

# SENATE BILL 423

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8lr1397  
CF HB 395

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By: **Senator Zirkin**

Introduced and read first time: January 25, 2018

Assigned to: Judicial Proceedings

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Committee Report: Favorable with amendments

Senate action: Adopted

Read second time: March 21, 2018

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## 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 under certain circumstances for certain classes of  
7 persons filing for postconviction DNA testing; ~~defining the term “conviction” as it~~  
8 ~~relates to the standard required to file a writ of actual innocence by a person~~  
9 ~~convicted at trial;~~ establishing a standard required to file a petition for writ of actual  
10 innocence by a person convicted as a result of a guilty plea, an Alford plea, or a plea  
11 of nolo contendere; ~~defining a certain term;~~ authorizing a court to order a new trial  
12 or vacate a conviction under certain circumstances for certain classes of persons who  
13 file a petition for writ of actual innocence; authorizing an appeal to be taken by  
14 certain persons under certain circumstances; and generally relating to  
15 postconviction DNA testing and petitions for writ of actual innocence.

16 BY repealing and reenacting, with amendments,  
17 Article – Criminal Procedure  
18 Section 8–201  
19 Annotated Code of Maryland  
20 (2008 Replacement Volume and 2017 Supplement)  
21 (As enacted by Chapter 62 of the Acts of the General Assembly of 2017)

22 BY repealing and reenacting, with amendments,  
23 Article – Criminal Procedure

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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.



1 Section ~~8-301(a)~~ 8-301  
 2 Annotated Code of Maryland  
 3 (2008 Replacement Volume and 2017 Supplement)

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

6 **Article – Criminal Procedure**

7 8-201.

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

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

12 ~~(3) “CONVICTION” MEANS:~~

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

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

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

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

17 ~~(4)~~ (3) “DNA” means deoxyribonucleic acid.

18 ~~[(4)]~~ (5) “Law enforcement agency” means any of the following:

19 (i) a municipal or county police department;

20 (ii) sheriff’s office;

21 (iii) the Maryland State Police;

22 (iv) any prosecuting authority;

23 (v) any state, university, county, or municipal police unit or police  
 24 force; and

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

27 ~~[(5)]~~ (6) “Scientific identification evidence” means evidence that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 (1) the specific evidence to be tested;

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

6 (3) the preservation of some of the sample for replicate testing and  
7 analysis;

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

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

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

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

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

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

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

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

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

30 (ii) if a postconviction proceeding has been previously initiated by  
31 the petitioner under § 7–102 of this article, reopen a postconviction proceeding under  
32 § 7–104 of this article; ~~or~~

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

5                   ~~(iv) IN THE CASE OF A PETITIONER WHO WAS CONVICTED BY~~  
 6 ~~MEANS OF A GUILTY PLEA, AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, ON~~  
 7 ~~A FINDING THAT A SUBSTANTIAL POSSIBILITY EXISTS THAT THE DNA TESTING~~  
 8 ~~RESULTS SUBSTANTIALLY OR SIGNIFICANTLY UNDERMINE THE FACTS SET FORTH~~  
 9 ~~BY THE STATE AS THE BASIS OF A PLEA AGREEMENT, ORDER A NEW TRIAL.~~

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

13                   **(4) (I) IF THE PETITIONER WAS CONVICTED AS THE RESULT OF A**  
 14 **GUILTY PLEA, AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, THE COURT MAY**  
 15 **GRANT A NEW TRIAL OR VACATE THE CONVICTION IF THE COURT DETERMINES THAT**  
 16 **THE DNA TEST RESULTS ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THE**  
 17 **PETITIONER'S ACTUAL INNOCENCE OF THE OFFENSE OR OFFENSES THAT ARE THE**  
 18 **SUBJECT OF THE PETITIONER'S MOTION.**

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

25                   **(III) WHEN DETERMINING WHETHER TO GRANT A NEW TRIAL OR**  
 26 **VACATE THE CONVICTION, THE COURT MAY CONSIDER ANY ADDITIONAL**  
 27 **ADMISSIBLE EVIDENCE SUBMITTED BY EITHER PARTY THAT CAME INTO EXISTENCE**  
 28 **AFTER THE PLEA WAS ENTERED AND IS RELEVANT TO THE PETITIONER'S CLAIM OF**  
 29 **ACTUAL INNOCENCE.**

30                   ~~(4)~~ **(5)** If a new trial is granted, the court may order the release of the  
 31 petitioner on bond or on conditions that the court finds will reasonably assure the presence  
 32 of the petitioner at trial.

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

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

35                   (ii) is secured in connection with a violation of § 2-201, § 2-204, §  
 36 2-207, § 3-303, or § 3-304 of the Criminal Law Article.

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

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

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

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

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

15           (iii) 1. A court ordering a postconviction hearing under  
16 subparagraph (ii) of this paragraph shall open the postconviction hearing under § 7–102 of  
17 this article, if no postconviction hearing has been previously initiated by the petitioner  
18 under § 7–102 of this article.

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

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

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

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

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

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

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

3 (2) The notification required in paragraph (1) of this subsection shall  
4 include:

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

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

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

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

12 (3) Unless another law or court order requires the preservation of the  
13 scientific identification evidence, if no objection to the disposition of the evidence is filed  
14 within 120 days of the notice required under this subsection, the State may dispose of the  
15 evidence.

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

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

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

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

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

1 8-301.

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

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

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

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

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

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

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

14 ~~2.~~ ~~(II)~~ ~~IF THE CONVICTION RESULTED FROM A GUILTY~~  
15 ~~PLEA, AN ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, SUBSTANTIALLY OR~~  
16 ~~SIGNIFICANTLY UNDERMINES THE FACTS SET FORTH BY THE STATE AS THE BASIS~~  
17 ~~OF THE PLEA AGREEMENT WHEN CONSIDERED WITH ADMISSIBLE EVIDENCE IN~~  
18 ~~ADDITION TO THE EVIDENCE THAT WAS PRESENTED AS PART OF THE FACTUAL~~  
19 ~~SUPPORT OF THE PLEA THAT WAS CONTAINED IN LAW ENFORCEMENT FILES IN~~  
20 ~~EXISTENCE AT THE TIME THE PLEA WAS ENTERED, ESTABLISHES BY CLEAR AND~~  
21 ~~CONVINCING EVIDENCE THE PETITIONER'S ACTUAL INNOCENCE OF THE OFFENSE~~  
22 ~~OR OFFENSES THAT ARE THE SUBJECT OF THE PETITIONER'S MOTION; AND~~

23 ~~{(2)}~~ ~~(II)~~ could not have been discovered in time to move for a new trial  
24 under Maryland Rule 4-331.

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

26 (1) be in writing;

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

28 (3) describe the newly discovered evidence;

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



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

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

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

8           (d)   (1)   Before a hearing is held on a petition filed under this section, the victim  
9 or victim's representative shall be notified of the hearing as provided under § 11-104 or §  
10 11-503 of this article.

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

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

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

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

21           (2)   (I)   IF THE CONVICTION RESULTED FROM A GUILTY PLEA, AN  
22 ALFORD PLEA, OR A PLEA OF NOLO CONTENDERE, WHEN ASSESSING THE IMPACT OF  
23 THE NEWLY DISCOVERED EVIDENCE ON THE STRENGTH OF THE STATE'S CASE  
24 AGAINST THE PETITIONER AT THE TIME OF THE PLEA, THE COURT MAY CONSIDER  
25 ADMISSIBLE EVIDENCE SUBMITTED BY EITHER PARTY IN ADDITION TO THE  
26 EVIDENCE THAT WAS PRESENTED AS PART OF THE FACTUAL SUPPORT OF THE PLEA  
27 THAT WAS CONTAINED IN LAW ENFORCEMENT FILES IN EXISTENCE AT THE TIME THE  
28 PLEA WAS ENTERED.

29           (II)   IF THE COURT DETERMINES THAT THE NEWLY DISCOVERED  
30 EVIDENCE ESTABLISHES BY CLEAR AND CONVINCING EVIDENCE THE PETITIONER'S  
31 ACTUAL INNOCENCE OF THE OFFENSE OR OFFENSES THAT ARE THE SUBJECT OF  
32 THE PETITIONER'S MOTION, THE COURT MAY:

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

