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SENATE . . . . . No. 2459

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

An Act Text of amendment (134) offered by Ms. Creem to the pending Senate Ways and Means amendment (Senate, No. 4) to the House Bill making appropriations for the fiscal year 2010 for the maintenance of the departments, boards, commissions, institutions and certain activities of the Commonwealth, for interest, sinking fund and serial bond requirements and for certain permanent improvements.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Ms. Creem moved that the bill be amended by inserting after Section ___, the following new Section:-

"SECTION __. The general court hereby finds and declares that forensic and scientific techniques are often used to analyze evidence or biological material obtained during the investigation of a crime, and, as these techniques become more accurate, their use can, in some

cases, conclusively establish a person's guilt or innocence, or otherwise provide significant probative evidence.

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

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

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

SECTION 2. 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. Definitions

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

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

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

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

"Factually innocent" shall describe a person convicted of a criminal offense who did not commit that offense.

"Governmental entity" shall mean any official body of the commonwealth, or of any county, city, or town within the commonwealth.

"Inventory" shall mean a detailed listing, including a particularized description of each listed item.

"Moving party" shall mean a person who files a motion pursuant to this Chapter.

"Post conviction" shall indicate any time after which a conviction has been entered.

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

"Replicate analysis" shall mean the duplication of an analysis performed on a particular item of evidence or biological material.

"Underlying case" shall mean the trial court proceedings that resulted in the conviction of the moving party.

"Victim" shall mean 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 that is the subject of the underlying case, and 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.

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

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

Section 3. Requirements and procedures for filing.

(a) A person seeking relief pursuant to 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; and

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

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

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

(5) 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

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

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

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

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

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

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

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

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

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

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

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

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

Section 4. Service of process and response to motion.

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

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

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

(1) An inventory of all 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;

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

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

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

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

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

Section 5. Appointment of counsel.

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

Section 6. Hearing.

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

(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.

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

Section 7. Ruling on the Motion.

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

(b) The judge shall allow the motion 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 been substituted, tampered with, replaced, or altered in any material respect;

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

(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;

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

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

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

Section 8. Laboratory.

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

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

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

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

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

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

(g) The laboratory shall endeavor to 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 judge. In the event that there is insufficient material to perform replicate analysis, upon request of either party, the judge shall make such orders to ensure that representatives of the moving party and the prosecuting attorney have the opportunity to observe the analysis. Such analysis shall be subject to the rules and practices of the laboratory.

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

Section 9. Timeliness of analysis.

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

Section 10. Costs.

The costs of the analysis shall be borne:

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

(b) by the commonwealth; or

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

Section 11. Effect on other proceedings.

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

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

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

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

Section 12. Disclosure of results of analysis.

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

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

Section 13. Effect of analysis.

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

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

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

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

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

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

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

A. No additional analysis is requested, or

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

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

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

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

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

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

Section 14. Notice to victims.

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

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

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

Section 15. Waiver of rights.

The right to file a motion pursuant to 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. Preservation of evidence and biological material.

(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 and biological material for the period of time that any person remains in the custody of the commonwealth 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 and biological material in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration.

(b) The secretary of the executive office of public safety and security shall promulgate regulations governing the retention and preservation of evidence and biological material by any governmental entity, which 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 of contemporaneously recorded documentation of individuals having and obtaining custody of any evidence of biological material.

Section 17. Liability.

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

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