

## **Department of Planning and Budget**

### **2021 Special Session I Fiscal Impact Statement**

**1. Bill Number:** SB1261ER

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

**2. Patron:** Edwards

**3. Committee:** Passed Both Houses

**4. Title:** Court of Appeals

**5. Summary:** The substitute bill expands the jurisdiction of the Court of Appeals of Virginia by providing for an appeal of right in every civil case and provides that the granting of further appeal to the Supreme Court of Virginia must be within the discretion of the Supreme Court.

The bill leaves unchanged the current requirement that in criminal cases the Commonwealth must petition the Court of Appeals for granting of an appeal. The bill increases from 11 to 17 the number of judges on the Court of Appeals.

The bill also (i) provides jurisdiction to the Court of Appeals over interlocutory appeals and petitions for review of injunctions; (ii) allows for oral arguments to be dispensed with if the panel of judges makes a unanimous decision that the appeal is frivolous or that the dispositive issues on appeal have already been authoritatively decided; (iii) creates a process by which the Attorney General will be notified of any criminal appeal and has the opportunity to intervene as counsel of record by filing a notice of appearance, and allows the Commonwealth's attorney to be counsel of record provided the Attorney General has not filed such notice of appearance; (iv) eliminates the requirement for an appeal bond in criminal appeals; (v) requires the clerk of the circuit court to prepare a transcript of any trial for which an appeal is noticed to him; and (vi) requires an expedited review of appeals of permanent protective orders and of bond validation proceedings.

The provisions of this bill are contingent on funding in a general appropriation act passed in 2021 by the General Assembly that becomes law.

It repeals §8.01-670.1 (appeal of interlocutory orders and decrees by permission) and §8.01-672 (jurisdictional amount). It provides that any case for which a notice of appeal to the Supreme Court has been filed prior to January 1, 2022, must continue in the Supreme Court of Virginia and shall not be affected by the provisions of this act.

The provisions of the act amending §17.1-400(creation and organization of the Court of Appeals) shall become effective in due course and that the remaining provisions of this act become effective on January 1, 2022.

6. **Budget Amendment Necessary:** Yes, Item 40 (Court of Appeals), Item 48 (Indigent Defense Commission), and Item 57 (Office of the Attorney General). The Governor's introduced budget includes funding \$806,898 and six positions to address anticipated workload impacts of expanding appeal rights within the Office of the Attorney General. It also includes \$235,419 in FY 2021 and \$4,876,227 in FY 2022 to support four additional Court of Appeals judges and associated support staff to address expansion and organization of the Court. However, because certain information was not available at the time the introduced budget was finalized, additional resources will be needed. Please see Line 8.
7. **Fiscal Impact Estimates:** Final (see Line #8)
8. **Fiscal Implications:** Currently, the Court of Appeals of Virginia (CAV) has appellate jurisdiction over criminal cases (other than cases in which a sentence of death was imposed) appealed from circuit court judgments by petition. In addition, the CAV has appellate jurisdiction over specified categories of civil cases in appeals of right. The Supreme Court of Virginia (SCV) has exclusive appellate jurisdiction for all other civil cases appealed from circuit court judgments, cases in which a sentence of death has been imposed, appeals from the State Corporation Commission, and attorney discipline proceedings. Most appeals in the SCV are by petition, which the SCV may grant or refuse by order.

The proposed bill amends multiple statutes to provide an appeal of right to the CAV from any final judgment, and specified interlocutory orders, of the circuit courts of Virginia in most criminal and civil cases. The bill maintains the SCV's jurisdiction in cases where a sentence of death was imposed, habeas corpus appeals, cases from the State Corporation Commission, and attorney discipline proceedings. Judgments of the CAV can be further appealed by petition to the SCV.

#### **Criminal cases**

According to the Office of the Executive Secretary of the Supreme Court (OES), the proposed bill likely would increase the number of cases in the CAV each year. In calendar years 2016 – 2019, the CAV received an average of 1,500 to 1,550 petitions for appeal in criminal cases. Metrics analyzing appeal of right in other states project anywhere from 775 to 3,500 criminal appeals being received yearly. The OES projects the number of criminal appeals in Virginia to range between 1,460 and 2,220, with the middle of the range equating to roughly 1,840 (depending upon the metric used). Because each appeal will be considered by a three-judge panel, in tandem with various legislative changes, the OES believes that the bill is likely to result in at least a 20 percent increase in the number of criminal appeals received. Consequently, the CAV could receive approximately 300 criminal additional appeals yearly.

#### **Civil cases**

Predicting the volume of civil appeals that would be filed in the CAV in an appeal of right system is more difficult than gauging expected criminal appellate volume. In calendar years 2016 - 2019, the SCV received roughly 400 to 450 civil petitions for appeal. OES indicates that these historical statistics are a poor predictor of the volume of anticipated appeals in an appeal of right system for civil cases. The volume of potential appeals likely has been suppressed by the petition model for civil appeals, particularly considering that 80 percent of such petitions are unsuccessful. Nationally, approximately 0.7 percent of all civil case filings are thereafter appealed in appeal of right jurisdictions. In Virginia, there were an average of 169,500 civil filings each year between 2016 and 2019, in circuit courts. Applying the 0.7 percent national average rate of civil appeals in appeal of right jurisdictions would equate to 1,186.5 cases. Therefore, by averaging the historical filings in the SCV and the national average rate of civil appeals, the CAV would expect to receive approximately 800 civil appeals yearly.

### **Quantifying the impact**

The increased number of cases received, and concomitant increased workload, will require more personnel if the quantity, efficiency, and quality of work is to be maintained. The amounts below are based on the best available information from the Office of the Executive Secretary and include the base salary and benefits for each position. Most of the amounts directly reflect those included within the Judicial Council of Virginia's Report to the General Assembly of Virginia, Court of Appeals Jurisdiction Study – SJ 47 (Dec. 2, 2020) ("Jurisdiction Study"). However, because SB1261 only permits summary dispositions in very limited circumstances, which would require oral argument in most cases, additional staffing above those provided within the Jurisdiction Study will be required to meet the increased logistical challenges of conducting a significantly larger number of oral arguments.

In addition to the \$5,111,646 provided in the Governor's introduced budget, OES estimates the following additional fiscal impact on the Court of Appeals (CAV):

<b>Expense</b>	<b>Qty</b>	<b>FY 22</b>	<b>FY23</b>
Staff Attorney II	1	\$124,752	\$124,752
Staff Attorney I	1	\$114,840	\$114,840
Deputy Clerk	2	\$186,913	\$186,913
Paralegal	1	\$74,649	\$74,649
Office space and setup		\$225,750	\$225,750
Court of Appeals judges	2	\$559,972	\$559,972
Law Clerks	4	\$459,359	\$459,359
Administrative Assistant	2	\$187,464	\$187,464
Annual office lease	2	\$73,852	\$73,852
Annual software and IT network charges	2	\$8,232	\$8,232
Furniture, files, telephone, etc.	2	\$60,000	
IT hardware/software purchases	2	\$57,710	
<b>Additional funding need for CAV</b>		<b>\$2,133,493</b>	<b>\$2,015,783</b>

### **OTHER COSTS: TRANSCRIPTION**

This bill includes a provision stating that circuit courts receiving a notice of appeal in a criminal case must prepare a transcript of the trial at the expense of the Commonwealth. Currently, the cost of preparing the transcript in a criminal case is only paid by the Commonwealth when the defendant has been adjudged as indigent.

According to OES, transcripts typically are prepared at a charge per page. Available information indicates that an average transcript fee is \$4.30 per page. The number of pages included in a circuit court case transcript varies based on the type of case appealed and the complexity of the matter being appealed. OES has established 300 pages as the average criminal case transcript. Assuming CAV receives approximately 1,840 criminal case appeal petitions each year as a result of this bill and the average case transcript is 300 pages, the estimated cost to the Commonwealth for the production of criminal cases transcripts would be \$2,373,600  $((1840*300)*4.30)$ . OES assumes that 80 percent of the 1,500 current criminal case petitioners are adjudged as indigent, and therefore have their transcription fees paid by the Commonwealth. Based upon these assumptions, the OES believes the annual amount paid for transcription is expected to increase by \$825,600 in the Circuit Court.  $\{ \$2,373,600 - ((1500*.80)*300*4.30) \}$

In addition, OES believes there will be a fiscal impact to the Criminal Fund for additional transcripts. The bill requires that all criminal cases in circuit court be recorded, including misdemeanors. It further requires a transcript to be prepared not only of the trial for all criminal cases appealed, but also transcripts for any pre- or post-trial hearings, if so requested by the appellant. Because the number of additional transcripts cannot be identified, the fiscal impact to the Criminal Fund is indeterminate.

#### **Office of the Attorney General (OAG)**

The Governor's introduced budget includes funding \$806,898 and six positions to address anticipated workload impacts of expanding appeal rights. However, the OAG believes it will need additional resources to meet all of the requirements of the bill. Under the current system in which, in the Court of Appeals of Virginia, the Criminal Appeals Section handles only granted criminal appeals, the section litigates 150-200 appeals per year in that Court based on data from 2019 and four prior years. These granted appeals are drawn from 1,500 to 1,600 petitions for appeal filed in criminal cases per year. If the number of criminal appeals in Virginia remains constant at current levels, appeal caseload would grow from 150-200 to 1,300 to 1,400 annually.

OAG estimates that for each new attorney position added that each attorney could handle approximately two additional appeals per month, equating to a need of at least 54 additional attorneys to meet the anticipated impact of the proposed bill. The total average cost for 54 attorneys and other ongoing costs (such as bar dues, CLE, office supplies, etc.) is approximately \$6,440,000. In addition, OAG estimates the need for 13 administrative staff to support the additional attorneys. The total cost of administrative staff is \$1,192,796.

The OAG also estimates there will be additional expense for travel (\$105,625), Victim Notification Program (\$325,056), one-time information technology costs for computers,

laptops, etc. (\$175,000), account payable help for finance department (\$15,000) and an additional Human Resource Generalist position (\$100,450).

The total fiscal impact to the OAG is estimated to be \$8,353,927 in FY 2022 and \$8,178,927 in FY 2023. The above information was not available at the time the introduced budget was finalized.

**Virginia Indigent Defense Commission (VIDC)**

According to VIDC, the proposed bill will require reply briefs to be filed in almost all appeal cases. Currently, only about 10 to 15 percent of VIDC appeals reach the merit stage in the Court of Appeals where reply briefs would be expected. VIDC estimates this increase in workload would require 8 additional Senior Assistant Public Defender positions. The estimated cost for these positions is \$824,277.

**9. Specific Agency or Political Subdivisions Affected:** Courts, Virginia Indigent Defense Commission, and Office of the Attorney General

**10. Technical Amendment Necessary:** No

**11. Other Comments:** None