

SENATE No. 00753

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 passage of the accompanying bill:

An Act providing access to forensic and scientific analysis.

PETITION OF:

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

SENATE No. 00753

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 often used
3 to 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 SECTION 2. The General Laws are hereby amended by inserting after chapter 278 the
16 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 the
21 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 plea of
25 nolo contendere, entered by the trial court.

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

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

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

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

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

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

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

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

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

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

48 Section 2. Applicability.

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

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

56 Section 3. Requirements and procedures for filing.

57 (a) A person seeking relief pursuant to this Chapter shall file a motion in the court in
58 which the conviction was entered, using the same caption and docket number as identified the
59 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 filed in
62 support of the motion that are signed by a person with personal knowledge of the factual basis of
63 the motion:

64 (1) The name and a description of the requested forensic or scientific
65 analysis; 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 and chain of custody if known, and

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

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

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

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

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

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

86 5. The evidence or biological material was otherwise unavailable at
87 the time of the conviction.

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

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

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

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

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

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

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

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

117 Section 5. Appointment of counsel.

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

120 Section 6. Hearing.

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

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

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

128 Section 7. Ruling on the Motion.

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

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

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

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

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

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

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

145 and

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

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

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

157 Section 8. Laboratory.

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

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

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

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

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

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

186 Section 9. Timeliness of analysis.

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

188 Section 10. Costs.

189 The costs of the analysis shall be paid:

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

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

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

196 Section 11. Effect on other proceedings.

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

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

202 Section 12. Disclosure of results of analysis.

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

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

207 Section 13. Further proceedings following analysis.

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

210 Section 14. Notice to victims.

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

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

216 Section 15. Waiver of rights.

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

221 Section 16. Preservation of evidence and biological material.

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

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

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

242 Section 17. Liability.

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

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

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

252 Section 18. Appeal.

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