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ALUMNI COMMENT

APPOINTMENT OF COUNSEL
FOR INDIGENT DEFENDANTS*

RENO S. HARP, III†

The initial step after the indictment has been returned by the grand jury is an inquiry by the court as to whether each defendant is represented by counsel. Section 19.1-241 of the Code of Virginia requires that counsel be appointed to defend all indigents who are charged with a felony. During the past twelve months, I have appeared in thirty different courts in this State. Judges before whom I have argued cases have expressed their concern over the increasing number of defendants who assert that they are unable to employ counsel, and ask the court to provide them with a lawyer. In most of the circuits that I have visited over 50 per cent of the criminal cases are now handled by lawyers appointed by the court. This has caused a great deal of concern among the members of the judiciary. Some judges have made it a practice in every case where the defendant requests court-appointed counsel to inquire as to the defendant's financial condition. If it then appears to the court that the defendant is financially able to employ a lawyer, he is urged to do so by the court and, if the defendant is on bond, the case is continued to the next term of court.

The selection of the attorney to represent an indigent defendant is the next, and a very important, step. Many of the courts have adopted the policy of appointing two lawyers of considerable experience in all capital cases. This divides between two experienced heads the heavy burden of deciding on what course of action to take. In some circuits the court appoints two lawyers, an older and a younger lawyer, to handle a number of cases. The young lawyer does the leg work and the older lawyer is available to give advice and counsel. The fees allowed by the court are then divided between the attorneys.

Very few courts still follow the practice of indicting, appointing counsel, and trying a defendant all on the same day. This is a very dangerous practice. Although perfectly correct, this procedure, looks

*This paper is based on an address delivered at the Annual Meeting of the Judicial Conference of Virginia, May 11, 1962.

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somewhat unusual at a later date. Some of the courts have adopted a hard and fast rule that at least a week must elapse between the time counsel is appointed and the trial of the case, even if the plea to be entered is guilty.

At the time the defendant is arraigned, a question may arise as to whether or not he understands the nature of his plea. In the case of a youthful offender inquiry should always be made as to his age and previous education. Some of the courts have expressed the view that in all questionable cases, the defendant should be examined and a determination made as to his mental condition. Moreover, the court should explain to him his constitutional rights, that is to say, his right to plead not guilty and to be tried by a jury; his right to plead not guilty and to be tried by the court, with the consent of the court and the Commonwealth's Attorney; and if he pleads guilty that he will be tried by the court. This procedure should be followed in every case, and is most important when the defendant pleads guilty. Of course, inquiry should be made to ascertain that any guilty plea is made voluntarily and without any promises having been made to the defendant.

The next question that arises is the necessity of transcribing the evidence. Some of the courts have adopted a uniform practice of requiring a court reporter in all capital cases. This is by far the better practice. The availability of a transcript of the record protects the right of the Commonwealth and of the accused. Section 17-30.1 does not prescribe the particular means to be used in recording the evidence in a particular case. In the Third Judicial Circuit almost all criminal cases are recorded by means of a dictaphone dictating machine. The machines have been purchased by the respective boards of supervisors, and the cost of operation is small. This procedure is less expensive than employment of court reporters and works nearly as well. The Virginia Advisory Legislative Council made a study of the entire problem of court reporters in 1949, and it was determined at that time not to establish a court-reporter system. However, some sort of record of every criminal trial of any magnitude is needed, because more and more long-term prisoners are filing petitions for writs of habeas corpus.

If the defendant pleads guilty, or not guilty, and is tried by the court without a jury, the use of the pre-sentence report, as provided for in Section 53-278.1, is of great assistance to the court in ascertaining the quantum of punishment to be imposed. Moreover, this report is part of the record of the court and usually contains a full summary of the crime or crimes committed by the defendant. More and more

courts in this State are using this very fine tool in determining the sentence to be imposed upon the defendant.

After the trial has been concluded, the next question which arises is the amount of the fee to be paid the attorney in court-appointed cases. Section 14-181 of the Code of Virginia (1950) provides that the court may allow a fee not to exceed \$150 in cases where the crime may be punishable by death, or by confinement in the penitentiary for a period of more than ten years. If the crime is other than those mentioned before, the court may allow a fee not to exceed \$50. The members of the bar and of the judiciary are aware of the fact that the amounts allowed by this statute are not sufficient to provide adequate compensation for the efforts of court-appointed attorneys in many cases.

The setting of the fee in any specific case is a difficult matter at best. There is a great difference in the fees allowed under identical situations in different courts. In one circuit a fee of \$15 is allowed an attorney when he represents an indigent defendant who pleads guilty, while only one hundred miles away, the minimum fee allowed in another circuit under the same situation is \$25. In 1960, \$107,447 was paid court-appointed attorneys. In 1961, \$156,965 was paid court-appointed attorneys. The total amounts involved are not small and are increasing each year.

In the order of appointing counsel the words "able and experienced attorney at law" could well be used. In the order allowing an attorney's fee the words "a fee of —— dollars is allowed John Doe, attorney at law, who effectively and competently represented Richard Roe on a charge of murder" are useful.

The members of the judiciary receive many letters from inmates at the Virginia State Penitentiary. On some occasions these letters request that an attorney be appointed to aid the indigent in his appeal from his criminal conviction. Section 17-30.1 provides for the recording of the evidence and incidents of trial. It also provides that, in any felony case where the defendant is represented by an attorney appointed by the court, the court shall on motion of counsel for the defendant order that a copy of the transcript of the evidence be prepared in order that the indigent defendant may appeal. There is no specific provision of law which provides for the appointment of counsel to assist an indigent in his appeal of his criminal conviction. The Supreme Court of the United States has not ruled specifically on this point in regard to State cases. In the Federal system indigents are entitled to court-appointed counsel on appeal. The highest courts

of the states of Washington, Indiana, New York and Kansas have held that under the fourteenth amendment an indigent is entitled to court-appointed counsel on appeal. They have held that the refusal of a court to assign counsel upon request was a violation of the defendant's constitutional rights as guaranteed to him by the fourteenth amendment to the Constitution of the United States.

The test to be applied in these cases was expressed in the case of *Griffin v. Illinois*, 351 U.S. 12 (1956). The Supreme Court of the United States held that the denial of a transcript which was necessary to appeal a decision in a criminal case was a denial of a constitutional right.

The Supreme Court of the United States has laid great stress upon the point that indigents must be raised to the same level as those defendants who have the financial means to employ counsel. In 1895 the Supreme Court of Appeals of Virginia in *Barnes v. Commonwealth*, 92 Va. 794, 23 S.E. 784 (1895) recognized the fundamental right of an accused to have the assistance of counsel. Subsequent decisions of the Supreme Court of Appeals of Virginia and the statutes enacted by the General Assembly require the appointment of counsel in all felony cases. In the absence of a definitive decision of the Supreme Court of the United States, it would seem that the better practice would be for a trial court, upon request of an indigent defendant, to appoint counsel to assist the indigent in appealing his criminal conviction. Such action will have a far-reaching effect on the trial courts in this Commonwealth, but it is likely that in the not too distant future, the Supreme Court of the United States will require such appointments. This is a problem of considerable interest, for a convict is usually unable to appeal his own conviction.

In some cases, the attorneys appointed to represent an indigent defendant will, on their own motion, appeal a criminal conviction, thus insuring the equal protection of rights of accused persons regardless of their financial situation.

It is the duty of the legal profession to make sure that all persons charged with crimes are treated equally before the bars of justice in this State.

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