Executive Summary

THE COMMISSION AND ITS WORK

The Georgia Supreme Court issued an order on December 27, 2000 establishing the Chief Justice's Commission on Indigent Defense, directing the group to "study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation." The Commission, reflecting a broad range of backgrounds and experiences, spent two years completing its tasks. During that time, the Commission conducted 17 public sessions at which it heard from 65 individuals who provided information and suggestions for improvement of Georgia's indigent defense system. These individuals included representatives from all parts of the criminal justice in Georgia, participants in indigent defense reform projects in other states and representatives of the civil rights community. In addition to hearing evidence from these individuals, the Commission conducted site visits to two of Georgia's judicial districts to observe court proceedings. The final component of data collection took the form of a study by The Spangenberg Group, a nationally and internationally recognized criminal justice research firm which has conducted empirical research in criminal justice systems in each of the fifty states over the last 15 years. After four months of site work in 19 carefully selected Georgia counties (representing each of the state's 10 judicial districts, each of the various indigent defense delivery systems and approximately 45% of the state's population), the Spangenberg Group produced a 100-page report which included specific findings concerning the operation of indigent defense in Georgia. The Spangenberg Report appears as Appendix A to this Report.

CONSTITUTIONAL RIGHT TO COUNSEL

Beginning in 1963 in its landmark decision in *Gideon v. Wainwright*, the Supreme Court of the United States has made it clear that the Sixth Amendment to the United States Constitution's right to counsel requires appointment of counsel to those who cannot afford to hire an attorney. Over the next 39 years, most recently in its decision in *Alabama v. Shelton* in May of this year, the Court has expanded this Sixth Amendment right to include: representation at many pretrial proceedings, representation in an appeal as of right and availability of expert witnesses in certain circumstances. In addition to the Sixth Amendment right to counsel, the Georgia Constitution provides that "[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of

counsel."

HISTORY OF INDIGENT DEFENSE IN GEORGIA

Beginning with the Georgia Criminal Justice Act in 1968 which directed each of the state's 159 counties to establish local indigent defense programs, the State has attempted to respond to these constitutional mandates by providing counsel to indigent criminal defendants. In the Georgia Indigent Defense Act of 1979, the General Assembly created the Georgia Indigent Defense Counsel as a separate agency within the judicial branch. The GIDC was set up to administer taxpayer funds to support local indigent defense programs and recommend to the Georgia Supreme Court guidelines to govern the operation of such programs. The current Supreme Court guidelines appear as Appendix C to this Report. Since 1965, the State Bar has been involved in attempting to improve the quality of indigent defense services in Georgia. Additionally, in recent years both state and federal litigation asserting that the Georgia indigent defense system is inadequate and unconstitutional has been brought.

Georgia's current system of indigent defense is funded overwhelmingly by the county governments. The Spangenberg Report, in outlining the funding sources for indigent defense, asserts that approximately 11.6% of the total cost of indigent defense is underwritten by the State of Georgia, with the rest being spent by the individual counties. The tripartite committees, representing in each county the county governing body, the superior court and the local bar association, are charged by state law with the responsibility for operating the indigent defense program. Currently, three different types of delivery systems are utilized in Georgia's indigent defense systems. The most heavily utilized format is the panel system, which is used by 73 counties (of the 152 receiving state funds from the GIDC) as the primary mechanism for provision of legal services. Under this system, an attorney is appointed from a panel of attorneys. The second most common system for provision of legal services is the contract system, which is used in 59 counties as the primary system. Under this system, the attorney is hired on a flat-fee basis to represent all indigent criminal defendants or all indigents in a particular category, such as felony, juvenile, etc. Finally, 20 counties receiving GIDC funds utilize a public defender system as the primary source of indigent defense. Under this system, the public defender (and a staff of assistants in larger counties) is a full-time government employee who devotes all of his or her time to serving as an attorney for indigent criminal defendants.

THE COMMISSION'S FINDINGS

Based on the Commission's numerous public hearings, a review of the extensive documentation provided by witnesses and others and a careful review of the Spangenberg Report, the Commission has concluded that the right to counsel guaranteed by the state and federal constitutions is not being provided for all of Georgia's citizens. This failure is attributable to:

THE STATE OF GEORGIA IS NOT PROVIDING ADEQUATE FUNDING TO FULFILL THE CONSTITUTIONAL MANDATE THAT ALL CITIZENS HAVE EFFECTIVE ASSISTANCE OF COUNSEL AVAILABLE WHEN CHARGED WITH A CRIME

- The constitutional obligation to provide adequate legal services for indigents charged with violating state criminal law is imposed on the State of Georgia and this duty should be funded adequately by the State.

- There is not enough money currently allocated within Georgia to the provision of constitutionally-mandated indigent criminal defense.

- While precise estimates are not available at this time, the United States Supreme Court's decision in *Alabama v. Shelton* has the potential for greatly expanding the burden on the already-inadequate Georgia system for the provision of indigent criminal defense.

THE STATE OF GEORGIA LACKS A STATEWIDE SYSTEM OF ACCOUNTABILITY AND OVERSIGHT TO PROVIDE CONSTITUTIONALLY ADEQUATE ASSISTANCE OF COUNSEL FOR INDIGENT DEFENDANTS

- Georgia's current fragmented system of county-operated and largely county-financed indigent defense services is failing the state's mandate under the federal and state constitutions to protect the right of indigents accused of violation of the state criminal code.

- There is no effective state-wide structure in placed designed to monitor and enforce compliance with existing Georgia Supreme

Court rules governing the operation of local indigent defense programs.

- The criminal defense function must be independent. In order to fully establish the appropriate independence, defense counsel must have responsibility for case by case administration, without depriving judges of their inherent right and obligation to insure that courtroom proceedings comply with the mandates imposed by fundamental law, statutes and the rules of professional responsibility. Similarly, independence from the executive function at the local level requires funding of indigent defense services at the state level.

- A public defender system is the delivery system most likely to afford effective representation to those entitled to it under legal and constitutional mandates.

- The quality of legal services provided to indigent defendants is significantly hampered by a failure of most systems to impose minimum eligibility requirements for the attorneys who represent indigent defendants.

- Funding for services such as expert witnesses, investigators and qualified interpreters is integral to a constitutionally acceptable level of indigent criminal defense. In many areas of the state inadequate funding for such services results in unfair and often unconstitutional treatment of indigent criminal defendants.

- Georgia lacks an effective approach to identifying and assisting indigent defendants with mental disabilities.

- Georgia lacks an effective approach to providing counsel for juvenile defendants.

- There is no comprehensive system of data collection designed to provide accurate statistics regarding the provision of indigent criminal defense services in Georgia.

- Litigation designed to bring indigent criminal defense in various county systems into compliance with appropriate constitutional and legal standards has already been brought and, in some cases, yielded piecemeal reform by consent decree. Further litigation is being contemplated and likely will occur. Thorough, carefully considered reform of the Georgia system by the appropriate legislative and executive policy makers is far preferable to reform by litigation in the state and federal courts.

THE COMMISSION'S RECOMMENDATIONS

In light of its findings, the Commission recommends the following steps be taken as quickly as is feasible:

- Adequate funding of indigent criminal defense in cases alleging a violation of state law should be provided by appropriations by the Georgia General Assembly.

- The delivery of indigent defense services should be reorganized to insure accountability, uniformity of quality, enforceability of standards and constitutionally adequate representation. Such a system would: 1) deliver indigent legal services at the circuit level, rather than the county level; 2) presumptively deliver services through a full-time public defender with appropriate support staff; 3) be operated by a statewide board charged with the responsibility and power to operate the entire system. This board should be given: the power to hire and fire circuit public defenders, the power to define the guidelines under which public defender, panel and contract systems will operate and the responsibility to provide

meaningful review of the operation of local systems and the responsibility to conduct training programs for attorneys involved in indigent defense.

- The State should adopt principles to govern the system of providing legal services to indigent criminal defendants.

- The State should adopt performance standards by which attorneys providing indigent defense should be evaluated.

- The State should develop a systematic, uniform, and effective approach for identifying and assisting indigent defendants with mental disabilities.

- The State should develop a uniform, effective approach to providing counsel for juvenile defendants, including establishing uniform procedures for determining indigency.

- A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal defense services in Georgia should be established and implemented.

- Because of the significant extra funding and structural reform required to operate a constitutionally-sufficient indigent system a transition plan must be created to expeditiously create a new system to remedy current inadequacies.

CONCLUSION

After lengthy consideration of the operation of indigent defense in this state, the Commission has determined that significant improvement is necessary to insure that our state has a constitutionally-sufficient, fair criminal justice system. Significantly more money must be devoted to providing a defense to those without adequate resources to provide it for

themselves. The Commission also concludes that an infusion of additional money, while absolutely necessary, is not sufficient to complete the awaiting task. In addition to more resources, a system which insures quality, uniformity and accountability must be created by the State

I. The Chief Justice's Commission on Indigent Defense

A. The Charge to the Commission

On December 27, 2000, the Georgia Supreme Court issued an order establishing the Chief Justice's Commission on Indigent Defense. Stating that it was "mindful of the need for competent and cost-efficient representation for indigents in this state," the court directed the Commission to "study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation." It named Charles R. Morgan, Executive Vice President and General Counsel of BellSouth Corporation, as Chair and Paul Kurtz of the University of Georgia School of Law as Reporter. The membership of the Commission[1] reflected a broad range of backgrounds and experiences. Included were state and federal judges, attorneys from private practice, state legislators, attorneys active in the provision of indigent criminal defense, the director of the Georgia Legal Services which provides legal services to indigents in non-criminal matters, a representative of the County Commissioners of Georgia, the Chair of the State Bar Indigent Defense Committee and lay persons.[2] Three Atlanta law firms: 1) McKenna Long

[1] Since the original creation of the Commission and appointment of the Commissioners in 2000, several changes in membership occurred. The textual description refers to the current membership of the Commission, which includes: A. Harris Adams (Chief Judge, State Court of Cobb County); Stanley F. Birch, Jr. (U.S. 11th Circuit Court of Appeals); Robert Brown (Georgia State Senate); Charles C. Clay (Senator-Elect, Georgia State Senate); Terry Coleman (Georgia House of Representatives); Flora Devine (Immediate Past Chair, Georgia Indigent Defense Council); C. Wilson DuBose (Attorney, Winkler DuBose & Davis and Chair, Georgia State Bar Indigent Defense Committee); C. Andrew Fuller (Judge, Superior Court, Northeastern Judicial Circuit); Jerry R. Griffin (Executive Director, Association County Commissioners of Georgia); Allen Hammontree (Georgia House of Representatives); Phyllis J. Holmen (Executive Director, Georgia Legal Services Program); Paul Holmes (Georgia Chamber of Commerce); Howard O. Hunter (Interim Provost, Emory University); R. William Ide (Past President, American Bar Association); Curtis Jenkins (Georgia House of Representatives); Robert E. Keller (District Attorney, Clayton County); George O. Lawson, Jr. (Attorney, Lawson & Thornton); Charles Lester (Past President, Georgia State Bar); Michael Meyer von Bremen (Georgia State Senate); Aasia Mustakeem (Attorney, Powell, Goldstein, Frazer & Murphy); William M. Ray, II (Judge, Superior Court, Gwinnett Circuit); Miller Pete Robinson (Attorney, Page, Scrantom, Sprouse, Tucker & Ford); Lawton Stephens (Judge, Superior Court, Western Judicial Circuit); A. Blenn Taylor (Judge, Superior Court, Brunswick Judicial Circuit).

[2] The Commission has been assisted a great deal by the excellent work of Ms. S. Kendall Butterworth of BellSouth Corporation, who has served as Special Assistant to the Chair of the Commission. Ms. Butterworth has attended every session of the Commission, developed, organized and coordinated the agenda for Commission meetings (including arranging for speakers) prepared presentation materials for the Chair and the Reporter on the Commission's activities and served as liaison to the Administrative Office of the Courts. Likewise, Ms. Emily N. Ward, who served as Staff Assistant to the Commission, and Ms. Julie E. Cook, both of

& Aldridge; 2) Powell, Goldstein, Frazer & Murphy and 3) Sutherland, Asbill & Brennan were gracious in providing meeting facilities for the Commission during times when the Supreme Court facilities were not available to the Commission.

B. The Work of the Commission

The Commission held its organizational meeting on January 29, 2001 and heard testimony at seventeen public sessions. At these sessions, a total of 65 individuals provided information, both in the form of prepared statements and responses to questions, to the Commission. These individuals included criminal defense attorneys both from within and outside Georgia, prosecuting attorneys from Georgia and the Executive Director of the Prosecuting Attorneys' Council of Georgia, representatives (both staff and board members) of the Georgia Indigent Defense Council, trial court judges from Georgia (including the President of the Council of Superior Court Judges), representatives of the Georgia Council of Juvenile Court Judges, sheriffs, representatives of the State Bar of Georgia (including the current president and a number of past presidents), participants in indigent defense reform efforts in Kentucky, Michigan, Tennessee, Indiana, North Carolina and Texas, members of the civil rights community, defendants and their families, and experts in indigent defense.

In addition to hearing evidence from these witnesses, Commission members have visited two of Georgia's ten judicial districts to conduct courtroom observations. On July 26, 2001, a group of Commission members observed proceedings in Judge Walter Matthews' courtroom in Floyd County Superior Court and met with Judge Matthews, the indigent defense administrator, the district attorney and two indigent defense attorneys afterwards for lunch. On October 18, 2001, another group of Commissioners visited Hall County Superior Court and observed proceedings in Judge Andrew Fuller's courtroom. The Commissioners also met with the Hall County Superior Court Judges, district attorneys, the Hall County indigent defense administrator and some indigent defense attorneys after the courtroom observations.

BellSouth Corporation have been extremely valuable in assisting the Commission in the completion of its tasks. Grateful appreciation is also offered by the Commission members to the staff of the Administrative Office of the Courts of Georgia, especially Ms. Cynthia Hinrichs Clanton and Ms. Bonnie Tinker, along with Billie Bolton, Patricia Smith, Jay Martin, Philippa Maister and Michael Kendrick. The Commission is also deeply appreciative of the continued interest by the Georgia Supreme Court. Several justices of the court attended meetings of the Commissi on and encouraged it in its work.

The Commission, and especially the Reporter, would like to acknowledge and thank Mr. Roger G. Gustafson, judicial clerk to the Honorable Stanley F. Birch, of the United States Court of Appeals for the Eleventh Circuit, a member of the Commission. Mr. Gustafson's excellent research and drafting played a significant role in the portion of this Report dealing with the history of indigent defense jurisprudence in the federal courts.

In addition to its own efforts, the Commission requested the Supreme Court, through the Administrative Office of the Courts, to retain The Spangenberg Group ("The Spangenberg Group") to conduct a statewide study of Georgia's indigent defense systems. The Spangenberg Group is a nationally and internationally recognized criminal justice research and consulting firm that specializes in research concerning indigent defense services. For over 15 years, it has been under contract with the American Bar Association's Bar Information Program (ABA-BIP), which provides support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. It has conducted empirical research in each of the 50 states and compiled comprehensive statewide studies of the indigent defense systems in more than half the states. Prior to undertaking this work for the Commission, the Spangenberg Group had compiled studies of the Fulton County indigent defense system, the Fulton County Conflict Defender and a review of the University of Georgia's Legal Aid & Defender Clinic which serves as the Public Defender in the Western Judicial Circuit.

The Spangenberg Group's report (which is attached to this Report as **Appendix A**) is based on two major components: data collection/analysis and on-site assessment. For the data collection and analysis, The Spangenberg Group collected information on cost, caseload and system type for each of Georgia's 159 counties. The Spangenberg Group conducted site work from January 2002 through April 2002, which involved visits to 19 counties that were selected based upon factors such as judicial district, geography, population and diversity of type of delivery system (contract, appointed counsel or public defender). The Spangenberg Group spoke with defense attorneys, judges, district attorneys, sheriffs, probation officers, tripartite committee members and county commissioners to obtain insight into the county's current system and opinions on how the current system might be improved. In addition to these interviews, The Spangenberg Group observed criminal court sessions in most of the counties in the study. The selected 19 counties represented each of Georgia's 10 judicial districts and roughly 45% of Georgia's population. The Spangenberg Group has been engaged and will perform additional site visits to magistrate, municipal, state and probate courts in the original 19 counties in order to assess the impact of the May, 2002 United States Supreme Court decision in *Alabama v. Shelton,* 122 S. Ct. 1764 (2002) (holding the Sixth Amendment of the United States Constitution forbids imposition of a suspended sentence of imprisonment upon an indigent defendant who has neither received a court-appointed lawyer nor waived the right to counsel).[3] A supplemental report will be submitted by The Spangenberg Group on its findings concerning the impact of *Shelton.* The Commission intends to make its recommendations concerning the implications of the *Shelton* decision for Georgia's indigent defense systems after the receipt of that report.

[3] The *Shelton* decision appears as **Appendix B** to this Report.

II. Indigent Defense in Georgia

A. United States Supreme Court Jurisprudence on Right to Counsel for Indigents

The United States Constitution's Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." As the Supreme Court has recognized, "the right to be represented by counsel is among the most fundamental of rights . . . [because] it is through counsel that all other rights of the accused are protected."[4] Beginning with its seminal decision in *Powell v. Alabama*[5] holding that due process requires state courts to appoint counsel for indigent criminal defendants in certain capital cases, the Court has addressed an indigent defendant's right to appointed counsel not only during criminal trials, but also at critical stages of pretrial proceedings, on appeal and in non-criminal proceedings resulting in a loss of individual liberty. In addition, the Court has addressed the obligation to provide other court-appointed experts to assist a criminal defendant. While apparently no federal court has decided the question, allocation of financial responsibility of indigent defense between state and local governments has been addressed by some state courts.

1. Right to Appointed Counsel During Criminal Trial

In *Gideon v. Wainwright*,[6] the Court extended the Sixth Amendment right to counsel, already established in federal court proceedings in *Johnson v. Zerbst*,[7] to state criminal prosecutions through the Fourteenth Amendment.[8] In the Court's view, "that lawyers in criminal courts are necessities, not luxuries" promotes an "obvious truth" that "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."[9]

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[4] *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

[5] 287 U.S. 45 (1932).

[6] 372 U.S. 335 (1963). It should be noted that Eugene Cook, then Attorney General of the State of Georgia, joined the Attorneys General of 21 other states in filing *amicus curiae* briefs supporting Clarence Gideon's claim of a constitutional violation. *See* MEARS, A BRIEF HISTORY OF THE GEORGIA INDIGENT DEFENSE COUNCIL 2 (2nd ed. 1998) (hereinafter MEARS).

[7] 304 U.S. 458 (1938).

[8] *Id.* at 344-45.

[9] *Gideon*, 372 U.S. at 344.

> The right ... to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. . . . "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[10]

In *Argersinger v. Hamlin*,[11] the Court clarified *Gideon* and announced that the right to counsel extends "to any criminal trial, where an accused is deprived of his liberty."[12] Rejecting "the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer,"[13] and doubting that the "legal and constitutional questions involved" in the criminal prosecution of a petty crime are necessarily less complex than those of a non-petty crime,[14] the Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[15]

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[10] *Id*. at 344-45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

[11] 407 U.S. 25 (1972).

[12] *Id.* at 32.

[13] *Id.* at 30-31.

[14] *Id.* at 33.

[15] *Id.* at 37. Later, the Court refused to extend its rulings to provide Sixth Amendment right to counsel where the punishment was a fine, rather than imprisonment. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court wrote:

> [T]he central premise of Argersinger–that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment–is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. . . . We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only

In *Alabama v. Shelton*[16], the Court dealt with the question of whether the Sixth Amendment was violated by the imposition of a suspended sentence upon a misdemeanant who neither had counsel nor waived his right to representation.[17] Applying "the key Sixth Amendment inquiry [] whether the adjudication of guilt . . . is sufficiently reliable to permit incarceration,"[18] the Court held "that a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."[19] In doing so, Justice Ginsburg's opinion for a five-member majority rejected the argument advanced by invited *amicus* that provision of counsel at the probation revocation hearing which might immediately result in imprisonment was sufficient under the Constitution.[20] The majority also rejected the dissent's argument that, because the Court in *Scott* drew "a bright line between imprisonment and the mere threat of imprisonment,"[21] imposition of a suspended sentence without counsel at trial, standing alone, is permissible, particularly where states can impose safeguards in later proceedings that activate the sentence.[22]

> that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

440 U.S. at 373-74.

[16] 122 S. Ct. 1764 (2002).

[17] *Id.* at 1767. In *Shelton*, the defendant was placed on probation which was revocable upon violation of its terms. Probation revocation would trigger incarceration under the suspended sentence.

[18] *Id*. at 1772.

[19] *Id.* at 1767 (citations omitted). The Court also justified its holding on the grounds that "[m]ost jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution," *id*. at 1773, and that pretrial probation is a viable alternative to the imposition of uncounseled suspended sentences in misdemeanor cases. *Id.* at 1774.

[20] *Id.* at 1770-71. The Court noted that a probation revocation hearing differs from activating a suspended sentence previously imposed in that the "sole issue at the" former "is whether the defendant breached the terms of probation. . . . The validity or reliability of the underlying conviction is beyond attack." *Id*. at 1772. "Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense." *Id.* at 1770.

[21] *Id.* at 1776 (J. Scalia, dissenting).

[22] *Id.* at 1772-73.

As to the right to appointed counsel at trial generally, although the Sixth Amendment does not guarantee a "'meaningful relationship' between an accused and his counsel,"[23] it does ensure the right to the effective assistance of counsel.[24] Moreover, where the right to counsel is a "constitutional requisite, the right to be furnished counsel does not depend on a request" by the defendant.[25] Instead, to avoid a constitutional violation, the state must prove "'an intentional relinquishment or abandonment of a known right or privilege'"[26] by the defendant and courts must "indulge in every reasonable presumption against waiver."[27]

2. Right to Appointed Counsel at Pretrial Proceedings

Although "[t]here was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required, . . . appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected"[28] and substantially prejudiced.[29] Thus, an indigent criminal defendant

> [N]eed not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where . . . the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial.[30]

In a landmark decision, Justice Sutherland explained the necessity of an attorney at certain critical stages before trial:

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[23] *Morris v. Slappy*, 461 U.S. 1, 14, (1983) (citation omitted).

[24] *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970).

[25] *Michigan v. Jackson*, 475 U.S. 625, 633 n. 6 (1986).

[26] *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[27] *Id.* at 404.

[28] *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

[29] *United States v. Wade*, 388 U.S. 218, 227 (1967).

[30] *Id.* at 226-27; *see also Brewer v. Williams*, 430 U.S. 387, 398; *but see Coleman v. Alabama*, 399 U.S. 1, 23 (1970) (J. Black, concurring) (objecting to Court's apparent focus on "a right to a 'fair trial' as conceived by judges" instead of the Sixth Amendment's right to counsel provisions).

> [D]uring perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[31]

Drawing a bright line among pretrial proceedings, however, proved to be a more difficult and contentious task. In a plurality opinion almost 40 years after *Powell*, the Court, after examining a series of cases in the area, concluded that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against" the defendant and that "all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings–whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[32] Five years later, the Court was less unequivocal: "Whatever else it may mean, the right to counsel . . . means *at least* that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him."[33] In *United States v. Gouveia*,[34] the Court ignored that apparent ambivalence and adopted the plurality's conclusion in *Kirby*, stating that the Court's "cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant."[35]

The Court's rationale grew out of a realization that the "core purpose" of the constitutional guarantee is to protect the defendant when "confronted with both the intricacies of the law and the advocacy of the public prosecutor."[36]

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have

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[31] *Powell v. Alabama*, 287 U.S. 45, 57 (1933).

[32] *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

[33] *Brewer*, 430 U.S. at 398 (emphasis added).

[34] 467 U.S. 180 (1984).

[35] *Id.* at 187. By contrast, seizing upon that ambivalence, Justice Stevens, in a concurring opinion, argued that *Brewer*'s formulation "does not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings." *Id.* at 193.

[36] *United States v. Ash*, 413 U.S. 300, 309 (1973).

> solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.[37]

Thus, Supreme Court jurisprudence has established that an indigent defendant has a constitutional right to appointed counsel in a state criminal proceeding, not only at trial, but also at: (1) a post-indictment lineup;[38] (2) an arraignment in a capital case where state law made it a critical stage in the criminal proceeding, even if the defendant was not prejudiced by lack of counsel;[39] (3) a preliminary hearing at which the defendant pleaded guilty, regardless of actual prejudice, even if state law did not require a plea at the hearing;[40] (4) a probable cause hearing, before arraignment, where defendant's guilty plea was used later at trial on cross-examination;[41] (5) a preliminary hearing, optional under state law or one in which nothing could substantially prejudice the defendant at trial;[42] (6) a post-indictment secret interrogation by police[43]; and (7) a preindictment custodial

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[37] *Kirby*, 406 U.S. at 689-90 (citation omitted).

[38] *United States v. Wade*, 388 U.S. 218, 236-37, 239 (1967) (" . . . the postindictment lineup was a critical stage of the prosecution at which" the defendant was entitled to counsel, where there were no "[l]egislative or other regulations . . . which eliminate[d] the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial.").

[39] *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.").

[40] *White v. Maryland*, 373 U.S. 59, 60 (1963).

[41] *Arsenault v. Massachusetts*, 393 U.S. 5, 5-6 (1968).

[42] *Coleman v. Alabama*, 399 U.S. 1, 8-10 (1970). The state court had found no prejudice because, under Alabama law, the preliminary hearing was not a required step, the "'accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case,'" and testimony not subjected to cross-examination is barred at trial. *Id.* at 8. Four members of the Court observed that counsel is required at a preliminary hearing in order to "expose fatal weaknesses in the State's case" that could persuade the magistrate judge not to bind the case over for trial, preserve a basis for impeachment at trial, to facilitate adequate preparation for trial, and to make "effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Id*. at 9.

[43] *Massiah v. United States*, 377 U.S. 201, 205 (1964) ("'[a]ny secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes

interrogation under certain conditions.[44] Thus, the right to counsel generally "has two

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and the fundamental rights of persons charged with crime.'") (citation omitted).

[44] In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court held that:

> [W]here ...the investigation is no longer a general inquiry ... but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment to the Constitution.

Id. at 490-91. Observing that the defendant "had [in essence] become the accused . . . [since] the purpose of the interrogation was to 'get him' to confess his guilt," *id.* at 485, the Court concluded that "[it] would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486. Denying counsel under these circumstances "would make the trial no more than an appeal from the interrogation . . . ." *Id.* at 487 (citation omitted).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court "held that the privilege against compulsory self-incrimination includes a right to counsel at a pretrial custodial interrogation." *Coleman*, 399 U.S. at 7; *see also United States v. Gouveia*, 467 U.S. 180, 194 (1984) (J. Stevens, concurring). In *Johnson v. New Jersey*, 384 U.S. 719 (1966), however, the Court clarified that the "prime purpose" of *Escobedo* and *Miranda* was "to guarantee full effectuation of the privilege against self-incrimination," not the Sixth Amendment right to counsel standing alone. *Id.* at 729; *see also Gouveia*, 467 U.S. at 188 n.5. As the Third Circuit has explained:

> The opinion ... in *Escobedo* . . . represents the high watermark of the movement in the Supreme Court to control police methods of interrogation through the sixth amendment. . . . [I]n *Miranda* . . . all involved saw in *Escobedo* the potential for a holding that all post-arrest interrogation by government agents in the absence of counsel was prohibited by the sixth amendment. That was not to be. Instead the court completely changed direction, abandoning the sixth amendment as a basis for control of post-arrest, pre-indictment interrogation by government agents. . . . Instead . . . [,] [t]he privilege against self-incrimination was identified as primarily, if not solely, a fifth amendment problem . . . . The precise holding in *Escobedo* . . . [, however,] was not overruled. Rather, as Professor Kamisar has put it, "by moving from a right to counsel base in *Escobedo* to a self-incrimination base, '*Miranda* [did] not [enlarge] *Escobedo* as much as it *displaced* it.'"

United States v. Muzychka, 725 F.2d 1061, 1066-1068 (3d Cir. 1984) (footnotes omitted).

sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. The Sixth Amendment guarantee of assistance of counsel also provides the right to counsel at . . . 'the initiation of adversary judicial proceedings.'" *Michigan v. Jackson*, 475 U.S. 625, 629, (1986) (citations omitted). There is, however, no right to counsel upon mere arrest.[45]

3. Right to Appointed Counsel on Appeal and in Post-Conviction Attacks

Both the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to "'affor[d] adequate and effective appellate review to indigent defendants.'"[46] Such review is afforded by a state's appellate procedure "so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal"[47] in light of two underlying goals: ensuring meaningful appellate access to indigent defendants while "enabl[ing] the State to 'protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.'"[48] Applying this standard, the Court vacated the judgment of a state appellate court that, in accordance with state law, denied two indigent criminal defendants the assistance of counsel on their first appeal of right after having reviewed the record itself and determined that "'no good whatever could be served by appointment of counsel.'"[49] Recognizing that on appeal "only the barren record speaks for the indigent, and, unless the printed pages show that injustice has been committed, he is forced to go without a champion on appeal," the Court rejected this "ex parte" approach and concluded that, "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, . . . an unconstitutional line has been drawn between rich and poor" and "the right to appeal does not comport with fair procedure."[50]

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[45] *See Gouveia*, 467 U.S. at 190 ("we have never held that the right to counsel attaches at the time of arrest."). "[D]eclin[ing] to depart from . . . [its] traditional interpretation of the Sixth Amendment right to counsel" and in view of other constitutional and statutory protections, the Court refused to extend the right to counsel to a preindictment delay in the special case of prisoners who could be held indefinitely for an alleged crime committed in prison before charged. *Id.* at 192.

[46] *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)).

[47] *Id.* at 276-77.

[48] *Id.* at 277-78 (citation omitted).

[49] *Douglas v. California*, 372 U.S. 353, 358 (1963) (citation omitted).

[50] *Id.* at 356-57.

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man ... enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[51]

In *Evitts v. Lucey*,[52] the Court similarly observed that "[a]n unrepresented appellant–like an unrepresented defendant at trial–is unable to protect the vital interests at stake."[53]

The Court refused to extend *Douglas*, however, to discretionary state appeals or applications for review in the U.S. Supreme Court.[54] Cognizant that "[t]he precise rationale for the *Griffin* and *Douglas* line of cases ha[d] never been explicitly stated,"[55] the Court bifurcated its analysis between the Due Process and Equal Protection Clauses as "each depend[s] on a different inquiry which emphasizes different factors."[56] Under its Due Process analysis, the Court concluded that, because "the State need not provide any appeal at all," it is not necessarily unfair to deny appointed counsel to indigent appellants, especially since "[t]he defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence [as he does during trial], but rather as a sword to upset the prior determination of guilt."[57] Under its Equal Protection analysis, the Court noted that the Clause "'does not require absolute equality or precisely equal advantages,'" or that the state "'equalize economic conditions.'"[58] In addition, the indigent defendant, in seeking discretionary review, "will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case," providing adequate basis

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[51] *Id.* at 357-58.

[52] 469 U.S. 387 (1985).

[53] *Penson v. Ohio*, 488 U.S. 75, 85 (1988) (citation omitted).

[54] *Ross v. Moffitt*, 417 U.S. 600, 610, 612 (1974).

[55] *Id.* at 608.

[56] *Id.* at 609.

[57] *Id.* at 610-11.

[58] *Id.* at 612 (citations omitted).

on which to grant or deny discretionary review. Thus, the Court concluded that denying counsel at this stage does not violate the Equal Protection Clause.[59]

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.[60]

Likewise, "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction," the Court has refused to mandate appointment of counsel to indigent persons mounting collateral attacks (e.g., habeas corpus) on their convictions.[61] "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."[62] In *Murray v. Giarratano*,[63] the Court concluded "that th[is] rule . . . should apply no differently in capital cases than in noncapital cases" and therefore applies to death row inmates across the board.[64]

4. Right to Appointed Experts

Relying on and extending its holdings in *Ross* and *Douglas* concerning the right to appointed counsel on appeal from a criminal conviction, the Court in *Ake v. Oklahoma*,[65] held that a criminal defendant is also entitled to "access to a competent psychiatrist who

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[59] *Id.* at 615.

[60] *Id.* at 616.

[61] *See, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). While there is no constitutional requirement of access to appointed counsel in post-conviction collateral attacks, it appears that Georgia is the only state with a significant death row population that does not provide either mandatory or discretionary appointment of counsel for indigent persons in capital post-conviction proceedings.

[62] *Id.* at 556-57.

[63] 492 U.S. 1 (1989).

[64] *Id.* at 10. Similarly, the Court has refused to apply the right to appointed counsel to appeals from state-determined post-conviction, collateral attacks. *Coleman v. Thompson*, 501 U.S. 722 (1991).

[65] 470 U.S. 68 (1985).

will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" after "demonstrat[ing] to the trial judge that his sanity at the time of the offense is to be a significant factor at trial."[66] However, the Court also found that denying a criminal defendant access to an investigator, a fingerprint expert, and a ballistics expert under a state law predicating access to such expert assistance on a finding of reasonableness was not unconstitutional.[67]

5. Allocation of Indigent Defense Costs Between State and Local Governments

It appears that no federal court has ruled on the question of whether, in the absence of a state statute directly on point, the primary responsibility for funding indigent defense and litigation costs resides with the state or with county and city governments. Several state courts have, however, decided the issue, relying either on constitutional principles and the holding in *Gideon* or a "necessary implication from the [state] statutory scheme."[68]

The Arkansas Supreme Court held, for example, that where a state statute and a county ordinance, both of which imposed mandatory fee caps, were held unconstitutional, "the state is responsible for payment of" fees and expenses associated with representing an indigent criminal defendant.[69] The decision relied in part on the federal constitutional requirement that "states appoint counsel for indigent defendants."[70] Similarly, a New York state court, in a mandatory preliminary injunction directing payment to attorneys appointed to represent indigent litigants in family and criminal matters, concluded that, although the City of New York is an indispensable party to the action because the state delegates to the counties the task of formulating a plan to fund indigent representation, in light of *Gideon*, "New York State bears the ultimate responsibility to provide counsel to the indigent."[71]

By contrast, on appeal from a state court ruling "directing the state to pay attorney's fees for representation of both indigent children and parents in all [civil]

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[66] *Id.* at 83.

[67] *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1 (1985).

[68] *State v. Rush*, 217 A.2d 441, 449 (1966).

[69] *State v. Post*, 845 S.W.2d 487, 492 (Ark. 1993).

[70] *Id.* at 492 (citing *Gideon*).

[71] *N.Y. County Lawyers' Ass'n v. New York*, 745 N.Y.S.2d 376, 381 (Sup. Ct. 2002).

juvenile dependency proceedings,"[72] the Florida Supreme Court held "that when counsel is constitutionally required, the county, rather than the state, must compensate appointed counsel."[73] In that case, however, the court based its decision on an inference drawn from a state statute providing that "counties shall provide . . . personnel necessary to operate the circuit and county courts."[74] Similarly, the Michigan Supreme Court has held that the "financial burden of providing" counsel to indigent parents in the course of a parental rights termination proceeding "is allocated to the county as the unit of government which funds the tribunal in which the indigent parent is called upon to defend his right to the continued custody of his child."[75] The court construed a state statute, providing that all expenses associated with probate court jurisdiction over neglected children be paid by the county, to include the cost of indigent representation.[76] In New Jersey, because "[t]he county is a subdivision of the State, constituted to perform certain functions of State government, . . . and among them . . . the prosecution of criminal causes . . . [,] [i]t is generally held that the county is liable for the expenses involved."[77] Reasoning that a state statute providing that the county pay "'[a]ll expenses incurred by the prosecutor . . . in the detection, arrest, indictment and conviction of offenders against the laws'" includes the necessary expense of providing court-appointed counsel to indigent criminal defendants, the New Jersey Supreme Court held that the county is responsible for such costs.[78]

B. Georgia Law on Indigent Defense

In addition to the right to counsel guaranteed by the Sixth Amendment to the United States Constitution, the Georgia Constitution provides that "[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel."[79] In responding to the mandate of *Gideon v. Wainwright*,[80] the Georgia

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[72] *In the Interest of D.B. and D.S.*, 385 So.2d 83, 87 (Fla. 1980).

[73] *Id.* at 87.

[74] *Id.* at 92-93. For criminal cases, state legislation expressly required counties to pay the fees. *Id.* at 93.

[75] *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55, 66 (Mich. 1976).

[76] *Id.* at 66.

[77] *State v. Rush*, 217 A.2d 441, 449 (N.J. 1966).

[78] *Id.* at 449.

[79] GA. CONST., Art. I, §1, para. XIV. As has been noted elsewhere, "[e]very Georgia Constitution since 1798 has declared that no one in this State should ever be prosecuted without the 'privilege and benefit of counsel.'" MEARS, A BRIEF HISTORY OF THE GEORGIA INDIGENT DEFENSE

General Assembly enacted the Georgia Criminal Justice Act in 1968 which directs the state's 159 counties and their courts to appoint and compensate attorneys for indigent criminal defendants.[81] The other major piece of legislation dealing with indigent defense came in 1979 with the establishment of the Georgia Indigent Defense Council as a separate agency within the judicial branch of state government.[82] The goal of the GIDC, according to the statute,[83] is to "administer [state and federal] funds ... to support local indigent defense programs" as well as to recommend to the Georgia Supreme Court "uniform guidelines...within which local indigent defense programs...shall operate." It is also authorized to provide training, along with technical and research support, to attorneys representing indigent criminal defendants. The Council is made up of 15 persons appointed by the Georgia Supreme Court to a four-year term.[84] The Council has

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COUNCIL 1 (2nd ed. 1998).

[80] 372 U.S. 335 (1963).

[81] Georgia Laws 1968, p. 999. This is currently codified at O.C.G.A. §17-12-1, *et. seq.* Section 3 of the Act law mandates that the courts of each county "provide for the representation of indigent persons in criminal proceedings" through either "[a]n arrangement whereby a judge... will assign attorneys on an equitable basis through a systematic, coordinated defender plan" or "[a]n arrangement whereby a non-profit legal aid agency or agencies will be assigned to provide the representation" or a combination of these two systems. O.C.G.A. §17-12-4. The Act also authorizes the use of a "non-profit legal aid agency" to provide criminal defense services for indigents, O.C.G.A. §17-12-6, and also authorizes superior courts in cooperation with the county governing authority to establish public defender offices. O.C.G.A.§17-12-7. Under §10(a), the county governing authority is directed to "include in its annual budget for the operations of the courts in such county an additional amount to finance the costs and expenses necessary for the implementation" of the indigent criminal defense plan required by the Act. O.C.G.A. §17-12-13. Under §4, the county governing authority is given the power to establish fee limits and limits on the amount spent for investigation, but the court is given the power "in extraordinary circumstances" to "approve the payment of such additional compensation in excess of the limits...as the trial court may determine...to be necessary to provide for compensation for protracted representation." O.C.G.A. §17-12-5.

[82] Georgia Laws 1979, p. 367. The Georgia Indigent Defense Act is currently codified at O.C.G.A. §17-12-30 *et seq.* Although §2 of the Act announces the "policy of this state to provide the constitutional guarantees of the right to counsel and equal access to the courts to all its citizens in criminal cases and to provide...[t]hat the state be responsible for funding the indigent defense system established in this article," O.C.G.A. §17-12-31(10), the State currently funds approximately 11.6% of the cost of indigent defense within the state. *See Spangenberg Report* at p. 12.

[83] O.C.G.A. §17-12-33.

[84] Under O.C.G.A. §17-12-32(b), one lawyer from each of the state's ten judicial districts shall be appointed, along with three nonlawyers from the state at large and one member of a

recommended Guidelines for the operation of local indigent defense systems to the Georgia Supreme Court, which has promulgated them.[85] As will be detailed in this Report, these guidelines continue to be violated due the failure of adequate funding and appropriate organization of the indigent defense system.

Under the Georgia Indigent Defense Act, funding for local indigent defense plans at the county level is sought by the local tripartite committee[86] from the Georgia Indigent Defense Council. The statute outlines the requirements for any local indigent defense

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"metropolitan county governing authority" and one member of "nonmetropolitan county governing authority." The current members of the GIDC are: Virgil Adams (3rd District); Burt Baker (2nd District); David L. Cannon, Sr. (9th District); Flora Devine (7th District); Marin L. Fierman (8th District); Jerry Griffin (Non-lawyer At-Large); Betty Hill (Non-metro governing authority); Paul Holmes (Non-lawyer At-Large); Robert E. Minnear (Non-lawyer At-Large); Bruce H. Morris (5th District); Judge John E. Morse, Jr. (1st District); Samuel S. Olens (Metro governing authority); Edward D. Tolley (10th District); Judge Alvin T. Wong (4th District); Gerald P. Word (6th District). The GIDC also has created an Advisory Committee which currently has 11 members.

[85] The current Georgia Supreme Court Guidelines are attached as **Appendix C**. The Guidelines are fairly comprehensive in coverage and would seem to provide the outlines of an adequate indigent defense system. For example, appointment of counsel is required within 72 hours of "arrest or detention. Counsel shall make contact with the person promptly after actual notice of appointment." Guideline §1.2. Program officials are directed to provide *Miranda* warnings and application for indigent defense services within 72 hours of detention. Guideline §1.3. The Guidelines provide a base set of standards to be used in the indigency determination with permission granted to the local system to use standards providing greater access to counsel. Guideline §1.5. Public defenders are protected against dismissal for anything short of "good cause" as defined in the Guidelines. Guideline §2.3. Appointments of panel attorneys "shall be made on an impartial and equitable basis" and "to ensure balanced workloads through a rotation system...." Guideline §2.4. Performance standards are, under the guidelines, to be promulgated by the local tripartite committee. Violation of such performance standards are "cause for either admonishment, suspension or removal of the attorney from the panel." Guideline §2.5. Independence of counsel is assured, Guideline §2.8, competency of counsel is required, Guidelines §§3.1, 3.2, and the "local committee and the program's attorneys should prvent caseloads, by reason of their excessive size, from interfering with the rendering of quality representation or leading to the breach of professional obligations, using [ABA Standards]." Guidelines §6.1 (which also includes precise recommendations as to appropriate maximum caseloads).

[86] Under O.C.G.A. §17-12-37, the tripartite committee is made up of at least three people appointed by the local governing authority, the superior court and the local bar association. Equal representation for each of the appointing authorities is assured if the committee has more than three members. Specifically excluded from eligibility for membership, under subsection (c) are judges, prosecutors and public defenders. The committee, under the statute, shall meet at least seminannually and elect its own chair. O.C.G.A. §17-12-38(e).

plan.[87] After funding is approved, it is the responsibility of the local tripartite committee to "implement and manage the local program within the guidelines approved and promulgated by the Supreme Court."[88]

C. History of Efforts at Indigent Defense Reform in Georgia

The Board of Governors of the State Bar of Georgia, less than two years after *Gideon*, formed a Special Committee on Assistance to Indigent Criminal Defendants.[89] This committee was charged with the responsibility for investigating the feasibility of the establishment of a statewide system to provide "adequate defense services to indigent persons accused of crimes" and to "draft proposed legislation to provide a statewide indigent defense system."[90] In June, 1965, the committee "submitted an exhaustive report" including proposed legislation modeled on the American Law Institute's Model Indigent Defense Act to the Board of Governors which approved the proposed Defense of Indigents Act.[91] After hearings on the proposal conducted by a special committee of the Georgia House of Representatives, the bill was introduced into the 1966 session of the General Assembly, but was defeated.[92] After the United States Supreme Court's decision

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[87] Under O.C.G.A. §17-12-38(c), the plan must comply with the Supreme Court guidelines and must provide for:

> "(1) The reasonable independence of counsel;
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> (2) Reasonable early entry by counsel into a case;
>
> (3) A procedure to determine whether or not persons seeking assistance are eligible as indigents;
>
> (4) A procedure for determining that attorneys representing indigents are competent in the practice of criminal law; and
>
> (5) A rate of compensation and schedule of allowable expenses to be paid for indigent defense services."

[88] O.C.G.A. §17-12-38(b).

[89] This was done at a meeting in Columbus in November, 1964. MEARS , at p. 3.

[90] *Id.*

[91] Bondurant, *The Challenge of Right to Counsel in Georgia*, 3 GA. STATE BAR J. 157, 169 (1966).

[92] *Id.*

in *Miranda* in 1966, the State Bar committee and its Board of Governors (along with the Executive Council of the Younger Lawyers Section) reiterated their endorsement of the Defense of Indigents Act.[93] The 1967 General Assembly, however, again failed to enact the State Bar proposal.[94]

In 1968, the Georgia Criminal Justice Act (described above), placing the obligation for indigent defense on the counties, was enacted. Convinced that this approach to indigent defense was constitutionally inadequate, the State Bar resumed its efforts at reform in early 1972 with a "survey of the needs of indigent defendants in criminal cases throughout the State."[95] At approximately the same time, the Executive Council of the Younger Lawyers Section of the State Bar in 1973 unanimously passed a resolution urging the Bar to "sponsor an independent nonprofit corporation to seek funding, to coordinate, to upgrade and to expand the defenders' services to the indigent in Georgia."[96]

In 1973, a study of indigent defense in Georgia funded by the State Planning Agency, the State Crime Commission and a grant from the federal Law Enforcement Assistance Administration was conducted by the State Bar Criminal Justice Committee. Among other conclusions, the Committee found a lack of uniformity in the application of standards of indigency throughout the state, an inadequate amount of resources being devoted to indigent defense and widely varying treatment of such issues as waiver of counsel and the timing of the offer of counsel.[97] The ensuing history was captured this way by the *Spangenberg Report*:

> Despite this extensive effort to review and document problems, the General Assembly continued to rely on the Criminal Justice Act of 1968.... The State Bar was not discouraged by the lack of response by the state legislature. The Bar created a private, nonprofit organization called the Georgia Criminal Justice Council that would continue to pursue implementation of a statewide indigent defense system. Working at first with grants from the Department of Human Resources and State Crime Commission, the ... Council worked on developing a

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[93] *Id.*

[94] It has been reported that this defeat was caused, at least in part, by "heavy negative lobbying from district attorneys and superior court judges from across the state." MEARS, at p. 5.

[95] MEARS at p. 8.

[96] *Id.*

[97] State Bar of Georgia, *Survey of Indigent Defense Needs in the State of Georgia*, Nov. 30, 1973, at p. 23. The *Spangenberg Report* notes that '[i]t is striking how similar the findings in that 1973 study are to findings from our study in 2002." *Spangenberg Report* at p. 10.

> framework for a statewide delivery system as well as a plan for funding such a system. Eventually ... the agency ... became a quasi-state agency whose members were nominated by the State Bar and confirmed by the Georgia Judicial Council. The entity was to administer state and federal grants to assist counties and judicial circuits in carrying out the obligation of providing effective assistance of counsel to indigent defendants....[98]

In 1974, the State Crime Commission, "in response to national demands for programs to defend the poor, also initiated its own comprehensive statewide study of the indigent defense efforts by counties in Georgia."[99] The Commission identified lack of funding, lack of uniformity in practices and a critical shortage of lawyers in many counties as serious problems and, therefore, endorsed the call for a statewide system of indigent defense underwritten by state tax dollars.

In 1979, the General Assembly created the Georgia Indigent Defense Council. After several years in which it administered grants from the state and the federal Law Enforcement Assistance Administration, the GIDC became inactive for lack of funding. It was funded again in 1989 and has been in existence since then. Its operations are more fully detailed later on in this Report.[100]

As frustration concerning the status of indigent defense in the state has grown in recent years,[101] plaintiffs in both federal and state courts have asserted that various aspects

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[98] *Spangenberg Report*, at p. 11. The Council was operated as part of the Georgia Indigent Legal Services Corporation, the predecessor to Georgia Legal Services. MEARS, at p. 13.

[99] MEARS, at p. 13. This study was mandated by the National Advisory Commission on Criminal Justice Standards and Goals.

[100] *See* nn. 107 through 121 , *infra*, and accompanying text.

[101] Actually, the litigation described in the text at this point was pre-dated by litigation originally filed as an original mandamus action in the Georgia Supreme Court as *Holbrook v. Georgia* in November, 1985. The lawsuit, filed at a time when the State was providing absolutely no funding for indigent defense, alleged a "statewide systemic failure to provide constitutionally adequate criminal defense services" to indigent defendants and that these failings undermined "the integrity and finality of criminal judgements in Georgia." MEARS, at p. 45. The lawsuit alleged that the State's delegation of the operation and funding of indigent defense services to the counties constituted an abandonment of Georgia's constitutional obligations and asserted that "[i]ndigent criminal defense services function without regard for, and in violation of, accepted minimum standards of training, workload and resources...." *Id.* at p. 49. The Georgia Supreme Court quickly dismissed the action. Subsequently, a similar class action (filed on behalf of indigent defendants and attorneys claiming inadequate funding was preventing them from providing effective counsel to indigents) was filed in Federal District Court for the Northern District of Georgia. The dismissal of this case, *Luckey v. Harris*, on abstention grounds was

of indigent criminal defense are legally inadequate. At this point, this litigation and reportedly contemplated litigation is summarized. In *Stinson v. Fulton County Board of Commissioners*, Civil Action No. 1:94-CV-0240 (N.D. Ga..), plaintiffs sought declaratory and injunctive relief against Fulton County to eliminate the long delays for persons suspected of committing felony offenses in Fulton County between the time their cases were bound over to the Superior Court of Fulton County and they were transported to the Fulton County Jail and the time they were able to consult with a lawyer. The delays in providing counsel were alleged to amount to a prejudicial denial of the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Prior to the filing of this case, persons who were bound over to the Fulton County Jail could not expect to see an attorney until and unless they were actually indicted, often months after being bound over to the Fulton County Jail. A settlement of the lawsuit resulted in an increase of the staff and responsibilities of Fulton Pretrial Services in order to facilitate prompt contact with indigent persons bound over to on felony charges, a timely pretrial release assessment, and appointment of the Fulton County Public Defender to represent qualified arrestees. The Settlement Agreement requires the Fulton County Public Defender to make contact with the arrestee within forty-eight (48) hours after appointment by Pretrial Services.

In *Parks et al. v. Fennessy et al.,* Civil Action No.1:96-CV-182-3 (M.D. Ga.), the plaintiffs sought declaratory and injunctive relief against the State Court of Sumter County for failing to inform or advise indigent persons arraigned on misdemeanor charges of the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Persons who were formally charged with misdemeanors in the State Court of Sumter County were never informed upon arraignment that they had a right to counsel, and that if they could not afford counsel they were entitled to appointed counsel at no cost. Additionally, it was alleged that the State Court failed to establish, for indigent persons who entered guilty pleas without counsel, that they had knowingly and intelligently waived the right to counsel after being advised of the dangers and disadvantages of self-representation at critical stages of the proceedings. The Consent Decree entered in *Parks* requires the Court to clearly advise indigent persons accused of misdemeanors of their right to counsel and, where defendants proceed without the assistance of counsel, requires the Court to establish that the right to counsel was knowingly and intelligently waived after full advisement of the dangers and disadvantages of self-representation during critical stages of the proceedings.

In *Bowling et al. v. Lee et al.,* Civil Action No. 01-V-802, (Sup. Ct. for Coweta County), plaintiffs seek declaratory, injunctive, and mandamus relief to remedy a county indigent defense program based on the contract defender model. In Coweta County, two

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eventually affirmed by the United States Eleventh Circuit Court of Appeals. *Luckey v. Miller*, 976 F. 2nd 673 (11th Cir. 1992).

contract defenders handled the entire caseload while maintaining private practices. Because of alleged mismanagement and excessive caseloads, plaintiffs asserted that indigent persons accused of felonies in the Superior Court of Coweta County routinely remained between three to eight months in the Coweta County Jail before ever seeing a lawyer. Consequently, it was asserted that defendants were effectively denied the right to have and be represented by counsel at a preindictment commitment hearing and frequently were never afforded an opportunity to establish the basis for preindictment recognizance or release on bond.

Also, it was alleged that judicial pressure was placed on unrepresented indigent defendants to negotiate and resolve their cases with prosecutors without ever having been advised of the right to counsel, of the availability of appointed counsel for indigent persons, or the dangers and disadvantages of self-representation during critical stages of the proceedings. *See Faretta v. California,* 422 U.S. 806, 835 (1975); *Clark v. Zant,* 247 Ga. 194, 195, 275 S.E.2d 49, 50 (1981); *Ledford v. State*, 247 Ga.App. 885, 545 S.E.2d 396 (2001). This resulted in more than half of all persons accused of felonies in Coweta County entering guilty pleas without having the opportunity to consult with a lawyer.

Since the filing of the lawsuit, the county's two contract defenders have been dismissed. The County has created a Public Defender Office, its first ever, which is staffed by a Chief Public Defender and two assistant public defenders. The office has two support staffers and investigative assistance. In addition, to ensure that indigent defendants do not languish in the Coweta County Jail, the County created the position of an Indigent Defense Administrator, whose job it is to monitor arrestees, assess indigency, and appoint the Public Defender in a timely manner. It has been reported that substantial savings in costs of incarceration have been realized by the county. The Commission has been informed that an Atlanta law firm has agreed to represent individual defendants who have been subject to the practices challenged in the Coweta County lawsuit. Several of these individual habeas corpus actions are working themselves through the Superior Courts of the State.

In *Foster et al. v. Fulton County et al.*, Civil Action No.1:99-CV-900 (N.D. Ga.), plaintiffs originally sought injunctive relief to address the absence of procedures to address and provide treatment and care for the growing population of HIV-positive inmates in the Fulton County Jail. A Settlement Agreement entered into by the parties required Fulton County to take certain steps to improve health care for HIV-positive inmates, as well as to reduce overcrowding at the jail. In April 2002 , when it was apparent that overcrowding at the Jail persisted, the District Court ordered the County and the Plaintiffs to identify other means to reduce overcrowding. On the basis of evidence presented at a hearing in May regarding the failure of the State Court of Fulton County and the municipal courts feeding the State Court of Fulton County to timely provide counsel and the failure of those courts to provide an early, meaningful opportunity for persons arrested for minor misdemeanor charges to consult with counsel

and resolve their cases, the District Court ordered, on July12, 2002, Fulton County to make counsel available to all persons arrested on misdemeanor charges within 72 hours of arrest and to provide within 72 hours of arrest an "All Purpose Hearing" where defendants could resolve their cases by entering a plea, or receive an individualized bond hearing if they desired to go to trial. The district court also ordered Fulton County to meet with the municipalities within Fulton County to better coordinate the handling of arrestees between the municipal courts and the Magistrate and State Courts within Fulton County. A subsequent action, *Smith et al. v. Fulton County et al.*, Civil Action No. 1:02-CV-2446 (N.D. Ga.) sought declaratory and injunctive relief against Fulton County and all the municipalities within Fulton County to continue making comprehensive changes to the indigent defense system in Fulton County. Smith joined the municipalities --which were not parties to *Foster* -- and seeks essentially the same relief as that ordered in the *Foster* order.

The Commission is informed that several counties within the State are currently considering filing a suit similar to the Quitman County suit in Mississippi. Several years ago, Quitman County, a very poor county in Mississippi, filed suit against the State of Mississippi for the State's failure to adequately fund the provision of legal representation to indigent persons accused of crimes, as required by the Sixth and Fourteenth Amendments and their Mississippi constitutional and statutory counterparts. Last year, the Supreme Court of Mississippi ruled that such a suit by a county against the State was entirely appropriate and permitted the County to pursue its claims in the trial court. *See State of Mississippi v. Quitman County*, 807 So.2d 401 (2001).

While not in the form of litigation seeking systemic change, a recent Georgia Court of Appeals decision not only reversed a criminal conviction for ineffective assistance of counsel, but also provided a window into the actual operation of indigent defense. In *Heath v. State*,[102] the defendant appealed the denial of his motion to withdraw a guilty plea to three counts of serious injury by vehicle.[103] The basis of his motion was ineffective assistance of counsel. Finding that "the assistance provided by [defense counsel] was so deficient that it effectively equaled no assistance at all," the Court of Appeals reversed the refusal to permit a withdrawal of the guilty plea. In detailing the actions of the defendant's attorney, the appellate court noted: 1) he advised defendant that the sentence was likely to be "at the lower end" of the sentence recommendation by the district attorney of 4 to 15 years[104]; 2) he failed to interview or contact a witness whose

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[102] 2002 Ga. App. LEXIS 1525 (November 26, 2002).

[103] The plea was negotiated. The original charge included 15 counts of serious injury by vehicle, two counts of driving under the influence of alcohol and one count of reckless driving.

[104] The actual sentence was 15 years in confinement and 15 years of probation. The court's sentence followed the defendant's admission that "this was his fifth DUI conviction."

name he had been provided who might have actually been driving the vehicle at the time of the collision at issue;[105] 3) after failing to investigate the possibility that his client was not driving the vehicle at the time of the collision, defense counsel argued to the court that his client *was* driving; 4) he testified at the plea withdrawal hearing that he "could not recall the elements of the offense of serious injury by vehicle;" 5) he testified that he had done no research on the statutory definition of "serious;" 6) he did not confer with his client at all during the 13 months between arraignment and the entry of the plea. The appellate court concluded that defense counsel "did absolutely nothing meaningful on his client's behalf, thereby denying Heath his Sixth Amendment right to counsel altogether."

While not reflecting attempts at systemic change, several Atlanta law firms recently have responded to publicity about the critical state of indigent defense in Georgia. Moved by the burdens shouldered by Drew Powell, the Public Defender in the Mountain Judicial Circuit, one major Atlanta law firm has organized a pro bono program in which associates and partners assist Mr. Powell by representing public defender clients at preindictment commitment hearings and in pretrial bond reduction proceedings. This assistance has helped free up some of Mr. Powell's time to spend representing his clients in Superior Court.[106] Also, in response to publicity regarding the difficulties experienced by indigent persons accused of misdemeanors in the State Court experience, another Atlanta law firm has agreed to set up a pro bono project assisting lawyers working for the State Court Division of the Fulton County Conflict Defender to provide representation to indigent defendants appearing in the State Court of Fulton County. Paul Hastings has also agreed to act as a clearinghouse for other firms interested in providing the same or similar assistance.

D. Current State of Criminal Indigent Defense in Georgia

1. Georgia Indigent Defense Council

In 1979, the Georgia Indigent Defense Council was established as a separate agency within the judicial branch of the government.[107] Its legislative charter includes

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[105] The defendant claimed to have no memory of the incident. The defendant's niece "testified that when she telephoned [defense counsel] to report the existence of the witness, 'he told me that he had so many cases on his load, that if he looked into every nook and cranny that there was to this case, that he would never get anything done, and that my uncle was nothing but a drunk, ... and that his only option ... was to say that he was guilty.'"

[106] *See* Rankin, *Premier Law Firm Defends Indigents; Lawyers Help with Case Overload,* ATL. JOURNAL-CONST., August 31, 2002, p. 1H..

[107] Ga. Laws 1979, p. 367, §4. The legislation establishing the GIDC was entitled "The Georgia Indigent Defense Act."

responsibility for administration of state and federal funds to support local programs, to recommend uniform guidelines within which local programs should operate and to provide training, technical assistance and support to the local programs.[108] While work on drafting guidelines began immediately after the creation of the GIDC, the *Spangenberg Report* asserts that these guidelines "encountered protracted resistance over familiar territory: loss of local control replaced by a 'central bureaucratic agency with dictatorial power and absolute control over indigent defense in Georgia.'" [109] Indeed, the guidelines were not officially approved until 1989.[110]

The GIDC has not had a smooth ride since its establishment. In 1981, with the demise of the Law Enforcement Assistance Administration at the federal level and the loss of all state funding, the GIDC became an inactive agency and shut down its office in Atlanta. In 1988, the Council of Superior Court Judges changed its historic position against state funding for indigent defense and adopted a position of "publicly supporting funding of the 1979 Georgia Indigent Defense Act."[111] At least in part because of this change of position, the 1989 General Assembly appropriated $1 million to the operation of indigent defense, designating 10% for the operation of the central office and the rest for the operation of local indigent defense programs.[112] The current level of state funding which is administered by the GIDC is detailed in the *Spangenberg Report* at Table 3-1.[113]

In addition to administering grant funds to the counties for the operation of local indigent defense programs, the GIDC has several divisions which perform other functions. In 1992, the General Assembly created the Multi-County Public Defender to "undertake the defense of all indigent persons charged with a capital felony for which the death penalty is being sought in any court...."[114] The division also provides training and assistance to attorneys appointed in capital cases and serves as co-counsel in the trial and direct appeal of death penalty cases. "In calendar year 2001, the Multi-County Public

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[108] O.C.G.A. §17-12-33.

[109] *Spangenberg Report* at p. 11-12 (quoting a memorandum from Judge George A. Horkan to Judge Cloud Morgan which appeared in MEARS, at p. 35).

[110] According to MEARS, the Georgia Supreme Court approved the guidelines on October 3, 1989, but inadvertently failed to enter an order to that effect until June 4, 1992. MEARS, at p. 43.

[111] MEARS, at p. 57.

[112] *Id.* at p. 60.

[113] The most recent figures indicate the annual expenditure by the state for indigent defense, both at the county and state level, was $52,968,892. *Spangenberg Report*, at p.14, Table 3-1.

[114] O.C.G.A. § 17-12-91.

Defender provided direct representation or consultative services in 84 cases in 34 different counties."[115] The Mental Health Advocacy Division is staffed by three attorneys, a paralegal and two social workers and monitors all Georgia cases in which the defendant has been found not guilty by reason of insanity, represents such defendants after conviction in connection with treatment and also works with judicial and mental health professionals in cases where defendants have been found incompetent to stand trial.[116] The GIDC also operates a small Juvenile Advocacy division, an Appellate Division and a Professional Education Division.[117]

Participants in the criminal justice system who have interaction with the GIDC's special divisions offered "universal praise" to the Spangenberg Group concerning the quality of the assistance provided.[118] By contrast, the *Spangenberg Report* found that the GIDC, despite what might be seen as its statutory mandate, has not been an effective statewide advocate for the cause of indigent defense in the State and has not been able to monitor compliance with the Supreme Court's Guidelines on indigent defense. The *Spangenberg Report* concludes that "GIDC should have the power to assist programs that are not in compliance (with Supreme Court Guidelines) and, where necessary, bring the appropriate pressure to remedy programs that fail to meet Supreme Court guidelines."[119] It would appear that the lack of clout derives from the minimal state funding provided by the General Assembly with a locally-operated indigent defense system. Thus, county officials have been reluctant to respond to requests from "the state" to change their system when "the state" funds a very small portion of the indigent defense system.[120] This could be seen as an unfunded mandate. From its perspective, the GIDC has been very reluctant to withhold state funding for failure to comply with the Supreme Court Guidelines[121] because this often would result in taking money away from an already

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[115] *Spangenberg Report*, at p. 17. The division has five attorneys, four mitigation specialist/investigators, a mental health specialist, a clerk, a tracking/statistics worker and an administrative assistant. *Id.*

[116] *Id.* at pp. 17-18.

[117] Brief discussions of these operations can be found in the *Spangenberg Report* at p. 18.

[118] *Id*. at p. 93.

[119] *Id.* at p. 82.

[120] "People in a number of counties told us they feel the application for state funds is overly burdensome, given the relatively small percentage of funds for indigent defense provided through the state grants." *Spangenberg Report*, at p. 23.

[121] Current legislation requires that the county indigent defense plan shall be operated "within the guidelines approved and promulgated by the Supreme Court." O.C.G.A. §17-12-38(b). Supreme Court Guideline §5.3 states: "The Council shall have the right to terminate any agreement for

resource-starved system, thus insuring even less quality.

2. Tripartite Committees as Supervisors of County or Multi-County Systems

Georgia state law[122] establishes a "local tripartite governing committee" which acts for a county or combination of counties in establishing a "state funded local indigent defense program."[123] The tripartite committee consists of equal representation from the county governing authority, the superior court and the local bar association. The members, none of whom can be "judges, prosecutors or public defenders,"[124] are appointed for three-year terms.[125] After the funding decision is made by the Georgia Indigent Defense Council, it is the responsibility of the tripartite committee to "implement and manage" the program.[126] The tripartite committee is directed to meet at least semiannually.[127]

While the *Spangenberg Report* states that the tripartite committee model for local control of indigent defense "seems like a sound structure" for "local control and input into indigent defense with state funding and standards,"[128] it is apparent that there is wide variability in the effectiveness of the tripartite committees in providing quality legal representation to indigent criminal defendants. There has been no effective oversight of the tripartite committees and many of the committees have failed to provide any

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cause... when a local program fails to comply with the guidelines or fails to fulfill their [sic] duties and obligations under the agreement." An appeal to the Supreme Court from a de-funding decision by the Council is provided.

[122] O.C.G.A.§17-12-37(b).

[123] *Id.* From the information detailed in this Report, it should be obvious that the term "state funded...indigent defense program" is a term of art. The state, in fact, funds barely a tenth of these "state funded" programs. Under the statute, the plan proposed by the tripartite committee must comply with Supreme Court guidelines and must provide for: "independence of counsel;" "reasonable early entry by counsel into a case;" a plan for the determination of indigency of prospective clients; a plan for "determining that attorneys...are competent in the practice of criminal law;" and a plan for compensation of attorneys. O.C.G.A. §17-12-38(c).

[124] O.C.G.A. §17-12-37(c).

[125] O.C.G.A. §17-12-37(e).

[126] O.C.G.A. §17-12-38(b).

[127] O.C.G.A. §17-12-38(e).

[128] *Spangenberg Report*, at p. 21.

oversight of the local programs which, by statute, they are supposed to supervise. While judges are statutorily barred from service on these committees, in one county visited by the Spangenberg Group the committee was chaired by the Chief Judge of the Superior Court.[129] In a different county, the chief judge is not on the committee but several interviewees reported that he is the "invisible hand" behind indigent defense policy in that county.[130]

Under both the statute and the Supreme Court guidelines,[131] it is the responsibility of the tripartite committee to observe and monitor the performance of indigent defense attorneys, but most of the tripartite committees in the counties visited by the Spangenberg Group "do not engage in effective monitoring" of the local indigent defense program.[132] This is understandable in light of the fact that no resources are allocated to the hiring of staff for the committee and the committee members themselves usually are unpaid professionals who volunteer their time. In several counties, the administrator of the indigent defense system serves on the committee,[133] which raises a major question of conflict of interest in that the committee is charged with reviewing the work of the administrator. The *Spangenberg Report* also notes that a number of committees include laypersons and reports complaints from a number of attorneys representing indigents of the inappropriateness of laymen supervising their work. It is also clear that some of the tripartite committees rarely, if ever, meet and others meet only to perform the ministerial duties of reviewing (and often reducing) vouchers submitted by panel attorneys.

3. Delivery Systems

There are three methods of delivering legal services to indigent criminal defendants in Georgia. The systems operated by Georgia's 159 counties each represent the adoption of one or more of the following: 1) panel system; 2) contract system; and 3) public defender system. Virtually all the counties have some combination of these systems. Thus, for example, a county with a panel system in place for indigent adult felony defendants may have contract attorneys representing indigent juveniles.[134] Similarly, a county might choose to employ contract defenders in certain courts (drug

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[129] *Id.*

[130] *Id.*

[131] *See* Supreme Court Guidelines §§3.1, 3.2.

[132] *Id.* at p. 22.

[133] *Id.*

[134] Indeed, this is the system currently being operated in Cobb County. *Spangenberg Report*, p. 27.

court, juvenile court) and for certain proceedings (probation revocation, bond hearings, preliminary hearings and appeals) and use panel attorneys for all other courts in all other proceedings.[135] Many systems will include one primary method of delivery with a different delivery system provided for in cases where, for example, the public defender cannot handle the case of a particular defendant because of an actual or potential conflict of interest.[136]

a. Panel Systems

As of fiscal year 2001, a plurality of counties used systems in which an attorney is appointed from a panel of attorneys. A total of 73 of the 152 counties receiving GIDC state grant money[137] were using panels as the primary delivery mechanism of indigent criminal defense services.[138] Beyond that, panels were used to deal with conflict and overflow situations in a number of other counties which use contract or public defender systems as primary delivery mechanisms.

Lack of uniformity characterizes the panel systems in operation within the state. The issue of composition of the panels provides an excellent illustration of this lack of uniformity. Some counties provide for mandatory participation either by all or a substantial subset of all local attorneys, regardless of their interest or experience in criminal matters. Thus, e.g., in Hall and Dawson Counties, the panel is composed essentially of all active lawyers in the county.[139] In at least one other county (Lowndes), all attorneys must serve a five-year term on the Superior Court panel and, beyond that, all attorneys practicing criminal law and all those whose civil practice include court appearances must remain on the panel.[140] The Georgia Supreme Court has upheld

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[135] This is the system in Bibb County. *See id.*

[136] This is the system employed in Fulton County, the state's most populous county. A detailed analysis of the Fulton County system is provided in the *Spangenberg Report*, at pp. 73-77.

[137] As noted in the *Spangenberg Report*, a major hurdle in making statements about the current system of indigent criminal defense in our state is the lack of comprehensive, reliable data. Thus, we only have current data about the format of indigent defense systems in the 152 counties currently receiving state funds from the GIDC and even that information is based solely on self-description on the funding application forms. "There are no data available on indigent defense expenditure from counties that do not apply for grant funds [from the Georgia Indigent Defense Counsel]." *Spangenberg Report*, at p. 13.

[138] *Spangenberg Report* at p. 28.

[139] According to the *Spangenberg Report*, some attorneys are exempted because of their occupation (e.g., prosecutors) and all attorneys are rotated off the panel at the age of 65. *Id.*

[140] *Id.* Similar systems are reported in Bibb and Baldwin Counties, with participation in the latter

mandatory panel membership in a 1992 case in which it rejected a declaratory judgment action brought by an attorney asserting that mandatory participation was unlawful and unconstitutional.[141] By contrast, listing on a panel for appointment in felony cases is purely voluntary in a number of counties.[142]

There is also a range of reported models in terms of qualifications,[143] supervision,[144] compensation,[145] and method of appointment.[146] Because of the variations among panel systems, the quality of representation likewise varies. While some systems clearly are providing very good representation of indigent criminal defendants, in other

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county required for the first ten years of practice in the county.

[141] *Sacandy v. Walther*, 413 S.E. 2nd 727 (Ga. 1992)(rejecting attorney's claim that appointment to the panel violated separation of powers jurisprudence, court did hold that uncompensated service as co-counsel was illegal under Georgia law and, thus, avoided dealing with a claim that such mandated service violated the 13th Amendment to the UNITED STATES CONSTITUTION.

[142] Voluntary participation in panel programs for felony defendants is reported in Clayton, Cobb, Chatham and Richmond Counties. *Id.* at p. 29.

[143] Cobb County requires that in order to be placed on one of the various lists (misdemeanor, felony, capital murder, non-capital murder, direct appeal and juvenile), the attorney must have an appropriate level of experience and criminal law training. *Id*. at p. 30. By contrast, in other systems the only qualification for service on a panel is membership in the State Bar.

[144] While the *Spangenberg Report* identifies Lowndes County as having a relatively formal system whereby the panel attorneys periodically report to the indigent defense coordinator the status of their cases and return client visitation cards, The Spangenberg Group reported that "[v]ery little monitoring of panel attorney performance is done" within the state and that only rarely is a panel attorney removed from the list because of poor performance. *Id*. at p. 32. The Lowndes program makes available a grievance procedure for attorneys who feel they were wrongfully removed from the list. *Id*.

[145] Supreme Court Guideline §2.6 provides in part: "[a]ttorneys handling appointed cases shall receive reasonable and adequate compensation for their labor, based on hourly rates and time spent as documented in records submitted by the attorneys...." Despite a November, 1999 amendment to the guidelines which "eliminated suggested maximum per-case caps" which previously had been mentioned by the Guidelines, The Spangenberg Group reports that caps are routinely imposed in many systems, the amounts claimed in vouchers by panel attorneys are often reduced without any explanation and flat fees are paid for certain types of service, such as a felony plea or misdemeanor plea. "In some instances superior and juvenile court judges ask attorneys to submit blank vouchers which the judges complete themselves." *Id*. at p. 33.

[146] While sometimes the appointment is done by indigent defense administrators, in other counties the appointment is often made the judge in the courtroom without any attempt to provide for a rotation of appointments.

systems judges report that they have to "coach" the less experienced panel attorneys, assistant district attorneys describe indigent defense in their county as "not worth a damn" and some defendants are not visited by their attorneys for lengthy periods of time.

b. Contract Attorneys

The second most common system for provision of legal services to indigent criminal defendants is the contract system under which an attorney or firm contracts to undertake representation of all defendants (or all defendants in a particular category, such as felony, juvenile, etc.) on a flat-fee basis. As of 2001, 59 of the 152 counties applying for GIDC money utilized this system to provide the bulk of indigent criminal defense.[147] It appears that contract representation is relied upon most heavily by counties with smaller populations. Nine of the 19 counties which were studied in the Spangenberg Report have populations over 100,000. Of those 9 counties, only Cobb and Bibb utilize contract attorneys. Cobb uses four contract defenders for indigent defense in juvenile court, while Bibb has contracts for representation in drug court, preliminary hearings, appeals, juvenile court and probation revocation.[148] While only 2 of the largest 9 use contract attorneys at all, 5 of the smallest 10 counties in the Spangenberg Report use contract attorneys as the sole means of providing indigent defense.[149]

A major perceived advantage of this system from the perspective of county officials who underwrite the vast majority of the expenses of indigent criminal defense in Georgia is that, as contrasted to a panel system, it provides much more predictability in terms of expenditures and is easier to administer. Thus, in "Spalding County, a contract system was adopted just over 10 years ago to replace a panel system. It was felt a contract system would be easier to administer than a panel program and it would give the county the benefit of knowing what its costs for indigent defense were going to be from year to year."[150]

A contract defender system, however, carries with it significant risks of conflict of interests between the attorney and his client. Because the fees received by the attorney

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[147] *See Spangenberg Report,* at p. 34.

[148] *Id*. at p. 35.

[149] *Id.* at p. 5.

[150] *Id.* at p. 38. Another perspective on the reason why counties choose the contract system rather than either a panel or a public defender system is provided by a contract defender in Ben Hill and Wilcox counties. He was quoted in a recent news article as asserting that counties select the contract system "because they want to pay as little as they have to." Rankin, *Defending the Poor: Three Systems: Is One Superior?*, ATL. JOURNAL-CONST., April 21, 2002, p. A21.

are not tied to the number of clients represented or the amount of time devoted to the representation, there can be seen to be disincentives built into such a system which might push an attorney toward perfunctory representation of clients. This risk would be heightened if the contract fee was expected to provide funds for investigators, transcripts, expert witnesses, etc. Similarly, the inclusion of death penalty defense work, which is almost by definition more time consuming and inevitably bears greater consequences to the client, in an indigent defense contract would exacerbate the risks to the professional representation of the defender's non-capital clients.

Because of these risks, the Supreme Court's guidelines for the operation of indigent defense are careful to impose significant constraints on what might otherwise be perceived as the freedom of contract. Thus, the guidelines regarding contract indigent defense provide:

> The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation....
>
> The contract shall provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:
>
> (a) the caseload assigned to the Contractor exceeds the allowable caseloads specified or;
> (b) The Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation or;
> (c) The cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded
>
> The contract shall avoid creating conflicts of interest between the Contractor or individual defense attorney and clients. Specifically:
>
> > (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys and;
> > (b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and
> > (c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

The inclusion of capital felonies where the death penalty is sought as a portion of the contract is prohibited.

GUIDELINES OF THE SUPREME COURT OF GEORGIA FOR THE OPERATION OF LOCAL INDIGENT DEFENSE PROGRAMS §2.7[151]

Assuming that enforcement of these rules would insure quality legal services which would satisfy the requirements of all ethical, legal and constitutional mandates, the Spangenberg Report identified a number of violations of these rules in the counties which it studied. Thus, the contract in one county explicitly includes death penalty representation in the felony contract, in another county the contract lawyer must pay any conflict attorneys out of the contract fee and in another county the contracted law firm conducts eligibility screening of clients. In addition, while it is not clear that this would constitute a violation of the Supreme Court rules, a number of contracts omitted any reference to maximum number of cases and even those which do provide such a cap sometimes do not provide any automatic cutoff of further cases being added to the contract defender's caseload when the maximum is reached.[152] Although precise figures are unavailable, many contract attorneys are representing a very large number of defendants each year, well in excess of appropriate caseloads.[153]

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[151] It should also be noted that the Commentary to the *American Bar Association Standards for Criminal Justice Providing Defense Services*, in recounting the history of contract defenders for the provision of indigent criminal defense, noted that across the country the "desire for economy in services all too often overrode constitutional obligations." AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3rd ed. 1992), Commentary to Standard 5-3.1, at p. 46. The Commentary goes on to note several cases in which contract systems were declared illegal and/or unconstitutional. *See, e.g., State v. Smith*, 681 P. 2nd 1374 (Ariz. 1984)(contract attorneys were so overworked, their services did not satisfy constitutional standards); People v. Barboza, 627 P. 2nd 188 (Cal. 1981) (contract with county provides disincentive to acknowledgment of conflicts of interest). Because of the risks involved in broad use of contract systems, the Commentary makes clear its assumption that "contracts should not be the primary provider, as they often are in practice."*Id.* at p. 47.

[152] *See generally Spangenberg Report*, pp. 34-40. It should be noted that the ABA standards for provision of defense services provides that "Contracts for services should include... allowable workloads for individual attorneys, and measures to address excessive workloads...." AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, STANDARD 5-3.3(B)(v) (3rd ed. 1992).

[153] The only caseload limitation mentioned in the Supreme Court Guidelines applies, by its terms, to full-time public defenders. Under §6.1, the following caseload is recommended per year per attorney for public defenders: "150 felonies ... 300 misdemeanors...250 Juvenile Offender cases...60 Juvenile dependency clients...250 Civil Commitment cases...25 Appeals...." The Guideline makes clear that these numbers are "not intended to be an aggregate. Attorneys

c. Public Defenders

Twenty of the 152 counties receiving state funds utilize public defender offices.[154] Four of the 19 counties examined in the Spangenberg Report operated such offices, ranging from Habersham County, with a population of approximately 36,000, to Fulton County, the largest county in the study and in the state.[155] Obviously, these offices show wide variation in size. For example, Habersham has two attorneys, an investigator and an administrative assistant, while Fulton County's office, with a budget of well over $8 million, employs 74 attorneys, 20 investigators, 17 administrators and a temporary social worker.

As with all systems, arrangements must be made for alternative sources of indigent representation in situations where there is a conflict of interest preventing the public defender from representing a client. Each county has its own system. Thus, in Houston County a panel system administered by the indigent defense coordinator is utilized in such situations. Likewise, a panel system is utilized in Habersham County and in DeKalb County.[156] Likely because of the size of the county and the enormous caseload, Fulton County uses what might be described as a blend of a contract/public defender system to handle cases in which the Public Defender is conflicted out of. "In 1996, the Fulton County Conflict Defender was incorporated as a not-for-profit criminal defense organization. The program, which contracts with the county, represents indigent defendants charged with felony offenses whose cases pose a conflict of interest for the Fulton County Public Defender. Conflict defenders are also often assigned every third case out of the Superior Court courtrooms, as well as to complex cases and cases in which the judges see a need for social work involvement."[157]

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whose representation involves handling cases within different categories listed above should adjust the caseload limitations proportionally." Because contract attorneys do indigent defense work only part-time, presumably the caseload limitations should be even lower than those mentioned in the rule. Instead, it would appear that some contract attorneys actually exceed the caseload limitations outlined for full-time defenders.

[154] It is obvious that there is at least one additional public defender office in the state because the Fulton County Public Defender, which was one of the counties studied by the Spangenberg Group, does not receive any GIDC funding.

[155] *See Spangenberg Report*, Table 1-1, p. 5. The material in the *Spangenberg Report* describing the findings concerning the public defender offices studied appears on pp. 40-46.

[156] The *Spangenberg Report* asserts that, while officially there are 18 attorneys on the Habersham County conflict panel list, an attorney in the county asserted that only five attorneys are "actively taking appointments." *Spangenberg Report*, at p. 43. Fee caps are used, following now-withdrawn GIDC guidelines.

[157] *Id.* at p. 45. The Conflict Defender employs 13 attorneys, two paralegals, an office

The *Spangenberg Report* details the generally positive evaluations of the various public defender offices offered by participants in the criminal justice system in the four public defender counties in the study. For example, the assistant public defenders in Houston County "commented on the high level of supervision and mentoring that goes on in their office" with one of them, a former Bibb County contract attorney, concluding that a comparison of the two systems indicates that the public defender system presents "distinct advantages both to him professionally and to the clients he represents."[158] The *Report* goes on to quote him as noting that under a contract system "there is no supervision or quality control."[159] Similarly, the DeKalb County Public Defender office, which is headed by perhaps the most experienced public defender in the state who has been in office since 1984, "was praised by numerous interviewees as one of the best indigent defense programs in Georgia."[160] The office has adopted vertical representation in which the same attorney represents a client from bail hearing through trial, has obtained salary parity with district attorney lawyers and the Public Defender is regarded as a "true advocate for indigent defense who works hard to implement important changes."[161]

While it is clear that there are some problems with some of the offices,[162] most of the identified weaknesses of the offices derive not from the structure of the system, but rather from a lack of resources. Thus, for example, there was criticism about extraordinarily high caseloads for the attorneys, lack of time devoted to formal training sessions, inadequate attention to the defense of those charged with misdemeanors (as compared to felonies), limited numbers of qualified interpreters and investigators and, in Fulton County, lack of formal supervision by administrative attorneys who are too busy with their own heavy caseload to be able to provide any meaningful oversight of the work

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administrator, a legal administrator, three investigators and two social workers. *Id.* As part of the response to *Foster v. Fulton County* (discussed in Chapter 5 of the *Spangenberg Report*), the office has hired five attorneys, two paralegals and a social worker to provide services to state court misdemeanor defendants.

[158] *Id.* at p. 40.

[159] *Id.*

[160] *Id.* at p. 45.

[161] *Id.*

[162] For example, the DeKalb County office was criticized in the *Spangenberg Report* because the Chief Public Defender is also designated as the indigent defense administrator. *Id.* This would appear to mean that the Chief Public Defender is formally the supervisor of the work of the office which he himself heads.

of those assigned to them. Salary data provided by the GIDC indicates that the average salary for Chief Public Defenders is "just over $70,000 while the current state salary for District Attorneys is $97,326."[163] Apparently the latter figure does not include any salary supplements paid to District Attorneys by counties. While it is possible that at least part of the disparity may be explained by lesser seniority and/or qualifications of the public defenders, it would appear that there is systematic inequality in pay between those on the prosecution side of the criminal justice system and those who defend indigent defendants.

III. **Findings**

Based upon the Commission's numerous public hearings, a review of the extensive documentation provided to the Commission by witnesses and other interested parties and a careful examination of the work of the Spangenberg Group, the Commission has concluded that the right to counsel guaranteed by both the federal and state constitutions is not being provided for all of Georgia's citizens.[164] This failure is attributable to: 1) a lack of adequate funding to provide effective assistance of counsel for indigents facing state criminal charges; 2) a lack of a statewide system providing accountability and oversight to provide constitutionally adequate assistance of counsel for indigent defendants. Specifically, the Commission finds:

THE STATE OF GEORGIA IS NOT PROVIDING ADEQUATE FUNDING TO FULFILL THE CONSTITUTIONAL MANDATE THAT ALL CITIZENS HAVE EFFECTIVE ASSISTANCE OF COUNSEL AVAILABLE WHEN CHARGED WITH A CRIME

1. The constitutional obligation to provide adequate legal services for indigents charged with violating state criminal law is imposed on the State of Georgia and this duty should be funded adequately by the State.

[163] *Id.* at p. 46.

[164] While difficult problems of calculation insure that there are no precise figures available, there can be no doubt that an overwhelming majority of criminal defendants in Georgia are participants in the indigent defense system. Not only did numerous witnesses assert this in their testimony before the Commission, but the national figure normally cited as the estimated percentage of the criminal defendant population eligible for appointed counsel is 80%. *See* Caroline W. Harlow, *Defense Counsel in Criminal Cases*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, NCJ 179023 (November, 2002). Thus, problems with the indigent defense system have a significant impact on the fairness of the entire criminal justice system.

The current method of providing indigent defense services in Georgia imposes a large unfunded mandate by the State upon its counties. This results in a very uneven distribution of services, at least some of which is directly related to the disparity of wealth among Georgia's 159 counties. For example, according to GIDC figures reported in the *Spangenberg Report*, a total of $.81 per resident was expended in Chattahoochee County on indigent defense, while the parallel figure for Cobb County was $5.20 and for Chatham County was $10.09. The Sixth Amendment of the United States Constitution and the comparable provision of the Georgia Constitution[165] impose the obligation to provide effective assistance of counsel for indigents accused of violating state crimes on the state of Georgia, rather than the counties or the legal profession. Indeed, since 1979, Georgia legislation has provided that it is the "policy of this state to provide the constitutional guarantees of the right to counsel....to all its citizens in criminal cases and to provide...[t]hat the *state* be responsible for funding the indigent defense system established in this article."[166] In contrast to this bold assertion and acceptance of responsibility for funding indigent defense, the most recent figures indicate that the actual expenditures by the State equal a little over one-tenth of the total expenditure in the 152 Georgia counties which are the recipient of state funds.[167] By contrast, 24 states in the United States provide total state funding of indigent defense services and the state governments of all of the comparison states (except Texas)[168] underwrote a higher percentage of the cost of indigent defense than the state of Georgia for the applicable reporting period.[169]

It would be expected that after the State takes the burden of indigent defense funding off the counties, the counties would be able to use a portion of the resources previously spent for this for other governmental purposes, including, for example, enhancement of the state-funded indigent defense system in much the same way as local governments presently provide enhancement of the prosecutorial system. Of course, once adequacy of funding by the state is

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[165] GA. CONST., Art. I, §1, para. XIV.

[166] O.C.G.A. §17-12-31 (10) (emphasis added).

[167] *Spangenberg Report*, Table 6-2. Presumably, the other seven counties provide complete funding for indigent defense, less any grants or donations from the federal government or private entities.

[168] It should be noted that under 2001 legislation enacted in Texas, it is very likely that Georgia will fall below that state in the percentage of state funding of the overall cost of indigent defense.

[169] *Spangenberg Report*, Table 6-2. It should be noted that North Carolina and Alabama fund the entire cost of indigent defense, Tennessee funds 87%, Kentucky 83.4% and Florida 80.2%. *See Id.*

achieved, the counties might choose to use the saved money for purposes unrelated to the criminal justice system or for tax relief.

2. There is not enough money currently allocated within Georgia to the provision of constitutionally-mandated indigent criminal defense.

The Spangenberg Group, reporting on its findings in the 19 counties (representing approximately 45% of the population of our state) concluded that "[n]one of the 19 counties...provide sufficient funds to assure quality representation to all indigent defendants." [170]. This conclusion is consistent with all the testimony which the Commission heard during its deliberations from participants in the criminal justice system, including prosecutors, defense counsel, indigent defense administrators, judges and others. This shortfall in funding presents itself in numerous ways. The most obvious illustration of underfunding is the low pay available for the payment of attorney fees. As noted in the *Spangenberg Report* (p. 91), some counties pay flat fees or impose stringent caps on payments to panel attorneys, such as limiting the fee for a plea to a misdemeanor to $265, regardless of how much time was expended by the attorney in interviewing the client, doing legal research or investigating the case. Likewise, some counties provide a simple flat fee for certain type of behavior, such as $300 for a guilty plea in a felony case.[171]

Panel or contract attorneys who are paid barely enough to cover their overhead are forced, in the words of the *Spangenberg Report*, "to make tough choices on how they handle their appointed cases: many admit they do not provide the same level of service that they do to retained clients; to do so would work a financial hardship on them. Often what suffers are client visits, either in or out of jail, investigation, legal research and zealous motions practice. The low compensation works as a disincentive for many attorneys to do the same level of work on appointed cases as they would in retained cases."[172]

Underfunding also is apparent in the public defender system. As reported by the Georgia Indigent Defense Council in its 2001 Report to the Governor and the General Assembly (at pp. 7-8):

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[170] *Spangenberg Report* at p. 91.

[171] The *Spangenberg Report* notes that many panel attorneys report that their vouchers for work performed in the exercise of the legal defense of indigents are "routinely reduced without explanation...." *Spangenberg Report* at p. 91.

[172] *Spangenberg Report* at pp. 91.

> A continuing problem is the inequitable compensation between prosecutors and defense attorneys. A [1999] survey ... revealed a striking 34% salary gap between District Attorneys and Public Defenders. That gap has grown as compensation for the state employed prosecutors has risen but that of defenders has not. In one North Georgia county, locally employed defenders are still receiving the same level of compensation awarded in 1987, while the salaries of the state employed judges and prosecutors have risen by more than 160% over the last fifteen years. Only one Georgia county provides salary parity between the prosecutor's office and the public defender office.
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> The salary study also showed that Chief Assistant District Attorneys are paid at rates more than five (5%) percent above those received by lead defenders. These attorneys are expected to have similar skills and abilities, yet we do not compensate them accordingly.

To the extent that a disparity between compensation for prosecutors and public defenders exists, talented attorneys will be encouraged away from the defense function and high rates of turnover will be suffered in the offices of public defenders. Either way, the legal services provided to the individual defendant will suffer. In addition to failure to realistically compensate attorneys, other manifestations of the lack of funding are inappropriate limitations on or total refusal of any funding for interpreters, investigators and/or expert witnesses. It has also been reported that the underfunding of the indigent defense system is at least a partial, if not the primary, explanation for the failure of many county systems to provide any services to such populations as juveniles and those charged with misdemeanors.

Not only does Georgia's allocation of resources to indigent defense suffer in comparison to expenditures on behalf of prosecution, but Georgia suffers by comparison to other generally similarly-situated jurisdictions. Of the ten other comparable jurisdictions identified in the *Spangenberg Report* for which information on per capita expenditures was available, only Indiana and Texas spent less per capita than Georgia on indigent defense.[173] It should be noted that Texas has recently added a state appropriation of $20 million for new grants to indigent defense, thus, undoubtedly raising its per capita expenditure beyond Georgia's unless significantly more resources are allocated in Georgia. Such states as Florida, Tennessee, Alabama and North Carolina devote considerably more resources to indigent defense than Georgia.

[173] *Spangenberg Report*, at Table 6-2.

A sufficiently-funded and better-organized indigent defense system could help save public funds which are being expended in inefficient ways. While the amount of current expenditures which might be saved by an improved indigent defense system cannot be precisely quantified, a number of arrestees charged with non-violent crimes are being held in county jails. In October, 2002, well more than half (59%) of the inmates of county jails in the state were arrestees awaiting trial, according to the Department of Community Affairs. While many such persons would not be appropriate candidates for pre-trial diversion or release on bond (because of the nature of their alleged crimes or their own record), it is reasonable to expect that a large number of these arrestees are charged with non-violent crimes. With a well-functioning indigent defense system in place, cases would be disposed of more quickly, enabling counties to reduce the expense of pretrial incarceration. Many such defendants are awaiting the appointment of counsel and others are awaiting visits from already-appointed counsel. Under an indigent criminal defense system operating according to appropriate standards with appropriate accountability, many such arrestees would be able to be released pending trial. Indeed, the Commission has been informed that *some arrestees are being held in pretrial detention in county jails for periods longer than the maximum sentence that could be imposed on them for commission if they were adjudged guilty as charged*. An adequately-funded, well-organized indigent defense system which provided well-trained attorneys, adequately compensated for their time could help reduce needless continued incarceration of non-violent defendants before trial and the unfair incarceration of those who had "served" their maximum sentence before trial.

Similarly, a well-functioning indigent defense system would help to reduce the costs incurred by the state in conducting retrials of defendants whose convictions are overturned for ineffective assistance of counsel. While this is also not quantified, needless expenditure is incurred for a second trial in some cases. Likewise, a well-trained and available criminal defense counsel assigned to represent an arrestee with mental health problems could assist in obtaining diagnosis and appropriate care.[174]

The Commission does not suggest that any efficiencies which could be created by an appropriately-funded and well-organized indigent defense system could be expected to offset the amount of additional money which needs to be spent on the indigent defense system. But a better system of indigent defense would produce some offsetting savings of governmental expenditures which might be directed to

[174] The *Spangenberg Report* finds "indigent defendants with mental illness frequently spend long periods of time detained pre-trial without proper screening or treatment." *Spangenberg Report,* at p. 91.

more appropriate areas, such as mental health assistance, rather than the warehousing of pre-trial arrestees. While savings obtained from a better indigent defense system would largely be reductions in county expenditures on items such as county jails, transportation of prisoners from one county to another, etc., there are also savings which might be achieved in the provision of attorney services (reduction of retrials) which, under the Commission plan, would be savings of state tax dollars.

3. While precise estimates are not available at this time, the United States Supreme Court's decision in *Alabama v. Shelton*[175] has the potential for greatly expanding the burden on the already-inadequate Georgia system for the provision of indigent criminal defense.

The Spangenberg Group has been engaged and is in the process of compiling a report on the impact of *Shelton* on Georgia's indigent criminal defense system. Its final report is presently scheduled for completion sometime in the spring of 2003. The Supreme Court decision is not likely to have a significant impact on the Commission's suggestions about structural reform of the Georgia system. However, with a larger population of defendants now covered by the state and federal constitutional mandate to provide defense services, the need for greater state funding of the indigent defense system could only be increased. It is also clear that *Shelton* will impose new and potentially costly obligations on municipal court systems in cases involving ordinance violations carrying the possibility of incarceration.

THE STATE OF GEORGIA LACKS A STATEWIDE SYSTEM OF ACCOUNTABILITY AND OVERSIGHT TO PROVIDE CONSTITUTIONALLY ADEQUATE ASSISTANCE OF COUNSEL FOR INDIGENT DEFENDANTS

4. Georgia's current fragmented system of county-operated and largely county-financed indigent defense services is failing to satisfy the state's mandate under the federal and state constitutions to protect the rights of indigents accused of violation of the state criminal code.

[175] This 2002 United States Supreme Court case is discussed earlier in this Report at nn. 16-22 and accompanying text.

State law[176] delegates to each of its 159 counties the responsibility for providing a system of indigent defense representation and responsibility for monitoring the provision of such services. The evidence received directly by the Commission along with a fair reading of the *Spangenberg Report* makes clear that this county-based system is failing to satisfy the state's constitutional and legal obligations to the indigent defendant population. "In many counties we visited, there is little or no oversight of indigent defense attorney performance or qualifications. There is little or no enforcement of the [Supreme Court] Guidelines ... for the Operation of Local Indigent Defense Services."[177] While the Supreme Court Guidelines require the county-based tripartite committees to insure the competence of indigent defense attorneys (whether public defenders, panel attorneys or contract attorneys),[178] the committee members in most of the counties visited by the Spangenberg Group "do not engage in effective monitoring of the contract, panel or public defender system in their county."[179]

The failure or inability of the country tripartite committees to exercise meaningful supervision over the county systems is reflected in the numerous examples reported by the Spangenberg Group of situations in which indigent defendants are not being given the assistance of counsel to which they are entitled under the law and, in some circumstances, under the state and federal constitutions. For example, the Supreme Court Guidelines [§1.2] state that "[c]ounsel shall be appointed for every eligible person in custody within 72 hours of arrest or detention. Counsel shall make contact with the person promptly after actual notice of appointment." This routinely does not occur in many counties[180] and the *Report* concludes that

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[176] *See* O.C.G.A. §17-12-4; O.C.G.A. §17-12-37.

[177] *Id.* at p. 85.

[178] Supreme Court Guidelines §§3.1, 3.2. Section 3.1 covers the public defender and contract lawyer and §3.2 deals with panel attorneys. The indicators of performance under both guidelines are identical: (a) early entry into representation of indigents; (b) vigorous and independent representation of the client; (c) participation in training activities and continuing legal education; (d) effective and reasonable use of time and resources.

[179] *Spangenberg Report*, at p. 22. In many counties, the role of the tripartite committee is confined to reviewing and approving vouchers and reviewing attorney grievances. *Id*. The *Report* notes that it might well be unrealistic to expect the tripartite committee, which typically lacks a staff other than the indigent defense administrator and often includes non-lawyers, to exercise any meaningful supervision over the local indigent defense program.

[180] The *Spangenberg Report* asserts that in one county the jail staff has been told not to deliver requests for counsel from prisoners to the contract attorneys more than once weekly. *Spangenberg Report* at p. 47. In another county, "the earliest the defendants had met with their court-appointed lawyer was approximately three weeks after arrest. Some defendants told us that

> "early representation of indigent defendants is uneven throughout the state and problematic in many areas: sometimes there is no involvement of counsel until arraignment, and in some counties, we were told felony indictments can take up to one year."[181]
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> Beyond initial appointment, it is clear that very often "appointed attorneys do not meet with their clients enough" to satisfy their ethical, legal and constitutional obligations.[182] Likewise, there is a "great deal of variance"[183] across the state in the process of determining eligibility for indigent services. While some counties stick closely to federal poverty guidelines, others have "homegrown rules of thumb."[184] The training requirements for indigent defense attorneys in the counties visited by the Spangenberg Group were "very minimal–and often non-existent."[185] While the Spangenberg Group concluded that it had insufficient information to reach any conclusions about the overall attorney workload in the counties it visited, it did report that attorneys in the four public defender offices "told us they felt their caseload was excessive."[186]

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counsel was met with for the first time seven to eight weeks after arrest." *Id.* at p. 48.

[181] *Id.* at p. 48. "One DeKalb county conflict case attorney [said] that if a defendant is out on bond, no appointment of counsel is made until indictment, which can take up to a year. The attorney commented that when he is not appointed until arraignment, compared with a retained case, he loses 6-12 months of investigation." *Id.* at pp. 48-49.

[182] *Spangenberg Report*, at p. 56. This conclusion was offered to the Spangenberg Group by "attorneys, judges, jail staff and inmates." *Id.* In addition to the fact that this obligation is not being enforced by a meaningful system of oversight, the absence of jails and the overcrowding of others partially contribute to this problem. *See id.*

[183] *Spangenberg Report*, at p. 59.

[184] *Id.*

[185] *Id.* at p. 60. This failure of training is not due to a lack of opportunities. The GIDC offers "dozens of low-cost criminal law training sessions in Atlanta and in other locations around the state each year. Attorneys who participate...praised them. However, GIDC reports that overall participation is low; it has had to cancel some sessions scheduled outside of Atlanta due to too few participants." *Id.* at p. 61. In 2001, the Professional Education Division of the GIDC sponsored over 60 seminars. GEORGIA INDIGENT DEFENSE COUNSEL: 2001 ANNUAL REPORT at p. 54. According to the GIDC, it is the second largest provider of continuing legal education in the state. *Id.* at p. 53. The Division also publishes a number of books and pamphlets aimed at the practitioner of criminal defense law, with titles ranging from "The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims" to a "Search and Seizure Manual" to "The Effective Use of Objections During a Criminal Trial." *Id.* at p. 57.

[186] *Spangenberg Report* at p. 66.

5. There is no effective state-wide structure in place designed to monitor and enforce compliance with existing Georgia Supreme Court rules governing the operation of local indigent defense programs.

The Supreme Court Guidelines, which appear as **Appendix C**, appear to be a well-constructed set of rules designed to insure quality indigent defense services. Unfortunately, though, the failure of many counties to exercise oversight over their local systems is exacerbated by the inability of the Georgia Indigent Defense Council to monitor the performance of the counties. This is not attributable to any lack of good intentions or lack of competence on the part of the GIDC or its staff. Effective supervision by the state is virtually impossible because the GIDC is underfunded and thus understaffed to engage in any meaningful monitoring of the local system, there are 159 different systems, the size of the state makes personal supervision and visitation difficult, and, finally and perhaps most importantly, the state contributes barely 10% of the funding for indigent defense. The combination of these factors renders the GIDC unable to enforce rules[187] designed to provide an efficient, constitutionally-acceptable system of indigent defense services.

6. The criminal defense function must be independent. In order to fully establish the appropriate independence, defense counsel must have responsibility for case by case administration, without depriving judges of their inherent right and obligation to insure that courtroom proceedings comply with the mandates imposed by fundamental law, statutes and the rules of professional responsibility. Similarly, independence from the executive function at the local level requires funding of indigent defense services at the state level.

Because of the severe underfunding and fragmented organizational structure of the indigent defense system, it is not uncommon for judges to have a major influence on the type of indigent defense system used in their county. Judges often

[187] Supreme Court Guideline 5.3 gives the GIDC the power to "terminate any agreement [with a local indigent defense program] when a local program fails to comply with the guidelines or fails to fulfill their [sic] duties and obligations under the agreement." The *Spangenberg Report* notes, however, that the GIDC "has not turned down any county that applies for funds [and] does not de-fund counties it finds are not providing adequate indigent services." *Spangenberg Report*, at p. 25. The refusal to withdraw funds is attributed by the *Report* to the hostile reactions triggered by occasional letters by the GIDC to local programs calling "attention to what [the GIDC] perceives as inadequate performance," the fear of political fallout from the General Assembly and local judges, and the commitment of the GIDC to the improvement of indigent defense and its fear that removal of funding will not improve a poorly-performing system but instead exacerbate the already-existing problems. *Id.*

participate in the appointment of attorneys in individual cases, in the review of vouchers submitted by panel attorneys and in the determination of how much to pay such attorneys in an individual case. Judges also often make the sole determination of whether the defendant will be permitted to employ an expert witness. The *Spangenberg Report* details instances of judges serving on the tripartite committees which are charged with the day to day operation of the local indigent defense system. All of these behaviors, while undoubtedly derived from a commitment and duty to assure that a constitutionally adequate defense is provided for indigents, nevertheless has the potential for unfairness to the defendants and attorneys or at least the appearance of unfairness. In a number of instances court-appointed and contract attorneys "expressed concern that if they were viewed by some judges as zealous advocates—e.g., they filed several motions in one case or demanded trials—they ran the risk of being removed from the ad hoc counsel appointment list or denied a future contract."[188] Whether or not there is such a risk in fact (and the Commission has not been informed of any situation in which an appointment was denied or a contract terminated for such reasons), the mere fact that some attorneys (and their indigent clients) believe that there is a risk provides cause for concern.

Independence from the local governing body is also extremely important. In a state where the county governing body is elected, there is a tremendous temptation to limit expenditures on indigent defense to politically acceptable levels rather than constitutionally required levels. As numerous witnesses before the Commission testified, the cause of indigent defense is not one which is especially popular among the voters of Georgia. Several witnesses informed the Commission that in their county, the judge or judges had to intervene with the county commissioners on behalf of funding for indigent defense. Funding for constitutionally-mandated indigent defense should not be subject to competition for the expenditure of local dollars for schools and other similar items.

7. A public defender system under which those providing indigent defense services are full-time employees of the state, subject to direct supervision and mentoring of senior lawyers with experience and interest in criminal defense work, is the delivery system most likely to afford effective representation to those entitled to it under legal and constitutional mandates.

While panel systems make supervision and mentoring more difficult than a public defender system, such a system, when adequately funded and administered, can be operated consistently with constitutional and legal standards. While limited use of a contract system to provide indigent defense services may be appropriate in

[188] *Spangenberg Report*, at p. 86.

narrow situations, such as conflicts or appeals, the Commission concludes that it is extremely difficult if not impossible to use effectively a flat-rate contract system as the primary means of providing indigent defense services.

8. The quality of legal services provided to indigent defendants is significantly hampered by a failure of most systems to impose minimum eligibility requirements for the attorneys who represent indigent defendants.

The *Spangenberg Report* reveals that in most of the counties which were visited "there are no minimum eligibility criteria for attorneys who wish to accept court-appointed cases."[189] Thus, in some counties, the only requirement for membership on the panel from which appointments are made is membership in the state bar. In other counties, the panel is composed of all attorneys in the county who are in the early stages of their career,[190] without regard to whether they have training,

[189] *Spangenberg Report*, at p. 92. It would seem that the inability to enforce requirements of a minimum level of training and education would be most acute in the panel system (which is, however, the predominant system of indigent defense service delivery). All attorneys in a public defender office presumably have expressed an interest in criminal defense work and, at least in a multi-lawyer office, have an opportunity for mentoring by more senior attorneys. For example, the *Spangenberg Report* notes comments in the Houston County public defender office on the "high level of supervision and mentoring" that takes place in that office. *Id.* at p. 40. Of course, the availability of more resources could provide for more training opportunities within the public defender system. *See id.*, at p. 44 (expressing concern about an "apparent lack of formal supervision and training" in the Fulton County Public Defender Office. It would seem that most of those who would seek work as contract attorneys would be those with interest, training and experience in criminal law, though the Spangenberg Group was told "that in some counties, it is possible that no attorneys who meet the Supreme Court's minimum standards will be interested in becoming a contract attorney, so the county takes whoever is willing to do the work." *Id.* at p. 36. Presumably the reference to the Supreme Court's standards is to Guideline §3.1, which requires that the tripartite committee should satisfy itself that a contract lawyer (or public defender) is "competent, meaning: (a) has an adequate educational background; (b) has demonstrated ability to perform competent trial work and the administration of an office; (c) he or she conducts their professional work in an ethical manner; (d) is a member in good standing of the State Bar of Georgia." The parallel provision dealing with panel attorneys mentions only competence and does not refer to educational background or trial experience. Supreme Court Guideline §3.2.

[190] *Id.* at pp. 28-9. In several counties, an attorney must serve on the panel for the first 5 years of practice, while in Baldwin County service on the panel is mandatory for all attorneys during their first 10 years of practice. In Lowndes County, after the initial 5-year mandatory term on the panel, an attorney not intending to practice criminal law may resign from the panel. If, however, the civil practice involves any in-court practice, the attorney must participate on the panel. *Id.* at p. 28.

competence or experience (or interest)[191] in criminal law. In a number of counties, young attorneys "'cut their teeth' on felony cases, the only appointed cases that are available."[192]

A notable exception to the general failure to impose standards of experience and training is the Cobb County panel program. According to testimony before the Commission and the *Spangenberg Report*, there are separate panels for misdemeanor, felony, capital and non-capital murder, direct appeal and juvenile cases.

> To be included on the various lists ... attorneys must attend annual criminal law CLE seminars and meet minimum levels of experience. For example, attorneys on the misdemeanor list must have engaged in the criminal practice of law for one year prior to joining and must have served as lead or assisting counsel in at least three misdemeanor trials. Felony attorneys must have five years experience in criminal defense or prosecution and must have practiced criminal law for three consecutive years before joining the panel. Further, they must have previously served as lead or assisting counsel in three felony trial cases. Attorneys may move up on the list ... by submitting a letter to the Administrator that provides information regarding meeting the requirements of the desired list.[193]

9. Funding for services such as expert witnesses, investigators, qualified interpreters, rooms where attorneys can conduct private conversations with their indigent clients, and social work evaluations of and services for clients is integral to a constitutionally acceptable level of indigent criminal defense. In many areas of the state inadequate funding for such services results in unfair and often unconstitutional treatment of indigent criminal defendants.

The Spangenberg Group found major problems "surrounding requests for investigators or expert witnesses" in its study.[194] Denial of past requests[195] for

[191] *Id.* at p. 28. A panel attorney in Bibb County, where "all practicing attorneys must serve on the panel...for at least 5 years," an attorney who is on the panel and regularly practices criminal law reported that "because of the nature of the panel system, personal injury attorneys are forced to take cases which are outside of their areas of experience and they just plead these cases." *Id.*

[192] *Id.* at p. 92.

[193] *Spangenberg Report* at p. 30, fn. 34.

[194] *Spangenberg Report*, at p. 90.

[195] A panel attorney in Bibb County reported that he has filed 20 requests for expert witnesses on behalf of his clients and has never had a request approved. *Id* at p. 64.

investigative assistance or expert witnesses have caused some attorneys to fail to make such requests, even in cases where such assistance would seem appropriate. In at least one county, judges and defense attorneys reported that expert witness and investigative expenses would be approved only in death penalty cases.[196] While all four of the public defender offices visited by the Spangenberg Group had investigators on staff, the situation is very different in panel and contract systems. In at least one contract system, the fees for expert witnesses come out of the contract itself,[197] a clear violation of Supreme Court Guideline §2.7, which is designed to guard against conflicts of interest between attorney and client.

Severe problems exist in the availability of interpreters.[198] In a number of counties, the "lack of available Spanish speaking interpreters was cited as a significant problem" by participants in the system.[199] There were reports of defendants' children being brought to court to serve their parents as interpreters, inmates, probation officers and jail guards being used as interpreters and, in one county, commercial "language lines" being utilized to provide interpreter services at first appearance hearings.[200] It was also reported that in one county with a 10% Hispanic jail population, attorneys rarely visit their Hispanic clients because, while interpreters are provided at court sessions, there are no translators available at the jail.[201]

10. Georgia lacks a systematic, uniform, effective approach to identifying and assisting indigent defendants with mental disabilities. Additionally, defense counsel are often not trained to recognize or cope with the behaviors associated with mental disabilities, are not uniformly aware of the

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[196] In another county, the Spangenberg Group was told that obtaining approval for investigator services even in a death penalty case was like "pulling teeth." *Id.* at p. 62.

[197] *Id.* at p. 38.

[198] The Georgia Supreme Court in October, 2001 promulgated rules requiring the availability of certified and/or registered interpreters for non-English speakers in court proceedings. This order also established a Commission to oversee the development of county programs and to promulgate guidelines for interpreter programs. This program has begun to have an impact. As of July 31, 2002, there were 148 qualified interpreters (having attended an orientation session and passed a written examination) and 19 certified interpreters (having additionally passed an oral examination). *Id*. at p. 63.

[199] *Id.* at p. 62.

[200] *Id*. at pp. 62-3.

[201] *Id.* at p. 63.

consequences of pleas of not guilty by reason of insanity and guilty but mentally ill, and lack information about alternative pre- or post-trial dispositions for persons with mental disabilities.

There are two dimensions to this problem. The smaller first part relates to defendants who interpose defenses of not guilty by reason of insanity, guilty but mentally ill, or incompetence to stand trial. There have been about 400 of these cases in the last 10 years. Defense counsel handling such cases are often unfamiliar with the consequences of such pleas, which can place an individual in a mental institution for an indefinite duration (by contrast to a criminal sentence of a definite term). Defense counsel typically do not follow the person once committed under these pleas and the later exercise of rights can be impaired.

The larger problem relates to the system's response to indigent defendants with mental disabilities which may not relate to their culpability for the alleged criminal offense. Such defendants often spend long periods of time detained pre-trial without proper screening or treatment. The Commission heard testimony from sheriffs and others that jails have become the institution which replaced state and regional hospitals for the mentally disabled, and that counties are spending substantial sums on medication and other medical needs of these defendants. The Commission heard testimony from experts in the field that many defense counsel are untrained and ill-equipped to deal with the behaviors exhibited by defendants with mental disabilities, do not zealously represent these clients, and are unaware of possible alternative pre- and post-trial dispositions. There are few available resources, such as social workers, that could assist defense counsel with any of these issues.

The Commission received information about one county that has implemented an early intervention system under which jail inmates are screened with the purpose of referring inmates with mental disabilities to local mental health services. The Commission also received descriptions of mental health courts in other states, as well as systems that provide social workers to assist in diversion/treatment efforts. Currently, however, there is no systematic attempt to involve the indigent defense system in developing consistent, effective, statewide solutions, including collaboration among various state and local agencies that have missions to serve persons with mental disabilities.

11. Georgia lacks a uniform, effective approach to providing counsel for juvenile defendants, including making the determination of indigency. Special training for counsel for juvenile defendants generally is not required. Little guidance is provided on the special responsibilities of courts that deal with juveniles as they relate to providing counsel or on the special ethical issues for attorneys representing juvenile defendants. In many counties,

juveniles are not included in the indigent defense plan and the interests of juveniles are not represented on the county tripartite committees. In others, contract juvenile defenders are expected to handle huge caseloads well in excess of accepted and acceptable standards. Finally, the provision of counsel in deprivation cases is not uniform throughout the state.

Almost 28% of the cases in 2001 reported to the GIDC as involving indigent clients were juvenile court cases. This almost certainly understates the magnitude of the problem because many counties exclude juvenile courts from the indigent defense system. It is clear that attorneys are overburdened in cases in some of the counties in which indigent services are provided in the juvenile court system. For example, the *Spangenberg Report* found that a single part-time public defender in Richmond County handles approximately 1,200 juvenile cases annually (along with a private practice) and, in the year prior to the group's site visit, four contract lawyers in Cobb County represented a total of 3,500 juvenile clients.[202]

There is great disparity in how indigency is determined and whether parental resources are considered in juvenile cases. Georgia law and the Constitution require counsel to be available to the child at all critical stages, including from the outset of detention. Although ABA Standards forbid waiver of counsel by juveniles, Georgia law permits an uncounseled waiver of counsel and allows the child to be represented by a parent or guardian. Experts believe that most juveniles in the system also have mental health issues and the special needs of these children, as they affect the provision of competent defense services, are being ignored. The Commission also heard evidence that truancy intervention programs can have substantial impact on the problem of juvenile crime, because 80% of all juvenile burglaries are committed during school hours.

Another problem created by Georgia law is that the charges to be brought against a child are determined by court personnel, not by the prosecutor. Often, thus, neither the prosecutor nor the defense counsel can adequately prepare for hearings. Pre-trial access to information by defense counsel is complicated by the fact that the case files are held by court personnel, not by the prosecutor.

Although GIDC provides training programs for lawyers who represent juveniles, most counties do not require counsel who represent juveniles to enroll in that training.[203] Social workers and other special resources to assist with pre- and

[202] *Spangenberg Report*, at p. 94.

[203] The Spangenberg Group was informed that Fulton County juvenile court judges require attorneys to present a certificate attesting to completion of GIDC training in juvenile cases as a condition of appointment to represent juveniles. *Spangenberg Report*, at p. 61.

post-trial disposition issues are not available to juvenile defenders.

Georgia law requires counties to provide counsel for parents in deprivation cases, but they are not required to provide counsel or guardians ad litem for children. There is inconsistency in whether counsel are in fact appointed for those parents. According to the *Spangenberg Report*, in "some counties, indigent parents are provided appointed counsel and children are provided with a guardian ad litem. In other counties children are represented by appointed counsel. In some counties indigent parents receive no representation at all."[204]

12. There is no comprehensive system of data collection designed to provide accurate statistics regarding the provision of indigent criminal defense services in Georgia. The absence of such a system significantly hampers the ability of policy makers and administrators to make informed judgments and plan meaningful improvements in the administration of indigent defense services.

The Spangenberg Group found a "lack of reliable and comprehensive data on indigent defense," noting that the only source of county by county caseload data is the information provided in applications for GIDC funding prepared by the counties.[205] Not all counties "count cases" in the same way and some counties simply omit certain categories of cases from their application forms. Data collection of information dealing with jail population, training of indigent defense personnel and funding is also inadequate and needs significant improvement.

13. Litigation designed to bring indigent criminal defense in various county systems into compliance with appropriate constitutional and legal standards has already been brought and, in some cases, yielded piecemeal reform by consent decree. Further litigation is being contemplated and likely will occur. Thorough, carefully considered reform of the Georgia system by the appropriate legislative and executive policy makers is far preferable to reform by litigation in the state and federal courts.

IV. Recommendations:

1. Adequate funding of indigent criminal defense in cases alleging a violation of state law should be provided by appropriations by the Georgia General

[204] *Spangenberg Report*, at p. 94.

[205] *Id*. at pp. 94-95.

Assembly[206]

Georgia's experience over the past 40 years has demonstrated that a system of minimal or non-existent state funding with primary financial responsibility at the county level does not work. It results in an inadequate and, in many respects, unconstitutional level of services, tremendous variation in quality and serious unfairness in the operation of the criminal justice system. Both the United States and Georgia Constitutions oblige the state to provide criminal defense for indigents charged with violating state law. The State should live up to that obligation by providing adequate resources for indigent defense. This responsibility should not be delegated to the counties.

2. The delivery of indigent defense services should be reorganized to insure accountability, uniformity of quality, enforceability of standards and constitutionally adequate representation.

A. Indigent defense should be organized on a judicial circuit level rather than the current system under which the unit of delivery is the county. The reduction of delivery systems from 159 to 49 will help to insure uniformity, quality and accountability.

B. **The presumptive method of delivery should be a full-time public defender with appropriate support staff.** Once the new structure and funding system of indigent defense is in place, it will be presumed that each judicial circuit will have a Circuit Public Defender and an appropriate staff. Those circuits currently operating other types of systems, as well as those circuits that would like to adopt a different type of program, should be required to obtain approval from the proposed new Georgia Indigent Defense Board, which should grant such approval only if it is convinced that the proposed system will be meet or exceed the standards promulgated by the Board for the operation of indigent defense systems. Alternative systems might be a panel system or a contract system or some combination of such systems. For example, a multi-county circuit might seek approval for a system in which a public defender provided services in one or more counties within the circuit

[206] It should be noted that for 23 years since the enactment of the Georgia Indigent Defense Act, the legislative expression of policy in the area of indigent criminal defense has included the statement that "It is the policy of this state to provide the constitutional guarantees of the right to counsel and equal access to the courts to all its citizens in criminal cases and to provide...(10) That the *state* be responsible for funding the indigent defense system established in [the Georgia Indigent Defense Act.]." O.C.G.A. §17-12-31 (emphasis added).

and a contract system would operate in the rest of the circuit. Once having been approved by the Board, such systems would have to perform according to the performance standards promulgated and enforced by the Board, through its staff.

C. The state should establish a Georgia Indigent Defense Board to organize, supervise and assume overall responsibility for the operation of Georgia's indigent defense system.

1) The Board should be comprised of 13 members appointed as follows: a) Ten members appointed by the Georgia Supreme Court, one from each of the state's ten judicial districts. In making these appointments, the court should receive suggestions from the State Bar of Georgia, the Prosecuting Attorneys Council, the organizations representing each category of judges in the state, and the Georgia Association of Criminal Defense Lawyers, as well as any individuals or other organizations within the state; b) One member each appointed by the Governor, the Lieutenant Governor and the Speaker of the Georgia House of Representatives.

2) While Board members should represent a diversity of backgrounds, experiences and qualifications, Board members should be individuals with significant experience in the criminal justice system or a demonstrated strong commitment to provision of adequate and effective representation of indigent criminal defendants.

3) Board members should serve four-year terms with a limit of two consecutive full terms after any initial abbreviated or unexpired term. The initial terms, however, for Board members representing the odd-numbered judicial districts, along with the initial term for the appointee of the Lieutenant Governor should be for two years, while all other initial appointees should serve a full four-year term.

D. The Georgia Indigent Defense Board should have broad powers and responsibilities for the delivery of indigent criminal defense services. It should: a) hire, after appropriate advertisement, a Director of Indigent Defense who will serve as chief of the Board's staff; b) determine the types of information required for the auditing and monitoring of the performance of the indigent criminal defense function and supervise the collection of that data, whether done by its own staff or by the Administrative Office of the Courts; c) annually present a report to the Supreme Court, Governor and General Assembly concerning the status of indigent defense in

Georgia; and d) create rules governing the indigent defense function, including such topics as permissible caseload/workload, continuing education, attorney qualifications and compensation for work in certain kinds of cases (capital cases, felonies, misdemeanors, etc.), investigators, interpreters, determination of indigency, time frames for appointment and first contact, structure of conflict defense systems, structure of panel systems, structure of contract systems.

It also should: e) operate public defender offices in as many of the 49 circuits which are not operating alternative Board-approved systems of indigent defense. (In this context, the term "operate" includes the ability to appoint, supervise and dismiss Circuit Defenders under the standards and procedures promulgated by the Board.) In appointing Circuit Defenders, the Board should advertise vacant positions in the local area, seek and receive input from the governing authorities of the county or counties in the Circuit and receive suggestions from local bar associations, attorneys, Superior Court and other judges and other citizens. Circuit defenders shall be experienced in the criminal defense function and have a commitment to effective representation of indigent defendants within the mandates of the Board and the profession concerning appropriate professional conduct; f) review proposals for alternative delivery systems in circuits seeking to operate a different system. Having established standards for the operation of such alternative delivery systems, the Board should have the power to approve or disapprove such proposals, based on compliance with (or reasonable prediction of compliance with) those standards; g) conduct an annual review of the performance of indigent defense delivery systems (both state-operated circuit public defenders and other approved systems) to insure that each system is operating appropriately and in compliance with the Board's standards; h) determine whether a local non-public defender system is in compliance with the Board's rules and, if it is not, to replace that system with a Board-operated circuit public defender; i) within its discretion, create statewide offices for particular functions (e.g., death penalty representation, appellate work, post-conviction representation, mental health work, juvenile representation); j) conduct education and training programs for persons providing indigent defense services in the state, including those employed in public defender programs or alternative delivery systems.

3. The State of Georgia should adopt principles to govern the circuit systems of providing legal services to indigent criminal defendants

As the "result of careful drafting and review by representatives of all segments of

the criminal justice system—judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research,"[207] the American Bar Association has promulgated a set of Standards designed to guide policy makers in constructing and operating "systems for legal representation."[208] In addition to General Principles governing Professional Independence,[209] Supporting Services[210] and Training and Professional Development,[211] the Standards provide guidance in establishing and operating systems utilizing Assigned Counsel,[212] Contract Defense Services[213] and (Public) Defender Systems.[214] Stage of

[207] AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3rd ed. 1992) at p. ix. (hereinafter STANDARDS) (in addition to the blackletter provisions which are quoted herein, the American Bar Association has provided a history of each standard, related standards from other sources and commentary on each of the blackletter provisions)

[208] STANDARD 5-1.2 (Subsection (a) of this Standard endorses the use of a full-time public defender "when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas." Subsection (b) provides that all systems "should include the active and substantial participation of the private bar.").

[209] STANDARD 5-1.3 (Subsection (a) provides: "The legal representation plan ... should be designed to guarantee the integrity of the relationship between the lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.")

[210] STANDARD 5-1.4 ("The legal representation plan should provide for investigatory, epert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process....")

[211] STANDARD 5-1.5 ("The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs."

[212] Part II of the STANDARDS. The standards in this part deal with systematic assignment, eligibility to serve, rotation of assignments and revision of roster, as well as compensation and expenses. The latter provision, STANDARD 5-2.4 provides: "Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses."

[213] Part III of the STANDARDS. The standards in this part deal with the use of contracts for services, contracting parties and procedures, and elements of the contract for services. STANDARD 5-3.1 provides: "The contracting authority should not award a contract primarily on

Proceedings,[215] Eligibility for Assistance[216] and Offer and Waiver.[217] Very importantly, Part V of the Standards includes a provision on appropriate workload which states that no defenders, under any type of system, "should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."[218] Since the promulgation of the third edition of Chapter 5 of the ABA Standards in 1992, the ABA House of Delegates, in February of this year, adopted a set of 10 "Principles of a Public Defense Delivery System."[219]

The Commission strongly recommends that the State's policy makers (the Georgia Supreme Court, the General Assembly and the Georgia Indigent Defense Board) utilize these Standards and Principles in the creation and supervision of the indigent criminal defense delivery system in Georgia. Unquestionably, adequate state funding is necessary to the creation of an appropriate indigent defense system. It cannot be stated strongly enough, however, that without a carefully considered system which operationalizes these Standards and Principles, even a significant increase in state funding will be insufficient to provide an adequate indigent defense system. While the Commission's complete report on the impact of *Shelton* awaits the completion of the further work of The Spangenberg Group, the Commission strongly recommends that the principles promulgated for local indigent defense systems be used in establishing and monitoring the indigent defense system providing representation in municipal and probate courts.

4. The State of Georgia should adopt performance standards by which

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the basis of cost." The Commentary to this standard refers to guidelines concerning the negotiating and awarding of government contracts for criminal defense services promulgated by the National Legal Aid and Defender Association and endorsed by the American Bar Association.

[214] Part IV of the STANDARDS. The standards in this part deal with the chief defender and staff, restrictions on private practice and facilities.

[215] Part VI of the STANDARDS includes guidelines concerning the initial provision of counsel, the duration of representation and removal of counsel.

[216] Part VII of the STANDARDS.

[217] Part VIII of the STANDARDS.

[218] STANDARD 5-5.3.

[219] The blackletter of these Principles appear in **Appendix D** of this Report. The ABA promulgated Commentary to provide context and detail to these Principles.

attorneys providing indigent defense should be evaluated

It is important for the state to adopt standards against which, consistent with respect for the attorney-client relationship, indigent defense attorneys can be evaluated. Such standards should provide a source of guidance to defense attorneys, but should not be used to determine whether any alleged misconduct of the attorney constitutes ineffective assistance of counsel nor whether professional discipline is appropriate. Beginning in 1963, the American Bar Association and the American Law Institute began a collaboration in the creation of such standards. In 1992, the American Bar Association approved the third edition of these Defense Function Standards.[220] On its face, this set of standards applies to all criminal defense attorneys, whether providing services to paying or indigent clients. The vast majority of criminal defendants in the State of Georgia are indigents. The Commission does not necessarily recommend that every one of the ABA Standards be adopted for use in the provision of indigent defense services, but offers a summary of them as examples of the kinds of provisions which should be included in any performance standards promulgated by the Georgia Supreme Court or the Georgia Indigent Defense Board. The promulgation of such standards will assist the Board in conducting its evaluation of Circuit systems and will give Circuit administrators (whether public defenders or otherwise) assistance in evaluating the conduct of attorneys within their respective offices. While the Commission's complete report on the impact of *Shelton* awaits the completion of the further work of The Spangenberg Group, the Commission strongly recommends that the standards for local indigent defense be used in evaluating the work of attorneys providing indigent defense services in municipal and probate courts.

The Standards are "intended to be used as a guide to professional conduct and performance."[221] Under the Standards, defense counsel are directed to "serve as the accused's counselor and advocate with courage and devotion and ... render effective, quality representation."[222] Specific standards are offered to cover:

[220] These Standards appear as Title 4 of the ABA Standards mentioned earlier.

[221] STANDARD 4-1.1 (while making clear that these Standards are not designed to "be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction," this Standard states that the Standards "may or may not be relevant in such judicial evaluation, depending on all the circumstances.")

[222] STANDARD 4-1.2(b).

- **Delays; Punctuality; Workload**[223]
- **Public Statements**[224]
- **Establishment of (Lawyer-Client) Relationship**[225]
- **Interviewing the Client**[226]
- **Prompt Action to Protect the Accused**[227]
- **Duty to Keep Client Informed**[228]
- **Duty to Investigate**[229]
- **Relations with Prospective Witnesses**[230]
- **Advising the Accused**[231]
- **Control and Direction of the Case**[232]
- **Duty to Explore Disposition Without Trial**[233]
- **Plea Discussions**[234]
- **Sentencing**[235]
- **Appeal**[236]

Another set of performance standards widely relied upon throughout the country was promulgated by the National Legal Aid and Defender Association (NLADA)

[223] STANDARD 4-1.3.

[224] STANDARD 4-1.4.

[225] STANDARD 4-3.1

[226] STANDARD 4-3.2.

[227] STANDARD 4-3.6.

[228] STANDARD 4-3.8.

[229] STANDARD 4-4.1.

[230] STANDARD 4-4.3.

[231] STANDARD 4-5.1.

[232] STANDARD 4-5.2.

[233] STANDARD 4-6.1.

[234] STANDARD 4-6.2.

[235] STANDARD 4-8.1.

[236] STANDARD 4-8.2.

in 1995.[237] The NLADA has been in existence for over 50 years and works closely with the American Bar Association and the National Association of Criminal Defense Lawyers in assisting in the development of indigent defense programs throughout the country. The NLADA guidelines, which focus primarily on indigent defense counsel, are in many respects similar to the ABA Chapter 4 Standards mentioned earlier. Their object is to alert the attorney to possible courses of action that may be necessary, advisable or appropriate and thereby to assist the attorney in deciding upon the particular actions which must be taken to insure the best representation possible.

Specific performance standards for those attorneys engaged in indigent defense should be promulgated in Georgia. Whether these are to be issued by the proposed Georgia Indigent Defense Board, the Georgia Supreme Court or some other agency, the Commission strongly recommends that the ABA and NLADA performance standards be considered as a model for such standards.[238]

5. The state should develop a systematic, uniform, and effective approach for identifying and assisting indigent defendants with mental disabilities. Defense counsel should be required to have training to recognize and cope with the behaviors associated with mental disabilities. Defense counsel also should be required to have training concerning the consequences of pleas of not guilty by reason of insanity and guilty but mentally ill, and concerning alternative pre- or post-trial dispositions for persons with mental disabilities. Improvement of the procedures for assisting mentally disabled indigent defendants is needed in order to provide more appropriate and humane responses to the needs of the many individuals caught up in the criminal justice system who have special needs. Simultaneously, improved and uniform procedures will also assist in easing the burden on local jails currently housing mentally handicapped individuals with special medical or behavioral problems. Diverting such defendants to more appropriate settings as quickly as possible will also improve efficiencies in local courts.

6. The state should develop a uniform, effective approach to providing counsel for juvenile defendants, including establishing uniform procedures for determining indigency. Counsel for indigent juveniles should be required to have training concerning the special ethical issues faced by attorneys

[237] The NLADA guidelines are printed in their entirety in **Appendix E**.

[238] The task of drafting specific performance guidelines for Georgia based on the ABA and NLADA guidelines already has been attempted by Michael Mears of the Georgia Multi-County Defender Office. They are attached as **Appendix F**.

representing juveniles, the special needs of juveniles with mental disabilities and/or substance abuse issues, and alternative pre- and post-adjudication dispositions. All circuit indigent defense plans should be required to address issues related to providing adequate counsel for juveniles and provide for counsel for indigent parties in deprivation cases. Maximum caseload standards should be established and enforced for attorneys representing indigent juveniles. Waiver of counsel by juveniles or their parents should not be permitted.

This set of recommendations will bring Georgia's juvenile justice system into compliance with constitutional requirements for juvenile defendants and should result in earlier and more appropriate dispositions for juveniles with special needs. Juveniles detained for lengthy periods and in inappropriate settings risk exacerbation of existing problems, contrary to the rehabilitative goal of the juvenile justice system. A uniform statewide approach to these issues will reduce the disparity of treatment currently existing within the state.

7. A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal defense services in Georgia should be established and implemented. The data collection procedures should enhance the ability of policy makers and administrators to make informed judgments concerning the administration of the system and planning for improvements. Consistent with these goals, the data collection procedures should not unduly burden local systems and should be funded by the state.

The importance of accurate, comprehensive, and current data for administration and planning purposes cannot be overstated. Indeed, even if the decision is made to delay full state funding of the indigent defense system and/or to delay the creation of the State Indigent Defense Board, the system of data collection must be improved significantly. This recommendation will address the problems noted by the Spangenberg group and others about making comparative judgments about the local indigent defense systems within the state. Such data also is crucially important to the understanding of how Georgia's system is satisfying its obligations in comparison to other states.

8. Because of the significant extra funding and structural reform required to operate a constitutionally-sufficient indigent system, a transition plan must be created to expeditiously create a new system to remedy current inadequacies.

While the precise details of a transition plan to take the state from its current

indigent defense system to the system recommended by the Commission is beyond the scope of this Report, the Commission urges the relevant policy makers to create such a plan with the goal of having a fully-funded, fully-organized new indigent defense system in place on July 1, 2005. The first goal of a transition plan would be to significantly increase state funding for indigent defense services in order to insure the constitutional adequacy of the system. At the same time, during the initial part of the transition period, the new Board must be created, members appointed and the Director of Indigent Defense must be hired and given time to hire a staff. It is also imperative that the Board have sufficient time to consider and create a funding formula to provide an appropriate level of funding for each of the 49 judicial circuits. Likewise, during the transition period, the Board must consider and create standards for the operation of indigent defense. At least for the initial portion of the period of transition to the new system, the Georgia Indigent Defense Council should remain in place, continuing to serve as the funding conduit for state funds, providing advice and counsel to local indigent defense programs, operating the multi-county public defender, providing training, etc. During the transition to the new system of complete state funding, the current system of funding should remain in place with increasingly large contributions being made by the state. Under no circumstances should there be any diminution of funding for indigent defense services during the transition.

V. Conclusion

After lengthy consideration of the operation of indigent defense in this state, the Commission has determined that significant improvement is necessary to insure that our state has a constitutionally-sufficient, fair criminal justice system. Significantly more money must be devoted to providing a defense to those without adequate resources to provide it for themselves. The Commission also concludes that an infusion of additional money, while absolutely necessary, is not sufficient to complete the awaiting task. In addition to more resources, a system which insures quality, uniformity and accountability must be created by the State. Members of the Commission thank the court for the opportunity to serve their state in the cause of justice.