STATE OF MAINE
Knox, SS.

SUPERIOR COURT
Docket No. CR-1989-071

STATE OF MAINE )
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)
)
v. ) **Order on Motion for Further DNA Testing**
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)
Dennis J. Dechaine, )
Defendant. )
)

## Introduction

By motion dated September 13, 2021, Defendant seeks DNA analysis ("and/or *re*analysis") of certain items related to his conviction for kidnapping, sexual assault, and murder of a 12-year-old girl in 1989. The case has generated a long and detailed history, the events of which are recorded in decisions of the Law Court and need not be recounted now. **State v. Dechaine**, 572 A.2d 130 (Me. 1990), *cert. denied*, 498 U.S. 857 (1990); **State v. Dechaine**, 630 A.2d 234 (Me. 1993); **State v. Dechaine**, 644 A.2d 458 (Me. 1994); **State v. Dechaine**, 2015 ME 88, 121 A.3d 76.

Although Defendant's motion seeks limited relief, it implicates much larger interests. The first is the one he advances: if, notwithstanding his confession, conviction, and previous failed attempts at post-judgment relief, he is actually innocent, Defendant has an essential interest in seeing that the truth is found, presented, and recognized. Less important but still foundational is the interest of the people of the State of Maine in the finality of its verdicts—that convictions reached in accordance with due process, for which appeals and collateral challenges have been exhausted, not be the subject of endless contention. Finally, the victim's family members have powerful interests. They have endured 34 years of litigation since their daughter was tortured and killed and they have a need, finally, for their suffering and loss not to be aggravated by further court proceedings. In ruling on Defendant's motion the court is mindful of all these interests, but the terms of its decision must be determined by the specific provisions of the statute under which Defendant seeks relief.

The court held an oral argument on December 10, 2021, at which Defendant was represented by Nale Law Offices and the State by AAG Donald Macomber. The matter is now in order for decision.

Discussion

Defendant's motion is based on 15 M.R.S. § 2138(4-A), which provides:

> **4-A. Standard for ordering DNA analysis.** The court shall order DNA analysis if a person authorized under section 2137 presents prima facie evidence that:
>
> **A.** A sample of the evidence is available for DNA analysis;
>
> **B.** The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in a material way;
>
> **C.** The evidence was not previously subjected to DNA analysis or, if previously analyzed, will be subject to DNA analysis technology that was not available when the person was convicted;
>
> **D.** The identity of the person as the perpetrator of the crime that resulted in the conviction was at issue during the person's trial; and
>
> **E.** The evidence sought to be analyzed, or the additional information that the new technology is capable of providing regarding evidence sought to be reanalyzed, is material to the issue of whether the person is the perpetrator of, or accomplice to, the crime that resulted in the conviction.

15 M.R.S. § 2138(4-A).

Some of the items Defendant believes are relevant to his guilt were subjected to DNA analysis in 2012. He now argues he is entitled to further examination by new instruments and techniques that are immensely more powerful in gathering and analyzing samples than any technology in existence in 2012. These include the M-VAC Wet Vacuum Collection System and software for probabilistic genotyping.

The State responded with a motion of its own, pursuant to 15 M.R.S. § 2137, to dismiss Defendant's motion as untimely filed. Section 2137(2) provides:

> **2. Time for filing.** A motion under this section must be filed by the later of:
>
> **A.** September 1, 2008, including a motion pertaining to criminal proceedings in which DNA testing was conducted before September 1, 2006;
>
> **B.** Two years after the date of conviction; and
>
> **C.** In cases in which the request for analysis is based on the existence of new technology with respect to DNA analysis that is capable of providing new material information, within 2 years from the time that the technology became commonly known and available.

15 M.R.S. § 2137(2).

Much of both parties' written arguments were devoted to the nature of DNA analysis in the past, the nature of the advanced capabilities now available, the handling of evidence at previous stages of this case's history, and the likelihood (or not) that renewed examination would actually yield new evidence of any useful quality. At hearing, these issues were set aside. Counsel for the State conceded that, at least for the purpose of the pending motions, the prerequisites of § 2138(4-A) have been satisfied. This left before the court a single, critical question: whether Defendant filed his motion within two years of when the new technology became "commonly known and available." 15 M.R.S. § 2137(2)(C).

This remaining issue is both factual and legal. It requires the court to assess who knew what and at what time about the M-VAC Wet Vacuum Collection System and probabilistic genotyping, and then to consider whether that demonstrated knowledge falls within the statutory language of "commonly known and available." The hearing on the motions was nontestimonial, and the factual information available to the court is therefore limited to the affidavits the parties attached to their pleadings.

Defendant supported his motion with affidavits from his former counsel, Attorney Steven Peterson, and from Suzanna R. Ryan, a forensic DNA expert in California. The State's motion to dismiss was supported by an affidavit from Catharine MacMillan, a forensic DNA analyst at the Maine State Police Crime Laboratory (MSPCL). Attorney Nale's response to the State's motion included his own affidavit in which he reported the absence of any mention of the new technology, either in news reports and periodicals or in the Department of Public Safety's annual reports, over the five years preceding the motion. Mr. Nale also reported a conversation he had had with an official at the MSPCL to the effect that a backlog of DNA testing has not allowed use of the new technology.

From these documents, the court gleans the following:

- Mr. Peterson has been in practice since 1976. He represented Defendant in obtaining DNA testing by comparatively primitive techniques in 2012. Mr. Peterson, as an active criminal lawyer, was unaware of the new technology before he spoke with Mr. Nale. He believes the general public and prison population are similarly unaware of it.

- According to Ms. Ryan, the M-Vac system began being marketed for forensic use but, as of the date of her affidavit, only 32 forensic laboratories and 38 law enforcement agencies in the United States had it available for use.

- Similarly, according to Ms. Ryan, probabilistic genotyping software came into use for forensic casework in 2012, but only in Australia and New Zealand, with laboratories in the U.S. beginning its use in about 2015. She identifies two such programs, STRmix™ and TrueAllele, but avers only to the distribution of the former. She reports it is being used by 59 organizations in the U.S., including the F.B.I., and is being validated by 60 more.

- Ms. MacMillan has personally been involved in DNA analysis of evidence in Mr. Dechaine's case since 2003. She reports that the M-VAC system and probabilistic genotyping have "existed for numerous years within the forensic community." She asserts court rulings on what appear to be three probabilistic genotyping programs, beginning respectively in 2012, 2013, and 2016. STRmix was addressed in a peer-reviewed journal in 2016. It was being used by 17 laboratories (including the New York City OCME and the FBI) by 2017. As of 2018, it was being or had been internally validated by at least 31 laboratories whose data had been analyzed in a peer-reviewed journal. A private laboratory, DNA Labs International (location not identified) validated the M-VAC in 2014 and validated STRmix in 2016. Another private laboratory, Sorenson Forensics (location also not identified) validated the M-VAC "ten years ago" and validated two probabilistic genotyping software systems (one, "Bullet Proof," not otherwise addressed in any affidavit) in 2018.

- Ms. MacMillan reported that the MSPCL purchased the M-VAC in 2019 and completed its validation in January of 2020 but has not yet used it in casework. The MSPCL purchased STRmix at the end of 2019 but had not, as of November 15, 2021, begun validating it.

- Mr. Nale reported on his search of news reports, periodicals, and the Department of Public Safety's annual reports, over the five years preceding the motion. His finding was that the new technologies were not mentioned in these sources. Mr. Nale also reported a conversation he had with an official at the MSPCL to the effect that a backlog of DNA testing has not allowed use of the new technology.

No affidavit contradicted any other affidavit, so the court accepts the preceding statements as true. At the hearing, counsel for the State advanced two additional factual contentions: that Defendant himself had generated the most recent change in the statute that opened the opportunity for further testing, and that defense counsel had approached the State about the pending motion 18 months before the hearing. The court is confident counsel reported these facts to the best of his knowledge. Without evidence of further specifics and context to evaluate Mr. Nale's inquiry (e.g., what exactly he said to Mr. Macomber 18 months ago), however, that assertion is not of use to the court in its evaluation. Likewise, Mr. Dechaine's personal knowledge and legislative efforts were not established by evidence and cannot be considered.[1]

In the statute, "commonly known and available" is presented in the conjunctive. In the absence of a statutory definition or interpretation by the Law Court, this phrase must be interpreted according to its plain meaning. Turning to the first element, the State argues "common knowledge" refers to the scientific and technological community charged with conducting DNA analyses. By this standard, the M-VAC system and probabilistic genotyping have been commonly known for far longer than the two-year deadline

[1] It appears likely (though perhaps paradoxical) that Mr. Dechaine's personal specialized knowledge—even if he in fact had it—would not affect the court's evaluation. The statute refers to the time when technology became "commonly known and available" but makes no exception for an involved person's actual subjective awareness.

imposed by the statute. That proposed meaning is arguable but it is not "plain." It seems particularly unsuited to a statute authorizing aggrieved laypersons but not scientific operatives to seek DNA examination. 15 M.R.S. § 2137 (1). By contrast, Mr. Dechaine argues something is "commonly known" only when it has penetrated the knowledge base of the population of prison inmates. That makes some logical sense in the context of this case but neither is it persuasive.

A third possibility is to read "common" to include the public at large. That reading would be too broad to establish any reasonable deadline related to rapidly shifting scientific technology. Doe v. Reg'l Sch. Unit 26, 2014 ME 11, ¶ 15, 86 A.3d 600 (explaining that courts have "'the power and duty . . . to interpret statutes so as to avoid absurd results'"); see also id. ("In construing a statute, [courts] may properly consider its 'practical operation and potential consequences'"). The nature of the statute, its purpose, and the specialized knowledge to which it relates require a finding that the relevant community encompasses those involved in prosecuting and defending criminal cases. At the very least, it must mean that both prosecutors and defense attorneys have some shared awareness of the technological advances.

According to his affidavit, Mr. Peterson represented Mr. Dechaine. He was aware of the critical role DNA evidence played in the case. He has been active in the defense of criminal cases for decades. While his personal knowledge is not necessarily coextensive with relevant common knowledge, Mr. Peterson's affidavit is the best evidence presented by the parties on the issue. The court concludes that Defendant's motion was brought within two years of the updated technology becoming commonly known, if indeed it yet has.

The foregoing is probably academic because the court concludes the technology has not been "available" under the terms of the statute and indeed appears not yet to be. "Available" as that term is used in a statute in Maine cannot reasonably be read to mean available to people in other states in their cases. It must mean available in Maine.[2]

## Order and Conclusion

Based on the discussion above, Defendant's motion for further DNA testing must be GRANTED.

In issuing this order, the court must emphasize its limited scope. By granting the immediate motion the court offers no opinion about the many other issues implicated by the facts, including whether the items to be examined have been so contaminated that they cannot yield useful samples; whether they have physically degraded to the point they are unusable; or whether any result of further testing will legitimately generate a further motion in this case. The court's ruling today specifically does not endorse Defendant's bold assertion that examination of the items by enhanced technology will identify a perpetrator other than himself.

[2] Here, too, a factual assertion at hearing is interesting but not supported by evidence. Counsel for the State made reference to protocols for sharing of technology between states or other jurisdictions. Without evidence of the terms of those protocols, to whom they are available, and under what terms, their bare existence cannot inform this decision.

The Clerk may incorporate this Order upon the docket by reference.

Dated: July 22, 2022

The Hon. Bruce C. Mallonee
Justice, Maine Superior Court