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SENATE BILL NO. 333

Offered January 14, 2004

Prefiled January 14, 2004

A BILL to amend the Code of Virginia by adding in Title 19.2 a chapter numbered 19.3, consisting of sections numbered 19.2-327.10 through 19.2-327.14, relating to post-conviction relief.

Patrons—Stolle, Howell and Norment; Delegates: Albo, Kilgore, McDonnell and Moran

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 19.2 a chapter numbered 19.3, consisting of sections numbered 19.2-327.10 through 19.2-327.14, as follows:

CHAPTER 19.3.**ISSUANCE OF WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE.**

§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence.

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter.

§ 19.2-327.11. Contents and form of the petition based on newly discovered evidence of actual innocence.

A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the newly discovered evidence supporting the allegation of innocence; (iv) that the newly discovered 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; (v) the date the newly discovered evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the newly discovered evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the conviction became final; (vii) the newly discovered evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the newly discovered evidence is not merely cumulative, corroborative or collateral. 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 clause (iii) or clause (iv) of § 53.1-232.1. Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

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

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice

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59 in which to file a response to the petition; however, nothing shall prevent the Attorney General from
60 filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt of
61 the petitioner that is not included in the record of the case, including evidence that was suppressed at
62 trial.

63 D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court
64 may, in any case, award a writ of certiorari to the clerk of the respective court below, and have
65 brought before the Court the whole record or any part of any record. If, in the judgment of the Court,
66 the petition fails to state a claim, or if the assertions of newly discovered evidence, even if true, would
67 fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition
68 summarily, without any hearing or a response from the Attorney General.

69 E. In any petition filed pursuant to this chapter that is not summarily dismissed, the defendant is
70 entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and
71 Article 4 (§ 19.2-163.1) of Chapter 10 of this title. The Court of Appeals may, in its discretion, appoint
72 counsel prior to deciding whether a petition should be summarily dismissed.

73 § 19.2-327.12. Determination by Court of Appeals for findings of fact by the circuit court.

74 If the Court of Appeals determines from the petition, from any hearing on the petition, from a review
75 of the records of the case, or from any response from the Attorney General that a resolution of the case
76 requires further development of the facts, the court may order the circuit court in which the order of
77 conviction was originally entered to conduct a hearing within 90 days after the order has been issued to
78 certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and
79 certified findings of fact of the circuit court shall be filed in the Court of Appeals within 30 days after
80 the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth
81 and the Attorney General shall be served a copy of the order stating the specific purpose and evidence
82 for which the hearing has been ordered.

83 § 19.2-327.13. Relief under writ.

84 Upon consideration of the petition, the response by the Commonwealth, previous records of the case,
85 the record of any hearing held under this chapter and, if applicable, any findings certified from the
86 circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already
87 summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert
88 grounds upon which relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition
89 for failure to establish newly discovered evidence sufficient to justify the issuance of the writ, or (ii)
90 only upon a finding that the petitioner has proven by clear and convincing evidence all of the
91 allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding
92 that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, grant the writ,
93 and vacate the conviction, or in the event that the Court finds that no rational trier of fact could have
94 found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which
95 the petitioner was convicted, but the Court finds that there remains in the original trial record evidence
96 sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court
97 shall modify the order of conviction accordingly and remand the case to the circuit court for
98 resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the
99 convicted person seeking relief.

100 § 19.2-327.14. Claims of relief.

101 An action under this chapter or the actions of any attorney representing the petitioner under this
102 chapter shall not form the basis for relief in any habeas corpus proceeding. Nothing in this chapter
103 shall create any cause of action for damages against the Commonwealth or any of its political
104 subdivisions.