

**SENATE . . . . . No. 00753**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

*Cynthia Creem*

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act providing access to forensic and scientific analysis.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Cynthia Creem</i>	<i>First Middlesex and Norfolk</i>
<i>Kay Khan</i>	<i>11th Middlesex</i>
<i>Gloria L. Fox</i>	<i>7th Suffolk</i>

**SENATE . . . . . No. 00753**

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By Ms. Creem, petition (accompanied by bill, Senate, No. 753) of Fox, Khan and Creem for legislation to provide access to forensic and scientific analysis [Joint Committee on the Judiciary].

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE  
SENATE  
, NO. 1659 OF 2009-2010.]

**The Commonwealth of Massachusetts**

—————  
**In the Year Two Thousand Eleven**  
—————

An Act providing 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. Legislative Findings

The general court hereby finds that (1) 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; (2) as these techniques have improved, they have allowed analyses of earlier obtained evidence or biological materials; (3) 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; (4) in recent years, there have been a significant number of exonerations based on the results of newly developed forensic and scientific techniques; (5) 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.

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

Chapter 278A

Post Conviction Access to Forensic and Scientific Analysis.

Section 1. Definitions.

As used in this chapter, the following words shall have the following meanings, unless the context clearly requires otherwise:-

“Analysis” shall mean the process by which a forensic or scientific technique is applied to evidence or biological material to identify the perpetrator of a crime.

“Conviction” shall mean any verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, entered by the trial court.

— ~~“Criminal offender databases” shall include: the State DNA Database, G. L. c. 22E; the Sex Offender Registry, G. L. c. 6, §§ 178C-N; and the Criminal Offender Record Information System, G. L. c. 6, § 168-178A.~~

“Factually innocent” shall describe a person convicted of a criminal offense who did not commit that offense.

“Governmental entity” shall mean any official body of the commonwealth, or of any county, city, or town within the commonwealth.

— ~~“Inventory” shall mean a detailed listing, including a particularized description of each listed item.~~

“Moving party” shall mean a person who files a motion pursuant to this Chapter.

“Post conviction” shall indicate any time after which a conviction has been entered.

“Prosecuting attorney” shall mean the District Attorney for the district in which the moving party was convicted, or the Attorney General of the commonwealth.

“Replicate analysis” shall mean the duplication of an analysis performed on a particular item of evidence or biological material.

“Underlying case” shall mean the trial court proceedings that resulted in the conviction of the moving party.

“Victim” shall mean any natural person who suffered direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of the crime that is the subject of the underlying case, and shall also include the parent, guardian, legal representative, or administrator or executor of the estate of such person if that person is a minor, incompetent, or deceased.

Section 2. Applicability.

Any person who has been convicted of a criminal offense in a court of the commonwealth, and is in custody or whose liberty is restrained as the result of that conviction, and asserts that he is factually innocent of that criminal offense, may file a motion for forensic or scientific analysis pursuant to this Chapter.

The procedures set forth in this chapter shall not be construed to prohibit the performance of forensic or scientific analysis under any other circumstances, including by agreement between the person convicted of a criminal offense and the prosecuting attorney.

### Section 3. Requirements and procedures for filing.

(a) A person seeking relief pursuant to this Chapter shall file a motion in the court in which the conviction was entered, using the same caption and docket number as identified the underlying case.

(b) The motion shall include the following information, and when relevant, shall include specific references to the record in the underlying case, or to affidavits that are filed in support of the motion that are signed by a person with personal knowledge of the factual basis of the motion:

(1) The name and a description of the requested forensic or scientific analysis; and

(2) Information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth; and

(3) A description of the evidence or biological material on which the analysis may be conducted, including its location and chain of custody if known, and

(4) Information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case; and

(5) Information demonstrating that the evidence or biological material has not been subjected to the requested analysis because:

1. The requested analysis had not yet been developed at the time of the conviction; or

2. The results of the requested analysis were not admissible in courts of the commonwealth at the time of the conviction; or

3. The moving party and his attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction; or

4. The moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, and a reasonably effective attorney would have sought the analysis; or

5. The evidence or biological material was otherwise unavailable at the time of the conviction.

(c) If the moving party is unable to include for filing with the motion any of the items  
or

information described in subsection (b), or if the moving party lacks items or information necessary to establish any of the factors listed in section 7(b), the moving party shall include a description of efforts made to obtain such items and information and may move for discovery of such items or information from the prosecuting attorney or any third party.

(d) The moving party shall file with the motion an affidavit stating that he or she is factually innocent of the offense of conviction and that the requested forensic or scientific analysis will support the claim of innocence. A person who 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, or admits 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 is alleged to have made, an incriminating statement. If the moving party entered a plea of guilty or nolo contendere to the offense of conviction or made an incriminating statement, the moving party shall state in the affidavit that the claim of ~~actual~~ factual innocence is not made notwithstanding the plea or incriminating statement.

(e) The court may deny, without prejudice, any motion which fails to include all the information required by this Section.

#### 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 enlargements of time in which to file the response, which the court may allow for good cause shown.

(c) The prosecuting attorney's response shall include any specific legal or factual objections that the prosecuting attorney has to the requested analysis.

#### 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.

#### Section 6. Hearing.

(a) The court shall order a hearing on the motion if it conforms with the requirements of section 3. The moving party shall be present for the hearing unless he waives his presence.

(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.~~

#### 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 requested forensic or scientific analysis 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 deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value;

(3) that the evidence or biological material has not already been subjected to the requested analysis for one or more of the reasons set forth in section 3 (b) (5) ;

(4) that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case;

(5) that the purpose of the motion is not the obstruction of justice or delay;  
and

(6) that the results of the particular type of analysis being requested have been found to be admissible in courts of the commonwealth.

(c) The judge on motion of any party, after notice to the opposing party and any third party from whom discovery is sought, and an opportunity to be heard, may authorize such

discovery as provided for under Rule 30 (c) (4) of the Massachusetts Rules of Criminal Procedure, from either party the prosecuting attorney or any third party as is deemed appropriate, subject to appropriate protective orders or an order to the party seeking discovery moving party to produce reciprocal discovery.

(1) Such discovery may include items and biological material from third parties, provided the parties seeking discovery can show analysis of these items or biological material will probably provide evidence material to the identification of a perpetrator of the crime.

(2) If, in response to a motion made under section 3(c), the court finds good cause for the moving party's inability to obtain items or information required under sections 3(b) and 7(b), the court may order discovery, consistent with Rules 14 and 17 of the Massachusetts Rules of Criminal Procedure, to assist the moving party in identifying the location and condition of 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. In considering such discovery requests by the moving party, the Court shall not require that a prima facie case for relief under Rule 30 of the Massachusetts Rules of Criminal Procedure has been made out.

#### Section 8. Laboratory.

(a) In allowing a motion under this Chapter, the judge shall specify conditions on the analysis, including, but not limited to, the transportation, handling, and return of evidence or biological materials, to protect the integrity of the evidence or biological material and the analysis.

(b) The prosecuting attorney and the moving party shall agree on a forensic services provider to conduct the analysis, which may include the department of state police or city of Boston forensic services units.

(c) If the prosecuting attorney and the moving party are unable to agree on a forensic services provider, the judge shall designate a provider that is accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board and has the capability to perform the requested analysis. For purposes of this section, “laboratory” shall refer to the forensic services provider selected under subsection (b) or (c).

(d) The laboratory shall give equal access to its personnel, opinions, conclusions, reports, and other documentation to the prosecuting attorney and the moving party.

(e) The laboratory shall endeavor to retain and maintain the integrity of a sufficient portion of the evidence or biological material for replicate analysis. If, after initial examination of the evidence or biological material, but before the actual analysis, the laboratory determines that there is insufficient material for replicate analysis, it shall simultaneously notify in writing the prosecuting attorney, the moving party, and the judge. Exhaustive testing shall not occur except by specific order of the judge, notwithstanding ~~without~~ written authorization by both the moving party and the prosecuting attorney. In the event that exhaustive testing is so authorized, 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, unless such observation is inconsistent with the practices or protocols of the laboratory conducting the analysis.

(f) The moving party shall cooperate with the laboratory. At the laboratory's or the prosecuting attorney's request and upon court order, the moving party shall provide biological samples to the laboratory or to law enforcement personnel. If the moving party unreasonably fails to cooperate with such orders, 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 practicable.

#### Section 10. Costs.

The costs of the analysis shall be paid:

(a) by the moving party if the moving party is not indigent and has sufficient means to make such payment; or

(b) if the moving party is indigent, as an extra fee or cost under the provisions of sections 27A through 27G of chapter 261; or

(c) by the moving party and as an extra fee or cost in shares as the court deems equitable.

#### Section 11. Effect on other proceedings.

~~(a) If an appeal of the conviction or other post-conviction proceedings in the underlying case are pending, the moving party shall file a motion to stay such proceedings and for leave to file a motion under this chapter, which shall be liberally granted.~~

~~(b)~~ 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, t~~ The judge shall order production, for disclosure to both parties within thirty days, of the underlying laboratory data, documents, and notes.

Section 13. Further proceedings following analysis.

If the analysis is inconclusive, the court may order any additional analysis requested if the court concludes that the requirements of section 7(b) are met.

Section 14. Notice to victims.

(a) If a motion is filed under this Chapter, the prosecuting attorney may notify the victim of the crime in the underlying case.

(b) The prosecuting attorney may, in his or her discretion, notify the victim if the court allows a motion for forensic or scientific analysis and, if the victim is notified of the allowance of the motion, shall promptly notify the victim of the result of the analysis.

Section 15. Waiver of rights.

The right to file a motion pursuant to this Chapter shall not be waived. This prohibition of any waiver includes, but is not limited to, any stated or unstated waiver that is or is alleged to be part of any agreement or understanding related to any plea of guilty or of nolo contendere or to any sentencing or appellate proceeding or to any correctional placement or conditions.

Section 16. Preservation of evidence and biological material.

(a) Any governmental entity that is in possession of biological evidence that is collected for its potential evidentiary value during the investigation of a crime, the prosecution of which results in a conviction, shall retain such biological evidence for the period of time that any person remains in the custody of the commonwealth or under parole or probation supervision in connection with that crime, without regard to whether the biological evidence was introduced at trial. Each governmental entity shall retain all such biological evidence in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration. Such biological evidence need not be preserved if it must be returned to a third party or if it is of such a size, bulk, or physical character as to render retention impracticable.

(b) The secretary of the executive office of public safety and security, in consultation with the Forensic Sciences Advisory Board, shall promulgate regulations governing the retention and preservation of biological evidence by any governmental entity, which regulations shall include standards for maintaining the integrity of the materials over time, the designation of officials at each governmental entity with custodial responsibility, and requirements of contemporaneously recorded documentation of individuals having and obtaining custody of any biological evidence.

(c) For the purposes of this section, the term “biological evidence” means a sexual assault forensic examination kit or semen, blood, saliva, hair, skin tissue, or other identified biological material.

Section 17. Liability.

(a) Governmental officials and employees acting in good faith shall not be liable in a civil or criminal proceeding for any act or pursuant to the provisions of this chapter.

(b) If a governmental entity responsible for the preservation of evidence or biological material engages in willful or wanton misconduct or gross negligence which results in the deterioration or destruction of evidence or biological material so that a laboratory is unable to perform adequate or proper analysis, that entity shall be subject to proceedings for contempt.

(c) Nothing in this chapter shall create any cause of action for damages against the commonwealth or any of its subdivisions or officers, employees, agents, or subdivisions, except as provided in this Section.

#### Section 18. Appeal.

An order allowing or denying a motion for forensic or scientific analysis filed under this Chapter is a final and appealable order. Any appeal from such an order shall be claimed by filing a notice of appeal within 30 days of the court's entry of the written order upon the docket.