

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
NO. 82-2224

COMMONWEALTH

vs.

HENRY HOUGHTON

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION
FOR ACCESS TO FORENSIC AND SCIENTIFIC ANALYSIS
PURSUANT TO G. L. CHAPTER 278A

Now comes the Commonwealth in the above entitled and numbered matter and in accordance with the order of this Honorable Court, submits its response to the defendant's Motion for Access to Forensic and Scientific Analysis and for Post-Conviction Discovery pursuant to G.L. c. 278A.

I. Request For Access To Forensic And Scientific Analysis Pursuant To G.L. C. 278A

1. The defendant has complied with the following requirements of G. L. c. 278A:

Section §2

2. The defendant, Henry Houghton, is permitted to file for relief pursuant to G.L. c. 278A because on December 16, 1982 he was convicted on thirteen indictments relating to the July 1982 rape and assault of a twelve year old girl, T.S., and sentenced to MCI Walpole [Cedar Junction] for the term of not less than 30 nor more than 40 years on 82-2224, with lesser state prison sentences imposed and ordered to run concurrently with that sentence. As of this date, he is held in custody at MCI Gardner (Medium Security).

The defendant has submitted an affidavit averring that he is factually innocent of the kidnapping, rape and assaults. See pp. 72-73 appended to his motion.

Section 3(b)

1. The defendant has specified that he is requesting STR DNA, Y-STR and mini-STR analysis.

To the extent that the defendant seeks to have the evidence subjected to STR DNA testing and Y-STR DNA analysis, the Commonwealth does not object. To the extent that the defendant seeks to have mini-STR testing performed the Commonwealth does object for the reason that mini-STR DNA test results have not yet been ruled admissible in the courts of the Commonwealth.

2. The Commonwealth acknowledges that STR DNA and Y-STR DNA analysis are admissible in the courts of the Commonwealth. See generally Commonwealth v. Rosier, 425 Mass. 807 (1997).

The defendant has not demonstrated that mini-STR DNA analysis is admissible as evidence.

3. The defendant has specified that he seeks to have trial exhibits ## 12a through 12D (four beer bottles) and 14 (guilt or blanket) subjected to DNA analysis. (Def. Memo. p. 11). The fact that these six exhibits have been in the custody and control of the Office of the Clerk of the Hampden County Superior Court suggests that there is no issue with the chain of custody. The fact that Ex. #14, a knife, is reported to be missing suggests that there may be an issue.

The Commonwealth cannot agree that the exhibits have not been handled, altered by natural forces or deteriorated over the past three decades. At the time of trial and conviction, the gathering, handling and storage of forensic evidence was not sophisticated. Precautions against contamination were rare, especially at, during and after trial.

The defendant also seeks to have cuttings performed by the State Police Laboratory in 1982 analyzed. These items were not offered or introduced in evidence. The defendant does not specify where they are or if they still exist. The defendant does not assert that he has made any effort to locate the

items other than asking the court to compel the Commonwealth to submit an inventory.

The defendant also states that a knife, Ex. #4, has not been located. As a trial exhibit, it was in the custody and control of the Hampden County Clerk's Office. The Office of the District Attorney has never had the knife in its custody or control and has never been responsible for its custody. The Office of the District Attorney has no knowledge of the current whereabouts of the exhibit.

The defendant seeks a DNA sample from the victim. The victim was twelve years old at the time of the crime. On information and belief, she has married and is no longer living in this area. If Y-STR DNA analysis were to be conducted, the absence of a sample from the young woman would not necessarily be relevant.

4. The Commonwealth acknowledges that comparative DNA analysis has the potential to exclude or include the defendant as a potential contributor to a particular sample which may or may not link the defendant to the crime. See generally Commonwealth v. Rosier, 425 Mass. 807 (1997).

5. (i) The Commonwealth does not dispute that the requested analysis had not been developed at the time of the conviction.

(ii) The Commonwealth does not dispute that the results of the requested analysis were not admissible in the courts of the Commonwealth at the time of the conviction.

(iii) The Commonwealth does not dispute that the neither the defendant nor his attorney had reason to be aware that there may have been biological evidence amenable to DNA testing on the evidence at the time of the conviction. Whether or not there is any biological evidence to be extracted from the specified exhibits has yet to be determined.

(iv) The provisions of this section are not applicable. See (iii) above.

(v) Some of the evidence the defendant seeks to have tested was available and admitted at trial. Whether or not there is any biological evidence to be extracted from the specified exhibits has yet to be determined.

Section §3(c)

To the extent that the defendant has specified six exhibits in the custody and control of the Office of the Clerk of the Hampden County Superior Court in his request for analysis, the Commonwealth does not object to the request for forensic and scientific testing of the six named exhibits.

The Commonwealth does not dispute that STR DNA and or/ Y-STR DNA analysis on these six exhibits may result in a profile that includes or excludes the defendant as a potential donor. The Commonwealth does not agree that the defendant has provided any information that would lead to the belief that there is evidence available for comparative analysis to the defendant's DNA profile, or any profile developed from the exhibits or that such analysis would yield exculpatory evidence.

* To the extent that the defendant has also requested testing on items where he cannot specify the nature or location of the item, the Commonwealth does object. The defendant asserts that Ex. #4, a knife, is no longer in the custody of the Hampden County Superior Court Clerk's Office. He refers to cuttings, slides or samples which may have been used or prepared by the laboratory in 1982 or 1983 which were not introduced at trial. Because the defendant has not specified the location or chain of custody of these items and apparently has not made inquiry of the last known custodians, the Commonwealth objects to inclusion of these items in the request for an order to test.

Section §3 (d)

The defendant has submitted an affidavit averring that he is factually innocent of the kidnapping, rape and assault on T.S.

The Commonwealth does not dispute that the request for STR DNA and/or Y-STR DNA analysis on known, specified items is made in good faith and not to cause delay or obstruct justice. See c. 278A, §7(b)(5).

The Commonwealth objects to the request for mini-STR DNA analysis because the results of that method of testing are not admissible in the courts of Massachusetts.

The Commonwealth respectfully requests that the Massachusetts State Police Laboratory be designated as the agency to perform any testing ordered. See c. 278A, §8.

The Commonwealth will respond to the defendant's request for post-conviction discovery pursuant to Mass. R. Crim. P. 30 (c)(4) separately.

Respectfully submitted,
THE COMMONWEALTH



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June 9, 2014

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
NO. 82-2224

COMMONWEALTH

vs.

HENRY HOUGHTON

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION
FOR POST-CONVICTION DISCOVERY
PURSUANT TO G. L. CHAPTER 278A AND
MASS. R. CRIM. P. 30 (c) (4) AND FUNDS

The defendant has filed a motion for access to forensic and scientific analysis pursuant to G.L. c. 278A. He has also moved for post-conviction discovery pursuant to both G.L. c. 278A and Mass. R. Crim. P. 30 (3) (4). The Commonwealth objects to the scope of the defendant's requests and asserts that he has not made a sufficient showing to establish the existence of some items, not shown that he has made a good faith effort to locate others and not shown that testing on unspecified items would assist him.

The purpose of c. 278A is to provide a mechanism for convicted criminals who claim factual innocence to obtain access to forensic testing of evidentiary material. Section 3(b) requires the moving party to specify the type of testing desired, a description of

the material the party seeks to have tested, "including its location or chain of custody, if known," and a statement that the material was not previously tested and the reason therefore. If the moving party is unable to provide this information, he must describe the efforts made to obtain the information." Subsection 7(c) provides that after notice and an opportunity to be heard, a court may order discovery of "items and biological matter from third parties, providing the party seeking discovery demonstrates that analysis of these items or biological material will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator of the crime." It also provides that "if ... the court finds good cause for the moving party's inability to obtain items or information required under this subsection. . . [it] may order discovery to assist the moving party to identify the location and condition of evidence or biological material that was obtained in the underlying case...." The defendant's motion does not establish that he has met his burden.

The defendant's motion asks this court to order the Office of the District Attorney to "disclose the

existence, location, production, and chain of custody of any biological, physical or forensic material collected or discovered in relation to this case, whether entered into evidence at trial or not. This would include any materials in the possession of the Hampden County District Attorney's Office, any police or law enforcement body or any third party. The standard for ordering such discovery under c. 278A is good cause, not the prima facie case standard application under Mass. R. Crim. P. 30.

First, the motion is over broad. He does not assert that he has any information that any such additional evidence exists. Second, the defendant does not state what, if any, efforts he has made to locate evidence aside from what is being held by the Clerk's office except to seek an order from this Court to compel the Office of the District Attorney to search for evidence from various law enforcements agencies and compile an inventory. Nor has he stated whether he has contacted the State Police Laboratory to inquire about whether cuttings and reports from 1982 would have been preserved. It should be noted that the State Police Laboratory has moved since 1982.

The Office of the District Attorney is not a custodian of evidence. Evidence is collected by police departments as part of the investigative process, and the individual departments are charged maintaining the evidence and documenting the chain of custody. If evidence is sent to a facility for forensic testing, for example, the sending and receiving agencies document who sent what where, and when. When a case is scheduled for trial, a police department transports the evidence to the courthouse. After a foundation is laid, the evidence is admitted in evidence and becomes the responsibility of the clerk's office. If evidence is not admitted, it remains in the custody and control of the police unless and until a request for return or destruction of property is granted and documented. Should the defendant enter a plea of guilty, the evidence remains with the police unless and until disposed of according to protocol. Because the Office of the District Attorney is not a custodian of evidence, it should not be charged with compiling an inventory of what other agencies may have done.

The defendant has not made the showing required to entitle him to discovery under c. 278A. He has not

met the more stringent standard set forth in Mass. R. Crim. P. 30. Post-conviction discovery is a matter within the judge's discretion, and is dependent on whether sufficient showing has been made. See Commonwealth v. Caillot, 454 Mass. 254, 266 (2009), citing Commonwealth v. Martinez, 437 Mass. 84, 97-98 (2002). A judge may order "appropriate discovery after the verdict if the defendant makes 'a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial.'" Commonwealth v. Werner, 81 Mass. App. Ct. 689, 693 (2012), quoting Commonwealth v. Daniels, 445 Mass. 392, 407, (2005). See Mass. R. Crim. P. 30(c)(4). The defendant has made no such showing.

The defendant's request for funds to hire an expert is premature. He has requested funds to hire an expert concerning "possible degradation of DNA on the physical evidence related to this case." While the Commonwealth acknowledges that degradation of potential DNA evidence may have occurred in this case, it suggests that the request for funds for an expert is premature. The evidence should first be screened to determine whether it is possible to obtain a sample sufficient for DNA analysis. That initial

screening is usually done by the laboratory assigned to perform the analysis as a first step in determining whether analysis is possible and what kind of analysis would be most conducive to producing the most informative results while conserving and/or preserving what may be a scarce sample.

G.L. c. 261, §§ 27A-27G is intended to provide payment of certain fees and costs incurred by an indigent defendant, and includes "expert assistance" in its definition of "[e]xtra fees and costs," which may be paid under § 27C (4), if such services the judge finds are "reasonably necessary to assure the applicant as effective a ... defense or appeal as he would have if he were financially able to pay." The statute does not entitle the defendant to the appointment of such assistance, where, as here, the defendant has failed to make a sufficient showing that such assistance is "reasonably likely to uncover evidence that might warrant a new trial."

Commonwealth v. Morgan, 453 Mass. 54, 63-64 (2008), citing Commonwealth v. Daniels, 445 Mass. 392, 407 (2005).

More than thirty years have passed since the commission of the crime. That fact alone poses

additional problems. The Office of the District Attorney is not seeking to obstruct justice, but the defendant has not demonstrated that he is engaged in anything more than a fishing expedition. He does not state what evidence there may be and, accordingly, cannot specify what relevance it may have to the case. He does not specify or even limit the "law enforcement bodies" that may be involved. He cites, for example, the East Longmeadow Police Department, but the record suggests that the East Longmeadow Police Department arrested the defendant the week following the rape and had no other involvement with this case. The crimes are alleged to have occurred in West Springfield.

In order to facilitate matters, the Commonwealth suggests that the following procedure be implemented.

1. Orders directing the West Springfield Police Department, the State Police Crime Laboratory and the Clerk of the Hampden County Superior Court to search for any and all evidence and any documents relating to the testing, chain of custody or disposition of said evidence should issue. These entities should be directed to report the results of their searches within a short, determined time frame, such as thirty days.

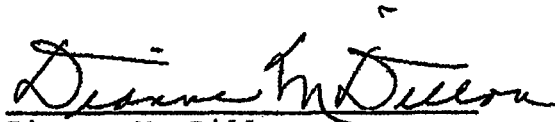
2. The same entities should be ordered to segregate and preserve any evidence in their control or custody pending further order of the court.

3. Once it has been determined whether any additional evidence from the 1982 crime exists, the defendant should be required to state whether he intends to use any such evidence to proceed with requests for post-conviction relief and ordered to do so within a defined time period.

4. If the defendant has actual reason to believe that any other entity is in possession or control of relevant evidence, he should report the name of the agency and the reason to require that entity to search and report to the court.

The Commonwealth is submitting proposed orders for the court's consideration.

Respectfully submitted,
THE COMMONWEALTH



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CERTIFICATE OF SERVICE

I, Dianne M. Dillon, do hereby certify that on this date I have made service of the within documents by first-class mail, postage prepaid on: Joseph M. Kenneally, Esquire, at P. O. Box 6, Three Rivers, MA. 01080.

Dianne M. Dillon

June 9, 2014

COMMONWEALTH OF MASSACHUETTS

HAMPDEN, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
NO. 82-2224

COMMONWEALTH

vs.

HENRY HOUGHTON

ORDER

It is hereby ordered that the West Springfield Police Department search its records and evidence storage to determine the location of any and all physical evidence relating to the July 18-19, 1982 investigation of the kidnapping, rape and sexual assault of T.S. which resulted in the conviction of Henry Houghton. The Department is ordered to determine whether it is still in possession of any of the physical evidence and/or reports of analyses or testing performed, and further ordered to report the results of its search to this court on or before

The Department is further ordered to segregate and preserve any and all such evidence in its custody and control pending further order of this court.

Associate Justice of the
Superior Court

Date:

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
NO. 82-2224

COMMONWEALTH

vs.

HENRY HOUGHTON

ORDER

It is hereby ordered that the State Police Crime Laboratory in Sudbury, Massachusetts search its records and evidence storage to determine the location of any and all physical evidence relating to the July 18-19, 1982 investigation of the kidnapping, rape and sexual assault of T.S. which resulted in the conviction of Henry Houghton. The Department is ordered to determine whether it is still in possession of any of the physical evidence and/or reports of analyses or testing performed, and further ordered to report the results of its search to this court on or before _____.

The Laboratory is further ordered to segregate and preserve any and all such evidence in its custody and control pending further order of this court.

Associate Justice of the
Superior Court

Date:

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
NO. 82-2224

COMMONWEALTH

vs.

HENRY HOUGHTON

ORDER

It is hereby ordered that the Clerk of the Hampden County Superior Court search its records and evidence storage to determine the location of any and all physical evidence relating to the July 18-19, 1982 investigation of the kidnapping, rape and sexual assault of T.S. which resulted in the conviction of Henry Houghton. The Department is ordered to determine whether it is still in possession of any of the exhibits admitted and/or evidence marked for identification in this case, and further ordered to report the results of its search to this court on or before _____. If any evidence, specifically Ex. #4, a knife, is no longer in the custody of the Clerk, a report on the disposition of said evidence should be made.

The Clerk is further ordered to segregate and preserve any and all such evidence in its custody and control pending further order of this court.

Associate Justice of the
Superior Court

Date: