

SENATE No. 753

The Commonwealth of Massachusetts

PRESENTED BY:

Cynthia S. Creem

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act providing access to forensic and scientific analysis.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Cynthia S. Creem</i>	
<i>Kay Khan</i>	<i>11th Middlesex</i>
<i>Gloria L. Fox</i>	<i>7th Suffolk</i>

SENATE No. 753

By Ms. Creem, petition (accompanied by bill, Senate, No. 753) of Fox, Khan and Creem for legislation to provide access to forensic and scientific analysis [Joint Committee on the Judiciary].

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 1659 OF 2009-2010.]

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. Legislative Findings

2 The general court hereby finds that (1) forensic and scientific techniques are
3 often used to analyze evidence or biological material obtained during the investigation of a
4 crime, and, as these techniques become more accurate, their use can, in some cases, conclusively
5 establish a person’s guilt or innocence, or otherwise provide significant probative evidence; (2)
6 as these techniques have improved, they have allowed analyses of earlier obtained evidence or
7 biological materials; (3) in some circumstances, modern techniques can be used to demonstrate
8 that a conviction that predates the development of such techniques was based on incorrect factual
9 findings, and these forensic and scientific techniques provide a more reliable basis for
10 establishing a factually correct verdict than the evidence available at the time of the original

11 conviction; (4) in recent years, there have been a significant number of exonerations based on the
12 results of newly developed forensic and scientific techniques; (5) the purpose of this chapter is to
13 remedy the injustice of wrongful convictions of factually innocent persons by allowing access to
14 analyses of biological material with newer forensic and scientific techniques.

15 SECTION 2. The General Laws are hereby amended by inserting after chapter
16 278 the following chapter:—

17 Chapter 278A

18 Post Conviction Access to Forensic and Scientific Analysis.

19 Section 1. Definitions.

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

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

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

26 “Criminal offender databases” shall include: the State DNA Database, G. L. c.
27 22E; the Sex Offender Registry, G. L. c. 6, §§ 178C-N; and the Criminal Offender Record
28 Information System, G. L. c. 6, § 168-178A.

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

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

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

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

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

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

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

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

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

50 Section 2. Applicability.

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

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

58 Section 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

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

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

90 (c) If the moving party is unable to include for filing with the motion any of the
91 items or

92 information described in subsection (b), or if the moving party lacks items or information
93 necessary to establish any of the factors listed in section 7(b), the moving party shall include a
94 description of efforts made to obtain such items and information and may move for discovery of
95 such items or information from the prosecuting attorney or any third party

96 (d) The moving party shall file with the motion an affidavit stating that he or
97 she is factually innocent of the offense of conviction and that the requested forensic or scientific
98 analysis will support the claim of innocence. A person who pleaded guilty or nolo contendere in
99 the underlying case may file a motion under this Chapter. A judge shall not find that identity was
100 not or could not have been a material issue in the underlying case because of the plea. A person
101 who is alleged to have, or admits to having, made a statement that is or could be incriminating
102 may file a motion under this Chapter. A judge shall not find that identity was not or should not
103 have been a material issue in the underlying case because the moving party made, or is alleged to
104 have made, an incriminating statement. If the moving party entered a plea of guilty or nolo
105 contendere to the offense of conviction or made an incriminating statement, the moving party
106 shall state in the affidavit that the claim of actual innocence is not made notwithstanding the plea
107 or incriminating statement.

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

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

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

113 (b) The prosecuting attorney shall have 60 days to file a response with the court
114 and shall simultaneously serve the response on the moving party. The prosecuting attorney may
115 request enlargements of time in which to file the response, which the court may allow for good
116 cause shown.

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

119 Section 5. Appointment of counsel.

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

122 Section 6. Hearing.

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

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

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

130 Section 7. Ruling on the Motion.

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

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

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

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

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

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

146 (5) that the purpose of the motion is not the obstruction of justice or
147 delay; and

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

150 (c) The judge on motion of any party, after notice to the opposing party and an
151 opportunity to be heard, may authorize such discovery from the prosecuting attorney or any third

152 party as is deemed appropriate, subject to appropriate protective orders or an order to the moving
153 party to produce reciprocal discovery. If, in response to a motion made under section 3(c), the
154 court finds good cause for the moving party's inability to obtain items or information required
155 under sections 3(b) and 7(b), the court may order discovery, consistent with Rules 14 and 17 of
156 the Massachusetts Rules of Criminal Procedure, to assist the moving party in identifying the
157 location and condition of evidence or biological material that was obtained in relation to the
158 underlying case, regardless of whether it was introduced at trial or would be admissible.

159 Section 8. Laboratory.

160 (a) In allowing a motion under this Chapter, the judge shall specify conditions
161 on the analysis, including, but not limited to, the transportation, handling, and return of evidence
162 or biological materials, to protect the integrity of the evidence or biological material and the
163 analysis.

164 (b) The prosecuting attorney and the moving party shall agree on a forensic
165 services provider to conduct the analysis, which may include the department of state police or
166 city of Boston forensic services units.

167 (c) If the prosecuting attorney and the moving party are unable to agree on a
168 forensic services provider, the judge shall designate a provider that is accredited by the American
169 Society of Crime Laboratory Directors Laboratory Accreditation Board and has the capability to
170 perform the requested analysis. For purposes of this section, "laboratory" shall refer to the
171 forensic services provider selected under subsection (b) or (c).

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

174 (e) The laboratory shall endeavor to retain and maintain the integrity of a
175 sufficient portion of the evidence or biological material for replicate analysis. If, after initial
176 examination of the evidence or biological material, but before the actual analysis, the laboratory
177 determines that there is insufficient material for replicate analysis, it shall simultaneously notify
178 in writing the prosecuting attorney, the moving party, and the judge. Exhaustive testing shall not
179 occur without written authorization by both the moving party and the prosecuting attorney. In the
180 event that exhaustive testing is so authorized, upon request of either party, the judge shall make
181 such orders to ensure that representatives of the moving party and the prosecuting attorney have
182 the opportunity to observe the analysis, unless such observation is inconsistent with the practices
183 or

184 protocols of the laboratory conducting the analysis.

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

189 Section 9. Timeliness of analysis.

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

192 Section 10. Costs.

193 The costs of the analysis shall be paid:

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

196 (b) if the moving party is indigent, as an extra fee or cost under the provisions
197 of sections 27A through 27G of chapter 261; or

198 (c) by the moving party and as an extra fee or cost in shares as the court deems
199 equitable.

200 Section 11. Effect on other proceedings.

201 (a) If an appeal of the conviction or other post-conviction proceedings in the
202 underlying case are pending, the moving party shall file a motion to stay such proceedings and
203 for leave to file a motion under this chapter, which shall be liberally granted.

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

206 Section 12. Disclosure of results of analysis.

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

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

211 Section 13. Further proceedings following analysis.

212 If the analysis is inconclusive, the court may order any additional analysis requested if
213 the court concludes that the requirements of section 7(b) are met.

214 Section 14. Notice to victims.

215 (a) If a motion is filed under this Chapter, the prosecuting attorney may notify
216 the victim of the crime in the underlying case.

217 (b) The prosecuting attorney may, in his or her discretion, notify the victim if
218 the court allows a motion for forensic or scientific analysis and, if the victim is notified of the
219 allowance of the motion, shall promptly notify the victim of the result of the analysis.

220 Section 15. Waiver of rights.

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

226 Section 16. Preservation of evidence and biological material.

227 (a) Any governmental entity that is in possession of biological evidence that is
228 collected for its potential evidentiary value during the investigation of a crime, the prosecution of
229 which results in a conviction, shall retain such biological evidence for the period of time that any
230 person remains in the custody of the commonwealth or under parole or probation supervision in
231 connection with that crime, without regard to whether the biological evidence was introduced at
232 trial. Each governmental entity shall retain all such biological evidence in a manner that is
233 reasonably designed to preserve the evidence and biological material and to prevent its
234 destruction or deterioration. Such biological evidence need not be preserved if it must be

235 returned to a third party or if it is of such a size, bulk, or physical character as to render retention
236 impracticable.

237 (b) The secretary of the executive office of public safety and security, in
238 consultation with the Forensic Sciences Advisory Board, shall promulgate regulations governing
239 the retention and preservation of biological evidence by any governmental entity, which
240 regulations shall include standards for maintaining the integrity of the materials over time, the
241 designation of officials at each governmental entity with custodial responsibility, and
242 requirements of contemporaneously recorded documentation of individuals having and obtaining
243 custody of any biological evidence.

244 (c) For the purposes of this section, the term “biological evidence” means a
245 sexual assault forensic examination kit or semen, blood, saliva, hair, skin tissue, or other
246 identified biological material.

247 Section 17. Liability.

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

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

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

257 Section 18. Appeal.

258 An order allowing or denying a motion for forensic or scientific analysis filed
259 under this Chapter is a final and appealable order. Any appeal from such an order shall be
260 claimed by filing a notice of appeal within 30 days of the court's entry of the written order upon
261 the docket.