Massachusetts Criminal Procedure Rule 30: Postconviction Relief

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may on rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be

heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal Under G. L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

Previous Rule Next Rule

MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

June 8, 2011

The Honorable Cynthia Stone Creem
Chair, Joint Committee on the Judiciary
Massachusetts State Senate
State House, Room 405
Boston, MA 02133

The Honorable Eugene O'Flaherty
Chair, Joint Committee on the Judiciary
Massachusetts House of Representatives
State House, Room 136
Boston, MA 02133

RE: H.2165/S.753, *"An Act Relative to Providing Access to Scientific and Forensic Analysis"*

Dear Chairwoman Creem and Chairman O'Flaherty:

I am writing regarding H.2165/S.753, *"An Act Relative to Providing Access to Scientific and Forensic Analysis,"* otherwise known as the "DNA Access bill," which provides post-conviction access to and testing of forensic evidence and biological material by defendants who claim factual innocence. This bill is spearheaded by the Boston Bar Association Task Force to Prevent Wrongful Convictions ("the Task Force"), which is comprised of a highly regarded group of law enforcement professionals in Massachusetts with diverse backgrounds, including prosecutors, defense attorneys, academics, and police officers.

I have always been committed to making DNA testing available both to support prosecutions and to prevent wrongful convictions. In 2005, as Middlesex District Attorney, I worked with fellow District Attorneys and the Attorney General to establish the "Justice Initiative" to look at the criminal justice system as a whole. As one of four District Attorneys who sat on the forensics subgroup of the Initiative, I strongly supported—and continue to support—the use of DNA testing, including post-conviction, if such testing would establish the innocence of a defendant. In fact, I was personally involved in post-conviction DNA exclusion cases as Middlesex District Attorney, including the Kenneth Waters case. In each of those cases, the District Attorney's Office cooperated with the defendants' attorneys to implement DNA testing. In each of those cases, the defendants were released upon DNA testing exonerating or excluding them.

The DNA Access bill sets forth a process that allows those in custody or restrained as a result of a criminal conviction, who claim to be innocent, to obtain DNA testing. Specifically, the legislation permits a judge to order DNA testing when a prisoner who claims he or she is actually innocent persuades the judge that there is important forensic evidence available to be tested that was not tested at the time of trial, and demonstrates that the results of the testing would be admissible in court.

Massachusetts is one of only two states that do not have a statute providing for post-conviction DNA access. It is time to put a formal process in place for obtaining this evidence, as this bill does. As such, I support this bill's concept and ultimate passage. However, we believe that improvements to the bill can be made, and we are available to work with the Task Force members, the Committee, and other stakeholders on such improvements to ensure that the legislation strikes an appropriate balance of ensuring that defendants with legitimate claims can obtain test results that could vindicate them, while at the same time protecting the families of victims and the court system from frivolous proceedings.

Thank you for your attention to this important matter, and please feel free to contact Jennifer Stark, Chief of the Policy & Government Division at (617) 963-2021 with any questions you may have.

Cordially,

Martha Coakley

ORGANIZED
NOVEMBER 3,1887

INCORPORATED
MAY 2,1949

EXECUTIVE DIRECTOR
CHIEF A. WAYNE SAMPSON (RET.)
GENERAL COUNSEL
JOHN M. COLLINS, ESQUIRE

E-MAIL: OFFICE@MASSCHIEFS.ORG
WEBSITE: WWW.MASSCHIEFS.ORG

BUSINESS OFFICE
26 PROVIDENCE ROAD, GRAFTON, MA 01519
TEL: (508) 839-5723 / (800) 322-2011
FAX: (508) 839-4873

In Unity There Is Strength

September 19, 2011

Representative Robert A. DeLeo
Speaker of the House
State House, Room 356
Boston, MA 02133

Representative Eugene O'Flaherty
State House, Room 136
Boston, MA 02133

Re: SB 753 An Act relative to post conviction DNA access

Dear Speaker DeLeo and Representative O'Flaherty:

I am writing on behalf of the Massachusetts Chiefs of Police Association to support in principal SB 753 An Act relative to Post Conviction DNA Access.

Our members strongly support the belief that no innocent person should be convicted or serve a prison sentence for a crime that they did not commit. It is in our mutual interest to ensure that any person wrongly convicted is exonerated.

Members of our Association have met with the Massachusetts District Attorney's Association and I am under the belief that they will submit some technical language to address some of their concerns. We support their proposed amendments.

Thank you for your time and consideration in this matter.

Yours truly,

A W. Sampson

Chief A. Wayne Sampson (Ret.)
Executive Director

cc: Gretchen Bennett, New England Innocence Project
Exchange Place, 53 State Street, 17th Floor
Boston, MA 02109

The Commonwealth of Massachusetts
MIDDLESEX DISTRICT ATTORNEY
15 COMMONWEALTH AVENUE WOBURN, MA 01801
WWW.MIDDLESEXDA.COM

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

TEL: 781-897-8300
FAX: 781-897-8301

June 7, 2011

The Honorable Cynthia Stone Creem
Senate Chair - Joint Committee on Judiciary
State House, Room 416-B
Boston, MA 02133

The Honorable Eugene O'Flaherty
House Chair – Joint Committee on Judiciary
State House, Room 136
Boston, MA 02133

RE: SB 753 and HB 2165
An Act providing access to forensic and scientific analysis.

Dear Chairwoman Creem and Chairman O'Flaherty:

As District Attorney of Middlesex County, I offer my support for the concepts set forth in SB 753 and HB 2165. It is in the interests of the public and the criminal justice system to permit access to scientific and forensic evidence to convicted defendants who have bona fide claims of innocence. As prosecutors, our duty is to seek the truth. No prosecutor has any interest in convicting an innocent person, and no prosecutor has an interest in keeping an innocent person in prison. In addition to the unjustness of a defendant who is imprisoned for a crime he did not commit, there is a public safety component because in such a circumstance, the person who actually committed that crime may remain at large.

Massachusetts already is unique among the states because it gives convicted defendants broad and unparalleled access to the courts by permitting them to challenge the justness of their conviction by permitting the filing of motions for new trial at any time, which includes a right to file, also at any time, motions for postconviction discovery; all other states and the federal system impose time limits on the filing of such motions. This broad post-conviction access to the courts, desirable as it may be, comes at a price. Even under the current laws, there are many postconviction motions that are filed years and even decades after a conviction that are entirely meritless, and there are costs associated with those motions that are borne by CPCS, the District Attorney's Offices, and the Court, in responding to and separating out the frivolous ones. Additionally, I also point out that the Commonwealth is oftentimes required to reimburse a defendant from the budget of the district attorneys for the costs and fees associated with appealing even erroneous postconviction orders, including orders regarding postconviction discovery, even in circumstances where the prosecution prevails on appeal. For this reason, I also urge the Committee's consideration of SB 721, *An Act Relating to Costs of Appeals By the Commonwealth*, sponsored by Chairwoman Creem, in conjunction with these bills to offset the costs in instances where the prosecution prevails on appeal. It is important that measures are taken so that the worthwhile goals at the heart of SB 753 and HB 2165 do

not add needless costs to our already burdened criminal justice system, and that is why I support provisions that would require a convicted defendant's motion to be based on a credible claim of innocence, and a demonstration in the motion that the proposed testing would actually support the theory of innocence.

Two additional issues related to the legislative proposals are worthy of mention. The first very important issue relates to the potential impact of the bill on victims, their survivors, and the families of victims – groups oftentimes forgotten as defendant's rights are satisfied. We believe that the citizens of the Commonwealth as well as those most impacted by the crimes, the victims and their families, would agree that a burden imposed by these bills, which insures both that those actually responsible for their crime have been punished and that an innocent individual has not been convicted, is a necessary cost to the functioning of a truly just process. However, we are always mindful of the need of victims and their families to engage in ongoing recovery towards ever elusive closure to the effects of tragic and painful incidents. These bills, by requiring that the court find that the convicted offender has satisfied a demanding standard *before* permitting any additional testing, appropriately balances these competing demands.

The second issue pertains to the collateral financial costs resulting from the long term storage requirements being established by the legislation. Provisions of the new law would require that most physical evidence items, both used at trials and not used, be retained for extended periods of time and under environmentally appropriate conditions. This may undoubtedly require additional expenditure of limited public resources not only by district attorneys' offices, but also by state and local police departments, as well as all the trial courts and clerk's offices across the Commonwealth. We understand and agree that the added costs resulting from the underlying purpose and aim of this bill are financial burdens our citizens should be willing to share to ensure the truth and validity of criminal convictions. However, the Legislature must be willing to likewise pledge financial resources to the law enforcement community and justice system, so as to ensure the full and effective implementation of this proposal.

Finally, in its 2010 White Paper on Public Safety and Criminal Justice Policy, the Massachusetts District Attorney's Association announced that it supported "DNA testing at any phase of a proceeding, including post-conviction, if that testing will establish the actual innocence of the defendant." The MDAA agreed to give "careful consideration to thoughtfully crafted legislation to that end." I believe that the bills before you are carefully crafted after much measured, balanced, and contemplative consideration, and I urge the Committee to report the bills out favorably, to be ultimately resolved by including provisions that include the caveats that I outline above.

Sincerely,

Gerard T. Leone, Jr.
Middlesex District Attorney

The Commonwealth of Massachusetts

DISTRICT ATTORNEY OF SUFFOLK COUNTY
DANIEL F. CONLEY

One Bulfinch Place, Suite 300
Boston, MA 02114-2921

Telephone: (617) 619-4000
Fax: (617) 619-4210

June 8, 2011

The Honorable Cynthia S. Creem
Senate Chair, Joint Committee on the Judiciary
State House, Room 405
Boston, MA 02133

The Honorable Eugene L. O'Flaherty
House Chair, Joint Committee on the Judiciary
State House, Room 136
Boston, MA 02133

RE: S.B. 753 and H.B. 2165
An Act providing access to scientific and forensic analysis

Dear Chairwoman Creem and Chairman O'Flaherty:

The Boston Bar Association rightly argues "that for every defendant wrongly convicted, a criminal goes free, and society remains at risk while the individual who has escaped the consequences of his actions is free to commit crimes against other victims." As Suffolk County District Attorney, from first-hand experience, I can attest to the truth of this position.

Early in my tenure as District Attorney, defense attorneys brought a motion for post-conviction DNA testing for a man named Anthony Powell. Powell had been convicted of the rape of a woman in Roxbury that occurred in 1991. As I have in virtually all such cases, I assented to the motion and the testing went ahead. DNA samples that had been recovered were submitted to the FBI's Combined DNA Index System, or CODIS. That testing led to two separate results.

First, the testing led to the exoneration of Anthony Powell, who had served 12 years in prison for the Roxbury rape after his erroneous conviction at a 1992 trial. Second, while the sample did not match Anthony Powell's DNA, it did match another sample in the CODIS database connected to a rape that had also occurred in 1991 in Jamaica Plain. Absent the offender's name, we indicted his unique DNA profile in 2006.

In 2007, an individual named Jerry Dixon was convicted of separate crimes, served a brief period of incarceration, and was required to give a DNA sample because of a 1991 armed robbery conviction. That sample was entered into the CODIS database, which in 2008 connected Dixon to the 1991 rapes in Jamaica Plain and Roxbury. Dixon is in custody and presently awaiting trial.

This case embodies all the reasons we need to update Massachusetts laws with respect to post–conviction DNA testing. If enacted, this legislation will codify many of the practices that I voluntarily put in place nearly a decade ago. These are good practices that serve the interest of justice, both in preventing and correcting erroneous convictions, and in helping to hold the guilty accountable.

Accordingly, I embrace the spirit of this legislation wholeheartedly. At the same time, I urge this Committee and the Legislature as a whole to review and adopt the changes contained in the attached addendum in order that this legislation accomplish its full purpose as espoused by the Boston Bar Association, which is to prevent the possibility of erroneous conviction and ensure that the guilty party is brought to justice.

In addition to the changes I am proposing, I believe this bill would be strengthened immeasurably if we use this opportunity to look at the overall picture of DNA evidence in Massachusetts. The Commonwealth presently lags behind many other states and the Federal government in the strictures imposed on the collection of DNA samples from those who are arrested and charged with serious crimes. It would be in the best interest of justice and public safety to expand CODIS.

For over a century, law enforcement has been collecting fingerprint evidence from individuals arrested for a crime. It makes sense to continue this practice but in full keeping with modern available science, which would include arrestee DNA sampling. While some might regard this as a controversial move, courts all across the country have rightly viewed the taking of a DNA sample at arrest as being no more intrusive than obtaining a fingerprint.

To date, 24 states and the Federal government have adopted versions of Katie's Law, which requires arrestee DNA sampling. Massachusetts, meanwhile, does not permit DNA sampling even for those arrested and charged with murder, burglary, serious sex crimes or any other felony. In fact, Massachusetts remains one of only 13 states that do not even mandate that DNA samples be submitted from those *convicted* of sex crime misdemeanors.

As the cases of Anthony Powell and Jerry Dixon make clear, our obligation here cannot end with exonerating those who have been wrongly convicted. The same evidence that exonerates must be used to apprehend and hold the guilty accountable. As other states and the Federal government update their laws in recognition of this new science, and indeed as these changes have been sanctioned by courts all across the country, it is time for Massachusetts to update its own laws to ensure that no one is wrongly convicted and that those who are guilty of serious crimes such as murder and rape are brought to justice.

For these reasons, I wholeheartedly support the spirit of this legislation and respectfully urge the Legislature to adopt the changes outlined in the attached addendum, and to further use this opportunity to adopt Katie's Law as a sensible companion piece to this bill.

Sincerely,

Daniel F. Conley
Suffolk County District Attorney

ADDENDUM

Substantive changes needed:

1. The bill does not address obtaining DNA samples from persons other than the defendant. Indeed, the bill explicitly makes simple notice to the victim by the prosecutor voluntary (§ 14). A DNA mismatch between a defendant and non-semen biological material left at the scene begs the question whether the DNA would match the victim or a consensual partner. As written, there is no explicit authorization for obtaining biological samples from such persons or testing them. As a result, the testing would occur just on the defendant's sample and not on other samples that might be necessary for a meaningful result. Instead, the bill should allow the judge to require the provision of necessary samples from third parties and to include testing of these samples.

2. In section 3(c) and section 7(c), the bill creates an undefined right to move for discovery. Indeed, section 7(c) invokes Mass. R. Crim. P. 14 and 17, both rules that apply only to pretrial discovery. Instead, the bill should specify that a defendant (or the Commonwealth) can move for discovery under Mass. R. Crim. P. 30(c)(4), which already creates a well-defined and well-understood mechanism for post-conviction discovery.

3. In section 11(a), the bill requires a defendant with a pending appeal or post-conviction motion to file a motion to request a stay of such proceedings, and requires such stays to be liberally granted. There is no reason to require the defendant to file a motion for a stay or require the court to liberally grant it. Instead, the bill should permit a motion for testing to be considered parallel with any other appeal or post-conviction motion. Appeals, especially of murder cases, already take a substantial amount of time and this testing should not unnecessarily add to a delay of justice.

4. In section 8(e), the bill bans exhaustive testing unless both the defendant and the Commonwealth agree. Instead, the motion judge should be allowed to authorize exhaustive testing. Indeed, exhaustive testing should require the court's approval, even if the parties agree.

Technical changes needed

1. Section 1 offers definitions for "criminal offender databases" and "inventory" but those terms are not used again.

2. In section 3(d), the bill switches from "factual innocence," defined in section 1, to "actual innocence." As "actual innocence" is a term of art in habeas corpus litigation and does not mean factual innocence, this should be corrected.

3. In section 6(a), the bill requires a hearing. A court should be able to rule on the papers, so "shall" should be replaced with "may."

4. In section 6(c), the bill states that the defendant may move to be present and the Commonwealth shall produce the defendant if the court so orders. This is already the law for all post-conviction hearings. This provision merely adds confusion.

5. In section 7(b)(3), the word "already" is missing from before "been subjected to the requested analysis."

6. In section 3(b)(5), the defendant is required to make a showing regarding why he has not previously requested testing. Section 7(b), however, omits any requirement that the judge make a finding on that issue.

7. In section 12(b), the bill allows a judge to order production of underlying laboratory data. But section 8(d), correctly, makes that mandatory.

“I appreciated the opportunity to discuss with each of you the proposed legislation concerning access to forensic and scientific analysis and found our conversations instructive. As you know, at the time I wrote my letter I did not know that the bill was the product of the Boston Bar Association’s remarkable work on wrongful convictions.

"My objectives in writing the letter were to comment on the ramifications of the overlap between the bill and Rule 30 of the Massachusetts Rules of Criminal Procedure and to underscore the importance of establishing procedures governing the retention and preservation of biological material and obtaining funding to support the implementation of such procedures and the creation of adequate facilities at the various governmental entities to ensure the integrity of the evidence indefinitely.

"Most importantly, I did not know, until my conversation with Kathy late Friday, that a statute, as opposed to a rule, was a prerequisite to securing federal monies. That fact alone alters my thinking about the legislation. **Unless we have the resources and facilities to preserve the evidence and to prevent its deterioration, the laudable objective of the legislation would be vitiated. Nothing in my letter was intended to impede the passage of legislation that would make more likely the availability of monies to achieve our common goal of broadening access to evidence that is appropriately preserved.**

“I trust this clarifies the position of the court but do not hesitate to contact me to discuss the matter further.”

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
SUFFOLK COUNTY COURTHOUSE
THREE PEMBERTON SQUARE, 13TH FLOOR
BOSTON, MA 02108

BARBARA J. ROUSE
CHIEF JUSTICE

TELEPHONE
(617) 788-8130

July 26, 2011

Honorable Stephen M. Brewer
Chairman, Senate Committee on
Ways and Means
State House, Room 212
Boston, MA 02133

RE: Senate Bill No. 753, *An Act providing access to forensic and scientific analysis.*

Dear Chairman Brewer:

I am writing to you in reference to Senate Bill No. 753, *An Act providing access to forensic and scientific analysis.* This petition was filed in the previous session as Senate No. 1659, and was included in a study package on 23 June 2010. Although we applaud the proponents' objective to preserve the integrity of post-conviction scientific and forensic evidence, we have the following concerns about this legislation.

- The proposed legislation duplicates the post-conviction relief that is already available under Rule 30 of the Massachusetts Rules of Criminal Procedure, which currently sets forth procedures for relief where justice has not been served. The procedures for seeking relief under this bill are essentially the same as those contained in the Rule: the same type of motion must be filed in the underlying case; similar detail must be provided in the motion and affidavit(s); notice must be given to the prosecuting attorney; the judge in the exercise of discretion may assign or appoint counsel to represent the defendant in the preparation and presentation of the motion; a hearing is permitted if the procedural requirements are satisfied; and the original trial judge conducts the hearing, if possible. Therefore, Senate No. 753 is unnecessary and would potentially create confusion.

- This proposal would provide special treatment for a class of defendants claiming innocence based on the evaluation or reevaluation of forensic evidence. Defendants seeking post-conviction relief based on, among other reasons, newly discovered non-forensic evidence, recantation of a witness's testimony, or ineffective assistance of counsel may well have equally meritorious claims but would be treated differently.

- Respectfully, Section 16 of the bill, which mandates procedures governing the retention and preservation of biological evidence, should be the sole focus of this legislation. It is imperative that we have such regulations to insure the integrity and uniform preservation of these materials.

- Any realistic consideration of this bill must take into account the increased costs and burdens on the affected government entities. Without adequate funding to implement the new protocols, this legislation will not achieve its intended objective.

Thank you for the opportunity to comment and I would be pleased to discuss this further.

Sincerely,

Barbara J. Rouse
Chief Justice

cc: Members, Senate Ways and Means Committee ✓