

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1977

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ENROLLED

Finance Committee Substitute for Judiciary Committee Substitute
for **SENATE BILL NO. 388**

(By Mr. *Palumbo & Mr. Stepe* *original sponsors.*)

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PASSED *April 9,* 1977

In Effect *July 1, 1977* **Repeals**

No. 388

ENROLLED
FINANCE
COMMITTEE SUBSTITUTE
FOR
JUDICIARY
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 388

(MR. PALUMBO and MR. STEPTOE, *original sponsors*)

[Passed April 9, 1977; in effect July 1, 1977.]

AN ACT to amend and reenact section ten, article five, chapter forty-nine; section three, article four, chapter fifty; section four, article four-a, chapter fifty-three; and section one, article three, and section twenty-two, article twelve of chapter sixty-two, all of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend chapter fifty-one of said code by adding thereto a new article, designated article eleven, relating to providing a system for the defense of needy persons; statement of legislative finding and policy; definitions; providing for right to representation and defining stages of proceedings at which persons are entitled to representation; requiring notification of right to an attorney; providing procedure for appointment of counsel; requiring affidavit of indigency; duty of circuit court to determine whether person is entitled to appointed counsel; specifying factors to be considered in determining eligibility; making it unlawful for an attorney to make false statement of fees and expenses and providing penalties; making it unlawful to make false statement in affidavit and providing criminal penalty therefor;

establishing procedure for payment of compensation and expenses of appointed counsel and creating special fund for payment; and requiring the director of the administrative office of the supreme court of appeals to administer the system.

Be it enacted by the Legislature of West Virginia:

That section ten, article five, chapter forty-nine; section three, article four, chapter fifty; section four, article four-a, chapter fifty-three; and section one, article three, and section twenty-two, article twelve of chapter sixty-two, all of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that chapter fifty-one of said code be amended by adding thereto a new article, designated article eleven, all to read as follows:

CHAPTER 49. CHILD WELFARE.

ARTICLE 5. JUVENILE PROCEEDINGS.

§49-5-10. Right to counsel; mandatory advice with respect thereto; appointment of counsel.

1 In any proceeding under the provisions of this article,
2 the child shall have the right to be represented by
3 counsel, and the child and his parents, his guardian, his
4 custodian, or any other person standing in loco parentis
5 to him, or the person named in the petition, must be in-
6 formed at the outset of the child's right to be represented
7 by counsel, and if neither the child nor any other of the
8 aforementioned persons can pay for the services of coun-
9 sel, that counsel will be appointed to represent the child.
10 Upon the presentation to the court or judge thereof of a
11 written request for the appointment of counsel and an
12 affidavit by the child, or by his parents, the guardian of
13 his person, his custodian, or any other person standing in
14 loco parentis to him, or by the person named in the
15 petition, showing that neither the child nor any other of
16 the aforementioned persons can pay for the services of
17 counsel, the court or judge, upon being satisfied as to the
18 truth of the information set forth in the affidavit, shall,
19 by order entered of record, appoint an attorney-at-law to
20 represent the child in any proceeding under the provi-
21 sions of this article. The attorney so appointed shall be

22 paid for his services and expenses in accordance with the
23 provisions of article eleven, chapter fifty-one of this code.

CHAPTER 50. MAGISTRATE COURTS.

ARTICLE 4. PROCEDURE BEFORE TRIAL.

§50-4-3. Appointment of counsel in criminal proceeding.

1 In any criminal proceeding in a magistrate court in
2 which the applicable statutes authorize a sentence of
3 confinement the magistrate shall forthwith advise a
4 defendant of his right to counsel and his right to have
5 counsel appointed if such defendant cannot afford to re-
6 tain counsel. In the event a defendant requests that coun-
7 sel be appointed and executes an affidavit that he is
8 unable to afford counsel, the magistrate shall stay further
9 proceedings and shall request the judge of the circuit
10 court, or the chief judge thereof if there is more than one
11 judge of the circuit court, to appoint counsel. Such judge
12 shall thereupon appoint counsel. If there is no judge
13 sitting in the county at the time of the request then the
14 clerk of the circuit court shall appoint counsel from a list
15 of attorneys in accordance with the rules established by
16 such judge of the circuit court. Counsel shall be paid for
17 his services and expenses in accordance with the pro-
18 visions of article eleven, chapter fifty-one of this code.

CHAPTER 53. EXTRAORDINARY REMEDIES.

ARTICLE 4A. POST-CONVICTION HABEAS CORPUS.

§53-4A-4. Inability to pay costs, etc.; appointment of counsel; obtaining copies of record or records in criminal proceedings or in a previous proceeding or proceedings to secure relief; payment of all costs and expenses; adjudging of costs.

1 (a) A petition filed under the provisions of this article
2 may allege facts to show that the petitioner is unable
3 to pay the costs of the proceeding or to employ counsel,
4 may request permission to proceed in forma pauperis
5 and may request the appointment of counsel. If the court
6 to which the writ is returnable (hereinafter for
7 convenience of reference referred to simply as "the
8 court," unless the context in which used clearly indicates

9 that some other court is intended) is satisfied that the
10 facts alleged in this regard are true, and that the petition
11 was filed in good faith, and has merit or is not frivolous,
12 the court shall order that the petitioner proceed in forma
13 pauperis, and the court shall appoint counsel for the
14 petitioner. If it shall appear to the court that the record
15 in the proceedings which resulted in the conviction and
16 sentence, including, but not limited to, a transcript of the
17 testimony therein, or the record or records in a proceed-
18 ing or proceedings on a prior petition or petitions filed
19 under the provisions of this article, or the record or
20 records in any other proceeding or proceedings instituted
21 by the petitioner to secure relief from his conviction or
22 sentence, or all of such records, or any part or parts
23 thereof, are necessary for a proper determination of the
24 contention or contentions and grounds (in fact or law)
25 advanced in the petition, the court shall, by order entered
26 of record, direct the state to make arrangements for copies
27 of any such record or records, or all of such records, or
28 such part or parts thereof as may be sufficient, to be
29 obtained for examination and review by the court, the
30 state and the petitioner. The state may on its own initia-
31 tive obtain copies of any record or records, or all of the
32 records, or such part or parts thereof as may be sufficient,
33 as aforesaid, for its use and for examination and review by
34 the court and the petitioner. If, after judgment is entered
35 under the provisions of this article, an appeal or writ of
36 error is sought by the petitioner in accordance with the
37 provisions of section nine of this article, and the court
38 which rendered the judgment is of opinion that the review
39 is being sought in good faith and the grounds assigned
40 therefor have merit or are not frivolous, and such court
41 finds that the petitioner is unable to pay the costs inci-
42 dent thereto or to employ counsel, the court shall, upon
43 the petitioner's request, order that the petitioner proceed
44 in forma pauperis and shall appoint counsel for the pe-
45 titioner. If an appeal or writ of error is allowed, whether
46 upon application of the petitioner or the state, the re-
47 viewing court shall, upon the requisite showing the re-
48 quest as aforesaid, order that the petitioner proceed in
49 forma pauperis and shall appoint counsel for the peti-

50 tioner. If it is determined that the petitioner has the
51 financial means with which to pay the costs incident to
52 any proceedings hereunder and to employ counsel, or
53 that the petition was filed in bad faith or is without
54 merit or is frivolous, or that review is being sought or
55 prosecuted in bad faith or the grounds assigned therefor
56 are without merit or are frivolous, the request to
57 proceed in forma pauperis and for the appointment of
58 counsel shall be denied and the court making such de-
59 termination shall enter an order setting forth the findings
60 pertaining thereto and such order shall be final.

61 (b) Whenever it is determined that a petitioner shall
62 proceed in forma pauperis, all necessary costs and ex-
63 penses incident to proceedings hereunder, originally, or
64 on appeal pursuant to section nine of this article, or both,
65 including, but not limited to, all court costs, and the cost
66 of furnishing transcripts, shall, upon certification by the
67 court to the state auditor, be paid out of the treasury of
68 the state from the appropriation for criminal charges.
69 Any attorney appointed in accordance with the provisions
70 of this section shall be paid for his services and expenses
71 in accordance with the provisions of article eleven, chap-
72 ter fifty-one of the code. All costs and expenses incurred
73 incident to obtaining copies of any record or records, or
74 all of the records, or such part or parts thereof as may be
75 sufficient, as aforesaid, for examination and review by
76 the court, the state and the petitioner, shall, where the
77 petitioner is proceeding in forma pauperis, and the court
78 orders the state to make arrangements for the obtaining
79 of same or the state obtains the same on its own initia-
80 tive, be paid out of the treasury of the state, upon certi-
81 fication by the court to the state auditor, from the appro-
82 priation for criminal charges. All such costs, expenses and
83 fees shall be paid as provided in this subsection (b) not-
84 withstanding the fact that all proceedings under the pro-
85 visions of this article are civil and not criminal in charac-
86 ter. In the event a petitioner who is proceeding in forma
87 pauperis does not substantially prevail, all such costs,
88 expenses and fees shall be and constitute a judgment of
89 the court against the petitioner to be recovered as any
90 other judgment for costs.

91 (c) In the event a petitioner who is not proceeding in
92 forma pauperis does not substantially prevail, all costs
93 and expenses incurred incident to obtaining copies of any
94 record or records, or all of the records, or such part or
95 parts thereof as may be sufficient, as aforesaid, for exami-
96 nation and review by the court, the state and the peti-
97 tioner, shall, where the court orders the state to make
98 arrangements for the obtaining of same or the state ob-
99 tains the same on its own initiative, be and constitute a
100 judgment of the court against the petitioner to be re-
101 covered as any other judgment for costs. In any case
102 where the petitioner does not proceed in forma pauperis,
103 the court shall adjudge all costs and expenses to be paid
104 as shall seem to the court to be right, consistent with the
105 immediately preceding sentence of this subsection (c)
106 and with the provisions of chapter fifty-nine of this
107 code, as amended.

CHAPTER 62. CRIMINAL PROCEDURE.

ARTICLE 3. TRIAL OF CRIMINAL CASES.

§62-3-1. Time for trial; depositions of witnesses for accused; counsel, copy of indictment, and list of jurors for accused; remuneration of appointed counsel.

1 When an indictment is found in any county, against
2 a person for a felony or misdemeanor, the accused, if
3 in custody, or if he appear in discharge of his recogni-
4 zance, or voluntarily, shall, unless good cause be shown
5 for a continuance, be tried at the same term. If any
6 witness for the accused be a nonresident of the state,
7 or absent therefrom in any service or employment, so
8 that service of a subpoena cannot be had upon him in
9 this state, or is aged or infirm so that he cannot attend
10 upon the court at the trial, the accused may present
11 to the court in which the case is pending, or to the judge
12 thereof in vacation, an affidavit showing such facts, and
13 stating therein what he expects to prove by any such
14 witness, his name, residence, or place of service or em-
15 ployment; and if such court or judge be of the opinion
16 that the evidence of any such witness, as stated in such
17 affidavit, is necessary and material to the defense of the

18 accused on his trial, an order may be made by such court
19 or judge for the taking of the deposition of any such
20 witness upon such notice to the prosecuting attorney, of
21 the time and place of taking the same, as the court or
22 judge may prescribe; and in such order the court or judge
23 may authorize the employment of counsel, practicing at
24 or near the place where the deposition is to be taken,
25 to cross-examine the witness on behalf of the state,
26 the reasonable expense whereof shall be paid out of
27 the treasury of the state, upon certificate of the court
28 wherein the case is pending. Every deposition so taken
29 may, on the motion of the defendant, so far as the evi-
30 dence therein contained is competent and proper, be
31 read to the jury on the trial of the case as evidence
32 therein. A court of record may appoint counsel to assist
33 an accused in criminal cases at any time upon request.
34 A copy of the indictment and of the list of the jurors
35 selected or summoned for his trial, as provided in sec-
36 tion three of this article, shall be furnished him, upon
37 his request, at any time before the jury is impaneled.
38 In every case where the court appoints counsel for the
39 accused and the accused presents an affidavit showing
40 that he cannot pay therefor, the attorney so appointed
41 shall be paid for his services and expenses in accor-
42 dance with the provisions of article eleven, chapter
43 fifty-one of this code. The amount so paid, in the
44 event the accused shall not prevail, shall be and con-
45 stitute a judgment of said court against the accused to
46 be recovered as any other judgment for costs.

ARTICLE 12. PROBATION AND PAROLE.

§62-12-22. Appointment of counsel for parole violators; au- thority to appoint; payment of counsel.

1 Any person accused of a violation of his parole, as
2 set forth in this article, may be represented by counsel
3 at any hearing held for the purpose of determining
4 whether his parole should be revoked. In the event the
5 person accused of a violation of his parole is unable to
6 pay for counsel and desires to have counsel appointed
7 for him, he shall present his application for the appoint-
8 ment of counsel and an affidavit reflecting his inability

9 to pay for such counsel to the circuit court in the county
10 in which such person is confined or in the county in which
11 the hearing is to be held for the purpose of determining
12 whether his parole should be revoked, or to the judge
13 thereof in vacation. If it appears to the satisfaction of
14 the court or judge that such person is in fact unable to
15 pay for counsel, such court or judge may appoint counsel
16 to represent such person. Counsel so appointed shall be
17 paid for his services and expenses in accordance with
18 the provisions of article eleven, chapter fifty-one of this
19 code.

CHAPTER 51. COURTS AND THEIR OFFICERS.

ARTICLE 11. DEFENSE OF NEEDY PERSONS.

§51-11-1. Statement of legislative findings and policy.

1 In order that needy persons who have been charged
2 with the commission of serious crimes against this state,
3 or who have been convicted of crimes, or who are sub-
4 ject to a court having jurisdiction over juveniles, or who
5 are incarcerated or subject to incarceration in a public
6 or private institution pursuant to a judicial commitment
7 order, be afforded the rights and privileges guaranteed
8 to them by the constitution of the United States of
9 America and by the constitution of the state of West
10 Virginia, it is necessary and in the public interest to
11 provide a system of legal representation for persons who
12 are financially unable to employ counsel.

§51-11-2. Definitions.

1 For the purpose of this article:
2 "Detain" means to have in custody or otherwise sig-
3 nificantly deprive of freedom of action;
4 "Expenses" includes the expenses of investigation,
5 other preparation and trial expenses and the cost of
6 transcripts of testimony, not otherwise provided at public
7 expense;
8 "Needy person" means any person, whether juvenile
9 or adult, who at the time his need is determined is un-
10 able to pay counsel to represent him and to pay the

11 other necessary expenses of representation without un-
12 due hardship;

13 "Serious crime" means:

14 (a) A felony;

15 (b) A misdemeanor or offense, the penalty for which
16 involves the possibility of confinement or a fine of more
17 than five hundred dollars, or any other offense in which,
18 in the opinion of the court, either the complexity of the
19 matter, or the youth, inexperience, or mental capacity
20 of the accused, may require representation of the accused
21 by an attorney; and

22 (c) An act which except for the age of the person in-
23 volved, would otherwise be a serious crime.

24 The term "serious crime" shall not include an alleged
25 violation which is exclusively a violation of a municipal
26 ordinance.

**§51-11-3. Right to representation; stages at which representa-
tion available.**

1 A needy person who is being detained by a law-enforce-
2 ment officer, or who is under formal charge of having
3 committed, or is being detained under a conviction of,
4 a serious crime, is entitled to representation by an at-
5 torney, to investigative services and other services neces-
6 sary to his defense. The attorney, investigative services,
7 and other services, and the cost and expense thereof,
8 shall be provided to such needy person at all stages
9 of the proceedings through sentencing, including
10 direct, collateral, or post-conviction appeals to state or
11 federal courts.

12 The right of a needy person to a benefit conferred by
13 this section is not affected by his having provided a
14 similar benefit at his own expense, or by his having
15 waived it at an earlier stage.

§51-11-4. Notification of right to an attorney.

1 It shall be the duty of the circuit court or magistrate
2 before whom a person accused of a serious crime initially
3 shall appear, to inform the accused of his right to an
4 attorney and investigative and other services in and about

5 his defense, and that an attorney and such services will
6 be provided if the accused is financially unable to employ
7 an attorney and otherwise to provide for his defense,
8 without undue hardship.

**§51-11-5. Appointment of counsel; procedure for determining
eligibility; revocation of order of appointment of
counsel.**

1 (a) A circuit court at any time upon request, and
2 upon the filing of an affidavit of indigency as hereinafter
3 provided shall appoint one or more counsel, at least one
4 of whom shall be reasonably competent in the practice of
5 ~~of~~ criminal law;

*ok
Sec. 10. g.*

6 (1) to represent one accused of a felony, or of a misde-
7 meanor punishable by imprisonment;

8 (2) to represent a juvenile under the provisions of
9 article five of chapter forty-nine of this code;

10 (3) to represent a person in custody in seeking a writ of
11 habeas corpus;

12 (4) to represent a person entitled to counsel under
13 the provisions of chapter twenty-seven of this code;

14 (5) to represent a person whose order of probation or
15 parole has been revoked under the provisions of article
16 twelve of chapter sixty-two of this code.

17 (b) The affidavit of indigency and the attorney voucher
18 and affidavit shall be upon such form as shall be prescribed
19 by the supreme court of appeals, and shall be signed by
20 the accused or other needy person or the attorney, or, in
21 the event of his disability, by another person in his behalf.

22 (c) It shall be the duty of the circuit court, upon the
23 basis of the affidavit of a person requesting appointment of
24 counsel and of such evidence as may be adduced in open
25 court, to determine whether such person is a needy person
26 so as to be entitled to appointed counsel. If the court
27 should determine that such person is not entitled to ap-
28 pointed counsel, the appointment previously made shall
29 be revoked, and the attorney previously appointed shall
30 be entitled to compensation under the provisions of this
31 article, for services already rendered.

§51-11-6. Determination of eligibility; false statement prohibited; penalties.

1 In determining whether a person is a needy person,
2 the circuit court shall consider such factors as his net
3 worth and the liquidity of his assets, his disposable in-
4 come, and the number and ages of his dependents, and
5 may consider such other factors as it may deem pertinent
6 and material, but the fact that the accused has been
7 released on bond shall not be determinative of the ques-
8 tion of eligibility. The court shall advise such person
9 of the penalties for giving false information and of the
10 possibility of a civil suit for recovery of moneys advanced
11 under this article for his defense.

12 If any attorney shall willfully give false information to
13 the court with respect to his services or expenses he shall
14 be guilty of a misdemeanor, and, upon conviction thereof,
15 shall be fined not less than one thousand dollars nor more
16 than ten thousand dollars and may be imprisoned in the
17 county jail not less than three months nor more than
18 a year, or both fined and imprisoned.

§51-11-7. Recovery of amounts advanced; offense of making false statements, and penalty therefor.

1 To the extent that a person is financially able to pay
2 for counsel and other services furnished him under this
3 article, without undue hardship, the court having juris-
4 diction over him may order that he make such payment.
5 If such person shall willfully give false information to
6 the court with respect to his income or resources, or
7 obligations, he shall be guilty of a misdemeanor, and,
8 upon conviction thereof, shall be fined not more than five
9 hundred dollars, or imprisoned in the county jail not
10 less than three months nor more than one year, or both
11 fined and imprisoned.

§51-11-8. Compensation of attorneys for services and expenses of defense; vouchers; order of approval by circuit court; payment.

1 In each case in which an attorney is assigned under
2 the provisions of this article to perform legal services
3 for a needy person, he shall be compensated for actual

4 and necessary services rendered at the rate of twenty
5 dollars per hour for work performed out of court, and
6 at the rate of twenty-five dollars per hour for work
7 performed in court, but the compensation for services
8 shall not exceed one thousand dollars. Expenses of the
9 attorney in rendering such services, including, but not
10 limited to, necessary expenses for travel, transcripts, in-
11 vestigative services and expert witnesses, shall be reim-
12 bursed to a maximum of five hundred dollars, unless the
13 attorney, for good cause shown to the court, shall have re-
14 ceived advance approval to incur expenses for a larger
15 sum.

16 The attorney shall present to the circuit court an
17 itemized voucher for such services and expenses and an
18 affidavit certifying the same to have been actually per-
19 formed or incurred, which shall be forwarded to the
20 director of the administrative office of the supreme court
21 of appeals, with an order of the circuit court approving
22 payment of the amount of the voucher or of such lesser
23 sum to which the circuit court shall believe the attorney
24 to be entitled.

25 Payment shall be made by the director of the admin-
26 istrative office of the supreme court of appeals from a
27 fund entitled "Representation of needy persons fund,"
28 from appropriations made by the Legislature. Such fund
29 shall not be part of the judicial account.

**§51-11-9. Director of administrative office of supreme court
of appeals; duties; expenses.**

1 It shall be the duty of the director of the administra-
2 tive office of the supreme court of appeals to administer
3 the program of legal representation of needy persons
4 established by this article, and to administer the fund
5 created by this article.

6 The director shall serve without additional compensa-
7 tion but may employ such assistants, investigators, audi-
8 tors, secretaries and other persons necessary to the effec-
9 tive, uniform and prudent administration of this article,
10 and may incur such other expenses as may be necessary
11 for such purpose. Such expenses shall be paid from the
12 fund established by this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

James L. Davis
Chairman Senate Committee

Clarence L. Christman Jr.
Chairman House Committee

Originated in the Senate.

To take effect July 1, 1977.

J. Chillon Jr.
Clerk of the Senate

W. Blankenship
Clerk of the House of Delegates

W. T. Bratherton Jr.
President of the Senate

Donald L. Kopp
Speaker House of Delegates

The within is approved this the 27

day of April, 1977.

James D. Ralston
Governor



APPROVED AND SIGNED BY THE GOVERNOR

RECEIVED

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OFFICE OF THE GOVERNOR

Date April 27, 1977
Time 12:10 p.m.

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SECY. OF STATE