

SENATE No. 1987

Senate, Wednesday, July 27, 2011 – Recommended new draft from the Senate committee on Ways and Means for Senate, No. 753, An Act providing access to forensic and scientific analysis.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

AN ACT PROVIDING ACCESS TO FORENSIC AND SCIENTIFIC ANALYSIS.

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

1 **SECTION 1.** The General Laws are hereby amended by inserting after chapter 278 the
2 following chapter:-

Chapter 278A

Post Conviction Access to Forensic and Scientific Analysis

5 Section 1. As used in this chapter, the following words shall, unless the context clearly
6 requires otherwise, have the following meanings:-

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

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

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

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

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

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

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

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

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

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

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

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

29 “Victim”, any natural person who suffered direct or threatened physical, emotional or
30 financial harm as the result of the commission or attempted commission of the crime or

31 delinquency case that is the subject of the underlying case; “victim” shall also include the parent,
32 guardian, legal representative or administrator or executor of the estate of such person if that
33 person is a minor, incompetent or deceased.

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

39 The procedures set forth in this chapter shall not be construed to prohibit the
40 performance of forensic or scientific analysis under any other circumstances, including by
41 agreement between the person convicted of a criminal offense and the prosecuting attorney.

42 Section 3. (a) A person seeking relief under this chapter shall file a motion in the court
43 in which the conviction was entered, using the same caption and docket number as identified the
44 underlying case.

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

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

50 (2) information demonstrating that the requested analysis is admissible as
51 evidence in courts of the commonwealth;

52 (3) a description of the evidence or biological material that the moving party
53 seeks to have analyzed or tested, including its location and chain of custody if known;

54 (4) information demonstrating that the analysis has the potential to result in
55 evidence that is material to the moving party's identification as the perpetrator of the crime in the
56 underlying case; and

57 (5) information demonstrating that the evidence or biological material has
58 not been subjected to the requested analysis because:

59 (i) the requested analysis had not yet been developed at the time of the
60 conviction;

61 (ii) the results of the requested analysis were not admissible in the
62 courts of the commonwealth at the time of the conviction;

63 (iii) the moving party and the moving party's attorney were not aware
64 of and did not have reason to be aware of the existence of the evidence or biological material at
65 the time of the underlying case and conviction;

66 (iv) the moving party's attorney in the underlying case was aware at the
67 time of the conviction of the existence of the evidence or biological material, the results of the
68 requested analysis were admissible as evidence in courts of the commonwealth, a reasonably
69 effective attorney would have sought the analysis and the moving party's attorney failed to seek
70 the analysis; or

71 (v) the evidence or biological material was otherwise unavailable at the
72 time of the conviction.

73 (c) If the moving party is unable to include for filing with the motion any of the items
74 or information described in subsection (b), or if the moving party lacks items or information
75 necessary to establish any of the factors listed in subsection (b) of section 7, the moving party
76 shall include a description of efforts made to obtain such items and information and may move
77 for discovery of such items or information from the prosecuting attorney or any third party.

78 (d) The moving party shall file with the motion an affidavit stating that the moving
79 party is factually innocent of the offense of conviction and that the requested forensic or
80 scientific analysis will support the claim of innocence. A person who pleaded guilty or nolo
81 contendere in the underlying case may file a motion. The court shall not find that identity was
82 not or could not have been a material issue in the underlying case because of the plea. A person
83 who is alleged to have, or admits to having, made a statement that is or could be incriminating
84 may file a motion under this chapter. The court shall not find that identity was not or should not
85 have been a material issue in the underlying case because the moving party made, or is alleged to
86 have made, an incriminating statement. If the moving party entered a plea of guilty or nolo
87 contendere to the offense of conviction or made an incriminating statement, the moving party
88 shall state in the affidavit that the claim of factual innocence is made notwithstanding the plea or
89 incriminating statement.

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

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

97 (b) If the motion is not dismissed by the court under subsection (e) of section 3, the
98 prosecuting attorney shall file a response with the court within 60 days after the date upon which
99 the court issues notice under said subsection (e) of said section 3, and shall simultaneously serve
100 the response on the moving party. The prosecuting attorney may request additional time in which
101 to file the response, which the court may grant for good cause shown.

102 (c) The prosecuting attorney's response shall include any specific legal or factual
103 objections that the prosecuting attorney has to the requested analysis.

104 Section 5. The court may assign or appoint counsel to represent a moving party who
105 meets the definition of indigency under section 2 of chapter 211D in the preparation and
106 presentation of motions filed under this chapter.

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

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

112 Section 7. (a) After reviewing the motion, the prosecuting attorney's response and after
113 holding a hearing, the court shall state findings of fact and conclusions of law on the record, or
114 shall make written findings of fact and conclusions of law that support the decision to allow or
115 deny a motion brought under section 3.

116 (b) The court shall allow the requested forensic or scientific analysis if each of the
117 following has been demonstrated by a preponderance of the evidence:

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

119 (2) that the evidence or biological material has been subject to a chain of
120 custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with,
121 replaced, handled or altered such that the results of the requested analysis would lack any
122 probative value;

123 (3) that the evidence or biological material has not been subjected to the
124 requested analysis for any of the reasons set forth in clauses (i) to (v), inclusive, of paragraph (5)
125 of subsection (b) of section 3;

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

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

130 and

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

133 (c) The court on motion of any party, after notice to the opposing party and any third
134 party from whom discovery is sought, and an opportunity to be heard, may authorize such
135 discovery as provided for under Rule 30(c)(4) of the Massachusetts Rules of Criminal Procedure,

136 from either party or any third party as is deemed appropriate, subject to appropriate protective
137 orders or an order to the party seeking discovery to produce reciprocal discovery.

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

142 If, in response to a motion made under subsection (c) of section 3, the court finds good
143 cause for the moving party's inability to obtain items or information required under subsection
144 (b) of said section 3 and subsection (b) of section 7, the court may order discovery to assist the
145 moving party in identifying the location and condition of evidence or biological material that was
146 obtained in relation to the underlying case, regardless of whether it was introduced at trial or
147 would be admissible. The court, when considering such discovery requests, shall not require the
148 establishment of a prima facie case for relief under Rule 30 of the Massachusetts Rules of
149 Criminal Procedure.

150 Section 8. (a) In allowing a motion under section 3, the court shall specify conditions
151 on the analysis, including, but not limited to, the transportation, handling and return of evidence
152 or biological materials, to protect the integrity of the evidence or biological material and the
153 analysis.

154 (b) The prosecuting attorney and the moving party shall agree on a forensic services
155 provider accredited by the American Society of Crime Laboratory Directors Laboratory
156 Accreditation Board to conduct the analysis, which, except in the case of exhaustive testing, may

157 include the forensic and technology center of the state police crime laboratory or the Boston
158 police department crime laboratory units.

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

166 (d) The laboratory shall give equal access to its personnel, opinions, conclusions,
167 reports and other documentation to the prosecuting attorney and the moving party.

168 (e) The laboratory shall endeavor to retain and maintain the integrity of a sufficient
169 portion of the evidence or biological material for replicate analysis. If, after initial examination
170 of the evidence or biological material, but before the actual analysis, the laboratory determines
171 that there is insufficient material for replicate analysis, it shall simultaneously notify in writing
172 the prosecuting attorney, the moving party and the court. Exhaustive testing shall not occur
173 except by specific order of the court. In the event that exhaustive testing is so authorized, upon
174 request of either party, the court shall make such orders to ensure that representatives of the
175 moving party and the prosecuting attorney have the opportunity to observe the analysis, unless
176 such observation is inconsistent with the practices or protocols of the laboratory conducting the
177 analysis.

178 (f) The moving party shall cooperate with the laboratory. At the laboratory's or the
179 prosecuting attorney's request and upon court order, the moving party shall provide biological
180 samples to the laboratory or to law enforcement personnel. If the moving party unreasonably
181 fails to cooperate with such orders, the court may deny the motion with prejudice.

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

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

185 (1) by the moving party if the moving party does not meet the definition of indigency
186 under section 2 of chapter 211D and has sufficient means to make such payment;

187 (2) if the moving party meets the definition of indigency under said section 2 of said
188 chapter 211D, as an extra fee or cost under the provisions of sections 27A through 27G,
189 inclusive, of chapter 261; or

190 (3) if a person is indigent, but has the ability to pay a reduced fee as defined under said
191 section 2 of said chapter 211D, by the moving party as an extra fee or cost in an amount the court
192 deems equitable.

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

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

197 (b) The court shall, at the request of a party or on its own initiative, order production of
198 the underlying laboratory data, documents and notes.

199 Section 13. If the analysis is inconclusive, the court may order any additional analysis
200 requested if the court concludes that the requirements of subsection (b) of section 7 are met.

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

203 (b) The prosecuting attorney shall notify the victim if the court allows a motion for
204 forensic or scientific analysis and, if the victim is notified of the allowance of the motion, shall
205 promptly notify the victim of the result of the analysis.

206 Section 15. The right to file a motion under this chapter shall not be waived. This
207 prohibition of any waiver includes, but is not limited to, any stated or unstated waiver that is or is
208 alleged to be part of any agreement or understanding related to any plea of guilty or of nolo
209 contendere or to any sentencing or appellate proceeding or to any correctional placement or
210 conditions.

211 Section 16. (a) Any governmental entity that is in possession of evidence or biological
212 material that is collected for its potential evidentiary value during the investigation of a crime,
213 the prosecution of which results in a conviction, shall retain such evidence or biological material
214 for the period of time that a person remains in the custody of the commonwealth or under parole
215 or probation supervision in connection with that crime, without regard to whether the evidence or
216 biological material was introduced at trial. Each governmental entity shall retain all such
217 evidence or biological material in a manner that is reasonably designed to preserve the evidence
218 and biological material and to prevent its destruction or deterioration. The evidence or biological
219 material need not be preserved if it is to be returned to a third party or if it is of such a size, bulk
220 or physical character as to render retention impracticable.

221 (b) The director of the crime laboratory within the department of state police, in
222 consultation with the forensic sciences advisory board established by section 184A of chapter 6,
223 shall promulgate regulations governing the retention and preservation of evidence or biological
224 material by any governmental entity. The regulations shall include standards for maintaining the
225 integrity of the materials over time, the designation of officials at each governmental entity with
226 custodial responsibility and requirements for contemporaneously recorded documentation of
227 individuals having and obtaining custody of any evidence or biological material.

228 Section 17. (a) Governmental officials and employees acting in good faith shall not be
229 liable in a civil or criminal proceeding for any act under the provisions of this chapter.

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

234 (c) Nothing in this chapter shall create any cause of action for damages against the
235 commonwealth or any of its subdivisions or officers, employees, agents or subdivisions, except
236 as provided in this section.

237 Section 18. An order allowing or denying a motion for forensic or scientific analysis
238 filed under this chapter is a final and appealable order. If the moving party appeals an order
239 denying a motion for forensic or scientific analysis the moving party shall file a notice of appeal
240 with the court within 30 days after the entry of the judgment.