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HOUSE BILL NO. 2085

Offered January 11, 2017

Prefiled January 10, 2017

A BILL to amend and reenact §§ 19.2-327.2, 19.2-327.2:1, 19.2-327.3, and 19.2-327.5 of the Code of Virginia, relating to petition for 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, 19.2-327.2:1, 19.2-327.3, and 19.2-327.5 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.

§ 19.2-327.2:1. Petition for writ of actual innocence joined by Attorney General; release of prisoner; bond hearing.

The Attorney General 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 and the Attorney General's answer with the circuit court that entered the felony conviction or adjudication of delinquency 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 Supreme 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 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

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59 in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution and
60 conviction of perjury as provided for in § 18.2-434.

61 C. The Supreme Court shall not accept the petition unless it is accompanied by a duly executed
62 return of service in the form of a verification that a copy of the petition and all attachments has been
63 served on the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of
64 delinquency occurred and the Attorney General or an acceptance of service signed by these officials, or
65 any combination thereof. The Attorney General shall have 30 days after receipt of the record by the
66 clerk of the Supreme Court in which to file a response to the petition. The response may contain a
67 proffer of any evidence pertaining to the guilt or delinquency or innocence of the petitioner that is not
68 included in the record of the case, including evidence that was suppressed at trial.

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

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

75 **§ 19.2-327.5. Relief under writ.**

76 Upon consideration of the petition, the response by the Commonwealth, previous records of the case,
77 the record of any hearing held under this chapter and the record of any hearings held pursuant to §
78 19.2-327.1, and if applicable, any findings certified from the circuit court pursuant to § 19.2-327.4, the
79 Supreme Court shall either dismiss the petition for failure to state a claim or assert grounds upon which
80 relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish
81 allegations sufficient to justify the issuance of the writ or (ii) only upon a finding of ~~clear and~~
82 ~~convincing~~ *by a preponderance of the* evidence that the petitioner has proven all of the allegations
83 contained in clauses (iv) through (viii) of subsection A of § 19.2-327.3, and upon a finding that no
84 rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt, grant
85 the writ, and vacate the conviction or adjudication of delinquency, or in the event that the Court finds
86 that no rational trier of fact would have found sufficient evidence beyond a reasonable doubt as to one
87 or more elements of the offense for which the petitioner was convicted or adjudicated delinquent, but
88 the Court finds that there remains in the original trial record evidence sufficient to find the petitioner
89 guilty or delinquent beyond a reasonable doubt of a lesser included offense, the Court shall modify the
90 conviction or adjudication of delinquency accordingly and remand the case to the circuit court for
91 resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the
92 convicted or delinquent person seeking relief. If a writ vacating a conviction or adjudication of
93 delinquency is granted, the Court shall forward a copy of the writ to the circuit court, where an order of
94 expungement shall be immediately granted.