A Study of the Defense of Indigents in Virginia and The Feasibility of a Public Defender System

REPORT OF THE BOARD OF GOVERNORS,
CRIMINAL LAW SECTION, VIRGINIA STATE BAR
TO
THE GOVERNOR
AND
THE GENERAL ASSEMBLY OF VIRGINIA

DECEMBER 1971

VIRGINIA STATE BAR
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INTRODUCTION

On July 22, 1970, the Board of Governors of the Criminal Law Section of the Virginia State Bar decided to explore the strengths and weaknesses, prospective problems and improvements in the varied systems of providing court-appointed counsel for indigent persons charged with felonies or juvenile offenses in Virginia, and also the feasibility of establishing a Public Defender office or offices in the state.

The survey effort was funded on November 24, 1970, with the help of a $10,867 federal grant, obtained through the Virginia Division of Justice and Crime Prevention from a federal block grant allotted the Commonwealth under provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. The in-kind services of lawyers assisting in the study were donated under the non-federal share of the project. Of the initial grant, $4,062 in federal funds was specifically designated for a one-day, Criminal Law Seminar, held February 19, 1971, in Fredericksburg, Virginia.

On September 2, 1971, a supplemental grant of $3,000 was obtained from the Division to expand the study in examining Public Defender Programs operating in a Southern state, a mid-Atlantic state and a New England state, also from the view-points of prosecutors, judges and defense lawyers.

Both the Virginia Courts System Study Commission and Virginia Attorney General Andrew P. Miller expressed considerable interest in this study and its findings as a prospective adjunct to efforts already under consideration to effect improvements in Virginia's administration of criminal justice.

II
PAST TO PRESENT, AN OVERVIEW

Historically, Virginia has demonstrated her leadership in developing laws under which a society can assure order and justice for the poor and the rich alike.

As long ago as 1849, Virginia had enacted legislation giving the Courts discretion to appoint attorneys to defend indigents accused of crimes, or even in civil causes.

That legislation said, in part, that:

"Any poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the courts may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party . . ."[1]

It is perhaps an interesting commentary that a related statute of the time also allowed attorneys' fees ranging from two dollars and fifty-cents to five dollars for such services.[2]

The Virginia Supreme Court, in ruling on a murder case in 1895, said, in part, that "every person accused of crime has a right to have counsel to aid him in his defence, but no one is compelled to employ counsel . . ."[3] It appears that this case was instrumental in developing a general policy by the trial courts of providing court-appointed counsel to an indigent person charged with a capital offense.

Oklahoma in 1911 and Los Angeles in 1914 pioneered in establishing the first Public Defender offices in this country.[4]

A Public Defender system was first authorized in Virginia by a 1920 statute permitting such a system in localities with over 100,000 population. The apparent snag in this legislation, providing that the Criminal Court can appoint a Public Defender, was the lack of compensation unless City Council appropriated money for his salary, since no City Council has ever allocated money for a Public Defender in Virginia.

In 1940, Virginia's earlier legislation was extended to encompass court-appointed counsel for indigents in any felony case, in a court of record, rather than primarily capital cases, again a development well ahead of many sister states.[6]

In 1958, another statute was passed, allowing for the appointment of a Public Defender for "any county having a population of more than 57,000 but less than 65,000 persons which adjoins a city having a population of more than 200,000 persons. . . ."[7]

1. Code of Virginia of 1849 p. 704 c. 185, Sec. 1
2. Id. at p. 706 c. 185, Sec. 12
3. *Barnes* v. *Commonwealth*, 92 Va. 794 of p. 803 (1895)
4. Association of the Bar of the City of New York & National Legal Aid and Defender Ass'n., Equal Justice for the Accused 44 (1959)
5. Code of Virginia of 1920, as amended, Title 19, c. 1, Sec. 19.1-12
6. Code of Virginia of 1942, as amended by Acts of 1940, Sec. 19
7. Code of Virginia of 1950, as amended by Acts of 1958, Sec. 19.1-13

The United States Supreme Court held in 1963 that an indigent defendant in a serious criminal prosecution in a state Court has the right to have a court-appointed attorney to represent him.[8]

The following year saw two further developments in this area in Virginia: legislation providing that an indigent charged with a felony be given court-appointed counsel was again expanded, this time, to encompass preliminary hearings in Courts Not of Record;[9] and a study and report by the Virginia Advisory Legislative Council, at the request of Governor Albertis S. Harrison, on the need of a Public Defender system, a statute specifying the time at which counsel should be appointed to defend indigents charged with felonies, the method of making such appointments, the length of time which should elapse between the appointment of counsel and the time of trial, and other related matters.[10]

The Council recommended in 1965 that the existing system of appointing attorneys to represent indigent persons charged with felonies in Virginia be continued, but augmented and improved by creation of a Circuit Director of court-appointed attorneys by the Virginia State Bar for each Circuit, elected in the same manner that members of the Council of the Virginia State Bar are elected. The essential duties of these Circuit Directors were to coordinate the assigned counsel systems, provide lists of willing and eligible attorneys to the judges for court appointments and report to the Virginia State Bar on activities and suggested improvements in the systems.

The Council also recommended retaining the existing definition of an indigent,[11] and that an attorney be appointed to represent an indigent person charged with a felony at the time of his first appearance before a court.

The Circuit Directors would receive a per diem and would take no part in the trial of a Public Defender case.[12] However, this, like other prior enabling legislation, has yet to be utilized in Virginia.

In the meantime, national, state and local bar organizations and court officials have continued to seek means of providing

8. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)
9. Code of Virginia of 1950, as amended by Acts of 1964, Sec. 19.1-241.3 (1964 Acts of Assembly 986, 984)
10. Public Defenders and Related Matters: Report of the Virginia Advisory Legislative Council to the Governor and the General Assembly of Virginia, December 13, 1965
11. Code of Virginia of 1950, as amended, Sec. 19.1-241.3
12. Code of Virginia of 1950, as amended, Art. 2.1, Sec. 54-52.3

adequate legal assistance to indigent persons and improved methods of so doing. Many states have tried different systems of providing counsel for indigents in criminal cases and some constructive changes have resulted.

Escalating crime statistics have brought demands to get tough with criminals and at the same time increasing concern for protection of constitutional rights both of suspects whose guilt is not proven and of convicted offenders who still have some rights. These conflicting attitudes and trends have been manifesting themselves in judicial decisions and in all areas of criminal justice administration from apprehension and arrest through to corrections and penology.

The population explosion, along with spiraling crime, has generated a litigation explosion which would already have inundated the courts, if electronic data processing and related equipment and techniques of modern management had not been forthcoming to help keep pace.

Today, the well-to-do client is likely to be able to put on a defense probably equal to the prosecution if not often much better. This can be seen particularly in white-collar crime, antitrust violations, tax prosecutions and the like.

Studies, including the one embodied in this report, on the other hand have shown that many court-appointed lawyers are overworked, underpaid, inadequately trained, without adequate, if any, investigational resources and thus often unable to provide a full and aggressive defense.

In fewer than a dozen years, a rash of United States Supreme Court cases have strengthened the defendant's position in state and federal criminal proceedings through interpretation of the Fourth, Fifth, Sixth and 14th Amendments to the United States Constitution. These cases have made a well-versed criminal defense lawyer practically indispensable at almost every step of a criminal proceeding.

The whole adversary process depends for its validity on the accused's ability to challenge the state, thus putting it to its burden of proof beyond a reasonable doubt, which in turn requires that the prosecution scrutinize its procedures and its evidence to determine if it has a proper case that can be established according to the law.

Most of the major Court decisions reflected a clear recognition by the Court that the motto over its entrance, "Equal Justice Under Law," was not true in the land, and that the criminal justice

system dealt primarily with poor people, spawned from minority groups, for whom the adversary system in its traditional form did not work at all.[13]

In a succession of cases, the U.S. Supreme Court, while frequently sharply divided, held: (1) that an accused in police custody could not be legally interrogated under the Fifth Amendment without an appropriate warning of his right to remain silent and of his right to the assistance of counsel, and without being provided with counsel if he elected representation and could not afford a lawyer;[14] (2) that a poor accused had a right to have counsel appointed to be present at his line-up,[15] at his preliminary hearing where critical issues were involved,[16] and in juvenile court proceedings.[17]

The latest standards approved by the House of Delegates of the American Bar Association (ABA), in many respects, are the most far-reaching yet, and should have a greater impact on the programs providing defense services for the poor in criminal cases throughout the country than any others before them.[18]

Basically, all of these sets of standards point in the same direction today: toward the professionalization of legal services for poor defendants at a level equal to the competent and skilled legal services received by a defendant who is financially able to employ his own lawyer. The basic standards governing provision of effective services must apply regardless of the system used to provide them.

The first essential standard for effective assistance of counsel is reasonable compensation for the lawyer representing the defendants. The ABA standard relating to salaried lawyers in a Defender agency states: "The Defender and staff should be compensated at a rate commensurate with their experience and skill, sufficient to attract career personnel, and comparable to that provided for their counterparts in prosecutorial offices."[19]

The importance of this standard of reasonable compensation cannot be overstated. The practice of many years, which still exists in a number of states, of assigning uncompensated counsel to re-

13. *Miranda* v. *Arizona* 384 U. S. 436, 472 (1966)
14. Id.
15. *United States* v. *Wade* 388 U. S. 218 (1967)
16. *White* v. *Maryland* 373 U. S. 59 (1963)
17. *In re Gault* 387 U. S. 1 (1967)
18. ABA Project on Minimum Standards for Criminal Justice, Providing Defense Services, 30, 34, 53-54, 67, 68 (Tent. Draft 1967)
19. Id. at 34

present poor defendants has produced a dismal record of inadequate representation, despite examples of individual lawyers who have conscientiously spent many hours and their own money on an appointed case.[20]

This, too, was a conclusion of the President's Commission on Law Enforcement and the Administration of Justice, which said:

"The criminal process is seriously disabled by procedures which rely upon uncompensated or inadequately paid assigned counsel or upon undersalaried defenders for representation of the poor. . . .

"All systems for representation of defendants should provide adequate compensation for counsel. Defender offices should be sufficiently financed so that enough lawyers may be hired to give thorough preparation to all cases. The salary paid to the defender should be commensurate with that paid to a lawyer of comparable experience in the prosecutor's office.

"Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient because it is part of a lawyer's obligation as a member of the Bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused. If the status of the defense Bar is to be upgraded and if able lawyers are to be attracted into criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount."[21]

Virginia has achieved some updating of its compensation schedules for court-appointed counsel, but it still faces a challenge if the cited "reasonability" standard is to be met.

Interviews as part of this study indicate continuing concern in this area by many who feel the court-appointed practice often becomes a classroom for newly-graduated young lawyers or a mass-practice-little preparation sustainer for the general practitioner who relies on this built-in criminal practice to supplement his modest civil clientele.

20. Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 48 (1963)
21. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 60-61 (1967)

Even Virginia prosecutors face this dilemma of compensation sufficient to attract and retain career personnel in competition with private practice, relying on the "prime time" hours of part-time personnel. Their plight is one of the current concerns to which the Virginia Courts Study System is addressing itself.

With the growing criminal dockets, complexity of rapidly changing criminal law with its commensurate requirements of defense proficiency and more reasonable compensation to attract that proficiency, the citizens of Virginia face the grim prospect of even more staggering cost burdens in future years unless some means is devised to effect economizing changes and at the same time a more effective and efficient system.

As Virginia Attorney General Andrew P. Miller noted in a speech given in January, 1971, in Norfolk: "The representation given to some individuals (under the present assigned counsel system) is not as adequate as it should be . . ."

He added:

"In 10 years, there has been a sevenfold increase in cases before the Virginia Supreme Court. In many of these cases, there have been an inordinate number of court-appointed attorneys requesting extensions of time to file briefs.

"Time after time, you see instances of allegations of inadequacy of counsel . . . At the October term of the Virginia Supreme Court, three cases out of seven criminal appeals were affirmed simply because constitutional issues raised at the appellate level were not properly brought forth at the trial court level . . ."

Mr. Miller spoke strongly of a need, in this age of specialization, for lawyers specializing in criminal law and in representing the indigent.[22]

The cost to Virginia taxpayers in providing court-appointed counsel for indigents in 1965 came to $491,101, including $34,180 in Richmond alone.

In fiscal 1971, the statewide total came to $1,655,788.64, including $243,267.95 in the City of Richmond, increases of 34.7 per cent and 7.15 per cent, respectively, over a six-year period.[23]

In March, 1971, the U. S. District Court for the Eastern District of Virginia ruled that counsel must be provided in a misdemeanor case carrying an authorized penalty of more than six months imprisonment of a $500 fine.[24]

22. Speech by Virginia Attorney General Andrew P. Miller to the Woman's Auxiliary of the Norfolk-Portsmouth Bar Association in Norfolk, Virginia, Jan. 21, 1971
23. Figures provided by State Comptroller's Office, Commonwealth of Virginia

Currently, the U. S. Supreme Court has pending before it a Florida case that raises the definite prospect of such a requirement being imposed upon the states and necessitating not only tremendous additional costs, but a rewriting of Virginia's criminal code to delineate "serious" and non-serious misdemeanors.[25] Provision of counsel to indigents in misdemeanor cases carrying authorized penalties of more than six months' imprisonment or a $500 fine has been a federal Court practice for some time.

Nearly 350 counties in the United States, a host of metropolitan areas and at least 13 states are currently being served by Public Defenders. Among the states are Florida, Delaware, Alaska, Wisconsin, Minnesota, Oregon, Puerto Rico, Colorado, Hawaii and Massachusetts. Systems in three other states, two of them statewide, are covered elsewhere in this report.

Vermont, New Hampshire and Maine are currently among those states currently studying the feasibility of organizing a Public Defender system.

But the pure assigned counsel and Public Defender systems haven't been the only ones on the scene. Many hybrid programs have developed in recent years. Minnesota, for example, uses a dual system composed of a full-time State Public Defender who handles all indigent appeals. The Minnesota Public Defender also provides help and instruction for the district Defenders who represent indigents at the trial level and at the same time engage in private practice.

San Diego, California, uses a mixed public and private system consisting of a staff of full-time lawyers who defend 25 to 35 per cent of the indigent cases, and give assistance to private counsel who defend the remaining indigent cases.

In one survey a few years ago, seventy-one out of seventy-nine Judges questioned in California, Illinois, Indiana, Massachusetts and Florida said they believed that Public Defenders maintained their independence, even though employed by a governmental body.[26]

It may be that still further legislative action will be needed to create an ideal system for the defense of indigents facing criminal

24. *Marston* v. *Oliver* 324 Fed. Sup. 691 (1971)
25. *James* v. *Headley* 410 Fed. 2d 325 (5th U. S. Circuit Court of Appeals 1969)
26. 1 L. Silverstein, Defense of the Poor in Criminal Cases in the American Courts 50-51 (1965)

charges in Virginia, but the General Assembly could balance the issues presented and design a system which simultaneously avoids the deficiencies and includes the advantages of both systems, given the experience of an alternative to present methods prevailing in the Commonwealth.

After careful study and consideration, the Study Committee made its report to the Board of Governors. The Board has reviewed the Report of the Committee and makes the following recommendations:

III
RECOMMENDATIONS

1. That legislation be enacted to provide for the establishment of a Virginia Commission on the Defense of Indigents, said commission to consist of two (2) active Judges of Courts of Record, two (2) attorneys at law who are active members of the Virginia State Bar, and one (1) public member. Members of the Commission shall be selected by a vote of the majority of members of each House of the Virginia General Assembly for staggered terms not to exceed four (4) years.
2. The Commission shall establish Public Defender pilot programs in three areas of the Commonwealth, to wit: (a) In a judicial circuit or circuits embracing a city or county with a population in excess of 200,000 persons; (b) in a judicial circuit or circuits embracing a city or urbanized county with a population of not less than 100,000 persons nor more than 200,000 persons, and (c) in a judicial circuit or circuits that constitute the area served by a regional juvenile court or other area tending toward a non-metropolitan constituency.
3. A Public Defender for each pilot program shall be selected by the Commission, after consultation with appropriate members of the Judiciary, Commonwealth's Attorneys and other members of the Bar in the areas to be served by said programs. Each Public Defender shall be appointed to a term not to exceed three years, provided, however, that he shall be reconfirmed annually by a majority vote of the Standing Commission.
4. The Commission shall determine both qualifications and salaries for each of the three Public Defenders, said salaries not to be less than that which would be required for a fulltime Commonwealth's Attorney in the respective areas served.

5. The positions of Public Defender shall be fulltime; Assistant Public Defenders, however, may be employed on a "prime time" basis, with approximately twenty-five (25) hours per week required in such positions. Salaries for the assistants should be determined by the Public Defenders, subject to approval by the Commission, which shall have final authority in establishing annual budgets of the three pilot programs.
6. The Public Defender or his assistants shall provide daily appearances in all Courts of Record wherein felony trials are held, as well as daily appearances in Courts not of Record which conduct preliminary hearings in felony cases, and in Juvenile Courts.
7. Additionally, it might be beneficial to provide representation for indigents through the Public Defender's Office in mental commitment proceedings, extradition, and habeas corpus proceedings wherein a hearing is directed by a Court of Record pursuant to Section 8-596 of the Code of Virginia of 1950, as amended.
8. Investigators should be provided for each Public Defender office, with the Public Defender selecting same. The number of investigators shall be determined by the Public Defender, subject to approval by the Commission, with the anticipated ratio being one investigator for every three Assistant Public Defenders.
9. Investigators shall be empowered to make preliminary inquiries and determinations of indigency, subject to review and approval of the Court wherein the charges are pending.
10. The Court wherein a criminal case is pending, whether pending for a preliminary hearing or trial, should be able to assign counsel in cases where conflicts of interest may appear or in instances wherein it is determined to be inappropriate or inadvisable for the Public Defender's Office to afford representation.
12. The Public Defender offices should provide assistance no later than the first Court appearance for the indigent defendant charged with a felony or appropriate juvenile offense and should appear at all "critical" stages thereafter.
13. The Public Defender offices should provide assistance to indigents who desire to petition for an appeal to the Supreme Court of Appeals.

14. The Public Defender should be required to submit reports, as requested, to the Commission on caseloads, type of cases, handled, court appearances, appeals, office expenditures and other pertinent information which may be requested by the Commission; copies of the reports shall also be furnished to the Virginia Supreme Court.

IV
REASONS FOR RECOMMENDATIONS

1. The Board of Governors of the Criminal Law Section of the Virginia State Bar is convinced that specialized Defender offices should be established to determine whether improved and more efficient Criminal Justice will result. The legal specialist is more needed now than at any prior time in our history, and yet the average practitioner who is appointed to defend indigents spends only approximately 25% of his time in criminal practice.

2. Other states, such as North Carolina, New Jersey, and Rhode Island have successfully operated Public Defender Systems with increased efficiency and without a breakdown in the adversary system.

3. Attorneys at law who specialize in criminal practice are less likely to overlook proper objections, such as those overlooked in over 40% of the criminal appeals which were affirmed at the October, 1970, term of the Virginia Supreme Court of Appeals.*

4. It is felt that improvements in the determination of indigency will result if investigators are allowed to make preliminary determinations.

5. Very few habeas corpus hearings have resulted from representation by Public Defenders.

6. Experiences in other states indicate that the private practice of criminal law is not endangered and that the public defender attorneys and the private practitioner can successfully complement each other.

7. Costs of assigned counsel in Virginia have spiralled upward in the past six years-nearly 400%, from $491,101 to $1,655,788.

** Three of seven criminal appeals were affirmed without consideration of constitutional issues because proper objections were not made at the trial Court level.*

V
CONCLUSION

We are hopeful that the adoption of the foregoing recommendations will lead to the improvement of the method of providing attorneys for indigent persons charged with felonies or certain juvenile offenses, facilitate speedy and less costly trials of indigent persons charged with such offenses and generally expedite the overall administration of justice, while providing a valuable comparison of assigned counsel and Public Defender systems from the standpoints of cost, efficiency and effectiveness.

A resolution and bill to effectuate the recommendations made herein are included in section X.

We acknowledge our indebtedness to the able and distinguished individuals who formed the Committee and to members of the Judiciary, the Bar and others who gave it the benefit of their advice and experience.

Respectfully Submitted,
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VI
THE VIRGINIA STUDY

In June 1971, Messrs. Stephen D. Bloom, Edward R. Carpenter, John Franklin and William W. Muse, students at the T. C. Williams School of Law of the University of Richmond, were employed to conduct a survey of the Defense of Indigents in the Commonwealth of Virginia.

Questionnaires were prepared and approved by the Board of Governors of the Criminal Law Section, Virginia State Bar, one for Judges, one for Commonwealth's Attorneys and one for defense lawyers, R. E. Booker, former Executive Director of the Virginia State Bar, and J. Rodney Johnson, Professor of Law at the T .C. Williams School of Law, served as coordinators of the project. N. Samuel Clifton, Executive Director of the Virginia State Bar, also was instrumental in helping to expedite the survey, with Virginia State Bar offices used as both headquarters and clearing house.

All Judges of Courts of Record having criminal jurisdiction and a selection of Judges of Courts Not of Record were assigned to the students to contact and interview with the questionnaires. The same was done in reference to all Commonwealth's Attorneys and a trial lawyer from each county and city selected from membership in the Criminal Law Section, if possible. The students began the survey June 15, completed their interviews by August 15 and engaged in a complete and exhaustive analysis of their findings that reached completion September 15. Messrs. Booker and Johnson subsequently analyzed the reports and prepared a resume of them.[27]

More than 75 per cent of the persons to be interviewed were seen, with others unavailable for various reasons: illness, on vacation, attending the American Bar Association meeting in New York and London, crowded court dockets or engaged in or preparing for extensive litigation.

A total of 75 Judges were interviewed, 46 from Courts of Record and 29 from Courts Not of Record. Ten Judges were not seen. In all, 100 Commonwealth's Attorneys were interviewed, including 27 who serve in urban areas and 73 who serve in rural sections of the State. Of the 91 defense lawyers around the state

27. Resume available at Virginia State Bar Headquarters, Imperial Bldg., Richmond, Va.

interviewed in the course of this study, 64 are rural practitioners and the other 27 practice in urban areas. The average defense lawyer respondent has been practicing for 13.6 years and devotes approximately 25.5 per cent of his time to the practice of criminal law. Eighty-two of the 91 defense lawyers were appointed to serve as counsel for an indigent person accused of crime in 1970 in a state court of record.

The study encompassed several matters felt to have a direct or indirect bearing on how the defense of indigents in Virginia is presently faring and how it might be improved upon. Among these were considerations of workability and competence, methods of attorney selection, compensation, determination of indigency, limited practice by third-year law students, classifying misdemeanors as serious or non-serious and appointing counsel in serious misdemeanors, the use of investigators and the time at which counsel should be appointed for an indigent person charged with a crime.

A check of the Virginia Courts whose Judges participated in the survey showed at least 50 per cent of those persons charged with felonies in 1970 receiving court-appointed counsel.

It is interesting to note that although a majority of Judges, Commonwealth's Attorneys and defense lawyers, rated their present assigned counsel systems as at least satisfactory or better, majority sentiment also was found in their ranks for changes that would indicate dissatisfaction with at least certain elements of their present systems and procedures.

The Judges had the largest majority rating their present system as satisfactory, good or excellent in quality and workability, while a few Judges considered the system too expensive and only one considered court appointed counsel incompetent. A total of 94 per cent of the Judges said they had no problem in getting lawyers to serve as counsel for indigents. They also rated 74 per cent of the lawyers in their jurisdictions as competent to handle felony cases.

And yet, of the 75 per cent of the Judges who felt the present means of determining indigency was adequate (generally having the accused execute the affidavit required by law and brief questioning under oath), some also were of the opinion that it could be improved by such actions as providing investigators for counsel and requiring a more detailed affidavit from the accused.

Additionally, of the Judges surveyed, a majority (57 per cent) favored establishing a Public Defender system in Virginia, while

65 per cent were in favor of reimbursing court-appointed counsel for out-of-pocket expenses.

The Public Defender

Among the reasons they gave for favoring a Public Defender system:

1) Many lawyers don't know and don't understand criminal law.
2) Less expensive.
3) Indigents exploit the present system.
4) Indigents would be better represented.
5) More expeditious handling of criminal cases.
6) Would eliminate most habeas corpus suits on incompetence.
7) Would provide investigators and a specialist for the indigent.

Among reasons given by the 33 per cent of the Judges who oppose a Public Defender system (another 10 per cent were undecided):

1) Too expensive.
2) Deprives the young lawyer of a chance to practice criminal law.
3) Would socialize the practice of law.
4) Lawyers should be experienced in all fields of law.
5) Might lead to the destruction of criminal law practice.
6) Too much opportunity for collusion between prosecution and defense.
7) System would attract only the very young lawyer or one who had not succeeded in private practice; salary would be too low to attract competent lawyers.
8) Poses problem of electing or appointing Public Defender.

The interviewers found that many of the Judges contacted were unfamiliar with how Public Defender systems operated in other states.

Thirty-six per cent of the Commonwealth's Attorneys in the survey favor a Public Defender system in Virginia, with another 42 per cent opposed and 22 per cent declining to express an opinion. However, the survey also disclosed that 82 per cent, a surprisingly high number, of the Commonwealth's Attorneys were unfamiliar with any of the Public Defender programs currently operating in other states.

One objection to the Public Defender systems frequently voiced by the Commonwealth's Attorneys is the feeling that a Defender office becomes a "Social Agency" and the adversary system is damaged. Forty-two per cent of the Commonwealth's Attorneys agreed with this sentiment; 31 per cent disagreed, and 27 per cent declined to express an opinion.

When the defense attorneys were asked whether or not they would favor some form of a Public Defender system, 45 per cent answered in the affirmative, including 61 per cent of the urban practitioners and 41.3 per cent of the rural practitioners. Another 34 per cent answered in the negative and 21 per cent declined to express an opinion.

Among the advantages cited by defense attorneys favoring a Public Defender:

1) Consistent and better representation by an experienced defender.

2) Investigative staff available to defense.

3) Less expensive than the present system.

4) Greater efficiency would help to alleviate overcrowded dockets.

Among the disadvantages cited by defense attorneys opposing a Public Defender system:

1) Socialization of the practice of law: government would control the judge, prosecutor and defense.

2) Could attract only mediocre or young attorneys.

3) Would deprive young attorneys of valuable trial experience.

4) More expensive to operate.

When asked whether they felt the establishment of a Public Defender system would weaken the adversary system by involving the State in both the prosecution and defense of indigents, 67.6 per cent of the defense attorneys said yes, 21.1 per cent answered no, and 11.3 per cent expressed no opinion. Of those who answered yes, however, none cited instances where the problem had occurred. Their answers were admittedly speculative and generally based on the feeling that such complete governmental control would be more conducive to collusion with the Commonwealth's Attorney's office, and that the Public Defender position would become more of a formality in dealing with each case rather than an adversary approach.

On the other hand, those who advocate the Public Defender maintain that it will strengthen rather than weaken the adversary system, Among their comments:

1) Defendant will obtain a more rigorous defense from a specialist, thereby creating a stronger advocate, keeping the Commonwealth's Attorney on his guard.

2) Will equalize criminal law adversary system—the State has the advantage now with a specialist and investigators.

3) The State already is involved in the present system.

4) Public Defender should only be funded by the State and operate as an independent office.

Compensation

The Judges, in responding on reimbursement for out-of-pocket expenses, tended to favor such reimbursement, though 74 per cent opposed it for private investigators, 55 per cent opposed it for the use of experts and 52 per cent opposed it for a transcript at the preliminary hearing.

Of the defense attorneys responding to the survey, 65.5 per cent favor paying the out-of-pocket expenses of lawyers incurred in investigation and preparing a case; 62.2 per cent also believe that lawyers should be paid more for their services, perhaps adopting the federal system of remuneration by paying the attorney for work he engages in, thereby creating an incentive to represent his client to the fullest.

All of the defense attorneys who were appointed as counsel for an indigent person charged with a crime in 1970 in a state court received compensation, averaging $233 per case. If the respondents had been retained by a client to render the services they rendered in these same cases, the average fee would have been $1,141 (Urban, $1,016—Rural, $1,223). By far, the overwhelming majority indicated they were not paid for any out-of-pocket expenses they had in those cases.

The Commonwealth's Attorneys also favored larger fees for appointed counsel although they didn't feel that this would improve the quality of defense in indigent cases, as such. However, 70 per cent did feel the quality of defense would be improved if investigative personnel were afforded to assist court-appointed counsel.

The present average salary of a Commonwealth's Attorney was found to be $10,635 (Urban, $13,500—Rural, $9,575). The incumbent Commonwealth's Attorneys responded that the minimum salary that would be necessary to justify their jobs being fulltime would be $21,265 (Urban, $25,500—Rural, $19,700), on the average.

Only eight rural Commonwealth's Attorneys and two urban Commonwealth's Attorneys had no fulltime secretarial help. Four of the urban prosecutors and two of their rural counterparts had one or more investigators. The remainder have no investigative personnel assigned to their offices but al have benefit of local and state police investigators.

Method of Selection

Fifty-five per cent of the Judges were decidedly in favor of appointing the attorney to represent an indigent defendant between his arrest and appearance before a Judge. In the last case in which the responding defense lawyers were appointed in 1970, 68.2 per cent were appointed either before or at first appearance (arraignment on the warrant).

The Judges' own rotating list of names is the system used in a majority of felony case appointments in Virginia, followed by a roster of all lawyers practicing in the Court's jurisdiction, less those who are exempt by age or infirmity. In very serious or complex cases, 82 per cent of the Judges have a special system or make special appointments. The average percentage of lawyers asking to be excused is 15 per cent.

Eighty-three per cent of the Commonwealth's Attorneys say they come in on felonies during the investigative stage. In 99 per cent of the cases, they said, the same attorney appointed in the Court Not of Record is also appointed in the Court of Record.

However, in responding to a question of what improvements they would recommend, the prosecutors suggested that more experienced attorneys not be exempted merely upon their request, and that more partial selections of attorneys be made, based on the complexity of the case. Defense attorneys also said all lawyers should be burdened equally, that the judges' lists should show years of criminal experience for each lawyer, and that attorneys should be appointed sooner.

Misdemeanors

A bare 6 per cent of the Judges felt a lawyer should be appointed for every indigent charged with a crime, felony or misdemeanor, but 43 per cent felt that misdemeanors should be classified as serious and non-serious.

Seventy-three per cent of the Commonwealth's Attorneys oppose appointing counsel in misdemeanor cases under any circumstances, citing expense, unnecessary trial delays, punishment not

warranting representation and added docket congestion. Sixteen per cent of the remaining prosecutor respondents favored appointments in "serious" misdemeanors.

Of the defense attorneys interviewed, 52.7 per cent, or 48, felt that counsel should be appointed for indigents charged with "serious" misdemeanors—aggravated cases carrying maximum sentences, petit larceny, moral turpitude crimes or offenses carrying a penalty exceeding six months in jail or a $500 fine.

(A Miami case which may determine whether the states are required in the future to appoint counsel in serious misdemeanor cases is currently pending in the U.S. Supreme Court.) [28]

Indigency

Determination of indigency was not clearly defined, nor was any general system used except execution of the required affidavit. Most Judges question the accused under oath on his ability to procure and pay counsel. Some receive assistance from police and welfare investigators. Practically all courts make some effort to collect the costs, fines and counsel fees imposed and awarded; the judgments are usually docketed, fi. fa. are issued in some jurisdictions, and a number of Courts make payment of costs a condition for parole, but no uniform method is followed.

Only 37 per cent of the Commonwealth's Attorneys feel the present means of determining indigency is sufficient, with the prevalent theme among the other 63 per cent a need for more investigation. Many said the filling out of a simple financial statement by the accused (similar to that used by banks prior to granting a loan) would disclose his non-indigency immediately in many cases and would deter him from wasting the court's time with the issue. If the accused still claimed indigency, the statement could be a basis for the Court's interrogation. Statewide guidelines also are suggested to insure uniformity in this area. Defense attorneys feel appointed counsel could determine indigency, with the burden of proof shifted to the accused.

Third-Year Law Student Practice

A majority of Judges and Commonwealth's Attorneys (57 per cent of each group) did not favor the appointment of third-year law students to act as counsel for indigents charged with misdemeanors. Such a procedure was favored by 40 per cent of the Commonwealth's Attorneys, with another 3 per cent undecided, and 32 per cent of the Judges, with an additional 11 per cent undecided.

28. *Argersinger* v. *Hamlin* 236 S. 2nd 442 (1970)

VII
PUBLIC DEFENDERS VS. ASSIGNED COUNSEL IN NORTH CAROLINA

INTERVIEWED

State Representative *W. Marcus Short* (General Assembly)
Greensboro
The Honorable *Thomas W. Seay Jr.*
Judge
Superior Court of Guilford County
18th Judicial District
The Honorable *John D. McConnell*
Judge
Superior Court of Guilford County
18th Judicial District
The Honorable *E. D. Kuykendall Jr.*
Chief District Judge
District Court, City of Greensboro
18th Judicial District
W. Douglas Albright
Solicitor (state prosecutor)
18th Judicial District
Joseph P. Shore
Clerk of the Superior Court of Guilford County
Greensboro
18th Judicial District
Wallace C. Harrelson
Public Defender
18th Judicial District
Solomon G. Cherry
Public Defender
12th Judicial District

The North Carolina General Assembly in 1969 enacted legislation for the avowed purpose of providing legal representation for indigent criminal defendants, strengthening the assigned counsel system and establishing a public defender system in two judicial districts.[29]

29. N. C. Gen. Stat. Sec. 7A-450 (1969)

Its intent was to study the function of both systems in ascertaining how best to answer the problem of providing counsel for criminal defendants determined under state law to be indigent. The legislation also provides an opportunity to compare the Assigned Counsel and Public Defender systems in order to resolve the debate between advocates of the two.

The two districts in which Public Defender offices were created were the Twelfth District, made up of Cumberland and Hoke Counties with Fayetteville as its major population center, and the Eighteenth Judicial District, which is Guilford County and includes the cities of Greensboro and High Point, N. C.[30]

Under the North Carolina legislation, the Governor appoints each of the two Public Defenders, one for the Twelfth District and one for the Eighteenth District, for a term of four years, with each district bar association recommending two persons to the Governor for these appointments.

Solicitors, comparable to commonwealth's attorneys in Virginia, likewise are elected to four-year terms.

In North Carolina, the trial judge sets counsel fees in an amount equal to "a fee based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, the time, effort and responsibility involved, and the fee usually charged in similar cases."[31]

A judgment for counsel fees is rendered against the indigent and in favor of the state, which the state can execute at its option, in both the appointed and Public Defender systems. Assigned counsel are immediately paid the adjudged fee by the state, while the Public Defender's office, which operates on a fixed budget, is not reimbursed for individual cases.

The court system in North Carolina begins at its first level with the District Court, comparable to Virginia's Police Court, Traffic Court or County court. The court of original felony jurisdiction is the Superior Court, comparable to Virginia's Hustings Court, or Circuit Court. At the next highest levels are a Court of Appeals, to which there is an appeal as a matter of right, and the North Carolina Supreme Court.

Wallace C. Harrelson, Public Defender for the Eighteenth Judicial District, has a staff of three assistants, one full-time secretary and a parttime secretary.

His office handles any indigent defendant facing a charge that

30. Id. 7A-465
31. Id. 7A-458

carries a penalty exceeding six months imprisonment or a fine in excess of $500, a felony charge or any case where delinquency is alleged in a juvenile proceeding.

The Public Defender office also handles all appeals to the North Carolina Supreme Court and United States Supreme Court, but does not get involved in U.S. District Court. Harrelson or his assistants also have been appointed in habeas corpus proceedings, also referred to as post-conviction proceedings.

The cost of operating the Guilford Public Defender's office in its first year was roughly $60,000. That figure included salaries for Harrelson ($16,500), two assistants ($12,000 each), an investigator ($8,000), a secretary ($6,000) and money for a law library and travel allowances.

A third assistant was added to the staff in September of 1970 and Harrelson's salary was increased this year to $20,000, which is expected to bring operating costs up to $75,000.

Bert Montague, Director of the Administrative Office of the Courts in Raleigh, estimates the cost of operating the Public Defender's office in Guilford to be about 40 per cent less than the court-appointed system.

In similar six-month periods, the Public Defender system in the Eighteenth Judicial District cost the taxpayers $30,000 in 1970, compared with the $50,000 paid out in fees to court-appointed lawyers in 1969. And in the Second District, Harrelson points out that twice as many poor defendants received legal representation in 1970 compared with the year before.

In fiscal 1969, a total of 502 defendants were represented in the Eighteenth Judicial District at a cost of $87,430. In the first six months of 1970, under the Public Defender, more than 502 defendants were represented for a cost of $32,843.

It is interesting to note that only one writ of habeas corpus has been filed against the Public Defender since January of 1971, and a like number in 1970, while there were appreciably more under the assigned counsel system in 1969.

Mr. Harrelson also noted that the average stay in jail awaiting trial has been reduced from six to eight months under the court-appointed system to a current average stay of eight to nine weeks.

Superior Court Judge John D. McConnell of Southern Pines, in praising the program, points out that poor defendants are now receiving the services of fulltime specialists in the field of criminal law.

Both Judge McConnell and Superior Court Judge Thomas W. Seay Jr. feel the Public Defender system is working well in Greensboro, primarily because the Greensboro Bar had favored it and because of the dedication and caliber of the Public Defender and his staff.

Neither Judge could offer an explanation as to why Greensboro favored the system, while other parts of the state were opposed to it.

Solicitor W. Douglas Albright also stated that the Public Defender system was working "very well," citing as one of the reasons a more rapid dispatch of justice.

Mr. Albright said that under the old system he had to "hunt around for lawyers" and encountered frequent difficulty in getting trial dates set.

He also felt the public defenders didn't give any cases away, as some opponents had predicted, but were in fact much more involved in technical defenses and putting forth an effective effort for the client than even privately retained attorneys.

Chief District Judge E. D. Kuykendall Jr., in taking a position shared by Guilford Superior Court Clerk Joseph P. Shore, assessed the Public Defender system as doing a "terrific" job, with no significant problems or adverse criticism.

One of the problems under the prior, assigned counsel, system, Mr. Shore said, was that the judges, who rotate from one area to another, did not know the lawyers when they came into an area and thus had to rely heavily on a bar association list, often with inexperienced and inadequate representation as a result.

State Rep. W. Marcus Short of Greensboro, one of the principal architects of the 1969 state legislation, felt that such philosophical arguments as better representation weren't as significant as what he termed the primary reasons for a public defender system: expediting the administration of justice and reducing the costs of providing effective representation for indigents.

Rep. Short said he was unaware of either better or worse representation with the two systems, but thought "probably" the court-appointed attorneys were doing as good a job as the retained attorneys, He again emphasized that his arguments for a Public Defender system had been those of quicker justice at less cost.

A cost comparison, made for the period January 1, 1970 to December 31, 1970, showed that the two Public Defender districts in North Carolina operated at substantially less cost per defendant

than did the two assigned-counsel districts tested: the 14th Judicial District of Durham County, including the city of Durham, and the 26th Judicial District of Mecklenburg County, which includes the major city of Charlotte.[32]

Using the same four districts, a substantially more effective defense of indigents also was indicated in the Public Defender districts, which showed a higher proportion of dismissals, of convictions given probation or suspended sentences, and of trials terminated during the 12-month period.[33]

The study committee found it interesting to note that almost everyone, to a man, including the prisoners interviewed, regarded the Public Defender as doing a better job than even privately retained attorneys.

One of the prisoners interviewed was formerly stationed at Ft. Bragg, N.C., and a resident of Greensboro for the past 18 months since his release from military service. He had been in jail 11 months on multiple drug charges, but the reason for his extended stay lay largely in the fact that his case was on appeal and the practice in such circumstances was to retain an appellant in jail until his appeal was heard, unlike Virginia procedure.

The inmate said he had had four interviews of 30 to 60 minutes each with Mr. Harrelson, that the Public Defender did "as good a job as he could" with his caseload and that he did "a fine job" from a legal standpoint, not to mention taking more of a personal interest in the client than anyone else.

Another prisoner interview dealt with Roy a 26-year-old resident of Greenville, N.C., married and the father of one child. He had served time previously for multiple offenses, and at the time of the interview was charged with murder and armed robbery in Guilford County.

His trial lasted four days and he was sentenced to life imprisonment. He said he was interviewed at least eight to 10 times, and probably more, by Mr. Harrelson, and that the interviews lasted anywhere from 15 to 45 minutes apiece. The second prisoner said the Public Defender fully understood his case, "took a real interest,"

32. This information was taken from quarterly reports which were submitted to the Administrative Office of the Courts: 14th Jud. Dist.—Assigned Counsel, $185.60 (pop. 131,362); 26th Jud. Dist.—Assigned Counsel $176.60 (pop. 352,006); 12th Jud. Dist.—Public Defender $103.10 (pop. 222,692); 18th Jud. Dist.—Public Defender, $94.40.
33. N. C. Law Review p. 714 v. 49 (1971)

and that nobody, even the best retained attorney, could have done a better job.

According to U.S. Sen. Sam J. Ervin of North Carolina:

"There has been sufficient experience with public defenders in State courts to establish that this is a very satisfactory method of providing counsel. . . . I know of no basis for believing that such public defenders would be influenced to disregard the interests of their clients by the fact that they receive compensation from the Government, or were in constant contact with the prosecuting officials. They are no different from judges in that regard, and judges are entirely able to maintain their independence."[34]

VIII
OFFICE OF THE PUBLIC DEFENDER, STATE OF NEW JERSEY

INTERVIEWED

The Honorable *Frank J. Kingfield*
Assignment Judge
Superior Court of New Jersey
Law Division
Burlington County
Trenton, N. J.
Evan Jahos
Director
Division of Criminal Justice
Office of the Attorney General
for the State of New Jersey
Trenton, N. J.
Stanley C. VanNess
Public Defender (state)
Office of the Public Defender
Trenton, N. J.
Dominick J. Ferrelli
Prosecutor for
Burlington County
Trenton, N. J.

The Office of the Public Defender, administered by the New Jersey State Public Defender, was established in 1967.[35]

34. Hearings on S. 63 & S. 1057 before the Senate Committee on the Judiciary, 88th Congress, 1st. Sess., 73-74 (1963)
35. Chap. 43 of the Laws of N. J. of 1967, approved May 2, 1967 and effective July 1, 1967

It provides legal representation for any indigent defendant who is formally charged with the commission of an indictable offense. That representation includes court appearances, pre-trial investigation and preparation; extradition hearings, violation of probation hearings, sanity hearings, and post conviction relief hearings.

Services are rendered principally in the County Courts of New Jersey (courts of record) and, where entitled under law, in various Municipal Courts throughout the state. Additionally, convicted indigent defendants and juvenile offenders are represented on appeal to the Appellate Courts of New Jersey and in some instances to the United States Supreme Court.

The Office of the Public Defender is currently administered by Mr. Stanley Van Ness, New Jersey State Public Defender, who is appointed by the Governor with the advice and consent of the Senate for a term of five years. Structurally, the office is composed of a headquarters and 12 regional offices, an Appellate Section, and Section for the defense of Juvenile Offenders.

The propose of this office was expressed in the Statement of Legislative Policy as follows:

". . . to provide for the realization of the constitutional guarantees of counsel in criminal cases for indigent defendants by means of the system and program established and authorized by this act to the end that no innocent person shall be convicted, and that the guilty, when convicted, shall be convicted only after a fair trial according to the due process of the law." [36]

Mr. Van Ness said another unstated, yet significant, reason for the establishment of the Office of Public Defender was to spare county government and local property taxpayers the expense of paying for the representation of indigent defendants as would have been required by the mandate of the New Jersey Supreme Court under *State* v. *Rush.* [37]

His office uses "pool" attorneys in the numerous municipal courts throughout the state because of the savings that result in pool cost vs. staff cost. Also, Mr. Van Ness reports, attorney representation at this level has resulted in the reduction of criminal indictments to misdemeanors, therefore avoiding further representation in County Courts. Pool attorneys also are utilized in this category since these courts are manned during the night in many cases, as well as during the day.

36. Id.

37. *State* v. *Rush* 46 N. J. 399, 412, 217, A. 2d 441, 448 (1966)

The lowest court in the New Jersey court system is the Municipal Court, followed by the County Court, comparable to Virginia's courts of record, an Intermediate Appellate court known as Superior Court, and the New Jersey Supreme Court.

Prior to the establishment of a Public Defender Office in New Jersey, court-appointed counsel served without compensation, except in capital cases, making it difficult to arrive at a cost comparison for the two systems.

New Jersey law requires that the Public Defender maintain a pool or pools of competent trial attorneys who participate as counsel on a case basis to the ends that special expertise is available when needed, conflict of interest is avoided, and interest on the part of the private bar in the administration of criminal law is continued. Some 600 different attorneys have handled one or more cases under this pool arrangement since the inception of the Public Defender program. During the 1970 fiscal year, 2,384 cases were assigned to pool counsel, or 11 per cent of the total caseload. Pool attorneys disposed of 2,342 cases at an average cost of $232.85 per case, compared to an average cost of $375 that would've been incurred by local taxpayers under an assigned counsel system that could be resorted to under *State* v. *Rush.* [38]

According to Mr. Van Ness, the cost per case handled by Public Defender staff attorneys decreased from $209 in fiscal 1969 to $165 in fiscal 1970, including all salaries and operating costs plus fees for expert witnesses where needed.

"As is obvious," he added, "the most economical method of disposing of cases assigned to this office is through the use of staff attorneys who quickly develop expertise in a criminal law specialty beyond that which can be expected from the average member of the private bar. Moreover, it is believed that the direct supervision which is possible of a staff attorney leads to more efficient and effective performance on his part."

The cost in 1970 of operating the Public Defender Office was approximately $5.7 million for a state with a population of about eight million persons.

Van Ness said his current salary is $36,000 annually, and that his office contains 154 attorneys, with 26 of those doing appellate work. The Deputy Public Defender, normally in charge of a region, earns between $22,000 and $30,000 annually, while his first assistant normally would have an Attorney Grade 1 pay scale of $18,000 to

38. Id.

$22,000 annually. An Attorney Grade 2, someone with one year's experience in a Public Defender system or two years' private criminal experience, would come within the $16,300 to $20,000 pay range, while an Attorney Grade 3, just starting out, earns between $12,700 and $15,800 yearly.

According to Mr. Van Ness, there are 12 Public Defender regions in New Jersey, each with at least one Public Defender and an assignment judge.

The New Jersey Public Defender said his office ultimately rules on the question of indigency, and that he and his staff currently handle 75 per cent of all the criminal business in the state.

Mr. VanNess states that the individual is given the final decision as to whether his case is appealed, but that the Public Defender's office can advise one way or the other and will handle the appeal even if it is pursued contrary to staff advice.

In fiscal 1971, 844 appeals were docketed from a total of 23,182 cases handled by the Public Defender. Writs of habeas corpus usually are referred to as post conviction relief applications, and are handled by the Public Defender except in areas of conflict.

Mr. Van Ness has the power to appoint a temporary private Public Defender in areas where the caseload is not large or where an area of conflict exists, the basic reason for outside counsel.

New Jersey is reputed to have some of the most liberal discovery procedures in the nation, and Mr. Van Ness reports that the Public Defender uses discovery much more than does retained counsel. For every four lawyers, the Public Defender's Office has three investigators, supplied by the State Civil Service. Mr. Van Ness is basically an administrator, occasionally handling some appellate work, but very little trial work. He does stress an all-out effort to avoid any tendency for the Public Defender and the prosecutor to become too comfortable with each other.

Superior Court Judge Frank J. Kingfield held strong convictions that the Public Defender system was better than either the retained counsel or old assigned-counsel system, and predicted that one day the Public Defender in New Jersey also would be handling serious misdemeanor cases, such as drunken driving, assault and disorderly person offenses.

If anything, Judge Kingfield said, the Public Defender was doing an excellent job. His main objection was the fact that the Public Defender would result in another "bureaucracy," and he was, basically, against bureaucracies.

Judge Kingfield also noted that there was no way for a young lawyer to get experience now except in an Office of Economic Opportunity (OEO) or in the Public Defender or Attorney General's offices.

He felt the indigents were receiving better representation than they had previously, in fact, should; that the administration of criminal justice has improved significantly, with the jails cleared more rapidly, and that there was "absolutely no collusion" between the Public Defender and the prosecution.

Evan Jahos, Director of the Criminal Justice Division in the State Attorney General's Office, also felt that the Public Defender system was far better than assigned counsel had ever been, that the Public Defender attorneys were of "excellent caliber," more experienced and more effective than the former assigned counsel. Mr. Jahos, like Judge Kingfield and Mr. Van Ness, cited a total absence of "collusion" between the offices of prosecutor and Public Defender.

The only criticism Mr. Jahos and Dominick J. Ferrelli, Prosecutor for Burlington County, had of the Public Defender system was that there were too many appeals.

Mr. Ferrelli has six assistants and 11 investigators in his office, with an annual budget of $305,000, including $245,000 for salaries alone. His annual pay as chief prosecutor is $17,500; his assistants, who are part-time personnel, each receive $10,000, and his investigators receive $9,000.

According to Mr. Ferrelli, the Burlington County Public Defender's office has two attorneys, three investigators and two clerical workers. Burlington has a population of about 340,000 persons.

Mr. Ferrelli had no criticism whatsoever of the Public Defender system, and in fact was quite favorably impressed with it.

IX

THE RHODE ISLAND PUBLIC DEFENDER EXPERIENCE

INTERVIEWED

The Honorable *James C. Bulman*
Justice
Superior Court
Providence County
Providence, R. I.

Richard Israel
Attorney General
for the State of Rhode Island
Providence, R. I.
William Riley
Public Defender
for the State of Rhode Island
Providence, R. I.
Charles J. Rogers
Defense Attorney
Providence, R. I.
Edward P. Smith
Executive Director
Rhode Island Bar Association
Providence, R. I.

Legislation creating the office of Public Defender in Rhode Island was enacted in 1941.[39]

This Act provides for the representation of indigent defendants by the Public Defender and his assistants in such cases as are referred by the Supreme and Superior Courts, and such further cases as are referred by the Family Court.[40]

At present, the Public Defender operates only in Superior Court—the trial court of record, and Family Court, as well as handling appeals to the Supreme Court. Though the Public Defender is appointed by the Governor for a three-year term, with the advice and consent of the Senate, there has been a notable record of stability and relatively little turnover in the office.

It is significant to note that the Public Defender's office does not represent persons in the District Courts, which are comparable to Virginia's County, Municipal and Police Courts. In the District Courts, there is an assigned counsel system, with the Public Defender not coming into the picture until a person is indicted. Assigned counsel are paid approximately $10 an hour for out-of-court time and $15 an hour for in-court time.

It is also significant to note that the District Courts have no authority to bail persons charged with robbery, murder, rape or arson. Accordingly, the remedy of habeas corpus is frequently used to get a case from the District Court to the Superior Court in order

39. Chap. 1007 of the Public Laws of 1941, now Title 12, Chap. 15 of the General Laws of R. I., 1956, as amended by Chap. 3, Sec. 3, of the Public Laws of R. I. 1968
40. P. L. of R. I. 1944, c 1441, now Sec. 14-1-31 of the General Laws of R. I. (1956)

that a person charged with one of the aforementioned crimes can be let to bail.

Rhode Island, the nation's smallest state, has an area approximately the size of Virginia Beach and a population of about 850,000 persons, with the greatest concentration in Providence, a city of 245,000 persons. Because of these considerations of size, the state Public Defender system in Rhode Island might well be compared to a large city system.

Through practice, more than any explicit legislative authority, city solicitors, comparable to city or county attorneys in Virginia, have assumed responsibility for prosecuting cases initiated by law enforcement agencies in their locality.

But once above the District Court level, all prosecutions are under the jurisdiction of the State Attorney General's office.

State judges have both criminal and civil jurisdiction, but as a practical matter most of them handle either one or the other. Rhode Island has five counties, with a Superior Court in each county.

William Riley has been in office as Public Defender since mid-1971, having previously served as an assistant Public Defender. The annual salary for his fulltime position, though he occasionally does some non-criminal work on nights and week ends, is $22,040. He has seven assistants and one investigator. The salary scale for his assistants ranges from $9,542 to $16,445 annually, but their positions are technically part-time. They work approximately 35 hours per week, but also have private offices and are allowed to handle private criminal cases. The one staff investigator is paid $8,242 yearly. Mr. Riley's office operates on an annual budget of approximately $164,000.

During 1970, each attorney in the Public Defender office carried an average caseload of 119 cases, and on the average disposed of 239 cases. In spite of an increasing workload, the office has been able to reduce the number of cases pending at the end of each year by approximately 10 per cent from 1968 through 1970. The Public Defender disposed of a total of 1,702 cases during 1970, including 253 cases of breaking and entering, 174 violations of probation or deferred sentence, 92 assault cases, 92 robbery cases and 89 grand larceny cases.

According to Mr. Riley, using the number of cases disposed of each year (1968-1970, inclusive) as a denominator and the budget for each year as a numerator, the per case cost during each year

has been less than $80 per case, compared to an average per case payment to assigned counsel of $130 for handling cases in the District Courts.

Charles J. Rogers, a practicing attorney, a former prosecutor and also a former clerk, explained that when he was clerk for eight years he also sat as a judge in some cases in the District Court.

Mr. Rogers advised that he is in no way affected by the Public Defender's office and feels that the Public Defender is necessary. His practice does not suffer, he added, and, for the most part, members of the Bar do not object to the Public Defender. He feels the resentment on the part of some members of the Bar is due to ignorance rather than any failing of the program.

A complaint which both Mr. Rogers and the Public Defender, Mr. Riley, did have was the fact that the state attorney general controls the court calendars. Mr. Rogers advised that he frequently received notices from the Attorney General's office that cases were set in two or three different counties on the same day, which made it impossible for him to be present.

Edward P. Smith, Executive Director of the Rhode Island Bar Association for the past 13 years, explained that he feels he receives a fair cross-section of the complaints and criticism voiced against lawyers and their bar association as a whole, and he has received very few complaints over the years relating to the Public Defender system or those involved in the system.

Superior Court Justice James C. Bulman also stated that the Public Defender system works well, as does the appointment by the Governor. Justice Bulman does feel there should be more lawyers in the Public Defender's office. The prior, court-appointed counsel system, as he recalled it, "just didn't work out well."

The adversary posture of the Public Defender is clearly established, according to Justice Bulman, who described the Public Defender office as "terrific; I really can't say enough good things about it."

State Attorney General Richard Israel also felt that the only problem with the Public Defender system was one of understaffing. He said he saw no problem on the question of collusion and no indication that the Public Defender's office and the Attorney General's office were becoming too comfortable with each other. In fact, Mr. Israel said he knew of only three lawyers in the state other than the public defender assistants whom he would employ

if charged with a crime himself, since the Public Defender attorneys were "extremely capable."

As a general rule, the Attorney General said, the Public Defender is more effective, cuts out the unnecessary pleas, motions, etc., and can keep up with the latest criminal law and constitutional law cases far better than the trial bar generally.

Mr. Israel stated that he was having no particular problem in reference to habeas corpus, though the courts do receive many pro se petitions.

Though the Public Defender, by statute, determines indigency, Mr. Israel said it was his feeling that the courts still make the final determination as a practical matter, especially since the Public Defender does not get into the picture until after indictment, and he is appointed subject to any information he might receive which would indicate the person is not indigent. It appears that every effort is made in Rhode Island to determine if the person can afford private counsel.

Mr. Riley feels the system operates quite well in Rhode Island, but he does find two distinct problems facing his system. First, the Public Defender frequently enters a case after a person has been incarcerated for several months. This, he said, hampers investigation, is unfair to the defendant in that he doesn't receive continuous representation and is uneconomical. Secondly, the Attorney General, by having control of the criminal calendar, frequently sets too many cases for the Public Defender to handle, resulting in numerous witnesses being called and then the cases being postponed. Mr. Riley feels the calendar definitely should be controlled by the courts, as is done in Virginia.

The second problem could become a political one, since Rhode Island has a Republican Governor and a Democratic Attorney General who could have an opportunity for political harassment with a Public Defender appointed by the Governor.

According to Mr. Riley, though the inmates often feel there is a certain amount of collusion between the prosecution and the Public Defender, none exists insofar as he knows. He feels that his assistants provide both conscientious and vigorous representation.

The Public Defender does concede some problem in getting young lawyers into the practice of criminal law without service either in his office or that of the Attorney General, but Rhode Island has instituted a novel clerkship program, wherein law stu-

dents work in these two offices, receiving some practical criminal law exposure.

Mr. Riley's office handles habeas corpus cases that are referred by the Supreme Court of Rhode Island and the Superior Courts, but normally he does not handle cases in the federal courts.

Mr. Riley highly recommends a non-political Public Defender system for Virginia, with attractive salaries and an active interest by the Bar Association both in the selection of the Public Defender and the overall operation of the Public Defender's office.

X
PROPOSED LEGISLATION

A B I L L

To create a Public Defender Commission, provide for its membership, define its powers and duties; to provide for public defenders in certain cities and counties, and to prescribe their duties; and to appropriate funds.

Be it enacted by the General Assembly of Virginia:

1. § 1. There is hereby created a Public Defender Commission, which shall be composed of five citizens and residents of this Commonwealth. Members of the Commission shall be elected by vote of a majority of the members elected to each house of the General Assembly. The Commission shall annually elect one of its members Chairman. The Commission shall consist of two members who are active judges of courts of record, two members who are active members of the Virginia State Bar and have practiced law in the State for ten or more years immediately preceding their appointment and one public member who shall not be an active or retired judge and shall never have been a licensed lawyer. Members of this Commission shall receive no compensation for their services but shall be paid their reasonable and necessary expenses incurred in the performance of their duties, for which there is hereby appropriated from the general fund of the State treasury the sum of ten thousand dollars. The Commission shall report its actions to the General Assembly no later than November fifteen, nineteen hundred seventy-four.

§ 2. The duties of the Public Defender Commission hereinafter referred to as "The Commission" are:

(a) To select three areas wherein public defender offices are to be established in the following manner.

(i) A city or county of the population in excess of two hundred thousand.

(ii) A city with a population of at least one hundred thousand and not more than one hundred twenty-five thousand or a county of a population of at least one hundred sixty thousand and an area of more than twenty-four square miles.

(iii) An urban-rural area to be identical with that served by a regional Juvenile and Domestic Relations Court.

(b) Appoint a public defender for each of the above areas to serve at the pleasure of the Commission, who shall devote his full time to his duties and not engage in the private practice of law. The Commission shall fix his compensation.

(c) To authorize the public defender to employ such assistants as authorized by the Commission. Such assistants shall devote a minimum of twenty-five hours per week to their duties and may engage in the private practice of law. The Commission shall approve the salaries to be paid said assistants.

(d) To authorize the public defender to employ the necessary staff, carry out the duties imposed upon him to include secretarial and investigative personnel and such other personnel as may be necessary.

(e) To authorize the public defender to secure such office space as needed and to purchase or rent such office equipment and purchase supplies and to incur such expenses as are necessary to carry out the duties imposed upon him.

(f) To receive and expend moneys appropriated by the General Assembly of Virginia and to receive other moneys as they be available to it and to expend the same in order to carry out the duties imposed upon it.

§ 3. Public defenders and their assistants shall carry out the following duties:

(a) To secure office space, to employ a staff, to fix salaries and to do such other things necessary to carry out the duties imposed upon him with the approval of the Commission.

(b) To represent indigent defendants charged with a crime when such defendants are entitled to be represented by law by court appointed counsel in a court of record or a court not of record.

(c) To represent indigent defendants who are entitled to be represented by court appointed counsel in an appeal of his conviction to the Supreme Court of Virginia.

(d) To represent indigent prisoners when a habeas corpus proceeding is brought by such prisoners.

(e) To submit such reports as required by the Commission.

§ 4. In counties and cities in which public defenders are appointed, the provisions of §§ 14.1-183 and 14.1-184 shall not apply unless the public defender is unable to represent the defendant or petitioner by reason of conflict of interest or otherwise, in which case the provisions of §§ 14.1-183 and 14.1-184 shall be in full force and effect.

2. An emergency exists and this act is in force from its passage.

END