

HOUSE BILL NO. 834

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on \_\_\_\_\_)

(Patron Prior to Substitute--Delegate Cousins)

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

**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 of (i) a Class 1 felony; (ii) aggravated murder in violation of § 18.2-31 or first degree murder or a second or subsequent conviction of second degree murder in violation of Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2; (iii) where the victim is a minor, (a) rape in violation of § 18.2-61; (b) forcible sodomy in violation of § 18.2-67.1; (c) object sexual penetration in violation of § 18.2-67.2; (d) aggravated sexual battery in violation of § 18.2-67.3; (e) an attempt to commit a violation of clause (a), (b), (c), or (d); or (f) carnal knowledge in violation of § 18.2-63, 18.2-64.1, or 18.2-64.2; (iv) human trafficking in violation of § 18.2-355; (v) an act of terrorism as described in § 18.2-46.4; (vi) possession, manufacture, distribution, etc., of a weapon of terrorism or hoax device in violation of § 18.2-46.6, except for a violation of subsection B of § 18.2-46.6; (vii) producing or filming child pornography in violation of § 18.2-374.1; (viii) lynching in violation of § 18.2-40; (ix) death by mob in violation of § 18.2-45; (x) committing, conspiring, aiding, or abetting acts of terrorism in violation of § 18.2-46.5; (xi) abuse or neglect of a child in violation of § 18.2-371.1; or (xii) treason in violation of § 18.2-481, 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:

- 27           1. Has served at least 25 years of his sentence; and  
28           2. Has not (i) filed a petition for modification of a sentence pursuant to this section within the  
29 preceding three years, (ii) had a sentence modified pursuant to this section within the preceding five years,  
30 or (iii) filed more than two petitions for modification of a sentence pursuant to this section.

31           B. Notwithstanding any other provision of law or rule of court, upon petition of a person who  
32 remains incarcerated in a state or local correctional facility or secure facility, as defined in § 16.1-228,  
33 -serving the sentence for any conviction or for a combination of any convictions of (i) a first and single  
34 offense of second degree murder as described in § 18.2-32; (ii) where the victim was an adult, a felony  
35 offense of (a) rape in violation of § 18.2-61, (b) forcible sodomy in violation of § 18.2-67.1, (c) object  
36 sexual penetration in violation of § 18.2-67.2, or (d) aggravated sexual battery in violation of § 18.2-67.3;  
37 (iii) malicious wounding in violation of § 18.2-51; (iv) entering a dwelling with the intent to commit rape,  
38 murder, or arson in violation of § 18.2-77, 18.2-79, or 18.2-80; (v) shooting, stabbing, or maiming by mob  
39 in violation of § 18.2-41; (vi) shooting, stabbing, etc., with intent to maim or kill in violation of § 18.2-  
40 51; (vii) malicious bodily injury to law-enforcement officers, firefighters, search and rescue personnel, or  
41 emergency medical services personnel in violation of § 18.2-51.1; (viii) burning or destroying a meeting  
42 house, etc., in violation of § 18.2-79; or (ix) reproduction, distribution, solicitation, and facilitation of  
43 child pornography in violation of subsection C or D of § 18.2-374.1:1, the circuit court that entered the  
44 original judgment or order shall grant a hearing to determine whether to modify such person's sentence if  
45 such person:

- 46           1. Has served at least 20 years of his sentence; and  
47           2. Has not (i) filed a petition for modification of a sentence pursuant to this section within the  
48 preceding three years, (ii) had a sentence modified pursuant to this section within the preceding five years,  
49 or (iii) filed more than two petitions for modification of a sentence pursuant to this section.

50           C. Notwithstanding any other provision of law or rule of court, upon petition of a person who  
51 remains incarcerated in a state or local correctional facility or secure facility, as defined in § 16.1-228,  
52 -serving the sentence for any conviction or for a combination of any convictions not enumerated in

53 subsection A or B, the circuit court that entered the original judgment or order may grant a hearing to  
54 determine whether to modify such person's sentence if such person:

55 1. Has served at least 15 years of his sentence; and

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

59 D. The circuit court shall have authority to conduct hearings on and dismiss without prejudice  
60 petitions for the modification of a sentence pursuant to this section. No petition dismissed without  
61 prejudice shall be counted as a petition filed for the purposes of clause (iii) of subdivisions A 2, B 2, and  
62 C 2. The judge may make an initial determination on the merits and dismiss the petition in chambers  
63 without prejudice within 60 days of receipt of the petition. If the judge determines that the petition lacks  
64 merit, no hearing shall be conducted and no notification shall be sent to the local attorney for the  
65 Commonwealth or victim, as defined in § 19.2-11.01. The judge shall file a written explanation of the  
66 reason for the dismissal as prescribed in subsection L.

67 E. Any person eligible for modification of a sentence under subsection A, B, or C may file a  
68 petition for the assistance of counsel and a statement of indigency with the court on a form provided by  
69 the Supreme Court of Virginia. The court may summarily dismiss the petition if the person is not eligible  
70 for modification of a sentence based on the criteria set forth in subsection A, B, or C. If the petition is not  
71 summarily dismissed and the court finds that the person is entitled to representation by counsel subject to  
72 the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10, the court shall appoint counsel to represent  
73 the petitioner. An attorney appointed to represent a petitioner pursuant to this subsection shall be  
74 compensated at the same rate as an attorney providing representation on a felony case pursuant to § 19.2-  
75 163.

76 F. The petition for modification of a sentence shall be filed with the circuit court that entered the  
77 original judgment or order on a form provided by the Supreme Court of Virginia by the petitioner or by  
78 counsel for the petitioner. Such petition shall allege with specificity all of the following: (i) the petitioner's  
79 full name and date of birth; (ii) the offense for which the petitioner was convicted; (iii) the date on which

80 such offense was alleged to have been committed; (iv) the date on which the petitioner was sentenced for  
81 such offense; (v) whether the petitioner remains incarcerated in a state or local correctional facility or  
82 secure facility serving the sentence he seeks to modify and, if so, which facility; (vi) whether the petitioner  
83 has previously filed any other petition in accordance with this section; and (vii) the reason the petitioner  
84 is requesting a sentence modification and any information in support thereof. If the petitioner fails to  
85 submit a completed form, the circuit court may allow the petitioner to amend the petition to correct any  
86 deficiency. Failure to include all information pursuant to this subsection shall not be grounds for dismissal  
87 of the petition.

88 G. The Commonwealth shall be made party to the proceeding. The petitioner shall provide a copy  
89 of the petition by delivery or by first-class mail, postage prepaid, to the attorney for the Commonwealth  
90 of the city or county in which the petition is filed. The attorney for the Commonwealth may file an  
91 objection or answer to the petition indicating his position within 60 days after it is received from the  
92 petitioner, a copy of which shall be provided to the petitioner or counsel for the petitioner by delivery or  
93 by first-class mail, postage prepaid. The petitioner may reply to any objection or answer filed by the  
94 attorney for the Commonwealth within 30 days after receipt of such objection or answer.

95 H. The court shall conduct a hearing on the petition within 90 days of the filing of the petition.  
96 The court may continue the hearing to a date more than 90 days after the filing of the petition with the  
97 agreement of the petitioner and the attorney for the Commonwealth. The attorney for the Commonwealth  
98 shall make reasonable efforts to notify any victim, as defined in § 19.2-11.01, of such hearing and of the  
99 victim's right to testify, subject to the provisions of § 19.2-295.3, at the hearing and to submit a Victim  
100 Impact Statement, subject to the provisions of § 19.2-299.1, which may include information of any  
101 changes related to the factors outlined in § 19.2-299.1 since the original sentencing. If the attorney for the  
102 Commonwealth is unable to contact the victim, he shall file a written pleading outlining the efforts made  
103 to notify the victim. Prior to the hearing on the petition, the court shall determine whether such efforts are  
104 reasonable. Failure of the attorney for the Commonwealth to make reasonable efforts to notify any victim  
105 shall not preclude the court from considering the petition.

106 I. The hearing on the petition shall be conducted by the judge who entered the original judgment  
107 or order unless such judge is no longer available, in which case the chief judge of the circuit court shall  
108 assign the petition to another judge of that circuit court. The petitioner may appear by use of two-way  
109 electronic video and audio communication that meets the standards set forth in subsection B of § 19.2-  
110 3.1.

111 J. At such hearing, the petitioner and the attorney for the Commonwealth may submit additional  
112 evidence, including witness testimony and documentary evidence. Subject to the provisions of § 19.2-  
113 295.3, the court shall permit any victim to testify at the hearing, and subject to the provisions of § 19.2-  
114 299.1, any victim may submit a Victim Impact Statement to be considered by the court at the hearing.

115 K. At such hearing, the court may dismiss the petition or, upon good cause shown by the petitioner,  
116 at any time before the petitioner's sentence has been completely served, (i) suspend the unserved portion  
117 of any such sentence or run the unserved portion of any sentence concurrently with another sentence, (ii)  
118 place the person on probation for such time as the court shall determine, or (iii) otherwise modify the  
119 sentence imposed, except that no modification of any term of confinement shall exceed the original term  
120 of confinement imposed by the court. The court may modify a sentence pursuant to this section regardless  
121 of whether any mandatory minimum term of confinement or other minimum term of incarceration is  
122 otherwise required by law. When determining whether there is good cause to modify the petitioner's  
123 sentence, the court shall consider the following factors:

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

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

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

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

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

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

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

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

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

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

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

150 12. Any other information the court determines to be relevant to whether the petitioner has changed  
151 since the time of the original sentencing or relevant to whether there is good cause for modification of the  
152 petitioner's sentence.

153 L. Within 30 days of the hearing or dismissal, the court shall file with the record of the case a  
154 written explanation for the grant or denial of the petition and shall provide a copy of such written  
155 explanation to the petitioner and to the attorney for the Commonwealth. The written explanation shall  
156 address each of the factors in subsection K and indicate the weight given to each factor.

157 M. Following the entry of an order to modify a sentence pursuant to this section, within five days  
158 the clerk of the circuit court shall cause a copy of such order to be forwarded to the Virginia Criminal

159 Sentencing Commission, the Department of State Police, and the state or local correctional facility or  
160 secure facility, as defined in § 16.1-228, where the petitioner is incarcerated. When calculating a sentence  
161 modified pursuant to this section, the petitioner shall receive credit for any time served in any local or  
162 state correctional facility or secure facility.

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

168 O. The attorney for the Commonwealth shall not require that a person waive his right to petition  
169 for modification of a sentence pursuant to this section as a condition of a plea agreement. Notwithstanding  
170 the terms of any plea agreement that attempts to limit the filing of a petition for modification of a sentence  
171 pursuant to this section, a court may modify such sentence, provided that the other requirements of this  
172 section are met.

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

183 Q. The Department of Corrections shall ensure that any counsel appointed to represent a petitioner  
184 confined in a state correctional facility has an opportunity to have reasonable contact with his client,  
185 whether in person, by telephone, or by mail. At the request of the petitioner or counsel for the petitioner,

186 the circuit court shall enter an order of transportation to transfer the petitioner to the local or regional  
187 correctional facility serving the circuit court in which the petition was filed so that the petitioner is  
188 reasonably able to assist his attorney in the preparation of the petition.

189 R. No fee shall be charged for filing a petition under subsection E or F.

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

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