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SENATE BILL NO. 777

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 5, 2018)

(Patron Prior to Substitute—Senator Stanley)

A BILL to amend the Code of Virginia by adding in Title 19.2 a chapter numbered 19.4, consisting of a section numbered 19.2-327.15, relating to post-conviction relief; previously admitted scientific evidence.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 19.2 a chapter numbered 19.4, consisting of a section numbered 19.2-327.15, as follows:

CHAPTER 19.4.

WRIT OF NEW OR DISCREDITED FORENSIC SCIENTIFIC EVIDENCE.

§ 19.2-327.15. *Previously admitted forensic scientific evidence undermined; vacation of conviction.*

A. As used in this chapter, unless the context requires a different meaning:

"Covered offense" includes any violation of, attempted violation of, or conspiracy to violate Article 1 (§ 18.2-30 et seq.), 3 (§ 18.2-47 et seq.), 4 (§ 18.2-51 et seq.), or 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 or Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2.

"Forensic science" means the application of scientific or technical practices to the recognition, collection, analysis, and interpretation of evidence for criminal law.

"Forensic scientific evidence" includes scientific or technical knowledge; a testifying forensic analyst's or expert's scientific or technical knowledge or opinion; reports and testimony offered by experts or forensic analysts; scientific standards and guidelines; and a scientific method or technique upon which the relevant forensic scientific evidence is based.

"Scientific knowledge" includes the knowledge on which the general scientific community relies and all fields of scientific knowledge on which those fields or disciplines rely.

B. Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a covered offense upon a plea of not guilty or an Alford plea, or who was adjudicated delinquent upon a plea of not guilty or an Alford plea by a circuit court of an offense that would be a covered offense if committed by an adult, the Court of Appeals shall have the authority following receipt of such petition in accordance with subsection C to vacate a conviction or adjudication of delinquency under this chapter. Only one such writ based upon a conviction or adjudication of delinquency may be filed by a petitioner unless it is distinguishable from prior petitions under this section.

C. The petitioner shall allege in the petition categorically and with specificity, under oath, the following: (i) that the petitioner did not commit the covered offense for which the petitioner was convicted or adjudicated delinquent, nor engage in conduct that would support a conviction for a lesser offense or any other crime arising from, or reasonably connected to, the facts supporting the indictment or information upon which he was convicted or adjudicated delinquent; (ii) an exact description of the forensic scientific evidence and its relevance in demonstrating that the petitioner did not commit the covered offense; (iii) specific facts indicating that relevant forensic scientific evidence was not available at the time of the petitioner's conviction or adjudication of delinquency through the exercise of reasonable due diligence by the petitioner or that discredited forensic scientific evidence was presented at the petitioner's conviction or adjudication of delinquency; (iv) that had the forensic scientific evidence been presented at conviction or adjudication of delinquency, the petitioner would not have been convicted or adjudicated delinquent.

D. 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 in the Court of Appeals 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.

E. 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

60 certificate that a copy of the petition and all attachments have been sent, by certified mail, to the
61 attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency
62 occurred and the Attorney General.

63 F. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court
64 may, in any case, award a writ of certiorari to the clerk of the respective court below and have brought
65 before the Court the whole record or any part of any record. If, in the judgment of the Court, the
66 petition fails to state a claim, the Court may dismiss the petition summarily, without any hearing or a
67 response from the Attorney General.

68 G. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the
69 Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall
70 have 60 days after receipt of such notice in which to file a response to the petition, which may be
71 extended for good cause shown; however, nothing shall prevent the Attorney General from filing an
72 earlier response. The response may contain a proffer of any evidence pertaining to the guilt or
73 delinquency or innocence of the petitioner that is not included in the record of the case, including
74 evidence that was not introduced at trial.

75 H. If the Court of Appeals determines from the petition, from any hearing on the petition, from a
76 review of the records of the case, or from any response from the Attorney General that a resolution of
77 the case requires further development of the facts, the court may order the circuit court in which the
78 order of conviction or the adjudication of delinquency was originally entered to conduct a hearing
79 within 90 days after the order has been issued to certify findings of fact with respect to such issues as
80 the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be
81 filed in the Court of Appeals within 30 days after the hearing is concluded. The petitioner or his
82 attorney of record, the attorney for the Commonwealth, and the Attorney General shall be served a copy
83 of the order stating the specific purpose and evidence for which the hearing has been ordered.

84 I. In making a determination as to whether the relevant forensic scientific evidence was not
85 ascertainable through the exercise of reasonable diligence before the date of or during the conviction or
86 adjudication of delinquency, or whether the forensic scientific evidence has been discredited since the
87 date of the conviction or adjudication of delinquency, the court shall consider whether the relevant
88 forensic scientific evidence has changed since the trial or plea date.

89 J. Upon consideration of the petition, the response by the Attorney General, previous records of the
90 case, and any evidence presented at the hearing, the court shall (i) dismiss the petition for failure to
91 establish allegations sufficient to justify vacating the petitioner's conviction or adjudication of
92 delinquency or (ii) upon a finding by clear and convincing evidence that the petitioner has proven all of
93 the allegations contained in subsection C, grant the writ and vacate the petitioner's conviction or
94 adjudication of delinquency, subject to retrial in the discretion of the Commonwealth. The burden of
95 proof in a proceeding brought pursuant to this section shall be upon the petitioner.

96 K. In any petition filed pursuant to this chapter that is not summarily dismissed, the petitioner is
97 entitled to representation by counsel subject to the provisions of Articles 3 (§ 19.2-157 et seq.) and 4
98 (§ 19.2-163.3 et seq.) of Chapter 10.

99 L. A petition filed pursuant to this chapter shall not constitute the sole grounds to delay setting an
100 execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to
101 clause (iii) or (iv) of § 53.1-232.1 or to delay or stay any other appeals following conviction or
102 adjudication of delinquency or petitions to any court; however, any evidence or arguments raised in
103 such a petition may form the basis to issue a stay of execution.

104 M. Nothing in this chapter creates any liabilities for an expert who repudiates his original opinion
105 provided at a hearing or trial or whose opinion has been undermined by later scientific research or
106 technological advancements.

107 N. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the
108 Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the
109 Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of
110 this chapter.

111 **2. That the provisions of this act shall become effective on July 1, 2019.**

112 **3. That the provisions of this act shall expire on July 1, 2023.**

113 **4. That the Office of the Executive Secretary of the Supreme Court of Virginia shall report to the**
114 **Chairmen of the Senate and House Courts of Justice Committees on January 1 of each year the**
115 **number of petitions filed for writs of new or discredited forensic science evidence pursuant to**
116 **Chapter 19.4 (§ 19.2-327.15) of Title 19.2 of the Code of Virginia, as created by this act, and the**
117 **dispositions thereof.**