

By Ms. Creem, a petition (accompanied by bill, Senate, No. 178) of Cynthia S. Creem and Dianne Wilkerson for legislation to provide access to forensic and scientific analysis obtained in the investigation of crime. Criminal Justice.

The Commonwealth of Massachusetts

In the Year Two Thousand and Three.

AN ACT TO PROVIDE ACCESS TO FORENSIC AND SCIENTIFIC ANALYSIS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The general court hereby finds and declares that forensic and scientific techniques are often used to analyze evidence or biological material obtained during the investigation of a crime, and, as these techniques become more accurate, their use can, in some cases, conclusively establish a person's guilt or innocence, or otherwise provide significant probative evidence. It is further found that as these techniques have improved, they have allowed analyses of earlier obtained evidence or biological materials and that in some circumstances, modern techniques can be used to demonstrate that a conviction that predates the development of such techniques was based on incorrect factual findings, and these forensic and scientific techniques provide a more reliable basis for establishing a factually correct verdict than the evidence available at the time of the original conviction. It is further found that in recent years, there have been a significant number of exonerations based on the results of newly developed forensic and scientific techniques. Therefore, the purpose of this chapter is to remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques.

1 SECTION 2. The General Laws are hereby amended by
 2 inserting after chapter 278 the following chapter:—

3 Chapter 278A Post Conviction Access to Forensic and Scien-
 4 tific Analysis

5 Section 1. Definitions As used in this chapter, the following
 6 words shall have the following meanings, unless the context
 7 clearly requires otherwise:— "Analysis" shall mean the process by
 8 which a forensic or scientific technique is applied to evidence or
 9 biological material to identify the perpetrator of a crime. "Convic-
 10 tion" shall mean any verdict or finding of guilty, a plea of guilty,
 11 or a plea of nolo contendere, entered by the trial court. "Criminal
 12 offender databases" shall include: the State DNA Database, G. L.
 13 c. 22E; the Sex Offender Registry, G. L. c. 6, §§ 178C-N; and the
 14 Criminal Offender Record Information System, G. L. c. 6,
 15 § 168-178A. "Factually innocent" shall describe a person con-
 16 victed of a criminal offense who did not commit that offense.
 17 "Governmental entity" shall mean any official body of the com-
 18 monwealth, or of any county, city, or town within the common-
 19 wealth. "Inventory" shall mean a detailed listing, including a
 20 particularized description of each listed item. "Moving party"
 21 shall mean a person who files a motion pursuant to this Chapter.
 22 "Post conviction" shall indicate any time after which a conviction
 23 has been entered. "Prosecuting attorney" shall mean the District
 24 Attorney for the district in which the moving party was convicted,
 25 or the Attorney General of the commonwealth. "Replicate
 26 analysis" shall mean the duplication of an analysis performed on a
 27 particular item of evidence or biological material. "Underlying
 28 case" shall mean the trial court proceedings that resulted in the
 29 conviction of the moving party. "Victim" shall mean any natural
 30 person who suffered direct or threatened physical, emotional, or
 31 financial harm as the result of the commission or attempted com-
 32 mission of the crime that is the subject of the underlying case, and
 33 shall also include the parent, guardian, legal representative, or
 34 administrator or executor of the estate of such person if the
 35 person is a minor, incompetent, or deceased. "Victim and witness
 36 assistance board" shall mean the entity established by section 4 of
 37 chapter 258B.

38 Section 2. Any person who has been convicted of a criminal
 39 offense in a court of the commonwealth, and is in custody or

40 whose liberty is restrained as the result of that conviction, and
 41 asserts that he is factually innocent of that criminal offense, may
 42 file a motion pursuant to this Chapter.

43 Section 3. Requirements and procedures for filing. (a) A person
 44 seeking relief pursuant to this Chapter shall file a motion in the
 45 court in which the conviction was entered, using the same caption
 46 and docket number as identified the underlying case. (b) The
 47 motion shall include the following information, and when rele-
 48 vant, shall include specific references to the record in the under-
 49 lying case, or to affidavits that are filed in support of the motion
 50 that are signed by a person with personal knowledge of the factual
 51 basis of the motion: (1) The name and a description of the
 52 requested forensic or scientific analysis; and (2) Information
 53 demonstrating that the requested analysis is admissible as evi-
 54 dence in courts of the commonwealth; and (3) A description of the
 55 evidence or biological material on which the analysis may be con-
 56 ducted, including its location if known; and (4) Information
 57 demonstrating that the evidence or biological material was
 58 obtained in relation to the underlying case; and (5) Information
 59 demonstrating that the analysis has the potential to result in evi-
 60 dence that is material to the moving party's identification as the
 61 perpetrator of the crime in the underlying case; and (6) Informa-
 62 tion demonstrating that the evidence or biological material has not
 63 been subjected to the requested analysis because: 1. The requested
 64 analysis had not yet been developed at the time of the conviction;
 65 or 2. The results of the requested analysis were not admissible in
 66 courts of the commonwealth at the time of the conviction; or 3.
 67 The moving party and his attorney were not aware of and did not
 68 have reason to be aware of the existence of the evidence or bio-
 69 logical material at the time of the underlying case and conviction;
 70 or 4. The moving party's attorney in the underlying case was
 71 aware at the time of the conviction of the existence of the evi-
 72 dence or biological material, the results of the requested analysis
 73 were admissible as evidence in courts of the commonwealth, and a
 74 reasonably effective attorney would have sought the analysis; or
 75 5. The evidence or biological material was otherwise unavailable
 76 at the time of the conviction. (c) The moving party shall file with
 77 the motion copies of all reports, documents, memoranda, and
 78 notes from forensic or scientific analysis that has been conducted

79 on any evidence or biological material that was obtained in relation to the underlying case. The moving party shall include these reports with the motion regardless of whether the moving party has previously provided them to the prosecuting attorney, whether they were offered or admitted as evidence in the underlying case, or whether they would have been admissible as evidence in the underlying case. (d) The moving party shall provide copies of those portions of the transcripts of the trial, if applicable, during which the results of forensic or scientific analysis was offered as evidence by either the moving party or prosecuting attorney. (e) The moving party shall identify all court proceedings that are currently pending and that relate to the underlying case, including the name of the court, docket number, and status of each such proceeding. The moving party shall also certify that each party to those proceedings has received notice of the proceedings under this Chapter. (f) If the moving party is unable to include for filing with the motion any of the items or information described in (b), (c), and (d), the moving party shall include a description of efforts made to obtain such items and information. (e) A person who has pleaded guilty or nolo contendere in the underlying case may file a motion under this Chapter. A judge shall not find that identity was not or could not have been a material issue in the underlying case because of the plea. A person who is alleged to have admitted to having, made a statement that is or could be incriminating may file a motion under this Chapter. A judge shall not find that identity was not or should not have been a material issue in the underlying case because the moving party made, or alleged to have made, an incriminating statement. (f) The court may deny, without prejudice, any motion which fails to include all the information required by this Section.

109 Section 4. Service of process and response to motion. (a) The moving party shall file the motion with the court which adjudicated the underlying case and shall serve a copy of the motion on the prosecuting attorney. (b) The prosecuting attorney shall have 60 days to file a response with the court and shall simultaneously serve the response on the moving party. The prosecuting attorney may request one 30 day extension in which to file the response which the court shall allow only for good cause shown. (c) The prosecuting attorney's response shall include: (1) An inventory of

18 all evidence or biological material that was obtained in relation to the underlying case, regardless of whether it was introduced at trial or would be admissible; (2) The current location of all evidence or biological material that was obtained in relation to the underlying case; and (3) A detailed chain of custody for the evidence or biological material that is the subject of the motion. (d) The response shall also include copies of all reports, documents, memoranda, and notes from forensic or scientific analysis that has been conducted on any evidence or biological material that was obtained in relation to the underlying case. The prosecuting attorney shall include these documents with the response regardless of whether the prosecuting attorney has earlier provided them to the moving party or defense counsel, or whether such documents were offered or admitted as evidence in the underlying case, or whether such documents would have been admissible. (e) The response shall also include any specific legal or factual objections that the prosecuting attorney has to the requested analysis. (f) The response may include evidence or other information relating to the guilt of the moving party.

37 Section 5. Appointment of counsel. The judge in his discretion may assign or appoint counsel to represent a moving party in the preparation and presentation of motions filed under this Chapter.

39 Section 6. Hearing. (a) The court shall order a hearing on the motion if it conforms with the requirements of section 3. (b) The judge who conducted the trial or accepted the moving party's plea of guilty or nolo contendere in the underlying case shall conduct the hearing if possible. (c) The moving party may file a motion requesting that he be present at the hearing on the motion. If the judge allows such a motion, the judge shall order the commonwealth to produce the moving party at the hearing.

48 Section 7. Ruling on the Motion. (a) The judge shall state findings of fact and conclusions of law on the record, or shall make written findings of fact and conclusions of law, that support the decision to allow or deny a motion brought under this Chapter. (b) The judge shall allow the motion if each of the following has been demonstrated by a preponderance of the evidence: (1) that the evidence or biological material exists; (2) that the evidence or biological material has been subject to a chain of custody that is sufficient to establish that it has not been substituted, tampered

157 with, replaced, or altered in any material respect; (3) that the evi-
 158 dence or biological material has not been subjected to the
 159 requested analysis; (4) that the requested analysis has the poten-
 160 tial to result in evidence that is material to the moving party's
 161 identification as the perpetrator of the crime in the underlying
 162 case; (5) that the purpose of the motion is not the obstruction of
 163 justice or delay; (6) that the results of the particular type of
 164 analysis being requested have been found to be admissible in
 165 courts of the commonwealth; and (7) that, if the results of the
 166 requested analysis are favorable to the moving party, justice may
 167 not have been done in the underlying case. (c) The judge may
 168 order the production of information and materials in whatever
 169 form, from the commonwealth or any person or entity, by sub-
 170 poena or other legal process.

171 Section 8. Laboratory. (a) In allowing a motion under this
 172 Chapter, a judge may impose reasonable conditions on the
 173 analysis designed to protect the interests of the commonwealth in
 174 the integrity of the evidence or biological material and the
 175 analysis. (b) The prosecuting attorney and the moving party shall
 176 agree on a laboratory to conduct the analysis. (c) If the prose-
 177 cuting attorney and the moving party are unable to agree on a lab-
 178 oratory, the judge shall designate a laboratory that is accredited
 179 by the American Society of Crime Laboratory Directors Labora-
 180 tory Accreditation Board and has the capability to perform the
 181 requested analysis. (d) The laboratory shall be provided with a
 182 copy of all of the filings relating to the motion, including all of
 183 the judge's orders. The laboratory shall also be provided with a
 184 copy of this Chapter in its entirety. (e) The laboratory shall only
 185 communicate with the prosecuting attorney and the moving party
 186 simultaneously and in writing. (f) Neither the prosecuting
 187 attorney nor the moving party shall communicate with the labora-
 188 tory without simultaneously communicating with the other party.
 189 (g) The laboratory shall endeavor to retain and maintain the
 190 integrity of a sufficient portion of the evidence or biological
 191 material for replicate analysis. If, after initial examination of the
 192 evidence or biological material, but before the actual analysis, the
 193 laboratory determines that there is insufficient material for rep-
 194 cate analysis, it shall simultaneously notify in writing the prose-
 195 cuting attorney, the moving party, and the judge. In the event the

there is insufficient material to perform replicate analysis, upon
 request of either party, the judge shall make such orders to ensure
 that representatives of the moving party and the prosecuting
 attorney have the opportunity to observe the analysis. Such
 analysis shall be subject to the rules and practices of the labora-
 tory. (h) The moving party shall cooperate with the laboratory. At
 the laboratory's request and upon court order, the moving party
 shall provide biological samples to the laboratory. If the moving
 party unreasonably fails to cooperate with the laboratory, the
 judge may deny the motion with prejudice.

Section 9. Timeliness of analysis. Upon allowance of a motion
 under this Chapter, analysis shall take place as soon as practi-
 cable.

Section 10. Costs. The costs of the analysis shall be borne: (a)
 by the moving party if the moving party is not indigent and has
 sufficient means to make such payment; or (b) by the common-
 wealth; or (c) by both the moving party and the commonwealth,
 in shares as the court deems equitable.

Section 11. Effect on other proceedings. (a) A motion may be
 filed under this Chapter even if an appeal of the conviction or
 other post-conviction proceedings in the underlying case are
 pending. (b) A judge shall consider a motion filed pursuant to this
 Chapter even if there is an appeal or other post conviction pro-
 ceedings pending. (c) If the judge allows a motion filed pursuant
 to this Chapter, the court in which the appeal or post conviction
 proceedings are pending shall be notified if different from the
 court in which the motion was filed. When a court receives notice
 under this section, it shall stay any appeal or post conviction pro-
 ceedings pending the final outcome of proceedings pursuant to
 this Chapter. (d) Proceedings pursuant to this chapter shall not
 stay or otherwise interfere with a term of incarceration, parole,
 probation, or other sentence imposed.

Section 12. Disclosure of results of analysis. (a) The results of
 the analysis shall be simultaneously disclosed to the moving
 party, the prosecuting attorney, and the judge. (b) At the request
 of any party, or on its own initiative, the judge shall order produc-
 tion of the underlying laboratory data, documents, and notes.

Section 13. Effect of analysis. (a) If the analysis confirms that
 the factual findings for the verdict or judgment in the underlying

235 case were correct, and that the moving party was properly con-
 236 victed and sentenced, the court shall deny the motion with preju-
 237 dice. The court may also order: (1) The prosecuting attorney to
 238 provide copies of the report of the analysis to the Superintendent
 239 of the Department of Correction and the Chairperson of the Parole
 240 Board; (2) The prosecuting attorney to provide copies of the
 241 report of the analysis to relevant criminal offender databases; or
 242 (3) The moving party to assume the cost of the analysis. (b) If the
 243 analysis neither confirms nor contradicts the factual findings for
 244 the verdict or judgment in the underlying case, the court shall: (1)
 245 Order any additional analysis requested if the court concludes that
 246 the requirements of § are met, or (2) If no additional analysis is
 247 requested that would meet the requirements of § deny the motion
 248 with prejudice if either: A. No additional analysis is requested, or
 249 B. Additional analysis is requested but the requirements of § are
 250 not met. (c) If the analysis demonstrates that the factual findings
 251 for the verdict or judgment in the underlying case were incorrect,
 252 and that the moving party was not properly convicted or sen-
 253 tenced, notwithstanding any rule or law that would bar a new
 254 trial, the court shall: (1) On motion of the prosecuting attorney
 255 and good cause shown, order replicate analysis of the evidence or
 256 biological material and a stay of further proceedings pending the
 257 result of the replicate analysis, with the cost of such replicate
 258 testing to be borne by the prosecuting attorney; (2) Order the
 259 release of the moving party from custody; (3) On motion of the
 260 moving party, order a new trial; or (4) Order any other relief that
 261 serves the interest of justice.

262 Section 14. Notice to victims. (a) If a motion is filed under this
 263 Chapter, the prosecuting attorney may notify the victim of the
 264 crime in the underlying case pursuant to G. L. c. 258B. (b) The
 265 prosecuting attorney shall promptly notify the victim and the
 266 victim and witness assistance board if a judge allows the motion.
 267 (c) The prosecuting attorney shall promptly notify the victim and
 268 the victim and witness assistance board of the result of the
 269 analysis.

270 Section 15. Waiver of rights. The right to file a motion pur-
 271 suant to this Chapter shall not be waived. This prohibition of any
 272 waiver includes, but is not limited to, any stated or unstated
 273 waiver that is or is alleged to be part of any agreement or under-

274 standing related to any plea of guilty or of nolo contendere or to
 275 any sentencing or appellate proceeding or to any correctional
 276 placement or conditions.

277 Section 16. Preservation of evidence and biological material.
 278 (a) Any governmental entity that is in possession of evidence or
 279 biological material that is collected for its potential evidentiary
 280 value during the investigation of a crime, the prosecution of
 281 which results in a conviction, shall retain such evidence and bio-
 282 logical material for the period of time that any person remains in
 283 the custody of the commonwealth in connection with that crime,
 284 without regard to whether the evidence or biological material was
 285 introduced at trial. Each governmental entity shall retain all such
 286 evidence and biological material in a manner that is reasonably
 287 designed to preserve the evidence and biological material and to
 288 prevent its destruction or deterioration. (b) The Attorney General
 289 and the Secretary of Public Safety shall promulgate regulations
 290 governing the retention and preservation of evidence and biolog-
 291 ical material by any governmental entity, which regulations shall
 292 include standards for maintaining the integrity of the materials
 293 over time, the designation of officials at each governmental entity
 294 with custodial responsibility, and requirements of contemporane-
 295 ously recorded documentation of individuals having and
 296 obtaining custody of any evidence of biological material.

297 Section 17. Liability. (a) Governmental officials and
 298 employees acting in good faith shall not be liable in a civil or
 299 criminal proceeding for any act or pursuant to the provisions of
 300 this chapter. (b) If a governmental entity responsible for the
 301 preservation of evidence or biological material engages in willful
 302 or wanton misconduct or gross negligence which results in the
 303 deterioration or destruction of evidence or biological material so
 304 that a laboratory is unable to perform adequate or proper analysis,
 305 that entity shall be subject to proceedings for contempt. (c)
 306 Nothing in this chapter shall create any cause of action for dam-
 307 ages against the commonwealth or any of its subdivisions or offi-
 308 cers, employees, agents, or subdivisions, except as provided in
 309 this Section.

310 Section 18. Appeal. An order allowing a motion filed under
 311 this Chapter is not a final and appealable order. An order denying
 312 a motion filed under this Chapter is a final and appealable order.

313 Any appeal from such an order shall be claimed by filing a notice
314 of appeal within 30 days of the court's entry of the written order
315 upon the docket.