

“If you cannot afford a lawyer ...”

A report on Georgia's failed
indigent defense system

The Southern Center for Human Rights
Atlanta, Georgia
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About This Report

This report supplements a previous report issued by the Southern Center for Human Rights on the representation provided in Georgia's courts to poor people accused of crimes, *Promises to Keep: Achieving Fairness and Equal Justice for the Poor in Criminal Cases* (Nov. 2000).¹ It also adds to a growing body of information collected by the Chief Justice's Commission on Indigent Defense, the media, a consulting group, and other sources about the distance between the representation required to have a just and reliable adversary system, and the representation actually provided.

Because practices vary widely from county to county throughout the state, information from a variety of sources and perspectives is needed to identify the deficiencies in representation, the reasons for them, and the solutions. The information in this report is based on three years of observations of court proceedings in Superior, State, juvenile and municipal courts throughout the state; interviews with countless participants in the criminal justice system; review of thousands of criminal files in the offices of court clerks; examination of documents obtained from counties and the Georgia Indigent Defense Council through the Georgia Open Records Act; and meetings, interviews and correspondence with people accused of crimes and their family members. This report, like others before it, reveals the urgent need for Georgia to develop a system with a sensible structure, sufficient funding, independence and accountability, to ensure equal justice throughout the state.

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About the Southern Center for Human Rights

The Southern Center for Human Rights is a nonprofit, public interest legal project, which since 1976 has defended the civil and human rights of people in the criminal justice and corrections systems of the South. The Center advocates for improvements in the legal representation of poor people in the criminal courts; it represents people accused of crimes at trials, on appeals and in later stages of review; it represents prisoners in challenges to unconstitutional conditions and practices in prisons and jails; it advocates judicial independence; it educates the public about injustices in the criminal courts, about abuses in prisons and jails, and about the importance and value of a fair process, an independent judiciary, and constructive, non-violent and humane responses to crime; it works with community groups, civil rights organizations, religious groups, mental health professionals, social workers, lawyers and others in efforts to achieve its goals; and it annually provides human rights internships to over 30 students and volunteers from around the nation and the world. The Center is funded primarily by individuals, law firms and foundations. It receives no government funding. The Center's website is www.schr.org.

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A man spent almost 11 months in the Crisp County Jail after his arrest before a lawyer was appointed to represent him. The man had been arrested in December 2001 on misdemeanor charges of loitering and giving false information and was told he had an outstanding felony warrant. During the time he was in jail without a lawyer, he had been denied bond. Although he was entitled to a preliminary hearing, he did not have one. He never saw a lawyer by January 13, 2003, when he was released because, as the deputy explained to him, “the judge decided to let him go.”

A 51-year-old real estate lawyer, assigned against his will to represent children in Lumpkin County, sued, asking not to be appointed because he “came to the realization that whoever is stuck with me, the real estate attorney, is not getting a fair fight. It’s just a charade to think I can go in there and effectively represent the interests of my clients. I’m just not a trial lawyer.”

“Legal ‘Russian roulette’,” *Atlanta Journal-Constitution*, July 13, 2002

“My lawyer came to me with a plea. I asked where was my discovery, [and] he said he didn’t have it yet. [I] also asked him had he talked to the witnesses. [H]e said no. Now how can he offer me a plea without doing any of the things I’ve asked him to. What about rights.”

Letter from the Columbia County
Jail, December 2002

As their names are called, people without lawyers facing felony charges approach the front of the courtroom in Coweta County and are directed to speak to the assistant district attorney. The judge does not advise them of their right to a lawyer to deal with the prosecutor. After a whispered conversation, the prosecutor often announces, "It will be a plea." The defendants plead guilty. They are only informed of the right to counsel when the judge lists the rights they are giving up.

In the Superior Court of Coweta
County, January 2003

When asked about his attorney by the judge in the Superior Court of Cobb County in March 2002, a defendant stated, "I guess I have an attorney. I haven't seen him since I've been in jail – I've been in for six months." When asked if he wanted to proceed anyway, the defendant responded, "I don't know what to do." The judge replied, "Let's continue the case. The Court will call your attorney and ask him to go see you." The case was continued and the judge commented to observers, "The system's breaking down."

"There are people here on this floor who have been locked up for six months on a "Bicycle Without a Light" charge. Mentally incompetent people who are at great risk. The 'assembly line' of the judicial system is prevalent to unheard of proportions."

Letter from the Fulton County Jail,
2002

I've got three jails with lots of folks. ... I'm constantly in court, or in trial, or preparing for court or trial and I really don't have time to go to the jail and see these folks. My investigator ... has become my jail liaison. He goes to the jail every day and talks to inmates and tries to calm them down, but even still we don't get to see them. I'm lucky if I see some of my clients before they even have a preliminary hearing. I meet a significant portion of them at the preliminary hearing."

From the Mountain Judicial
Circuit, February 2002

"My public defender had not talked to no witnesses nor did any kind of pre-hearing investigation by the second hearing date we had, so I fired her. The first hearing date had been postponed because she was not ready and I had to go back to jail and wait a couple more weeks and then she wasn't ready again."

Letter from the Douglas County
Jail, 2002

A defendant sent to his court-appointed lawyer affidavits from his witnesses who would establish that he was somewhere else at the time of the crime. The lawyer never talked to the alibi witnesses. After the lawyer told the defendant's sister that he believed the defendant was not only guilty but would get what he deserved, the defendant's family scraped together some money to hire a private lawyer.

Letter from the Cherokee County
Jail, September 2002

I. IN VIOLATION OF THE CONSTITUTION

The Constitutions of the United States and Georgia guarantee equal justice and fairness and that any person accused of a crime for which he or she faces the loss of liberty be represented by a lawyer. If the person is indigent, the lawyer must be provided by the state.² The United States Supreme Court reaffirmed these principles in 2002 in the case of *Alabama v. Shelton*.³

But in Georgia, people accused of crimes are not always provided lawyers. And some who are provided lawyers do not see them until it is too late for the lawyers to be of any assistance. And too often the lawyers provided do not have the time, skills, and resources to provide meaningful representation.

Georgia has left to each of its 159 counties the responsibility of providing lawyers to those who cannot afford them, resulting in a hopelessly fragmented and unfair system. The following are common experiences, which are documented in this report, of people throughout the state who cannot afford lawyers:

- There are no lawyers available to represent people in some municipal and state courts. Despite the constitutional requirement that lawyers be provided, virtually everyone is processed through those courts without a lawyer.
- Many adults and children who cannot afford a lawyer plead guilty – even to felony charges – and are sentenced to probation, prison or jail without the assistance of an attorney in violation of state and federal law.
- People languish in jail for weeks or months in some counties before meeting with a lawyer, despite the Georgia Supreme Court requirement that lawyers be appointed within 72 hours of arrest

and that lawyers meet promptly with their clients.

- The determination of whether an accused can afford a lawyer differs from county to county. In some counties, the decision is arbitrarily made without standards; in others, it is based on guidelines that do not accurately assess whether a person can afford a lawyer; and in others, it is based on improper and irrelevant factors such as release on bail.
- Defendants in some counties do not receive preliminary or commitment hearings, even though they are required by law. In some other counties, the hearing may be provided, but no lawyer is available to the accused even though it is constitutionally required.
- Even after a lawyer has been appointed, many people cannot communicate with their lawyers because the lawyers do not visit the jail, accept telephone calls from their clients, or reply to letters, despite requirements that they consult with their clients and keep them informed of the status of their cases.
- Many people meet their court-appointed lawyers for the first time in court and are advised minutes later to plead guilty before the lawyer has done any investigation, research or preparation.
- Appointed counsel in many counties rarely, if ever, utilize investigators and expert witnesses. Many judges are unwilling to approve funds for these purposes.
- Court-appointed lawyers regularly handle several times the number of cases set out in caseload limits adopted by the Georgia Supreme Court, and as a result, their clients do not receive individualized and competent representation.
- In many counties, attorneys who have little or no interest, skill, or experience in criminal law or trial advocacy routinely represent

the poor in criminal cases.

- Motions practice is virtually non-existent in some counties; in some others, the same boilerplate motions are filed in virtually every case.
- Many court-appointed attorneys do not explore sentencing alternatives or provide any advocacy regarding sentencing for their clients.
- Because of the lack of sentencing advocacy, many people who are convicted are, despite their poverty, fined and ordered to pay court costs and various fees and surcharges they cannot pay and for which they will inevitably face probation revocation and incarceration, at a significant cost to counties.

THE RIGHT TO COUNSEL: WHAT IT IS AND WHY IT MATTERS

Without the right to counsel, other important rights designed to ensure the fairness and reliability of the criminal justice system are rendered meaningless. The federal and Georgia Constitutions require that all indigent persons accused of felonies and misdemeanors for which they face the loss of liberty be provided with counsel.⁴ Statutes enacted by the General Assembly as well as Court Rules and Guidelines created by the Georgia Supreme Court and the Georgia Indigent Defense Council are designed to ensure that indigent defendants are represented by counsel at all stages of the cases against them.⁵

For instance, within 48 or 72 hours of a person's arrest, he is supposed to be brought before a judge,⁶ informed of the right to counsel, and informed of the process of how to apply for a lawyer if he cannot afford to hire one.⁷ If the person bonds out of jail before being appointed a lawyer, the county is supposed to provide a mechanism whereby he can obtain appointed counsel at least 10 days before the next court proceeding.⁸

Early appointment of counsel is necessary to help the accused in securing pretrial release, if appropriate.⁹ Early appointment of counsel is also crucial to ensuring a detained person's right to a pre-indictment commitment or preliminary hearing. At a commitment hearing, a defendant may challenge the validity of the charges.¹⁰ Because Georgia law provides the right to an adversarial pre-indictment commitment hearing to weed out meritless charges, an indigent defendant has a constitutional and statutory right to be represented by counsel at the hearing.¹¹ Thereafter, since adversary proceedings have begun, an indigent defendant has the right to be represented by counsel at any proceeding or hearing where he or she may potentially lose any of the rights granted by the constitutions and laws of Georgia and the United States.¹²

A defendant has the right to be represented by counsel at arraignment, where he is called upon to enter a plea.¹³ A defendant has to be provided counsel before he can be compelled to negotiate with the prosecution about his case.¹⁴

The right to counsel is so fundamental to the sound operation of a reliable criminal justice system that courts “must indulge every presumption” against a waiver of the right to counsel.¹⁵ Accordingly, judges are required to investigate as long and as thoroughly as possible to ensure that a defendant understands the dangers and disadvantages of self-representation before permitting him to give up the right to counsel and represent himself in any proceeding.¹⁶

The right to counsel is meaningless unless counsel is effective and is able to render advice and provide services that are helpful to the defendant. A lawyer’s representation must fall within the range of reasonably competent advice and services, regardless of whether the defendant chooses to enter a guilty plea or go to trial.¹⁷ Whether the client is poor or paying, lawyers are required to perform fundamental professional tasks, such as independently investigating and evaluating the prosecution’s case,¹⁸ knowing and learning the relevant law, advising the defendant of the law in relation to the facts and the potential consequences,¹⁹ and retaining investigative or expert assistance where necessary for the defense.²⁰ Before sentence is imposed, counsel should advocate for the best possible sentencing and, where appropriate, treatment options for his or her client.²¹

Finally, a lawyer must have a reasonable workload so that an overwhelming number of cases does not interfere with the rendering of individualized and zealous representation.²²

SYSTEMS OF PROVIDING LAWYERS FOR POOR PEOPLE ACCUSED OF CRIMES

Indigent defendants in Georgia are currently represented through one or a combination of the following systems:

Contract System, “Contract Lawyer,” or “Contract Defender” In this system, a lawyer or a group of lawyers bids on the right to represent most or all indigent defendants in the county over a specific period of time. In some counties, the low bidder gets the contract. In contract systems, the less the contract lawyer does for his clients under the contract, the higher the financial return. The lawyer who wins the contract is still allowed to maintain paying clients, thereby providing a financial incentive to neglect the indigent clients.

Panel System, Court-Appointed Lawyer, or “Panel Lawyer” In this system, when an indigent defendant requires an attorney, the judge appoints an attorney to represent the defendant from a “panel,” or list, of lawyers drawn up by the county. Some counties require all lawyers in the county to be members of the panel, even if they have no interest, skill, or experience in the practice of criminal law. Panel lawyers are paid by the hour at fees that are well below market rates. Like contract lawyers, panel lawyers are allowed to maintain private practices.

Public Defender In this system, a publicly funded office with full-time attorneys and investigators represents all indigent defendants in the county, unless there is a conflict of interest. If funded adequately, a public defender is the most efficient and cost-effective system to provide competent counsel to poor defendants.

II. FAILURES TO PROVIDE COUNSEL

Perhaps the worst aspect of Georgia's indigent defense system is that many poor defendants struggle through the criminal justice system without any representation at all, whether for weeks or months after arrest, when they have to decide how to plead, or even at trial. The U.S. Supreme Court announced in the case of *Faretta v. California*²³ in 1975 that trial judges are to discourage the waiver of counsel, and with good reason. As the U.S. Supreme Court said in 1932 in *Powell v. Alabama*²⁴ and again in 1963 in *Gideon v. Wainwright*,²⁵ lawyers are necessities, not luxuries. This is particularly true for the illiterate, non-English speakers, the uneducated, the mentally ill and mentally retarded, and children.

"Please let it be known that I have been incarcerated here at the Cobb County Detention Center since August 17, 2002 and have asked for legal representation for at least 2 months and have received nothing."

Inmate in Cobb
County Jail,
November 7, 2002

In most courts in the United States, it is exceedingly rare for people to represent themselves in criminal cases. One study calculated that only one percent of felony defendants represented themselves in the nation's 75 largest counties.²⁶ While it appears that the majority of Georgia counties provide counsel in most felony cases, it is not at all unusual in Georgia today for defendants to represent themselves in criminal court. Throughout the state, the Center has come across innumerable cases in which defendants have been forced to represent themselves. Many represent themselves not because of a desire to do so but because of subtle or overt pressure, because lawyers are not available, because they do not understand that they have the right to a lawyer free of charge, or because the attorney made available by the court has a reputation of doing more harm than good to the clients he or she represents.

Immediately After Arrest

To be effective, lawyers must begin representing their clients as soon after arrest as possible. By verifying information about their clients' ties to the community, family support and employment, lawyers can help obtain pretrial release for their clients, which may help them keep their jobs and homes, and continue to support their families. A lawyer may also identify mental or physical health problems or the need for substance-abuse treatment and see that these problems are addressed promptly.

Early representation is also essential so that an independent investigation can commence before witnesses move or forget what they saw, heard, or knew. A witness who could prove that the client was somewhere else at the time the crime took place may not be able to remember where he was on a particular day if interviewed weeks or months later. When lawyers do not meet their clients until months after the arrest, they lose precious time that they could have spent investigating the case, researching the law, litigating important pretrial issues, or seeking alternative sentencing options for their clients.

For many defendants who ultimately plead guilty and are sentenced to probation, early entry by a lawyer into representation can mean release from jail and immediate involvement in a drug, alcohol, job or other programs. If the client responds well to the program, it may be a basis for probation instead of a jail or prison sentence.

For these and other reasons, the Georgia Supreme Court adopted guidelines in November 1999, requiring that counsel be appointed within 72 hours of arrest or detention, and that appointed counsel make contact promptly with the client after appointment.²⁷

However, few counties actually comply with the 72-hour rule. Defendants often wait weeks or months before they have contact with a

lawyer. It is not uncommon for the first opportunity for an indigent defendant to meet with his lawyer to be at arraignment, which can be months after arrest.

"I frequently visit the Courts in [the Lookout Mountain Judicial Circuit] and as an observer the disregard of people's rights deeply disturbs me. Some of the Judges will appoint attorneys to the indigent on the day of trial and hear their cases within minutes of appointment. There is no possible way anyone can obtain an adequate defense in this manner."

Court observer in
Walker County,
September 20, 2002

For example, in Sumter County, the accused often wait in jail three to six months or longer before seeing a lawyer. The county makes no effort to ensure that appointed lawyers actually meet with their clients in a timely manner. Keadrick Waters waited four months in jail without seeing his court-

appointed lawyer. Finally, after an *Atlanta Journal-Constitution* reporter brought attention to his case, Mr. Waters was appointed a new lawyer.²⁸

Individuals arrested in Stewart County are housed in the Sumter County Jail and assigned a contract lawyer who practices in Columbus, an hour's drive away. Due to Stewart County's failure to appoint counsel in a timely manner and the distance this lawyer must drive to see his clients, these individuals often do not meet their lawyer until months after arrest. One Stewart County defendant sat in jail for almost seven months without a lawyer. He repeatedly wrote to several officials asking for a lawyer to be appointed, but received no response. He wrote to the Center that he was innocent but could not get anyone to help him prove it. He finally was appointed a lawyer after the Center intervened. After counsel was appointed and began working on the case, the charges against him were dropped.

In one municipal court in North Fulton County, a non-English speaking defendant spent 61 days in the city jail without contact with a lawyer. When he was finally brought back to court for a plea, the solicitor had recommended 10 days in jail, plus fines. The defendant had already spent six times the amount of recommended time in jail. Only at the plea phase was a court-appointed attorney available to the client, and at that point, his services were useless in getting back the time the defendant had already spent in jail.

Even in Cobb County, which is considered by some to do better in providing lawyers than most other counties, inmates may wait between a couple of weeks and a month before counsel is appointed. The county requires that counsel prove they have met their clients within 72 hours of appointment. But the indigent defense office can take weeks to process a request for counsel. In the summer of 2002, upon receiving a complaint from an inmate that he had been in the Cobb County Jail for a month without seeing a lawyer, the Center contacted the indigent defense office and learned from a staff member that a month delay was not unusual because “it takes that long to do the appointment.” One attorney with the Cobb County Solicitor’s Office informs defendants that if they apply for counsel, it will take about two weeks for them to be appointed a lawyer.

“I am an inmate in the Camden County Public Safety Complex awaiting trial. I have been appointed an attorney because I am indigent, but due to a reason or the other he has not been back here to talk to me yet. I am in a position whereby just one mistake and everything gets messed up. I am confused because I don’t really know who to talk to about what.”

Letter from inmate
August 29, 2002

In Jail Without Seeing A Lawyer

In Cherokee County, many jailed defendants report not being visited by an attorney until a month or more after arrest or report seeing their attorneys only in court. Waiting for months without a lawyer was also the experience of

thousands of defendants in Coweta County until the Center filed suit against the county for failure to provide adequate representation for indigent defendants. The Center became involved after receiving a complaint from a group of inmates who had been in the jail from six months to a year without ever seeing a lawyer.

Many individuals never meet their lawyers until they have been indicted, which may not occur until three, six, or nine months after arrest.²⁹ This is commonplace in Dooly and Crisp counties, where one contract lawyer, who has contracted with the counties to handle most of the cases, handles hundreds of felony cases a year in addition to misdemeanors, appeals, a substantial private practice, and employment as a part-time judge in two cities.

Such delays are also common in Walker, Dade, Catoosa, Chattooga, Early, and Greene counties, and until the recent termination of the contract lawyer there, the entire Oconee Judicial Circuit, which includes Pulaski, Telfair, Bleckley, Wheeler, Montgomery, and Dodge counties. This list is by no means exhaustive. The Center receives hundreds of calls and letters each year from poor defendants and their families all over the state seeking help, because even after months in jail they have not been able to speak with a lawyer.

CHILDREN TREATED WORSE THAN ADULTS

In the case of *In re Gault*, the U.S. Supreme Court recognized that a “juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”³⁰ On a typical day, children sit shackled to each other at wrists and/or ankles on cement benches in cold cells next to a malfunctioning toilet and wait from 7:30 a.m. until 5 p.m. for their opportunity to stand before a judge, only to be notified at the end of the day by the guard that their case was continued. Many children rarely have an opportunity to speak with a lawyer before they go before a judge. If a child is lucky, a probation officer, contract attorney or public defender will ask her whether she wants a lawyer (without any additional information or advisement). If the child says yes, she is briefly *informed* (usually for five minutes) of her plea before her case is called before the judge.³¹

In some cases, the child will then proceed to a courtroom to hear a judge recite an advisement of rights for the record in legal language the child does not understand, to which the child is asked to respond “yes” or “no.” Six children interviewed following their hearings in DeKalb and Fulton counties said, “We never understand what [the judges] say until someone simplifies it ... and they never simplify it, so [we] just said what they told [us] to say.” After responding to the judge’s questions, the child often is never heard from again while the judge, prosecutor, lawyer, and probation officer confer about the child’s fate during the adjudication and disposition phases of the hearing. Once returned to holding cell, and later, the detention facility, that child is not likely to see or hear from her attorney again – unless at a later hearing date.

In interviews with children at Georgia’s Metro Regional Youth Detention Center, 26 out of 30 children said their attorneys never visited or spoke with them at the facility. Three children did not have lawyers appointed to represent them; one was represented by a private attorney obtained by his parents. Without exception, each remaining child stated that he or she met appointed defenders for five minutes or less moments before entering the courtroom, either in the hallway or in the holding cell.

Effectively Denying The Right To A Commitment Hearing

As a result of long periods of time without counsel, indigent defendants lose valuable rights. For instance, Georgia law provides every defendant who is arrested and jailed with the right to a commitment hearing.³² At the commitment hearing, the prosecution must present sufficient evidence to show that there is probable cause that the defendant committed a crime.³³ At the hearing, the defendant has the opportunity to cross-examine the prosecution's witnesses, and a judge decides whether some or all the charges lack merit and whether the defendant should be held until trial or released.³⁴ The United States Supreme Court held in 1970 in the case of *Coleman v. Alabama*³⁵ that indigent defendants have a right to be represented by an appointed lawyer at a commitment hearing. Once the defendant has bonded out or has been indicted by a grand jury, he no longer has a right to a commitment hearing.³⁶

Because indigent defendants have no lawyers to explain the importance of the commitment hearing and to protect their rights, however, defendants often waive the hearing. In some jurisdictions, jailers routinely instruct defendants to sign forms waiving their right to a commitment hearing. For instance, in Union City, jailers provide inmates with a "waiver of rights" form that includes a waiver of the commitment hearing. When defendants arrive in municipal court for a first appearance hearing, the judge simply asks them if they've signed the form. Without any inquiry to determine whether they understand what they have signed, the judge then moves their case along to the next phase of the process in Fulton County.

In some courts, judges or court personnel encourage defendants to waive their right to a commitment hearing by failing to explain the purpose of the hearing, minimizing the importance of the hearing, or suggesting that asking for a commitment hearing will slow the process down. In many jurisdictions, such as Dooly and Crisp counties, it is rare for defendants to have commitment hearings, because their lawyers do

not meet with them until they have been indicted. At this point, it is too late because the accused is not entitled to a commitment hearing after being indicted.

Some defendants manage to request a commitment hearing without the assistance of an attorney. But without counsel, only rarely can a defendant protect his rights at the hearing, and few are able to make the hearing meaningful. For instance, a municipal judge in East Point routinely holds preliminary hearings with defendants who have never been provided with a lawyer. The defendants do not have counsel because the judge simply holds the hearings without ever asking the defendants whether they want lawyers. This judge, after taking the testimony of law enforcement officers, gives the defendants an opportunity to cross-examine the prosecution witnesses, which the defendants typically do not know how to do. The judge also gives the defendants an opportunity to “make a statement in [their] own behalf,” without warning them of the right to remain silent.³⁷ Many defendants make incriminating statements which can later be used against them.

Breakdowns In The Appointment Process

Widespread delays in appointment of counsel are attributable to a variety of policies, practices and people. Defendants have trouble obtaining and filing lawyer application forms from jailers, or they are provided no information about how to apply for counsel upon release from jail. In the Coweta County Jail, for example, inmates frequently reported that they had to send the same application over and over again before the forms reached their intended destination.

Inmates from some counties even report that jail officers refuse to provide them with the applications. One inmate in the Lookout Mountain Judicial Circuit reported, “When I asked the prison staff about the forms for an appointed attorney/lawyer, I was informed that I couldn’t get a public defender for misdemeanor charges. It was stated the only

way to get a lawyer was if I had felony charges.” He was given the wrong information, since all persons who may be jailed or placed on probation – whether because of felony or misdemeanor charges – have a right to a lawyer.³⁸ In one county in the Griffin Judicial Circuit, which is comprised of Fayette, Spalding, Pike and Upson counties, the jail is supposed to provide defendants who have made bond with information on how to apply for a court-appointed lawyer after release from jail. According to the indigent defense office, defendants are informed upon their release who the contract lawyer for the county is. When interviewed, however, an officer at the jail stated that no contact information for the contract lawyer is given to defendants at the time of release and stated, “If people bond out, they’re generally expected to hire a lawyer.”

“If You’re Not Locked Up, You Don’t Get A Lawyer”

Illegal county policies that deny or postpone appointment of counsel for people who have bonded out of jail also cause delays. An indigent defense administrator in the Appalachian Judicial Circuit, which includes Fanin, Gilmer and Pickens stated that defendants who bond out prior to being appointed counsel must wait until their arraignment to apply. In Stephens County, defendants who make bond within 72 hours of arrest are required to re-apply for counsel after they have been indicted. The Southern Judicial Circuit, which includes Colquitt, Thomas, Brooks, Lowndes, and Echols counties, has a policy of forcing released defendants to wait until their arraignment to seek appointed counsel. These policies, which are common throughout the state, are illegal. Counties are required to make arrangements to provide all indigent defendants with counsel at least 10 days before the next hearing.³⁹

Failure To Follow First Appearance Procedures

Another reason for the delays indigent defendants experience in receiving appointed counsel is the failure of some courts to provide first appearance hearings or to follow the legal requirements for those hearings. Georgia law requires that every defendant who is jailed on a criminal charge must be given an appearance before a magistrate within 48 hours of an arrest without a warrant or within 72 hours of an arrest on a warrant.⁴⁰ At this hearing, in addition to making an independent evaluation of whether there was probable cause for the arrest, the magistrate must: (1) inform the defendant of his right to counsel; (2) determine whether the defendant is indigent; (3) instruct him how to apply for counsel; (4) explain that the defendant has a right to a commitment hearing and that he has a right to counsel at the commitment hearing; and (5) set a commitment hearing date and inform the defendant of it.⁴¹ Yet some magistrates and county officials routinely ignore requirements regarding first appearances. For instance, in the municipality of College Park, the Center has observed the judge routinely process cases by simply asking people whether they want their cases sent on to the next stage of the process in Fulton County without making mention of the right to counsel or a commitment hearing, or making an inquiry about indigence.

Encouraging “Waivers” Of The Right To Counsel

The most critical decision a defendant can make is whether to enter a guilty plea or go to trial. It is difficult for a layperson to understand the legal elements of a charged offense or the availability of any defenses. Therefore, the assistance of a lawyer is crucial to determine whether it is in the defendant’s best interest to enter a guilty plea. Recognizing the dangers that are created by the imbalance of knowledge and expertise between a skilled prosecutor and a defendant ignorant of the

law, the U.S. Supreme Court commands that judges “must indulge every presumption against waiver” of the right to counsel.⁴² The Supreme Court has further made it clear that judges have a duty to discourage individuals from representing themselves and to warn them of the “dangers and disadvantages” of self-representation. The judges are supposed to make sure that any defendant who seeks to waive counsel does so “with eyes wide open.”⁴³ However, in Georgia today, due to delays and failures in appointment of counsel, many defendants make the all-important decision of how to plead without the assistance of a lawyer.

Contrary to these requirements, waiver procedures are so routine in some counties that it appears to the defendants that filling out a waiver of counsel form is the normal course of action. People without lawyers go along because they have no idea how else to proceed. In the Fairburn municipal court in October 2002, the clerk of court appeared in the hallway prior to the proceedings. After asking the group waiting to get into the courtroom whether they were defendants, she handed the waiver of counsel form to everyone and said simply, “Fill this out.” No further explanation of the purpose of the form or its content was given. The form was entitled “Waiver of Right to Be Represented by an Attorney, Advise [sic] of Rights.” The defendant filled out the forms.

An American Bar Association study of juvenile court systems in Georgia found that in many counties in Georgia, children routinely waive their right to a lawyer.⁴⁴ Judges ask the children to waive counsel without explaining to them the value of a lawyer. In some Georgia courts, as many as 90 percent of juvenile defendants represent themselves.⁴⁵

Negotiating With Prosecutors And Pleading Guilty Without Counsel

In violation of clearly established law, judges and court personnel in some courts ask defendants to enter pleas to the charges before mentioning the right to counsel.⁴⁶ The right to a court-appointed

lawyer is disclosed only during the entry of the guilty plea as one of the rights a defendant gives up by entering the plea. At that point the defendant has already made the decision to enter the plea, and the plea colloquy -- the series of questions the judge is required to ask to make sure the defendant knows what he or she is doing and the rights he or she is giving up by pleading guilty -- appears to be a formality with no real meaning. Most defendants likely believe that it is too late to change course and request the assistance of an attorney at that point.

During arraignments in 2002, a Superior Court judge in Crisp County began his inquiry by asking the defendants whether they already had an attorney. When they answered no, he asked the defendants whether they intended to represent themselves. Many bewildered defendants answered, "I guess so." Despite his clear obligation to do so, the judge made no effort to dissuade them from representing themselves or to determine whether they understood the dangers and disadvantages of proceeding without an attorney. He then instructed them to negotiate a plea with the prosecutor. The judge did not mention the right to appointed counsel until after the discussion with the prosecutors, during the guilty plea colloquy. Only those defendants who knew on their own to seek appointed counsel were given the opportunity to speak with the contract lawyer.

Many defendants end up waiving counsel because the prosecutor discusses the case with them and negotiates a plea before the defendants even have an opportunity to request or speak with a court-appointed lawyer. Judges often direct unrepresented defendants to interact with the prosecutors. In Chatham County, after completing a discussing the disadvantages of proceeding

"I was tried May 1, 2002 without a lawyer in Spaulding County-Griffin, GA ... and was sentenced to [three] 12-month sentences to run consecutive."

Letter from inmate,
Spaulding County Jail,
July 12, 2002

without counsel, a State Court judge left the courtroom, saying he wanted to give everyone an “opportunity” to speak with the prosecutor. Though he had explained that those wishing to plead not guilty did not have to speak with the prosecutor, he had never explained how they would go about getting a court-appointed lawyer.

Failing To Adequately Inform Defendants Of The Right To Counsel

Still other courts fail to inform defendants of the right to appointed counsel at all. For example, in Stephens County State Court, the judge routinely fails to explain the right to counsel and the right to a court-appointed lawyer for those who cannot afford to hire one. Instead he tells them they need to hire a lawyer, and gives them the opportunity to resolve the case that day by entering a guilty plea. This judge routinely sentences unrepresented defendants to significant fines and probation without ever asking whether they can afford a lawyer or whether they would like to consult with an attorney.

Failing To Accurately Assess Indigence

Defendants also go without counsel because county officials and judges incorrectly refuse to appoint counsel. The U.S. Constitution and Georgia law guarantee a court-appointed attorney to anyone who cannot afford to hire an attorney without undue financial hardship. The Georgia Supreme Court guidelines express a clear policy in favor of appointment where there is doubt about a defendant’s ability to hire his or her own lawyer, and they require that the assessment of one’s ability to afford a lawyer take into consideration income and expenses.⁴⁷ Even when a defendant’s income exceeds the guidelines set by the county or courts, Georgia law requires judges to consider appointing counsel for defendants who have tried but have been unable to hire private counsel.⁴⁸

Many courts and counties do not follow these requirements in determining whether to appoint counsel.

Some judges fail to inquire about all the defendant's financial circumstances before denying counsel. For example, during a June 2001 arraignment in McIntosh County, the judge told defendants that they did not qualify for court-appointed lawyers based solely on their gross hourly wage. The judge never asked how many hours per week the defendants worked, how much they earned after taxes and other expenses, or whether they had dependents to support or sick relatives with medical bills, or other extraordinary liabilities or expenses. In addition, the judge told another defendant told, based on his appearance alone that he was "obviously employed," and thus did not qualify for appointed counsel.

Some judges deny the appointment of counsel to defendants because they are released on bond, even though the bond may have been posted by a relative, and the defendant has no resources. The law clearly prohibits using release on bond as the sole determinant of whether a person is eligible for appointed counsel.⁴⁹ As recently as late 2002, one judge in the Chattahoochee Judicial Circuit, which includes Harris, Talbot, Muscogee, Taylor and Marion

"I was arrested in Union County, Georgia [and] I am currently being held in Union County Jail under a twelve thousand dollar bond, which I have been unable to make. On Oct. 2, being financially unable to retain legal counsel, I submitted an application for appointment of counsel. A copy of this application was faxed to Superior Court Judge Hugh W. Stone on Oct. 2. I received his reply on Oct. 3. It effectively denied me appointment of counsel, for financial reasons. I own no home, I'm unemployed with zero assets. I ask you, how can I afford an attorney? I can't. So, I am left only with the option of representing myself."

Letter from inmate in the
Union County Jail,
November 20, 2002

counties, has denied counsel for this very reason.

Some officials fail to appoint counsel for completely illegitimate reasons. During an arraignment calendar in Marion County Superior Court in 2002, nearly all defendants who asked for appointed counsel were denied. The judge denied counsel to defendants because the cases were “too old,” or because he felt that the defendants should have been able to retain counsel by that time. In Coweta County, defendants were routinely denied counsel inappropriately prior to the county being sued. For example, one man was denied counsel for wearing gold jewelry. After being denied counsel, the man and his wife pawned all their jewelry, including their wedding rings, for \$60 at a pawn shop.

In many counties, people are denied counsel simply because their gross income is slightly higher than an arbitrary preset limit even though the guidelines and court rules clearly require courts to assess eligibility based on net income.⁵⁰ The Federal Poverty Guidelines are commonly used as a measure of ability to hire a lawyer. The Federal Poverty Guidelines, however, measure destitution – the ability to buy food, not to hire a lawyer for \$5,000 or \$10,000. The current Federal Poverty Guidelines place the threshold for a family of one at an annual income of \$8,860.⁵¹ In some jurisdictions, such as Hall County, people who cannot afford to hire an attorney are denied counsel because their income is above that low threshold.

Many people who earn somewhat more than the Federal Poverty Guidelines cannot afford to hire an attorney without undue financial hardship, so they are nevertheless entitled to a court-appointed attorney. Recognizing the insufficiency of the Federal Poverty Guidelines as an absolute measure of eligibility for legal services, the Georgia Legal Services Program, which provides civil legal services to indigent people, provides representation to people with incomes between 125 and 188 percent of the Federal Poverty Guidelines.⁵²

III. VIGOROUS REPRESENTATION IS LACKING

Securing a lawyer is only half the battle for an indigent defendant in many Georgia counties. Once appointed, a lawyer is then expected to use the skills of the profession to zealously advocate on behalf of the client. The Supreme Court said the law is far too complex for the accused to navigate without a lawyer.⁵³ But the Southern Center has observed too many instances where having a lawyer has seemingly not helped in any way. The reasons are clear, and most often revolve around the lack of money and time that appointed attorneys spend on their cases.

When attorneys take an oath to uphold the Georgia and U.S. Constitutions, it is expected they will vigorously defend their clients. Instead, lawyers who represent indigent defendants often:

- Provide no confidential counseling;
- File no motions to suppress illegally obtained evidence⁵⁴ or to reduce bail;
- Conduct no independent investigations;
- Hire no expert witnesses;
- Provide no sentencing advocacy; and
- Do not know and fail to research the law.

“Before my trial began [in Murray County] I furnished my [court-appointed] attorney with the names of witnesses/alibis, also I gave him photos and diagrams of the alleged crime scene. Naturally, this evidence was to be used to rebut whatever evidence the State had against me. But to my dismay, when my trial got underway I realized he had not interviewed any of the people whose names I had furnished him nor had he put into evidence the other material I had furnished him. Needless to say, I was found guilty ... [B]e advised that this attorney is appointed to probably 99% of all cases in this County. I think that’s a lot of the problem.”

Letter from Murray County Jail,
September 15, 2002

Lawyers have a duty to assess the client’s legal situation. Yet some court-appointed lawyers announce that cases will be resolved with guilty pleas before even talking to their clients. An independent assessment of the case requires a confidential interview and usually an investigation. But many contract defenders and court-appointed lawyers do not have any investigators. One lawyer, who represented indigent defendants for more than 35 years, even in several death penalty cases, could not recall a case in which he had ever used an investigator. One Columbus lawyer revealed that he does not ever investigate, admitting that he relies solely upon the police investigation. When the lawyer was offered the use of a free investigator to interview witnesses in a capital case he was defending, he refused the offer.

COURT OF APPEALS FINDS LAWYER PROVIDED NO REPRESENTATION AT ALL

The Georgia Court of Appeals reversed the conviction of a Paulding County man whose lawyer had utterly failed to conduct any investigation into the case and urged the defendant to plead guilty.

The lawyer repeatedly refused the requests of the defendant and a family member that he investigate the case. In almost five years of representing indigent clients as a contract defender, the lawyer had never applied for funds to hire investigative assistance. The lawyer did not review the prosecution's evidence until 18 months after his appointment, on the day the case was set for trial. Even then, the lawyer failed to look over all the prosecution's evidence; refused to look over important victim impact evidence that was crucial at sentencing; and failed to ascertain or account for his client's prior record before recommending a guilty plea.

Based on the lawyer's wholesale abdication of his responsibility to independently assess the facts of the case, the Georgia Court of Appeals concluded that the lawyer had provided the defendant "no meaningful representation at all," and reversed the man's convictions. *Heath v. State* (No. A02A1604, Nov 26, 2002).

Most people who receive such representation are not provided a lawyer to help them appeal their convictions.

Meet 'Em And Plead 'Em Justice

For many people accused of crimes throughout Georgia, their only “representation” is a whispered conversation with a lawyer in the courtroom or right outside the courtroom just moments before pleading guilty and being sentenced.

In Greene County, 116 defendants were on the trial calendar on one day in November 2000. Sixty-three of the defendants were handled by the sole contract defender that day. Of those 63 defendants, the cases of 17 were continued, three defendants failed to appear, and of the 43 remaining cases, 42 resulted in pleas and one in a trial. In the same county months later, 114 defendants were on the calendar. The contract lawyer was responsible for representing 94 people on the trial docket charged with over 200 offenses ranging from drug possession to murder. The contract lawyer did not request any trials that day. All 94 cases were pled or continued. In the cases in which pleas were entered, a sentence was imposed without any advocacy regarding sentencing.

In Crisp County, a cramped little room at the jail serves as a “courtroom.” A sheriff’s deputy told one observer that the courtroom was not open to the public even though Georgia law provides that all criminal proceedings must be open to the public.⁵⁵ The judge remained in a back room while the prosecutor and lawyers worked out pleas with inmates, many of whom were meeting their lawyer for the first time. Once a batch of pleas was ready, the judge came in, took the pleas and then retired to the back room to wait until the next batch was ready. This process continued until “court” was over.

For 20 years, all defendants in the Oconee Judicial Circuit, which is comprised of Dodge, Pulaski, Bleckley, Telfair, Wheeler, and Montgomery counties in south central Georgia, were represented by a single family who held the contract for indigent representation and

handled cases for an average cost of less than \$50 per case. Mark Straughan and his father spent about 40 percent of their practice representing the poor for \$60,000 a year. The rest of the time was devoted to their private civil practice. Mark Straughan estimated that about 80 percent of the criminal cases in his counties were indigent cases. In testimony before the Chief Justice's Commission on Indigent Defense in February 2002, Mark Straughan said he did not need to devote much time to cases because he assumed that most of his clients were guilty:

[M]ost of them are going to be guilty. [In] the vast majority you're going to get to trial, the client has been lying to you the whole time, and everybody else has a different story than him, and all the hard evidence points toward him being guilty.⁵⁶

After his comments were reported in the media, the indigent defense committee – which over the years had repeatedly awarded the contract to Mr. Straughan and his father but neglected to monitor their performance – fired him.⁵⁷

It is impossible for lawyers who meet indigent defendants at arraignment and advise them to plead guilty that day to render meaningful representation. The lawyers make no independent assessment of the facts, but rely on information provided by the prosecution and police. They make no effort to find other important facts in mitigation of sentence. There is no sentencing advocacy because the lawyers do not know their clients. This is not legal representation. It is processing, and requires no legal skill.

Although the Georgia Indigent Defense Council's guidelines set some clear standards for evaluating attorney performance,⁵⁸ no oversight of the court-appointed attorneys exists in most counties. Many counties, and indeed entire judicial circuits, appear to take the view that if a court-appointed attorney agrees to take a case, then the counties' obligation to provide counsel to a person who cannot afford counsel has been fulfilled.

There is no oversight of the actual performance of the court-appointed lawyer.

As a result, prosecutors often have total control in plea bargaining with poor people. When lawyers representing defendants consistently fail to conduct independent investigations, diligently prepare for trial, and mount challenges to prosecution cases through pretrial litigation, and instead meet and plead clients, prosecutors grow comfortable in the knowledge that they can dictate the terms of any plea bargain. The same is not true with defendants who have prepared lawyers. Lawyers who have prepared for trial and who have demonstrated their ability and willingness to try cases are able to effectively negotiate on behalf of their clients.

Unfortunately, the treatment of defendants condemned by the United States Supreme Court in 1972 remains an apt description of what happens in many Georgia courtrooms today:

Defense lawyers appear having had no more than time for hasty conversations with their clients. ... Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.⁵⁹

The Supreme Court was talking about the processing of misdemeanor cases, but it describes the processing of both misdemeanor and felony cases in many Georgia counties today.

Too Many Cases

The Georgia Supreme Court has adopted guidelines limiting the number of cases to be handled by attorneys in counties receiving state funding. The guidelines, based on those adopted by the American Bar

Association, prohibit a full-time public defender from handling more than 150 felonies per year; or 300 misdemeanors per year; or 250 juvenile offender cases per year; or 60 juvenile dependency clients per year; or 25 appeals per year.⁶⁰ The limits are not intended to be an aggregate.

Despite these guidelines, lawyers who contract or are appointed to defend poor people are often forced by limited compensation, lack of oversight, or refusal by county officials to hire more lawyers to handle caseloads several times greater than the limits.

Drew Powell, Public Defender of the Mountain Circuit, provided testimony before the Chief Justice's Commission on Indigent Defense in February 2002 about his caseload:

Last year our office opened 632 new cases. Our office consists of myself, an assistant Public Defender, one investigator, and one office manager/secretary. We also, unfortunately, have to represent folks whose children have been taken away by the Department of Family and Children Services. We opened 42 of those cases last year. Those cases are extremely, extremely time consuming. As I said, we opened 632 cases last year. We closed 568 ... cases last year. We had 289 cases open on January 1 of this year. And so that's 857 cases that we worked on last year.⁶¹

Mr. Powell's situation is not unique. Many attorneys appointed or contracted to defend the poor are working with bare-bones resources because the counties they receive funding from do not perceive indigent defense as a priority, or simply have no resources. But the consequences of processing large numbers of cases are obvious: Defendants get shortchanged. As a result, some choose to handle their own cases without counsel while others will accept their fate and plead guilty with a lawyer. As Mr. Powell explained:

I can't tell you the number of times when my clients tell me I didn't really do this, but I'm going to plead guilty

because I know what I've got here. I don't know that you're going to have time to work on my case and get it done right, and so I'm going to take this plea bargain.⁶²

Failure To Conduct Any Advocacy On Sentencing

When an attorney lets a client languish in jail, meets him for the first time in court and advises a guilty plea without conducting fundamental investigations, without independently assessing the prosecution's case, and without taking the time to develop an understanding of the client's background, the attorney is unable to provide meaningful advocacy at arguably the most important part of the process: sentencing. Given that most defendants enter guilty pleas, the failure of lawyers representing the indigent to conduct meaningful advocacy at sentencing is perhaps the most glaring deficiency in the indigent defense system in Georgia.

Clients are individuals with needs and conditions that effective sentencing advocacy should address. Lawyers must be able to recognize the conditions their clients may suffer from, for example:

- Whether the client is mentally retarded. Mental retardation may not be apparent on first glance. If the lawyer spends little or no time with the client and does no investigation into the client's life, it may never be discovered.
- Whether the client is mentally ill. The client may be suffering from schizophrenia, bipolar disorder, or brain damage. While some mental disorders are apparent, others are more subtle or the symptoms are not always manifested.

- Whether the client has problems with substance abuse.

After recognizing any one of the many conditions clients have, an effective advocate at sentencing should assist the court in crafting the least restrictive placement or treatment program for the client that best meets both the needs of the client and society. Poor defendants, however, rarely benefit from this sort of advocacy. As a result, society and taxpayers bear enormous costs to imprison people who might better be dealt with in another setting.

New Debtor's Prisons

The failure of lawyers representing indigent defendants to advocate at sentencing is extremely harmful where fines are involved. Every day, poor defendants who have little or no income are placed on probation and fined \$1,000, \$2,000, or more. Piled on top of the fines are a series of fees and surcharges to be contributed, for example, to the Peace Officers Standards and Training Fund, the Jail Fund, the Library Fund, the Crime Laboratory Fund, and the Victim Assistance Program. Some defendants are ordered to pay restitution.

Defendants who are placed on probation must also pay a monthly probation supervision fee. Many county programs, in addition, order the indigent

"I was jailed [in Appling County on charges of writing bad checks] where I stayed for three months before being taken to court. In court I was ordered to pay restitution of \$159, a fine of approximately \$650, and placed on probation for three years [totaling \$1,260 in probation supervision fees]. I thought this to be excessive considering the amount of the checks totaled \$45 and such a long stay in jail. ... Due to financial difficulties at home I got three months behind (\$195). A warrant was issued and I was arrested again. The warrant stated that I was \$417 in arrears. When I was only \$195 in arrears at the time of arrest ... I was taken back to court [after a month in jail] and was sentenced to a diversion center until all probation fees are paid. So far I've paid \$890 and have spent over six months in jail. I've been told by the probation officer that I have ... another seven months in jail. Add another 4 to 5 months ... and this comes to an approximate total of 1 year 5 months in jail and over \$2,000 in fines and fees for \$45 worth of bounced checks. This can't be right. I was told by the judge that I was not entitled to court appointed representation because this was a technical violation of probation."

Letter, February 26, 2002

defendant to repay the costs of the court-appointed lawyer. When the fines, fees, and surcharges are totaled, they amount to a monthly payment that a poor person cannot conceivably make even when gainfully employed. Lawyers representing the poor regularly fail to raise during sentencing the unreasonableness of these fines and fees in relation to the earning potential of their clients.

The lawyer's failure to advocate at sentencing for reasonable fines and fees leads to severe consequences for indigent people who are placed on probation. The United States Supreme Court held long ago that while a person may be fined as punishment for a criminal offense, he cannot be sent to jail for his inability to pay the fine.⁶³ Unfortunately, whereas the Supreme Court holds that a person cannot be denied a lawyer if that person is going to be deprived of liberty,⁶⁴ indigent probationers do not have an absolute constitutional or statutory right to counsel during probation revocation hearings for the failure to pay fines and fees.⁶⁵ Unfamiliar with the law that prevents the court from revoking their probation for the failure to pay excessive fines, indigent probationers are sent off to jail or a diversion center in a new form of debtors' prison because of the failure of lawyers to prevent the imposition of the excessive fine at sentencing.

No Translators For Those Who Do Not Speak English

In recent years, increasing numbers of poor people with limited or no English skills have been charged with crimes in Georgia. In many parts of the state, these people do not receive the assistance of trained translators. Without translators, the system breaks down: Defendants cannot communicate effectively with their lawyers and provide them with critical information necessary to their defense; attorneys cannot fully investigate cases that involve non-English speaking witnesses; judges are unable to ensure that non-English speaking defendants understand their rights and the consequences of their decisions. Recognizing the problems faced by non-English speakers in Georgia courts, the Georgia Supreme

Court recently created guidelines requiring the use of certified translators for all non-English speaking defendants.⁶⁶

Because of the failure to provide certified interpreters, lawyers and defendants often turn for translation assistance to law enforcement officers, jailers, or other inmates. Lawyers cannot have confidential and candid conversations necessary for developing effective attorney-client relationships.

¿HABLAS INGLES?

In the summer of 2002, a Latino defendant who spoke no English appeared for arraignment in Dooly County Superior Court. Despite having been in jail for months, the defendant had not been visited by his court-appointed lawyer prior to that day. No translator was present, and the lawyer did not speak Spanish. After meeting for a few minutes with the defendant and a friend who acted as an translator, the lawyer announced that the defendant would be entering a guilty plea.

The judge stated that he thought the court should have a translator, but instead of arranging for an official translator, he looked into the audience to see if there were any likely candidates. He called the defendant's friend, a Latina who appeared to be in her teens, up to the podium and asked if she could translate. He made no effort to test her understanding of the English language or legal terminology and swore her in as the "official court interpreter."

The judge then began the series of questions to determine whether the defendant understood what he was doing and the rights he was giving up. Although the girl did not understand some of the legal terms the judge used, she tried to roughly translate what he said. Fortunately, when the judge asked her to translate the accusations against her boyfriend, she was able to do so, and the defendant emphatically denied having done what he was accused of. Then the judge had the defendant explain what he had done, which turned out not to be a crime. The judge refused to accept the plea. The apparently embarrassed lawyer protested, saying that the defendant had told him something different. The lawyer never obtained an interpreter to work on the case. The defendant ended up entering a "best interest" plea, which does not admit guilt but serves as a guilty plea for purposes of sentencing.

The lawyer called on the same girl to interpret for another non-English speaking defendant who was pleading guilty to a felony. Because she was unable to translate the lawyer's explanation of the consequences of pleading guilty under the First Offender Act, the lawyer asked a bystander who spoke a small amount of Spanish to do so. The judge then called the girl again to interpret the guilty plea colloquy for the court and accepted the defendant's plea.

No Experts

In Forsyth County, where all local lawyers are conscripted to defend poor people accused of crimes, a lawyer was asked what he would do if he needed an investigator. He replied, “Too bad.” And if he needed experts? “Too bad.” Could he approach the judge for funds? He again replied, “Too bad.” A contract lawyer in Floyd County, who handles 200 cases, said virtually the same thing. He receives funds only for exceptional -- *i.e.*, capital -- cases.

But it is not “too bad.” The United States Supreme Court held in *Ake v. Oklahoma* that due process requires that experts be provided to indigent defendants where a significant issue at trial requires development by expert testimony.⁶⁷ For many poor people accused of crimes, this right has become all but meaningless because lawyers do not apply for funds for expert assistance, usually on the belief that the local judge will not grant such requests anyway.

Lack of Expertise Of Court-Appointed Lawyers

There are no statewide standards for the education and competence of lawyers who represent indigent defendants. In many counties, in fact, lawyers who do not have interest, skill, or basic knowledge in the practice of criminal law are conscripted by the county into representing indigent criminal defendants. While a handful of county indigent defense programs require lawyers to have some experience in criminal law in order to receive appointments, the vast majority of counties have no such requirements.

One defendant in Gwinnett County wrote that his court-appointed lawyer had stated, “I have over 100 cases on my desk already. I don’t have time for paying clients, and simply don’t have the knowledge to handle your case.”

GEORGIA HAS FAILED TO PROVIDE TREATMENT OPTIONS FOR THE MENTALLY ILL

In Georgia there exist few mental health courts, few diversionary programs, and few places a law enforcement officer can take a defendant who is mentally ill, other than jail. When provided with no alternatives, an officer will arrest a mentally ill person for criminal trespassing and take him to the city or county jail as he would anyone else. Appointed counsel often will not provide any sentencing advocacy or explore alternatives to incarceration. As a result, jail has become housing for the mentally ill.

According to the Center on Crime, Communities & Culture, 670,000 mentally ill people are admitted to U.S. jails each year – nearly eight times as many as are admitted to mental hospitals in a year.⁶⁸ Of the 10 million people booked into jails every year, 13 percent of them have some mental illness, compared to 2 percent of the general population who have a mental illness.⁶⁹

In Fulton County one mentally ill woman has been arrested more than two dozen times since 1998. She was diagnosed with schizophrenia at age 15, and at age 40 she was living with her mother and unable to care for herself. She regularly visited the outpatient clinics at Grady Hospital because she heard voices, or she was sexually assaulted, or she needed help with her drug addiction. She was repeatedly picked up on such charges as criminal trespassing, loitering, public drunkenness, and giving false information. While incarcerated, her medications were repeatedly interrupted, exacerbating her mental illness.

After a recent incarceration for simple battery, she was released early in the morning before daylight, and before any public transportation was available to leave the jail. Being an easy target, she was picked up by a truck of men, who sexually assaulted her. Later in the morning she made her way to Grady Hospital for treatment, and her mother came to get her.

This woman and persons like her are not being served by the criminal justice system. She has completed the cycle so often that her mother had no other choice but to move her out of state to a place her mother felt her daughter could be safe.

IV. AN APPROACH DESIGNED TO FAIL

The problems plaguing Georgia's indigent defense system should come as no surprise. They are the inevitable result of the lack of structure, funding, oversight, and independence necessary to ensure that poor people accused of crimes are treated fairly by the courts. Recently, the Spangenberg Group, a nationally reputed consulting agency on indigent defense systems, concluded that a "lack of program oversight and insufficient funding are the two chief problems underlying a complete absence of uniformity in the administration of and quality of indigent defense services" in many Georgia counties.⁷⁰ Lack of structure and independence make Georgia's indigent defense problems even more intractable.

Lack Of Structure

Georgia relies upon each of its 159 counties to provide representation to poor people accused of crimes. The approaches to providing representation differ not only from county to county but from court to court within a county. Some counties rely primarily on contracting with attorneys, sometimes on the basis of what lawyer will represent the poor for the lowest bid.⁷¹ Other counties conscript lawyers or appoint from a list of lawyers who are willing to take appointments.⁷² Only 21 counties use public defender offices made up of full-time lawyers who specialize in representing poor people accused of crimes.⁷³ All three of these approaches may be found indifferent counties within the same judicial circuit.

In contrast, Georgia's courts and district attorney offices are organized along Georgia's 49 judicial circuits and provide a structure that is more manageable and efficient. Counties organized along judicial circuits have the ability to cooperate and coordinate; pool resources, personnel, and training; and eliminate duplication of effort to operate more cost-effectively and efficiently. There is no reason why the

representation of indigent defendants in the courts of the state should not be structured, as do the courts and district attorneys, by judicial circuit.

The Chief Justice’s Commission on Indigent Defense, comprised of 24 persons selected by the Chief Justice of the Georgia Supreme Court from various backgrounds and representing a variety of interests in the criminal justice system, recently concluded a study of the indigent defense system in Georgia. Its report identified the county-based structure as a major factor contributing to the poor quality of representation for people who cannot afford lawyers, noting that “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 rights of indigents accused of violations of the state criminal code.”⁷⁴ Likewise, the Spangenberg Group’s study found that Georgia’s county-based indigent defense structure hinders its improvement: “Georgia’s large number of counties and its multi-layered court system make improvements to indigent defense a particularly daunting task.”⁷⁵

Inadequate Funding

Problems in Georgia’s indigent defense system are caused by the utter lack of resources dedicated to providing representation. Georgia’s experience with county-based indigent defense systems shows that most counties have neither the political will nor the financial ability to adequately finance effective indigent defense systems. Counties provide almost 90 percent of the cost of representation

A lawyer in Jones County put months of hard work into an appointed case defending a battered woman accused of murder. The case was so difficult that he was unable to work on other cases. After the trial, he submitted a bill to the judge in which he purposefully under-billed for the amount of hours he had spent. The judge slashed the bill even further without explanation. The lawyer lost thousands of dollars on the case.

for indigent defendants, while the State of Georgia barely covers the rest.⁷⁶ As a result, counties are unable to provide lawyers with the fees and resources necessary to sustain effective systems of indigent defense.

In the aggregate, Georgia and its counties spent \$50.6 million last year on indigent defense, far less than other states with similar populations and caseloads. The most recent comparative study of indigent defense expenditures among states like Georgia which fund indigent defense programs through a combination of state and county funds was completed in 2002.⁷⁷ The study found that Georgia lags behind comparable states in the amount of resources it dedicates to indigent defense.

A recent comparative study on state indigent defense expenditures found that Georgia, despite having the fourth highest population, spent the least amount in state dollars for indigent defense during fiscal year 2001, with the exception of Texas. The spending, by state was as follows: Florida (\$141,308,564), North Carolina (\$68,411,000), Ohio (\$47,090,219), Tennessee (\$38,275,900), Alabama, (\$32,900,000), Kentucky (\$25,380,000), Kansas (\$15,178,023), Arkansas (\$12,333,561), Indiana (\$10,400,000), Georgia (\$5,893,227), and Texas (\$303,987).

Because of inadequate funding on the county and state level, lawyers representing indigent defendants receive fees that are well below market rates. These low rates, and the inadequate resources provided to lawyers, prevent them from providing adequate representation and discourage private lawyers from developing expertise in criminal law. Ultimately, low fees and

insufficient resources place the lawyer's ethical and professional obligation to vigorously represent his or her indigent clients in direct conflict with the need to make a living by spending more time representing paying clients.

The unwillingness of many judges to approve funds to pay for needed expert witnesses and investigative assistance, and the regularity with which judges reduce fee vouchers submitted by lawyers who represent indigent clients also deter the lawyers who have a choice from accepting appointments in the future. Moreover, inadequate compensation and insufficient resources force private lawyers to choose between subsidizing the indigent defense system or declining to take appointed cases.

The Chief Justice's Commission on Indigent Defense concluded that Georgia's failure to guarantee the right to counsel to indigent defendants was due in part to the insufficient amount of money currently allocated within Georgia to the provision of constitutionally mandated indigent criminal defense.⁷⁸ The Commission further concluded that in "many areas of the state, inadequate funding for [expert witnesses, investigators and qualified interpreters] results in unfair and often unconstitutional treatment of indigent criminal defendants."⁷⁹ Likewise, the Spangenberg Group found that "[m]ajor problems were found surrounding requests for investigators or expert witnesses,"⁸⁰ and that many counties do not "provide sufficient funds to assure quality representation to all indigent defendants."⁸¹

In DeKalb County, an experienced and highly regarded lawyer was appointed to represent an indigent defendant in a death penalty case that lasted more than two years. She conducted an intensive investigation, spent days arguing motions, took the case to trial, and put on more than 50 defense witnesses. Seven months after the conclusion of the trial and without explanation, the judge cut the lawyer's fee request by approximately one-third. The lawyer lost a significant amount of money on the representation and has decided because of this experience never to take an appointed case again.

No Oversight Or Accountability

Georgia's experience with using the county-based model of indigent defense, which relies upon uncompensated members of a tripartite indigent defense committee⁸² to ensure that indigent defendants receive effective representation, has demonstrated that local control is a model for failure, rather than a framework for success. In many counties, the tripartite committee exists only on paper and uncompensated tripartite committee members do not have the time, inclination, or expertise to monitor the quality of representation provided by contract defenders, court-appointed lawyers, and public defenders. Recognizing the impotence of the tripartite committee model of oversight, the Chief Justice's Commission concluded that "[t]here is no effective statewide structure in place designed to monitor and enforce compliance with existing Georgia Supreme Court rules governing the operation of local indigent defense programs."⁸³

The Spangenberg Group similarly concluded that the "model of the tripartite committee, while seemingly laudatory on paper, has, in practice, failed to effectively monitor or administer indigent defense in many counties. The model of state grant-making and local control has never worked."⁸⁴ The Chief Justice's Commission on Indigent Defense also concluded that the current system, which relies upon local judges and tripartite committees to monitor indigent defense programs, is inadequate to guarantee that defendants receive representation consistent with guidelines established by the Georgia Supreme Court.⁸⁵

Relying upon the presiding judge as a fall-back mechanism to ensure effective representation has likewise failed.⁸⁶ Judges have historically had the default responsibility for ensuring that defendants receive effective representation, but have demonstrated their inability over the years to identify and prevent persistent patterns of deficient representation. For instance, the judges of the Oconee Judicial Circuit

failed to address the manifest constitutional, ethical, and professional failings that characterized the performance of the contract defenders there. The contract defender was eventually removed from representing indigent defendants by the local tripartite committee when the newspaper reported that he regularly violated his constitutional, professional and ethical responsibilities to his clients.

No institutions currently exist on the statewide level to ensure that indigent defendants are guaranteed effective counsel. The State Bar of Georgia does not have the staffing or the resources to intervene in individual cases to ensure that a lawyer provides vigorous representation to his appointed clients. Whenever it receives a complaint regarding an

The Fulton County Daily Report reported in 1995 that members of one county's three-person committee that was supposedly overseeing the indigent defense program conducted no oversight over the quality of indigent defense; the committee's only function was to sign the application form for state supplemental funds.

indigent defendant, the State Bar's practice is to refer such inquiries to the Georgia Indigent Defense Council.⁸⁷ Like the State Bar, however, the Georgia Indigent Defense Council lacks the staff or the enforcement

mechanism to guarantee that indigent defendants receive vigorous representation. The Georgia Indigent Defense Council can take no action against a county that has failed to abide by its responsibilities to indigent defendants, except to withhold state funding the next time the county applies. This drastic and counterproductive remedy has never been used. The inability of the State Bar or the Georgia Indigent Defense Council to exert pressure to improve indigent defense led the Spangenberg Group to find that "[t]here is no effective statewide advocate for indigent defense in Georgia."⁸⁸

To make matters worse, the poor person denied effective legal representation prior to or at trial therefore has little or no redress.

Because Georgia does not provide counsel for post-conviction proceedings, those who have received poor or no representation have no way of effectively challenging their convictions. The only poor defendants who are likely to receive lawyers for post-conviction proceedings are those sentenced to death, and they have prevailed repeatedly on claims of ineffective assistance of counsel.

THE UNACCOUNTABLE COUNTIES

Although some state funding is available to counties that submit a relatively simple application to the Georgia Indigent Defense Council, seven counties currently choose not to apply for funds: Catoosa, Chattooga, Dade, and Walker (which constitute the Lookout Mountain Circuit), and Jackson, Jones, and Putnam counties. Some county officials have complained that it is too difficult to complete the application form, which requires little more than filling in the number of cases handled in the previous year, the names of the people who represent the indigent, and the amount of money spent on indigent defense in the prior year. Jon B. Wood, the Chief Superior Court Judge of the Lookout Mountain Circuit, when asked why the counties in his judicial circuit would not accept state funds, refused to comment. A county official in that circuit said that it was the judiciary's decision. One explanation for the refusal of these counties to accept state money is the wish to avoid any oversight of their compliance with state law that, at least in theory, is a condition of the receipt of state funds.

The indigent defense system in the Lookout Mountain Circuit illustrates the problems that can occur where there is a total lack of oversight. All attorneys in the circuit, with few exceptions, are required to take court-appointed criminal cases from the moment they are sworn in to the local bar association, and must continue to do so for 15 years. This means that lawyers who have no experience or interest in practicing criminal law are appointed to represent indigent defendants in criminal cases in the circuit. For instance, one man currently charged with a serious felony in Catoosa County was assigned a lawyer whose speciality is worker's compensation law. The lawyer told the defendant's family that he did not typically handle such cases. The defendant complained that the lawyer did not communicate with him about the status of the case, did not respond to his letters, and urged him to "just plead out."

In addition to being conscripted to take cases they do not want, appointed attorneys in the Lookout Mountain Judicial Circuit are terribly underpaid.

According to a fee schedule, attorneys in 2002 were paid a flat rate of \$300 per felony guilty plea or probation revocation plea, and \$1,125 per felony trial, regardless of the amount of work put into the case. The county's records for 2002 indicate that attorneys were paid a flat fee of \$100 for each misdemeanor case. When overhead costs are accounted for, lawyers who expend a reasonable amount of time representing indigent clients at these rates end up losing money. The results of this system are predictable. The Center has received numerous complaints about defendants languishing for months in the jails of the Lookout Mountain Circuit without contact with a lawyer. One observer of the justice system in the Lookout Mountain Circuit wrote:

I frequently visit the courts in this district and as an observer, the disregard of people's rights deeply disturbs me. Some of the Judges will appoint attorneys to the indigent on the day of trial and hear their cases within minutes of appointment. There is no possible way to obtain an adequate defense in this manner ... [One lawyer] is appointed to a lot of the indigent cases and in my opinion anyone would be just as well off representing themselves. From what I have observed in the courts here in this Judicial District, appointments of counsel are more a matter of record than justice.

When people finally meet their lawyers, they often receive substandard representation. Local officials and attorneys agree that investigations do not occur in most cases. One local judge said he believed that local attorneys did not have the resources to adequately defend their cases against law enforcement. Even more troubling, local attorneys readily admitted that they did not conduct investigations in many cases. One local attorney who takes appointed cases explained, "In some cases, you can look at the police report and talk to the client [and that's enough]. Some cases, you don't even need to talk to the client." Two attorneys said that there are many members of the local bar who do little or no work on their appointed cases, and go to trial unprepared due to a lack of enthusiasm for the work. A county official responsible for handling county funds commented that she had never received a request for investigative funds in an appointed case.

No Independence

Recognizing the problem faced by many defense lawyers in local programs, the Chief Justice’s Commission concluded that ensuring the independence of defense counsel from judicial and executive authorities is central to improving indigent defense in Georgia. Among the conclusions it emphasized were that “[t]he criminal defense function must be independent. In order to fully establish the appropriate independence, defense counsel must have responsibility for case by case administration. ...”⁸⁹

Despite ethical, professional, and constitutional rules requiring lawyers to exercise independent professional judgment on behalf of their clients, the appointment of counsel in many county indigent defense programs, however, undermines the independence of counsel.

A perception among many lawyers is that one way to avoid being assigned indigent cases is to provide a vigorous defense.

The appointment of panel lawyers by the judge in panel systems, or the influence the judge has in selecting, negotiating, and renewing the lawyer’s contract in contract lawyer systems, creates – at the least – the appearance that lawyers need to be more loyal to the judge than to their clients. A lawyer’s conduct in a case should not be influenced in any way by considerations of administrative convenience or by the desire to remain in the good graces of the judge who assigned the case or who negotiates or approves the contract. Because some lawyers are dependent upon judges for continued appointments or the renewal of the indigent defense contract, however, a lawyer may be reluctant to provide zealous advocacy for fear of alienating the judge.

The Spangenberg Group found that “[t]wo of the biggest problems facing indigent defense in Georgia and efforts to improve it are its lack of independence from the judiciary, and a steadfast unwillingness on the part of some judges in the state to support a system that grants this independence.”⁹⁰

The American Bar Association, in Standard 5-1.3 (a) of its *Criminal Justice Standards*, provides that lawyers representing indigent defendants “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.”

V. CONCLUSION

March 18, 2003 marks the fortieth anniversary of the United States Supreme Court's decision in *Gideon v. Wainwright* guaranteeing the right to counsel. Yet the Chief Justice's Commission and a nationally reputed indigent defense consultant have each concluded that Georgia fails to meet its constitutional responsibility to provide lawyers for those who cannot afford them.

Because more than 80 percent of the almost 170,000 criminal cases handled by Georgia's courts involve people who cannot afford to hire a lawyer, the crisis in representation is a crisis in the very administration of justice in Georgia. The adversary system cannot be relied upon to convict the guilty and free the innocent when one side is not adequately represented. Individualized sentencing is impossible. The credibility of the courts is undermined, and citizens lose their respect for the courts and their decisions.

The Chief Justice's Commission on Indigent Defense and the Georgia Bar have recommended creation of a state-level system of oversight and accountability by establishing a statewide public defender system, organized by the state's 49 judicial circuits just as judges and prosecutors are organized. They also recommend that the state assume responsibility for funding indigent defense and that the criminal defense function become independent from judicial or executive pressures that serve to undermine constitutional, ethical, and professional obligations to vigorously represent the interests of the client.

In the last 40 years, there have been many reports by commissions, the bar, the media and other observers about the gross deficiencies in legal representation for the poor in Georgia. Five lawsuits have addressed and corrected some of the problems. But the time has come for a comprehensive approach that will ensure equal justice to every person accused of a crime in Georgia, restore trust and confidence in the

courts, and guarantee that verdicts and sentences rendered in Georgia's courts are informed ones that come after a full exploration of the facts.

ENDNOTES

1. See SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES (Nov. 2000), available at <<http://www.schr.org/indigentdefense/articles.html>> (last visited January 12, 2003).
2. See U.S. CONST., amds. VI & XIV; GA. CONST., art. I, sec. 1, para. I, II & XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (recognizing federal constitutional right to counsel in all felony cases); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that the quality of justice a person receives cannot be determined by the amount of money he or she has).
3. *Alabama v. Shelton*, 535 U.S. 654 (2002).
4. See U.S. CONST., amds. VI & XIV; GA. CONST., art. I, sec. 1, para. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (recognizing federal constitutional right to counsel in all felony cases); *Elam v. Rowland*, 194 Ga. 58, 59, 20 S.E.2d 572, 572 (1942) (recognizing state constitutional right to counsel in all felony cases); *Alabama v. Shelton*, 535 U.S. 654 (2002) (recognizing federal constitutional right to counsel in misdemeanor cases); *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (2002) (recognizing federal constitutional right to counsel in misdemeanor cases).
5. See, e.g., OFF. CODE GA. ANN. §§ 17-12-1 *et seq.*; OFF. CODE GA. ANN. §§ 17-12-30 *et seq.*; GEORGIA INDIGENT DEFENSE COUNCIL, GUIDELINES FOR THE OPERATION OF LOCAL INDIGENT DEFENSE PROGRAMS (hereinafter “Guidelines”) (approved by the Georgia Supreme Court Nov. 1999), available at <<http://www.gidc.com/guidelin.htm>> (last visited January 12, 2003); Uniform Rules of the Superior Courts (“USCR”), Rule 29.
6. See Guidelines, *supra*, note 5, Guideline 1.2 (requiring appointment of counsel within 72 hours of arrest or detention); OFF. CODE GA. ANN. § 17-4-26 (requiring person arrested on a warrant to be brought before judicial officer within 72 hours of arrest); OFF. CODE GA. ANN. § 17-4-62. (requiring person arrested without a warrant to be brought before judicial officer within 48 hours of arrest).
7. See Uniform Magistrate Court Rule (“UMCR”) 25.1(3) (requiring magistrate within 48 or 72 hours of arrest to “[d]etermine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application.”); Uniform Superior Court Rule (“USCR”) 26.1C) (same); Uniform State Court Rule 26.1(C) (same).

8. See Guidelines, *supra*, note 5, Guideline 1.2 (requiring that defendants who bond out of jail within 72 hours of arrest be “notified at least ten (10) days prior to the next critical stage of the proceedings against him/her of the right to receive court-appointed counsel and the procedure to be followed to have eligibility determined and counsel appointed”).
9. See OFF. CODE GA. ANN. § 17-6-1(e)(1)-(4) (requiring pretrial release determination to be based on whether the accused poses a risk of fleeing or failing to appear; poses a threat or danger to a person or the community; or poses a risk of committing any felony pending trial).
10. See OFF. CODE GA. ANN. § 17-7-20 *et seq.*
11. See *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (establishing federal constitutional right to counsel at pre-indictment commitment or preliminary hearing); *State v. Houston*, 234 Ga. 721, 723, 218 S.E.2d 13, 15 (1975) (establishing Georgia constitutional right to counsel at pre-indictment commitment or preliminary hearing); OFF. CODE GA. ANN. § 17-7-24 (creating statutory right to be represented by counsel at pre-indictment commitment or preliminary hearing).
12. See *United States v. Gouveia*, 467 U.S. 180 (1984); *Mempa v. Ray*, 389 U.S. 128 (1967); *White v. Maryland*, 373 U.S. 59 (1963).
13. See *Hamilton v. Alabama*, 368 U.S. 52 (1961); (announcing federal constitutional right to counsel at arraignment); *Carswell v. State*, 244 Ga.App. 516, 520-21, 534 S.E.2d 568, 572 (2000) (affirming constitutional right to counsel at arraignment). See also USCR 30.2 (“Before arraignment the court shall inquire whether the accused is represented by counsel and, if not, inquire into the defendant’s desires and financial circumstances. If the defendant desires an attorney and is indigent, the court shall authorize the immediate appointment of counsel.”); USCR 33.2(A) (requiring that a “defendant shall not be called upon to plead before having the opportunity to retain counsel, or if the defendant is eligible for appointed counsel, until counsel has been appointed or right to counsel waived”).
14. See, *e.g.*, *Maine v. Moulton*, 474 U.S. 159 (1985).
15. See *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).
16. 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); *State v. Watson*, 244 Ga.App. 484, 536 S.E.2d 170 (2000).

17. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985); *McMann v. Richardson*, 397 U.S. 759 (1970).

18. See, e.g., AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, (3rd ed. 1993) (hereinafter “ABA STANDARDS”), Standard 4-4.1(a)-Duty to Investigate (“Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.”); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997) (hereinafter “NLADA STANDARDS”), Guideline 4.1.a-Investigation (“Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.”); *id.* at Guideline 4.1.b.3-Investigation-Potential Witnesses (“Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused.”).

19. See, e.g., ABA STANDARDS, *supra*, note 18, Standard 4-5.1(a)-Advising the Accused (“After informing himself . . . fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.”). See also, GEORGIA RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (requiring that a lawyer be competent in his representation and that “[c]ompetence requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation”).

20. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985) (providing for expert assistance for indigent defendants as a requirement of due process); *Roseboro v. State*, 258 Ga. 39, 365 S.E.2d 115 (1988) (setting out the showing required for approval of funds for expert assistance).

21. See, e.g., NLADA STANDARDS, *supra*, note 18, Guideline 1.1.a-Role of Defense Counsel (“The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process.”).

22. See Guidelines, *supra*, note 5, Guidelines 6.1 (advising that counsel should “prevent caseloads, by reason of their excessive size, from interfering with the rendering of quality representation or leading to the breach of professional obligations”); ABA STANDARDS *supra*, note 18, Standard 4-1.3 (e)-Workload (“Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client’s interest in the speedy disposition of

charges, or may lead to the breach of professional obligations.”).

23. *Faretta*, 422 U.S. 806, 835.

24. *Powell*, 287 U.S. 45, 68-69.

25. *Gideon*, 372 U.S. 335.

26. *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS: INDIGENT DEFENSE 4, at Table 8 (Feb.1996).

27. *See* Guidelines, *supra*, note 5, Guideline 1.2 (requiring counsel to be appointed within 72 hours of arrest and detention and make contact with the defendant promptly after notice of appointment)

28. *See, e.g.,* Bill Rankin, *Justice Delayed in the Sumter County Jail, an Inmate Waits to Learn His Fate*, ATLANTA JOURNAL-CONSTITUTION, Apr. 21, 2002, at A1; Bill Rankin, *Indigent System Critic Is Sentenced to 15 Years*, Oct. 10, 23, ATLANTA JOURNAL-CONSTITUTION, at B1.

29. Many counties have only two terms of Superior Court per year. Some others have terms four times a year. Consequently, indigent defendants who are not arrested and indicted within a term of court often have to wait three, four, or six months before they may be indicted by a grand jury and arraigned in the next term of court. *See* OFF. CODE GA. ANN. § 15-6-3 (establishing the terms of courts for the Superior Courts).

30. *In re Gault*, 387 U.S. 1, 36 (1967).

31. For an in depth assessment of the deficiencies faced by indigent juveniles in Georgia’s delinquency system, see AMERICAN BAR ASSOCIATION, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS, at 19-23 (July 2001), *available at* <<http://www.schr.org/reports/index.htm>> (last visited January 12, 2003). The Center participated in the evaluation of Georgia’s delinquency system and assisted in the preparation of this report.

32. *See* OFF. CODE GA. ANN. §§ 17-7-20 *et seq.*

33. *See* OFF. CODE GA. ANN. § 17-7-23.

34. *See* OFF. CODE GA. ANN. § 17-7-28.

35. *Coleman*, 399 U.S. 1.

36. See OFF. CODE GA. ANN. § 17-6-16; USCR 26.1(D); UMCR 25.1(4).
37. The right to remain silent is a fundamental constitutional right guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. See U.S. CONST., amds. V & XIV; *Miranda v. Arizona*, 384 U.S. 426 (1966). Most lay people can recite this right because of their familiarity with police shows on television.
38. See *Shelton*, 535 U.S. 654; *Gideon*, 372 U.S. 335, 342.
39. See Guidelines, *supra*, note 5, Guideline 1.2 (requiring counties to provide counsel at least 10 days before next hearing).
40. See OFF. CODE GA. ANN. § 17-4-26 (requiring person arrested on a warrant to be brought before judicial officer within 72 hours of arrest); OFF. CODE GA. ANN § 17-4-62. (requiring person arrested without a warrant to be brought before judicial officer within 48 hours of arrest).
41. See UMCR 25.1; USCR 26.1.
42. See *Brewer*, 430 U.S. 387, 404; *Johnson*, 304 U.S. 458, 464.
43. *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).
44. See AMERICAN BAR ASSOCIATION, *supra*, note 31, at 19-23.
45. See *id.*
46. See *Hamilton*, 368 U.S. 52 (establishing right to counsel at arraignment); *Carswell*, 244 Ga.App. 516, 520-21, 534 S.E.2d 568, 572 (same) See also USCR 30.2 (“Before arraignment the court shall inquire whether the accused is represented by counsel and, if not, inquire into the defendant’s desires and financial circumstances. If the defendant desires an attorney and is indigent, the court shall authorize the immediate appointment of counsel.”); USCR 33.2(A) (requiring that a “defendant shall not be called upon to plead before having the opportunity to retain counsel, or if the defendant is eligible for appointed counsel, until counsel has been appointed or right to counsel waived”).
47. See Guidelines, *supra*, note 5, Guideline 1.3 (setting forth sample indigence assessment form); Guideline 1.5 (requiring that indigence assessment take into account net instead of gross income, child care expenses, support and alimony payments, unusual or excessive medical or other expenses); USCR 29.2 (requiring that indigence determination take into account the “accused’s assets, liabilities, employment, earnings,

other income, number and ages of dependents”).

48. See, e.g., *Flanagan v. State*, 218 Ga. App. 598, 600, 462 S.E.2d 469, 471 (1995) (requiring that when presented with a non-indigent defendant who has appeared for trial without retained counsel, the trial judge has a duty to delay the proceedings long enough to ascertain whether the defendant has acted with reasonable diligence in obtaining an attorney’s services, and whether the absence of an attorney is attributable to reasons beyond the defendant’s control”); *Houston v. State*, 205 Ga. App. 703, 704, 423 S.E.2d 431 (1992) (same). See also Guidelines, *supra*, note 4, Guideline 1.5 (stating that “[c]ounsel may be appointed for any accused person who is unable to obtain counsel due to special circumstances such as emergency, hardship, or documented refusal of the case by members of the private bar because of financial inability to pay for counsel”).

49. See OFF. CODE GAL ANN. § 17-12-10 (providing that “[r]elease on bail shall not necessarily preclude a person from being considered indigent”).

50. See Guidelines, *supra*, note 5, Guideline 1.5; USCR 29.3.

51. See UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, 2002 HHS POVERTY GUIDELINES, available at <http://aspe.hhs.gov/poverty/02poverty.htm?>> (last visited January 12, 2003)

52. See GEORGIA LEGAL SERVICES PROGRAM, ELIGIBILITY FOR GEORGIA LEGAL SERVICES PROGRAM, available at <http://www.glsp.org/extranet/eligibility.resources.htm> (last visited Jan. 12, 2003).

53. See *Gideon*, 372 U.S. 335; *Powell*, 287 U.S. 45, 68-69.

54. Evidence which is obtained by law enforcement illegally -- for instance, in violation of a defendant’s Fourth Amendment right to be free from unreasonable searches and seizures, in violation of a defendant’s Fifth Amendment right against self-incrimination, or in violation of a defendant’s Sixth Amendment right to counsel, which includes the right to be counseled by a lawyer during interactions with police or prosecutors after formal charges have been filed -- is prohibited from being used as evidence against a defendant. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 654 (1967); *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960); *Massiah v. U.S.*, 377 U.S. 201, 206-07 (1964). Filing a motion to suppress is a way to exclude illegal evidence from being used against a defendant.

55. The federal and Georgia Constitutions grant the right to a public trial. See U.S. CONST., amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”); GA CONST., art. I, sec. 1, para. XI (“In criminal cases, the

defendant shall have a public and speedy trial by an impartial jury”). *See also Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated on other grounds*, 446 U.S. 961 (1980) (stating that the Sixth Amendment to the United States Constitution combines with this paragraph to ensure that every person charged with offending the laws of this state shall have a public and speedy trial).

56. *Before the Chief Justice’s Commission on Indigent Defense*, Feb. 12, 2002 (testimony of Mark Straughan, Contract Defender, Oconee Judicial Circuit), at 74, available at <<http://www.georgiacourts.org/aoc/idhearings/021202.TXT>> (last visited January 12, 2003).

57. *See* Bill Rankin, *Defender of Poor Relieved of Duties Testified He Assumed His Clients Guilty, Liars*, ATLANTA JOURNAL-CONSTITUTION, Apr. 30, 2002, at B1; Editorial, *Contract Lawyers Can’t Get Job Done*, ATLANTA JOURNAL-CONSTITUTION, May 5, 2002, at F10; Bill Rankin, *Defending the Poor: Part Two: A Cheap Dose of Due Process in Dodge*, ATLANTA JOURNAL-CONSTITUTION, Apr. 22, 2001, at A1.

58. *See, e.g.*, Guidelines, *supra*, note 5, Guideline 2.3 (providing standards for operating public defender program); Guideline 2.5 (providing factors with which to select and evaluate panel attorneys); Guideline 2.7 (providing factors with which to select and evaluate contract defender); Guideline 3.1 (requiring that the public defender or contract defender be competent or effective in his or her role); Guideline 3.2 (requiring that panel attorneys be competent in their roles).

59. *Argersinger v. Hamlin*, 407 U.S. 25, 34-36 (1972).

60. *See* Guidelines, *supra*, note 5, Guideline 6.1 (providing that the caseload limits are designed to prevent caseloads “by reason of their excessive size, from interfering with the rendering of quality representation or leading to the breach of professional obligations”).

61. *Before the Chief Justice’s Commission on Indigent Defense*, Feb. 12, 2002 (testimony of Drew Powell, Public Defender, Mountain Judicial Circuit), at 23, available at <<http://www.georgiacourts.org/aoc/idhearings/021202.TXT>> (last visited January 12, 2003).

62. *Id.* at 37-38.

63. *Bearden v. Georgia*, 461 U.S. 660 (1983).

64. *Argersinger*, 407 U.S. 25, 34-36.

65. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (holding that there is no absolute constitutional right to counsel at a probation revocation hearing, but that it must be determined based on, inter alia, the complexity of the issues, and the ability of the defendant to advocate for himself).
66. See GEORGIA SUPREME COURT, SUPREME COURT OF GEORGIA RULES ON INTERPRETERS FOR NON-ENGLISH SPEAKING PERSONS (Oct. 2001), available at <<http://www.gidc.com/interpre.htm>> (last visited January 12, 2003).
67. *Ake v. Oklahoma*, 470 U.S. 68 (1985).
68. See OPEN SOCIETY INSTITUTE, CRIMINAL JUSTICE INITIATIVE, MENTAL ILLNESS IN US JAILS (Nov. 1996), at 1, available at <http://www.soros.org/crime/research_brief_1.html> (last visited December 12, 2002).
69. See *id.*
70. THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE (Dec. 12, 2002), at ii, available at <www.georgiacourts.org>. (last visited Jan. 12, 2003).
71. A total of 59 of Georgia's counties rely on a contract defender system to provide representation to indigent defendants. In a contract defender system, a county contracts with one or more lawyers to handle part or all of the indigent defense caseload for a fixed amount of money over a fixed period of time. See CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, REPORT ON THE STATUS OF INDIGENT DEFENSE IN GEORGIA, at 38 (Dec. 12, 2002), available at <www.georgiacourts.org> (last visited Jan. 12, 2003); see also GEORGIA INDIGENT DEFENSE COUNCIL, *Counties By Primary [Indigent Defense] Program Type*, available at <<http://www.gidc.com/counties%20by%20primary%20program%20type.htm>> (last visited Jan. 12, 2003).
72. A total of 73 of Georgia's counties provide representation through a panel system in which private attorneys from the local bar association are assigned by the court to represent indigent defendants on a rotating basis. See CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71, at 36. See also GEORGIA INDIGENT DEFENSE COUNCIL, *Counties By Primary [Indigent Defense] Program Type*, available at <<http://www.gidc.com/counties%20by%20primary%20program%20type.htm>> (last visited Jan. 12, 2003).
73. A total of 21 counties provide representation to indigent defendants through use of a public defender office staffed by full-time employees who only represent indigent defendants. See CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71,

at 41. *See also* GEORGIA INDIGENT DEFENSE COUNCIL, *Counties By Primary [Indigent Defense] Program Type*, available at <http://www.gidc.com/counties%20by%20primary%20program%20type.htm> (last visited Jan. 12, 2003).

74. CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71, at 3.

75. THE SPANGENBERG GROUP, *supra*, note 70, at iii..

76. *See* GEORGIA INDIGENT DEFENSE COUNCIL, 2001 ANNUAL REPORT, at 10 (Jan. 1, 2001), available at <http://www.gidc.com/Annual%20Report%202001.pdf> (last visited Jan. 12, 2003).

77. *See* THE SPANGENBERG GROUP, *supra*, note 70, at 80.

78. CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71, at 3.

79. *Id.* at 4.

80. THE SPANGENBERG GROUP, *supra*, note 70, at iii.

81. *Id.*

82. *See* OFF. CODE GA. ANN. § 17-12-37 (establishing that tripartite committees made up of representatives appointed by county commissioners, judges, and the local bar association, are supposed to select the method of providing indigent defense in the county and are to oversee the operation of the program to ensure that it operates in accordance with Georgia statutes and Guidelines, as well as in accordance with the Georgia and United States Constitutions).

83. CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71, at 4.

84. THE SPANGENBERG GROUP, *supra*, note 70, at iii.

85. CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71, at 4.

86. *See, e.g.*, OFF. CODE GA. ANN. § 17-12-44 (recognizing the “inherent power of the court to appoint counsel to represent indigent defendants and to order compensation and reimbursement from county funds in individual cases as the proper administration of justice may require”). This section of the Georgia Code is relied upon by many judges in support of the assertion that they have inherent power to monitor the performance of indigent defense counsel.

87. In recent years, however, the State Bar, through its Indigent Defense Committee, has taken a very proactive stance in addressing Georgia's indigent defense crisis. The Indigent Defense Committee of the State Bar was instrumental in persuading the State Bar to ask the Chief Justice of the Georgia Supreme Court to create a Commission to study indigent defense in Georgia and make recommendations to the General Assembly. The Chief Justice appointed such a Commission and the Commission, after more than two years of study, made a series of comprehensive suggestions on December 12, 2002. *See* CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71. In addition, the State Bar's Indigent Defense Committee worked with the Bar to pass a resolution which endorses significant reform to Georgia's indigent defense system by creating a statewide, 100% state-funded, independent public defender system organized along Georgia's 49 judicial circuits.

88. THE SPANGENBERG GROUP, *supra*, note 70, at iii.

89. CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, *supra*, note 71, at 4.

90. THE SPANGENBERG GROUP, *supra*, note 70, at ii.