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SENATE BILL NO. 1105

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary on February 1, 2021)

(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 forensic 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 DISCREDITED OR CONTRADICTED 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:

"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 that is generally accepted within the relevant scientific community and all fields of scientific knowledge on which those fields or disciplines rely.

B. Notwithstanding, and in addition to, any other provision of law or rule of court, upon a petition of a person who was convicted of a felony offense, or who was adjudicated delinquent of an offense that would be a felony 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 petition 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) the felony offense for which the petitioner was convicted or adjudicated delinquent; (ii) that the petitioner did not commit the felony offense for which the petitioner was convicted or adjudicated delinquent; (iii) an exact description of the newly available forensic scientific evidence and its relevance to guilt or punishment; (iv) specific facts indicating that relevant forensic scientific evidence was not available or could not have been obtained in the exercise of diligence before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency or that newly available forensic evidence would discredit or contradict forensic scientific evidence that was admitted at the petitioner's trial or adjudication of delinquency; and (v) that the admission of the discredited or contradicted forensic scientific evidence or the absence of the newly available forensic scientific evidence was not harmless.

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 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 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 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.

F. 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, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

G. 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, which 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 not introduced at trial.

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

I. Upon consideration of the petition, the response by the Attorney General, 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 adjudication of delinquency or (ii) upon a finding by a preponderance of the evidence that the admission of the discredited or contradicted forensic scientific evidence or the absence of the newly available forensic scientific evidence was not harmless beyond a reasonable doubt, grant the writ and vacate the petitioner's conviction or adjudication of delinquency, 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.

J. 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 Articles 3 (§ 19.2-157 et seq.) and 4 (§ 19.2-163.3 et seq.) of Chapter 10.

K. A petition filed pursuant to this chapter shall not constitute the sole 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; however, any evidence or arguments raised in such a petition may form the basis to issue a stay of execution.

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

M. 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.

2. That the provisions of this act shall become effective on July 1, 2022.

3. That the provisions of this act shall apply to petitions filed before July 1, 2026.

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