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SENATE BILL NO. 378

Offered January 12, 2022

Prefiled January 11, 2022

A *BILL to amend the Code of Virginia by adding a section numbered 19.2-303.03, relating to petition for modification of sentence; eligibility; procedures.*

Patrons—Petersen and Morrissey

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 19.2-303.03 as follows:

§ 19.2-303.03. *Petition for modification of a sentence; eligibility; procedures.*

A. Notwithstanding any other provision of law or rule of court, upon petition of a person who remains incarcerated in a state or local correctional facility or secure facility, as defined in § 16.1-228, serving the sentence for any conviction or for a combination of any convictions, the circuit court that entered the original judgment or order shall grant a hearing to determine whether to modify such person's sentence if such person:

1. Has served at least 10 years of his sentence if he was 25 years of age or younger at the time of the offense or has served at least 15 years of his sentence if he was 26 years of age or older at the time of the offense;

2. Meets the following behavioral standards, unless a waiver of such standards is granted upon agreement with the attorney for the Commonwealth or the court:

a. Such person has been earning good conduct time, good conduct allowance, or earned sentence credits as a Class Level I as defined by the Department of Corrections operating procedures for at least five consecutive years prior to the filing of the petition;

b. Such person has not been convicted of a 100 series disciplinary offense as defined by the Department of Corrections operating procedures during the five years preceding the filing of the petition; and

c. Such person has not been convicted of more than one 200 series disciplinary offense as defined by the Department of Corrections operating procedures during the five years preceding the filing of the petition; and

3. Has not (i) filed a petition for modification of a sentence pursuant to this section within the preceding three years, (ii) had a sentence modified pursuant to this section within the preceding five years, or (iii) filed more than two petitions for modification of a sentence pursuant to this section.

B. The circuit court shall have authority to conduct hearings on petitions for the modification of a sentence pursuant to this section.

C. Any person eligible for modification of a sentence under subsection A may file a petition for the assistance of counsel and a statement of indigency with the court on a form provided by the Supreme Court of Virginia. The court may summarily dismiss the petition if the person is not eligible for modification of a sentence based on the criteria set forth in subsection A. If the petition is not summarily dismissed and the court finds that the person is entitled to representation by counsel subject to the provisions of Article 3 of Chapter 10, the court shall appoint counsel to represent the petitioner. An attorney appointed to represent a petitioner pursuant to this subsection shall be compensated at the same rate as an attorney providing representation on a felony case pursuant to § 19.2-163.

D. The petition for modification of a sentence shall be filed with the circuit court that entered the original judgment or order on a form provided by the Supreme Court of Virginia by the petitioner or by counsel for the petitioner. Such petition shall allege with specificity all of the following: (i) the petitioner's full name and date of birth; (ii) the offense for which the petitioner was convicted; (iii) the date on which such offense was alleged to have been committed; (iv) the date on which the petitioner was sentenced for such offense; (v) whether the petitioner remains incarcerated in a state or local correctional facility or secure facility serving the sentence he seeks to modify and, if so, which facility; (vi) whether the petitioner has previously filed any other petition in accordance with this section; and (vii) the reason the petitioner is requesting a sentence modification and any information in support thereof. If the petitioner fails to submit a completed form, the circuit court may allow the petitioner to amend the petition to correct any deficiency. Failure to include all information pursuant to this subsection shall not be grounds for dismissal of the petition.

E. The Commonwealth shall be made party to the proceeding. The petitioner shall provide a copy of the petition by delivery or by first-class mail, postage prepaid, to the attorney for the Commonwealth of

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59 the city or county in which the petition is filed. The attorney for the Commonwealth may file an
60 objection or answer to the petition indicating his position within 60 days after it is received from the
61 petitioner, a copy of which shall be provided to the petitioner or counsel for the petitioner by delivery
62 or by first-class mail, postage prepaid. The petitioner may reply to any objection or answer filed by the
63 attorney for the Commonwealth within 30 days after receipt of such objection or answer.

64 F. The court shall conduct a hearing on the petition within 90 days of the filing of the petition. The
65 court may continue the hearing to a date more than 90 days after the filing of the petition with the
66 agreement of the petitioner and the attorney for the Commonwealth. The attorney for the Commonwealth
67 shall make reasonable efforts to notify any victim, as defined in § 19.2-11.01, of such hearing and of
68 the victim's right to testify, subject to the provisions of § 19.2-295.3, at the hearing and to submit a
69 Victim Impact Statement, subject to the provisions of § 19.2-299.1, which may include information of
70 any changes related to the factors outlined in § 19.2-299.1 since the original sentencing. If the attorney
71 for the Commonwealth is unable to contact the victim, he shall file a written pleading outlining the
72 efforts made to notify the victim. Prior to the hearing on the petition, the court shall determine whether
73 such efforts are reasonable. Failure of the attorney for the Commonwealth to make reasonable efforts to
74 notify any victim shall not preclude the court from considering the petition.

75 G. The hearing on the petition shall be conducted by the judge who entered the original judgment or
76 order unless such judge is no longer available, in which case the chief judge of the circuit court shall
77 assign the petition to another judge of that circuit court. The petitioner may appear by use of two-way
78 electronic video and audio communication that meets the standards set forth in subsection B of
79 § 19.2-3.1.

80 H. At such hearing, the petitioner and the attorney for the Commonwealth may submit additional
81 evidence, including witness testimony and documentary evidence. Subject to the provisions of
82 § 19.2-295.3, the court shall permit any victim to testify at the hearing, and subject to the provisions of
83 § 19.2-299.1, any victim may submit a Victim Impact Statement to be considered by the court at the
84 hearing.

85 I. At such hearing, the court may dismiss the petition or, upon good cause shown by the petitioner,
86 at any time before the sentence has been completely served, (i) suspend the unserved portion of any
87 such sentence or run the unserved portion of any sentence concurrently with another sentence, (ii) place
88 the person on probation for such time as the court shall determine, or (iii) otherwise modify the
89 sentence imposed, except that any modification of any term of confinement shall not exceed the original
90 term of confinement imposed by the court. The court may modify a sentence pursuant to this section
91 regardless of whether any mandatory minimum term of confinement or other minimum term of
92 incarceration is otherwise required by law. When determining whether there is good cause to modify the
93 petitioner's sentence, the court shall consider the following factors:

94 1. The age of the petitioner at the time of the offense and any relevant research presented at the
95 hearing regarding development of the youth brain, the amount of time that has passed since the date of
96 the offense, and evidence of the maturity of the petitioner since the date of the offense;

97 2. The age of the petitioner at the time the petition was filed and relevant research presented at the
98 hearing regarding the decline in criminal behavior as individuals grow older;

99 3. The history and characteristics of the petitioner at the time of the hearing, including rehabilitation
100 demonstrated by the petitioner, the petitioner's disciplinary record while incarcerated, and the
101 petitioner's efforts to participate in any educational or therapeutic programs;

102 4. Whether the petitioner was the victim of domestic or sexual abuse at the time of the offense and
103 whether such abuse was related to the petitioner's commission of the offense and any treatment or
104 therapy received since the time of sentencing;

105 5. Any report from a physical, mental, or psychiatric examination of the petitioner conducted by a
106 licensed health care professional that has occurred after the initial sentencing hearing and any
107 treatment received by the petitioner while incarcerated;

108 6. Any testimony or Victim Impact Statement presented by any victim of the offense or by a family
109 member of the victim if the victim is deceased;

110 7. Any evidence concerning whether the petitioner's sentence was enhanced because the petitioner
111 exercised his constitutional right to a trial or evidence that the petitioner was sentenced above the
112 recommendation of the original discretionary sentencing guidelines;

113 8. Compliance with the petitioner's case plan, as described by the Department of Corrections
114 operating procedures, during the five years preceding the filing of the petition;

115 9. Any evidence of the petitioner's acts of service, leadership, or mentorship engaged in or developed
116 independently by the petitioner;

117 10. Any information regarding the petitioner's home and employment plans;

118 11. Any information related to support from community leaders, faith leaders, or other stakeholders
119 as deemed appropriate by the court; and

120 12. Any other information the court determines to be relevant to whether the petitioner has changed

121 since the time of the original sentencing or relevant to whether there is good cause for modification of
122 the petitioner's sentence.

123 J. Within 30 days of the hearing, the court shall file with the record of the case a written
124 explanation for the grant or denial of the petition and shall provide a copy of such written explanation
125 to the petitioner and to the attorney for the Commonwealth. The written explanation shall address each
126 of the factors in subsection I and indicate the weight given to each factor.

127 K. Following the entry of an order to modify a sentence pursuant to this section, the clerk of the
128 circuit court shall cause a copy of such order to be forwarded to the Virginia Criminal Sentencing
129 Commission, the Department of State Police, and the state or local correctional facility or secure
130 facility, as defined in § 16.1-228, where the petitioner is incarcerated within five days. When calculating
131 a sentence modified pursuant to this section, the petitioner shall receive credit for any time served in
132 any local or state correctional facility or secure facility.

133 L. The decision of a circuit court to dismiss a petition or to modify a sentence pursuant to this
134 section shall not form the basis for relief in any habeas corpus or appellate proceeding, unless such
135 decision was contrary to law. Filing a petition under this section shall not be construed to abridge, toll,
136 or modify any existing remedy, including filing a writ of habeas corpus, a writ of actual innocence, or
137 any other form of relief.

138 M. The attorney for the Commonwealth shall not require that a person waive his right to petition for
139 modification of a sentence pursuant to this section as a condition of a plea agreement. Notwithstanding
140 the terms of any plea agreement that attempts to limit the filing of a petition for modification of a
141 sentence pursuant to this section, a court may modify such sentence, provided that the other
142 requirements of this section are met.

143 N. Whenever a person becomes eligible to petition for modification of a sentence pursuant to this
144 section, the Department of Corrections shall notify such person of his eligibility along with a copy of
145 this section, the form for the fillable petition provided by the Supreme Court of Virginia, and all
146 information necessary to complete such form within 30 days of such person becoming eligible. The
147 notification shall be provided to each eligible individual in his primary language. Upon request of the
148 petitioner or counsel for the petitioner, the Department of Corrections shall provide any records,
149 electronic and paper, associated with the petitioner, without cost, including sentencing orders, program
150 enrollment and completion, security status, case plan documentation, risk assessment data and
151 evaluation, medical records, and any other relevant records. A copy of any such records requested and
152 provided shall also be provided to the court and the attorney for the Commonwealth.

153 O. The Department of Corrections shall ensure that any counsel appointed to represent a petitioner
154 confined in a state correctional facility has an opportunity to have reasonable contact with his client,
155 whether in person, by telephone, or by mail. At the request of the petitioner or counsel for the
156 petitioner, the circuit court shall enter an order of transportation to transfer the petitioner to the local
157 or regional correctional facility serving the circuit court in which the petition was filed so that the
158 petitioner is reasonably able to assist his attorney in the preparation of the petition.

159 P. No fee shall be charged for filing a petition under subsection C or D.

160 Q. A person convicted of a crime that is subsequently repealed or for which the penalty or
161 sentencing range is subsequently reduced may petition the circuit court that entered the original
162 judgment or order for modification of his sentence pursuant to this section at any time, and such person
163 shall automatically qualify for modification of his sentence, regardless of whether good cause is shown.
164 The court shall modify the sentence to be in compliance with the penalties for the offense in effect on
165 the date of the hearing on the petition for modification of a sentence.