

SENATE NO. 907



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:*

1 SECTION 1. The general court hereby finds and declares that forensic and scientific techniques are
2 often used to analyze evidence or biological material obtained during the investigation of a crime, and,
3 as these techniques become more accurate, their use can, in some cases, conclusively establish a
4 person's guilt or innocence, or otherwise provide significant probative evidence.

5 It is further found that as these techniques have improved, they have allowed analyses of earlier
6 obtained evidence or biological materials and that in some circumstances, modern techniques can be
7 used to demonstrate that a conviction that predates the development of such techniques was based on
8 incorrect factual findings, and these forensic and scientific techniques provide a more reliable basis for
9 establishing a factually correct verdict than the evidence available at the time of the original
10 conviction.

11 It is further found that in recent years, there have been a significant number of exonerations based on
12 the results of newly developed forensic and scientific techniques.

13 Therefore, the purpose of this chapter is to remedy the injustice of wrongful convictions of factually
14 innocent persons by allowing access to analyses of biological material with newer forensic and
15 scientific techniques.

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

18 Chapter 278A

19 Post Conviction Access to Forensic and Scientific Analysis

20 Section 1. Definitions

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

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

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

27 “Criminal offender databases” shall include: the State DNA Database, G. L. c. 22E; the Sex Offender
28 Registry, G. L. c. 6, §§ 178C-N; and the Criminal Offender Record Information System, G. L. c. 6, §
29 168-178A.

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

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

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

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

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

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

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

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

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

48 “Victim and witness assistance board” shall mean the entity established by section 4 of chapter 258B.

49 Section 2. Any person who has been convicted of a criminal offense in a court of the commonwealth,
50 and is in custody or whose liberty is restrained as the result of that conviction, and asserts that he is
51 factually innocent of that criminal offense, may file a motion pursuant to this Chapter.

52 Section 3. Requirements and procedures for filing.

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

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

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

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

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

63 (4) Information demonstrating that the evidence or biological material was obtained in relation to the
64 underlying case; and

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

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

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

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

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

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

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

79 (c) The moving party shall file with the motion copies of all reports, documents, memoranda, and
80 notes from forensic or scientific analysis that has been conducted on any evidence or biological
81 material that was obtained in relation to the underlying case. The moving party shall include these
82 reports with the motion regardless of whether the moving party has previously provided them to the
83 prosecuting attorney, whether they were offered or admitted as evidence in the underlying case, or
84 whether they would have been admissible as evidence in the underlying case.

85 (d) The moving party shall provide copies of those portions of the transcripts of the trial, if applicable,
86 during which the results of forensic or scientific analysis was offered as evidence by either the moving
87 party or prosecuting attorney.

88 (e) The moving party shall identify all court proceedings that are currently pending and that relate to
89 the underlying case, including the name of the court, docket number, and status of each such
90 proceeding. The moving party shall also certify that each party to those proceedings has received
91 notice of the proceedings under this Chapter.

92 (f) If the moving party is unable to include for filing with the motion any of the items or information
93 described in (b), (c), and (d), the moving party shall include a description of efforts made to obtain
94 such items and information.

95 (e) A person who pleaded guilty or nolo contendere in the underlying case may file a motion under
96 this Chapter. A judge shall not find that identity was not or could not have been a material issue in the
97 underlying case because of the plea. A person who is alleged to have, or admits to having, made a
98 statement that is or could be incriminating may file a motion under this Chapter. A judge shall not
99 find that identity was not or should not have been a material issue in the underlying case because the
100 moving party made, or is alleged to have made, an incriminating statement.

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

103 Section 4. Service of process and response to motion.

104 (a) The moving party shall file the motion with the court which adjudicated the underlying case and
105 shall serve a copy of the motion on the prosecuting attorney.

106 (b) The prosecuting attorney shall have 60 days to file a response with the court and shall
107 simultaneously serve the response on the moving party. The prosecuting attorney may request one 30
108 day extension in which to file the response, which the court shall allow only for good cause shown.

109 (c) The prosecuting attorney's response shall include:

110 (1) An inventory of all evidence or biological material that was obtained in relation to the underlying
111 case, regardless of whether it was introduced at trial or would be admissible;

112 (2) The current location of all evidence or biological material that was obtained in relation to the
113 underlying case; and

114 (3) A detailed chain of custody for the evidence or biological material that is the subject of the
115 motion.

116 (d) The response shall also include copies of all reports, documents, memoranda, and notes from
117 forensic or scientific analysis that has been conducted on any evidence or biological material that was
118 obtained in relation to the underlying case. The prosecuting attorney shall include these documents
119 with the response regardless of whether the prosecuting attorney has earlier provided them to the
120 moving party or defense counsel, or whether such documents were offered or admitted as evidence in
121 the underlying case, or whether such documents would have been admissible.

122 (e) The response shall also include any specific legal or factual objections that the prosecuting
123 attorney has to the requested analysis.

124 (f) The response may include evidence or other information relating to the guilt of the moving party.

125 Section 5. Appointment of counsel.

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

128 Section 6. Hearing.

129 (a) The court shall order a hearing on the motion if it conforms with the requirements of section 3.

130 (b) The judge who conducted the trial or accepted the moving party's plea of guilty or nolo contendere
131 in the underlying case shall conduct the hearing if possible.

132 (c) The moving party may file a motion requesting that he be present at the hearing on the motion. If
133 the judge allows such a motion, the judge shall order the commonwealth to produce the moving party
134 at the hearing.

135 Section 7. Ruling on the Motion.

136 (a) The judge shall state findings of fact and conclusions of law on the record, or shall make written
137 findings of fact and conclusions of law, that support the decision to allow or deny a motion brought
138 under this Chapter.

139 (b) The judge shall allow the motion if each of the following has been demonstrated by a
140 preponderance of the evidence:

141 (1) that the evidence or biological material exists;

- 142 (2) that the evidence or biological material has been subject to a chain of custody that is sufficient to
143 establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
- 144 (3) that the evidence or biological material has not been subjected to the requested analysis;
- 145 (4) that the requested analysis has the potential to result in evidence that is material to the moving
146 party's identification as the perpetrator of the crime in the underlying case;
- 147 (5) that the purpose of the motion is not the obstruction of justice or delay;
- 148 (6) that the results of the particular type of analysis being requested have been found to be admissible
149 in courts of the commonwealth; and
- 150 (7) that, if the results of the requested analysis are favorable to the moving party, justice may not have
151 been done in the underlying case.

152 (c) The judge may order the production of information and materials in whatever form, from the
153 commonwealth or any person or entity, by subpoena or other legal process.

154 Section 8. Laboratory.

155 (a) In allowing a motion under this Chapter, a judge may impose reasonable conditions on the
156 analysis designed to protect the interests of the commonwealth in the integrity of the evidence or
157 biological material and the analysis.

158 (b) The prosecuting attorney and the moving party shall agree on a laboratory to conduct the analysis.

159 (c) If the prosecuting attorney and the moving party are unable to agree on a laboratory, the judge
160 shall designate a laboratory that is accredited by the American Society of Crime Laboratory Directors
161 Laboratory Accreditation Board and has the capability to perform the requested analysis.

162 (d) The laboratory shall be provided with a copy of all of the filings relating to the motion, including
163 all of the judge's orders. The laboratory shall also be provided with a copy of this Chapter in its
164 entirety.

165 (e) The laboratory shall only communicate with the prosecuting attorney and the moving party
166 simultaneously and in writing.

167 (f) Neither the prosecuting attorney nor the moving party shall communicate with the laboratory
168 without simultaneously communicating with the other party.

169 (g) The laboratory shall endeavor to retain and maintain the integrity of a sufficient portion of the
170 evidence or biological material for replicate analysis. If, after initial examination of the evidence or
171 biological material, but before the actual analysis, the laboratory determines that there is insufficient
172 material for replicate analysis, it shall simultaneously notify in writing the prosecuting attorney, the
173 moving party, and the judge. In the event that there is insufficient material to perform replicate
174 analysis, upon request of either party, the judge shall make such orders to ensure that representatives
175 of the moving party and the prosecuting attorney have the opportunity to observe the analysis. Such
176 analysis shall be subject to the rules and practices of the laboratory.

177 (h) The moving party shall cooperate with the laboratory. At the laboratory's request and upon court
178 order, the moving party shall provide biological samples to the laboratory. If the moving party
179 unreasonably fails to cooperate with the laboratory, the judge may deny the motion with prejudice.

180 Section 9. Timeliness of analysis.

181 Upon allowance of a motion under this Chapter, analysis shall take place as soon as practicable.

182 Section 10. Costs.

183 The costs of the analysis shall be borne:

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

186 (b) by the commonwealth; or

187 (c) by both the moving party and the commonwealth, in shares as the court deems equitable.

188 Section 11. Effect on other proceedings.

189 (a) A motion may be filed under this Chapter even if an appeal of the conviction or other post-
190 conviction proceedings in the underlying case are pending.

191 (b) A judge shall consider a motion filed pursuant to this Chapter even if there is an appeal or other
192 post conviction proceedings pending.

193 (c) If the judge allows a motion filed pursuant to this Chapter, the court in which the appeal or post
194 conviction proceedings are pending shall be notified if different from the court in which the motion
195 was filed. When a court receives notice under this section, it shall stay any appeal or post conviction
196 proceedings pending the final outcome of proceedings pursuant to this Chapter.

197 (d) Proceedings pursuant to this chapter shall not stay or otherwise interfere with a term of
198 incarceration, parole, probation, or other sentence imposed.

199 Section 12. Disclosure of results of analysis.

200 (a) The results of the analysis shall be simultaneously disclosed to the moving party, the prosecuting
201 attorney, and the judge.

202 (b) At the request of any party, or on its own initiative, the judge shall order production of the
203 underlying laboratory data, documents, and notes.

204 Section 13. Effect of analysis.

205 (a) If the analysis confirms that the factual findings for the verdict or judgment in the underlying case
206 were correct, and that the moving party was properly convicted and sentenced, the court shall deny the
207 motion with prejudice. The court may also order:

208 (1) The prosecuting attorney to provide copies of the report of the analysis to the Superintendent of
209 the Department of Correction and the Chairperson of the Parole Board;

210 (2) The prosecuting attorney to provide copies of the report of the analysis to relevant criminal
211 offender databases; or

212 (3) The moving party to assume the cost of the analysis.

213 (b) If the analysis neither confirms nor contradicts the factual findings for the verdict or judgment in
214 the underlying case, the court shall:

215 (1) Order any additional analysis requested if the court concludes that the requirements of § are met,
216 or

217 (2) If no additional analysis is requested that would meet the requirements of § deny the motion
218 with prejudice if either:

219 A. No additional analysis is requested, or

220 B. Additional analysis is requested but the requirements of § are not met.

221 (c) If the analysis demonstrates that the factual findings for the verdict or judgment in the underlying
222 case were incorrect, and that the moving party was not properly convicted or sentenced,
223 notwithstanding any rule or law that would bar a new trial, the court shall:

224 (1) On motion of the prosecuting attorney and good cause shown, order replicate analysis of the
225 evidence or biological material and a stay of further proceedings pending the result of the replicate
226 analysis, with the cost of such replicate testing to be borne by the prosecuting attorney;

227 (2) Order the release of the moving party from custody;

228 (3) On motion of the moving party, order a new trial; or

229 (4) Order any other relief that serves the interest of justice.

230 Section 14. Notice to victims.

231 (a) If a motion is filed under this Chapter, the prosecuting attorney may notify the victim of the crime
232 in the underlying case pursuant to G. L. c. 258B.

233 (b) The prosecuting attorney shall promptly notify the victim and the victim and witness assistance
234 board if a judge allows the motion.

235 (c) The prosecuting attorney shall promptly notify the victim and the victim and witness assistance
236 board of the result of the analysis.

237 Section 15. Waiver of rights.

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

242 Section 16. Preservation of evidence and biological material.

243 (a) Any governmental entity that is in possession of evidence or biological material that is collected
244 for its potential evidentiary value during the investigation of a crime, the prosecution of which results
245 in a conviction, shall retain such evidence and biological material for the period of time that any
246 person remains in the custody of the commonwealth in connection with that crime, without regard to
247 whether the evidence or biological material was introduced at trial. Each governmental entity shall
248 retain all such evidence and biological material in a manner that is reasonably designed to preserve the
249 evidence and biological material and to prevent its destruction or deterioration.

250 (b) The Attorney General shall promulgate regulations governing the retention and preservation of
251 evidence and biological material by any governmental entity, which regulations shall include standards
252 for maintaining the integrity of the materials over time, the designation of officials at each

253 governmental entity with custodial responsibility, and requirements of contemporaneously recorded
254 documentation of individuals having and obtaining custody of any evidence of biological material.

255 Section 17. Liability.

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

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

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

265 Section 18. Appeal.

266 An order allowing a motion filed under this Chapter is not a final and appealable order. An order
267 denying a motion filed under this Chapter is a final and appealable order. Any appeal from such an
268 order shall be claimed by filing a notice of appeal within 30 days of the court's entry of the written
269 order upon the docket.