



16 Beacon Street
Boston, MA 02108

Phone (617) 742-0615
Fax (617) 523-0127
www.bostonbar.org

October 14, 2025

Maura A. Looney, Clerk
Supreme Judicial Court of Massachusetts
John Adams Courthouse, Suite 1400
Boston, MA 02108

Re: Commonwealth v. *Shawn Tanner*,
No. SJC-13647
Amicus Curiae Letter

Dear Clerk Looney:

As an organization dedicated to advancing the highest standards of excellence for the legal profession, the Boston Bar Association (“BBA”) respectfully submits this letter in response to the amicus solicitation issued by the Justices in the above-captioned case: “Whether G. L. c. 278A permits postconviction forensic testing where the defendant dies after such testing is ordered but before it is completed.”

As the primary drafter of the language that ultimately became G.L. c. 278A (“Chapter 278A”), the BBA writes separately to remind the Court of the process that led to its enactment, and to underscore the extent to which the drafters were motivated by systemic considerations—not simply to provide a remedy to the wrongly convicted, but to prevent wrongful convictions from occurring and from going undetected. As the BBA recognized, “the tragedy of convicting the wrong person goes beyond the suffering of the individual” and includes threats to public safety and an undermining of trust in our courts and justice system. *See Boston Bar Association, Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts*, Final Report (December 2009) (“Task Force Report”).

With those goals in mind, and guided by its mission to facilitate access to justice for all individuals, the BBA encourages postconviction forensic testing generally and requests that it proceed here.

BBA Involvement in Enactment of Chapter 278A

The BBA has a special interest in cases addressing Chapter 278A. In 2008, the BBA convened a Task Force charged with examining the prevalence of wrongful convictions and making recommendations to remedy and prevent them. *See Task Force Report*. That work culminated in a draft of the bill that ultimately became Chapter 278A.

The Task Force was composed of esteemed attorneys from numerous relevant fields, including law enforcement officials, prosecutors, defense attorneys, a senior scientist from the Massachusetts State Police Crime Laboratory, a senior attorney from the Massachusetts Executive Office of Public Safety, Chief Counsel for the state’s Committee for Public Counsel Services, and the former Chief Justice of the Appeals Court. The Task Force fairly reflected all three branches of government and all sides of the criminal adversarial process. *See Task Force Report* at 1-2.

Spurred on by advances in DNA technology and its ability to expose wrongful convictions, the Task Force’s work included developing recommendations related to postconviction relief and forensics. *Id.* at 58-66.

Noting that Massachusetts was then one of only four states without a postconviction access and testing statute, the Task Force’s recommendations focused primarily on remedying that problem.

Specifically, the Task Force recommended that “the Legislature should enact, and the Governor should sign into law, a statute providing for postconviction access to and testing of forensic evidence and biological material by defendants who claim factual innocence and for postconviction retention of biological material.”¹ The BBA provided a proposed bill as an exhibit to the Task Force Report.

The BBA’s proposed legislation became the draft for what is now Chapter 278A. Professor David M. Siegel, a member of the Task Force, testified before the Joint Commission on the Judiciary in support of the bill.

The Task Force’s recommendations and commentary demonstrate that its focus—and the intent behind the draft language—was broader than simply providing a remedy to the wrongly convicted. Indeed, in discussing the need for postconviction access and testing, the Task Force focused not simply on its ability to test claims of innocence but also to permit prosecutions based on the newly discovered evidence. And as referenced above, it noted that wrongful convictions undermine trust in our courts and justice system and threaten public safety by failing to punish the actual perpetrators.

Prior BBA Amicus Briefs Regarding Chapter 278A

The BBA has submitted amicus briefs in several cases involving the scope of Chapter 278A, and the consistent theme of those briefs is that the purpose of the statute is not served by engaging in restrictive readings or application in a way that prevents access and testing.

For example, in *Commonwealth v. Wade*, 475 Mass. 54 (2016) (“Wade III”), the BBA submitted an amicus brief urging the SJC to reverse the trial court’s order denying the defendant access to forensic testing under Chapter 278A. *See generally* Wade III, Brief of Amicus Curiae, Boston Bar Association (“Wade Amicus”).

The BBA argued that by erroneously increasing the burden imposed on a defendant seeking to utilize Chapter 278A, the trial court contravened both the plain meaning of the statute and the Legislature’s intent. *Wade Amicus* at 15-18. This Court agreed, holding that the plain text of Chapter 278A requires that a defendant satisfy only one of the threshold requirements under § 3(b)(5). *Wade III*, 475 Mass. at 55.

In *Commonwealth v. Johnson*, the BBA again argued for a broad interpretation of Chapter 278A, urging the Court to find that a defendant required to register as a sex offender as a consequence of a Massachusetts conviction satisfies the “restraint on liberty” threshold requirement. Although the Court did not reach “whether the liberty interests implicated by sex offender registration fall within the scope of chapter 278A,” it did agree that Chapter 278A should be construed broadly, ruling that Johnson’s incarceration for failing to register was sufficient to trigger his statutory right to DNA testing.

The BBA took a similar approach in *Commonwealth v. Jenks*, 487 Mass. 1032 (2021), arguing that the threshold showing required to obtain a hearing under Chapter 278A is intentionally low and that to merit a hearing under Section 3, a defendant merely needs to assert information that *could* satisfy the statutory factors. *See generally* Jenks, Brief of Amicus Curiae, Boston Bar Association. Once again, the Court agreed, finding that the defendant satisfied the “low bar under §3(b)(5)(iv) to be entitled to a hearing on his motions.”

Although these cases involve different issues, the throughline is clear: the purpose of Chapter 278A is met through a broad interpretation that errs in favor of facilitating access and testing, not restricting it. This

¹ Other recommendations complemented the Task Force’s goal of creating a robust system permitting postconviction access to and testing of forensic evidence. Those recommendations included: (i) expanding membership of the Commonwealth’s Forensic Sciences Advisory Board to include a broader range of scientific and criminal justice system stakeholders and (ii) reviewing and enhancing law enforcement training and practices for evidence collection. *See* Task Force Report at 61-65.

principle is a direct outgrowth of the Task Force's concern about the perils of wrongful convictions writ large, including issues of public safety and erosion of trust in our legal system.

Statement of BBA Regarding This Case

Since publication of the Task Force Report in 2009, the BBA has consistently advocated for a broad interpretation and application of Chapter 278A, and it does so here as well.

As this Court has previously observed, in passing Chapter 278A, the Legislature sought to "remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques." Wade, 47 Mass. at 504, quoting 2011 Senate Doc. No. 753, 2011 House Doc. No. 2165 (C. Add at 4). The injustice of wrongful conviction is not limited to those wrongly convicted. To the contrary, wrongful convictions have far reaching consequences that affect crime victims, their loved ones, and the public at large.

While the text of Chapter 278A does not expressly apply to defendants who died before testing could be accomplished, neither does it expressly restrict such application. Given that the statute does not specifically address this question, the legislative history and broader context for the legislation become especially important. The BBA—through the Task Force and otherwise—played a singular role in the efforts that led to the passage of Chapter 278A. From the BBA's perspective—both in 2009 when it published the Task Force Report and now—the provisions of Chapter 278A were not intended solely to provide a remedy for those wrongly convicted, but rather to hold our criminal legal system up to the highest standard of fairness and quality, and that goal is not achieved by vacating an order for testing, particularly where the motion for testing was not opposed.

Conclusion

For all of the reasons above, the BBA urges the Court to affirm the judgment of the trial court denying the Commonwealth's motion to vacate.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party, party's counsel, or person or entity other than amicus curiae and its counsel, authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Neither amicus curiae nor its counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.



Suma V. Nair, BBO #663127
BBA President
16 Beacon Street
Boston, MA 02108
617.742.0615
snair@fiduciary-trust.com

CERTIFICATE OF SERVICE

I, Michael Avitzur, certify that on October 14, 2025, pursuant to Mass. R. App. P.13(d), a copy of the foregoing Amicus Curiae Letter in *Commonwealth v. Tanner*, SJC-13647, was filed electronically by operation of the Court's electronic filing system, with notice to all parties indicated therein. Parties may access this filing through the Court's system.

/s/ Michael Avitzur, BBO #600951
Boston Bar Association
16 Beacon Street
Boston, MA 02108
617.778.1942
mavitzur@bostonbar.org