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HOUSE BILL NO. 1432

Offered January 9, 2013

Prefiled December 20, 2012

A *BILL to amend and reenact §§ 19.2-327.3, 19.2-327.5, 19.2-327.11, and 19.2-327.13 of the Code of Virginia, relating to writs of actual innocence.*

Patrons—Albo and Morrissey

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-327.3, 19.2-327.5, and 19.2-327.11 through 19.2-327.13 of the Code of Virginia are amended and reenacted as follows:

§ 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 or convicted of ~~(4)~~ (a) a Class 1 felony, ~~(2)~~ (b) a Class 2 felony, or ~~(3)~~ (c) any felony for which the maximum penalty is imprisonment for life; (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 60 days of obtaining the test results under § 19.2-327.1; (vii) the reason or reasons the evidence will prove that no rational trier of fact ~~could~~ *would* have found proof of guilt beyond a reasonable doubt; and (viii) for any conviction that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9.1-1104. 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 *clause (iii) or (iv) of § 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~~ 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 in the form of a verification 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 or an acceptance of service signed by these officials, or any combination thereof. The Attorney General shall have 30 days after receipt of the record by the clerk of the Supreme Court in which to file a response to the petition. The response may contain a proffer of any evidence pertaining to the guilt *or innocence* 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.

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

§ 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 Supreme Court shall either dismiss the petition for failure to state a claim or assert grounds upon which

INTRODUCED

HB1432

59 relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish
60 allegations sufficient to justify the issuance of the writ, or (ii) only upon a finding of clear and
61 convincing evidence that the petitioner has proven all of the allegations contained in clauses (iv) through
62 (viii) of subsection A of § 19.2-327.3, and upon a finding that no rational trier of fact ~~could~~ *would* have
63 found proof of guilt beyond a reasonable doubt, grant the writ, and vacate the conviction, or in the
64 event that the Court finds that no rational trier of fact ~~could~~ *would* have found sufficient evidence
65 beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was
66 convicted, but the Court finds that there remains in the original trial record evidence sufficient to find
67 the petitioner guilty beyond a reasonable doubt of a lesser included offense, the ~~court~~ Court shall
68 modify the conviction accordingly and remand the case to the circuit court for resentencing. The burden
69 of proof in a proceeding brought pursuant to this chapter shall be upon the convicted person seeking
70 relief. If a writ vacating a conviction is granted, the Court shall forward a copy of the writ to the circuit
71 court, where an order of expungement shall be immediately granted.

72 **§ 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable**
73 **evidence of actual innocence.**

74 A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i)
75 the crime for which the petitioner was convicted, and that such conviction was upon a plea of not
76 guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact
77 description of the previously unknown or unavailable evidence supporting the allegation of innocence;
78 (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of
79 record at the time the conviction became final in the circuit court; (v) the date the previously unknown
80 or unavailable evidence became known or available to the petitioner, and the circumstances under which
81 it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the
82 exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry
83 of the final order of conviction by the court; (vii) the previously unknown or unavailable evidence is
84 material and, when considered with all of the other evidence in the current record, will prove that no
85 rational trier of fact ~~could~~ *would* have found proof of guilt beyond a reasonable doubt; and (viii) the
86 previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.
87 Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to
88 § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or clause (iv) of
89 § 53.1-232.1 or to delay or stay any other post-conviction appeals or petitions to any court. Human
90 biological evidence may not be used as the sole basis for seeking relief under this writ but may be used
91 in conjunction with other evidence.

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

99 C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition
100 unless it is accompanied by a duly executed return of service in the form of a verification that a copy of
101 the petition and all attachments have been served on the attorney for the Commonwealth of the
102 jurisdiction where the conviction occurred and the Attorney General, or an acceptance of service signed
103 by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of
104 Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition
105 and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the
106 jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not
107 summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the
108 Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice
109 in which to file a response to the petition that may be extended for good cause shown; however, nothing
110 shall prevent the Attorney General from filing an earlier response. The response may contain a proffer
111 of any evidence pertaining to the guilt *or innocence* of the petitioner that is not included in the record
112 of the case, including evidence that was suppressed at trial.

113 D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court
114 may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought
115 before the Court the whole record or any part of any record. If, in the judgment of the Court, the
116 petition fails to state a claim, or if the assertions of previously unknown or unavailable evidence, even if
117 true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the
118 petition summarily, without any hearing or a response from the Attorney General.

119 E. In any petition filed pursuant to this chapter that is not summarily dismissed, the defendant is
120 entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and

Article 4 (§ ~~19.2-163.1~~ 19.2-163.3 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.

§ 19.2-327.13. 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~~ *would* 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~~ *would* 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~~ Court shall modify the order of 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. If a writ vacating a conviction 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.

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HB1432