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Plan would give convicts more chance of retrial

Va. high court may relax 21-day rule

BY CHRISTINA NUCKOLS THE VIRGINIAN-PILOT

RICHMOND — People who have new evidence that they were wrongly convicted of a crime would have a better chance of getting another trial under a proposal being considered by the Virginia Supreme Court.

The General Assembly has already acknowledged the need for Virginia courts to consider biological evidence that a felon is innocent. Legislators decided this year to let the state Supreme

Court review new DNA tests. Voters are being asked to approve that action in a referendum that will be on Tuesday's ballot.

But legislators so far have not addressed cases involving other types of physical evidence or witness testimony.

The rule change announced Friday by the state's highest court would fill that void. The Supreme Court is seeking public comment until Dec. 2 before making a final decision.

The proposal would loosen Virginia's so-called "21-day rule" but not eliminate it. That rule limits the introduction of new evidence to a three-week period following a conviction. It is the most restrictive limit in the nation.

The high court would create an exemption to the 21-day rule only for evidence that was not available at trial and could not have been discovered at that time. A person whose attorney failed to uncover evidence that should have been available would have no recourse under the new rule.

Also, the rule change would not allow consideration of evidence "offered solely to discredit or impeach a witness' prior testimony." It is unclear whether that restriction would cover witnesses who later recant their testimony.

The legislator who led the push for consideration of new DNA evidence said he hopes the court will narrow its proposal on other types of evidence.

"It's much broader than I would like to see it go," said Sen. Kenneth W. Stolle, R-Virginia Beach.

Stolle said he is concerned that some courts would be too lenient in interpreting the types of evidence that could be used to invoke a new trial. While requests for new DNA testing would be reviewed solely by the Supreme Court, the proposed rule for other types of evidence gives trial judges the authority to make those decisions.

Stolle also said the court should set a time limit for when new evidence can be introduced even if the justices think 21 days is too short. He believes that only DNA evidence should be exempted from time limits because new technology allows scientists to come up with more accurate tests.

Stolle said he will consult with the justices about possible revisions. He also said the legislature may consider extending the 21-day rule to 45 or 60 days when it convenes in January.

Defense attorneys welcomed the proposed rule change.

"It sounds like they really want to do the right thing," said Norfolk attorney Andrew A. Protogyrou. "We

need to realize there are mistakes and give the courts the opportunity to consider new evidence.”

Richmond attorney Steven D. Benjamin, who served on a task force advising the legislature on DNA testing, said the proposal is so narrow that it could be used only in rare cases, such as when a murder weapon is discovered after a trial or when a prosecutor is found to have illegally withheld evidence.

However, Benjamin said some of the restrictions are understandable.

Limits on new witness testimony help to discourage bribery, he said. More generally, he said, the restrictions make sure that defense attorneys don't withhold some evidence during trial in order to ensure a lengthy appeals process.

Still, Benjamin said limits on presenting new evidence need to be as narrow as possible.

“Innocence should always be the key to freedom,” he said. “There should never be any barrier to proving someone has been wrongfully convicted.”



Sen. Kenneth W. Stolle, R-Virginia Beach, thinks some courts would be too lenient in interpreting evidence that could be used to invoke a new trial.