STATE OF MAINE
Knox, SS.

SUPERIOR COURT
Docket No. KNOCR-1989-071

State of Maine,)
)
)
v.) **Order on Scope of Evidence**
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)
Dennis Dechaine,)
Defendant.)

Introduction

This now 34-year-old case arises out of the torture, sexual assault, and murder of a 12-year-old girl in 1989. The case has generated a long and detailed history that is summarized in decisions of the Law Court: **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); and **State v. Dechaine**, 2015 ME 88, 121 A.3d 76.

Defendant's most recent claim for relief was a motion for further DNA analysis under the terms of 15 M.R.S. §§ 2137 and 2138(4-A), which the Court granted by order dated July 22, 2022. That analysis was completed and the results were submitted pursuant to § 2138(8). Those results established Defendant's right to a hearing in accordance with § 2138(10). In anticipation of that event, and following a conference with the Court, counsel for Defendant filed a motion asking the Court to specify the scope of the evidence to be admitted at the hearing. Both parties submitted memoranda and the Court conducted oral argument on May 8, 2023. This preliminary issue is now in order for decision.

Discussion

The Court has grappled with the same issue of the scope of evidence in response to earlier motions Defendant pursued. *See* Order, No. KNOCR-1989-00071 (September 16, 2005); Order, No. KNOCR-1989-00071 (November 10, 2010); Order on Motion to Reconsider, No. KNOCR-1989-00071 (November 15, 2013). The standard for deciding the issue has been clarified by amendment to the statute.

The first version of the statute required a convicted person to prove, by clear and convincing evidence, that:

> (1) Only the perpetrator of the crime or crimes for which the person was convicted could be the source of the evidence;
> (2) The evidence was collected, handled and preserved by procedures that allow the court to find that the evidence is not contaminated or is not so degraded that the DNA profile of the analyzed sample of the evidence can not be determined to be identical to the DNA sample initially collected during the investigation; and
> (3) The person's purported exclusion as the source of the evidence, balanced against the other evidence in the case, is sufficient to justify that the court grant a new trial.

§ 2138(8)(B)(1)-(3) (enacted by P.L. 2001, ch. 469, § 1), *amended by* P.L. 2005, ch. 659, §§ 2-5 (effective Sept. 1, 2006). In 2006, the Legislature enacted § 2138(10) as it now appears. *See* P.L. 2005, ch. 659, §§ 2-5 (effective Sept. 1, 2006).[1] The Court's decision in response to the pending motion will be based on 15 M.R.S. § 2138(10), effective July 29, 2016, which sets forth three alternatives by which a defendant might show his entitlement to a new trial:

> If the results of the DNA testing under this section show that the person is not the source of the evidence, the person authorized in section 2137 must show by clear and convincing evidence that:
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> > A. Only the perpetrator of the crime or crimes for which the person was convicted could be the source of the evidence, and that the DNA test results, when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person show that the person is actually innocent. If the court finds that the person authorized in section 2137 has met the evidentiary burden of this paragraph, the court shall grant a new trial;
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> > B. Only the perpetrator of the crime or crimes for which the person was convicted could be the source of the evidence, and that the DNA test results, when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person would make it probable that a different verdict would result upon a new trial; or

[1] Although § 2138 has been amended four times since 2006, subsection 10 has remained the same.

C. All of the prerequisites for obtaining a new trial based on newly discovered evidence are met as follows:

(1) The DNA test results, when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person would make it probable that a different verdict would result upon a new trial;
(2) The proferred DNA test results have been discovered by the person since the trial;
(3) The proferred DNA test results could not have been obtained by the person prior to trial by the exercise of due diligence;
(4) The DNA test results and other evidence admitted at the hearing conducted under this section on behalf of the person are material to the issue as to who is responsible for the crime for which the person was convicted; and
(5) The DNA test results and other evidence admitted at the hearing conducted under this section on behalf of the person are not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict.

§ 2138(10)(A)-(C). The DNA analysis submitted following the Court's order of July 22, 2022, shows that six items related to the homicide were examined and compared both to Defendant's DNA and DNA from blood found on or under the victim's thumbnail. Defendant was excluded as a contributor to DNA found on three of the physical items. On one, he could be neither included nor excluded as a contributor. As to the final two—a stick used for sexual torture and a scarf used to strangle the victim—Defendant was included as a possible contributor. (Defendant argues he was excluded as a contributor to the blood from the thumbnail, though there is no commentary in the report to confirm that contention.)

To address the effects of this evidence in accordance with the terms of the statute, Defendant wishes to present the testimony of five witnesses. The first, Richard Staub, Ph.D., would testify as an expert concerning the new test results. The State does not object to this testimony so long as Gary Harmor, who actually conducted the recent tests, also testifies. Because Mr. Harmor's actions in the testing lab provide part of the factual basis for Dr. Staub's opinions, the Court agrees both must testify.

The remainder of Defendant's proposed evidence requires closer scrutiny. Two of Defendant's listed witnesses are lawyers: Thomas Connolly, Esq., who was co-counsel for Defendant at trial and in post-judgment proceedings, and an as-yet unidentified expert. Defendant proposes that Mr. Connolly testify the new DNA results would be consequential in the presentation of evidence and overall strategy were a new trial to

be ordered, thereby addressing the predictive element of § 2138(10)(C)(1). The unnamed expert would testify to the likely effect of the DNA evidence on the deliberations of a jury in Maine.

Mr. Connolly's testimony would not be helpful to the Court. The inquiry under the statute is whether "[t]he DNA test results...would make it probable that a different verdict would result upon a new trial," not whether the DNA evidence, if known in 1989, would have resulted in a different verdict at that time. § 2138(10)(C)(1). To the extent Mr. Connolly has insights relevant to the statutory inquiry, current counsel can consult with him and present them in their argument.

Likewise unhelpful would be the testimony of the proposed legal expert. Counsel argues that the statutory standard requires assessment of the effect of the DNA evidence on a jury rather than a judge. Fair enough. But counsel is expected to argue the point on exactly that basis, and the Court is required to assess the evidence with reference to the statute. Absent a more specific showing, the Court infers the proposed witness would offer only anecdotes associated with jury deliberations in other cases. These would not be helpful to the Court's statutory analysis in a case that resists comparison to any other.

The final two proposed witnesses, Rod Englert and Melissa Fernandez, are forensic experts. Defendant seeks to present their testimony to assist the court in evaluating the new DNA evidence in conjunction with "all the other evidence in the case, old and new..." § 2138(10)(C)(1). The Court faced similar interpretive challenges in its earlier orders.

In its 2005 Order, applying the standard outlined in the first version of § 2138, the Court concluded that "[t]he focal point of the DNA analysis hearing . . . [was] on the meaning of the DNA evidence," and therefore the Court would consider only "the evidence established at the original trial and the new DNA evidence implicating a perpetrator other than Defendant." Order at 4 (Sept. 16, 2005). The Court noted that "allow[ing] all 'other evidence' to be introduced for the first time at [that] hearing[] . . . would essentially be conducting a new trial," which would be improper without Defendant first meeting the statutory requirements that were in effect at that time. Order at 4 (Sept. 16, 2005) (applying 15 M.R.S. § 2138(8)(B)(3), *amended by* P.L. 2005, ch. 659, §§ 2-5 (effective Sept. 1, 2006)).

In 2010, the Court concluded that "'other evidence' [was] expressly limited to evidence that has already been admitted in prior proceedings, and new evidence relating to the source of the DNA and the meaning of the test results," and the

narrow focus of a hearing under § 2138(10) was "on the meaning of DNA evidence in light of the existing record." Order at 5, 7 (Nov. 10, 2010).

Mr. Englert's and Ms. Fernandez's testimony is difficult to assess on an in limine basis because the new DNA reports await interpretation. The report suggests Dr. Staub and Mr. Harmor will confirm the critical point of Defendant's argument—the similarity between DNA under the victim's thumbnail and DNA from the scarf. The Court will have to assess what testimony from Mr. Englert and Ms. Fernandez might put that finding in context versus that which would in effect provide Defendant with a new, independent analysis of all the evidence in the case.

Mr. Englert's report is not clearly limited to reviewing the DNA evidence in conjunction with the now voluminous record of the trial and successive post-trial evidentiary hearings. To the contrary, he argues some points, e.g., the lack of scratches on Mr. Dechaine or dirt on his clothing, that are not related to DNA findings. The Court will not exclude testimony by Mr. Englert and Ms. Fernandez but will not allow it to exceed the scope of the statutory inquiry: "what does the new DNA evidence show in conjunction with the existing record?" Their testimony may not extend to "how could the case have been better presented in 1989?"

Order

Defendant may present testimony from Dr. Staub so long as Mr. Harmor also testifies.

Defendant may not present testimony from experts who would only reinforce the arguments his current counsel will make.

Defendant may present testimony from Mr. Englert and Ms. Fernandez, limited to placing the new DNA results in the context of existing evidence.

So ORDERED.

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

Dated: December 20, 2023

Bruce C. Mallonee

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