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SENATE BILL NO. 1227

Offered January 8, 2025

Prefiled January 8, 2025

A BILL to amend and reenact §§ 19.2-158 and 19.2-159 of the Code of Virginia, relating to court appearance of a person not free on bail.

Patrons—Aird and Stanley

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That §§ 19.2-158 and 19.2-159 of the Code of Virginia are amended and reenacted as follows:****§ 19.2-158. When person not free on bail shall be informed of right to counsel and amount of bail.**

A. As used in this section, "bail information" means (i) the magistrate's bail determination checklist prepared pursuant to subsection B of § 19.2-121, (ii) any risk assessment instrument or interview results prepared pursuant to § 19.2-152.4:3, and (iii) any other information in possession of the court or the Commonwealth relevant to the factors listed in § 19.2-120.

B. Every person charged with an offense described in § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record, unless the circuit court issues process commanding the presence of the person, in which case the person shall be brought before the circuit court, on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of his bail and his right to counsel detained. If the court not of record sits on a day prior to the scheduled sitting of the court which that issued process, the person shall be brought before the court not of record. The judges of any judicial circuit, including the judges of the districts contained in that circuit, may designate a judge of any court to conduct a hearing pursuant to this section for any person detained and required to appear before any court in that circuit.

C. Prior to a hearing conducted pursuant to this section, the court shall appoint a qualified and competent attorney-at-law to represent the person unless the accused has retained an attorney who appears on behalf of the accused or the accused has declined representation. The court shall presume the accused is indigent for the purposes of appointment of counsel for a hearing held pursuant to this section. All counsel shall be given access to the accused and the ability to review bail information a reasonable time prior to the start of any proceeding.

D. For a hearing conducted pursuant to this section:

1. The court shall advise the accused of (i) the nature of the charge or charges against him; (ii) his current bail; and (iii) his right to counsel;

2. Counsel for the accused shall be provided with adequate time and space in which counsel can confidentially consult with the accused, including private, secure electronic communications;

3. The court shall also hear and consider motions by the person or Commonwealth relating to may address the issue of bail or conditions of release pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title if requested by the accused or the Commonwealth. If such issue is addressed, either the accused or the Commonwealth may make a subsequent motion in the court in which the hearing was held or appeal any decision pursuant to § 19.2-124. Absent good cause shown, a hearing on bail or conditions of release shall be held as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.

The attorney for the Commonwealth may participate in any proceeding conducted pursuant to this section.

No hearing on the charges against the accused shall be had until the foregoing conditions have been complied with, and the accused shall be allowed a reasonable opportunity to employ counsel of his own choice, or, if appropriate, the statement of indigence provided for in § 19.2-159 may be executed.

E. The chief judge in each circuit shall create a plan, in writing, that establishes the means by which the jurisdiction will meet the provisions described in this section. The plan shall be completed by November 1, 2025, or at least 90 days before any change to an existing plan. In developing the plan, the chief judge may create a committee that may include an attorney for the Commonwealth or his designee, the public defender or his designee or a member of the defense bar if the jurisdiction is not served by a public defender, a magistrate from the judicial circuit, and a representative from (i) a local pretrial services agency; (ii) an adult detention center; (iii) a juvenile detention center; (iv) a circuit court clerk's office; (v) a general district court clerk's office; (vi) a juvenile and domestic relations district court clerk's office that is located within the judicial circuit; (vii) a judge from a circuit court, general district court, and juvenile and domestic relations district court located within the judicial circuit; and (viii) any other person the chief judge deems proper to

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include.

Such plan shall include (a) the method of selecting qualified attorneys to provide representation at the proceedings conducted pursuant to this section, including whether such representation will be provided by a public defender or private appointed counsel, or a combination thereof; (b) the manner in which the court will provide the counsel for the accused with adequate and confidential time and space to meet and prepare for the proceeding; (c) the time and place of proceedings to be conducted under this section; (d) a process to ensure that if an excessive number of proceedings should arise that such proceedings may be handled in a prompt manner; (e) a protocol to ensure that the public defender and other counsel for the accused receives adequate notice of the names of the persons appearing on the docket, access to those persons, and bail information; and (f) a protocol to ensure payment to an attorney appointed for the accused who is not a public defender.

Notwithstanding any other provision of law, the court may make payments to an appointed attorney at the same rate, \$90 per hour, and from the same funds as for court-appointed misdemeanor representation in accordance with § 19.2-163. If a judicial circuit elects to allow one appointed attorney to handle more than one appearance at a time, the court is authorized to make payments in accordance with this paragraph. However, if more than one charge for the accused is addressed during a proceeding, such appointed attorney shall be compensated at an hourly rate instead of for each charge.

All plans created in accordance with this subsection shall be made available to the public. A copy of such plan and any subsequent revisions shall also be sent to the Executive Director of the Virginia Indigent Defense Commission.

F. Except in jurisdictions having a public defender office established pursuant to § 19.2-163.04, the provisions of subsections C, D, and E are not required.

§ 19.2-159. Determination of indigency; guidelines; statement of indigence; appointment of counsel.

A. If the accused shall claim that he is indigent, and the charge against him is a criminal offense that may be punishable by confinement in the state correctional facility or jail, subject to the provisions of § 19.2-160, the court shall determine from oral examination of the accused or other competent evidence whether or not the accused is indigent within the contemplation of law pursuant to the guidelines set forth in this section.

B. In making its finding, the court shall determine whether or not the accused is a current recipient of a state or federally funded public assistance program for the indigent. If the accused is a current recipient of such a program and does not waive his right to counsel or retain counsel on his own behalf, he shall be presumed eligible for the appointment of counsel. This presumption shall be rebuttable where the court finds that a more thorough examination of the financial resources of the defendant is necessary. If the accused shall claim to be indigent and is not presumptively eligible under the provisions of this section, then a thorough examination of the financial resources of the accused shall be made with consideration given to the following:

1. The net income of the accused, which shall include his total salary and wages minus deductions required by law. The court also shall take into account income and amenities from other sources including but not limited to social security funds, union funds, veteran's benefits, other regular support from an absent family member, public or private employee pensions, dividends, interests, rents, estates, trusts, or gifts.

2. All assets of the accused which are convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing the ability of the accused to maintain home and employment. Assets shall include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit, and tax refunds. All personal property owned by the accused which is readily convertible into cash shall be considered, except property exempt from attachment. Any real estate owned by the accused shall be considered in terms of the amounts which could be raised by a loan on the property. For purposes of eligibility determination, the income, assets, and expenses of the spouse, if any, who is a member of the accused's household, shall be considered, unless the spouse was the victim of the offense or offenses allegedly committed by the accused.

3. Any exceptional expenses of the accused and his family which would, in all probability, prohibit him from being able to secure private counsel. Such items shall include but not be limited to costs for medical care, family support obligations, and child care payments.

The available funds of the accused shall be calculated as the sum of his total income and assets less the exceptional expenses as provided in the first paragraph of this subdivision 3. If the accused does not waive his right to counsel or retain counsel on his own behalf, counsel shall be appointed for the accused if his available funds are equal to or below 125 percent of the federal poverty income guidelines prescribed for the size of the household of the accused by the federal Department of Health and Human Services. The Supreme Court of Virginia shall be responsible for distributing to all courts the annual updates of the federal poverty income guidelines made by the Department.

If the available funds of the accused exceed 125 percent of the federal poverty income guidelines and the accused fails to employ counsel and does not waive his right to counsel, the court may, in exceptional circumstances, and where the ends of justice so require, appoint an attorney to represent the accused.

However, in making such appointments, the court shall state in writing its reasons for so doing. The written statement by the court shall be included in the permanent record of the case.

C. If the court determines that the accused is indigent as contemplated by law pursuant to the guidelines set forth in this section, the court shall provide the accused with a statement which shall contain the following:

"I have been advised this _____ day of _____, 20____, by the (name of court) court of my right to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel and I hereby request the court to appoint counsel for me."

(signature of accused)

The court shall also require the accused to complete a written financial statement to support the claim of indigency and to permit the court to determine whether or not the accused is indigent within the contemplation of law. The accused shall execute the said statements under oath, ~~and the~~. *Such written financial statement may be affirmed by a magistrate, notarized pretrial services officer, or notarized staff member of a state correctional facility or jail and forwarded to the court. The said court shall appoint competent counsel to represent the accused in the proceeding against him, including an appeal, if any, until relieved or replaced by other counsel.*

The executed statements by the accused and the order of appointment of counsel shall be filed with and become a part of the record of such proceeding.

All other instances in which the appointment of counsel is required for an indigent shall be made in accordance with the guidelines prescribed in this section.

D. Except in jurisdictions having a public defender, or unless (i) the public defender is unable to represent the defendant by reason of conflict of interest; (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice; or (iii) the public defender, with the concurrence of the executive director of the Virginia Indigent Defense Commission or his designee, determines that the current active caseload would preclude the public defender from providing adequate representation to new clients, counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose names are on the list maintained by the Virginia Indigent Defense Commission pursuant to § 19.2-163.01. If no attorney who is on the list maintained by the Virginia Indigent Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and experience. The court shall provide notice to the Commission of the appointment of the attorney.

2. That the provisions of this act shall become effective on January 1, 2026, except the provisions of subsection E of § 19.2-158 of the Code of Virginia, as amended by this act, which shall become effective in due course.