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October 30, 2013

The Honorable Robert F. McDonnell
Governor of Virginia
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, VA 23219

The Honorable Thomas K. Norment, Jr., Chairman
Senate Courts of Justice Committee
Senate of Virginia
P.O. Box 6205
Williamsburg, VA 23188

The Honorable David B. Albo, Chariman
House Courts of Justice Committee
Virginia House of Delegates
6367 Rolling Mill Place, Suite 102
Springfield, VA 22152

The Honorable Walter A. Stosch, Chairman
Senate Finance Committee
Senate of Virginia
Innsbrook Centre
4551 Cox Road, Suite 110
Glen Allen, VA 23060-6740

The Honorable Lacey E. Putney, Chairman
House Appropriations Committee
Virginia House of Delegates
P.O. Box 127
Bedford, VA 24523

Re: Report pursuant to Item 43 (D)(2) of the 2013 Appropriations Act

Dear Governor McDonnell and Chairmen Norment, Albo, Stosch, and Putney:

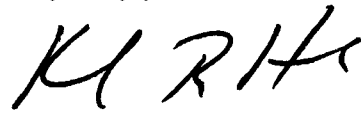
Item 43, Paragraph D.2, of the Appropriations Act, Chapter 806, 2013 Session, requires the Executive Secretary to submit to the Governor and the Chairmen of the Senate Courts of

Justice, House Courts of Justice, Senate Finance, and House Appropriations Committees a report on the implementation of policies and procedures to reduce the number of misdemeanor charges for which the Commonwealth will seek incarceration and their impact on Criminal Fund expenditures. The policies and procedures were to be developed by the Committee on District Courts, in consultation with the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission. Please find enclosed a report prepared in response to this budget item.

If you have any questions regarding this report, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'K R Hade', written in a cursive style.

Karl R. Hade

KRH:jrp

Enclosure

cc: Division of Legislative Automated Systems

**Report on the Development of Recommendations to
Reduce the Number of Misdemeanor Cases in Which
the Commonwealth Will Seek Incarceration**

Prepared by the
Office of the Executive Secretary of the
Supreme Court of Virginia
Karl R. Hade, Executive Secretary
October 30, 2013

I. Background

Item 43 (D)(2) of the 2013 Appropriations Act contains a provision intended to decrease Criminal Fund expenditures through the reduced use of court-appointed attorneys to represent certain accused misdemeanants. Specifically, the budget language provides as follows:

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, 2013, 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 and their impact on Criminal Fund expenditures.

2013 Budget, Item 43 (D)(2). This language is identical to language included in the 2010-2012 biennial budget, with one exception. This year's provision adds the requirement that the report also include information regarding an *impact on Criminal Fund expenditures*.

During the 2010 Session of the General Assembly, two bills were introduced to reduce expenditures from the Criminal Fund for court-appointed counsel in misdemeanor cases where the Commonwealth's Attorney would not be seeking punishment of incarceration. The two bills, House Bills 1393 and 1394, failed to pass. However, language was included in the 2010-2012 biennial budget requiring the Committee on District Courts to consult with the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission to develop policies and procedures to reduce Criminal Fund expenditures for court-appointed counsel in misdemeanor cases. As with the current budget language, the 2010 language required a report on the implementation of the policies and procedures to be sent to the Governor and the Chairmen of the Senate Finance, House Appropriation, and the Senate and House Courts of Justice Committees.

A work group of representatives from the Committee on District Courts, the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission met in 2010. The 2010 work group determined that it would not be appropriate or workable for Commonwealth's Attorneys to decide in advance not to seek incarceration in criminal and delinquency matters in juvenile and domestic relations district court cases. In addition, the 2010 work group members indicated that it was not realistic to expect all Commonwealth's Attorneys across Virginia to agree on a list of offenses for which jail time would not be sought. What could be viewed as a serious misdemeanor offense in one jurisdiction may not be seen as serious at all in another. Accordingly, the 2010 work group concluded that the Commonwealth's Attorney's decision not to seek incarceration would have to be made at the local level and, in many instances, on a case-by-case basis. Recognizing these limitations, and that effective procedures were already in place to allow for the non-appointment of counsel in certain

misdemeanor cases where, if convicted, jail time would not be imposed on a defendant, the 2010 work group submitted a report that included recommendations in lieu of specific policies and procedures.

The recommendations from 2010 focused on the promotion of an increased awareness of procedures that allow the court to forego the appointment of counsel for an indigent defendant in any case where the court has indicated in writing prior to trial that it will not impose jail time, either on request of the Commonwealth or on its own motion in the absence of the Commonwealth. *See* Va. Code § 19.2-160. A copy of the 2010 *Report on the Development of Recommendations to Reduce the Number of Misdemeanor Cases in Which the Commonwealth Will Seek Incarceration* and the 2010 *Recommendations to Reduce Expenditures Through the Criminal Fund for Court-Appointed Counsel in Misdemeanor Cases* are attached as Appendix A.

II. 2013 Work Group

In accordance with the language in Item 43 (D)(2) of the 2013 budget, representatives of the Committee on District Courts, the Virginia Association of Commonwealth's Attorneys and the Virginia Indigent Defense Commission met on Monday, August 26, 2013. Present at the meeting for the Committee on District Courts¹ were the Honorable Philip Trompeter, Judge of the Roanoke Juvenile and Domestic Relations District Court, and the Honorable Pamela O'Berry, Chief Judge of the Chesterfield General District Court; the Virginia Association of Commonwealth's Attorneys was represented by the Honorable Michael R. Doucette, Commonwealth's Attorney for the City of Lynchburg, and the Honorable Shannon L. Taylor, Commonwealth's Attorney for Henrico County; and the Indigent Defense Commission was represented by its Executive Director, the Honorable David J. Johnson (collectively referred to as the "Work Group"). The Office of the Executive Secretary of the Supreme Court (OES) provided staff support to the Work Group.

The meeting began with a review of the current budget language as well as the recommendations made in 2010. There was consensus among the Work Group members that the decision from 2010 to exclude juvenile and domestic relations district court from any recommendations should stand. The work group that met in 2010 concluded that it would not be appropriate or workable for Commonwealth's Attorneys to agree in advance not to seek jail time in cases before the juvenile and domestic relations district court. Because of the distinct jurisdictional prerequisite for adult criminal cases before the juvenile and domestic relations district court - that the victim is either a family or household member or a minor - these cases were less amenable to the policies and practices which may be appropriate in a general district court criminal case. For delinquency cases, the statute governing the appointment of counsel for juveniles and the dispositional options available in those cases differ so considerably from adult

¹ The Honorable Thomas K. Norment, Jr., member of the Virginia Senate and Chair of the Senate Courts of Justice Committee, and the Honorable David B. Albo, Member of the Virginia House of Delegates and Chair of the House Courts of Justice Committee were invited to attend the meeting as members of the Committee on District Courts, but were unable to attend.

criminal cases that policies developed for the latter would not be legally relevant or appropriate in delinquency matters.

Discussing how the appointment of counsel in misdemeanor cases has been handled since 2010, the consensus of the Work Group was that steps have been taken in the last few years around the state to identify misdemeanor cases where jail time will not be imposed so that counsel is not appointed, and that these steps have resulted in reduced expenditures from the Criminal Fund. However, the Work Group also agreed that, at this time, there is insufficient data to support this belief. In order to complete its task, the Work Group acknowledged the need for improved data collection so that the savings can be reasonably quantified.

As part of the implementation of the recommendations made in 2010, the OES implemented changes to the General District Court Case Management System (CMS) designed to facilitate the collection of information on those cases in which counsel was not appointed because jail time was not being sought. In the fall of 2010, a new "Attorney Type" code "C" (Court Designation Not to Impose Jail Time) was implemented. This new code for Attorney Type would be entered in those cases in which the court indicated it would not impose jail time if the defendant was convicted and, accordingly, no attorney was appointed to represent the defendant.

A review of the Attorney Type code data for the last three fiscal years revealed that the "C" Attorney Type is not widely used. For example, data from the General District Court CMS showed that no "C" Attorney Type codes had been entered in either Lynchburg or Chesterfield in the last three fiscal years. However, Mr. Doucette reported that he provided to the Lynchburg General District Court a list of misdemeanor offenses for which his office will not seek jail time and that the court is not appointing counsel in those cases. Similarly, Judge O'Berry advised that the Chesterfield County Commonwealth's Attorney began sending an Assistant Commonwealth's Attorney to all arraignments in General District Court to identify misdemeanor cases in which jail time will not be sought so that she and her colleagues on the Chesterfield General District Court bench do not appoint attorneys in those cases.

It is likely that, in those two localities, other Attorney Type codes are being used in lieu of the "C." For example, there is an Attorney Type "W" (Waived) for when a defendant waives his right to counsel, and an Attorney Type "N" (None) for when a defendant does not have counsel. Despite the fact that use of Attorney Type code "C" is not widespread, some jurisdictions are regularly using it, and its use statewide has increased steadily since it was implemented in 2010. During FY 2013, three jurisdictions entered "C" as the Attorney Type in 800-1,000 cases, and another jurisdiction utilized the Attorney Type "C" code in over 1,100 cases.

In order to make a determination of the correct Attorney Type code to enter into CMS, the clerk must receive adequate information. The warrant and summons forms that OES promulgates allow the court to check a box indicating that "If convicted, no jail sentence will be imposed" so that the clerk would know that Attorney Type "C" should be entered in the case. However, discussion among the Work Group members revealed that the OES forms are not

widely used in the relevant misdemeanor cases. Instead, the vast majority of the cases where the Commonwealth is not seeking incarceration are brought on the Virginia Uniform Summons (often referred to as the Uniform Traffic Summons), which is not a form that OES produces. The Virginia Uniform Summons is maintained by the Attorney General, and any changes to the form are to be made by the Attorney General after consultation with the Committee on District Courts, the Superintendent of State Police and the Commissioner of the Department of Motor Vehicles. Va. Code § 46.2-388 (2013).

The Work Group agreed that it would be beneficial to change the Virginia Uniform Summons so that the court could indicate in appropriate cases that no jail sentence will be imposed if the defendant is convicted so that the clerk would have the necessary information on the court paperwork when selecting the Attorney Type code in CMS. An interim solution to revising the Virginia Uniform Summons was also discussed. Judge O'Berry indicated that, in Chesterfield General District Court, the judges use a stamp to indicate when jail time will not be imposed and, accordingly, counsel is not appointed.

In addition to recommended changes to the Virginia Uniform Summons, the Work Group discussed ways to increase the use of the Attorney Type "C" code and, accordingly, the accuracy of the data. Currently, the Attorney Type field is mandatory only when the case is finalized and certain dispositions are entered. For example, if a person is found not guilty, CMS does not require entry of an Attorney Type code. The Work Group recommended that the Attorney Type field be made mandatory in *all* criminal cases. This change will be made to the General District Court CMS with a case management system update release scheduled for November 2013.

The Work Group also recognized that changes to the form or to CMS will be successful only if judges and clerks are educated regarding this issue and are provided additional training on the forms, and the entry of the appropriate Attorney Type code in CMS. Additionally, there was consensus that as Commonwealth's Attorneys play a significant role in determining the charges for which they will not seek jail time, it is important that Commonwealth's Attorneys who are not seeking jail time for specified misdemeanors discuss these procedures at the local level, with their chief judge and clerks, to help ensure that the procedures are implemented correctly and consistently.

A summary of the 2013 Work Group meeting was presented to the Committee on District Courts at its meeting on August 29, 2013. The Committee on District Courts requested staff in OES to pursue changes to the Virginia Uniform Summons and implementation of a stamp to be used in the interim. OES staff has proposed to the Attorney General a revision to the Virginia Uniform Summons to reflect if counsel was not appointed because the court decided it would not impose jail time if the defendant is convicted. OES is preparing a stamp for use by general district courts in the interim.

III. Criminal Fund Expenditures for Court-Appointed Counsel in Misdemeanor Cases

Although the specific impact to the Criminal Fund cannot be quantified for counsel not

being appointed in misdemeanor cases where jail time will not be imposed, data is available on overall expenditures from the Criminal Fund for court-appointed counsel paid for representing adult defendants in misdemeanor cases. The table below shows this data for the five most recent fiscal years broken out by the type of court for which the payments were made.

Court	2008-09	2009-10	2010-11	2011-12	2012-13
Circuit	\$ 1,336,967	\$ 1,377,555	\$ 1,430,640	\$ 1,475,110	\$ 1,483,540
General District	\$ 6,693,452	\$ 7,190,274	\$ 6,814,182	\$ 6,591,437	\$ 6,540,688
Juvenile & Domestic Relations District	\$ 3,720,528	\$ 3,974,316	\$ 4,155,938	\$ 4,302,913	\$ 4,336,534
Combined District	\$ 2,747,500	\$ 2,616,733	\$ 2,177,835	\$ 2,403,174	\$ 2,282,169
Total	\$ 14,498,447	\$ 15,158,878	\$ 14,578,595	\$ 14,772,634	\$ 14,642,931

Although the total amount paid to court-appointed counsel for misdemeanor cases in each of the last five fiscal years was well over \$14 million, a significant percentage of that amount each year (26% - 30%) was spent for representation in the juvenile and domestic relations district court. Additionally, some portion of the amounts attributable to the combined district courts² would be for amounts paid to attorneys representing adult criminal defendants before the juvenile and domestic relations district court.

III. Recommendations

After review with the Committee on District Courts, and in order to reduce Criminal Fund expenditures for court-appointed counsel, it is recommended that OES and the Virginia Commonwealth's Attorneys Association continue to promote awareness of the procedures that allow for the non-appointment of counsel in misdemeanor cases when the court has indicated in advance that jail time will not be imposed as follows:

1. OES should provide additional training to judges and clerks regarding the process, the available district court forms, and the entry of the appropriate Attorney Type code into CMS.
2. The Virginia Association of Commonwealth's Attorneys should encourage Commonwealth's Attorneys to discuss these procedures at the local level with their chief general district judge and clerks.

² In combined district courts, there is a single clerk's office that serves both the general and the juvenile and domestic relations district courts.

To provide more accurate data about the impact to the Criminal Fund, the Committee on District Courts makes the following recommendations for improving data collection on the use of procedures designed to allow for the non-appointment of counsel in certain misdemeanor cases:

1. The Attorney Type field in the General District CMS should be made mandatory in *all* criminal cases. Currently, the Attorney Type field is mandatory only when the case is finalized and certain dispositions are entered. The field will be made mandatory by OES in a case management system release scheduled for November 2013.
2. The Virginia Uniform Summons should be revised to include a check-box for use by the court to indicate that no jail sentence will be imposed if the defendant is convicted. Although the forms developed by OES already provide such a check-box, which is used by the clerk to know when to enter the "C" Attorney Type code into CMS, the Virginia Uniform Summons does not capture this information. In the interim, a stamp should be developed for use by courts so that the necessary information for the clerk to know what Attorney Type code to enter into CMS will be noted by the court on the Virginia Uniform Summons.
 - a. The Virginia Uniform Summons is maintained by the Attorney General, in consultation with the Committee on District Courts, the Superintendent of State Police and the Commissioner of the Department of Motor Vehicles. OES Staff has contacted the Attorney General Office and requested that this change be made to the Virginia Uniform Summons.
 - b. Some courts currently use a stamp to indicate on the Virginia Uniform Summons when jail time will not be imposed upon conviction and counsel is not appointed. The Work Group recommended this approach for use in the interim or as an alternative if the changes to the Virginia Uniform Summons are not approved so that the clerks will have the necessary information to enter the correct Attorney Type field in the General District CMS.