

SENATE BILL SUMMARY

BILL NO: S. 753

TITLE: An Act to provide access to forensic and scientific analysis

SPONSOR: Senator Creem

COMMITTEE: Judiciary

HEARING DATE: June 8, 2011

PRIOR HISTORY: S. 1659 of 2009
S. 907 of 2007
S. 941 of 2005
S. 178 of 2003

CURRENT LAW:

SUMMARY OF THE PROPOSED LAW:

Section 1 of the bill contains legislative findings.

Section 2 of the bill adds a new Chapter 278A entitled “Post Conviction Access to Forensic Scientific Analysis,” as follows:

Section 1 provides a list of definitions for terms used within this chapter.

Section 2: A person convicted of a criminal offense in a court of the commonwealth and in custody as a result of that conviction and asserting that he or she is factually innocent of that criminal offense may file a motion pursuant to this chapter.

Section 3: When seeking relief pursuant to this chapter, a person 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. The motion shall include certain specified information, including:

- The name and a description of the requested forensic or scientific analysis;
- Information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;
- A description of the evidence or biological material on which the analysis may be conducted, including its location and chain of custody if known;
- 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

- Information demonstrating that the evidence or biological material has not been subjected to the requested analysis because:
 - The requested analysis had not yet been developed at the time of the conviction;
 - The results of the requested analysis were not admissible in courts of the Commonwealth at the time of the conviction;
 - 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;
 - 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
 - The evidence or biological material was otherwise unavailable at the time of the conviction.

If the moving party is unable to include or establish any of these, he must include a description of efforts made to obtain such items and information and may move for discovery of such from the prosecuting attorney or any third party. 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 innocence is not made notwithstanding the plea or incriminating statement.

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

Section 4: 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. 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.

Section 5: The judge may assign counsel to represent a moving party in the preparation and presentation of motions filed under this chapter.

Section 6: If a motion complies with the requirements of Section 3, the court shall order a hearing on the motion. The moving party may request to be present at the hearing on the motion and, if the judge allows this motion, the judge shall order the Commonwealth to produce the moving party.

Section 7: 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. If each of the following has been demonstrated by a preponderance of the evidence, the judge shall allow the motion:

- evidence exists;
- evidence was subject to chain of custody sufficient to establish that it has not been submitted, tampered with, replaced, or altered in any material way;
- evidence has not been subjected to requested analysis;
- requested analysis has the potential to result in evidence that is material to moving party's identification as perpetrator of crime;
- purpose of the motion is not obstruction of justice or delay;
- results of the type of analysis requested have been found to be admissible in courts of the commonwealth; and
- if the results of the requested analysis are favorable to the moving party, justice may not have been done in the underlying case.

The judge, on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery from the prosecuting attorney or any third party as is deemed appropriate, subject to appropriate protective orders or an order to the moving party to produce reciprocal discovery. If, in response to a motion made under Section 3, the court finds good cause for the moving party's inability to obtain items or information required under sections 3 and 7, the court may order discovery 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.

Section 8: When allowing a motion, the judge may specify conditions on the analysis designed to protect the integrity of the evidence and analysis. The prosecutor and moving party shall agree on a provider to conduct the analysis, and, if unable to agree, the judge shall designate a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board. The laboratory shall give equal access to its personnel, opinions, conclusions, reports, and other documentation to the prosecuting attorney and the moving party, and shall endeavor to retain and maintain the integrity of a sufficient portion of the evidence for replicate analysis. If the laboratory determines that there is insufficient material for replicate analysis, it shall simultaneously notify in writing the prosecutor, moving party, and the judge. Exhaustive testing shall not occur 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 that is inconsistent with the practices or protocols of the laboratory. The moving party must cooperate with the laboratory and provide biological samples upon request. The judge may deny the motion with prejudice if the moving party refuses to cooperate with the laboratory.

Section 9: Upon allowance of a motion the analysis shall take place as soon as practicable.

Section 10: The cost of analysis shall be borne by the moving party, if he is not indigent and has sufficient means; the commonwealth; or by both the moving party and the commonwealth.

Section 11: 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. Proceedings pursuant to this chapter shall not stay or interfere with a term of incarceration, parole, probation, or other sentence.

Section 12: Results of analysis shall be simultaneously disclosed to the moving party, prosecutor, and the judge. At the request of any party, the judge shall order production of the underlying laboratory data, documents, and notes.

Section 13: If the analysis is inconclusive, the court may order any additional analysis requested if the court concludes that the requirements of Section 7 are met.

Section 14: Upon motion filed under this chapter, the prosecutor may notify the victim of the crime in the underlying case. The prosecutor may also 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: The right to file a motion under this chapter may not be waived, even in 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: Any governmental entity in possession of evidence or biological material that is collected for its potential evidentiary value during the investigation of a crime, the prosecution of which results in a conviction, shall retain this evidence for the period of time that any person remains in the commonwealth's custody in connection with that crime, regardless of whether that evidence was introduced at trial. Each governmental entity shall retain all such biological evidence in a manner that is reasonably designed to preserve it, 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. The secretary of the 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 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 (as defined).

Section 17: Governmental officials and employees acting in good faith shall not be liable in civil or criminal proceedings for any act pursuant to this chapter. A governmental entity responsible for the preservation of evidence or biological matter will be subject to contempt proceedings if the entity engages in willful or wanton misconduct or gross negligence that results in the deterioration or destruction of evidence so that the lab is unable to perform analysis. This chapter does not create a cause of action for damages against the commonwealth or its subdivisions or officers, employees, or agents, except as provided in this section.

Section 18: An order allowing or denying a motion filed pursuant to 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.