

**SENATE . . . . . No.**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

**Cynthia Stone 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 to provide access to forensic and scientific analysis.

PETITION OF:

NAME:

Cynthia Stone Creem

DISTRICT/ADDRESS:

First Middlesex and Norfolk

[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. S00907 OF 2007-2008.]

## The Commonwealth of Massachusetts

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In the Year Two Thousand and Nine

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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 techniques  
2 are often used to analyze evidence or biological material obtained during the investigation of a  
3 crime, and, as these techniques become more accurate, their use can, in some cases, conclusively  
4 establish a person's guilt or innocence, or otherwise provide significant probative evidence.

5 It is further found that as these techniques have improved, they have allowed analyses of earlier  
6 obtained evidence or biological materials and that in some circumstances, modern techniques can  
7 be used to demonstrate that a conviction that predates the development of such techniques was  
8 based on incorrect factual findings, and these forensic and scientific techniques provide a more  
9 reliable basis for establishing a factually correct verdict than the evidence available at the time of  
10 the original conviction.

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

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

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

## 18 Chapter 278A

### 19 Post Conviction Access to Forensic and Scientific Analysis

#### 20 Section 1. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 Section 3. Requirements and procedures for filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

102 (e) A person who pleaded guilty or nolo contendere in the underlying case may file a motion  
103 under this Chapter. A judge shall not find that identity was not or could not have been a material  
104 issue in the underlying case because of the plea. A person who is alleged to have, or admits to  
105 having, made a statement that is or could be incriminating may file a motion under this Chapter.

106 A judge shall not find that identity was not or should not have been a material issue in the  
107 underlying case because the moving party made, or is alleged to have made, an incriminating  
108 statement.

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

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

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

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

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

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

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

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



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

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

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

#### 136 Section 5. Appointment of counsel.

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

#### 139 Section 6. Hearing.

140 (a) The court shall order a hearing on the motion if it conforms with the requirements of section  
141 3.

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

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

147 Section 7. Ruling on the Motion.

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

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

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

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

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

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

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

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

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

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

167 Section 8. Laboratory.

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

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

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

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

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

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

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

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

197 Section 9. Timeliness of analysis.

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

199 Section 10. Costs.

200 The costs of the analysis shall be borne:

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

203 (b) by the commonwealth; or

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

205 Section 11. Effect on other proceedings.

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

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

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

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

216 Section 12. Disclosure of results of analysis.

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

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

221 Section 13. Effect of analysis.

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

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

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

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

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

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

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

236 A. No additional analysis is requested, or

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

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

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

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

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

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

247 Section 14. Notice to victims.

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

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

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

254 Section 15. Waiver of rights.

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

259 Section 16. Preservation of evidence and biological material.

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

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

274 Section 17. Liability.



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

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

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

284 Section 18. Appeal.

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