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HOUSE BILL NO. 1181

Offered January 17, 2022

A *BILL to amend and reenact §§ 19.2-157 and 19.2-159 of the Code of Virginia, relating to right to counsel; target of investigation.*

Patron—Mullin

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-157 and 19.2-159 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-157. Duty of court when accused appears without counsel; right to counsel upon receipt of target letter.

A. Except as may otherwise be provided in §§ 16.1-266 through 16.1-268, whenever a person charged with a criminal offense the penalty for which may be confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, appears before any court without being represented by counsel, the court shall inform him of his right to counsel. The accused shall be allowed a reasonable opportunity to employ counsel or, if appropriate, the statement of indigence provided for in § 19.2-159 may be executed.

B. *Whenever a person is informed in writing by the attorney for the Commonwealth, the Attorney General, or counsel or special counsel for a multi-jurisdiction grand jury or special grand jury that he is the target of a criminal investigation for a criminal offense, the penalty for which may be confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, that target may present the written target letter to the clerk of the circuit court to set a hearing for the circuit court to proceed pursuant to subsection A. The target letter, statement of indigence, other documents, and proceedings shall be sealed until such time as the target is charged with a criminal offense related to the target letter or until good cause is shown that they be unsealed.*

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

A. If the accused *or target pursuant to subsection B of § 19.2-157* shall claim that he is indigent, and the charge against him *or the offense for which he is a target* 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 target* or other competent evidence whether or not the accused *or target* 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 *or target* is a current recipient of a state or federally funded public assistance program for the indigent. If the accused *or target* 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 *or target* is necessary. If the accused *or target* 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 *or target* shall be made with consideration given to the following:

1. The net income of the accused *or target*, 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 *or target* which are convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing the ability of the accused *or target* 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 *or target* which is readily convertible into cash shall be considered, except property exempt from attachment. Any real estate owned by the accused *or target* 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 *or target's* household, shall be considered, unless the spouse was the victim of the offense or offenses allegedly committed by the accused *or for which he is a target*.

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

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

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

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

79 "I have been advised this _____ day of _____, 20__, by the (name of court) court of my right to
80 representation by counsel in the trial of the charge pending against me *or for which I am a target*; I
81 certify that I am without means to employ counsel and I hereby request the court to appoint counsel for
82 me."

83 _____ (signature of accused *or target*)

84 The court shall also require the accused *or target* to complete a written financial statement to support
85 the claim of indigency and to permit the court to determine whether or not the accused *or target* is
86 indigent within the contemplation of law. The accused *or target* shall execute the said statements under
87 oath, and the said court shall appoint competent counsel to represent the accused *or target* in the
88 proceeding against him, including an appeal, if any, until relieved or replaced by other counsel.

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

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

93 D. Except in jurisdictions having a public defender, or unless (i) the public defender is unable to
94 represent the defendant *or target* by reason of conflict of interest or (ii) the court finds that appointment
95 of other counsel is necessary to attain the ends of justice, counsel appointed by the court for
96 representation of the accused *or target* shall be selected by a fair system of rotation among members of
97 the bar practicing before the court whose names are on the list maintained by the Indigent Defense
98 Commission pursuant to § 19.2-163.01. If no attorney who is on the list maintained by the Indigent
99 Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the
100 list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and
101 experience. The court shall provide notice to the Commission of the appointment of the attorney.