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## HOUSE BILL NO. 423

Offered January 12, 2022

Prefiled January 11, 2022

A *BILL to amend and reenact § 19.2-327.11 of the Code of Virginia, relating to writ of actual innocence; previously unknown or unavailable nonbiological evidence; contents and form of petition.*

Patron—Herring

Committee Referral Pending

**Be it enacted by the General Assembly of Virginia:****1. That § 19.2-327.11 of the Code of Virginia is amended and reenacted as follows:****§ 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; (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 ~~was not~~ 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, 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, unavailable, or untested evidence is not merely cumulative, corroborative, or collateral. Nothing in this chapter shall constitute grounds 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.

INTRODUCED

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59 D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court  
60 may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought  
61 before the Court the whole record or any part of any record. If, in the judgment of the Court, the  
62 petition fails to state a claim, or if the assertions of previously unknown, unavailable, or untested  
63 evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may  
64 dismiss the petition summarily, without any hearing or a response from the Attorney General.

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