Ben LaGuer's Actual Innocence

"I have very serious questions about the justice of his conviction," said retired Superior Court Judge Isaac Borenstein. "When I look at the evidence, I really believe they have the wrong man."[1]

According to Gwen Ifill of the PBS NewsHour, "No democrat had held the Bay State's executive job in sixteen years – not since Michael S. Dukakis, who gave you the job in 1991 after having run a dismal and losing 1988 presidential campaign. Deval L. Patrick didn't just win. He pounded his Republican opponent, Kerry Healey, in a landslide, garnering 56 percent of the vote in a state where African Americans make up just under 7 percent of the population. Moreover, he defeated Healey after her own attempts to point him as a weak knee sellout lawyer backfire. Central to her campaign were ads that focused on Patrick's 2002 defense of a jailed Puerto Rican felon named Benjamin LaGuer, who was convicted of raping a fifty nine year old white woman in her Leominster apartment ... The perception that Healey had run a racist campaign may also have helped Patrick in the black community, where he was largely unknown. There is nothing like a perceived attack from an outsider to make otherwise warring insiders bank together."[2] Patrick told reporters prior to the election "'I am proud of what I did.' Asked whether he would still advocate on LaGuer's behalf 'knowing what you know now,' he said yes. Patrick did not elaborate. Later, an aide explained that Patrick would advocate for LaGuer again because he may not have received a fair trial."[3]

In a December 4, 2006 pleading to the Supreme Judicial Court, Attorney James C. Rehnquist said: "the Commonwealth's references to the lower court's findings with respect to the DNA testing merit no attention, as the courts' supposed findings are based not on any review of test documentation, but rather nothing more than the mischaracterization of the testing that the Commonwealth presented in its opposition to Mr. LaGuer's motion for a new trial."

In an October 2006 Boston Globe editorial, it was written that "It would have been more surprising if Deval Patrick had not responded with interest to an appeal for support from a convicted rapist whose 1984 trial included racist remarks by a juror. Like former Boston University president John Silber, historian Elie Wiesel, and others, Patrick wrote letters on Benjamin LaGuer's behalf. This page editorialized for a new trial in 1994. Patrick's mistake this week was to say initially that there was only one letter, when it turned out there were more, as well as a contribution to the cost of a DNA test for the convict. The DNA test in 2002 provided evidence of LaGuer's guilt and Patrick has said he has played no role in the case since then. LaGuer contends the DNA evidence was contaminated and still proclaims his innocence... [DNA samples taken from LaGuer's clothes were mishandled by the State's Laboratory technician, Mark T. Grant, whose own lab notes show that he was handling and testing LaGuer's underclothes at the same time a rape kit, contaminating the latter with LaGuer's DNA and resulting in a false positive. Since then, many experts have gone on record saying that the DNA evidence was contaminated.] The court in which LaGuer was tried was tilted against him. The all-white jury that convicted him included one member who made racist comments ..."[4]

Worcester District Attorney Joseph D. Early, Jr., who runs the state's second largest office of local prosecutors, has not hired a single black, latino or Asian lawyer since he was first elected in 2006. Assistant District Attorneys (ADAs) are the front-line lawyers who pursue justice on behalf of victims.

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[1] Williamson, Dianne. Worcester Telegram and Gazette. LaGuer case is bedeviling justice again. April 22, 2010. http://www.telegram.com/article/20100422/COLUMN01/4220638

[2] Ifill, Gwen. The Breakthrough: Politics and Race in the Age of Obama. p180, 188. (Doubleday, 2009)

[3] Estes, Andrea. Boston Globe. Healey, Patrick duel on crime. 5 October 2006.

[4] Editorial. Boston Globe. "Patrick's Missteps" 6 October 2006. A16.

DA Early has expressed the belief that nonwhite ADAs have lower conviction rates because white juries credit white defense lawyers in greater numbers. This rationale for not hiring minority prosecutors is not supported - and even refuted - by empirical data.

According to GQ contributing editor Sean Flynn, “The irony in the approach runs deep. In order to preserve a supposedly fair and truthful verdict, [the prosecutor] was trying to make one of the men who rendered it look feeble-minded and untruthful, thoroughly incredible as a witness to the deliberation yet eminently qualified as a participant in them.”[5]

University of Texas and Williams College professor of political science Joy James said, "Early state malfeasance seems to stem from the now deceased lead detective, Ronald Carignan, whose unorthodox procedures were later supported by the District Attorney. Ben LaGuer was arrested 15 July 1983. Without physical evidence or a confession, police decided the guilt of LaGuer who shares the same race and ethnicity but not physical description of a man who may have been the perpetrator. LaGuer lived next door to the victim when the crime occurred, yet, another black Puerto Rican had also lived in the building and associated with the survivor; he had a history of mental illness and sexual assault but has to this date never been interviewed by detectives. The grand jury indictment was based on disinformation provided by Carignan who informed the grand jury that the crime had occurred in LaGuer's apartment; it in fact had occurred in the victim's apartment. The detective claimed that the victim was unable to appear at the hearing although she had already been released from the hospital. So, the detective became the sole spokesman for narrating the events of the crime. He stated that the victim identified LaGuer as her assailant to police; although she later denied [that] she did identify LaGuer as her attacker during the trial. Carignan testified that he recovered only one partial fingerprint from the scene of a crime that took place over eight hours; yet, in November 2001, a report emerged showing that four full fingerprints were retrieved from the base of a telephone whose cord had been used to bind the victim's wrists. . The prints did not belong to LaGuer and were subsequently lost (or destroyed) by the District Attorney's office. The detective, who kept the rape kit and items confiscated from LaGuer's apartment in his car trunk during his summer vacation, allegedly mixed underclothes he had taken from LaGuer's apartment with evidence collected at the crime scene. This compromised evidence used in 2002 as 'reliable' samples for DNA testing which claimed to prove 'conclusively' LaGuer's guilt."[6]

According to CNN chief political writer John King, “William Nowick of Worcester was among the jurors who convicted LaGuer...Nowick said jurors had numerous questions about the evidence that might have been answered if they knew about the schizophrenia or why LaGuer was discharged early from the Army ... ‘Those two things would have changed an awful lot,’ Nowich said. ‘How could she identify anyone? And most of us were veterans. We didn’t know why he was let of the Army and thought it probably was for rape or for attacking some girl in Germany.’ LaGuer was discharged from the Army three weeks before the 1983 attack because he was caught with a small amount of hashish.”[7]

“I think there is overwhelming evidence to show that your predecessor John J. Conte mishandled this case in a very serious way,” Dr. Silber added.[8] “As you probably know, the DNA that was performed on Ben LaGuer’s specimen was not correct: it was outrageously mishandled.”

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[5] Boston Phoenix, “Oxymoronic: For Benji LaGuer, there’s no justice in the system” by Sean Flynn 30 August 1991
[6] James, Joy. Journal of Critical Sociology 36 (1) (2010). "Campaigns Against 'Blackness': Criminality, Incivility, and Election to Executive Office."
[7] King, John. Associated Press. Rapist fights conviction with jailhouse evidence 15 November 1987.
[8] Letter from Boston University President Emeritus John R. Silber to Worcester District Attorney Joseph D. Early, 14 October 2009. http://www.benlaguer.org/pdf/Letter-Silber%20to%20Early.pdf

In March 2007, the Supreme Judicial Court ruled: "We conclude that, in the unusual circumstances of this case, the fingerprint evidence that was not produced has not been shown to have any bearing on the defendant's guilt or innocence and is consequently not exculpatory as to this defendant," Justice Judith Cowin wrote on behalf of the Court's majority; "What is exculpatory is that the Commonwealth could not place the defendant in the victim's apartment by means of any evidence, including fingerprints or other physical evidence."

"Carigan testified at trial that the victim told him that she had observed the defendant several times going in and out of the apartment next to her," ADA Lemire said in court papers after trial, adding, "Even though the victim denied making this statement to the officer, this alone does not mean that a deliberate falsehood was presented to the grand jury."[9] James R. Lemire, the trial prosecutor, told the Governor's Council that "We had very limited forensics; it wasn't like 'CSI'," and that "The case was mostly tried on the basis of the victim's identification of LaGuer as the perpetrator."

An Appeals Court noted that Lemire did not disclose a fingerprint report. "A criminal trial is not a game. The objective of prosecutors must be the fair administration of justice, and not just obtaining a conviction."[10] (Judge Lemire is currently Chief Regional Justice.)

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"Serious questions have been raised concerning the handling of evidence in Mr. LaGuer's case—questions that deserve serious consideration," said state Senator Jarrett T. Barrios, chairman, Public Safety Committee, in a letter to Dr. Carl Selavka of the Massachusetts State Police crime lab.[11] This case remains one of enormous legal, scientific and political consequences.[12]

When New England School of Law Associate Professor of Law David M. Siegel first requested access to the evidence for DNA testing, in January 2000, the clerk's docket in Worcester Superior Court stood at 85 entries. These filings included four grand jury indictments, an arraignment, pretrial motions, discovery request, pretrial conferences, judicial rulings and seven prior defense bids for a new trial. By the time Forensic Science Associates (FSA) congregated a less than 0.03 nanogram stain of male DNA in August 2001, the docket was 150 entries.

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In spite of 11 court battles over access to DNA evidence, the pretrial state forensic analyst was never asked about a parcel of "underclothes from suspect" that Carignan had asked him to examine.

On March 2, 2006 a panel of appellate judges ruled that after the chief investigator "obtained a search warrant, Detective Carignan conducted a search of the defendant's apartment. Among the items of clothing observed in that apartment were several pairs of tube socks." (65 Mass. App. Ct. 612) In his trial testimony Carignan said those socks were never seized. (Tr. 344, 379) In 2011, Hautanten said that Carignan "did not take anything out of that apartment".[13] However, Grant had examined eight socks prior to trial.[14] In spite of this demonstrated evidence, LaGuer was denied a new trial. "LaGuer's argument is

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[9] Commonwealth's Memoranda in Opposition to Defendant's Motion to Dismiss, 18 August 1985, p3.
10 65 Mass. App. Ct. 623 (2006)
[11] Letter, J. Barrios to C. Selavka of 15 July 2004.
[12] http://www.baystate-banner.com/archives/editorials/2006/101206.htm; http://www.baystate-banner.com/issues/2007/01/25/editorial01250701.htm; http://baystatebanner.com/news/2010/apr/13/its-about-time/
[13] Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial. 23 November 2011, page 6.
[14] State Police, Evidence Inventory and Documentation Report of 12 May 2000 by Gwen Pino; Follow Up, Investigative Report of July 14, 1983 by Detective Carignan ("In the room where the uniforms were and papers of

basically that the DNA samples stated as being recovered from the scene had been purposefully or negligently jumbled and mixed with samples of LaGuer's DNA recovered from his apartment. The Court finds that, upon this motion record, there is no evidentiary support for this assertion."[15] In fact, Grant was ferried a parcel of "underclothes from suspect" from LaGuer and his residence.[16] Grant's notes show testing in the "interior crotch" of LaGuer's underpants. His notes also indicate certain hairs from a jersey that LaGuer had were put on microscopic slides. Carignan's signature appears on all chain of custody forms.

On the afternoon of July 14, 1983, Carignan and two other officers executed a warrant at the LaGuer residence. The warrant specified what detectives could recover, i.e., any property belonging to Plante as well as the match pair to the tube sock earlier found in her apartment.[17] "In drawers and on the bedroom floor, the officers found several pair of tube socks...The officers did not take any of them, because they didn't see the matching one, a tube sock with black and yellow stripes to match one left behind in the victim's apt." In a pretrial letter, Ettenberg had requested "a copy of the search warrant and affidavit which was utilized to obtain certain evidence from my client's apartment."[18] This information was not furnished. In 1989, Grant admitted that fabrics taken from Plante were run together with others seen on LaGuer and in his residence.[19] Grant said "everything was bagged together in one box."[20]

Siegel's failure to advise the court that eight tube socks, underclothes, a jersey and other fabrics illegally taken were included led to a catastrophe. The court had ordered a double-blind protocol for DNA testing. Blake was never made aware that certain specimens were not part of the court order. "He's reported these results," Siegel noted, "so it's absolutely clear that the work was done blindly."[21] After Blake incorrectly related that its analysis "fail to support Benjamin LaGuer's claim of factual innocence in the rape and murder of Lennice Mae Plante," LaGuer not only disagreed the "murder" reference, but the validity of a genotype created from specimens taken illegally from his apartment.

Only a fool would have allowed FSA to create a DNA profile from samples previously enmeshed with LaGuer's illegally collected fabrics, including "unspecified slides" of hairs from his jersey. In May 2000 the State Police had a slide of hairs from a "yellow pullover," a different name for a "yellow jersey" LaGuer was donning when arrested. These slides were sent for DNA extraction, sequencing and comparison on August 2001.[22] In November 2011, prosecutors said no less than nine times that the

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Benjamin LaGuer I observed several tube socks…of different stripes and there were several pair that did not match"); State Police "Record of Evidence Submitted" form of August 3, 1983; MSPCL Nov. '83 report, item No 21.

[15] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss, 27 February 2012, page 6.

[16] MSPCL Pretrail Benchnotes of M.T. Grant, p.1; MSPCL Nov. '83 report, item No 21.

[17] The Search Warrant for Ben LaGuer's apartment authorized Carignan to seize only these specific items: "Straw pocketbook with personal papers, and US currency, approximately $12.00, 2 Silver rings one with a turquoise stone, all the property of Lennice Mae Plante. 1 tube sock with black and yellow stripes to match one left behind in the Plante apt."

[18] Letter from Peter L. Ettenberg to James R. Lemire 12 January, retrieved from Supreme Judicial Court Record Appendix of ADA Sandra L. Hautanen, 15 November 2006, Exhibit 078.

[19] Testimony of Mark T. Grant 22 May 1989. (Tr. 68, 74)

[20] Testimony of Mark T. Grant 22 May 1989. (Tr. 68, 74)

[21] Telegram and Gazette DNA profile completed in LaGuer rape case by Matthew Bruun 7 February 2002

[22] FSA Report 2, 4 February 2002, pp. 6-7

"yellow pullover" in Grant's benchnotes is the “yellow jersey” described in all other reports.[23] ADA Hautanen admits that certain fabrics were "incorrectly" labeled.[24]

On 17 May 1989, Leominster Police Lieutenant Francis J. Ptak and Trooper William P. Kokocinski signed a receipt for three (3) underpants.[25] In court, Lemire only presented two (2) pairs.[26] Lemire had the third “cotton” underwear. Judge Mulkern concluded: “The only underwear in this case consist of two pairs of clearly feminine underwear found at the victim’s apartment.” [27] In 1998 a prosecutor requested “also Benjie’s underwear” from Leominster PD.[28] In May 2000 the MSPCL catalogued an “underclothes from suspect” parcel.[29] In April 2010, Hautanen, knowing that LaGuer’s underpants had been seized and examined prior to trial, admitted to the Parole Board that “obviously there were men’s underwear in this case.”[30]

In this case, a chain of custody record reveals that Carignan had illegally seized fabrics not mentioned in the search warrant.

“One of the things the testing could tell us,” argued ADA Joseph Reilly in May 2000, “is whether or not there are signs of contamination which may lead us to conclude or may lead a court to conclude that there was tampering. It may have been advertent, it may have been inadvertent.”[31] Instead of asking FSA to preclude microbial contamination, Siegel did not alert FSA. In 2001 Siegel objected that “most of the things they want to test aren’t things that they’ve established authentication of.”[32] In fact, DA Conte was first to say that the evidence may well have been contaminated beyond the point of valid test results.[33] In September 2001, Blake said, “This is very difficult evidence, there’s no question about it.” The DNA stain was less than 0.03 nanograms.[34] (“If you shine a flashlight at night in a darkened room, you will see these little dust particles. Most of those weigh a lot more than a billionth of a gram.”)[35] In 2002, Blake said contamination was never an issue until LaGuer heard the damaging result.[36]

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[23] Commonwealth’s Response to the Supplemental Memorandum in Support of LaGuer’s Ninth Motion for a New Trial. 23 November 2011 (5, 7, 8, 12, 13, 14, 17pp)

[24] Commonwealth’s Response to the Supplemental Memorandum in Support of LaGuer’s Ninth Motion for a New Trial. 23 November 2011, pp. 6-8.

[25] Dated 17 May, 1989 Leominster Police Chain of Custody Report of Articles transferred to State Trooper William Kokocinski listed among other articles, three (3) pairs of underwear. Also see, Leominster Police Department Report by Lt Michele D. Pellecchia.

[26] Transcript of May 22, 1989, court hearing, p. 7.

[27] Memorandum and Decision Denying a New Trial by Judge Robert V. Mulkern, 2 June 1989 pp9

[28] In a July 8, 1998 letter to Lt. Michele D. Pellecchia of the Leominster Police, disclosed in April 2001, Sandra Wysocki wrote: “I am particularly interested in items 15 to 18 on the attached Lab report dated November 3, 1983 from the Department of Public Safety.” (These items correspond to the rape kit.) The lab report is scribed with “also Benjie’s underwear” next to “underpants – suspect.”

[29] State Police “Record of Evidence Submitted” form of August 3, 1983

[30] Testimony State Parole Board 22 April 2010.

[31] ADA Joseph J. Reilly, III, 15 May 2000 pg 17,19

[32] Transcript of Hearing of 15 May 2000. The National Research Council's The Evaluation of Forensic DNA Evidence Report 82 (1996) made clear "the potential of DNA evidence and the relative ease with which it can be mishandled or manipulated by the careless or unscrupulous, the integrity of the chain of custody is of paramount importance."

[33] District Attorney John J Conte’s Press Release of 14 January 2000

[34] FSA, Report 2, Table 1, Profiler Plus Genes, P4 (February 2002).

[35] Testimony of D.D. Riley (Essex 9777CR-0196) (11/24/98) p. 11

[36] Telegram, Conte Rejects LaGuer’s Claim by M Bruun 15 February 2004

Dr. Lawrence Kobilinsky says, "The minuscule level of DNA the FSA report relies for its conclusions is of an amount that could be consistent with contamination."[37]

Analyst Grant's pretrial analysis revealed that the vaginal and rectal swabs had no semen or seminal fluid.[38] Nevertheless, FSA offered a rosy scenario. "It can be expected that there are hundreds of thousands of spermatozoa in this sample. A successful analysis from this sample should be possible from several thousand spermatozoa even if the sample is degraded by aging."[39] Despite FSA's prediction,[40] the swabs had no male DNA. "Since no spermatozoa and no male DNA was recovered from the Plante vaginal/rectal swabs, this evidence is not relevant to the genetic information of Plante's assailant."[41] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.[42] The absence of such blood was particularly probative.

In his summary to the jury, Lemire said the length of time which Plante stood face to face with the assailant strengthened the reliability of her identification, arguing "that man's face is imprinted in that woman's brain. It will be there for the rest of her life. She saw that man for eight hours. She'll remember that face until dies." (Tr. 567) In an interview, juror Stephen J. Martin said: "It's a question of who you believe. I believed her. If I was in a room with someone for that length of time, I think I'd remember the person. She was very, very emphatic."[43] Her account that a man had forced her to engage in coitus for eight hours led to the belief that her her rectal and vaginal Q-Tip swabs had sufficient levels of DNA for a profile. But the absence of her own blood contradicted her account. Her physician noted that her "anus showed no blood, abrasions, or lacerations."[44] "Here, the defendant has not established that the testing procedure was flawed or that evidence of a flawed result would have substantial effect on the jury's determination rendered almost entirely upon the victim's identification of the defendant as her assailant," Tucker ruled, rejecting a ninth bid for a new trial. LaGuer's then-lawyer strenuously disagreed. Superior Court Judge Isaac Borenstein said, "I am confident that we can argue that the DNA analysis provides evidence that actually contradicts the victim's account, and therefore, additional exculpatory evidence for a new trial."[45]

On May 19, 2004, Hautanen argued that LaGuer's DNA was "found on cotton swabs used to obtain evidence from the victim's vaginal, rectal, and oral cavities."[46] False.[47] Hautanen argued that a

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[37] Analytical report from Dr. Lawrence Kobilinsky of May 28, 2004 to James C. Rehnquist of Goodwin Procter, Boston. Rehnquist had already filed the previous motion for a new trial on February 11, 2004.

[38]MSPCL Nov. '83 report, Items 18 ("No seminal fluid or sperm cells were detected on the swabs."); MSPCL Nov. '83 report, Items 15 and 16 ("No sperm cells or seminal fluid were detected on the slides."); Report Number 1, Forensic Science Associates, 15 August 2000, p 4 ("Microscopic examination of the cellular debris revealed a low to moderate number of epithelial cells and numerous yeast cells; no spermatozoa were detected from either swab even after the non sperm cells were digested away.")

[39] Affidavit of Edward T. Blake, 21 December 1999, 6p.

[40] At FSA, lab tech Alan Keel pooled enough cellular material in a vial to produce a tiny amount of DNA, less than 0.03 nanograms, for a single gene sequence. With special detergents, the vial spun in a centrifuge until the cell encasing cracked and its DNA spiral spilled out, like a cracked egg its yolk.

[41] Report Number 1, FSA, 15 August 2000, p.9

[42] Report Number 1, Forensic Science Associates, 15 August 2000, pg 6 ("Examination of the swab from the Pubic Hair Beaker...revealed a low level of epithelial cells; no spermatozoa were detected on this specimen.")

[43] Bruun, Matthew. Telegram. Jurors Mixed On Recent Findings In LaGuer Case. 13 December 2001. B1.

[44] Records of Edmund C. Meadows, July 1983.

[45] Letter from former Superior Court Judge Isaac Borenstein to Ben LaGuer 20 November 2008. http://www.benlaguer.org/documents/Judge%20Isaac%20Borenstein%20Evidence%20Memo.doc

[46] Commonwealth's Opposition to Defendant's Eight Motion for New Trial, May 19, 2004, p. 11 by Sandra L. Hautanen & Joseph J. Reilly III, Assistant District Attorneys for the Middle District.

"preparation of 'pooled sperm' was used to get the 100 sperm needed to generate a DNA profile."[48] In fact, there is no reference on any report to 100 sperm.

In August 27, 2003, State Police case manager admitted to a state legislator that the crime laboratory "did not have a manual governing the handling of evidence in 1983. However, the trained and experienced forensic chemist and law enforcement investigators, handled evidence per guidelines of practice of that time." Under international standards, this case raises challenges not only about the veracity of law enforcement but about the weight of any analytical opinion that was based on fraudulent facts. "Contact between victim and suspect samples must be avoided at all times." (Interpol Handbook on DNA Data Exchange and Practice, 2009)

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One prominent forensic scientist, Dr. Theodore Kessis, explains: "Given the state of the record, it is entirely possible that the 'unspecified' samples added to these pooled specimens came from LaGuer directly, perhaps being poorly labeled swabs and/or slides associated with the serologic testing of his underpants. It is also possible that these 'unspecified' samples came in contact with items belonging to LaGuer. Regardless, the testing of samples of unknown origin in the context of mixing (pooling) the same samples with specimens of known origins can never be relied upon to give an accurate result upon which conclusions can be drawn."[49]

After Grant examined the fabrics for inculpating evidence, blood or other secretions belonging to Lennice Mae Plante, that analysis was not disclosed to the defense. The defense was left in the dark about police secretly carting off LaGuer's underclothes. Grant's benchnotes should have been provided to the defense prior to trial because the absence of urine or blood on the soles of his socks shows that LaGuer never stepped foot on her stained floors.

In September 2011 Tucker misunderstood and so misrepresented the devastating effect of an inaccurate DNA interpretation. "If you prove the DNA was flawed, what does that get you?" Tucker asked. "If it's not correct, you are back to the trial verdict, which did not include DNA evidence; if correct, it does not exclude you." But this flawed DNA had fallen on LaGuer's claim of innocence, the epicenter of his life and credibility, like an atomic explosion. LaGuer's DNA result had been a "shock wave reverberated throughout the media world."[50] In 2004 Judge Hillman, the ex-lawyer to Plante's family who had overseen the DNA analysis, said he "would be remiss if [he] did not take into account the results of [LaGuer's] DNA test."[51] In 2006 Governor Patrick withdraw his support for LaGuer's quest for parole or a new trial based on this flawed DNA analysis. In 2007 SJC Justice John M. Greaney asked attorney Rehnquist "Isn't this some academic exercise, since the DNA evidence is going to sink LaGuer on retrial?"[52]

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[47] MSPCL Nov. '83 report, Items 18 ("No seminal fluid or sperm cells were detected on the swabs."); MSPCL Nov. '83 report, Items 15 and 16 ("No sperm cells or seminal fluid were detected on the slides."); Report Number 1, FSA, 15 August 2000, p 4 ("Microscopic examination of the cellular debris revealed a low to moderate number of epithelial cells and numerous yeast cells; no spermatozoa were detected from either swab even after the non sperm cells were digested away.");

[48] Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New trial, November 23, 2011, p 15, by Sandra L. Hautanen, Assistant District Attorney for the Middle District.

[49] http://www.benlaguer.org/documents/kessisletter.pdf

[50] Jurkowitz, Mark, Boston Globe, Shock waves and a turnaround 22 May 2002

[51] Memorandum of Decision and Order on Defendant's Motion for a New Trial, 22 September 2004, pp. 6-7 n.24

[52] http://www.suffolk.edu/sjc/archive/2007/SIC_09765.htEfll

In December 2006, in a statement to the media, Conte said that the genetic material used in the comparison was taken before LaGuer was in custody. Clearly, Conte was quelling growing opinion that the genotype had derived from LaGuer's fabrics. "That material that was investigated is thoroughly documented. The reason the work was done the way it was done was to insure the integrity of the analysis." James C. Rehnquist argued on his client's behalf.[53]

On 19 May 2004 Hautanen and Reilly urged the trial court to deny a new trial because DNA evidence "demonstrate to a mathematical certainty that he committed the crimes of which he was convicted." The district attorney had earlier put out a press release: "In 1984 we proved LaGuer's guilt beyond a reasonable doubt, that is to a moral certainty. In 2002, DNA testing has proved Mr. LaGuer guilt to a mathematical certainty."[54] Hautanen and Reilly presented that statistical evidence as if to suggest (falsely) the likelihood of guilt rather than the odds of a genotype repeating in a sample. The 100 million to one is the odds that a second person shares LaGuer's genotype,[55] not proof that demonstrates guilt. Dr. William C. Thompson says, one must consider "the probability of an erroneous match (i.e., a false match due to an error in the collection, handling, or typing of samples."

Officer Monahan asked the emergency room physician, Dr. William C. Siegel,[56] if her injuries might be the result of self-abuse. Barry had referred to prior false rape accusations. According to Monahan, Siegel "stated that in his medical opinion she was raped and it was not self abuse. There was evidence of semen in her vagina and throat."[57] The difference between a rape and self abuse pivots on the presence of semen. But Cellmark, a world leader in assessing forensic specimens, could not confirm the stain was semen: "Unknown stain, morphology of cellular material not recognized for identification."[58] "Twenty years ago," Blake said, "scientists would not have been able to detect this evidence." The MSPCL referred to sperm as the "presumed fluid" in this rape case. There are no hospital records of testing for semen.[59] An MSPCL audit revealed no evidence of a sperm analysis. "Please note that the method to remove the semen in 1983 from the cut pubic hair is unclear."[60] Carignan furnished Grant his police narrative.[61] It can be inferred that Grant falsely confirmed sperm,[62] in a practice known as "dry

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[53] Letter from James C. Rehnquist to Supreme Judicial Court 24 January 2007 ("Indeed, independent reviews of the DNA testing procedures by several forensic science experts have raised legitimate questions as to whether the DNA evidence at issue here was contaminated prior to testing."); Letter from ADA Sandra L. Hautanen to Supreme Judicial Court 30 January 2007 ("Naturally, the Defendant is dissatisfied with the DNA test results showing that he is the rapist; now, however is not the time to try to impeach his own handpicked DNA expert who did the testing that the Defendant requested.")

[54] Bruun, Matt. Conte Says DNA Match Proves Guilt. Telegram. 27 March 2002

[55] FSA estimated LaGuer's genotype will appear randomly "less than 1 out of 100 million members of the Caucasian and Black population and less than 1 out of 10 million of the Mexican American population" based on a study of 200 Whites, 2001 blacks, and 202 Mexicans conducted by the Serological Research Institute, as well as a study of 200 Whites and 195 Blacks conducted by Applied Bio-systems Division.

[56] She remains his only clinical case involving a rape allegation. He became a board certified cardiologist.

[57] Original, Investigative Police Report of Timothy Monahan, 13 July 1983.

[58] Report, Cellmark Diagnostics, J.J. Higgins, 5 September 2000 p.2

[59] Burbank Hospital records of July 1983.

[60] State Police, Post Conviction Evidence Assessment Report, August 14, 2000, p. 3

[61] May 22, 1989 Testimony of Mark T. Grant; "Yes. Detective Carignan, the investigator, always made it a habit to submit the entire police report so I read the entire police report…") p.47

[62] While Grant was asked to examine evidence in 1983, he never put it in his pretrial report. State Police analyst Mark T. Grant was held liable in the wrongful conviction of Dennis Maher. His post-exoneration lawsuit alleged that Grant was responsible for the forensic malfeasance that led to his verdict. A federal judge in Boston reviews Grant's request to have the lawsuit dismissed. *Maher v. Town of Ayer*, 463F. Supp. 2d. 117 (2006). http://www.lowellsun.com/front/ci_3663058

labbing" samples, so his report would match the police narrative.[63] Ettenberg never asked Siegel if he made the sperm observation.

In her rebuttal, Hautanen offered Dr. D. Kim Rossmo, Director for Geospatial Intelligence and Investigation at Texas State University. "I have not read the original police reports or trial transcripts, visited the crime scene, interviewed any parties, or reviewed any response or rebuttal from the district attorney's office, law enforcement agencies, or the state crime laboratory." (Rossmo, 260) In spite of this cautionary caveat, Rossmo asked "Did Benjamin LaGuer receive a fair trial? I cannot answer that question. Is he factually guilty? Conjecture and theories aside, the actual evidence supports the conclusion, beyond any reasonable doubt, that he brutally raped his neighbor in 1983." (Rossmo, 264)[64] A LexisNexis search of "D. Kim Rossmo" yielded no result.

DNA expert Lawrence Kobilinsky, John Jay College of Criminal Justice Chairman, followed the case closely for years. To question the results, he said, one must question whether the evidence was contaminated — either accidentally or maliciously. "We really don't know the history of the evidence. It seems in this particular case there are a number of questions about the history of the evidence," he said.[65] Dr. Daniel Hartl of Harvard agreed with Kobilinsky.[66] In May 1989 Grant related that he ran multiple cases to save time.[67] This knowledge was critical to the FSA recommendation that the beakers, vials, tubes, partial swabs, paper towels, and hair slides be all combined for an optimal DNA profile. A series of crime labs had earlier tested these fast atrophying samples. Distinguished University of California Professor of Evidence, Edward J. Imwinkelried, said, "It will be a mistake to make this case sound as if it turns on technical DNA issues." Tony N. Frudakis, a molecular biologist, said the evidence could have been contaminated if LaGuer's underwear was handled nearby. "My understanding is the people related to the process haven't necessarily admitted that's what happened. But the small amount of genetic material recovered from the evidence would be consistent with contamination. It fits with their story."

Blake offered a psychological theory for why LaGuer (with whom Blake had never met) would seek DNA. "The culture of prison put rapists and child molester at the bottom. The cons themselves don't like that kind of activity. Simply dealing with people you have contact outside, if you maintain your innocence, you can maintain that contact. They can't bring themselves to admit to their mothers they're guilty of the crime. In this case," Blake said, specifically of LaGuer, "his mother was the Boston media."[68] Steve Kasten, a partner with the Chicago-based law firm McDermott, Will & Emery, was so horrified over Blake's public statements that, when Siegal refused to intervene, Kasten sternly asked Blake to desist. For another year, Kasten worked tirelessly to assist in creating a narrative.

On Friday 21 March 2002, Siegel made a comment for the Sunday Boston Globe suggesting that he was unaware of any defects with FSA's analytical conclusions. "The result doesn't afford a basis for filing a new trial." Siegel had left the country for the Mediterranean. He led Blake to believe (falsely) that LaGuer would not be able to settle thousands of dollars still owed to his testing company. He failed to pay Blake thousands of dollars that Patrick and Silber had provided to settle those debts. (In 2004, Siegel apologized in a letter to Silber. Rehnquist was later reimbursed by Siegel for settling Blake's debt.

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[63] Grant was never subpoenaed to testify at trial. Lemire ignored a pretrial defense request for the hair sample with an eye toward independent testing, and Ettenberg abandoned the issue. Grant's MSPCL forensic report has the telephone numbers of Lemire and Carignan scribbled, a practice of direct contact with MSPCL technicians no longer allowed under Forensic Standards of Professional Ethics.

[64] Commonwealth's Response To Defense Motion For New Trial 23 November 2011, 20-21p, Exhibit 18.

[65] http://www.benlaguer.org/documents/kobilinsky_letter.pdf

[66] http://www.benlaguer.org/documents/danielhartlletter8-21.doc

[67] Testimony of Mark T. Grant 22 May 1989. (Tr. 68, 74)

[68] T&G, "DNA Finding Difficult to Rebut" by M Bruun of March 31, 2002; Forensic Science Associates, Report 2, Table 1, Profiler Plus Genes, P4 (February 2001) (Forging a genotype with less than 0.03 nanograms)

Blake billed over $32,000 in fees.) Upon Siegel's return, a letter from Blake awaited him, asking "why we pursued a time consuming and expensive investigation of these spermatozoa on Mr. LaGuer's behalf if he had prior knowledge or belief that this evidence was untrustworthy."[69] Conte complained the evidence was "contaminated beyond the point of valid test results" in a 2000 press release.[70]

"What we were working with in this case was what was left after this specimen had been essentially extracted," Blake said. "We're dealing with the residue of what was extracted." FSA was never informed that LaGuer's pilfered underclothes had been tested along with crime scene evidence. According to Dr. Lawrence Kobilinsky, "Had LaGuer's lawyer in 2002 brought these facts to Dr. Blake and Mr. Keel's attention, as he should have at the conclusion of the blind test, it is hard to imagine that Dr. Blake could have made the highly charged and, in my opinion, uncalled for comments that he made." Dr. Bruce Jackson, chair of Forensic Sciences, University of Massachusetts, said, "The handling of vital evidence, especially the chain of custody processes during the twenty years has been active, would be deemed sloppy and unacceptable by today's forensic standards. These issues give rise to nagging questions regarding possible contamination of samples. Hence, the DNA testing performed by Dr. Blake was not conducted optimally and his data should be carefully reviewed and reexamined."

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At trial, Lennice Mae Plante denied her assailant who was totally nude when he entered her apartment. Or, that she had seen her assailant in the apartment next door. She provided police no distinctive features. She did not notice a severe stutter that LaGuer had since childhood. (Tr. 173, 174) She made no reference to a slit across LaGuer's eyebrow, a Panther tattoo on his left arm, or a cap in his front tooth. She could not have described her assailant as "very dark" skinned, she insisted, because LaGuer's Polaroid did not depict a very dark skinned man. While shown a photo array of dark skinned males, Plante testified that eight of the nine appeared to be Caucasian. Carignan asked her to "pick out anybody she knew."

Plante had related to police that she had a white plastic bag put over her head. But, according to Carignan, the only plastic bag found near her was dark green.

Plante's testimony that her assailant covered his face with an afghan blanket only when he switched on her bathroom light bulb to urinate, suggests that her studio was substantially less illuminated than ADA Lemire let on. She denied leaving her key rings connected to her door, which the manager said she had a habit of. LaGuer testified that he had both helped her with her grocery cart and alerted her about her key ring despite her earlier denials.

The jury's verdict in this case relies for its conclusion on a single cross-racial eyewitness, universally recognized as the least reliable evidence in the identification category. This eyewitness testimony is greatly diminished when one factors new research examining cross-age eyewitness reliability. A New York Times editorial, quoting the Oregon Supreme Court, recognized that "it is incumbent on courts and law enforcement to treat eyewitness memory just as carefully as they might other trace evidence, like DNA, bloodstain, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination."[71]

Lennice Mae Plante did not sign a release for Herbert Lipton Mental Health clinic to disclose her medical and psychiatric histories. Lemire never produce a single shred of evidence that she was "cured" of schizophrenia and taken "off" antipsychotics three years prior to trial. If his intent was to deprive

[69] Letter from E. Blake to D. Siegel of 4 April 2002
[70] District Attorney John J. Conte's Press Release of 14 January 2000
[71] Editorial, New York Times. A Check on Bad Eyewitness Identification. 6 December 2012.

LaGuer of material to challenge Plante's credibility, then one can assume that Lemire had no plan correct the false assertion that Plante had been "off" antipsychotics and "cured" of schizophrenia for more than two years. (Tr. 3, 314)

Prosecutors and LaGuer's lawyers agree on virtually nothing except that she was assaulted in some way. Her ability to observe her assailant for eight hours in is determinative factors.[72]

For a period ending in May 2008 all prison telephone calls between LaGuer and his lawyers were monitored until Department of Corrections put an end (Grievance Number 33698) to this violation of attorney/client privilege. No one other than Hautanen had any interest in these wiretaps. She learnt his legal strategy. She argued the DNA, if only to poison appellate judges. In 2007 SJC Judge John M. Greaney probably spoke for others when he asked Rehnquist, "Isn't this some academic exercise, since the DNA evidence is going to sink LaGuer on retrial?"[73]

Lemire made no effort to obtain a state police fingerprint report that was available. Lemire did not ask if a recovered purse was dusted for latent prints. (While Plante identified a knife her assailant left behind, LaGuer was charged with unarmed robbery.) He made no effort to identify other prints. Arthur Martin of the state police notified Carignan that four prints lifted off the telephone, whose cord was cut to bound Plante's hands, did not match those on LaGuer's reference card in a comparison. Moreover, Lemire did not request the analysis of a hairdryer, despite latent print dust powder. He did not request the fingerprint analysis on the partial print off the aluminum Pepsi can; Carignan believed her assailant drank from it.

ADA Lemire did not independently request the height of Plante's windows, which were far less than the twenty feet Carignan testified. Such error affected whether her assailant had fled through her window. It was a significant fact because the height of those windows supported the argument that Gomez, instead of LaGuer, was capable of the assault and petty robbery of Lennice Plante.

Robert Mulligan, the state's trial court department chief justice, had been considering Lemire for the post of Worcester county's chief justice. In September 2011 Judge Richard Tucker was presiding over LaGuer's latest bid for a new trial. Tucker and Lemire had lunch immediately after a 90-minute courtroom session about the prosecutorial abuses of Lemire. Tucker had endorsed Lemire as a defense witness.[74] Instead of disputing these facts, Hautanen says "[t]hese types of disrespectful and irrelevant passages do not belong in defendant's motion for consideration, or any other motion." In his final denial, Tucker did not dispute his *ex parte* meeting with Lemire.[75] Lemire knew that any truthful answer about a

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[72]"The defendant challenged the victim's mental state and her ability to see, with any clarity, the face of her assailant. The parties disputed the amount and quality of light (from an outside source that could have illuminated the inside of the victim's apartment." Commonwealth v. LaGuer, 65 Mass. App.Ct 612 n5 (2006) "To further his defense of misidentification, the defendant challenged the victim's testimony about the adequacy of the lighting in her apartment as well as her memory, eyesight (she did not have her reading glasses on at the time of her attack or when she selected the defendant's photograph in the hospital), physical condition (one eye was swollen shut from being beaten), mental stability, and reactions to medications." Commonwealth v. LaGuer, 448 Mass 585 at n17 (2007) More significant, complainant testified that she did not tell Detective Ronald N. Carignan that her assailant lived next door. (Tr.181)

[73] http://www.suffolk.edu/sjc/archive/2007/SJC_09765.html

[74] Under Code of Judicial Conduct Rule 3:09, Section 3B(7)(iv) "No judge shall consult with another judge about a case pending before one of them when the judge initiating the consultation knows the other judge has a financial, personal or other interest which would preclude the other judge from hearing the case, and no judge shall engage in such consultation when the judge knows he or she has such an interest."

[75] Commonwealth's Opposition To LaGuer's Defense Motion For Reconsideration Of New Trial Denial, 9 April 2012, pp. 12-13; Judge Tucker's "Denial" of LaGuer's Reconsideration Motion For A New Trial, 17 May 2012, p.1.

secret seizure of LaGuer's clothes as well as Plante's use of antipsychotics would contradict his pretrial claims.

At Lemire's confirmation hearing for associate justice before the Governor's Council, a member made him explain why the Appeals Court had cited him for not disclosing a fingerprint report prior to trial. While Tucker granted LaGuer an evidentiary hearing, his defense lawyer had less than 2 days to pull it all off.

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District Attorney Joseph D. Early had pledged during his 2006 campaign that he would review LaGuer's case once he took office. The court docket had well over a hundred and fifty entries. One of those legal pleadings could exceed fifty pages. Before sundown, on the day he was sworn in, his spokesman had a press release; Early's district attorney's office would stay the course of his predecessor. A lot of LaGuer's supporters had high hopes that Early, taken at his word, would review the case. They wanted him not to say anything public that might offend Early. While LaGuer did his level best to be cautious, he did not believe for a second that Early was a different kind of man. For starters, people who knew Early better had told LaGuer that the DA candidate was dumb as a rock. The former district attorney, John J. Conte, had waited for the optimal moment to announce his retirement. Conte and Early muscled out every candidate even before the primary. Joseph Early Sr. had been once a huge political figure in Worcester politics. He was probably responsible for the University of Massachusetts Medical School erecting an enormous hospital in the region. Early Sr. resigned from the US House of Representatives over a national scandal concerning the exchange of US postage for cash at the congressional post office. If Early had not been Early Sr.'s first born he would not have a shot in hell of being handled the post. The younger Early has a string of street criminals and as slew of low paying guardianship court assignments. His was unremarkable academic record. Once Conte announced his retirement, Early had to cruise a campaign to November 3, where the Democrats sweep across the state with Deval Patrick, and nationally with Barack Obama.

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"Nobody in their right mind thinks that DNA is valid," Joseph D. Early, Jr. told then-First Assistant Probate and Family Court Clerk Robert E. Terk in fall 2006. Less than a day after he said he did not know enough about the Ben LaGuer case to make an informed opinion, newly installed District Attorney Early boned up enough on the particulars to make it crystal clear that he supported his predecessor's handling of the case as well as its outcome. "Apparently, Mr. Early found ample time among the swearing in, congratulations and the light introductory talks to get the measure of the Ben LaGuer," Telegram columnist Clive McFarlane said.[76] In January 2007, DA Early added, "I am concerned about the chain of custody" issues.

In March 2002, no law enforcement agency was willing to investigate LaGuer's claim that the samples used in the DNA were not limited to crime-related evidence. In 2004, with the urging of state representative Ellen Story, a number of forensic experts agreed to review the case file. Governor Patrick ordered the Department of Public Safety to audit the DNA test to ensure its validity.[77] Lt. Governor Tim Murray, a Worcester-based politician with ties to District Attorneys Conte and Early, intervened to cut off the forensic audit at its knees.

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[76] McFarlane, Clive. DA quickly dismisses LaGuer, Telegram & Gazette Wednesday 10 January 2007.
[77] Letter to Ben LaGuer from Executive Office of Public Safety of 12 July 2007; Letter to Ben LaGuer from Executive Office of Public Safety of 11 July 2007; Boston Herald, Deval forwards LaGuer letter by Dave Wedge 25 July 2007 ("Gov. Deval Patrick, who has vowed a hands off approach in the Ben LaGuer case, is raising eyebrows after his office forwarded a request for a review of the convicted rapist's case to top administration officials.")

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"While the Commonwealth may be reluctant to retry a 1983 case because of the victim's health and the death of the chief investigator," District Attorney John J. Conte said, responding to a Telegram column,"rest assured hesitation is not due to any perceived 'shakiness' in the case. The case against LaGuer, despite the passage of time, is extremely strong."[78] In September 2006, Lemire was less glib when testifying before the Governor's Council ratifying his judicial appointment: "We had very limited forensics; it wasn't like 'CSI,' The case was mostly tried on the basis of the victim's identification of LaGuer as the perpetrator."[79] In response to a Boston Globe column, Conte averred "any and all evidence pertaining to this case that is held by the district attorney's office has been, and will continue to be preserved."[80] Hautanen had told a judge that Lemire told her that certain files in his trial file "aren't there anymore."[81] Some agent had removed them, possibly to obscure the illegal seizure of LaGuer's fabrics. The Supreme Judicial Court held in March 2007 "[t]here is no question that some evidence has been lost or destroyed."[82] It is astonishing how much evidence has vanished. The sock and knife disappeared. A series of fingerprints from a telephone and hair dryer disappeared.[83] A partial from a Pepsi can disappeared.[84]

Allegations of Fraud are Unfounded

LaGuer rejected a plea.[85] Clearly, a guilty plea offer of two years minimum is not incompatible with the established 1983 recommendations. A pretrial offer has been public knowledge since a November 1987 feature article in Boston Magazine. District Attorney Conte did not dispute this plea offer in his widely distributed "Setting the Record Straight" eighteen page memo 25 April 2001. In a 19 June 2003 letter to the Parole Board, ADA Lynn Turcott said that LaGuer's trial lawyer had "confirmed that the Commonwealth made no plea offer to Mr. LaGuer before the trial." LaGuer argued that another setback of five years, would have been more time in prison than had he plead guilty. On May 10, 2010, retired Superior Court Judge Isaac Borenstein sent the Board "an affidavit that refutes the Commonwealth's contention that no plea offer was communicated to Mr. LaGuer before his trial in 1984. LaGuer's trial counsel, Peter Ettenberg, has reviewed his notes and avers that he did receive and communicate to his client an offer from the prosecutor…precisely as LaGuer testified at hearing."

After the April 2010 parole hearing Robert E. Terk, a longtime attorney and consultant, scoured through his extensive files for any evidence that might corroborate a pretrial plea bargain offer. As Hautanen had dumped a thousand page memoranda on the parole board members only minutes prior to the hearing, Parole Board Chairman Mark A. Conrad extended the period of time for LaGuer's lawyers to provide additional rebuttal evidence. On July 2, after Ettenberg and Lemire provided their respective affidavits, the unsigned pretrial letter was retrieved.[86] ADA Hautanen had no objection.

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[78] Conte, J. John. LaGuer Evidence Remains Strong. Letter to the Editor. Telegram. A8. June 3, 1991
[79] Schaffer, Noah. Massachusetts Lawyers Weekly. 10A October 10, 2006
[80] Unpublished letter to Globe Editor from John J. Conte, January 15, 2002
[81] Transcript 9 January 2002, pp 14-15
[82] 448-Mass. 585
[83] A series of photographic exhibits on file with attorney.
[84] Follow Up, Investigative Report by R Carignan, 15 July 1983, p.3
[85] Affidavit of Peter L. Ettenberg April 29, 2010 ("I have reviewed my notes related to the trial. These notes confirm…that such a sentence would have made Mr. LaGuer eligible for parole after two years, and that Mr. LaGuer would be credited for the time he had already served…I conveyed this offer to Mr. LaGuer. Mr. LaGuer was unwilling to plead guilty, contending he was innocent of the crimes charged."); John Strahinich Boston Magazine of October 1987 (Ben LaGuer "could have walked out of prison in July 1985.") Letter from J.R Lemire to P.L. Ettenberg January 17, 1984 ("Per our conversation at the courthouse, this office is prepared to offer the defendant a twenty year Concord sentence in exchange of his guilty plea. The victim's family is quite concerned over her physical and mental health."); (Tr. 616)
[86] Letter from Ben LaGuer to Parole Board 2 July 2010

After LaGuer submitted a motion for a new trial alleging fraud in the DNA analysis, Hautanen asked Ettenberg to sign an affidavit on his email. On September 6, 2011, three days before a hearing, the affidavit spells in his e-mail "Laguer," with a small alphabetic "g" letter. This is how Hautanen insisted on spelling his name. Instead of asking Lemire to authenticate the unsigned letter, she had Ettenberg affirm her office had "never made a formal written plea offer."

On September 9, 2011, Hautanen filed a pleading entitled “Commonwealth’s Motion to Dismiss Ninth Motion for New Trial Due to fraud on the Court, with the disputed pretrial letter listed and marked “Exhibit 1” on page one. In court, she averred that LaGuer had nothing material in the five volumes of exhibits. Judge Tucker retorted, “I didn’t say that anything of them entered into evidence.”

Terk argued on his client’s behalf that Ettenberg had signed an affidavit to curry favor with prosecutors. “I draw no such inference,” Tucker ruled, “from Attorney Ettenberg’s affidavit and credit his statement that he never saw the letter until 2011.” Ettenberg had no memory of requesting evidence prior to the trial.[87] But, Lemire had earlier told Hautanen that certain files had been removed and others "aren't there anymore." [88] Considering his letter could be among those files, Hautanen's claim of fraud is particularly odious.

Hautanen admitted to the parole board that James Lemire’s affidavit in May 2010 avers that all pleas required Conte’s approval, a fact made clear in his pretrial letter. Lemire recalls pretrial talks with Ettenberg at the courthouse, a fact noted in his pretrial letter. Lemire recalls concern over Plante’s health, a fact noted in his pretrial letter. Lemire further recalls in his affidavit that he met with Plante “shortly before trial to discuss our options in the case.” The only option Lemire had “shortly before trial” was to begin jury selection or sweeten a plea LaGuer had rejected. It seems more credible that LaGuer was put on trial because he had rejected the plea offer, and not, as Lemire now recalls in a convenient affidavit, because Plante wanted a day in court. In fact, Plante was far more interested in President John F. Kennedy visiting her. LaGuer rejected the best plea bargain Lemire was prepared to offer, and whether the defense had an “informal” deal and still required Conte’s final approval is splitting hairs.

“The Commonwealth asserts, in no uncertain terms, that this letter is fraudulent and is part of an ongoing scheme of a fraud on the court,” Tucker said, adding, “The Commonwealth points to this letter being unsigned and the unusual situation of defendant, or defendant's counsel, having an unsigned letter from the trial ADA.” First, Lemire’s affidavit of May 2010 could not have denied the content of a letter first made public in July 2010. Second, there is nothing “unusual” about unsigned documents. In her petition to dismiss due to fraud, Hautanen included an unsigned 1991 pleading to the Supreme Judicial Court.[89] In a 2006 appellate brief to the Supreme Judicial Court, Hautanen included an unsigned letter from Ettenberg.[90] The District Attorney's office has routinely circulated unsigned papers, pleadings, letters and reports.[91] The search warrant provided Ettenberg was unsigned (Tr. 379-380)

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[87] In his letter to LaGuer on February 15, 2001, Ettenberg confirms to his former client, “I can only assume that anything else in my files was sent on to the attorney after me, Michael Caplette, as I noticed a release and request from him to you that I send him my file. I do not know what the letter you refer to of October 24, 1983 contains.”

[88] Transcript 9 January 2002, pp 14-15

[89] Commonwealth’s Motion to Dismiss LaGuer’s Ninth Motion for New Trial Due to Fraud on the Court (exhibit 10) 9 September 2011

[90] Unsigned Letter from Defense Trial Attorney Peter L. Ettenberg to Trial Assistant District Attorney James R. Lemire dated January 12, 1984 (retrieved from a Record Appendix filed to the Supreme Judicial Court by Assistant District Attorney Sandra L. Hautanen, in re: SJC-09765, filed November 15, 2006, as “app-192” marked “078”

[91] Unsigned Letter from Assistant District Attorney Lynn Morril Turcotte to Supreme Judicial Court Clerk Jean M. Kenneth dated May 2, 1994 (retrieved from Commonwealth’s Motion to Dismiss LaGuer’s Ninth Motion for New Trial Due to Fraud on the Court dated September 9, 2011 marked Exhibit number 10; Unsigned “Commonwealth’s

In August 2014 Hautanen provided the defense an unsigned pleading opposing LaGuer's third request for clemency. Ina series of papers, she included a 2012 judge's memorandum of decision which names Lennice Mae Plante 37 times in 17 pages. In September 2014, Hautanen filed a supplemental complaint to the Board of Pardons relating that a defense lawyer had been ordered to redact the victim's name from an appellate brief. Hautanen further asserted that LaGuer's claim of a plea bargain offer prior to trial was untrue and that a judge had found and unsigned letter describing the plea to be unauthentic. In April 2015, Hautanen argued in a memorandum to the Parole Board that LaGuer should be denied parole and made to serve another five years for naming Plante in litigation, his fifth such parole setback. Ironically, Hautanen had included in her opposition papers the 2012 judge's memorandum naming Plante 37 times in 17 pages. In May 2015, Hautanen's appellate brief to the Appeals Court not only includes the 2012 memorandum naming Plante, but an unsigned May 1994 petition to the Supreme Judicial Court opposing a review of racial bias in the jury deliberation.

In spite of her admission on April 23, 2015 before the state Parole Board that a prosecutor had discussed a plea bargain prior to trial, Hautanen argued in her recent 2015 brief to the Appeals Court that a lower court had credited her claim that LaGuer had attempted to defraud the court, thus forfeiting his rights to redress. The fact that Hautanen admitted that a plea was discussed substantially undercuts her claim of fraud. Her inconsistent and conflicting statements have occurred with no disciplinary sanction, despite LaGuer's multiple complaints to state judicial agencies.

Assistant District Attorney Sandra L. Hautanen requested on September 9, 2011, that LaGuer's rights to challenge the verdict against him be terminated on the basis that a pretrial letter describing a 2-year plea bargain was fraudulent.[92] Her office had never offered LaGuer, she insisted, an opportunity to plead guilty in exchange for a lenient sentence. Crediting her account, Judge Richard Tucker dismissed a defense motion that offered evidence of fraud in the DNA analysis. In sworn testimony before the Parole Board on April 23, 2015, Sandra Hautanen acknowledged the pretrial plea proposal. Her admission of this previously denied fact will not only affect the Appeals Court judicial review of Tucker terminating LaGuer's right to further challenge his conviction, but her admission amply demonstrates Hautanen has manipulated the judicial process to prevent LaGuer from admitting evidence of fraud in the DNA analysis. Moreover, Hautanen had denied a 2-year plea offer to the Parole Board in April 2010, when a few members were debating whether LaGuer had served enough time. He has served more than thirty years than he would had he plead guilty prior to his 1983 trial.

Rather than addressing the fraud allegations, Hautanen hurled the letter on the court as if it were a pivotal factor. "I find the January 17, 1987 letter to be unauthentic," Tucker ruled, "and its knowing use in this proceeding is an attempt to interfere with the judicial system's ability to adjudicate the matter." How

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opposition to Application for Further Appellate Review" stamped in red ink marked "COPY" dated May 2, 1994 (retrieved from Commonwealth's Motion to Dismiss LaGuer's ninth Motion for New Trial Due to Fraud on the Court dated September 9, 2011 marked Exhibit number 10; Unsigned "Commonwealth's Opposition to Defendant s Eighth Motion for New Trial" dated May 19, 2004; Unsigned "Commonwealths Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for a New Trial" dated April 27, 1989; Undated and Unsigned "Commonwealth's Memorandum in Opposition to Defendant's Motion to Dismiss" by James R. Lemire, Assistant District Attorney, relating to an evidentiary hearing held September 18, 1985 (Superior Court Docket 83—103391, line item 38); "Commonwealth's Opposition to LaGuer's Post-Conviction 'Motion for Discovery and Production of Tangible Evidence" dated April 30, 2012, with attached Unsigned and Undated Proposed Joint Stipulation as to Dividing tissue Designated as 'Item D,' and further Testing Procedures; Unsigned Letter from Assistant District Attorney Sandra P. Wysocki to Leominster Police Department Lieutenant Michele D. Pellecchia dated July 8, 1998; Fax Transmission, Cover Letter of Assistant District Attorney Wysocki transmitting 5 pages to Leominster Lieutenant Pellecchia July 8, 1998

[92] Commonwealth's Motion to Dismiss LaGuer's Ninth Motion for New Trial Due to Fraud on the Court, pg. 1. 9 September 2011

could a rejected plea be germane to a claim that illegally seized underclothes contaminated a 0.03ng stain of male DNA? While Hautanen asserted the letter was not authentic, she had no linguistic or forensic expert. Her office did not bring criminal charges. She interviewed no paralegal staff. In view of Ettenberg's trial notes referring to a pretrial plea, Lemire should have been asked to refresh his memory. The affidavit Ettenberg signed provided a distracting narrative away from the crimes her office had perpetrated and covered up.

Racial Bias in the Jury Deliberation

A number of facts are unique to cases of interracial rape. It is the invisible evidence of trauma, shame and psychosexual paranoia. When a person of color enters a Massachusetts court house SJC Paul Liacos astonishingly admitted, "The likelihood is that they are not going to get equal justice."[93] [94] "This is a pretty big black eye on the bench in Massachusetts," said Superior Court Judge Shannon Frison, President Massachusetts Black Judges' Association.[95] The white liberals of Massachusetts do have a strange relationship with even the most prominent of the blacks among them. And cases of interracial rape invite a particularly strange brand of fetishism. "We saw an animal, and he saw the same animal." [96] In a 1998 Assumption College lecture, ADA Lemire said, according to a student who heard him, "The jury did not like Mr. LaGuer because he was black." ADA Hautanen testified before the state parole board in April 2010, "Perhaps there may have been a little jury bias in the court."

While Worcester County had a sizable minority population from which prospective jurors of color could be drawn, the pool selected for LaGuer's trial included not a single ethnic candidate. There was not a single person of color on the courtroom pew. The trial judge was a white man. The court clerks, bailiffs, sheriffs, defense and prosecuting attorneys were all Caucasian. The courtroom walls were adorn with portraits of white man in black robes. The accuser was a white woman. The Leominster Police Department detectives were all white. The emergency room physician was white. Every person on the prosecution witness list was Caucasian. The psychologist and psychiatrists who examined LaGuer were white. The county chief of probation, who made a sentencing recommendation, was a white man. LaGuer's first appeal was rejected by three white judges of the Appeals Court. His appeal to review the life sentence was also rejected by a panel of three white judges.

In 1991 the Supreme Judicial Court rendered a landmark ruling. In William P. Nowick's affidavit, corroborated by the jury foreman, James W. Dalzell, juror Joseph Novak is quoted retorting "The goddamned spic is guilty just sitting there; look at him. Why bother having a trial?"[97] The SJC asked the trial judge to afford LaGuer a new trial if the allegations were "essentially true."

Dalzell told State Troopers: "The first two paragraphs, racism was brought up, and I asked the jury body to knock it off." [98] In August, the judge asked if he had heard, "spics screw all day and night?" Dalzell answered, "I heard something that wasn't proper . . . I do remember having to take order more than once." In his earlier interview with troopers, Dalzell was asked flat out, "Did you hear racist or racial remarks?" He answered, "I am going to say yes; but if you ask me what I heard, I don't remember." (Tr. 156-65).

In 2001, juror Stephen J. Martin said, "The life sentence showed the judge agree with the verdict. We saw an animal, and he saw the same animal."[99] A fourth juror confirmed to WHDH Investigative

[93] Mulvihill, Maggie. Boston Herald. State's court chief says sentencing bias may spark appeals, September 22, 1994. p 16.
[94] Boston Globe, Courts Are Guilty Of Racism, by Associated Press, 22 September 1994.
[95] Walker, Adrian. Boston Globe. Evidence of bias against black judges. June 11, 2014, B1.
[96] Bruun, Matthew. Telegram. Jurors Mixed On Recent Findings In LaGuer Case. 13 December 2001. B1.
[97] Early case for innocence, part 2: http://www.youtube.com/watch?v=BNu_XvpTF20
[98] State Police Tpr. Richard D. McKeon and William Kokocinski 6/13/91 interview juror James Dalzell
[99] T&G, "Jurors mixed on recent findings in LaGuer case" by Matt Bruun of 13 December 2001

Reporter Hank Phillippi Ryan the racist slurs. [100] Another juror commented on the case.[101] Lemire lectured about the racially tainted verdict. Lemire never disputed that, in his 1998 Assumption College lecture, he said "the jury did not like Mr. LaGuer because he was black." Therefore, the denials of racism in court can be disingenuous at best, false at worst.[102] Hautanen stipulated a level of bias: "Perhaps there may have been a little jury bias in the courtroom. I think nobody really knows. What happens in a jury room is what happens in a jury room."[103]

State Troopers McKeon and Kokocinski strongly believed that Novak made the racist slurs attributed to him. It is said that both shared their opinions with prosecutors.

Alan W. Harty of Barre was a deliberating juror. In 2011 his younger brother Craig approached LaGuer in the prison yard. Alan, he said never spared a moment to disparage his younger brother's criminal lifestyle. He said his older brother probably voted to convict because of his own shame and guilt. Not only did a flawed jury selection process result in the empanelment of twelve white men, to the exclusion of women and minorities, but the method the court used to weed out racial and class bias was also flawed. Alan contacted prison officials to protect his brother from any threats from LaGuer but officials found no basis for concern.

In 2012, Tucker dismissed the racist affair as one of "two known instances where LaGuer skewed evidence" in this case. The racial slurs "as well as other allegations set forth in Nowick's affidavit, were not corroborated by the jury foreman or by any other jurors, despite the fact that Nowick's affidavit sets forth they were during jury deliberations."[104]

To conclude, as did Tucker, that LaGuer is responsible for this racial stain on the verdict is misplaced blame. *See*, *Commonwealth v. LaGuer*, 36 Mass. App. Ct. 310, at 312 (1994) ("Juror Dalzell, the foreman of the jury, testified that he had no present memory of hearing any statement with racial overtones and did not remember the two statements attributed by juror Nowick to juror X [Novak]. In an interview that has been conducted by state troopers, used by the defense to impeach Dalzell's testimony at the hearing, Dalzell had been more equivocal."

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A sobering, but not surprising recent Pew Research Center survey confirms an enduring racial chasm in this country. Seventy percent of Blacks believe that are treated less fairly than whites in dealing with the police. Almost as many (68%) distrust courts. This sense of inequality is a permanent ghost of the black experience. No matter how much white liberals want to make us believe that race-based grievances are the exception, we have that ghost in our mist. Behind the facade of genuinely nice white liberals is a denied pathology of fear and hate and shame. When one sits face to face with LaGuer, when the situation is intimate, he confesses that speaking of race option. Nothing about this case is more

[100] Early case for innocence, part 1. www.youtube.com/watch?v=bJPhecY_f7g
[101] One juror Gerald J. Scalon, was excused from duty in Commonwealth v. Felix Torrez (Henry, J., Worcester WORCR2006-01848) ("It all stems from years ago when I was on a criminal trial jury. It's since become very famous. I know I did the right thing but every time it's brought up politically or something, I have sudden doubts...I'd have to be very, very certain. I've had sleepless nights over it but I think I did the right thing...It was beating up and raping an older woman...It was Benji LaGuer...The victim took the stand and she swore that it was him and his attorney tried to say that it was her eyesight and she proved in my mind that her eyesight was okay...That's why I – but every time it comes up I do have – I guess it's human...")(Transcript of jury empanelment of 12 August 2008, pages 112-117.)
[102] Affidavit of Michelle L. Chafitz. http://benlaguer.org/pdf/Affidavit_Michelle_Chafitz.pdf
[103] Testimony State Parole Board 22 April 2010. (Audio tape available in attorney's files.);
[104] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 17

troubling than twelve white men locked in a jury room, deliberating the fate of a black man accused of raping a white woman. Over the decades, a few jurors have given the public glimpses of the deliberation that ended LaGuer's life as once was known to his friends and family. The whole magisterial power of white supremacy was put in the hands of twelve white men to decide his fate. LaGuer's ghost is always urging a sense of resentment and anger. But the expression of a clear idea, communicating the injustice he feels requires a steady and deliberate mind and hand to build his arguments. People want to hear a raging lunatic, unclear by resentment and scary in his anger.

Until one accounts for the racial bias, LaGuer's more than 30 years (369 months) is extremely atypical. According to the United States Department of Justice website, the average time served for rape in the 1990s was 5.5 years (or 66 months.) In a recent Department of Justice report, the authors show that black defendant's on the average serve 20% more time in prison than whites for similar offenses.

This considerable length of social sensory deprivation risk injuring inmates with a new subtype of post—traumatic stress disorder. According to a seminal paper recently published in the International Journal of Law and Psychiatry, researcher Marieke Liem found experimental data suggesting "that post—incarceration syndrome constitute a discrete subtype of PTSD that results from long-term imprisonment. Former inmates were found to suffer from a cluster of mental health symptoms. While LaGuer does not exhibit symptoms observed in the research subjects, his physical health has deteriorate in recent years in part due to prolong and chronic stress and hypertension, vision impediment, diabetes and other ailments resulting from a restriction of movement. The risk of any individual is significant and his welfare as well as society's should be of equal concern. The question of how middle class white America views the faces of prison may hold a clue to why Blacks and Latinos are disproportionately sentenced more harshly than whites for the same office, and may explain why prison officials are free to treat prisoners with total indifference to human dignity questions.[105]

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Democratic gubernatorial candidate Deval L. Patrick apologized for not disclosing the extent of his advocacy on behalf of LaGuer, as he struggled to move past the biggest controversy of his campaign. "I apologize to anyone who feels we didn't come forward with all the facts." Patrick should have researched his involvement in the case before offering statements over the past week that minimized his role. "We screwed up in terms of how we have handled doing the homework before we answered questions about this issue, no question about that," he added, "And I take the responsibility for that." It is said that a working group was setup consisting of senior advisers David Morales, Richard Chacon and David Axelrod to frame the debate in light most favorable to Patrick. Chacon, the campaigns chief spokesman and former Globe reporter, was very familiar with LaGuer's case. As a young TV producer for WCVB, the ABC affiliated station in Boston, Chacon had been the first journalist to put LaGuer's story on the air. While answering questions about LaGuer on WFOX, Patrick was asked if he would still refer to LaGuer as eloquent and thoughtful given what he knew about the DNA test. "He is eloquent and he is thoughtful," Patrick emphatically answered.[106]

Patrick lied about their relationship to protect his campaign.[107]

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[105] Liem, Marieka. Is there a recognizable post-incarceration syndrome among released lifers? International Journal of Law and Psychiatry, 36, 333—337 (2013)

[106] https://www.youtube.com/watch?v=71O4PePxVf8

[107] McGrory, Brian. Time For Honesty. Boston Globe, 4 October 2006, "For a candidate who is constantly decrying politics as usual, he [Patrick] seems to have followed a strategy familiar to politicians throughout history: He lied."

While LaGuer was locked up at the Shirley Supermax prison, representatives of Kerry Healey's campaigned offered LaGuer a hundred thousand dollars for Patrick's correspondence with the inmate. The matter became public knowledge when prison guards, who had been instructed to violate normal security procedures for these men to access LaGuer, filed a formal grievance complaint. They had pizza and orange soda. One asked, "Benji, What a Democrat ever done for you?" They knew that Bill Weld's law firm had represented him, and Jim Rehnquist was preparing a new effort for a retrial.[108]

In a statement released by his campaign, Patrick said: "My sole involvement In this case was more than 10 years ago, when I wrote a letter on Mr. LaGuer's behalf. At the time, there were serious unanswered issues concerning the facts and fairness of the original trial." Asked about LaGuer, Patrick tells reporters: "I know who he is. He is someone on whose behalf I wrote, I think, maybe 15 years ago." On 3 October, Chacon says, "Deval Patrick has already said that almost 10 years ago he wrote a letter on Mr. LaGuer's behalf." Patrick wrote two letters to the Parole Board, one six years ago, and wrote two notes to LaGuer, which the Globe obtained from an archive at Northeastern University. Patrick then said he was "proud of what I did" and would do it again. "I don't think it was a mistake." According to a 5 October 2006 editorial, Patrick did a bunch more than he led everyone to believe, "acknowledging yesterday that he corresponded with the convicted rapist — or the parole on LaGuer's behalf — a total of four times. The revelation is alarming — Patrick previously said he wrote the board only once for LaGuer — but perhaps not surprising, LaGuer won high profile people to his cause amid charges of racism during his trial. Patrick now says he believes LaGuer is guilty." Patrick said: Asked whether he would still advocate on LaGuer's behalf "knowing what you know now," he said yes. Patrick did not elaborate. Later, an aide explained that Patrick would advocate for LaGuer again because he may not have received a fair trial. "There were very, very series questions raised about bigotry in the jury room. They don't negate guilt, they do address the question of fundamental fairness of the trial." When first asked if he would support LaGuer for parole knowing what he knew about the DNA test result, Patrick said, "I will tell you I think that's hard, because the question of parole is a broader question than guilt or innocence." Asked again if he would recommend LaGuer for parole, he answered: "No, is the answer because I'm running for governor, and now everything is overly scrutinized."

Many considered a controversial political ad Republican gubernatorial candidate aired as racist because it played upon stereotypes of black men as sexual predator. "The case of Ben LaGuer is disturbing, not just because of its possible wrongful incarceration and political opportunism but because something happened to Lennice Mae Plante," says Professor Joy James.[109] The ad, in which a woman walked alone in a parking garage, was widely criticized during the campaign, and Healey's running mate, Reed Hillman, distanced himself from the sport. The TV spot prompted an impromptu press conference put together by state Democratic Party with 50 advocates of survivors of sexual and domestic violence who blasted the Healey ad as a form of fear mongering that was insensitive to victim: "Anyone who claims to be a victim advocate or a champion for victims' rights or even has the most remote understanding of victims' issues wouldn't do this," said Mary R. Lauby, executive director of Jane Doe Inc., a victim's advocacy group. "What concerns me is that Deval Patrick would persist in describing and complimenting a convicted rapist as being eloquent and thoughtful even after DNA evidence has proven beyond all doubt that in fact," Healey asserted, "Mr. LaGuer was convicted properly." Patrick's campaign declined to comment. Healey's ad drew national attention from political Critics, who labeled them as among the nastiest airing anywhere in the country.

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[108] http://www.benlaguer.org/pdf/Letter-Rehnquist%20to%20Early.pdf

[109] James, Joy. State of White Supremacy: Racism, Governance, and the United States. Stanford University Press. http://www.benlaguer.org/documents/Stanford%20University%20Press.pdf. Also see "Campaigns against 'Blacknes': Criminality, Incivility, and Election to Executive Office. University of Texas. http://humanities.williams.edu/files/James-Campaigns-Against-Blackness.pdf.

"We've only got two weeks left, and we're going to be out there every day pointing out our differences with Deval Patrick's agenda....and where the special interest are influencing his positions," Healey said. Patrick's campaign officials, meanwhile, said their recent polls show that Healey's attack ads linking Patrick to LaGuer have backfired. A Channel 7/Suffolk University poll showed Mr. Patrick leading Ms. Healey 53 percent to 26 percent. The poll indicated a significant shift toward Patrick and away from Healey, compared to results of a similar poll two weeks ago that put Patrick ahead by 13 points. Suffolk University Political Research Center Director David Paleologos said the poll appeared to reflect a public rejection of Healey's campaign ads. "The negative tone by Healey was overkill. It made her unpopular with some voters and neutralized would-be supporters. Once voters gave the race a second look, they returned to Deval Patrick," Mr. Paleologos said.

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On 14 October 2006, well after the LaGuer/Patrick controversy was in full swing, Patrick's running mate appear to be one of 1,127 lawyers in the state who argued before the Sex Offender Registry Board on behalf of sex offenders seeking to lower classifications. Democratic candidate for lieutenant governor said he had not taken any new cases since 2003. But Lieutenant Governor Timothy P. Murray was still on the list as of the day this story went to presses, according to the registry's director Jennifer Franco. One case was pending in court. Murray asked Telegram columnist Clive McFarlane to cease reporting and LaGuer faded from his columns.

LaGuer's carceral experiences are among the most thoroughly reported events of any Massachusetts inmate in recent history. His medical, housing and program observational and evaluative reports are in the thousands of pages. He maintains a private archive as well as a public collection with Northeastern University.[110] [111]

Biographical Notes

Born May 1, 1963 at 4:06 p.m. in Saint Francis Hospital, Bronx New York, delivered by Dr. Antonio Cavalli, M.D. Mary Cruz LaGuer and Luperto LaGuer of Tinton Avenue, Bronx, Post Office Zone 55. (Certificate of Birth Registration No. 63-208073.)

A skeletal version of Ben LaGuer's childhood reflects no evidence of emotional or physical abuse. Except for a brief period of recurring asthmatic episodes and a surgery for hernia, he was a perfectly healthy little boy. He attended a number of public elementary public schools in New York City. He got all of his preschool vaccines at the Saint Anns Park Children's clinic. After residing on Tinton Avenue, where Maria worked as a seamstress assembling dresses for dolls in a sweatshop three city blocks away, near the old Lincoln Hospital in the Bronx, they moved to 669 Beck Street, where LaGuer's father got a rent free apartment on the fifth floor in exchange for him keeping the hallways clean and attending to minor tenant complaints. Luperto worked at a Yonkers Road Paving Company in the summer and shipped off on merchant marine vessels as a deckhand in winters, so dealing with the many tenant complains fell on Maria to deal with. Her older sons, Frank and Danny, pitched in sweeping and mapping the five flight of stairs. When Luperto was home, they family attended the Seventh Day Adventist Church on Prospect Avenue. A young .Benji first conscious memory of his sisters, three daughters from Luperto's first marriage to Monzerrates Ruis. Ruis had met a recently discharged Luperto in Aquadilla, Puerto Rico, when WWII ended in 1946. Judi was their first daughter, followed by Aida then Elizabeth. In 1973, after Luperto was beaten and robbed one predawn morning en route to work, leaving nearly paralyzed on one side of her upper body and damaged in his vision, he became eligible for social security benefits. Wisely,

[110] www.lib.neu.edu/archives/collect/finaids/m100findprint.html

[111] (Lemire had put Barry on his list of prospective witnesses. Trial Witness List from J Lemire to P Ettenberg 17 January 1984; but, when the judge read the list to the jury, Barry was the only witness scratched off. Transcript of Jury Empanelment 24 January 1984, pp4)

he decided that in Puerto Rican his social security benefits would stretch a lot further in terms of the paying power of the dollar. He rented a spacious home in town for a hundred dollars a month. Fresh produces and freshly butchered meats could be ordered on a daily basis for a fraction of what he paid in the A&P on a 149th Street and Southern Boulevard. Maria's son Danny stayed in New York City under the care of Rey, her adapted brother. Danny had been working with Rey as his apprentice in a White Stone Good Year, in a suburb of Queens, New York. Her second oldest son, Frank, had signed up become a US Navy officer. Maria and Luperto, with their three youngest sons, settled in the southern province of Guayama. Unlike Luperto's birth place, in Aquadilla, on the western most tip of the great history town of Mayaguez, Maria had a large family in Guayama, five biological sisters and a brother. Maria's biological mother was still alive when Benji first saw his grandmother. She was bedridden, living in a shack that was bending to one side on a mountain slope, off the road that was barely paved. To Benji, his grandmother appeared as if she was a hundred years old. She had sold Maria for a couple of mountain whiskey. Benji's memory is that his grandmother was really happy and crying to see her daughter. Until then Benji had always considered his aunts and uncles and cousins in New York to be his only family. Maria's real last name is Cruit, not Cruz. Maria was made to feel like one of the daughters, but she was a servant. Her adopted father was Cornelius Cruz. Her sisters are Anna Velez (her husband Herman Velez) who had two sons Richard Velez and Eddie Velez. Lucy, Rebecca, Magdalia, Elizabeth (china) and Nilda Nieves. Her brothers included Nemias Cruz, Rey Cruz, Isaia Cruz Elizabeth DeJesus (Elizabeth Cruz DeJesus). Rey Cruz had eight daughters and one of his daughters, Edith Cruz-Santiago had ten children of her own. Her sister Lourdes Cruz, his oldest daughter, was thought to one day become Miss Puerto Rico. Luperto had a sister and brother, Anna Gonzalez and Gregory Gonzalez. Anna died of overian cancer in the early 1970s. She had two daughters Iraida Gonzalez-Cepeda, Carman Gonzalez and a older brother who died. Luperto had a third sister, Raquel Correa. She had a number of sons and daughters. She died in the 1990s.

In Puerto Rico, a young Benji spent two years academically frustrated because his elementary school teachers consistently deemed him unable to perform either in English or Spanish. Luperto had found a job as the grounds keeper of the local Rotary International Club. Benji began helping his father, gradually attacking the attention of a manager who had a young Benji delivering drinks to the members whom met for lunch. He watched over the much younger kids swimming in the pool. The members of the Rotary included local businessman, physicians and their heirs of every stripe. Some of the woman asked Benji to help them setup chairs and tables for their charity events. He was asked to help setup home dinners for special holidays. Benji soon dropped out of school and none of his teachers ever sent home a note of his disappearance from the school enrollment roster. He had nice clothes and shoes, not only given to him by Rotary wives that he helped, but himself had earned money to buy on his own. Soon, Benji was walking in many of the downtown fanciest establishments as if belonged among the elite. He walked into restaurants and made his way to the back of the kitchen and made his own meal. And everyone knew Benji was a beloved young man to the owner. He held a variety of jobs with the local film theater, restaurants, record store. Benji had enough money for a plan ticket to visit his oldest brother Danny a number of times between a period of a couple years. He had met a recently discharged Army vet who was training for the Olympic trials. He had a friend in New York City who was a major drug dealer with international links. He lived in a beautiful mansion in New Jersey. Benji's friend and his friend had grown up together in La Loma del Viento (The hill of the Winds section of Guayama.) Benji's friend was waiting one day for a moving truck to arrive with a shipment. His drug dealer friend had shipped over a hundred thousand dollars' worth of stereo equipment. Benji and his friend began to play music on the street that could be heard for miles. They got gigs to play weddings and special events. On weekends, they could pocket as much as $400 a day.

In 1978, Luperto and Maria separated after she learn that he had an affair with Danny's mother in law, a woman whom he knew for many years. Luperto returned to New York to live with his oldest daughter, whom was then living with her husband and two children in Harvestraw, New York, north of

the city. Judi's husband was the pastor of a congregation affiliated with the Seventh Day Adventist Church. Benji spent a couple months with his sister. On some weekends, he boarded a Gray Hound bus to city to visit his brother Danny. For a while Benji enrolled in James Monroe High School in the Bronx, which placed him in the ninth grade more for his age then his academic proficiency.

In winter of 1978 Benji went to live with his second oldest sister Aida and her husband, three daughters and son. Aide had always worked in one capacity or another in social services. Benji was enrolled in the tenth grade. He was very popular. The Latino Student Body even elected him president over Yvette Delgado, whom had been with that group of Spanish speaking students since kindergarten. He was very well liked among a wide range of parents, teachers, janitors and teenage age kids. Leominster, Massachusetts, was a nice New England town. On Saturdays, Aida held Sabbath meals and her former husband and his new wife would join them all in one love and festive few hours. Benji worked for Jose, Aida's former husband, as a photographer's assistant. He earned money working the graveyard shift in a plastic factory, making the world famous red flamingoes seen in lawns around the planet. He was a member of the Drama class. In 1979, he joined the Army's elite 82nd Airborne Division, and later served with the 1st Army in Germany.

According to an 11 August 1983 Superior Court pretrial intake report, Ben LaGuer was discharged from the Army on 24 June 1983. He was eligible to collect unemployment compensation. He had a pending job offer with the Leominster Bus Company as an air conditioner and repair man. He played football and basketball. He had plans to attend college in the future. W. J. Cahill. Worcester probation officer.

LaGuer was transferred from county jail to the notorious maximum security penitentiary at Walpole on 17 February 1984. Within a week he had a highly coveted job in the prison law library. He spent days, nights, weekends and holidays on a desk. His fellow inmates asked for his legal advice, which he did with ever broadening complexity and nuance. He settled racial and tribal disputes. With the Nation of Islam Mosque adjacent to the library, disputes had a way of staying low key and calm as not to disturb services. The prison was frozen many times in the course of the day, usually when a fight broke out or any number of disturbances. But the library was a safe haven. The library had no clocks: only calendars to serve as reminders of court deadlines.

On February 28, 1985 the Red Cross acknowledged LaGuer in the Walpole Times for organizing the maximum security prison population to raise funds for the Ethiopian famine in a national relief. Despite the sexual offense he stood convicted, he became president of El Comite De Confinados Latinos at MCI-Walpole through sheer force of his good character and respect of other inmates. His writings have appeared in Boston Magazine, Worcester Magazine, Boston Poet, Telegram and Gazette, Sentinel and Enterprise, Valley Advocate, Angolite, Mass Dissent, Phantom, Prison Voices, and other publications including the Columbia Journal. He served as editorial director and associate publisher of the Gardner Press Newsletter. His writings have been anthologized in several books of prose and poetry. He earned a bachelor's degree magna cum laude from Boston University and won a first place International PEN award for an essay.

In 2000 Ben LaGuer was denied parole: "Convicted sex offender not in treatment. Inmate's account of his involvement in the governing offense lacks credibility." His second parole denial 2003: "Despite his achievement relative to institutional programming, LaGuer takes no responsibility for a rape for which he was convicted." His third parole denial 2010: "Indeed, since his last parole hearing in 2003, LaGuer admittedly has not been involved in any significant rehabilitative programming of any kind; rather he has focused all of his energy on his appellate effort." LaGuer is eligible to participate in only 1 out of 7 programs available in prison; "not considered a need area for this offender, no recommendation required." In April 2010, LaGuer had pledged to participate so long as that program did not seek a false

admission of guilt. In June 2012, despite his refusal to sign a waiver admitting guilt, a sex offender treatment program coordinator notified LaGuer "…you have been placed on a waiting list for the program…you are considered to be program compliant with respect to programming needs identified for you by the Department of Corrections."

He has no history of psychosis, deviance or animal cruelty. In three decades LaGuer has provided thousands of specimens for urine drug tests. He has never tested positive. He has never had a demerit for disrespecting the female staff. During review for a parole hearing, Eric J. Crane, Parole Policy Analyst, used the Reentry from Corrections System to Community Science of LS/CMI – Risks and needs Assessment Tool[112] (8 April 2015) and scored LaGuer as a "Medium" category client with 13 of 43 possible adverse points. His most adverse score was "Leisure/Recreational" with 2 of 2 points, because he does not participate in prison programs. His second most adverse score was "Educational/Employment" with 5 of 9 possible points, because he does not have a valid prison job assignment. When his scores are averaged with other risk assessment tools, a "low" score ranges between 5 and 10 points and a "medium" ranges between 11 and 21, LaGuer places toward the lower end with less than 13 points. For example, he scored 0 of 4 points in the "Antisocial" category, 1 of 4 points (low) in the "Procriminal Attitude/Orientation" category and 0 of 8 (very low) points in the "Alcohol/Drug Problem" risk factor. Other nationally recognized evidence-based risk assessment tools replicate LaGuer's suitability. The Northpointe fact-based risk assessment evaluators, as well as the Department of Corrections Personalized Program, ranks LaGuer among the lowest trace metrics for recidivism, violence, substance abuse, criminal thinking, anger, education, cognitive behavior, are "not considered a need area for this offender."[113] According to a 2012 Massachusetts Department of Corrections report, the recidivism rate for sex offenders is 17%,[114] less than all other categories of violent crime. This is consistent with other reports, including US Department of Justice figures.

The trial judge assigned independent psychiatrist Dr. Lawrence Hipshman to perform a psych and medical exam of LaGuer. "LaGuer does not fit either a psychological nor pathological profile of a person capable of committing this crime." (Tr 610-611). Dr. Hipshman met with the twenty-year old inmate for three hours and reviewed the Department of Mental Health's (DMH) case file. DMH psychologists had been collecting data on LaGuer since his pretrial detention. LaGuer had over two thousand dollars from his military separation checks. He had no reason to whip her in anger over twelve dollars. Dr. Daniel M. Weiss of the Bridgewater Treatment Evaluative staff found LaGuer "Not Sexually Dangerous" in a report cited by a number of agencies. "In talking with him at some length and in reading the report and trying to compare the action with his own history….it seems totally out of character that this man would have done

[112] The LS/CMI (Level of Service/Case Management Inventory) is a General Risk/Need Assessment that provides and offender's ciminogenic needs and prosocial strengths, helps determine an appropriate risk score and classification, aids program placement decisions based on risk factors, covers the nuts and bolts of case management and covers details for successful completion of probation/parole. The Reentry from Corrections System to Community, Science of the LS/CMI - A Risk and Needs Assessment Tool is wholly owned by Multi-Health Systems Incorporated (MHS), a private company. http://www.mhs.com/Info.aspx?id=About

[113] Northpointe Institute, Correctional Offender Management Profiling for Alternate Sanctions, Overall Risk Potential, Screener Larry Lombardi, 20 September 2010; COMPAS Department of Corrections, Risk Assessment Result of Ben LaGuer 20 September 2010 http://benlaguer.org/documents/Ben%20LaGuer%20COMPAS%20Results.pdf; Crimaldi, Laura. Boston Herald. LaGuer tries again; 4th parole bid. 23 April 2010 ("He said the pornography found in his cell in October 2006 was delivered among piles of hate mail generated during the 2006 gubernatorial campaign. LaGuer said the porn was in a sealed envelope he never opened.")

[114] Massachusetts Department of Corrections Report on Population Trends 2012, page 50.

it…he is not a sexually dangerous person and I recommend no further action on that question at this time."[115]

In 1998, Leominster High School councilor Lee Alves testified before the state parole board that LaGuer was very sociable and well-adjusted young man in his teenage years. Chief Psychologist Marcelino DeLeon wrote on behalf of his former clerk of many years.

The Parole Board in April 2010 had a detailed home plan for him to live in a beautiful home that was recently featured in the New York Times with over two dozen photographs describing its architecture;[116] a work plan to clerk for a retired Superior Court judge in a law firm; and an educational plan including a prestigious university Masters of Fine Arts program. LaGuer testified on his own behalf before the Parole Board.[117] BU President Emeritus Silber testified before the Parole Board in April 2010 that LaGuer would be able to live with him and his family in their Brookline home. Silber offered employment recommendations, saying he would have hired LaGuer himself had he still been the University's president. In 2002, LaGuer contracted hepatitis through the failure of the prison dentist to follow proper sterilization protocols for dental tools. LaGuer is being evaluated for candidacy to a liver transplant.

The Trial

The trial began Tuesday and ended Friday, 24-27 of January 1984. (Tr. 3, 593) Jurors deliberated from 3:25 p.m. until 4:45 p.m. on Friday, then Monday from 10:11 am until reaching a verdict at 11:53 am. (Tr 592, 596). He was sentenced to life.[118] Judge Robert V. Mulkern noted that LaGuer "doesn't have a background of crime or violence. (Tr. 617)

On April 23, 2015, Assistant District Attorney Sandra L. Hautanen acknowledged that the trial prosecutor had discussed a pre-trial plea bargain.[119] The terms of that plea made LaGuer immediately eligible for minimum security status and parole beginning in July 1985. She had previously denied LaGuer had ever been offered such a lenient plea bargain.

Ben LaGuer has long been incarcerated at the North Central Correctional Institution, a prison facility which formerly served as the Gardner State Hospital. Lennice Plante was a psychiatry patient at that erstwhile facility, according to the trial prosecutor. (Tr. 4)

Case History

On April 5, 1985, while his first direct appeal was pending, Mr. LaGuer filed a motion to dismiss over Carignan's false grand jury testimony. In 1985, a judge ruled that Carignan "acknowledged the inconsistencies discussed above, but denied any purposeful attempt to mislead the grand jury." On July 24, 1985, the Appeals Court affirmed the conviction, Commonwealth v. LaGuer 396 Mass. 1103 (1985). On October 15, 1985 Mr. LaGuer filed a first motion for a new trial alleging ineffective assistance of trial counsel as well as other deficiencies that resulted in LaGuer's wrongful conviction. On December 31, 1986, he filed his second (amending his first). On March 27, 1987, a third (amending his second). On December 11, 1987, Mr. LaGuer filed a habeas corpus petition. On November 8, 1988 the U.S. District

[115] Dr. Lawrence Hipshman, State Forensic Pathological Evaluation Report of 17 February 1984; Dr. Daniel Weiss, State Forensic Psychological Evaluation Report, Not Sexually Dangerous Report of 22 May 1984
[116] Wadler, Joyce. Scrap Mansion. New York Times. 16 August 2012.
[117] http://www.benlaguer.org/statement.html
[118] Palazzolo, Joe. Wall Street Journal. Racial Gap in Men's Sentencing 15 February 2013, A3 ("Prison sentences of black men were nearly 20% longer than those of white men for similar crimes in recent years, an analysis by the US Sentencing Commission found.")
[119] Testimony of Sandra Hautanen, State Parole Board 23 April 2015.

Court for Massachusetts dismissed the petition. LaGuer v. Bender, Civil Action No. 86-1237-WF, 1988. On February 24, 1989, a fourth (amending his third), alleged ethnic slurs during deliberation. (The Supreme Judicial Court only ordered a probe of jury racial bias, because prosecutors asserted that a stain of crime scene blood matched LaGuer's blood type. Subsequent tests revealed that the MSPCL had mistyped Plante's blood from her actual O Type.[120] LaGuer's blood was never found at the scene.) On remand, the judge denied jury bias. Mr. LaGuer appealed. (Fine, J. dissenting) ("Surely, given their consistent testimony that a remark had been made, a reasonably objective fact finder would have concluded that it was more likely than not that someone had expressed ethnic bias in the course of deliberations.") Commonwealth v. LaGuer, 410 Mass. 89 (1991), 36 Mass App. Ct. 310 (1994). On May 22, 1997, a fifth motion for new trial alleged ineffective counsel over his exclusion of all women jurors. Mr. LaGuer appealed. Commonwealth v. LaGuer, 46 Mass. R. Ct 1108 (1999). ("As in his prior motion for a new trial, the defendant based his request for relief on alleged ineffective representation. Specifically, the defendant claimed his attorney's decision to use preemptory challenges to exclude women from the jury amounted to deficient performance…admittedly, such discrimination is impermissible, and the Commonwealth certainly could have objected to the defense counsel's conduct. The defense may not, after the fact, assign error to jury selection procedures of its own devising.")

On March 22, 2002, DNA evidence "fail[ed] to support Benjamin LaGuer's claim of factual innocence of the rape and murder of Lennice Mae Plante."[121] On February 11, 2003, his sixth motion for a new trial alleged malfeasance owing to the government hiding fingerprint evidence. On September 22, 2004, the judge denied the motion. The Appeals Court affirmed the denials. Commonwealth v. LaGuer 65 Mass. App. Ct. 612, 623 (2006). On March 23, 2006, further appellate review allowed. The order denying a new trial was affirmed. See Commonwealth v. LaGuer 448 Mass. 585 (2007). "What is exculpatory is that the Commonwealth could not place the defendant in the victim's apartment by means of any evidence, including fingerprints or any other physical evidence…None of the physical evidence was linked to the defendant." (448 Mass. 585)[122]

On 28 April 2011, the defense offered a ninth motion for a new trial based on newly discovered evidence and withheld evidence. On February 27, 2012, the motion was denied along with other motions for reconsideration and production of evidence. On May 23, 2012, LaGuer filed for executive clemency. On 9 August, the Board of Pardons recommended clemency be denied.[123] On November 9th, the Appeals Court agreed to take up LaGuer's newest challenge. On 30 November, the Board of Pardons sent LaGuer a letter saying that "since the Governor has neither disapproved of nor taken any action…it is presumed that the Governor concurs in the adverse recommendation."

The Police Investigation

Patrolman Timothy E. Monahan, his partner and a maintenance man named Dennis Benoit entered the building first floor hallway. Screams of a woman was coming from the far right end, apartment 101. Benoit used his master key. Monahan says their attempt to extricate her was impeded; a belt was tightly fastened to a reclined lounge chair behind the door, under her knob, not letting them get through to her. It took some time to dismantle the barricade. Inside, past the hallway, a woman was laying

[120] State Police Crime Laboratory Serological Report, Gwen Boisvert Pino, 17 February 1988; Report Number 1, FSA, 4 August 2001, pg. 10 ("The DNA recovered from the blood on the tissue paper…was also determined to originate from a female…the same as the genetic profile obtained from Lennice Mae Plante.")

[121] Superior Court Judge Richard T. Tucker named Lennice Mae Plante in his order and memorandum, pursuant to his authority to publicly name her under MGL 265, Section 24c.

[122] http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/06/27/confession_isnt_the_only_factor/; http://www.telegram.com/article/20100422/COLUMN01/4220638/0/FRONTPAGE; http://www.telegram.com/article/20130715/NEWS/307159666

[123] http://www.benlaguer.org/documents/Clemency%20Report.pdf

naked on a pool of urine. Her wrists were tied with the telephone wire. Plante's feet were bound tied with an electric cable that was still affixed to a hairdryer. She told police that he had a knife, and a police lieutenant observed it on her nightstand.

Monahan reported, "I asked her if she knew who [did this to her] and she stated "no." [124] She then stated "it was terrible he beat me and raped me several times and after he was done he took the rings off my fingers. I had two of them on my left hand. He asked me for my money and I told him I had none he then punched me in the face and I fell to the floor and then he raped me over and over."

Lt. Robert Hebert reported "she was unable to give me any description of the assailant." [125]

Patrolman Dean J. Mazzarella obtained no description. Dr. William C. Siegel says she arrived "by ambulance stating that she was beaten and raped by an unknown assailant."[126] She had a "rare yeast" infection and evidence of scabbing, a preexisting affliction that included her scratching herself.

Dr. Edmund Meadows noted "her assailant told her that he would kill her if she told what he looked like but she denies knowing her assailant."[127] There is no evidence of social service agencies assisting her. ER physician Siegel heard her rambling over unrelated topics. She said her assailant had jumped on her chest, despite no evidence of internal injuries.

In spite of her very particular claim that she was continuously penetrated for eight hours, her physical exam revealed no blood, lacerations, or abrasions on her anus. Her daughter Elizabeth Barry reported her mother to be a schizophrenic. Plante offered police conflicting accounts of the assault, ranging between ten minutes and a couple days before settling on eight hours, between 9pm Tuesday until 5am Wednesday.

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Detective Ronald N. Carignan (1935-1988) had only recently been promoted. According to his November 4, 1988 obituary, "Patrolman Carignan was a 29 year veteran of the Leominster Police Department and had served in the detective bureau for the past several years." While Carignan had told jurors he investigated major crimes, there are no records crediting him with any such investigations. He was the most junior detective of the squad. His report says that Lt. Robert Hebert telephoned his home at 5:15am. He went to the police station, then drove to the tenement. He says he was met by the side of the road by Dennis Benoit, the maintenance man.

Detective Carignan paused to note that her door was "jimmied" in ways he left unanswered in his report. He did not believe there had been much of a struggle except for two flipped chairs. A pair of windows in her apartment had a view to her backyard. He did not believe her assailant had scaled that window from the lawn (testifying that the window was over twenty feet, too high to scale or flee). One window was opened and its shades half pulled.

Carignan had no recollection of dusting the window sills for blood stains or latent prints. Any blood on those windows would have eviscerated the theory that LaGuer had exited her door and returned to his next-door apartment.

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[124] Original, Investigation Report by Timothy E. Monahan 13 July 1983, pp 3
[125] Tr. 241
[126] Burbank Hospital records of July 1983.
[127] Id.

The grounds keeper Dennis Benoit was awoken by his brother. He had heard a woman yelling for help. He met the police cruiser in the middle of that empty street.

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Officer Monahan claims in his report that he responded to the Waterway Apartment Complex at 5:10am. Lt. Hebert's report, probably copying from Monahan's report, also says 5:10am. But Burbank Hospital emergency room documents indicate that Plante was admitted at 5:00am, ten full minutes before Monahan said (less reliably) that he had responded to the call.

After a walk through the scene, Carignan and Monahan went to the Burbank Hospital where Plante was still having her medical exam. ER nurse Deborah Brown colleted physical evidence in a brown paper bag for police prior to 7:50am.[128] According to the Sheriff's Department, LaGuer was never medically treated despite Plante's "rare yeast" infection so aggressive she was vaginally discharging a yellowish pus. No yeast crystals were found in the "interior crotch" of LaGuer's underpants.[129]

After a hospital bedside interview, Carignan had a "scant" description.[130] "I asked her if he was a black man and to this she said, 'yes he was, he was very dark skinned."[131]

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Lennice Mae Plante had returned from shopping on Tuesday morning, July 12, 1983. She rushed in the vestibule, passed the mailboxes. Her studio was the last door on the left wall. She left her key ring on her door. The manager gave her his only spare. That evening, near 9:00pm, she was getting ready for bed. As she sipped on a cup of tea, the door opened and all of a sudden: this very dark skinned black man, not hispanic, entered her studio wearing tube socks and a jogging outfit. He punched her so hard in the face that she fell back. He smashed the lamp on top of a nighttable. She noticed no accent, no distinctive speech characteristics. While she insisted that her studio was bright enough for her to recognize his face, she could not remember any tattoos or scars. She learns from him a great amount of details. He's thirty years old and from the town of Fitchburg, she tells police. She told a police lieutenant that he had a knife. He became very angry. He snatched two rings off her fingers. He eventually left with her straw pocketbook. Her nightgown had only a torn strap. The police lieutenant said he knocked on LaGuer's door.

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After the building manager had Carignan focus on the young neighbor, the detective recalled questioning him about a burglary. Carignan had told him someone from the detective bureau might interview him, but LaGuer never heard from anyone. Carignan was now assigned to the detective bureau. LaGuer became a suspect of convenience. In 1980, three years earlier, he had been a "possible suspect" in a burglary and a party to a complaint involving a domestic violence call.[132] He lived in the tenement. Lennice Mae Plante had asked for a replacement key. Carignan didn't ask whether she had any unsavory

[128] Burbank Hospital records of July 1983.
[129] Analytical forensic report from Wideman to state representative Ellen Story of 30 March 2006 "If Mr. LaGuer in fact had sexual intercourse with Plante, especially over an 8 hr period, it is very possible that biological materials would have been transferred from her vagina to his penis and then from his penis to his underwear." http://www.benlaguer.org/documents/forensiccasereview.pdf
[130] Follow Up, Investigative Report of July 13, 1983 by Detective Carignan. In September 1985, Carignan openly admitted that, after he typed his report, that he destroyed all his original notepads.
[131] Id.
[132] Internal Leominster Police Department reports: (4/17/80 Ben LaGuer assaulted by Sidney Colson, 80-3646) (10/10/80 LaGuer possible suspect in the break in of Kent Carluccio's home, 80-10688) In April 2001, ADA Hautenan provided a stack of reports.

characters in the periphery of her life. Other than the building manager, his assistant, her daughter Elizabeth Barry, and LaGuer, no one else was interviewed.

Carignan found no bloody prints of LaGuer on her door handle, light switch, toilet, mirror, walls, sink or Formica counter. Not a single print of his on the hairdryer, trimline phone, or aluminum Pepsi can. (In some instances, as we shall review later, Carignan found latent prints that he withheld in secrecy.)

No trace of blood was found on the floor or walls between the apartments. Lt. Hebert reported no blood or smudges on the exterior of LaGuer's door handle. While Lt. Hebert told neighbors that Carignan would be coming around, the chief investigator had begun the process of requesting a search warrant for the apartment of Luperto LaGuer. According to Carignan, Elizabeth Barry told her mother that she would apprehend the man who raped her unless Plante revealed his identity. Plante then told her daughter that LaGuer had raped her. Barry promptly asked for Detective Carignan.

Carignan met Barry at Burbank Hospital. In a pretrial letter, Lemire admitted that Barry was present when her mother inculpated LaGuer. But this account is dubious in myriad ways. Why would Barry traumatize her mother? Plante had arrived the hospital stating that another physician said "her assailant told her that he would kill her if she told what he looked like but she denies knowing her assailant."[133] Carignan's account is even more suspicious when one considers Plante's trial testimony that she never told Carignan that her neighbor had raped her. She never saw her assailant enter LaGuer's apartment.

In his search warrant affidavit, Carignan requested to seize the matching sock to the yellow and black earlier found in her studio as well as two rings, a straw purse, personal papers and some twelve dollars. Carignan found none. Moreover, the investigators found no bloody latent prints or smudges in his bedroom. There was no blood in his bathroom. There was not a speckle of blood on his fabrics. There was no evidence of her carpet fibers. There was also no evidence of her blood on the soles of his socks.

On the Monday of the week jury selection began, Elizabeth Barry met Lemire for the first time. In her presence, her mother had identified her assailant to Carignan. Her testimony would corroborate the identification evidence. They met in his private office, a highly restricted area of the grand edifice on 2 Main Street. After that meeting, Lemire pulled Barry off the witness list. Barry's recollection did not match the detailed Carignan narrative.

When Carignan entered LaGuer's apartment to execute a search warrant, a picture of him was seen on top of his dresser. The fact that Carignan did not take that portrait belied his claim that Plante had identified her neighbor. Her identification of LaGuer's picture would have aided any future prosecution. But, Carignan's account was incredulous for other reasons. If Plante had inculpated LaGuer, why was no patrolman assigned to cover that region alerted? Carignan admitted he asked the building manager to call if anyone sighted LaGuer in the neighborhood. He made no request for an arrest warrant.

While police had a solid basis for suspecting LaGuer, Carignan's remote reports were not sufficient probable cause for a search warrant.[134] What strains credulity is not only that Plante denied inculpating LaGuer, but that Carignan alerted nobody about her alleged identification because he was conducting his "own investigation." However, his lone wolf story is contradicted by the fact that Detective Keith LaPrade and Timothy Monahan publicly shared credit with Carignan for breaking the

[133] Id.

[134] Her history of psychosis made it easy on Carignan to ascribe to her whatever assertions the magistrate might demand to approve his search warrant application. Any discrepancies would be shrugged off, particularly if the search had yielded incriminating evidence.

case. On September 18, 1985, a court hearing was held over Carignan used false testimony before the grand jury. After a daylong hearing, Mulkern concluded "acknowledged the inconsistencies discussed above, but denied any purposeful attempt to mislead the grand jury." Carignan had testified about facts he should have known to be false.[135]

This case pivots on whether one can trust that Plante had identified LaGuer as her assailant, as the police narrative asserts. The fact that Lemire pulled Barry from his witness list should have exploded in Ettenberg's eyeballs like a mushroom cloud. Under his supervision, Carignan collected the crime scene evidence, dusted for fingerprints and interviewed witnesses. He was provided a hospital rape kit. He executed a search warrant in LaGuer's apartment. He set up a Polaroid for Plante to select "anybody she knew." He was the sole witness before a Worcester county Grand Jury. He made measurements of the crime scene and testified to certain building light fixtures. There can be no doubt that Carignan's credibility was a centerpiece factor. His report and testimony are misleading and incomplete. His cover-up of illegal fabrics is exculpatory, should have been divulged prior to trial, because if Carignan lied, then his credibility would have been significantly affected. Most importantly, a disgraced Carignan would have greatly enhanced Plante's testimony that she never identified LaGuer as her assailant.

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District Attorney Joseph D. Early, Jr. should be more forthcoming as evidence mounts of egregious errors in the evidence collection, provenance papers, microbial debris, gene sequencing, laboratory procedures, and integrity of scientific data. In science, the integrity of data is the foundation of every finding, new discovery and scientific notion of progress. Detective Carignan fabricated the provenance for certain specimens. DA Early enlistment of high officials to kill a DNA forensic audit that Governor Deval Patrick asked the State Police to undertake is part of a continuing crime of state.

Leominster Police Chief Alan J. Gallagher, in response to criticism over the police investigation, said, "You can't second-guess a jury. You present the evidence to them and they decide." Carignan and Lemire conspired to conceal critical evidence. "A conspiracy is everything that ordinary life is not. It's the inside game, cold, sure, undistracted, forever closed off to us. We are the flawed ones, the innocent, trying to make some rough sense of the daily jostle. Conspirators have a logic and daring beyond our reach. All conspiracies are the same taut story of individuals who find coherence in some criminal act." This paper seeks to correct the official narrative in large and small matters.

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She was born Lennice Mae Schichter in a New England town, of Fitchburg, Massachusetts, on May 9, 1924, the offspring of Henry G. Schichter and Elizabeth Deply. When the United States Army accepted her as a prospective Surgical Technician on October 31, 1944, she had a High School Diploma. She had apprenticed as a Die Cutter in a local factory. As age 20, she served with the Army's 28th WAC Hospital Company for one year and nine months, earning a Good Conduct Medal and the American Service WWII Victory Medal. She had blue eyes, brown hair, stood 5'3" tall and weighed 116 pounds. The Army separated her in July 1946.

On October 31, 1947, Lennice married Raymond Wilfred Plante in a first wedding for both, by Minister Robert L. Underwood. She was 23, Raymond a year older. His parents, Wilfred J. Plante and

[135] Carignan's report quoted Plante as telling him, "All of a sudden this black guy comes into the apartment, totally nude except for a pair of white socks." In his grand jury testimony, Carignan says, "All of a sudden the door opened and in came Benjamin LaGuer." He testified the event occurred in LaGuer's apartment; it in fact happened in her apartment. He testified that she was still in hospital and not available to the grand jury; she had in fact left the hospital. He testified that she was lying in a puddle of blood; his own report claims one that smelled of urine.

Dalia St. Jean attended. In the Marriage Certificate,[136] Lennice listed Hairdresser as her occupation. On September 17, 1949, a daughter was born to Raymond and Lennice, they named Elizabeth Plante. Lennice began to suffer health problems. In 1953 she had a hysterectomy. Prior to that she had two abortions. Raymond became cruel and abusive. In 1952 he had her civilly committed to the Gardner State Hospital, where she was diagnosed a Paranoid Schizophrenic. He kept her in a padlocked closet when he left their Lunenburg home. His daughter referred to her father as a drunk and womanizer. In 2003, Barry said her womanizing father beat her mother and locked her in closets whenever he left the house.[137] Lennice was made a high functioning Schizophrenic through a regiment of anxiolytic and antipsychotic drugs. On December 18, 1962, Lennice filed for a divorce on the grounds of cruelty and abuse. The first item stipulated was her relinquishing custody of then thirteen year old Elizabeth. Raymond agreed to pay her sixty-five hundred dollars (or fifty thousand two hundred in current dollar value) to settle her claims. For a number of years, how many is still a question, she is said to have worked for the Stowe Nursing Home. After not being able to hold down any employment as a Hairdresser, she appeared to get worse enough to become eligible for Federal Disability Benefits. She was only 56 years old when she once again became psychotic. Burbank Hospital records indicate that Plante had "refused" on gastroentorology exam even though she had been vomiting for weeks. (According to a rape crisis counselor, Plante was vomiting a very dark fluid when she was sitting in the hospital room with her.) Plante had again “denied any alcoholic intake although her GT was elevated in the range of 126, normal being 9-31." She was diagnosed with Laennec’s Cirrhosis, a disease of the liver linked to chronic alcoholism. Some researchers claim the condition should be re-named “alcoholic’s cirrhosis”.[138]

According to her daughter, the police noted Plante was under the care of the Fitchburg Herbert Lipton Mental Health Clinic. On July 13, 1983, her daughter telephoned the hospital. There is still a question over how many years Plante had been under their medical care, because these Psychiatric Records have not been made available to the defense. In response to inquiries, Lemire asserted that Plante was taken “off” antipsychotic pharmaceuticals three years prior to the trial. The defense, Lemire argued, “is causing a prejudice to her position and causing her to be suspect because of a mental health condition, which was treated and not under any treatment for two years prior to the rape.” (Tr. 4) Lemire’s assertion that she was not under any treatment is contrary to her daughter’s statement that “[s]he is under the care by a Mental Health Clinic and has had a nervous breakdown about 14 years ago and has not been right since. She was going to call her counselor and also her doctor.” She stated her mother had been “followed by” a mental health clinic “for schizophrenia” according to Burbank Hospital’s RN Linda Grossi. After Lennice Mae Plante was discharged from the hospital, she was taken to the Wright Nursing Home in Fitchburg. She then moved to the “Lipton Center” a halfway house operated by the Herbert Lipton Mental Health Clinic Staff, including Annie K. DeMartino.

Assistant District Attorney Lemire misled the court about the mother-daughter rancorous history. “Only since this incident she has had trouble with her daughter Lemire says, “They don’t get along.” (Tr. 4) But, in his years as building manager, Raymond Cochran said, he had never seen her daughter. The truer version may be that Elizabeth had never really forgiven her mother. Lennice had grabbed her divorce settlement and left her daughter to care for a drunken father. Elizabeth herself shows signs she might have inherited the Paranoid Schizophrenic gene. In the 1990s, a manifestly paranoid Elizabeth issued a complaint that LaGuer had vandalized her car.[139] DOC officials assured police LaGuer had not been freed. Her husband made arrangements to adopt an infant from an orphanage in Honduras. One can say that Elizabeth and Robert Barry’s life turned Technicolor the moment they walked in their Lunenburg home with Samantha Barry. The pain had been percolating decades before a young LaGuer returned

[136] http://benlaguer.org/documents/Lennice%20Plante%20marriage%20records.pdf
[137] Elizabeth Barry, Television Interview, Greater Boston, Hosted by Emily Rooney, WGBH July 12, 2003
[138] This disease is named after Rene Laennec, the French physician and inventor of the stethoscope.
[139] Incident Report, Department of Corrections; Incident Report, Leominster Police Department (1991)

home. On her dying hour his wife made Robert pledge that he would fight to keep LaGuer in prison.[140] That year, when Samantha sat before the State Parole Board with her daughter in arms, seated next to her father Barry, a young woman who had not even been born when LaGuer was charged, began to cry. This man, whom she wished his freedom to be denied, had been an un-representable horror. He was a stench in their air.

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After interviewing her, Lemire told the jury in his opening statement that Plante would testify her assailant was wearing shorts and tube socks when she first became aware of him. “During the course of this he removed his clothing,” Lemire said (Tr. 23, 564) Carignan’s narrative that only LaGuer would have met her in the nude runs afoul of Monahan’s testimony that a lounge chair was reclined under her doorknob, wrapped with a belt. LaGuer could not have left through door and returned to his apartment next door, because the barricade left only a window for her assailant to flee. Jose Gomez could have initially barricaded himself in the apartment with Plante. In a haze of smoke, liquor and drugs, he became violent and beat her. He hogtied her. A neighbor heard her screaming. With the police tearing down her trap door, Gomez leaped seven feet out of her window to the backyard. DeMartino's testimony, confirming Gomez’s presence in her apartment, totally supports the defense theory to the jury.

Gomez relied on her to provide the fuel of their combustible lifestyle. But, in her psychotic mind, President Kennedy would not have approved of secret life exposed at a public trial.

The fact that Plante was deceptive about her friendship with Gomez, Tucker concluded, was not a basis for a new trial. "The court makes no such finding. Far from establishing a connecting link between this male and the crime, Demartino's testimony support that Plante was not frightened by and, in fact, was a friend of a man of color (Gomez) prior to the attack, but became extremely fearful thereafter." This ruling might have some weight if Plante had not denied the very relationship that Tucker said DeMartino was in a unique position to expose. Plante’s denial of that secret relationship was fertile ground to challenge whether she was afraid to identify Gomez. Lemire, in his summary, said that Plante was afraid to name who assaulted her. (Tr. 565) Consider what Mr. Ettenberg said, I would argue to you whether it's not just to distract [but] confuse you." (Tr. 568) Demartino now provides that missing gap of evidence.

At trial, Plante’s barricaded door is among the first questions asked. “To the best of my recollection,” Detective Carignan said, “it opened fairly easy.” (Tr. 247-249) But Detective Carignan could not have seen the struggle to open that door because his home phone rang fifteen minutes after Plante was admitted to the emergency room. (Tr. 247)

“This is very important to recall,” Lemire argued, emphasizing that LaGuer had means and opportunity. “[T]he setup of that apartment building. Who would walk by her door on that day? Who? One person. That chap right there is the only person that would have any business walking by her door, Ben LaGuer. And, the keys are hanging right in the door. He has seen them there before by his own testimony. He took them this time and he came in that apartment that night…” (Tr. 563-564) In 2007, a Supreme Judicial Court ruling concluded that Plante had “left her key in the door the day of the rape, and they were never located. The defendant’s apartment is the only unit beyond the victim’s on that floor, requiring the defendant to walk by the victim’s in order to reach his own. Thus, the jury could infer that the defendant had an opportunity to obtain her keys.” (488 Mass. 599) In September 1999, former FBI agent Richard Slowe found her key ring in her purse. Slowe’s discovery undercut any hypothesis that LaGuer stole her key. Ettenberg never asked that the contents of her purse be itemized. The building

[140] Parole Board, testimony, Samantha Barry 10 April 2010; Parole Board, Testimony, Robert J. Barry 10 April 2010

manager testified that complainant often misplaced her keys. (Tr. 64-65). Her pocketbook remains in the custody of Worcester County Clerk of Court.

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The building manager's daughter lived on the ground floor under LaGuer. She called her father after she heard a toilet flush upstairs. Cochran's call is marked in a police report at 10:50am. At the bureau, however, Carignan and his men were already gearing up. At 10:34am, sixteen minutes earlier, a National Criminal Identification Check (NCIC) was run on Benjamin LaGuer, complete with date of birth and social security number. The countdown to LaGuer's last minutes of freedom had begun.

The Police Interrogation

The Leominster Police Station is situated in a narrow brick edifice on Church Street. The police department takes up the whole first floor of the building and the district court sits second floor. The Detective Bureau is a single room large enough to fit four desks.

A parade of uniformed officers stepped in and out of the room with the clear intent of satisfying their curiosity. LaGuer was awaiting for Detective Carignan to return.

Once in the room, Carignan asked a very young looking LaGuer if he wanted anything to eat or drink. Despite his hunger, he had not eaten breakfast, he said he was fine. He was offered a cigarette. But he didn't smoke. Carignan would later testimony that LaGuer answered all of their questions without ever invoking his right to have a lawyer present. LaGuer told police that he returned from the military two weeks before. His friend had sold a cube of Hashish to an Undercover Military Police officer while he was stationed in Germany. While most of his belongings were in his father's apartment, he spent a lot of his time with his sisters. He had obtained applications to attend Fitchburg State College as a full—time student in the fall. He had contributed the maximum toward his educational GI Bill in order to qualify for the maximum monetary benefits.

Detective Keith E. LaPrade, Carignan's partner, filed no police report. LaPrade asked LaGuer if he had ever had words with Lennice Mae Plante. Who? asked LaGuer. The lady next door, he replied. That was the first time LaGuer had heard her name. Yes, he once helped her pull up her grocery cart. He had alerted her more than once about leaving her key connected to her door. He had never seen her with any dark skinned males. He had heard and seen her mumbling to herself in the hallway. She appeared totally fragile.

There was no tape recorder. None of the officers had taken any notes.

LaGuer did not hesitate to provide a set of his fingerprints, so that police might compare his prints with a partial print Carignan had claim was taken from a telephone. He also agreed to stand in a lineup after Carignan said Plante might be able to identify her assailant. Instead of arranging a group of individuals for a police lineup, as LaGuer wanted, Carignan made plans to show her a photographic array.

To this end, Detective LaPrade shot a cartridge of Polaroids. Unsatisfied with the pictures, Carignan complained the pictures were too light, LaPrade reshot another cartridge of LaGuer. Carignan showed his partner how to adjust the contrast knob on the camera to produce darker pictures.

Monahan stayed out in the hospital corridor while Carignan and Barry went in the room where Plante was interned. As Barry was deleted from the witness list, Carignan became the sole narrator. While defense investigators found a nurse who said Plante was only shown a single polaroid, not the array alleged, the nurse could not jeopardize her job. She was a single mother of two young children.

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By all accounts, LaGuer was not fitting the type of person associated with this complaint. After his mother and father divorced, a sixteen year old LaGuer had moved to Leominster to live with his sister. While might have been a very poor student, academically, he was very sociable and well liked. He was elected President of the Latino Student Body. He had a number of steady relationships. His sisters, all three, worked for social services agencies in town. LaPrade helped him remember the names of the Leominster High School custodian staff. The principal had caught LaGuer in their lounge any number of times, and sent him to his class. William Daly, his civics teacher, liked LaGuer so such that he loaned him his car, even though he knew LaGuer had no license. To earn money while in high school, LaGuer was part of an office cleaning crew at Digital Corp in Westminster. He also worked in the plastic factory that pressed the internationally famous lawn pink flamingos. His faith and father were major influences in his life.

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When Carignan emerged from his hospital trip, he still wanted a confession, despite his claim that Lennice Mae Plante had picked out LaGuer's Polaroid when he asked her to select anybody she knew in the array. He was clearly ready to up the ante. He accused LaGuer of being untruthful about his alibi account. LaGuer had answered LaPrade's question about his activities on Tuesday while Carignan had asked him about his whereabouts on Wednesday. It was Friday afternoon. LaGuer didn't know that the timeframe was between 9 P.M. Tuesday and 5 A.M. Wednesday. Carignan had created a whole contradiction from a minor confusion. It appeared as if Carignan and LaPrade knew when her assailant had left, but they were still trying to figure out when it all began. LaGuer had not eaten. He had only a few sips of water. The secret for good decisions while under threat is not panicking. He had learned this in the army.

It appears as if Carignan grow more impatient by the minute. He was leaving town on vacation. The district court judge was only waiting on Carignan to wrap up his papers, as he too was off for that weekend. Carignan had an easy way to close this case. If LaGuer only admitted to entering Plante's apartment to rob her, LaGuer could go home and they would deal with all other details when he returned from his vacation. The judge would take into account his military service, Carignan told LaGuer. The police report would be written up in a favorable way. She was only robbed of a few dollars anyway. LaGuer could admit to robbing her for pot money. To prove how wrong Carignan was in his logic, that LaGuer had robbed his neighbor for pot money, LaGuer draw a bundle of dollars from his pocket with more in his knapsack.

The fact that LaGuer had admitted smoking pot made Carignan leap to the conclusion that he would commit a major felony to fulfill a recreational pleasure. Yet any confession of his entering Plante's apartment, for any reason, would implicate him in the awesome story of her assault. Carignan again touched upon the subject of a scratch on LaGuer's back and how his blood and skin would return positive from the lab. LaGuer had previously told Carignan, before a full room of officials, that he had scratched himself on a bench in Lake Shirley over the July 4th weekend. The reason Carignan was rehashing that subject for the second time was that nobody had taken notes of his answer when LaGuer was first asked.

Finally, after hours, Carignan revealed that Lennice Mae Plante had identified him as the màn who raped and robbed her. LaGuer was taken to the prisoner tank to await arraignment in district court. Assistant District Attorney Paul F. Bolton (he remains in assistant district attorney in Worcester as of May 2012) read the charges. It was the first time LaGuer had ever heard of such nastiness in his life.

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At 1:00pm, Carignan told her that he had some pictures her mother should see. "Mrs. Barry and I went to her room and asked her if she could look at the photographs and immediately without any

hesitation picked out Benjamin LaGuer ... I asked her if she was sure that is the man and to this she said 'yes, he's the one, I'm positive he is the one.'" Carignan's version could not have taken more than five minutes. (Carignan asked Monahan to stay out in the corridor.) After Carignan and Monahan left the hospital, they drove to State Police Leominster Barracks. Trooper Arthur Martin, a fingerprint expert, was left the trimline telephone and a print card of LaGuer. Carignan and Monahan returned to the detective bureau.

The Arrest Report, withheld until November 2001, indicate that LaGuer was charged at 1:40pm. But Trooper Martin's report put Carignan at the State Police Barracks at 2:30pm. Martin's report offers evidence that Carignan fabricated his report to conceal the length of time he actually spent obtaining alleged photographic identification.

Martin notified Carignan that four latent prints from the base of the trimline telephone did not match LaGuer's reference prints. Carignan notified Lt. Arthur Caisse. Carignan and Caisse then met with the building manager. "Raymond Cochran let us into the apartment and we further searched the apartment for additional evidence and dusted for latent prints on several items in the apartment." LaGuer was already transferred to the Worcester County House of Corrections with a $5,000 bail. The Sentinel & Enterprise, local paper, had a front page "Police Nab Man in brutal Rape" story.

In 2010, Hautanen stipulated that that government had "men's underwears". The pretrial MSPCL forensic analysis report revealed no female secretions.[141] In 2011, she asserted that the only underpants in this case consist of two clearly female nylon panties. Her conflicting accounts are part of a continuous scheme to defraud. Detective Carignan stashed fabrics taken from LaGuer in the Leominster Police Department storage room. He clearly did not want the jury to know that, despite all efforts, not a scintilla of microbial evidence linked LaGuer to the crime.

New Details of the Accuser's History of Psychosis

Anne K. DeMartino was employed at the Herbert Lipton Community Mental Health Center "Lipton Center" from 1982 to 1988. (Ms. DeMartino is the recipient of many awards, including a Governor's award for public service and ABC News has twice named her "Person of the Week", first with Peter Jennings in 1987, then Sam Donaldson in 1989.)[142]

Annie K. DeMartino is a witness that became known to the defense as a former caretaker to Lennice Mae Plante through a chance encounter. Defense Attorney Robert E. Terk, then First Assistant clerk of the Worcester Probate and Family Court, was asked to join a fundraiser for gubernatorial candidate Deval L. Patrick. Attorney Terk communicated DeMartino's discovery to an Amherst-based New York Times stringer, Eric Goldsheider, who was then considering a biography of Ben LaGuer. Annie DeMartino granted journalist Goldsheider an interview, which he recorded and transcribed. Through Boston University President John R. Silber, she agreed to meet with a team of Goodwin Proctor, LLP attorneys led by James C. Rehnquist. A copy of Goldsheider's feature front page story, published in the western Massachusetts publication The Valley Advocate, revealed stunning new relations that former superior court judge Issac Borenstein agreed with attorneys James C. Rehnquist and Earl C. Cooley should be represented as exculpatory material. Annie DeMartino became suddenly unavailable due to a medical issue. She was said to have travelled to Ireland.

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[141] MSPCL Pretrial Bench notes of M.T. Grant, p.1; MSPCL Nov. '83 report, item No 21. Analytical forensic report from Wideman to state representative Ellen Story of 30 March 2006 "If Mr. LaGuer in fact had sexual intercourse with Plante, especially over an 8 hr period, it is very possible that biological materials would have been transferred from her vagina to his penis and then from his penis to his underwear."

[142] Sunday Sentinel and Enterprise, "DeMartino bids city council a fond farewell; board member serves Fitchburg for twenty years" by Emily Devlin 27 December 2009

This new portrayal of Plante's mental fitness raises doubts that Superior Court Judge William C. O'Neil, Jr., who denied the defense her psychiatric records, actually read her records. He inspected her psychiatric records between April 1 and September 30, 1983. He found no evidence LaGuer could use to challenge Plante's credibility and eyewitness. But, the judge would not have found anything valuable in those files because Plante was being treated with antipsychotics at other facilities, including Burbank Hospital, Wright Nursing Home and Veteran's Administration Hospital.

Plante had delusions about President Kennedy visits. DeMartino says that Plante had ties to third party suspect Jose Orlando Gomez; her use of antipsychotics at the time of trial, including Haloperidol; and accused other men of her assault. [143]

"It also appears that LaGuer asked this court to find a basis for a third party culprit defense. Presumably [Gomez] with whom Plante developed a friendship prior to the attack would be such a culprit. The court makes no such finding."[144]

It is said that Plante did not initially identify LaGuer because he had threatened her life. But if Gomez had mistreated her, as he had his estranged wife,[145] Plante may have identified LaGuer out of fear that Gomez might have retaliated against her. Plante had denied any such friendship. (Tr. 161) DeMartino lets LaGuer question whether Plante was afraid to reveal Gomez's identity. According to a Mayday report, "It is quite likely that this Gomez had the capacity to gain entry into the Waterways complex, enter by key, buzzing his mother, or by trickery. Gomez apparently has a history of sexual related episodes of misconduct and has been confined to the Worcester State Hospital for observation attributable to his misconduct." Her assailant told her that he was from Fitchburg,[146] the town where the Gomez family had resettled. Her handbag was found on a road toward Fitchburg. Four fingerprints found on the base of the trimline telephone, the cord of which was used to bind the victim's wrists,[147] did not match LaGuer.[148] Gomez's blood type is consistent with the perspiration on the tube sock recovered. DeMartino aids in refuting Lemire about Gomez. "There is no evidence the Gomez family was in that apartment at the time." Tr. 569.

LaGuer asserted that evidence warranted a new trial. The Supreme Judicial Court credits Carignan's narrative that he found a "small partial" on the telephone. But, according to a report withheld for two decades, Detective Carignan had provided the telephone for fingerprint analysis to Trooper Arthur Martin. It was the Trooper, not Carignan, who lifted and performed the comparison that excluded LaGuer. Carignan's report of a "small partial" was a deception. The fact that Plante lied about Gomez is highly

[143] Transcript of Annie K. DeMartino interview of Eric Goldscheider 13 February 2007; Valley Advocate, Tragedy Times Two by Eric Goldscheider 5 April 2007; Transcript of Annie K. DeMartino interview with attorneys James C. Rehnquist, Kathy Luz, Joshua Stayn of Goodwin Proctor, Boston, Along with Dr. John Silber, Professor of Law, President Emeritus Boston University 17 April 2008; Sunday Telegram, New LaGuer Trial Supported/DeMartino Raises Question of ID, by Matt Bruun 8 April 2007.

[144] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 12

[145] Fitchburg District Court, Application for Criminal Complaint, Officer Farrell, charging Jose Orlando Gomez with rape and assault & Battery (Domestic) on 25 May 1998 ("The wife of the above Defendant stated that he grabbed and punched her as well as threatened to beat her up. The victim states she is in fear of her safety as he is very abusive. Victim also reported being raped." Worcester Superior Court 98-0558 Gomez pleads guilty to Assault & Battery, in exchange of rape charges dismissed at the request of prosecutor. Superior Court Judge Peter A Velis sentenced Gomez to 59 days in jail. He ordered Gomez to attend Batterers program or Anger Management. Stay away from victim.

[146] Follow Up, Investigative Report of July 14, 1983 by Detective Carignan

[147] Original, Investigation Report by Timothy E. Monahan 13 July 1983, pp 3

[148] The prosecution withheld this evidence for two decades.

exculpatory. If the top fingerprint matched Gomez, establishing who last handled the telephone, then the jury would have had a basis to infer that he did pull its cord to bind Plante's hands.

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"Plante's prior treatment within the Herbert Lipton system was well known," Judge Tucker ruled. But those Lipton records were denied to LaGuer. "Even if the defense was not aware of DeMartino's role in Plante's care, this fact was learnable. Indeed, DeMartino was present with Plante at court throughout the entire trial."[149] False. All witnesses except for Carignan entered the courtroom to testify then left after cross-examination owing to a sequestration order.[150]

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"DeMartino had not been listed as a witness at trial by the Commonwealth and there has been no credible evidence put forth that the district attorney's office or the police knew of her existence, or her testimony, at any time prior to her discovery by LaGuer." [151] In fact, Lemire himself admitted that Plante had met with Carignan (which presumably also included escorting nurse DeMartino) in his Worcester courthouse office. (Tr. 154) Deterctive Carignan testified that Lemire had met separately with her (which also presumably included escorting nurse DeMartino). (Tr. 392) DeMartino had to reveal her relationship to Plante to enter Lemire's restricted office area.

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Police photographed a scratch on LaGuer's back.[152] But, Lemire never disputed LaGuer had scratched himself on a picnic table.[153] Other photos showed his hand.[154] Plante was beaten so hard around her face that physicians reconsidered reconstructive surgery. [155] But LaGuer's knuckles had no abrasions ordinarily found on aggressors.[156] While prosecutors reanimated the scratch as significant in subsequent appeals, Lemire did not devote a single phrase to it in either his opening or closing statements to the jury. According to Billings B. Kingsbury, a longtime Telegram court reporter, Plante had "an extremely difficult time on the witness stand. I covered the trial. It was only through delicate handling by former Assistant District Attorney James R. Lemire that the woman was able to come to court and be heard."[157]

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On direct examination with Lemire, Plante was carefully steered to recall that two weeks prior to her alleged assault she had been buzzed from the vestibule. When she opened her door, down a twenty feet stretch of narrow corridor, on the other side of the mailboxes, she got a quick glance of a man. She shut the door once she realized it was not her daughter. She did not hear keys clinking or footsteps as if the man had come toward her end of the corridor. When Lemire asked if the man she saw on the vestibule was in the courtroom, she raised her index finger. The trial judge said her "testimony is also somewhat unclear." (Tr. 108-111)

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[149] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 10

[150] On 12 January 2004, LaGuer requested a sequestration order. (Docket No. 15)

[151] Id., p. 7

[152] Follow Up, Investigation Report by R N Carignan of 15 July, 1983

[153] Trial Transcript, February 1984, Closing Statement by ADA Lemire

[154] A series of police photographs of Ben LaGuer on file with the Leominster police department and official descriptions of his distinctive marks also on police file.

[155] Testimony, Grand Jury, R. N. Carignan, August 2, 1983.

[156] The Hon. Isaac Borenstein, Interview. Greater Boston, Host Emily Rooney. PBS. WGBH, Boston. 23 March 2009

[157] Sunday Telegram, Interesting Angles in Rape Appeal by Billing B. Kingsbury 26 May 1991.

She says the man that buzzed her was not who she had seen accompanied by a woman. This was significant because while LaGuer's father was settling business affairs in Puerto Rico, his wife was staying with Ben. She would prepare his meals. Lennice Mae Plante would have seen them on a daily basis.

If LaGuer was not the man on the vestibule, then her identification of him in court must be balanced with her testimony that she never inculpated her neighbor. Her nurse observed Carignan showing her a single Polaroid. Lemire's decision to strike Barry from the witness list stemmed from the fact that Carignan had first obtained LaGuer's name from the building manager.[158]

In this case, Tucker, J. misunderstood and so misrepresented the devastating effects of DeMartino. Judge Tucker described, in his ruling, a far flung account of DeMartino. "DeMartino's testimony regarding Plante's condition following the attack establishes that [she] suffered severely from the trauma that she experienced. LaGuer, being a man of color, certain does not benefit from DeMartino's observation of Plant's palpable fright of darker complexioned following the attack." Tucker conflates Plante's fear of a black man who lived at the Lipton facility with testimony that she had accused other colored men of her assault. In court, Plante raised her index finger toward the only black man in the courtroom at a time when she had indiscriminately accused other black men of the interracial rape. Carignan admitted that Plante knew her assailant would be seated in the courtroom. (Tr. 392) It had all been part of the trial rehearsal. The trial judge, court clerk, stenographer, bailiffs, defense as well as prosecuting attorneys were all Caucasian. The entire jury venue consisted of Caucasian individuals. In the unusual circumstances of this case, the risk that complainant identified the only male of color in the courtroom even though she denied she identified her neighbor to police is substantial.

Improper Handling of Forensic Evidence

In May 1989, Judge Robert V. Mulkern denied a request for DNA testing.[159] In November 1996, Judge Herbert F. Travers denied a lawyer even access to the samples.[160] In September 1999, lawyers found the boxes of evidence with their tamper-proof seals broken.[161] (These seals were affixed, by court order, across the boxes in May 1989.)[162]

In January 2000, a team of lawyers that included Robert Cordy (a former chief of staff to former Governor Bill F. Weld and current Associate Justice of the Supreme Judicial Court) requested DNA testing on LaGuer's behalf. Cordy was accused of improperly accessing the courthouse storage.[163] In December 1999, Robert Cordy wrote the district attorney to set up DNA testing.[164] In response, DA Conte assailed Cordy in a press release: "At best, the unsanctioned handling of the evidence by Mr. LaGuer's attorneys has disrupted the chain of custody of the evidence in the case. At worst, evidence may well have been contaminated beyond the point of obtaining valid test results."[165]

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[158] Internal Leominster Police Department reports: (4/17/80 Ben LaGuer assaulted by Sidney Colson, 80-3646) (10/10/80 LaGuer possible suspect in the break in of Kent Carluccio's home, 80-10688) In April 2001, ADA Hautenan provided a stack of reports.

[159] Attorney Barry Berke of Naftalis & Frankel, LLP, New York

[160] Attorney Oliver C Mitchel Jr., formerly of Goldstein & Manello, PC, Boston

[161] November 1999 affidavit of Richard Slowe, a former FBI agent and prosecutor hired to supervise the defense's handling of these articles.

[162] Transcript of May 22, 1989 court hearing, pp. 130-131.

[163] District Attorney John J. Conte's Press Release of 14 January 2000. ("At best, the unsanctioned handling of the evidence by Mr. LaGuer's attorneys has disrupted the chain of custody of the evidence in the case.")

[164] Robert Cordy was a managing partner in the Boston office of McDermott, Will & Emery. A former chief counsel during the William F. Weld Administration, Cordy today is an Associate Justice of the Supreme Judicial Court.

[165] District Attorney John J Conte's Press Release of 14 January 2000

The legal battle for DNA testing had only begun. In April 2001, 14 months later, the defense learns that ADA Sandra Wysocki had requested the evidence in July 1998.[166] Conte only in deepened the mystery of Wysocki's probe:

> "During the argument before the Appeals Court regarding the absence of women on the jury, Mr. LaGuer claimed that the Commonwealth had lost the physical evidence in his case. To investigate this claim, the prosecutor checked with the Leominster Police Department, who confirmed that all the evidence from the police department had been moved to the Clerk's Office after the 1989 blood-type hearing." [167]

This is false. The hearing on the absence of women from the jury was held December 11, 1998,[168] five months after Wysocki had requested "Benjie's underwear" and the rape kit.[169]

In his ruling, Tucker says, his predecessor Hillman "went to great detail to prescribe the handling, transportation and the division of the biological material to allow replicate DNA testing by selected laboratories of the Commonwealth and defendant."[170] However, FSA had "unspecified slides"[171] never approved for DNA comparison.[172]

Considering the amount of blood, the assailant's fabrics should have been stained with her secretions. In fact, the recovered sock had O-Type perspiration. Jose O. Gomez, the third party culprit, is also a secretor of O-Type.

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On April 27, 1989, the trial judge held a hearing in Worcester superior court. At the center of one dispute was a piece of "underpants - suspect" might be exculpatory. Lemire averred he was not sure if any evidence was still available. Attorney Terk requested the evidence from the Leominster Police. Lt. Caisse knew exactly where to locate the secretly stashed evidence. Unfamiliar with Carignan's second round of raids, Lt Ptak described "a cardboard box containing numerous articles which were used as evidence at the trial." In fact, what Lt. Ptak had was a parcel of clothes that Carignan had previously denied recovering in a raid of LaGuer's apartment. But the real story is not that Carignan lied about the origin of these fabrics. It was not until DNA testing, in November 2001, that LaGuer's lawyers came across a State Police pre-trial receipt alluding to "underclothes from suspect" in their files.

In December 1986 LaGuer offered fresh evidence in support of his claim of innocence. LaGuer is B-Type. In April 1989 Lemire criticized the judge. But Judge Mulkern retorted: "if the assailant had

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[166] In a July 8, 1998 letter to Lt. Michele D. Pellecchia of the Leominster Police, disclosed in April 2001, Wysocki wrote: "I am particularly interested in items 15 to 18 on the attached Lab report dated November 3, 1983 from the Department of Public Safety." (These items correspond to the rape kit.) The lab report is scribed with "also Benjie's underwear" next to "underpants – suspect."

[167] Press Release "Setting the Record Straight" of 25 April 2004

[168] Court of Appeals, Docket No. 98-P-68.

[169] In his response of July 10, 1998 Lt. Pellecchia wrote, "ADA Sandi Wysocki requested items 15, 16, 17 and 18 from us on another request for an appeal on the part of the defendant. Our records indicated that all evidence was turned over to CPAC Tpr. William Kokocinski on 5/17/89 on request of ADA Kate McMahon by Lt. Ptak. I notified ADA Wysocki of this information."

[170] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 5.

[171] FSA Report 2, 4 February 2002, pp. 6-7

[172] Finding and Order on Defendant's Motion for DNA Testing of February 2001; further findings and order on Defendant's Motion for DNA Testing of May 2001.

blood type O and Mr. LaGuer has blood type B, don't you think that presents a problem to me?"[173] According to his court papers, Lemire said: "(Plante, whom) testified that she may well have been gagged with the sock, is type O blood. A tissue, bearing droplets of type B blood, was also found in (her) apartment." Thus, the saliva "could well have been Plante, and the tissue bearing LaGuer's blood type does not exclude him from suspicion."[174] While a police report refers to her gagging, Plante had plainly stated he had "stuffed something in her mouth and she kept gagging on her own blood."[175] There is no specific reference or evidence of her gagging on a sock. In fact, a pretrial exam of the sock detected no blood.[176] A 1989 exam also detected no saliva.[177]

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To advance his argument that the assailant had gagged Plante with a sock, Lemire cited pages 333 and 183 of the trial transcript. But, a closer examination of those pages would leave a factfinder totally unsatisfied. On page 333, Carignan's police report quotes Plante as asserting that "he (her assailant) had stuffed something in her mouth." The report makes no reference to a gagging sock. On page 183, a poorly prepared defense attorney asks Plante "when it was that a sock was put in your mouth?" (Tr. 183) But she had never referred to a gagging sock. "He may have put a sock in my mouth when he put me in the bag, I didn't know about socks." Ettenberg, reversing, asked, "Do you remember something being in your mouth?" Plante, in a clear voice, said "I don't know."

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In support of Lemire's thesis, she said the fluid in the tube sock recovered from Plante's studio was saliva. But there was a reason to doubt her analysis. She tested the tube sock for enzymes "found in high quantities in saliva and other body fluids but particularly saliva. All those results were negative, meaning that we were unable to detect amylase on any area of the sock."[178]

After a lengthy evidentiary hearing in a Boston courtroom, trial judge Mulkern denied LaGuer a new trial. "I find that the jury would have been warranted in finding that the victim scratched the assailant during the attack and when he bled, he used these tissues to wipe off the blood. The blood B-Type on the tissues, the proximity to where the rape occurred in the victim's apartment; and the blood found in the victim's fingernails were all consistent with this finding."[179] Naturally, the blood on the tissues matched Plante's genome. Moreover, Carignan could not have seen blood on her fingernails because she was "cleaned up" when he first met her. (Tr. 211-216, 258) According to her ER physician, Plante had "dried blood on both hands."

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Not a single droplet of blood had ABO O-Type, her bloodtype. When all reports indicated that Plante was drenched in blood, the absence of her blood in this MSPCL report afforded the trial prosecutor all of the doubt he needed. Karolyn M. LeClaire, a MSPCL chemist, read Lemire's 27 April memorandum.[180] In secret, prior to trial, Lemire had asked to be provided with the bloodtype of every investigator present in her studio. In 27 April, Lemire argued that MSPCL analyst Grant was not smart enough to tell the difference between perspiration in a sock from the morphology of saliva. But the claim

[173] Ayres, B. James. Boston Globe, Hearing Set to Consider New Trial in Rape case. 23 April 1989
[174] See. Commonwealth's Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for New Trial, 27 April 1989, pg. 10
[175] Follow Up, Investigative Report of July 14, 1983 by Detective Ronald N. Carignan.
[176] Testimony of State Police Analyst Mark T Grant, 22 May 1989 pp43-44 ("Well…any stains or tears or anything like that. I didn't notice anything at that time with regard to that analysis.").
[177] Testimony of State Police Analyst Karolyn M. LeClair, 22 May 1989, pg 93.
[178] Testimony of State Police Analyst Karolyn M. LeClair, 22 May 1989, pg 93.
[179] Decision Denying a New Trial by Judge Robert V. Mulkern, 2 June 1989 pp4-5
[180] Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for New Trial, 27 April

that a tube sock was stuffed in her mouth is only half the story. At trial, Lemire declined to subpoena analyst Grant because he did not want the O-Type perspiration in the sock linked to third party suspect Gomez, a secretor of O-Type.

Prosecutor Misinterprets Original Forensics

In October 1983 State Police Analyst Grant settled that the presumptive culprit is a secretor of ABO O-Type antigens. He made that deduction by extracting perspiration from a tube sock left behind by her assailant. Lemire requested an order to compel LaGuer to provide a saliva sample for comparison. His did not yield a result. Lemire did not request a second sample. At trial, he did not refer to the forensic tests on certain fabric evidence.

The matter of why Ben LaGuer's saliva did not yield a positive result remain a mystery until May 1994, when Esquire magazine published a strange account of LaGuer swapping his saliva with another inmate. The magazine insisted that a legitimate saliva sample would have shown his innocence rather than a false impression of guilt because the sock had revealed O-Type antigens and Ben LaGuer is B-Type.

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In October 1983, Carignan, in the presence of defense attorney Ettenberg, raised a brown paper towel up to LaGuer's mouth for him to spit a saliva specimen. The state police required a bloodtype from LaGuer to compare perspiration drawn from the culprit's recovered tube sock. It is said that LaGuer, afraid that Carignan would only complete his scheme, switched his saliva with another prisoner. The serology was inconclusive. Lemire could have requested a second specimen. But Lemire had had detected enough errors in the forensic analysis not include Grant on the witness list. After examining a heap of fabrics from Plante's sanguinary studio, not a single droplet of blood matched her known O-Type antigens. The absence of her blood was fatal to Grant's credibility.

In August 2000, as illustrated earlier, a state police supervisor examined certain microscopic slides wrapped in a fibrous wad identical to the one used to collect LaGuer's saliva. Another slide had hairs from a jersey LaGuer had three days after the crime. These hairs had male DNA in infinitesimal quantity. Parenthetically, the fact that only LaGuer's DNA appears in the congregated stain suggests that any charge that he contaminated the evidence with another inmate's saliva must be a false confession before the state's Parole Board, when he was bartering for his freedom under a coercive environment. If LaGuer had actually provided the saliva of another inmate, why was a DNA profile not shown in the genetic data? The absence of a second genetic profile discredits the saliva swapping affair.

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Grant had reported that certain bloody wads from the scene had B-Type antigens. The trial judge said that wad further inculpated him in the crime. In August 2001, the Forensic Science Associates (FSA) announced that blood was comparable with Plante's genome.[181] One can say that Lemire was correct in his pretrial assessment not to include such evidence.

In 2011, Hautanen said LaGuer should be denied a ninth motion for a new trial because he had thwarted Lemire's ability to incriminate him with blood evidence that never actually could have incriminated him: the blood was compatible with Plante. Hautanen's argument to the court was that Ben LaGuer should be punished for impeding her office's use of faulty serology.

[181] State Police Crime Laboratory Serological Report, Gwen Boisvert Pino, 17 February 1988; Report Number 1, FSA, 4 August 2001, pg. 10 ("The DNA recovered from the blood on the tissue paper…was also determined to originate from a female…the same as the genetic profile obtained from Lennice Mae Plante.")

An independent analysis would have exposed a sock that inculpated Jose Orlando Gomez. A review would have shown that the blood on the wads belonged to Lennice Mae Plante.

The Laboratory and Analytical Pitfalls of DNA Evidence

While Edward T. Blake is the public face of his boutique testing, the actual task of extracting, sequencing and comparing DNA belongs to lab technician Charles Alan Keel. FSA's audacious attempts to sequence ever smaller amounts of degraded DNA have drawn critics, in academia, who charge that testing samples weighing less than validation studies is bad science. Blake's advocacy has been criticized as antithetical to scientific principles of DNA technology. He has silenced critics by often ascribing ulterior motives, discourse that academics in law and genetics loathe to publicly participate in. FSA is not accredited by the American Society of Crime Laboratory Directors (560 F. Supp. 1164) because Blake does not subscribe to nationally approved standards. In LaGuer's case, he was unable to show proof of attending many conferences and seminars on his curriculum vitae.

In New York, Kerry Kotler served eleven years in state prison for a particularly heinous rape, until Ed Blake exonerated him through DNA analysis. After his release Kotler was charged with a second rape that was so galling, calculating, many instantly assumed that Blake's analysis had been a sleight of hand. Blake testified for Kotler at his second trial. The jury rejected Blake's theory that Kotler's DNA had been planted in the evidence because the police were angry over his first victory over them.

In Texas, lawyers for death row inmate Ricky McGinn retained Blake to perform DNA testing. Blake's laboratory and analytical report, in a reversal of fortunes, became the state's centerpiece evidence for executing McGinn. While Texas prosecutors disclosed that Texas Rangers had made McGinn ejaculate himself to extract a reference sample for comparison, Blake did not preclude microbial contamination in his report nor did he raise a strong enough objection to halt the execution until Texas Rangers had explained why they had used such an unusual method of evidence collection. In Virginia, Blake was hired on behalf of Roger Keith Coleman, a death row inmate with evidence so favoring innocence that TIME put him on its cover. After Blake inculpated Coleman, his lawyers assembled new experts that included Eric S. Lander,[182] director Broad Institute, a genomics research center of MIT and Harvard. Dr. Lander is among an elite group of geneticists who challenged Blake's analysis. Blake had artificially paired a number of genes and deduced an inference that Lander and other experts found invalid. But, in a flagrant attempt to hasten his execution, a panel of Federal Circuit judges held that "Coleman now wishes to challenge his own expert through other experts who say Blake performed tests and made assumptions which are not scientifically accepted at this time." (798 F. Supp. 1214) After Coleman was executed Blake refused to return DNA vials to prosecutors. He accused prosecutors of wanting to prevent further testing that might exonerate Coleman. But, considering the opposition of prominent forensic scientists, why would Blake test if his analysis led to Coleman's wrongful execution?

No one disputes that Forensic DNA testing has achieved great success in convicting the guilty and exonerating the innocent. But DNA successes have not come untamed by failure. As three Justices of the United States Supreme Court recognized, "DNA testing – even when performed with modern STR technology and even when performed in perfect accordance with protocols - often fails to provide 'absolute proof' of anything."[183] The poor condition of many crime scene samples rendered interpretation of a crime scene sample a highly subjective task.[184]

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[182] http://www.broadinstitute.org/history-leadership/scientific-leadership/core-members/eric-s-lander

[183] District Atty's Office for the Third Judicial District V. Osborne, 557 U.S. 52, 80—81 (2009(Alito, J., concurring).

[184] See generally Erin Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing, 58 Emory L.J. 489, 501 (2008)("The job of the DNA analyst. . .relies largely on reasoning

Contamination, inadvertent transfer, and deliberate malfeasance have also given rise to an abundant catalog of mistakes. One leading scholar has collected a list of common errors, along with illustrative case studies.[185] At least three individuals subsequently exonerated by DNA tests were first wrongly convicted based on faulty DNA testing or analysis.[186] In one case of contamination, a positive hit match identified a man who would have been a toddler at the time of the offense; the lab had conducted a training exercise using his DNA that accidentally contaminated the crime samples.[187] In another famous case, police hunted across Europe for a suspect that surfaced in a wide assortment of crimes ranging from murder to larceny, only to realize that the DNA belonged to an employee of the firm that manufactured swabs used to collect the evidence.[188]

In addition, DNA can inadvertently transfer. Studies show that if A shakes hands with B, and then B shakes hands with C, it is possible for A's cells to transfer to C, leaving the false impression that A and C came into direct contact.[189] Similarly, studies have shown that machine washing can transfer spermatozoa onto "clean" articles of clothing.[190] In view of the sensitivity of DNA testing, contamination can be as simple as "someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches the area that may contain the DNA to be tested."[191] One recent example involved a high profile investigation into the murder of a Yale University graduate student. Police recovered DNA material from intimate clothing of the victim, who was found in a wall cavity, in addition to material clearly attributed to the later—convicted killer. A search in the DNA database uncovered a matched to a convicted offender, but investigation established that he had died before the attack. Further inquiry revealed that the offender had built the cavity as part of a construction team. His biological had apparently been preserved for years, transferring to various parts of the when the killer forced her body through the shaft.[192]

Unfortunately, the rate of error and false attribution among crime laboratories is not as well known a reality as the perceived infallibility of DNA technology in the cultural myth. Yet as the National Academy of Sciences observed, "although DNA analysis is considered the most reliable forensic tool available today, laboratories nonetheless can make errors, such as mislabeling, losing samples, or misinterpreting the data." (2013 Westlaw 476046)

A series of state and federal audits cited the MSPCL with mismanagement. Robert N. Sikellis, et al., Operational Assessment of the Massachusetts State Police Crime Laboratory System 29 June 2007 (noting that "several DNA analysts suggested that supervisors are not consistent with their interpretations

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abilities, processes of elimination, subjective judgment calls, and inferences; it is not a mathematically certain, objective enterprise.") (2013 Westlaw 476046)

[185] See. William C. Thompson, The Myth of Infallibility, in Genetic Explanations: Sense and Nonsense 232 (Sheldon, Krimsky & Jeremy Gruber eds., 2012)

[186] See. Brandon L. Garrett, convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011)

[187] See. Thompson, The Myth, supra. at 228.

[188] Id. Crime Laboratories have also confronted deliberate falsification of DNA test result. 4 Mod. Sci. Evidence § 31:15 (2012—13 edition)(listing errors in cases involving DNA analysis)

[189] Alex Lowe et al., The propensity of individuals to deposit DNA and secondary transfer of low level DNA from individuals to inert surfaces, 129 Forensic Sci. Int'l J. 25, 33 (2002) (reporting that in certain conditions, a secondary profile might appear on an object the person never touched, even while the primary profile of the person who handled the object does not appear.

[190] E. Kafarowski et al., The Retention and Transfer of Spermatozoa in clothing by Machine Washing, 29 Canadian Soc. Forens. Sci. J. 7 (1996)

[191] Nat'l Comm. on the Future of DNA Evidence, US Dep't of Just., What Every Law Enforcement Officer Should Know about DNA Evidence (1990).

[192] 4 Mod Sci. Evidence § 31:13, at 148

of DNA reports and protocols...[also that the laboratory was] in need of documentation mechanisms, protocols, review processes, and most elements of quality management controls.")[193]

While assistant MSPCL chemist Kellie Bogosian observed the process on behalf of prosecutors, she had no knowledge of the evidence chain of custody. She earned credits on DNA techniques Online and attended a DNA seminar at Quantico's FBI Academy.

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"He doesn't strike me as a nut," Ty West, an NBC producer, said in April 1994. West, who spoke with LaGuer at least a week, said he was considering pitching his story to the network. "He thinks he's got a good case and on the surface, it does look like he didn't get a fair trial."[194] John Strahnich, currently Boston Herald executive editor followed the case for three decades. He said in 2002 that when he first heard of the DNA result it left him so depressed that he couldn't get out of bed the day he found out. "There's no doubt in my mind that it was a bad investigation, a bad jury and a bad trial. The irony may be that for all that it was a good result."[195] In spite of evidence that police and prosecutors had long engaged in a scheme to cover up certain legal abuses, the Boston Globe earlier described the trial as "a pretty odoriferous piece of business," LaGuer's supporters to migrate away en mass. It is hard to imagine how, in retrospect, anyone might credit LaGuer over the new "gold standard" DNA test.

As this paper has set to demonstrate, Hautanen led Siegel down every rabbit hole until he was near a psychotic break. Siegel had left a lot of people scratching their heads when he told the Boston Globe that a new discovery was "but one more finding in a case that feels more and more like something out of 'Alice in Wonderland." He had been drowning for months under cartloads of Hautanen's legal sledge. On 16 May 2002, after the firestorm, Siegel appeared more subdued in his measured comments to an Associated Press story, which ran on Foxnews.com. "It's obviously a fact that makes the case a bit more complicated. I think he's consistently maintained his innocence and still does, and that's really all there is. He's ready to pursue whatever avenue of relief is available."

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After a bright burning seven year stretch as a public defender at the Tennessee Legal Aid Society, where he had risen through the ranks from petty offenses to even a few death penalty cases, David M. Siegel just stopped himself cold one day. The daily grind hit him hard. Southern justice has little do to with what law school teaches, and has everything to do with race, class and affluence. A young idealistic lawyer can have her ideals dry up under that southern sun and even hotter air of courtrooms. The stories lawyers tell of their often black, some white, all poor and uneducated, clients are haunting enough to wake the dead in screams and sweat.

He could no longer find ways of dealing with a rigged system.

He came to Boston with a teaching offer from the New England School of Law. His wife, Erika Geetter, worked for the general counsel at Boston University's Office of General Counsel. It was she who recommended her husband when the then BU president, John Silber, tasked the general counsel with assisting LaGuer in his legal struggle. Siegel had been working to establish the New England Innocence Project. It was an opportunity for him to network with top BU officials. Ron Cass, the Dean of the BU Law School was a supporter and one of the first financial contributors.

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[193] Supervisor MSPCL Robert E. Pino, DNA Unit, was fired from the lab for violating standard protocols and for reporting "DNA matches based on faulty information." His dismissal was upheld by the courts (456 Mass. 450)
[194] Baron, Andy. Sentinel and Enterprise. LaGuer continues jailhouse affair with media. 18 April 1994.
[195] http://www.foxnewsa.com/story/0,2933,52915.html

Cass and Silber called for regular updates. He often was quoted in the media. His star was rising. His own Law School dean was quite pleased with all of the publicity Siegel was generating for the school. He was asked to lecture on the case. He was coauthoring a law review article with Judi Goldberg, who went to clerk for Chief Justice Mark Wolf in Boston.

A number of large law firms in Boston offered to assist Siegel with resources on a pro bono basis. Three firms in particular had committed to help before Siegel had been to the prison to visit with his client. The managing partners of Holland Knight, LLP and McDermott, Will & Emery, LLP., had asked Siegel to participate in a conference call to assess how much money for DNA testing and actual billable this litigation would entail. LaGuer's links to a range of public supporters was a real plus. Weil Gotshal & Manges LLP, Associate Jill G. Fieldstein, a former CBS NEWS producer for 60 Minutes who tried to air LaGuer's story, along with other lawyers, produced a lengthy memoranda for Siegel to use in drafting his petition for DNA analysis. Siegel assumed that a request for DNA testing would be easily approved. Ben LaGuer had been campaigning for DNA testing at least since March 1989.[196] He copied a number of newspaper and magazine features to support his case. But, Siegel did not object that the presiding judge had been a lawyer for the victim's family. In the end, a DNA exoneration would bring so much pressure that even prosecutors would fall back. But Hillman ultimately ruled that withheld fingerprints in no way undermine his former client's eyewitness testimony. It is the classic bias found in conflict of interest cases. On the other hand, Siegel had heard worse stories than the presiding judge having formerly represented the victim's family. Siegel underestimated the degree to which prosecutors would escalate the cost of testing and latitude Hillman would afford them.

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As a mere associate law professor, Siegel had no inclination to challenge the integrity of distinguished alum such as John J. Conte. After nearly three years, Siegel was exhausted. The lawyers who had begun this quest all faded.

Conte was the District Attorney of Worcester County for thirty years, longer than any other District Attorney in the state's history. Before becoming District Attorney, Conte served fourteen years as a member of the Massachusetts State Senate, representing Worcester's Second District. In the Senate, he served as Chairman of the Judiciary Committee, and was also a member of the Governor's Select Committee on Judicial Needs. This committee was chaired by former Watergate Special Prosecutor Archibald Cox. In 1976, then-Governor Michael S. Dukakis appointed Conte to fill a vacancy. Conte graduated from Holy Cross College. Conte's secrecy left many in the dark. This "penchant for paranoia and secrecy is just plain weird, and sometimes irresponsible. His office is triple-locked and stacked with television monitors."[197] Conte became obsessed by LaGuer's public challenges. When notified of LaGuer's upcoming parole hearing, he instantly mobilized three named prosecutors to his office. Conte ran with fear and secrecy. He operated a pay to play scheme. He required staff to attend his political fundraisers. He reassigned members of the state police when they failed his loyalty litmus test.

Siegel never understood why prosecutors had made an epic battle of a simple request. He had totally underestimated how much sweat and reputation had been put at risk to keep LaGuer in prison, and to protect the many lies told along the way.

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[196] Engel, Edward. Sentinel & Enterprise. Con seeks a new trial. 30 March 1989. "The jailhouse lawyer has said that blood tests taken after the Appeals Court's ruling would prove his innocence, and that he would be willing to undergo a new DNA profiling procedure to prove he was not the assailant."
[197] Telegram & Gazette, January 26, 2006

The 1980s was a golden age for the criminal defense. Courts across the state were brimming with fancy and faster talking young lawyers chasing the spoils of a booming drug trade and a breakdown in urban family life. In Worcester, Peter Ettenberg had a bustling legal practice. His name echo in every crime infected alley as well as in most cell blocks at the county jail. Ettenberg had made a named brand. His staff telephoned the media whenever he was scheduled to appear in court with a new client. For the right price, preferred in a large bag of cash, Ettenberg could delay the legal proceedings, allowing a drug dealer to post bail and continue his business for months and even years. He had a staff of secretaries and paralegals cranking out petitions like Nabisco puts out Oreo cookies. He had one of the most beautiful law offices in the county. His assuring atmospherics at 370 Main Street was part of a scheme to squeeze a client of his last dollar if only for a lottery shot at beating the odds of serving prison time. Walking into his office was like entering a car dealership. The mark with fancier shoes always ends up paying more. In a lawyer's office, the man with desperate eyes and fancy shoes will always pay four times for the same offense as the man who walks in wearing sneakers and a couple of prison bids already under his belt. No client is ever told up front that the district attorney wins a guilty verdict-ninety five percent of the time. No client is every told that his interest with the government is competing with the interest of 150 clients the lawyer also has pending with prosecutors. While the defense lawyer is ideally looking after his client's interest, the lawyer's business is far and above the overarching concern. To be successful, the lawyer must hustle the district attorney no different than a client for his money. It is the district attorney's office who approves every plea bargain, which is why a lawyer is always hesitant to upset his ties to a prosecutor and their law enforcement agencies. Watching Ettenberg in court was like sitting at a Lucha Libre bout, a Mexican mask wrestling spectacle that a more fake than a 3 dollar bill. Exposing Lemire and Carignan on behalf of a client who had even failed to pay his original retainer was not a profitable enterprise for his future relationship with Lemire. LaGuer was not a name Ettenberg expected to hear much from in future. "It makes me look real bad," Ettenberg told the Sentinel following a four part investigative expose. The criminal justice system in American are full of these dark corners where very bad things happen outside the plain view.

LaGuer Alibi Defense Neglected

In a pretrial investigation, Nancy Martinez and Robert Hammack of the Worcester-based Mayday Investigative Agency corroborated Ben LaGuer's alibi with six individuals "whom we believe will be helpful and willing to cooperate in LaGuer's defense."

Peter Ettenberg did not interview a single alibi, psychiatric or forensic witness. He probably assumed that his young client would accept Lemire's two year plea agreement. But when LaGuer refused, Ettenberg had no ready defenses. He was only days in from Barbados. Ettenberg had no choice but to devise a classic trial strategy; he attacked the government's case instead of mounting his own independent defense. Ettenberg had no realistic plans to put on a trial for a five thousand dollar retainer.

What each alibi said firmly put LaGuer across town, in Litchfield Terrace, visiting Tina Pouliot's home (ex-girlfriend) at the exact moment when Plante said a man broke in. All remembered what LaGuer was wearing, the evening hour while others recall it Tuesday. Elizabeth Bromes, LaGuer's sister, testified that she left her brother in front of Cumberland Farms at approximately 9:30 p.m. (Tr. 443).

"Quite frankly," Ettenberg said, "I really don't have a defense other than where my client says he was his word against her word." (Tr. 7) Then, LaGuer testified that he never went to Litchfield, distancing himself from his alibi. He said he telephoned Pouliot from a café, then stayed when her sister told him that Tina was not home. (Tr. 490-494). LaGuer's account is consistent with Ettenberg's false alibi. In an interview with the Sentinel & Enterprise 10 December 1989 Ettenberg said: "As for the alibi witnesses we knew who they were and sent investigators out to talk at all hours without paying them. Toward the end of our defense we had no more money."

After Ettenberg released the Mayday report, LaGuer prepared a motion alleging that "trial counsel's failure to call certain alibi witnesses on his behalf amounted to ineffective assistance of counsel." At a hearing Ettenberg might explain why he had falsely stated that he had no "defense other than where (LaGuer) says he was, his word against her word." Why would his client testify to a version that left him alone rather than supported with six alibi witnesses? Judge Mulkern denied LaGuer's request to put Ettenberg on the witness stand. "The expected testimony of the four individuals now claimed to be alibi witnesses is inconsistent and contradicts defendants." Since Ettenberg had denied an alibi defense and LaGuer had denied visiting Litchfield, Mulkern figured, these alibi witnesses were inconsistent with the trial defense.

In 2012, Tucker dismissed the racist affair as one of "two known instances where LaGuer skewed evidence" in this case. The racial slurs "as well as other allegations set forth in Nowick's affidavit, were not corroborated by the jury foreman or by any other jurors, despite the fact that Nowick's affidavit sets forth they were during jury deliberations."[198]

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"It makes me look real bad," Ettenberg told the Sentinel, when asked about his own handling of the case in response to a four-part exposé. Police conduct was not the only target of criticism.

One legal observer has said that criminal defense lawyers "are supposed to be the people who recognize bogus claims, challenge them, move to get them excluded, and undermine those that survive exclusion by knowledgeable, thorough and telling cross examination. On the whole, they don't do any of these things very well." This criticism over Siegel's timidity to challenge the history of forensic tests is valid. The best forensic testing protocol one could design would never compensate for the result of testing extraneous, incorrectly labeled, illegally collected fabrics from LaGuer and his residence. The courtroom is ideally a space for the truth to emerge through a system of adversarial combat of zealous lawyering. In the modern courtroom, the politics of careerism and sense of fraternity among those in the legal profession undermine those fundamental tenets. Today, far too many defense lawyers want to be admired than feared. It is a threat to the breakdown of a criminal justice system dependent upon idea that truth and justice only emerges when the alleged facts are "put through the crucible of cross examination."

LaGuer has been put into a fight that is way large than anything he could possibly hope to win. It is much bigger than any controversy LaGuer could have been dropped into the middle of. But he remains on his feet, on top of that mountain from where he screams out to a world above his own. A fair assessment of the trial record demonstrates that an unsigned pretrial letter is not evidence that shows a larger conspiracy.

The district attorney has left deep scars on Ben LaGuer, his family, the victim, her family, and history will judge what they did. The games played against this man are recorded in the trial of false legal pleadings and court opinion. LaGuer has fought all of the powers and all of the impunities of the corrupt. Armed with the power to accuse and define under the patriotic state flag, many prosecutors and some judges have had no qualm about suffocating LaGuer's proof of actual innocence in order to protect a clique of names and reputations.

Superior Court Judge Richard T. Tucker named Lennice Mae Plante in his order and memorandum, pursuant to his authority to publicly name her under MGL 265, Section 24c, mandating that the victim's name "shall be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted." Judge Tucker named her 37

[198] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 17

times in his 17 page memorandum. Plante died in 1997. Her only daughter, Elizabeth Barry, voluntarily appeared on PBS.[199] Barry was photographed by Robert E. Klein of the Boston Globe and Paul Kapteyn of the Telegram. She appeared at a press conference to politically endorse gubernatorial candidate Kerry Healey.[200] Her husband and daughter allowed themselves to be photographed in August 2010, at a hearing before the state Parole Board. Robert Barry has also made public comments to the Boston Herald under his own name.

The guilty verdict was all but a foregone conclusion when twelve white men sat to judge whether a dark skinned young man not old enough to buy beer, had raped a white woman. Judge Timothy S. Hillman, who oversaw the DNA testing, had been the victim's estate lawyer.[201]

LaGuer's trial attorney says he could have been out of prison after two years: "Mr. LaGuer was unwilling to plead guilty, contending he was innocent of the crimes charged."[202]

"I don't know how anybody can be so convinced that this man is guilty in light of the irregularities I have just enumerated," Boston University President Emeritus Dr. John R. Silber (1926-2012) told the Parole Board.

"I do not think that this Court does its best work when we make up our minds ... before the issues have been raised by the parties, brought before us, and briefed and argued for our consideration."
-Supreme Judicial Court Chief Justice Roderick Ireland

[199] Elizabeth Barry, Television Interview, Greater Boston, Hosted by Emily Rooney, WGBH July 12, 2003
[200] Phillips, Frank. The Boston Globe. Healey keeps up attack; Patrick toughens his ad. http://www.boston.com/news/local/articles/2006/10/11/healey_keeps_up_attack_patrick_toughens_his_ad/ (paywall). For full text: http://www.northeastshooters.com/vbulletin/threads/11725-Healey-keeps-up-attack-Patrick-toughens-his-ad; Monahan, John. Telegram and Gazette. Healey presses LaGuer attack as Mayor meets with Patrick. October 11, 2006. http://masscops.com/threads/governors-race-and-union-endorsements-thread-combined.16544/page-10
[201] Boston Herald, judge in rape trial set to be victim's ex-lawyer by J.M. Lawrence 6 November 2004
[202] Affidavit of Peter L. Ettenberg April 29, 2010. http://www.benlaguer.org/documents/Affidavit%20Of%20Peter%20Edenberg.pdf