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SENATE BILL NO. 625

Offered January 8, 2020

Prefiled January 7, 2020

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 failure to advise of consequences of guilty plea; vacation of conviction.*

Patron—Surovell

Referred to Committee on the Judiciary

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.**VACATION OF CONVICTIONS FOR FAILURE TO ADVISE OF CONSEQUENCES OF GUILTY PLEA.****§ 19.2-327.15. Failure to advise of consequences of guilty plea; vacation of conviction.**

A. Notwithstanding any other provision of law or rule of court, a person convicted or adjudicated delinquent of a criminal offense, other than an offense for which registration is required as defined in § 9.1-902 or a violent felony as defined by § 17.1-805, who is not a citizen of the United States may petition to vacate his conviction or adjudication of delinquency if (i) (a) on or before July 1, 2019, the petitioner was found guilty of such offense or (b) the petitioner received actual notice that he is subject to deportation or removal from the United States, exclusion from admission to the United States, or denial of naturalization under federal law as a result of entering a plea of guilty or nolo contendere to such offense and such petition is filed within one year after receiving such notice; (ii) a conviction or adjudication of delinquency for such offense is grounds for deportation or removal from the United States, exclusion from admission to the United States, or denial of naturalization under federal law; and (iii) the petitioner had not been advised of the potential consequences set forth in clause (ii) of a conviction or adjudication of delinquency for such offense. Only one such petition may be filed by a petitioner based upon such conviction or adjudication of delinquency.

B. The petitioner shall file the petition with the circuit court that entered the original judgment order of conviction or adjudication of delinquency complained of in the petition or, if the original judgment order was entered by a district court, the circuit court for the locality wherein the district court sits.

C. The petitioner shall allege in the petition categorically and with specificity, under oath, the following: (i) the offense for which the petitioner was convicted or adjudicated delinquent; (ii) the date the original judgment order of conviction or adjudication of delinquency was entered; (iii) that the petitioner entered a plea of guilty or nolo contendere to such offense; (iv) that a conviction or adjudication of delinquency for such offense is grounds for deportation or removal from the United States, exclusion from admission to the United States, or denial of naturalization under federal law; (v) that the petitioner was not advised by his counsel of the potential consequences set forth in clause (iv) of a conviction or adjudication of delinquency for such offense prior to entering the plea; and (vi) that the petitioner would not have pled guilty or nolo contendere to the offense if he had been aware of such consequences.

D. The petitioner shall serve a copy of the petition on the attorney for the Commonwealth for the jurisdiction where the conviction or adjudication of delinquency occurred. The attorney for the Commonwealth shall have 30 days after being served with a copy of the petition in which to file a response to the petition.

E. The court may hold a hearing on the petition or, if the allegations contained in the petition can be fully determined on the basis of the record of the case resulting in the petitioner's conviction or adjudication of delinquency, the court may make a determination on the basis of the record of the case without holding a hearing. However, the court shall hold a hearing upon request of the petitioner or the attorney for the Commonwealth.

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

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59 *G. The petitioner shall be deemed to waive his privilege with respect to communications between the*
60 *petitioner and his trial counsel to the extent necessary to permit a full and fair hearing on the alleged*
61 *basis for vacating the petitioner's conviction.*
62 *H. In any petition filed pursuant to this section, the petitioner is entitled to representation by counsel*
63 *subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10.*