

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Eugene L. O'Flaherty

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 to provide access to scientific and forensic analysis.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Eugene L. O'Flaherty	2nd Suffolk

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1636 OF 2007-2008.]

The Commonwealth of Massachusetts

—————
In the Year Two Thousand and Nine
—————

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

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

17
18 Chapter 278A. Post Conviction Access to Forensic and Scientific Analysis.

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20 § 1. Definitions.

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

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24 “Analysis” shall mean the process by which a forensic or scientific technique is applied to evidence or biological
25 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 contendere, entered by
27 the trial court.

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

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

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

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

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

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

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

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

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

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

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47 § 2. Applicability.

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

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52 § 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

74 or

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

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

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

83 the moving party has previously provided them to the prosecuting attorney, whether they were offered or admitted
84 as evidence in the underlying case, or 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, during which
86 the results of forensic or scientific analysis was offered as evidence by either the moving party or prosecuting
87 attorney.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

124 The judge in his discretion may assign or appoint counsel to represent a moving party in the preparation and
125 presentation of motions filed under this Chapter.
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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 in the
130 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 the judge
132 allows such a motion, the judge shall order the commonwealth to produce the moving party at the hearing.
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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 findings of fact
136 and conclusions of law, that support the decision to allow or deny a motion brought under this Chapter.

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

- 139 (1) that the evidence or biological material exists;
140 (2) that the evidence or biological material has been subject to a chain of custody that is sufficient to
141 establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
142 (3) that the evidence or biological material has not been subjected to the requested analysis;
143 (4) that the requested analysis has the potential to result in evidence that is material to the moving party's
144 identification as the perpetrator of the crime in the underlying case;
145 (5) that the purpose of the motion is not the obstruction of justice or delay;
146 (6) that the results of the particular type of analysis being requested have been found to be admissible in
147 courts of the commonwealth; and
148 (7) that, if the results of the requested analysis are favorable to the moving party, justice may not have been
149 done in the underlying case.

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

152
153 § 8. Laboratory.

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

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

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

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

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

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

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

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

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177 § 9. Timeliness of analysis.

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

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180 § 10. Costs.

181 The costs of the analysis shall be borne:

182 (a) by the moving party if the moving party is not indigent and has sufficient means to make such payment; or (b) by
183 the commonwealth; or (c) by both the moving party and the commonwealth, in shares as the court deems equitable.

184
185 § 11. Effect on other proceedings.

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

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

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

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

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197 § 12. Disclosure of results of analysis.

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

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

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203 § 13. Effect of analysis.

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

209 (2) The prosecuting attorney to provide copies of the report of the analysis to relevant cr iminal
210 offender databases; or

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

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

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

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

217 A. No additional analysis is requested, or

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

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

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

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

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

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

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229 § 14. Notice to victims.

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

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

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

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237 § 15. Waiver of rights.

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

242

243 § 16. Preservation of evidence and biological material.

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

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

255
256 § 17. Liability.

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

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

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

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266 § 18. Appeal.

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

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