The Commonwealth of Massachusetts

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The Honorable Cynthia S. Creem
Senate Chair, Joint Committee on the Judiciary
State House, Room 405
Boston, MA 02133

The Honorable Eugene L. O'Flaherty
House Chair, Joint Committee on the Judiciary
State House, Room 136
Boston, MA 02133

RE: S.B. 753 and H.B. 2165
An Act providing access to scientific and forensic analysis

Dear Chairwoman Creem and Chairman O'Flaherty:

The Boston Bar Association rightly argues "that for every defendant wrongly convicted, a criminal goes free, and society remains at risk while the individual who has escaped the consequences of his actions is free to commit crimes against other victims." As Suffolk County District Attorney, from first-hand experience, I can attest to the truth of this position.

Early in my tenure as District Attorney, defense attorneys brought a motion for post-conviction DNA testing for a man named Anthony Powell. Powell had been convicted of the rape of a woman in Roxbury that occurred in 1991. As I have in virtually all such cases, I assented to the motion and the testing went ahead. DNA samples that had been recovered were submitted to the FBI's Combined DNA Index System, or CODIS. That testing led to two separate results.

First, the testing led to the exoneration of Anthony Powell, who had served 12 years in prison for the Roxbury rape after his erroneous conviction at a 1992 trial. Second, while the sample did not match Anthony Powell's DNA, it did match another sample in the CODIS database connected to a rape that had also occurred in 1991 in Jamaica Plain. Absent the offender's name, we indicted his unique DNA profile in 2006.

In 2007, an individual named Jerry Dixon was convicted of separate crimes, served a brief period of incarceration, and was required to give a DNA sample because of a 1991 armed robbery conviction. That sample was entered into the CODIS database, which in 2008 connected Dixon to the 1991 rapes in Jamaica Plain and Roxbury. Dixon is in custody and presently awaiting trial.

This case embodies all the reasons we need to update Massachusetts laws with respect to post–conviction DNA testing. If enacted, this legislation will codify many of the practices that I voluntarily put in place nearly a decade ago. These are good practices that serve the interest of justice, both in preventing and correcting erroneous convictions, and in helping to hold the guilty accountable.

Accordingly, I embrace the spirit of this legislation wholeheartedly. At the same time, I urge this Committee and the Legislature as a whole to review and adopt the changes contained in the attached addendum in order that this legislation accomplish its full purpose as espoused by the Boston Bar Association, which is to prevent the possibility of erroneous conviction and ensure that the guilty party is brought to justice.

In addition to the changes I am proposing, I believe this bill would be strengthened immeasurably if we use this opportunity to look at the overall picture of DNA evidence in Massachusetts. The Commonwealth presently lags behind many other states and the Federal government in the strictures imposed on the collection of DNA samples from those who are arrested and charged with serious crimes. It would be in the best interest of justice and public safety to expand CODIS.

For over a century, law enforcement has been collecting fingerprint evidence from individuals arrested for a crime. It makes sense to continue this practice but in full keeping with modern available science, which would include arrestee DNA sampling. While some might regard this as a controversial move, courts all across the country have rightly viewed the taking of a DNA sample at arrest as being no more intrusive than obtaining a fingerprint.

To date, 24 states and the Federal government have adopted versions of Katie's Law, which requires arrestee DNA sampling. Massachusetts, meanwhile, does not permit DNA sampling even for those arrested and charged with murder, burglary, serious sex crimes or any other felony. In fact, Massachusetts remains one of only 13 states that do not even mandate that DNA samples be submitted from those *convicted* of sex crime misdemeanors.

As the cases of Anthony Powell and Jerry Dixon make clear, our obligation here cannot end with exonerating those who have been wrongly convicted. The same evidence that exonerates must be used to apprehend and hold the guilty accountable. As other states and the Federal government update their laws in recognition of this new science, and indeed as these changes have been sanctioned by courts all across the country, it is time for Massachusetts to update its own laws to ensure that no one is wrongly convicted and that those who are guilty of serious crimes such as murder and rape are brought to justice.

For these reasons, I wholeheartedly support the spirit of this legislation and respectfully urge the Legislature to adopt the changes outlined in the attached addendum, and to further use this opportunity to adopt Katie's Law as a sensible companion piece to this bill.

Sincerely,

Daniel F. Conley
Suffolk County District Attorney

ADDENDUM

Substantive changes needed:

1. The bill does not address obtaining DNA samples from persons other than the defendant. Indeed, the bill explicitly makes simple notice to the victim by the prosecutor voluntary (§ 14). A DNA mismatch between a defendant and non-semen biological material left at the scene begs the question whether the DNA would match the victim or a consensual partner. As written, there is no explicit authorization for obtaining biological samples from such persons or testing them. As a result, the testing would occur just on the defendant's sample and not on other samples that might be necessary for a meaningful result. Instead, the bill should allow the judge to require the provision of necessary samples from third parties and to include testing of these samples.

2. In section 3(c) and section 7(c), the bill creates an undefined right to move for discovery. Indeed, section 7(c) invokes Mass. R. Crim. P. 14 and 17, both rules that apply only to pretrial discovery. Instead, the bill should specify that a defendant (or the Commonwealth) can move for discovery under Mass. R. Crim. P. 30(c)(4), which already creates a well-defined and well-understood mechanism for post-conviction discovery.

3. In section 11(a), the bill requires a defendant with a pending appeal or post-conviction motion to file a motion to request a stay of such proceedings, and requires such stays to be liberally granted. There is no reason to require the defendant to file a motion for a stay or require the court to liberally grant it. Instead, the bill should permit a motion for testing to be considered parallel with any other appeal or post-conviction motion. Appeals, especially of murder cases, already take a substantial amount of time and this testing should not unnecessarily add to a delay of justice.

4. In section 8(e), the bill bans exhaustive testing unless both the defendant and the Commonwealth agree. Instead, the motion judge should be allowed to authorize exhaustive testing. Indeed, exhaustive testing should require the court's approval, even if the parties agree.

Technical changes needed

1. Section 1 offers definitions for "criminal offender databases" and "inventory" but those terms are not used again.

2. In section 3(d), the bill switches from "factual innocence," defined in section 1, to "actual innocence." As "actual innocence" is a term of art in habeas corpus litigation and does not mean factual innocence, this should be corrected.

3. In section 6(a), the bill requires a hearing. A court should be able to rule on the papers, so "shall" should be replaced with "may."

4. In section 6(c), the bill states that the defendant may move to be present and the Commonwealth shall produce the defendant if the court so orders. This is already the law for all post-conviction hearings. This provision merely adds confusion.

5. In section 7(b)(3), the word "already" is missing from before "been subjected to the requested analysis."

6. In section 3(b)(5), the defendant is required to make a showing regarding why he has not previously requested testing. Section 7(b), however, omits any requirement that the judge make a finding on that issue.

7. In section 12(b), the bill allows a judge to order production of underlying laboratory data. But section 8(d), correctly, makes that mandatory.