



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

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900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Cathy C. Hogan
Clerk of the Circuit Court of Bedford County
123 East Main Street, Suite 201
Bedford, Virginia 24523

Dear Ms. Hogan:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You make three inquiries with respect to the assessment of expenses against an indigent criminal defendant convicted in a circuit court.¹ First, you ask whether there is a limit on the amount of court-approved expenses that may be assessed against such defendant, when the amount of such expenses exceeds the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2) of the *Code of Virginia*.² Second, you ask whether § 19.2-163(2) limits the amounts that may be assessed by a circuit court clerk under § 17.1-275.5 of the *Code of Virginia*.³ Third, you inquire whether the amount of expenses that may be assessed against such defendant who is represented by an attorney from a public defender or capital defender office is limited to the amount of the pre-waiver compensation limit set forth in § 19.2-163(2).

Response

It is my opinion that an indigent criminal defendant convicted in a circuit court may be taxed for court-approved, reasonable expenses in addition to, and over and above the court-appointed counsel pre-

¹ With respect to your specific inquiries, you seek clarification of a prior opinion of this Office, 2013 Op. Va. Att'y Gen. No. 13-060 (Sep. 20, 2013), which concluded that "because § 19.2-163(2) specifically sets the amount that a convicted indigent defendant can be taxed at the pre-waiver compensation limit, a defendant cannot be taxed with approved expenses or fees that exceed the pre-waiver compensation limit." *Id.* Your current inquires focus clearly upon the distinction between amounts that may be assessed for "compensation for [court-appointed counsel] services on an hourly basis," and "reasonable expenses incurred by" such attorney in the representation of an indigent criminal defendant, as provided for in § 19.2-163, and whether those separate amounts may be *combined* upon a conviction and "taxed against the defendant as a part of the costs of prosecution." While the former opinion generally addressed this subject matter under § 19.2-163(2), it did not purport to opine on the very specific legal issues that you now raise. To the extent that the former opinion's conclusion is in conflict with the conclusions of this Opinion, that conclusion is superseded.

² VA. CODE ANN. § 19.2-163 (Supp. 2013).

³ VA. CODE ANN § 17.1-275.5 (Supp. 2013).

waiver compensation limit set forth in § 19.2-163(2). It is further my opinion that §§ 17.1-275.5 and 19.2-163 must be read together to determine the amount of combined court-appointed counsel compensation and approved expenses that may be assessed against such a defendant. Finally, it is my opinion that the amount of expenses that may be assessed against such a defendant who is represented by an attorney from a public defender or capital defender office is not limited by the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2).

Applicable Law and Discussion

You first inquire whether there is a limit on the amount of expenses that may be assessed against a convicted indigent defendant, when the amount of such expenses approved by the court under § 19.2-163 exceeds the amount of the court-appointed counsel pre-waiver compensation limit. Section 19.2-163 provides that “[t]he circuit or district court shall direct the payment of such reasonable expenses incurred by . . . court-appointed counsel as it deems appropriate under the circumstances of the case.” Under the plain language of this statute, no monetary limit is set upon the amount the court may approve as reasonable expenses.⁴ Accordingly, upon court-appointed counsel’s request, the court may direct payment of reasonable expenses, without regard to the court-appointed counsel pre-waiver compensation limit of § 19.2-163(2).⁵ Moreover, with respect to the combined total amount of compensation awarded to counsel, up to the pre-waiver compensation limit, and reasonable expenses approved by the court, § 19.2-163 provides that “[i]f the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution[.]”⁶

Therefore, I conclude that the court may approve the payment of reasonable expenses to court-appointed counsel in addition to, and over and above the compensation approved for court appointed-counsel pursuant to § 19.2-163(2). I further conclude that the clerk may combine the amount of court-approved expenses and compensation approved for court-appointed counsel, and assess the total amount against the defendant as part of the costs of the prosecution. Nevertheless, in calculating this combined total, and with respect to the compensation approved by the court for court-appointed counsel, the clerk may assess against the defendant only an amount of compensation up to the pre-waiver compensation limit of § 19.2-163(2).

⁴ “An important principle of statutory construction is that ‘words in a statute are to be construed according to their ordinary meaning, given the context in which they are used.’” *City of Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993) (quoting *Grant v. Commonwealth*, 233 Va. 680, 684, 292 S.E.2d 348, 350 (1982)).

⁵ Section 19.2-163. *See also* 1977-78 Op. Att’y. Gen. 199 (regarding a district court’s authority to award reasonable expenses to court-appointed counsel).

⁶ Section 19.2-163 further provides that “[i]n the event that counsel for the defendant requests a waiver *on the limits of compensation*, the court shall assess against the defendant an amount equal to the pre-waiver compensation limit specified in this section for each charge for which the defendant was convicted.” (Emphasis added.) Thus, in the event of a court-approved waiver respecting counsel compensation, and an award of additional compensation for services over and above the pre-waiver compensation limit of § 19.2-163(2), the maximum amount the clerk of court may assess the defendant is the pre-waiver compensation limit. The statute’s language makes clear that this calculation applies only to *compensation* to court-appointed counsel “for...services on an hourly basis,” and does not pertain to the separate assessment of court-approved, “reasonable expenses incurred by such court-appointed counsel.” Section 19.2-163; *see infra* note 5.

You next ask whether “§ 19.2-163(2) limits the fees that may be assessed by a circuit court clerk under § 17.1-275.5[.]”⁷ Both statutes generally relate to the same subject - namely, the amount of costs that lawfully are to be assessed against a convicted criminal defendant - and should be construed together.⁸ Should they conflict, the more specific statute will prevail over the more general.⁹ Nevertheless, in reading them together, I find no conflict between these two statutory provision.

Section 19.2-163(2), and those other parts of the statute relevant to your inquires, pertain to those circuit court cases in which indigent defendants have been provided with court-appointed counsel. The statute therein provides for the determination of that attorney’s compensation, and for court approval of reasonable expenses that may be reimbursed to that attorney and taxed against such defendants who are convicted. Section 17.1-275.5, on the other hand, applies generally to all cases in which the Commonwealth has incurred costs in the prosecution of defendants convicted in courts of record.

Thus, with respect to the matters about which you inquire, § 19.2-163(2) is the more specific statute, and governs assessments in those circumstances to which it applies - namely, circumstances in which a convicted indigent defendant has been represented by court-appointed counsel, and the determination of compensation “for his services on an hourly basis[.]”¹⁰ It harmoniously corresponds with, and imposes a limitation on one matter within the broad scope of § 17-275.5(A)(1), mandating that a circuit court clerk assess against a convicted defendant “[a]ny amount paid by the Commonwealth for legal representation of the defendant.”¹¹ Section 19.2-163(2) provides the methodology for the determination of compensation of court-appointed counsel for indigent criminal defendants, and other

⁷ As quoted by you in your opinion request, § 17.1-275.5(A), in relevant part, pertains to certain costs in criminal cases, and it requires the clerk to “assess, in addition to the fees provided for by” several other statutory sections within Article 7 of Title 17.1 of the *Code of Virginia*, the following amounts:

1. Any amount paid by the Commonwealth for legal representation of the defendant;
2. Any amount paid for trial transcripts;
3. Extradition costs;
4. Costs of psychiatric evaluation;
5. Costs taxed against the defendant as appellant under Rule 5A:30 of the Rules of the Supreme Court of Virginia . . .

With respect to such monetary amounts to be assessed against a convicted criminal defendant, § 17.1-275.5(A) does not make reference to § 19.2-163. Moreover, with one exception that might include them, these categories of cost items do not appear to relate to “reasonable expenses *incurred by . . . court-appointed counsel,*” as provided for by § 19.2-163. (Emphasis added). See § 17.1-275.5(A)(1) (potentially encompassing the reasonable expenses of court-appointed counsel). Instead, the items constitute costs of prosecution of the defendant, and his subsequent appeal, which most frequently would not be billed to, or paid in the first instance by, court-appointed counsel.

⁸ “The general rule is that statutes may be considered as *in pari materia* when they relate to the same person or thing, the same class of persons or things or to the same subject or to closely connected subjects or objects. Statutes that have the same general or common purpose or are parts of the same general plan are also ordinarily considered as *in pari materia.*” *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

⁹ According to long-accepted principles of statutory construction, “[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.” *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (internal citations omitted). See also *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 48, 41 S.E.2d 720, 730 (1947).

¹⁰ Section 19.2-163.

¹¹ See also §§ 19.2-163.4 and 19.2-163.4:1.

provisions within that statute mandate that the circuit court clerk assess a convicted defendant for the amount of such compensation, *not to exceed* the pre-waiver compensation limit. I conclude that this very specific limitation on the amount of court-appointed compensation that may be assessed against a defendant represented by court-appointed counsel, correspondingly limits the amount that a clerk may assess a defendant under § 17.1-275.5(A)(1) for this particular *component* of amounts that may be “paid by the Commonwealth for legal representation of the defendant.”

You inquire further whether the amount of expenses assessed against an indigent defendant who is represented by an attorney from a public defender or capital defender office is limited to the amount of the pre-waiver compensation limit set forth in § 19.2-163(2). I conclude that the amount of expenses assessed under such circumstances is not so limited. Section 19.2-163.4:1 provides as follows:

In any case in which an attorney from a public defender or capital defender office represents an indigent person charged with an offense and such person is convicted, the sum that would have been allowed a court-appointed attorney as compensation *and as reasonable expenses* shall be taxed against the person defended as a part of the costs of the prosecution, and, if collected, shall be paid to the Commonwealth or, if payment was made to the Commonwealth by a locality for defense of a local ordinance provision, to the appropriate county, city or town.^[12]

The plain meaning of § 19.2-163.4:1 provides that all court-approved expenses incurred by an attorney from a public defender or capital defender office must be assessed against a convicted indigent defendant. “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.”¹³ Therefore, it is my opinion that the amount of expenses assessed against a convicted indigent defendant who is represented by an attorney from a public defender or capital defender office is not limited to the amount of pre-waiver compensation allowed a court-appointed attorney under § 19.2-163(2).¹⁴

¹² Emphasis added.

¹³ *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

¹⁴ I note that, in your request, you posit four scenarios, each involving an indigent criminal defendant convicted of a Class 2 felony, and inquire as to the amount a circuit court clerk should assess against the convicted indigent defendant. I address each scenario in turn, noting that the amounts calculated are hypothetical only, in applying the legal conclusions reached herein. In the first scenario, the defendant’s court-appointed counsel submits documentation requesting statutory attorney’s fees in the amount of \$1,235 (such sum, in each of your hypothetical scenarios, represents the pre-waiver compensation limit under § 19.2-163(2)), plus expenses of \$400. The circuit court approves both amounts. In this instance, the defendant should be assessed in the amount of \$1,635. *See* § 19.2-163. In the second scenario, the defendant’s court-appointed counsel submits documentation requesting a waiver of the \$1,235 compensation limit, for a total attorney’s fee of \$2,000, plus expenses in the amount of \$400. The circuit court approves the waiver and the full amount of expenses sought. In this instance, the defendant should be assessed for compensation and expenses in the amount of \$1,635. *See* § 19.2-163. In the third scenario, the defendant is represented by a public defender, who in addition to seeking compensation in the amount of \$1,235, submits documentation of expenses totaling \$400, and the circuit court approves these amounts. In this instance, the defendant should be assessed for compensation and expenses in the amount of \$1,635, representing the pre-waiver compensation limit that would have been allowed a court-appointed attorney under § 19.2-163(2), that is, \$1,235, plus approved expenses in the amount of \$400. *See* § 19.2-163.4:1 (2008) (setting the sum that shall be assessed against the convicted indigent defendant at “the sum that would have been allowed a court-appointed attorney as compensation and as reasonable expenses”). In the fourth scenario, the defendant’s court-appointed counsel submits documentation for only ten hours of legal services, plus expenses in the amount of \$400. The circuit court approves

Conclusion

Accordingly, it is my opinion that an indigent criminal defendant convicted in a circuit court may be taxed for court-approved, reasonable expenses in addition to, and over and above the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2). It is further my opinion that §§ 17.1-275.5 and 19.2-163 must be read together to determine the amount of combined court-appointed counsel compensation and approved expenses that may be assessed against such a defendant. Finally, it is my opinion that the amount of expenses that may be assessed against such a defendant who is represented by an attorney from a public defender or capital defender office is not limited by the court-appointed counsel pre-waiver compensation limit set forth in § 19.2-163(2).

With kindest regards, I am

Very truly yours,

Handwritten signature of Kenneth T. Cuccinelli, II in black ink.

Kenneth T. Cuccinelli, II
Attorney General

\$900 in compensation for the attorney's services, plus \$400 in expenses. *See* OFFICE OF THE EXEC. SEC'Y, DEP'T OF JUDICIAL SERVS., COURT-APPOINTED COUNSEL PROCEDURES & GUIDELINES MANUAL 5-1 (2013), *available at* <http://www.courts.state.va.us/courtadmin/aoc/djs/resources/manuals/ctapptatty/chapter05.pdf> (establishing \$90 an hour as the current compensation rate for court-appointed counsel). In this instance, the defendant should be assessed a total of \$1,300. *See* § 19.2-163(2).