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HOUSE BILL NO. 1584

Offered January 11, 2023

Prefiled January 6, 2023

A *BILL to amend and reenact § 19.2-270.4:1 of the Code of Virginia, relating to storage, preservation, and retention of biological evidence in felony cases.*

Patron—Sullivan

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-270.4:1 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-270.4:1. Storage, preservation, and retention of biological evidence in felony cases.

A. Notwithstanding any provision of law or rule of court, upon motion of a person convicted of a felony or his attorney of record to the circuit court that entered the judgment for the offense, the court *For the purposes of this section, "biological evidence" means (i) the contents of a physical evidence recovery kit as defined in § 19.2-11.5 or (ii) any item, or representative sample taken from an item, collected as a part of a criminal investigation that contains blood, bones, fingernail scrapings, hair, saliva, semen, skin tissue, teeth, or other bodily fluids.*

B. Any governmental entity that possesses any biological evidence shall ~~order~~ ensure the storage, preservation, and retention of ~~specifically identified human~~ such biological evidence or representative samples collected or obtained ~~in the case during the course of a criminal investigation of a felony case~~ for a ~~such~~ period of ~~up to 15 years from the time of that the defendant remains incarcerated or under any registration or supervision requirement in connection with the felony conviction, unless the court determines, in its discretion, that the evidence should be retained for a longer period of time. Upon the filing of such a motion, the or until the expiration of the statute of limitations for the alleged offense has lapsed in such case where a felony remains unsolved or no charges have been filed. The biological evidence shall be preserved in a condition that is suitable for deoxyribonucleic acid (DNA) testing and analysis, and such evidence shall be made available for DNA testing under § 19.2-327.1.~~

C. ~~The~~ defendant may request a hearing for the limited purpose of identifying the ~~human~~ biological evidence or representative samples that are to be stored in accordance with the provisions of this section. Upon the granting of the motion, the court shall order the clerk of the circuit court to transfer all such evidence to the Department of Forensic Science. *The court shall order the Department of Forensic Science to submit an inventory of the biological evidence that has been preserved in connection with the defendant's case, a copy of which shall be provided to the defendant.* The Department of Forensic Science shall store, preserve, and retain such evidence. If the evidence is not within the custody of the clerk at the time the order is entered, the court shall order the governmental entity having custody of the evidence to transfer such evidence to the Department of Forensic Science. Upon the entry of an order under this subsection, the court may upon motion or upon good cause shown, with notice to the convicted person, his attorney of record and the attorney for the Commonwealth, modify the original storage order, as it relates to time of storage of the evidence or samples, for a period of time greater than or less than that specified in the original order.

~~B. D.~~ Pursuant to standards and guidelines established by the Department of Forensic Science, the order shall state the method of custody, transfer, and return of any evidence to insure and protect the Commonwealth's interest in the integrity of the evidence. Pursuant to standards and guidelines established by the Department of Forensic Science, the Department of Forensic Science, local law-enforcement agency, or other custodian of the evidence shall take all necessary steps to preserve, store, and retain the evidence and its chain of custody for the period of time specified. *When a government entity cannot locate biological evidence that it is required to preserve under subsection B, the chief evidence custodian of such entity shall submit an affidavit, under penalty of perjury, that describes the biological evidence that cannot be located and details the efforts made to locate such evidence.*

~~C. E.~~ In any proceeding under this section, the court, upon a finding that the ~~physical~~ biological evidence is of such a nature, size, or quantity that storage, preservation, or retention of all of the evidence is impractical, may order the storage of only representative samples of the evidence. The Department of Forensic Science shall take representative samples, cuttings, or swabbings and retain them. The remaining evidence shall be handled according to § 19.2-270.4 or as otherwise provided for in the Code.

F. *If the court finds that the biological evidence has not been preserved in accordance with the*

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59 *provisions of this section, the court may order such remedy as the court determines appropriate,*
60 *including (i) granting a new trial; (ii) dismissing the charges; (iii) reducing the sentence; (iv) vacating*
61 *the defendant's conviction; or (v) entering a finding that a presumption exists that the evidence would*
62 *have been exculpatory to the defendant because the evidence has not been preserved in accordance with*
63 *this section.*

64 ~~D.~~ G. An action under this section or the performance of any attorney representing the petitioner
65 under this section shall not form the basis for relief in any habeas corpus or appellate proceeding.
66 Nothing in this section shall create any cause of action for damages against the Commonwealth, or any
67 of its political subdivisions or officers, employees or agents of the Commonwealth or its political
68 subdivisions.