DNA Probability Match Data Errors

Position Paper for the Maine Association of Criminal Defense Lawyers

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I. Introduction

On May 11, 2015, the Federal Bureau of Investigation (FBI) Crime Laboratory issued a bulletin to National DNA Index System (NDIS) participating laboratories advising them that it had identified errors in the FBI Short Tandem Repeat (STR) population database published in 1999 and 2001. The FBI has since published data correcting these errors. The allele frequencies cited in these publications have been used by many forensic laboratories throughout the country – including in Maine – for calculating DNA match statistics.

The FBI is currently considering expanding the number of CODIS core loci from 13 to 20 and, in order to establish allele frequencies for these additional loci, samples from the original population study were reanalyzed by the FBI using the new STR typing kits that are commercially available to forensic laboratories. The errors were discovered during a concordance check of the new versus originally published data. The FBI maintains that the errors were due to human mistakes in transcription and to limitations in the then-existing technology. The FBI further maintains that the difference in probabilities calculated with the original (erroneous) data compared to that of the amended data is nominal. As of June 2015, NDIS participating laboratories have stopped using the original allele frequencies.

II. Litigating DNA Probability Match Errors.

Maine has two mechanisms for litigating allegations of DNA Probability Match Errors in cases where the Judgment and Commitment has become final: M.R.Crim.P. 33 and 15 M.R.S. §2121 et seq. Additionally, lawyers should take special care to screen cases decided after the FBI acknowledged the probability match error (on May 11, 2015) to ensure that the lab analyst did not rely on the erroneous data notwithstanding the FBI's concession of error. Defendants in that category may have other grounds for relief.

A. Rule 33, Motion for a New Trial

A defendant seeking a new trial based on newly discovered evidence must establish by clear and convincing evidence that: (1) the evidence is such as will probably change the result if a new trial is granted; (2) it has been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it is material to the issue; and (5) it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict. *State v. Twardus*, 2013 ME 74, ¶ 29, 72 A.3d 523. The defendant's burden in seeking a new trial based on newly discovered evidence "is a heavy one." *Id.* at ¶ 30. "It is not enough for the defendant to show that there is a possibility or a chance of a different verdict. It must be made to appear that, in light of the overall testimony, new and old, another jury *ought* to give a different verdict; there must be a *probability* that a new trial would result in a different verdict." *Id.* at ¶ 30. When the newly discovered evidence is "merely impeaching," the standard is even higher. *Id.* The defendant must how a "nearly certain change in result." *Id.* A motion for new trial based on newly discovered evidence must be made within two years after entry of the judgment in the Unified Criminal Docket. M.R.Crim.P. 33.

B. 15 M.R.S. §2125 et seq., Petition for Post-Conviction Relief

As a threshold matter, a person seeking post-conviction relief demonstrate that the challenged judgment "is causing a present restraint," which includes, *inter alia*, incarceration; future incarceration; probation; conditional release; unconditional discharge; unpaid fine; restitution; community service work; and any other juvenile disposition. 15 M.R.S. § 2124(1). Or, that the judgment resulted in a commitment to the custody of the Commissioner of Health and Human Services as a result of being found not criminally responsible. 15 M.R.S. § 2124(1-A). Or, that incarceration or increased incarceration was imposed pursuant to a post-sentencing proceeding following a criminal judgment, although the criminal judgment itself is not challenged. 15 M.R.S. § 2124(2). Or, if the judgment resulted in incarceration pursuant to a sentence imposed in Maine, in another state or in a Federal Court for a crime punishable by incarceration for a year or

more, if the length of the incarceration is greater than it would otherwise have been in the absence of the challenged criminal judgment of this State. 15 M.R.S. § 2124(3).

Newly discovered evidence constitutes a valid ground for post-conviction relief. 15 M.R.S. § 2125. The one-year deadline following the entry of the Judgment and Commitment for filing a petition for post-conviction relief does not apply to claims of newly-discovered evidence. Rather, the one-year deadline begins to run from "[t]he date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 15 M.R.S. § 2128-B(C). A person who has taken an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity is not precluded from filing a petition for post-conviction relief while the appeal is pending. 15 M.R.S. § 2126. The post-conviction proceeding is automatically stayed pending resolution of the appeal unless the Law Court otherwise directs. 15 M.R.S. § 2126.

The Law Court has not articulated the standard of review for claims of newly discovered evidence under the post-conviction relief statutory scheme. The Law Court also has not specified whether a defendant who has standing to file a Rule 33 motion must do so in order to exhaust for purposes of post-conviction relief. *See* 15 M.R.S. § 2126. However, one Superior Court opinion suggests that a petitioner must pursue a Rule 33 motion first. *Keef v. State*, 1986 Me. Super. LEXIS 158 (Me. Super. Ct. July 16, 1986). Of course, a defendant who is time-barred from relief under Rule 33 may bring a petition for post-conviction relief in the first instance. *State v. Chesnel*, 2011 ME 84, ¶ 7, 25 A.3d 946 (trial court lacks jurisdiction to hear motion challenging sentence, filed two years after defendant's petition for post-conviction relief, because post-conviction review process specifically prescribes the process for doing so).

C. 15 M.R.S. § 2136 et seq., Post-Conviction DNA statute

Certain eligible persons may move the court to order DNA analysis of evidence in the control or possession of the State that is related to the underlying investigation or prosecution that led to the person's conviction. 15 M.R.S. § 2137(1). The relief sought

is a new trial. *Id.* An eligible person is anyone "how has been convicted of and sentenced for a crime" in Maine "that carries the potential punishment of imprisonment of at least a year and for which the person is in actual execution of either a pre-Maine Criminal Code sentence of imprisonment, including parole," or certain specified a sentencing alternatives. *Id.* In cases where the request for analysis is based "on the existence of new technology with respect to DNA analysis that is capable of providing new material information," the motion must be filed within two years of "the time that the technology became commonly known and available." 15 M.R.S. § 2137(2).

The standard for ordering DNA analysis is set forth in 15 M.R.S. § 2138(4-A). The prerequisites for obtaining a new trial based on newly discovered evidence are set forth in 15 M.R.S. § 2138(10)(C). A petitioner must prove by clear and convincing evidence that he is entitled to a new trial and "[w]hen reviewing on appeal findings of fact that must be proved by clear and convincing evidence, [the Law Court will] determine whether the factfinder could reasonable have been persuaded that the required factual finding was or was not proved to be highly probable." *State v. Dechaine*, 2015 ME 88, ¶ 13, -- A.3d --.

It is unclear whether the DNA post-conviction statutory scheme applies if the petitioner is not seeking retesting of an existing sample or testing of a newly discovered sample.