

SENATE BILL NO. 412
AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee for Courts of Justice
on _____)
(Patron Prior to Substitute—Senator Boysko)

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.

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, (iii) any available charging documents, and (iv) any other information in the court case file for the current charge 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 a judicial circuit and judges of the corresponding districts may coordinate with each other to ensure that a judge is available to conduct a hearing pursuant to this section for any person detained and required to appear before any court in that circuit.

C. The court shall also hear and consider motions by the person or Commonwealth relating to bail or conditions of release pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. If such issue is addressed, either the accused or the Commonwealth may make a subsequent motion to address the issue of bail or conditions of release in the court in which the charge is pending 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. Nothing in this subsection shall preclude either party from raising the issue of bail or conditions of release at a subsequent hearing based on a material change in circumstances or a violation of the terms and conditions previously set for the accused.

D. 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. In jurisdictions having a public defender office established pursuant to § 19.2-163.04, the following procedure shall also apply:

1. Prior to a hearing conducted pursuant to subsection B, the court shall appoint the public defender to represent the person consistent with the provisions of § 19.2-163.4 if such person requests and qualifies for the appointment of counsel pursuant to § 19.2-159. If the public defender is not reasonably available to provide representation at such hearing, the court shall appoint counsel and address the issue of bail or conditions of release as soon as practicable, but in no event later than three calendar days after such hearing, excluding Saturdays, Sundays, and legal holidays. All counsel, when practicable, shall be given access to the accused and the ability to review bail information within a reasonable time prior to the start of any proceeding.

2. For a hearing conducted pursuant to subsection B:

a. 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; and

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

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

4. 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 subsection. Such plan shall include (i) 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; (ii) the time and place of proceedings to be conducted under this section; (iii) a process to ensure that if an excessive number of proceedings should arise that such proceedings may be handled in a prompt manner; and (iv) 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. All plans created in accordance with this subdivision shall be made available to the public. A copy of any such plan and any subsequent revisions shall also be sent to the executive director of the Virginia Indigent Defense Commission. No plan shall be revised unless the proposed changes

are made public for at least 90 days.

F. Notwithstanding any other provision of law, counsel appointed to represent an accused person at a hearing pursuant to this section, other than a public defender, shall be compensated for his services on an hourly basis at a rate set by the Supreme Court of Virginia. If such counsel continues to represent the individual on the underlying charge, his total payment shall not exceed the fee for court-appointed representation pursuant to § 19.2-163; however, if such counsel's representation is limited to a hearing pursuant to this section, his compensation shall not exceed one hour. If the accused person has more than one pending charge, counsel appointed to represent him at a hearing pursuant to this section shall be compensated in an amount not to exceed the fee for a single charge when multiple charges are addressed at the same hearing.

G. A jurisdiction that does not have a public defender office established pursuant to § 19.2-163.04 may implement the provisions of subsection E.

§ 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

94 causing substantial hardship or jeopardizing the ability of the accused to maintain home and employment.
95 Assets shall include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates
96 of deposit, and tax refunds. All personal property owned by the accused which is readily convertible into cash
97 shall be considered, except property exempt from attachment. Any real estate owned by the accused shall be
98 considered in terms of the amounts which could be raised by a loan on the property. For purposes of
99 eligibility determination, the income, assets, and expenses of the spouse, if any, who is a member of the
100 accused's household, shall be considered, unless the spouse was the victim of the offense or offenses
101 allegedly committed by the accused.

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

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

112 If the available funds of the accused exceed 125 percent of the federal poverty income guidelines and the
113 accused fails to employ counsel and does not waive his right to counsel, the court may, in exceptional
114 circumstances, and where the ends of justice so require, appoint an attorney to represent the accused.
115 However, in making such appointments, the court shall state in writing its reasons for so doing. The written
116 statement by the court shall be included in the permanent record of the case.

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

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

123 _____ (signature of accused)

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

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

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

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

146 **2. That the provisions of this act shall become effective on January 1, 2027, except the provisions of**
147 **subdivision E 4 of § 19.2-158 of the Code of Virginia, as amended by this act, which shall become**
148 **effective in due course.**

149 **3. That the plan described in subdivision E 4 of § 19.2-158 of the Code of Virginia, as amended by this**
150 **act, shall be completed by November 1, 2026. In developing the plan, the chief judge may create a**
151 **committee that may include an attorney for the Commonwealth or his designee; the public defender or**
152 **his designee; the Chief Magistrate or his designee from the judicial circuit; one representative each**
153 **from a local pretrial services agency, an adult detention center, a juvenile detention center, a circuit**

154 court clerk's office, a general district court clerk's office, and a juvenile and domestic relations district
155 court clerk's office that is located within the judicial circuit; one judge each from a circuit court,
156 general district court, and juvenile and domestic relations district court located within the judicial
157 circuit; and any other person the chief judge deems proper to include.