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VA. CODE ANN. S 19.2-270.4:1 (Michie Supp. 2001) VA. CODE ANN. SS 19.2-237.1 to 19.2-237.6 (Michie Supp. 2001)

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I. Introduction

When Earl Washington, Jr. was pardoned after nine years on death row and seven more years in prison because DNA testing proved his innocence, the Virginia General Assembly proposed and debated a host of legislative reforms to the Virginia capital punishment scheme.[1] Perhaps the most important legislation to emerge from that reform movement created a "Writ of Actual Innocence," which permits death row inmates (and other convicted felons) to present exculpatory biological evidence beyond the twenty-one days heretofore afforded for the presentation of new evidence.[2] This legislation: (1) modifies Section 19.2-270.4 of the Virginia Code, by creating an exception to the general rules governing the destruction of trial exhibits;[3] (2) adds a number of statutes providing for the preservation, testing, and presentation of biological evidence;[4] and (3) proposed an amendment to the Virginia Constitution.[5]

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1. Earl Washington, Jr. was sentenced to death in 1984. Washington v. Commonwealth, 323 S.E.2d 577, 581 (Va. 1984). Post-conviction testing of semen taken from the crime scene excluded Washington as a possible donor. *See* Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying*, WASH. POST, Oct. 3, 2000, at A01. In spite of this fact, every state and federal court that reviewed Washington's conviction upheld his death sentence. *See Washington*, 323 S.E.2d at 589 (affirming death sentence); Washington v. Virginia, 471 U.S. 1111 (1985) (mem.) (denying cert.); Washington v. Murray, 952 F.2d 1472 (4th Cir. 1991) (remanding for evidentiary hearing after denial of state habeas corpus relief and summary dismissal of habeas corpus petition in federal district court); Washington v. Murray, 4 F.3d 1285, 1288 (4th Cir. 1993) (affirming denial of habeas corpus petition after rehearing in federal district court). Earl Washington, Jr. spent nine-and-a-half years on death row and once came within five days of execution. *See* Masters, *supra*, at A01. In 1993, Governor L. Douglas Wilder commuted Washington's sentence to life in prison because the semen stains from the crime scene could not have been left by Washington. *Id.* Finally, in October of 2000, when more sophisticated DNA testing matched the semen stains to a convicted rapist, Governor James Gilmore granted Washington an absolute pardon, stating that "a jury afforded the benefit of the DNA evidence and analysis available to me today would have reached a different conclusion regarding the guilt of Earl Washington." *Id.*

2. *See* VA. SUP. CT. R. 1:1 (permitting trial courts to modify, vacate, or suspend final judgments for only twenty-one days after the date of entry).

3. VA. CODE ANN. § 19.2-270.4:1 (Michie Supp. 2001) (amending VA. CODE ANN. § 19.2-270.4 (Michie 2000)); *see infra* Part II.A.

4. VA. CODE ANN. §§ 19.2-327.1 to -327.6 (Michie Supp. 2001); *see infra* Parts II.B-C.

5. S.J. 419 (Va. 2001) (proposing an amendment to VA. CONST. art. VI, § 1); *see infra* Part

II. The Innocence Statutes

The new statutes can be grouped into three categories. Section 19.2-270.4:1 of the Virginia Code regulates the preservation of biological evidence;[6] Section 19.2-327.1 provides for scientific testing of new or untested evidence;[7] and Sections 19.2-327.2 through 19.2-327.6 establish the procedure to petition the Supreme Court of Virginia for a writ of actual innocence.[8] Each of these new code sections contains a caveat that failure to comply with its terms will not form the basis for any appeal, habeas corpus petition, or cause of action against the Commonwealth.[9]

A. Preservation of Biological Evidence

The General Assembly enacted Section 19.2-270.4:1 to provide for the preservation and storage of human biological evidence.[10] Subsection B of Section 19.2-270.4:1 provides:

> In the case of a person sentenced to death, the court that entered the judgment shall, in all cases, order any human biological evidence or representative samples to be transferred by the governmental entity having custody to the Division of Forensic Science. The Division of Forensic Science shall store, preserve, and retain such evidence until the judgment is executed. If the person sentenced to death has his sentence reduced, then such evidence shall be transferred from the Division to the original investigating law enforcement agency for storage as provided in this section.[11]

Section 19.2-270.4:1 also directs the Department of Criminal Justice Services to promulgate standards and guidelines controlling the custody, transfer, and return of biological evidence in order to protect the integrity of the evidence.[12] Furthermore, all custodians of such evidence must "take all necessary steps to preserve, store, and retain the evidence and its chain of custody."[13] If the nature, size, or quantity of biological evidence in a particular case would make its preservation

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III.

6. § 19.2-270.4:1; *see infra* Part II.A.

7. VA. CODE ANN. § 19.2-327.1 (Michie Supp. 2001); *see infra* Part II.B.

8. VA. CODE ANN. §§ 19.2-327.2 to -327.6 (Michie Supp. 2001); *see infra* Part II.C.

9. §§ 19.2-270.4:1(E), 19.2-327.1(G), 19.2-327.6. These provisions essentially make the new requirements noncompulsory by preventing the inmate from seeking damages or attacking his sentence in the event of non-compliance by the Commonwealth.

10. § 19.2-270.4:1.

11. § 19.2-270.4:1(B). A person convicted of a felony but not sentenced to death will be required to move the court to preserve biological evidence for later testing. *Id.*

12. § 19.2-270.4:1(C).

13. *Id.*

impracticable, the Division of Forensic Science is required to preserve only "representative samples of the evidence."[14]

B. Procedure for Seeking Analysis of Newly Discovered or Untested Scientific Evidence

Section 19.2-327.1 permits a convicted felon to apply to the circuit court that entered the original conviction for testing of any human biological evidence related to his conviction.[15] In order to obtain such testing, the petitioner must state, under the penalty of perjury, the crime for which he was convicted, the reason that the evidence was not tested prior to the entry of final judgment, and the reason why new testing may prove that the petitioner is actually innocent.[16] The petitioner must also swear under oath the following: (1) that the evidence or the testing procedure was not available at the time that final judgment was entered in the circuit court; (2) that the chain of custody is sufficient to establish the integrity of the evidence; (3) that the testing is "materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence"; (4) that the proposed testing involves a scientific method employed by the Division of Forensic Science; and (5) that the petitioner did not unreasonably delay the filing of the petition.[17]

The petitioner is required to serve a copy of this motion upon the attorney for the Commonwealth, who will have thirty days to file a response.[18] The court must then set a hearing date between thirty and ninety days after the date upon which the petitioner's motion was filed.[19] In order to obtain an order for scientific testing, the petitioner must show by clear and convincing evidence that all of the aforementioned requirements have been met.[20] Once the motion has been heard, the court enters its findings and either dismisses the motion or orders the testing to be performed by the Division of Forensic Science.[21] The hearings and the results of any testing that is performed become part of the case record.[22]

C. The Writ of Actual Innocence

Under Section 19.2-327.2, any person sentenced to death may petition the Supreme Court of Virginia for a writ of actual innocence.[23] In filing a petition

14. § 19.2-270.4:1(D).

15. VA. CODE ANN. § 19.2-327.1(A) (Michie Supp. 2001).

16. VA. CODE ANN. § 19.2-327.1(B) (Michie Supp. 2001).

17. § 19.2-327.1(A).

18. VA. CODE ANN. § 19.2-327.1(C) (Michie Supp. 2001).

19. *Id.* Subsection C also provides that motions made by a petitioner under a sentence of death "shall be given priority on the docket." *Id.*

20. VA. CODE ANN. § 19.2-327.1(D) (Michie Supp. 2001).

21. *Id.*; *see also* VA. CODE ANN. § 19.2-327.1(E) (Michie Supp. 2001).

22. *Id.* The Division of Forensic Science is instructed to give testing priority to capital cases. *Id.*

23. VA. CODE ANN. § 19.2-327.2 (Michie Supp. 2001). In addition, the Supreme Court of Virginia will be authorized to issue writs of actual innocence for any person convicted of a felony

for a writ of actual innocence, the petitioner will be entitled to representation by counsel.[24] The statute places a pleading burden on the petitioner:

> The petitioner shall allege categorically and with specificity, under oath, the following: (i) the crime for which the petitioner was convicted, and that . . . the person is under a sentence of death . . . ; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (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 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 sixty days of obtaining the test results under § 19.2-327.1; (vii) that the petitioner is currently incarcerated; (viii) the reason or reasons the evidence will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (ix) for any conviction that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9-196.11.[25]

Furthermore, the petition must include all relevant allegations of fact, all previous records, applications, petitions, appeals, dispositions, and a copy of any test results.[26] The petition must be accompanied by a return of service verifying that the petition and all attachments were served upon the attorney for the Commonwealth in the jurisdiction where the original conviction occurred and the Attorney General.[27]

Upon hearing the petition, if the Supreme Court of Virginia determines that further factual development is necessary, it may order the circuit court in which the final judgment was entered to conduct a hearing within ninety days.[28] The record and findings of the circuit court must be filed with the Supreme Court of Virginia within thirty days of the hearing.[29] The Supreme Court of Virginia may then dismiss the petition for failure to state a claim or for failure to establish the

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upon a plea of not guilty or any person convicted of a Class 1 felony, a Class 2 felony, or any other felony for which the maximum penalty is imprisonment for life. *Id.* The statutory provisions governing the writs of actual innocence will take effect on November 15, 2002 if the proposed Constitutional amendment passes. *Id.*

24. VA. CODE ANN. § 19.2-327.3(E) (Michie Supp. 2001).

25. VA. CODE ANN. § 19.2-327.3(A) (Michie Supp. 2001).

26. VA. CODE ANN. § 19.2-327.3(B) (Michie Supp. 2001). All of these statements must be made under penalty of perjury. *Id.*

27. VA. CODE ANN. § 19.2-327.3(C) (Michie Supp. 2001). The Attorney General has thirty days to respond to the petition. *Id.* "The response may contain a proffer of any evidence pertaining to the guilt of the defendant that is not included in the record of the case, *including evidence that was suppressed at trial.*" *Id.* (emphasis added).

28. VA. CODE ANN. § 19.2-327.4 (Michie Supp. 2001).

29. *Id.*

facts necessary to justify the issuance of the writ.[30] If the petitioner has proven by clear and convincing evidence the allegations contained in clauses four through nine of subsection A of Section 19.2-237.3,[31] and if the Supreme Court of Virginia finds that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, then the court may grant the writ of actual innocence and vacate the conviction.[32]

III. Proposed Amendment to the Virginia Constitution

The entire legislative scheme for the writ of actual innocence is contingent upon the amendment of the Virginia Constitution to create original jurisdiction in the Supreme Court of Virginia to hear petitions for writs of actual innocence. For that reason, both houses of the Virginia Assembly unanimously passed Senate Joint Resolution 419, which would amend Article VI, Section I of the Virginia Constitution to confer original jurisdiction upon the Supreme Court of Virginia "to consider claims of actual innocence presented by convicted felons in such cases and in such manner as may be provided by the General Assembly."[33] In order to become effective, this constitutional amendment must now be referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates.[34] If, at that time, both houses of the General Assembly again approve the proposed amendment by a majority vote, then the amendment shall be submitted to the "voters qualified to vote in elections by the people."[35] If a majority of those voting vote in favor of the amendment, it shall become part of the Constitution on the date prescribed by the General Assembly.[36]

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30. VA. CODE ANN. § 19.2-327.5 (Michie Supp. 2001).

31. *See supra* note 25 and accompanying text.

32. § 19.2-327.5. Note that both conditions must be fulfilled before the Supreme Court of Virginia can grant the writ of actual innocence. *See id.* If the court finds that these conditions are met with respect to the capital offense, but also finds that enough evidence remains "in the original trial record" to convict the petitioner of a lesser included offense, the court may modify the conviction accordingly and remand for resentencing. *Id.* The quoted language seems to indicate that any new evidence proffered by the Attorney General in response to the petition for writ of actual innocence could not be considered for the purpose of finding a lesser included offense. *See supra* note 27.

33. S.J. 419 (Va. 2001) (proposing amendment of VA. CONST. art. VI, § 1). Legislative history and bill tracking information may be obtained from the Virginia General Assembly, *Legislative Information System, at* http://leg1.state.va.us/lis.htm (last visited Sept. 30, 2001).

34. *See* VA. CONST. art. XII, § 1 (establishing the procedure for amending the Virginia Constitution).

35. *Id.*

36. *Id.* Thus, the amendment will go before the voting public no earlier than November of 2002. This explains why the writ of actual innocence statutes are not scheduled to take effect until November 15, 2002. *See supra* note 23.

IV. Analysis

The above legislation purports to facilitate the testing of biological evidence in order to ensure that innocent people are not put to death. Unfortunately, it is likely that these statutes will have no application whatsoever in the overwhelming majority of death penalty cases because only a handful of capital cases involve biological evidence.[37] Out of ninety-three death row prisoners nationwide who have been exonerated since 1977, only ten were able to use DNA evidence to prove their innocence.[38] For this reason, the innocence statutes are likely to have only minimal impact on the administration of the death penalty in Virginia.

Nonetheless, this legislation is cause for optimism. In particular, the proposed amendment of the Virginia Constitution is likely to be the most constructive long-term reform of Virginia's capital punishment system. By giving the Supreme Court of Virginia original jurisdiction over writs of actual innocence, the General Assembly has created a new mechanism by which death row inmates can challenge their convictions and sentences. If, in the future, the General Assembly expands the permissible uses of writs of actual innocence to address false confessions, jailhouse snitch testimony, faulty eyewitness identifications, prosecutorial misconduct, procedural default, the twenty-one day rule, inadequate resources for capital defendants, ineffective assistance of counsel, and other systemic problems in Virginia's death penalty jurisprudence, then perhaps there will be fewer Earl Washingtons on the Commonwealth's death row.

V. Conclusion

Capital defense attorneys should be alert to changes in the Virginia Code which provide a new method for challenging Virginia death sentences. Practitioners are urged to contact the Virginia Capital Case Clearinghouse for updates and further information about these code sections.

Kathryn Roe Eldridge
Matthew L. Engle

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37. *See* Virginians for Alternatives to the Death Penalty, *Virginia Legislature and the Death Penalty, at* http://www.vadp.org/legis.htm (last visited Sept. 30, 2001). In addition, anecdotal evidence, which includes the experience of the Virginia Capital Case Clearinghouse, indicates that most capital cases do not involve biological evidence. This may be due to the fact that most capital murder charges are brought under the robbery subsection of the capital murder statute. *See* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2001) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery"). Robbery and attempted robbery are not crimes that typically produce DNA or other biological evidence.

38. *See* Virginians for Alternatives to the Death Penalty, *supra* note 37.

CASE NOTE:

Case of Interest