

Department of Legislative Services  
 Maryland General Assembly  
 2018 Session

FISCAL AND POLICY NOTE  
 Enrolled - Revised

Senate Bill 423

(Senator Zirkin)

Judicial Proceedings

Judiciary

Criminal Procedure - Postconviction - DNA Testing and Petition for Writ of Actual Innocence

This bill expands eligibility to file a petition for postconviction DNA testing or a database/log search to include a person convicted as the result of a plea of guilty, an Alford plea, or a plea of *nolo contendere*. The bill also establishes procedures for petitions filed under these circumstances. The bill makes similar changes to eligibility to file a petition for writ of actual innocence and procedures for those petitions.

Fiscal Summary

**State Effect:** General fund expenditures by at least \$108,500 in FY 2019 to handle additional petitions. Future years reflect annualization. Revenues are not affected.

(in dollars)	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	108,500	136,400	140,600	145,400	150,300
Net Effect	(\$108,500)	(\$136,400)	(\$140,600)	(\$145,400)	(\$150,300)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease*

**Local Effect:** Local expenditures increase for the circuit courts, State’s Attorneys, and local crime labs to handle additional petitions. Local revenues are not expected to be materially affected.

**Small Business Effect:** None.

## Analysis

### Bill Summary:

#### *Postconviction DNA Testing*

For a petitioner who was convicted by means of a guilty verdict reached as a result of a trial, a guilty plea, an Alford plea, or a plea of *nolo contendere*, the court must order DNA testing if it finds that a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing and the requested DNA test employs a method of testing generally accepted within the relevant scientific community.

If the petitioner was convicted as the result of a trial and the results of the postconviction DNA testing are favorable to the petitioner, the court must:

- open a postconviction proceeding, if no postconviction proceeding has been previously initiated by the petitioner;
- reopen a postconviction proceeding, if such a proceeding has been previously initiated by the petitioner; or
- order a new trial, if the court finds that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial.

If the court finds that a substantial possibility does not exist that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, the court may still order a new trial if the court determined that the action is in the interest of justice.

For a petitioner who was convicted as the result of a guilty plea, an Alford plea, or a plea of *nolo contendere* and the court determines that the DNA test results establish by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion, the court may, as the court considers appropriate:

- open a postconviction proceeding, if no postconviction proceeding has been previously initiated by the petitioner;
- reopen a postconviction proceeding, if such a proceeding has been previously initiated by the petitioner; or
- set aside the conviction and schedule the matter for trial.

When assessing the impact of the DNA test results on the strength of the State's case against the petitioner at the time the plea was entered, the court may consider, in addition to evidence that was presented as part of the factual support of the plea, admissible evidence submitted by either party that was contained in law enforcement files in existence at the time the plea was entered. When determining an appropriate remedy, the court may consider any additional admissible evidence submitted by either party that came into existence after the plea was entered and is relevant to the petitioner's claim of actual innocence.

### *Petition for Writ of Actual Innocence*

Under the bill, a person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence in the circuit court for the county in which the conviction was imposed if the person claims that there is newly discovered evidence that:

- if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; or
- if the conviction resulted from a guilty plea, an Alford plea, or a plea of *nolo contendere*, establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion; and
- could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

If the conviction resulted from a trial, in ruling on a petition for writ of actual innocence, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.

If the conviction resulted from a guilty plea, an Alford plea, or a plea of *nolo contendere*, when assessing the impact of the newly discovered evidence on the strength of the State's case against the petitioner at the time of the plea, the court may consider admissible evidence submitted by either party in addition to the evidence presented as part of the factual support of the plea that was contained in law enforcement files in existence at the time the plea was entered. If the court determines that, when considered with admissible evidence, in addition to the evidence presented as part of the factual support of the plea, that was contained in law enforcement files in existence at the time the plea was entered, the newly discovered evidence establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion, the court may:

- allow the petitioner to withdraw the guilty plea, Alford plea, or plea of *nolo contendere*; and
- set aside the conviction, resentence, schedule the matter for trial, or correct the sentence, as the court considers appropriate.

When determining the appropriate remedy, the court may allow both parties to present any admissible evidence that came into existence after the plea was entered and is relevant to the petitioner's claim of actual innocence.

If the petitioner was convicted as a result of a guilty plea, an Alford plea, or a plea of *nolo contendere*, an appeal may be taken either by the State or the petitioner from an order entered by the court.

### *Certification of Conviction in Error*

On written request by the petitioner, the State's Attorney may certify that a conviction was in error if (1) the court grants a petition for writ of actual innocence; (2) in ruling on a petition for writ of actual innocence, the court sets aside the verdict or conviction or schedules the matter for trial or grants a new trial; and (3) the State's Attorney declines to prosecute the petitioner because the State's Attorney determines that the petitioner is innocent.

### **Current Law:**

#### *DNA Postconviction Testing Petition*

As part of a postconviction proceeding, a person convicted of a "crime of violence" under § 14-101 of the Criminal Law Article may petition for (1) DNA testing of scientific identification evidence that the State possesses that is related to the judgment of conviction or (2) a search by a law enforcement agency of a database or log for the purpose of identifying the source of physical evidence used for DNA testing. A petitioner is required to pay for the cost of DNA testing ordered by the court unless the test results are favorable to the petitioner.

A petitioner is permitted to move for a new trial on the grounds that the conviction was based on unreliable scientific evidence and a substantial possibility exists that the petitioner would not have been convicted without the evidence. A court must order the search if it finds that a reasonable probability exists that such a search has the potential to produce exculpatory evidence relating to a postconviction claim. The court may order a new trial on a finding that such action is in the interest of justice and, on a finding that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, must order a new trial. If the State is unable

to produce scientific evidence as required, the court must hold a hearing to determine whether the failure to produce evidence was the result of intentional and willful destruction. The court must order a postconviction hearing to be conducted if specified determinations and findings are made.

The State must preserve scientific identification evidence that (1) the State has reason to know contains DNA material and (2) is secured in connection with specified criminal offenses. The State must preserve this scientific identification evidence for the time of the sentence, including any consecutive sentence imposed in connection with the offense.

#### *Petition for Writ of Actual Innocence*

A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence in the circuit court for the county in which the conviction was imposed if the person claims that there is newly discovered evidence that (1) creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined and (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

In ruling on a petition, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate. The court must state the reasons for its ruling on the record. A petitioner in a writ of actual innocence proceeding has the burden of proof.

#### *Certification of Conviction in Error*

A State's Attorney may, upon written request of a petitioner for a writ of actual innocence, certify that a conviction was in error if (1) the court grants the petitioner's petition for relief; (2) the court sets aside the verdict or grants a new trial when ruling on the petitioner's petition for writ of actual innocence; and (3) the State's Attorney declines to prosecute the petitioner because the State's Attorney determines that the petitioner is innocent.

#### *Alford Pleas and Nolo Contendere*

An Alford plea is a specialized type of guilty plea in which a defendant does not admit to guilt but acknowledges that sufficient evidence exists for the prosecution to convince a judge or jury beyond a reasonable doubt that the defendant committed the crime. Defendants typically enter Alford pleas to avoid the threat of greater punishment.

A plea of *nolo contendere*, commonly referred to as "no contest," is a plea through which the defendant does not dispute the charges but does not admit guilt either.

**Background:** In *Yonga v. State*, 446 Md. 183 (2016), the Maryland Court of Appeals affirmed a holding by the Court of Special Appeals that a defendant as determined by a guilty plea is not eligible to file a petition for writ of actual innocence under § 8-301 of the Criminal Procedure Article. In its opinion, the court noted that “only a conviction garnered after a bench or jury trial can provide the fodder against which the standard in Section 8-301(a)(1) can be measured.”

While acknowledging that the statute is silent on the issue, the court, in reaching its decision, analyzed the legislative history of the statute, relevant Maryland Rules, and the court’s understanding of the meaning of “actual innocence.” The court also considered the fact that a motion for a new trial has never been granted under Maryland Rule 4-331(c)(1) for an individual convicted as a result of a guilty plea. The court also noted that because of the differences in the procedures and evidence presented during a trial compared to a conviction based on a guilty plea, a trial is the appropriate event against which to measure whether the newly discovered evidence “creates a substantial or significant possibility that the result may have been different” under § 8-301 of the Criminal Procedure Article.

In *Jamison v. State*, 450 Md. 387 (2016), the Maryland Court of Appeals held that a defendant who entered an Alford plea was not entitled to petition for postconviction DNA testing under § 8-201 of the Criminal Procedure Article for the same offense. The court determined that the defendant’s Alford plea was equivalent to a guilty plea and discussed the *Yonga* analysis extensively in its opinion.

**State Expenditures:** General fund expenditures increase by at least \$108,492 in fiscal 2019 for the Office of the Attorney General (OAG) and the Office of the Public Defender (OPD) to handle additional petitions filed as a result of the bill.

*Office of the Attorney General*

General fund expenditures for OAG increase by \$103,492 in fiscal 2019, which accounts for the bill’s October 1, 2018 effective date. This estimate reflects the cost of hiring one assistant Attorney General to assist with handling cases related to additional petitions filed as a result of the bill. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1
Salary and Fringe Benefits	\$98,133
Operating Expenses	<u>5,359</u>
<b>Total FY 2019 OAG Expenditures</b>	<b>\$103,492</b>

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses.

The extent to which the bill increases OAG caseloads cannot be reliably determined at this time. **OAG did not respond to repeated requests for information on current and projected caseloads.** Regardless, the Department of Legislative Services advises that, given its statewide appellate review function in postconviction review cases and the expansion in eligibility for postconviction review resulting from compliance with the bill, it is likely that an additional assistant Attorney General position is needed to handle additional petitions.

#### *Office of the Public Defender*

General fund expenditures for OPD increase by \$5,000 each year for DNA testing, assuming that the office cannot pay for this testing through federal grants. This estimate assumes that the bill generates few additional cases for OPD and a relatively low need for nongrant funded DNA testing.

OPD advises that until very recently, it evaluated cases involving guilty pleas, Alford pleas, and pleas of *nolo contendere* for possible DNA testing and litigation on the basis of newly discovered evidence. Due to the difficulty in obtaining relief in these cases, OPD anticipates that it undertakes representation in few additional cases as a result of the bill. According to OPD, claims of factual innocence are usually forwarded to the Innocence Project, which is a joint project of OPD and the University of Baltimore School of Law. Pursuant to a memorandum of understanding, an OPD attorney administers the project's legal clinic. OPD covers any DNA testing for the project that is not covered by the federal grant. *Pro se* petitions for relief are forwarded to OPD's Post-Conviction Defenders Division (PCD) and the Innocence Project's clinic for review and screening by the clinic's administrator, who utilizes law students and grant-funded staff attorneys to assess the claims. Depending on the outcome of the evaluation, OPD or the Innocence Project may provide representation. OPD advises that the number of additional meritorious *pro se* petitions it receives under the bill is speculative.

Should the volume of additional petitions filed increase to the point that OPD cannot accommodate the increased workload with existing personnel, then general fund expenditures for OPD increase further. *For illustrative purposes only*, accounting for the bill's October 1, 2018 effective date, the cost associated with hiring one assistant public defender for PCD is \$69,615 in fiscal 2019.

The Department of State Police (DSP) advises that the bill does not have a material effect on DSP finances. According to DSP, the department has never received a request for postconviction testing of DNA evidence and petitioners in these cases typically submit samples/evidence to private laboratories for testing.

**Local Expenditures:** Depending on actual caseloads, operating expenditures for circuit courts and State’s Attorneys may increase minimally to handle additional petitions. The Judiciary advises that the bill’s effect on circuit court caseloads is unknown at this time.

The Office of the State’s Attorney for Baltimore County advises that the bill (1) greatly increases the number of cases each State’s Attorney’s office will have to deal with for DNA petitions and petitions for writs of actual innocence; (2) increases county workloads to litigate these petitions in court, including hiring experts and requesting labs to test DNA evidence; and (3) may result in local prosecutors relitigating cases that are decades old. The office further advises that while defendants in these cases have the choice to pursue testing through private laboratories, prosecutors may wish to pursue their own testing of relevant evidence, which results in additional local expenditures for counties that have crime laboratories that conduct DNA analysis.

According to the *Maryland State Police Forensic Sciences Division Statewide DNA Database Report – 2016 Annual Report* (published April 2017), the Maryland Statewide DNA Database receives DNA evidence profiles from six DNA laboratories: DSP, Anne Arundel County Police, Baltimore City Police, Baltimore County Police, Montgomery County Police, and Prince George’s County Police.

---

### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 395 (Delegate Dumais) - Judiciary.

**Information Source(s):** Harford County; City of College Park; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Office of the Attorney General; Department of State Police; Baltimore County; Ballentine’s Law Dictionary; Department of Legislative Services



**Fiscal Note History:**  
mm/kdm

First Reader - February 1, 2018  
Third Reader - April 4, 2018  
Revised - Amendment(s) - April 4, 2018  
Revised - Updated Information - April 4, 2018  
Enrolled - May 11, 2018  
Revised - Amendment(s) - May 11, 2018

---

Analysis by: Amy A. Devadas

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510