

# SENATE, NO. 2511

[Senate, June 23, 2010 - New draft of Senate, No. 1659 reported from the committee on the Judiciary.]



## The Commonwealth of Massachusetts

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IN THE YEAR OF TWO THOUSAND AND TEN

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### **AN ACT TO PROVIDE 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 court hereby finds and declares that forensic and scientific  
2 techniques are often used to analyze evidence or biological material obtained during the  
3 investigation of a crime, and, as these techniques become more accurate, their use can, in some  
4 cases, conclusively establish a person's guilt or innocence, or otherwise provide significant  
5 probative evidence.

6           It is further found that as these techniques have improved, they have allowed analyses of  
7 earlier obtained evidence or biological materials and that in some circumstances, modern  
8 techniques can be used to demonstrate that a conviction that predates the development of such  
9 techniques was based on incorrect factual findings, and these forensic and scientific techniques

10 provide a more reliable basis for establishing a factually correct verdict than the evidence  
11 available at the time of the original conviction.

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

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

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

19 Chapter 278A

20 Post Conviction Access to Forensic and Scientific Analysis

21 Section 1. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

45 “Victim” shall mean any natural person who suffered direct or threatened physical, emotional, or  
46 financial harm as the result of the commission or attempted commission of the crime that is the  
47 subject of the underlying case, and shall also include the parent, guardian, legal representative, or

48 administrator or executor of the estate of such person if that person is a minor, incompetent, or  
49 deceased.

50 “Victim and witness assistance board” shall mean the entity established by section 4 of chapter  
51 258B.

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

56 Section 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109                               (e) A person who pleaded guilty or nolo contendere in the underlying case may  
110                               file a motion under this Chapter. A judge shall not find that identity was not or could not

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

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

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

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

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

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

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

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

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

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

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

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

144 Section 5. Appointment of counsel.

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

147 Section 6. Hearing.

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

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



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

155 Section 7. Ruling on the Motion.

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

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

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

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

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

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

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

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

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

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

178 Section 8. Laboratory.

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

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

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

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

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

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

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

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

208 Section 9. Timeliness of analysis.

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

210 Section 10. Costs.

211 The costs of the analysis shall be borne:

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

214 (b) by the commonwealth; or

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

217 Section 11. Effect on other proceedings.

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

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

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

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

229 Section 12. Disclosure of results of analysis.

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

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

234 Section 13. Effect of analysis.

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

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

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

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

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

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

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

250 A. No additional analysis is requested, or

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

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

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

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

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

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

264 Section 14. Notice to victims.

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

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

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

271 Section 15. Waiver of rights.

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

276 Section 16. Preservation of evidence and biological material.

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

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

292 Section 17. Liability.

293 (a) Governmental officials and employees acting in good faith shall not be liable  
294 in a 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  
296 biological material engages in willful or wanton misconduct or gross negligence which  
297 results in the deterioration or destruction of evidence or biological material so that a  
298 laboratory is unable to perform adequate or proper analysis, that entity shall be subject to  
299 proceedings for contempt.

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

303 Section 18. Appeal.

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