COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, ss. Criminal Session

COMMONWEALTH

v. Indictment Nos: 83-103391 to 94

BEN LAGUER

LaGuer's Brief *AMENDED* Rebuttal to The Commonwealth's November 23, 2011 Response

Ben LaGuer, through his counsel, respectfully requests this Court to accept this very brief rebuttal to the Commonwealth's "Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial" filed November 23, 2011. The Commonwealth's Response contains numerous errors of fact. The defense seeks only to address the most glaring inaccuracies. In this pleading the defense inserts new sections marked **I. and II.** All other sections remain the same although re-numbered.

I. The District Attorney Claims that a Number of Evidence Tags on the Presumptive Crime Scene Samples are Untrustworthy.

The district attorney claims that a number of evidence tags on presumptive crime scene samples are untrustworthy. The district attorney asserts that a group of tube socks referred multiple times in police reports, trial testimony and appellate court ruling are extraneous to the case because "[a] label with the markings 'COMM No 17, 6/21/84 LJH was attached to one of the socks,' and two other socks with colored stripes had label on them marked 'No 19 6/21/84.' There was no evidentiary hearing held in defendant's case on '6/21/84,' and the initials 'LJH' do not correspond to anyone involved in defendant's case. Nothing is known about where the socks

came from, or who put them in the box of evidence." (Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, p9)

At a Superior Court evidentiary hearing held on May 22, 1989, then-ADA James R. Lemire did not object to the defense admitting as Exhibit 4 three socks that were loose in the evidence box, in the same box in which the yellow and black striped tube sock recovered from complainant's studio had been stored since the trial in an open bag. The evidence box had an empty bag that was not sealed, which contained the markings of "socks" in plural, along with an exhibit number. (Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, EXH 6, at 41.) At this May 1989 hearing, State Police Crime Laboratory assistant chemist Mark T. Grant testified that the tube socks in the evidence box were undoubtedly from this case. "Yes. If you notice, there's number 636 next to the sock," Grant said, adding: "Those are the socks from this case." (Id., at 75) The district attorney either fails to appreciate the testimony of his own 1989 forensic expert, or he deliberately engages in a careless deception.

For the Court's consideration, it may be informative that Attorney Robert Terk, under the supervision of Lt. Francis Ptak of the Leominster Police Department, photographed these socks on May 17, 1989. The photographs were published in Esquire magazine in 1994, and these socks appear to have no rubber bands or evidence tags to them. It is a matter of extreme controversy if these tags were annexed to these groups of socks after the Court hearing on May 22, 1989.

The district attorney pointed out two other glaring examples of untrustworthy evidence tags. "The box of evidence brought [to court on 22 May 1989] from the police station also contained other 'nylon' items: the victim's blue, nylon nightgown, ***described incorrectly*** as '1 plastic bag with blue nylon underpant' on a list prepared by Lt. Ptak of the Leominster police, and the victim's 'Brown stocking' or nylons, described by Lt. Ptak as 'clear plastic bag with nylon." (Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, p8)

In spite of Ronald N. Carignan's trial testimony that on Friday 15 July 1983 LaGuer put on a jersey when the police arrived at his father's apartment, the district attorney argues that on this instance the evidence tag on the jersey is more reliable proof of its origins; that the jersey

was recovered earlier on 13 July 1983. (Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, p5-7) The district attorney today conveniently attempts to suggest that Carignan could not distinguish a male "jersey" sport shirt from the assortment of other female garments retrieved from complainant's apartment.

II. District Attorney Materially Misrepresents 1989 Testimony of State Police Assistant Chemist

The district attorney falsely claims that State Police Laboratory chemist Mark T. Grant admitted "in open court in May, 1989" that "he had listed incorrectly in his lab report as 'Underpants – suspects' (EXH 2, Item 21; EXH 6 at 52-53, 77-80)" for the victim's underpants recovered from her studio." (Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, p5-6)

At no point in his 1989 did Grant aver that he had "listed incorrectly" complainant's undergarments as "underpants – suspect" in his 1983 report. The context of his testimony that he did not list clearly feminine undergarments as underpants from suspect is a series of questions put to him to determine the whereabouts of the then-considered potentially exculpatory underwear. Prosecutors might have enlightened Grant to the fact (which they equally withheld from the defense) that the Leominster Police Department had only days earlier provided three (3) underpants instead of the two (2) feminine undergarments put on display in court for Grant's identification. The district attorney in his response today misrepresents again in the historical record the assortment of "underclothes from suspect" pilfered from LaGuer and shipped in 1983 to the State Police Crime Laboratory for analysis.

III. The DNA Evidence

For an issue so central to its strategies, the District Attorney's office submits an obscure article published by Dr. D. Kim Rossmo, Director for Geospatial Intelligence and Investigation at Texas State University. The publication, entitled Criminal Investigative Failures, Wrongful Innocence Claims: Roger Coleman and Benjamin LaGuer is not published by a mainstream firm. Suffice to say that Rossmo freely admitted, "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 in his article 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) (District Attorney's Response, Exhibit 18)

To present such a Geospatialist, someone who specializes in applying statistics analysis to geography, as a valued forensic opinion in DNA analysis demonstrates the Commonwealth's lack of support for its forensic arguments within the respectable scientific community, most notably, the Massachusetts State Police Crime Laboratory. The defense respectfully submits that Rossmo, as a Geospatialist, would never qualify as a forensic DNA expert in this jurisdiction.

IV. The Jersey Shirt, Underpants and Tube Socks

The District Attorney's argument that "[n]othing is known about where the socks came from or who put them in the box of evidence" is false. The trial record is littered with references to these exact tube socks from LaGuer's apartment. The District Attorney's argument that only two clearly feminine pairs of underwear were found on the box of evidence is also false. Prosecutors withheld a transfer inventory report from May 17, 1989 authored by State Police Trooper William Kokocinski. His report reveals his retrieval of three (3) pairs of underwear from the Leominster Police Department. The District Attorney submitted Trooper Kokocinski's report (Response, Exhibit 9), but offers no explanation concerning the still missing and unaccounted for third pair of underwear.

In its response, the District Attorney argued that "[b]ecause defendant knew in March 2002 that 'the only underwear in the case consisted of two pairs of clearly feminine underwear found at the victim's apartment,' defendant was aware that the sperm-splashing scenario in his 11 page letter had no basis in fact." (Response, 19). The State Police Crime Laboratory recovered biological evidence from the "interior crotch" of LaGuer's underpants.[1] On May 17,

[1] MSPCL Pretrial Bench notes of M.T. Grant, p.1; MSPCL Nov. '83 report, item No 21.

1989, a trooper had two (2) of complainants' panties and LaGuer's underpants.[2] However, five days later, the trial prosecutor presented in Court only the victim's underpants; "These are the two underpants that were listed in the report, in the lab report, as far as any underpants that's in the evidence box."[3] The trial court concluded: "The only underwear in this case consist of two pairs of clearly feminine underwear found at the victim's apartment."[4] In July 1998, however, ADA Sandra Wysocki requested "also Benjie's underwear" from the local police.[5] ADA Sandra L. Hautenen testified on 22 April 2010, "obviously, there were men's underwear in this case" contradicting her very current claim to this court that none existed.[6]

V. Newly Discovered Evidence

In its Response, the Commonwealth incorrectly described LaGuer's factual and legal claims that cascade from Annie K. Demartino's newfound testimony. "As a preliminary matter," the Response asserts, "any claims regarding the victim's competency are barred by waiver."(Response, 26) The District Attorney's argument in this regard is stupefying, because the key issue is not the witness's competency, but whether this newly discovered evidence would have substantially aided the jury in deciding a number of verdict determinative issues.

Demartino's testimony that complainant was prescribed antipsychotics at the time of her trial testimony, contrary to the trial prosecutor's assertion that complainant had long been free of the drugs, inter alia, would have been a key issue for the jury in the weighing credibility and reliability of complainant's identification.

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[2] 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.

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

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

[5] 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."

[6] Testimony State Parole Board 22 April 2010. (Audio tape available in attorney's files.);

As the Court of Appeals clearly stated, "LaGuer contends that this ruling deprived him of his Sixth Amendment right to confrontation" as cited in LaGuer's Memorandum in Support of Motion for New Trial dated April 28, 2011. (LaGuer Memo, 11).

With regard to any prior knowledge of Demartino, the District Attorney asserted before this Court, "Your Honor, we didn't know about her." (Response, 27). If this Court believes the District Attorney's office was entirely unaware of Demartino and her testimony, then logic naturally follows that LaGuer would have had even less opportunity to discover her potentially exculpatory testimony.

District Attorney Early's argument that LaGuer should have collected pertinent "information from someone familiar with the victim at the Herbert Lipton Mental Center [as a] logical avenue[] of inquiry" (Response, 26) is beyond the bounds of contemporary rules of law and legislative intent to protect victim rights.

Moreover, it would have been imprudent at the time of trial to seek further evidence of the victim's mental health, because the judge granted the Commonwealth's motion in limine to suppress any evidence of the complainant's current psychosis. The newly discovered evidence, some of which directly contradicts the arguments made in favor of that motion, was therefore not reasonably discoverable by the defense prior to and after trial. Whether the Commonwealth was mistaken or not forthright is irrelevant—the defense had no reason to doubt its claims that complainant was of sound mind and not taking psychotics. This newly discovered testimony therefore casts these assertions into serious doubt and plagues his convictions.

VI. Quoting Evidence Not In Exhibits and Mysterious "Unspecified" Slides

The District Attorney claims that a "preparation of 'pooled sperm' was used to get the 100 sperm needed to generate a male DNA profile. (EXH 13 at 5-7, 10)." A fact check, (Response, 15) of that citation confirms no such assertion. There is no reference on those pages to 100 sperm.

What these cited pages do confirm is that Forensic Science Associates had a number of "Unspecified Slides" prepared by Mark T. Grant that exposes other possibilities of greater

extraneous evidence contaminating the presumptive pool of probative cellular material. (See Response Exhibit 13 at 6 and 7).

VII. District Attorney's Claim that LaGuer had a Prescient Knowledge of the Alleged Inculpatory DNA Result is Fallacious

In its Response, the District Attorney argues a point that is mostly reliant on a newspaper account. "According to media reports, on March 22, 2002 – just one day after FSA had reported the DNA test result on March 21, 2002 in Report 3 -- defendant sent an eleven page, single-spaced letter, including numerous footnotes to Judge T. Hillman, the judge who had overseen the DNA proceedings, 'outlining his response to the DNA finding'. As such defendant must have written the eleven page letter before FSA reported the DNA results, which means that defendant knew in advance what the DNA testing on the 'rape kit' evidence would show: that his DNA profile would match the only male profile found in the 'pooled sperm.'" (Response, 18) This narrative is flawed in a number of critical aspects.

The term sperm is only used to describe the presumptive cellular material in a rape case analysis.

All of the laboratory work FSA undertook to obtain cellular material for a DNA test result was completed in FSA Report 2 of February 4, 2002. Report 2 revealed what specimens had yielded cellular material. It allowed LaGuer to ask himself why samples FSA had predicted would yield DNA instead generated no male DNA. Report 2, moreover, allowed LaGuer to pull together a number of facts and inferences for 47 days until Report 3 in March 21, 2002. The presence of extraneous material from LaGuer and his apartment was hazy but perceptible in various reports. LaGuer expressed concern over the threats of these extraneous samples contaminating the DNA sensitive testing to his lawyers, reporter Eric Goldscheider and Telegram & Gazette reporter Matt Bruun.

After 47 days examining Report 2, LaGuer could easily prepare an eleven page letter to the trial court judge, which he began writing on the morning of Friday, working all day Friday and throughout the night in his single prison inmate cell, including Saturday morning. LaGuer's

letter was mailed from prison prior to 1PM on Saturday. The District Attorney's office dated and time stamped the letter March 25, 2002 at 9:50AM (Response Exhibit 16). LaGuer was well qualified to write his letter given his education, acuity and work ethic. He is also an award winning writer. The District Attorney stretches the bounds of credulity on this point, and simply wasted the court's time with another irrelevant argument.

On behalf of Ben LaGuer, in conclusion, Counsel prays that this information will assist in the Court's ultimate factual determinations.

Respectfully submitted.
Ben LaGuer,

By his Counsel,

Dated: December 15, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of December, 2011, that a true copy of the within Defendant's 'Brief **Amended** Rebuttal to the Commonwealth's November 23, 2011 Response' was served upon the Office of the Worcester County District Attorney, by mailing same, first class postage prepaid to Joseph D. Early, Jr, Esq., Judicial Regional Courthouse, Room G301, 225 Main Street, Worcester, MA 01608.

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Robert E. Terk, Esq.