
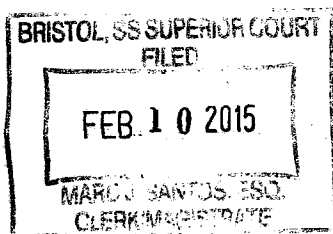


CLERK'S NOTICE	DOCKET NUMBER 7373CR43558	Trial Court of Massachusetts The Superior Court 
CASE NAME: Commonwealth vs. Edward Stanley Lykus		Marc J. Santos, Clerk of Court Bristol County
TO: Chauncey B. Wood, Esq. Wood & Nathanson, LLP 227 Lewis Wharf Boston, MA 02110		COURT NAME & ADDRESS Bristol County Superior Court - Fall River 186 South Main Street, Suite 202 Fall River, MA 02721
<p style="text-align: center;">You are hereby notified that on 02/10/2015 the following entry was made on the above referenced docket:</p> <p>MEMORANDUM & ORDER:</p> <p>of Decision on Defendant's Post-Conviction Motion for Scientific/Forensic Analysis Pursuant to G.L. c 278A: The Defendant's motion for scientific /Forensic testing of the postage stamp designated as trial exhibit 60 is ALLOWED. The parties shall confer and report to the court within forty-five (45) days regarding the identity of the laboratory to conduct the testing, the procedures recommended for transporting, handling and returning the postage stamp and any other procedures required to accomplish the DNA testing</p>		
DATE ISSUED 02/10/2015	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Thomas F McGuire, Jr.	SESSION PHONE#

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss.

Docket Nos. 1973CR43558
1973CR43559
1973CR45045



COMMONWEALTH

v.

EDWARD STANLEY LYKUS

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S POST-CONVICTION MOTION FOR
SCIENTIFIC/FORENSIC ANALYSIS PURSUANT TO G.L. c. 278A**

In 1973, the defendant, Edward Stanley Lykus, was convicted of first degree murder, kidnapping and extortion. He has filed a post-conviction motion, pursuant to G.L. c. 278A, for DNA testing of a postage stamp that was affixed to the envelope containing the ransom note admitted in evidence at trial. He seeks a scientific comparison of any DNA that may be recovered from the stamp with his own DNA. The Commonwealth opposes the motion.

The defendant's attorney, Eva G. Jellison, submitted affidavits dated May 2nd, September 19th and November 12th of 2014.¹ The court also held an evidentiary hearing at which the defendant presented testimony of Carll Ladd, Ph.D., who is an expert in DNA analysis. In opposition to the motion, the Commonwealth submitted an affidavit dated July 31, 2014, signed by Sharon M. Convery Walsh. She is employed as the Technical Leader of the DNA Unit and the Combined DNA Index System at the Massachusetts State Police Forensic and Technology Center.

¹ The Commonwealth objects to submission of the affidavit dated November 12, 2014. That objection is **overruled**.

FACTS

The facts of the case are set out in *Commonwealth v. Lykus*, 367 Mass. 191 (1975) (*Lykus I*), S.C., 406 Mass. 135 (1989) (*Lykus II*) and S.C., 451 Mass. 310 (2008) (*Lykus III*). Additional facts are based on the credible evidence presented by the parties in regard to *the defendant's* motion.

On November 2, 1972, thirteen-year-old Paul Cavalieri was kidnapped and murdered in North Attleborough. The kidnapper sent a ransom note to the victim's family. They turned it over to police. The note was contained in an envelope that was admitted at trial as exhibit 15. The envelope had a postage stamp affixed to it. The stamp subsequently became detached from the envelope. The stamp and five staples were placed in a clear plastic envelope and admitted at trial as exhibit 60.² The envelope and the stamp were preserved in the custody of the Bristol County Superior Court Clerk's office from the 1973 trial until the present, except for the period of the defendant's first appeal when they were in the custody of the Clerk of the Supreme Judicial Court.

If the person who affixed the postage stamp to the envelope did so by licking the stamp, it is likely that the person's DNA was transferred to the stamp through that person's saliva. Although forty-two years have passed since the postage stamp was affixed to the envelope, DNA testing of the stamp is possible and may produce scientifically reliable evidence.

DNA can degrade due to environmental factors. However, the postage stamp in question is in good condition. It appears dry and mold-free. In addition, even if DNA on the stamp is degraded, DNA testing may still be able to generate a partial DNA profile that would be sufficient to exclude a person as the source of the DNA on the stamp.

² Exhibit 60 is described on the clerk's exhibit list as "Five staples" with no mention of a stamp. At trial, the staples had greater evidentiary significance than the stamp due to a comparison of the staples with the defendant's stapler. However, the postage cancellation marks on the stamp match the cancellation marks on the envelope.

ANALYSIS

G.L. c. 278A establishes a procedure by which a defendant may obtain post-conviction scientific testing, including DNA testing, of evidence. Section 7(b) of the statute provides that the court “shall allow” the requested scientific analysis if the defendant *demonstrates six facts* by a preponderance of the evidence.

The first required showing is that “the evidence or biological material exists.” G.L. c. 278A, § 7(b)(1). The postage stamp that was on the envelope containing the ransom note exists. It was admitted in evidence at trial and is now in the custody of the court clerk. The Commonwealth contends, however, that the defendant has failed to satisfy this requirement because he has not shown that the stamp contains biological material. That is true but the statute requires that the defendant show that either the evidence or the biological material exists. The stamp exists and is the evidence subject to scientific testing.

The second requirement is “that the evidence or biological material has been subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value.” G.L. c. 278A, § 7(b)(2). On receipt of the ransom note, the victim’s family gave the note and the envelope with the affixed stamp to the police. The police and agents of the Federal Bureau of Investigation had possession of the evidence prior to the trial. Since the 1973 trial the envelope and stamp have been in the custody of the clerks of the Superior Court and the Supreme Judicial Court. The stamp has been preserved in a plastic pouch and appears to be in good condition. Even if DNA on the stamp has degraded somewhat, there are methods of DNA testing that could produce results that are sufficient to exclude a person as

the source of the DNA. Thus, it is likely that any DNA on the stamp has not deteriorated to the point where scientific testing would lack “any probative value.”

The third requirement is that prior testing was not done for certain reasons. One such reason is that “the requested analysis had not yet been developed at the time of *the conviction*.” G.L. c. 278A, § 7(b)(3), incorporating § 3(b)(5)(i). The murder trial was in 1973, which was long before DNA testing was used in Massachusetts courts. *Commonwealth v. Curnin*, 409 Mass. 218, 221 (1991) (“The use of DNA testing for forensic purposes is of very recent origin.”) The Commonwealth does not dispute that DNA analysis was not available at the time of the defendant’s conviction.

The fourth requirement is “that the requested analysis has the potential to result in evidence that is material to the moving party’s identification as the perpetrator of the crime in the underlying case.” G.L. c. 278A, § 7(b)(4). The parties disagree as to whether potential DNA evidence excluding the defendant as the person who affixed the postage stamp to the envelope containing the ransom note would be “material” to the identification of the defendant as the person who committed the kidnapping and murder.

The defendant contends that evidence that someone else sent the ransom note would be material to his identification as the culprit because the Commonwealth argued at trial that the kidnapping, extortion and murder were carried out by a single individual. Defendant’s Post-Conviction Motion, pp. 9-10. The Commonwealth contends that such evidence would be immaterial “because another person could have [licked the stamp] without knowing that it would be affixed to an envelope which would contain, at some point, a ransom note” and because of other, overwhelming evidence of the defendant’s guilt. Commonwealth’s Response to Defendant’s Post-Conviction Motion, p. 4.

Our appellate courts have not defined the meaning of the phrase, “material to the moving party’s identification as the perpetrator,” in section 7(b)(4); but the Supreme Judicial Court has defined the meaning of identical language in section 3(b)(4), which sets out the requirements a defendant must meet during a threshold review of the motion by the court. Under section 3(b)(4) the Supreme Judicial Court has interpreted the materiality standard broadly:

Neither G.L. c. 278A, § 3(b)(4), nor any other subsection of G.L. c. 278A, § 3, imposes upon a moving party the burden of establishing a reasonable probability of a more favorable result at trial.

A moving party has no burden to establish that the requested analysis would have had any effect on the underlying conviction, and the motion judge is not called upon to weigh the evidence that was presented at trial against alternative theories of guilt.

Commonwealth v. Wade, 467 Mass. 496, 507-508 (2014).

Since the language in section 7(b)(4) is identical to the language in section 3(b)(4) of the statute, the materiality requirement must be construed consistently under both sections. “Where the Legislature uses the same words in several sections which concern the same subject matter, the words “must be presumed to have been used with the same meaning in each section.””

Commonwealth v. Wynton W., 459 Mass. 745, 747 (2011), quoting *Insurance Rating Bd. v. Commissioner of Insurance*, 356 Mass. 184, 188–189 (1969) and *Liddell v. Standard Acc. Ins. Co.*, 283 Mass. 340, 346 (1933).

Under this standard, the defendant has satisfied the materiality requirement by showing that potential DNA evidence would have “some logical connection with the facts of consequence or the issues.” Black’s Law Dictionary, Evidence (9th ed. 2009) (defining “material evidence”). It is not necessary at this stage for the defendant to demonstrate that such evidence would be

sufficient to challenge his conviction. That, of course, will be the central issue if the defendant moves for a new trial after DNA testing.

The fifth required showing is that “the purpose of the motion is not the obstruction of justice or delay.” G.L. c. 278A, § 7(b)(5). The defendant has been convicted and is serving his sentence. There is no chance that allowing the defendant’s motion will obstruct or delay justice.

The final requirement is that “the results of the particular type of analysis being requested have been found to be admissible in courts of the commonwealth.” G.L. c. 278A, § 7(b)(6).

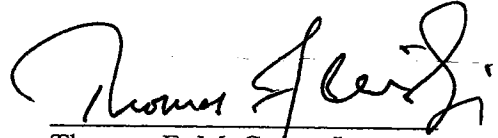
DNA testing results are routinely admitted in evidence in Massachusetts. *Commonwealth v. Bizanowicz*, 459 Mass. 400, 407 (2011) (“There is no scientific debate over the methodology by which such DNA matches are obtained or their validity.”)

Under the broad standard of G.L. c. 278A, the court must allow the defendant’s request for DNA testing of the postage stamp. When allowing such a motion, the court is required to “specify conditions on the analysis, including, but not limited to, the transportation, handling, and return of evidence or biological materials, to protect the integrity of the evidence or biological material and the analysis.” G.L. c. 278A, § 8(a). The Commonwealth and the defendant are required to confer and, if possible, agree on the laboratory to conduct the scientific testing. G.L. c. 278A, § 8(b). If the parties cannot agree on a forensic services provider, they are to submit the names of proposed providers to the court and the court will then make the selection. G.L. c. 278A, § 8(c). The court therefore directs the parties to submit their proposals to the court within forty-five days concerning the laboratory to conduct the testing, the procedures recommended for transporting, handling and returning the postage stamp and any other procedures required to accomplish the DNA testing.

ORDER

The defendant's motion for scientific/forensic testing of the postage stamp designated as trial exhibit 60 is **ALLOWED**. The parties shall confer and report to the court within forty-five days regarding the identity of the laboratory to conduct the testing, the procedures recommended for transporting, handling and returning the postage stamp and any other procedures required to accomplish the DNA testing.

January 31, 2015



Thomas F. McGuire, Jr.
Justice of the Superior Court