

STATE OF MAINE
KNOX, ss

Superior Court
Criminal Action
Docket No. CR-89-71

STATE OF MAINE,)
)
 Plaintiff)
)
v.)
)
DENNIS J. DECHAINE,)
)
 Defendant)

DECISION AND ORDER

This matter comes before the court on the defendant's motion for new trial based upon newly discovered evidence pursuant to M.R.Crim.P. Rule 33.

EVIDENCE AT TRIAL

Jennifer Henckel hired Sarah Cherry to babysit for her eleven month old daughter on Wednesday, July 6, 1988. She and her husband lived on the Lewis Hill Road in Bowdoin with their two daughters. Mrs. Henckel had to attend a meeting in Augusta. On July 6 Mrs. Henckel's regular child care provider was on vacation. Sarah Cherry was twelve years old, known to Mrs. Henckel, and was hired to babysit from 9:00 a.m. until 3:00 p.m. Mrs. Henckel left Sarah and her daughter at 9:00 a.m. She called home at noon and spoke with Sarah. There had been no problems and Mrs. Henckel told Sarah that her meeting would last longer than expected and she would not be home until 3:30 p.m. When she arrived home at 3:20 p.m., she saw a notebook and an auto body repair bill lying in the driveway which she picked up. The door to the house was ajar, which she considered unusual even though she had left the door unlocked when she left that morning.

Upon entering the house, Mrs. Henckel found the television set was on. Sarah's glasses, dungaree jacket and sneakers were nearby but Sarah was not in the house. Mrs. Henckel's baby was found sleeping in her own bedroom. The kitchen sink contained utensils used for the preparation of lunch. The house was otherwise neat and orderly.

Mrs. Henckel called her neighbor, Holly Johnson, as well as her husband and Sarah's absence could not be explained. John Henckel called Debra Crossman, Sarah's mother, and Mrs. Henckel called the Sagadahoc County Sheriff's Office.

Debra Crossman had last seen her daughter on July 6th when she left for work. Sarah was picked up by John Henckel between 8:00 and 8:30 a.m. To her knowledge, the only other persons who knew Sarah was babysitting were her husband, Christopher Crosman, her grandmother, her daughter Hillary, and Sarah's friend, Julie Wagg who lived near the Henckel residence. To her knowledge, Jessica Crosman had no knowledge that Sarah was babysitting. ¹

Holly Johnson, whose house is located across the road from the Henckels, heard a vehicle come from the southerly direction on the Lewis Hill Road between 1:00 and 1:15 p.m. on July 6. The vehicle slowed at the Henckel driveway and did not sound as though it continued on. Mrs. Johnson also heard the Henckel's dog barking.

1. Christopher Crosman had two daughters, Jacqueline and Jessica, by a prior marriage. Their mother, Maureen, had remarried and was living in Phippsburg with her husband Douglas Senecal. Jessica Crosman lived with her mother but did spend time at her father's residence weekends during the summer.

A search for Sarah was commenced by the sheriff's department and the Maine State Police. A command post was set up at the northerly end of the Lewis Hill Road at its intersection with the Dead River Road. The notebook and the auto body repair bill found in the Henckel driveway were turned over to the sheriff's deputies. The auto body repair bill was for repairs to a 1981 red Toyota pickup owned by the defendant. Writings in the notebook revealed that it also belonged to the defendant. Deputies then began efforts to locate the defendant and his pickup truck.

Between 8:00 and 8:30 p.m. on July 6th, a person matching the defendant's description was seen by Arthur Spaulding walking by the window of his house in the woods in the general vicinity of where Sarah's body was later found. At approximately 8:45 p.m. on July 6th Helen and Harry Buttrick found the defendant walking across Mrs. Buttrick's mother's lawn next to their house on the Dead River Road not far from the road leading from Arthur Spaulding's house. The defendant said he had become lost while fishing and couldn't find his truck. He told the Buttricks that he was from Yarmouth even though he lived in Bowdoinham. After helping the Buttricks carry groceries into the house, he went with Harry Buttrick to try to find his truck. A short distance down the Dead River Road they found Deputy John Ackley. Ackley notified the command post that he had found Dechaine and had the defendant get into his cruiser. Following Miranda warnings the defendant was questioned by Deputy Daniel Reed and Detective Mark Westrum. He denied any knowledge of Sarah Cherry or her disappearance, stated that he became lost

while fishing, that he had thrown away a three foot fishing pole he was using, and was trying to find his truck. When questioned about the auto body repair bill, he denied they were his, later acknowledged his ownership and explained their presence in the Henckel driveway by saying that he might have gotten out of his truck at the head of the Henckel driveway to urinate (after previously denying being on the Lewis Hill Road) and that they must have fallen out of his truck. When questioned further about the papers being near the house he said "whoever grabbed her" must have been the papers near the road, picked them up and placed them in the driveway closer to the house "to set me up".

Sheriff Haggett later questioned the defendant while still in Ackley's cruiser. The defendant told Haggett that the keys were still in his truck. Later, when Ackley's cruiser was needed, the defendant hid his key chain containing the key to the truck under the front seat of the cruiser. They were later found by Detective Westrum, given to Sheriff Haggett who showed them to the defendant and the defendant acknowledged ownership.

Robert West, a neighbor of the Henckels and Holly Johnson, positively identified the defendant's truck as being on the Lewis Hill Road in the vicinity of the Henckel residence on Tuesday, July 5th, the day before Sarah Cherry was kidnapped.

The defendant's pickup truck was found shortly after midnight on Thursday, July 7th. It was located on a wooded path 75 feet easterly of the Hallowell Road with its doors locked.

Sarah Cherry's body was found on Friday, July 8th in a shallow grave, covered with branches and leaves in an area about 500 feet west of the Hallowell Road not far from where defendant's truck was found. She had been sexually abused and tortured before her death. The medical examiner was of the opinion that death was caused by strangulation by a bandanna around the neck and a stab wound to the jugular vein, either of which alone would have caused death. Ropes that had been used to tie Sarah were similar to those found in the defendant's truck and in his barn. Furthermore, a length of rope discovered in the area where Sarah's body was found and a piece of rope found in the defendant's truck had once been one piece of rope. Numerous stab wounds on Sarah's chest and neck were consistent with those inflicted with a small pen knife like one the defendant routinely carried on his key chain but that was not found.

Defendant was indicted for intentional and knowing murder 17-A M.R.S.A. s 201(1)(A)(1983); depraved indifference murder 17-A M.R.S.A. s 201(1)(B)(1983); kidnapping 17-A M.R.S.A. s 301(1)(A)(1983); and two counts of gross sexual misconduct 17-A M.R.S.A. s 253(1)(B)(1983 and Supp. 1988).

There was testimony at trial about numerous contradictions in the defendant's story to police officers. In addition, the defendant made statements to detectives and corrections officers which were in the nature of admissions to the crime.

The defendant's testimony at trial contradicted the stories he gave to police officers about his activities on July 6th. He testified that, after returning from West

Gardiner Beef with chickens left the previous week for slaughtering, he took a quantity of drugs purchased in Boston along with hypodermic needles and drove around the back roads of Bowdoinham, Merrymeeting Bay, Richmond Corner, Litchfield Corner and eventually wound up on the Hallowell Road where he went into the woods and became lost. According to his testimony, the drugs which he diluted with water and injected intravenously on three occasions at no time caused any blackout. On the contrary, they resulted in heightened awareness.

At trial, the defendant sought to introduce evidence that Douglas Senecal had murdered Sarah Cherry and had "set up" Dechaine. As noted, supra at footnote 1, Douglas Senecal was married to the former Maureen Crosman, mother of Jackie Crosman and Jessica Crosman. Senecal was charged with two counts of unlawful sexual contact, Class C, (17-A M.R.S.A. s 255) against Jackie Crosman. The defense sought to introduce evidence that Senecal was scheduled for trial in Sagadahoc Superior Court in July 1988, that he found out from Jessica Crosman that Sarah Cherry was babysitting at the Henckel residence on July 6th and that he went there and murdered her to prevent her from testifying as a witness for the State at Senecal's trial. He further contended that the notebook and auto body repair bill had been stolen from Dechaine by Senecal, either at Dechaine's vegetable market in Brunswick or from his truck, and planted them in the Henckel driveway in order to "set up" or "frame" the defendant.

The defendant was convicted on both counts of murder, kidnapping, and both counts of gross sexual conduct. His convictions were affirmed by the Law

Court in State v. Dechaine, 572 A.2d 130 (Me. 1990).

In footnote 3 of the opinion the court noted that Dechaine had not raised the sufficiency of the evidence on appeal. After briefly summarizing the evidence, the Law Court stated that the jury's conclusion that Dechaine was guilty beyond a reasonable doubt of all charges submitted to it was rational.

The evidence of Senecal as an alternative suspect was excluded at trial and the ruling was affirmed on appeal. 572 A.2d at 133, 134. In affirming the exclusion of the evidence, the Law Court noted, at footnote 6, the defendant had no evidence that Sarah Cherry was to be a witness at Senecal's trial or that Sarah had any knowledge of the incident for which Senecal was charged. Instead, the available evidence was that the State had not listed Sarah as a witness in the Senecal trial and had no plans to call her as a witness. The Law Court further noted that the defendant had no evidence that Senecal knew that Sarah was babysitting on July 6th. Furthermore, at the time of Sarah Cherry's abduction and murder, Senecal knew that Jackie Crosman was in California and was unavailable to testify against him.² The Law Court further noted that Senecal's truck was a medium-sized, red-and-white Ford Ranger pickup truck, unlike Dechaine's smaller red Toyota, that Dechaine produced no evidence that Senecal knew Dechaine was in the Lewis Hill

2. On July 15, 1988, the State moved to continue Senecal's trial due to the unavailability of Jackie Crosman and the motion was granted July 18, 1988. The State again moved to continue trial on August 12, 1988 for the same reason. The motion was granted August 15, 1988 with the condition that trial was continued finally to a session to be scheduled no less than 90 days from that date. The indictment was dismissed January 25, 1989 for the State's failure to produce Jackie Crosman.

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.

MOTION FOR NEW TRIAL

The defendant's motion for a new trial is brought pursuant to Rule 33 of the Maine Rules of Criminal Procedure and is based upon newly discovered evidence. The newly discovered evidence offered by the defendant in his motion is based upon (1) allegations of an alibi of the defendant on the evening of July 5, 1988 to contradict the testimony of Robert West and (2) testimony relating to the alternative suspect, Douglas Senecal. At the hearing on the motion, no evidence was offered as to alibi. Evidence was offered relating to the alternate suspect, Douglas Senecal.

EVIDENCE PRESENTED ON ALTERNATIVE SUSPECT DEFENSE

Defense counsel prepared an affidavit signed and sworn to by Margaret Steele of Richmond. In that affidavit she stated that she had known Douglas Senecal for over twenty years. She stated that Bobby Lapiere, whom she had known since he was two years old (now age 48), "indicated" that he had direct knowledge that Senecal killed Sarah Cherry, that Sarah Cherry had information that Senecal did not want disclosed about the criminal prosecution of Senecal for sexual abuse of Jackie Crosman. In her testimony at the motion hearing she stated that Lapiere had never said Senecal "admitted" killing Sarah, only that Lapiere "knew" that Senecal had killed Sarah.

Kristen Comee had lived with her husband and three children at Popham Beach and had been friends with Senecal, his wife Maureen, Jackie, Jessica and the

son and daughter of Senecal and Maureen. In her affidavit she stated that Jessica had previously babysat for her and that she had asked Jessica to babysit on July 6, 1988. Jessica had other commitments for July 6th and changed them to accommodate Mrs. Comee. Her affidavit stated that she believes the other commitment was with the Henckels and that Sarah Cherry had taken that assignment to permit Jessica to babysit for Mrs. Comee. Her affidavit further stated that Maureen came to pick up Jessica from babysitting on the following day, July 7th, and told her that Sarah Cherry was missing. She further stated that Jessica's reaction was very emotional and disproportionate for the information then known.

Mrs. Comee's testimony at the motion hearing may be summarized as follows: Jessica Crosman and her sister, Jackie, had both babysat for her, that Jackie had not babysat for her in 1988, that Jessica babysat primarily on Tuesdays and Thursdays, that she asked Jessica to babysit on Wednesday, July 6th, that Jessica had another commitment and changed it to accommodate Mrs. Comee. Maureen Senecal picked up Jessica between 4 and 5 p.m. on July 6th. Jessica babysat for her the following day, July 7th, and when Maureen came to pick up Jessica she told her something in private which caused Jessica to burst into tears. Mrs. Comee had been told by Maureen that Sarah Cherry was missing, but she was surprised and puzzled by Jessica's reaction to what her mother had told her. She was aware Jessica babysat for others but had never been told that Jessica babysat for the Henckels. Mrs. Comee had a series of threatening telephone calls after Sarah's murder and the voice on the

telephone was familiar. The threatening telephone calls stopped after Douglas Senecal moved to North Carolina in 1989.

Ralph Jones testified that in July, 1988 he owned land and a residence on Dead River Road in Bowdoin. At the time he was living in New Hampshire, and the electric power was disconnected at his house and a gas generator was used for power. He attended high school in Lisbon Falls until the 10th grade, and knew Douglas Senecal as well as his brother and sister. Douglas Senecal was older and ahead of him in high school, and while he was friendly with Senecal's brother and sister, he was not friendly with Senecal. He left high school in 1971 and has seen Senecal 5 times in the past 20 years. On July 6, 1988 between 7:30 and 8:00 p.m. he was outside his house, 150 feet off Dead River Road. He heard a truck engine slow and stop on the road beyond his driveway at a point where he could not see the vehicle or its occupants. He heard a man's voice outside the truck speaking loudly, a young child's muffled voice either laughing or crying and another man's voice from inside the truck. The voice of the loud man outside the truck was familiar. He went down his driveway to investigate further on the chance that it might be people coming again to his property to commit theft. As he reached the road the man outside got in a red and white pickup which took off at high speed going westerly on the Dead River Road, stopped at a knoll in the road where a vehicle turn off and a woods road leads to a stream near where Sarah Cherry's body was found. The truck left tread marks at the side of the road and similar tread marks were also left at two locations off Dead River Road leading into the woods where

Sarah's body was found. The tread of the tires was a common tread and he could not tell the size of the tires. He saw the license plate from 500 feet away and got three of the four plate numbers, two of which were the same. Jones never saw any of the occupants of the pickup truck, but his testimony was that the voice of the man he heard speaking loudly was Douglas Senecal. He reported his sightings and findings to the command post. No casts were made of the tread marks he found, and the truck he had seen he later identified as belonging to Douglas Senecal.

Pamela Babine testified at the motion hearing that she lived in a house in Phippsburg in July, 1988 that she and her husband rented from Senecal. She testified that she knew Jackie Crosman before July 6, 1988, that she saw Jackie on July 6th, that she spoke with Jackie that day and she appeared "severely nervous". She testified that on July 6th Senecal parked in her driveway in a red Toyota pickup truck staring at her for one hour and fifteen minutes. Her testimony as to the time of day this occurred is confusing at best but it would have started as early as 10:30 a.m. and as late as 11:00 a.m. Her identification of the truck as a red Toyota was made not from the name on the tailgate but from the front of the truck after it had turned around in her driveway and stopped with the front of the truck facing the road. She claimed to have reported the incident to the Phippsburg police and to Bonnie Halliday of the Department of Human Services after Sarah's body was found on July 8th. Her reason for not coming forward with this information sooner was fear of Senecal, that she went to Florida as well as to Lewiston, Casco, Naples and Sabattus in Maine hiding out.

Gerald Paradis testified that he had known Dechaine during their childhood days in Madawaska. His fiancée, now his wife, purchased the house owned by Senecal and occupied by Pamela Babine on Devil's Highway in Phippsburg. Paradis and his wife met Senecal in May 1988 and a real estate sales agreement was signed shortly thereafter. Closing was to occur in July 1988. Paradis made frequent trips to the property after the sales agreement was signed to deliver belongings for storage, to cut limbs and brush around the house and to perform repairs and renovations. He developed a friendly relationship with Senecal. During the first two weeks in July, Paradis noticed a change in Senecal's behavior which included heavy drinking, nervousness, anger and aggressiveness. On one occasion Paradis saw Senecal in the road drunk and noticed scratches on his face and chest. During this time period Paradis had discovered problems with the sewer system on the property and attempted to obtain a sewer system permit from the code enforcement officer. When Paradis went to Senecal for signature of permit applications Senecal displayed anger which he felt was not proportionate to the problem. During the same time frame Paradis threatened to have his wife refuse to go through with the real estate purchase because of the sewer system problem. Paradis ultimately brought suit against Senecal for damages arising out of the purchase of Senecal's property.

Patrick Senecal is Douglas Senecal's uncle. He received a telephone call at a time when Douglas' name came up during Dechaine's trial. The person whose voice he identified as being Douglas. The caller made a threat to him by reference to having young daughters but with no reference to the Sarah Cherry

murder. He further testified to conversations he had with his brother, Eddie Senecal, about statements Douglas allegedly made. The statements were excluded because Eddie Senecal had previously testified, stated he was an alcoholic, that he had no memory of having stated that Douglas made admissions to him about Sarah Cherry and that he had never heard Douglas say he killed Sarah Cherry.

Ropert Lapiere testified about his conversations with Margaret Steele and denied ever saying anything that would implicate Senecal to Sarah's murder. He also testified about his relationship with the Senecal family, the pending charge against Senecal involving Jackie Crosman, his agreement at Maureen's request to look for Jackie in the San Diego vicinity when he returned to California and his finding Jackie in San Diego.

In response to the evidence presented in support of the motion for new trial, the State called witnesses whose testimony may be summarized as follows: Alfred Hendsbee, the primary investigator in the murder case, described events leading up to the location, removal and search of Dechaine's truck. Assuming he had been given information such as that testified to by Ralph Jones, he would have followed up any such leads. The possibility of photographing and/or making casts of any tire marks in the gravel on the Dead River Road would have been remote due to contamination of the area by others on foot and in vehicles similar to what had happened to the gravel surface in the Henckel driveway. Trooper Ronald Jack has lived on the Lewis Hill Road since 1976, knows Ralph Jones and is familiar with the Dead River Road as it existed in July 1988. The road in July 1988 was much different

than today with more growth on the sides of the road, less gravel and very dry and dusty. He did not speak with Ralph Jones on July 7, 1988 and would have investigated any report Ralph Jones might have made to him about hearing a little girl scream. He had no such report.

State Police Detective Stephen Drake spoke with Deputy Ackley on July 7, 1988 in the late morning but it did not concern Ralph Jones. Detective Patrick Lehan testified that he had never met Ralph Jones, was not directed or taken to Dead River Road to look for tire marks and received no information on July 7th about a truck, about a little girl and a girl screaming.

Lucien Tardiff, Jr., general manager of Bath Lumber, testified to Senecal being in his store in Bath purchasing a saw blade some time at or after noontime on July 6, 1988. Thomas Austin, owner of the Winnegance Store in Bath testified to the ill feelings of Pamela Babine toward Senecal.

FINDINGS OF FACT

The findings of fact in support of the motion for new trial based upon newly discovered evidence are as follows. Douglas Senecal was charged with two counts of unlawful sexual contact against Jackie Crosman in Sagadahoc County Superior Court which was on the list of cases to be tried between July 18-22, 1988. A motion to continue due to the unavailability of Jackie Crosman to testify was filed July 15, 1988. On July 6, 1988 Jackie Crosman was in San Diego, California, a fact known by her mother, Maureen Senecal, wife of Douglas Senecal. Jessica Crosman cancelled another engagement to babysit for Kristen Comee on July 6, 1988. There is no evidence of what engagement Jessica had to cancel. When Jessica's mother picked

her up, Mrs. Comee observed that Jessica burst into tears when told some disturbing news. After Sarah Cherry's murder she received threatening telephone calls from a man whose voice was familiar and the threatening calls ceased after Senecal moved to North Carolina.

Ralph Jones was visiting his property on Dead River Road in Bowdoin on July 6th. At a time between 7:30 and 8:00 p.m., he heard a vehicle stop on the road and heard a man's loud voice, a voice he now believes to be that of Douglas Senecal. He also heard a muffled laugh or cry of a child, and another male voice inside the truck. When he reached the roadway, he saw a pickup truck by that time 500 feet down the road driving away at high speed. He saw three of the license numbers, two of which are the same digit. He never saw any of the three occupants of the truck, which then turned into a turnoff or woods road which leads to the area where Sarah Cherry's body was found. He now believes the truck he saw was Douglas Senecal's. The testimony and the reporting of these matters and the tire tread marks to the police is not credible.

Pamela Babine was living in a home rented from Douglas Senecal on July 6, 1988 and had been given notice to vacate the premises. She had considerable ill feelings toward Senecal. Her testimony that she saw Senecal in her driveway between 10:30 a.m. and 12:15 p.m. for one hour and fifteen minutes on July 6th in a red Toyota pickup truck is highly questionable. Evidence was introduced that Senecal had purchased a saw blade at Bath Lumber Company within the time frame when Senecal was supposedly in Mrs. Babine's driveway. More importantly,

however, the trial testimony of the defendant placed him in his Toyota pickup from the time he left home on the morning of July 6th through his departure from West Gardiner Beef at 11:00 a.m., his circuitous return trip over secondary highways and back roads to Lewiston and over Route 196, through Lisbon Center and Topsham to Route 24 and from there to his home in Bowdoinham. According to his trial testimony, Dechaine had lunch, went to his barn where he procured his hidden drug and syringes, left the farm in his Toyota pickup, drove to Merrymeeting Bay, injected part of the drugs, drove to Richmond Corners, Litchfield Corners and, after stopping to inject drugs a second time, eventually parked his truck in the woods off the Hallowell Road where it was eventually found. Furthermore, during this same time frame Dechaine saw and was seen by Justine Denison. State's Exhibits 15, 16 and 48 and defense exhibit 5, photographs of defendant's truck, display the name of the truck only on the rear of the vehicle and nowhere on the front of the vehicle as claimed by Mrs. Babine. Assuming Mrs. Babine did see Senecal in her driveway on July 6th at the time she believes he was there, and assuming he was in a red pickup truck and not his own red-and-white pickup truck, the testimony of Dechaine precludes the possibility that Senecal had stolen Dechaine's truck and was in that truck in Mrs. Babine's driveway.

Gerald Paradis and his fiance purchased from Senecal the house that had been rented by Pamela Babine. Ill feelings developed between Paradis and Senecal after a dispute arose over the septic system which almost resulted in a cancellation of the real estate purchase and which ultimately resulted in litigation. During July 1988

Paradis noticed a change in Senecal's behavior, observed Senecal to be drinking and on one occasion saw him in the road drunk with scratches on his face and chest. The contention that the scratches seen on Senecal by Paradis are evidence that Sarah Cherry was fighting off Senecal is rejected. The testimony of Judith Brinkman, forensic chemist with the Maine State Police crime lab in Augusta, testified at a hearing on January 27, 1989 on the defendant's motion to continue trial. Her testimony at that hearing concerned certain tests made from scrapings taken from Sarah Cherry's fingernails. It was established that Sarah's blood was Type A and Dechaine's is Type O and there was nothing that led her to believe that there was a mixture of Sarah's blood with that of another person with Type A. She stated that if you scratch someone hard enough to make them bleed and cause crust underneath the fingernails, you would expect to find tissue or some kind of skin material or signs of trauma to the nails such as breaking. No skin was found under Sarah's nails and none of her nails was broken. Ronald Roy, forensic pathologist and chief medical examiner, testified that he found no flesh or skin adhering to the fingernails. Its presence would indicate scratching. Scratching will take skin before blood and the blood under Sarah's fingernails was consistent with blood from stab wounds in her neck accumulated by struggling with the ligature around her neck which was causing strangulation. Therefore, evidence that Senecal had scratches on his face and chest during the time frame of Sarah's murder would not be evidence that Sarah had caused those scratches.

Patrick Senecal believed Douglas Senecal had called him at a time when Douglas' name came up during the Dechaine trial. Nothing said by Douglas Senecal to Patrick Senecal related in any way to Sarah Cherry or her murder.

From the above, the defendant contends that the motive, opportunity and means of killing Sarah Cherry have all been established. As to motive, the defense contends Senecal knew Sarah Cherry had knowledge of the pending criminal charges against him involving Jackie Crosman. He contends Jessica switched babysitting jobs to have Sarah babysit Jennifer Henckel, that Senecal found out from Jessica where Sarah would be babysitting and his motive was to silence Sarah's testimony as a witness by killing her. As to opportunity, the defendant contends Ralph Jones places Senecal in the vicinity of the murder within the time frame of Sarah's death. As to the means, the defendant contends Pamela Babine places Senecal in Dechaine's truck in her driveway, that items in the truck were used to tie-up and bind Sarah, that the auto body repair bill and the notebook found at the Henckel residence had been taken in a breakin at Dechaine's farm produce stand in Brunswick.

CONCLUSIONS OF LAW

In order to prevail on a motion for new trial on the grounds of newly discovered evidence, the defendant has the burden of establishing the following: (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to

the issue, and (5) that it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict. State v. Rich, 592 A.2d 1085, 1087 (Me. 1991) quoting State v. Casale, 148 Me. 312, 319-20, 92 A.2d 718, 722 (1952). The defendant has the burden of establishing all five factors. State v. Grover, 518 A.2d 1039, 1042 (Me. 1986). The defendant must show all five factors by convincing evidence. *Id.* The defendant has the burden of making a clear showing that a different verdict would result upon a new trial, that is, it must clearly appear upon a review of the whole evidence - new and old - that it is probable that another jury, given the new evidence with the old evidence, would return a different verdict. State v. Harding, 408 A.2d 1003, 1005 (Me. 1979). The mere hope that another jury may reach a different conclusion is not enough. State v. Harding, 408 A.2d at 1006.

As to the alternative suspect theory, the Law Court noted in Dechaine's appeal:

A criminal defendant is entitled to present evidence in support of the contention that another is responsible for the crime with which he is charged; [citations omitted]. The evidence "must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability." [citations omitted]. We have, however, upheld the exclusion of evidence that is "too speculative or conjectural or too disconnected from the facts" of a defendant's prosecution. [citations omitted] 572 A.2d at 134.

The evidence incriminating another person must be competent, confined to substantive facts which create more than a mere suspicion that such other person committed the crime, and the connection between the alternative perpetrator and

the crime must be reasonably established by the admissible evidence the defendant is prepared to offer. State v. Dechaine, 572 A.2d at 134.

If permitted, the defense would present at trial through Kristen Comee the statements Maureen Senecal made to her about Sarah Cherry being missing and Jessica Crosman's reaction to the fact that her stepsister was missing. From that the defense would argue that we can infer that Sarah had switched babysitting jobs with Jessica, that Jessica told Senecal where Sarah was babysitting, that he went to the Senecal house in Dechaine's red Toyota pickup truck which he had previously stolen along with Dechaine's notebook and auto body repair bill which he had also stolen from Dechaine's farm stand, that he went to the Henkel residence with the express purpose of killing Sarah to silence her testimony in the Jackie Crosman case and to "set up" Dechaine as the perpetrator. The defense would present at trial the testimony of Pamela Babine to place Senecal in Dechaine's red Toyota pickup truck until 12:15 pm. on July 6th as well as evidence of a breakin at Dechaine's farm stand in Brunswick in order to show that Dechaine's notebook and auto body repair bill "may" have been stolen. The defense would then have us infer that Senecal "planted" Dechaine's notebook and auto body repair bill in the Henckel driveway, abducted Sarah and drove away in either Dechaine's truck or in his own red-and-white Ford Ranger pickup truck at sometime between 12:15 p.m. and the time Jennifer Henckel returned at 3:20 p.m. The defendant would then have us infer from Ralph Jones' testimony that Senecal, Sarah and another man were stopped on the Dead River Road in the red-and-white Ford Ranger pickup sometime between

7:30 - 8:30 p.m. on July 6th, that they sped away and disappeared into a woods road where Senecal murdered Sarah. The defense would then present Gerald Paradis' testimony to show that the scratches on Senecal's face and chest were the result of Sarah's struggle while she was being murdered. The defense would then present Patrick Senecal's testimony that his brother Edward Senecal told him Douglas Senecal admitted murdering Sarah and that Douglas Senecal threatened him by telephone during Dechaine's murder trial.

The first element the defense must establish by clear and convincing evidence is that the newly discovered evidence will probably lead to a different result in a new trial. Obviously, if the evidence offered at the new trial is inadmissible, it cannot change the result. State v. Preston, 521 A.2d 305, 307 (Me. 1987). The testimony sought to be elicited at the motion hearing from Kristin Comee concerning statements made by Maureen Senecal come with no exception to the hearsay rule. The testimony sought to be elicited from Patrick Senecal of admissions allegedly made by Douglas Senecal were offered as a declaration against penal interest pursuant to M.R. Evid 804(b)(3). To be admissible, the defense had the burden of showing that the statement made by Douglas Senecal to Patrick, not to his brother Edward, that the statement must have so far subjected Douglas Senecal to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true and the statement must be corroborated by circumstances "clearly" indicating its trustworthiness. State v. Preston, 521 A. 2d at 307. Patrick Senecal's testimony was excluded. Any admissions

by Douglas Senecal would have to be made to Partick Senecal to be admissible. The requirements of Rule 804(b)(3) have not been met.

When the evidence presented at the motion hearing is compared with the evidence at the trial, the new evidence still lacks the substantial link between Douglas Senecal and the alternative perpetrator theory of defense. There is only conjecture by the defense that Senecal had any basis to believe that Sarah had any knowledge or information about the pending sex abuse charges or that he had any knowledge that Sarah was in the Lewis Hill Road area of Bowdoin on July 6th. The evidence at trial was that Debra Crosman, Christopher Crosman, Debra's grandmother, her daughter Hillary Crosman and Sarah's friend Julie Wagg knew of Sarah's babysitting plans and that those arrangements had been made two weeks in advance with Jennifer Henckel. There has been no evidence whatsoever that Senecal knew Dechaine, what type of vehicle Dechaine drove, or that Senecal was in the Lewis Hill Road area of Bowdoin on July 6th. There has been no evidence presented which would establish that Senecal knew Dechaine ran a farm stand that he had sublet that summer to another and we are still left with no evidence that Dechaine's personal property allegedly taken in the breakin was in any way connected to this case. The only evidence which would link Senecal to Dechaine's pickup truck is the testimony of Pamela Babine which was totally contradicted by the evidence of Dechaine and Justine Dennison. The evidence of a person on Dead River Road in a red-and-white pickup with a voice like Senecal's and a young child who was crying or laughing is not sufficient to link Senecal to this case.

Furthermore, the torture and sexual abuse of Sarah Cherry is hardly consistent with a murder committed for the sole purpose of silencing a potential witness at a criminal trial.

The evidence presented at the motion hearing does not have sufficient probative value to raise a reasonable doubt as to Dechaine's culpability on an alternative perpetrator theory. The evidence does not meet the requirement that evidence incriminating Senecal must be competent and confined to substantive facts which create more than a mere suspicion that Senecal committed the murder of Sarah Cherry. The evidence which has been presented is no more than speculation and conjecture.

MOTION TO DISMISS

The State has filed a motion to dismiss the motion for new trial for the reason that the motion is untimely and the court is without jurisdiction to hear the motion. In view of the foregoing findings and rulings, the State's motion to dismiss is deemed to be moot.

For the foregoing reasons, the entry shall be:

The motion for new trial on the grounds of newly discovered evidence is DENIED.

DATED: July 31, 1992

Carl O. Bradford /s/
Carl O. Bradford
Justice, Superior Court

