

COMMUTATION PETITION OF
BENJAMIN LAGUER, W40280 / ECU# 12-C-29
CASE SUMMARY

Benjamin LaGuer has petitioned His Excellency, the Governor, for executive clemency in the form of a commutation of sentence. This is Mr. LaGuer's second petition for commutation of sentence.

PRIOR PETITION

On January 18, 2008, the Board voted to deny Mr. LaGuer's initial commutation petition. In reaching its decision, the Advisory Board of Pardons noted that Mr. LaGuer had an administrative remedy available through his upcoming parole hearing in June 2008. Therefore, he did not meet the threshold requirements set forth in the 2007 Governor's Guidelines.

OFFENSE(S) FOR WHICH A COMMUTATION IS SOUGHT

On January 30, 1984, in Worcester Superior Court, Benjamin LaGuer was convicted of aggravated rape, unarmed robbery, breaking and entering in the night time with intent to commit a felony, and assault and battery. Mr. LaGuer was sentenced to life in prison for the aggravated rape conviction. On the unarmed robbery and breaking and entering charges, Mr. LaGuer received sentences of twelve to fifteen years at the Massachusetts Correctional Institution at Cedar Junction to run concurrently with the sentence on the aggravated rape charge. The conviction for assault and battery was filed with Mr. LaGuer's consent. The effective date of sentence was July 16, 1983, making the initial parole eligibility date July 15, 1998.

Mr. LaGuer convictions were affirmed by the Appeals Court; *see* Commonwealth v. LaGuer, 20 Mass.App.Ct. 965 (1985), and further appellate review was denied, *see* Commonwealth v. LaGuer 396 Mass. 1103 (1985). On October 15, 1985, Mr. LaGuer filed a second motion for a new trial.

On December 31, 1986, he filed his third motion for a new trial. On March 27, 1987, a fourth motion for a new trial was filed and on September 27, 1987, a joint motion was filed to obtain the defendant's blood type. On December 11, 1987, Mr. LaGuer filed a fifth new trial motion and a federal magistrate recommended summary dismissal of defendant's habeas corpus petition. On November 8, 1988, the U.S. District Court for Massachusetts dismissed the petition, LaGuer v. Bender, Civil Action No. 86-1237-WF, 1988. On February 24, 1989, Mr. LaGuer filed a sixth new trial motion, which raised a jury bias claim based on an affidavit signed by Juror Nowick alleging that jurors made ethnic slurs during deliberation. On June 2, 1989, Judge Mulhern denied the motion, but the Court remanded the matter for an evidentiary hearing "solely" to determine the truth of juror Nowick's affidavit alleging "ethnic bias". After a full evidentiary hearing, the judge denied the claim of jury bias in Commonwealth v. LaGuer, 410 Mass. 89 (1991). Mr. LaGuer appealed and the Appeals Court affirmed the decision on March 31, 1994, in Commonwealth v. LaGuer, 36 Mass App. Ct. 310; and on May 26, 1994 the SJC denied further review in Commonwealth v. LaGuer, 418 Mass. 1103 (1994). On May 22, 1997, Mr. LaGuer filed a seventh new trial motion on which the judge refused to act. A motion to reconsider was denied and Mr. LaGuer appealed. On January 19, 1999, the Appeals Court affirmed Judge Travers' refusal to act in Commonwealth v. LaGuer, 46 Mass. R. Ct 1108. On March 26, 1999, the SJC denied further review in Commonwealth v. LaGuer, 429 Mass. 1103 (1999). On February 11, 2003, Mr. LaGuer filed an eighth motion for new trial. On September 22, 2004, Judge Hillman denied the motion without a hearing and issued a memorandum of decision. On January 5, 2005, the judge denied Mr. LaGuer's motion to reconsider. On August 8, 2005, Mr. LaGuer filed notices of appeal and on March 2, 2006, the Appeals Court affirmed the denials of the eight motion for new trial and the

motion to reconsider, in Commonwealth v. LaGuer, 65 Mass. R. Ct. 612, 623 (2006). On June 7, 2006, Mr. LaGuer's motion for further review was denied.

PAROLE HEARING

On June 29, 1998, Mr. LaGuer had his initial parole eligibility hearing, however, since the full complement of the Board was not present for that hearing, a rehearing was held on April 5, 2000. On July 25, 2000, the Board voted to deny Mr. LaGuer's parole. The Board noted that Mr. LaGuer was a convicted sex offender not in treatment, and that his account of his involvement in the offense lacked credibility. The Board set a review of five years.

On June 19, 2003, at his review hearing the Board voted to deny Mr. LaGuer's parole with a five year review date. The Board noted that despite Mr. LaGuer's achievements relative to institutional programming, he took no responsibility for his crimes. The Board further noted that Mr. LaGuer has not attended programming to address the nature of this offense. Given the fact that this crime was an extremely violent and vicious rape of a victim over an eight hour period of time the Board was of the opinion that he was a risk to the community. Mr. LaGuer was scheduled to have his review hearing in June 2008, however, he requested a postponement, which was subsequently allowed. On April 22, 2010, Mr. LaGuer has his next review hearing. On May 20, 2010, the Board voted to deny parole with a five year review date. The Board noted that Mr. LaGuer has not attended programming to address the nature of this offense; had accumulated 6 disciplinary reports since his last parole hearing and his failure to take responsibility for his crimes. A copy of the April 22, 2010 record of decision is attached for the Board's review. Mr. LaGuer is schedule to have his next review hearing in April 2015.

OFFICIAL VERSION

The official version of this incident is derived from Commonwealth v. LaGuer, 448 Mass. 585 (2007). The facts are as follow: At approximately 9:00 p.m. on July 12, 1983, a man broke into the victim's apartment, turned off the light, "socked the side" of the victim's face, threw the victim to the floor, and raped her vaginally, anally, and orally for the following eight hours, ending at about 5:00 a.m., July 13, 1983. The rapist severely beat the victim and, before leaving, stole her jewelry, money and a purse. The rapist bound the victim's hands with a cord from her telephone and her feet with a cord from a hair dryer. The victim fought and struggled with her assailant. The victim was able to see the man's face as the room was illuminated by outside security lights. The rapist made no attempt to hide his face, except when he went to the bathroom. He warned the woman that if she identified him, he would kill her.

PETITIONER'S REASONS FOR SEEKING A COMMUTATION

Attorney Robert Terk submitted a commutation petition¹ on behalf of Mr. Benjamin LaGuer. Attorney Terk indicated in his memorandum that the premise of this petition is Mr. LaGuer's absolute claim of "actual innocence." Attorney Terk's memorandum focuses on the legality and procedural aspects of Mr. LaGuer's trial.

Under M.G.L. c. 127, §154, ... "said Board shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner." Furthermore, Attorney Terk also referenced in his memorandum that under Herrera vs. Collins, 506 US 390 (1993), His Excellency has the constitutional power, vested in the powers to grant executive clemency, to vacate a verdict based on real evidence of factual

¹ Petitioner originally emailed an unsigned petition to the Board in May 2012. Petitioner was advised that in order to process his petition he must submit a signed copy. On June 13, 2012, the Board received a signed petition.

innocence.² Attorney Terk stated that this petition is accompanied with a bibliography and other supporting documents showing police and prosecutorial abuses resulting in 24 years of false imprisonment, however, the supporting documentation was not provided with the original memorandum Attorney Terk submitted.

On July 9, 2012, Attorney Terk was informed via email that to further process Mr. LaGuer's commutation petition he would need to provide all the supporting documents mentioned in his memorandum, a copy of said email is attached for the Board's review. This delay on the part of petitioner tolled the timeframe in processing the petition.

On July 30, 2012, this office received via UPS the supporting documentation mentioned in Attorney Terk's memorandum.

INSTITUTIONAL ADJUSTMENT

According to the Department of Correction Classification Report dated May 22, 2012, Mr. LaGuer is a 49-year-old man incarcerated at North Correctional Center Institute, a medium security facility, where he receives regular visits from his sister, friends and supporters. Mr. LaGuer receives positive housing evaluation, however, he is not program involve or employed at this time. This report also reveals that Mr. LaGuer has a total of 28 disciplinary reports and 2 minor infractions. The most recent was on September 25, 2011, where Mr. LaGuer picked up an informal infraction for leaving his movement card causing a bad count number to be submitted ruing a census count conducted by 109 West Yard. However, prior to the September 25, 2011, informal infraction, on June 24, 2009, Mr. LaGuer received a disciplinary report and sanction with a written reprimand for possession of any photographic material. This report also states that Mr. LaGuer continues to participate in the following institutional structured activities: Chapel services, Narcotics Anonymous; Alcoholics Anonymous meetings, inmate general library, weight-gym, and recreation yard. This report further states that Mr. LaGuer's prior programming included Spanish Narcotics Anonymous, college courses and one-on-one counseling. According to this report, Mr. LaGuer's work assignment included being a clerk and volunteering at the law library.

With respect to Mental and Medical Health Issues, according to the UMASS Correctional Health Medical/Parole Contact Sheet dated August 2, 2012, Mr. LaGuer has been diagnosis with Hepatitis C, Hypotension; GERD; Diabetes, Liver Masses; and Liver Cirrhosis. There is a reference to petitioner undergoing cancer treatments. The sheet also revealed that Mr. LaGuer has an outpatient Clinic Appointment at Tufts to see a Liver Specialists. According to the Department of Correction Classification Report dated May 22, 2012, on May 22, 1984, Mr. LaGuer was found not to be a sexually dangerous person by Daniel Weiss, M.D. It also indicated that Mr. LaGuer has no history of mental health issues.

MILITARY

With respect to Military service, Attorney Terk stated that Mr. LaGuer was recruited by the Army in 1980 and that he was in the Army for two years. Attorney Terk also stated that while in the Army Mr. LaGuer worked in the air conditioning and refrigeration field and received a general discharge under honorable conditions. A copy of Mr. LaGuer's DD214 is attached for the Board's review.

REFERENCE

² This case based in Texas, involved a habeas corpus petition seeking immediate release based upon a claim that the petitioner was innocent. As a side note, the court mentioned that Texas clemency guidelines allowed for granting clemency on the grounds of innocence. Massachusetts guidelines contain no such section, however do not preclude the granting of clemency to individuals who claim innocence. The grant of a commutation, however, would not "vacate" the sentence as argued in the petition.

With respect to references, neither Mr. LaGuer nor his Attorney submitted letters of support or reference with his commutation petition.

OPPOSITION

On June 28, 2012, this office received a letter from Assistant District Attorney Sandra L. Hautanen, which states that the Worcester County District Attorney's Office strongly opposes the Petition for Executive Clemency filed by Benjamin LaGuer. Assistant District Attorney Hautanen states that Mr. LaGuer has failed to meet several of the threshold requirements for executive clemency set forth in the 2007 Governor's Guidelines as such Mr. LaGuer's petition has no merit and should be denied. A copy of Assistant District Attorney Sandra Hautanen's letter of opposition and exhibits are attached for the Board's review.

PRIOR OPPOSITION

On December 11, 2007, this office received a letter from Assistant District Attorney Jane A. Sullivan, Chief of the Appeals Unit who stated that the Worcester County District Attorney's Office strongly opposes the Petition for Executive Clemency filed by Benjamin LaGuer. This letter states that Mr. LaGuer is serving a second degree life sentence for Aggravated Rape and as such he has other adequate administrative or judicial remedies available to him. Therefore; the need for a pardon will not generally meet the compelling need standard.

APPLICABLE LAW AND GUIDELINES

The Governor's Guidelines state that the petitioner bears the responsibility of demonstrating, by clear and convincing evidence, that:

- Petitioner has made exceptional strides in self-development and self-improvement and would be a law-abiding citizen.
- Petitioner is suffering from a terminal illness or severe and chronic disability, which has been verified by a licensed medical doctor that would be substantially mitigated by release from prison.

In addition, the Governor "will very rarely, if ever grant commutation relief where":

- There is an adequate administrative or judicial remedy available.

Furthermore, MGL Chapter 127, Section 154, which states:

- The said Board shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner.

Due to the fact that Mr. LaGuer has not demonstrated that he has made exceptional strides and self-improvement since his incarceration and that he has an administrative remedy available through the parole process in April 2015, he does not meet the threshold requirement set forth in the 2007 Governor's Guidelines. Furthermore, Mr. LaGuer is disputing the 2nd degree life sentence he received for rape. According to MGL Chapter 127, Section 154, "...The Board shall not review the proceedings of the trial court and shall not consider the correctness, regularity or legality of such proceedings..." For these reasons, I respectfully recommend that Mr. LaGuer's petition for executive clemency be denied.