UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DENNIS J. DECHAINE,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 00-123-P-H***
	)	
WARDEN, Maine State Prison,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Dennis Dechaine, confined to the Maine State Prison in Thomaston, Maine, collaterally attacks a life sentence and concurrent twenty-year sentences imposed upon him by the Maine Superior Court following his conviction on March 18, 1989 for murder, kidnapping and gross sexual misconduct.[1] Petition Under 28 USC ' 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 1). Incident to the Petition, he also seeks discovery in the form of an order compelling a non-party to submit a saliva sample for DNA testing. Memorandum in Support of Petition for a Writ of Habeas Corpus (28 U.S.C. § 2254) ("Memorandum") (Docket No. 2) at 18-25. For the following reasons, I recommend that the Petition and its associated discovery request be denied.

[1] The Superior Court imposed concurrent life sentences upon Dechaine for murder (Count I) and depraved-indifference murder (Count II), as well as concurrent sentences of twenty years each for kidnapping (Count III) and two counts of gross sexual misconduct (Counts IV and V). Judgment and Commitment, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct. April 4, 1989), attached as Exh. A(8) to Response to Petition for Writ of Habeas Corpus, etc. ("Response") (Docket No. 5); *State v. Dechaine*, 572 A.2d 130, 131 (Me. 1990). On direct appeal the Law Court modified the judgment to reflect conviction on Counts I and II for a single offense of murder with a single sentence of life imprisonment and corrected a clerical error in the numbering of the counts charging gross sexual misconduct, which should have remained Counts V and VI following dismissal of Count IV. *Dechaine*, 572 A.2d at 132 n.2, 136.

I. Background

Dechaine was indicted on August 1, 1988 on charges of murder (Count I), depraved-indifference murder (Count II), kidnapping (Count III), rape (Count IV) and gross sexual misconduct (Counts V and VI) in connection with the July 6, 1988 restraint, sexual abuse and murder of a child, Sarah Cherry, in Sagadahoc County, Maine. Indictment for Violation of 17-A M.R.S.A. § 201(1)(A) [Count I] and (B) [Count II] – Murder[,] 17-A M.R.S.A. § 301(1)(A)(3) – [Count III] – Kidnapping[,] 17-A M.R.S.A. §§ 251(1)(B) and 252(1)(B) [Count IV] – Rape[, and] 17-A M.R.S.A. §§ 251(1)(A)&(C)(3) and 253(1)(B) [Counts V & VI] Gross Sexual Misconduct, *State v. Dechaine*, Criminal No. 88-244 (Me. Super. Ct.), attached as Exh. A(3) to Response.

At his arraignment the following day Dechaine pleaded not guilty to all counts. Docket, *State v. Dechaine*, Criminal No. 88-244 (Me. Super. Ct.) ("Sagadahoc Docket") (entry of August 2, 1988), attached as Exh. A(4) to Response. Prior to trial the state dismissed Count IV (rape) on the ground of ambiguity of the medical evidence. Dismissal – Count IV (M.R.Crim.P. Rule 48(a)), *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), attached as Exh. A(7) to Response.

A. Pre-Trial Motion To Obtain DNA Evidence

On January 26, 1989 Dechaine, through counsel Thomas J. Connolly, filed a motion for a continuance and permission to conduct DNA testing, then "a radical and new technique," on fingernail clippings taken from Cherry's body. Motion To Compel Discovery and To Continue, *State v. Dechaine*, Criminal No. 88-244 (Me. Super. Ct.), attached as Exh. A(6) to Response, ¶ 17; Sagadahoc Docket (entry of January 26, 1989). The court promptly scheduled a hearing at which Judith Brinkman, a forensic chemist with the Maine State Police Crime Lab, testified and explained the forensic significance of DNA testing. Transcript of Hearing on Motion To Continue, *State v. Dechaine*, Criminal No. 88-244 (Me. Super. Ct.), filed with Response, at 10-12. Brinkman testified

that in contrast to traditional serological testing methods, DNA "should be like a fingerprint, much more discriminating from one person compared to another except for in identical twins because identical twins have the exact same DNA." *Id*. at 11. There were three methods of DNA testing; the method that Connolly proposed to use was known as "polymerase chain reaction," or "PCR," then conducted only by one laboratory in California (which had a three- to four-month backlog) and in the "research stages" at the FBI laboratory. *Id*. at 12-14, 23.

Brinkman testified that she had been provided with ten fingernail clippings obtained during Cherry's autopsy and had used up eight of them (all but the thumbnails) to perform blood-typing tests. *Id*. at 18-19, 21. The blood adhering to the nails was found to be human blood containing A and H antigens, consistent with type A blood but also possibly resulting from a mixture of bloods of type A and/or type O. *Id*. at 20-21, 27-28. The blood on the nails could not have been contributed by someone with type AB or B blood; however, that ruled out a relatively small percentage of the population inasmuch as persons with type A blood comprised forty-one percent of the population and persons with type O forty-five percent. *Id*. at 20-21.

Brinkman had tested the whole blood of both Dechaine and Cherry, determining that of Dechaine to be type O and that of Cherry to be type A. *Id*. at 17-18. She theorized that the blood on the nails was solely that of Cherry, noting that Cherry's hands were found bound and positioned near her neck, which had been bleeding. *Id*. at 46-47; *see also id*. at 53 (representation of prosecutor Eric E. Wright). She further explained, "There was nothing that led me to believe that there was a mixture [of bloods]. If someone had scratched someone hard enough to make them bleed and cause crust underneath the fingernails, you would expect to find tissue, some type of skin material or something indicating that there you know, that there had been scratching or you would expect to find some type

of trauma to the nail such as broken nails or something like that and there didn't they didn't appear to be that way." *Id*. at 19-20.

Brinkman reported that she had spoken with Jennifer Mehavolin of the California testing laboratory, who had advised that based on the small amount of blood available on the thumbnail clippings, it did not "sound like the possibility of getting good results." *Id*. at 22. In Brinkman's opinion, high heat and humidity at the time of the murder also could have degraded the DNA. *Id.* at 24. At the conclusion of the hearing the motion to continue for purposes of performing DNA testing was denied. *Id*. at 61.

B. Trial

Venue in the case was changed to Knox County, Maine, where Dechaine was tried from March 6-18, 1989 with Superior Court Justice Carl O. Bradford presiding. Docket, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.) ("Knox Docket") (entries of February 21, 1989 and March 6-18, 1989), attached as Exh. A(5) to Response.

Testimony at trial revealed that John and Jennifer Henkel of Lewis Hill Road, Bowdoin, hired Cherry, a twelve-year-old girl who had just finished sixth grade, to babysit their ten-month-old infant on Wednesday, July 6, 1988. Transcript of Jury Trial, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.) ("Trial Transcript"), filed with Response, Vol. I at 93-94 (testimony of Debra Cherry Crossman); 116-17, 124-25 (testimony of John Henkel). Cherry's mother, Debra Cherry Crossman, reminded her daughter the previous evening (as she always told her children when leaving) not to let anyone into the house or to inform any caller that she was alone. *Id*., Vol. I at 96 (testimony of Debra Cherry Crossman). Only Cherry's mother, stepfather, Christopher Crossman, sister Hillary, great-grandmother and friend Julie Wagg knew she was babysitting that day. *Id*., Vol. I at 92, 95, 97. At

noon Jennifer Henkel called home and spoke with Cherry, who said that she was feeding the baby and about to fix herself some lunch. *Id*., Vol. I at 170 (testimony of Jennifer Henkel).

Holly Johnson, a neighbor across the street from the Henkels, testified that at approximately 1 p.m. she heard a vehicle slowing down at the Henkels' driveway and heard the Henkel dogs barking. *Id*., Vol. II at 340, 342 (testimony of Holly Johnson). About fifteen minutes later she saw a red Toyota truck heading northbound. *Id*., Vol. II at 340-41, 346. She could not be sure that the two vehicles were the same or that the truck was in fact a Toyota. *Id*., Vol. II at 347-48.

Jennifer Henkel arrived home at about 3:20 p.m. *Id*., Vol. I at 171 (testimony of Jennifer Henkel). She immediately noticed some papers a little looseleaf notebook and a car-repair bill in the driveway and picked them up. *Id*., Vol. I at 172. She found both the garage-level and upper-level doors to the house, which she had left unlocked but closed, slightly ajar. *Id*., Vol. I at 169-70, 175. Upon entering she saw the television set turned on, Cherry's eyeglasses folded neatly in a rocking chair and her blue-jean jacket, sneakers and socks in a little neat pile next to a couch. *Id*., Vol. I at 176. Nothing seemed disturbed, misplaced or damaged. *Id*., Vol. I at 180. The baby was asleep in her crib, but Cherry was nowhere to be found. *Id*., Vol. I at 177-78. After a half-hour of fruitless searching an increasingly frantic Jennifer Henkel called police. *Id*., Vol. I at 178. Following his arrival home from work at between 3:30 p.m. and 3:45 p.m. John Henkel noticed what he thought was an unusual tire impression in the driveway and set some rocks around it to preserve it. *Id*., Vol. I at 127-28 (testimony of John Henkel).

Sometime between 4:20 p.m. and 4:49 p.m. Leo Scopino and Daniel Reed, deputy sheriffs with the Sagadahoc County Sheriff's Department, responded to Henkel's call. *Id*., Vol. I at 213-15 (testimony of Leo Scopino, Jr.); *id*., Vol. II at 265-67 (testimony of Daniel Reed). Jennifer Henkel showed them the car-repair bill and notebook she had found in the driveway. *Id*., Vol. I at 179-80

(testimony of Jennifer Henkel). The car-repair bill had the name "Dennis Dechaine" on top of it and described damage to a 1981 Toyota pickup truck. *Id*., Vol. I at 130-31 (testimony of John Henkel). Neither the Henkels nor Cherry's mother ever had heard of Dechaine. *Id*., Vol. I at 98 (testimony of Debra Cherry Crossman), 130 (testimony of John Henkel), 183 (testimony of Jennifer Henkel).

Scopino and Reed found a phone-book listing for a Dennis Dechaine on Old Post Road in Bowdoinham and drove to the residence, arriving sometime after 5 p.m. *Id.*, Vol. I at 218-19 (testimony of Leo Scopino, Jr.). Dechaine was not there, but the officers spoke to his wife. *Id*., Vol. I at 219. As the evening wore on, additional police officers became involved in a search for Cherry, Dechaine or Dechaine's vehicle. *Id*., Vol. I at 222-23, Vol. II at 271 (testimony of Daniel Reed). A command post was set up at the corner of Lewis Hill and Dead River roads. *Id*., Vol. II at 272.

Arthur Spaulding, whose house is set back in the woods about five or six hundred feet off of Dead River Road, testified that sometime that evening between 8 and 8:30, after he had started his generator, he saw a man in a blue polo shirt who appeared to be in his twenties walk past his window in the direction of Dead River Road. *Id*., Vol. I at 193-96 (testimony of Arthur Spaulding).

At about 8:45 p.m. Helen Small Buttrick of Dead River Road, who was driving home with her husband Harry, spotted a man walking across the lawn of her mother's home, which was about seven hundred feet from the Buttricks' residence. *Id*., Vol. I at 200-02 (testimony of Helen Small Buttrick). The Buttricks stopped and asked the man, who turned out to be Dechaine, what he wanted. *Id*., Vol. I at 203-04. Dechaine told the Buttricks he had been fishing and could not find his truck. *Id*., Vol. I at 203. Harry Buttrick offered to help Dechaine find it following a brief stop at the Buttrick home. *Id*., Vol. I at 203-04. Helen Buttrick, who noticed nothing unusual about Dechaine's behavior, asked him where he lived. *Id*., Vol. I at 205. Dechaine responded that he lived in Yarmouth, was visiting in Bowdoinham "and sort of on the side he said I should have stayed there." *Id*. He also said that he had

been in the woods for two hours and had followed the sound of a generator and come out. *Id*. Dechaine left with Harry Buttrick to look for his truck. *Id*., Vol. I at 207.

At about 9 p.m. Mark Westrum, a detective with the Sagadahoc County Sheriff's Department, and Deputy John Ackley reported to the command post at the intersection of Lewis Hill and Dead River roads. *Id*., Vol. II at 273 (testimony of Daniel Reed), 354, 357 (testimony of Mark Westrum). Within thirteen minutes Ackley received a call from Helen Small Buttrick advising that her husband was driving with a man who stated that he had lost his pickup truck. *Id*., Vol. II at 358 (testimony of Mark Westrum). Ackley and Westrum set off to find the Buttrick vehicle, which they quickly located. *Id*. Buttrick suggested that the police might be able to help Dechaine find his vehicle, and Dechaine got into the back seat of the police cruiser. *Id*., Vol. II at 358-59.

Ackley and Westrum drove Dechaine to the command post, where Ackley exited the vehicle and Reed got in. *Id*., Vol. II at 272-73 (testimony of Daniel Reed). Reed gave Dechaine a Miranda warning and explained that the police were investigating the disappearance of a twelve-year-old girl. *Id*. Dechaine stated that he had been fishing and lost his truck. *Id*., Vol. II at 279. According to Reed, Dechaine initially denied that the papers found in the Henkel driveway were his. *Id*., Vol. II at 280-81. He then acknowledged that they were his and stated that he kept them in the passenger seat of his truck. *Id*. Dechaine and Reed engaged in a heated exchange over how the papers could have gotten into the Henkel driveway, after which Dechaine told Reed, "whoever grabbed the girl saw these, placed them up at the head of the driveway to set me up." *Id*., Vol. II at 283.

Following the questioning Westrum padded Dechaine down. *Id*., Vol. II at 365 (testimony of Mark Westrum). He noticed a handprint, fingers pointing downward, on the back of Dechaine's shirt. *Id*. Scopino also searched Dechaine. *Id*., Vol. I at 224 (testimony of Leo Scopino, Jr.). He found no weapons but observed a one- to two-and-a-half inch scratch and circular bruise on Dechaine's inner

left arm and a circular scratch on Dechaine's right knuckle, which appeared to be fresh. *Id*. Scopino observed that Dechaine was trembling and his eyes were extremely large. *Id*., Vol. I at 225. He saw no blood on Dechaine's clothes. *Id*., Vol. I at 232.

Dechaine was moved to a different cruiser, in the process of which Westrum discovered Dechaine's keys placed underneath the seat behind which Dechaine had been seated. *Id*., Vol. II at 366-67 (testimony of Mark Westrum), 395-96 (testimony of David Haggett). Dechaine then was taken on a search for his truck, which was located at approximately 12:05 a.m. on July 7th. *Id*., Vol. II at 367-69 (testimony of Mark Westrum), 401 (testimony of James Clancy). The truck, a red Toyota pickup with damage to the right-hand fender, was locked. *Id*., Vol. II at 431 (testimony of Alfred Hendsbee). Dechaine consented to its removal and search. *Id*., Vol. II at 444.

At approximately 2:40 a.m. Dechaine was again questioned, this time by Maine State Police Detective Alfred Hendsbee. *Id*., Vol. II at 429, 435. Hendsbee asked Dechaine point-blank if had taken Cherry, to which Dechaine responded that he did not do it and never would do such a thing. *Id*., Vol. II at 445-47. Hendsbee examined Dechaine and noticed, in addition to a bruise on his arm and a muddy handprint on the back of his shirt, faint scratch marks in his kidney area on the right-hand side that had not drawn blood. *Id*., Vol. II at 449, 451. Dechaine's pants appeared damp. *Id*., Vol. II at 449. Dechaine stated that he had made the handprint swatting flies and got the scratches walking through the woods. *Id*., Vol. II at 473. After being photographed at Bowdoinham Town Hall Dechaine was driven home at approximately 4 a.m. *Id*., Vol. II at 371-72 (testimony of Mark Westrum).

In the early-morning hours of July 7th Maine State Police Trooper Thomas Bureau performed a search with a dog in the vicinity of Dechaine's truck. *Id*., Vol. II at 404-06 (testimony of Thomas Bureau). The dog picked up a track from the driver's door that headed in a northeasterly direction for

approximately one hundred and fifty feet to the edge of a bog, made a loop and came back to the driver's door. *Id*., Vol. II at 406. Bureau casted the dog around the truck, and when he got to the passenger side he picked up a track that looped back in a westerly direction toward the Hallowell/Litchfield Road, crossed that road and continued in a westerly direction to a stream, crossed the stream and began to head in a southerly direction, at which point the dog stopped tracking. *Id*., Vol. II at 406-07. Bureau could not tell whether the tracks picked up from the driver and passenger side were the tracks of the same person. *Id*., Vol. II at 422-23. The truck was secured and taken to the Maine State Police crime lab in Augusta. *Id*., Vol. II at 428 (stipulation).

On July 7th Dechaine and his wife, Nancy Emmons, consulted with attorney George Carlton. *Id*., Vol. VI at 1043, 1070 (testimony of Nancy Emmons).[2] Emmons testified that on that day, when a photograph of Cherry was shown on the television news, Dechaine exclaimed, "my God, I've never seen that girl before." *Id*., Vol. VI at 1074-76. He also remarked that he had never kidnapped anyone. *Id*., Vol. VI at 1076.

A search team discovered Cherry's body concealed under a pile of brush at about noon on July 8th. *Id*., Vol. III at 496-97 (testimony of William Allen). The body was found in a wooded area off of Hallowell Road approximately four hundred feet from the spot on the opposite side of the road where Dechaine's truck had been located. *Id*., Vol. I at 52-54 (testimony of Arthur Albin). The distance from the Henkel residence on Lewis Hill Road north to the intersection of Dead River Road was about 1.9 miles; the distance from that intersection west on Dead River Road to Hallowell Road was about one mile; and the Dechaine truck was found about three-tenths of a mile north of that intersection off of Hallowell Road. *Id*., Vol. I at 40-41. The Spaulding residence was four-tenths of a mile west of the intersection of Dead River and Hallowell roads. *Id*., Vol. I at 41.

[2] Carlton remained co-counsel throughout trial and post-trial until at least July 1992. *See* Sagadahoc Docket; Knox Docket (continued…)

Dr. Ronald Roy, chief medical examiner for the State of Maine, supervised removal of the body and conducted an autopsy upon it. *Id*., Vol. III at 547, 551-52, 564 (testimony of Dr. Ronald Roy). Cherry was found bound and gagged, with her pants pulled down, one stick protruding from her vagina and another stick protruding from her anus. *Id*., Vol. III at 558, 560-61, 563. She had been grazed and stabbed repeatedly in the head, neck and chest by a sharp instrument (in Dr. Roy's opinion a small knife, like a penknife) and strangled with a scarf. *Id*., Vol. III at 561, 564-67, 569-71, 573-74. She had died on July 6th, the precise time unknown. *Id*., Vol. III at 593. Cherry's bound hands were positioned in front of her chest, just below her neck, and there was blood under her fingernails. *Id*., Vol. III at 578. Dr. Roy stated that he would not expect the blood to be that of her assailant inasmuch as even if she had scratched her assailant, "[w]hen you scratch somebody you don't come away with bloody fingernails." *Id*., Vol. III at 579. In Dr. Roy's opinion, the stab wounds were small enough that he would not have been surprised if no blood transferred to the assailant. *Id*., Vol. III at 576-77.

Following discovery of the body, at approximately 2 p.m. on July 8th Hendsbee drove to the Dechaine residence and found Dechaine and Emmons sitting on their porch. *Id*., Vol. IV at 799 (testimony of Alfred Hendsbee). According to Hendsbee, Dechaine immediately approached the vehicle and stated, "I can't believe 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." *Id*. Dechaine cooperated in the execution of a search warrant, saying, "do what you've got to do." *Id*., Vol. IV at 800. Hendsbee testified that during the search Dechaine also said that he could not believe he killed this girl when he could not even kill his own chickens. *Id*., Vol. IV at 802. Hendsbee asked Emmons whether Dechaine carried a knife. *Id*., Vol. VI at 1128 (testimony of Nancy Emmons). Emmons responded that he had a

(entry of July 9, 1992).

penknife on his key ring. *Id*. Hendsbee then informed her that the knife was not on Dechaine's key chain. *Id*. She was surprised. *Id*.

Dechaine was arrested that afternoon and charged with the murder of Cherry. *Id*., Vol. IV at 803 (testimony of Alfred Hendsbee). Westrum, who helped book Dechaine that day, testified that Dechaine became emotional, crying and sobbing and saying, "Oh my God; it should have never happened. . . . Why did I do this?" *Id*., Vol. IV at 827, 830 (testimony of Mark Westrum). According to Westrum, Dechaine's comments at that time included the following: "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." *Id*., Vol. IV at 831. Dechaine was transferred that evening to Lincoln County Jail. *Id*., Vol. V at 850, 854 (testimony of Darryl Robert Maxcy). Darryl Robert Maxcy, a Lincoln County corrections officer, testified that Dechaine said, "You people need to know I'm the one who murdered that girl, and you may want to put me in isolation." *Id*., Vol. V at 855. A second corrections officer who was also present, Brenda Dermody, recalled Dechaine having made a nearly identical statement. *Id*., Vol. V at 872 (testimony of Brenda Dermody).

Following removal of the body Bureau returned to the vicinity to confirm his suspicion that his dog had refused to continue tracking in the early-morning hours of July 7th because he had never scented a dead body and did not like the smell. *Id*., Vol. II at 414-15 (testimony of Thomas Bureau). The dog hesitated to go near the spot where the body had lain. *Id*., Vol. II at 418-19. Bureau estimated that during the earlier search the dog had stopped tracking approximately seventy-five to one hundred feet away from the body. *Id*., Vol. II at 416.

On July 8th the dog also discovered a piece of yellow rope on the ground two hundred and fifty eight feet from the location in which Dechaine's truck had been found and one hundred and forty five

feet from the location of the body. *Id*., Vol. II at 414, Vol. I at 53-54 (testimony of Arthur Albin). Later testing revealed that the piece of rope used to bind Cherry's wrists, a piece of rope recovered from inside Dechaine's truck and the piece of rope found in the woods all had the same basic characteristics. *Id*., Vol. IV at 732 (testimony of Judith Brinkman). The piece of rope found in the woods and that from Dechaine's truck matched exactly; they "were once one rope." *Id*., Vol. IV at 737. The rope binding Cherry's wrists was too damaged to permit a conclusion whether there was an exact match with the rope found in the woods. *Id*., Vol. IV at 740.

Four latent fingerprints were found on the surfaces of Dechaine's truck. *Id*., Vol. III at 622 (testimony of Ronald Richards). One could not be identified; the other three matched those of Dechaine. *Id*., Vol. III at 623-24. No fingerprint of Cherry's was found on the numerous items inside the truck, nor any hair that matched hers. *Id*., Vol. IV at 674 (testimony of John Otis), 752 (testimony of Judith Brinkman). Nor was any blood found, except blood on a napkin that appeared to be old. *Id*., Vol. IV at 750 (testimony of Judith Brinkman).

Dusting of the two doors and doorframes leading to the Henkel residence yielded two latent fingerprints, neither of which matched those of Dechaine or Cherry. *Id*., Vol. IV at 660-61, 663 (testimony of John Otis). The notebook and autobody-receipt were not tested for latent fingerprints in part because so many people had handled them. *Id*., Vol. II at 474 (testimony of Alfred Hendsbee). Scopino in addition had written in the notebook upon first responding to Jennifer Henkel's call an admitted mistake. *Id*., Vol. I at 234-35 (testimony of Leo Scopino, Jr.). The tire imprint detected by John Henkel was found to have a design consistent with the tread design of the left front tire of Dechaine's truck. *Id*., Vol. IV at 657-58 (testimony of John Otis). No conclusive determination was possible because of the faintness of the cast of the tire that the Maine Crime Lab had prepared and the relatively poor quality of the impression in the driveway. *Id*., Vol. IV at 656, 658-59.

No blood or unidentified hairs or fibers were found on the clothes Dechaine had been wearing on July 6th; however, they happened to have been laundered by the time police seized them. *Id*., Vol. IV at 768-69 (testimony of Judith Brinkman); 800-01 (testimony of Alfred Hendsbee). No blood, hairs or fibers matching any from Cherry's body (other than blue cotton of negligible probative value) were found under his fingernails. *Id*., Vol. IV at 769-70 (testimony of Judith Brinkman). A pink synthetic fiber discovered on a tree near the body did not match fibers found on either Dechaine or Cherry. *Id*., Vol. IV at 784.

Dechaine took the stand in his own defense at trial, denying that he had abducted, tied up, buried or killed Cherry. *Id*., Vol. VII at 1300-01 (testimony of Dennis John Dechaine). He also denied having confessed. *Id*., Vol. VII at 1286-87, 1293. Dechaine, who was thirty-one years old at the time of trial, testified that on the afternoon of July 6th he went to a wildlife refuge on Merry Meeting Bay where he injected a drug that he had purchased in a museum bathroom in Boston from a person who told him it was speed. *Id*., Vol. VI at 1176, 1207-08, 1210, 1216-20. He then took a route that led him to Hallowell Road, noticed a woods road and pulled into it. *Id*., Vol. VI at 1222. He wandered into the woods off the side of the road and injected more of the drug. *Id*., Vol. VI at 1223. Feeling "more lucid" and "more energetic," he wandered for some period of time in the Hallowell Road area, stopping frequently and finishing the remainder of the drug. *Id*., Vol. VI at 1223-24, 1228. At one point he was unable to find his truck, which may or may not ultimately have been found where he last left it. *Id*., Vol. VI at 1225-26. He did not believe that he had left it locked. *Id*., Vol. VII at 1296.

At about dusk he followed the sound of a generator and came out to a dirt road. *Id*., Vol. VI at 1229. He lied to the Buttricks about where he was from and his activities that afternoon for fear that they would notice he was under the influence of drugs. *Id*., Vol. VI at 1231-32. He told the same lie

(that he had been out fishing) to police for the same reason. *Id*., Vol. VI at 1253. He recalled having immediately acknowledged ownership of the auto-body receipt and notebook when presented with those items by Reed. *Id*., Vol. VI at 1238. He hid his keys from the police when he discovered them after mistakenly informing the police that he had left them in his truck. *Id*., Vol. VI at 1244. He wanted to avoid further confrontation, particularly with Reed. *Id*., Vol. VI at 1244-45. He was not carrying a penknife on his key ring in July 1988. *Id*., Vol. VII at 1274. Asked whether there was any period of which he had no memory, Dechaine replied, "I can safely say there are periods of time where my memory is probably not as sharp as it could have been, but I think that's because I was doing nothing of any significance to have to cause me to have reference points." *Id*., Vol. VI at 1226.

Dechaine had a reputation for peacefulness and non-violence. *Id*., Vol. V at 904 (testimony of Justine Dennison), 928 (testimony of Brian Dennison), 978-79 (testimony of Kent Womack), 1018 (testimony of Joan Economeau), 1029 (testimony of Eric Lewis Brandtmeyer), 1038-39 (testimony of Ann Brandtmeyer), Vol. VI at 1112-13 (testimony of Nancy Emmons), 1172 (testimony of Elizabeth Hite). He was upset by violence and the sight of blood. *Id*., Vol. V at 971-72 (testimony of Kent Womack), 1163 (testimony of Mike Hite).

Connolly subpoenaed two witnesses, Douglas Senecal and Jennifer Dox, to appear at trial and made an offer of proof on the basis of which the trial judge declined to allow the evidence. Transcript of Chambers Conference[,] March 16, 1989, *State v. Dechaine*, Criminal No. 89-71 (Me. Super Ct.), filed with Response, at 1-3, 29. The offer of proof included the following: that (i) Senecal was the stepfather of Jackie Crossman, who was the natural daughter of Cherry's stepfather, Christopher Crossman, (ii) in June and July 1988 Senecal was under indictment in Sagadahoc County on charges of having engaged in unlawful sexual contact with Jackie Crossman on two occasions in 1983, (iii) Jackie Crossman resided in the Crossman residence with Cherry in 1983, (iv) on June 20, 1988

Senecal was notified that his case was on the first page of the trial list commencing July 14th; (v) on July 5, 1988 Jennifer Dox of the Department of Human Services ("DHS") conducted interviews at the Senecal residence with the primary purpose of locating Jackie Crossman, who was missing, and (vi) Dox concluded that Senecal and his wife Maureen had facilitated Jackie Crossman's removal from Maine. *Id*. at 3-6.

Connolly further offered to prove that (i) on July 12, 1988 Bonnie Holiday of DHS received a report from a caller identifying herself as Pam Babine that Senecal was involved in the Cherry homicide, (ii) the following day Holiday informed Hendsbee of that report, advising that Senecal was the subject of several allegations of sexual abuse, that the Senecal family was very violent and that Senecal had been behaving strangely since the homicide, (iii) Holiday told Hendsbee that Babine sounded crazy at times but that her information usually was true, (iv) the Senecal prosecution was continued on July 15, 1988 because of Jackie Crossman's unavailability, (v) when served with a subpoena by Connolly's process server Senecal would not discuss the Dechaine case, claiming a Fifth Amendment privilege, (vi) Senecal's counsel, Joseph Field, contacted Connolly the following morning and made Senecal available to both Connolly and prosecutor Wright, (vii) Senecal admitted that he drove a small red pickup truck, (viii) Senecal provided a list of four persons with whom he claimed to have been on July 6, 1988, (ix) Connolly's investigator was unable to verify any of these alibis, (x) Cherry was best friends with Jackie Crossman's sister Jessica, (xi) although Jessica would deny it, one could reasonably infer that Senecal knew Cherry would be babysitting at the Henkel residence, (xii) as of July 5, 1988 Senecal was under significant pressure and had a motive to discourage Cherry from coming forward with allegations, that (xiii) lack of evidence of a struggle at the Henkel residence indicated that Cherry knew her assailant, and that (ix) Senecal used instrumentalities from Dechaine's truck to set him up. *Id*. at 6-16.

Field, who was present at the chambers conference, represented that Cherry would not have been called as a witness in the sexual-abuse case against Senecal. *Id*. at 17. He also represented that Senecal's truck was a medium-size red and white Ford Ranger pickup, Babine was a disgruntled tenant of Senecal's and that, if called, Senecal would not take the Fifth Amendment. *Id*. at 24-26. After performing an *in camera* review of DHS records the court declined to allow the Senecal and Dox testimony, commenting, "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." *Id*. at 23, 28-29.

After approximately nine hours of deliberation the jury returned a verdict of guilty as to all counts. Trial Transcript, Vol. VIII at 1536-41.

C. Direct Appeal

Dechaine appealed both his judgment of conviction and his sentence to the Law Court. Knox Docket (entries of April 4, 1989, April 11, 1989). Dechaine's appeal of his sentence was denied without comment on May 4, 1990. Order, *State v. Dechaine*, No. AD-89-27 (Me. May 4, 1990), attached as Exh. A(13) to Response. By decision dated March 15, 1990 the Law Court affirmed Dechaine's convictions with one modification, explaining:

> Dechaine contends that the Superior Court abused its discretion in denying his motion for continuance made for the purpose of allowing Dechaine to undertake further testing of blood samples; in excluding evidence of an alleged alternative perpetrator; in denying access to confidential records of the Department of Human Services concerning that alleged perpetrator; and in allowing the state medical examiner to testify in the State's rebuttal case concerning the cause of a bruise on Dechaine's arm, an opinion not previously disclosed to Dechaine in accordance with a discovery order. In addition, Dechaine maintains that convictions for intentional or knowing murder and depraved indifference murder, for which concurrent life sentences were imposed, violate his right to be free of double jeopardy. We find no abuse of discretion or clear error in the rulings complained of, and after modifying the judgment to reflect a single conviction for murder for which one sentence is imposed, we affirm the convictions.

Dechaine, 572 A.2d at 131. The Law Court observed that, although Dechaine had not raised sufficiency of the evidence as an issue on appeal, the jury had rationally concluded that he was guilty

beyond a reasonable doubt. *Id*. at 132 n.3. With respect to Dechaine's alternative-perpetrator theory "[t]he evidence that Dechaine proferred . . . did not substantiate his theory. Dechaine had no evidence that Sarah Cherry was to be a witness at Senecal's trial or . . . that Senecal knew that Sarah was babysitting on July 6. . . . Dechaine produced no evidence that Senecal knew Dechaine was in the Lewis Hill Road area of Bowdoin that day, that he had access to Dechaine's locked truck, or that he even knew of the existence of Dechaine." *Id*. at 133-34 n.6.

D. Motion for New Trial

On May 5, 1992 Connolly filed a motion for a new trial based on newly discovered evidence. Motion for New Trial (M. R. Cr. P. 33), *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), attached as Exh. A(19) to Response. A three-day hearing was held on the motion during which, as an initial matter, Connolly proposed to question one actual and one alternate juror in the Dechaine trial as to whether the new evidence in their view would have affected the outcome of the case. Transcript of Motion for New Trial, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), filed with Response, Vol. I at 21-22. That request was denied. *Id*., Vol. I at 50. The court then heard evidence that included:

1. The testimony of Margaret Steele, a former neighbor of Douglas Senecal, that she had been told by Bobby Lapierre, a mutual acquaintance of Steele's and Senecal's, that Lapierre knew Senecal had killed Cherry. *Id*., Vol. I at 52-54, 58. According to Steele, Lapierre cautioned her never to tell anyone or Senecal would kill both of them. *Id*., Vol. I at 58. Lapierre denied making any such statements to Steele. *Id*., Vol. III at 539-40.

2. The testimony of Kristin Comee, a friend of the Senecal family who had employed Jackie and Jessica Crossman as babysitters, *id*., Vol. I at 178-79, 181, that on July 6, 1988 Jessica Crossman became very upset when her mother Maureen spoke to her upon picking her up late that

afternoon, *id*., Vol. I at 194. Comee testified that she was surprised and puzzled by Jessica's reaction, which seemed out of proportion in view of the fact that the body was not found until July 8th. *Id*., Vol. I at 195-96. Later Comee received threatening phone calls that she thought might have been made by Senecal. *Id*., Vol. I at 199-201. The court excluded as hearsay proferred evidence from Comee that the Senecal family knew before July 8th that Cherry was dead. *Id*., Vol. I at 205-07.

3. The testimony of Ralph Jones, an acquaintance of Senecal's, *id*., Vol. II at 230, that on July 6, 1988 between 7:30 p.m. and 8:30 p.m. he heard a truck pull over next to the foot of his driveway on Dead River Road in Bowdoin, *id*., Vol. II at 237-39, 242. He ran about one hundred and fifty feet (halfway down his driveway) and saw a red and white truck taking off. *Id*., Vol. II at 243. Before the truck departed he heard two male voices (one yelling) and one "little female" voice. *Id*., Vol. II at 244. The girl's voice could have been happy or sad, laughing or crying. *Id*., Vol. II at 246. The angry male voice sounded like that of Senecal. *Id*., Vol. II at 245-46. As the truck was pulling away Gary Jasper, an acquaintance of Jones's, drove past and stopped to speak with Jones. *Id*., Vol. II at 253. Jasper then drove off after the red and white truck. *Id*, Vol. II at 254, 257. Jones observed the truck pull onto a knoll near a wood road, then drive off. *Id*., Vol. II at 255-57. Jasper quickly returned and then departed. *Id*., Vol. II at 258.[3] Jones, who testified that he had experience in identifying tire marks, *id*., Vol. II at 260-64, stated that on the evening of July 6th and the morning of July 7th he compared the tire marks left near his driveway by the red and white truck with tire marks on a pulloff where Dechaine's truck later was found and a wood road leading to the spot where the body later was found, *id*., Vol. II at 264-67, 290-91. The tire marks in all three places matched. *Id*., Vol. II at 264-67.

[3] Jasper, who had been called as a defense witness at trial, testified then that while at Jones's house at about 7:30 or 8 on the evening of July 6th he saw a person who was alone getting into a red Toyota pickup truck on Dead River Road, and that he had seen the same vehicle at about 3 p.m. that day on Lewis Hill Road. Trial Transcript, Vol. V at 940-43, 947-48, 952-53.

Jones testified that on the morning of July 7th he reported to the police command post, informed the police of the tire tracks, was shown a picture of a red Toyota, stated that it was not the truck he had seen, and was asked whether the truck was a diesel and replied that it was not. *Id*., Vol. II at 275-77. He recalled having spoken with a state police officer whom he knew, Ronald Jacque. *Id*., Vol. II at 274-75. Later that day he took two detectives, one of whom he identified as Detective Lehan and the other possibly Hendsbee, to his house to show them the tire marks. *Id*., Vol. II at 280, 346-47. They declined to look at the other two sets of tire marks. *Id*., Vol. II at 281-82.

Jones acknowledged that he had heard Senecal's voice only five times in twenty years. *Id*., Vol. II at 331-32. He did not on the morning of July 7th give Senecal's name to the police. *Id*., Vol. II at 361. He did not see any of the occupants of the truck. *Id*., Vol. II at 334.

A July 7th police report stated that on that day Jones reported to Ackley that the previous evening at about 8 he had seen a truck with a fish-type box in the back and had heard screams coming from the truck. *Id*., Vol. II at 362-63. Hendsbee testified that he did not recall ever meeting or speaking with Jones. *Id*., Vol. III at 587. Had he been informed of tire tracks that a witness thought important, it would have been proper procedure to check those out. *Id*., Vol. III at 593. Jacque testified that he had no conversation with Jones on the morning of July 7, 1988. *Id*., Vol. III at 609. Lehan testified that he did not recall meeting or speaking with Jones on July 7, 1988 or going to the Dead River Road with Jones or anyone else to look at tire tracks. *Id*., Vol. III at 632.

4. The testimony of Pamela Ruth Babine that in July 1988 she was renting a house from Senecal, *id*., Vol. II at 396, that on July 6, 1988 at about 10:30 or 11 a.m. Senecal pulled into her driveway in a red Toyota pickup truck and remained there for about an hour and fifteen minutes, *id*., Vol. II at 403, 410, that when she saw him again on July 8, 1988 he was very nervous, would get angry and blow up, *id*., Vol. II at 407-08, and that she feared him, *id*., Vol. II at 417.

5. The testimony of Gerald Pardis that in May 1988 he negotiated to buy the house that the Babines were renting from Senecal. *Id*., Vol. II at 457-58. In early July 1988 Paradis noticed a change in Senecal's behavior. *Id*., Vol. II at 467-68. Senecal was very nervous and aggressive and drinking alcohol. *Id*., Vol. II at 468. Also during the first week of July 1988 Paradis observed scratches on Senecal's face and chest. *Id*., Vol. II at 470. Paradis and Senecal had disagreements over the house sale, including a septic issue with respect to which Paradis eventually sued Senecal. *Id*., Vol. II at 478-80.

6. The testimony of Edward Senecal, an uncle of Douglas Senecal who was close to Douglas, denying that Douglas ever told him that he killed Cherry. *Id*., Vol. III at 507. Edward Senecal also denied that he had told a private investigator that if he provided a statement he would be in fear for his life. *Id*., Vol. III at 501-02.

7. An offer of proof that Patrick Senecal, another uncle of Douglas Senecal who was not close to Douglas, *id*., Vol. III at 509-10, would testify that Douglas had made a threatening phone call stating that Patrick had better not testify against him because Patrick had a young daughter, too, *id*., Vol. III at 517, and that Edward Senecal had told Patrick that Douglas had confessed to murdering Cherry, *id*., Vol. III at 526. The court found both proferred statements unreliable and excluded them. *Id*., Vol. III at 521-22, 537-38.

8. The testimony of Lucien A. Tardif, Jr., general manager of Bath Lumber, that on July 6, 1988 Douglas Senecal purchased an item in the store, which then was located in Bath, most likely between 12:30 p.m. and 1 p.m. *Id*., Vol. III at 648-49, 653-54, 659.

By decision dated July 31, 1992 the court denied the motion for a new trial, observing, "When the evidence presented at the motion hearing is compared with the evidence presented at the trial, the new evidence still lacks the substantial link between Douglas Senecal and the alternative perpetrator

theory of defense." Decision and Order, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct. July 31, 1992), attached as Exh. A(20) to Response, at 22-23. The court found Babine's report of the Toyota sighting "highly questionable" given evidence that Senecal had been at Bath Lumber during that time frame and that Dechaine himself had testified at trial that he had been driving his truck at about that time. *Id*. at 15-16. Jones's testimony was found lacking in credibility. *Id*. at 15. On appeal the Law Court upheld denial of the motion, finding "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 Dechaine has been convicted." *State v. Dechaine*, 630 A.2d 234, 237 (Me. 1993).

E. Custody of Clippings

Prior to the filing of Dechaine's motion for a new trial Connolly sought to remove certain of the defense exhibits in the Dechaine case. Removal of Exhibits in Criminal Case, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), attached as Exh. A(14) to Response. At a hearing held February 4, 1991 Connolly and prosecutor Wright represented to the court that they had agreed that the exhibits in issue, which included some obtained by the state but offered by the defense, should be maintained in the custody of the court. Transcript of Hearing on Defendant's Motion for Removal of Exhibits, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), filed with Response, at 2-4. The court thereafter issued an order "that the clerk of court shall not permit the removal of any exhibit in this case without further Order of the court" and that "insofar as any person wishes to examine any exhibit, such examination is to be done within the clerk's office and under the supervision of the clerk." Order, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct. Feb. 21, 1991), attached as Exh. A(15) to Response.

By form letter dated April 17, 1992 an assistant clerk of the court informed counsel for both Dechaine and the state that the exhibits would be disposed of in two weeks unless removed by counsel. Letter dated April 17, 1992 from Deborah J. Pooler to Eric Wright, Esq., Thomas Connolly, Esq. and George Carlton, Esq. ("Clerk Letter"), attached as Exh. A(16) to Response. By letter dated April 22, 1992 Connolly asked that the clerk not dispose of any evidence, offered to arrange for pickup if necessary and called the clerk's attention to the existence of the previous order in the matter. Letter dated April 22, 1992 from Thomas J. Connolly to Deborah J. Pooler, attached as Exh. A(17) to Response. The court signed a form order dated April 30, 1992 authorizing the clerk to dispose of any exhibits not removed by counsel of record within thirty days. Order, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct. April 30, 1992), attached as Exh. A(18) to Response. On May 5, 1992 Connolly removed defense exhibits 1-26, 26A and 27-46 from the clerk's office. Endorsement to Clerk Letter. By letter dated June 8, 1993 Connolly transmitted fingernail clippings that he stated were those of Cherry to a laboratory in Boston for DNA testing. Letter dated June 8, 1993 from Thomas J. Connolly to C.B.R. Lab, attached as Exh. B(3) to Response.

On December 13, 1993 the state filed a motion for return of property taken by Connolly, including the thumbnail clippings (exhibits 26 and 26A). Motion for Return of Property, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), filed as Exh. A(24) to Response. A hearing was held at which Fernand LaRochelle, supervisor of the criminal division of the Attorney General's Office, testified that he became aware for the first time on December 9, 1993 that Connolly possessed the fingernail clippings. Transcript of Proceedings[,] Plaintiff's Motion for Return of Property, *State v. Dechaine*, Criminal No. 89-71 (Me. Super. Ct.), filed with Response, at 9, 11. LaRochelle contacted Connolly, who declined to return the clippings, stating "that they were in a safe place and that if we executed a search warrant of his office that we would not find them because they were not there." *Id*.

at 12. At the conclusion of proceedings the court ordered the property at issue turned over to the state crime laboratory forthwith, with a proviso that the fingernail clippings could be destroyed only upon express written order of the court. *Id*. at 31-33. Connolly that day returned certain exhibits, including the fingernail clippings. Letter dated December 20, 1993 from Eric E. Wright to the Honorable Carl O. Bradford, attached as Exh. A(26) to Response.[4] The order compelling return of the exhibits was upheld on appeal. *State v. Dechaine*, 644 A.2d 458 (Me. 1994).

On May 24, 1994 CBR Laboratories, Inc. reported the results of tests on fingernail clippings that it had received from Connolly on June 10, 1993 and on blood labeled as that of Dechaine that it had received on April 22, 1994. Letter dated May 24, 1994 from David H. Bing, Ph.D. to Professor Barry C. Scheck, attached as Exh. B(4) to Response. The laboratory found that there were two or more donors to the DNA extracted from one of the fingernails and excluded Dechaine as a donor. *Id.*[5]

F. State Post-Conviction Review Proceeding

Dechaine on September 29, 1995 filed a *pro se* state petition for post-conviction review. Petition for Post-Conviction Review ("State Petition"), *Dechaine v. State*, Criminal No. 95-380 (Me. Super. Ct.) ("State PCR Proceeding"), attached as Exh. B(2) to Response. He alleged one ground of actual innocence and three grounds of ineffective assistance of counsel based on counsel's asserted failure (i) in the context of the pre-trial motion for continuance to produce affirmative evidence of the efficacy of DNA testing, object to incompetent evidence of DNA results or follow up on an offer of the state to investigate further testing procedures, (ii) to provide an expert to establish time of death and (iii) to obtain DNA testing on the fingernail clippings in a sufficiently timely fashion to permit its consideration in the context of Dechaine's motion for a new trial. *Id*. at 3-4.

[4] Connolly stated that he did not have certain exhibits (fingerprint evidence) and thus could not provide them to the state. *See* Letter dated December 27, 1993 from Thomas J. Connolly to Eric Wright, attached as Exh. A(27) to Response.

[5] The state represents that "[i]n subsequent testing, done while the state post-conviction review petition was pending, Sarah Cherry (continued…)

The state on April 4, 1996 moved to depose Dechaine's co-counsel George Carlton, noting *inter alia* that (i) the State Petition had been languishing inasmuch as Dechaine had failed to respond to the court's inquiries concerning whether he had retained or required appointment of counsel, (ii) Carlton, whom the state represented was not present at trial when Dechaine testified, possessed knowledge disproving Dechaine's claim of innocence, (iii) although Dechaine had known the results of the CBR Laboratories DNA testing since May 1994, he had waited to file the State Petition until September 15, 1995, two weeks after Carlton suffered a stroke, and (iv) Carlton was still capable of providing reliable information.[6] Motion for Deposition of Petitioner's Co-Counsel, George M. Carlton, Jr., M.R. Crim. P. 15(a) and 72 ("Deposition Motion"), State PCR Proceeding, attached as Exh. B(6) to Response, ¶¶ 5-6, 8.

On April 16, 1996 counsel for Dechaine entered an appearance. Docket, State PCR Proceeding ("State PCR Docket") (entry of April 16, 1996), attached as Exh. B(1) to Response. Following hearing the court permitted the deposition of Carlton upon written questions, with responses to be provided *in camera* to the court without copy to either party so as to preserve attorney-client privilege to the extent applicable. Transcript of Hearing on Motion To Continue Hearing on Motion To Take Deposition, State PCR Proceeding, filed with Response, at 23-24. Dechaine filed an interlocutory appeal that the Law Court denied as premature. Notice of Appeal to the Law Court (M.R.Crim. 37 and 76), State PCR Proceeding, attached as Exh. B(8) to Response; Order, *Dechaine v. State*, No. Kno-96-321 (Me. May 14, 1996), attached as Exh. B(9) to Response. A motion for reconsideration of the Superior Court's earlier disposition of the Carlton deposition motion was

was included as one potential donor of the DNA." Response at 13. However, no such report is in evidence.

[6] The state accompanied its motion with an affidavit of Margaret Carlton Bash, a physician and the daughter of Carlton, in which she stated that although the stroke had rendered her father quadriplegic and mute, he was able to respond to questions with head movements, eye movements and eye blinks. Affidavit [of Margaret Carlton Bash], attached to Deposition Motion. When medically stable, her father had the same cognitive ability as prior to the stroke. *Id*.

denied by order filed October 1, 1996. Opinion and Order, State PCR Proceeding, filed as Exh. B(13) to Response. On May 28, 1996 Dechaine amended the State Petition to clarify that his ineffective-assistance of counsel claims pertained solely to Connolly. Amendment to Petition for Post-Conviction Review, State PCR Proceeding, attached as Exh. B(10) to Response.

The state on June 12, 1996 moved to dismiss the State Petition pursuant to 15 M.R.S.A. § 2128(5), which had been amended effective September 29, 1995 (the day of Dechaine's filing) to provide:

> A petition may be dismissed if it appears that by delay in its filing the State has been prejudiced in its ability to respond to the petition or to retry the petitioner, unless the petitioner shows that it is based on grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred. If the delay is more than 5 years following the final disposition of any direct appeal to the Maine Law Court . . . prejudice is presumed, although this presumption is rebuttable by the petitioner.

Respondent's Motion To Dismiss and Answer to Petition for Post-Conviction Review, as Amended ("Motion To Dismiss"), State PCR Proceeding, attached as Exh. B(11) to Response, at 7-8.

On July 22, 1996 Dechaine filed a motion to permit the taking of a saliva sample from Douglas Senecal to compare Senecal's DNA with that found on the fingernail clippings submitted for testing. Motion To Permit Taking of Saliva Sample from Alternative Suspect, State PCR Proceeding ("Discovery Motion"), attached as Exh. B(12) to Response.

In support of its Motion To Dismiss, the state on December 19, 1996 filed five affidavits, three of which addressed Carlton's purported knowledge of Dechaine's guilt. State PCR Docket (entry of December 23, 1996); Affidavit of Fernand LaRochelle ("LaRochelle Aff."), attached as Exh. B(14) to Response; Affidavit [of Edmund Folsom], attached as Exh. B(15) to Response; Affidavit [of Joseph H. Field], attached as Exh. B(16) to Response. These included an affidavit of LaRochelle averring *inter alia* that on the morning of July 8, 1988 he called Carlton and "told him that I had just two questions

for him and he could answer or not. I asked Attorney Carlton if Sarah was still alive, and, if so, were we searching in the right area. Attorney Carlton replied that Sarah was not alive and added something to the effect that we were looking in the right area." LaRochelle Aff. at 1.

On January 16, 1998 the court held a hearing on both the Motion To Dismiss and the Discovery Motion. State PCR Docket (entry of January 16, 1998). Dechaine subsequently filed two affidavits disputing that he deliberately delayed filing his State Petition until becoming aware that Carlton suffered a stroke. *Id*. (entry of February 7, 1998); Affdavit [of Dennis Dechaine] ("Dechaine Aff."), attached as Exh. B(18) to Response; Affidavit of Paul M. Boots, Esq., attached as Exh. B(19) to Response. Dechaine averred that commencing as early as 1993 he had engaged in a lengthy search for counsel and that he was not even aware as of the time he filed the State Petition that Carlton had suffered a stroke. *See generally* Dechaine Aff.

By decision filed February 10, 1999 the court granted the Motion To Dismiss, holding that not only had Dechaine failed to rebut the statutory presumption of prejudice pursuant to 15 M.R.S.A. § 2128(5) but that the state also had demonstrated actual prejudice. Order Dismissing Post-Conviction Petition, State PCR Proceeding, attached as Exh. B(20) to Response, at 3-5. The court noted that following the state's "extensive but ultimately unsuccessful efforts to depose Carlton, which were continually opposed by the Petitioner[,]" Carlton had died on June 21, 1998. *Id*. at 3 n.4. The court rebuffed Dechaine's argument that inasmuch as he claimed only the ineffectiveness of Connolly, Carlton would have had neither relevant nor admissible testimony to offer. *Id*. at 3. Rather, in the court's view, the state clearly would have had the right to call Carlton for purposes of assessing the quality of legal assistance rendered. *Id*. at 3-4. The court did not directly address the Discovery Motion; however, it opined that "Connolly's lack of success [in having the fingernail clippings tested for DNA or the results admitted in a new trial] cannot be blamed on his defective performance, but

rather upon the volume of incriminating evidence against his client." *Id*. at 7. The court concluded, "The dismissal of the Dechaine PCR petition on procedural grounds will not result in a manifest injustice because the Petitioner cannot show that no reasonable juror would convict him even if he could get DNA test results of the victim's fingernail nail [sic] clippings into evidence." *Id*. at 8.

By notice filed March 1, 1999 Dechaine appealed the grant of the Motion To Dismiss on six grounds, including the court's failure to rule on the Discovery Motion. Notice of Appeal to the Law Court of Order Dismissing Post-Conviction Petition, State PCR Proceeding, attached as Exh. B(21) to Response. The Law Court on April 27, 1999 issued an order denying probable cause to proceed with the appeal. Order Denying Certificate of Probable Cause, *Dechaine v. Maine*, No. Kno-99-133 (Me. April 27, 1999), attached as Exh. B(25) to Response.

On April 26, 2000 the instant federal habeas petition was filed. Petition at 1.

II. Discussion

A. Request To Compel DNA Testing

Central to Dechaine's habeas petition is his request (in the guise of Ground One of the Petition) that the court compel Douglas Senecal to submit a saliva sample for purposes of testing and comparison of his DNA profile with the two profiles extracted from the thumbnails of Sarah Cherry. *See* Petition at 5; Attachment to Petitioner Dennis Dechaine's Petition for Writ of Habeas Corpus ("Attachment") ¶ 12A; Memorandum at 18-25. This raises a fundamental question (curiously not considered by either party) whether the court possesses the power to issue such an order.[7] I conclude that it does not.

[7] A court may *sua sponte* raise and decide issues relating to its power to act. *See, e.g., White v. Gittens*, 121 F.3d 803, 806 (1st Cir. 1997) ("[i]t is too elementary to warrant citation of authority that a court has an obligation to inquire sua sponte into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting.") (citation and internal quotation marks omitted); Black's Law Dictionary 1425 (6th ed. 1990) (subject matter jurisdiction includes "the power to deal with the general subject involved in the action.").
(continued…)

Requests for discovery in this context are governed by Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (the "Habeas Rules"), which provides in relevant part: "A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." The rule does not on its face contemplate the availability of discovery through any avenue other than the Federal Rules of Civil Procedure, nor can I find a case construing it to do so. To the contrary, at least one court, the Court of Appeals for the Fourth Circuit, has squarely held that Rule 6(a) confines a habeas petitioner to the modes of discovery available through the Federal Rules of Civil Procedure. *See In re Pruett*, 133 F.3d 275, 281 (4th Cir. 1997) (noting, in holding that lower court lacked power to issue *ex parte* discovery order in habeas case, "Habeas Rule 6(a) establishes Civil Rules 26-37 as the outer boundary of the extent and manner in which § 2254 petitioners may conduct discovery."). Other courts have assumed, without deciding, that this was so. *See, e.g.*, *Martinez v. Johnson*, 104 F.3d 769, 773 (5th Cir. 1997) (rule "allows for all forms of discovery that are available under the Federal Rules of Civil Procedure"); *Willis v. Newsome*, 771 F.2d 1445, 1447 (11th Cir. 1985) ("In federal habeas corpus actions the parties are entitled to use discovery procedures available under the Federal Rules of Civil Procedure only with the court's permission.").

Dechaine's request implicates Fed. R. Civ. P. 35(a), which provides in relevant part: "When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control."

Senecal's status in this habeas action is at most that of a potential witness. He clearly is not in the custody or under the legal control of Dechaine. Nor is there any indication that he is in the custody or under the legal control of the state. Nor could he be said, even under a liberal construction of the term, to be a "party" to this action. He is neither a named party nor a "real party in interest" in the sense that he has a legal right to enforce the claims at issue in this habeas petition. *See Schlagenhauf v. Holder*, 379 U.S. 104, 115 n.12 (1964) ("It is not now necessary to determine to what extent, if any, the term 'party' [in Rule 35] includes one who is a 'real party in interest' although not a named party to the action."); Black's Law Dictionary 1264 (6th ed. 1990) (defining "real party in interest" as "[p]erson who will be entitled to benefits of action if successful . . . . Under the traditional test, a party is a 'real party in interest' if it has the legal right under the applicable substantive law to enforce the claim in question.").

One might well question whether Rule 35 defines the universe of persons who can be ordered to submit to a physical or mental examination in a federal civil proceeding. In my view, it does. The rule initially applied only to "parties"; it was amended in 1970 to permit examination of persons in the custody or under the legal control of parties. *See* Fed. R. Civ. P. 35 advisory committee notes (1970 amendment). This limited extension evinces a conscious balancing of the need to gather evidence against the intrusion on privacy necessarily entailed in compelling a person to submit even to a non-invasive physical or mental examination. Not surprisingly, the rule has been held to define the outer boundaries of the power of the court. *See, e.g., Scharf v. United States Attorney Gen.*, 597 F.2d 1240, 1243-44 (9th Cir. 1979) (court lacked power under Rule 35(a) to order blood tests of party's purported parents in citizenship litigation); *Fong Sik Leung v. Dulles*, 226 F.2d 74, 76 (9th Cir. 1955) ("Absent F.R.C.P. 35, a federal court, in purely federal litigation, has no power to compel any one to submit to the procedure ordering a blood test, whether a party or a prospective witness."); 8A C.

Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2233 at 471 (2d ed. 1994) ("Claims of inherent power in the face of a rule with specific limitations are always dubious, and especially when it is clear that the federal courts had no power, inherent or otherwise, to order a physical or mental examination prior to the adoption of [Rule 35].").[8]

Inasmuch as the court is without power to order Senecal to submit a saliva sample for purposes of DNA testing, I recommend that the discovery request be denied.

B. Effect of Procedural Default

The question remains whether, on the record presented, the Petition succeeds. Apart from Ground One Dechaine asserts three grounds for relief. Grounds Two and Three assail the failure of the court in the State PCR Proceeding to act on his motion to compel DNA testing of Senecal; Ground Four asserts ineffective assistance of counsel Connolly in failing to obtain timely DNA testing of the thumbnail clippings. *See* Petition at 5; Attachment ¶¶ 12B-12D.

The state contends, and I agree, that Grounds Two and Three are not cognizable in this proceeding. *See* Response at 45. The court in the State PCR Proceeding declined to open the door to

[8] In no case cited by Dechaine in support of Ground One was a non-party compelled to submit to a physical or mental examination in a habeas context. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633-34 (1989) (upholding mandatory drug, alcohol testing of railway employees involved in accidents); *Winston v. Lee*, 470 U.S. 753, 763-67 (1985) (invalidating order compelling potentially risky surgery to remove bullet from robbery suspect); *New Jersey v. T.L.O.*, 469 U.S. 325, 343-48 (1985) (upholding search of purse of student suspected of smoking in lavatory); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (upholding choice between submission by drunk-driving suspect to blood-alcohol test or risk that noncompliance would be used as evidence against him) *United States v. Mara*, 410 U.S. 19, 22 (1973) (upholding grand-jury subpoena compelling submission of handwriting specimen); *United States v. Dionisio*, 410 U.S. 1, 15, 18 (1973) (upholding grand-jury subpoena compelling submission of voice exemplar); *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969) (invalidating detention of rape suspects without probable cause or warrant for sole purpose of obtaining fingerprints); *Schmerber v. California*, 384 U.S. 757, 770-72 (1966) (upholding mandatory blood-alcohol testing incident to arrest of driver involved in accident); *Breithaupt v. Abram*, 352 U.S. 432, 436-38 (1957) (upholding involuntary blood-alcohol testing of driver involved in accident); *M.A. v. Estate of A.C.*, 274 N.J. Super. 245, 247-48 (N.J. Sup. Ct. Ch. Div. 1993) (relying on general rules of discovery and inherent power of court to compel discovery in ordering blood testing of decedent's children and their mother in paternity action); *In re Paternity of K.I.S*, 168 Wis.2d 775 (Wis. Ct. App. 1992) (upholding decision of lower court in paternity action to admit results of DNA test obtained without putative father's consent and in violation of stay); *In re Estate of Rogers*, 245 N.J. Super. 39, 41 (N.J. Sup. Ct. App. Div. 1990) (finding inherent authority to compel decedent's wife, a nonparty witness, to submit to blood tests in paternity action); *People v. Scott*, 21 Cal.3d 284, 294-95 (Cal. 1978) (invalidating order compelling intrusive search of suspect for evidence of trichomoniasis in sexual-abuse case); *In re Fingerprinting of M.B.*, 125 N.J. Super. 115, 123-24 (N.J. Sup. Ct. App. Div. 1973) (upholding mass fingerprinting of juveniles (continued…)

a hearing on the merits of Dechaine's State Petition because he came knocking too late. Dechaine's procedural default, in turn, obviated the need for the court to act upon the Senecal discovery motion; the point was then moot. Dechaine thus could assail the state court's failure to act on his motion, if at all,[9] only by means of a challenge to the constitutional propriety of the procedural-default mechanism in issue, 15 M.R.S.A. § 2128(5). He does not do so. *See generally* Memorandum.

Turning to Ground Four (ineffective assistance of counsel), Dechaine's state procedural default again factors prominently, although for different reasons. As the Supreme Court has made clear, "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

A claim of "fundamental miscarriage of justice," in turn, requires a showing "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Paradoxically, the court in assessing the strength of such a showing may take into consideration evidence that would not come before the "reasonable juror":

> [T]he district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. . . . The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.

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in connection with murder investigation).

[9] The First Circuit has declined to join the growing number of courts that have held that errors and defects in state post-conviction review proceedings are not *per se* cognizable on federal habeas-corpus review. *Dickerson v. Walsh*, 750 F.2d 150, 152-53 (1st Cir. 1984).

Id. at 327-28 (citation and internal quotation marks omitted).

Dechaine neither (i) challenges the independence or adequacy of the state procedural rule pursuant to which his claims of ineffective assistance of counsel were defaulted nor (ii) demonstrates cause for his default.[10] *See generally* Memorandum. However, he does claim actual innocence. *See, e.g., id*. at 1-2. In the state's view, he nonetheless falls short of making the showing contemplated by *Schulp*. Response at 34-35, 41.[11]

The voluminous record in this case raises troubling questions. How could the professedly non-violent Dechaine have randomly abducted a twelve-year-old child and committed this atrocious crime? Dechaine denied under oath that he did it. No fingerprints, hairs or fibers matching those of Dechaine were found on or near the victim or at the Henkel home. Conversely, no fingerprints, hairs or fibers matching those of Cherry were found on Dechaine or in or on Dechaine's truck. Debris, including a pink synthetic fiber, was found near the crime scene that had no apparent connection to Dechaine or Cherry. The Maine State Police tracking dog did not pick up a track from one side of Dechaine's truck to the other evidence that the state conceded was "a little ambiguous." *See* Trial Transcript, Vol. VIII at 1488. Cherry had been warned not to let a stranger into the house, and there

[10] It is difficult to see how Dechaine could demonstrate cause inasmuch as his State Petition was not filed until September 29, 1995, sixteen months after the May 24, 1994 issuance of the laboratory report setting forth the results of the DNA testing that formed the basis for his claims of ineffective assistance of counsel. Dechaine attributed the delay to ongoing futile attempts to obtain experienced counsel beginning as early as 1993; however, he eventually filed the State Petition *pro se*. In any event, lack of counsel in state post-conviction review proceedings does not *per se* constitute cause and prejudice sufficient to excuse a state procedural default. *See, e.g., Lancaster v. Newsome*, 880 F.2d 362, 373 n.15 (11th Cir. 1989); *Vasquez v. Lockhart*, 867 F.2d 1056, 1058 (8th Cir. 1988).

[11] The state alternatively seeks dismissal of the Petition pursuant to Rule 9(a) of the Habeas Rules on the ground that Dechaine's tardiness has prejudiced its ability to respond. Response at 44-45. Rule 9(a) permits dismissal even of a timely filed habeas petition "if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." The state contends that it has been prejudiced by the death of Carlton, whom it alleges had knowledge of Dechaine's actual guilt. Response at 21-22, 45. The record contains three affidavits of attorneys concerning Carlton's asserted knowledge of Dechaine's guilt. As I read *Schlup*, a federal court may weigh excluded or inadmissible evidence whether inculpatory or exculpatory in determining whether a habeas petitioner has made a sufficient showing of "actual innocence" to excuse a state procedural default. The existence of these affidavits is not, in any event, outcome-determinative in this case. The state accordingly fails to demonstrate the requisite prejudice to warrant dismissal pursuant to Rule 9(a). (continued…)

was no evidence of a struggle there. Dechaine's purported confessions contained no details of the crime. Dechaine was cooperative with police officers, allowing his person and his truck to be searched (although he admitted both that he hid his keys and at various points lied).

Nonetheless, the evidence of Dechaine's guilt remains substantial. Dechaine's papers were found in the Henkel driveway; a neighbor thought she saw a red Toyota pickup truck heading north (in the direction in which the body later was found) shortly after the last known contact with Cherry; Dechaine's truck was found near the body; Dechaine himself emerged from the woods in the general vicinity of the body; a rope from Dechaine's truck was found in between the truck and the body; the rope used to bind Cherry's hands was consistent with that in Dechaine's truck and that found in the woods; the dog evidence indicated that someone headed from the passenger side of Dechaine's truck toward the spot where the body was found; Nancy Emmons was surprised that the penknife was not on her husband's key ring; and four police or corrections officers testified that Dechaine made incriminating statements on three separate occasions within the space of several hours on July 8, 1988 the pivotal day on which the body was found and Dechaine was placed under arrest. Finally, three attorneys aver that Carlton indicated to them that Dechaine was guilty; most chillingly, that Carlton conveyed to LaRochelle of the Attorney General's Office on the morning of July 8, 1988 before Cherry's body was found that Cherry was no longer alive and that searchers were looking in the right place.

To this day there remains no evidence that Senecal knew that Cherry was babysitting at the Henkel home on July 6, 1988, that Cherry had any knowledge of the sex-abuse crimes with which Senecal had been charged or that Senecal had any connection to Dechaine or could have accessed his truck in sufficient time to have abducted Cherry and planted the papers in the Henkel driveway

between noon, when Jennifer Henkel spoke with Cherry, and 3:20 p.m., when she returned home. The state Superior Court excluded or discounted evidence tending to implicate Senecal (including that of Steele, Babine, Jones and Patrick Senecal) as unreliable, contradictory of other facts in evidence or otherwise lacking in credibility conclusions that upon independent review appear wholly supportable.

Against this backdrop, Dechaine now offers the May 1994 DNA evidence that two people contributed DNA to the Cherry thumbnail clippings, neither of which was him. This evidence, standing alone, simply does not suffice to place this now twelve-year-old case "within the narrow class of cases . . . implicating a fundamental miscarriage of justice." *Schlup*, 513 U.S. at 314-15 (citation and internal quotation marks omitted); *see also Simpson v. Matesanz*, 175 F.3d 200, 210 (1st Cir. 1999) (describing exception as "quite narrow and seldom used").

As an initial matter, as the state points out, *see* Response at 28, 42, the manner in which the nail clippings were handled raises concerns about chain of custody and possible contamination.[12] Even assuming *arguendo* that there were no such problem, the presence of a DNA profile inconsistent with those of either Cherry or Dechaine does not in itself undermine the weight of the evidence against Dechaine. There is no evidence that the mystery DNA necessarily or even likely transferred to the nail clippings during commission of the crime. Indeed, the only evidence of record touching on the subject remains that of Brinkman and Roy to the effect that the blood of the assailant would not have been expected to be found on Cherry's nails.

Even with the benefit of the DNA evidence and the excluded Senecal evidence, a reasonable juror could have found Dechaine guilty beyond a reasonable doubt.

III. Conclusion

[12] Dechaine asserts that Connolly signed an affidavit assuring that chain of custody was preserved while the nail clippings were in his (continued…)

For the foregoing reasons, I recommend that the Petition be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this 28th day of July, 2000.

_____

David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-123

DECHAINE v. WARDEN, MAINE STATE, et al Filed: 04/26/00
Assigned to: JUDGE D. BROCK HORNBY
Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

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possession. Memorandum at 32 n.15. However, no such affidavit is of record.

985-7193

v.

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