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## SENATE BILL NO. 823

Offered January 9, 2013

Prefiled December 27, 2012

A BILL to amend and reenact §§ 19.2-327.2, 19.2-327.3, 19.2-327.10, and 19.2-327.11 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 19.2-327.2:1 and 19.2-327.10:1, relating to the issuance of a writ of actual innocence; joint petition by convicted felon and attorney for the Commonwealth.

Patron—Alexander

Referred to Committee for Courts of Justice

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

1. That §§ 19.2-327.2, 19.2-327.3, 19.2-327.10, and 19.2-327.11 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 19.2-327.2:1 and 19.2-327.10:1 as follows:

**§ 19.2-327.2. Issuance of writ of actual innocence based on biological 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 for any person, regardless of the plea, sentenced to death, or convicted of (i) a Class 1 felony, (ii) a Class 2 felony or (iii) any felony for which the maximum penalty is imprisonment for life, 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.

**§ 19.2-327.2:1. Petition for writ of actual innocence joined by attorney for the Commonwealth; release of prisoner; bond hearing.**

The attorney for the Commonwealth of the jurisdiction wherein the person was convicted may join in a petition for a writ of actual innocence made pursuant to § 19.2-327.2. When such petition is so joined, the petitioner may file a copy of the petition and attachments thereto with the circuit court that entered the felony conviction and move the court for a hearing to consider release of the person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the court may order the person released from custody subject to the terms and conditions of bail so established, pending a ruling by the Court on the writ under § 19.2-327.5.

**§ 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 (1) a Class 1 felony, (2) a Class 2 felony or (3) 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 have found proof of guilt beyond a would have created in a rational trier of fact reasonable doubt as to the guilt of the petitioner; 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 § 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

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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 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.

**§ 19.2-327.10. 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. ~~Only one such writ based upon such conviction may be filed by a petitioner.~~ 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.

**§ 19.2-327.10:1. Petition for writ of actual innocence joined by attorney for the Commonwealth; release of prisoner; bond hearing.**

*The attorney for the Commonwealth of the jurisdiction wherein the person was convicted may join in a petition for a writ of actual innocence made pursuant to § 19.2-327.10. When such petition is so joined, the petitioner may file a copy of the petition and attachments thereto with the circuit court that entered the felony conviction and move the court for a hearing to consider release of the person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the court may order the person released from custody subject to the terms and conditions of bail so established, pending a ruling by the Court on the writ under § 19.2-327.13.*

**§ 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; ~~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 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 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 by the 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 beyond a~~ *would have created in a rational trier of fact* reasonable doubt ~~as to the guilt of the petitioner~~; 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 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, 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.

121 C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition  
122 unless it is accompanied by a duly executed return of service in the form of a verification that a copy of  
123 the petition and all attachments have been served on the attorney for the Commonwealth of the  
124 jurisdiction where the conviction occurred and the Attorney General, or an acceptance of service signed  
125 by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of  
126 Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition  
127 and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the  
128 jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not  
129 summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the  
130 Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice  
131 in which to file a response to the petition that may be extended for good cause shown; however, nothing  
132 shall prevent the Attorney General from filing an earlier response. The response may contain a proffer  
133 of any evidence pertaining to the guilt of the petitioner that is not included in the record of the case,  
134 including evidence that was suppressed at trial.

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

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