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## HOUSE BILL NO. 1308

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice  
on January 23, 2013)

(Patron Prior to Substitute—Delegate Habeeb)

A BILL to amend and reenact §§ 19.2-327.1, 19.2-327.2, 19.2-327.3, 19.2-327.5, and 19.2-327.10 through 19.2-327.13 of the Code of Virginia, relating to writs of actual innocence; petition by juvenile adjudicated delinquent upon felony charge.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-327.1, 19.2-327.2, 19.2-327.3, 19.2-327.5, and 19.2-327.10 through 19.2-327.13 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-327.1. Motion by a convicted felon or person adjudicated delinquent 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 or any person who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may, by motion to the circuit court that entered the original conviction or the adjudication of delinquency, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction or adjudication of delinquency if: (i) the evidence was not known or available at the time the conviction or adjudication of delinquency became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Department of Forensic Science at the time the conviction or adjudication of delinquency 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 the convicted person's actual innocence of the convicted person or the person adjudicated delinquent; (iv) the testing requested involves a scientific method employed by the Department of Forensic Science; and (v) the convicted person convicted or adjudicated delinquent has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available at the Department 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 or adjudicated delinquent, (ii) the reason or reasons the evidence was not known or tested by the time the conviction or adjudication of delinquency became final in the circuit court, and (iii) the reason or reasons that the newly discovered or untested evidence may prove the actual innocence of the person convicted or adjudicated delinquent. 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, and 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 30 days of the receipt of service. The court shall, no sooner than 30 and no later than 90 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 Department 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 Department of Forensic Science and prescribe in its order, pursuant to standards and guidelines established by the Department, 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 Department 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 clause (iii) or (iv) of § 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.

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60 Nothing in this section shall create any cause of action for damages against the Commonwealth or any  
61 of its political subdivisions or any officers, employees or agents of the Commonwealth or its political  
62 subdivisions.

63 H. In any petition filed pursuant to this chapter, the ~~defendant~~ petitioner is entitled to representation  
64 by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10 of this title.

65 **§ 19.2-327.2. Issuance of writ of actual innocence based on biological evidence.**

66 Notwithstanding any other provision of law or rule of court, upon a petition of a person who was  
67 convicted of a felony upon a plea of not guilty or *who was adjudicated delinquent upon a plea of not*  
68 *guilty by a circuit court of an offense that would be a felony if committed by an adult*, or for any  
69 person, regardless of the plea, sentenced to death, or convicted *or adjudicated delinquent* of (i) a Class 1  
70 felony, (ii) a Class 2 felony, or (iii) any felony for which the maximum penalty is imprisonment for life,  
71 the Supreme Court shall have the authority to issue writs of actual innocence under this chapter. The  
72 writ shall lie to the circuit court that entered the felony conviction; *or adjudication of delinquency* and  
73 that court shall have the authority to conduct hearings, as provided for in § 19.2-327.5, on such a  
74 petition as directed by order from the Supreme Court.

75 **§ 19.2-327.3. Contents and form of the petition based on previously unknown or untested**  
76 **human biological evidence of actual innocence.**

77 A. The petitioner shall allege categorically and with specificity, under oath, the following: (i) the  
78 crime for which the petitioner was convicted *or the offense for which the petitioner was adjudicated*  
79 *delinquent*, and that such conviction *or adjudication of delinquency* was upon a plea of not guilty or that  
80 the person is under a sentence of death or convicted of ~~(1)~~ (a) a Class 1 felony, ~~(2)~~ (b) a Class 2 felony  
81 or ~~(3)~~ (c) any felony for which the maximum penalty is imprisonment for life; (ii) that the petitioner is  
82 actually innocent of the crime for which he was convicted *or adjudicated delinquent*; (iii) an exact  
83 description of the human biological evidence and the scientific testing supporting the allegation of  
84 innocence; (iv) that the evidence was not previously known or available to the petitioner or his trial  
85 attorney of record at the time the conviction *or adjudication of delinquency* became final in the circuit  
86 court, or if known, the reason that the evidence was not subject to the scientific testing set forth in the  
87 petition; (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney  
88 of record; (vi) that the petitioner or his attorney of record has filed the petition within 60 days of  
89 obtaining the test results under § 19.2-327.1; (vii) the reason or reasons the evidence will prove that no  
90 rational trier of fact could have found proof of guilt *or delinquency* beyond a reasonable doubt; and  
91 (viii) for any conviction *or adjudication of delinquency* that became final in the circuit court after June  
92 30, 1996, that the evidence was not available for testing under § 9.1-1104. The Supreme Court may  
93 issue a stay of execution pending proceedings under the petition. Nothing in this chapter shall constitute  
94 grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that  
95 has been set pursuant to *clause (iii) or (iv) of § 53.1-232.1* ~~(iii) or (iv)~~.

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

104 C. The Supreme Court shall not accept the petition unless it is accompanied by a duly executed  
105 return of service in the form of a verification that a copy of the petition and all attachments has been  
106 served on the attorney for the Commonwealth of the jurisdiction where the conviction *or adjudication of*  
107 *delinquency* occurred and the Attorney General or an acceptance of service signed by these officials, or  
108 any combination thereof. The Attorney General shall have 30 days after receipt of the record by the  
109 clerk of the Supreme Court in which to file a response to the petition. The response may contain a  
110 proffer of any evidence pertaining to the guilt *or delinquency* of the ~~defendant~~ petitioner that is not  
111 included in the record of the case, including evidence that was suppressed at trial.

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

116 E. In any petition filed pursuant to this chapter, the ~~defendant~~ petitioner is entitled to representation  
117 by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10 of this title.

118 **§ 19.2-327.5. Relief under writ.**

119 Upon consideration of the petition, the response by the Commonwealth, previous records of the case,  
120 the record of any hearing held under this chapter and the record of any hearings held pursuant to  
121 § 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 (viii) of subsection A of § 19.2-327.3, and upon a finding that no rational trier of fact could have found proof of guilt *or delinquency* beyond a reasonable doubt, grant the writ, and vacate the conviction *or adjudication of delinquency*, 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 *or adjudicated delinquent*, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty *or delinquent* beyond a reasonable doubt of a lesser included offense, the court shall modify the conviction *or adjudication of delinquency* 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 *or delinquent* person seeking relief. If a writ vacating a conviction *or adjudication of delinquency* is granted, the Court shall forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted.

**§ 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, *or the petition of a person who was adjudicated delinquent, upon a plea of not guilty, by a circuit court of an offense that would be a felony if committed by an adult*, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. Only one such writ based upon such conviction *or adjudication of delinquency* may be filed by a petitioner. The writ shall lie to the *circuit* court that entered the conviction *or the adjudication of delinquency* 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 previously unknown or unavailable 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 *or the offense for which the petitioner was adjudicated delinquent*, and that such conviction *or adjudication of delinquency* was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted *or the offense for which he was adjudicated delinquent*; (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction *or adjudication of delinquency* became final in the circuit court; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction *or adjudication of delinquency* by the *circuit* court; (vii) the previously unknown or unavailable 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 *or delinquency* beyond a reasonable doubt; and (viii) the previously unknown or unavailable 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 or to delay or stay any other ~~post-conviction~~ appeals *following conviction or adjudication of delinquency*, or petitions to any court. 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, *and* 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 *or adjudication of delinquency* 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 *or adjudication of delinquency* 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 in which to file a response to the petition that may be extended for good cause shown; however, nothing shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt *or delinquency* of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may 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. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of previously unknown or unavailable evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

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

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

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction *or the adjudication of delinquency* was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be filed in the Court of Appeals within 30 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.

**§ 19.2-327.13. 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, if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or the Court shall (i) dismiss the petition for failure to establish previously unknown or unavailable evidence sufficient to justify the issuance of the writ, or (ii) only upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact could have found proof of guilt *or delinquency* beyond a reasonable doubt, grant the writ, and vacate the conviction *or finding of delinquency*, 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 *or adjudicated delinquent*, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty *or delinquent* beyond a reasonable doubt of a lesser included offense, the court shall modify the order of conviction *or delinquency* accordingly and remand the case to the circuit court *that entered the conviction or adjudication of delinquency* for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted *or delinquent* person seeking relief. If a writ vacating a conviction *or adjudication of delinquency* is granted, and no appeal is made to the Supreme Court, or the Supreme Court denies the Commonwealth's petition for appeal or upholds the decision of the Court of Appeals to grant the writ, the Court of Appeals shall forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted.