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HOUSE BILL NO. 1944

Offered January 14, 2015

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A BILL to amend and reenact §§ 19.2-159 and 19.2-163 of the Code of Virginia and to repeal § 19.2-163.4:1 of the Code of Virginia, relating to court-appointed counsel; determination of indigency.

Patrons—McClellan, Lopez, Morrissey and Rasoul

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-159 and 19.2-163 of the Code of Virginia are amended and reenacted as follows:

§ 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 which may be punishable by death or 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. The accused is eligible for the appointment of counsel if the court finds that the total financial resources available to the accused are not sufficient to pay both the household expenses allowable under subsection G and the expected cost of representation by private counsel for the duration of the trial. The fact that the accused has posted bail shall not be used as a basis to deny the appointment of counsel for the accused.

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. For purposes of eligibility determination, the expected cost of representation by private counsel for the duration of the trial shall be presumed to be as follows:

- 1. To defend a misdemeanor charge, \$3,000;
2. To defend a felony punishable by confinement in the state correctional facility for a period of no more than 10 years, \$10,000;
3. To defend a felony punishable by confinement in the state correctional facility for a period of more than 10 years but no more than 20 years, \$70,000; and
4. To defend a felony punishable by confinement in the state correctional facility for a period of more than 20 years or punishable by death, \$700,000.

The court may adjust these presumptive amounts upon finding that (i) the presumptive amount substantially differs from the amount charged by local attorneys to defend the same offense, in which case the court may use the amount charged by local attorneys, or (ii) no local attorneys are available to defend the accused, in which case the court may add to the presumptive amount any additional costs, including costs of travel, that would be charged by a nonlocal attorney.

C. 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 to assess the accused's ability to pay the expected cost of representation by private counsel for the duration of the trial with consideration given to the following financial resources:

1. The net annual 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 derived annually 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 financial assets of the accused which are readily 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 Such financial 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, except for the accused's primary residence, shall be considered in terms of the amounts which could be raised by a loan on the

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59 property without causing substantial hardship or jeopardizing the ability of the accused to maintain  
60 home and employment. If the accused owns more than one motor vehicle, any additional vehicle shall be  
61 considered in terms of the amounts which could be raised by a loan on the additional vehicle without  
62 causing substantial hardship or jeopardizing the ability of the accused to maintain home and  
63 employment.

64 For purposes of eligibility determination, the annual income, financial assets, and expenses of the  
65 spouse, if any, who is a member of the accused's household, shall be considered, unless the spouse was  
66 the victim of the offense or offenses allegedly committed by the accused. If the accused is a minor, the  
67 annual income, financial assets, and expenses of the accused's parents, if any, shall be considered unless  
68 the parents were the victim of the offense or offenses allegedly committed by the accused or the court  
69 finds good cause to treat such income and assets as unavailable to the accused.

70 For purposes of eligibility determination, no consideration shall be given to credit available to the  
71 accused, including but not limited to amounts available from credit cards or amounts that can be  
72 borrowed against life insurance policies or from public or private employee pensions or savings plans.

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

76 The available funds of the accused shall be calculated as the sum of his total income and assets less  
77 the exceptional expenses as provided in paragraph 3 above. If the accused does not waive his right to  
78 counsel or retain counsel on his own behalf, counsel shall be appointed for the accused if his available  
79 funds are D. An accused is presumptively eligible for the appointment of counsel and the court may  
80 appoint counsel without further examination if:

81 1. The accused is a current recipient of a state or federally funded public assistance program for the  
82 indigent;

83 2. Counsel was appointed for the accused within the previous 12 months based on an examination of  
84 the accused's financial resources and there has been no significant improvement in the accused's ability  
85 to pay since that time; or

86 3. The gross annual income available to the accused is equal to or below 125 percent of the  
87 federal poverty income guidelines prescribed for the size of the household of the accused by the federal  
88 Department of Health and Human Services and the value of the financial resources available to the  
89 accused as determined under subsection C is less than one-half of the expected cost of representation by  
90 private counsel for the duration of the trial. The Supreme Court of Virginia shall be responsible for  
91 distributing to all courts the annual updates of the federal poverty income guidelines made by the  
92 Department.

93 E. If the court does not find the accused presumptively eligible for the appointment of counsel under  
94 subsection D, the court shall conduct an examination of the accused's financial resources pursuant to  
95 subsection C to determine whether to appoint counsel based on the information before the court. The  
96 court may require the accused (i) to submit an affidavit detailing his financial resources accompanied  
97 by documentation of his income, (ii) to submit information or documentation regarding specific assets,  
98 (iii) to appear at a hearing on the appointment of counsel or pretrial services interview, or (iv) to make  
99 reasonable efforts to obtain private counsel and to report to the court on the results of such efforts.

100 If the available funds of the accused exceed 125 percent of the federal poverty income guidelines  
101 and F. The court shall find that the accused is ineligible for the appointment of counsel if the value of  
102 the financial resources available to the accused as determined under subsection C is more than one-half  
103 of the expected cost of representation by private counsel for the duration of the trial. If the accused is  
104 determined to be ineligible for the appointment of counsel and fails to employ counsel and does not  
105 waive his right to counsel, the court may, in exceptional circumstances, and where the ends of justice so  
106 require, appoint an attorney to represent the accused. However, in making such appointments, the court  
107 shall state in writing its reasons for so doing. The written statement by the court shall be included in the  
108 permanent record of the case.

109 If the court determines that the financial resources available to the accused as determined under  
110 subsection C have a negative balance, the court shall find the accused to be indigent and incapable of  
111 contributing to the cost of counsel. The court shall appoint counsel for the accused and the accused  
112 shall not be required to contribute to the cost of counsel except as provided in subsection I.

113 G. For purposes of eligibility determination, the following household expenses are allowable to the  
114 extent that the court finds them reasonable: (i) housing, (ii) utilities and telephone, (iii) household  
115 supplies, (iv) food, (v) medical and dental care, (vi) personal care, (vii) clothing, (viii) child care, (ix)  
116 funeral costs, (x) transportation, including costs associated with owning and maintaining a motor  
117 vehicle, (xi) insurance, (xii) tuition, (xiii) minimum payments for servicing debt obligations, (xiv)  
118 court-ordered payments, (xv) employment-related expenses, and (xvi) any other expenses allowed by the  
119 court.

120 Household expenses are only allowable to the extent that such expenses are paid by or are the

121 obligation of the accused. Household expenses paid on behalf of the accused by another shall not be  
122 considered allowable. If the accused is married, the court shall presume that each spouse pays  
123 household expenses in an amount proportionate to each spouse's income.

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

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

130 \_\_\_\_\_ (signature of accused)

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

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

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

140 I. The accused shall not be required to pay the amount allowed by the court for the counsel  
141 appointed for the accused unless the accused engaged in fraud during the determination of his eligibility  
142 for the appointment of counsel. If the accused is found by the court to have engaged in fraud, the  
143 amount allowed by the court to the attorney appointed to defend him shall be taxed against the  
144 defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the  
145 Commonwealth, or the county, city, or town, as the case may be. An abstract of such costs shall be  
146 docketed in the judgment docket and execution lien book maintained by such court.

147 D. J. Except in jurisdictions having a public defender, or unless (i) the public defender is unable to  
148 represent the defendant by reason of conflict of interest or (ii) the court finds that appointment of other  
149 counsel is necessary to attain the ends of justice, counsel appointed by the court for representation of the  
150 accused shall be selected by a fair system of rotation among members of the bar practicing before the  
151 court whose names are on the list maintained by the Indigent Defense Commission pursuant to  
152 § 19.2-163.01. If no attorney who is on the list maintained by the Indigent Defense Commission is  
153 reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise  
154 demonstrated to the court's satisfaction an appropriate level of training and experience. The court shall  
155 provide notice to the Commission of the appointment of the attorney.

156 **§ 19.2-163. Compensation of court-appointed counsel.**

157 Upon submission to the court, for which appointed representation is provided, of a detailed  
158 accounting of the time expended for that representation, made within 30 days of the completion of all  
159 proceedings in that court, counsel appointed to represent an indigent accused in a criminal case shall be  
160 compensated for his services on an hourly basis at a rate set by the Supreme Court of Virginia in a total  
161 amount not to exceed the amounts specified in the following schedule:

162 1. In a district court, a sum not to exceed \$120, provided that, notwithstanding the foregoing  
163 limitation, the court in its discretion, and subject to guidelines issued by the Executive Secretary of the  
164 Supreme Court of Virginia, may waive the limitation of fees up to (i) an additional \$120 when the  
165 effort expended, the time reasonably necessary for the particular representation, the novelty and  
166 difficulty of the issues, or other circumstances warrant such a waiver; or (ii) an amount up to \$650 to  
167 defend, in the case of a juvenile, an offense that would be a felony if committed by an adult that may  
168 be punishable by confinement in the state correctional facility for a period of more than 20 years, or a  
169 charge of violation of probation for such offense, when the effort expended, the time reasonably  
170 necessary for the particular representation, the novelty and difficulty of the issues, or other  
171 circumstances warrant such a waiver; or (iii) such other amount as may be provided by law. Such  
172 amount shall be allowed in any case wherein counsel conducts the defense of a single charge against the  
173 indigent through to its conclusion or a charge of violation of probation at any hearing conducted under  
174 § 19.2-306; thereafter, compensation for additional charges against the same accused also conducted by  
175 the same counsel shall be allowed on the basis of additional time expended as to such additional  
176 charges;

177 2. In a circuit court (i) to defend a felony charge that may be punishable by death an amount  
178 deemed reasonable by the court; (ii) to defend a felony charge that may be punishable by confinement  
179 in the state correctional facility for a period of more than 20 years, or a charge of violation of probation  
180 for such offense, a sum not to exceed \$1,235, provided that, notwithstanding the foregoing limitation,  
181 the court in its discretion, and subject to guidelines issued by the Executive Secretary of the Supreme

182 Court of Virginia, may waive the limitation of fees up to an additional \$850 when the effort expended,  
183 the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or  
184 other circumstances warrant such a waiver; (iii) to defend any other felony charge, or a charge of  
185 violation of probation for such offense, a sum not to exceed \$445, provided that, notwithstanding the  
186 foregoing limitation, the court in its discretion, and subject to guidelines issued by the Executive  
187 Secretary of the Supreme Court of Virginia, may waive the limitation of fees up to an additional \$155  
188 when the effort expended, the time reasonably necessary for the particular representation, the novelty  
189 and difficulty of the issues, or other circumstances warrant such a waiver; and (iv) in the circuit court  
190 only, to defend any misdemeanor charge punishable by confinement in jail or a charge of violation of  
191 probation for such offense, a sum not to exceed \$158. In the event any case is required to be retried due  
192 to a mistrial for any cause or reversed on appeal, the court may allow an additional fee for each case in  
193 an amount not to exceed the amounts allowable in the initial trial. In the event counsel is appointed to  
194 defend an indigent charged with a felony that may be punishable by death, such counsel shall continue  
195 to receive compensation as provided in this paragraph for defending such a felony, regardless of whether  
196 the charge is reduced or amended to a felony that may not be punishable by death, prior to final  
197 disposition of the case. In the event counsel is appointed to defend an indigent charged with any other  
198 felony, such counsel shall receive compensation as provided in this paragraph for defending such a  
199 felony, regardless of whether the charge is reduced or amended to a misdemeanor or lesser felony prior  
200 to final disposition of the case in either the district court or circuit court.

201 Counsel appointed to represent an indigent accused in a criminal case, who are not public defenders,  
202 may request an additional waiver exceeding the amounts provided for in this section. The request for  
203 any additional amount shall be submitted to the presiding judge, in writing, with a detailed accounting  
204 of the time spent and the justification for the additional amount. The presiding judge shall determine,  
205 subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, whether the  
206 request for an additional amount is justified in whole or in part, by considering the effort expended and  
207 the time reasonably necessary for the particular representation, and, if so, shall forward the request as  
208 approved to the chief judge of the circuit court or district court for approval.

209 If at any time the funds appropriated to pay for waivers under this section become insufficient, the  
210 Executive Secretary of the Supreme Court of Virginia shall so certify to the courts and no further  
211 waivers shall be approved.

212 The circuit or district court shall direct the payment of such reasonable expenses incurred by such  
213 court-appointed counsel as it deems appropriate under the circumstances of the case. Counsel appointed  
214 by the court to represent an indigent charged with repeated violations of the same section of the Code of  
215 Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall  
216 be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such  
217 offenses are tried as part of the same judicial proceeding. The trial judge shall consider any guidelines  
218 established by the Supreme Court but shall have the sole discretion to fix the amount of compensation  
219 to be paid counsel appointed by the court to defend a felony charge that may be punishable by death.

220 The circuit or district court shall direct that the foregoing payments shall be paid out by the  
221 Commonwealth, if the defendant is charged with a violation of a statute, or by the county, city or town,  
222 if the defendant is charged with a violation of a county, city or town ordinance, to the attorney so  
223 appointed to defend such person as compensation for such defense.

224 Counsel representing a defendant charged with a Class 1 felony, or counsel representing an indigent  
225 prisoner under sentence of death in a state habeas corpus proceeding, may submit to the court, on a  
226 monthly basis, a statement of all costs incurred and fees charged by him in the case during that month.  
227 Whenever the total charges as are deemed reasonable by the court for which payment has not previously  
228 been made or requested exceed \$1,000, the court may direct that payment be made as otherwise  
229 provided in this section.

230 When such directive is entered upon the order book of the court, the Commonwealth, county, city or  
231 town, as the case may be, shall provide for the payment out of its treasury of the sum of money so  
232 specified. ~~If the defendant is convicted, the amount allowed by the court to the attorney appointed to~~  
233 ~~defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected,~~  
234 ~~the same shall be paid to the Commonwealth, or the county, city or town, as the case may be. In the~~  
235 ~~event that counsel for the defendant requests a waiver of the limitations on compensation, the court shall~~  
236 ~~assess against the defendant an amount equal to the pre-waiver compensation limit specified in this~~  
237 ~~section for each charge for which the defendant was convicted. An abstract of such costs shall be~~  
238 ~~docketed in the judgment docket and execution lien book maintained by such court.~~

239 Any statement submitted by an attorney for payments due him for indigent representation or for  
240 representation of a child pursuant to § 16.1-266 shall, after the submission of the statement, be  
241 forwarded forthwith by the clerk to the Commonwealth, county, city or town, as the case may be,  
242 responsible for payment.

243 For the purposes of this section, the defense of a case may be considered conducted through to its

244 conclusion and an appointed counsel entitled to compensation for his services in the event an indigent  
245 accused fails to appear in court subject to a capias for his arrest or a show cause summons for his  
246 failure to appear and remains a fugitive from justice for one year following the issuance of the capias or  
247 the summons to show cause, and appointed counsel has appeared at a hearing on behalf of the accused.

248 Effective July 1, 2007, the Executive Secretary of the Supreme Court of Virginia shall track and  
249 report the number and category of offenses charged involving adult and juvenile offenders in cases in  
250 which court-appointed counsel is assigned. The Executive Secretary shall also track and report the  
251 amounts paid by waiver above the initial cap to court-appointed counsel. The Executive Secretary shall  
252 provide these reports to the Governor, members of the House Appropriations Committee, and members  
253 of the Senate Finance Committee on a quarterly basis.

254 **2. That § 19.2-163.4:1 of the Code of Virginia is repealed.**

255 **3. That the provisions of this act may result in a net increase in periods of imprisonment or**  
256 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**  
257 **be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**  
258 **2 of the Acts of Assembly of 2014, Special Session I, requires the Virginia Criminal Sentencing**  
259 **Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated**  
260 **amount of the necessary appropriation is \$0 for periods of commitment to the custody of the**  
261 **Department of Juvenile Justice.**