

**Acts****2012****CHAPTER 38** 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:

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

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

“Biological material”, a sexual assault forensic examination kit, semen, blood, saliva, hair, skin tissue or other identified biological substance.

“Conviction”, a verdict or finding of guilty, a plea of guilty, a plea of nolo contendere or an adjudication of delinquency as a juvenile entered by the trial court.

“Exhaustive testing”, analysis of a particular item of evidence or biological material that precludes replicate analysis of the evidence or biological material.

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

“Governmental entity”, an official body of the commonwealth, or of a county, city or town within the commonwealth.

“Identity”, the moving party’s identity as the perpetrator of the offense for which the moving party was convicted in the underlying case.

“Moving party”, a person who files a motion under this chapter.

“Post conviction”, indicates any time after which a conviction has been entered.

“Prosecuting attorney”, the district attorney for the district in which the moving party was convicted or the attorney general of the commonwealth.

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

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

“Victim”, 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 or delinquency case that is the subject of the underlying case; “victim” 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. A person may file a motion for forensic or scientific analysis under this chapter if that person: (1) has been convicted of a criminal offense in a court of the commonwealth; (2) is incarcerated in a state prison, house of correction, is on parole or probation or whose liberty has been otherwise restrained as the result of a conviction; and (3) asserts factual innocence of the crime for which the person has been convicted.

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. (a) A person seeking relief under 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;
- (2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;
- (3) a description of the evidence or biological material that the moving party seeks to have analyzed or tested, including its location and chain of custody if known;
- (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:
 - (i) the requested analysis had not yet been developed at the time of the conviction;
 - (ii) the results of the requested analysis were not admissible in the courts of

the commonwealth at the time of the conviction;

(iii) the moving party and the moving party's 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;

(iv) 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, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or

(v) 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 subsection (b) of section 7, 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 the moving party 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. The court 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. The court 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 factual innocence is made notwithstanding the plea or incriminating statement.

(e) The court shall expeditiously review all motions filed and shall dismiss, without prejudice, any such motion without a hearing if the court determines, based on the information contained in the motion, that the motion does not meet the requirements set forth in this section. The prosecuting attorney may provide a response to the motion, to assist the court in considering whether the motion meets the requirement under this section. The court shall notify the moving party and the prosecuting attorney as to whether the motion is sufficient to proceed under this chapter or is dismissed.

Section 4. (a) The moving party shall file a motion under section 3 with the court that adjudicated the underlying case and shall serve a copy of the motion on the prosecuting attorney.

(b) If the motion is not dismissed by the court under subsection (e) of section 3, the prosecuting

attorney shall file a response with the court within 60 days after the date upon which the court issues notice under said subsection (e) of said section 3, and shall simultaneously serve the response on the moving party. The prosecuting attorney may request additional time in which to file the response, which the court may grant 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. The court may assign or appoint counsel to represent a moving party who meets the definition of indigency under section 2 of chapter 211D in the preparation and presentation of motions filed under this chapter.

Section 6. (a) The court shall order a hearing on the motion if the motion meets the requirements of section 3. The moving party shall be present for the hearing unless the moving party waives the party's presence at the hearing.

(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.

Section 7. (a) After reviewing the motion, the prosecuting attorney's response and after holding a hearing, the court 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 section 3.

(b) The court 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 been subjected to the requested analysis for any of the reasons in clauses (i) to (v), inclusive, of paragraph (5) of subsection (b) of section 3;
- (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 court 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 or any third party as is deemed appropriate, subject to appropriate protective orders or an order to the party seeking discovery to produce reciprocal discovery.

Such discovery may include items and biological materials from third parties, provided the party seeking discovery demonstrates that analysis of these items or biological material will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator of the crime.

If, in response to a motion made under subsection (c) of section 3, the court finds good cause for the moving party's inability to obtain items or information required under subsection (b) of said section 3 and subsection (b) of section 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. The court, when considering such discovery requests, shall not require the establishment of a prima facie case for relief under Rule 30 of the Massachusetts Rules of Criminal Procedure.

Section 8. (a) In allowing a motion under section 3, the court 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 accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board to conduct the analysis, which, except in the case of exhaustive testing, may include the forensic and technology center of the state police crime laboratory or the Boston police department crime laboratory units.

(c) If the prosecuting attorney and the moving party are unable to agree on a forensic services provider, the prosecuting attorney and the moving party shall submit to the court a list of not more than 3 forensic services providers who are accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board and have the capability to perform the requested analysis. The court shall select a forensic services provider from either list. For purposes of this section, "laboratory" shall refer to the forensic services provider selected under this subsection or subsection (b).

(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 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 court. Exhaustive testing shall not occur except by specific order of the court. In the event that exhaustive testing is so authorized, upon request of either party, the court 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 court may deny the motion with prejudice.

Section 9. Upon allowance of a motion under section 3, analysis shall take place as soon as practicable.

Section 10. The costs of the analysis shall be paid:

- (1) by the moving party if the moving party does not meet the definition of indigency under section 2 of chapter 211D and has sufficient means to make such payment;
- (2) if the moving party meets the definition of indigency under said section 2 of said chapter 211D, as an extra fee or cost under sections 27A through 27G, inclusive, of chapter 261; or
- (3) if a person is indigent, but has the ability to pay a reduced fee as defined under said section 2 of said chapter 211D, by the moving party to the maximum feasible amount possible given the financial resources of the moving party as the court deems equitable.

Section 11. Proceedings under this chapter shall not stay or otherwise interfere with a term of incarceration, parole, probation or other sentence imposed.

Section 12. (a) The results of the analysis shall be simultaneously disclosed to the moving party, the prosecuting attorney and the court.

(b) The court shall, at the request of a party or on its own initiative, 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 subsection (b) of section 7 are met.

Section 14. (a) If a motion is filed under section 3, the prosecuting attorney shall notify the victim of the crime in the underlying case.

(b) The prosecuting attorney shall 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 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. (a) Any governmental entity that is 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 such evidence or biological material for the period of time that a person remains in the custody of the commonwealth or under parole or probation supervision in connection with that crime, without regard to whether the evidence or biological material was introduced at trial. Each governmental entity shall retain all such evidence or biological material in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration. The evidence or biological material need not be preserved if it is to 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 director of the crime laboratory within the department of state police, in consultation with the forensic sciences advisory board established by section 184A of chapter 6, shall promulgate regulations governing the retention and preservation of evidence or biological material by any governmental entity. The 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 for contemporaneously recorded documentation of individuals having and obtaining custody of any evidence or biological material.

Section 17. (a) Governmental officials and employees acting in good faith shall not be liable in a civil or criminal proceeding for any act under 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. An order allowing or denying a motion for forensic or scientific analysis filed under this chapter shall be a final and appealable order. If the moving party appeals an order denying a motion for forensic or scientific analysis the moving party shall file a notice of appeal with the court within 30 days after the entry of the judgment.

Approved, February 17, 2012.
