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HOUSE BILL NO. 1153

Offered January 8, 2020
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A BILL to amend and reenact §§ 19.2-265.4, 19.2-327.2, 19.2-327.2:1, 19.2-327.3, 19.2-327.10, 19.2-327.10.1, and 19.2-327.11 of the Code of Virginia, relating to evidence in criminal cases; duty to provide discovery; writs of actual innocence.

Patron—Lopez

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-265.4, 19.2-327.2, 19.2-327.2:1, 19.2-327.3, 19.2-327.10, 19.2-327.10.1, and 19.2-327.11 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-265.4. Failure to provide discovery.

A. In any criminal prosecution for a felony in a circuit court or for a misdemeanor brought on direct indictment, the attorney for the Commonwealth shall have a duty to adequately and fully provide discovery as provided under *this section and* Rule 3A:11 of the Rules of ~~the~~ Supreme Court *of Virginia*. ~~Rule 3A:11 shall be construed to apply to such felony and misdemeanor prosecutions.~~ This duty to disclose shall be continuing and shall apply to any additional evidence or material discovered by the Commonwealth prior to or during trial which is subject to discovery or inspection and has been previously requested by the accused. In any criminal prosecution for a misdemeanor by trial de novo in circuit court, the attorney for the Commonwealth shall have a duty to adequately and fully provide discovery as provided under Rule 7C:5 of the Rules of ~~the~~ Supreme Court.

B. *Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph:*

1. Any relevant (i) written or recorded statements or confessions made by the accused or any codefendant, or the substance of any oral statements or confessions made by the accused or any codefendant to any law-enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests, other written scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case that are known by the attorney for the Commonwealth to be within the possession, custody, or control of the Commonwealth;

2. Any books, papers, documents, tangible objects, or buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, provided that the Commonwealth may object as to the reasonableness of the request;

3. All relevant police reports, subject to exemptions as provided in this section or otherwise required by statute. For purposes of this subdivision, "police reports" means any formal, written report of investigation by any law-enforcement officer, as defined in § 9.1-101, including reports of interviews of witnesses but not including notes or drafts; and

4. All relevant statements of any non-expert witness whom the Commonwealth is required to designate on a witness list pursuant to subsection J. The Commonwealth shall disclose any statements of rebuttal witnesses not previously disclosed prior to the beginning of its rebuttal case. For purposes of this subdivision, "statements" means a statement written or signed by the witness, a verbatim transcript, or an audio or video recording. This subdivision shall not limit the disclosure of police reports under subdivision 3, whether or not such reports contain accounts of statements made by prospective witnesses.

C. If the accused provides written notice for discovery under this section and the Commonwealth provides such discovery, the accused shall:

1. Permit the Commonwealth within a reasonable time, but not less than 10 days before trial or sentencing, to inspect and copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine, and breath analyses, and other scientific tests that may be within the accused's possession, custody, or control and that the accused intends to proffer or introduce into evidence at the trial or sentencing;

2. Disclose within a reasonable time, but not less than 10 days before trial, whether he intends to introduce evidence to establish an alibi and, if so, the accused shall disclose the place at which he claims to have been at the time of the commission of the alleged offense; and

3. If he intends to rely upon a defense as provided in § 19.2-168, permit the Commonwealth to

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inspect and copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination shall be used by the Commonwealth in its case-in-chief, whether the examination is conducted with or without the consent of the accused.

D. Whenever the Commonwealth intends to introduce expert opinion testimony at trial, the attorney for the Commonwealth shall notify in writing the accused of the Commonwealth's intent to present such testimony not later than 14 days before trial, or as otherwise ordered by the court. The notice shall include the witness's name and contact information, a summary of the witness's qualifications, the substance of the facts and opinions to which the witness is expected to testify, a summary of the grounds for each opinion, and copies of written reports, if any, prepared by the witness.

Whenever the accused intends to introduce expert testimony at trial, he shall notify the attorney for the Commonwealth in writing of the intent to present such testimony not later than seven days before trial, or as otherwise ordered by the court. The notice shall include the witness's name and contact information, a summary of the witness's qualifications, the substance of the facts and opinions to which the witness is expected to testify, a summary of the grounds for each opinion, and copies of written reports, if any, prepared by the witness.

With leave of court for good cause shown, the parties may supplement the notice of expert witness testimony, and the Commonwealth may offer written notice of rebuttal expert witness testimony. When such testimony is allowed, the court shall require disclosure compliant with the provisions of this subsection as to the testimony to be offered by the expert.

Where a party intends to introduce expert testimony through a representative of the Department of Forensic Science, a party may provide the other party with a copy of a certificate of analysis prepared by the Department of Forensic Science and signed either by hand or by electronic means by the person performing the analysis or examination, in satisfaction of the requirements of this subsection.

If the court finds that a party has failed to provide this notice in a timely manner, the court may grant such relief as it deems appropriate, including the granting of a continuance or the exclusion of the expert testimony.

E. A notice by the accused under subsection B shall be made at least 10 days before the day fixed for trial. The notice shall include all relief sought under this section.

F. Neither the Commonwealth nor the accused shall be required to disclose mental impressions, opinions, theories, or conclusions of attorneys or their agents.

G. The Commonwealth and the accused shall agree as to the time, place, and manner of making the discovery and inspection permitted under this section. If the parties are unable to agree, upon motion of either party the court shall enter an order as to the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just, including imposition of an award of attorney fees or other appropriate sanction if the failure of a party to agree as to the time, place, and manner of making the discovery and inspection is deemed unreasonable.

H. For good cause a party may withhold or redact such information or condition its disclosure on restrictions limiting copying or dissemination, including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. As used in this subsection, "good cause" includes protection of a victim's or witness's personal or financial security, privacy in the case of graphic images or child pornography, and medical or mental health records.

The opposing party may file a motion to compel disclosure or to remove any restriction. The court may order the withholding party to submit the information for review in camera. The court may approve, reject, or modify the restriction and may order such other relief as is appropriate.

Upon sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred or make such other order as is appropriate, including an order restricting the copying or dissemination of the material and the disposition of the material at the conclusion of the case. Upon motion by either party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a review in camera, the entire text of the written statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

I. If, after disposition of a notice filed under this section, and before or during trial, counsel or a party discovers additional material previously requested by notice or falling within the scope of an order previously entered that is subject to discovery or inspection under this section, the party shall promptly notify the other party or his counsel or the court of the existence of the additional material and shall provide the other party with the inspection rights provided in this section. If at any time during the course of the proceedings it is brought to the attention of the court that ~~the attorney for the Commonwealth~~ *a party* has failed to comply with *the requirements of this section or with an order issued pursuant to* this section, the court ~~may~~ *shall* order ~~the Commonwealth~~ *such party* to permit the

discovery or inspection~~, grant a continuance, or prohibit the Commonwealth from introducing evidence not~~ *of materials not previously* disclosed~~, or the court~~ *and* may ~~enter~~ *grant* such other ~~order~~ *relief* as it deems ~~just under the circumstances~~ *appropriate*.

J. The attorney for the Commonwealth shall provide to the accused a written list of names and addresses, if available, of all witnesses expected to testify at trial. Disclosure of rebuttal and surrebuttal witnesses is not required under this subsection. The Commonwealth shall provide such list no later than seven days before trial. Upon motion of either party, the court may modify the requirements of this subsection for good cause shown.

At the commencement of trial, the attorney for the Commonwealth shall provide his witness list to the court. Where the attorney for the Commonwealth seeks to call a witness not disclosed on the list, upon objection of the accused, the court may fashion such relief as it deems appropriate, including granting a continuance or recess, granting further discovery, instructing the jury regarding nondisclosure, or prohibiting or limiting testimony of the witness. At the request of either party, the court may place the list or portions of the list under seal where appropriate for the protection of witnesses or others.

K. Upon indictment, waiver of indictment, or return of information, or prior to entry of a guilty plea or plea of nolo contendere, whichever first occurs, the attorney for the Commonwealth shall disclose to the accused all information in its possession, custody, or control that tends to negate the guilt of the accused, mitigate the offense charged, or reduce punishment, subject to modification or limitation by the court. Information that tends to impeach the Commonwealth's witnesses shall be produced no later than seven days prior to the date scheduled for trial. The duty to disclose under this subsection shall not require any request, demand, or notice by the accused and shall be continuing in nature, as otherwise required by law.

§ 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

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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 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.

§ 19.2-327.10. 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 the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) 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; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) 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; (vii) the previously unknown or unavailable 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) the previously unknown or unavailable 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 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.

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