Supreme Judicial Court
Sitting as the Law Court
Docket Number Kno-14-187

STATE OF MAINE
Appellee

v.

DENNIS J. DECHAINE
Appellant

On Appeal from the Knox County Superior Court

Brief for Appellant

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PROCEDURAL HISTORY

On August 28, 2008, the Defendant filed a *Post -Judgment Conviction Motion for DNA Analysis and for New Trial*, pursuant to 15 M.R.S.A., § 2137 et seq. (A at 15).[1]

On March 20, 2009, the Court entered an Order (A at 17) impounding the Combined Inventory and Description of Previous Testing which had been submitted by Agreement of the State and the Defendant. Previous DNA testing had been done in this matter as a result of a *Motion for New Trial* which had been withdrawn orally on September 23, 2005.

The Court issued a *Scheduling Order* on the new Motion on March 5, 2010 (A at 18). On October 1, 2010, the Defendant filed a *Motion to Define the Scope of Evidence* and a *Motion for a Testimonial Hearing* (A at 20). The Defendant sought to include in the DNA hearing other evidence including time of death evidence, evidence of alternative suspects, exculpatory notes from law enforcement and all exculpatory evidence of the Defendant. The State opposed the Motion by way of a *Memorandum* dated October 14, 2010 (A at 22).

On November 10, 2010, the Court issued an *Order* (A at 27) which denied the Defendant the right to introduce other evidence of an exculpatory nature, including the time of death evidence, except it allowed alternative suspect evidence if it was implicated by DNA evidence.

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1. Designations to portions of the *Appendix* shall be (A at ___)

On January 26, 2011, after Agreement between the State and the Defendant, the Court issued an *Order (*A at 35) as to what items should be subject to DNA analysis and the method by which such testing was to be conducted.

On July 25, 2011, the Defendant filed *a Motion for Recusal* (A at 38) arguing, inter alia, that the Presiding Justice, Carl O. Bradford, had refused the Defendant the right to conduct DNA testing at his own expense prior to the original trial in 1989 and that the Justice was, under all the circumstances of this case, prejudiced against the Defendant. The Court took this Motion under advisement on July 29, 2011. The Court formally Denied the Motion on April 9, 2014 after the DNA hearings. The State opposed the Motion by *Memorandum* dated July 28, 2011 (A at 43). Also on July 25, 2011, the Defendant filed a *Motion to Present Claim of Actual Innocence* (A at 40), again seeking to present all exculpatory evidence, including time of death evidence, at the upcoming hearing. The State filed a *Memorandum in Opposition to the Claim of Actual Innocence* dated July 28, 2011 (A at 43). On August 17, 2011, the Court issued an *Order* (A at 49) denying the Defendant's Motion to present a claim of Actual Innocence.

The case proceeded to hearing commencing on June 12, 2012 in the Cumberland County Court. At the hearing which was held over the course of three days, the Defendant produced testimony of eleven witnesses and the State produced testimony of four additional witnesses. There were also two Stipulations entered into record. After the conclusion of the third day, the Defendant sought the right to conduct some additional DNA testing, "touch DNA" using a different methodology on the items to be tested

and the Court left open the record so that such testing could be conducted and for additional testimony as needed based on that testing.

Additional DNA was discovered and another hearing was necessitated. Prior to the additional hearing, the Defendant again filed a *Motion to Reconsider* dated November 4, 2013 (A at 51), asking that the Court allow additional exculpatory evidence, including testimony from two renown pathologists on the issue of time of death. On November 18, 2013 this Motion was denied (A at 53).

The additional hearing was conducted on November 7 and November 8, 2013. The Defendant offered three witnesses, including the same two DNA experts from the first hearing and the State offered two DNA experts. The new evidence related to the significance of the new DNA evidence that had been obtained after the June 2012 hearing.

FACTS AND EVIDENCE PRODUCED AT DNA HEARING

After Sarah Cherry's body was located on July 8, 1988, it was taken to a morgue in Augusta for purposes of an autopsy. Dr. Ronald Roy was the medical examiner who performed the autopsy. Others present at the autopsy included John Otis of the Maine State Police who worked at the Crime Lab at the time (H at 5)[1] and Assistant Attorney General Fern LaRochelle who was director of the Criminal Division also at that time (H at 193). During the autopsy, Sarah Cherry's fingernails were clipped and turned over to John Otis (H at 28, 29). At the DNA hearing, John Otis stated that he did not have any concerns about the procedures used at the time of the autopsy (H at 30). After receiving the fingernail clippings, John Otis placed them in a container and later turned them over to Judith Brinkman, who was a chemist who worked at the Maine State Crime Lab (H at 32). Blood testing was performed on the fingernail clippings and in the course of that testing, 8 of 10 of the clippings were consumed, leaving only the two thumbnail clippings for additional testing (H at 94).

After Attorney Thomas Connally's Motion to Continue the trial to conduct DNA testing was denied in February 1989, the case proceeded to trial the next month. The State brought the fingernail clippings to the trial and although it did not offer the clippings into evidence, the defense attorney marked the same as a defense exhibit and offered them into evidence (H at 102). At the DNA hearing in June of 2012, jury foreman Bradley Hunter testified that the clippings went into the jury room in a sealed box which was not opened (H at 49).

1. References to the transcripts of the Official Court Reporter at the DNA hearing shall be (H at ___) through (H5 at ___) for the five days of hearing.

The fingernail clippings were returned to the Clerk of Courts in Knox County Superior Court, Susan Guillette after the jury's verdict in this case. Ms. Guillette testified by Stipulation that the clippings were stored in an exhibit room which was locked at night, that clerks would escort anyone who asked to see the exhibits and that she had no knowledge of any of the exhibits being tampered with, opened or otherwise handled.

Tom Connally testified during the DNA hearing how he picked up the fingernail clippings on April 5, 1992 after receiving a standard court notice that trial exhibits would be destroyed if not retrieved (H at 104, 107). After retrieving the same, he stored the same in a file at his office (H at 108). The secretary at the law office testified that she did not handle the clippings while they were stored at the office (H at 171).

Carol Waltman, a good friend of Dennis Dechaine, was not content with the verdict which was reached at his trial. She later became the President of an organization known as 'Trial and Error' which was trying to get a new trial for Dennis Dechaine. At a time when the fingernail clippings were in the possession of Tom Connally, Carol Waltman contacted Peter Newfield at the *Innocence Project* in New York City (H at 57) seeking guidance as to how she could help Dennis Dechaine. In the course of her endeavors, Carol Waltman discovered that clippings were at Tom Connally's office. She discovered on March 5, 1993 that Tom Connally had the clippings and she again contacted Peter Newfield and Barry Scheck for instructions as to how to proceed (H at 59). Thereafter, she contacted Tom Connally with information about CBR Labs in Boston which could conduct DNA testing on the clippings. The clippings arrived at

the lab on June 10, 1993 and photos were taken of it upon arrival showing it was sealed and the seal was not broken (H at 62). At the DNA hearing, Carol Waltman detailed the steps she had taken to protect the integrity of the nail clippings (H at 61-64). In addition, she went to the Maine State Prison and was able to get a blood sample from Dennis Dechaine to forward to the lab in Boston (H at 65-69). After DNA testing at CBR Labs was completed, a report dated September 9, 1993 was issued which excluded Dennis Dechaine as the source of the DNA detected under the left fingernail clipping of Sarah Cherry (A at 55).[2] A report from CBR dated May 24, 1994 was later sent to Barry Scheck at the Innocence Project confirming the lab's findings (A at 58). There was no evidence of tampering when the nail clippings were at CBR Labs (H at 165) and even the State's DNA expert, Fred Bieber, testified that he had formerly worked at the CBR Lab (Dr. Bing) and that the lab used good techniques in 1993 (H3 at 27, 29).

Just prior to the testing by CBR Labs, on March 31, 1992, the State issued an evidence letter of items in its possession that it proposed to destroy by the Attorney General's Office (H at 109). This letter included evidence from the Dennis Dechaine case that had not been used at trial. The letter was in the nature of an internal memo and was not shared with defense counsel (H at 200). After retrieving the fingernail clippings, together with other defense exhibits, Tom Connally filed a Motion for a New Trial on May 5, 1992, the focus of which was on an alternative suspect. It was later learned that the remaining evidence from the Dechaine investigation was destroyed by the State on June 18, 1992 and therefore would become unavailable for DNA testing (H at 150).

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2. References to the Appendix associated with this Brief shall be (A at ______)

On September 21, 1993 CBR Labs returned to Tom Connally the remaining fingernail clippings (H at 113). Eventually the State discovered that the clippings were in Tom Connally's possession, and after a further hearing, they were turned over to Detective Ron Gallant on December 20, 1993 (H at 118). Detective Gallant testified at the DNA hearing by Stipulation, that on December 20, 1993, he traveled to the Lincoln County Superior Court and received a bag of evidence from Tom Connally, including the right and left fingernail clippings and took them to the crime lab for safekeeping.

At the DNA hearing in June 2012, the Defendant offered, inter alia, the testimony of Catherine MacMillan, a forensic DNA analyst and the State CODIS Administrator, which included comparing DNA profiles and generating statistical significance. She described in detail her work in this case starting in 2003 (H at 214). Her work included reviewing a report from Dr. Bing's lab dated December 17, 1997 (A at 62). That report was issued after the Boston lab had an opportunity to analyze the extract from the fingernail clippings after the lab had known samples from both Dennis Dechaine and Sarah Cherry. Catherine MacMillan testified that report also excluded Dennis Dechaine as the source of the DNA under the left fingernail clipping of Sarah Cherry (H at 237).

Catherine MacMillan testified at length about her work on this case, including work that led to the exclusion of numerous people who had something to do with the case or handling Sarah Cherry's body (A at 65). She testified as to the DNA testing she did including her work in conjunction with *Orchid Cellmark Lab*. She concluded that no other male DNA had been detected during that work on any item tested except for the fingernail DNA (H at 253). She also concluded that although the male DNA under the

fingernail was only a partial DNA profile, nonetheless, the exclusion of Dennis Dechaine as the source of that DNA was valid (H at 264).

At the time of the DNA hearing in June 2012, the Defendant also offered the testimony of two other DNA experts. The first expert was Dr. Rick Staub who has a Ph.D in genetics and who was forensic laboratory director for *Orchid Cellmark*, a Texas laboratory which conducted DNA testing in this case in conjunction with the Maine State Lab (H2 at 6, 12). He explained that the work done initially had been STR testing and that he agreed with the opinion of Catherine MacMillan which excluded Dennis Dechaine (H2 at 29). He verified that using RFU levels lower than the standard 150, which was done in this case (RFU 50) would still give a valid profile (H2 at 16). He also testified about the YSTR testing (male chromosome) on other items in this case (A at 80) and the only clear male Y-STR was on the fingernail clippings (H2 at 28). He emphasized that the DNA on the fingernail clipping was very clearly from a single individual (H2 at 27).

In order to rebut the scientific findings in this case, the State theorizes that the DNA was the result of contamination. In support of that position, the State offered the testimony of Robert Goodrich who was an autopsy technician who worked with the chief medical examiner at the time of Sarah Cherry's autopsy and who also was present at the autopsy (H2 at 65, 76). Mr. Goodrich conceded that he does not remember details of that autopsy and that he was not involved in collecting the fingernail clippings (H2 at 69). Mr. Goodrich describes the conditions of the morgue used at that time to do autopsies and

how mortuary instruments, including clippers, were not properly cleaned, although sometimes rinsed and disinfected (H2 at 84). He concedes, however, that he did not express any concerns about the quality of the autopsy performed in this case (H2 at 78) and did not express a concern about lab conditions until 2004, after Dennis Dechaine had filed a Motion seeking a new trial based upon the DNA testing that had been conducted (H2 at 87).

Additionally, the Defendant offered the testimony of Eric Wright, the Assistant Attorney General who was assigned the Dechaine case. He conceded in his testimony that at the time of trial (March 1989) that no concerns had been expressed about the quality of lab conditions or in the way mortuary instruments were used (H2 at 126, 129).

To bolster its argument that the DNA evidence was contaminated, the State offered the testimony of Dr. Frederick R. Bieber who does genetic testing and who teaches at Harvard Medical School. After qualifying Dr. Bieber as an expert, the State posed a hypothetical question predicated on what it now contends were bad autopsy practices in 1988. Based upon this hypothetical, Dr. Bieber opines that the practices at that time would be a textbook recipe for contamination (H3 at 25 -27). He concedes, however, that he never visited the morgue (H3 at 40). He cannot quantify the percentage of the possibility of contamination (H3 at 39-40). He also expressed concern, given the hypothetical question, about autopsy results which may have been used in other cases successfully prosecuted by the State, whether some corrective action should have been taken (H3 at 41).

Next, the State offered the testimony of Dr. Carll Ladd, who is the supervisor of the DNA section at the Connecticut Forensic Laboratory and is a forensic consultant. The State offered the same hypothetical which was offered to Dr. Bieber, and Dr. Ladd parroted Dr. Bieber's testimony (T3 at 55 -60). He also testified about the possibility of DNA transfer from fingernail clippers used in sequential autopsies. On cross-examination, Dr. Ladd concedes that he did not do any experiments using nail clippers to verify contamination or the possibility of transfer (H3 at 76). He also concedes that although he believes the lab conditions to be ripe for contamination, he cannot quantify the probability of that having happened (H3 at 97).

Dr. Greg Hampikian who is a geneticist and the Director of the *Idaho Innocence Project* and who previously worked with Dr. Ladd (H3 at 100) does not agree that he would expect to see contamination based upon the facts of this case (H3 at 111). He testified that to determine if a DNA sample is contaminated, you need to have a 'control' for comparison and in this case you have a great control which is the other half of the fingernail clipping (H3 at 113). There is no contamination because on the 'control' there is the DNA of the victim and nothing else. Dr. Hampikian also disagrees that he would expect to see contamination under the conditions of this case (H3 at 48, 130).

In addition to Dr. Hampikian, Dr. Staub concurs that it would be hard to imagine transfer (contamination) in this case from the nail clipper because DNA under the nail is from a single male contributor (H2 at 47) and there would be more than one if the DNA was the result of transfer (H2 at 32).

At the conclusion of the hearing in June 2012, the Court agreed to leave the hearing open so that additional testing could be done using an alternative methodology (scraping) on the remaining items to determine if other DNA could be located. Scrapings were taken from t-shirt, bra, handkerchief, bandana and scarf (ligature) (H4 at 63). There was additional DNA located but it was low quantity (H4 at 59, 61). The initial report of this testing, dated August 31, 2012 (A at 69) indicated there was a mixture of two males on the t-shirt and at least two males on the ligature and a male profile on the bra. Thereafter, a blood swatch was obtained from Dennis Dechaine to compare to these results. These comparisons are not identifications, but attempts at exclusions. Dennis Dechaine is not excluded on one end of the scarf, but there is no DNA on the other. He is also not excluded from the mixture on the t-shirt. In addition, the alternative suspect, Doug Senecal, whose DNA had been obtained by private investigator, William Moore, cannot be excluded from the scarf (H4 at 74), and in fact, Senecal is more likely than Dennis Dechaine to be the source of that DNA (T5 at 21-22). The test results obtained from the additional DNA scraping are low level, degraded and difficult to analyze (T5 at 92). Dr. Staub testified at the November 2013 hearing as to statistical significance of the DNA results. Although Dennis Dechaine cannot be excluded on all items, the attribution statistic does not identify anyone (H5 at 22). In addition, there is a concern for 'transfer' contamination since the rope and scarf are alleged to have been taken from the Defendant's truck and could have come in contact with the other items (H5 at 15). After this testing was completed, both Dr. Staub and Dr. Hampikian conclude that the fingernail DNA is the best DNA evidence. It is a nice clean profile, not a mixture and not likely contaminated (H4 at 83; H5 at 13).

In the final analysis, the question is whether the Defendant has shown by clear and convincing evidence that the DNA test results and evidence at this hearing, together with all the other evidence in the case, old and new, would make it probable that a jury would have come to a different verdict if this DNA evidence had been submitted to them. Stated differently would a jury probably have a reasonable doubt after hearing this DNA evidence together with all other evidence either heard at trial or other hearing or proceeding.

ISSUES

I. **THE COURT ERRED IN NOT GRANTING A NEW TRIAL BASED UPON THE DNA EVIDENCE.**

II. **THE PRESIDING JUSTICE ERRED IN NOT RECUSING HIMSELF FROM THE DNA HEARING.**

III. **THE COURT ERRED IN NOT ALLOWING ADDITIONAL EVIDENCE OF ACTUAL INNOCENCE.**

I. THE COURT ERRED IN NOT GRANTING A NEW TRIAL BASED UPON THE DNA EVIDENCE.

The Defendant contends that he has met his burden to justify a new trial based upon the DNA evidence presented to the Court. Title 15 M.R.S.A. § 2138(10)(C) sets forth the standard in this case to obtain a new trial.

> "10. *Standard for granting new trial*;court's *findings; new trial granted or denied.* If the results of the DNA testing under this section show that the person is not the source of the evidence, the person authorized in §2137 must show by clear and convincing evidence that:
>
> C. All of the prerequisites for obtaining a new trial based upon newly discovered evidence are met as follows:
>
> (1) The DNA test results when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person would make it probable that a different verdict would result upon a new trial;
> (2) The proffered DNA test results could not have been discovered by the person since the trial;
> (3) The proffered DNA test results could not have been obtained by the person prior to trial by the exercise of due diligence;
> (4) The DNA test results and other evidence admitted at the hearing conducted under this section on behalf of the person are material to the issue as to who is responsible for the crime for which the person was convicted; and

> (5) The DNA test results and other evidence admitted at the hearing conducted under this section on behalf of the person are not merely cumulative or impeaching unless it is clear that such impeachment would have resulted in a different verdict."

The primary focus of the DNA evidence offered in the instant case was on the fingernail clippings of the victim, Sarah Cherry, obtained at the autopsy. The Defendant went to great lengths at the three day hearing in June 2012 to establish the chain of custody of those clippings. The Defendant offered the testimony of all key individuals who were involved in the handling, storage or testing of the clippings for DNA results. These individuals included Detective John Otis who obtained the clippings at the autopsy, chemist Judith Brinkman who tested the clippings for blood, defense attorney Thomas Connally who offered the clippings into evidence at trial (H at 102), jury foreman Bradley Hunter who recalled the clippings were sent into the jury room (H at 49), Superior Court Clerk Susan Guillette (by stipulation) who described the safeguards used to protect the evidence after trial, the secretary for Thomas Connally who verified that the clippings were safely stored while at the attorney's office, Carol Waltman, the President of *Trial and Error*, an organization supporting the Defendant and who helped arrange for the clippings to be sent to CBR Labs in Boston for DNA testing in 1993 (H at 62) and finally Detective Ron Gallant who eventually obtained the clippings after their return from CBR Labs (by stipulation) (H at 118).

After establishing that the chain of custody of the fingernail clippings was secure, the Defendant then offered expert testimony on the DNA test results, both from the testing done at CBR Labs and additional testing done by Catherine MacMillan who worked in conjunction with Orchid Cellmark Labs, a Texas laboratory retained by the Defendant to conduct additional DNA tests. The results of all this testing universally established that the DNA on or under the fingernail clipping was not that of the Defendant. This ultimate conclusion confirmed the original results of Dr. Bing at the CBR Labs (A at 62).

Catherine MacMillan, who worked at the State of Maine Laboratory testified that although the DNA result was only a partial DNA profile, that it clearly excluded the Defendant as the source of that DNA (H at 264). In addition, the Defendant offered two other DNA experts to testify on the meaning of the results. Dr. Rick Staub, who has a Ph.D. in genetics and who at the time was the Director of Orchid Cellmark confirmed the findings of Catherine MacMillan (H2 at 29) and confirmed that the test result was a valid profile (H2 at 16). Also Dt. Staub testified to the various testing methodologies utilized during the analysis and that the source of the DNA was a single male (not Dennis Dechaine) on or under the fingernail clipping (H2 at 27).

The State responded to these findings by claiming that the test results were the product of contamination due to poor laboratory and morgue conditions at the time. To support its contention, the State offered the testimony of the autopsy technician at the time, Robert Goodrich, who questioned the cleanliness of conditions at the morgue in 1988. However Goodrich did not express this concern until after the Defendant filed his *Motion for a New Trial* in 2004 based upon DNA testing (H2 at 87).

The State additionally called two experts to support its theory of contamination. Dr. Frederick Bieber, a geneticist and teacher at Harvard Medical School hypothesized that the autopsy practices in 1988 were a textbook recipe for contamination (H3 at 25-27). He also, however, expressed concerns about other convictions the State may have obtained based upon these morgue conditions (H3 at 41).

In addition, the State offered the testimony of Dr. Carl Ladd, a supervisor of the DNA section of the Connecticut Forensic Laboratory to testify upon the possibility that DNA could have been transferred from one autopsy to the next because of sequential use of the same fingernail clippers during autopsies. However, he concedes that he did not do any independent testing on similar clippers to verify the likelihood of transfer (H3 at 97).

The Defendant contends that the State has attempted to rebut science with speculation. Nonetheless, the Defendant offered witnesses to impeach the State's theory. Eric Wright, the Assistant Attorney General who tried this case, testified that he had no concerns about laboratory conditions in 1988 - 1989 and no one expressed a concern about the manner in which mortuary instruments were used (H2 at 126, 129).

Also the Defendant offered its own expert on the subject of contamination. Dr. Greg Hampikian, a geneticist and Director of the Idaho Innocence Project opined that he would not expect contamination under the circumstances of this case (H3 at 48, 130). He supports his belief by stating that the other half of the fingernail clipping was a 'control' and that there was no such contamination on the control which had DNA of the victim only and no one else. He also disagreed with the likelihood of transfer from fingernail clippings (H2 at 32).

After the June 2012 hearing, additional testing for DNA was conducted on the victim's shirt, bra, bandana and scarf using a scraping methodology. Although additional testing resulted in the discovery of other DNA, such DNA was low level, questionable as to scientific reliability and not very probative for the purposes of identification. Both the State and the Defendant appear to concede that these additional DNA results are of very little significance in this case (A at 112, 150-151).

The Defendant contends that the fingernail clipping DNA is sufficient by itself to grant a new trial. However it is even more compelling when considered together with the evidence submitted at trial. This Court has already heard the other evidence in this case, both from the State and the Defendant,. *State v. Dechaine*, 572 A. 2d 130 (Me.). That evidence included, inter alia, testimony that there was no physical evidence of Sarah Cherry being in the Defendant's truck or of Defendant being at the Henkel residence. The physical evidence referred to includes blood, hair or fiber evidence. There is no physical evidence of Sarah Cherry on the person of the Defendant. There was no evidence that the Defendant had any connection to Sarah Cherry or the Henkel residence. The Defendant had a reputation for non-violence and testified at trial under oath that he did not commit this murder. These are a few of the areas of evidence that are exculpatory, but when combined with the fingernail DNA evidence, the Defendant has established by clear and convincing evidence that it is probable that a jury would have come to a different verdict if it had heard this DNA evidence.

II. THE PRESIDING JUSTICE ERRED IN NOT RECUSING HIMSELF FROM THE DNA HEARING

After filing a Post-Judgment Conviction Motion for DNA Analysis and for New Trial, Defendant on July 25, 2011, filed a *Motion for Recusal* (A at 38-39). In relevant part, Title 15 M.R.S.A. § 2138 (1) provides as follows:

> "The motion must be assigned to the trial judge or justice who imposed the sentence unless that judge or justice is unavailable, in which case the appropriate chief judge or chief justice shall assign the motion to another judge or justice."

Defendant contended that the Justice presiding over the DNA Motion was predisposed against him in a number of ways. The Justice had imposed the ultimate sentence in Maine at the time of the original trial, life in prison. Also during the course of this DNA Motion, the presiding Justice had already limited Defendant evidence by disallowing the use of exculpatory evidence relative to the time of death of Sarah Cherry, the victim of the murder. Most importantly the Justice was being asked to reverse a decision he had made prior to the trial. The Justice had denied Defendant the right to have DNA testing done prior to the trial, even at Defendant's own expense. The Justice was now being asked to grant a new trial based upon DNA evidence the use of which he had earlier excluded prior to trial by denying a Motion to Continue to Conduct the DNA testing. Defendant contended that under the unique circumstances of this case, that an objective Justice should be appointed who had no prior involvement in this case.

The Motion was argued on July 29, 2011, along with other pending Motions (A at 11). Defendant argued that the presiding Justice was being put in an awkward and uncomfortable position to make a ruling for a new trial based upon DNA evidence. At the end of the hearing on the *Motion for Recusal*, the Court stated as follows:

> "For the purposes of today's hearing, I am denying the Motion to Recuse. However, I'm keeping that option open between now and the time of the hearing on the DNA evidence itself."

Prior to November 2013 DNA hearings, the Court was reminded that it had not ruled definitively on the *Motion for Recusal*. On April 9, 2014, the same day that the Court denied Defendant's *Motion for a New Trial*, the Court formally denied the *Motion for Recusal* (A at 198-199).

A denial of a Motion for Recusal is reviewed for an abuse of discretion. Estate of Dineen, 1998 Me. 268, 721 A. 2d 185, 188, the Court has stated that recusal "is a matter within the broad discretion of the trial court." Johnson v. Amica Mut. Ins. Co., 733 A. 2 977, 980. Also see State v. Atwood, 2010 Me. 12, § 20, 988. A. 2d 981.

Defendant is not claiming that the Justice should recuse himself solely because of earlier adverse rulings, although the Justice had already sentenced him to life in prison and also severely limited him in the presentation of evidence at the upcoming DNA hearing. Defendant contends that the Justice who denied him a pretrial continuance to develop potentially exculpatory DNA evidence, was now being asked to grant a new trial based upon the very type of evidence which he did not believe would be productive prior

to trial. This potential predisposition is further exacerbated by the simple fact that much of the evidence which could have been tested prior to trial was no longer available to be tested because it had been destroyed by the State (H at 109, 200). Under the unique circumstances of this case, it is logical to conclude that the Justice's "impartiality might reasonably be questioned, and that therefore the Justice should recuse himself." See *De Cambra v. Curson*, 2008 Me. 127, § 8, 953 A. 2d 1163, 1165.

Given the lengthy and remarkable history of this case and repeated assertions of innocence by Defendant for more than a quarter century, the *DNA Motion for a New Trial* should have been presided over by an objective Justice with no question of bias or prejudice or earlier involvement in the case.

III. THE COURT ERRED IN NOT ALLOWING ADDITIONAL EVIDENCE OF ACTUAL INNOCENCE.

On October 1, 2010, the Defendant filed a *Motion to Define Scope of Evidence* in this case (A at 20). The Defendant sought to produce additional exculpatory evidence at the DNA hearing. This additional evidence included testimony of Cyril Wecht, M.D., J.D., an internationally renown pathologist (A at 200) and the testimony of Board Certified Forensic Pathologist, Dr. Walter I. Hofman (A at 203-206). Both experts had evaluated this case and gave written reports and opinions regarding the issue of time of death of Sarah Cherry, which opinions were obtained separately and both of which were exculpatory of the Defendant. In that Motion the Defendant also sought to be able to offer at the upcoming DHA hearing evidence of alternative suspects and evidence rebutting so-called confessions of the Defendant. The State objected to the admissibility of this evidence, contending that the evidence at the DNA hearing was limited to DNA related issues (A at 22) and that the Defendant was attempting to re-litigate issues already heard at trial or in other proceedings. The Court denied the Defendant's Motion and ruled that the evidence at the hearing would be limited to DNA and related evidence (A at 27-34).

On July 25, 2011, the Defendant filed a new Motion to Present Claim of Actual Innocence (A at 40) under the 14th Amendment of the Constitution of the United States of America and Article 1, § 6-A of the Constitution of the State of Maine. The Defendant claimed that he had a fundamental right to demonstrate his actual innocence at the upcoming DNA hearing. Berger v. United States, 295, US, 78, 88 (1934). The

Defendant also cited other cases supporting the right to present evidence of his actual innocence. See State et al v. Roper, 102 S.W. 3d 541, 547 (Me.2003); Montoya v. Ulibari, 163 P. 3d 476, 484 (N.M. 2007); People v. Cole, 765 N.Y.S. 2d 477 (N.Y. App Div. 2003).

The Defendant contends that it is constitutionally impermissible to disallow him to prove his actual innocence, especially in light of the fact that he is serving a life sentence.

The State objected to this Motion (A at 43-48), arguing that a claim of actual innocence is only cognizable in the context of Post-Conviction Review Statutes and not under the terms of the Post-Judgment DNA Analysis set forth in Title 15 M.R.S.A. § 2136 et seq.

On August 17, 2011 the Court issued its Order (A at 49) stating in part as follows:

> "Maine has never recognized a freestanding claim of actual innocence as grounds for post-conviction relief."

The Court went on to state that it would not rule on this issue since this proceeding was not a post-conviction review petition. The effect of this ruling was to deny the Defendant the right to present other exculpatory evidence, including the expert testimony on the time of death of Sarah Cherry.

The Defendant nonetheless raised the issue again with a *Motion to Reconsider* dated November 4, 2013, shortly before the second round of DNA hearings since the record was still open from the June 2012 hearing (A at 50). In support of its Motion, the

Defendant cited _State of Maine v. Olland Reese_, 2013 Me. 10, 60 A. 3rd 1277. In a similar context in that case, the Court ruled as follows:

> "At the hearing it was agreed that the Court could consider the original trial record, the entire post-conviction record, and all of the crime lab and *other expert reports generated from the outset of the case up to the date of the hearing.*"

On November 15, 2013 (A at 53) the Court denied the *Motion to Reconsider* and the Defendant was not able to present a claim of actual innocence and attendant evidence. The Defendant contends that these rulings are constitutionally impermissible and manifestly unjust.

CERTIFICATE OF SERVICE

I, Steven C. Peterson, Esquire hereby certify that I have caused Notice of the foregoing *Brief for Appellant (one original and nine copies)* by depositing in the U.S. Mail, postage prepaid, addressed to Matthew Pollack, Clerk of the Law Court, Maine Supreme Judicial Court, 205 Newbury Street, Portland, ME 04101-4125 and (*2 copies*) addressed to the attorney for the Appellee, Donald W. Macomber, A.A.G., Office of the Attorney General, Criminal Division, 6 State House Station, Augusta, Maine 04333-0006.

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