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SJC-13033

LEROY J. RANDOLPH vs. COMMONWEALTH & another[1]
(and a consolidated case[2]).

Suffolk. March 3, 2021. - July 16, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Deoxyribonucleic Acid. Evidence, Scientific test, Buccal swab, Relevancy and materiality. Practice, Criminal, Postconviction relief, Discovery, Appeal. Homicide.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on August 19, 2020.

The case was reported by Gaziano, J.

Indictment found and returned in the Superior Court Department on September 13, 1984.

Following review by this court, a postconviction motion to obtain a deoxyribonucleic acid sample, filed on December 16, 2019, was heard by Christine M. Roach, J., and an appeal from that order was transferred to this court by order of Gaziano, J.

Michael J. Traft for Leroy J. Randolph.

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[1] Richard Randolph.

[2] Commonwealth vs. Richard L. Randolph.

Erin D. Knight, Assistant District Attorney, for the Commonwealth.
Dennis Shedd for Richard Randolph.

BUDD, C.J. In December 1986, Richard Randolph was convicted of murder in the first degree following the killing of Brian Golden. The petitioner in this case is Richard's nephew, Leroy J. Randolph.[3] In 2020, Richard obtained a court order pursuant to G. L. c. 278A, § 7, requiring Leroy to submit a saliva sample for deoxyribonucleic acid (DNA) testing to establish whether the DNA found on the murder weapon belongs to Leroy. Leroy has appealed from the order. For the reasons stated infra, we affirm.

Statutory framework of G. L. c. 278A. A defendant who has been convicted of a crime but asserts "factual innocence" may request postconviction forensic testing pursuant to G. L. c. 278A. See G. L. c. 278A, § 2. An eligible defendant must engage in a two-step process beginning with a motion stage in which the defendant must present "information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator

[3] Because Leroy Randolph and Richard Randolph share the same surname, we use their first names for clarity.

of the crime in the underlying case," among other factors.[4] G. L. c. 278A, § 3 (b).

If the judge finds that the preliminary requirements at the motion stage have been satisfied, a hearing will be scheduled, prior to which the Commonwealth must file a response including any objections to the requested analysis. G. L. c. 278A, § 4 (c). To prevail at the hearing, the defendant must establish by a preponderance of the evidence each of the factors

[4] General Laws c. 278A, § 3 (b), requires that a defendant provide the following: "(1) the name and a description of the requested forensic or scientific analysis; (2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth; (3) a description of the evidence or biological material that the moving party seeks to have analyzed or tested, including its location and chain of custody if known; (4) information demonstrating that the 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; and (5) information demonstrating that the evidence or biological material has not been subjected to the requested analysis because: (i) the requested analysis had not yet been developed at the time of the conviction; (ii) the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction; (iii) the moving party and the moving party's attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction; (iv) the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or (v) the evidence or biological material was otherwise unavailable at the time of the conviction."

enumerated in G. L. c. 278A, § 7 (b),[5] including "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). If the defendant seeks to analyze the DNA of a third party, G. L. c. 278A, § 7 (c), also must be satisfied by demonstrating that the requested analysis "will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator of the crime." "If such a showing is made, the court shall allow the requested forensic or scientific analysis, the results of which may be used to support a motion for a new trial." Commonwealth v. Williams, 481 Mass. 799, 801-802 (2019), citing Commonwealth v. Wade, 467 Mass. 496, 505 (2014), S.C., 475 Mass. 54 (2016).

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[5] The defendant must demonstrate by a preponderance of the evidence "(1) that evidence or biological material exists; (2) 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; (3) that the evidence or biological material has not been subjected to the requested analysis for any of the reasons set forth in [§ 3 (b) (5) (i)-(v)]; (4) 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; (5) that the purpose of the motion is not the obstruction of justice or delay; and (6) 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) (1)-(6).

General Laws c. 278A, § 18, allows for appeals from orders allowing or denying a motion for forensic or scientific testing. However, as discussed in more detail infra, § 18 does not reference explicitly appeals sought by third parties.

Background and procedural posture. We summarize the relevant facts of the underlying criminal case and the motion judge's findings, reserving certain details for discussion of specific issues.

The victim and his wife lived in an apartment below Richard's mother's residence. Commonwealth v. Randolph, 415 Mass. 364, 365 (1993). Following an evening of drinking, Richard, Leroy, and other Randolph family members confronted the victim's wife, resulting in an altercation between the two families. Id. at 364-365. From the third-floor landing, the Randolphs threw various items at the victim, including a knife that struck the victim in the eye and killed him. Id. at 365. Richard was accused of throwing the knife, and at trial the jury found him guilty of murder in the first degree.[6] Id.

Richard filed his first motion for a new trial in 1991, supporting his contention that he was misidentified as the perpetrator with additional witnesses' claims that Leroy had

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[6] Richard also was convicted of assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A; and armed assault in a dwelling, in violation of G. L. c. 265, § 18A.

confessed to having thrown the knife. Id. at 367-368. The motion was denied after an evidentiary hearing, and the denial was affirmed, as were his convictions, in 1993. Id. In 2000, Richard filed a second motion for a new trial alleging errors in certain of the jury instructions; that motion also was denied. Although a single justice allowed his "gatekeeper" petition to appeal from the denial pursuant to G. L. c. 278, § 33E, the denial itself ultimately was affirmed. Commonwealth v. Randolph, 438 Mass. 290, 303 (2002).

In 2019, pursuant to G. L. c. 278A, Richard sought and obtained leave to analyze DNA left on the murder weapon.[7] The testing revealed that a match between Richard's DNA and DNA recovered from the murder weapon is extremely unlikely. Richard subsequently filed a motion pursuant to G. L. c. 278A, § 7 (c), seeking a DNA sample from Leroy to determine whether Leroy's DNA is present on the knife; Leroy, who was served with a copy of the motion, filed an opposition. Following a nonevidentiary hearing in which Leroy participated, the motion was allowed. Leroy subsequently filed a notice of appeal in the Superior Court pursuant to G. L. c. 278A, § 18. Due to uncertainty

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[7] The initial analysis of deoxyribonucleic acid (DNA) collected from the knife pursuant to G. L. c. 278A in 2017 was inconclusive. In 2019, a new testing method called probabilistic genotyping was used, which is better suited for analyzing samples that contain more than one person's DNA.

regarding his right to appeal under § 18 from an order allowing a motion pursuant to G. L. c. 278A, § 7 (c), Leroy additionally filed a petition in the county court pursuant to G. L. c. 211, § 3. A single justice consolidated the appeals and reported the case to the full court to resolve the threshold procedural question as well as the substantive issue presented on appeal.

Discussion. 1. Procedure for third party appealing G. L. c. 278A order. Before turning to whether the motion allowing the third-party DNA sample to be collected from Leroy properly was allowed, we consider the proper procedure for bringing such an appeal. As discussed infra, G. L. c. 278A, § 18, is the appropriate avenue of appeal for Leroy as a third party to (and subject of) the c. 278A order at issue.

As with all questions of statutory interpretation, we begin with the language of the section in question. "[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019), quoting Sullivan v. Brookline, 435 Mass. 353, 360 (2001). General Laws c. 278A, § 18, provides:

> "An order allowing or denying a motion for forensic or scientific analysis filed under [c. 278A] shall be a final

> and appealable order. If the moving party[8] appeals an order denying a motion for forensic or scientific analysis the moving party shall file a notice of appeal with the court[9] within [thirty] days after the entry of the judgment."

The first sentence of the section makes clear that an order "allowing or denying" a motion under G. L. c. 278A is "final and appealable." However, the second sentence prescribes an appeal mechanism (i.e., filing a notice of appeal within thirty days) only for a "moving party" who appeals from "an order denying a motion." The section is silent as to whether the same mechanism applies to a third party seeking review of an order allowing a motion requiring him or her to provide a DNA sample pursuant to G. L. c. 278A.[10]

"As a general rule, only parties to a lawsuit, or those who properly become parties, may appeal from an adverse judgment." Corbett v. Related Cos. Northeast, 424 Mass. 714, 718 (1997).

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[8] General Laws c. 278A, § 1, defines a moving party as a "person who files a motion under this chapter."

[9] Under Mass. R. A. P. 3 (a) (1), as appearing in 481 Mass. 1603 (2019), the notice of appeal is to be filed "with the clerk of the lower court," here, the Superior Court.

[10] General Laws c. 278A, § 18, technically does not apply here because Leroy is appealing from an order allowing a motion for discovery pursuant to G. L. c. 278A, § 7 (c), not an order allowing a motion for forensic analysis pursuant to G. L. c. 278A, § 7 (a). However, we see no reason not to apply to discovery orders the appellate mechanism for forensic analysis orders. See Commonwealth v. Johnson, 482 Mass. 830, 833 n.6 (2019).

See G. L. c. 231, § 113 ("A party aggrieved by a final judgment of the superior court . . . may appeal therefrom to the appeals court . . ." [emphasis added]). However, "[t]here are limited circumstances in which a nonparty has been permitted to appeal from a judgment, despite its failure to intervene, for example, where a nonparty has a direct, immediate and substantial interest that has been prejudiced by the judgment, and has participated in the underlying proceedings to such an extent that the nonparty has intervened 'in fact.'" Corbett, 424 Mass. at 718. Here, we conclude that a third party who is ordered to provide a DNA sample pursuant to G. L. c. 278A has a right to appeal from that order, even where, as here, he or she has not intervened in the case.

To begin, as noted supra, the first sentence of G. L. c. 278A, § 18, states plainly that whether a motion under c. 278A is allowed or denied, that decision is appealable. It is true that the section thereafter references only the moving party with respect to appealing from a c. 278A order. However, where the motion has been allowed, the moving party has prevailed and would have no reason to appeal. Rather, only a person aggrieved by an order allowing a c. 278A motion, e.g., the Commonwealth or a third party from whom a DNA sample is sought, would be motivated to take an appeal in an attempt to have the order reversed. To hold that orders allowing c. 278A

motions are appealable but that third parties aggrieved by such orders may not appeal from them would be an "absurd" and "unreasonable" result that "could not be what the Legislature intended." Wassilie, 482 Mass. at 573, quoting Ciani v. MacGrath, 481 Mass. 174, 178 (2019). Cf. Corbett, 424 Mass. at 721-722 (disallowing nonparty appeal where allowing appeal "would be in conflict with the express wishes of the Legislature").

Indeed, elsewhere in c. 278A the Legislature provided third parties with the right to participate in proceedings under c. 278A in order to protect their interests. Under G. L. c. 278A, § 7 (c), the court may order discovery of biological materials "after notice to . . . any third party from whom discovery is sought, and an opportunity to be heard." Just as a third party is entitled to protect his or her interests by participating in the motion hearing, we conclude that he or she is entitled to appellate review of an allowance of a c. 278A motion before being obligated to produce a DNA sample.

Practical considerations also dictate allowing a nonparty to appeal pursuant to G. L. c. 278A. Barring a right to appeal pursuant to G. L. c. 278A, § 18, a third party would have to attempt to invoke our extraordinary superintendence power under

G. L. c. 211, § 3.[11] To succeed, the third party would have to establish not only the absence of an alternative remedy, but also "a substantial claim of violation of [his or her] substantive rights." Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990), quoting Dunbrack v. Commonwealth, 398 Mass. 502, 504 (1986). Obtaining relief under G. L. c. 211, § 3, is no easy task. We have emphasized that "[e]ven where an alternative avenue of review is unavailable, . . . no party 'should expect this court to exercise its extraordinary power of general superintendence lightly.'" Aroian v. Commonwealth, 483 Mass. 1008, 1009 (2019), quoting Commonwealth v. Richardson, 454 Mass. 1005, 1006 (2009). Moreover, with regard to the relief sought here, we previously have stated that "the taking of a buccal swab itself, without more, is not a substantial bodily intrusion warranting interlocutory review under G. L. c. 211, § 3." Commonwealth v. Bertini, 466 Mass. 131, 138 (2013), citing Gilday v. Commonwealth, 360 Mass. 170, 171 (1971). Thus, if a third party had no right to appeal under G. L. c. 278A, § 18, for all practical purposes he or she would be denied the right to appeal altogether. In addition, requiring a third party seeking to

[11] General Laws c. 211, § 3, empowers this court to, among other things, "correct and prevent errors . . . if no other remedy is expressly provided."

appeal from a c. 278A order to proceed under G. L. c. 211, § 3, would place all such cases in this court in the first instance, whereas the Appeals Court addresses c. 278A appeals brought by moving parties. We see no sensible reason for such disparate treatment.[12]

For all of the foregoing reasons, we conclude that third parties who are ordered to provide biological materials pursuant to G. L. c. 278A must be permitted to take an appeal in the ordinary course before doing so.

As to the process a third party must follow, the Massachusetts Rules of Appellate Procedure state that where no particular process for appeal is "otherwise provided [for] by statute or court rule," parties must follow the ordinary appellate procedure, i.e., "fil[e] a notice of appeal with the clerk of the lower court," pursuant to Mass. R. A. P. 3 (a) (1), as appearing in 481 Mass. 1603 (2019), "within [thirty] days after entry of the . . . appealable order . . . appealed from." Mass. R. A. P. 4 (b) (1), as appearing in 481 Mass. 1606 (2019).

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[12] We also note that requiring a third party to seek relief pursuant to G. L. c. 211, § 3, rather than taking an appeal as of right, would add considerable delay to what the Legislature intended to be a relatively straightforward process. See Commonwealth v. Moffat, 478 Mass. 292, 301 (2017) ("The Legislature intended G. L. c. 278A to make postconviction forensic testing easier and faster than it had been for defendants who sought such testing in conjunction with motions for new trials pursuant to Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 [2001]").

Accordingly, the process of appealing from an order pursuant to c. 278A is the same for both a third party and a moving party.

2. Need for third party to obtain leave under gatekeeper provision before appealing G. L. c. 278A order. Because this case involves an underlying conviction of murder in the first degree that long since has been affirmed after plenary review, we also must consider whether a third party seeking to appeal from an order allowing a motion under c. 278A is obligated first to obtain leave to do so pursuant to the gatekeeper provision of G. L. c. 278, § 33E. That statute provides in relevant part: "If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court" (emphases added).

At first blush, this language could be read to require leave from a single justice in order to take an appeal, regardless of the nature of the motion or the party seeking to appeal. Indeed, we have required both defendants and the Commonwealth to file gatekeeper petitions in order to appeal from decisions on a variety of motions. See, e.g., Commonwealth v. Smith, 460 Mass. 318, 319 (2011) (Commonwealth's appeal from allowance of motion for new trial); Lykus v. Commonwealth, 432

Mass. 160, 162 (2000) (defendant's appeal from denial of motion to correct sentence); Commonwealth v. Francis, 411 Mass. 579, 579 (1992) (Commonwealth's appeal from allowance of motion for new trial); Commonwealth v. Davis, 410 Mass. 680, 683-684 (1991) (defendant's appeal from denial of postconviction motion for funds for scientific testing of physical evidence).

However, in our view, where a third party is ordered to provide biological material under c. 278A, that party is entitled to take an appeal as of right, without first seeking leave from a single justice under the gatekeeper provision of G. L. c. 278, § 33E. To a great extent, the same considerations supporting a third party's right to appeal despite the lack of unambiguous authorization in G. L. c. 278A, § 18, similarly convince us that such an appeal must be as of right, even in cases of murder in the first degree. In particular, requiring a third party to convince a single justice that his or her appeal "presents a new and substantial question" is at odds with the easier and faster proceeding contemplated by c. 278A. Although we are confident "that single justices faced with gatekeeper applications under § 33E will allow cases to proceed to the full court in all meaningful matters," Smith, 460 Mass. at 322, we must acknowledge that if such an application is denied, that decision is final and unreviewable, see, e.g., Commonwealth v. Robinson, 477 Mass. 1008, 1009 (2017), cert. denied sub nom.

McGrath v. Massachusetts, 138 S. Ct. 665 (2018), leaving third parties with no appeal at all. Moreover, the gatekeeper provision exists "in recognition of the fact that the defendant already has received plenary review in the direct appeal." Smith, supra at 321. Unlike the defendant and the Commonwealth, a third party did not participate in that plenary review. There is no justification for depriving a third party of an appeal when he or she is brought into the case many years later.

In addition, the gatekeeper statute applies only to cases of murder in the first degree. See G. L. c. 278, § 33E. If we were to require a third party to file a gatekeeper application in this instance because the underlying conviction is murder in the first degree, he or she would be treated differently from a third party ordered to produce biological materials in connection with a conviction of any other crime who would be entitled to appeal, as of right, to the Appeals Court without any obligation to obtain leave from a single justice of this court. Here again, we see no sensible reason for this disparate treatment of similarly situated third parties. For all these reasons, we conclude that a third party need not file an application pursuant to the gatekeeper provision in order to appeal from the allowance of a motion under c. 278A, but rather may take an appeal, as of right, to the Appeals Court.

3. Merits of G. L. c. 278A order. As for the merits of the motion judge's order, where, as here, the motion judge was not the trial judge, we review claims of error independently because "we regard ourselves as in as good a position as the motion judge to assess the . . . record." Commonwealth v. Moffat, 478 Mass. 292, 299 (2017), S.C., 486 Mass. 193 (2020), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). Leroy argues that Richard did not meet his burden under either G. L. c. 278A, § 7 (b) or (c), to demonstrate that Leroy should be required to provide a buccal swab. We disagree.

a. Sufficiency of facts supporting request for scientific analysis. To satisfy G. L. c. 278A, § 7 (b), the moving party must establish by a preponderance of the evidence sufficient facts to meet six criteria outlined in the statute. Moffat, 478 Mass. at 297-298. The six criteria are

> "(1) that the evidence or biological material exists;
>
> "(2) 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;
>
> "(3) that the evidence or biological material has not been subjected to the requested analysis for any of the reasons set forth in clauses [§ 3 (b) (5) (i)-(v)];
>
> "(4) 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;

> "(5) that the purpose of the motion is not the obstruction of justice or delay; and
>
> "(6) 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) (1)-(6). In reviewing motions for forensic testing under G. L. c. 278A, we are mindful that the Legislature enacted the statute in order to remedy wrongful convictions. Commonwealth v. Linton, 483 Mass. 227, 234 (2019). As such, we construe the language of G. L. c. 278A, § 7 (b), in a manner that is generous to the moving party. Commonwealth v. Clark, 472 Mass. 120, 136 (2015).

General Laws c. 278A, § 7 (b) (2), requires the moving party to establish by a preponderance of the evidence "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" (emphasis added). See, e.g., Linton, 483 Mass. at 235-236 (chain of custody burden not met where three or more people had touched item to be tested and it had been stored in suboptimal conditions).

Leroy first contends that the knife against which his DNA would be analyzed was not kept in a chain of custody such that

any results would be sufficiently probative.[13] He claims that multiple people either did touch or likely may have touched the knife after the culprit threw it at the victim.[14] He posits that the subsequent handling of the knife created a mixture of DNA from multiple individuals, thereby increasing the level of uncertainty associated with any potential match.

Leroy's arguments regarding the knife's chain of custody largely are speculative. The record supports Leroy's contention that the victim's wife and a single detective touched the knife without gloves following the murder. All other assertions about other individuals handling the knife are not supported by the record.[15] See Commonwealth v. Lyons, 89 Mass. App. Ct. 485, 493-494 (2016) (parties' speculation about state of evidence not

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[13] Richard argues that Leroy lacks standing to challenge the sufficiency of the showings under § 7 (b), and the motion judge expressed doubt on this point as well. We share this doubt, particularly as to any issue concerning the chain of custody of the knife or the analysis of the DNA found thereon. That analysis was conducted -- and Richard was excluded as a contributor to the DNA on the knife -- before Richard moved to obtain Leroy's DNA sample. We need not resolve this issue today, however.

[14] Leroy notes that the victim's wife retrieved the knife from the victim's body immediately following the murder. He argues that it also was handled by at least two detectives, a criminalist, trial attorneys, and potentially members of the jury.

[15] The motion judge noted in her decision that the court's docketed records of these proceedings from 1986 are very minimal and that little is known about the use of the knife at trial.

dispositive). The motion judge found no routine handling of the knife in the record to undermine the requirements of G. L. c. 278A, § 7 (b) (2), and we see no reason to disturb her findings.

In any case, it is not clear that the alleged handling of the knife would render subsequent DNA analysis devoid of any probative value. In Linton, 483 Mass. at 235-236, we affirmed a judge's ruling on a motion under G. L. c. 278A, § 7, denying DNA testing of evidence on the basis of an insufficient chain of custody where the evidence had been touched by three or more people and was improperly stored. This finding was based, in part, on expert testimony that Y-chromosome short tandem repeat (Y-STR) DNA testing of an object that had been touched by three or more people would preclude a finding of material results. Id. Here, in contrast, Richard intends to use a probabilistic genotyping method of DNA testing that, unlike ordinary DNA testing, is said to be able to provide results even in cases where complex mixtures of DNA are present. Thus, Richard has demonstrated by a preponderance of the evidence that such testing would not "lack any probative value." G. L. c. 278A, § 7 (b) (2).

b. Sufficiency of showing that requested materials will provide evidence material to identification. The allowance of a motion for forensic or scientific analysis generally requires,

inter alia, a finding by a preponderance of the evidence 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" (emphasis added). G. L. c. 278A, § 7 (b) (4). In contrast, a third party can be ordered to produce biological materials only where the "party seeking discovery demonstrates that [such materials] will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator of the crime" (emphasis added). G. L. c. 278A, § 7 (c). Thus, where a third party's interests are at stake, the Legislature requires greater certainty that the biological materials produced by the third party will be material to the underlying criminal case.

Leroy argues that Richard did not satisfy the heightened standard to demonstrate by a preponderance of the evidence that the requested DNA sample "will . . . provide evidence material to the identification of a perpetrator of the crime" under G. L. c. 278A, § 7 (c). We disagree.

Although the burden under § 7 (c) is higher than that under G. L. c. 278A, § 7 (b) (4), the moving party need not demonstrate that the requested biological material conclusively will identify the perpetrator. Rather, the moving party must

establish a link between the material to be tested and the perpetrator. See Clark, 472 Mass. at 137-138.[16]

Here, a limited number of people were involved in the brawl that precipitated the murder, and one of those individuals must have thrown the knife at the victim. The result of the recent DNA testing of the knife excluding Richard tends to demonstrate that he may not have been the culprit. Further, a witness testified that she saw the knife in the air, saw it strike the victim, and then immediately looked up and saw only Leroy at the top of the stairs. Additionally, the record suggests that at no point other than the time of the killing would Leroy have had access to the knife. In addition, some witnesses have claimed that Leroy admitted that he threw the knife. Leroy denies making any such admission, but at this juncture, neither we nor the motion judge need resolve this credibility dispute. It is enough for present purposes that there is a basis to believe that Leroy handled the knife on the day of the murder, that is, that the DNA previously found on the knife could be Leroy's.

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[16] Leroy contends that in Commonwealth v. Linton, 483 Mass. 227 (2019), we held that where material has been handled by three or more people, any DNA testing would be immaterial to identifying the perpetrator of the crime. Id. at 236. Even if Linton did establish such a "three-person" rule, that case involved a motion for traditional Y-STR testing, not the currently proposed probabilistic genotyping.

Given these circumstances, a result matching Leroy's DNA to that located on the knife would make it more probable that he threw the knife at the victim. Contrast Moffat, 478 Mass. at 300 (connection insufficient between material to be tested -- cigarette butts found 200 yards from body three days after shooting -- and perpetrator, such that testing would not help to identify perpetrator). The motion judge properly found that Richard established, by a preponderance of the evidence, that analysis of Leroy's DNA "will . . . provide evidence material to the identification of a perpetrator of the crime." G. L. c. 278A, § 7 (c).

4. Constitutional claims. Leroy contends on appeal that the order to provide a DNA sample violates his rights under the Fourth Amendment and art. 14 because his DNA sample could be used against him in a future prosecution. Relying on Jansen, petitioner, 444 Mass. 112 (2005), the motion judge ruled that Leroy's constitutional rights would not be implicated because no State action would be involved in the search; i.e., the DNA sample was being sought not by the Commonwealth, but by Richard. See id. at 119-120.

We note that Leroy does not challenge this ruling,[17] but instead focuses on how his DNA sample might be used by the

[17] Even assuming that the court order for Leroy's DNA sample amounted to a search within the meaning of the Fourth Amendment

Commonwealth at a later time. Although this is a legitimate concern, the issue before us today is the propriety of the order allowing the sample to be collected. It would be premature for us to take up the question whether Leroy's DNA properly may be used as evidence against him in a future prosecution.[18] We note, however, that Leroy is free to request, in the Superior Court, that his DNA be produced subject to an appropriate protective order.[19] See G. L. c. 278A, § 7 (c).

Conclusion. The order of the Superior Court allowing Richard's motion to obtain a DNA sample from Leroy is affirmed.

So ordered.

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and art. 14, it would be justified by probable cause. The judge found that the DNA sample "will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator of the crime." G. L. c. 278A, § 7 (c). Such a finding is more than the probable cause finding required for the Commonwealth to obtain a buccal swab from a third party. See Commonwealth v. Kostka, 471 Mass. 656, 659 (2015), citing Commonwealth v. Draheim, 447 Mass. 113, 119 (2006) (Commonwealth must establish probable cause to obtain buccal swab from third party). See also Commonwealth v. Preston P., 483 Mass. 759, 774 (2020) (preponderance of evidence is higher standard than probable cause).

[18] The Commonwealth has made no representations regarding whether it will seek to use the DNA sample at some point in the future.

[19] In their briefs, Leroy requests that we issue a protective order prohibiting the Commonwealth from using his DNA sample to prosecute him, and Richard indicates that he has no objection to such an order. In our view, however, such a request is better presented to the motion judge in the first instance.