COURT APPOINTED COUNSEL IN VIRGINIA:

Genuine Aid to the Indigent?

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On June 23, 1971 United States District Judge Marvin E. Frankel ordered Norman Thomas released from New York's Green Haven State Prison subject to being re-tried by the state within thirty days. Represented by a string of at least five Legal Aid Society lawyers, Thomas suffered what Judge Frankel called "the most brutal and horrifying kind of isolation, effectively walled off for months from any genuine assistance by a facade of representation." According to Judge Frankel, despite several hand written pleas by Thomas to the state court asking for freedom by writ of habeas corpus and for assignment of different lawyers, Thomas' pretrial ordeal was highlighted by the failure of Legal Aid Lawyers to either visit him or to call witnesses which he requested. (New York Times, June 24, 1971.)

Thomas' ordeal prompts one to ponder the practical meaning of a basic Constitutional right of an accused " . . . to have the assistance of counsel for his defense . . . in all criminal prosecutions . . . ". (U.S. Const. amend. VI.) Reflections upon this right in the context of the increasing need for competent legal representation for indigent defendants in criminal prosecutions encouraged a series of interviews with members of the Williamsburg and York County Bars. This article attempts to briefly examine Virginia's response to the need for adequate representation for indigent criminal defendants in the light of a limited number of interviews, pertinent statutes, and case law.

Legal Aid Society, Public Defender, Court Appointed Counsel: these three characterize the basic approaches to providing counsel in this country for those facing criminal charges who are financially unable to retain private counsel. (Manson, The Indigent in Virginia, 51 Va. L. Rev. 163(1965). The Legal Aid Society is used in some of the larger cities such as Norfolk with its Tidewater Legal Aid Society, and the Public Defender System is authorized in certain counties with very high population density, but apparently this authorization has not been employed. The Legal Aid Society is a private organization funded predominantly from private sources, whereas a Public Defender System is an official organ of government staffed by lawyers whose salary is paid from public funds. The Court Appointed or " . . . assigned counsel system consists . . . of the appointment of individual attorneys to represent indigent (criminal) defendants on a case-by-case basis." (Id. at 176) " . . . Virginia and the vast majority of states have relied on the assigned (court appointed) counsel system to provide representation for indigents." (Id. at 175). Although the Court Appointed Counsel system perhaps lacks the efficiency and specialized expertise of the Public Defender system, it more than compensates by its virtues of simplicity, minimum organization, individual treatment for each client, and lack of potential suspicion possible where the public defender works for the government.

Until 1963 the Sixth Amendment was not interpreted as compelling the states to provide counsel in non-capital cases for those unable to afford private counsel. That year in **Gideon v. Wainwright** the United States Supreme Court held that in all cases in which a felony is charged the state must provide counsel if the defendant is financially incapable of providing his own.

As early as 1940 the Virginia Supreme Court of Appeals held that " . . . courts of record having criminal jurisdiction possess the inherent authority, independent of statute, to appoint counsel to defend paupers . . . charged with crime." (Watkins v. Commonwealth, 174 Va. 518 at 522, (1940)). The Virginia Code is now explicit in requiring that in all cases involving felony charges the defendant be represented at "every stage of the proceeding . . . before any court . . . " (including preliminary hearings before courts not of record to determine whether there is probable cause prerequisite to certifying the case to a grand jury). The Code further provides that, once appointed, counsel " . . . shall represent defendant until relieved (by the court appointing him) or replaced in a manner prescribed by law." (Va. Code sec. 19.1-241.1 (1966)).

So zealous has the Virginia high court been in implementing Gideon that in 1965 it held that " . . . failure to appoint counsel to assist an indigent defendant in making an appeal from conviction is a denial of the equal protection of the laws and due process guaranteed him under the Federal Constitution and the Virginia Bill of Rights." (Cabaniss v. Cunningham, 206 Va. 330, (1965)), and in 1968 it held that a defendant's confession to a felony obtained without advising him of his right to a court appointed counsel prior to questioning was not admissible in evidence. (Cardwell v. Commonwealth, 219 Va. 68, (1968)).

The Code of Virginia provides that all who are charged with a felony must first "be brought before" a judge of a court not of record where the judge must inform the accused of his right to counsel and bail amount, after which the accused is given a reasonable time to hire his own lawyer or execute an affidavit that he is too poor to afford a lawyer. (Va. Code secs. 19.1-241.2, 241.3 (1966)). Prior to executing the affidavit of indigency the accused will face an oral examination by the judge who will use the information thereby obtained and "other competent evidence" to determine whether defendant is indigent "within the contemplation of law" (a rather vaguely defined standard). If the court finds the accused indigent, it then requires him to execute a statement under oath that he " . . . is without means to employ counsel of

(his) own choosing . . . . a thorough investigation (into the accused's financial status) is seldom . . . conducted . . . (but) his statement (of indigency) is sometimes checked with information known to or easily obtainable by the commonwealth attorney, the arresting officer, or any other official connected with the case." (Manson, 51 Va. L. Rev. 163 at 165.)

Attorneys are customarily appointed in this area orally by the judge from a list of attorneys known by him to be willing to serve. Attorneys are not required by statute to accept appointment, but it is generally felt that a lawyer's position as an officer of the court obligates him to accept such appointments as a matter of judicial ethics. Continuances will be given if the court appointed counsel needs unexpected additional time to properly prepare for trial. (Va. Code sec. 19.1-241.4 (1964)). Counsel is usually selected in this area on the basis of the compatability of his known attitudes with the nature of the charge and the age of the defendant as well as upon the basis of the kind and amount of his trial experience. Thus when possible, no attorney, say, who is known to have a "hard-nosed" attitude towards drug offenders would be assigned to defend a minor accused of trafficking in narcotics. The importance of establishing rapport between minor defendants and their parents and the court appointed counsel cannot be over emphasized.

A major problem with the system of appointed counsel is inadequate pay for services rendered. Counsel is authorized compensation for representing one charged with a felony at a preliminary hearing in a court not of record in an amount set by the judge thereof, but not to exceed $75.00. (Va. Code sec. 19.1-241.5 (1968)). This inadequate limit is somewhat alleviated where, in the usual case, counsel continues his services in a court of record. When the statutory maximum punishment authorized for the charge is death or confinement in the penitentiary for in excess of twenty years, the court may allow counsel up to $400.00 and for the defense in case of a lesser felony up to $200.00. The court will also direct payment of reasonable expenses incurred by counsel appropriate to the circumstances with the defendant being liable to reimburse all amounts disbursed for his defense to the Commonwealth if he is convicted. (Va. Code sec. 14.1-184).

The shocking inadequacy of representation that plagued the New York Thomas case would be unlikely to occur in this area. By local practice the judge asks counsel in open court prior to conclusion of the case how many times and how long he has met with the accused as well as how much time counsel has spent in preparing the defense. The judge then asks the accused the same first two questions as well as whether counsel has advised the accused of accused's right to waive preliminary hearing, to remain silent, and to call witnesses. The accused is then asked whether he is satisfied with current counsel and whether there is any reason why the case cannot proceed. The answers to all of these questions are filed to be readily available should the accused later ask that his conviction be overturned by writ of habeas corpus on the ground of inadequate representation of counsel.