

**SENATE . . . . . No. 1659**

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**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Nine**  
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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  
2 techniques are often used to analyze evidence or biological material obtained during the  
3 investigation of a crime, and, as these techniques become more accurate, their use can, in some  
4 cases, conclusively establish a person’s guilt or innocence, or otherwise provide significant  
5 probative evidence.

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

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

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

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

19           Chapter 278A

20           Post Conviction Access to Forensic and Scientific Analysis

21           Section 1. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56           Section 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

77 2. The results of the requested analysis were not admissible in courts of the

78 commonwealth at the time of the conviction; or

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

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

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

88 (c) The moving party shall file with the motion copies of all reports, documents,  
89 memoranda, and notes from forensic or scientific analysis that has been conducted on any  
90 evidence or biological material that was obtained in relation to the underlying case. The moving  
91 party shall include these reports with the motion regardless of whether the moving party has

92 previously provided them to the prosecuting attorney, whether they were offered or admitted as  
93 evidence in the underlying case, or whether they would have been admissible as evidence in the  
94 underlying case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

139 Section 5. Appointment of counsel.

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

142 Section 6. Hearing.

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

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

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

150 Section 7. Ruling on the Motion.

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



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

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

157 (2) that the evidence or biological material has been subject to a chain of custody that is  
158 sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any  
159 material respect;

160 (3) that the evidence or biological material has not been subjected to the requested  
161 analysis;

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

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

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

167 (7) that, if the results of the requested analysis are favorable to the moving party, justice  
168 may not have been done in the underlying case.

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

171 Section 8. Laboratory.

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

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

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

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

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

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

188 (g) The laboratory shall endeavor to retain and maintain the integrity of a sufficient  
189 portion of the evidence or biological material for replicate analysis. If, after initial examination  
190 of the evidence or biological material, but before the actual analysis, the laboratory determines  
191 that there is insufficient material for replicate analysis, it shall simultaneously notify in writing  
192 the prosecuting attorney, the moving party, and the judge. In the event that there is insufficient

193 material to perform replicate analysis, upon request of either party, the judge shall make such  
194 orders to ensure that representatives of the moving party and the prosecuting attorney have the  
195 opportunity to observe the analysis. Such analysis shall be subject to the rules and practices of  
196 the laboratory.

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

201 Section 9. Timeliness of analysis.

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

204 Section 10. Costs.

205 The costs of the analysis shall be borne:

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

208 (b) by the commonwealth; or

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

211 Section 11. Effect on other proceedings.

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

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

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

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

223 Section 12. Disclosure of results of analysis.

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

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

228 Section 13. Effect of analysis.

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

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

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

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

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

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

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

243 A. No additional analysis is requested, or

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

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

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

- 252 (2) Order the release of the moving party from custody;
- 253 (3) On motion of the moving party, order a new trial; or
- 254 (4) Order any other relief that serves the interest of justice.

255 Section 14. Notice to victims.

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

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

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

262 Section 15. Waiver of rights.

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

267 Section 16. Preservation of evidence and biological material.

268 (a) Any governmental entity that is in possession of evidence or biological material that  
269 is collected for its potential evidentiary value during the investigation of a crime, the prosecution  
270 of which results in a conviction, shall retain such evidence and biological material for the period  
271 of time that any person remains in the custody of the commonwealth in connection with that

272 crime, without regard to whether the evidence or biological material was introduced at trial.  
273 Each governmental entity shall retain all such evidence and biological material in a manner that  
274 is reasonably designed to preserve the evidence and biological material and to prevent its  
275 destruction or deterioration.

276 (b) The secretary of the executive office of public safety and security shall promulgate  
277 regulations governing the retention and preservation of evidence and biological material by any  
278 governmental entity, which regulations shall include standards for maintaining the integrity of  
279 the materials over time, the designation of officials at each governmental entity with custodial  
280 responsibility, and requirements of contemporaneously recorded documentation of individuals  
281 having and obtaining custody of any evidence of biological material.

282 Section 17. Liability.

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

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

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

292 Section 18. Appeal.

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