011954536

SENATE BILL NO. 1366

Senate Amendments in [ ] — February 6, 2001

A BILL to amend and reenact § 19.2-270.4 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 19.2-270.4:1; and by adding in Title 19.2 a chapter numbered 19.1, consisting of a section numbered 19.2-327.1, and by adding in Title 19.2 a chapter numbered 19.2, consisting of sections numbered 19.2-327.2 through 19.2-327.6, relating to forensic evidence and testing; writ of actual innocence.

Patrons Prior to Engrossment—Senators: Stolle, Barry, Bolling, Byrne, Chichester, Couric, Edwards, Forbes, Hanger, Hawkins, Houck, Howell, Lambert, Lucas, Martin, Marye, Miller, K.G., Mims, Newman, Norment, Potts, Puckett, Puller, Quayle, Rerras, Reynolds, Ruff, Saslaw, Stosch, Ticer, Trumbo, Wagner, Wampler, Watkins, Whipple and Williams; Delegates: Abbitt, Albo, Almand, Amundson, Armstrong, Barlow, Baskerville, Bennett, Blevins, Bolvin, Brink, Broman, Bryant, Byron, Callahan, Clement, Councill, Cox, Cranwell, Crittenden, Darner, Day, DeBoer, Deeds, Devolites, Diamonstein, Dickinson, Dillard, Drake, Dudley, Grayson, Griffith, Hall, Hamilton, Hargrove, Harris, Howell, Hull, Ingram, Jackson, Joannou, Johnson, Jones, D.C., Jones, J.C., Jones, S.C., Katzen, Keister, Kilgore, Landes, Larrabee, Louderback, Marshall, May, McClure, McDonnell, McEachin, McQuigg, Melvin, Moran, Morgan, Moss, Nixon, O'Bannon, O'Brien, Orrock, Parrish, Phillips, Plum, Pollard, Purkey, Putney, Rapp, Reid, Rhodes, Robinson, Rollison, Rust, Scott, Sherwood, Shuler, Spruill, Stump, Suit, Tata, Tate, Thomas, Van Landingham, Van Yahres, Wardrup, Ware, Watts, Weatherholtz, Welch, Williams, Woodrum and Wright

---

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

[1.] That §19.2-270.4 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 19.2-270.4:1, and by adding in Title 19.2 a chapter numbered 19.1, consisting of a section numbered 19.2-327.1, and by adding in Title 19.2 a chapter numbered 19.2, consisting of sections numbered 19.2-327.2 through 19.2-327.6, as follows:

§ 19.2-270.4. When donation, destruction or return of exhibits received in evidence authorized.

A. *Except as provided in § 19.2-270.4:1 and unless* objection with sufficient cause is made, the trial court in any criminal case may order the donation or destruction of any or all exhibits received in evidence during the course of the trial (i) at any time after the expiration of the time for filing an appeal from the final judgment of the court if no appeal is taken or (ii) if an appeal is taken, at any time after exhaustion of all appellate remedies. The order of donation or destruction may require that photographs be made of all exhibits ordered to be donated or destroyed and that such photographs be appropriately labeled for future identification. In addition, the order shall state the nature of the exhibit subject to donation or destruction, identify the case in which such exhibit was received and from whom such exhibit was received, if known, and the manner by which the exhibit is to be destroyed or to whom donated.

B. *Except as provided in § 19.2-270.4:1,* a circuit court for good cause shown, on notice to the attorney for the Commonwealth and any attorney for a defendant in the case, may order the return of any or all exhibits to the owners thereof, notwithstanding the pendency of any appeal. The order may be upon such conditions as the court deems appropriate for future identification and inclusion in the record of a case subject to retrial. In addition, the owner shall acknowledge in a sworn affidavit to be filed with the record of the case, that he has retaken possession of such exhibit or exhibits.

C. Any photographs taken pursuant to an order of donation or destruction or an order returning exhibits to the owners shall be retained with the record in the case and, if necessary, shall be admissible in any subsequent trial of the same cause, subject to all other rules of evidence.

D. Upon petition of any organization which is exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, the court in its sound discretion may order the donation of an exhibit to such charitable organization.

§ 19.2-270.4:1. Storage, preservation and retention of human biological evidence in felony cases.

A. Notwithstanding any provision of law or rule of court, upon motion of a person convicted of a felony but not sentenced to death or his attorney of record to the circuit court that entered the judgment for the offense, the court shall order the storage, preservation, and retention of any human biological evidence or representative samples collected or obtained in the case for a period of up to fifteen years from the time of conviction, unless the court determines, in its discretion, that the evidence should be retained for a longer period of time. [*Upon the filing of such a motion, the defendant may request a*

hearing for the limited purpose of identifying the human biological evidence or representative samples that are to be stored in accordance with the provisions of this section.] *Upon the granting of the motion, the court shall order the clerk of the circuit court to return all such evidence to the original investigating law enforcement agency that submitted the case for prosecution. If the evidence is not within the custody of the clerk at the time the order is entered, the court shall order the governmental entity having custody of the evidence to return such evidence to the original law enforcement agency as stated in the order. Upon the entry of an order under this subsection, the court may upon motion or upon good cause shown, with notice to the convicted person, his attorney of record and the attorney for the Commonwealth, modify the original storage order, as it relates to time of storage of the evidence or samples, for a period of time greater than or less than that specified in the original order.*

B. In the case of a person sentenced to death, the court that entered the judgment shall, in all cases, order any human biological evidence or representative samples to be transferred by the governmental entity having custody to the Division of Forensic Science. The Division of Forensic Science shall store, preserve, and retain such evidence until the judgment is executed. If the person sentenced to death has his sentence reduced, then such evidence shall be transferred from the Division to the original investigating law enforcement agency for storage as provided in this section.

C. Pursuant to standards and guidelines established by the Division of Forensic Science, the order shall state the method of custody, transfer and return of any evidence to insure and protect the Commonwealth's interest in the integrity of the evidence. Pursuant to standards and guidelines established by the Division of Forensic Science, the local law enforcement agency or other custodian of the evidence shall take all necessary steps to preserve, store, and retain the evidence and its chain of custody for the period of time specified.

D. In any proceeding under this section, the court, upon a finding that the physical evidence is of such a nature, size or quantity that storage, preservation or retention of all of the evidence is impractical, may order the storage of only representative samples of the evidence. The evidence shall then be transferred to the Division of Forensic Science, which shall take representative samples, cuttings or swabbings and transfer them to the original investigating law enforcement agency for storage or retain them if the case of a death sentence. The remaining evidence shall be handled according to § 19.2-270.4 or as otherwise provided for in the Code.

E. An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees or agents of the Commonwealth or its political at subdivisions.

CHAPTER 19.1.
SCIENTIFIC ANALYSIS OF NEWLY DISCOVERED OR UNTESTED SCIENTIFIC EVIDENCE.

§ 19.2-327.1. Motion by a convicted felon for scientific analysis of newly discovered or previously untested scientific evidence; procedure.

A. Notwithstanding any other provision of law or rule of court, any person convicted of a felony may, by motion to the circuit court that entered the original conviction, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction if: (i) the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available [*at the Division of Forensic Science*] *at the time the conviction became final in the circuit court; (ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way; (iii) the testing is materially relevant, noncumulative, and necessary and may prove* [~~*or disprove*~~] *the convicted person's actual innocence; (iv) the testing requested involves a scientific method employed by the Division of Forensic Science; and (v) the convicted person has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available* [*at the Division of Forensic Science*] .

B. The petitioner shall assert categorically and with specificity, under oath, the facts to support the items enumerated in subsection A and (i) the crime for which the person was convicted, (ii) the reason or reasons the evidence was not known or tested by the time the conviction became final in the circuit court, and (iii) the reason or reasons that the newly discovered or untested evidence may prove [~~*or disprove*~~] *the actual innocence of the person convicted. Such motion shall contain all relevant allegations and facts that are known to the petitioner at the time of filing and shall enumerate and include all previous records, applications, petitions, appeals and their dispositions.*

C. The petitioner shall serve a copy of such motion upon the attorney for the Commonwealth. The Commonwealth shall file its response to the motion within thirty days of the receipt of service. The court shall, no sooner than thirty and no later than ninety days after such motion is filed, hear the motion. Motions made by a petitioner under a sentence of death shall be given priority on the docket.

D. The court shall, after a hearing on the motion, set forth its findings specifically as to each of the items enumerated in subsections A and B and either (i) dismiss the motion for failure to comply with the requirements of this section or (ii) dismiss the motion for failure to state a claim upon which relief can be granted or (iii) order that the testing be done by the Division of Forensic Science based on a finding of clear and convincing evidence that the requirements of subsection A have been met.

E. The court shall order the tests to be performed by the Division of Forensic Science and prescribe in its order, pursuant to standards and guidelines established by the Division, the method of custody, transfer, and return of evidence submitted for scientific investigation sufficient to insure and protect the Commonwealth's interest in the integrity of the evidence. The results of any such testing shall be furnished simultaneously to the court, the petitioner and his attorney of record and the attorney for the Commonwealth. The Division of Forensic Science shall give testing priority to cases in which a sentence of death has been imposed. The results of any tests performed and any hearings held pursuant to this section shall become a part of the record.

F. Nothing in this section shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to § 53.1-232.1 (iii) or (iv) .

G. An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus proceeding or any other appeal. Nothing in this section shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.

CHAPTER 19.2.

ISSUANCE OF WRIT OF ACTUAL INNOCENCE.

§19.2-327.2. Issuance of writ of actual innocence.

Notwithstanding any other provision of law or rule of court, upon a petition of a person incarcerated who was convicted of a felony upon a plea of not guilty, or for any person, regardless of the plea, sentenced to death, the Supreme Court shall have the authority to issue writs of actual innocence under this chapter. The writ shall lie to the circuit court that entered the felony conviction; and that court shall have the authority to conduct hearings, as provided for in § 19.2-327.5, on such a petition as directed by order from the Supreme Court.

§ 19.2-327.3. Contents and form of the petition based on previously unknown or untested human biological evidence of actual innocence.

A. The petitioner shall allege categorically and with specificity, under oath, the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty or that the person is under a sentence of death; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence; (iv) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court, or if known, [the reason] that the evidence was not subject to the scientific testing set forth in the petition; (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney of record has filed the petition within sixty days of obtaining the test results under § 19.2-327.1; (vii) that the petitioner is currently incarcerated; (viii) the reason or reasons the evidence will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (ix) for any conviction that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9-196.11. The Supreme Court may issue a stay of execution pending proceedings under the petition. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to § 53.1-232.1 (iii) or (iv).

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing and shall enumerate and include all previous records, applications, petitions, appeals and their dispositions. A copy of any test results shall be filed with the petition. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the court may dismiss the petition or return the petition to the prisoner pending the completion of such form. The petitioner shall be responsible for all statements contained in the petition. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

C. The Supreme Court shall not accept the petition unless it is accompanied by a duly executed return of service verifying that a copy of the petition and all attachments has been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General. The Attorney General shall have thirty days after receipt of the record in which to file a response to the petition. The response may contain a proffer of any evidence pertaining to the guilt of the defendant that is not included in the record of the case, including evidence that was suppressed at

trial.

D. The Supreme Court may, when the case has been before a trial or appellate court, inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record.

§ 19.2-327.4 Determination by the Supreme Court for findings of fact by the circuit court.

If the Supreme Court determines from the petition, from any hearing on the petition, from a review of the records of the case, including the record of any hearing on a motion to test evidence pursuant to § 9-196.1:1, or from any response from the Attorney General that a resolution of the case requires further development of the facts under this chapter, the court may order the circuit court to conduct a hearing within ninety days after the order has been issued to certify findings of fact with respect to such issues as the Supreme Court shall direct. The record and certified findings of fact of the circuit court shall be filed in the Supreme Court within thirty days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

§ 19.2-327.5. Relief under writ.

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter and the record of any hearings held pursuant to § 19.2-327.1, and if applicable, any findings certified from the circuit court pursuant to § 19.2-327.4, the Court shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish allegations sufficient to justify the issuance of the writ, or (ii) only upon a finding of clear and convincing evidence that the petitioner has proven all of the allegations contained in clauses (iv) through (ix) of subsection A of § 19.2-327.3, and upon a finding that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, grant the writ, and vacate the conviction, or in the event that the Court finds that no rational trier of fact could have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court shall modify the conviction accordingly and remand the case to the circuit court for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted person seeking relief.

§ [~~*19.327.6*~~ *19.2-327.6*] *Claims of relief.*

An action under this chapter or the performance of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.

[2.] That the provisions of Chapter 19.2 of Title 19.2, consisting of sections 19.2-327.2 through 19.2-327.6, of this act shall become effective on November 15, 2002.

[3. That an emergency exists and the provisions of this act, except for the provisions of Chapter 19.2, consisting of sections 19.2-372.2 through 19.2-372.6, are in force from its passage.]