

SB 94 \*\* VETO \*\*

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# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1996



# ENROLLED

SENATE BILL NO. 94

(By Senator WOOTON, ET AL)



PASSED MARCH 9, 1996  
In Effect FROM Passage

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OFFICE OF THE CLERK  
SENATE OF WEST VIRGINIA

## ENROLLED

### Senate Bill No. 94

(BY SENATORS WOOTON, ANDERSON, BOWMAN,  
DITTMAR, GRUBB, OLIVERIO, ROSS, SCHOONOVER,  
WAGNER, BUCKALEW AND SCOTT)

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[Passed March 9, 1996; in effect from passage.]

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AN ACT to amend and reenact sections two, six, eight, nine, thirteen-a and fifteen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to public defender services generally; adding enhanced sentencing proceedings, forfeiture proceedings and certain guardians as eligible proceedings; excluding part-time employees from certain benefits unless authorized and funded; allowing public defender organizations to file periodic reports; specifying transcript costs; providing that the three thousand dollar cap may be exceeded by court order and upon good cause shown; removing the requirement that one public defender serve two certain circuits; eliminating requirement that panel attorneys file preference statement; specifying and

limiting hourly rate for paralegal services; removing allowance for travel expense reimbursements above certain limits for attorneys appointed to cases outside the attorney's circuit; limiting reimbursement for certain transcripts and court reporter expenses; establishing an hourly rate for reimbursement for investigators; specifying that claims submitted more than four years after the last date of service shall be rejected; designating an extraordinary writ as a separate case; and providing for the correction of vouchers.

*Be it enacted by the Legislature of West Virginia:*

That sections two, six, eight, nine, thirteen-a, fifteen and seventeen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 21. PUBLIC DEFENDER SERVICES.**

**§29-21-2. Definitions.**

1 As used in this article, the following words and phrases  
2 are hereby defined:

3 (1) "Eligible client": Any person who meets the  
4 requirements established by this article to receive  
5 publicly funded legal representation in an eligible  
6 proceeding as defined herein;

7 (2) "Eligible proceeding": Criminal charges which may  
8 result in incarceration; juvenile proceedings; proceedings  
9 to revoke parole or probation if the revocation may  
10 result in incarceration; contempt of court; child abuse  
11 and neglect proceedings which may result in a termina-  
12 tion of parental rights; mental hygiene commitment  
13 proceedings; extradition proceedings; proceedings which  
14 are ancillary to an eligible proceeding, including, but not  
15 limited to, proceedings to enhance sentences brought  
16 pursuant to sections eighteen and nineteen, article  
17 eleven, chapter sixty-one of this code, forfeiture pro-  
18 ceedings brought pursuant to article seven, chapter  
19 sixty-a of this code, and proceedings brought to obtain

20 extraordinary remedies; and appeals from or post-  
21 conviction challenges to the final judgment in an eligible  
22 proceeding. Legal representation provided pursuant to  
23 the provisions of this article is limited to the court  
24 system of the state of West Virginia, but does not include  
25 representation in municipal courts unless the accused is  
26 at risk of incarceration;

27 (3) "Legal representation": The provision of any legal  
28 services or legal assistance as counsel or guardian ad  
29 litem consistent with the purposes and provisions of this  
30 article;

31 (4) "Private practice of law": The provision of legal  
32 representation by a public defender or assistant public  
33 defender to a client who is not entitled to receive legal  
34 representation under the provisions of this article, but  
35 does not include, among other activities, teaching;

36 (5) "Public defender": The staff attorney employed on  
37 a full-time basis by a public defender corporation who,  
38 in addition to providing direct representation to eligible  
39 clients, has administrative responsibility for the opera-  
40 tion of the public defender corporation. The public  
41 defender may be a part-time employee if the board of  
42 directors of the public defender corporation finds  
43 efficient operation of the corporation does not require a  
44 full-time attorney and the executive director approves  
45 such part-time employment;

46 (6) "Assistant public defender": A staff attorney  
47 providing direct representation to eligible clients whose  
48 salary and status as a full-time or part-time employee  
49 are fixed by the board of directors of the public defender  
50 corporation;

51 (7) "Public defender corporation": A corporation  
52 created under section eight of this article for the sole  
53 purpose of providing legal representation to eligible  
54 clients; and

55 (8) "Public defender office": An office operated by a  
56 public defender corporation to provide legal representa-

57 tion under the provisions of this article.

**§29-21-6. Powers, duties and limitations.**

1 (a) Consistent with the provisions of this article, the  
2 agency is authorized to make grants to and contracts  
3 with public defender corporations and with individuals,  
4 partnerships, firms, corporations and nonprofit organi-  
5 zations, for the purpose of providing legal representation  
6 under this article, and may make such other grants and  
7 contracts as are necessary to carry out the purposes and  
8 provisions of this article.

9 (b) The agency is authorized to accept, and employ or  
10 dispose of in furtherance of the purposes of this article,  
11 any money or property, real, personal or mixed, tangible  
12 or intangible, received by gift, devise, bequest or other-  
13 wise.

14 (c) The agency shall establish and the executive  
15 director or his designate shall operate a criminal law  
16 research center as provided for in section seven of this  
17 article. This center shall undertake directly, or by grant  
18 or contract, to serve as a clearinghouse for information;  
19 to provide training and technical assistance relating to  
20 the delivery of legal representation; and to engage in  
21 research, except that broad general legal or policy  
22 research unrelated to direct representation of eligible  
23 clients may not be undertaken.

24 (d) The agency shall establish and the executive  
25 director or his designate shall operate an accounting and  
26 auditing division to require and monitor the compliance  
27 with this article by public defender corporations and  
28 other persons or entities receiving funding or compensa-  
29 tion from the agency. This division shall review all plans  
30 and proposals for grants and contracts, and shall make  
31 a recommendation of approval or disapproval to the  
32 executive director. The division shall prepare, or cause  
33 to be prepared, reports concerning the evaluation,  
34 inspection or monitoring of public defender corporations  
35 and other grantees, contractors, persons or entities

36 receiving financial assistance under this article, and  
37 shall further carry out the agency's responsibilities for  
38 records and reports as set forth in section eighteen of  
39 this article.

40 The accounting and auditing division shall require  
41 each public defender corporation to periodically report  
42 on the billable and nonbillable time of its professional  
43 employees, including time utilized in administration of  
44 the respective offices, so as to compare such time to  
45 similar time expended in nonpublic law offices for like  
46 activities.

47 The accounting and auditing division shall provide to  
48 the executive director assistance in the fiscal adminis-  
49 tration of all of the agency's divisions. Such assistance  
50 shall include, but not be limited to, budget preparation  
51 and statistical analysis.

52 (e) The agency shall establish and the executive  
53 director or a person designated by the executive director  
54 shall operate an appellate advocacy division for the  
55 purpose of prosecuting litigation on behalf of eligible  
56 clients in the supreme court of appeals. The executive  
57 director or a person designated by the executive director  
58 shall be the director of the appellate advocacy division.  
59 The appellate advocacy division shall represent eligible  
60 clients upon appointment by the circuit courts, or by the  
61 supreme court of appeals. The division may, however,  
62 refuse such appointments due to a conflict of interest or  
63 if the executive director has determined the existing  
64 caseload cannot be increased without jeopardizing the  
65 appellate division's ability to provide effective represen-  
66 tation. In order to effectively and efficiently utilize the  
67 resources of the appellate division the executive director  
68 may restrict the provision of appellate representation to  
69 certain types of cases.

70 The executive director is empowered to select and  
71 employ staff attorneys to perform the duties prescribed  
72 by this subsection. The division shall maintain vouchers  
73 and records for representation of eligible clients for

74 record purposes only.

**§29-21-8. Public defender corporations.**

1 (a) In each judicial circuit of the state, there is hereby  
2 created a "public defender corporation" of the circuit.  
3 The purpose of these public defender corporations is to  
4 provide legal representation in the respective circuits in  
5 accordance with the provisions of this article.

6 (b) If the judge of a single judge circuit, the chief judge  
7 of a multijudge circuit or a majority of the active mem-  
8 bers of the bar in the circuit determine there is a need to  
9 activate the corporation, they shall certify that fact in  
10 writing to the executive director. The executive director  
11 shall allocate funds to those corporations so certifying in  
12 the order in which he or she deems most efficient and  
13 cost effective.

14 (c) Public defender corporations may apply in writing  
15 to the executive director for permission to merge to form  
16 multicircuit or regional public defender corporations.  
17 Applications for mergers shall be subject to the review  
18 procedures set forth in section eleven of this article.

**§29-21-9. Panel attorneys.**

1 (a) In each circuit of the state, the circuit court shall  
2 establish and maintain regional and local panels of  
3 private attorneys-at-law who shall be available to serve  
4 as counsel for eligible clients.

5 An attorney-at-law may become a panel attorney and  
6 be enrolled on the regional or local panel, or both, to  
7 serve as counsel for eligible clients, by informing the  
8 court. An agreement to accept cases generally or certain  
9 types of cases particularly shall not prevent a panel  
10 attorney from declining an appointment in a specific  
11 case.

12 (b) In all cases where an attorney-at-law is required to  
13 be appointed for an eligible client, the appointment shall  
14 be made by the circuit judge. In circuits where a public  
15 defender office is in operation, the judge shall appoint

16 the public defender office unless such appointment is not  
17 appropriate due to a conflict of interest or unless the  
18 public defender corporation board of directors or the  
19 public defender, with the approval of the board, has  
20 notified the court that the existing caseload cannot be  
21 increased without jeopardizing the ability of defenders  
22 to provide effective representation.

23 If the public defender office is not available for ap-  
24 pointment, the court shall appoint one or more panel  
25 attorneys from the local panel. If there is no local panel  
26 attorney available, the judge shall appoint one or more  
27 panel attorneys from the regional panel. If there is no  
28 regional panel attorney available, the judge may appoint  
29 a public defender office from an adjoining circuit if such  
30 public defender office agrees to the appointment.

31 In circuits where no public defender office is in opera-  
32 tion, the judge shall first refer to the local panel and then  
33 to the regional panel in making appointments, and if an  
34 appointment cannot be made from the panel attorneys,  
35 the judge may appoint the public defender office of an  
36 adjoining circuit if the office agrees to the appointment.  
37 In any circuit, when there is no public defender, or  
38 assistant public defender, local panel attorney or re-  
39 gional panel attorney available, the judge may appoint  
40 one or more qualified private attorneys to provide  
41 representation, and such private attorney or attorneys  
42 shall be treated as panel attorneys for that specific case.  
43 In any given case, the appointing judge may alter the  
44 order in which attorneys are appointed if the case  
45 requires particular knowledge or experience on the part  
46 of the attorney to be appointed.

**§29-21-13a. Compensation and expenses for panel attorneys.**

1 (a) All panel attorneys shall maintain detailed and  
2 accurate records of the time expended and expenses  
3 incurred on behalf of eligible clients, and upon comple-  
4 tion of each case, exclusive of appeal, shall submit to the  
5 appointing court a voucher for services. Claims for fees  
6 and expense reimbursements shall be submitted to the

7 appointing court on forms approved by the executive  
8 director. Claims submitted more than four years after  
9 the last date of service shall be rejected.

10 The appointing court shall review the voucher to  
11 determine if the time and expense claims are reasonable,  
12 necessary and valid, and shall forward the voucher to the  
13 agency with an order approving payment of the claimed  
14 amount or of such lesser sum the court considers appro-  
15 priate.

16 (b) Notwithstanding any other provision of this section  
17 to the contrary, public defender services may pay by  
18 direct bill, prior to the completion of the case, litigation  
19 expenses incurred by attorneys appointed under this  
20 article.

21 (c) Notwithstanding any other provision of this section  
22 to the contrary, a panel attorney may be compensated for  
23 services rendered and reimbursed for expenses incurred  
24 prior to the completion of the case where: (1) More than  
25 six months have expired since the commencement of the  
26 panel attorney's representation in the case; and (2) no  
27 prior payment of attorney fees has been made to the  
28 panel attorney by public defender services during the  
29 case. The amounts of any fees or expenses paid to the  
30 panel attorney on such an interim basis, when combined  
31 with any such amounts paid to the panel attorney at the  
32 conclusion of the case, shall not exceed the limitations  
33 on fees and expenses imposed by this section.

34 (d) In each case in which a panel attorney provides  
35 legal representation under this article, and in each  
36 appeal after conviction in circuit court, the panel attor-  
37 ney shall be compensated at the following rates for  
38 actual and necessary time expended for services per-  
39 formed and expenses incurred subsequent to the effec-  
40 tive date of this article:

41 (1) For attorney's work performed out of court, com-  
42 pensation shall be at the rate of forty-five dollars per  
43 hour. For paralegal's work performed out of court for

44 the attorney, compensation shall be at the rate of the  
45 paralegal's regular compensation on an hourly basis or,  
46 if salaried, at the hourly rate of compensation which  
47 would produce the paralegal's current salary, but in no  
48 event shall the compensation exceed twenty dollars per  
49 hour. Out-of-court work includes, but is not limited to,  
50 travel, interviews of clients or witnesses, preparation of  
51 pleadings and prehearing or pretrial research.

52 (2) For attorney's work performed in court, compensa-  
53 tion shall be at the rate of sixty-five dollars per hour. No  
54 compensation for paralegal's work performed in court  
55 shall be allowed. In-court work includes, but is not  
56 limited to, all time spent awaiting hearing or trial if the  
57 presence of the attorney is required.

58 (3) The maximum amount of compensation for out-of-  
59 court and in-court work under this subsection is as  
60 follows: For proceedings of any kind involving felonies  
61 for which a penalty of life imprisonment may be im-  
62 posed, such amount as the court may approve; for all  
63 other eligible proceedings, three thousand dollars unless  
64 the court, for good cause shown, approves payment of a  
65 larger sum.

66 (e) Actual and necessary expenses incurred in provid-  
67 ing legal representation for proceedings of any kind  
68 involving felonies for which a penalty of life imprison-  
69 ment may be imposed, including, but not limited to,  
70 expenses for travel, transcripts, salaried or contracted  
71 investigative services and expert witnesses, shall be  
72 reimbursed in such amount as the court may approve.  
73 For all other eligible proceedings, actual and necessary  
74 expenses incurred in providing legal representation,  
75 including, but not limited to, expenses for travel, tran-  
76 scripts, salaried or contracted investigative services and  
77 expert witnesses, shall be reimbursed to a maximum of  
78 fifteen hundred dollars unless the court, for good cause  
79 shown, approves reimbursement of a larger sum.

80 Expense vouchers shall specifically set forth the  
81 nature, amount and purpose of expenses incurred and

82 shall provide such receipts, invoices or other documenta-  
83 tion required by the executive director and the state  
84 auditor:

85 (1) (A) Reimbursement of expenses for production of  
86 transcripts of proceedings reported by a court reporter  
87 is limited to the cost per original page set forth in section  
88 four, article seven, chapter fifty-one of this code.  
89 Reimbursement of the cost of copies of such transcripts  
90 is limited to twenty-five cents per page.

91 (B) (i) There shall be no reimbursement of expenses for  
92 or production of a transcript of a preliminary hearing  
93 before a magistrate or juvenile referee, or of a magistrate  
94 court jury trial, which has been reported by a court  
95 reporter at the request of the attorney, where the prelim-  
96 inary hearing or jury trial has also been recorded elec-  
97 tronically in accordance with the provisions of section  
98 eight, article five, chapter fifty of this code or court rule.

99 (ii) Reimbursement of the expense of an appearance fee  
100 for a court reporter who reports a proceeding other than  
101 one described in subparagraph (i) of this paragraph, or  
102 who reports a proceeding which is not reported by an  
103 official court reporter acting in his or her official capac-  
104 ity for the court, is limited to twenty-five dollars. Where  
105 a transcript of such proceeding is produced, there shall  
106 be no reimbursement for the expense of any appearance  
107 fee. Where a transcript is requested by the attorney  
108 after an appearance fee has been paid, reimbursement of  
109 the expense incurred to obtain the transcript is limited  
110 to the cost of producing the transcript, within the  
111 prescribed limitations of paragraph (A) of this subdivi-  
112 sion, less the amount of the paid appearance fee.

113 (iii) Reimbursement of travel expenses incurred for  
114 travel by a court reporter is subject to the limitations  
115 provided by subdivision (2) of this subsection.

116 (iv) Except for the appearance fees provided in this  
117 paragraph, there shall be no reimbursement for hourly  
118 court reporters' fees or fees for other time expended by

119 the court reporter, either at the proceeding or traveling  
120 to or from the proceeding.

121 (C) Reimbursement of the cost of transcription of tapes  
122 electronically recorded during preliminary hearings or  
123 magistrate court jury trials is limited to the rates estab-  
124 lished by the supreme court of appeals for the reim-  
125 bursement of transcriptions of electronically recorded  
126 hearings and trial.

127 (2) Reimbursement for any travel expense incurred in  
128 an eligible proceeding is limited to the rates for the  
129 reimbursement of travel expenses established by rules  
130 promulgated by the governor pursuant to the provisions  
131 of section eleven, article eight, chapter twelve of this  
132 code and administered by the secretary of the depart-  
133 ment of administration pursuant to the provisions of  
134 section forty-eight, article three, chapter five-a of this  
135 code.

136 (3) Reimbursement for investigative services is limited  
137 to a rate of thirty dollars per hour for work performed by  
138 an investigator.

139 (f) For purposes of compensation under this section, an  
140 appeal from a final order of the circuit court, or proceed-  
141 ing seeking an extraordinary remedy, made to the  
142 supreme court of appeals, shall be considered a separate  
143 case.

144 (g) Vouchers submitted under this section shall specifi-  
145 cally set forth the nature of the service rendered, the  
146 stage of proceeding or type of hearing involved, the date  
147 and place the service was rendered and the amount of  
148 time expended in each instance. All time claimed on the  
149 vouchers shall be itemized to the nearest tenth of an  
150 hour. If the charge against the eligible client for which  
151 services were rendered is one of several charges involv-  
152 ing multiple warrants or indictments, the voucher shall  
153 indicate such fact and sufficiently identify the several  
154 charges so as to enable the court to avoid a duplication  
155 of compensation for services rendered. The executive

156 director shall refuse to requisition payment for any  
157 voucher which is not in conformity with the record-  
158 keeping, compensation or other provisions of this article  
159 and in such circumstance shall return the voucher to the  
160 court or to the service provider for further review or  
161 correction.

**§29-21-15. Public defender corporations — Board of directors.**

1 (a) The governing body of each public defender corpo-  
2 ration shall be a board of directors consisting of persons  
3 who are residents of the area to be served by the public  
4 defender corporation:

5 (1) In multi-county circuits, and in the case of multi-  
6 circuit or regional corporations, the county commission  
7 of each county within the area served shall appoint a  
8 director, who shall not be an attorney-at-law. The  
9 president of each county bar association within the area  
10 served shall appoint a director, who shall be an attorney-  
11 at-law: *Provided*, That in a county where there is not an  
12 organized and active bar association, the circuit court  
13 shall convene a meeting of the members of the bar of the  
14 court resident within the county and such members of  
15 the bar shall elect one of their number as a director. The  
16 governor shall appoint one director, who shall serve as  
17 chairman, who may be an attorney-at-law, unless such  
18 appointment would result in there being an even number  
19 of directors, in which event the governor shall appoint  
20 two directors, one of whom may be an attorney-at-law.  
21 The governor's appointees shall serve four-year terms  
22 which terms shall coincide with the term of the governor.  
23 Appointments may be made for unexpired terms as may  
24 be necessary. Other board members' terms shall be as  
25 determined by the board;

26 (2) In single-county circuits, the manner of selecting  
27 directors shall be the same as that described in subdivi-  
28 sion (1) of this subsection, except that the county com-  
29 mission shall appoint two directors rather than one, and  
30 the bar shall appoint two directors rather than one.

31 (b) The board of directors shall have at least four  
32 meetings a year. Timely and effective prior public notice  
33 of all meetings shall be given pursuant to rules promul-  
34 gated in accordance with the provisions of section three,  
35 article nine-a, chapter six of this code, and all meetings  
36 shall be public except for those concerned with matters  
37 properly discussed in executive session.

38 (c) The board of directors shall establish and enforce  
39 broad policies governing the operation of the public  
40 defender corporation but shall not interfere with any  
41 attorney's professional responsibilities to clients. The  
42 duties of the board of directors shall include, but not be  
43 limited to, the following:

44 (1) Appointment of the public defender and any  
45 assistant public defenders as may be necessary to enable  
46 the public defender corporation to provide legal repre-  
47 sentation to eligible clients; and

48 (2) Approval of the public defender corporation's  
49 budget and the fixing of professional and clerical  
50 salaries: *Provided*, That the compensation paid to any  
51 part-time public defender, part-time assistant public  
52 defender or other part-time employee shall not include  
53 benefits such as retirement, health insurance or paid  
54 leave time for illness or vacation unless public defender  
55 services has certified in writing to the board of directors  
56 that there exists sufficient funding to provide such  
57 benefits and the board of directors authorizes such  
58 benefits to be included in the compensation; and

59 (3) Removal of any public defender, assistant public  
60 defender or other employee for misfeasance, malfeasance  
61 or nonfeasance.

62 (d) To the extent that the provisions of chapter thirty-  
63 one of this code regarding nonprofit corporations are not  
64 inconsistent with this article, the provisions of said  
65 chapter shall be applicable to the board of directors of  
66 the public defender corporation.

67 (e) While serving on the board of directors, no member

68 may receive compensation from the public defender  
69 corporation, but a member may receive payment for  
70 normal travel and other out-of-pocket expenses required  
71 for fulfillment of the obligations of membership and may  
72 accept appointments to represent eligible clients so long  
73 as he or she does not discuss a particular case with any  
74 public defender, assistant public defender or other  
75 employee of the office governed by the board. Directors  
76 may not serve as co-counsel with the public defender or  
77 assistant public defender in any matter.

**§29-21-17. Private practice of law by public defenders.**

1 (a) No full-time public defender or full-time assistant  
2 public defender may engage in any private practice of  
3 law except as provided in this section.

4 (b) A board of directors may permit a newly employed  
5 full-time public defender or full-time assistant public  
6 defender to engage in the private practice of law for  
7 compensation for the sole purpose of expeditiously  
8 closing and withdrawing from existing private cases  
9 from a prior private practice. In no event shall any  
10 person employed for more than ninety days as a full-time  
11 public defender or full-time assistant public defender be  
12 engaged in any other private practice of law for compen-  
13 sation: *Provided*, That until the first day of January, one  
14 thousand nine hundred ninety-three, the prohibition  
15 against the private practice of law does not apply to  
16 full-time public defenders employed in Class II, III or IV  
17 counties as defined by article seven, chapter seven of this  
18 code.

19 (c) A board of directors may permit a full-time public  
20 defender or full-time assistant public defender to engage  
21 in private practice for compensation if the defender is  
22 acting pursuant to an appointment made under a court  
23 rule or practice of equal applicability to all attorneys in  
24 the jurisdiction and if the defender remits to the public  
25 defender corporation all compensation received.

26 (d) A board of directors may permit a full-time public

27 defender or full-time assistant public defender to engage  
28 in uncompensated private practice of law if the public  
29 defender or assistant public defender is acting:

30 (1) Pursuant to an appointment made under a court  
31 rule or practice of equal applicability to all attorneys in  
32 the jurisdiction; or

33 (2) On behalf of a close friend or family member; or

34 (3) On behalf of a religious, community or charitable  
35 group.

36 (e) Violation of the requirements of this section is  
37 sufficient grounds for immediate summary dismissal  
38 regardless of the conditions of employment established  
39 by a corporation's board of directors.

*[Faint handwritten signature]*

*[Handwritten initials: HPI, MAM]*  
*[Handwritten signature]*

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

*Candy Koenig*  
.....  
Chairman Senate Committee

*Rudy Leavitt*  
.....  
Chairman House Committee

Originated in the Senate.

In effect from passage.

*Darrell B. Gibbs*  
.....  
Clerk of the Senate

*Bryson D. Hunt*  
.....  
Clerk of the House of Delegates

*Earl Ray Tomblin*  
.....  
President of the Senate

*Calvin P. Johnson*  
.....  
Speaker House of Delegates

The within is disapproved this the 14th  
day of March, 1996.

*Yastin Capel*  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

Date 3/13/96

Time 4:55pm