

# SENATE BILL 423

E2

(8lr1397)

## ENROLLED BILL

— Judicial Proceedings/Judiciary —

Introduced by **Senator Zirkin**

Read and Examined by Proofreaders:

\_\_\_\_\_  
Proofreader.

\_\_\_\_\_  
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this

\_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock, \_\_\_\_\_ M.

\_\_\_\_\_  
President.

### CHAPTER \_\_\_\_\_

1 AN ACT concerning

2 **Criminal Procedure – Postconviction – DNA Testing and Petition for Writ of**  
3 **Actual Innocence**

4 FOR the purpose of clarifying the group of persons who may file a certain petition for  
5 postconviction DNA testing or a database or log search; ~~requiring a court to order a~~  
6 ~~new trial or vacate a conviction~~ authorizing a court to order a certain remedy under  
7 certain circumstances for certain classes of persons filing for postconviction DNA  
8 testing; ~~defining the term “conviction” as it relates to the standard required to file a~~  
9 ~~writ of actual innocence by a person convicted at trial~~; establishing a standard  
10 required to file a petition for writ of actual innocence by a person convicted as a result  
11 of a guilty plea, an Alford plea, or a plea of nolo contendere; ~~defining a certain term;~~  
12 authorizing a court to order a new trial or vacate a conviction a certain remedy under  
13 certain circumstances for certain classes of persons who file a petition for writ of  
14 actual innocence; authorizing an appeal to be taken by certain persons under certain

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#### EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.

*Italics* indicate opposite chamber/conference committee amendments.



1 circumstances; making conforming changes; and generally relating to postconviction  
 2 DNA testing and petitions for writ of actual innocence.

3 BY repealing and reenacting, with amendments,  
 4 Article – Criminal Procedure  
 5 Section 8–201  
 6 Annotated Code of Maryland  
 7 (2008 Replacement Volume and 2017 Supplement)  
 8 (As enacted by Chapter 62 of the Acts of the General Assembly of 2017)

9 BY repealing and reenacting, with amendments,  
 10 Article – Criminal Procedure  
 11 Section ~~8–301(a)~~ 8–301  
 12 Annotated Code of Maryland  
 13 (2008 Replacement Volume and 2017 Supplement)

14 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,  
 15 That the Laws of Maryland read as follows:

16 **Article – Criminal Procedure**

17 8–201.

18 (a) (1) In this section the following words have the meanings indicated.

19 (2) “Biological evidence” includes, but is not limited to, any blood, hair,  
 20 saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic  
 21 marker groupings may be obtained.

22 ~~(3) “CONVICTION” MEANS:~~

23 ~~(I) A VERDICT OF GUILTY REACHED AS A RESULT OF A TRIAL;~~

24 ~~(II) A PLEA OF GUILTY;~~

25 ~~(III) AN ALFORD PLEA; OR~~

26 ~~(IV) A PLEA OF NOLO CONTENDERE.~~

27 ~~(4)~~ (3) “DNA” means deoxyribonucleic acid.

28 ~~[(4)]~~ ~~(5)~~ “Law enforcement agency” means any of the following:

29 (i) a municipal or county police department;

30 (ii) sheriff’s office;

1 (iii) the Maryland State Police;

2 (iv) any prosecuting authority;

3 (v) any state, university, county, or municipal police unit or police  
4 force; and

5 (vi) any hospital, medical facility, or private entity that is conducting  
6 forensic examinations and securing biological evidence related to criminal investigations.

7 ~~{(5)}~~ ~~(6)~~ “Scientific identification evidence” means evidence that:

8 (i) is related to an investigation or prosecution that resulted in a  
9 judgment of conviction;

10 (ii) is in the actual or constructive possession of a law enforcement  
11 agency or agent of a law enforcement agency; and

12 (iii) contains biological evidence from which DNA may be recovered  
13 that may produce exculpatory or mitigating evidence relevant to a claim of a convicted  
14 person of wrongful conviction or sentencing if subject to DNA testing.

15 (b) Notwithstanding any other law governing postconviction relief, a person who  
16 is convicted of a crime of violence under § 14–101 of the Criminal Law Article may file a  
17 petition:

18 (1) for DNA testing of scientific identification evidence that the State  
19 possesses that is related to the judgment of conviction; or

20 (2) for a search by a law enforcement agency of a law enforcement data  
21 base or log for the purpose of identifying the source of physical evidence used for DNA  
22 testing.

23 (c) A petitioner may move for a new trial under this section on the grounds that  
24 the conviction was based on unreliable scientific identification evidence and a substantial  
25 possibility exists that the petitioner would not have been convicted without the evidence.

26 (d) (1) Subject to subsection ~~(e)~~ **(F)** of this section, **IF A PETITIONER WAS**  
27 **CONVICTED AS THE RESULT OF A TRIAL, A GUILTY PLEA, AN ALFORD PLEA, OR A**  
28 **PLEA OF NOLO CONTENDERE**, a court shall order DNA testing if the court finds that:

29 (i) a reasonable probability exists that the DNA testing has the  
30 scientific potential to produce exculpatory or mitigating evidence relevant to a claim of  
31 wrongful conviction or sentencing; and

1 (ii) the requested DNA test employs a method of testing generally  
2 accepted within the relevant scientific community.

3 (2) A court shall order a data base search by a law enforcement agency if  
4 the court finds that a reasonable probability exists that the data base search will produce  
5 exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.

6 (e) (1) A petitioner shall notify the State in writing of the filing of a petition  
7 under this section.

8 (2) The State may file a response to the petition within 15 days after notice  
9 of the filing or within the time that the court orders.

10 (f) If the court orders DNA testing under subsection (d) of this section, the court  
11 in its order may issue orders the court considers appropriate, including designation of any  
12 of the following:

13 (1) the specific evidence to be tested;

14 (2) the method of testing to be used;

15 (3) the preservation of some of the sample for replicate testing and  
16 analysis;

17 (4) the laboratory where the testing is to be performed, provided that if the  
18 parties cannot agree on a laboratory, the court may approve testing at any laboratory  
19 accredited by the American Society of Crime Laboratory Directors (ASCLAD), the  
20 Laboratory Accreditation Board (LAB), or the National Forensic Science Technology  
21 Center; and

22 (5) release of biological evidence by a third party.

23 (g) (1) Except as provided in paragraph (2) of this subsection, DNA testing  
24 ordered under subsection (d) of this section shall be conducted as soon as practicable.

25 (2) Based on a finding of necessity, the court may order the DNA testing to  
26 be completed by a date that the court provides.

27 (h) (1) Except as provided in paragraph (2) of this subsection, the petitioner  
28 shall pay the cost of DNA testing ordered under subsection (d) of this section.

29 (2) If the results of the DNA testing that the court orders under this section  
30 are favorable to the petitioner, the court shall order the State to pay the costs of the testing.

31 (i) (1) If the results of the postconviction DNA testing are unfavorable to the  
32 petitioner, the court shall dismiss the petition.

1           (2) ~~IF~~ IF THE PETITIONER WAS CONVICTED AS THE RESULT OF A TRIAL  
 2 AND the results of the postconviction DNA testing are favorable to the petitioner, the court  
 3 shall:

4           (i) if no postconviction proceeding has been previously initiated by  
 5 the petitioner under § 7–102 of this article, open a postconviction proceeding under § 7–102  
 6 of this article;

7           (ii) if a postconviction proceeding has been previously initiated by  
 8 the petitioner under § 7–102 of this article, reopen a postconviction proceeding under  
 9 § 7–104 of this article; ~~for~~

10           (iii) ~~IN THE CASE OF A PETITIONER WHO WAS CONVICTED BY~~  
 11 ~~MEANS OF A GUILTY VERDICT REACHED AS A RESULT OF A TRIAL,~~ on a finding that a  
 12 substantial possibility exists that the petitioner would not have been convicted if the DNA  
 13 testing results had been known or introduced at trial, order a new trial; ~~OR~~

14           ~~(IV) IN THE CASE OF A PETITIONER WHO WAS CONVICTED BY~~  
 15 ~~MEANS OF A GUILTY PLEA, AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, ON~~  
 16 ~~A FINDING THAT A SUBSTANTIAL POSSIBILITY EXISTS THAT THE DNA TESTING~~  
 17 ~~RESULTS SUBSTANTIALLY OR SIGNIFICANTLY UNDERMINE THE FACTS SET FORTH~~  
 18 ~~BY THE STATE AS THE BASIS OF A PLEA AGREEMENT, ORDER A NEW TRIAL.~~

19           (3) If the court finds that a substantial possibility does not exist under  
 20 paragraph (2)(iii) of this subsection, the court may order a new trial if the court determines  
 21 that the action is in the interest of justice.

22           (4) (I) IF THE PETITIONER WAS CONVICTED AS THE RESULT OF A  
 23 GUILTY PLEA, AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, THE COURT MAY  
 24 GRANT A NEW TRIAL OR VACATE THE CONVICTION IF CONTENDERE AND THE COURT  
 25 DETERMINES THAT THE DNA TEST RESULTS ESTABLISH BY CLEAR AND  
 26 CONVINCING EVIDENCE THE PETITIONER'S ACTUAL INNOCENCE OF THE OFFENSE  
 27 OR OFFENSES THAT ARE THE SUBJECT OF THE PETITIONER'S MOTION, THE COURT  
 28 MAY, AS THE COURT CONSIDERS APPROPRIATE:

29                   1. IF NO POSTCONVICTION PROCEEDING HAS BEEN  
 30 PREVIOUSLY INITIATED BY THE PETITIONER UNDER § 7–102 OF THIS ARTICLE, OPEN  
 31 A POSTCONVICTION PROCEEDING UNDER § 7–102 OF THIS ARTICLE;

32                   2. IF A POSTCONVICTION PROCEEDING HAS BEEN  
 33 PREVIOUSLY INITIATED BY THE PETITIONER UNDER § 7–102 OF THIS ARTICLE,  
 34 REOPEN A POSTCONVICTION PROCEEDING UNDER § 7–104 OF THIS ARTICLE; OR

35                   3. SET ASIDE THE CONVICTION AND SCHEDULE THE  
 36 MATTER FOR TRIAL.

1                    **(II) WHEN ASSESSING THE IMPACT OF THE DNA TEST RESULTS**  
 2 **ON THE STRENGTH OF THE STATE'S CASE AGAINST THE PETITIONER AT THE TIME**  
 3 **THE PLEA WAS ENTERED, THE COURT MAY CONSIDER, IN ADDITION TO EVIDENCE**  
 4 **THAT WAS PRESENTED AS PART OF THE FACTUAL SUPPORT OF THE PLEA,**  
 5 **ADMISSIBLE EVIDENCE SUBMITTED BY EITHER PARTY THAT WAS CONTAINED IN LAW**  
 6 **ENFORCEMENT FILES IN EXISTENCE AT THE TIME THE PLEA WAS ENTERED.**

7                    **(III) WHEN DETERMINING ~~WHETHER TO GRANT A NEW TRIAL OR~~**  
 8 **~~VACATE THE CONVICTION~~ AN APPROPRIATE REMEDY UNDER THIS PARAGRAPH, THE**  
 9 **COURT MAY CONSIDER ANY ADDITIONAL ADMISSIBLE EVIDENCE SUBMITTED BY**  
 10 **EITHER PARTY THAT CAME INTO EXISTENCE AFTER THE PLEA WAS ENTERED AND IS**  
 11 **RELEVANT TO THE PETITIONER'S CLAIM OF ACTUAL INNOCENCE.**

12                    ~~(4)~~ **(5)**            If a new trial is granted ***OR THE MATTER IS SCHEDULED FOR***  
 13 ***TRIAL***, the court may order the release of the petitioner on bond or on conditions that the  
 14 court finds will reasonably assure the presence of the petitioner at trial.

15                    (j)        (1)        The State shall preserve scientific identification evidence that:

16                                    (i)        the State has reason to know contains DNA material; and

17                                    (ii)       is secured in connection with a violation of § 2-201, § 2-204, §  
 18 2-207, § 3-303, or § 3-304 of the Criminal Law Article.

19                    (2)        The State shall preserve scientific identification evidence described in  
 20 paragraph (1) of this subsection for the time of the sentence, including any consecutive  
 21 sentence imposed in connection with the offense.

22                    (3)        (i)        If the State is unable to produce scientific identification evidence  
 23 described in paragraph (1) of this subsection, the court shall hold a hearing to determine  
 24 whether the failure to produce evidence was the result of intentional and willful  
 25 destruction.

26                                    (ii)       If the court determines at a hearing under subparagraph (i) of  
 27 this paragraph that the failure to produce evidence was the result of intentional and willful  
 28 destruction, the court shall:

29    1.        order a postconviction hearing to be conducted in  
 30 accordance with subparagraph (iii) of this paragraph; and

31    2.        at the postconviction hearing infer that the results of the  
 32 postconviction DNA testing would have been favorable to the petitioner.

33                                    (iii)       1.        A court ordering a postconviction hearing under  
 34 subparagraph (ii) of this paragraph shall open the postconviction hearing under § 7-102 of

1 this article, if no postconviction hearing has been previously initiated by the petitioner  
2 under § 7–102 of this article.

3                   2. A court ordering a postconviction hearing under  
4 subparagraph (ii) of this paragraph shall reopen the postconviction hearing under § 7–104  
5 of this article, if a postconviction hearing has been previously initiated by the petitioner  
6 under § 7–102 of this article.] ~~INFER THAT THE RESULTS OF THE POSTCONVICTION  
7 DNA TESTING WOULD HAVE BEEN FAVORABLE TO THE PETITIONER IN ANY  
8 PROCEEDING TO DETERMINE WHETHER THE PETITIONER SHOULD BE GRANTED  
9 RELIEF UNDER SUBSECTION (1)(2) OF THIS SECTION.~~

10                   (4) The State shall make the scientific identification evidence available to  
11 parties in the case under terms that are mutually agreed on between them.

12                   (5) If an agreement cannot be reached, the party requesting the testing  
13 may file an application in the circuit court that entered the judgment for an order setting  
14 the terms under which the evidence will be made available for testing.

15                   (k) (1) The State may dispose of scientific identification evidence before the  
16 expiration of the time period described in subsection (j) of this section if the State notifies  
17 the following persons:

18                           (i) the person who is incarcerated in connection with the case;

19                           (ii) any attorney of record for the person incarcerated; and

20                           (iii) the Office of Public Defender for the judicial district in which the  
21 judgment of conviction was entered.

22                   (2) The notification required in paragraph (1) of this subsection shall  
23 include:

24                           (i) a description of the scientific identification evidence;

25                           (ii) a statement that the State intends to dispose of the evidence;

26                           (iii) a statement that the State will dispose of the evidence unless a  
27 party files an objection in writing within 120 days from the date of service in the circuit  
28 court that entered the judgment; and

29                           (iv) the name and mailing address of the circuit court where an  
30 objection may be filed.

31                   (3) Unless another law or court order requires the preservation of the  
32 scientific identification evidence, if no objection to the disposition of the evidence is filed

1 within 120 days of the notice required under this subsection, the State may dispose of the  
2 evidence.

3 (4) If a person files written objections to the State's notice that it intends  
4 to dispose of scientific identification evidence, the court shall hold a hearing on the proposed  
5 disposition of the evidence and at the conclusion of the hearing, if the court determines by  
6 a preponderance of the evidence that:

7 (i) the evidence has no significant value for forensic science  
8 analysis, the court may order the return of the evidence to its rightful owner, the  
9 destruction of the evidence, or other disposition as provided by law; or

10 (ii) the evidence is of such size, bulk, or physical character that it  
11 cannot practicably be retained by a law enforcement agency, on a showing of need, the court  
12 shall order that the evidence be made available to the party objecting to the disposition of  
13 the evidence for the purpose of obtaining representative samples from the evidence in the  
14 form of cuttings, swabs, or other means, prior to the release or destruction of the evidence.

15 (5) If the court orders that representative samples be made available under  
16 paragraph (4)(ii) of this subsection, the court shall further order that the samples be  
17 obtained by a qualified crime scene technician acting on behalf of the party seeking to  
18 obtain the samples or by the law enforcement agency in possession of the evidence, which  
19 also shall preserve and store the representative samples until the representative samples  
20 are released to the custody of a DNA testing facility.

21 (6) An appeal to the court of appeals may be taken from an order entered  
22 under this section.

23 8-301.

24 (a) ~~(1) IN THIS SUBSECTION, "CONVICTION" MEANS:~~

25 ~~(I) A VERDICT OF GUILTY REACHED AS A RESULT OF A TRIAL;~~

26 ~~(II) A PLEA OF GUILTY;~~

27 ~~(III) AN ALFORD PLEA; OR~~

28 ~~(IV) A PLEA OF NOLO CONTENDERE.~~

29 ~~(2)~~ A person charged by indictment or criminal information with a crime  
30 triable in circuit court and convicted of that crime may, at any time, file a petition for writ  
31 of actual innocence in the circuit court for the county in which the conviction was imposed  
32 if the person claims that there is newly discovered evidence that:



1           ~~[(1)]~~ ~~(I)~~ ~~1-~~ **(I) IF THE CONVICTION RESULTED FROM A TRIAL**, creates  
 2 a substantial or significant possibility that the result may have been different, as that  
 3 standard has been judicially determined; [and] OR

4           ~~2-~~ **(II) IF THE CONVICTION RESULTED FROM A GUILTY**  
 5 **PLEA, AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, SUBSTANTIALLY OR**  
 6 **SIGNIFICANTLY UNDERMINES THE FACTS SET FORTH BY THE STATE AS THE BASIS**  
 7 **OF THE PLEA AGREEMENT WHEN CONSIDERED WITH ADMISSIBLE EVIDENCE IN**  
 8 **ADDITION TO THE EVIDENCE THAT WAS PRESENTED AS PART OF THE FACTUAL**  
 9 **SUPPORT OF THE PLEA THAT WAS CONTAINED IN LAW ENFORCEMENT FILES IN**  
 10 **EXISTENCE AT THE TIME THE PLEA WAS ENTERED, ESTABLISHES BY CLEAR AND**  
 11 **CONVINCING EVIDENCE THE PETITIONER'S ACTUAL INNOCENCE OF THE OFFENSE**  
 12 **OR OFFENSES THAT ARE THE SUBJECT OF THE PETITIONER'S MOTION; AND**

13           ~~[(2)]~~ ~~(II)~~ could not have been discovered in time to move for a new trial  
 14 under Maryland Rule 4-331.

15           (b) A petition filed under this section shall:

16           (1) be in writing;

17           (2) state in detail the grounds on which the petition is based;

18           (3) describe the newly discovered evidence;

19           (4) contain or be accompanied by a request for hearing if a hearing is  
 20 sought; and

21           (5) distinguish the newly discovered evidence claimed in the petition from  
 22 any claims made in prior petitions.

23           (c) (1) A petitioner shall notify the State in writing of the filing of a petition  
 24 under this section.

25           (2) The State may file a response to the petition within 90 days after receipt  
 26 of the notice required under this subsection or within the period of time that the court  
 27 orders.

28           (d) (1) Before a hearing is held on a petition filed under this section, the victim  
 29 or victim's representative shall be notified of the hearing as provided under § 11-104 or §  
 30 11-503 of this article.

31           (2) A victim or victim's representative has the right to attend a hearing on  
 32 a petition filed under this section as provided under § 11-102 of this article.

1 (e) (1) Except as provided in paragraph (2) of this subsection, the court shall  
 2 hold a hearing on a petition filed under this section if the petition satisfies the requirements  
 3 of subsection (b) of this section and a hearing was requested.

4 (2) The court may dismiss a petition without a hearing if the court finds  
 5 that the petition fails to assert grounds on which relief may be granted.

6 (f) (1) [In] IF THE CONVICTION RESULTED FROM A TRIAL, IN ruling on a  
 7 petition filed under this section, the court may set aside the verdict, resentence, grant a  
 8 new trial, or correct the sentence, as the court considers appropriate.

9 (2) (I) IF THE CONVICTION RESULTED FROM A GUILTY PLEA, AN  
 10 ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, WHEN ASSESSING THE IMPACT OF  
 11 THE NEWLY DISCOVERED EVIDENCE ON THE STRENGTH OF THE STATE'S CASE  
 12 AGAINST THE PETITIONER AT THE TIME OF THE PLEA, THE COURT MAY CONSIDER  
 13 ADMISSIBLE EVIDENCE SUBMITTED BY EITHER PARTY, IN ADDITION TO THE  
 14 EVIDENCE ~~THAT WAS~~ PRESENTED AS PART OF THE FACTUAL SUPPORT OF THE PLEA,  
 15 THAT WAS CONTAINED IN LAW ENFORCEMENT FILES IN EXISTENCE AT THE TIME THE  
 16 PLEA WAS ENTERED.

17 (II) IF THE COURT DETERMINES THAT, WHEN CONSIDERED  
 18 WITH ADMISSIBLE EVIDENCE, IN ADDITION TO THE EVIDENCE PRESENTED AS PART  
 19 OF THE FACTUAL SUPPORT OF THE PLEA, THAT WAS CONTAINED IN LAW  
 20 ENFORCEMENT FILES IN EXISTENCE AT THE TIME THE PLEA WAS ENTERED, THE  
 21 NEWLY DISCOVERED EVIDENCE ESTABLISHES BY CLEAR AND CONVINCING  
 22 EVIDENCE THE PETITIONER'S ACTUAL INNOCENCE OF THE OFFENSE OR OFFENSES  
 23 THAT ARE THE SUBJECT OF THE PETITIONER'S MOTION, THE COURT MAY:

24 1. ALLOW THE PETITIONER TO WITHDRAW THE GUILTY  
 25 PLEA, ALFORD PLEA, OR PLEA OF NOLO CONTENDERE; AND

26 2. ~~GRANT A NEW TRIAL OR VACATE THE CONVICTION SET~~  
 27 ASIDE THE CONVICTION, RESENTENCE, SCHEDULE THE MATTER FOR TRIAL, OR  
 28 CORRECT THE SENTENCE, AS THE COURT CONSIDERS APPROPRIATE.

29 (III) WHEN DETERMINING THE APPROPRIATE REMEDY, THE  
 30 COURT MAY ALLOW BOTH PARTIES TO PRESENT ANY ADMISSIBLE EVIDENCE THAT  
 31 CAME INTO EXISTENCE AFTER THE PLEA WAS ENTERED AND IS RELEVANT TO THE  
 32 PETITIONER'S CLAIM OF ACTUAL INNOCENCE.

33 [(2)] (3) The court shall state the reasons for its ruling on the record.

34 (g) A petitioner in a proceeding under this section has the burden of proof.

1 **(H) IF THE PETITIONER WAS CONVICTED AS A RESULT OF A GUILTY PLEA,**  
 2 **AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, AN APPEAL MAY BE TAKEN**  
 3 **EITHER BY THE STATE OR THE PETITIONER FROM AN ORDER ENTERED UNDER THIS**  
 4 **SECTION.**

5 **[(h)] (I) On written request by the petitioner, the State’s Attorney may certify**  
 6 **that a conviction was in error, if:**

7 (1) the court grants a petition for relief under this section;

8 (2) in ruling on a petition under this section, the court ~~sets aside the verdict~~  
 9 ~~or grants a new trial.~~

10 (I) **SETS ASIDE THE VERDICT OR CONVICTION; OR**

11 (II) **SCHEDULES THE MATTER FOR TRIAL OR GRANTS A NEW**  
 12 **TRIAL; and**

13 (3) the State’s Attorney declines to prosecute the petitioner because the  
 14 State’s Attorney determines that the petitioner is innocent.

15 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
 16 October 1, 2018.

Approved:

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Governor.

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President of the Senate.

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Speaker of the House of Delegates.