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## HOUSE BILL NO. 2438

Offered January 19, 2011

A *BILL to amend and reenact §§ 19.2-321.1 and 19.2-321.2 of the Code of Virginia, relating to criminal cases; delayed appeal.*

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Patron—Herring

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Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 19.2-321.1 and 19.2-321.2 of the Code of Virginia are amended and reenacted as follows:**

§ 19.2-321.1. Motion in the Court of Appeals for delayed appeal in criminal cases.

A. Filing and content of motion. - When, due to the error, neglect, or fault of counsel representing the appellant, or of the court reporter, or of the circuit court or an officer or employee thereof, an appeal in a criminal case has ~~either~~ (i) never been initiated; ~~or~~ (ii) been dismissed for failure to adhere to proper form, procedures, or time limits in the perfection of the appeal; *or (iii) been denied, or the conviction or convictions have been affirmed for failure to file or timely file the indispensable transcript or written statement of facts* as required by law or by the Rules of the Supreme Court; then a motion for leave to pursue a delayed appeal may be filed in the Court of Appeals within six months after the appeal has been dismissed *or denied, the conviction or convictions have been affirmed*, or the circuit court judgment sought to be appealed has become final, whichever is later. Such motion shall identify the circuit court and the style, date, and circuit court record number of the judgment sought to be appealed, and, if one was assigned in a prior attempt to appeal the judgment, shall give the Court of Appeals record number in that proceeding, and shall set forth the specific facts establishing the said error, neglect, or fault. If the error, neglect, or fault is alleged to be that of an attorney representing the appellant, the motion shall be accompanied by the affidavit of the attorney whose error, neglect, or fault is alleged, verifying the specific facts alleged in the motion, and certifying that the appellant is not personally responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity for appeal.

B. Service, response, and disposition. - Such motion shall be served on the attorney for the Commonwealth or, if a petition for appeal was granted in the original attempt to appeal, upon the Attorney General, in accordance with the Rules of the Supreme Court. If the Commonwealth disputes the facts alleged in the motion, or contends that those facts do not entitle the appellant to a delayed appeal under this section, the motion shall be denied without prejudice to the appellant's right to seek a delayed appeal by means of petition for a writ of habeas corpus. Otherwise, the Court of Appeals shall, if the motion meets the requirements of this section, grant appellant leave to initiate or re-initiate pursuit of the appeal.

C. Time limits when motion granted. - If the motion is granted, all computations of time under the Rules of the Supreme Court shall run from the date of the order of the Court of Appeals granting the motion, or if the appellant has been determined to be indigent, from the date of the order by the circuit court appointing counsel to represent the appellant in the delayed appeal, whichever is later.

D. Applicability. - The provisions of this section shall not apply to cases in which the appellant is responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity for appeal, nor shall it apply in cases where the claim of error, neglect, or fault has already been alleged and rejected in a prior judicial proceeding.

§ 19.2-321.2. Motion in the Supreme Court for delayed appeal in criminal cases.

A. Filing and content of motion. - When, due to the error, neglect, or fault of counsel representing the appellant, or of the court reporter, or of the Court of Appeals or the circuit court or an officer or employee of either, an appeal from the Court of Appeals to the Supreme Court in a criminal case has ~~either~~ (i) never been initiated; ~~or~~ (ii) been dismissed for failure to adhere to proper form, procedures, or time limits in the perfection of the appeal; *or (iii) been denied, or the conviction or convictions have been affirmed for failure to file or timely file the indispensable transcript or written statement of facts* as required by law or by the Rules of the Supreme Court; then a motion for leave to pursue a delayed appeal may be filed in the Supreme Court within six months after the appeal has been dismissed *or denied, the conviction or convictions have been affirmed*, or the Court of Appeals judgment sought to be appealed has become final, whichever is later. Such motion shall identify by the style, date, and Court of Appeals record number of the judgment sought to be appealed, and, if one was assigned in a prior attempt to appeal the judgment to the Supreme Court, shall give the record number assigned in the

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59 Supreme Court in that proceeding, and shall set forth the specific facts establishing the said error,  
60 neglect, or fault. If the error, neglect, or fault is alleged to be that of an attorney representing the  
61 appellant, the motion shall be accompanied by the affidavit of the attorney whose error, neglect, or fault  
62 is alleged, verifying the specific facts alleged in the motion, and certifying that the appellant is not  
63 personally responsible, in whole or in part, for the error, neglect, or fault causing loss of the original  
64 opportunity for appeal.

65 B. Service, response, and disposition. - Such motion shall be served on the attorney for the  
66 Commonwealth or, if a petition for appeal was granted in the Court of Appeals or in the Supreme Court  
67 in the original attempt to appeal, upon the Attorney General, in accordance with Rule 5:4 of the  
68 Supreme Court. If the Commonwealth disputes the facts alleged in the motion, or contends that those  
69 facts do not entitle the appellant to a delayed appeal under this section, the motion shall be denied  
70 without prejudice to the appellant's right to seek a delayed appeal by means of petition for a writ of  
71 habeas corpus. Otherwise, the Supreme Court shall, if the motion meets the requirements of this section,  
72 grant appellant leave to initiate or re-initiate pursuit of the appeal from the Court of Appeals to the  
73 Supreme Court.

74 C. Time limits when motion granted. - If the motion is granted, all computations of time under the  
75 Rules of the Supreme Court shall run from the date of the order of the Supreme Court granting the  
76 motion, or if the appellant has been determined to be indigent, from the date of the order by the circuit  
77 court appointing counsel to represent the appellant in the delayed appeal, whichever is later.

78 D. Applicability. - The provisions of this section shall not apply to cases in which the appellant is  
79 responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity  
80 for appeal, nor shall it apply in cases where the claim of error, neglect, or fault has already been alleged  
81 and rejected in a prior judicial proceeding, nor shall it apply in cases in which a sentence of death has  
82 been imposed.