



Georgia Department of Audits and Accounts Performance Audit Operations

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Why we did this review

In fiscal year 2010, the state spent approximately \$40 million providing legal services to indigent defendants, while counties spent an estimated \$70 million. Our review examines the processes for ensuring these resources are directed to those defendants who are truly indigent and the processes for recovering certain costs when required or allowed. Specifically, the audit determined the effectiveness of: 1) practices used to screen criminal defendants for indigent defense services, 2) efforts to ensure the accuracy of defendants' self-reported information, and 3) efforts to recover costs associated with defending indigent defendants.

Who we are

The Performance Audit Operations Division was established in 1971 to conduct in-depth reviews of state programs. The purpose of these reviews is to determine if programs are meeting their goals and objectives; provide measurements of program results and effectiveness; identify other means of meeting goals; evaluate the efficiency of resource allocation; assess compliance with laws and regulations; and provide credible management information to decision-makers.

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Public Defender Services: Indigent Determination and Cost Recovery

Action necessary to improve indigent determination and defense cost recovery

What we found

We found that decisions to provide public defender services were not always adequately supported by documentation in the defendants' files and that efforts to recover a portion of defense costs were inconsistent across judicial circuits. The Georgia Public Defender Standards Council (GPDSC), circuit personnel responsible for indigent determination, and the courts must each take steps to address these issues.

The statewide public defender system was created in 2003 to ensure indigent defendants receive their constitutional right to counsel. Circuit public defenders (or their designee) are responsible for determining who is eligible to receive a publicly funded defense. The eligibility standards, adopted by the GPDSC, are based primarily on financial criteria established in state law. The law also allows courts to recover costs associated with providing court-appointed counsel if it does not impose a financial hardship on the defendant.

Our comparison of eligibility standards to 711 defendant applications from nine circuits found that 60% were clearly appropriate and approximately 5% appeared noncompliant due to the defendant's income exceeding income requirements. The remaining 35% lacked adequate documentation to make a determination (e.g., missing applications, applications lacking key information or with questionable income). If any of those defendants were improperly categorized as indigent, public defender caseloads would have been unnecessarily increased, allowing less time and resources for cases of the truly indigent.

We found that these issues were the result of deficiencies in the

screening and verification processes, including the following:

- Screeners were not critically reviewing the application to reconcile conflicting/illogical information, and information provided by defendants was rarely verified.
- Circuits had inconsistent methods for calculating household size, considering parental income, considering income of other household members, and considering sources of income.
- Circuits had inconsistent methods for considering assets available to a defendant. Without adequate guidance regarding how assets should be considered or the amount of assets necessary to hire an attorney, circuit staff were unsure how to evaluate the liquidity and actual value of assets.
- Circuits had inconsistent methods of capturing and/or considering defendant expenses. While expenses may not be used as the basis for indigent determination, expense information does serve as a useful method for assessing whether reported income is reasonable (i.e., would reported income cover expenses?).
- Circuits based eligibility decisions on factors inconsistent with the law and GPDSC standards.
- Circuits' applications did not capture all necessary information and did not facilitate the eligibility determination.

The shortcomings in the indigent determination process can be addressed by linking a critical review of defender-provided information to verification of questionable information; improving GPDSC guidance for screeners; adopting circuit practices that are consistent with state law and GPDSC guidance; and improving the applications to ensure that necessary information is captured.

We also identified weaknesses regarding circuits' cost recovery practices. Although state law requires any person applying for legal defense services to pay a \$50 application fee, our review found that almost no defendants pay the fee upfront when applying for a public defender. And in the majority of cases reviewed, courts were either unable (by law) or unwilling to order the defendant to pay the fee at the end of the case. Unlike the application fee, payment of attorney fees is not required, but *may* be ordered by the court if the payment does not impose a financial hardship on the defendant. We found that courts ordered reimbursement in just under half of the eligible cases and that the frequency of ordering reimbursement varied widely among the circuits.

***GPDSC Director's Response:** The GPDSC response indicated general agreement with the report's findings. The response stated that, "The research provided has better defined and clarified concerns that we share. The information found in this audit will be used for the betterment of the agency's service to Georgia and we welcome these findings. While the sample of the Georgia circuits studied in the audit were admittedly small and not a statistical sampling, we agree that it does identify specific areas for improvement."*

"GPDSC will be pursuing and implementing as many of these recommendations as possible in order to relieve pressure from an already stressed system. The related findings of GPDSC, along with those in the audit, will be presented to the Georgia Public Defenders Standards Council, Judiciary and Legislature in the upcoming year so that they can take the next necessary steps."

"GPDSC is pleased to have confirmation and validation of the issues outlined by the Audit Department concerning indigency screening, verification and cost recovery. We are committed to pursuing any and all actions that can potentially improve the efficiency and effectiveness of the Georgia indigent defense system."

The portions of the response specifically addressing indigent determination is on page 19 and cost recovery is on page 24.

Table of Contents

Audit Purpose	1
Background	1
History of Indigent Defense in Georgia	1
Current Structure of Georgia's Indigent Defense System	1
Qualifications for Indigent Defense	2
Determining Eligibility for Indigent Status	4
Cost Recovery	5
Public Defender Caseload Activity	6
Financial Information	8
Findings and Recommendations	
Georgia's indigent determination process has deficiencies that undermine its effectiveness at identifying defendants eligible for public defender service.	9
Screeners do not critically review defendant-provided information and infrequently conduct verification procedures to confirm indigent status.	11
GPDSC guidance does not adequately address the issues faced by those charged with determining eligibility.	13
Applications for indigent defense services do not always capture information necessary for eligibility determination.	15
Circuits are inappropriately using factors other than income and assets to determine whether a defendant qualifies for a public defender.	17
Few defendants pay the indigent defense application fee when initially applying for a public defender, and courts do not consistently order defendants to pay unpaid application fees as required by state law.	20
The prevalence of courts ordering defendants to repay defense costs varies significantly among the circuits.	22
Alternate practices used in other states may improve indigent determination and cost recovery efforts.	25
Appendices	
Appendix A: Objectives, Scope, and Methodology	28
Appendix B: Circuit Application for Public Defender	31

Audit Purpose

The purpose of this audit was to determine the effectiveness of 1) practices used to screen criminal defendants for indigent defense services, 2) efforts to ensure the accuracy of defendants' self-reported information, and 3) efforts to recover costs associated with defending indigent defendants. Details about the objectives, scope, and methodology related to this report are included in **Appendix A**.

This report has been discussed with the appropriate parties representing the Georgia Public Defender Standards Council. A draft copy was provided for their review and comment. The GPDSC response is included after the indigent determination findings on page 19 and after the cost recovery findings on page 24.

Background

History of Indigent Defense in Georgia

The Sixth Amendment to the United States Constitution provides defendants with the right to counsel in all criminal prosecutions. According to several U.S. Supreme Court cases, the Fourteenth Amendment's due process clause links the federal constitutional right to counsel to state criminal prosecutions. Therefore, this right to counsel requires that a government-funded attorney be appointed to represent indigent defendants in multiple case types and proceedings. In particular, *Gideon v. Wainwright* (1963) extended the right to counsel to indigent defendants charged with a serious crime and later opinions extended the right to any crime that actually leads to imprisonment including misdemeanor and petty offense cases.

The Georgia Constitution follows the U.S. Constitution, providing that “every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel.” To meet these constitutional mandates, the General Assembly has enacted three major pieces of legislation since *Gideon v. Wainwright*. The Georgia Criminal Justice Act in 1968 made counties responsible for organizing and funding indigent defense services. To address geographic inconsistencies and foster overall improvement in indigent defense services, the legislature enacted the Georgia Indigent Defense Act of 1979. This Act created a statewide indigent defense system and the Georgia Indigent Defense Council (GIDC) as a separate agency within the judicial branch of state government. The GIDC was responsible for developing statewide policies and guidelines and administering grant funds to counties for the operation of local indigent defense programs. Most recently, the Georgia Indigent Act of 2003 was enacted to again address system deficiencies. This Act provided a source of additional state funding and replaced the GIDC with the Georgia Public Defender Standards Council (GPDSC).

Current Structure of Georgia's Indigent Defense System

The GPDSC is an executive branch agency whose primary objective is to ensure “adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under [the Act].” The GPDSC is composed of 15 members appointed by the Governor, Lieutenant Governor, Speaker of the House of Representatives, Supreme Court Chief Justice, the Georgia Court of Appeals Chief Judge, and one council member chosen by majority

vote of all the circuit public defenders. The GPDSC also has a director and staff who manage daily operations.

Indigent defense services are organized along the lines of the state's 49 judicial circuits. The GPDSC established public defender offices in nearly all of the judicial circuits. In addition to an appointed circuit public defender, the offices generally employ staff attorneys and administrative support staff. Depending on the resources available, the offices may also employ investigators. The GPDSC assists public defenders by providing manuals and other educational materials, model forms and documents, training for staff attorneys, and legal research assistance. The GPDSC is also required to account for all revenue received by the public defender offices from each governing authority.

Judicial circuits composed of a single county were permitted to opt out of the state-funded system and operate alternate indigent defense systems. Six circuits (Bell-Forsyth, Blue Ridge, Cobb, Douglas, Gwinnett, and Houston) opted out of the state system and continue their county-managed systems. While some of these systems have structures similar to the state system (circuit public defender and staff attorneys), others contract with private attorneys to provide legal services. Opt-out circuits are primarily funded by the counties but may receive state funds for the minimum salary of a circuit public defender, assistant circuit public defenders, an investigator, and administrative staff exclusive of benefits. Circuits approved to operate an alternate system must meet standards established by the GPDSC to continue operating and are required to be reviewed annually to ensure the standards are met. According to GPDSC staff, additional circuits are not permitted to opt out of the state system.

Regardless of the method used to deliver services, state law requires indigent defendants to be represented in the following types of actions and proceedings:

- Any case prosecuted in superior court in which there is a possibility of imprisonment, probation, or a suspended sentence of imprisonment;¹
- A hearing on a revocation of probation in a superior court;
- Any juvenile court case in which the juvenile may face a disposition of confinement, commitment, or probation; and
- Any direct appeal of any of the previously stated proceedings.

Qualifications for Indigent Status

O.C.G.A. §17-12-2 defines an indigent defendant based on earnings as a percentage of federal poverty guidelines, the type of crime the defendant is charged with, and other resources available to the defendant. According to the law, an indigent defendant is:

- a person charged with a *misdemeanor, violation of probation, or a municipal or county offense punishable by imprisonment* who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person or his or her dependents;

¹ Counties and cities can also contract with circuit public defender offices to provide indigent defense services in state and municipal courts.

- a *juvenile* charged with a *delinquent act* or a *violation of probation* punishable by detention whose parents earn less than 125 percent of the federal poverty guidelines unless there is evidence that the juvenile or his or her parents have other resources; and
- a person charged with a *felony* who earns or, in the case of a juvenile, whose parents earn, less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources.

As shown in **Exhibit 1**, the income thresholds vary according to the number of persons comprising the family unit. For example, an adult defendant charged with a felony crime whose household consists of four individuals would be indigent if the defendant's annual household income is less than \$33,525. In comparison, if the defendant lives alone, he or she would have to earn less than \$16,335 to qualify for legal services.

Exhibit 1			
2011 Poverty Guidelines			
Size of Family Unit	100%	125%	150%
1	\$10,890	\$13,613	\$16,335
2	\$14,710	\$18,388	\$22,065
3	\$18,530	\$23,163	\$27,759
4	\$22,350	\$27,938	\$33,525
5	\$26,170	\$32,713	\$39,255
6	\$29,990	\$37,488	\$44,985
7	\$33,810	\$42,263	\$50,715
8	\$37,630	\$47,038	\$56,445
Each add'l person add	\$3,820	\$4,775	\$5,730
Source: U.S. Department of Health and Human Services			

Net income is defined as earnings after adjustments for social security taxes; federal, state, and local taxes; health-care costs; business income or loss; retirement and/or social.

Eligibility standards and policies developed by the GPDSC follow Georgia law, requiring that federal poverty guidelines be applied when determining whether an individual is indigent. GPDSC policy also clarifies certain aspects of the law, including references to income earned by the defendant or the defendant's parents and "other resources" that may be available to cover legal defense costs. According to the policy, circuits are to consider a defendant's net income (or take home pay) instead of gross income. In addition, "other resources" are defined as liquid assets or assets that can quickly be converted to cash without significant loss, such as cash, checking accounts, savings accounts, money market accounts, trust funds, and life insurance policies.

While a defendant that does not fall within the standards or guidelines established by law is not eligible to receive a public defender, the standards offer an exception in close cases. Circuits are required to consider all of the defendant's circumstances, such as extraordinary medical expenses and child support, in addition to income. The standards also provide for an appeal process whereby a defendant deemed ineligible may apply to the judge presiding over the case for an order appointing a public defender. The court has the discretion to take such action if the defendant is unable to hire a qualified lawyer without undue hardship.

Determining Eligibility for Indigent Status

According to O.C.G.A. §17-12-23, the entitlement to legal representation for indigent defendants begins within three business days of arrest and request for counsel. Within this timeframe, defendants must be informed of their right to have counsel and, if they cannot afford to hire an attorney, one will be provided to them. Defendants who indicate they wish to have a public defender must submit an application to the public defender's office or, in alternate systems, indigent defense office or the court. As required by law, the circuit public defender uses this information to whether the defendant is entitled to representation. The processes typically used by circuits to identify those who are truly indigent are described in detail below.

Indigent Screening

Indigent screening is the initial interview conducted by a representative of the public defender's office, indigent defense office, or the court to inquire about the defendant's financial circumstances. Individuals responsible for screening include staff attorneys, investigators, administrative personnel, or the judges themselves. Typically, these interviews take place at the jail during the defendant's first appearance hearing before a magistrate judge. Some circuits use video-conferencing technology in place of in-person interviews. Defendants who are released from custody prior to the first appearance hearing are reportedly instructed by jail personnel to contact the public defender's office if they need legal representation.

The screening process usually requires the screener or defendant to first complete an application. The GPDSC has developed a model application, but circuits have the discretion to decide what questions their applications will include. Applications generally request financial data related to income and assets, as well the defendant's marital status and number of dependents. The screener reviews the completed application and may ask follow-up questions to clarify reported information. The information is then used to determine the defendant's eligibility according to the guidelines outlined in the law and GPDSC standards. **Appendix B** provides an example of an application form used by a circuit to assess defendants' financial eligibility.

Indigent Verification

Verification is the process used by screeners to confirm the accuracy of defendants' self-reported financial information, such as employment status and income. It allows the screener to confirm that the defendant lacks sufficient income or other resources to hire a qualified lawyer. Neither state law nor GPDSC standards mandate specific verification methods; therefore, circuits use their discretion to determine how verification should occur and what information should be verified. For example, some circuits verify income using tax returns, public assistance information, W-2 forms, pay stubs, or written statements from employers. Other circuits have purchased software that provides electronic access to certain financial information.

State law provides an incentive for circuits to establish verification systems. According to O.C.G.A. §17-12-80, counties can retain certain fines and fees if they establish an indigent verification system approved by GPDSC's Indigency

Verification Committee (IVC).² As of September 2010, 53 of 159 counties (representing 20 of 49 judicial circuits) had approved systems.

The IVC has issued guidance for those counties/circuits choosing to establish a verification system. According to the guidance, further investigation may be necessary “if, for instance, the reported income appears to be inconsistent with the reported assets, or if court-ordered child support appears to be based on higher income than reported on the application.” The guidance suggests the use of some of the following procedures:

- contacting the applicant’s current employer to verify employment;
- requesting a current pay stub verifying the applicant’s, applicant’s spouse, and/or parent’s current income;
- requesting copies of the applicant’s, applicant’s spouse, and/or parent’s last two federal income tax returns to verify qualifying dependents and income history;
- requesting a copy of the applicant’s dismissal/separation notice or dismissal letter on company letterhead to verify unemployment;
- contacting the applicable child support recovery agency to verify current child support payments;
- contacting the applicable probation and/or parole office to verify current fines;
- contacting the applicable tax assessor’s office to verify property ownership;
- contacting local utility companies to verify service history;
- conducting an on-site inspection at the applicant’s residence and/or business if self-employed to verify the absence of assets; and/or
- utilizing a computer program that collects and analyzes financial data.

Cost Recovery

According to O.C.G.A. §15-21A-6, any defendant who applies for or receives public defender services must pay a \$50 application fee. The fee may be waived if the court “finds that the applicant is unable to pay the fee or that measurable hardship will result if the fee is charged.” In the event the fee is not waived or paid before sentencing, the law requires the fee to be imposed as a condition of probation. The fee is collected by either the public defender, indigent defense administrator, or the clerk of court when paid prior to sentencing. When paid as a condition of probation (post-sentencing), the fee is paid to the Department of Corrections probation unit. In circuits with approved verification systems, any amounts collected in payment of the application fee are retained by the county providing the legal defense services. Circuits that do not have approved verification systems must remit any funds collected to the Georgia Superior Court Clerks Cooperative Authority (GSCCCA) for deposit into the general fund of the state treasury.

² Members of the Indigency Verification Committee include judges, county commissioners, attorneys, public defenders, and representatives of the Georgia Municipal Association.

The law also gives the court authority to order defendants to repay all or a portion of defense costs as a condition of probation. O.C.G.A. §17-12-51 states a “*court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other costs of the defense if the payment does not impose a financial hardship upon such defendant...*” Judges may use their discretion in determining whether to impose an order to repay attorney fees and other defense costs. If ordered, defendants pay these fees through the probation office. Depending on how public defender services are funded, payments may be remitted to the municipality, county, or the GPDSC for deposit into the general fund of the state treasury.

Public Defender Caseload Activity

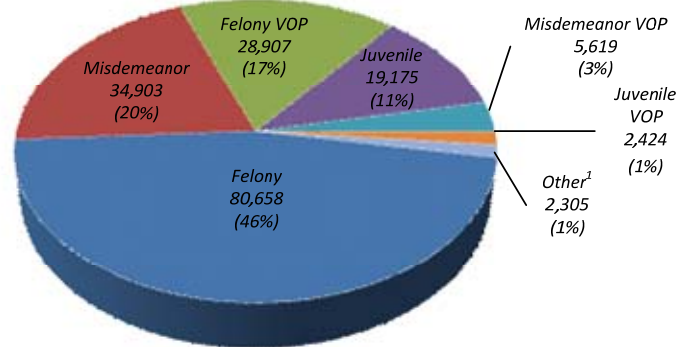
In fiscal year 2010, public defenders and indigent defense administrators opened 173,991 cases, an increase of 20% over fiscal year 2009. As shown in **Exhibit 2**, 63% (109,565) of the cases opened in fiscal year 2010 were felony and felony probation cases held in superior court. The exhibit also shows the number of misdemeanor and juvenile cases, which are generally held in state and juvenile courts. It should be noted that counties and cities may contract with public defender offices to provide legal services to defendants in state and municipal courts.

Public defenders closed 182,309 cases during fiscal year 2010.³ As shown in **Exhibit 2**, cases resulting in a guilty plea or conviction or dismissed charges accounted for 68% (123,342) of closed cases. Violation of probation cases, which generally require less time, represented another 14% (25,861) of cases.

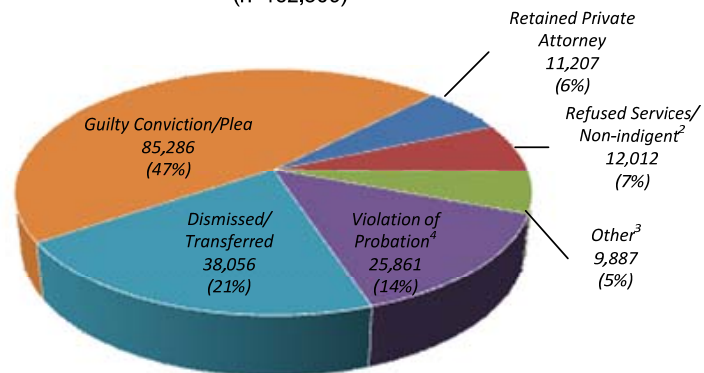
³ Cases closed in fiscal year 2010 includes those that opened in 2010 and in prior years.

Exhibit 2 Public Defender Caseloads Fiscal Year 2010

Cases Opened by Case Type
(n=173,991)



Cases Closed by Case Disposition
(n=182,309)



¹ "Other" cases opened includes juvenile deprivation, recorder's court, appeals, local ordinances, and miscellaneous cases.

² GPDSC reported that some work is done on these cases that result in a refusal of services (e.g. meet in jail, research charges, etc).

³ "Other" includes cases such as those involving appeals and child deprivation.

⁴ Violation of Probation cases typically result in dispositions such as continued probation time or revocation of probation.

Source: GPDSC JCATS Data

Financial Information

As shown in Exhibit 3, GPDSC's fiscal year 2010 fund sources totaled \$40.4 million, of which about 75% (\$30.2 million) was forwarded to circuits for the operation of their public defender and conflict offices. As of March 2011, GPDSC fund sources were estimated at \$39.6 million for fiscal year 2011. Additional funding is received from counties to pay for county employees working in public defender offices, but these figures are not included in Exhibit 3.

Exhibit 3 GPDSC Fund Sources and Expenditures by Budget Program Fiscal Years 2008-2011				
	FY2008 Actual	FY2009 Actual	FY2010 Actual	FY2011 Budget
FUND SOURCES				
State	\$38,130,140	\$35,010,269	\$37,503,926	\$38,438,945
Federal	63,066	96,060	27,578	-
Other ¹	8,319,942	2,994,634	2,903,664	1,203,310
Total	\$46,513,148	\$38,100,963	\$40,435,168	\$39,642,255
EXPENDITURES				
Public Defender Standards Council ²	\$11,377,408	\$9,003,026	\$7,924,841	\$7,003,171
Public Defenders ³	35,204,004	29,075,991	30,160,609	31,528,916
Public Defenders - Special Project ⁴	-	-	1,465,968	1,110,168
Total	\$46,581,412	\$38,079,017	\$39,551,418	\$39,642,255
1. The decrease in Other funding in FY2009 was attributed to a reduction in funds from the Clerk's/Sheriff's Trust Fund and administrative fees from contracts with counties for state-paid indigent defense employees, as well as the elimination of Interest on Lawyer's Trust Accounts (IOLTA). The FY2011 budgeted amount only includes Clerk's/Sheriff's Trust funding. 2. The Council program funds the Capital Defender Office, Central Office, and Office of Mental Health. In addition, the Office of the Conflict Defender was added in FY2011. 3. The Public Defenders program funds the public defender circuit offices as well as conflict offices. 4. Provides funds for establishing present contracts with outside conflict counsel and other third party providers in non-capital cases first arising in fiscal years 2005 through 2009. Source: FY2011 Appropriations Act, GPDSC financial records, PeopleSoft and Governor's Office of Planning and Budget documents				

The Indigent Defense Fund, which funds indigent defense in Georgia, includes the \$50 indigent defense application fee, a \$15 filing fee for civil actions and cases filed in all manner of courts, and additional fines in cases in which defendants pay criminal fines and post bond. Fee collections are transmitted to GSCCCA for deposit into the Indigent Defense Fund. In fiscal year 2010, GSCCCA deposited \$44.8 million into the Fund. As of February 2011, fiscal year 2011 collections had amounted to \$25.9 million.

According to the GPDSC Legislative Oversight Committee (LOC), total spending for indigent defense has increased over 100% in the past 10 years (from \$54,197,814 in FY 2000 to \$110,989,395 in FY 2010). The state's share of indigent defense funding has increased with the move to a statewide public defender system. Prior to the creation of the GPDSC, counties reportedly contributed approximately 90% of the total cost, while the state contributed the remaining 10% through grant funding. Based on estimates reported by the LOC, the state's contribution has increased to approximately 40% of total spending.

Findings and Recommendations

Indigent Determination

Georgia's indigent determination process has deficiencies that undermine its effectiveness at identifying defendants eligible for public defender services.

An effective indigent determination process consistently screens defendants for public defender services and verifies questionable information provided by the defendant. The result is a reliable, documented determination of a defendant's indigency status. However, we identified weaknesses in the screening and verification practices that led to a significant portion of cases in our sample being unsupported by the defendant file. If any of these defendants were improperly categorized as indigent, public defender caseloads may have been unnecessarily increased, allowing less time and resources for cases of the truly indigent.

We reviewed the indigent determination practices and a sample of eligibility decisions in nine circuits. We interviewed personnel who screen defendants for services, circuit public defenders, and judges. We also reviewed a sample of 711 Superior Court cases⁴ closed between October and December 2009. Our review revealed the following:

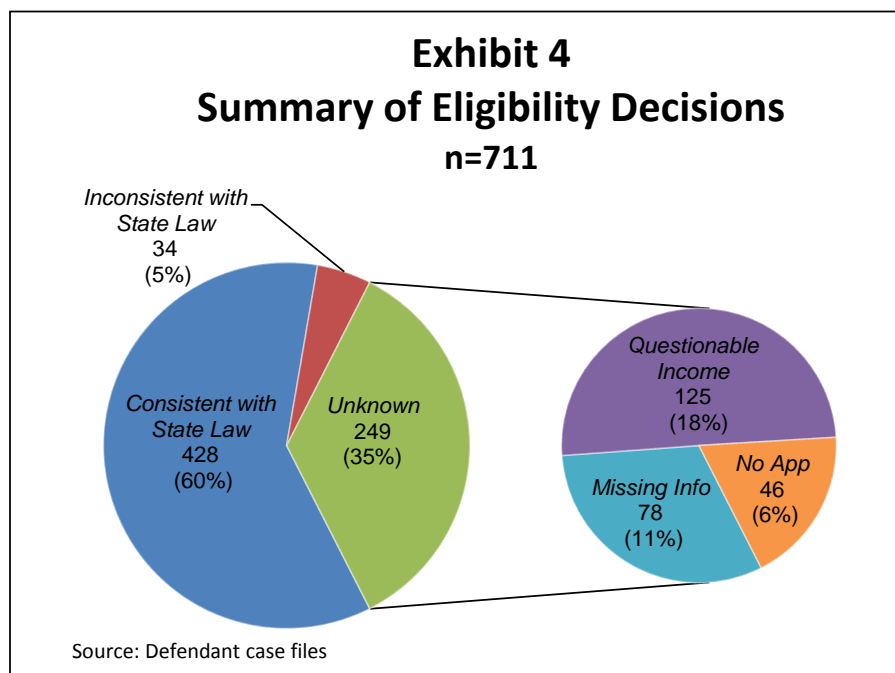
- Information reported by defendants that was not critically reviewed and, even when clearly dubious, was rarely subject to verification;
- Inconsistent methods for calculating household size, considering parental income, considering income of other household members, and considering sources of income;
- Inconsistent methods for considering assets available to a defendant;
- Inconsistent methods of capturing and/or considering defendant expenses;
- Applications that did not capture all necessary information and that did not facilitate the eligibility determination; and
- Practices inconsistent with state law and GPDSC guidance regarding consideration of expenses, appointment of counsel for those charged with violations of probation, and use of gross instead of net income.

These issues impact the accuracy and consistency of indigent determinations. While a majority of eligibility decisions (428 or 60%) appeared appropriate, the appointment of a public defender was not supported by the defendant's application or was inconsistent with eligibility requirements in a significant percentage of the cases (see **Exhibit 4**). In 34 cases (5%), the decision appeared noncompliant due to the defendant's income exceeding income requirements.⁵ We were unable to

⁴ Cases in which defendants were denied public defender services based on income exceeding poverty guidelines were also reviewed; however, we were unable to determine the circuit approval/denial rates because not all circuits kept separate records of defendants that were deemed ineligible.

⁵ While a judge may require a court-appointed attorney even when income exceeds thresholds set in law, we found no documentation of an order in these cases.

determine compliance in the remaining 249 cases (35%) because of inadequate documentation. These cases were generally associated with applications containing clearly questionable information, applications missing information necessary to make a determination, and missing applications. Additional details on these cases are provided below.



- **Questionable Income Reported** – In 125 cases we were unable to determine compliance with the law because income information provided by the defendant did not reconcile with the expenses he or she reported to pay. These issues were present in all but one circuit.
- **Missing Information** – We found that 78 applications were missing key information needed to make an eligibility decision. The information that was most frequently absent was the defendant's income or assets; in other instances, spousal income was not captured. The percentage of applications reviewed that were missing key information exceeded 10% in several circuits.
- **No Application** – In 46 instances, the office had no application for the defendant. A significant portion of these occurred in one circuit, though five of the nine circuits had at least one case that had no accompanying application.

The impact of unsupported decisions cannot be precisely determined. We found that when judges required defendants to pay for their defense, the median amount of court orders across the nine circuits ranged from \$225 to \$750. The actual cost of a single case would vary even more. In addition to the cost, defendants improperly deemed indigent add to public defender caseloads, allowing less time and resources for cases of defendants who are truly indigent.

The shortcomings in the indigent determination process can be largely mitigated by coupling trained screeners critically reviewing defendant-provided information with verification of questionable information; improving GPDSC guidance for screeners; improving the applications to ensure that necessary information is captured; and adopting circuit practices that are consistent with state law and GPDSC guidance. These issues are discussed in greater detail in the following findings.

Screeners do not critically review defendant-provided information and infrequently conduct verification procedures to confirm indigent status.

Quality information is necessary for a screener to determine whether a defendant is eligible for public defender services. However, we found numerous instances in which screeners relied upon incomplete and inconsistent information to make eligibility decisions. Inadequate screening and verification of information presented on indigent defense applications result in an overreliance on the defendant's truthfulness and understanding of the application questions.

As noted in the previous finding, 125 (18%) of the 711 cases in our review contained income information that we deemed questionable. In almost all of these cases (117), the defendant reported no wages or other form of financial support but also did not report that they were living with anyone, or the defendant reported no income but claimed to support a spouse and/or children. The applications did not contain evidence that the screener attempted to reconcile the conflicting information through follow-up questions or verification of questionable information. More detail on screener review and verification is provided below.

Screener Review

Screening should be conducted by personnel who are trained to understand the information that is necessary to make an indigent determination and who can recognize questionable information provided by a defendant. Numerous studies point to trained personnel as essential to an efficient and effective indigent determination process. Screeners should assist defendants filling out applications and ask questions along the way to reconcile inconsistent answers. If defendants must complete applications on their own, screeners should follow-up to clarify questionable information before making the determination.

Our review found that screening practices vary across and, in some instances, within circuits. In eight of the nine circuits reviewed, defendants are usually screened in person by administrative or investigative staff of the public defender office or an indigent defense office. However, the circuits also reported that there are instances in which the defendants obtain and complete an application without the assistance of a screener. In one circuit, defendants are provided an application by jail staff and the application is reviewed by a judge. In our case review, we were not always able to determine if a defendant completed an application with the assistance of a screener. However, the fact that a significant number of applications contained questionable information indicates that screeners did not adequately follow-up with the defendant, whether the screener was present while the applications were completed or not.

Verification

Verification refers to obtaining documentation from the defendant or a third party to confirm that information provided by the defendant is accurate. While verification identifies inaccurate information, studies have also found that it serves as a deterrent, encouraging honest answers during the screening process. Our review of numerous studies found that screeners have often questioned the efficiency of verification, stating that there is little time to verify information given time limits to provide counsel and that costs would outweigh any savings. However, a recent Texas study found verification can lead to cost savings, but the extent to which verification is needed depends on the quality of the screening process. The study found that thorough screening greatly reduced the incidence of discrepancies between reported and verified information. The study also considered the costs of verification, noting that the cost of hiring additional staff or procuring verification software must be compared to the savings these methods are expected to achieve. It should be noted that we found no definitive evidence of the method of verification or frequency of verification (i.e., all applications, sample) that should be performed.

While circuit personnel indicated that verification occurs in some instances, we rarely found evidence of verification of defendants' financial information. Of the 711 cases reviewed, we found that verification occurred in 36 (5%) cases and were largely limited to a single circuit.⁶ Verification of defendants' financial information was evidenced by the presence of supporting documentation, such as pay stubs, employer letters, and bank statements, or by notations documenting verification of information such as employment and property ownership. While only one circuit had written policies or procedures that address verification, personnel stated that verification is conducted in certain instances. Two circuits reported that verification is conducted when information is questionable, such as when no income or assets are reported or when the defendant reports to be paid in cash only. In addition, two circuits stated that they verify information in cases in which the defendant is not in custody, while others verify certain items such as ownership of real estate or vehicles. However, as noted above, we found no evidence of verification in any of the 125 applications with questionable information.

Regarding impediments to verification, circuit personnel noted a lack of time and resources, as well as guidance to determine when it is most necessary. Although the Indigent Verification Committee has issued guidance⁷ addressing verification, it does not include some of the "red flags" that we identified during our review. The guidance provides examples of reported income being inconsistent with assets or child support. We more frequently observed instances in which normal living expenses exceeded reported income or when the defendant had dependents but neither the defendant nor the spouse was employed (or reported the receipt of other income such as unemployment or public assistance).

⁶ At the time of our review, one circuit had recently procured an automated verification system. However, the system was not in place during the timeframe in which defendants in our sample of cases were screened.

⁷ The guidance may be used by any circuit but is intended for those that establish an approved verification system. As of September 2010, 53 counties had an approved system, meaning that a majority of counties may not have seen the only source of guidance on the subject of verification.

RECOMMENDATIONS

1. Each circuit should take steps to ensure persons responsible for screening have the training necessary to identify and resolve inconsistencies and inaccuracies in information reported by defendants.
2. Each circuit should consider adopting practices that encourage the highest possible number of applications to be completed with the assistance of a screener.
3. The GPDSC should develop guidance for use by all circuits addressing when verification would be necessary.

GPDSC guidance does not adequately address the issues faced by those charged with determining eligibility.

State law defines individuals charged with a felony as indigent if they earn “*less than 150 percent of federal poverty guidelines unless there is evidence that the person has other resources that might be reasonably used to employ a lawyer without undue hardship...*” The GPDSC has developed standards, operating procedures, and Indigent Verification Committee guidance that address these criteria; however, the guidance does not address all circumstances faced by circuit public defender offices. As a consequence, the circuits have developed their own, varying interpretations of income and other resources available to the defendant. Differences could permit a person that would be appointed a public defender in one circuit to be denied in another circuit.

Income

Determining the income that should be compared to federal poverty guidelines is an issue complicated by varied living arrangements and potential income sources. State law and most GPDSC guidance refer only to income earned by the defendant. However, defendants frequently live with other adults, who may have income and who may be included in the household size that affects the eligibility decision. In addition, guidance refers to the defendant’s “earned income” as net income after taxes and other deductions, but it does not state whether other sources of financial support should be considered as well. More detail on income-related guidance that could be improved is included below.

- *Household Size* – Guidance does not sufficiently detail how circuits should determine household size, which is a component of the federal poverty guidelines. In calculating the size of the household unit, staffs in two circuits include dependents living outside the home if the defendant reports supporting them. The other seven circuits only include dependents living in the home.

Determining which individuals to include in household size also impacts the calculation of household income. Many defendants live with parents, spouses, other relatives, and non-relatives, whose income may need to be considered if those individuals are included in the household size.

- *Parental Income* – O.C.G.A. §17-12-2 requires that income earned by the

parents of a juvenile defendant be considered when determining indigence. However, the law and GPDSC guidance do not address parental income for those over 16 and still supported by their parents (an occurrence in 130 of the 711 cases reviewed). We found that five circuits inquire into the parent's income if the adult defendant is being supported by parents. The remaining circuits do not inquire into parental income even if the defendant depends on the parents financially or report only using parental income if the information is volunteered by the applicant.

It should be noted that in a 2009 case (*Thomas vs. State of Georgia*), the Georgia Court of Appeals found that a court could consider parental income when determining indigence for an adult defendant supported by parents. In the decision, the court found that the application contained parental income, which was “evidence that the person has other resources that might be reasonably used to employ a lawyer.”

- *Income of Other Household Members* – GPDSC guidance does not specify whether income earned by other adults living in the home should be factored into the eligibility decision. Only spousal income is mentioned, and it only appears in the guidelines for indigency verification systems, which were adopted in 2009. Other groups are not mentioned in those guidelines, or in other GPDSC guidance. We found that, in addition to parents, defendants often live with spouses, siblings, girlfriends/boyfriends, or friends, each of which may be employed and contributing to the support of the household.

Despite limited guidance, we found that all circuits reviewed considered spousal income a part of household income. Regarding income of other adults, one circuit said that it did not consider income from non-spouses in the eligibility decision while six other circuits reported that they consider income from other adults.

- *Income Calculation* – GPDSC guidance does not indicate how many weeks or months of income should be used as the basis for comparing to federal poverty guidelines. We found one circuit that considered the income earned by the defendant over the past year, while other circuits generally looked at more recent income levels (e.g., previous month) and projected a 12-month total. Under the first method, a defendant unemployed for the last two months may be ineligible if prior income was above poverty guidelines. The same defendant would be eligible, based on an income test, in other circuits.
- *Income Types* – Neither Georgia law nor GPDSC guidance provide a comprehensive list of income types that should be considered when determining eligibility. Defendants may receive various forms of public assistance (e.g., food stamps, Social Security Insurance), veterans disability payments, child support, or workers compensation. Although circuits generally asked about other sources of income, a consistent list of income sources was not used.

Assets

GPDSC guidance has defined “other resources” as assets that can be quickly converted to cash without significant loss. The GPDSC’s operating policy provides

examples such as cash, checking accounts, savings accounts, and money market accounts, while the model application included in the guidance for establishing an indigency verification system goes further, requesting equity in real estate and motor vehicles. However, GPDSC guidance does not adequately address how to consider assets. We found that circuit staffs were unsure how to evaluate the liquidity and actual value of assets. For example, one circuit stated that they include equity in a home but do not consider the first vehicle. Another circuit obtains information from defendants related to home equity, but question how much, or if, a defendant can actually obtain funds for the equity in a home. We also found several instances in which defendants reported having several hundred dollars in bank accounts, but were still represented by a public defender.

Eligibility Re-Assessment

GPDSC guidance does not specify circuit responsibilities related to re-assessing a defendant's eligibility. Four circuits reported that they have policies to re-assess eligibility when a defendant bonds out of jail. These policies are generally limited to informing the defendant to notify the public defender office if released from jail. These policies are intended to address the possibility that a defendant may return to work and experience a change in eligibility. In addition, a defendant that is out of jail may be requested to provide documentation supporting income or asset information reported in the application.

RECOMMENDATION

1. The GPDSC should provide additional guidance to address the issues noted. The guidance should provide examples likely to be faced by those charged with determining a defendant's eligibility for services.

Applications for indigent defense services do not always capture information necessary for eligibility determination.

The GPDSC does not mandate the use of a statewide application for public defender services, instead allowing the circuits to create their own. We found that the applications do not consistently request all information necessary or useful for eligibility determinations. In addition, we found that applications were not always fully completed. These two issues increase the likelihood of inaccurate and inconsistent eligibility decisions.

The IVC has created a model application (approved by the GPDSC) that is available, but not required, to be used by circuits. We compared this application and the applications used by nine circuits to each other. We assessed whether the applications contained all eligibility components that would facilitate compliance with state law, including components that would allow the screener to assess the reasonableness of a defendant's responses. Finally, we determined if the 711 applications in our file review had been fully completed by the defendant or screener.

Application Components

An application should clearly indicate to the screener what information is to be collected, guide the screener's decision-making, and require documentation of the decision. A general question, such as one that requests income from other sources, is

not as effective as a detailed one that provides a list of other sources. In addition, questions to be answered by the screener can guide and document the decision-making process. For example, if a screener could not answer “yes” to the question, “Is it clear how the defendant supports himself/herself?” it would be prudent to ask additional questions of the defendant or request documentation of reported income.

Our review of the applications found varying questions related to income, assets, and expenses, the three components that we deemed most relevant to eligibility. None of the circuits reviewed had applications that matched the GPDSC model application or that entirely matched another circuit. However, each application was not developed independently, confirmed by the presence of identical questions on some applications. The results of our review of the applications are below.

- ***Income*** – Income is the primary component in an eligibility decision, but we found application differences that could impact the amount of income reported and the related aspect of household size. While all applications capture wage income of the defendant and spouse, the income of other individuals in the home is generally not a part of the application. Yet, those same individuals may be listed as household members, increasing the household size. If they are included in the household size but their income is not included in household income, the defendant is more likely to qualify for public defender services.

All applications require defendants to report income received from non-wage sources (e.g., public assistance, veteran benefits, child support), but the circuits vary in the degree to which other income types are listed on the applications. Five circuits and GPDSC’s model application lists five or more types of other income, while three circuits include less detail and one included no detail on the types of other income to be considered.

We also found that most applications do not include a space to show calculations and comparisons to poverty guidelines. While all applications contain numerous blanks for various income sources, only one circuit has a data field for the screener to calculate total income. Likewise, this circuit’s application is the only one that allows the screener to enter the federal poverty guideline amount used in the income comparison. These two fields provide transparency to the eligibility determination.

- ***Assets*** – Assets may be considered in an eligibility decision if a defendant qualifies based on income. We did not find substantial differences in the asset categories listed in the reviewed applications. However, similar to income, we found that applications do not have a field for the screener to total all assets.
- ***Expenses*** – State law limits public defenders’ eligibility determinations to the two factors of income and assets; expenses are not a consideration. While it may not be used as the basis of a determination, obtaining expense information does serve as a useful method for assessing whether reported income is reasonable (i.e., would reported income cover stated expenses?). It is a relatively simple, low-cost method to identify instances in which the defendant has provided incorrect information or to identify instances in which verification of reported income should be obtained.

We found significant variation in the level of expense detail included on the

applications reviewed. Six of the nine circuits collect expense information though it is unclear how the expense information is used. One circuit only requests a defendant's extraordinary expenses, and GPDSC's model application and two circuits do not capture any expense information.⁸ It should be noted that while state law requires circuits to consider only income and assets in their eligibility determination, it is possible that judges use expense information when evaluating those instances in which a defendant has reportedly been unable to hire a private attorney.

Incomplete Applications

A significant portion of the defendants' applications in our file review were found to be incomplete. Approximately 11% (78 of 711) of the applications were missing relevant information needed to make an eligibility determination, the majority of which (77 cases) were missing information regarding income or assets of the defendant or of the spouse. An incomplete application suggests that eligibility determinations have been made without obtaining (or at least documenting) all necessary information. There were additional cases in one circuit in which the screener would leave blank those fields where the applicant provided no information. For example, if the applicant is unemployed, the employment field is blank.

RECOMMENDATIONS

1. The GPDSC and the circuits should consider the use of a single, statewide application based on guidance regarding whose income and assets to consider and how to calculate household size. If a single application is not adopted, the GPDSC should consider requiring a minimum level of detail in each circuit's application.
2. Applications should obtain expense information in order to compare with reported income.
3. Circuits should ensure that all application questions related to eligibility are completed.

Circuits are inappropriately using factors other than income and assets to determine whether a defendant qualifies for a public defender.

While state law and GPDSC standards specify the factors to be considered in determining who is indigent and eligible to receive a public defender, our review found that some circuits were basing eligibility decisions on factors inconsistent with the law and standards. These deviations from the eligibility criteria could result in a defendant receiving public defender services who would otherwise be ineligible.

- *Income exceeds poverty thresholds* – State law establishes the level of income required in order for a defendant to qualify for services. For example,

⁸ All of the circuits reviewed request child support amounts paid by the defendant. According to GPDSC guidance, circuits are required to subtract court-ordered child support from a defendant's income.

the law states that an indigent person is one “*charged with a felony who earns less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources.*” The law also has similar requirements for individuals charged with misdemeanor offenses and for juvenile offenders. However, our review found that in the nine circuits reviewed, 34 defendants whose incomes exceeded these thresholds were represented. We could not determine whether these decisions were the result of miscalculating the defendant’s income or whether other factors were considered in the decision to represent. Other factors that may have influenced the decision to represent these defendants include a judge overriding a decision not to represent, consideration of extraordinary expenses, incarceration status, prior knowledge of the defendant, and nature of the charges.

- ***Consideration of expenses*** – While the law requires the determination of indigence to be based on a defendant’s earnings and other resources, we identified one circuit that also factored in a defendant’s expenses. The screener subtracted child care expenses from total income before comparing the income to the poverty thresholds. Consideration of child care expenses is consistent with the Uniform Superior Court Rules, but those rules predate the current indigent defense law.

As discussed on page 16-17, expenses can be obtained to determine if a defendant’s reported income is reasonable; however, state law does not permit expenses to be deducted from a defendant’s income before the comparison to federal poverty guidelines.

- ***Automatic appointment in violation of probation cases*** – According to state law, the definition of an indigent person includes one who is “*charged with a...violation of probation...who earns less than 100 percent of the federal poverty guidelines...*” However, two circuits indicated that they do not apply these criteria to defendants charged with probation violations. Instead, they generally automatically appoint public defenders in these cases. In one of those circuits, defendants charged with probation violations are not always required to complete an application for public defender services. (Staff explained that these cases are typically handled very quickly and do not require significant resources.) Of the 34 cases involving defendants whose incomes exceeded poverty guidelines, 11 were probation violation cases.
- ***Use of gross income*** – GPDSC policy defines earned income as a defendant’s “net income” which shall include only a client’s take home pay, which is the gross income earned by a client minus those deductions required by law or as a condition of employment. While seven circuits request a defendant’s net pay on their application for indigent defense services, one circuit requests gross pay, and one circuit does not specify on its application whether it is requesting gross or take-home pay.

RECOMMENDATIONS

1. The GPDSC should ensure that all circuits have written policies and procedures for determining a defendant’s indigent status that are consistent with state law and GPDSC standards.

2. All circuits should ensure that their office practices for determining indigency are consistent with state law and GPDSC standards.

GPDSC Director's Response to Indigent Determination Findings:

"After analyzing the Department of Audits' findings and recommendations, GPDSC has conducted some additional research that focused on our state's needs as well as other states' processes of indigency verification. A number of states have programs much more established than our own. Because these states' programs have been in existence many more years than Georgia's, they have encountered and addressed some of the same issues raised in the audit and offer practices to be evaluated as we look to improve our own process."

"Some of our findings have led to additional recommendations beyond those of the audit. We are committed to any and all actions that can potentially improve the efficiency of the Georgia Public Defender system. We will be pursuing and implementing as many of these recommendations as possible in order to relieve pressure from an already stressed system."

"One of the recommendations we plan to implement is the creation of a new, standardized application form with concise definitions, clear examples, and simple directions. This application would be utilized by all Circuit Public Defender Offices statewide. Our goal is to have the application in process, ready to present to the newly reconstituted Council when it meets on August 19, 2011."

"Another recommendation speaks to verification of applications; the Audit cites a study from the State of Texas (page 12) that found thorough screening was far more effective than the verification process in determining indigency. According to the study, there was no data to support the use of expensive, complicated or time-consuming verification processes. The Audit finds that a lack of time, as well as guidance, was an impediment to verification. Additional GPDSC research found that defendants have a tendency to overestimate income and assets in a number of cases. Based on the sum total of this information, improved guidelines and the simplest, least expensive verification methods should be implemented. GPDSC will commence detailed training on the application and screening process for the screeners shortly after they are approved by the new Council. These recommendations, along with others from the audit and GPDSC research that could improve effectiveness, will be explored and implemented as quickly as possible."

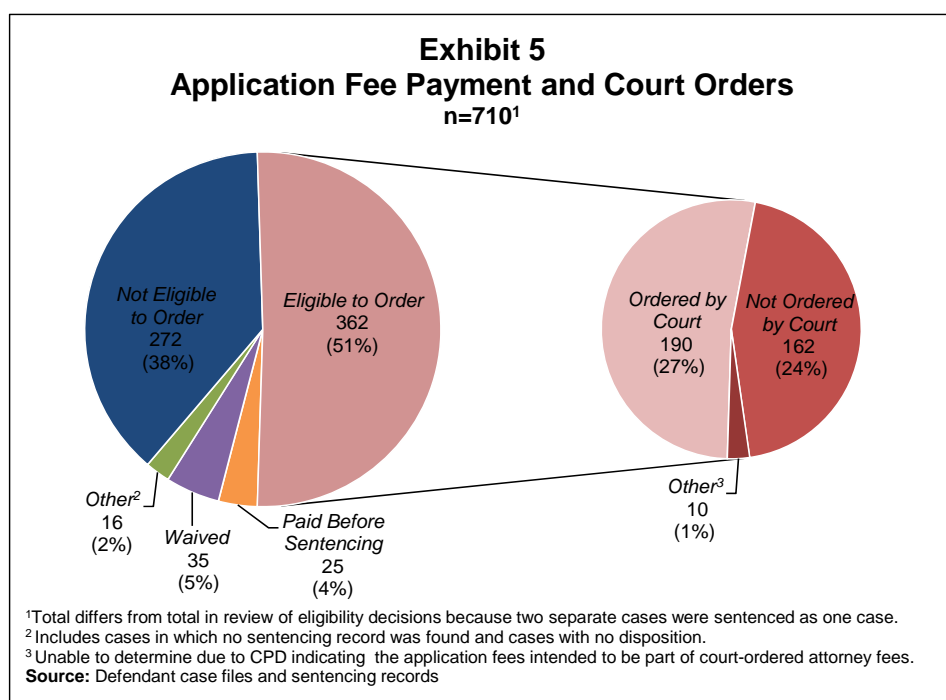
Cost Recovery

Few defendants pay the indigent defense application fee when initially applying for a public defender, and courts do not consistently order defendants to pay unpaid application fees as required by state law.

Although state law requires any person applying for legal defense services to pay a \$50 application fee, our review found that almost no defendants pay the fee upfront when applying for a public defender. And in the majority of cases reviewed, judges were either unable or unwilling to order the defendant to pay the fee at the end of the case. As a result, revenue anticipated by state law is not being collected and defendants in similar circumstances are being treated inconsistently.

O.C.G.A. §15-21A-6 requires that those applying for public defender services pay a \$50 application fee. Payment of the fee may be waived by the court “if it finds that the applicant is unable to pay the fee or that measurable hardship will result if the fee is charged.” GPDSC operating policies require that documentation of the waiver be maintained in the defendant’s file. If the fee is not paid or waived prior to sentencing, state law says that “the court shall impose such fee as a condition of probation.”

As illustrated in **Exhibit 5**, we found that defendants paid the application fee before sentencing in just 4% of cases (25 of 710). Courts waived the fee in 35 instances, and sentencing documents were unavailable for another 16 cases. Of the remaining cases, an order to pay the fee was possible in 362 cases. The courts ordered defendants to pay the fee in 190 of those cases and did not order payment in the other 162. **Exhibit 5** also shows the frequency with which courts were unable to order payment. Two hundred seventy-two cases (38%) ended without a sentence of probation, the only method by which the court can order the fee be paid. We found that 118 cases were dismissed, 105 cases were for violations of probation, and 49 cases resulted in a guilty plea or verdict without probation as a part of the sentence. It should be noted that



although defendants charged with probation violations likely remain on probation – a necessary component for ordering the fee – Department of Law officials stated that the law may limit the court’s ability to order the fee in those cases. Since a probation violation is not a new charge, the judge is not imposing a new sentence that would allow the fee to be ordered.

While defendants in approximately half of the total eligible cases were ordered to pay the application fee, the percentage ordered to pay by circuit varied from 0% to 100%. As shown in **Exhibit 6**, judges in the Southern circuit ordered defendants in all 48 cases eligible for recoupment to pay the application fee as a condition of probation. By contrast, we did not find any records showing that judges in Bell-Forsyth, Cobb, and Waycross circuits ordered defendants to pay application fees.

Exhibit 6			
Application Fee Ordered, By Circuit			
Circuit	Eligible Cases	Fee Ordered	% of Eligible Cases with Fee Ordered
Southern	48	48	100%
Gwinnett	54	48	89%
Rockdale	49	41	84%
Flint	29	16	55%
Houston	53	22	42%
Enotah	39	15	38%
Bell-Forsyth	35	0	0%
Cobb	45	0	0%
<u>Waycross</u> ¹	10	-	-
Total	362	190	52%
¹ We were unable to determine if application fees were ordered for 10 eligible cases in this circuit. The circuit public defender indicated the application fees are intended to be part of the attorney fees ordered by the court. Source: Defendant case files and sentencing records			

We identified numerous reasons for the current application fee practices. Upfront payment of the application fee is impacted by defendants being in jail at the time of application and/or by a belief that public defender personnel cannot effectively serve as both defense counsel and collection agent. Also, since judges have the ability to assess the fee in many cases, public defender personnel may allow the collection responsibility to be delegated to probation officers. Regarding court orders for the application fee, some circuit staff indicated that judges’ practices regarding *attorney fee* recoupment impacts the application fee orders, and we found that to be likely. As shown in the next finding, in the two circuits with no application fees ordered as part of a sentence, judges ordered attorney fee recoupment in at least 70% of cases. Interviews with Superior Court judges and CPD staff also revealed that some judges were unaware the fee could be ordered as a condition of probation, were opposed to requiring defendants to pay an application fee, or believed that defendants are unable to afford the application fee.

It should be noted that legislation allowing circuits with approved verification systems to retain application fee revenue should positively impact the upfront collection and the ordering of fees. Our review included many cases initiated before

the counties had approved verification systems; therefore, we were unable to document an increase in application fees ordered and/or collected in counties with verified systems. In addition, individuals in multiple circuits spoke of the budgetary challenges faced by and resulting pressure applied by county governments. Based on these conversations, it is reasonable to expect that public defenders and courts will be more diligent about collecting/ordering applications fees if the revenue will be retained at the local level.

The impact of the inconsistent application fee practices includes a loss of revenue and inconsistent treatment of defendants. Application fees are intended to partially offset the cost of providing defense services. The cases in which judges chose not to order the fee represented \$8,100, and the cases in which the defendant did not pay when applying for service and the judge was later unable to order payment represented an additional \$13,600. In addition, defendants in some circuits are afforded additional indigent defense benefits, since they are not required to pay a fee that defendants in other circuits must pay.

RECOMMENDATIONS

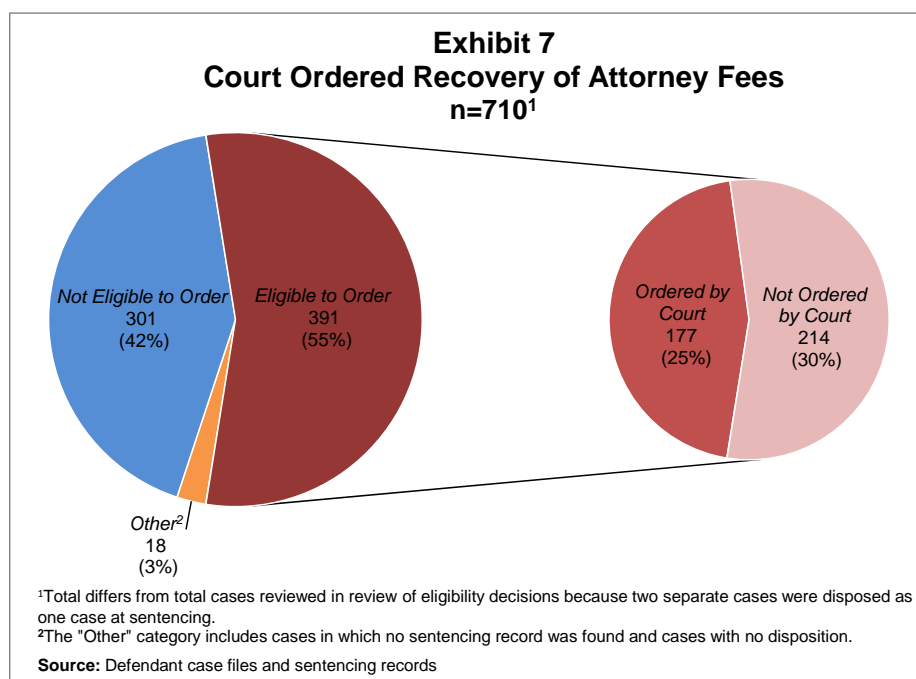
1. The circuits should improve efforts to collect the application fee prior to sentencing.
2. The GPDSC should continue to educate judges about the mandatory nature of the fee.
3. Circuits should request that judges formally waive the application fee for defendants who the court deems unable to afford the fee.
4. The General Assembly should consider amending state law to explicitly allow for courts to order recovery of the application fee in violation of probation cases.

The prevalence of courts ordering defendants to repay defense costs varies significantly among the circuits.

While the application fee *shall* be ordered, O.C.G.A. §17-12-51 states that repayment of all or a portion of attorney fees *may* be ordered by the court as a condition of probation, if the payment does not impose a financial hardship on the defendant. Our review found that courts ordered reimbursement in just under half of the eligible cases and that the frequency of ordering reimbursement varied widely among the circuits.

The circuits employed different methods of determining attorney fee amounts to be reimbursed. For example, two used a fee schedule in which defendants pay a set amount based on the type of case and/or the timing of a case's resolution (e.g., prior to arraignment, after trial, etc.). Three circuits base reimbursement amounts on actual attorney billings, generally calculated at an agreed-upon rate per case or hour. This method was used by all of the circuits that used private attorneys instead of government-employed public defenders. The remaining two circuits that order repayment of attorney fees allow judges to determine the amount to be reimbursed.

As shown in **Exhibit 7**, we found that 391 of the 710 cases in our sample were eligible for reimbursement of attorney fees⁹. The courts ordered reimbursement of \$98,300 in 177 cases (45%) and did not order payment in the remaining 214 (55%). Across the nine circuits reviewed, the percentage of cases with reimbursement orders varied from 0% to 98%. **Exhibit 8** on the next page shows that the percentage in five circuits exceeded 50% (two of which exceeded 90%), two circuits ordered in less than half of eligible cases, and the remaining two circuits did not order recoupment of attorney fees in any of the cases reviewed. Since state law provides the courts with discretion to assess attorney fees, there is no expected or desired percentage of orders that should be reached. Courts may assess defense costs to all defendants or to no defendants. For circuits with orders, the median ranged from \$225 to \$750.



We found that circuit practices, especially for those with particularly high or low percentages, are partly driven by philosophical differences. In Southern and Cobb, the practices appear to reflect a belief that defendants should be required to pay at least a portion of their defense costs, with few exceptions. In the Houston circuit, the opposite is true. The circuit public defender indicated that because defendants have already been deemed indigent, it is unreasonable to expect them to pay defense costs. In addition, staff in Rockdale and other circuits are hesitant to order a defendant to reimburse attorney fees partly because of the length of time it would take to collect if the defendant is sentenced to jail time. Meanwhile some judges are not optimistic that counties would actually receive reimbursement because recoupment of attorney fees is ranked low on the priority list of court fees (i.e., fees paid to probation are credited toward other fees, such as victim restitution, before attorney fees).

⁹ The court was unable to order reimbursement of attorney fees in 301 cases that ended without a sentence of probation, the method by which fee recovery is permitted. We found that 134 cases were dismissed, 118 cases were probation violations, and 49 cases resulted in a guilty plea or verdict without probation as a part of the sentence.

Exhibit 8 Recovery of Attorney Fees Ordered, By Circuit			
Circuit	Eligible Cases	Recovery Ordered	% of Eligible Cases with Recovery Ordered
Southern	49	48	98%
Cobb	45	42	93%
Waycross	22	16	73%
Bell-Forsyth	46	32	70%
Flint	33	18	55%
Gwinnett	54	16	30%
Enotah	40	5	13%
Houston	53	0	0%
<u>Rockdale</u>	<u>49</u>	<u>0</u>	<u>0%</u>
Total	391	177	45%
Total Amount Ordered - \$98,300			
Circuits' Median Orders Ranged from \$225 to \$750			
Source: Defendant case files and sentencing records			

If a court chooses to pursue cost recovery, state law requires that it consider whether the payment will create a financial hardship on the defendant and the defendant's family. According to some judges and circuit staff, judges may inquire into a defendant's financial situation at sentencing, but there is typically no presentation of financial information gathered during the initial defendant screening process. Regardless, the screening process would have placed defendants in only two categories: indigent and not indigent. Unlike some other states' processes, defendants who are able to fund a portion of their defense costs are not identified.

The impact of current practices affects both taxpayers and defendants. Circuits that never order cost recovery miss an opportunity to recover a portion of costs currently borne by tax revenue. Circuits that routinely order the recovery of attorney fees without a sufficient review of defendant financial information risk imposing financial hardships on defendants in violation of state law. Both practices discount the fact that all defendants who initially qualify for indigent defense services are not in precisely the same financial situation. For example, a 23-year-old single defendant living with parents may qualify for a public defender, but that individual faces a less precarious financial situation than a 23-year-old unemployed, single parent without a home.

RECOMMENDATION

1. Circuit personnel should consider identifying defendants that while indigent, may be able to contribute to the cost of their defense, and this information should be used by the courts during sentencing.

GPDSC Director's Response to Cost Recovery Findings:

"As to the issues related to cost recovery, it should be noted that a report from the Spangenberg Institute in 2001 found that states only recovered 6 to 20 percent of the requested application fees. Currently, the State of Georgia is collecting roughly 10 percent, with an additional amount being retained by those circuits with approved verification systems, putting Georgia at the high end of the collection range. The Spangenberg Institute found that most states failed to generate the kind of revenues they had projected when originally implementing the fees due to the low collection rate.

While working to improving Georgia's collection rate, it is important to note that a high rate of collection may be unlikely."

"A number of recommendations from the audit relating to indigent defense cost recovery deal with the efforts of other agencies. GPDSC is committed to supporting those other agencies in their role for cost recovery through improved information sharing, coordination and training."

Other Indigent Determination and Cost Recovery Methods

Alternate practices used in other states may improve indigent determination and cost recovery efforts.

As part of our review, we identified supplementary and alternate methods to screen defendants for indigent defense services and to foster cost recovery. To varying degrees, these practices have the potential to address some of the efficiency and effectiveness issues identified in the earlier findings.

- ***Presumptive Eligibility*** – State law requires that eligibility be based on the defendant's income in relation to federal poverty guidelines. Some states that use similar criteria also use presumptive eligibility factors to identify those defendants unlikely to be able to afford an attorney. Ohio, Washington, New Mexico, and North Dakota are four states that presume defendants to be indigent if they receive certain needs-based public assistance (e.g., TANF, SSI). Other presumptive eligibility factors include a defendant's residence in a correctional or mental health facility for a certain length of time and a defendant's inability to post bond.

Our review found that the screening process in 9% of cases reviewed could have been streamlined as these cases were eligible based on at least one of the suggested presumptive eligibility criteria mentioned above. These cases involved defendants who are typically indigent (e.g., in prison) or who were already classified as indigent by other state entities, such as the Georgia Division of Family and Children Services. In many cases, the eligibility for these benefits is based on poverty guidelines and asset limits, similar to indigent defense standards.

- ***Partially/Marginally Indigent*** – In addition to placing defendants into two distinct categories, indigent and not indigent, many states are now recognizing a third group of defendants who are indigent and able to contribute to their defense, or partially indigent. Ohio sets a separate income level for defendants that are marginally indigent, and those defendants are subject to recoupment, contribution, or partial payment. Washington's indigent screening form requires defendants to be categorized into four categories: 1) Eligible at no expense 2) Eligible but must contribute a specified amount 3) Rescreen in future regarding change in income and 4) Not eligible for public defender. The benefit of these designations is that defendants in similar financial situations are likely to be treated consistently in regard to assisting with the cost of their defense.

In Georgia, state law recognizes that the financial situations of indigent defendants differ, permitting courts to waive a defendant's application fee or to order a defendant to repay defense costs. However, state law does not formally identify a category of defendants as partially indigent and able to financially contribute to their defense. Accordingly, defendants are placed into one of only two categories: indigent and not indigent. Courts' decisions to assess some portion of costs to the defendant are not based on any formal classification made by the eligibility screener.

- *Other Cost Recovery Models* – Across the nation, a variety of methods have been employed to recover defense costs from some or all defendants. Costs can be recovered before case disposition through the use of up-front administrative fees or the execution of promissory notes or contracts that require prompt payment. Costs can also be recovered after case disposition through an order from the court. According to the Spangenberg Group, funds are much more likely to be obtained from a defendant if payment is required before disposition because defendants are more likely and better able to pay at the outset of a case before they are required to pay other court costs. It found that defense cost recoupment was generally a low priority in relation to other costs ordered by the court (e.g., probation fee, victim restitution, Sheriffs' Retirement Fund, etc.).

We found cost recovery models in other states that stress earlier contributions and less use of court orders.

- *Washington* – All persons determined to be indigent and able to contribute are required to execute a promissory note at the time counsel is appointed. The defendant can either pay in a lump sum or arrange a payment plan. Defendants pay a standard fee depending on the type of case.
- *Wisconsin* – In adult cases, the State Public Defender assesses attorney fees to recover a portion of the cost of legal representation. The fees are set by administrative rule and are based on the average length and complexity of the case type (e.g., homicide, probation revocation, etc.). For each case type, there is a maximum amount and a lower prepayment amount. At the beginning of the case, the clients are told the applicable amounts and given 60 days to pay the prepayment amount. If not paid within that timeframe, a higher amount is required. For example, a misdemeanor has a prepayment amount of \$60 versus a full payment amount of \$240.

Georgia's cost recovery model includes both application fees and court-ordered recoupment of attorney's fees. However, since application fees are frequently not paid at the case's outset, cost recovery is often dependent on the court ordering payment. Since state law permits judges to assess payment of application fees and recoupment of attorney fees only as a condition of probation, cost recovery was not possible in approximately 40% of cases reviewed (272 of 710 cases were ineligible for application fee orders and 301 were ineligible for recoupment of attorney fees).

RECOMMENDATIONS

1. The General Assembly should consider amending state law to allow public defenders to use designated presumptive eligibility criteria in order to streamline the defendant screening process. The law should provide those individuals screening defendants for services with the ability to verify needs-based benefits with the Division of Family and Children Services.
2. The GPDSC should consider the benefit of identifying which defendants, within the current law and federal poverty level, are likely to be able to contribute to their defense. This would require an update to current guidance, including the model application.
3. In circuits with judges that practice cost recovery, screeners should indicate on the applications if the defendant is able to contribute to his or her defense. This information should be made available to judges at the time of sentencing.

Appendix A

Objectives, Scope, and Methodology

This review of indigent defense specifically focused on indigent determination and cost recovery systems established at the judicial circuit level. The three primary objectives of this audit were to: (1) determine whether there is appropriate state guidance and oversight of indigent defense screening and verification; (2) evaluate the screening and verification processes across circuits and determine the impact of inconsistent or inadequate practices; and (3) evaluate cost recovery practices across the circuits. It did not address conflict cases or the adequacy of legal defense services.

To achieve these audit objectives, the audit team reviewed the activities of nine judicial circuits. The selection of circuits was based on county poverty rates, population, geographic location, and participation in the statewide public defender system (i.e. opt-in or opt-out). The following circuits were reviewed: Bell-Forsyth (opt-out), Cobb (opt-out), Enotah, Flint, Gwinnett (opt-out), Houston (opt-out), Rockdale, Southern, and Waycross.¹⁰

To determine the level of state guidance and oversight: The audit team reviewed GPDSC standards and policies and procedures to determine the level of guidance available to circuits. We also reviewed guidelines created by the Indigent Verification Committee to identify the level of guidance provided to circuits seeking approval of their indigent verification systems. Finally, we interviewed GPDSC and circuit staff to determine the effectiveness of direction provided by the GPDSC.

To determine the consistency and adequacy of indigent screening and verification processes: We interviewed personnel responsible for indigent screening in each of the nine circuits reviewed, other individuals in the public defenders' offices, as well as a Superior Court judge in most circuits. We obtained written policies when available.

Our assessment was also based on results of a file review. We obtained from JCATS (the state's public defender information system) a list of 3,436 Superior Court cases¹¹ closed by the nine public defender offices during the 2nd quarter of fiscal year 2010. From this list, we selected a non-statistical random sample of 711 (21%) cases. During our site visits to each office, we reviewed and/or obtained copies of defendants' application files to determine if information obtained during screening was sufficient to make decisions regarding eligibility and if eligibility determinations were consistent with state law and GPDSC policy. We also used the information obtained during this review to identify inconsistent practices within individual offices and across the circuits. Due to the record keeping practices in some circuits, we were unable to conduct a systematic review of denied applications to determine the rate at which applications were approved or denied.

To assess eligibility decisions, we developed a decision model based on key criteria contained in state law and GSDSC policies. Using information from each defendant's

¹⁰ The principal cities in these circuits respectively are Cumming, Marietta, Dahlonega, McDonough, Lawrenceville, Perry, Conyers, Valdosta, and Waycross.

¹¹ Superior Court cases were chosen because it has jurisdiction over both felony and misdemeanor cases.

file, we considered the following:

- **Defendant Charge** – We determined whether the defendant was charged with a felony, misdemeanor, or a violation of probation.
- **Household Size** – We considered a defendant's spouse and any dependents living in the home. A defendant who was 17 or older, with no spouse or children in the home, and living with parents was considered a household of one. Those not considered in the household size calculation included the following: spouse or children living in a different home; live-in girlfriends/boyfriends and their children; and roommates.
- **Income/Assets** – We considered all income (other than food stamps) and assets reported by the defendant. If the defendant reported being married, we considered spousal income/assets if the spouse lived in the same home and was not a victim of the defendant's crime. We did not consider parental income for any defendant 17 or older.

Using the information contained in the file, we compared the defendant's income to the federal poverty guideline for the year the defendant was screened (e.g., if a defendant was screened by the circuit in 2008, we compared income to the 2008 federal poverty guideline). Based on our assessment, we categorized eligibility decisions into one of three categories: (1) *Consistent with State Law*, (2) *Inconsistent with State Law*, and (3) *Unknown*. The *Unknown* category generally consists of cases in which (1) key information to make a determination (e.g., defendant's income, employed spouse's income) was not included in the application, or (2) the application contained clearly questionable information (e.g., defendant reported supporting multiple dependents but reported no income; defendant reported expenses greatly exceeding income).

We interviewed screening personnel regarding each circuit's verification practices and reviewed defendant application files for evidence that verification was conducted. During these file reviews we looked for items such as pay stubs, letters from employers, or notations by screening personnel that such items were obtained (even if not retained).

The audit team sought to obtain an understanding of internal controls relevant to the audit's objectives. We focused on the controls intended to ensure that only indigent defendants received public defender services. The results of our internal control review are throughout the relevant findings in this report.

To evaluate cost recovery practices across the circuits: To identify which of our selected cases were ordered to pay indigent defense application or attorney fees, we obtained copies of sentencing records from the public defender office or the Superior Court clerk's office in each circuit.

In addition, we reviewed legislation and judicial decisions regarding indigent determination and cost recovery; conducted in-depth interviews with GPDSC staff, circuit public defenders, and Superior Court judges. We also reviewed other states' practices to identify alternate methods of indigent determination and cost recovery.

This performance audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on the audit objectives.

Appendix B

Circuit Application for Public Defender

IN THE SUPERIOR COURT OF _____ COUNTY	
STATE OF GEORGIA	
State of Georgia) Warrant/Case No. _____
vs.) Charges: _____
_____) _____

APPLICATION FOR PUBLIC DEFENDER SERVICE AND CERTIFICATE OF FINANCIAL RESOURCES

I am the defendant in the above-styled action. I am charged with the offense(s) described above. I have been informed that I have the right to an attorney to represent me in the above-styled action. I understand that if I cannot afford an attorney, one will be appointed for me. My decision is:

_____ I DO NOT wish to have an attorney appointed for me.

_____ I PLAN TO hire my own attorney.

_____ I PLAN TO represent myself.

_____ **I DO wish for an attorney to be appointed for me**, and submit the following as an indication of my inability to pay an attorney. I cannot afford to hire a lawyer to assist me. I request that I be provided with a lawyer. I understand that I am providing this information in this declaration in order for a determination to be made as to my eligibility for an appointed lawyer or public defender, paid by public funds, to defend me on the offense(s) described above.

BELOW PLEASE ANSWER EACH AND EVERY QUESTION COMPLETELY:

1. Check One: _____ I am out on bond _____ I am in jail _____ I was arrested on _____ Time of arrest _____ am/pm

2. **PERSONAL INFORMATION:**

My full name is _____ My telephone number is _____

My mailing address is _____ City _____ State _____ Zip _____

Alternate telephone number _____ Contact Person: _____

My date of birth is _____ . My age is _____ . My Social Security Number is _____

Check one: _____ I DO reside with my parents/legal guardian. _____ I DO NOT reside with my parents/legal guardian.

The highest grade of school I completed is _____.

3. **EMPLOYMENT:**

Are you employed? YES NO (circle one). If employed answer (a). If not employed answer (b).

(a) **IF EMPLOYED:** My employer is _____

My employer's mailing address is _____

My net take home pay is (gross pay minus taxes): \$ _____ weekly _____ monthly _____ yearly _____

(b) **IF NOT EMPLOYED:** (Please answer questions (1) and (2) below completely:

(1) I have been unemployed for _____ weeks _____ months _____ years

(2) Source of Income:

I receive \$ _____ as unemployment compensation, welfare or disability, paid weekly _____ monthly _____

I was last employed by _____ on _____

Mailing address is _____ Job Title: _____

I earned a net take home pay (gross pay minus taxes) of \$ _____ weekly bi-weekly monthly _____

NOTE: I hereby authorize my employer, former employer, or benefit provider to release and furnish verification of my earnings or benefit payments to the court and or public defender's office.

4. **MARITAL STATUS:**

I AM NOT married I AM married Reside with Friend/Partner

My Spouse/Friend/Partner's full name is _____

Is Spouse/Friend/Partner employed? YES NO

IF Spouse/Friend/Partner IS EMPLOYED: My Spouse/Friend/Partner's employer is _____

My Spouse/Friend/Partner's employer mailing address is _____

His/her net take home pay is (gross pay minus taxes): \$ _____ weekly bi-weekly monthly _____

IF Spouse/Friend/Partner IS NOT EMPLOYED

(a) My Spouse/Friend/Partner has been unemployed for _____ weeks _____ months _____ years

(b) He/she receives \$ _____ as unemployment compensation, welfare or disability income paid weekly monthly He/she was last employed by _____ on _____

Mailing address is _____ Job Title: _____

His/her net take home pay (gross pay minus taxes) of \$ _____ weekly bi-weekly monthly _____

Page (1) of 2

Appendix B Continued

5. I am responsible for the support of _____ child(ren) under the age of 18 **living in my home**. The age(s) of my child(ren) is/are: _____, _____, _____, _____, _____.

Me/my Spouse/Friend/Partner pay \$ _____ each week/month for child daycare while we work.

6. The following people are my dependents (other than spouse/friend/partner or children) who live in my home:

Name	Relationship	Amount Contributed to Their Support
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. List child support payable under **Court Order** \$ _____ for child(ren) **NOT** living in my home.
List child support received under **Court Order** for any dependent living in your household \$ _____ each week/month (circle one).

8. Do you own a motor vehicle? YES NO If yes, how much do you owe on it? _____
What is the year _____ and model _____

9. Do you own a home? YES NO If yes, what is the value: \$ _____
Is your home mortgaged? YES NO How much do you owe on it? \$ _____
What is the amount of your **house payment** \$ _____ or **rent** each month \$ _____

10. List checking or savings accounts or other deposits with any bank or financial institution and the current balance(s):

11. List other assets or property, including real estate, jewelry, promissory notes, bonds or stocks, their value, and the amount of any loan against them: _____

12. List indebtedness and amount of payments: _____

13. List extraordinary living expenses and amount (such as regularly occurring medical expenses): _____

14. **Do you understand that whether you are convicted or acquitted, the County may seek reimbursement from you for attorney representation provided to you through Georgia Public Defender Standards Counsel. You may be required to pay the county all or part of the cost it incurs in providing an attorney to represent you? YES NO**

15. I have read (had read to me) the above questions and answers and they are true and correct. YES NO

16. **By signing below the applicant acknowledges that he/she may be ordered to reimburse attorney fees.**

The undersigned swears that the information given herein is true and correct and understands that a false answer to any item may result in a charge of false swearing punishable by fine of not more than \$1,000.00 or by imprisonment for not less than one or more than five years, or both.

This the _____ day of _____, 20 ____.

Defendant's Signature

SWORN TO and SUBSCRIBED before me

This _____ day of _____, 20 ____.

Notary Public

My commission expires: _____

(SEAL)

For additional information or for copies of this report call 404-657-5220 or see our website:
<http://www.audits.ga.gov/rsaAudits>