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SENATE BILL NO. 511

Offered January 8, 2020

Prefiled January 7, 2020

A BILL 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, 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 actual innocence.

Patron—Edwards

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

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, and 19.2-327.13 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

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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 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 petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10.

§ 19.2-327.5. Relief under writ.

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

§ 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~~, or the petition of a person 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, 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 or adjudication of delinquency may be filed by a petitioner.~~ The writ shall lie to the circuit court that entered the conviction or the adjudication of delinquency 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 General; release of prisoner; bond hearing.

The Attorney General may join in a petition for a writ of actual innocence made pursuant to § 19.2-327.10. 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 Court of Appeals 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 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~~; (ii) that the petitioner is actually innocent of the crime for which he was convicted or the offense for which he was adjudicated delinquent; (iii) an exact description of *(a)* the previously unknown or unavailable evidence supporting the allegation of innocence *or (b) the previously untested evidence and the scientific testing supporting the allegation of innocence*; (iv) *(a)* that such evidence was previously unknown or unavailable 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 (b) if known, the reason that the evidence was not subject to scientific testing set forth in the petition*; (v) the date *(a)* the previously unknown or unavailable evidence became known or available to the petitioner~~,~~ and the circumstances under which it was discovered *or (b) the results of the scientific testing of previously untested evidence became known to the petitioner or any attorney of record*; (vi) *(a)* 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 or adjudication of delinquency by the circuit court *or (b) that the testing procedure was not available at the time the conviction or adjudication of delinquency became final in the circuit court*; (vii) *that* the previously unknown ~~or~~, unavailable, *or untested* evidence is material and, when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) *that* the previously unknown ~~or~~, unavailable, *or untested* 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 (iv) of § 53.1-232.1 or to delay or stay any other appeals following conviction or adjudication of delinquency, 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, and 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.

C. 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 certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice in which to file a response to the petition that may be extended for good cause shown; however, nothing shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt or delinquency or innocence of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may 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. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of previously unknown ~~or~~, unavailable, *or untested* evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

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

§ 19.2-327.13. Relief under writ.

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter, and, if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted~~;~~, or the Court shall (i) dismiss the petition for failure to

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