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June 7, 2023

Sarah Bosk, Clerk
Superior Court at Knox County
62 Union Street
Rockland, Maine 04841

FILED VIA SHAREFILE

RE: **State of Maine v. Dennis Dechaine, CR-89-126**

Dear Sarah:

Enclosed is the State of Maine's Response to Defendant's Prehearing Memorandum Regarding Scope of Evidence. Should the court need any pleadings referenced in the State's response, please let us know.

Thank you for your assistance.

Sincerely,

/s/ Donald W. Macomber

DONALD W. MACOMBER
Assistant Attorney General
Criminal Division
Me. Bar No. 6883

Enclosure

cc: John Nale, Esq.

STATE OF MAINE **KNOX, ss.**	**SUPERIOR COURT** **CRIMINAL ACTION** ***DOCKET NO. CR-89-126***

STATE OF MAINE	)	
	)	**STATE OF MAINE'S RESPONSE**
v.	)	**TO DEFENDANT'S**
	)	**PREHEARING MEMORANDUM**
	)	**REGARDING SCOPE OF**
DENNIS DECHAINE,	)	**EVIDENCE**
Defendant	)	

The State of Maine, by its undersigned attorney Assistant Attorney General Donald W. Macomber, submits this memorandum in response to the Defendant's Prehearing Memorandum regarding the Scope of the Evidence.

INTRODUCTION

As explained later in this memorandum, Dechaine's "Brief Factual Statement" on pages 3-4 of his memorandum certainly downplays a simple truth– Dechaine confessed multiple times. Also, Dechaine testified under oath at trial that he did not kidnap, sexually assault, or kill Sarah Cherry. By its guilty verdict, the jury – who were able to personally observe Dechaine while he testified -- determined that Dechaine had committed perjury.

Moreover, Dechaine's memorandum also downplays the fact that Dechaine could be included as a contributor to the YSTR DNA results from 2 of the 6 items tested pursuant to this Court's July 2022 order and could not be excluded from a third item.

There are several other factual assertions in Dechaine's memorandum that are inaccurate or misleading:

- "unknown male DNA found in the blood under the victim's left thumbnail," p. 1 – it was never established where the DNA was located on the thumbnail, much less how it got there.

- The thumbnail DNA is a "probable inclusion on the scarf," p.1 –the YSTR profiles on the thumbnail and the scarf do not rise to the level of a match.

- "10 obvious dig marks on his face," p. 2 – Dr. Roy, who performed the autopsy, testified that he did not observe any flesh or skin adhering to the fingers that would suggest that Sarah had scratched her assailant. (T., Vol. III at 608-609).

- "Photo Exhibit #3 portray[s] the 'actual' strangulation process" – wrong. It depicts Dechaine's version of the strangulation process.

- "Evidence suggested that someone rifled [Dechaine's] truck and [took] items before locking the door," p.3 – there was no evidence in any proceeding that someone rifled the truck. Moreover, Dechaine had the truck keys on his person when he entered the police cruiser on the night of Sarah's disappearance. He hid them under the front seat of the cruiser.

BACKGROUND

1. Underlying Criminal Judgment-Arrest, Indictment and Trial.

On July 6, 1988, 12-year-old Sarah Cherry disappeared from a house in Bowdoin where she had been babysitting. Her tortured body, partially buried, was found on July 8, 1988, in the woods a few miles away.

Dechaine was arrested on July 8, 1988, after Sarah's body had been found. He made his first appearance in the Maine District Court on July 11, 1988, at which time he was represented by retained counsel, George M. Carlton, Jr., Esq., now deceased, who remained counsel of record throughout the pretrial, trial and sentencing stages and at subsequent proceedings.

By motion dated July 26, 1988, Thomas J. Connolly, Esq., sought the presence of a court reporter at the Grand Jury. Although it is unclear exactly when Mr. Connolly entered his appearance, he certainly was involved in the case even before the indictment. Attorney Connolly remained co-counsel of record, along with Mr. Carlton, throughout the case.

On August 1, 1988, the Sagadahoc County Grand Jury returned an indictment charging Dechaine with the following crimes against Sarah Cherry:

> Count I- Intentional or Knowing Murder, in violation of 17-A M.R.S. § 201 (1)(A)(1983):
>
> Count II- Depraved Indifference Murder, in violation of 17-A M.R.S. § 201(1)(B)(1983 and Supp. 1987):
>
> Count III- Kidnapping, in violation of 17-A M.R.S. § 301(1)(A)(3)(1983):
>
> Count IV- Rape, in violation of 17-A M.R.S. §§ 251(1)(B) and 252(1)(A)(1983 and Supp. 1987):
>
> Count V-Gross Sexual Misconduct (insertion of a birch stick into the vagina), in violation of 17-A M.R.S. §§ 251(1)(A) and (C)(3) and 253(1)(B)(1983 and Supp.. 1987);
>
> Count VI- Gross Sexual Misconduct (insertion of a birch stick into the anus), in violation of 17-A M.R.S. §§ 251(1)(A) and (C)(3) and 253(1)(B)(1983 and Supp. 1987)

State of Maine v. Dennis J. Dechaine, Superior Court at Sagadahoc County, Docket Number CR-88-244.

Before trial, venue was changed to Knox County, where the case was given docket number CR-89-71, and trial was scheduled for March 6, 1989. Justice Carl O. Bradford was specially assigned to handle all aspects of the case.

By motion dated January 25, 1989, Dechaine filed a motion to compel discovery and to continue the trial. The primary purpose of the motion was to permit Dechaine to have the fingernail clippings of Sarah Cherry, obtained by the State Police at her autopsy, subjected to what counsel conceded was then "a radical and new technique" of DNA testing.[1]

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[1] Although Dechaine's motion referred the trial court to recent approval of DNA testing by a Florida Court of Appeals, *Andrews v. State*, 533 So.2d 841(Fla. App. 1988) *rev. denied*, 542 So. 2d. 1332 (Fla.

After an evidentiary hearing held on January 27, 1989, the Court denied the motion to continue and to compel production of evidence for DNA testing. The motion to compel discovery, in other respects, was granted.

On March 6, 1989, before the jury was selected, the State of Maine dismissed Count IV of the indictment (charging rape) because "the medical evidence is sufficiently ambiguous that the allegations cannot be proved beyond a reasonable doubt."

Dechaine was tried before a jury beginning on March 6, 1989. The following evidence admitted at trial established that Dechaine was guilty beyond a reasonable doubt of the murder, kidnapping and gross sexual misconduct of Sarah Cherry:

Sarah was babysitting at the home of John and Jennifer Henkel on the Lewis Hill Road, in Bowdoin on July 6, 1988. (Trial Transcript hereinafter referred to as "T.", Volume 1 at 116-117, 166-169). Sarah was babysitting 11-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 specifically 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 people who knew of Sarah's plans to babysit at the Henkels on July 6, 1988, other than the Henkels themselves, were Sarah's mother Debra Crossman, her stepfather Christopher Crossman, her sister Hillary, her grandmother, and her girlfriend Julie Wagg. (T., Vol. I at 97).

1989), that case involved Restriction Fragment Length Polymorphism (RFLP) DNA testing, which was not the DNA testing procedure that Dechaine wanted to utilize. Rather, he sought to have Polymerase Chain Reaction (PCR) DNA testing done. PCR testing at that time was even newer and more radical than RFLP testing and at that time no reported decision had approved PCR testing.

Mrs. Henkel left her house at approximately 9:00 am on July 6, leaving Sarah alone inside the house with Monica. (T., Vol. I at 169). Mrs. Henkel deliberately did not lock the door to her house in order to prevent Sarah from getting locked out if she should take the baby outside in the course of the day. (T., Vol. I at 168, 170). When Mrs. Henkel called home shortly after 12 noon, she spoke with Sarah, who was "feeding the baby and about to fix herself some lunch." Sarah was having no problems and was making hotdogs for her lunch. (T., Vol. I at 170-171, 178).

When Mrs. Henkel arrived home at approximately 3:20 p.m., (T., Vol. I at 171) she found Monica asleep in her crib but could not find Sarah. (T., Vol. I at 176-179). Sarah's body was found two days later on July 8, 1988, approximately three and one-quarter miles from the Henkel home (T., Vol. I at 41, 61-62, T., Vol. III, at 497, 511-512, 524-527). Her body was found in dense woods and was approximately 450-500 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 552-553).

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 knees. Although she always wore underpants, (T., Vol. I at 113), there were no underpants on or around her body when she 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 561-563). Sarah had petechiae hemorrhages of her eyes, which are "one of the strong hall-marks of asphyxiation" and were consistent with strangulation. (T., Vol. III at 569). Birch sticks approximately 1 inch in diameter had been inserted 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 580-581). 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 appeared 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 564-565, 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 by 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 on 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). The 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, although Dr. Roy acknowledged that he could not be precise as to the time of death. (T. Vol. III at 592-593) (T., Vol. III at 585-586). 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).

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. III at 69) drive north and south on the Lewis Hill Road at an unusually slow speed on July 5, the day before Sarah Cherry's murder. (T., Vol. III at 70-73). Raymond Knight, who knew Dechaine, saw him at Knight's store that same afternoon (T., Vol. VII at 1382, 1384), contradicting Dechaine's wife's testimony that Dechaine 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 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 335-336), heard a vehicle slow down at the Henkel driveway and the bark of the Henkels' dogs (T., Vol. II at 338-340) 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 340-343). A tire impression found a few hours later in the Henkel driveway (T., Vol. I at 127-129) was consistent with the tread on the left front tire of Dechaine's truck (T., Vol. IV at 659). Dechaine acknowledged at trial that he was not aware of anyone else driving his truck on that day. (T., Vol. VII at 1316).

When Jennifer Henkel arrived home at approximately 3:20 p.m. on July 6, 1988, she discovered "a little loose-leaf notebook and a slip of paper like a car repair bill" lying in her driveway. (T., Vol. I at 171-172). Dechaine's name was on the car repair bill which was an auto body receipt for Dechaine's 1981 Toyota pickup truck. (T., Vol. II at 269-270). Dechaine admitted in an interview with Maine State Police Detective Al Hendsbee later that night that the notebook, associated with Dechaine's produce stand in Brunswick, was his. (T., Vol. II at 441). The police began looking for Dechaine.

At approximately 8:00 to 8:30 p.m. on July 6, 1988, a man matching Dechaine'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 195-196). At approximately 8:45 p.m. on July 6, 1988, Dechaine, who had walked approximately one-half mile down the Dead River Road (T., Vol. I at 41), told Helen and Harry Buttrick, who picked Dechaine up by the side of the road, that he had been fishing and could not find his truck. (T., Vol. I at 203). Dechaine also told the Buttrick's that he was visiting in Bowdoinham but lived in Yarmouth and "should have stayed there." (T., Vol. I at 205). At trial, Dechaine admitted that these statements to the Buttricks were lies. (T., Vol. VII at 1327-1328). Mr. Buttrick was driving around with Dechaine looking for the truck when they encountered a police vehicle. Mr. Buttrick explained to the officer that Dechaine could not find his truck, and then Dechaine got into the police vehicle. The officer brought Dechaine to the command post that had been set up to search for Dechaine and Sarah.

When Sagadahoc Deputy Sheriff Daniel Reed confronted Dechaine on July 6, 1988 at the command post, with the fact that the notebook and auto body receipt had been found in the Henkel driveway earlier that day, Dechaine initially denied that these items

were his. (T., Vol. II at 280). Dechaine then admitted that these items were his. (T., Vol. II at 281). Dechaine further admitted that he kept the notebook and auto body receipt on the passenger seat of 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 282-283). When asked by Deputy Reed to explain how the notebook and receipt were found at the head of the driveway near the Henkel house, Dechaine stated: "whoever grabbed the girl saw these, placed them at the head of the driveway to set me up." (T., Vol. II at 283). Neither Deputy Reed nor any other police officer, however, had informed Dechaine that Sarah Cherry had been abducted or kidnapped; Dechaine had simply been informed that the police were investigating a missing 12-year old girl. (T., Vol. II at 283-284). At trial, Dechaine acknowledged that he had not been told that Sarah had been abducted. (T., Vol. VI at 1240; Vol. VII at 1344).

A few hours later, in the early morning of July 7, 1988, Dechaine changed his story about the location of the notebook and receipt, telling the police 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). In the course of cross-examination at trial, however, Dechaine changed his story again and acknowledged that the auto body receipt with his name on it and the Paul's Produce notebook were in his truck on July 6, 1988. (T., Vol. VII at 1338, 1370).

Dechaine's locked truck was found by the police at approximately 12:05 am on July 7, 1988, very near the area where Sarah Cherry's body would later be discovered on

July 8, 1988. (T., Vol. II at 401, 431). 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 Dechaine's truck (T., Vol. IV at 707), a piece of rope found in the woods between Dechaine's truck and the spot where Sarah's body was discovered (T., Vol. II at 414-416), and rope seized from Dechaine's barn. (T., Vol. IV at 808, 732). Indeed, the rope found in Dechaine's truck and the piece of rope found in the woods near Sarah's body "were once one rope." (T., Vol. IV at 737).

Dechaine's locked truck had been found 74 feet into the woods on one side of the Old Hallowell Road, and Sarah's body was found 450-500 feet into the woods on the other side of the Old Hallowell Road. (T., Vol. I at 43). A 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 [Dechaine's truck] and tracked it" to within 75-100 feet of Sarah's body, stopping only because he was not familiar with the odor of dead bodies. (T., Vol. II at 416, 426-427). The piece of rope found in the woods was on the track between Dechaine's truck and the location where Sarah's body was discovered. (T., Vol. II at 425).

The bandana used to gag Sarah and the woolen scarf used as a ligature around her neck were acknowledged by the defense to have come from Dechaine's truck. (T. Vol. VIII at 1463).

Sarah Cherry had been stabbed in the neck and chest area, and the small sizes of the wounds indicated that she had been stabbed "with a small knife, like a penknife that somebody might carry." (T., Vol. III at 571). Dechaine had carried a penknife on his key

ring. (T., Vol. VI at 1128). The penknife, however, was not on Dechaine's key ring when it was found by the police on July 6, 1988, and Dechaine's wife testified that she was surprised when she learned from the police on July 8, 1988, that the penknife was not on Dechaine's key ring. (T., Vol. VI at 1128).

Dechaine told Sagadahoc County Sheriff David Haggett during the evening of July 6, 1988, that he had been out in the woods looking for fishing holes and that he could not remember where he had left his vehicle. Dechaine, no doubt trying to distance himself from the key ring which had had his penknife on it, also told Sheriff Haggett that his keys had been left in his vehicle. (T., Vol. II at 394). Prior to finding Dechaine's truck, however, Dechaine's key ring with the keys on it was found by Detective Mark Westrum of the Sagadahoc County Sheriff's Department under the front passenger seat on the right in Deputy John Ackley's police cruiser where Dechaine had been sitting. (T., Vol. II at 366). Detective Westrum also noticed that although he had turned off all radios in Ackley's cruiser, the portable police radio next to where Dechaine had been sitting had been turned on. (T., Vol. II at 366).

When confronted by Sheriff Haggett about the fact that the key ring had been found in Deputy Ackley's cruiser, Dechaine 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 decided to hide the key ring in the cruiser. (T., Vol. II at 396). Dechaine admitted to Detective Westrum that he 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 had murdered Sarah Cherry: "You people need to know that I am the one who murdered that girl, and you may want to put me in isolation." (T., Vol. V at 855, 872). Both Maxcy and Dermody directly denied that Dechaine's statement was at all ambiguous. (T., Vol. V at 857, 872).

On July 8, 1988, Dechaine 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). Dechaine told Detective Hendsbee several more times that he "couldn't believe he could do such a thing. That it wasn't the real him. He even stated at 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). Dechaine subsequently told Deputy Reed that "he knows what he did was wrong, but he doesn't consider him to be a murderer; he considers himself to be a drug addict." (T., Vol. VII at 1396).

Dechaine testified at trial in his own defense and told a completely different story than what he had told the police about his whereabouts and activities on July 6, 1988. Dechaine testified that he was not looking for fishing holes but had decided to use drugs that he had obtained in Boston and to inject them intravenously as he drove around the back roads of Bowdoinham, Merrymeeting Bay, Richmond Corner and Litchfield, eventually ending up on the Old Hallowell Road where he went into the woods and became lost. (T. Vol. VI at 1207, 1217, 1219-1222). He denied having anything to do with the abduction and killing of Sarah Cherry. (T.T. Vol. VII, at 1300-1301). The

defense theory at trial and during closing arguments, was that while Dechaine was in the woods injecting himself with drugs, the "real" killer must have abducted Sarah, brought her to where Dechaine's truck was, and tortured and killed her using Dechaine's rope, bandana and scarf from his truck and planted his notebook and auto body receipt in the driveway of the Henkel home. (T.T. Vol. VIII at 1465).

During the trial of the case, Dechaine also introduced as defense exhibits several items obtained by the Maine State Police during the investigation of the crimes, including Sarah Cherry's fingernail clippings (defense Exhibits 26 and 26A).[2]

The defense attempted to generate an alternative perpetrator defense by specifically suggesting that Douglas Senecal had committed the crimes against Sarah Cherry and "set up" or framed Dechaine. The trial court heard Dechaine's offer of proof and reviewed *in camera* Department of Human Services' records sought by the defense, and concluded that the proffered evidence amounted to "nothing but sheer speculation,..."[3]

On March 18, 1989, the jury found Dechaine guilty of all five of the remaining counts of the indictment.

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[2] More precisely, both "thumbnail" clippings which was all that remained of the clippings after serological testing at the Maine State Police Crime Laboratory. Judy Brinkman, the serologist at the time, testified that the nail clippings were thumbnail clippings. (Hearing of January 27, 1989 at 21). Brinkman testified at trial that the clippings were "very small" and contained type-A blood, consistent with Sarah Cherry. (T., Vol. VII at 719-720).

[3] At the offer of proof on this issue, Mr. Senecal was represented by counsel, Joseph Field, Esq, who informed the Court that Mr. Senecal would not invoke his Fifth Amendment privilege if he were called as a witness and that Mr. Field had in his possession affidavits from two individuals who were with Mr. Senecal during part of the day Sarah Cherry was abducted (July 6, 1988) and could account for his whereabouts from 12:30 p.m. to 4:30 p.m. that day. (Transcript of Chambers Conference, March 16, 1989, at 24-26). The evidence at trial showed that Sarah Cherry was kidnapped sometime between 12:00 p.m. and 3:20 p.m. on July 6, 1989. Thus, Attorney Field represented to the Court that Mr. Senecal had a corroborated alibi for the very time period during which Sarah Cherry was abducted and likely killed.

On April 4, 1989, the trial court sentenced Dechaine to concurrent terms of life in prison on the two counts of murder and to concurrent sentences of 20 years on each of the other three counts.[4]

2. Direct Appeal

Dechaine filed a timely notice of appeal to the Law Court from the underlying criminal judgment. In his appeal to the Law Court, Dechaine contended, among other things, that the trial court erred in denying his motion to continue in order to perform PCR DNA testing of what remained of Sarah Cherry's fingernails, namely, her two thumbnail clippings. Dechaine also claimed that the court erred by not allowing him to offer evidence against Douglas Senecal as the alleged alternative perpetrator.

The Law Court modified the judgment of conviction to reflect the renumbering of certain counts of the indictment after dismissal of count IV and to impose one judgment of conviction on the two alternative forms of murder and, as so modified, affirmed the judgment. *State v. Dechaine*, 572 A.2d 130 (Me.), *cert. denied*, 498 U.S. 857(1990). With specific reference to Dechaine's claim that the trial court had erred in denying his request for a continuance to permit him to have PCR DNA testing performed on Sarah Cherry's thumbnail clippings, the Law Court agreed that the court did not abuse its discretion by denying that request in view of the highly remote likelihood that any result of such testing would be obtained. *State v. Dechaine*, 572 A.2d at 132-133.

With respect to Dechaine's claim that the trial court committed reversible error by not allowing him to offer evidence against Douglas Senecal as an alleged alternative perpetrator, the Law Court agreed with the trial court that the evidence presented by

[4] On appeal, the Law Court merged the two murder counts into a single conviction and sentence for murder. 572 A.2d at 136.

Dechaine "of another alternative perpetrator constituted nothing more than speculation."[5] 572 A.2d at 134. In his direct appeal to the Law Court, Dechaine did not raise as an issue the sufficiency of the evidence to convict him. Nevertheless, the Law Court noted that the evidence was sufficient to support Dechaine's guilt beyond a reasonable doubt. 572 A.2d at 132 n.3.

3. Appeal of Sentence

The defendant also appealed his sentence to the former Appellate Division of the Supreme Judicial Court of Maine. That appeal was denied. *State v. Dechaine*, No. Ad-89-27 (ME. App. Div., May 4, 1990).

4. Petition for Certiorari

Dechaine petitioned for immediate review of the Maine Law Court's decision by the United States Supreme Court. The Supreme Court denied certiorari on October 1, 1990. *See Dechaine v. Maine*, 498 U.S. 857 (1990).

5. The Initial Attempt by Attorney Connolly to Take Possession of Sarah Cherry's Thumbnail Clippings.

By an *ex parte* motion dated December 20, 1990, Dechaine, through Attorney Connolly, sought removal of all defense exhibits. A few days later Attorney Connolly personally called the Superior Court clerk to say that he had someone available in Rockland "then and there" to pick up the exhibits. Only because the clerk called the State's prosecutor (former Assistant Attorney General Eric Wright) did the State learn of this *ex parte* effort by Mr. Connolly to remove the evidence, including the thumbnail clippings of the victim. (See *Motion for Return of Property*, dated December 13, 1993;

[5] Senecal was excluded as a contributor of the DNA found on the thumbnail during the earlier DNA motion for new trial.

Transcripts of Proceedings, State's Motion for Return of Property, dated December 20, 1993 at 22). A hearing was held on February 4, 1991, before the trial court, which expressed concern that there may be future collateral proceedings such as state post-conviction or federal habeas corpus petitions in the case. The court wanted to make sure "any and all exhibits submitted into evidence in this case will remain the property of the clerk of court, and remain part of this docket number until further hearing and order of court." (Hearing Transcript on Defendant's Motion for Removal of Exhibits, February 4, 1991 at 6).

On February 21, 1991, the trial court issued an order denying the motion for removal of exhibits and ordering that the clerk was not to permit the removal of any exhibits in the case without further order of the court and that any examination of any exhibit was to be done within the clerk's office, under supervision of the clerk.

6. The Second Effort by Attorney Connolly to Obtain Physical Possession of Sarah Cherry's Thumbnail Clippings.

By a form letter dated April 17, 1992, the clerk of courts of Knox County notified the parties that she was going to dispose of the exhibits in the case unless counsel made other arrangements. Attorney Connolly wrote to the clerk, asking her not to dispose of the exhibits and alerting the clerk to the existence of a previous court order "in this matter." By form order dated April 30, 1992, the court provided for disposal unless each party removed its exhibits. On May 5, 1992, Attorney Connolly took possession of all defense exhibits, including Sarah Cherry's thumbnail clippings which had been marked and admitted into evidence at trial as defendant's Exhibits 26 and 26A.

7. The New Trial Motion.

On the same day that Attorney Connolly took possession of Sarah Cherry's thumbnail clippings, May 5, 1992, he filed on behalf of Dechaine a motion for new trial based on the claim of newly discovered evidence, focusing on the assertion that another person, Douglas Senecal, had committed the crimes against Sarah Cherry. This was the same alternative perpetrator theory Dechaine had attempted to assert at the trial, but which both the trial court and the Maine Law Court had concluded was based on conjecture and speculation.

An evidentiary hearing was held before the trial court on Dechaine's motion for new trial based on newly discovered evidence on July 2, 1992 and July 8, 1992, with closing arguments on the motion held on July 9, 1992.

On July 31, 1992, the trial court issued a lengthy decision and order on the new trial motion and denied it, ultimately concluding that the evidence presented by Dechaine suggesting Mr. Senecal as an alternative perpetrator, "is no more than speculation and conjecture."

8. The Second Appeal to the Law Court.

On August 10, 1992, Dechaine filed a timely notice of appeal to the Law Court from the decision and order issued by this Court denying his motion for a new trial based on newly discovered evidence.

On August 26, 1993, the Law Court denied the appeal and found "no error in the trial court's determination that the evidence offered was speculative and based on conjecture as to both Senecal's claimed motive and claimed opportunity to commit the

offenses of which the defendant has been convicted." *State v. Dechaine,* 630 A.2d 234, 237 (Me. 1993).

9. The Fight to Return the Thumbnail Clippings.

It was not until December 9, 1993, that a representative from the Maine Attorney General's Office learned that Attorney Connolly had taken possession of various exhibits including Sarah Cherry's thumbnail clippings. Attorney Connolly refused to return them to the State. (*See* Transcript of Hearing on State of Maine's Motion for Return of Property, December 20, 1993)(Testimony of Fernand LaRochelle).

The State of Maine, in response, filed a motion for the return of the exhibits. After an evidentiary hearing held on December 20, 1993, the court ordered the immediate return of the exhibits. (*See* Affidavit of Eric Wright, dated January 21, 1994). (*See also* Hearing Transcript on State's Motion for Return of Property, at 20, 21, 26.).

Following the hearing, Attorney Connolly gave to the State's prosecutor several items, including what he represented as defense Exhibits 26 and 26A. He subsequently reported to the court that he had complied with the order to return all required exhibits. It was disputed, however, that Attorney Connolly had accounted for all the items, specifically latent fingerprint cards. (*See* Affidavit of Eric Wright, dated January 21, 1994; *See also* Stipulation regarding Ronald Kaufman, dated June 26 and 29, 2012).

10. The Third Appeal to the Law Court.

Dechaine filed a timely notice of appeal to the Law Court from the trial court's order of December 20, 1993, ordering the return of the exhibits to the State, including what was reported to be what remained of Sarah Cherry's thumbnail clippings. The Law

Court issued a decision on July 9, 1994, affirming the court's order. *See State v. Dechaine,* 644 A.2d 458 (Me. 1994).

11. The PCR DNA Testing.

Sometime in December 1994, the State of Maine prosecutor, former Assistant Attorney General Eric Wright, met with certain members of Trial and Error, a support group for Dechaine and received a copy of a report from CBR Laboratories, Inc., dated May 24, 1994, summarizing PCR testing done on what purported to be the thumbnail clippings of Sarah Cherry (which were received by the lab on June 10, 1993, from Attorney Connolly) and of Dechaine's blood (received by the lab on April 22, 1994). The report suggested that there were two or more donors of DNA extracted from one of Sarah Cherry's nail clippings and that Dechaine was excluded as a donor of that DNA. (Defendant's Exhibit 11).

12. The State Post-Conviction Review Petition.

On September 29, 1995, sixteen months after the DNA test report dated May 24, 1994, Dechaine filed a state post-conviction review petition pursuant to 15 M.R.S. §§ 2121-2131. *See Dechaine v. State*, Knox Docket Number CR-95-380. The petition sought to attack the underlying judgment in Knox Docket Number CR-89-71 on four separate bases, three of which alleged ineffective assistance of counsel, and the last asserting that the defendant was "actually innocent."

On April 4, 1996, the State of Maine moved to take the deposition of George M. Carlton, Jr. (Dechaine's former attorney) on the basis that he had knowledge that disproved Dechaine's claim of actual innocence.[6] Justice Marden granted the State's

[6] Dechaine was immediately a suspect in Sarah Cherry's disappearance on July 6,1988 because of the items with his name on them in the Henkel driveway. The police questioned him that night after he

motion on April 18, 1996, subject to the condition that Attorney Carlton's deposition be taken upon written interrogatories. Due to Attorney Carlton's deteriorating medical condition and ultimate death on June 21, 1998, the State of Maine was never able to depose him. Dechaine opposed the taking of Mr. Carlton's deposition at every opportunity. *See Order Dismissing Post-Conviction Petition*, at 3, n. 4 Knox Docket No. CR-95-380 (January 9, 1999)(Marden, J.).

On June 13, 1996, the State answered Dechaine's amended petition for post-conviction review and also moved to dismiss the petition on the ground that it was procedurally defaulted pursuant to 15 M.R.S. § 2128(5)(1995)[P.L.1995, c. 286 §4]. Specifically, the State moved for dismissal because the delay in the filing of the petition had prejudiced the State in its ability to respond to the petition or to retry Dechaine. More particularly, the State alleged that Dechaine's delay in filing his request for state post-conviction relief prejudiced the State because it did not have the opportunity to call George Carlton as a witness.

On January 9, 1999, Justice Marden issued an order dismissing the post-conviction review petition on the ground that the petition was procedurally defaulted because of the excessive delay in its filing and the fact that the State had been prejudiced by being precluded from calling George Carlton as a witness. Justice Marden further found that Dechaine's procedural default had not resulted in a manifest unfairness to him or in a wrongful conviction.

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emerged from the woods, but he was released. After he was released and before Sarah Cherry's body was discovered on July 8, 1988, Dechaine met with Attorney Carlton. On July 8, 1988, former Deputy Attorney General Fernand LaRochelle called Attorney Carlton and asked him if Sarah Cherry was still alive and if the police were looking in the right place for her. Attorney Carlton informed DAG LaRochelle that Sarah was not alive and that the police were looking in the right place. The police discovered Sarah's body shortly thereafter. (*Affidavit of Fernand R. LaRochelle*).

On March 3, 1999, Dechaine filed a notice of appeal to the Law Court from the order dismissing his post-conviction review petition. *See* Law Docket Number KNO-99-133. In an order dated April 27, 1999, the Law Court denied Dechaine a certificate of probable cause.

13. The Federal Habeas Corpus Petition.

On April 26, 2000, Dechaine filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See *Dennis J. Dechaine v. Warden, Maine State Prison*, Civil Number 00-123-P-H (District of Maine). In a written recommended decision dated July 28, 2000, the Honorable David M. Cohen, United States Magistrate Judge, recommended that the petition be denied without a hearing. In an order dated November 21, 2000, United States District Court Judge Gene Carter, affirmed the recommended decision and denied the petition.[7] *Dechaine v. Warden*, 2000 WL 3377 5285 (11/21/2000).

14. The First Motion for a New Trial Pursuant to the Post-Judgment Conviction Motion for DNA Analysis Law.

In a motion dated May 20, 2003, Dechaine filed his first "post-judgment conviction motion for DNA analysis and for new trial," pursuant to 15 M.R.S. § 2136-2138. The parties agreed to a stipulation regarding DNA testing pursuant to the statute, which stipulation was incorporated into an order signed by this Court on September 16, 2003.

In a written order dated September 16, 2005, the court limited/defined the scope of the evidence to be presented at the hearing on Dechaine's motion for a new trial based on DNA evidence. Specifically, Dechaine was not to be permitted to re-litigate such

[7] Neither the recommended decision nor the order affirming the decision are reported in the federal supplement reporter system.

issues as the time of death or his admissions to law enforcement officers. Dechaine's subsequent oral motion to reconsider was denied by the court on September 23, 2005. (See Transcript of Hearing of September 23, 2005 at 4 and 11).

A hearing on Dechaine's motion for new trial was scheduled for September 23, 2005, at which time the defense informed the court that it was withdrawing the motion because, under the statute in existence at that time, Dechaine could not meet his burden of proof that only the perpetrator of the crimes could be the source of the DNA evidence. Dechaine further indicated that it was his intention to seek a change in the law through the Legislature. *See* Transcript of hearing on September 23, 2005 at 30. *See also* Order dated November 8, 2005.

By virtue of Chapter 659 of the Public Laws of 2005, the Legislature did, in fact, make changes to the post-conviction DNA statute. Those changes became effective on September 1, 2006.

15. The Second Motion for a New Trial Pursuant to the Post-Judgment Conviction Motion for DNA Analysis Law.

In a motion dated August 28, 2008, Dechaine filed the second motion for DNA analysis and for new trial pursuant to 15 M.R.S. § 2137-2138. An order for DNA analysis pursuant to 15 M.R.S. § 2138 (5) was entered by the court on January 26, 2011.

During the pendency of his motion for a new trial based upon 15 M.R.S. § 2138(10), Dechaine filed several motions, including a motion to define the scope of the evidence to be allowed at the testimonial hearing. This evidence related to the time of death, any alternative suspect, Dechaine's incriminating statements and any other alleged exculpatory evidence. The court granted the motion to the extent that it allowed evidence relating to an alternative suspect if the DNA evidence "actually implicates the alternative

suspect." In all other respects the motion was denied, limiting the scope of the evidence to the new DNA results and their impact upon a new trial. *See* Order dated 11/10/2010. Dechaine's subsequent motion to reconsider was denied by the court in a written Order dated November 15, 2013.

Dechaine's motion to present a claim of "actual innocence" was denied by the court in a written order dated August 17, 2011. Dechaine's motion to recuse Justice Bradford, dated July 25, 2011, was denied by the court in a written order dated July 29, 2011.

A testimonial hearing was conducted before the court on June 12, 13 and 14, 2012. At the conclusion of the testimony in June 2012, Dechaine requested that additional testing be done on certain items of evidence, namely, the victim's t-shirt, the victim's bra, the handkerchief/bandana that had been inserted into the victim's mouth, and a scarf that had been used as a ligature around the victim's neck, using a scraping technique that had not previously been employed. All further testing using the scraping technique was performed by Orchid Cellmark (now known as Cellmark Forensics), which produced a total of five additional DNA reports. Additional testimony was taken with respect to these reports on November 7-8, 2013.

On April 9, 2014, the trial court issued a lengthy decision and order on the new trial motion and denied it, ultimately concluding that the evidence presented by Dechaine did not establish by clear and convincing evidence that, considering all the evidence in the case, old and new, that Dechaine would receive a different verdict in a new trial. The court reached that conclusion for several reasons: first, Dechaine's new DNA evidence excluded Douglas Senecal, his primary alternative suspect; second, Dechaine failed to connect the

DNA under Sarah's thumbnail to her murderer; third, credible expert testimony from the State's witnesses (MacMillan, Bieber, Ladd) that the DNA from Sarah's thumbnail could have been deposited there via contamination; fourth, the DNA from the thumbnail did not match the DNA on the other items Dechaine had tested (scarf, bandanna, t-shirt, bra); and finally, because the evidence of Dechaine's guilt was substantial.

16. The Fourth Appeal to the Law Court.

Dechaine filed a timely notice of appeal to the Law Court from the trial court's order of April 9, 2014 that denied his second post-conviction motion for new trial under the DNA law. The Law Court issued a decision on July 21, 2015, affirming the court's order. *See State v. Dechaine,* 2015 ME 88, 121 A.3d 76. Of particular relevance to this motion, the Court affirmed the trial court's order limiting the scope of the evidence in a DNA motion for new trial to "DNA results and its impact on identifying the perpetrator." *Id* at ¶ 39.

17. The Third Motion for a New Trial Pursuant to the Post-Judgment Conviction Motion for DNA Analysis Law.

On September 21, 2021, Dechaine filed his third motion for DNA analysis and for new trial pursuant to 15 M.R.S. § 2137-2138. The State moved to dismiss the motion on November 22, 2021. An order for DNA analysis pursuant to 15 M.R.S. § 2138(5), which implicitly denied the State's motion to dismiss, was entered by the Court on July 22, 2022. Testing pursuant to the order was completed in September 2022.

During a March 2023 status conference, the Court ordered the parties to brief the scope of the evidence that would be admissible at an evidentiary hearing. On May 17, 2023, Dechaine submitted his memorandum pursuant to the order.

DISCUSSION

At the outset, the State agrees with Dechaine based on the results of the testing ordered in July 2022, that the Court should hold a hearing pursuant to 15 M.R.S. § 2138(10), as required by 15 M.R.S. § 2138(8)(B), since he could be excluded from 3 of the 6 items tested.[8]

The State further has no objection to Dechaine calling Dr. Staub as a witness at that hearing to interpret the results of his new testing, provided that Dechaine will also be calling Gary Harmor, the analyst from SERI Lab that performed the tests pursuant to the Court's July 22 order.[9] If Dechaine does not intend to call Mr. Harmor, then the State would object to Dr. Staub's testimony as hearsay. The State does object to Dechaine's remaining proposed witnesses (Englert, Fernandez, Connolly, and an unidentified Maine trial attorney) as being beyond the scope of allowable evidence at such a hearing.

Section 2138(10) provides that the "other evidence in the case, old and new" that the court is to consider:

> means the evidence admitted at trial; evidence admitted in any hearing on a motion for new trial pursuant to Rule 33 of the Maine Rules of Criminal Procedure; evidence admitted at any collateral proceeding, state or federal; evidence admitted at the hearing conducted under this section relevant to the DNA testing and analysis conducted on the sample; and evidence relevant to the identity of the source of the DNA sample.

The DNA analysis statute affords a defendant a narrow opportunity to obtain a new trial outside of the post-conviction review process. It is, however, limited in scope by its own terms.

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[8] The State strenuously disagrees with Dechaine, however, that the results of the new testing support his claim for a new trial. In fact, the new testing shows that Dechaine could not be excluded from 2 of the 6 items and could be neither included nor excluded from a third item.

[9] Dechaine has not provided the State with an expert witness report from Dr. Staub to support the allegations made in his offer of proof. The Court should order that the doctor prepare such a report and provide it to the State sufficiently in advance of the hearing to allow the State to prepare for his testimony.

The Law Court held in its most recent decision involving this case that the "hearing conducted under [section 2138] ... allows the court to consider only two kinds of *new* evidence—that 'relevant to the DNA testing and analysis conducted on the sample,' and that 'relevant to the identity of the source of the DNA sample.' " *State v. Dechaine,* 2015 ME 88, ¶ 39, 121 A.3d 76. (quoting 15 M.R.S. § 2138(10)(C)). "The statute says nothing about reopening or supplementing the evidence introduced in prior proceedings; rather, *it allows the admission of DNA-related evidence that could not have been known at those prior proceedings, namely the new DNA results and their impact on identifying the perpetrator.*" *Id.* (emphasis added).

Dechaine's proposed scene reconstruction evidence (via Englert and Fernandez) does not relate to the new DNA results and their impact on identifying the perpetrator. It is no different from the time of death and alternative suspect evidence that the Law Court held in 2015 was properly excluded from the prior DNA proceeding. Using Dechaine's reasoning, that excluded evidence would also have been "relevant to the identity of the perpetrator."

Dechaine's proposed testimony from Attorney Connolly also does not relate to the new DNA results or their impact on identifying the perpetrator. Much of his proposed testimony can be gleaned from the existing record, including the transcript of the prior motion hearings, the trial, and post-trial motion hearings. How he would have utilized the 2022 DNA results at the 1989 trial simply has no relevance to the issue before the Court.

Finally, opinion testimony from a "Maine attorney about the impact of the DNA results on Maine juries" is not admissible because it is sheer speculation and not useful to the Court. It is the Court's job, not an unidentified attorney's, to determine whether the 2022 DNA test results would make it more probable that a different verdict would result upon a new trial.

CONCLUSION

For the foregoing reasons, this Court should conduct a hearing pursuant to 15 M.R.S. § 2138(1). Dr. Staub may testify if Dechaine also calls Gary Harmor of the SERI Lab, the analyst that conducted the new DNA testing. The Court should preclude Dechaine from calling his remaining proposed witnesses.

Respectfully submitted,

Dated: June 7, 2023

/s/ Donald W. Macomber
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CERTIFICATE OF SERVICE

I, Donald W. Macomber, Assistant Attorney General, certify that I have sent a copy of this memorandum by ShareFile and regular first-class mail to Petitioner's attorney, John Nale, Esq.

Respectfully submitted,

Dated: June 7, 2023

/s/ Donald W. Macomber
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