsection A 1 and possess familiarity with Virginia as well as federal habeas corpus practice.
 - b. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences.
2. Habeas corpus "co-counsel" shall satisfy one of the following requirements:
 - a. Service as "lead" or "co-counsel" in at least one capital habeas corpus proceeding in Virginia or federal courts, or both, during the last three years;
 - b. Have at least seven years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth or federal courts, or both.

*Whenever the term "capital case" is used, it shall mean a case tried to a jury wherein the sentencing phase was held pursuant to §19.2-264.2.

**Whenever the term "lead counsel" is used, this would also include an attorney acting as sole counsel in a case.

Statutory Authority

§19.2-163.8 E of the Code of Virginia.

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