

## Department of Planning and Budget

### 2020 Fiscal Impact Statement

**1. Bill Number:** HB974ER

<b>House of Origin</b>	<input type="checkbox"/> Introduced	<input type="checkbox"/> Substitute	<input type="checkbox"/> Engrossed
<b>Second House</b>	<input type="checkbox"/> In Committee	<input type="checkbox"/> Substitute	<input checked="" type="checkbox"/> Enrolled

**2. Patron:** Herring

**3. Committee:** Passed Both Houses

**4. Title:** Petition for writ of actual innocence

**5. Summary:** The proposed bill provides that a person who was convicted of a felony or who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may petition for a writ of actual innocence based on biological evidence or non-biological evidence, regardless of the type of plea he entered at trial.

Under current law, such person may petition for a writ based on biological evidence if he entered a plea of not guilty, and any person, regardless of the type of plea he entered at trial, may petition for such writ if he is sentenced to death or convicted or adjudicated delinquent of murder or a felony for which the maximum punishment is imprisonment for life.

The bill also (i) allows a writ of actual innocence based on non-biological evidence to be granted if scientific testing of previously untested evidence, regardless of whether such evidence was available or known at the time of conviction, proves that no trier of fact would have found proof of guilt of the person petitioning for the writ, provided that the testing procedure was not available at the time of conviction, and (ii) eliminates the provision that limits a petitioner to only one writ of actual innocence based on non-biological evidence for any conviction.

The bill provides that the petitioner must prove the allegations supporting either type of writ of actual innocence by a preponderance of the evidence. Currently, the petitioner must prove such allegations by clear and convincing evidence.

Lastly, the bill clarifies that the Attorney General may join a petition for a writ of actual innocence filed in connection with an adjudication of delinquency.

**6. Budget Amendment Necessary:** No

**7. Fiscal Impact Estimates:** Final (see Item #8)

**8. Fiscal Implications:** The proposed bill amends several sections of the Code of Virginia related to writs of actual innocence based on human biological evidence and on non-biological evidence.

Currently, the Supreme Court of Virginia (“SCV”) has exclusive original jurisdiction over writs of actual innocence based on biological evidence (“biological petitions”) pursuant to §19.2-327.2 of the Virginia Code. Under current law, three categories of felons can file

biological petitions: those who (i) pled not guilty, (ii) were sentenced to death regardless of plea, and (iii) entered any plea to an offense carrying a possible life sentence. Current law imposes no limit on the number of biological petitions a felon may file, so successive biological petitions are permitted. The proposed bill would expand the availability of biological petitions to any person convicted of a felony, regardless of plea or sentence.

The Court of Appeals has exclusive original jurisdiction over writs of actual innocence based on non-biological evidence under §19.2-327.10 of the Virginia Code. Currently, any felon who pled not guilty to any felony offense in a circuit court may petition for a writ of actual innocence based on non-biological evidence, or a combination of biological and non-biological evidence. Only one such petition is permitted.

The proposed bill would expand eligibility to the non-biological writ to any felon regardless of plea, and it would allow felons to file multiple non-biological petitions. Either party may appeal from the Court of Appeals to the Supreme Court of Virginia. Therefore, the proposed bill would result in an increase in original jurisdiction biological petitions filed in the Supreme Court of Virginia as well as an increase in non-biological petition appeals in the Court of Appeals.

According to the Office of the Executive Secretary of the Supreme Court (“OES”), the Supreme Court of Virginia has received an average of 6 biological petitions per year from eligible convicted felons. Additionally, data from the Virginia Criminal Sentencing Commission from the last 23 years show that on average 7 felons pled guilty for every 1 felon convicted at trial. Because the proposed bill expands the availability of biological petitions to all felons, regardless of plea, the population of eligible filers is expected to increase. Assuming felons file biological petitions at the same rate regardless of whether they pled guilty or went to trial, the Supreme Court of Virginia expects to see approximately 42 more petitions per year, for a total of 48.

In addition, the Court of Appeals is expected to see an increase in the number of non-biological petitions. On average, the Court of Appeals receives about 23 non-biological petitions per year. The proposed bill would allow felons to file multiple non-biological petitions. Using the approximate annual average of sentencing events from 2001 to 2018 of 24,922 felony sentencing events, it is estimated that the bill will result in a total of approximately 358 additional non-biological filings per year in the Court of Appeals. The Supreme Court of Virginia expects to receive an additional 80 non-biological appeals per year from the Court of Appeals.

This legislation will require additional support staff in order to process the additional caseload in approximately the same time as the Court’s current caseload and to ensure the same level of quality of the Court’s work product. Based on the best available information from OES, the fiscal impact for additional staffing for the Supreme Court and the Court of Appeals is estimated at \$863,619. The staffing cost breakdown is as follows:

- One attorney for the Supreme Court’s Office of the Chief Staff Attorney (\$125,531)
- One additional position for Supreme Court’s Clerk’s Office (\$102,064)
- Three staff attorneys for Court of Appeals’ Office of Chief Staff Attorney (\$323,010)
- One support staff for Court of Appeals’ Office of Chief Staff Attorney (\$88,056)
- Two additional deputy clerks for Court of Appeals’ Clerk’s Office (\$162,394)

- One additional assistant clerk for Court of Appeals' Clerk's Office (\$62,564)

Given the expanded eligibility, the lower burden of proof, and the increased need for hearings under the Supreme Court's opinion in Dennis v. Commonwealth, 297 Va. 104 (2019), it is expected that there also will be additional costs to the Criminal Fund. Although it is not possible to quantify the impact, the types of additional costs to the Criminal Fund could include the following:

- Appointment of counsel;
- Court reporter fees;
- Transcript fees;
- Witness fees, including expert witnesses and out-of-state witnesses;
- Transportation costs for incarcerated petitioners; and
- Increased security personnel for hearings involving incarcerated petitioners

Additionally, the lower burden of proof will result in the Court granting more writs, which triggers the compensation provisions of §§8.01-195.10 through 8.01-195.12. The impact on the Criminal Fund is \$15,000 for each exoneration. It is not possible to calculate the precise impact on the general fund because the formula for compensation is case-specific as required by law.

This proposed bill also is expected to have a fiscal impact on the Office of the Attorney General ("OAG"). The amendments to the statutes covering biological writs would increase the number of petitions which would in turn increase the number of cases to which the OAG would need to respond in the Court of Appeals and/or in the Supreme Court of Virginia. According to the OAG, drafting responses in cases involving guilty pleas are more time-intensive because of the lack of a lower court record. Based on the most recently available information, the fiscal impact on the OAG is estimated to be \$366,299 for three positions. This funding would cover the cost of two Assistant Attorney General I positions and one investigator position. The OAG also notes that there may be a need to retain expert witnesses (to the extent the Department of Forensic Science cannot assist); however, the cost for expert witness assistance cannot be quantified at this time.

**9. Specific Agency or Political Subdivisions Affected:** Courts, Office of the Attorney General

**10. Technical Amendment Necessary:** No

**11. Other Comments:** The conference report to House Bill 30 includes \$863,619 for fiscal impacts to the courts system and \$366,299 for fiscal impacts to the Office of the Attorney General.