

**HOUSE . . . . . No. 1636**

By Mr. O’Flaherty of Chelsea, petition of Eugene L. O’Flaherty relative to the use of forensic and scientific analysis in determining wrongful convictions. The Judiciary.

**The Commonwealth of Massachusetts**

In the Year Two Thousand and Seven.

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  
3 techniques are often used to analyze evidence or biological material  
4 obtained during the investigation of a crime, and, as these techniques  
5 become more accurate, their use can, in some cases, conclusively  
6 establish a person’s guilt or innocence, or otherwise provide signifi-  
7 cant probative evidence; (2) as these techniques have improved, they  
8 have allowed analyses of earlier obtained evidence or biological  
9 materials; (3) in some circumstances, modern techniques can be  
10 used to demonstrate that a conviction that predates the development  
11 of such techniques was based on incorrect factual findings, and these  
12 forensic and scientific techniques provide a more reliable basis for  
13 establishing a factually correct verdict than the evidence available at  
14 the time of the original conviction; (4) in recent years, there have  
15 been a significant number of exonerations based on the results of  
16 newly developed forensic and scientific techniques; (5) the purpose  
17 of this chapter is to remedy the injustice of wrongful convictions of  
18 factually innocent persons by allowing access to analyses of biolog-  
19 ical material with newer forensic and scientific techniques.

1 SECTION 2. The General Laws are hereby amended by adding  
2 the following new chapter:—

3 **Chapter 278A.**  
4 **Post Conviction Access to Forensic and Scientific Analysis.**

5 Section 1. Definitions.

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

8 “Analysis” shall mean the process by which a forensic or scien-  
9 tific technique is applied to evidence or biological material to iden-  
10 tify the perpetrator of a crime.

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

13 “Criminal offender databases” shall include:— the State DNA  
14 Database, G. L. c. 22E; the Sex Offender Registry, G. L. c. 6, Sec-  
15 tionSection 178C-N; and the Criminal Offender Record Information  
16 System, G. L. c. 6, Section 168-178A.

17 “Factually innocent” shall describe a person convicted of a crim-  
18 inal offense who did not commit that offense.

19 “Governmental entity” shall mean any official body of the Com-  
20 monwealth, or of any county, city, or town within the Common-  
21 wealth.

22 “Inventory” shall mean a detailed listing, including a particular-  
23 ized description of each listed item.

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

27 “Prosecuting attorney” shall mean the District Attorney for the  
28 district in which the moving party was convicted, or the Attorney  
29 General of the Commonwealth.

30 “Replicate analysis” shall mean the duplication of an analysis per-  
31 formed on a particular item of evidence or biological material.

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

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

40 “Victim and witness assistance board” shall mean the entity estab-  
41 lished by G. L. c. 258B, Section 4.

42 Section 2. Applicability.

43 Any person who has been convicted of a criminal offense in a  
44 court of the Commonwealth, and is in custody or whose liberty is  
45 restrained as the result of that conviction, and asserts that he is factually  
46 innocent of that criminal offense, may file a motion pursuant to  
47 this Chapter.

48 Section 3. Requirements and procedures for filing.

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

52 (b) The motion shall include the following information, and  
53 when relevant, shall include specific references to the record in the  
54 underlying case, or to affidavits that are filed in support of the  
55 motion that are signed by a person with personal knowledge of the  
56 factual basis of the motion:—

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

59 (2) Information demonstrating that the requested analysis is  
60 admissible as evidence in courts of the Commonwealth; and

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

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

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

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

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

72 2.) The results of the requested analysis were not admissible in  
73 courts of the Commonwealth at the time of the conviction; or

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

77 4.) The moving party's attorney in the underlying case was aware  
78 at the time of the conviction of the existence of the evidence or biological  
79 material, the results of the requested analysis were admissible  
80 as evidence in courts of the Commonwealth, and a reasonably effective  
81 attorney would have sought the analysis; or

82 5.) The evidence or biological material was otherwise unavailable  
83 at the time of the conviction.

84 (c) The moving party shall file with the motion copies of all  
85 reports, documents, memoranda, and notes from forensic or scien-  
86 tific analysis that has been conducted on any evidence or biological  
87 material that was obtained in relation to the underlying case. The  
88 moving party shall include these reports with the motion regardless  
89 of whether the moving party has previously provided them to the  
90 prosecuting attorney, whether they were offered or admitted as evi-  
91 dence in the underlying case, or whether they would have been  
92 admissible as evidence in the underlying case.

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

97 (e) The moving party shall identify all court proceedings that are  
98 currently pending and that relate to the underlying case, including  
99 the name of the court, docket number, and status of each such pro-  
100 ceeding. The moving party shall also certify that each party to those  
101 proceedings has received notice of the proceedings under this  
102 Chapter.

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

107 (e) A person who pleaded guilty or nolo contendere in the under-  
108 lying case may file a motion under this Chapter. A judge shall not  
109 find that identity was not or could not have been a material issue in  
110 the underlying case because of the plea. A person who is alleged to  
111 have, or admits to having, made a statement that is or could be  
112 incriminating may file a motion under this Chapter. A judge shall  
113 not find that identity was not or should not have been a material  
114 issue in the underlying case because the moving party made, or is  
115 alleged to have made, an incriminating statement.

116 (f) The court may deny, without prejudice, any motion which fails  
117 to include all 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  
120 adjudicated the underlying case and shall serve a copy of the motion  
121 on the prosecuting attorney.

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

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

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

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

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

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

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

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

149 Section 5. Appointment of counsel.

150 The judge in his discretion may assign or appoint counsel to rep-  
151 resent a moving party in the preparation and presentation of motions  
152 filed under this Chapter.

153 Section 6. Hearing.

154 (a) The court shall order a hearing on the motion if it conforms  
155 with the requirements of Section 3.

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

159 (c) The moving party may file a motion requesting that he be pre-  
160 sent at the hearing on the motion. If the judge allows such a motion,  
161 the judge shall order the Commonwealth to produce the moving  
162 party at the hearing.

163 Section 7. Ruling on the Motion.

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

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

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

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

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

177 (4) that the requested analysis has the potential to result in evi-  
178 dence that is material to the moving party's identification as the per-  
179 petrator of the crime in the underlying case;

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

182 (6) that the results of the particular type of analysis being  
183 requested have been found to be admissible in courts of the Com-  
184 monwealth; and

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

188 (c) The judge may order the production of information and mate-  
189 rials in whatever form, from the Commonwealth or any person or  
190 entity, by subpoena or other legal process.

191 Section 8. Laboratory.

192 (a) In allowing a motion under this Chapter, a judge may impose  
193 reasonable conditions on the analysis designed to protect the inter-

194 ests of the Commonwealth in the integrity of the evidence or biolog-  
195 ical material and the analysis.

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

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

203 (d) The laboratory shall be provided with a copy of all of the fil-  
204 ings relating to the motion, including all of the judge's orders. The  
205 laboratory shall also be provided with a copy of this Chapter in its  
206 entirety.

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

209 (f) Neither the prosecuting attorney nor the moving party shall  
210 communicate with the laboratory without simultaneously communi-  
211 cating with the other party.

212 (g) The laboratory shall endeavor to retain and maintain the  
213 integrity of a sufficient portion of the evidence or biological material  
214 for replicate analysis. If, after initial examination of the evidence or  
215 biological material, but before the actual analysis, the laboratory  
216 determines that there is insufficient material for replicate analysis, it  
217 shall simultaneously notify in writing the prosecuting attorney, the  
218 moving party, and the judge. In the event that there is insufficient  
219 material to perform replicate analysis, upon request of either party,  
220 the judge shall make such orders to ensure that representatives of the  
221 moving party and the prosecuting attorney have the opportunity to  
222 observe the analysis. Such analysis shall be subject to the rules and  
223 practices of the laboratory.

224 (h) The moving party shall cooperate with the laboratory. At the  
225 laboratory's request and upon court order, the moving party shall  
226 provide biological samples to the laboratory. If the moving party  
227 unreasonably fails to cooperate with the laboratory, the judge may  
228 deny the motion with prejudice.

229 Section 9. Timeliness of analysis.

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

232 Section 10. Costs.

233 The costs of the analysis shall be borne:—

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

236 (b) by the Commonwealth; or

237 (c) by both the moving party and the Commonwealth, in shares as  
238 the court deems equitable.

239 Section 11. Effect on other proceedings.

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

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

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

252 (d) Proceedings pursuant to this chapter shall not stay or other-  
253 wise interfere with a term of incarceration, parole, probation, or  
254 other sentence imposed.

255 Section 12. Disclosure of results of analysis.

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

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

261 Section 13. Effect of analysis.

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

266 (1) The prosecuting attorney to provide copies of the report of the  
267 analysis to the Superintendent of the Department of Correction and  
268 the Chairperson of the Parole Board;

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

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

272 (b) If the analysis neither confirms nor contradicts the factual  
273 findings for the verdict or judgment in the underlying case, the court  
274 shall:—

275 (1) Order any additional analysis requested if the court concludes  
276 that the requirements of Section are met, or

277 (2) If no additional analysis is requested that would meet the  
278 requirements of Section deny the motion with prejudice if either:—

279 A. No additional analysis is requested, or

280 B. Additional analysis is requested but the requirements of  
281 Section are not met.

282 (c) If the analysis demonstrates that the factual findings for the  
283 verdict or judgment in the underlying case were incorrect, and that  
284 the moving party was not properly convicted or sentenced, notwith-  
285 standing any rule or law that would bar a new trial, the court shall:—

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

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

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

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

294 Section 14. Notice to victims.

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

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

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

302 Section 15. Waiver of rights.

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

309 Section 16. Preservation of evidence and biological material.

310 (a) Any governmental entity that is in possession of evidence or  
311 biological material that is collected for its potential evidentiary value  
312 during the investigation of a crime, the prosecution of which results  
313 in a conviction, shall retain such evidence and biological material for  
314 the period of time that any person remains in the custody of the  
315 Commonwealth in connection with that crime, without regard to  
316 whether the evidence or biological material was introduced at trial.  
317 Each governmental entity shall retain all such evidence and biolog-  
318 ical material in a manner that is reasonably designed to preserve the  
319 evidence and biological material and to prevent its destruction or  
320 deterioration.

321 (b) The Attorney General and the Secretary of Public Safety shall  
322 promulgate regulations governing the retention and preservation of  
323 evidence and biological material by any governmental entity, which  
324 regulations shall include standards for maintaining the integrity of  
325 the materials over time, the designation of officials at each govern-  
326 mental entity with custodial responsibility, and requirements of con-  
327 temporaneously recorded documentation of individuals having and  
328 obtaining custody of any evidence of biological material.

329 Section 17. Liability.

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

333 (b) If a governmental entity responsible for the preservation of  
334 evidence or biological material engages in willful or wanton miscon-  
335 duct or gross negligence which results in the deterioration or  
336 destruction of evidence or biological material so that a laboratory is  
337 unable to perform adequate or proper analysis, that entity shall be  
338 subject to proceedings for contempt.

339 (c) Nothing in this chapter shall create any cause of action for  
340 damages against the Commonwealth or any of its subdivisions or  
341 officers, employees, agents, or subdivisions, except as provided in  
342 this Section.

343 Section 18. Appeal.

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