

# SENATE NO. 847

## 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. Legislative Findings

2 The general court hereby finds that (1) forensic and scientific techniques are often used to analyze  
3 evidence or biological material obtained during the investigation of a crime, and, as these techniques  
4 become more accurate, their use can, in some cases, conclusively establish a person's guilt or  
5 innocence, or otherwise provide significant probative evidence; (2) as these techniques have improved,  
6 they have allowed analyses of earlier obtained evidence or biological materials; (3) in some  
7 circumstances, modern techniques can be used to demonstrate that a conviction that predates the  
8 development of such techniques was based on incorrect factual findings, and these forensic and  
9 scientific techniques provide a more reliable basis for establishing a factually correct verdict than the  
10 evidence available at the time of the original conviction; (4) in recent years, there have been a  
11 significant number of exonerations based on the results of newly developed forensic and scientific  
12 techniques; (5) the purpose of this chapter is to remedy the injustice of wrongful convictions of  
13 factually innocent persons by allowing access to analyses of biological material with newer forensic  
14 and scientific techniques.

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

16 Chapter 278A

17 Post Conviction Access to Forensic and Scientific Analysis

18 § 1. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

46 “Victim and witness assistance board” shall mean the entity established by G. L. c. 258B, § 4.  
47 § 2. Applicability.

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

51 § 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

79 (c) The moving party shall file with the motion copies of all reports, documents, memoranda, and  
80 notes from forensic or scientific analysis that has been conducted on any evidence or biological  
81 material that was obtained in relation to the underlying case. The moving party shall include these  
82 reports with the motion regardless of whether the moving party has previously provided them to the

83 prosecuting attorney, whether they were offered or admitted as evidence in the underlying case, or  
84 whether they would have been admissible as evidence in the underlying case.

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

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

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

95 (e) A person who pleaded guilty or nolo contendere in the underlying case may file a motion under this  
96 Chapter. A judge shall not find that identity was not or could not have been a material issue in the  
97 underlying case because of the plea. A person who is alleged to have, or admits to having, made a  
98 statement that is or could be incriminating may file a motion under this Chapter. A judge shall not find  
99 that identity was not or should not have been a material issue in the underlying case because the  
100 moving party made, or is alleged to have made, an incriminating statement.

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

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

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

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

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

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

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

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

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

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

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

124 § 5. Appointment of counsel.

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

127 § 6. Hearing.

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

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

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

134 § 7. Ruling on the Motion.

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

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

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

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

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

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

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

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

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

151 (c) The judge may order the production of information and materials in whatever form, from the

152 commonwealth or any person or entity, by subpoena or other legal process.

153 § 8. Laboratory.

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

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

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

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

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

166 (f) Neither the prosecuting attorney nor the moving party shall communicate with the laboratory  
167 without simultaneously communicating with the other party. (g) The laboratory shall endeavor to  
168 retain and maintain the integrity of a sufficient portion of the evidence or biological material for  
169 replicate analysis. If, after initial examination of the evidence or biological material, but before the  
170 actual analysis, the laboratory determines that there is insufficient material for replicate analysis, it  
171 shall simultaneously notify in writing the prosecuting attorney, the moving party, and the judge. In the  
172 event that there is insufficient material to perform replicate analysis, upon request of either party, the  
173 judge shall make such orders to ensure that representatives of the moving party and the prosecuting  
174 attorney have the opportunity to observe the analysis. Such analysis shall be subject to the rules and

175 practices of the laboratory.

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

179 § 9. Timeliness of analysis.

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

181 § 10. Costs.

182 The costs of the analysis shall be borne:

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

185 (b) by the commonwealth; or

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

187 § 11. Effect on other proceedings.

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

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

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

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

198 § 12. Disclosure of results of analysis.

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

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

203 § 13. Effect of analysis.

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

207 (1) The prosecuting attorney to provide copies of the report of the analysis to the Superintendent of the  
208 Department of Correction and the Chairperson of the Parole Board; (2) The prosecuting attorney to  
209 provide copies of the report of the analysis to relevant criminal offender databases; or  
210 (3) The moving party to assume the cost of the analysis.

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

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

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

216 A. No additional analysis is requested, or

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

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

221 (1) On motion of the prosecuting attorney and good cause shown, order replicate analysis of the  
222 evidence or biological material and a stay of further proceedings pending the result of the replicate  
223 analysis, with the cost of such replicate testing to be borne by the prosecuting attorney;  
224 (2) Order the release of the moving party from custody; (3) On motion of the moving party, order a  
225 new trial; or (4) Order any other relief that serves the interest of justice.

226 §14. Notice to victims.

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

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

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

233 § 15. Waiver of rights.

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

238 § 16. Preservation of evidence and biological material.

239 (a) Any governmental entity that is in possession of evidence or biological material that is collected for  
240 its potential evidentiary value during the investigation of a crime, the prosecution of which results in a  
241 conviction, shall retain such evidence and biological material for the period of time that any person  
242 remains in the custody of the commonwealth in connection with that crime, without regard to whether  
243 the evidence or biological material was introduced at trial. Each governmental entity shall retain all

244 such evidence and biological material in a manner that is reasonably designed to preserve the evidence  
245 and biological material and to prevent its destruction or deterioration.

246 (b) The Attorney General and the Secretary of Public Safety shall promulgate regulations governing  
247 the retention and preservation of evidence and biological material by any governmental entity, which  
248 regulations shall include standards for maintaining the integrity of the materials over time, the  
249 designation of officials at each governmental entity with custodial responsibility, and requirements of  
250 contemporaneously recorded documentation of individuals having and obtaining custody of any  
251 evidence of biological material.

252 § 17. Liability.

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

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

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

262 § 18. Appeal.

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