Indigent Defense in Virginia: Practical and Empathic Motivations for Reform

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I. Introduction

The defining characteristic of the judicial system in the United States is the adversarial process through which justice is achieved. This aspect of our justice system sets it apart from methods of dispensing justice employed both in the past and in many societies today. The foundation of the adversarial system is the belief that if both sides ardently advocate for their position, then the ends of justice will be served by an outcome balanced in favor of the meritorious. Accordingly, parity in the justice system is vital. If the balance is upset by inadequate representation of either position, the system will fail to dispense justice properly.

In 1999 an estimated $1.2 billion was spent to provide indigent criminal defense in the nation's 100 most populous counties.[1] This $1.2 billion represents an estimated 3% of all local criminal justice expenditures in these counties. Clearly, on a national level, a lack of parity persists between the value placed on indigent defense and the value placed on maintaining a high conviction rate and ensuring criminals are placed in jail through vigorous prosecution. Levels of parity, however, vary from state to state, as indigent defense in non-federal cases is funded solely by states or localities (see Tables 1.1 and 1.2).[2] Therefore, one must analyze indigent defense on a state specific basis. This methodology can prove beneficial rather than constraining, because one can compare states and perceive effective and ineffective strategies for defending the indigent—in

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[1] Wallace, Scott, and David Carroll. "Implementation and Impact of Indigent Defense Standards." Washington DC: National Legal Aid and Defender Assocaition, December 2003. 4. This report was published on behalf of the Department of Justice and is available at http://www.ncjrs.gov/App/Publications/alphaList.aspx?alpha=I.

[2] See Saubermann, Jennifer M., and Robert Spangenberg. "State and County Expenditures for Indigent Defense Services in Fiscal Year 2005." West Newton, MA: The Spangenberg Group, December 2006. See also "Gideon's Broken Promise: America's Continuing Quest for Equal Justice." Chicago, IL: American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2004.

essence, states can learn from both the successes and failures of one another.[3] In this study, other states will be used to illuminate the juxtaposition of the current state of indigent defense in Virginia with the ostensible values and goals she professes. Although Virginia has made noteworthy progress in the past few years, she still falls markedly short of the standards she sets for herself. Through a better conceptual understanding of progress made in Virginia and the nature of the barriers to progress, one can recognize the direction in which Virginia must now head.

II. Precedent for Indigent Defense

The Sixth Amendment asserts one's right to the assistance of defense counsel, but does not explicitly establish a right to court-appointed counsel: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."[4] Clearly the state cannot prevent the accused from retaining a lawyer to assist in his defense. However, this assertion does not indicate whether the accused is entitled to counsel if he cannot afford to hire an attorney himself. This mandate would not come for nearly two centuries.

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The right of indigent defendants to court-appointed counsel was gradually established upon the foundation of the Sixth Amendment as well as the due process clauses of the Fifth and Fourteenth Amendments. In *Powell v. Alabama* in 1932, the United States Supreme Court ruled that the right to assigned counsel was a fundamental right guaranteed by the due process clause of the Fourteenth Amendment, but only with regard to capital cases.[5] It was not until *Gideon v. Wainwright* in 1963 that the right to

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[3] Virginia, however, is not the only beneficiary of this exchange. While this review focuses on the Commonwealth of Virginia, its findings do not apply solely to indigent defense in Virginia. Rather, they can be perceived in relation to a number of other states facing similar challenges.

[4] U.S. Constitution. Amendment VI.

[5] *Powell v. State of Alabama*. 287 U.S. 45 (1932).

court-appointed counsel became a fundamental right implied by the Sixth Amendment and the due process clause of the Fourteenth Amendment. Offering the opinion, Justice Black argued: "that the government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[6] Defense counsel was thus perceived by the court as an integral part of the judicial process. Asserting this position more resolutely, Justice Black continued: "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[7] Given this interpretation, the absence of court-appointed defense counsel would violate the due process mandate of the Fourteenth Amendment and would betray the philosophical underpinnings of the Sixth Amendment. The right to defense counsel was accordingly established as a fundamental right and a necessity for achieving the ends of justice.[8]

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III. Virginia's Commitment

The need for some sort of public defense of the indigent, in accordance with the precedent set by *Gideon v. Wainwright*, has long been accepted by the Virginia state legislature. The debate over the need for indigent defense is, for all intents and purposes, over. The state legislature, the Virginia state bar, and the Virginia Indigent Defense Commission have even gone so far as to recognize the need for a proactive and improved

[6] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[7] *Id.*
[8] This right would be further clarified in years to come. *Argersinger v. Hamlin*, 407 U.S. 25 (1972) extended the right to misdemeanor cases; *Alabama v. Shelton* 535 U.S. 654 (2002) declared that a defendant could not serve any jail time unless he was offered counsel. In other words, a defendant could not go to jail for violating probation unless he was offered counsel for the initial charge for which he received probation.

approach to indigent defense in Virginia. The degree to which these parties have emphasized the importance of an effective defense is, in fact, staggering.

Since 1999, the Virginia Bar Association has conscribed to the ABA's rules of professional conduct.[9] These ethical guidelines are obligatory and attorneys can, in fact, lose their license to practice for violating the model rules for professional conduct. Rule 1.3 requires that "A lawyer shall act with reasonable diligence and promptness in representing a client."[10] This rule, through the use of "shall" rather than "may," acts as an imperative and allows attorneys no room to subvert this duty. Another positive duty of the attorney is outlined in Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[11] These rules apply to all members of the bar, and thus, all practicing attorneys. In essence, the rules "provide a

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framework for the ethical practice of law," and if necessary, can be enforced "through disciplinary proceedings."[12] By adopting the ABA's set of ethics, the Virginia Bar Association, on behalf of all attorneys practicing in Virginia, including indigent defenders, made a commitment to the principles outlined therein.

With specific regard to indigent defense, the Virginia Bar Association also aligns its perception of indigent defense with the American Bar Association. In February of 2002, the ABA passed a widely publicized outline of the requirements of effective public defense entitled "The Ten Principles of a Public Defense Delivery System."[13] One

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[9] "Model Rules of Professional Conduct: Dates of Adoption." Center for Professional Responsibility. American Bar Association. March 16, 2008 < http://www.abanet.org/cpr/mrpc/alpha_states.html>.

[10] "Model Rules for Professional Conduct: Client-Lawyer Relationship" Center for Professional Responsibility. American Bar Association. March 15, 2008 <http://www.abanet.org/cpr/mrpc/mrpc_toc.html>.

[11] *Id.* at 1.1.

[12] *Id* at "Preamble and Scope."

[13] "Ten Principles of a Public Defense Delivery System." Chicago IL: American Bar Association Standing Committee on Legal Aid and Indigent Defendants, February 2002.

important principle listed requires that "Defense counsel's workload [be] controlled to permit the rendering of quality representation."[14] This requirement tackles a crippling problem for most public defender offices—they are simply overburdened. However, this provision, like many others in the document, betrays a crippling weakness: ambiguity. There is no determination of what a controlled workload consists of or, in other words, how many cases an attorney can handle while still offering each of his clients quality representation. While the majority of the provisions in this document display similar uncertainty (See Appendix 2.1), a few place a concrete burden on the system. For example, "The same attorney [must] continuously [represent] the client until completion of the case."[15] However, even in instances where the requirements of an effective public defense system are more definitive, no burden is actually placed on public defenders. While these principles have been publicized, there is no legal obligation to meet them. In fact, only the Virginia General Assembly has implemented enforceable standards specific to indigent defense in Virginia.

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The state legislature, through its creation of the Virginia Indigent Defense Commission (VIDC) in 2004 and its increase in public defense funding, appears to comprehend the importance of indigent defense. In fact, the creation of the VIDC by the General Assembly in section 19.2-163.01 of the Code of Virginia mandated the establishment of standards of practice for the defense of the indigent.[16] In accordance with its mandate, the VIDC published its "Standards of Practice for Indigent Defense

[14] *Id*. at 2. Principle 5.
[15] *Id.* at 3. Principle 7.
[16] The General Assembly directed the Indigent Defense Commission to, among other things, "establish official standards of practice for court-appointed counsel and public defenders to follow in representing their clients." VA Code § 19.2-163.01 (2004), available at < http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-163.01>.

Counsel in Non-Capital Criminal Cases at the Trial Level" in June of 2006.[17] Unlike the ABA's principles of public defense, these standards serve as a code of conduct to which public defenders are contractually obligated to comply. Still, some of the standards are more ambiguous than others. One such example is Standard 1.1, which asserts that "The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process."[18] This basic principle of the justice system does not lend itself to any quantifiable measurement, but nonetheless, indicates the importance of counterbalancing the aggressive efforts of the prosecution. Like the ABA's principles, the standards of conduct also contain more quantifiable provisions for the implementation of public defense. Counsel cannot skirt his responsibility, outlined in Standard 4.1, "to conduct an independent investigation regardless of the accused's admissions or account of events provided to counsel

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indicating guilt."[19] The authors of the standards of practice, including public defenders and commonwealth attorneys, set the standard markedly higher than other states, many of which do not even have statewide codes of conduct specifically for indigent defense counsel. Clearly, if public defenders and court-appointed counsel fulfill the standards of practice, they will provide their clients with an adequate defense. As a result, and in conjunction with the interest the legislature has shown in expanding provisions for indigent defense,[20] one might imagine that Virginia would benefit from one of the better public defense systems in the nation. This is not yet the case.

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[17] "Standards of Practice for Indigent Defense Counsel in Non-Capital Criminal Cases at the Trial Level." Virginia Indigent Defense Commission, June 2006.

[18] *Id.* at 6.

[19] *Id.* at 12.

[20] Virginia was one of the first states in the nation to establish a statewide Indigent Defense Commission with broad power over the implementation of indigent defense in Virginia. Furthermore, over the past decade, numerous bills regarding indigent defense have been proposed in the state legislature and the General Assembly has ordered multiple studies on indigent defense. As a result, the General Assembly appears to have a distinct interest the indigent defense system.

IV. Virginia's Broken Promise

Despite innumerable studies indicating the deficiencies in Virginia's indigent defense system and the apparent commitment of the Virginia legislature to remedy them, Virginia has dramatically underperformed in its defense of the indigent. This underperformance has created a system in which inadequacy has become the unchallenged norm. Moreover, given the persistent shortcomings of the public defense system, both public defenders and court-appointed attorneys are consistently unable to meet either the previously enumerated standards for members of the bar or those specifically set for attorneys who defend the indigent.

The seminal work on the process of indigent defense in Virginia, "A Comprehensive Review of Indigent Defense in Virginia," was completed in January 2004 by the Spangenberg Group.[21] The Spangenberg Group was contracted to perform the study on behalf of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. The findings of the nine month study were predominantly negative. The report was almost entirely devoid of praise for the public defense system in Virginia; the chief conclusion was that the Virginia "indigent defense system is deeply flawed and fails to provide indigent defendants the guarantees of effective assistance of counsel required by federal and state law."[22] According to the findings of the Spangenberg Group, the Commonwealth of Virginia had failed to follow through on its promises or live up to its own standards, not to mention the standards set by the United States Constitution. The Spangenberg Group offered the following representation of the

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[21] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. Available at www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004execsum.pdf.

[22] *Id.* at i.

defense provided to the indigent in Virginia: "Represented by lawyers who have the most meager of resources, indigent defendants in Virginia are denied…due process, or fairness, in legal proceedings against them. In the most extreme situations, innocent individuals are wrongfully convicted."[23] Taken as a whole, the findings of the study revealed the acute inadequacy of the indigent defense system in the Commonwealth of Virginia. However, numerous changes have been made in Virginia's public defense system since the publication of this report. Accordingly, we should perhaps consider the study's findings in relation to the progress made thereafter.

V. Moving Toward Reform

Despite the seemingly impossible task of reforming the system, the Spangenberg report recommended that Virginia implement five major systemic changes immediately.

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Three of the five suggested reforms dealt with the establishment of a statewide indigent defense commission to manage the indigent defense system by adopting performance and qualification standards for both court-appointed counsel and public defenders. Before the report was published, the Virginia General Assembly began to consider implementing such a commission. In 2002, the General Assembly directed the Virginia State Crime Commission "to study and examine whether the establishment of a statewide indigent defense commission would improve the quality and efficiency of the Commonwealth's indigent defense services."[24] The primary recommendations of the two year study, presented to the General Assembly on April 20, 2004, were virtually identical to the recommendations of Spangenberg study relating to an indigent defense commission. The report concluded that "1. Virginia should establish an Indigent Defense Commission; 2.

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[23] *Id.* at 1.
[24] Virginia State Crime Commission. "Indigent Defense Commission." April 20, 2004.

[The Commission should] have oversight of training and standards for both public defenders and court appointed counsel; 3. The Virginia Indigent Defense Commission shall publicize and enforce the qualification standards for court appointed attorneys."[25] The ancillary recommendations of the Crime Commission report dealt primarily with improving training for defenders of the indigent. The overwhelming affirmation of the importance of an indigent defense commission in both the Spangenberg and the Crime Commission reports did not fall on deaf ears.

Following the publication of the reports, House Bill 1056, creating the VIDC, was overwhelmingly passed in both the Virginia House and Senate.[26] Established to take Virginia in a new direction, the commission replaced the Public Defender Commission which was heavily criticized by the Spangenberg report.[27] Part of the VIDC's mandate was the creation of standards for court-appointed counsel and public defenders.[28] In accordance with this mandate the aforementioned "Standards of Practice for Indigent Defense Counsel" were adopted. Before these standards were adopted, "Attorneys representing non-capital indigent defendants in Virginia, whether public defenders or assigned counsel, [were] subject to very few minimum standards or guidelines."[29] As we will see, however, standards become devoid of meaning in the absence of a commitment to policies which uphold them standards and permit their enforcement. Nonetheless, the

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[25] *Id* at 2.

[26] House Bill 1056 (January 14, 2004). Available at http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HB1056.

[27] The report asserted that the commission actively discouraged any challenge of the system and simply did not work toward achieving justice for the indigent. Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 25.

[28] VA Code § 19.2-163.01 (2004), available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-163.01. Article 3.1 outlines the duty of the VIDC "4. To establish official standards of practice for court appointed counsel…[and] 5. To…establish standards of practice for public defenders."

[29] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 21.

creation of the VIDC represents a great leap forward in providing adequate defense for the indigent.

Before the establishment of the VIDC, there was no certification requirement for court-appointed attorneys or public defenders—if one had a license to practice, he could handle indigent defense cases. Yet, in response to the recommendations of the Spangenberg Group and the Crime Commission, "In October 2004, the VaIDC, with input from Circuit Court judges, created the initial certification training courses."[30] Attorneys now must not only become certified, but also participate in ongoing training. While this training does not match the training offered Commonwealth's attorneys either in quality or frequency, it still represents an important improvement in the indigent defense system.

Another way in which the Virginia legislature responded, or at least

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acknowledged, the Spangenberg report's criticism was by adjusting the fee caps for court-appointed counsel. Since 1971 "Findings that Virginia had the lowest compensation for court-appointed counsel in the country and/or that attorney compensation was unreasonably low, were repeated in at least 14 studies."[31] When the Spangenberg report was published, the maximum fees were $158, $445, and $1,235 for misdemeanors, felonies carrying up to 20 years, and felonies carrying more than 20 years respectively[32]; in other words, less than 2, 5, and 14 hours of work was allotted for attorneys to prepare for and try each respective type of case. Moreover, according to the 2004 report, these statutory caps did not represent the actual amount paid to court-appointed attorneys—$148, $395, and $1,096 (See Table 3.1). In 2007, however, the Virginia General Assembly passed a bill which made the fee-caps for felonies waivable.

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[30] Virginia State Crime Commission. "Indigent Defense Commission." April 20, 2004. 7.
[31] *Id.* at 17
[32] *Id.* at 46

For felonies carrying a sentence of less than twenty years, the judge could now approve an additional $155; for felonies carrying a sentence of more than twenty years, the judge could approve an additional $850.[33] This modest improvement did not go into effect until June of 2007, over three years after the Spangenberg report was published.

VI. Falling Short: Delegitimizing the Adversarial Process

All of the changes implemented by the Virginia General Assembly since the Spangenberg and Crime Commission Reports were published in 2004, when viewed as a whole, display a conspicuous lack of fiscal commitment to indigent defense in Virginia. In the indigent defense reform of 2004, Virginians gained standards destined to go unenforced and phantoms of financial support for indigent defenders. The proposed budget to support the creation of the Virginia Indigent Defense Commission and replace the Public Defender Commission totaled $216,172[34]—a paltry sum when viewed in terms of the percentage increase in spending on indigent defense (far less than one percent). Thus, while the legislature attempted to show a renewed commitment to indigent defense, its actual budgetary commitment was minimal. The Indigent Defense Commission certainly has great value, but its inception reflects an attempt to provide a cheap panacea for the indigent defense system rather than a valuation on the part of the General Assembly of indigent defense. When it came down to providing funding—the only measurable kind of support the General Assembly can offer—the legislation proved utterly inadequate. According to a recent ABA report on Virginia, "Among its deficiencies, the legislation provides no additional funding for indigent defense

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[33] VA Code § 19.2-163 (2007). "Compensation of Court-Appointed Counsel." Available at http://198.246.135.1/cgi-bin/legp504.exe?000+cod+19.2-163.

[34] Virginia State Crime Commission. "Indigent Defense Commission." April 20, 2004. 24.

services."[35] Thus, criticism that the Spangenberg Group levied against the Virginia legislature still applies: "The inaction of the General Assembly demonstrates that it fails to understand that effective indigent defense is a constitutionally mandated government service - not merely a budget category that can be funded at whatever level legislators feel inclined to provide."[36] The Virginia Fair Trial Project summarizes the current state of Indigent Defense in Virginia more optimistically in its May 2007 Progress Report: "despite the significant progress, more work is required to improve the public defense system."[37] Whether one views the progress made by the General Assembly and the VIDC as commendable or merely perfunctory, there is much to be done.

Fee Caps

Over four years after the Spangenberg Group published its thorough and scathing criticism of the indigent defense system in Virginia, the most pervasive and troubling problems remain. The fee for court-appointed attorneys in Virginia is $90 per hour, which is actually high relative to other states and matches the fee paid to court-appointed counsel in federal cases. However, "Virginia's relatively competitive hourly rates have little bearing"[38] when one considers the limits on the amount court-appointed attorneys can be paid per charge. Even with the fee cap waivers, the fee caps for court-appointed counsel still represent the second lowest in the nation; only Mississippi ranks lower. (See

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[35] "Virginia." Indigent Defense/ Public Defender Systems. 2005. ABA Standing Committee on Legal Aid and Indigent Defendants. March 14, 2008 http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/va.pdf.

[36] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 83.

[37] "Progress Report:Virginia's Public Defense System." Indigent Defense in Virginia. May 2007. Virginia Fair Trial Project. March, 11 2008 < http://www.vidcoalition.org/pdfs/ReportCard2007.pdf>.

[38] Desilets, Rebecca A, et al. "Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview." West Newton, MA: The Spangenberg Group, June 2007. 7.

Table 4.1).[39] In nine states, the per case maximums for felonies carrying life imprisonment exceed $10,000[40]; in thirteen states, there is no per case maximum placed on court-appointed attorneys fees.[41] Virginia performs so poorly in relation to the other states that, in a 2007 study, the Spangenberg Group cites her as a demonstration of the wide variation from state to state: "Of those states that do use a per-case maximum, the maximums vary greatly. For example, the per-case maximum for felonies punishable by life imprisonment is a waivable $25,000 in Vermont while the cap for the same type of case in Virginia is $1,235, waivable up to an additional $850."[42] Even with the fee waivers, Virginia's fee caps pale in comparison to those of other states. Moreover, the "waivers have not been adequately funded"[43] and, as a result, the actual caps are even lower in reality (as they were when the Spangenberg report was published in 2007, See Table 3.1).

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Given even the maximum time allotted by the fee caps, court-appointed counsel are hard-pressed to comply with the standards of conduct established by the indigent defense commission itself. Indeed, as a result of the low fee caps, "assigned counsel have little incentive to devote the necessary time and effort to properly represent indigent defendants, as they will not be compensated for such work."[44] The Virginia General Assembly simply disallows the level of devotion to each case required by the ABA, the Constitution, and even the standards mandated by the Virginia legislature itself.

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[39] Desilets, Rebecca A, et al. "Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview." West Newton, MA: The Spangenberg Group, June 2007. 7.

[40] *Id.* Ohio, Colorado, Delaware, Iowa, Nevada, New Hampshire, Rhode Island, Vermont

[41] *Id.* Arkansas, Connecticut, Georgia, Massachusetts, Minnesota, Missouri, Montana, New Jersey, North Carolina, Oregon, South Dakota, Wisconsin, Wyoming,

[42] *Id.* at 19.

[43] "Progress Report:Virginia's Public Defense System." Indigent Defense in Virginia. May 2007. Virginia Fair Trial Project. March, 11 2008 < http://www.vidcoalition.org/pdfs/ReportCard2007.pdf>.

[44] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 40.

Despite this persistent reality, the VIDC (which was created to represent the interests of indigent defendants) downplays the importance of raising or eliminating the fee caps. In its Annual Report to the General Assembly in 2007, the VIDC responded to criticism that Virginia has some of the lowest fee caps in the nation by arguing that the data collection methods for such information does not lend itself to comparisons between states.[45] Furthermore, in an attempt to divert focus in a manner akin to that of a foundering presidential administration, the report concluded that "it may be more useful to note the efforts Virginia has taken to improve its indigent defense system."[46] This callous dismissal of the serious problem posed by the low fee caps reveals a quite troubling outlook for a commission which was created for the sole purpose of improving the indigent defense system in Virginia—unfortunately, this mindset also pervades other facets of the indigent defense system.

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Disproportionate Salaries

Low fee caps for court-appointed attorneys are merely one manifestation of the lack of parity in Virginia's judicial system—an issue which threatens the legitimacy of the adversarial system. As observed in the ABA's 2005 summary of indigent defense in Virginia, "compensation and support for public defenders in Virginia lag far behind their prosecution counterparts."[47] In 2004, average pay for assistant Commonwealth's attorneys was $64,000, while compensation for assistant public defenders was $46,000.[48] These figures do not represent disproportionate funding by the state, but rather the

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[45] Virginia Indigent Defense Commission. "Annual Report 2007." August 20, 2007.
[46] *Id.* at 14
[47] "Virginia." Indigent Defense/ Public Defender Systems. 2005. ABA Standing Committee on Legal Aid and Indigent Defendants. March 14, 2008 http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/va.pdf.
[48] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004.

outcome of local supplements and grants provided to Commonwealth's attorneys but not to public defenders.[49] On April 2, 2008, the Virginia code was amended to allow local subsidies for public defense, but this provision will not necessarily result in more proportionate salaries for public defenders and does not affect appointed attorneys' salaries at all.[50] Once again, this new policy displays a token show of support for indigent defense rather than a meaningful attempt at reform. The disproportionate salaries, however, represent only one way in which indigent defense in Virginia is plagued by a lack of parity.

Access to Experts

Indigent defenders' access to experts is virtually non-existent when compared to that of the Commonwealth's attorneys. The Spangenberg study in 2004 concluded that

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"The lack of access to expert services for indigent defense counsel in Virginia is a pervasive and long-standing problem in each circuit."[51] This statement needs no clarification today; no progress has been made in improving access to experts who can be crucial in establishing a defense. Indigent defenders must request expert witnesses and "demonstrate a 'particularized need' to the trial court."[52] Moreover, court-appointed attorneys and public defenders must demonstrate the need in open court, revealing the nature of their defense to the Commonwealth and allowing the Commonwealth to argue

[49] "Report Card Supplement." Indigent Defense in Virginia. March 2003. Virginia Fair Trial Project. March 12, 2008 < http://www.vafairtrialproject.org/Supplement.php>.

[50] Senate Bill 634 (January 9, 2008). Available at http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+SB634.

[51] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 60.

[52] "Report Card Supplement." Indigent Defense in Virginia. March 2003. Virginia Fair Trial Project. March 12, 2008 < http://www.vafairtrialproject.org/Supplement.php>. This particular statement in the report refers to the precedent set by *Husske v. Commonwealth*, 252 Va. 203 (1996); *Barnebei v. Commonwealth*, 252 Va. 161 (1996).

against the appointment of experts.[53] Commonwealth's Attorneys, on the other hand, do not need to request experts, as they have state experts at their disposal. In reference to Virginia, the Spangenberg Group stated that "we have never encountered such a persistent problem of indigent defendants' right to seek expert funds being extinguished by a widespread practice of the courts of not allowing the requests to be filed ex parte" (in the absence of the other party).[54] Given the rarity of the appointment of experts in non-capital cases and the risk involved in requesting an expert in open court, most indigent defenders do not even bother asking for expert assistance, especially in low profile cases.

Investigation

The rights of indigent defendants are infringed upon in a similar manner with regard to investigation. Court-appointed counsel "rarely employ the use of investigators, for whom payment must be authorized by the court."[55] Given their low salaries, court-appointed counsel simply cannot afford to perform investigations. When interviewed, one Virginia attorney quoted in the Spangenberg study admitted, "we let things slide. We cannot help it. We don't have time for investigation or research."[56] Court-appointed attorneys operate a volume business in which they spend as little time as possible on each case in order to maximize efficiency and make a living on the state's meager salaries; investigation is not part of the equation. The inability to conduct a thorough investigation extends to public defenders as well. Although public defenders' offices typically have an

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[53] "Virginia." Indigent Defense/ Public Defender Systems. 2005. ABA Standing Committee on Legal Aid and Indigent Defendants. March 14, 2008 http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/va.pdf.

[54] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 63.

[55] *Id.* at 2.

[56] *Id.* at 28

investigator on staff, the volume of cases[57] stretches investigation quite thin—approximately one investigator every 2,926 cases[58]—and investigation is typically devoted only to high profile cases. As the VIDC 2007 Annual Report concludes, "Caseload limits have never been promulgated or enforced within public defender offices."[59] Thus, public defenders and, to a greater extent, court-appointed attorneys in Virginia inexorably fail to fulfill their obligation to conduct an independent investigation of their cases (VIDC Standard 4.1).[60] Again, we see that, while Virginia has adopted standards for indigent defense, such standards are far from the norm and certainly are not enforced. As a result, the indigent defense system in Virginia remains conspicuously inadequate.

Perception

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Each of the outlined deficiencies of the indigent defense system—low fee caps for court-appointed attorneys, disproportionate salaries for public defenders, limited access to experts, and insufficient investigation—not only create inequity but also create a self-sustaining perception of indigent defenders as incompetent.[61] A system which forces its attorneys to avoid trial and plea out their clients for fear they will lose money on a case inevitably engenders pervasive distrust of indigent defenders. Overburdened with cases and under-resourced, indigent defenders are forced into a negative relationship with their clients who easily perceive their inability to provide an adequate defense. Certainly, "the

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[57] See Table 6.1

[58] Given the ratio of one investigator for every 8.5 attorneys found in the 2004 Spangenberg Report (p. 38) and adjusted to the number of attorneys and cases in FY 2007.

[59] Virginia Indigent Defense Commission. "Annual Report 2007." August 20, 2007. 11.

[60] "Standards of Practice for Indigent Defense Counsel in Non-Capital Criminal Cases at the Trial Level." Virginia Indigent Defense Commission, June 2006.

[61] In a poll of randomly selected Virginians conducted by the Virginia Fair Trials Project, "Forty-two percent rated private lawyers as providing excellent or very good legal representation [while] 15% and 17%...did the same for court-appointed lawyers and public defenders, respectively." From "Virginians Say a Strong Defense Matters." Indigent Defense in Virginia. July 2004. Virginia Fair Trial Project. March 12, 2008. <http://www.vafairtrialproject.org/OpinionPoll.pdf>. 5.

perception by their clients of someone who's juggling a bunch of files and doesn't recognize them in court" does great harm to the case.[62] Compounding the harmful effects of such a perception is the reality that "Investigation…is limited to talking to the client and hoping that he or she is giving the right picture."[63] Thus, not only does the system ensure a contentious relationship between the attorney and client, but it also creates a constraining and ultimately destructive reliance on the client in formulating a defense. The conception of indigent defenders as incompetent, understandable given the resources they are allotted, creates an attorney-client relationship in which "Defendants…are often distant, dishonest, confrontational and suspicious of their own attorneys…and often believe that public defenders are too untalented and too uncommitted to actually advance their best interests."[64] Such a relationship prohibits the indigent defender from using his principal resource, the client, to establish an adequate defense.

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In my own experience this past summer working at the Capital Defenders Office in Richmond, I witnessed the detrimental effects of this reality in a capital case. Even though capital defenders are typically perceived as more competent, in accordance with the better resources and pay which they receive, our client viewed the attorneys as almost working against him. Instead of trying to work with them to prepare a defense, he attempted to plan a defense on his own. Furthermore, he disregarded the advice of the attorneys which, if listened to, could have conceivably helped him avoid conviction. By arousing distrust and unwillingness to cooperate and accordingly hindering the ability of the indigent defender to provide a defense, the dominant paradigm of indigent defenders

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[62] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 58.
[63] *Id.* at 28-29.
[64] Weiss, Michael Scott. "Public Defenders: Pragmatic and Political Motivations to Represent the Indigent." New York: LFB Scholarly Publishing, 2005. 24.

as incompetent becomes self-sustaining. Clearly, something must be done to change this perception in order to allow adequate defense of the indigent.

VII. Moving Forward

In delivering his opinion on *Gideon v. Wainwright* in 1963, Justice Black argued for the need for defense counsel to balance the reality that "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[65] Still, over forty years later, the parity which Justice Black called for has not been fully realized. Four years after the Spangenberg study of indigent defense in Virginia was published, many of the same problems it highlighted persist. Public defenders and court-appointed counsel still "work in a system that, more so than most other jurisdictions across the country, is stacked heavily against them."[66] Despite the

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wide acceptance of the precedent set by *Gideon v. Wainwright* and the strong constitutional foundation for providing adequate indigent defense, the indigent defense delivery system in Virginia remains deeply flawed—clearly theoretical justification, no matter how strong, proves insufficient.[67] This study, along with countless others, has clearly shown the necessity of greater funding for indigent defense in Virginia. However, the theoretical justifications have not elicited the desired response from the Virginia legislature.[68] Accordingly, researchers must look to alternative conceptions of indigent

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[65] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[66] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 73.

[67] In his essay "Beyond Justifications: Seeking Motivations to Sustain Public Defenders," Charles Ogletree shrewdly observes the reality that "theoretical justifications fall short in the face of reality." Ogletree, Charles J. "Beyond Justifications: Seeking Motivations to Sustain Public Defenders." Harvard Law Review. Vol. 106, No. 6 (April 1993). 1269.

[68] One can certainly make the claim, and many have, that the government simply does not see the interests of the impoverished criminal as meritorious—and neither do many of the most valued constituents.

defense and even means of subverting the legislature in order to effect positive change in the indigent defense system in Virginia.

The Dual Function of Public Defense

In providing indigent defense, some argue that attorneys should become detached from their clients and mechanically perform their duty. However, such an approach ignores the critical importance of the indigent defender as a social worker. In his essay "Beyond Justifications: Seeking Motivations to Sustain Public Defenders," Charles Ogletree argues that, in order for an attorney to sustain the motivation to defend the indigent, "it is critical [for him] to look beyond the crime with which the client is charged, to gain insight into the often difficult, impoverished, and painful life that preceded the commission of the crime."[69] Ogletree posits that devotion to the principles of the justice system does not provide sufficient motivation for individuals to defend the indigent. This assertion, I would argue, has a broader application than Ogletree indicates. Indeed, constitutional law and the necessity of indigent defense in an adversarial system have proven insufficient catalysts for reform in Virginia.

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Yet, if one looks to the corollary role of public defenders as social workers, new and more convincing arguments for supporting indigent defense emerge. In Michael Weiss' study of public defenders, "A number of the attorneys interviewed…emphasized that indigent defense is as much about 'social work' as it is about legal representation."[70] Indigent defendants are often the same people toward whom the government gears social work. In fact, indigent defendants are likely in the greatest need of assistance since the

[69] Ogletree, Charles J. "Beyond Justifications: Seeking Motivations to Sustain Public Defenders." Harvard Law Review. Vol. 106, No. 6 (April 1993). 1273.
[70] Weiss, Michael Scott. "Public Defenders: Pragmatic and Political Motivations to Represent the Indigent." New York: LFB Scholarly Publishing, 2005. 129.

challenges associated with indigence are compounded by their legal troubles. As Weiss observes, "because indigent defendants have so many personal problems, much of [the defender's] work is really about showing interest in clients, talking with them and listening to what they have to say."[71] Given the current state of indigent defense in Virginia, attorneys are often forced to neglect this vital role and inevitably convey a disposition of apathy if not antipathy toward their clients. The abandonment of the indigent defender's role as an invested advocate likely has unforeseen consequences.[72] Multiple states and public defender programs have perceived this reality and, in some cases, have done so for decades.

Three prominent models of the incorporation of social work into public defense can be found in the Bronx Defenders, the D.C. Public Defender Service, and the Georgia Justice Project. Attorneys in the D.C. Public Defender *Service* have stressed the

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importance of public defense as a social service and the relationship between the attorney and client for over three decades. As Ogletree recounts his experience working in the PDS, "It was argued that there was a direct relationship between the client's social background and his present status…We were encouraged to immerse ourselves in the reality of each client's life, to get to know him, his background, his family and friends."[73] Yet the office does not simply offer lip service to the importance of the relationship between the attorney and the client. The PDS also makes "it possible for lawyers

[71] *Id.* at 131.

[72] Although no study has yet been done on the effects of this abandonment, the psychological effect on the defendant is undoubtedly acute. Many indigent defendants have been betrayed throughout their lives and frequently feel betrayed by a society which condones their misery. The finality of the attorney's betrayal of his duties as the client's last hope irrevocably changes the defendant's perception of the justice system and of the society in which he lives. Such a destruction of one's faith in his society and the social structures which provide order inhibits any hope of rehabilitation or attempt at reintegration into society.

[73] Ogletree, Charles J. "Beyond Justifications: Seeking Motivations to Sustain Public Defenders." Harvard Law Review. Vol. 106, No. 6 (April 1993). 1286.

adequately to attend to their clients…by limiting attorneys' caseloads."[74] Furthermore, the connection of the client does not terminate when the case is decided. The PDS employs an offender rehabilitation division to provide their "clients with all of the support and social services needed to get them permanently and completely out of the criminal justice system."[75] The ORD operates as a social services office would, but does so with a better understanding of the client's needs and with the benefit of the client's established relationship with the PDS. The PDS, while exemplary, does not represent a lone example of a progressive approach to public defense.

Both the Bronx Defenders and the Georgia Justice Project emphasize the importance of rehabilitation and reintegration into the community and have been widely successful in doing so. With social workers on staff, The Bronx Defenders[76] and the Georgia Justice Project[77] resolve to break the cycle of poverty by helping their clients rebuild their lives. In other words, both offices perceive indigent defense as more than simply fulfilling a constitutional obligation. The GJP's mission is to "ensure justice for the indigent criminally accused and to take a holistic approach to assist them in establishing crime-free lives and being productive citizens."[78] The Bronx Defenders also employs "holistic advocacy [which] brings together experts from a variety of disciplines—criminal and civil attorneys, social workers, investigators, parent advocates, and community organizers—to tackle all of [the client's] needs heads on."[79] Such a conception of indigent defense is admittedly more expensive than offering the minimum

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[74] *Id* at 286

[75] "The Offender Rehabilitation Division." The Public Defender Service for the District of Columbia. March 26, 2008 < http://www.pdsdc.org/OffenderRehabilitation/index.asp>.

[76] "Criminal Defense." Our Practice. 2006. The Bronx Defenders. March 27, 2008 <http://www.bronxdefenders.org/?page=content¶m=criminal_defense>.

[77] "About the Georgia Justice Project." GJP Mission. 2008. Georgia Justice Project. March 27, 2008 < http://www.gjp.org/about>.

[78] *Id.*

[79] "Criminal Defense." Our Practice. 2006. The Bronx Defenders. March 27, 2008 <http://www.bronxdefenders.org/?page=content¶m=criminal_defense>.

required by law, as Virginia currently does. The justification for doing so, however, is both theoretically and practically sound.

The conception of public defense as a sustained service to the client operates with the understanding that indigent defendants are products of society's inadequacies and should not be abandoned. In other words, the provision of continuous service is provided in order to remedy society's failures as much as it is to assuage the effects of the client's. Even if one does not conscribe to this viewpoint, however, he can find comfort in the practical benefits of a progressive approach to indigent defense. Such an approach creates sustained motivation and dedication to a profession typically plagued by a revolving door of young, inexperienced lawyers. As Ogletree posits, "when an attorney sees her success rate in terms of improvements in the overall quality of her clients' lives, she may come to realize that she does much more good on a daily basis than the record of her 'wins' and 'losses' might indicate."[80] An improved dedication to the profession and an ability to devote time to each client through limited caseloads will in turn begin to reverse the perception of indigent defenders as incompetent and untrustworthy. The resulting positive relationship between the attorney and client will enable more efficient and effective defense work. In the end, incorporating social work and a progressive view of indigent defense will prove economically wise—the benefits of rehabilitation will have positive and compounding effects on society as a whole.

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Capital Defense: A Model of Commitment

By recognizing the disparity between indigent defense in capital cases and non-capital cases and re-evaluating the justification thereof, one can find further support for

[80] Ogletree, Charles J. "Beyond Justifications: Seeking Motivations to Sustain Public Defenders." Harvard Law Review. Vol. 106, No. 6 (April 1993). 1275.

reform of the indigent defense system. The resources at the disposal of capital defenders are drastically different from the resources of public defenders in non-capital cases. As the Spangenberg Group recounts, "At a group meeting of circuit, district and juvenile and domestic relations court judges in one circuit, the judges agreed that, for the most part, defendants get experts, investigators, and voir dire in capital cases only."[81] The Capital Defenders office at which I worked this summer was staffed by three attorneys, an investigator, a mitigation specialist, a law clerk, and myself and was in the process of hiring another investigator and another attorney. Furthermore, the office typically handles no more than five cases at a time and was handling only four over the summer. There are twenty-five public defenders' offices in Virginia each of which handle an average 3,772 cases every year; there are four capital defenders' offices each of which handle an average of 4 cases every year.[82] This illustration is certainly not meant to argue that these resources are not sorely needed—they are, especially considering the volumes paperwork and the complex nature of the two phase capital trial (the Commonwealth certainly expends great effort and resources in the prosecution of capital cases). However, there seems to be an illogical disconnect between the standards for capital defense and the standards for indigent defense in other cases.

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One justification for the disproportionate amount of resources is that a person's life is at stake. However, no matter what the length, prison terms have an acute impact on the defendant. The psychological impact of imprisonment as well as the difficulty reintegrating into society drastically affect one's life.[83] Accordingly, a system which

[81] Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 63.

[82] Based on the caseload data listed in the Virginia Indigent Defense Commission's "Annual Report 2007." August 20, 2007. See Table 6.1.

[83] For further study, see Bonta, James and Paul Gendreau. "Reexamining the Cruel and Unusual Punishment of Prison Life." Law and Human Behavior. Vol. 14, No. 4 (August 1990). 347-372.; Roberts, Julian V. and Michael Jackson. "Boats Against the Current: A Note on the Affects of Imprisonment." Law

devotes vast resources to defendants who might be put to death, while at the same time, does not allow an attorney to spend more than 14 hours on a case in which a defendant may go to jail for the rest of his life, operates unjustly.[84] While felony cases are not characterized by expensive two phase trials,[85] they often involve many of the same psychological issues and complexities characteristic of most capital cases. In making a case for devoting considerable resources to capital defense, then, many of the same justifications apply to indigent defense in felony cases. When viewed in relation to capital cases, the recognition of the need for greater funding of felony indigent defense becomes intuitive.

Judicial Scrutiny

Part of the explanation for the absence of such funding is the lack of judicial scrutiny of non-capital felony cases. Since the reinstitution of the death penalty in 1977, the Supreme Court has been deluged with capital murder cases. As a result of this scrutiny, the standards for capital defense have become more stringent. In *Ake v Oklahoma* in 1985, the Supreme Court held that indigent defendants accused of capital crimes had the right to a psychiatric evaluation.[86] In 1986, the Supreme Court asserted that the execution of the insane was unconstitutional.[87] Recently, in 2002, the Supreme Court outlawed the execution of the mentally retarded in *Atkins v. Virginia*.[88] These

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and Human Behavior. Vol. 15, No. 5 (October 1991). 557-562.; Western, Bruce. "The Impact of Incarceration on Wage Mobility and Inequality." American Sociological Review. Vol. 67, No. 4 (August 2004). 526-546.

[84] VA Code § 19.2-163 (2007).

[85] The first phase of a capital murder trial is the guilt phase and the second phase, assuming a guilty verdict, is the penalty phase in which the jury decides the penalty. In this second face, mitigating evidence (ie. An abusive childhood) may be presented by the defense in order to argue for life imprisonment without parole. This process quickly becomes very expensive as the defense must search through every aspect of the defendants life.

[86] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[87] *Ford v. Wainwright*. 477 U.S. 399 (1986).

[88] *Atkins v. Virginia*. 536 U.S. 304 (2002).

cases, while historically important, represent only a sample of capital cases on which the Supreme Court has ruled in recent years. The attention paid to capital cases is paralleled by a relative lack of attention given to defendants' rights in non-capital felony cases. In fact, the most important ruling in recent years which concerned the rights of all indigent defendants hindered efforts at improving indigent defense. In *Strickland v. Washington*, the Court held that, in order to justify a claim of ineffective assistance of counsel, the defendant must show that the counsel's performance was unreasonably inadequate and that, if not for the defense counsel's actions, the outcome would have probably been different.[89] This interpretation severely limits the ability of indigent defendants to claim that they received ineffective representation[90] and accordingly hinders the prospect for reform of indigent defense. While judicial precedent can sometimes impede the cause of indigent defense, it can also serve as a catalyst for change.

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Circumventing the State Legislature

Given the hesitation on the part of the Virginia General Assembly to commit to indigent defense reform, the courts can serve as a means of subverting the legislature and providing impetus for reform. In recent years, the use of lawsuits as a tool for effecting reform has become increasingly widespread.[91] While many of the lawsuits were unsuccessful, lawsuits in New York and Massachusetts resulted in the augmentation of

[89] *Strickland v. Washington*. 466 U.S. 688 (1984).

[90] In Virginia, this ability is already severely limited, because there is no right to counsel in non-capital state habeas cases. Claims of ineffective counsel are only permitted in a habeas petition after any direct appeal is exhausted. Since there is no right to counsel in such a proceeding, the indigent defendants must file the appeal pro se; without a legal background, this requirement provides a virtually insurmountable barrier to claims of ineffective assistance of counsel. Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 57, 72.

[91] "Gideon's Broken Promise: America's Continuing Quest for Equal Justice." Chicago, IL: American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2004. 34-36t. Lawsuits involving the inadequacy of indigent defense have been filed in the following eight states: Nevada, Pennsylvania, New York, Massachusetts, Montana, Michigan, Oregon and Louisiana.

fee caps for court-appointed attorneys. In *New York County Lawyers' Association v. State of NY and City of NY*[92] (2003), the New York State Supreme Court found that the failure to adequately compensate court-appointed attorneys violated indigent defendants' constitutional right to effective representation.[93] Although a settlement was eventually reached before the decision was appealed, the case represented an effective effort to circumvent the state legislature through the judiciary, in this case, the New York Supreme Court.

In Massachusetts, a similar effort was also successful in increasing the rates of compensation for court-appointed attorneys. In *Lavallee v. Justices in the Hampden Superior Court* (2004), indigent defendants in Hampden County argued that their constitutional rights to counsel were being violated as many defendants were arraigned and even kept in custody without the representation of appointed counsel.[94] The Supreme Judicial Court sided with the plaintiffs and ordered "the dismissal of charges without prejudice for those facing felony, misdemeanor, or municipal ordinance charges for more than 45 days without the appointment of counsel."[95] Before this decision was rendered, a second lawsuit was filed on behalf of all indigent defendants in Massachusetts: *Arianna S. v. Commonwealth of Massachusetts*.[96] In response to both the pending lawsuit and the Supreme Judiciary Court's findings, the Massachusetts legislature immediately raised the hourly rates by $7.50 and ordered the study of the court-appointed defender system; in 2005, the hourly compensation rates dramatically increased.[97] Although the

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[92] *New York County Lawyers' Association v. State of NY and City of NY*, 763 N.Y.S.2d 397, N.Y. Sup., (2003).
[93] Virginia State Crime Commission. "Indigent Defense Commission." April 20, 2004. 5.
[94] *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).
[95] Desilets, Rebecca A, et al. "Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview." West Newton, MA: The Spangenberg Group, June 2007. 5.
[96] *Arianna S., et al. v. Commonwealth of Massachusetts, et al.*, SJ 2004-0282 (2004).
[97] See Table 4.1

payment increases in Massachusetts and New York ultimately passed through the legislature, the state courts provided catalysts for reform by forcing the legislatures to consider the constitutional requirement of indigent defense.

In both cases, and in many of the unsuccessful claims as well, the lawsuits were filed and supported by private law firms and private advocacy groups. Thus, even though the legislature was circumvented, the primary method of effecting change in our democratic society was not. Those with a voice spoke for those whose voice was not being heard.

VIII. Conclusion

The Supreme Court, the Virginia Bar Association, and even the Virginia General Assembly have recognized the importance of indigent defense. Yet, despite the

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legislature's claims of commitment to defending the indigent, the indigent defense system in Virginia remains deeply flawed. As with any budget item, whether indigent defense receives the financial support it requires depends entirely upon the community's and the legislators' values. With a finite amount of money and an infinite number of ways to spend it, legislators must be judicious about how they allocate funding. As a result, funding for education, children's healthcare, indigent defense, or any number of programs simply reflects legislators' perception—not only of the merits of the program, but also of the influence and corresponding opinions of their constituents. Unfortunately, as Darryl Brown points out in his essay "Rationing Criminal Defense Entitlement," criminal defendants "fit a classic process-theory description of an insular minority unlikely to find favor in legislature."[98] Accordingly, the burden rests upon those who do

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[98] Brown, Darryl K. "Rationing Criminal Defense Entitlement: An Argument from an Institutional Design." Columbia Law Review. Vol. 104, No. 3 (April 2004). 801-835.

find favor in the legislature; it is those least likely ever to need an indigent defender who must display the empathy required to support provisions for improving the indigent defense system.

Yes, we recognize that the system is unfair, but do we care enough to remedy the situation? This is the single question we should ask ourselves. The innumerable questions to the effect of "is it fair that a single mother should have to work two jobs to support her child?" become hopelessly redundant because the answer is almost invariably no. Indeed, negative answers to the former question produce inaction much more frequently than do answers to questions of justification. The need for parity in the judicial system and, moreover, the right of indigent defendants to an adequate defense has been concretely established. Now we must simply practice what we preach and provide support for a system in which we place so much faith and pride—in essence, change our answer.

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Table 1.1

50 STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2005

State	Fiscal Year	State Expenditure	County Expenditure	Total Expenditure	Percent State Expenditure
Alabama	2005	$41,791,344		$41,791,344	100.0%
Alaska	2005	$27,183,800		$27,183,800	100.0%
Arizona	2005	$820,900	$103,169,343*	$103,990,243	0.8%
Arkansas	2005	$15,032,000	$1,440,395	$16,472,395	91.3%
California	2005	$27,460,000	$545,417,808	$572,877,808	4.8%
Colorado	2005	$47,473,830		$47,473,830	100.0%
Connecticut	2005	$35,547,327		$35,547,327	100.0%
Delaware	2005	$10,621,400		$10,621,400	100.0%
District of Columbia	2005			$59,535,000	0.0%
Florida	2005	$232,700,000		$232,700,000	100.0%
Georgia	CY 2005	$37,227,081	$57,000,000	$94,227,081	39.5%
Hawaii	2005	$10,530,386		$10,530,386	100.0%
Idaho	2005	$1,265,800	$9,921,192*	$11,186,992	11.3%
Illinois	2005	$24,342,584	$100,435,199*	$124,777,783	19.5%
Indiana	2005	$17,467,000	$25,000,000	$42,467,000	41.1%
Iowa	2005	$43,194,649		$43,194,649	100.0%
Kansas	2005	$18,114,857	$5,308,134*	$23,422,991	77.3%
Kentucky	2005	$29,970,270	$1,528,140	$31,498,410	95.1%
Louisiana	CY 2005	$4,381,640	$21,561,889	$25,943,529	16.9%
Maine	2005	$10,841,372		$10,841,372	100.0%
Maryland	2005	$70,330,970		$70,330,970	100.0%
Massachusetts	2005	$120,033,457		$120,033,457	100.0%
Michigan	2005	$5,634,400	$73,221,713	$78,856,113	7.1%

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State	Fiscal Year	State Expenditure	County Expenditure	Total Expenditure	Percent State Expenditure
Minnesota	2005	$61,110,000	$4,500,000	$65,610,000	93.1%
Mississippi	2005	$1,456,121	$11,364,919	$12,821,040	11.4%
Missouri	2005	$30,156,416		$30,156,416	100.0%
Montana	2005	$13,786,495		$13,786,495	100.0%
Nebraska	2004/ 2005[i]	$845,781	$22,693,906	$23,539,687	3.6%
Nevada	2005	$726,178*	$26,806,108*	$27,532,286	2.6%
New Hampshire	2005	$15,718,938		$15,718,938	100.0%
New Jersey	2005	$104,552,000		$104,552,000	100.0%
New Mexico	2005	$30,798,000		$30,798,000	100.0%
New York	2005	$157,636,127	$244,843,703	$402,479,830	39.2%
North Carolina	2005	$85,526,000		$85,526,000	100.0%
North Dakota	2005	$2,549,663		$2,549,663	100.0%
Ohio	2005	$41,100,978	$70,357,402	$111,458,380	36.9%
Oklahoma	2005	$17,513,364	$10,926,734*	$28,440,098	61.6%
Oregon	2005	$88,123,000		$88,123,000	100.0%
Pennsylvania	2005		$100,652,582*	$100,652,582	0.0%
Rhode Island	2005	$9,326,000		$9,326,000	100.0%
South Carolina	2005	$9,356,488	$13,283,625	$22,640,113	41.3%
South Dakota	2005	$927,726	$8,073,281	$9,001,007	10.3%
Tennessee	2005	$51,038,008	$4,422,300	$55,460,308	92.0%
Texas	2005	$16,370,412	$128,313,242	$144,683,654	11.3%
Utah	2005		$12,896,632*	$12,896,632	0.0%
Vermont	2005	$9,019,910		$9,019,910	100.0%
Virginia	2005	$90,129,365		$90,129,365	100.0%
Washington	2005	$4,397,900	$80,392,300	$84,727,200	5.2%
West Virginia	2005	$29,565,099		$29,565,099	100.0%
Wisconsin	2005	$68,088,536		$68,088,536	100.0%
Wyoming	2005	$5,233,755	$921,493	$6,155,248	85.0%
State Total	**2005**	**$1,777,017,327**	**$1,684,389,040**	**$3,520,941,367**	**50.5%**
Federal Expenditure: Criminal Justice Act Funding	2005	$668,800,000			
NATIONAL TOTAL	**2005**	**$4,189,741,367**			

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Source: Saubermann, Jennifer M., and Robert Spangenberg. "State and County Expenditures for Indigent Defense Services in Fiscal Year 2005." West Newton, MA: The Spangenberg Group, December 2006. 35-37.

Table 1.2

Percentages of State Plus County Indigent Defense Expenditures in FY 2002 Attributable to Either States or Counties

State	% Attributable to State	% Attributable to Counties
Pennsylvania	0.0%	100.0%
Nevada	2.6%	97.4%
Nebraska	4.8%	95.2%
Washington	5.5%	94.5%
California	6.1%	93.9%
Texas	6.6%	93.4%
Mississippi	11.2%	88.8%
Georgia[44]	17.4%	82.6%
New York	17.9%	82.1%
Louisiana	24.6%	75.4%
Illinois	25.3%	74.7%
South Dakota	32.4%	67.6%
Indiana	45.9%	54.1%
Montana[45]	51.0%	49.0%
Alabama	100.0%	0.0%
Maryland	100.0%	0.0%
Massachusetts	100.0%	0.0%
New Mexico	100.0%	0.0%
Oregon	100.0%	0.0%
Rhode Island	100.0%	0.0%
Virginia	100.0%	0.0%
Michigan	N/A	N/A

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Source: "Gideon's Broken Promise: America's Continuing Quest for Equal Justice." Chicago, IL: American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2004. 8.

Appendix 2.1

ABA Ten Principles of a Public Defense Delivery System

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

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Table 3.1

Court Appointed Attorney Fees in Virginia

Court	Type of Charge/Case	Statutory Amount[102]	Actual Amount Paid	Hourly Amount Recommended by the Supreme Court of Virginia
Supreme Court	Appeals	Set by Court, not less than $300	Varies	N/A
Court of Appeals	Appeals	Set by Court; not less than $300	Varies, usually $400	N/A
Circuit Court	Misdemeanor appeal (de novo)	$158	$148	Not to exceed $90 an hour for in and out-of-court work
	Carries up to 20 years[103]	$445	$395	Not to exceed $90 an hour for in and out-of-court work
	Carries more than 20 years	$1,235	$1,096	Not to exceed $90 an hour for in and out-of-court work
	Capital Cases	Reasonable fees- No Cap Set	Reasonable fees- No Cap Set	Up to $125 an hour for in and out-of-court work
General District Court	Adult Misdemeanors, Preliminary Hearings	$120	$112	Not to exceed $90 an hour for in and out-of-court work
Juvenile and Domestic Relations Court	Delinquency	$120	$112	Not to exceed $90 an hour for in and out-of-court work
	Guardian Ad Litem	No Cap	No Cap	$55 for out-of-court, $75 for in-court services
	Counsel for parent[104]	$120	$112	Not to exceed $90 an hour for in and out-of-court work

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Source: Spangenberg, Robert, et al. "A Comprehensive Review of Indigent Defense in Virginia" West Newton, MA: The Spangenberg Group, January 2004. 46.

Table 4.1

Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies (2007)

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Alabama[1]	$40	$60	Felony with possible sentence of life without parole: No maximum Class A Felony: $3,500 Class B Felony: $2,500 Class C Felony: $1,500	Yes		Code of Alabama § 15-12-21
Alaska	$50	$60	Felony disposed following a trial - $4,000; Felony disposed of following a plea of guilty or nolo contendere, or by dismissal - $2,000	Yes		2 AAC 60.010 Alaska Administrative Code
Arizona	Varies		Varies	Yes	Varies	AZ Rev. Stat. Ann. § 13-4013(a) grants authority to local court
Arkansas	Non-capital homicide, Classes A and Y felonies: $70-$90; All other felonies: $60-$80.		None			Arkansas Code Ann. § 16-87-211 authorizes the Public Defender Commission to set the rates
California	Varies Los Angeles: ranges from $68-$91, depending on type of felony. Sacramento: ranges from $70-$90, depending on type of felony.				Varies	California Penal Code § 987.2 grants authority to local court
Colorado	Type A (violent): $60 Type B (non-violent): $56		Felony 1 (trial/no trial): $15,000/$7,500 Felony 2 (trial/no trial): $7,500/$3,500 Felonies 3-6 (trial/no trial): $5,000/$2,500	Yes		Rates set by Chief Justice Directive 04-04, per Colo. Rev. Stat. § 21-2-105.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Connecticut	$65		None		Varies	Appointed counsel rates are set by the State PD in accordance with C.G.S. § 51-291(12).
Delaware	$60[2]		$15,000[3]	Yes	Yes	Del. Code Ann. 29 § 4605 grants authority to Supreme Court.
D.C.	$65		$3,600[4]	Yes		D.C. Code Ann. § 11-2604(a)
Florida	N/A		Non-capital, non-life felonies: $2,500; Life felonies: $3,000	Yes	Yes	Fla. Stat. § 27.5304 sets maximums and states that flat fee amounts "shall be established annually in the General Appropriations Act."
Georgia	$45	$60	None			OCGA § 17-12-8(b)(9) grants authority to the Georgia Public Defender Standards Council.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Hawaii	$90		$6,000	Yes		H.R.S. § 802-5(b)
Idaho	Varies Ada County (Boise): $40	 $50				Idaho Code § 19-860(b) grants authority to local judge.
Illinois[5]	Varies					725 IL.C.S. 5/113-3.
Indiana	Varies[6]					Ind. Code § 33-40-8-2 grants authority to local judge; Ind. Code § 33-40-5-4 authorizes Commission to set standard rates.
Iowa	Class A felonies: $65 All other felonies: $60		Felony punishable by life w/out parole (Class A): $18,000 Felony punishable by 25 years to life (Class B): $3,600 All other felonies (Classes C and D): $1,200	Yes		Iowa Code § 815.7; State Public Defender sets per case maximum in 493 I.A.C. 12.6 (1)

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Kansas	$80		Non-trial: Non-drug offenses levels 6-10/ Drug offense under 6 hours in court: $1,200 Non-drug offenses levels 1-5/ Drug offense over 6 hours in court: $1,600 Trial: Non-drug offenses levels 5-10: $2,400 Non-drug offenses level 4/ Drug offenses levels 2-4: $3,200 Non-drug offenses levels 1-3/ Drug offenses level 1: $8,000	Yes		K.S.A. 22-4501 et. seq. grants authority to Kansas Board of Indigents' Defense Services.
Kentucky	Non-violent felonies: $40 Violent felonies: $50		Non-violent felonies (no trial): $600 Non-violent felonies (trial): $900 Violent felonies (no trial): $1,200 Violent felonies (trial): $1,500	Yes	Varies	K.R.S. Ann. § 31.235 grants authority to the Department of Public Advocacy.
Louisiana	Varies					Louisiana Revised Statutes § 15-144 et. seq.
Maine	$50		Murder: As determined by trial judge. Class A: $2,500 Class B/C against a person: $1,875 Class B/C against property: $1,250	Yes		Supreme Judicial Court Admin. Order JB 05-5.
Maryland	$50		$3,000	Yes		Ann. Code of Maryland Art. 27 § 6(d) grants Public Defender authority to promulgate administrative law.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Massachusetts	Homicide cases: $100; Superior Court non-homicide felonies and youthful offender cases: $60; All other felony cases in district court: $50.		None			Mass. General Laws Ann. Ch. 211D § 11.
Michigan	Varies Range is from $40-$89		Varies			Michigan Complied Laws Ann. § 775.16 grants authority to presiding judge.
Minnesota[7]	$50		None			No official authority; PD establishes rates.
Mississippi	Varies Range is from $45-$65		$1,000 plus overhead expenses, which are presumptively set at $25 an hour.	No		Miss. Code Ann. § 99-15-170 *Wilson v. State*, 574 So. 2d 1338 (1990).
Missouri	Rarely Used $50		None		Yes	Missouri Rev. Stat. § 600.017 allows PD Commission to approve fee schedule.
Montana	$60		None			Administrative Rules of Montana Title 2.69.601 authorizes PD Commission to establish rates.
Nebraska	Varies. Range is from $60-$80. Douglas County (Omaha): $65 $80 Lancaster County (Lincoln): $75		Varies	Yes		Nebraska Revised Statutes § 29-3905 grants authority to local judge.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Nevada	$100		$20,000 facing life without the possibility of parole; $2,500 if facing less than life without parole.	Yes		N.R.S. 7.125
New Hampshire	$60		Homicide felonies: $15,000 All other felonies: $3,000	Yes		N.H. Constitution Part II, Art. 73A grants authority to the State Supreme Court; New Hampshire Supreme Court Rule 47.
New Jersey	$50	$60	None			N.J.S.A. § 2A: 158A-7 grants authority to the New Jersey Public Defender.
New Mexico	N/A		Varies		Yes	New Mexico Statutes Ann. § 31-15-7(11) authorizes Chief Public Defender to formulate a fee schedule.
New York	$75		$4,400	Yes		Article 18-B of the County Law § 722-b.
North Carolina	$65		None			General Statutes of North Carolina § 7A-498.5 grants authority to the Office of Indigent Defense Services.
North Dakota	$65		$2,000	Yes		North Dakota Century Code § 54-61-02(a)(1) grants authority to the Commission on Legal Counsel for Indigents.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Ohio	Varies. Public Defender Standards recommend: $50	$60	Public Defender Commission recommends: Aggravated Murder: $8,000 (1 attorney), $10,000 (2 attorneys); Murder and Felony w/ possibility of life sentence/repeat Violent Offender/Major Drug Offender: $5,000; Felonies (degrees 1-3): $3,000; Felonies (degrees 4&5): $2,500.	Yes		Ohio Revised Code Ann. § 120.33 grants local board of county commissioners authority to set rate; Ohio Revised Code Ann. § 120.04 authorizes public defender to recommend rates and set maximum.
Oklahoma[8]	$40	$60	$3,500	Yes		22 Oklahoma Statutes § 1355.4 grants authority to the Executive Director of the Oklahoma Indigent Defense System.
Oregon[9]	$40		None			O.R.S. § 151.216(f)(C) grants authority to the Public Defense Services Commission.
Pennsylvania	Varies Philadelphia County pays on a per diem basis.		Varies		Varies	Pennsylvania Statutes Ann. Article 16 § 9960.7 grants authority to local judge.
Rhode Island	Murder cases: $100; if potential sentence is greater than 10 years: $90; if potential sentence is less than 10 years: $60.		Murder cases: $15,000; if potential sentence is more than 10 years: $10,000; if potential sentence is less than 10 years: $5,000.	Yes		General Laws of the State of RI § 8-15-2 vests authority w/ Chief Justice. Supreme Court Executive Order No. 95-01.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
South Carolina	$40	$60	$3,500	Yes		Code of Law of S.C. Ann. § 17-3-50.
South Dakota	$78		None			S.D.C.L. § 23A-40-8.[10]
Tennessee	$40	$50	Preliminary hearings in general sessions or municipal court: $1,000; Trial court: $1,500	Up to $3,000[11]		Supreme Court Rule 13 § 2
Texas	Varies Bexar County (San Antonio): Ranges from $50-$75 out of court and $75-$125 in court. Dallas County: Ranges from $75-$100 El Paso County: $50 $65		Varies		Varies	Texas Code of Criminal Procedure Art. 26.05 grants authority to local judge.
Utah	Varies				Varies	Utah Code Ann. § 77-32-304.5 grants authority to county legislative body or district court.
Vermont[12]	$50		Felony involving life in prison; $25,000 Major felony: $5,000 Minor felony: $2,000	Yes		13 V.S.A. § 5205(a) grants authority to the Vermont Supreme Court.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Virginia	$90		$1,235 to defend charges punishable for more than 20 years; $445 to defend other felony charges.	Up to an additional $850 to defend charges punishable for more than 20 years; up to an additional $155 for all other felony charges.[13]		Code of Virginia § 19.2-163 grants authority to the Virginia Supreme Court and sets the per case maximums.
Washington	Varies King County: $50 Pierce County: $50-$62 Spokane County: (serious felonies) $50-$60 Skagit County: $65-$75		Varies Pierce County: Class A Felonies: $1,100 (no trial) $5,500 (trial) Classes B/C Felonies: $700 (no trial) $2,000 (trial)		Varies	RCW § 36.26.090 grants authority to court; RCW § 10.101.030 requires counties to adopt standards including rates of compensation.
West Virginia	$45	$65	No maximum for felonies punishable by life imprisonment without parole. All others: $3,000[14]	Yes		West Virginia Code Ann. § 29-21-13a(d).
Wisconsin	$40 plus $25 per hour for travel	$40	None			Wisconsin Statutes Ann. § 977.08(4m).
Wyoming	Varies: Up to $60, no less than $35	Varies: Up to $100	None			Wyoming Rules of Criminal Procedure Rule 44(e) sets range; Wyoming Code § 7-6-109 grants authority to court.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
U.S. Government	$92		$7,000	Yes		18 U.S.C. § 3006A

Source: Desilets, Rebecca A, et al. "Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview." West Newton, MA: The Spangenberg Group, June 2007. 7.

Table 6.1

FY 2007: Annual Report: Cases By Office

OFFICE	TOTAL CASES	CAPITAL	FELONY	MISD	APPEAL	TOTAL ADULT CASES	JUV FEL	JUV MISD	JUV APPEAL	TOTAL JUV CASES	ACTUAL ATTNYS	CASES/ ATTY
Alexandria	3231	0	1145	1923	16	3084	46	89	12	147	10.0	324.4
Arlington	1572	0	449	914	1	1364	49	159	0	208	9.2	171.2
Bedford	891	0	353	538	0	891	0	0	0	0	2.8	324.0
Charlottesville	1774	0	801	855	22	1678	32	64	0	96	6.8	261.7
Chesapeake	3356	1	1424	1324	113	2861	184	310	0	495	11.6	288.6
Danville	1720	0	760	788	20	1568	18	134	0	152	4.0	434.3
Fairfax	4276	0	1868	1777	15	3660	304	312	0	616	21.2	201.9
Franklin	1551	0	682	769	19	1470	43	38	0	81	5.9	264.2
Fredericksburg	7110	0	2516	3875	56	6447	140	522	1	663	13.2	540.7
Halifax	2173	0	759	1210	10	1979	28	166	0	194	5.1	422.8
Hampton	3612	0	1762	1296	2	3060	173	379	0	552	12.5	289.9
Leesburg	4688	0	1543	2512	38	4093	129	462	4	595	12.8	365.1
Lynchburg	3034	0	912	1951	1	2864	59	111	0	170	6.8	444.9
Martinsville	1575	0	478	928	8	1414	52	109	0	161	5.2	304.1
Newport News	4874	0	1487	2659	55	4201	242	431	0	673	17.5	278.8
Norfolk	6885	1	2901	3223	147	6271	208	403	2	614	21.1	326.3
Petersburg	2209	0	921	1036	52	2009	81	119	0	200	6.1	360.4
Portsmouth	4342	0	1610	2106	209	3925	125	291	1	417	14.5	299.9
Pulaski	1979	0	899	1059	2	1960	3	16	0	19	4.9	404.7
Richmond	10205	0	4429	5034	23	9486	288	431	0	719	25.4	401.8
Roanoke	4312	0	2035	1862	34	3931	154	226	1	381	8.9	486.7
Staunton	3881	0	1425	2009	4	3438	78	365	0	443	7.1	549.7
Suffolk	1417	0	723	486	36	1245	70	102	0	172	5.6	252.1
VA Beach	10395	0	3273	5268	445	8986	316	1074	19	1409	21.3	488.7
Winchester	3263	0	1121	1882	14	3017	57	187	2	246	8.3	395.5
Public Defender	94325	2	36276	47284	1342	84902	2879	6500	42	9423	267.4	352.7
Capital Defender	16	16				16						
Central	3	3				3						
Northern	5	5				5						
Southeastern	4	4				4						
Southwestern	4	4				4						
Appellate	1	0	0	0	1	1		Note: Assumed 129 Appeal Cases From PD Offices				
COMMISSION	94342	18	36276	47284	1343	84919	2879	6500	42	9423		

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Source: Virginia Indigent Defense Commission. "Annual Report 2007." August 20, 2007. 20.