

**HOUSE . . . . . No. 2165**

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The Commonwealth of Massachusetts

PRESENTED BY:

*John V. Fernandes*

*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 to provide access to scientific and forensic analysis.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>John V. Fernandes</i>	<i>10th Worcester</i>
<i>William N. Brownsberger</i>	
<i>Jason M. Lewis</i>	<i>31st Middlesex</i>

**HOUSE . . . . . No. 2165**

By Mr. Fernandes of Milford, a petition (accompanied by bill, House, No. 2165) of John V. Fernandes, William N. Brownsberger and Jason M. Lewis relative to providing access to scientific and forensic analysis. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act to provide access to scientific and forensic 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 often used to  
3 analyze evidence or biological material obtained during the investigation of a crime, and, as  
4 these techniques become more accurate, their use can, in some cases, conclusively establish a  
5 person’s guilt or innocence, or otherwise provide significant probative evidence; (2) as these  
6 techniques have improved, they have allowed analyses of earlier obtained evidence or biological  
7 materials; (3) in some circumstances, modern techniques can be used to demonstrate that a  
8 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

16 SECTION 2. The General Laws are hereby amended by adding

17 the following new chapter:—

18

19 Chapter 278A. Post Conviction Access to Forensic and Scientific Analysis.

20

21 § 1. Definitions.

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

24

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

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

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

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

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

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

38 “Moving party” shall mean a person who files a motion pursuant to this Chapter. “Post  
39 conviction” shall indicate any time after which a conviction has been entered.

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

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

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

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

51 “Victim and witness assistance board” shall mean the entity established by G. L. c. 258B,  
52 § 4.

53

54 § 2. Applicability.

55 Any person who has been convicted of a criminal offense in a court of the  
56 commonwealth, and is in custody or whose liberty is restrained as the result of that conviction,  
57 and asserts that he is factually innocent of that criminal offense, may file a motion for forensic or  
58 scientific analysis pursuant to this Chapter. The procedures set forth in this chapter shall not be  
59 construed to prohibit the performance of forensic or scientific analysis under any other  
60 circumstances, including by agreement between the person convicted of a criminal offense and  
61 the prosecuting attorney.

62

63 § 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

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

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

93 (c) If the moving party is unable to include for filing with the motion any of the items or  
94 information described in subsection (b), or if the moving party lacks items or information

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

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

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

112

113 § 4. Service of process and response to motion.

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

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

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

122

123 § 5. Appointment of counsel.

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

126

127 § 6. Hearing.

128 (a) The court shall order a hearing on the motion if it conforms with the requirements of  
129 §3.

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

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

135

136 § 7. Ruling on the Motion.

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

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

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

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

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

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

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

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

153 (c) The judge on motion of any party, after notice to the opposing party and an  
154 opportunity to be heard, may authorize such discovery from the prosecuting attorney or any third  
155 party as is deemed appropriate, subject to appropriate protective orders or an order to the moving

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

162

163 § 8. Laboratory.

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

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

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

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

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

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

192

193 § 9. Timeliness of analysis.

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

196

197 § 10. Costs.

198 The costs of the analysis shall be paid:

199 (a) by the moving party if the moving party is not indigent and has sufficient means to  
200 make such payment; or (b) if the moving party is indigent, as an extra fee or cost under the  
201 provisions of sections 27A through 27G of chapter 261; or (c) by the moving party and as an  
202 extra fee or cost in shares as the court deems equitable.

203

204 § 11. Effect on other proceedings.

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

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

210

211 § 12. Disclosure of results of analysis.

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

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

216

217 § 13. Further proceedings following analysis.

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

220 §14. Notice to victims.

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

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

226

227 § 15. Waiver of rights.

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

232

233 § 16. Preservation of evidence and biological material.

234 (a) Any governmental entity that is in possession of biological evidence that is collected  
235 for its potential evidentiary value during the investigation of a crime, the prosecution of which  
236 results in a conviction, shall retain such biological evidence for the period of time that any  
237 person remains in the custody of the commonwealth or under parole or probation supervision in  
238 connection with that crime, without regard to whether the biological evidence was introduced at  
239 trial. Each governmental entity shall retain all such biological evidence in a manner that is  
240 reasonably designed to preserve the evidence and biological material and to prevent its  
241 destruction or deterioration. Such biological evidence need not be preserved if it must be  
242 returned to a third party or if it is of such a size, bulk, or physical character as to render retention  
243 impracticable.

244 (b) The Secretary of Public Safety and Security, in consultation with the Forensic  
245 Sciences Advisory Board, shall promulgate regulations governing the retention and preservation  
246 of biological evidence by any governmental entity, which regulations shall include standards for  
247 maintaining the integrity of the materials over time, the designation of officials at each  
248 governmental entity with custodial responsibility, and requirements of contemporaneously  
249 recorded documentation of individuals having and obtaining custody of any biological evidence.

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

253

254 § 17. Liability.

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

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

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

264

265 § 18. Appeal.

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