

**SENATE . . . . . No. 2459**

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**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Ten**  
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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:*

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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

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

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

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

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

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

25 Chapter 278A

26 Post Conviction Access to Forensic and Scientific Analysis

27 Section 1. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62           Section 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

147 Section 5. Appointment of counsel.

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



150 Section 6. Hearing.

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

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

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

158 Section 7. Ruling on the Motion.

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

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

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

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

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

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

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

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

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

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

180 Section 8. Laboratory.

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

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

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

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

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

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

197 (g) The laboratory shall endeavor to retain and maintain the integrity of a sufficient  
198 portion of the evidence or biological material for replicate analysis. If, after initial examination  
199 of the evidence or biological material, but before the actual analysis, the laboratory determines  
200 that there is insufficient material for replicate analysis, it shall simultaneously notify in writing  
201 the prosecuting attorney, the moving party, and the judge. In the event that there is insufficient  
202 material to perform replicate analysis, upon request of either party, the judge shall make such  
203 orders to ensure that representatives of the moving party and the prosecuting attorney have the  
204 opportunity to observe the analysis. Such analysis shall be subject to the rules and practices of  
205 the laboratory.

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

210 Section 9. Timeliness of analysis.

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

213           Section 10. Costs.

214           The costs of the analysis shall be borne:

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

217           (b) by the commonwealth; or

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

220           Section 11. Effect on other proceedings.

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

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

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

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

232 Section 12. Disclosure of results of analysis.

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

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

237 Section 13. Effect of analysis.

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

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

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

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

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

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

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

252 A. No additional analysis is requested, or

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

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

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

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

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

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

265 Section 14. Notice to victims.

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

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

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

272 Section 15. Waiver of rights.

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

277 Section 16. Preservation of evidence and biological material.

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

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

292 Section 17. Liability.

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

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

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

302 Section 18. Appeal.

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