

## Department of Planning and Budget

### 2001 Fiscal Impact Statement

**1. Bill Number** SB1366

**House of Origin**    ☐ Introduced    ☐ Substitute    ☒ Engrossed  
**Second House**    ☒ In Committee    ☐ Substitute    ☐ Enrolled

**2. Patron**        Stolle

**3. Committee**    S. Courts of Justice

**4. Title**            Storage and testing of certain evidence, writ of actual innocence.

**5. Summary/Purpose:**

Establishes a procedure for the storage, preservation and retention of human biological evidence in felony cases. The bill also establishes a procedure for a convicted felon to petition the circuit court that entered the conviction to apply for a new scientific investigation of human biological evidence. Certain elements must be met for the court to order the testing. The petition must state the reasons the evidence was not known or tested by the time the conviction became final and the reasons that the newly discovered or untested evidence may prove or disprove the actual innocence of the person convicted.

**6. Fiscal Impact:** Yes, tentative (see #8 below).

**7. Budget amendment necessary:** Yes, Items 30, 462, 490, and C-184.

**8. Fiscal implications:**

For a person convicted of a felony, but not sentenced to death, the court shall order the storage, preservation, and retention of any evidence or representative samples to be held for at least fifteen years, or longer, if determined by the court. Upon the granting of the motion, the circuit court clerk, or governmental entity, will return the evidence to the original investigating law enforcement agency. The overall fiscal impact of this bill cannot be determined. The fiscal impact of this bill may not be significant for the first few years of implementation. However, the costs for storage and retention could increase over time.

The fiscal impact upon local law enforcement agencies cannot be determined since storage facilities vary widely, and the amount of potential evidence is not known. Recently acquired information from the Department of State Police estimates that for the first year (fiscal year 2002), there could be a fiscal impact of \$100,000. According to the department, it may be necessary to construct a secure, climate-controlled facility/room in the main warehouse (\$30,000) and employ two evidence technicians (\$70,000) to monitor and control the handling of the evidence. Thereafter, the fiscal impact may only be \$70,000 for the costs of the technicians. However, with the quantity of evidence increasing each year, and with the inability to dispose of evidence for up to 15 years, the agency may require the construction and staffing of additional storage space.

If a person is sentenced to death, then the evidence or representative samples shall be transferred to the Division of Forensic Science for storage. The division shall store, preserve, and retain the evidence until the judgement is executed. In addition, if the physical evidence cannot be stored “practically” by the local law enforcement agency, then the division shall take representative samples, cuttings, and/or a swabbing of the evidence, and then transfer these to the law enforcement agency for storage. If the court later finds that testing should be conducted on any of the stored evidence, then the division shall be responsible for conducting the tests. The Division of Forensic Science estimates that the fiscal impact of this bill could be \$871,484, which includes eleven additional positions (\$511,485), and equipment and supplies (\$360,000). It is likely, though, that the initial fiscal impact may be less than this; but, expenses could increase up to this level as more evidence is stored and analyzed.

The bill also provides for three separate proceedings relating to the use of new biological evidence or the development of new testing procedures. The first proceeding described by the bill would allow the court, by motion of a party in any felony case, or the court, in a case involving a sentence of death, to order the retention of evidence. The order must state the method of custody, transfer, and return of the evidence, and may order that only representative samples to be stored. The provision could result in additional hearings before the circuit court or, at the very least, additional time at the time of trial. According to the Office of the Executive Secretary of the Supreme Court, there could be a total fiscal impact on the judicial agencies of \$1.4 million each year (see below).

In 1998, there were 8,446 felony convictions for offenses that may involve biological evidence (including arson, assault, burglary, family offenses, kidnapping, murder, manslaughter, rape, robbery, sex offenses, solicitation, stalking, trespass and violent activities). If three-fourths of these cases involve human biological evidence, then there could be 6,335 possible motions filed. However, since many convictions rely on evidence that is not subject to “testing,” it is unclear to what extent possible evidence may be retained. The Supreme Court estimates that a five minute hearing, including the time required to produce the order, would be held to hear the motion since the judge would be aware of the evidence and the issues in the case, and five minutes of a circuit court clerk’s time. If the workload of judges and clerks increase to an unacceptable level, then additional positions may have to be added. According the Supreme Court, the bill could have a fiscal impact of approximately \$92,491 (for judges and clerks’ time).

The second proceeding could allow a person convicted of a felony to file a motion with the convicting circuit court requesting new scientific testing of evidence related to the case. The motion must be heard within 90 days but no sooner than 30 days following the filing of the motion. The court must make specific findings in the order issued following a hearing and may either dismiss the motion or order that the testing be done by the Division of Forensic Science. If testing is ordered, the method of custody, transfer and return of the evidence must be included in the order. The current population of inmates convicted of felonies in state and local facilities is approximately 32,000. If 10 percent of that population filed a motion in a given year, then there could be 3,200 hearings. The other 90 percent are those felonies that would not involve biological evidence, as well as those cases where no motion would be filed. Each hearing could require fifteen minutes of circuit court judge’s time and thirty minutes of circuit clerk’s time for receipt of papers and preparation of the file for the hearing and preparation of the order for the judges signature. If the workload of judges and clerks increase to an unacceptable level, then additional positions may have to be added. According the Supreme Court, the bill could have a fiscal impact of approximately \$157,920 (for judges and clerks’ time). If 90 percent of petitioners are indigent, then payment would also have to be made for a court appointed attorney, at an average cost of \$ 380 per proceeding, for a total cost of \$1,094,400 (\$380 x 2880 proceedings). Finally, if 10 percent

(320) of the petitions are granted, and if 90 percent of petitioners are indigent, then the Commonwealth must pay for the tests, at a cost of \$10,080 (\$35 per test x 288 tests). Therefore, the total cost for these types of proceedings could be approximately \$1,262,400.

The final proceeding noted in this bill provides for the issuance of a writ of actual innocence. A convicted felon may petition the Supreme Court of Virginia for a writ of actual innocence based on (1) testing of human biological evidence that was previously unknown or unavailable biological evidence or (2) the use of a new type of test of the biological evidence. The bill requires specific representations by the petitioner and that the petition be filed on a form provided by the Supreme Court. The Attorney General is given 30 days to respond to the motion. The response may include a proffer of any evidence pertaining to guilt that is not included in the official record of the case, including evidence that was suppressed at trial. The Supreme Court may require the clerk of the lower court to provide it with the whole record or any part of the record. In addition, the Supreme Court may, at any time during the pendency of the petition, order the circuit court to conduct a hearing to certify findings of fact with respect to certain issues. The circuit court must conduct a hearing within 90 days after the Supreme Court's order. The record and certified findings of fact must be filed in the Supreme Court within 30 days by the circuit court. Based on the record before it, the Supreme Court may either dismiss the petition for failure to state a claim, or upon a hearing, dismiss the petition for failure to establish allegations sufficient to issue a writ or grant the writ and vacate the conviction, or modify the conviction and remand the case to the circuit court for resentencing. The Supreme Court estimates that, of the number of motions granted for new testing, 32 will file petitions for writs of innocence. This is 10 percent of the number of motions granted. On average, each case filed with the Supreme Court costs approximately \$1,800. Therefore, the total cost of the proceedings before the Supreme Court could be approximately \$57,600 (for judge and clerk's times). In addition, in 10 percent of those cases, the circuit court will be directed to hold fact-finding hearings. It is difficult to determine the amount of time that will be required for each hearing because it will be dictated by the number and complexity of the issues on which the circuit court is required to take evidence. A prudent estimate could be two hours. The clerk would have an additional one-half hour of preparation and clean-up time, which could cost \$1,157 (for judge and clerk's times). If the workload of judges and clerks increase to an unacceptable level, then additional positions may have to be added.

The potential total fiscal impact of this bill cannot be definitely determined. There are many factors involved with these cases, and although the fiscal impact may reach the estimates provided herein, the full impact of this bill may not be realized until sometime in the future.

At this time, no information is available from the Office of the Attorney General. In addition, the Commonwealth's Attorneys' Services Council did not note a fiscal impact.

**9. Specific agency or political subdivisions affected:** The court system, the Department of Criminal Justice Services, the Virginia State Police, local law enforcement agencies, the office of the Attorney General, and Commonwealth's Attorneys.

**10. Technical amendment necessary:** No.

**11. Other comments:** See HB 2808.

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cc: Secretary of Public Safety  
Secretary of Administration

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