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HOUSE BILL NO. 598

Offered January 8, 2014

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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, relating to the type of plea required for issuance of a writ of actual innocence.

Patron—Herring

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 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 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, or for any person, regardless of the plea, sentenced to death, or convicted or adjudicated delinquent 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 or adjudication of delinquency 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.

§ 19.2-327.3. 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 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 or that the person is under a sentence of death or convicted of (a) a Class 1 felony, (b) a Class 2 felony, or (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 or adjudicated delinquent; (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 or adjudication of delinquency 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 would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) for any conviction or adjudication of delinquency 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.

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, and 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 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 or adjudication of delinquency 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 delinquency or innocence of the petitioner that is not

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59 included in the record of the case, including evidence that was suppressed at trial.

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

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

66 **§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence.**

67 Notwithstanding any other provision of law or rule of court, upon a petition of a person who was
68 convicted of a felony ~~upon a plea of not guilty~~, or the petition of a person who was adjudicated
69 delinquent, upon a plea of not guilty, by a circuit court of an offense that would be a felony if
70 committed by an adult, the Court of Appeals shall have the authority to issue writs of actual innocence
71 under this chapter. Only one such writ based upon such conviction or adjudication of delinquency may
72 be filed by a petitioner. The writ shall lie to the circuit court that entered the conviction or the
73 adjudication of delinquency and that court shall have the authority to conduct hearings, as provided for
74 in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with
75 §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the
76 Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia
77 shall have the authority to issue writs in accordance with the provisions of this chapter.

78 **§ 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable**
79 **evidence of actual innocence.**

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

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

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

121 including evidence that was suppressed at trial.

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

128 E. In any petition filed pursuant to this chapter that is not summarily dismissed, the petitioner is
129 entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and
130 Article 4 (§ 19.2-163.3 et seq.) of Chapter 10. The Court of Appeals may, in its discretion, appoint
131 counsel prior to deciding whether a petition should be summarily dismissed.