

## 1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 19.2-327.2, 19.2-327.2:1, 19.2-327.3, 19.2-327.5, 19.2-327.10,*  
 3 *19.2-327.10:1, 19.2-327.11, and 19.2-327.13 of the Code of Virginia, relating to petition for writ of*  
 4 *actual innocence.*

5 [H 974]

6 Approved

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

8 **1. That §§ 19.2-327.2, 19.2-327.2:1, 19.2-327.3, 19.2-327.5, 19.2-327.10, 19.2-327.10:1, 19.2-327.11,**  
 9 **and 19.2-327.13 of the Code of Virginia are amended and reenacted as follows:**

10 **§ 19.2-327.2. Issuance of writ of actual innocence based on biological evidence.**

11 Notwithstanding any other provision of law or rule of court, upon a petition of a person who was  
 12 convicted of a felony ~~upon a plea of not guilty~~ or who was adjudicated delinquent ~~upon a plea of not~~  
 13 ~~guilty~~ by a circuit court of an offense that would be a felony if committed by an adult; ~~or for any~~  
 14 ~~person, regardless of the plea, sentenced to death, or convicted or adjudicated delinquent of (i) a Class 1~~  
 15 ~~felony, (ii) a Class 2 felony, or (iii) any felony for which the maximum penalty is imprisonment for life,~~  
 16 the Supreme Court shall have the authority to issue writs of actual innocence under this chapter. The  
 17 writ shall lie to the circuit court that entered the felony conviction or adjudication of delinquency and  
 18 that court shall have the authority to conduct hearings, as provided for in § 19.2-327.5, on such a  
 19 petition as directed by order from the Supreme Court.

20 **§ 19.2-327.2:1. Petition for writ of actual innocence joined by Attorney General; release of**  
 21 **prisoner; bond hearing.**

22 The Attorney General may join in a petition for a writ of actual innocence made pursuant to  
 23 § 19.2-327.2. When such petition is so joined, the petitioner may file a copy of the petition and  
 24 attachments thereto and the Attorney General's answer with the circuit court that entered the felony  
 25 conviction *or adjudication of delinquency* and move the court for a hearing to consider release of the  
 26 person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the  
 27 court may order the person released from custody subject to the terms and conditions of bail so  
 28 established, pending a ruling by the Supreme Court on the writ under § 19.2-327.5.

29 **§ 19.2-327.3. Contents and form of the petition based on previously unknown or untested**  
 30 **human biological evidence of actual innocence.**

31 A. The petitioner shall allege categorically and with specificity, under oath, the following: (i) the  
 32 crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated  
 33 delinquent; ~~and that such conviction or adjudication of delinquency was upon a plea of not guilty or that~~  
 34 ~~the person is under a sentence of death or convicted of (a) a Class 1 felony, (b) a Class 2 felony, or (c)~~  
 35 ~~any felony for which the maximum penalty is imprisonment for life;~~ (ii) that the petitioner is actually  
 36 innocent of the crime for which he was convicted or adjudicated delinquent; (iii) an exact description of  
 37 the human biological evidence and the scientific testing supporting the allegation of innocence; (iv) that  
 38 the evidence was not previously known or available to the petitioner or his trial attorney of record at the  
 39 time the conviction or adjudication of delinquency became final in the circuit court, or if known, the  
 40 reason that the evidence was not subject to the scientific testing set forth in the petition; (v) the date the  
 41 test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the  
 42 petitioner or his attorney of record has filed the petition within 60 days of obtaining the test results  
 43 under § 19.2-327.1; (vii) the reason or reasons the evidence will prove that no rational trier of fact  
 44 would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) for any conviction  
 45 or adjudication of delinquency that became final in the circuit court after June 30, 1996, that the  
 46 evidence was not available for testing under § 9.1-1104. The Supreme Court may issue a stay of  
 47 execution pending proceedings under the petition. Nothing in this chapter shall constitute grounds to  
 48 delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set  
 49 pursuant to clause (iii) or (iv) of § 53.1-232.1.

50 B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the  
 51 time of filing and shall enumerate and include all previous records, applications, petitions, and appeals  
 52 and their dispositions. A copy of any test results shall be filed with the petition. The petition shall be  
 53 filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the  
 54 Court may dismiss the petition or return the petition to the prisoner pending the completion of such  
 55 form. The petitioner shall be responsible for all statements contained in the petition. Any false statement  
 56 in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution and

57 conviction of perjury as provided for in § 18.2-434.

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

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

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

72 **§ 19.2-327.5. Relief under writ.**

73 Upon consideration of the petition, the response by the Commonwealth, previous records of the case,  
74 the record of any hearing held under this chapter and the record of any hearings held pursuant to  
75 § 19.2-327.1, and if applicable, any findings certified from the circuit court pursuant to § 19.2-327.4, the  
76 Supreme Court shall either dismiss the petition for failure to state a claim or assert grounds upon which  
77 relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish  
78 allegations sufficient to justify the issuance of the writ or (ii) only upon a finding of clear and  
79 convincing by a preponderance of the evidence that the petitioner has proven all of the allegations  
80 contained in clauses (iv) through (viii) of subsection A of § 19.2-327.3, and upon a finding that no  
81 rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt, grant  
82 the writ, and vacate the conviction or adjudication of delinquency, or in the event that the Court finds  
83 that no rational trier of fact would have found sufficient evidence beyond a reasonable doubt as to one  
84 or more elements of the offense for which the petitioner was convicted or adjudicated delinquent, but  
85 the Court finds that there remains in the original trial record evidence sufficient to find the petitioner  
86 guilty or delinquent beyond a reasonable doubt of a lesser included offense, the Court shall modify the  
87 conviction or adjudication of delinquency accordingly and remand the case to the circuit court for  
88 resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the  
89 convicted or delinquent person seeking relief. If a writ vacating a conviction or adjudication of  
90 delinquency is granted, the Court shall forward a copy of the writ to the circuit court, where an order of  
91 expungement shall be immediately granted.

92 **§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence.**

93 Notwithstanding any other provision of law or rule of court, upon a petition of a person who was  
94 convicted of a felony upon a plea of not guilty, or the petition of a person who was adjudicated  
95 delinquent, upon a plea of not guilty, by a circuit court of an offense that would be a felony if  
96 committed by an adult, the Court of Appeals shall have the authority to issue writs of actual innocence  
97 under this chapter. Only one such writ based upon such conviction or adjudication of delinquency may  
98 be filed by a petitioner. The writ shall lie to the circuit court that entered the conviction or the  
99 adjudication of delinquency and that court shall have the authority to conduct hearings, as provided for  
100 in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with  
101 §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the  
102 Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia  
103 shall have the authority to issue writs in accordance with the provisions of this chapter.

104 **§ 19.2-327.10:1. Petition for writ of actual innocence joined by Attorney General; release of  
105 prisoner; bond hearing.**

106 The Attorney General may join in a petition for a writ of actual innocence made pursuant to  
107 § 19.2-327.10. When such petition is so joined, the petitioner may file a copy of the petition and  
108 attachments thereto and the Attorney General's answer with the circuit court that entered the felony  
109 conviction or adjudication of delinquency and move the court for a hearing to consider release of the  
110 person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the  
111 court may order the person released from custody subject to the terms and conditions of bail so  
112 established, pending a ruling by the Court of Appeals on the writ under § 19.2-327.13.

113 **§ 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable  
114 evidence of actual innocence.**

115 A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i)  
116 the crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated  
117 delinquent; and that such conviction or adjudication of delinquency was upon a plea of not guilty; (ii)

118 that the petitioner is actually innocent of the crime for which he was convicted or the offense for which  
 119 he was adjudicated delinquent; (iii) an exact description of (a) the previously unknown or unavailable  
 120 evidence supporting the allegation of innocence or (b) the previously untested evidence and the scientific  
 121 testing supporting the allegation of innocence; (iv) (a) that such evidence was previously unknown or  
 122 unavailable to the petitioner or his trial attorney of record at the time the conviction or adjudication of  
 123 delinquency became final in the circuit court or (b) if known, the reason that the evidence was not  
 124 subject to scientific testing set forth in the petition; (v) the date (a) the previously unknown or  
 125 unavailable evidence became known or available to the petitioner, and the circumstances under which it  
 126 was discovered or (b) the results of the scientific testing of previously untested evidence became known  
 127 to the petitioner or any attorney of record; (vi) (a) that the previously unknown or unavailable evidence  
 128 is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration  
 129 of 21 days following entry of the final order of conviction or adjudication of delinquency by the circuit  
 130 court or (b) that the testing procedure was not available at the time the conviction or adjudication of  
 131 delinquency became final in the circuit court; (vii) that the previously unknown  $\text{\textcircled{e}}$ , unavailable, or  
 132 untested evidence is material and, when considered with all of the other evidence in the current record,  
 133 will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a  
 134 reasonable doubt; and (viii) that the previously unknown  $\text{\textcircled{e}}$ , unavailable, or untested evidence is not  
 135 merely cumulative, corroborative, or collateral. Nothing in this chapter shall constitute grounds to delay  
 136 setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set  
 137 pursuant to clause (iii) or (iv) of § 53.1-232.1 or to delay or stay any other appeals following conviction  
 138 or adjudication of delinquency, or petitions to any court. Human biological evidence may not be used as  
 139 the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

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

147 C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition  
 148 unless it is accompanied by a duly executed return of service in the form of a verification that a copy of  
 149 the petition and all attachments have been served on the attorney for the Commonwealth of the  
 150 jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General, or  
 151 an acceptance of service signed by these officials, or any combination thereof. In cases brought by  
 152 petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a  
 153 certificate that a copy of the petition and all attachments have been sent, by certified mail, to the  
 154 attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency  
 155 occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it  
 156 shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner.  
 157 The Attorney General shall have 60 days after receipt of such notice in which to file a response to the  
 158 petition that may be extended for good cause shown; however, nothing shall prevent the Attorney  
 159 General from filing an earlier response. The response may contain a proffer of any evidence pertaining  
 160 to the guilt or delinquency or innocence of the petitioner that is not included in the record of the case,  
 161 including evidence that was suppressed at trial.

162 D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court  
 163 may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought  
 164 before the Court the whole record or any part of any record. If, in the judgment of the Court, the  
 165 petition fails to state a claim, or if the assertions of previously unknown  $\text{\textcircled{e}}$ , unavailable, or untested  
 166 evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may  
 167 dismiss the petition summarily, without any hearing or a response from the Attorney General.

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

172 **§ 19.2-327.13. Relief under writ.**

173 Upon consideration of the petition, the response by the Commonwealth, previous records of the case,  
 174 the record of any hearing held under this chapter, and, if applicable, any findings certified from the  
 175 circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already  
 176 summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert  
 177 grounds upon which relief shall be granted; or the Court shall (i) dismiss the petition for failure to  
 178 establish previously unknown  $\text{\textcircled{e}}$ , unavailable, or untested evidence sufficient to justify the issuance of

179 the writ, or (ii) only upon a finding that the petitioner has proven by ~~clear and convincing~~ a  
180 *preponderance of the evidence* all of the allegations contained in clauses (iv) through (viii) of subsection  
181 A of § 19.2-327.11, and upon a finding that no rational trier of fact would have found proof of guilt or  
182 delinquency beyond a reasonable doubt, grant the writ, and vacate the conviction or finding of  
183 delinquency, or in the event that the Court finds that no rational trier of fact would have found  
184 sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the  
185 petitioner was convicted or adjudicated delinquent, but the Court finds that there remains in the original  
186 trial record evidence sufficient to find the petitioner guilty or delinquent beyond a reasonable doubt of a  
187 lesser included offense, the Court shall modify the order of conviction or delinquency accordingly and  
188 remand the case to the circuit court that entered the conviction or adjudication of delinquency for  
189 resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the  
190 convicted or delinquent person seeking relief. If a writ vacating a conviction or adjudication of  
191 delinquency is granted, and no appeal is made to the Supreme Court, or the Supreme Court denies the  
192 Commonwealth's petition for appeal or upholds the decision of the Court of Appeals to grant the writ,  
193 the Court of Appeals shall forward a copy of the writ to the circuit court, where an order of  
194 expungement shall be immediately granted.