

Department of Planning and Budget 2021 Special Session I Fiscal Impact Statement

1. Bill Number: SB1105ES1

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

2. Patron: Stanley

3. Committee: Senate Finance and Appropriations

4. Title: Post-conviction relief for cases involving previously admitted scientific evidence.

5. Summary: The substitute bill establishes that notwithstanding, and in addition to, any other provision of law or rule of court, upon a petition of a person who was convicted of a felony offense, or who was adjudicated delinquent of an offense that would be a felony offense if committed by an adult, the Court of Appeals has the authority to vacate a conviction or adjudication of delinquency. Only one such petition based upon a conviction or adjudication of delinquency may be filed by a petitioner unless it is distinguishable from prior petitions.

The petitioner must allege in the petition categorically and with specificity, under oath, the following: (i) the felony offense for which the petitioner was convicted or adjudicated delinquent; (ii) that the petitioner did not commit the felony offense for which the petitioner was convicted or adjudicated delinquent; (iii) an exact description of the newly available forensic scientific evidence and its relevance to guilt or punishment; (iv) specific facts indicating that relevant forensic scientific evidence was not available or could not have been obtained in the exercise of diligence before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency or that newly available forensic evidence would discredit or contradict forensic scientific evidence that was admitted at the petitioner's trial or adjudication of delinquency; and (v) that the admission of the discredited or contradicted forensic scientific evidence or the absence of the newly available forensic scientific evidence was not harmless.

The petition must contain all relevant allegations of facts that are known to the petitioner at the time of filing, must be accompanied by all relevant documents, affidavits, and test results, and must enumerate and include all relevant previous records, applications, petitions, and appeals and their dispositions. The petition must be filed in the Court of Appeals on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may return the petition to the petitioner pending the completion of such form. Any false statement in the petition, if such statement is knowingly or willfully made, is grounds for prosecution of perjury.

In cases brought by counsel for the petitioner, the Court of Appeals cannot accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the

Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals cannot accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General.

The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it must notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General has 60 days after receipt of such notice in which to file a response to the petition, which may be extended for good cause shown; however, nothing prevents the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt or delinquency or innocence of the petitioner that is not included in the record of the case, including evidence that was not introduced at trial.

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the Court may order the circuit court in which the order of conviction or the adjudication of delinquency was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals directs. The record and certified findings of fact of the circuit court must be filed in the Court of Appeals within 30 days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth, and the Attorney General must be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

Upon consideration of the petition, the response by the Attorney General, previous records of the case, and any evidence presented at the hearing, the Court must (i) dismiss the petition for failure to establish allegations sufficient to justify vacating the petitioner's conviction or adjudication of delinquency or (ii) upon a finding by a preponderance of the evidence that the admission of the discredited or contradicted forensic scientific evidence or the absence of the newly available forensic scientific evidence was not harmless beyond a reasonable doubt, grant the writ and vacate the petitioner's conviction or adjudication of delinquency, subject to retrial in the discretion of the Commonwealth. The burden of proof in a proceeding brought pursuant to this section shall be upon the petitioner.

In any petition filed pursuant to this chapter that is not summarily dismissed, the petitioner is entitled to representation by counsel.

The bill also provides that a petition filed under the provisions of this bill does not constitute the sole grounds to delay setting an execution date or to grant a stay of execution or delay or stay any other appeals following conviction or adjudication of delinquency or petitions to any court; however, any evidence or arguments raised to such a petition may form the basis to issue a stay of execution.

Noting in the provisions of the bill creates any liabilities for an expert who repudiates his original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

The bill provides that either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia has the authority to issue writs.

The provisions of this bill become effective July 1, 2022 and apply to petitions filed before July 1, 2026.

The bill requires the Office of the Executive Secretary of the Supreme Court to report to the Chairmen of the Senate Committee on the Judiciary and House Committee for Courts of Justice by January 1 of each year the number of petitions filed for writs of new or discredited forensic scientific evidence and the dispositions thereof for the previous fiscal year.

The provisions of this bill will not become effective unless an appropriation effectuating the purposes of this act is included in a general appropriation act passed in 2021 by the General Assembly that becomes law.

- 6. Budget Amendment Necessary:** See Line #8
- 7. Fiscal Impact Estimates:** Preliminary (see Line #8)
- 8. Fiscal Implications:** According to the Office of the Executive Secretary of the Supreme Court, since the number of cases that could be impacted by this legislation is unknown, the fiscal impact is not feasible to determine at this time.

According to the Office of the Attorney General (OAG), the bill could allow a single expert opinion, asserting that some previously accepted forensic process was no longer valid, to challenge many hundreds of cases in which it had been used. The OAG states that because the summary dismissal policies for writs of actual innocence varies from case to case, the proposed writs brought under this legislation could require investigations and formal responses. However, the number of petitions that would require formal responses and investigation will depend upon facts outside of the trial record. Thus, the OAG believes it would need additional attorneys to file the responses, and at least one dedicated, forensically trained investigator to respond to these petitions. OAG believes the agency may need up to 5 positions and \$796,000 (salary and benefits) to meet the requirements of this bill.

9. Specific Agency or Political Subdivisions Affected: Courts, Department of Forensic Science, and Office of the Attorney General

10. Technical Amendment Necessary: No

11. Other Comments: None