STATE OF MAINE

OX, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. KNO-89-126

STATE OF MAINE,
Appellee

V.

DENNIS J. DECHAINE,
Appellant

ON APPEAL FROM SUPERIOR COURT
BRIEF OF APPELLEE, STATE OF MAINE

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Twelve-year old Sarah Cherry, who was a girl scout and had been in the gifted/talented program in Bowdoin Central School (T., Vol. I at 93-94), was babysitting at the home of John and Jennifer Henkel on the Lewis Hill Road in Bowdoin on July 6, 1988. (T., Vol. I at 116-17, **166-69).** Sarah was babysitting eleven-month old Monica Henkel (T., Vol. I at 168) and was "excited and a little nervous because it was the first time she baby-sat a baby" and only the second time she had done babysitting outside of her family. '(T., Vol. I at 96). Mrs. Henkel specificaly asked Sarah to babysit Monica because Mrs. Henkel "really admired" Sarah's kind, understanding, and gentle manner with babies and young children. (T., Vol. I at 169). The only persons who knew of Sarah's plans to babysit at the Henkels on July 6th were Sarah's mother Debra Crossman, her step-father Christopher Crossman, her sister Hillary, her grandmother, and her girlfriend Julie Wagg. (T., Vol. I at 97).

Mrs. Henkel left her house at approximately 9:00 a.m. on July 6th, leaving Sarah alone inside the house with Monica. (T., Vol. I at 169). Mrs. Henkel deliberately did not lock the door to her house to prevent Sarah from getting locked out if Sarah should take the baby outside in the course of the day. (T., Vol. I at 170, 168). When Mrs. Henkel called home shortly after 12:00 noon, she spoke with Sarah, who was "feeding the baby and about to fix herself some lunch." Sarah was having no problems and subsequently made hotdogs for her lunch. (T., Vol. I at 170-71, 178).

When Mrs. Henkel arrived home at approximately 3:20 p.m. (T., Vol. I at 171), she found Monica asleep in her crib (T., Vol. I at 177) but could not find Sarah. (T., Vol. I at 176-79). Sarah's body was found two days later on July 8, 1988 (T., Vol. I at 61-62; Vol. III at 497, 511-12, 524, 527), approximately three and one-quarter miles from the Henkel home. (T., Vol. I at 41). Her body was found in dense woods and was approximately 450 to 500 feet from the nearest road. (T., Vol. I at 43-44). Most of Sarah's body was covered by forest debris, dead leaves, and twigs five to six inches in depth. (T., Vol. III at 527, 552, 554). This fact alone indicated to Deputy Chief Medical Examiner Dr. Ronald Roy that Sarah had died by homicide. (T., Vol. III at 552-53).

Sarah's body was positioned so that she was "lying on her back with most of her torso turned to the left.... Her legs were flexed up towards her stomach and were laying on their left side. Her hands were in front of her and they were tied together by plastic rope." (T., Vol. III at 558). Sarah's blue jeans were pulled down to around her knee level; and although she always wore underpants (T., Vol. I at 113), there were no underpants on or around her body when her body was discovered. (T., Vol. III at 560). There was a gag made from a blue bandana in Sarah's mouth, which was held in place by a *woolen scarf that was tied* around the neck very tightly so that it was only two and one-half to three inches in diameter. (T.,

Vol. III at 561-63). Sarah had petechiae hemorrhages of her eyes, which are "one of the strong hall-marks of asphyxiation" and are consistent with strangulation. (T., Vol. III at 569).

Birch sticks approximately one inch in diameter had been placed in Sarah's vagina and rectum. (T., Vol. III at 563, 580). The stick in the vagina measured eight inches long and had been inserted three and one-quarter inches. The stick in the rectum was nine inches long and had been inserted four inches. (T., Vol. III at 580-81). Hemorrhaging from injuries in both the vaginal and rectal areas indicated that the sticks had been inserted while Sarah was still alive.- (T., **Vol**. III at 583). The insertion of the sticks did not cause Sarah's death and appear to have been inserted for purposes of "torture or sadism." (T., Vol. III at 584).

Sarah had also suffered a number of stab wounds to the head, neck, and chest. (T., Vol. III at **564-65**, 567). One of the stab wounds to Sarah's neck had punctured the jugular vein, which in and of itself would have been fatal. (T., Vol. III at 568). The small size of the stab wounds indicated that they were inflicted with "a small knife, like a penknife that somebody might carry." (T., Vol. III at 571, 574). There were also superficial incisions averaging two to three inches long in the surface of the skin on Sarah's neck. (T., Vol. III at 565). These wounds appeared to have been inflicted by a knife that was "dragged across the skin several times in a row."

(T., Vol. III at 566). These superficial wounds were consistent with "torture" but did not contribute to Sarah's death. (T., Vol. III at 566).

Examination of Sarah's stomach contents, which included "several pieces of relatively undigested hotdog" (T., Vol. III at 585), indicated that Sarah died within "two to four hours" of having eaten lunch. (T., Vol. III at 585-86). The causes of Sarah's death were "asphyxiation due to strangulation and multiple stab wounds of the neck and chest." (T., Vol. III at 587).

On August 1, 1988, a Sagadahoc County Grand Jury returned a six-count indictment charging Dennis John Dechaine with intentionally or knowingly causing the death of Sarah Cherry *(murder) in violation of* 17-A M.R.S.A. § 201(1)(A) (Count I), depraved indifference murder in violation of 17-A M.R.S.A. § 201(1)(B) (Count II), kidnapping in violation of 17-A M.R.S.A. § 301(1)(A)(3) (Count III), rape in violation of 17-A M.R.S.A. SS 251(1)(B) and 252(1)(A) (Count IV), and gross sexual misconduct in violation of 17-A M.R.S.A. SS 251(1)(A) & (C)(3) and 253(1)(B) (Counts V and VI). (R. at 10-9). On August 2, 1988, Dechaine was arraigned on the indictment and entered a plea of not guilty to all counts. (R. at 46). On that same date, it was ordered that venue be changed to Knox County for jury trial and that the jury trial be scheduled for March **1989.** (R. at 46).

On March 6, 1989, the State dismissed Count IV (rape) of the indictment pursuant to M.R. Crim. P. 48(a) *for the reason* that "[t]he State now believes the medical evidence as to Count IV is sufficiently ambiguous that the allegation cannot be proved beyond a reasonable doubt." (R. at 53). As a result, the gross sexual misconduct counts, which previously had been numbered Counts V and VI, were renumbered to Counts IV and V. (R. at 174, 157-56, 68).

On March 7, 1989, the jury was drawn, and the Defendant's jury trial commenced. (R. at 177). On March 18, **1989**, the jury returned a verdict of guilty on each of the remaining five counts of the indictment. (R. at 174; T., Vol. VIII at 1540-44). The following evidence admitted at trial provided a *rational basis for the jury's* finding beyond a reasonable doubt that Dennis John Dechaine was the one who murdered, kidnapped, and committed gross sexual misconduct against Sarah Cherry:

1) Robert West, who lived on the Lewis Hill Road in Bowdoinham and was a neighbor of the Henkels, saw a red Toyota truck, which West subsequently identified as Dechaine's by the "banged up" front headlight (T., Vol. I at **69)**, drive north and south on the Lewis Hill Road at an unusually slow speed on July 5th, the day before Sarah Cherry's murder. (T., Vol. I at 70-73). Raymond Knight saw the Defendant at Knight's store that same afternoon (T., Vol. VII at **1384)**, contradicting the Defendant's wife's testimony that the Defendant did not return

from a July 4th visit to northern Maine until late on the night of July 5th. (T., Vol. VI at 1058).

At approximately 1:00 p.m. on the day df Sarah Cherry's abduction and murder Holly Johnson, who also lived on the Lewis Hill Road across the street from the Henkels (T., Vol. II at 335-36), heard a vehicle *slow down at* the Henkel driveway and the bark of the Henkels' dogs (T., Vol. II at 338-40) and, within approximately fifteen minutes, saw a small red Toyota truck, which was consistent in appearance with Dechaine's red 1981 Toyota pickup (T., Vol. I at 80-81), heading northbound on the Lewis Hill Road at a relatively slow speed. (T., Vol. II at 340-43). A tire impression found a few hours later in the Henkel driveway (T., Vol. I at 127-29) was consistent with the tread on the left front tire of Dechaine's truck (T., Vol. IV at 659). The Defendant acknowledged at trial that he was not aware of anyone else driving his truck on that day. (T., Vol. VII at 1316).

2) When Jennifer Henkel arrived home at approximately 3:20 p.m. on July 6, 1988, Jennifer found "a little loose-leaf notebook and a slip of paper like a car repair bill" lying in her driveway. (T., Vol. I at 171-72). Dennis Dechaine's name was on the "car repair bill," which was an autobody receipt for Dechaine's 1981 Toyota pickup truck. (T., Vol. II at 269-70). The notebook was also Dechaine's and was associated with his Paul's Produce stand in Brunswick. (T., Vol. II at 441).

3) At approximately 8:00-8:30 p.m. on July 6th, a man matching the Defendant's appearance came out of the woods near where Sarah's body was discovered, and was walking towards the Dead River Road. (T., Vol. I at 195-96, 41). At approximately 8:45 p.m. on July 6th, the Defendant, who had walked approximately one-half mile down the Dead River Road (T., Vol. I at 41), told Helen and Harry Buttrick that he had been fishing and could not find his truck. (T., Vol. I at 203). The Defendant also told the Buttricks that he was visiting in Bowdoinham but lived in Yarmouth and "should have stayed there." (T., Vol. I at 205). At trial, the Defendant admitted that these statements to the Buttricks were lies. (T., Vol. VII at 1327-28).

4) When Sagadahoc County Deputy Sheriff Daniel Reed confronted the Defendant on July 6th with the fact that the notebook and autobody receipt had been found in the Henkel driveway earlier that day, the Defendant initially denied that these items were his. (T., Vol. II at 280). The Defendant then admitted that these items were his. (T., Vol. II at 281). The Defendant further admitted that he kept the notebook and autobody receipt on the passenger seat in his truck (T., Vol. II at 281) and that these items must have fallen out of his truck when he turned around at the foot of a long driveway and got out of his truck "to take a piss." (T., Vol. II at 282-83). When asked by Deputy Reed to explain how the notebook

and receipt were found at the head of the driveway near the . Henkel house, the Defendant stated: "Whoever grabbed the girl saw these, placed them up at the head of the driveway to set me up." (T., Vol. II at 283). However, neither Deputy Reed nor any other police officer had informed the Defendant that Sarah Cherry had been abducted or kidnapped; the Defendant had been informed simply that the police were investigating a missing 12-year old girl. (T., Vol. II at **283-84)**. At trial, the Defendant acknowledged this to be true. (T., Vol. VI at 1240; Vol. VII at 1344).

Morever, a few hours later, in the early morning of July 7th, the Defendant changed his story about the location of the notebook and receipt, telling the police that the notebook and receipt had not been in his truck because they were at Paul's Produce stand in Brunswick. Deehaine further told the police that "someone may have taken this notebook paper, receipt and placed them in the Henkel dooryard." (T., Vol. II at **441)**. In the course of cross-examination at trial, however, Dechaine changed his story again and acknowledged that the autobody receipt with his name on it and the Paul's Produce notebook were in his truck on July 6th. (T., Vol. VII at 1338, 1370).

5) The Defendant's truck was found by the police at approximately 12:05 a.m. on July 7th (T., Vol. II at 401), very near the area where Sarah Cherry's body was later discovered on July 8th. (T., Vol. II at 413-16). Sarah Cherry's body was

found with her hands "tied together by plastic rope." (T., Vol. III at 558). The rope tied around Sarah's wrists had the same basic characteristics as rope found behind the passenger seat of the Defendant's truck (T., Vol. IV at 707), a piece of rope found in the woods in-between the Defendant's truck and the spot where Sarah's body was discovered (T., Vol. II at 414-16), and rope seized from the Defendant's barn (T., Vol. IV at 808). (T., Vol. IV at 732). Indeed, the rope found in the Defendant's truck and the piece of rope found in the woods near Sarah's body "were once one rope." (T., Vol. IV at 737).

The Defendant's truck had been found 74 feet into the woods on one side of the Old Hallowell Road, and Sarah's body was found 450 to 500 feet into the woods on the other side of the Old Hallowell Road. (T., Vol. I at 43). The piece of rope was found 184 feet into the woods on the same side of the road as Sarah's body. (T., Vol. I at 43-44). A police dog "picked up the scent of whatever came out of [the Defendant's truck] and tracked it" to within 75 to 100 feet of Sarah's body, stopping only because he was not familiar with the odor of dead bodies. (T., Vol. II at 416, 426-27). The piece of rope found in the woods was on the track between the Defendant's truck and the location where Sarah's body was discovered. (T., Vol. II at 425).

6) Sarah Cherry had been stabbed in the neck area, and the small size of the wounds indicated that she had been stabbed

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"with a small knife, like a penknife that somebody might carry." (T., Vol. III at 571). The Defendant had carried a pen knife on his key ring. (T., Vol. VI at 1128). However, the pen knife was not on the Defendant's key ring when it was found by the police on July 6th, and the Defendant's wife testified that she was surprised when she learned from the police on July 8th that the pen knife was not on the Defendant's key ring. (T., Vol. VI at 1128).

7) The Defendant had told Sagadahoc County Sheriff *David* Haggett during the evening of July 6th that he (Dechaine) had been out in the woods looking for fishing holes and that he could not remember where he had left his vehicle. The Defendant, perhaps trying to distance himself from the key ring which had had the pen knife on it, also told Sheriff Haggett that the Defendant's keys had been left in his vehicle. (T., Vol. II at **394).** However, prior to the finding of the Defendant's truck, the Defendant's **key** ring with the keys on it was found by Detective Mark Westrum of the Sagadahoc County Sheriff's Department in Westrum's police cruiser where the Defendant had been sitting. (T., Vol. II at **395). Detective** Westrum also noticed that, although he had turned off all radios in his cruiser, the police radio next to *where* the Defendant had been sitting was on. (T., Vol. II at **366).**

When confronted by Sheriff Haggett about the fact that the key ring had been found in Detective Westrum's cruiser, the

Defendant explained that he was nervous and confused and that, upon realizing that his key ring had been in his pocket and not in his truck as he had told Sheriff Haggett, he (Dechaine) had decided to hide the key ring in Westrum's cruiser. (T., Vol. II at 396).

Detective Westrum further noticed that evening that the Defendant had a circular red mark, perhaps a bite mark, on one of his biceps and a handprint on the back of this T-shirt. (T., Vol. II at 365).

8) Dechaine admitted to Detective Westrum that he (Dechaine) had killed Sarah Cherry: "I didn't think it actually happened until I saw her face on the news; then it all came back to me. I remembered it.... Why did I kill her?... What punishment could they ever give me that would equal what I've done." (T., Vol. IV at 831). Dechaine also admitted to Darryl Maxcy and Brenda Dermody, corrections officers with the Lincoln County Jail, that he (Dechaine) had murdered Sarah Cherry: "You people need to know I'm the one who murdered that girl, and you may want to put me in isolation." (T., Vol. V at 855 (Maxcy), 872 (Dermody)). Both Maxcy and Dermody directly denied that Dechaine's statement was at all ambiguous. (T., Vol. V at 857, 872).

9) On July 8th, the Defendant stated to Maine State Police Detective Alfred Hendsbee: "I can't believe that I could do such a thing. The real me is not like that. I know me. I

couldn't do anything like that. It must be somebody else inside of me who is doing this." (T., Vol. IV at 799). The Defendant told Detective Hendsbee several more times that he (Dechaine) "couldn't believe he could do such a thing. It wabn't the real him. He even stated it one time that he can't believe he killed this girl and he can't even kill his own chickens; he has to take them to the slaughter house to have them killed." (T., Vol. IV at 802).

10) The Defendant subsequently told Deputy Reed that "he [Dechaine] knows what he did was wrong, but he doesn't consider him[self] to be a murderer; he considers himself to be a drug addict." (T., Vol. VII at 1396).

On April 4, 1989, the Defendant was adjudged guilty on all counts and sentenced to life imprisonment on Count I (intentional or knowing murder), life imprisonment on Count II (depraved indifference murder), twenty years on Count III (kidnapping),. twenty years on Count IV (gross sexual misconduct), and twenty years on Count V (gross sexual misconduct), all sentences to be concurrent. (R. at 174-73, 160-56). On that same day, the Defense timely filed a notice of appeal to the Law Court from the Defendant's judgments of conviction. (R. at 173, 161).

The Defendant is presently in execution of his sentence at the Maine State Prison in Thomaston. (See R. at 173, 167, 162).

ISSUES

I. GIVEN THE REMOTENESS OF THE POSSIBILITY THAT PCR TESTING OF THE BLOOD ON SARAH CHERRY'S FINGERNAILS WOULD BE HELPFUL TO THE DEFENSE, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE MOTION FOR A 3 TO 5 MONTH CONTINUANCE TO PERMIT PCR TESTING.

II. IN VIEW OF THE SPECULATIVE AND INADMISSIBLE NATURE OF THE "ALTERNATIVE PERPETRATOR" INFORMATION OFFERED BY THE DEFENSE, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING THIS EVIDENCE.

III. WHETHER THE TRIAL COURT'S IN CAMERA REVIEW OF THE DHS FILE FULLY COMPLIED WITH THE REQUIREMENTS OF PENNSYLVANIA V. RITCHIE.

IV. GIVEN THAT THE DEFENSE INTRODUCED INTO THE TRIAL THE ISSUE OF WHETHER A BRUISE MARK ON THE DEFENDANT'S LEFT ARM RESULTED FROM AN INTRAVENOUS INJECTION, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION UNDER M.R. CRIM. P. 16(d) IN ALLOWING DR. ROY'S REBUTTAL TESTIMONY THAT THE BRUISE MARK WAS PROBABLY NOT AN INTRAVENOUS INJECTION SITE.

V. WHETHER, UNDER STATE V. ALLARD, 557 A.2d 960 (ME. 1989), THE DEFENDANT'S DUAL CONVICTIONS AND SENTENCES FOR THE SINGLE MURDER OF SARAH CHERRY MUST BE MERGED INTO ONE MURDER CONVICTION FOR WHICH ONE LIFE SENTENCE MAY BE IMPOSED, AND WHETHER THE STATE IS ENTITLED TO RELY ON EITHER OF THE TWO UNDERLYING GUILTY VERDICTS TO SUPPORT THE SINGLE MURDER CONVICTION.

ARGUMENT

I. **GIVEN THE REMOTEWESS OF THE POSSIBILITY THAT PCR TESTING OF THE BLOOD ON SARAH CHERRY'S FINGERNAILS WOULD BE HELPFUL TO THE DEFENSE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENSE MOTION FOR A 3 TO 5 MONTH CONTINUANCE TO PERMIT PCR TESTING.**

The Defense argues that the Trial Court's denial of the Defense motion for an approximately three to five month continuance to permit DNA testing of Sarah Cherry's fingernail clippings violated M.R. Crim. P. 16 (discovery by the defendant) and fourteenth amendment due process. (Brief of Appellant at **6-29).** Given the evidence at the hearing on the Defense motion, as well as governing principles of law, this argument is without merit for several reasons.

First, although the Defense was hoping that DNA testing of the blood on the fingernail clippings would reveal that the blood was actually a mixture of Sarah Cherry's blood with the blood of some person other than the Defendant and would thus indicate that someone other than the Defendant caused Sarah Cherry's death (T., Continuance at 3-5, 49-51; R. at 43-41) [1],

[1] References to pages of the transcript of the hearing on the Defense motion to compel discovery and to continue the case, which transcript is dated January 27, **1989,** shall be in parentheses as follows: (T., Continuance at_____). References to the Superior Court Clerk's Record shall be in parentheses as follows: (R. at).

the Defense, which bore the burden of persuasion at the hearing, produced no evidence to indicate that the blood on Sarah Cherry's fingernail clippings belonged to anyone other than Sarah Cherry. There was no evidence to suggest that the blood may have come from a third party or even that a third party. may have been responsible for Sarah Cherry's death. Indeed, the uncontroverted testimony at the hearing was that the blood was Sarah Cherry's. Judith Brinkman, a forensic chemist with the Maine State Police Crime Laboratory, who was *the only* witness at the hearing and came at the Prosecutor's request, testified that the absence of skin tissue under, oT trauma to, Sarah Cherry's fingernails precluded the possibility that the blood on Sarah's fingernail clippings came from someone whom she had scratched. (T., Continuance at 19-20). Moreover, when Sarah Cherry's body was discovered, her bound hands were found reposed in the neck area where she had been stabbed and had bled. (T., Continuance at 46-47, 53). Blood was also located on a handkerchief, scarf, and the neck area of Sarah Cherry's T-shirt, all of which were found in the area of Sarah Cherry's neck. (T., Continuance at 31, 46-47, 53). Serological testing of these articles of clothing showed that the blood was either Type A or consistent with Type A (T., Continuance at 31-32), which was Sarah Cherry's blood type (T., Continuance at 18). The blood on Sarah Cherry's fingernail clippings also tested serologically as being "consistent with

someone with A blood type." (T., Continuance at 19). Given that the blood on Sarah Cherry's fingernail clippings tested to be the same as the blood on the scarf, handkerchief, and the neck area of Sarah Cherry's T-shirt, and given the likelihood that the blood on all of these items came from the same source - the wounds on Sarah Cherry's neck - and given the absence of skin tissue under and trauma to Sarah Cherry's fingernails, Judith Brinkman's opinion was that the blood on Sarah Cherry's fingernail clippings was Sarah Cherry's and not a mixture involving the blood of some other person. (T., Continuance 47, **28).**

Second, as Judith Brinkman testified, the kind of DNA testing the Defense wanted done - polymerase chain reaction (T., Continuance at 12) - required "5 milligrams [of blood] which would be equivalent to one drop of material. Unfortunately, that is their ideal conditions. At the present time they're not able to work with that little amount...." (T., Continuanceat 17). However, all that remained of Sarah Cherry's fingernail clippings were the two thumbnail clippings, which were "about a quarter of an inch long." (T., Continuance at 21). Judith Brinkman testified that she was advised by Forensic Science Associates in California (the only place in the United States that does polymerase chain reaction (PCR) testing (T., Continuance at **4, 12, 13, 14-15)), that** "realistically it was going to be difficult [to obtain PCR test

results from the two remaining thumbnail clippings]. Theoretically they [Forensic Science Associates] should be able to do it; realistically their benchwork process hasn't been as successful as they like. So, therefore, what I described to her [Jennifer Mehavolin of Forensic Science Associates] didn't sound like the possibility of getting good results." (T., Continuance at 22).

Third, degradation of the DNA in the blood on Sarah Cherry's fingernail clippings, on account of summer weather conditions, would also make it difficult to obtain any test results using the PCR technique:

> Because of the -- the weather conditions were about ninety degrees and very humid, the DNA or any ass you know, any biological fluid for that matter begins to break down. DNA itself, however, has bondings that are delicate bondings and which, you know, in a climate, weather that isn't good for biological fluids they will begin to break down. If degradation has occurred, PCR cannot be done. Also that there is a possibility of degradation just because of the weather conditions.

(T., Continuance at 24).

Fourth, there are problems with the reliability of PCR testing in its current state. The magazine article submitted by the Defense in support of its "Motion to Compel Discovery and to Continue" (R. at 43) states:

> The disadvantage of the Cetus test [PCR test] is that it is less specific than the other two approaches. The likelihood that two unrelated people will have the same DNA "type" on this test may range from 0.1 to

> 10%. Moreover, polymerase chain reaction,. on which the test relies, is a relatively new technique that may be less reliable and less widely accepted in the scientific community than the procedures underlying the other DNA typing test.
>
> So far the Cetus test has been used in three criminal cases in California. In one, it appeared to exculpate a rape defendant in San Mateo County who had been positively identified by the victim, posing a dilemma for the district attorney over whether to proceed with the case.

(R. at 39-38). Judith Brinkman testified that PCR testing is less precise than another method of DNA testing, and therefore has not been accepted in courts as has the other method, and that PCR testing in at least some cases is no more precise than traditional serology work. (T., Continuance at 15-16).

Fifth, on account of a three to four month backlog at Forensic Science Associates in California, it would take approximately four to six months to receive back in Maine the PCR test results. (T., Continuance at 23). Since the Defendant's jury trial was scheduled for March 6, 1989 (R. at 46, 41), even if the fingernail clippings were sent to Forensic Science Associates on January 27, 1989, the day of the hearing on the Defense motion to continue (T., Continuance), the PCR test results would not be received back until four to six months later (T., Continuance at 23) or until somewhere between approximately May 27, 1989 and July 27, 1989. Waiting for the PCR test results would thus have necessitated a delay or continuance in the Defendant's trial of three to five months.

In view of the evidence at the hearing, the Trial Court found:

> While it may be that... defense counsel has a trial strategy to explain the position of the hands in the area of the bleeding, the testimony of Ms. Brinkman as well as the acknowledgment by counsel is that there were puncture wounds in the area of the collar bone and the neck area where there was a scarf and a bandana and this bleeding was in an area where Sarah Cherry's hands were found at the time the body was discovered.
>
> The source of this blood which is sought to be analyzed under the PCR method is under the fingernails and we have no skin tissue mixed in there. It is strictly blood. The PCR process, test process itself based upon what I have heard here this morning cannot be attested to as having the same reliability, whether it is greater or lesser, than the known RFLP [another DNA test]....
>
> We have here the blood type of Sarah Cherry that is known to be type A. We know that the blood type of Mr. Dechaine is type 0. So, we know that the blood sample, the blood quantity under the fingernails and on the fingernails of Sarah Cherry was not the blood of Mr. Dechaine. It is consistent with Sarah Cherry's blood. The only thing that the PCR test would show other than what we already know is the possibility that the blood under the fingernails of Sarah Cherry was from someone other than Sarah Cherry with a type A blood. It is questionable as to whether the remaining quantity of blood is sufficient to allow a test to even be conducted. There is also the possibility that because of atmospheric conditions at the time her body was discovered that there was degradation between the time of her death and the time her body was discovered and the blood taken from her fingernails as a result of the weather.

> Weighing everything in balance here, the most that we have and under the best of conditions in the light most favorable to the defendant is the possibility that the blood under the two remaining thumbnails was the blood of someone other than Sarah Cherry and other than Mr. Dechaine and the possibility of that happening is so remote that I cannot grant the motion to continue this case for purposes of performing the PCR test. And, so, for those reasons the motion must be denied, the motion to continue must be denied.

(T., Continuance at 59-61).

"Generally speaking, the grant or denial of a motion for continuance is within the sound discretion of the trial justice and the ruling should not be set aside in the absence of a showing of an abuse of discretion." State v. Greenwald, 454 A.2d 827, 829 (Me. 1982); State v. Holt, 391 A.2d 822, 825 (Me. 1978). Moreover, it is the proponent of the motion who has the burden of satisfying the trial court that a continuance is warranted. In this case, that burden fell on the Defense. However, the Defense did not produce any witnesses, nor even an affidavit from forensic Science Associates in California, in support of its motion. All that the Defense produced was the magazine article attached to the motion, which admitted that the PCR test "is a relatively new technique that may be less reliable and less widely accepted in the scientific community than the procedures underlying the other DNA typing tests." (R. at 38).

Furthermore, in view of the evidence at the hearing that there was 1) a high likelihood that the blood on Sarah Cherry's fingernail clippings belonged to Sarah Cherry and not someone else and 2) a low likelihood of obtaining a reliable PCR test result because of-the small quantity of blood, the possibility of degradation, and the need for further refinement of the PCR test itself, and 3) "bearing in mind the practical necessities incident to every day operation of the court system" (State v. Holt, 391 A.2d at 825), the Trial Court did not abuse its discretion in denying the Defense motion to continue. "A motion for continuance must be based on more than a whimsical hope that more time to investigate might produce additional exculpatory evidence." Holt, 391 A.2d at 825.

Although the Defense dresses up the Trial Court's denial of the requested continuance as also a denial of discovery in violation of M.R. Crim. P. 16 and a denial of Dechaine's fourteenth amendment due process right to have access to material evidence, "discovery" and "access" are not the real issues here. There is no indication that the Defense was actually precluded from having access to Sarah Cherry's fingernail clippings. Indeed, the Trial Court granted and signed the "discovery" part of the Defense motion. (R. at 41). It was the "continuance" part only that was denied (R. at 41), which is thus the only real issue here. Nevertheless, to the extent that the Trial Court's denial of the continuance had

any effect on Defense access to the fingernail clippings, and since the Trial Court's denial in effect precluded the PCR testing sought by the Defense, the State will address the Defense's discovery and due process claims.

The same considerations that justify the Trial Court's denial of the continuance also make the fingernail clippings not discoverable under M.R. Crim. P. 16(b) for the purposes sought by the Defense. Given the totality of the circumstances presented by the evidence at the hearing - the small quantity of blood, the possibility of degradation, the need for further refinement of the PCR test, and the high likelihood that the blood was Sarah Cherry's - the PCR test was not a "reasonable test" within the meaning of M.R. Crim. P. 16(b)(1), and Sarah Cherry's fingernail clippings were not "tangible objects,... which are material to the preparation of the defense" within the meaning of M.R. Crim. P. 16(b)(2)(A) (emphasis added). See State v. Harnish, 560 A.2d 5, 7 (Me. 1989) (for due process purposes under Brady v. Maryland, 373 U.S. 83 **(1963)**, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.") (quoting United States v. Bagley, 473 U.S. 667, **682** (1985)). Thus, the Trial Court exercised

appropriate discretion in not granting the continuance for the Defense to have PCR testing of the fingernail clippings.

The Defense's due process claim is also without merit. In Arizona v. Youngblood, 109 S.Ct. 333, 337 (1988), the Supreme Court stated:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady [v. Maryland, 373 U.S. 83 (1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

In this case, Sarah Cherry's fingernail clippings are not "material exculpatory evidence" under Brady. Harnish, 560 A.2d at 7 ("evidence is material only if there is a reasonable probability that... the result of the proceeding would have been different") (quoting Bagley, 473 U.S. at 682). We are thus dealing with the failure of the State to provide access to "evidentiary material of which no more can be said than that it could have been subjected to tests" [Youngblood, 109 S.Ct. at 337), where there is a high likelihood of no test results, or at least reliable results, and no realistic possibility of exonerating the Defendant. Hence, the State's good faith in not making disclosure is a relevant consideration. The State's good faith here consisted of 1) the desire to avoid a lengthy

continuance of from three to five months, 2) the high likelihood under the circumstances of this case that the PCR test would not produce results, and 3) the very low likelihood that any test results would exonerate the Defendant since the undisputed testimony at the hearing on the motion to continue was that the blood on the fingernail clippings belonged to Sarah Cherry. Cf. Youngblood, 109 S.Ct. at 337 ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

Moreover, in view of these last two factors, "the chances that [the blood on the fingernail *clippings] would have* exculpated the defendants were slim," which is a separate reason for rejecting the Defendant's due process claim. Youngblood, 109 S.Ct. at 336. A defendant is not denied due process when he is unable to have tested only "that [which] might be of conceivable evidentiary significance in a particular prosecution." Youngblood, 109 S.Ct. at 337. Thus, contrary to the assertion of the Defense (e.g., Brief of Appellant at 25), the fact here that the Defense was unable to perform its own tests on the fingernail clippings is immaterial. See California v. Trombetta, **467 U.S. 479 (1984) (no** due process violation where defendant is precluded from having access to breath sample to perform own tests where sample was thrown out in course of normal police practice and the chances were low that the sample would have been exculpatory).

For all of the above reasons, the Trial Court did not abuse its discretion in denying the Defense motion for a continuance to permit PCR testing of the blood on Sarah Cherry's fingernail clippings. [2]

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[2] In support of its argument, the Defense on appeal relies in part on Judith Brinkman's trial testimony. However, the issue of whpther the Trial Court abused its discretion in denying the Defense motion to continue must be evaluated solely on the evidence before the Court at the hearing because it was this evidence that the Court had to rely on in making its decision. See State v. Tribou, 488 A.2d 472, 475 (Me. 1985) (only evidence presented at the suppression hearing, not trial evidence, "is considered in deciding whether the record supports the motion Justice's determination").

If, however, the Law Court like the Defense wishes to consider the trial evidence, the Law Court should consider all the evidence, not just that cited by the Defense. Not only is there nothing in Judith Brinkman's trial testimony to undermine her earlier testimony at the hearing, but also the other testimony at the trial in fact supports the State's position that the blood on Sarah Cherry's fingernail clippings belonged to Sarah Cherry and that PCR testing therefore would not have exonerated the Defendant. For example, Dr. Ronald Roy, Deputy Chief Medical Examiner for the State of Maine, testified concerning the blood underneath Sarah Cherry's fingernails: "Almost always it's the decedent's own blood under the fingernails. Unless there had been a bloody altercation where both people had been wounded, generally there isn't any transfer of blood." (T., Vol. III at 578). (There was no bloody altercation in this case.) When asked if the blood under the fingernails could have come from another individual whom Sarah Cherry had scratched, Dr. Roy answered: "No. Scratching doesn't raise blood. We've all been scratched and not bled from them. Even when you do find that the blood starts to form in a few seconds later. When you scratch somebody you don't come away with bloody fingernails." (T., Vol. III at 579). Dr. Roy later testified that the blood underneath Sarah Cherry's fingernails was her own (T., Vol. III at 599) and that the absence of flesh or skin underneath her fingernails indicated that the blood did not come from Sarah's scratching of someone else. (T., Vol. III at 608-09).

II. IN VIEW OF THE SPECULATIVE AND INADMISSIBLE NATURE OF THE "ALTERNATIVE PERPETRATOR" INFORMATION OFFERED BY THE DEFENSE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THIS EVIDENCE.

The Defense claims that the Trial Court's exclusion of evidence which, according to the Defense, indicated that another person may have murdered Sarah Cherry violated Dechaine's fourteenth amendment due process right to a fundamentally fair trial and M.R. Evid. 401, 402, and 403 governing the admissiblity of relevant evidence. (Brief of Appellant at 30-96). The Defense claims that it should have been allowed to call Douglas Senecal and Maine Department of Human Services caseworker Jennifer Dox as witnesses to show that Douglas Senecal may have been the one who murdered Sarah Cherry.

In addition to that claim, the Defense also argues that it should have been allowed to introduce evidence through Joan Economeau and Lisa Ford Christie of 1) a burglary at the Defendant's roadside stand in Brunswick, named Paul's Produce (T., **Vol. V** at 1012), two days after Sarah Cherry's abduction, and 2) the placing of a strangled cat with blood in its mouth at the stand, to show that the real killer of Sarah Cherry was trying to frame the Defendant as the murderer and that therefore Dechaine did not cause Sarah Cherry's death.

The Law Court has stated relative to this issue:

> Although we have recognized that "[i]n appropriate circumstances, a defendant should be allowed to introduce evidence to show that another person committed the crime," we have at the same time recognized that "[t]he trial court also has discretion to exclude such evidence if it is too speculative or conjectural or too disconnected from the facts of the case against the defendant." State v. LeClair, 425 A.2d 182, 187 (Me. 1981); State v. Conloque, 474 A.2d 167, 172 (Me. 1984); State v. Caulk, 543 A.2d 1366, 1371 (Me. 1988).

State v. Harnish; 560 A.2d 5, 9 (Me. 1989) (footnote omitted).

This rule is not inconsistent with due process. Although the Defendant argues that the exclusion of his "alternative perpetrator" evidence affected his constitutional right to present evidence in his own defense (Brief of Appellant at 83-87, 94-95, 106-07), it is well settled that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 108 S.Ct. 646, 653 (1988).

> It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interest. The integrity of the adversary process, which depends both on the presentation of reliable evience and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Id. at 655 (footnote omitted).

In this case, the evidence proffered by the Defense was too speculative, conjectural, and disconnected from the facts against the Defendant to be admissible. Also, the proffered evidence was largely in a form that did not permit it to be admitted. Hence, the Trial Court's exclusion of this evidence did not violate the Defendant's right to a fair trial or the Maine Rules of Evidence. The fervor with which the Defense has propounded its alternative perpetrator theory, which it has belabored at length in a 67-page argument, does not alter the fact that this matter is, upon analysis, devoid of substance and merit, as was immediately apparent to the Trial Court.

A. Douglas Senecal.

In an offer of proof, the Defense attempted to tie in Douglas Senecal to Sarah Cherry's murder as follows:

1) On the date of Sarah Cherry's death, July 6, 1988, Douglas Senecal was under indictment for unlawful sexual contact with Jackie Crossman, who is Senecal's step-daughter. Jackie Crossman is the natural daughter of Senecal's wife Maureen Senecal (formerly Maureen Crossman) and Christopher Crossman. (T., Chambers at 3-4, 6).[3] Christopher Crossman

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[3] References to pages of the transcript of the conference in chambers, dated March 16, 1989, in which the Defense made its offer of proof concerning the admissibility of *testimony about* Douglas Senecal, shall be in parentheses as follows: (T., Chambers at).

subsequently married Sarah Cherry's mother Debra Cherry (T., Vol. I at 91), and thus became Sarah's step-father. (T., Chambers at 6).[4] Sarah Cherry and Jackie Crossman were living together at the Crossman residence in Bowdoinham at the time of Sarah Cherry's death. (T., Chambers at 3). Among Senecal's bail conditions was that he have no contact, direct or indirect, with Jackie Crossman. (T., Chambers at 5). On June 20, 1988, Senecal learned that his jury trial on the charge of unlawful sexual contact could be at the end of July. On July 5, **1988**, Maine Department of Human Services caseworker Jennifer Dox interviewed Douglas Senecal and his wife Maureen Senecal (Jackie Crossman's natural mother) and learned that Douglas and Maureen had arranged for Jackie Crossman to leave the State of Maine so that she would be unavailable to testify against her step-father Douglas Senecal. (T., Chambers at 5-6).

In its offer of proof, the Defense suggested the unsupported hypothesis that Douglas Senecal went to see Sarah Cherry "to either find out [if Sarah knew anything about] the

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[4] There was no relationship between Douglas Senecal and Sarah Cherry.

location of Jackie or to encourage Sarah not to come forward with allegations for whatever reasons, that things got out of hand, and that Doug Senecal was involved in the hdmicide; that Doug Senecal at that point used the instrumentalities from the defendant's vehicle and set the defendant up." (T., Chambers at 16).

2) In the offer of proof, the Defense stated that Sarah Cherry's closest friend was Jessica Crossman, Jackie Crossman's sister, who resided with Douglas Senecal. The Defense asserted that Jessica may have been told by Sarah that Sarah would be babysitting at the Henkel residence on July 6, 1988, and Jessica may have communicated this fact to Douglas Senecal. Hence, according to the Defense, Senecal would have known where to find Sarah on July 6, 1988. (T., Chambers at 11-16). Th6 Defense in its offer of proof admitted, however, that Jessica had denied either having any knowledge that Sarah was babysitting at the Henkel residence on July 6th or telling Douglas Senecal about Sarah's whereabouts on that date. (T., Chambers at 12-13, 14-15, 22).

3) In the offer of proof, the Defense stated that Douglas Senecal drove a small red Ford pickup truck. (T., Chambers at 11, 10). The implication sought to be drawn by the Defense was

that the Defendant's 1981 red Toyota pickup truck was mistaken for the small red *Ford pickup truck of Douglas* Senecal. [5]

4) The Defense claimed that Douglas Senecal's alibi as to his whereabouts on July 6, 1988, particularly around the time of Sarah Cherry's abduction and murder, could not be confirmed. Defense Counsel stated:

> [H]e [Douglas Senecal] provided a list of persons with whom he claimed to have been with on July 6th, **1988.** There were a total of four. He also provided some receipts, two receipts, one for a saw that he purchased and one for gasoline that he may or may not have purchased. Each one of the individuals with whom he provided information as to his alibi were checked by my investigator and not one of them can confirm his statement. The only person that can confirm his whereabouts on that day is his wife, Maureen. Her period of exposure to him was between 12:00 and 1:30 according to her recollection on July 6th. Mr. Senecal admitted to driving his small red Ford pickup to Bath and no further. He admitted nothing further beyond that.

(T., Chambers at 10-11). [6]

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[5] 1n fact, as discussed below, Douglas Senecal did not own a small red pickup truck but rather a medium-size, red and white pickup truck.

[6] As discussed below, notwithstanding this Defense contention, counsel for Senecal represented that he had affidavits establishing Senecal's alibi from 12:30 to 4:30 p.m. on July 6th.

5) An informant named Pam Babine telephoned Maine Department of Human Services caseworker Bonnie Holiday and stated that her (Babine's) feeling was that "Doug Senecal was involved in the Sarah Cherry homicide." (T., Chambers at 6-7). Babine also stated that the Senecal family is very violent and that Douglas Senecal "has been behaving real strange since the death; not sad but strange. The whole family went to the funeral except for poug Senecal." (T., Chambers at 7). Babine further stated that she took a bicycle to Senecal's house to give it to Senecal's daughter and that Douglas Senecal was shaking so badly when he received the bicycle that he could not hold it. This incident occurred on July 6 or 7, 1988. Babine also stated that Sarah Cherry was found in Bowdoin "behind a Tony's, last name unknown, residence who used to do work for Doug Senecal." (T., Chambers at 7). Holiday stated in her report that she had talked with Pam Babine before and that Pam Babine sounded "crazy" at the time but that she had found Babine's information usually true. Douglas Senecal was Babine's landlord. (T., Chambers at 8).

All of the above information, however, even when considered in a light favorable to the Defense, is too conjectural - too built upon uncompelling inferences that are themselves built only upon speculation - and altogether disconnected from the actual facts of Sarah Cherry's murder to be admissible to show that Douglas Senecal may have been the murderer. As the

Prosecutor (T., Chambers at 18-19) and Trial Court (T., Chambers at 21-22) recognized, there is nothing in either the trial testimony or the Defense offer of proof, considered on its own terms, to show that Douglas Senecal ever had any contact with Sarah Cherry, let alone that Douglas Senecal knew where Sarah was on July 6th, or that he wanted to tamper with or eliminate her as a witness, or that he even thought that Sarah knew anything about Senecal's alleged unlawful sexual contact with Jackie Crossman. There is also nothing in the Defense offer of proof to indicate that Douglas Senecal had any knowledge of Dennis Dechaine or Dechaine's truck, let alone any desire to frame Dechaine as Sarah Cherry's murderer. Furthermore, there is no indication in the offer of proof that Senecal was anywhere other than where he said he was, took any measures to try to frame Dechaine, or even had sufficient knowledge about the circumstances of Sarah Cherry's murder to have been able to do so.

Moreover, there were other facts disclosed at the chambers conference that made the information about Douglas Senecal even more speculative:

1) The DHS file on Jackie Crossman failed to show any relationship between Douglas Senecal and Sarah Cherry and failed to show that Sarah Cherry knew anything about Senecal's alleged sexual abuse of Jackie Crossman. (T., Chambers at 24,

28-29). After an in camera review of the DHS file on Jackie Crossman, the Trial Court stated:

> There is nothing in there that would include anything that would be anymore than what we've already have known by way of your offer of proof. Specifically, I will say only this much. That the date of Sarah Cherry's murder is recorded in there under the chronological order of events by the DHS caseworker. And on the very last portion of that report are the items that Mr. Connolly has just made specific reference to as to the anonymous call, the taking of the bicycle, the nervousness, and there is nothing more in the file.

(T., Chambers at 28-29).

Moreover, there was nothing in the discovery relative to the charge of unlawful sexual contact to indicate that Sarah Cherry would be a witness against Douglas Senecal or even knew anything about the alleged incident. (T., Chambers at 16-18). According to Senecal's attorney Joseph Field, who was present at the chambers conference, the State's case

> -- against Mr. Senecal, was basically, from the State's point of view, a one witness case.... There was only one witness. That was the Jackie Crossman.
>
> Because the case never was reached for trial the State never filed a formal list of witnesses. However, when they provided me the discovery in response to my discovery request, basically the only witnesses that - they did not file a formal response to that - but the only information I got in response as to my request for discovery was basically a very brief report from David Haggett and a copy of the defendant's [Douglas Senecal's] speeding record, motor vehicle record from the Department of Motor Vehicles. It could be inferred from the police report that Jackie Crossman and Jennifer Dox and David

> Haggett would have been the witnesses in that case. No other witnesses would have been called.

(T., Chambers at 17). Sarah Cherry's name did not even appear in Sheriff Haggett's report. (T., Chambers at 18).

Finally, even accepting the Defense theory that Douglas Senecal had sent Jackie Crossman out of state to prevent her from testifying against him, Jackie Crossman had already left the State prior to July 6th (T., Chambers at 5-6) and there was no longer any reason for Senecal to be concerned about the charges against him. In particular, he had absolutely no reason to be concerned about Sarah Cherry since there is no basis for any suggestion that Sarah Cherry knew anything about the charges or would have testified against Senecal under any circumstances.

In summary, there was nothing before the Trial Court to indicate that Douglas Senecal had a reason or motive to see, let alone harm, Sarah Cherry.

2) Notwithstanding the Defense claim that Douglas Senecal would have known through Jessica Crossman that Sarah Cherry was babysitting at the Henkel residence on July 6, 1988, the Defense in its own offer of proof admitted that Jessica Crossman denied either having any knowledge that Sarah was babysitting at the Henkel residence on July 6th or telling Douglas Senecal about Sarah's whereabouts on that date. (T., Chambers at 12-13, 14-15, 22). Moreover, the trial testimony

was that the only people who knew of Sarah Cherry's plans to babysit at the Henkel residence on July 6th were Sarah's mother, step-father (Christopher Crossman), grandmother, her sister Hillary, and a friend named Julie Wagg. (T., Vol. I at 97). In view of the Defense offer of proof and the trial testimony, the Trial Court stated: "We can therefore anticipate that if Douglas Senecal takes the stand that Douglas Senecal would, in all likelihood, deny any knowledge of any baby-sitting job on the part of Sarah Cherry." (T., Chambers at 22). There was nothing before the Trial Court to suggest that such a denial by Douglas Senecal would have been anything but true. The unsupported Defense theory that Douglas Senecal knew where Sarah Cherry was is just that - an unsupported theory - and no more.

3) The Defense contention that Douglas Senecal "drove a red pickup truck of small size which was similar" to the Defendant's pickup truck and to the red Toyota pickup truck actually seen on the day of Sarah Cherry's murder is grossly misleading. The Defendant owned a red 1981 Toyota pickup truck. (T., Vol. I at 80-81). The Defendant's truck had damage on the front of the truck to the headlight on the far right-hand side. (T., Vol. I at 69 T., Vol. II at 350). Robert West, who lived on the Lewis Hill Road in Bowdoinham and was a neighbor of the Henkels, saw the Defendant's truck, which West identified by the "banged up" front headlight (T., Vol. I

at 69), drive north-and south on the Lewis Hill Road at an unusually slow speed the day before Sarah Cherry's murder. (T., Vol. I at 70-73). Holly Johnson, who also lived on the Lewis Hill Road across the street from the Henkels (T., Vol. II at 335-36), saw a small red Toyota truck heading northbound on the Lewis Hill Road at a relatively slow speed the day of Sarah Cherry's murder at approximately 1:00 to 1:15 p.m., which was within the very time period Sarah was abducted. (T., Vol. II at 340-43). (Sarah's body was recovered in woods north of the Henkels.)

Douglas Senecal's truck, however, is a two-color red and white, medium-size Ford Ranger pickup truck. (T., Chambers at 24). Douglas Senecal's truck does not look like the Defendant's truck. (T., Chambers at 18-19). Hence, Douglas Senecal's truck does not tie him in to Sarah Cherry's murder and does not aid the Defendant in his effort to point the finger at someone else.

4) In response to the Defense attack on Douglas Senecal's alibi concerning his whereabouts on July 6, 1988, Senecal's attorney Joseph Field informed the Court:

> I have in my file in my hand affidavits from him [Douglas Senecal] and two other witnesses.... He [Douglas Senecal]... outlines in detail where he was throughout the course of that day; which outline has been given both to Mr. Wright and to Mr. Connolly in my office on Thursday prior to the start of this trial.

owned a damaged red 1981 Toyota pickup truck. (T., Vol. I at 80-81).

5) Senecal's attorney also informed the Trial Court about problems with Pam Babine's credibility in accusing Douglas Senecal of involvement in Sarah Cherry's murder:

> We are aware of the name of the person who made the complaint against him [Douglas Senecal].... Pam Babine was a disgruntled tenant who was evicted by the defendant [Douglas Senecal] and his wife but given -- Mr. and Mrs. Babine were tenants of my defendant, Douglas Senecals. The Senecals sold the premises and found it necessary to evict the Babines. They gave them notice. They gave them opportunity to buy the premises and there was a great deal of animosity; all of which can be documented between the Babines and the Senecals as a result of this eviction.
>
> She [Pam Babine] also, according to her brother-in-law, whom I've spoken to, has been repeatedly hospitalized.

(T., Chambers at 26). Additionally, the Trial Court could take into account that what Babine said regarding where Sarah Cherry's body was found - i.e., behind the residence of someone named Tony - was not borne out by the evidence. The Trial *Court could thus* discount, as inherently unreliable, all that Babine had to say.

Even before hearing from Senecal's attorney, Joseph Field, and reviewing the DHS file on Jackie Crossman, the Trial Court stated relative to the information before it:

> In a light most favorable to the defense in this case there is nothing that would indicate other than speculation that Douglas Senecal, assuming that we were to

> even get into evidence in this case his sexual conviction, if any, let alone the pending charges against him, but there is nothing that would indicate that he had any knowledge of Sarah's baby-sitting, the place of her baby-sitting, and that he would have had any reason for going there other than the fact that he **is** under indictment. And if he took the stand and he was asked if he had anything to do with the abduction, gross sexual misconduct and murder of Sarah Cherry, that he would **invoke** the fifth amendment.
>
> And with all due respect, Mr. Connolly, I admire your tenacity. I admire your ingenuity, but this is inviting the jury to engage in nothing but speculation.

(T., Chambers at **23).**

Senecal's attorney then corrected the Court by pointing out that Senecal would not invoke the fifth amendment as to questions about Sarah Cherry "because he steadily refuses he had anything to do with it" but Senecal would take the fifth amendment with regard to questions about Jackie Crossman. (T., Chambers at **26-27).**

After hearing this argument and reviewing the DHS file, the Trial Court stated that "it is the judgment of this Court that it would be inappropriate for defense counsel to call Mr. Senecal for the purposes outlined in the offer of proof as well as the calling of DHS worker Jennifer **Dox," (T.**, Chambers at **29).** In view of all of the information before the Trial Cotrt, the Trial Court did not abuse its discretion in excluding the . evidence about Douglas **Senecal** on the ground that, in the Court's own words, "this is inviting the jury to engage in

nothing but speculation." (T., Chambers at 23). See State v. Harnish, 560 A.2d 5, 9 (Me. 1989) ("Here the trial court was confronted with only the *vague testimony that* an unidentified individual had publicly threatened to kill Desjardins the afternoon of the murder. There was **absolutely no** evidence to connect this threat to the murder later that evening, and no evidence suggesting that a third party was involved in the murder. We find no abuse of discretion in the trial court's decision to exclude the evidence under M.R. Evid. 403."). [7]

That the Defense offer of proof in this case, unlike in Harnish and State v. Caulk, 543 A.2d 1366 (Me. 1988), sought to identify a specific alternative person as the supposed real killer does not distinguish this case from Harnish and Caulk. For one would expect that where the Defense had settled upon and named a specific individual, the Defense would have had an enhanced ability to develop a focused rationale to explain why that person may be the truly guilty party and why Dechaine is innocent. Despite this advantage, the Defense offer of proof

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[7] 1n State v. Flemming, **409** A.2d 220, 224 (Me. 1979), the Law Court stated that when proffered evidence is of "doubtful relevancy" or is "purely speculative," another basis for its exclusion is to protect the witness - in this case, Douglas Senecal - from "harassment or undue embarrassment."

was nevertheless inadequate in showing any kind of rational connection between Douglas Senecal and Sarah Cherry's murder.

In short, the Defense offer of proof, considered as it must along with the previous trial testimony and the other information presented at the conference in chambers (see State v. White, 460 A.2d 1017, 1025 (Me. 1983) ("Although the testimony presented in White's oral offer of proof is, in the abstract, exculpatory, we must review it in the context of the trial record.... Me are convinced that the proffered evidence was not at all probative on the central issue in the case....")), reveals no more than the following:

1) Douglas Senecal had no motive to kill Sarah Cherry. Sarah had not been a witness to any alleged sexual crimes Senecal had committed against Jackie Crossman or to Senecal's efforts, if there were any, to get Jackie out of the State.

2) Douglas Senecal had at most a tangential connection to Sarah Cherry, which is a neutral fact in considering whether Senecal was the one who killed her.

3) Douglas Senecal did not even know that Sarah Cherry was babysitting on July **6, 1988**, let alone where.

4) Douglas Senecal owned a truck that did not match the Defendant's red 1981 Toyota pickup truck.

5) Douglas Senecal's whereabouts, during the very time period Sarah Cherry was abducted, were accounted for. Even under the Defense view, and even if not all of Senecal's alibi

witnesses were supportive of him, there is still no evidence that on July 6th Senecal travelled beyond Bath from his residence in Phippsburg. (T., Chambers at 11).

6) Pam Babine had no knowledge of who killed Sarah Cherry, but only "feelings" that Senecal did. (T., Chambers at 7).

Not only is the above information insufficient to tie in Douglas Senecal to Sarah Cherry's murder, but also the Defense failed to show how its proposed testimony about Douglas Senecal would have been admissible. An offer of proof must be both substantively sufficient and in a form that demonstrates the proposed testimony can be admitted. State v. Mahaney, **437 A.2d** 613, 616 (Me. 1981) ("An offer of proof must not only detail the proposed testimony but must also support the admissibility of that testimony,"); State v. Caulk, 543 A.2d 1366, 1371 (Me. 1988) (evidence that another person committed the crime excluded where, inter alia, it "was based almost entirely on hearsay"). In this regard, consider the following problems with the Defense offer of proof:

1) Pam Babine's feeling that Senecal killed Sarah Cherry is inadmissible opinion evidence under M.R. Evid. 701 (opinion testimony by lay witnesses) and 704 (opinion on ultimate issue).

2) What Pam Babine said to Bonnie Holiday of DHS, even if otherwise admissible, would have been inadmissible double hearsay through Jennifer Dox (Babine to Holiday, who reported

(5th Ciro 1981) ("neither side has the right to benefit from any inference which the jury may draw from *the witness's* assertion of the privilege either alone or in conjunction with any question... asked because such inferences are of dubious probative value and have a high potential for prejudice" (citing United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir.), cert. denied, **419 U.S.** 1053 (1974))); People v. Dikeman, Colo., 555 P.2d 519, 520 (1976) ("defense may not ask a defense witness questions which it knows the witness will refuse to answer because of a valid claim to a privilege not to testify"); Commonwealth v. Hesketh, **386** Mass. 153, 434 N.E.2d 1238, 1242 (1982) ("defendant has no right to put a witness on the stand simply to require him to assert his Fifth Amendment privilege before the jury"). Moreover, in the absence of any established connection between Senecal and Sarah Cherry's murder, evidence of any misconduct.by Senecal was simply irrelevant.

Finally, without citation of any supporting authority, the Defense contends that it should have been allowed to call Douglas Senecal and Jennifer Dox as witnesses so that the Defense would have been able to develop unspecified "additional material facts.' (Brief of Appellant at **68)** beyond what the Defense was able to show in its offer of proof. The Law Court, however, has already rejected the notion that a party might put a witness on the stand in the hope of somehow developing

that they had not come from his truck because they were at Paul's Produce stand in Brunswick. Dechaine explained to the police that "someone may have taken this notebook paper, receipt and placed them in the Henkel dooryard." (T., Vol. II at 441).

Later in the trial, the Defense called Joan Economeau, who had sub-leased Paul's Produce stand from Dechaine (T., Vol. V at 1012) and was operating Paul's Produce in the first part of July (T., Vol. V at 1019), as a witness. In the course of Economeau's testimony, the Prosecutor objected to Economeau's testifying about a break-in at Paul's Produce just prior to Dechaine's arrest on July 8, 1988. (T., Vol. V at 1019). In an offer of proof, the Defense attempted to tie in the break-in at Paul's Produce to Sarah Cherry's murder as follows:

1) Joan Economeau would testify that sometime between the evening of July 6, 1988, and the early morning of July 8, 1988, Paul's Produce stand was broken into *and* personal *property* belonging to Dennis Dechaine was taken. (T., Vol. V at **1019-20).** However, Joan Economeau was "not sure of exactly" which items were taken from Paul's Produce. (T., Vol. V at 1020).

2) Joan Economeau would also testify that "there was a cat that was killed and placed inside the stand.... This was prior to the defendant's arrest before his name was in the newspaper." (T., Vol. V at 1020).

> cat would remain the same regardless of my ruling on the other items. But there is nothing to indicate that on the date of Sarah Cherry's abduction from the Henkel residence that these items had been taken before her abduction and murder. Therefore, any items that were taken in a break after July 6th would have no probative value. Therefore, not relevant to this case at issue and therefore the proffered testimony of Miss Christy [sic] is excluded.

(T., Vol. VII at 1375).

In any event, the Defendant was not prejudiced by the exclusion of the proffered evidence relating to Paul's Produce. Given all of the evidence at the trial, the most likely explanation for the purported break-in, the theft of items belonging to the Defendant, and the presence of the Defendant's strangled cat, is that the Defendant himself staged the break-in, committed the theft, and strangled his cat in furtherance of his cover-up story that someone else killed Sarah Cherry and was trying to frame him (Dechaine). Indeed, the jury could have logically concluded that the Defendant thought up the idea of breaking into Paul's Produce while he was with the police on the night of July 6th. The Defendant originally told Sagadahoc County Deputy Sheriff Daniel Reed during the evening of July 6th that the Paul's Produce notebook and autobody receipt had been on the passenger seat in his truck (T., Vol. II at 281), that these items must *have* fallen out of his truck when he got out of his truck "to take a piss" at the foot of a long driveway (T., Vol. II at 282-83), and

that "[w]hoever grabbed the girl saw these [at the foot of the driveway], placed them up at the head of the driveway to set me up." (T., Vol. II at 283). A few hours later, however, in the early morning of July 7th, the Defendant changed his story about the location of the notebook and receipt, telling Detective Hendsbee that the notebook and the receipt had not been in his truck because they were at Paul's Produce stand in Brunswick. Dechaine further told the police that "someone may have taken this notebook paper, receipt and placed them in the Henkel *dooryard." (T.,* Vol. *II at* **441).** It *is* entirely possible that the Defendant changed his story because, by this time, he had conceived of the break-in to advance his claim that he had been set up as Sarah Cherry's murderer. Alternatively, it is possible that he subsequently decided to stage the break-in to support his claim that someone had taken his notebook and planted it in the Henkel driveway.

Other aspects of the offer of proof, in conjunction with the trial evidence, indicate that the Defendant was the one who broke into Paul's Produce and that there was therefore no prejudice to the Defense from the exclusion of this evidence.

1) According to the proposed testimony, the alleged break-in occurred some time between the evening of July **6, 1988** and the early morning of July 8, **1988 -** precisely in between Sarah Cherry's murder and the Defendant's arrest. By that time, the Defendant had asserted to the police that he had been

set up and, before his arrest, remained free to contrive events - such as the break-in - to support his assertion.

2) Around the time of Sarah Cherry's murder, the Defendant was not operating Paul's Produce stand because he had sublet the stand to Joan Economeau. (T., Vol. V at 1012, 1019). Hence, whoever strangled the cat had to find the cat at the Defendant's farm in Bowdoinham (T., Vol. VI at 1047) and then take the cat to Paul's Produce in Brunswick. Only a person with access to the Defendant's residence likely could have located and taken the cat, and only a person who also knew of the Defendant's association with Paul's Produce could have taken the cat there. The Defense conceded that it knew of "no particular individual that might have been hostile to the defendant during the time period" and sought to explain the break-in and strangulation of the cat only as the work of "the alternative perpetrator," who was attempting to frame the Defendant. (T., Vol. V at 1021-22).

The only logical conclusion is that the Defendant was the only one with *sufficient* knowledge about his relationship with both Paul's Produce and the cat to have staged the break-in and strangled the cat as part of a cover-up for the murder of Sarah Cherry. It is singularly fanciful to believe that some other person with an interest in covering up his involvement in the murder of Sarah Cherry not only was able to plant evidence relating to Dechaine at the Henkel driveway and crime scene but

III. THE TRIAL COURT'S IN CAMERA REVIEW OF THE DHS FILE FULLY COMPLIED WITH THE REQUIREMENTS OF PENNSYLVANIA V. RITCHIE.

Notwithstanding the argument at pages 97-110 of the Defense Brief, the Trial Court fully complied with Pennsylvania v. Ritchie, 480 U.S. 39 (1987), State v.Perry, 552 A.2d 545 (Me. 1989), and 22 M.R.S.A. § 4008(3)(B) (Supp. 1988), by conducting an in camera examination of the DHS fide before ruling that its contents need not be disclosed. Moreover, the Trial Court did not abuse its discretion in *denying* disclosure.

After reviewing the file, the Trial Court summarized its contents as follows:

> There is nothing in there that would include anything that would be anymore than what we've already have known by way of your offer of proof. Specifically, I will say only this much. That the date of Sarah Cherry's murder is recorded in there under the chronological order of events by the DHS caseworker. And on the very last portion of that report are the items that Mr. Connolly has just made specific reference to as to the anonymous call, the taking of the bicycle, the nervousness, and there is nothing more in the file.

(T., Chambers at 28-29). Thus, the file revealed no more than what was already known from the Defense offer of proof. For the reasons already discussed, therefore, the information from the file - like the Defense offer of proof - had too speculative and conjectual a relationship to this case even to be admissible. It certainly cannot be said that the DHS file

"probably would have changed the outcome of his [the Defendant's] trial" (State v. Perry, 552 A.2d 545, 547 (Me. 1989) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987))). Likewise, the DHS file was not "necessary for the determination of any issue" in the trial under 22 M.R.S.A. § 4008(3)(B) because the Trial Court had correctly ruled that the only issue to which the file might be relevant - the Defense's "alternative perpetrator" theory was too speculative to be raised as an issue at the trial.

Since the Defense "has failed to take any steps to have the [file] made part of the record on this appeal" (Perry, 552 A.2d at 548), the Law Court must defer to the Trial Court's summation of the file, as contained in the transcript of the chambers conference (T., Chambers at 28-29). This summation shows that the file did not contain "material" evidence. Pennsylvania v. Ritchie, 480 U.S. at 57 ("[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting United States v. Bagley, 473 **U.S. 667,** 682 (1985))). Hence, the Trial Court did not abuse its discretion in denying the Defense requst for disclosure.

Finally, the Defense may have received more than it was entitled to by the Trial Court's in camera review of the DHS file. The Defendant could "not require the trial court to

search through the [DHS] file without first establishing a basis for his claim that it contains material evidence." Ritchie, 480 U.S. at 58 n.I5. The Defense offer of proof relative to Douglas Senecal failed to establish such a basis. The Defense request for the in camera review also failed to show how the *information* sought from the DHS file "would be material" (id.) in raising a reasonable doubt that Dechaine murdered Sarah Cherry: "Your Honor, I would request that the Court in camera review the Department of Human Service's records to see if Sarah Cherry had been interviewed to see whether she had been questioned in reference to any of this [i.e., Douglas Senecal's alleged sexual abuse of Jackie Crossman]." (T., Chambers at 23°24). As the Trial Court's summary indicated, however, the DHS file did not show that Sarah Cherry had been questioned and there is no evidence that she knew anything about Senecal's alleged abuse of Jackie Crossman. Even assuming, however, that Sarah had been questioned in connection with the Jackie Crossman charges, the Defense still failed to show a rational, let alone sufficient, basis for its assertion that Douglas Senecal was the one who murdered Sarah Cherry or even knew where she was on July 6th. Accordingly, the DHS file was not "material" under any circumstances.

IV. GIVEN THAT THE DEFENSE **INTRODUCED INTO THE TRIAL THE ISSUE OF WHETHER A BRUISE MARK ON THE DEFENDANT'S LEFT ARM RESULTED FROM AN INTRAVENOUS INJECTION, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION UNDER M.R. CRIM. P. 16(d) IN ALLOWING DR. ROY'S REBUTTAL TESTIMONY THAT THE BRUISE MARK WAS PROBABLY NOT AN INTRAVENOUS INJECTION SITE.**

The Defense complains that the Trial Court abused its discretion by not excluding, pursuant to M.R. Crim. P. 16(d), Deputy Chief Medical Examiner Dr. Ronald Roy's rebuttal testimony that a small bruise mark on Dechaine's left arm was probably not an intravenous injection site. (T., Vol. VII at 1387-89). The Defense claims that the State's failure to disclose before trial Dr. Ray's opinion doubting that the bruise mark was an intravenous injection site directly violated a pretrial discovery order "[t]hat the State be required to provide written reports of all experts intended to be called by the State either in the case in chief or rebuttal and to speciify [sic] the facts, opinions and conclusions relied upon by the same." (R. at 41). The Defense further argues that the Trial Court not only abused its discretion by not sanctioning the State pursuant to M.R. Crim. P. 16(d) but also erred in failing to consider whether any sanctions should be applied at all. (Brief of Appellant at 116).

The Defense claims are meritless. When the Defense objected to the admission of Dr. Roy's rebuttal testimony (T.,

As the Defense admits -in its Brief, the Defendant himself stated pretrial in the course of an evaluation by the State Forensic Service that he had taken drugs by intravenous injection around the time of Sarah Cherry's murder.[9] (Brief of Appellant at 113). The State did not introduce in its case-in-chief any evidence of drug use by the Defendant, however, and was careful to avoid doing so. (T., Vol. V at **845-49).** It was the Defense which injected this issue into the trial.[10] In his trial testimony, the Defendant continued to maintain his alibi that he could not have killed Sarah Cherry because he was out in the woods taking drugs by intravenous

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[9] The State Forensic Service evaluation to which the Defense refers is not a part of the record on appeal. Precisely what the Defendant said is therefore not-before this Court. Even so, the Defendant was not bound to testify consistent with what he had said to the State Forensic Service. Therefore, the State could not predict exactly what the Defendant's testimony might be and what the State might have to rebut.

[10] The Defendant's claim of drug usage was not something the State could have introduced, for it was a "bad act" (CR. Evid. 404(b)) which served no admissible purpose, such as to prove intent, motive, identity, or the like. Dr. Roy's rebuttal testimony thus was not evidence which the State arguably could have introduced in its case-in-chief but chose not to in the hope of having the last word in rebuttal. To the contrary, this was true rebuttal evidence. State v. Libby, **546** A.2d **444**, **448** (Me. 1988) (definition of rebuttal evidence). Accordingly, the Defense's hyperbolic claims of being "sandbagged" (Brief of Appellant at 113, 117) are not well-founded.

injection on the day of Sarah Cherry's abduction and murder. (T., Vol. VI at 1219, 1223). The Defendant also testified that he "had left a bruise on my arm from the last injection." (T., Vol. VI at 1232). The Defendant identified this bruise mark in a photograph of his arm that was State's Exhibit 5. (T., Vol. VI at 1232). On cross-examination, the Defendant again testified that the bruise mark pictured in State's Exhibit 5 and also State's Exhibit 70, a blowup of State's Exhibit 5, was from an intravenous injection on July 6th, the day of Sarah Cherry's murder. (T., Vol. VII at **1333-34)**. In view of the Defendant's testimony on direct and cross-examination, the Trial Court, in overruling the Defense objection to Dr. Roy's rebuttal testimony, specifically found that "I don't think that this is a case where Mr. Connolly is that surprised by the anticipated testimony of Dr. Roy." (T., Vol. VII at 1379).

As the Trial Court recognized, the State did not frustrate the purpose of Rule 16 in this case because the Defense, having introduced into the trial the issue of whether the bruise mark on the Defendant's arm resulted from an intravenous injection, could not have been surprised by the fact that the State would consult with an expert as to whether the bruise mark was the site of an intravenous injection. See Bishop, 392 A.2d at 26 (since defendant was on notice that marijuana would be introduced at trial, the trial court's decision not to impose a sanction for violation of the "automatic discovery" rule was

not an abuse of discretion). The State should hardly be sanctioned for anticipating this Defense strategy - but one which only became viable or, as the Trial Court said, "merely finalized" (T., Vol. VII at 1379) once the Defendant testified.

Moreover, Defense Counsel talked with Dr. Roy pretrial and had a full opportunity at that time to discuss this issue with him but chose not to do so. (T., Vol. VII at 1378-79). The fact that Defense Counsel took his client at his word and apparently felt no need before trial to secure corroborating testimony is not the State's responsibility. See State v. Dube, 478 **A.2d 1138,** 1142 (Me. 1984):

> [W]e note that defendant conceded at oral argument that he had been given the opportunity immediately prior to trial to speak to the officers about their testimony but that he decided against speaking to them. We will not hold that it was an abuse of discretion for the trial justice to refuse to exclude the officers testimony where defendant was given the opportunity himself to cure the defect he alleges the State created by its non-disclosure.

Furthermore, although Defense Counsel stated that "[h]ad I known this rebutal [sic] evidence would have come in I would have my own expert or had the opportunity to get my own expert who would say they are consistent with tract [sic] marks" (T., Vol. VII at 1379), Defense Counsel never moved for a continuance to obtain such an expert.

Finally, the State's failure to disclose Dr. Roy's opinion about the bruise mark did not create an "imbalance in the means

of securing evidence." LeClair, 382 A.2d at 33. The Defense obviously had full access before trial to the Defendant's arm, to State's Exhibit 5 (made available through discovery) depicting the bruise mark in question, and to the Defendant's explanation that the bruise mark resulted from an intravenous injection. The Defense thus had ample opportunity to confirm the Defendant's explanation with its own expert. Even before his arrest, the Defendant had consulted with an attorney (T., Vol. VII at 1266-67, 1270), who remained co-counsel of record throughout the trial of this case. See LeClair, 382 A.2d at 33 (Rule 16's purpose "to eliminate concealment and surprise and to remedy the imbalance in the means of securing evidence" not frustrated where "Defendant had full access to the bullet hole; it was in his own apartment. Defendant was aware that the police had inspected the hole; he himself had pointed it out to the investigating officer. Defendant had ample time to make his own measurements even after [the officer] testified, since trial continued on the next day.").

For all of these reasons, the Trial Court did not abuse its discretion under M.R. Crim. P. 16(d) in allowing Dr. Roy's rebuttal testimony about the bruise mark on the Defendant's arm. Even assuming arguendo that the Trial Court did abuse its discretion, this non-constitutional error would nevertheless be harmless because it is "highly probable that the error [of admitting Dr. Roy's rebuttal testimony about the bruise mark]

did not affect the judgment." State v. Huff, 469 A.2d 1251, 1253-54 (Me. 1984). First, Dr. Roy' rebuttal testimony was equivocal. On cross-examination, he admitted that if certain fluids had been injected into the muscle rather than intravenously, this could have explained the bruise mark seen in the photographs. Second, the Defendant testified for nearly five hours and repeatedly denied having done harm to Sarah Cherry. (T., Vol. VI at 1176, 1240, 1252, 1256; Vol. VII at 1271, 1282r83, 1286, 1287-88, 1293, 1300, 1301-02, 1331, 1343, 1347, 1348-49, 1354, 1358, 1363, 1364, 1367, 1371-72). The jury had the opportunity to watch and listen to the Defendant carefully, and by its verdict necessarily rejected his denials. It cannot seriously be contended that any juror was suddenly swayed to vote guilty by Dr. Roy's rebuttal testimony when he or she would not have done so before.

Finally, the evidence that Dennis Dechaine was the one who murdered Sarah Cherry is overwhelming:

1) Robert West, who lived on the Lewis Hill Road in Bowdoinham and was a neighbor of the Henkels, saw Dechaine's truck (not just a "red pickup truck," as the Defense would have this Court believe (Brief of Appellant at 34)), which West identified by the "banged up" front headlight (T., Vol. I at 69), drive north and south on the Lewis Hill Road at an unusually slow speed the day before Sarah Cherry's murder. (T., Vol. I at 70-73). At approximately 1:00 p.m. on the day

of Sarah Cherry's abduction and murder, Holly Johnson, who also lived on the Lewis Hill Road across the street from the Henkels (T., Vol. II at 335-36), heard a vehicle slow down at the Henkel driveway and the bark of the Henkels' dogs (T., Vol. II at 338-40) and, within approximately fifteen minutes, saw a small red Toyota truck, which was consistent in appearance with Dechaine's red 1981 Toyota pickup (T., Vol. I at 80-81), heading northbound on the Lewis Hill Road at a relatively slow speed. (T., Vol. II at 340-43).

2) When Jennifer Henkel arrived home at approximately 3:20 p.m. on July 6, 1988, Jennifer found "a little loose-leaf notebook and a slip of paper like a car repair bill" lying in her driveway. (T., Vol. I at 171-72). Dennis Dechaine's name was on the "car repair bill," which was an autobody receipt for - Dechaine's 1981 Toyota pickup truck. (T., Vol. II at 269-70). The notebook was also Dechaine's and was associated with his Paul's Produce stand in Brunswick. (T., Vol. II at 441).

3) When Sagadahoc County Deputy Sheriff Daniel Reed confronted the Defendant on July 6th with the fact that the notebook and autobody receipt had been-found in the Henkel driveway earlier that day, the Defendant initially denied that these items were his. (T., Vol. at 280). The Defendant then admitted that these items were his. (T., Vol. II at 281). The Defendant further admitted that he kept the notebook and autobody receipt on the passenger seat in his truck (T.,

Vol. II at 281) and that these items must have fallen out of his truck when he turned around at the foot of a long driveway and got out of his truck "to take a piss." (T., Vol. II at 282-83). When asked by Deputy Reed to explain how the notebook and receipt were found at the head of the driveway near the Henkel house, the Defendant stated: "Whoever grabbed the girl saw these, placed them up at the head of the driveway to set me up." (T., Vol. II at 283). However, neither Deputy Reed nor any other police officer had informed the Defendant that Sarah Cherry had been abducted or kidnapped; the Defendant had been informed simply that the police were investigating a missing 12-year old girl. (T., Vol. II at 283-84). At trial, the Defendant acknowledged this to be true. (T., Vol. VI at 1240; Vol. VII at 1344).

Morever, a few hours later, in the early morning of July 7th, the Defendant changed his story about the location of the notebook and receipt, telling the police that the notebook and receipt had not been in his truck because they were at Paul's Produce stand in Brunswick. Dechaine further told the police that "someone may have taken this notebook paper, receipt and placed them in the Henkel dooryard." (T., Vol. II at **441)**. In the course of cross-examination at trial, however, Dechaine changed his story again and acknowledged that the autobody receipt with his name on it and the Paul's Produce notebook were in his truck on July 6th. (T., Vol. VII at 1338, 1370).

Defendant's truck and the piece of rope found in the woods near Sarah's body "were once one rope." (T., Vol. IV at 737).

As for a pen knife, the Defendant had carried a pen knife on his key ring. (T., Vol. VI at 1128). However, the pen knife was not on the Defendant's key ring when it was found by the police on July 6th, and the Defendant's wife testified that she was surprised when she learned from the police on July 8th that the pen knife was not on the Defendant's key ring. (T., **Vol. VI at 1128).**

6) The Defendant told Sagadahoc County Sheriff David Haggett during the evening of July 6th that he (Dechaine) had been out in the woods looking for fishing holes and that he could not remember where he had left his vehicle. The Defendant, perhaps trying to distance himself from the key ring which had had the pen knife on it, also told Sheriff Haggett that the Defendant's keys had been left in his vehicle. (T., Vol. II at 394). However, prior to the finding of the Defendant's truck, the Defendant's key ring with the keys on it was found by Detective Westrum in Westrum's police cruiser where the Defendant had been sitting. (T., Vol. II at 395). When confronted by Sheriff Haggett about the fact that the key ring had been found in Detective Westrum's cruiser, the Defendant explained that he was nervous and confused and that, upon realizing that his key ring had been in his pocket and not in his truck as he had told Sheriff Haggett, he (Dechaine) had

decided to hide the key°ring in Westrum's cruiser. (T., Vol. II at 396).

7) The Defendant's truck was found by the police at approximately 12:05 a.m. on July 7th (T., Vol. II at 401), very near the area where Sarah Cherry's body was later discovered (T., Vol. II at 413-16). The piece of rope found in the woods that matched the rope found in the Defendant's truck and had the same basic characteristics as the rope used to tie Sarah's hands together was located part way between the Defendant's truck and where Sarah's body was discovered. (T., Vol. II at 414-16).

8) At approximately 8:00-8:30 p.m. on July 6th, a man matching the Defendant's appearance came out of the woods near where Sarah's body **was** discovered, and was walking towards the Dead River Road. (T., Vol. I at 195-96, 41). At approximately 8:45 p.m. on July 6th, the Defendant, who had been walking along the Dead River Road, told Helen and Harry Buttrick that he had been fishing and could not find his truck. (T., Vol. I at 203). The Defendant also told the Buttricks that he was visiting in Bowdoinham but lived in Yarmouth and "should have stayed there." (T., Vol. I at 205). At trial, the Defendant admitted that these statements to the Buttricks were lies. (T., Vol. VII at 1327-28).

9) On July 8th, the Defendant stated to Maine State Police Detective Alfred Hendsbee: "I can't believe that I could do

such a thing. The real me is not like that. I know me. I couldn't do anything like that. It must be somebody else inside of me who is doing this." (T., Vol. IV at 799). The Defendant told Detective Hendsbee several more times that he (Dechaine) "couldn't believe he could do such a thing. It wasn't the real him. He even stated it one time that he can't believe he killed this girl and he can't even kill his own chickens; he has to take them to the slaughter house to have them killed." (T., Vol. IV at 802).

10) The Defendant subsequently told Deputy Reed that "he [Dechaine] knows what he did was wrong, but he doesn't consider him[self] to be a murderer; he considers himself to be a drug addict." (T., Vol. VII at 1396).

In view of this sampling of evidence that the Defendant was the one who murdered Sarah Cherry, considered with all of the other evidence admitted at trial, the Trial Court's admission of Dr. Roy's rebuttal testimony that the bruise mark on the Defendant's arm did not appear to be "a typical intravenous injection site" (T., Vol. VII at **1388),** if error at all, was harmless. It is "highly probable" that Dr. Roy's rebuttal testimony did *not affect the jury's* determination of guilt. Huff, **469 A.2d at 1253-54.**

V. UNDER STATE V. ALLARD, 557 A.2d 960 (ME. 1989), THE DEFENDANT'S DUAL CONVICTIONS AND SENTENCES FOR THE SINGLE MURDER OF SARAH CHERRY MUST BE MERGED INTO ONE MURDER CONVICTION FOR WHICH ONE LIFE SENTENCE MAY BE IMPOSED; HOWEVER, THE STATE IS ENTITLED TO RELY ON EITHER OF THE TWO UNDERLYING GUILTY VERDICTS TO SUPPORT THE SINGLE MURDER CONVICTION.

The Defense raises the same two issues concerning Dechaine's dual sentences and convictions for murder that were addressed in State v. Allard, 557 A.2d 960 (Me. 1989): 1) whether dual sentences and dual convictions for the single murder of Sarah Cherry are prohibited as a violation of Dechaine's double jeopardy rights under the Maine (art. I, § 8) and United States (amend. V) Constitutions, and 2) whether the State can prosecute a defendant for one murder under alternative theories - intentional or knowing murder (17-A M.R.S.A. § 201(1)(A)) and depraved indifference murder (I7-A M.R.S.A. § 201(1)(B)).

Regarding the first issue, the State readily concedes that the presently imposed concurrent life sentences relative to intentional or knowing murder (Count I) and depraved indifference murder (Count II) are illegal under Allard and that the underlying double guilty verdicts "must be merged into a single conviction [for murder] and *only one [life]* sentence

may be imposed for that conviction." Allard, 557 A.2d at 962. [12]

Regarding the second issue, "[p]rovided it does not act in bad faith, the State can prosecute a defendant for one offense under alternative theories of criminal responsibility. State v. Hickey, **459 A.2d 573, 578, 581** (Me. 1983)." Allard, 557 A.2d at 962. GiveA the gruesome and brutal circumstances of Sarah Cherry's death, the State in this case, no less than in Allard, was entitled to prosecute Dechaine for a single murder "using two alternative theories of murder: intentional and knowing murder (17-A M.R.S.A. § 201(1)(A)) and depraved indifference murder (17-A M.R.S.A. § 201(1)(B)), specifically permitted under Hicke, 459 A.2d at 578." Allard, 557 A.2d at 962. The State was not required to elect between theories at the time of prosecution and has proven each theory beyond a reasonable doubt. The State is therefore "entitled to rely on either theory to uphold the single conviction" (Allard, 557 A.2d at 962) and need not **make** an election of which theory - i.e., which count - to take to judgment.

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[12] The Trial Court sentenced Dechaine on April **4, 1989** (R. at 160, 174), without the benefit of the Law Court's decision in Allard, which was decided on May 2, 1989.

State v. Walsh, 558 A.2d 1184, 1187 (Me. 1989), requiring the State to make "an election of which count to take to judgment," is distinguishable because in Walsh - unlike the present case where there are double guilty verdicts for the single crime of murder - it was "impossible to enter a single judgment on both the rape and the gross sexual misconduct counts." Walsh, 558 A.2d at 1186 n.2. The Defense argument that Walsh should control here (Brief of Appellant at 121-23) is therefore entirely without merit, as the Law Court itself indicated in Walsh by expressly distinguishing the Allard situation - which is this case - where there are "double guilty verdicts for [a] single crime." Walsh, 558 A.2d at 1186 n.2.

In sum, despite the argument of the Defense (Brief of Appellant at 121-23), nothing in Allard or Walsh required the State to make an election on the theory of murder for which the Defendant was prosecuted. [13]

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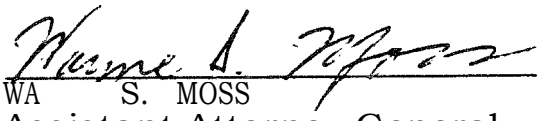
[13] There is one other minor issue relative to sentencing of which the Law Court should be aware. As noted above, the State had dropped Count IV (rape) before trial and for purposes of the jury's consideration Counts V and VI were renumbered Counts IV and V. The judgment and conviction, however, was entered on the renumbered Counts IV and V rather than on the original Counts V and VI of the indictment. This is a harmless clerical error that can be corrected without altering the result in this case in any way. See State v. Meader, 564 A.2d 1177, 1178 (Me. 1989).

CONCLUS ION

For all of the foregoing reasons, the State respectfully requests that the Defendant's appeal be denied.

Dated: December 7, **1989**

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, hereby certify that I have this day caused two copies of the foregoing "BRIEF OF APPELLEE" to be served upon Appellant's Attorney of Record, Thomas J. Connolly, Esquire, by having the same deposited in the United States Mail, postage prepaid, addressed as follows:

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Dated at Augusta, Maine this 7th day of December, 1989.

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