

**Report on the Development of Recommendations to  
Reduce the Number of Misdemeanor Cases in Which  
the Commonwealth Will Seek Incarceration<sup>1</sup>**

Prepared by the  
Office of the Executive Secretary of the  
Supreme Court of Virginia  
Karl R. Hade, Executive Secretary  
October 28, 2010

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<sup>1</sup> This report and the attached recommendations were submitted to, and approved by, the Committee on District Courts at its meeting on September 30, 2010.

## **I. Background**

During the 2010 session of the Virginia General Assembly, two legislative proposals were introduced to reduce expenditures from the Criminal Fund for court-appointed counsel in misdemeanor cases where the Commonwealth's Attorney would not seek punishment of incarceration. See, e.g., House Bills 1393 and 1394. These bills did not pass; however, the following language was included in the 2010-2012 biennial budget:

The Committee on District Courts, in consultation with the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission, shall develop policies and procedures to reduce the number of misdemeanor charges for which the Commonwealth will seek incarceration, thereby reducing expenditures through the Criminal Fund for court-appointed counsel or for public defenders. The Executive Secretary of the Supreme Court shall provide a report by October 30, 2010, to the Governor and to the Chairmen of the Senate and House Courts of Justice Committees, and the Chairmen of the Senate Finance and House Appropriations Committees on the implementation of these policies and procedures.

See 2010 Budget, Item 42(D)(2). Pursuant to this directive, representatives of the Committee on District Courts, the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission met on July 20, 2010. Those present included the Honorable Henry L. Marsh, III, Member of the Virginia Senate and Chair of the Senate Courts of Justice Committee; the Honorable Jackson H. Miller, Member of the Virginia House of Delegates and designee of the Honorable David B. Albo, Chair of the House Courts of Justice Committee; The Honorable Wenda K. Travers, Judge of the Prince William General District Court; the Honorable Philip Trompeter, Judge of the Roanoke Juvenile and Domestic Relations District Court; the Honorable David J. Johnson, Executive Director of the Indigent Defense Commission; the Honorable Neil S. Vener, Commonwealth's Attorney for Campbell County and President of the Virginia Association of Commonwealth's Attorneys; Karl R. Hade, Executive Secretary of the Supreme Court of Virginia and members of his staff, including Steven L. Dalle Mura, Jody D. Hess and Edward M. Macon (collectively referred to as the "Work Group").

The meeting began with a discussion of the legal authority and parameters regarding the right of an indigent criminal defendant to court-appointed counsel in misdemeanor cases at public expense. The Work Group also discussed current practices around the Commonwealth with regard to Commonwealth's Attorneys not seeking jail time in misdemeanor cases, including a letter circulated by Roanoke Commonwealth's Attorney, Donald S. Caldwell. Finally, the Work Group discussed concerns and possible legal issues related to not appointing counsel in criminal misdemeanor cases, as well as mechanical concerns with regard to timing, communication, and potential ramifications if a Commonwealth's Attorney initially indicates he/she will not seek jail time and later changes his/her mind.

## II. The Right to Counsel at Public Expense

The Sixth Amendment to the United States Constitution guarantees criminal defendants facing the possibility of incarceration the right to be represented by an attorney, and this guarantee is binding on the states. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In Virginia, this right is protected by statute.

Except as may otherwise be provided in §§ 16.1-266 through 16.1-268, whenever a person charged with a criminal offense the penalty for which may be death or confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, appears before any court without being represented by counsel, the court shall inform him of his right to counsel.

Va. Code § 19.2-157. Absent a knowing and intelligent waiver, no person may be incarcerated for any criminal offense unless he is represented by counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Although a criminal defendant has the right to retain counsel at his or her own expense, the United States Supreme Court has held that the Sixth and Fourteenth Amendments do not require a state to provide counsel to indigent criminal defendants in misdemeanor cases in which the offender does not face the possibility of incarceration. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). The Code of Virginia provides:

[I]f, prior to the commencement of the trial, the court states in writing, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion, that a sentence of incarceration will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and in such event no sentence of incarceration shall be imposed.

Va. Code § 19.2-160.<sup>2</sup>

The Work Group agreed that current law allows a court, either upon the request of the Commonwealth's Attorney or upon the court's own motion, to not appoint a public defender, or other counsel paid for at public expense, in misdemeanor cases where it is determined in advance that jail time will not be imposed. Accordingly, it was the consensus of the Work Group that statutory changes would not be necessary.

## III. Current Practices of Commonwealth's Attorneys

Neil Vener reported that in many jurisdictions across the Commonwealth, and especially in more populous, urban areas, Commonwealth's Attorneys do not appear in

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<sup>2</sup> The determination that "a sentence of incarceration" will not be imposed should be read to preclude suspended sentences as well. *Alabama v. Shelton*, 535 U.S. 654 (1979).

General District Court at all. They are not required to appear in misdemeanor cases.<sup>3</sup> Mr. Vener explained that Commonwealth's Attorneys do not collect any fee to appear in district court.<sup>4</sup>

Neil Vener and David Johnson both reported that in parts of the Commonwealth there are already various longstanding practices for Commonwealth's Attorneys not to seek a sentence of incarceration and, then, for the court not to appoint counsel at public expense in certain types of misdemeanor cases. In some jurisdictions, such as Campbell County, the Commonwealth's Attorney will either appear in court and notify the judge when the cases are first called or, if the Commonwealth's Attorney will not be in court, he/she may notify the clerk of those misdemeanor cases for which they will be seeking jail time. In other jurisdictions, such as the City of Roanoke, the Commonwealth's Attorney has sent a letter to the local circuit and district court judges advising them of the specific types of misdemeanor offenses for which, in the event of a conviction, the Commonwealth's Attorney will not be seeking punishment of incarceration. The Commonwealth's Attorney for the City of Roanoke reports that effective July 1, 2010 he has expanded "the use of the waiver of the right to seek jail time." In a letter dated June 30, 2010 to the Judges of the 23<sup>rd</sup> Judicial Circuit and District, Commonwealth's Attorney Donald Caldwell stated the following:

As a fundamental premise, the Commonwealth will strive to reserve its right to seek a sentence of incarceration, active or suspended, only in those cases which necessitate that type of sanction. The challenge for the most part is the ability to assess cases prior to advisal hearings, and this will constitute a continuing challenge. Nonetheless, there are a number of categories of offenses where a general approach, recognizing the potential for aberration in specific cases, is appropriate.

June 30, 2010 letter, Caldwell to the Judges of the 23<sup>rd</sup> Judicial Circuit and District.

#### **IV. Discussion of Issues And Limitations Regarding The Use Of Advance Stipulations Not To Appoint Counsel At Public Expense In Criminal Misdemeanor Cases.**

The Work Group discussed whether all Virginia Commonwealth's Attorneys might agree in advance to a single list of misdemeanors for which they would agree not to seek jail time. Mr. Vener, Commonwealth's Attorney for Campbell County and President of the Virginia Association of Commonwealth's Attorneys, indicated this would never happen. He explained that what may be viewed as a very serious offense in a rural area, may be considered less so in a more urban jurisdiction and vice-versa. He indicated, by way of example, that in some jurisdictions the Commonwealth's Attorneys

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<sup>3</sup> Va. Code § 15.2-1627 (B).

<sup>4</sup> Pursuant to Va. Code § 15.2-1627.3, "No attorney for the Commonwealth or city attorney shall receive a fee for appearing in misdemeanor cases before a district court notwithstanding any provision of law to the contrary."

would agree not to seek jail time for cases charging a first offense of possession of marijuana, while others would not.

The Work Group also discussed whether it would be appropriate or workable for Commonwealth's Attorneys to agree in advance in juvenile and domestic relations cases not to seek jail time. The consensus of the Work Group was that it would not be appropriate or workable for Commonwealth's Attorneys to agree in advance in juvenile and domestic relations cases not to seek jail time. In regard to delinquency cases, the statute governing the appointment of counsel for juveniles and the dispositional options applicable in those cases differ so considerably from adult criminal cases that policies developed for the latter would be not be legally relevant to or appropriate in delinquency matters. With regard to the limited class of adult criminal cases in juvenile and domestic relations district court, the Work Group concluded that these criminal cases, with their distinctive jurisdictional prerequisite – that the victim be either a family or household member or a minor – were less amenable to the policies and practices which may be appropriate for the general district court criminal docket. It is the Work Group's understanding that this practice of agreeing in advance not to seek incarceration for certain types of misdemeanors has not been adopted in any juvenile and domestic relations district court. Although Mr. Caldwell's letter was sent to the judges of the Roanoke Juvenile and Domestic Relations District Court, it appears those judges were included for informational purposes only.

The Work Group also discussed whether, at the outset of a particular case, a Commonwealth's Attorney or a judge could initially stipulate that incarceration (active or suspended) would not be imposed and then later change his or her mind. The consensus of the group was that this would be acceptable and happens now. Presumably, if the judge and Commonwealth's Attorney agree prior to trial that incarceration is a possibility following a conviction, the matter would be continued, counsel would be appointed and would be allowed time to undertake the representation. The Work Group recognized that the further along the proceedings were, the more problematic it would be to undo a stipulation that incarceration (active or suspended) would not be imposed. For example, as the case progresses, there may be issues of double jeopardy or speedy trial, if the case were essentially to begin anew with counsel appointed for the defendant. Such issues would, of course, have to be addressed on a case-by-case basis.

The Work group recognized that in certain cases there may be mandatory statutory provisions or other circumstances that either require, or weigh in favor of, appointment of counsel. For example, in connection with a charge of first-offense DUI, if the alleged BAC exceeds .15, by statute there is a mandatory minimum sentence of incarceration. Therefore, counsel would need to be appointed for such an alleged violation. See Va. Code § 18.2-270(A). The Work Group discussed the fact that in certain cases a misdemeanor conviction in the current case would give rise to enhanced punishment in the event of any future conviction for the same offense or a related offense. The Work Group agreed that this was a concern, but the consensus of the Group was that this would not necessarily be a contraindication of a stipulation that incarceration (active or suspended) not be imposed. The Work Group also discussed the

fact that a misdemeanor conviction in the current case could affect the defendant's immigration status. Again, the Work Group agreed that this may be a legitimate concern, but the consensus of the Group was that this would not prohibit a stipulation that incarceration (active or suspended) not be imposed.

It is possible, of course, that the judge and Commonwealth's Attorney might disagree as to any initial stipulation that incarceration not be imposed or over a later change. The Work Group recognized the need to balance prosecutorial and judicial discretion – the prosecutor's right to determine what offense is charged and the judge's obligation to determine what punishment is appropriate. The Work Group also recognized that different Commonwealth's Attorneys in different jurisdictions would have different lists of misdemeanor offenses for which they would presumptively not seek punishment of incarceration. Accordingly, the Work Group recognized that while some broad guidelines may be appropriate, often the Commonwealth's Attorney's decision not to seek incarceration (active or suspended) and the judge's decision to so stipulate, or not, would have to be made on a case-by-case basis.

## **V. Recommendations**

Based upon the foregoing, the Work Group respectfully submits the attached recommendations, in lieu of policies and procedures, "to reduce the number of misdemeanor charges for which the Commonwealth will seek incarceration, thereby reducing expenditures through the Criminal Fund for court-appointed counsel or for public defenders."

**Recommendations to Reduce the Expenditures Through  
the Criminal Fund for Court-Appointed Counsel in  
Certain Misdemeanor Cases**

Prepared by the  
Office of the Executive Secretary of the  
Supreme Court of Virginia  
Karl R. Hade, Executive Secretary  
October 28, 2010

In order to reduce the expenditures through the Criminal Fund for court-appointed counsel or for public defenders, the Committee on District Courts, has developed, in consultation with the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission, the following recommendations. The Committee on District Courts, the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission, recognize that effective procedures are already in place to allow for the non-appointment of counsel in certain misdemeanor cases, and, therefore, respectfully submit these recommendations in lieu of further policies and procedures.

- A. The Committee on District Courts, the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission shall take reasonable steps to promote an increased awareness of the procedures established pursuant to Va. Code § 19.2-160, for the non-appointment of counsel in misdemeanor cases, including the following:
1. The Office of the Executive Secretary of the Supreme Court of Virginia shall initiate a review by the District Court Forms Committee and OES staff of existing forms used to document appointment of counsel, waiver of the right to counsel, and the trial without appointment of counsel at public expense, in misdemeanor cases where it is determined that jail time will not be imposed.
  2. The Virginia Association of Commonwealth's Attorneys shall, after being notified of the completion of the review initiated by the Office of the Executive Secretary, inform its members and constituents of the procedures established pursuant to Va. Code § 19.2-160, including the existence of certain forms prepared and revised by the Office of the Executive Secretary of the Supreme Court of Virginia, including district court form DC-314, WARRANT OF ARREST – MISDEMEANOR, district court form DC-335, TRIAL WITHOUT A LAWYER, and district court form DC-337, TRIAL WITHOUT COUNSEL.
  3. The Virginia Indigent Defense Commission shall, after being notified of the completion of the review initiated by the Office of the Executive Secretary, inform its members and constituents of the procedures established pursuant to Va. Code § 19.2-160, including the existence of certain forms prepared and revised by the office of the Executive Secretary of the Supreme Court of Virginia, including district court form DC-314, WARRANT OF ARREST – MISDEMEANOR, district court form DC-335, TRIAL WITHOUT A LAWYER, and district court form DC-337, TRIAL WITHOUT COUNSEL.
  4. The Office of the Executive Secretary of the Supreme Court of Virginia, on behalf of the Committee on District Courts, shall, upon completion of the review of existing forms outlined above, inform circuit and general



district court judges and clerks, and magistrates of the procedures established pursuant to Va. Code § 19.2-160, including the existence of certain forms prepared and revised by the office of the Executive Secretary of the Supreme Court of Virginia, including district court form DC-314, WARRANT OF ARREST – MISDEMEANOR, district court form DC-335, TRIAL WITHOUT A LAWYER, and district court form DC-337, TRIAL WITHOUT COUNSEL.

B. In any case where a judge decides to initiate or accept the use of stipulations not to seek incarceration (active or suspended) in a misdemeanor case, the Committee on District Courts, the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission, recognize that existing law permits the following procedures:

1. Any judge of the Commonwealth of Virginia following the process provided for in Va. Code § 19.2-160, may on his/her own motion or upon the request of the Commonwealth's Attorney, decline to appoint counsel at public expense for a criminal defendant in a misdemeanor case upon a determination prior to the commencement of the trial in a particular case that incarceration (active or suspended) will not be imposed.
2. Any request made by a Commonwealth's Attorney, as well as any determination by a judge, that incarceration (active or suspended) not be imposed, should be in writing.
3. Forms for the use of stipulations not to seek incarceration (active or suspended) in misdemeanor cases shall be made available by the Office of the Executive Secretary of the Supreme Court of Virginia.