Commonwealth of Massachusetts
Supreme Judicial Court

Worcester, ss

Number Case Docket
FAR-24160

Commonwealth
v.
Benjamin LaGuer,
Defendant

Application For Further Appellate Review

"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]

The central question for this Court is whether the motion judge erred in dismissing a motion for a new trial on the basis that Ben LaGuer's defense attorney had proffered (six ways) the exculpatory evidence entitled him to a new trial rather than obtain an affidavit from a former healthcare provider rendering such material.

In this case, attorney Robert E. Terk faced a situation where a former nurse of the victim named Annie K. Demartino felt as if she still had ethical and legal obligations not to divulge medical information. Prosecutors for the Middle District do not dispute nurse Demartino's claims in substance. The prosecutors do not dispute that complainant, a 58-year-old woman with a history of paranoid schizophrenia was administered a regimen of antipsychotics on the day of her trial testimony. When she made the identification from an alleged photo array, she was in the hospital, on heavy medications, with poor eyesight (which was acknowledged by the prosecutor) and not wearing her reading glasses. She had a long history of paranoid schizophrenia, and randomly accused

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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

other negroes and latino men of her assault; she said that John F. Kennedy would be visiting her. Later she once even told Demartino that she was pregnant by Kennedy. At the trial she pointed out LaGuer who was the only dark skinned person in the courtroom. The prosecutor told trial judge Robert V. Mulkern that complainant had, for two and a half years, not had any psychiatric problems, and was not on any antipsychotics, which led Mulkern to reject a defense request to explore her history of psychosis in front of the jury. This, it turns out later, was untrue. According to Demartino, the victim also had befriended a man named Jose Orlando Gomez prior to the crime. Gomez had a history of threatening women. At trial, the victim denied any link to Gomez even though he had a relationship with her. Such impugned Assistant District Attorney James R. Lemire. As the trial prosecutor, Lemire requested to prohibit the defense from exposing the victim's psychosis to the jury. Lemire had kept secret a medical assessment that the woman was unfit, a fact that a prosecutor only disclosed during an April 2015 parole hearing.

The motion for a new trial[2] consists of 35 pages of text, annotated with 138 footnotes.[3] Included also is an affidavit of 118 material exhibits.[4] LaGuer's attorney has proffered testimony of 29 prospective witnesses.[5] The motion requested an evidentiary hearing. Judge Tucker instructed a clerk to telephone the parties and schedule a conference for 9 September 2011 at 2pm. Tucker left no written order. The court docket makes no reference to that order.

The motion judge, Richard T. Tucker, ordered the attorneys to prepare for a "live testimony" hearing on the basis of 48 hours' notice. This fact is not in dispute. On 9 September Hautanen argued that rule 30(c)(7)

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[2] http://www.benlaguer.org/newtrial/newtrial.html

[3] Appendix for the Commonwealth, Vol. 1, 1 of 2, Commonwealth v. LaGuer, Appeals Court, 12-P-1785, May 2015, page 48, 83.

http://benlaguer.org/documents/Terk%20Exhibit%20Affidavit%20April%2026%202011-2.pdf

http://benlaguer.org/documents/Witness%20List%205-26-11.pdf

provided for counsel to have 30 days' notice of any hearing. The defense had experts traveling from Ohio, New York and Texas. However, the defense could not orchestrate any of its legal obligations either on the basis of 48 hours' notice.

While Hautanen might have preferred an affidavit from Annie Demartino, Tucker was more than satisfied. "I would agree that the defendant's showing is not in the format the rule requires...However, within his memorandum, as opposed to affidavits, he touches some issues that I think are appropriate for a determination."[6] After adjourning a 90 —minute conference on 9 September 2011, Judge Tucker got together at a café with Judge Lemire only minutes later, despite the fact that Tucker had endorsed a witness list that included Lemire.[7] Tucker did not dispute this fact. In rebuttal, prosecutors merely said "these types of disrespectful and irrelevant passages do not belong in defendant's motion for reconsideration, or any other motion."[8] Before the ex parte meeting with Judge Lemire, Tucker was eager to take "live testimony" on the LaGuer case. After meeting with Lemire, Tucker said "(t)he court finds that, upon this motion record, there is no evidentiary support for this assertion" with respect to each claim.[9] The reason Tucker could not find evidentiary support is that LaGuer faced too heavy of a burden to meet on the basis of 48 hours, much too inadequate time to subpoena, organize and prepare an adequate defense.

In 1991, the Supreme Judicial Court focused on a claim of ineffective assistance of counsel due to trial counsel's failure to present expert testimony on the effect that schizophrenia may have had on the victim's

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[6] Transcript of 9 September 2011, page 11.

[7] The ex parte encounter was violative of Code of Judicial Conduct Rule 3:09, Section 3B(7)(iv).

[8] Commonwealth's Opposition to LaGuer's Defense Motion for Reconsideration of New Trial Denial dated 9 April 2012,p12-13

[9] http://www.benlaguer.org/documents/Tucker%20Ruling.pdf

cognitive skills and thus her reliability as a witness. It is important to note that her eye witness testimony is the sole factor upon which the conviction rests. The Court held "neither the expert's affidavit nor anything in the record demonstrates that there was evidence available to trial counsel that the victim's mental condition at the time of the attack or at the time of the trial was such that the expert's opinion was relevant to this case and therefore would have been admissible. Thus the judge was correct in observing that '[t]he defendant's position is at best speculative,' and he was correct in rejecting the defendant's assertion that counsel was ineffective because he failed to present the type of evidence set forth in the [posttrial] affidavit." Commonwealth v. LaGuer 410 Mass. 89, 93 (1991) The Supreme Judicial Court of course was in the dark about the complainant's true history of psychosis, as now clearly, fully, exposed by the testimony of her former nurse, Annie K. Demartino. The prosecution had deceived all of the stakeholders, including the Court. In spite of the fact that a psychiatrist had raised doubts about the complainant's physical and emotional fitness for trial, ADA Lemire had averred (falsely) that she had been "cured" of schizophrenia and "off" of antipsychotics years prior to the crime. These false statements were not only highly damaging to the defense, but left the defense without the ability to challenge the Commonwealth's central thesis and chief evidence. But such false statements also damaged the integrity of the criminal justice system under which LaGuer was tried and convicted.

If Judge Tucker felt as if he could not impartially adjudicate this motion for a new trial because of the serious issues involving his then-colleague, James Lemire, who would soon be named Chief Justice of the Middle District Trial Courts, Tucker should have recused himself. Lemire would soon become Tucker's immediate supervisor. Consequently, Tucker should have let a different judge, one from another jurisdiction, adjudicate the alleged improprieties that Lemire is alleged to have committed as a trial prosecutor. A different judge would have rendered a fair and impartial

decision of Annie Demartino, James Lemire, as well as other witnesses and evidence, including, but not limited to, the corroborating or impugning evidence of the Herbert Lipton mental health records and the reports of their staff physicians.

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In this application, Ben LaGuer alleges violations of his rights under Article Twelve of the Massachusetts Declaration of Rights as well as the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. LaGuer would like for this Court to consider the arguments he attempted to have the lower court consider through a Moffett Brief. The Appeals Court refused to accept LaGuer's Moffett brief even after defense attorney attempted to file it on his behalf multiple times.[10]

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Associate Superior Court Justice Robert V. Mulkern presided over the January 1984 trial in the Middle District Trial Court. Assistant District Attorney Lemire averred that the victim was "cured" of schizophrenia as well as taken "off" antipsychotics for years. On direct appeal, the Appeals Court held that a 14-year-old episode of psychosis was not relevant. "The record indicates that the complainant may have suffered a nervous breakdown some fourteen years prior to the attack upon her and subsequently underwent drug treatment, which (according to the uncontradicted statement of the district attorney) ended two to two and a half years prior to the attack." Commonwealth v. LaGuer, 20 Mass. App. Ct. 965, 966 (1985). The record actually showed more evidence that was not shared with the defense. The defense was denied the victim's medical records.[11] They had no ability to expose Lemire's false statements about her being "cured" and "off" antipsychotics.

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[10] http://www.ma-appellatecourts.org/search_number.php?dno=2012-P-1785&get=Search

[11] The only records Judge O'Neill reviewed were from the Herbert Lipton Mental Health Center, limited to the period of April 1, 1983 to September 30, 1983. Ms. Demartino's statement, however, refers to records kept at Burbank Hospital, the Lipton Center, and the Wright Nursing Home.

In April 2015, Hautanen averred to the state's Parole Board that the decision to have the victim testify "was against the wishes of her doctor."[12] Lemire did not disclose this medical information even though the Trial Court was then determining whether the victim was competent.

Whether the content of Demartino's proffered testimony is newly discovered or previously withheld evidence can only be determined through an evidentiary hearing. Whether Lemire withheld that the victim was physically and emotionally unfit for trial can only be determined through a hearing. Whether Lemire stated that the victim was "cured" of schizophrenia and "off" antipsychotics to muscle certain rulings in his favor can only be determined through a hearing. Whether the victim was psychotic despite a regimen of antipsychotics can only be determined through a hearing. (The fact that Demartino avers a psychotic episode may be reflected in her medical records, thus further corroborating her account of that patient.) Whether the victim denied third party suspect Jose Orlando Gomez to protect his identity (a common behavior in Battered Woman Syndrome) can only be determined through a hearing. Whether certain genomic data support that the victim was assaulted for eight hours, the predicate of her allegedly reliable identification, can only be determined through a hearing.

Whether chief police investigator Ronald N. Carignan (1935–1988) lied about not confiscating LaGuer's underclothes during search of his apartment because the fabrics were not listed on his search warrant affidavit can only be determined through Lemire's available testimony. Whether Lemire knew that a state police report had found no inculpatory stains on fabrics that LaGuer is assumed to have worn to the crime can only be determined through the now limited ability of Lemire's testimony. (Only Lemire can establish this testimony because his chief investigator died in 1988.) Whether this false testimony led forensic consultants to combine LaGuer's underclothes with

[12] https://youtu.be/Iu-IdPkHnPk

samples from the victim, contaminating a less than 0.03 nanostain beyond the point of valid test results, can only be determined through a hearing.

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Judge Tucker had ample evidence for an evidentiary hearing. "I always intended that you would have as much a hearing as you wished, meaning you could...offer live testimony, you may argue, or you may just submit on your papers." Amongst the 118 material exhibits Attorney Terk had proposed to subpoena records from the Herbert Lipton facility. Tucker had a lengthy 13 February 2007 transcript of an interview between Demartino and then-New York Times stringer Eric Goldschieder. Tucker had a 5 April 2007 Valley Advocate cover page feature by Goldschieder titled "Tragedy Times Two" based on Demartino. Tucker had an 8 April 2007 article published in the Telegram and Gazette, the largest circulating daily newspaper in central Massachusetts, by staff reporter Matthew Bruun.[13] In that article, Demartino confirmed the fairness and accuracy of the Goldschieder story. Tucker also had a 17 April 2008 transcript of an interview among Demartino, Attorney James C. Rehnquist, and Boston University President Emeritus and professor of law John R. Silber.[14]

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From Day One, prosecutors from the Middle District have asserted that the police never took anything out of that LaGuer apartment.[15] Their incessant denials notwithstanding, an assortment of State Police documents describe tests of fabrics from LaGuer's home. (Obviously, Lemire did not want to divulge that LaGuer's underclothes had no inculpatory evidence.)

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[13] http://www.thefreelibrary.com/New+LaGuer+trial+supported%3B+DeMartino+raises+question+of+ID.-a0161742543

[14] http://www.benlaguer.org/documents/2016/April%201008%20DeMartino%20Interview%20from%20Joshua%20Stayn%20pt1(1).pdf; http://www.benlaguer.org/documents/2016/April%202008%20DeMartino%20Interview%20from%20Joshua%20Stayn%20pt2(1).pdf

[15] Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's ninth Motion for a New trial dated 23 November 2011, p 6.

The 2011 motion for a new trial alleged that prosecutors had provided a false provenance of certain underclothes, and how Forensic Science Associates (FSA) contaminated the genetic data.

An emergency room nurse named Deborah Brown collected for police a rape kit.

Forensic Science Associates 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."[16] At FSA, lab tech Alan Keel pooled a tiny amount of DNA in a vial, less than 0.03 nanograms, barely enough to create a single genotype. 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."[17] The Q-Tip swab used to migrate her pubic hairs had no blood or sperm fractions.[18] Since the Q Tip and swabs could not have been the source of the DNA profile, the fabric seized from LaGuer and his apartment could not be excluded as the source of that contaminated profile. Even an imbecile should be able to discern such a basic fact.

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The absence of her blood on these highly probative swabs put her account in grave doubt.

"[T]hat man's face is imprinted in that woman's brain," Lemire said. "It will be there for the rest of her life. She saw that man for eight hours. She'll remember that face until [she]

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

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

[18] 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.")

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."[19] At trial, Lemire predicated the reliability of the woman's identification on the fact that she saw his face for eight hours. "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 bid for a new trial.[20] But the absence of her blood on these probative swabs put her account in doubt because the rectal and vaginal swabs are pristine. The absence of her blood confirms that her "anus showed no blood, abrasions, or lacerations."[21] (Tr. 281) 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."[22]

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The skeletal facts may be culled from Commonwealth v. LaGuer, 89 Mass. App. Ct. 32 (2016), Commonwealth v. LaGuer, 448 Mass. 585 (2007); Commonwealth v. LaGuer, 36 mass. App. Ct. 310 (1994); Commonwealth v. LaGuer, 410 Mass. 89 (1991); LaGuer v. Bender, U.S. Dist. Ct. No.

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

[20] http://www.benlaguer.org/documents/Tucker%20Ruling.pdf

[21] Burbank Hospital, notes of physicians William C. Siegel and Edmund C. Meadows, July 1983.

[22] 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

86-1237, 1988 U. S. Dist. Lexis 12771 (D. Mass. November 8, 1988); Commonwealth v. LaGuer, 20 Mass. App. Ct. 965 (1985); Further Appellate review denied, 1985 Mass. Lexis 1850 (October 30, 1985).

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Billings B. Kingsbury, a longtime Telegram court reporter, said the woman had "an extremely difficult time on the witness stand. I covered the trial. It was only through delicate handling by Lemire that the woman was able to come to court and be heard."[23] Annie K. Demartino's testimony that her patient had accused randomly negro and Latino men of her assault was vital to the mistaken identity defense. In fact the victim had only seen Ben LaGuer once prior to her assault (Tr. 180-181). While the county had a sizable minority population from which jurors of color could be picked, there was not a single ethnic candidate in the courtroom. The trial judge was white. The court clerks, bailiffs, police, sheriff and attorneys were all white. The walls were adorned with portraits of white men. The accuser was white. Every person on the prosecution witness list was white. Since the victim was randomly accusing negroes and Latinos of the assault against her, LaGuer could have sought a special seating arrangement to provide the least risk of a miscarriage of justice. Her psychosis is vital to the defense.

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

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

attacking some girl in Germany.'"[24] LaGuer was discharged from the army three weeks earlier because he was caught with a small amount of hashish.

The eyewitness case was not a strong one. "What is exculpatory is that the Commonwealth could not place the defendant in the victim's apartment by means of any evidence, including fingerprint or other physical evidence." See. Commonwealth v. LaGuer, 448 Mass. 585, at 595 (2007)

The Appeals Court portrayal of the identification evidence is wholly inaccurate. "The identification evidence at trial was that the victim initially told police she was unable to identify the perpetrator, only describing him as a short black male. The following day, however, she told the police her assailant was the defendant, who lived in the next door apartment." Commonwealth v. LaGuer, 89 Mass. App. Ct. 32 (2016). "The victim further testified that she had seen the defendant several times going into the apartment next door." Id. In fact, Lemire stated in his 18 September 1985 court papers a more accurate statement of how the complainant disavowed the identification of Ben LaGuer: "The defendant points out that Detective Ronald Carignan's testimony to the grand jury included a purported statement from the victim that she had seen the defendant in the hallway coming and going from the apartment next to hers on previous occasions. At trial the victim denied having said this to the police."[25] She denied her assailant had a speech impediment even though LaGuer had a stutter since childhood. She could not have described LaGuer as "very dark" skinned, she argued, because his mugshot is fair skinned. (Trial Transcript 181-191) She did not describe to police any distinctive scars or tattoos. LaGuer had no scrapes on his knuckles consistent with his fist striking her face.

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[24] King, John. Associated Press. Rapist fights conviction with jailhouse evidence 15 November 1987.

[25] Commonwealth's Memorandum In Opposition To The Defendant's Motion To Dismiss, by ADA James R. Lemire. 18 September 1985; Affidavit of counsel Robert Terk in support of motion for a new trial listing accuracy of exhibits, item #51.

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In 2011, Assistant District Attorney Hautanen argued dismissal was warranted because Attorney Robert E. Terk had forged a letter to bolster the credibility of a two-year plea bargain proposal that she said was neither discussed nor offered to LaGuer. Tucker agreed despite a long record referencing a two-year deal.[26] In 2015, however, Hautanen admitted to Parole Board officials that a plea bargain was discussed. "There had been discussions between Mr. LaGuer's defense attorney and the prosecutor, as always happens … [t]hey talked about possible pleas because you just never know what's going to happen … [t]here was no plea offer. There were discussions but no offer."[27] Such admission is enough to vacate the dismissal and remand the case for an evidentiary hearing, as Judge Tucker had initially intended.

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In his ruling,[28] Tucker says that the issue of racial bias, which was not included in LaGuer's papers, was part of a scheme to defraud the court. No reasonably intelligent jurist could have concluded that LaGuer had presented evidence of juror racial slurs as part of an "unconscionable scheme" to defraud the court. One may note that Hautanen subsequently conceded before the Parole Board that jurors had used racial slurs.

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[26] 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.")

[27] https://youtu.be/m9T2ZCCVLIs

[28] http://benlaguer.org/documents/Tucker%20Ruling.pdf

"Perhaps there may have been a little jury bias in the court."[29] The veracity of the racial animus among jurors is well documented by interviews of jurors conducted by State Police Troopers William P. Kokocinski and Richard D. McKeon.[30] (McKeon is currently the Superintendent of the Massachusetts State Police.) Also see. Commonwealth v. LaGuer, 36 Mass. App. Ct. 310 (1994)("Surely, however, given their consistent testimony that a remark had been made, a reasonable objective fact finder would have concluded that it was more likely than not that someone had expressed ethnic bias in the course of deliberation.") (Fine, dissenting) Sean Flynn, a journalist, was present for the juror hearing.[31]

Tucker added, in his ruling,[32] that LaGuer swapped his saliva with another prisoner to hamper the discovery of his bloodtype. But prosecutors have never argued how LaGuer's bloodtype would implicate him in the crime. The source of this allegation, a feature story in the national men's magazine Esquire, concluded, "if he had given authorities a legitimate

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[29] Hautanen, Sandra L. Testimony, State Parole Board, April 22, 2010. (The audio and visual versions are readily available on file.)

[30] http://www.benlaguer.org/documents/2016/Transcript%20of%20Juror%20William%20P.%20Nowick%20relating%20to%20racial%20bias%2C%20June%2011%2C%201991%2C%20part%201%20of%202(1).pdf; http://www.benlaguer.org/documents/2016/Transcript%20of%20Juror%20William%20P.%20Nowick%20relating%20to%20racial%20bias%2C%20June%2011%2C%201991%2C%20part%202%20of%202(1).pdf; http://www.benlaguer.org/documents/2016//Juror%20interviews%20by%20State%20Police%2C%20relating%20to%20racial%20bias%2C%20June%2012%2C%201991%20part%201%20of%202%20(missing%20page%2011)(1).pdf; http://www.benlaguer.org/documents/2016/Juror%20interviews%20by%20State%20Police%2C%20relating%20to%20racial%20bias%2C%20June%2012%2C%201991%2C%20part%202%20of%202(1).pdf; http://www.benlaguer.org/documents/2016/Transcript%20of%20Jury%20Foreman%2C%20relating%20to%20racial%20bias%2C%20July%2017%2C%201991.pdf

[31] "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." Flynn, Sean. Boston Phoenix. Oxymoronic: For Benji LaGuer, there's no justice in the system. 30 August 1991.

[32] http://benlaguer.org/documents/Tucker%20Ruling.pdf

saliva sample, the result would have provided evidence of his innocence rather than a false impression of guilt."[33]

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Assistant District Attorney Hautanen offered no more than a paper claim that Terk had forged a letter that was irrelevant to any issue. Commonwealth v. LaGuer, 89 Mass. Ct. 32 (2016). She offered no forensic analysis of a forgery. She offered no evidence of a modern font, typeface, typesetting or typecast. She did not order a search for a Xerox or a possible duplicate of the letter. Lemire was not asked if he had drafted the letter, explaining thus how such letter was made available to Terk. Her forgery thesis was that the letter was unsigned. While the letter is indeed not signed, prosecutors have put into exhibit a litany of unsigned documents.[34] In fact, Hautanen had put in evidence an unsigned letter from a defense attorney in her 2006 Supreme Judicial Court brief.[35]

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[33] Taylor, John. Esquire. May 1994. http://www.benlaguer.org/pdf/Esquire%20May%201994.pdf

[34] **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, Exhibit 10; **Unsigned** Letter from Assistant District Attorney Sandra P. Wysocki to Leominster Police Department Lieutenant Michele D. Pellecchia dated July 8, 1998 (retrieved from Fax Transmission, Cover Letter of Assistant District Attorney Wysocki transmitting 5 pages to Leominster Lieutenant Pellecchia July 8, 1998); **Unsigned** "Commonwealth's opposition to Application for Further Appellate Review", 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, Exhibit 10; **Unsigned** "Commonwealth's Opposition to Defendant s Eighth Motion for New Trial", 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; **Unsigned** "Commonwealth's Memorandum in Opposition to Defendant's Motion to Dismiss" by James R. Lemire, Assistant District Attorney, September 18, 1985 (Superior Court Docket 83—103391, line item 38) (retrieved from "Commonwealth's Opposition to LaGuer's Post-Conviction 'Motion for Discovery and Production of Tangible Evidence" April 30, 2012), **Unsigned** Proposed Joint Stipulation as to Dividing tissue Designated as 'Item D,' and further Testing Procedures.

[35] 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.

In sworn testimony before the Governor's Council Judge Lemire was untruthful when he "said he has not 'had anything to do with the case since the early '80s.'"[36] In 2002 the former prosecutor was asked to conduct a document audit. He reported that "there were more things in there [a trial file] and they aren't there any more."[37]

Judge Tucker had no basis to say attorney Terk had forged a letter "and its knowing use in this proceeding is an attempt to again interfere with the judicial system's ability to impartially adjudicate the matter." Terk had no reason to forge a letter that had no relevance to any issue.

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Justice Tucker ruled that Annie K. Demartino's evidence was not newly discovered evidence for reasons prosecutors never asserted. Hautanen stated that the "significance of the victim's mental health history and the potential for obtaining pertinent information from someone familiar with the victim at the Herbert Lipton Mental Health Center were logical avenues of inquiry … Considering defendant's motivation and manpower available to him over the years, evidence from Annie K. Demartino could have been discovered with 'reasonable pretrial or posttrial diligence' -- but it was not."[38] Hautanen argued that defense investigators should have rummaged through the clinic for privileged medical information that the Court had earlier denied to the defense. Tucker of course rejected Hautanen's rationale. He then put forth an equally faulty argument; "Even if the defense was not aware of Demartino's role in the victim's care, this fact was learnable. Indeed, Demartino was present with the victim at court throughout the entire trial". However, Demartino could not have been in the courtroom "throughout

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[36] Trainor, Jill. Appeals Court Nominee Quizzed. Newsbriefs. Massachusetts Lawyers Weekly 19 September 2016, 3.

[37] Testimony, Hautanen, Sandra L. 9 January 2002, pp 14-15.

[38] See. Commonwealth's Response To The Supplemental Memorandum In Support Of LaGuer's Ninth Motion For A New Trial 23 November, 2011, 27pp.

the entire trial" because the victim was sequestered. (Trial Transcript, 14) In his ruling, Tucker added, "…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."[39] In fact, Lemire made up their court itinerary through Demartino. Lemire had Demartino deliver the victim to his office on two separate occasions. (Trial Transcript 154, 392) Demartino could have only entered the District Attorney's office, which she described in some detail, because the staff recognized her official capacity. The District Attorney's offices had a highly restricted security access procedure, with double locked doors and closed circuit TV monitors. Thus, Tucker's ruling that Demartino was unknown to prosecutors until discovered by LaGuer is specious.

After the Justices of the Appeals Court realized how wrong Tucker had been in his findings of fact, there was suddenly a yet third set of equally erroneous findings to uphold the decision. But accusing counsel of ineffectiveness is unfair. Lemire should have been truthful about the fact that her physician considered her unfit. Moreover, this proffered evidence involved more than finding Demartino. Attorney Ettenberg had to assume that the victim was psychotic. Ettenberg had to assume that Demartino possessed such insights. To expect a defense attorney to interview every health care provider on hunches that the trial prosecutor had lied is an unreasonable burden on a criminal defendant's often-limited resources. The Appeals Court says LaGuer should have independently obtained documents already denied to the defense.

In this case, the Appeals Court credits Tucker's assessment that "there was no substantial risk that the proffered evidence, admitted at trial and credit by the jury, would have caused the jury to reach a different verdict" under Commonwealth v. Grace, 397 Mass. 303 (1986) without any regard for whether Demartino's declaration might be withheld evidence

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[39] http://www.benlaguer.org/documents/Tucker%20Ruling.pdf

under Commonwealth v. Tucceri, 412 Mass. 401 (1992). If Demartino's revelations are withheld rather than newly discovered, LaGuer would be entitled to a new trial if "a substantial basis exist for claiming prejudice from the nondisclosure." Tucceri, supra., at 412.

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Defense counsel Peter L. Ettenberg an investigator named Nancy Dickaut. (She was later hired by the District Attoney's office.) She found a likelier suspect within days. Jose Orlando Gomez lived in the tenement until his mother moved to the adjacent town of Fitchburg. She left her son homeless in the old neighborhood. Dickaut was able to put together a damning dossier. The victim had denied in her trial testimony any knowledge of him. Gomez had been committed to the Worcester State Hospital. His mother reported to social workers at the American Spanish Center in Leominster that Gomez had molested one or both of her granddaughters. She did not want officials involved for fear they might risk foster care placement. Whether Gomez had drawn the interest of police is unclear. In her trial testimony, the victim said she had no knowledge of a man named Gomez. Lemire told the jury that Gomez was put in evidence to confound them. In a brief to this Supreme Judicial Court, defense attorney James C. Rehnquist averred that certain withheld fingerprints might have matched Gomez. "While it is certainly possible that, because the rapist used the telephone to bind the victim, he grasped the base of the instrument, it is entirely speculative to assume that the fingerprints on the telephone belong to a third party suspect..." Commonwealth v. LaGuer, 448 Mass. 585, at 597 (2007). The Court added that "The defendant claims in his brief before this court that he would have used the four fingerprints to attempt to match them to the alleged third party suspect, Jose Gomez." id. The fact that Demartino's testimony introduces real evidence of Jose Orlando Gomez in the victim's apartment is not surprising to the defense.

According to Demartino, contrary to the victim's testimony, Gomez and her were more than casual friends. Gomez stayed in her apartment. Gomez may

have taken up residency with her. According to Dickaut, he had a history of violence toward women. (The victim was very familiar with these dominant and aggressive alpha male types. According to Elizabeth Barry, her father abused her mother for years. He locked her in closets when he left their home.) Her relationship with Gomez may never be fully understood. She may have suffered from battered women's syndrome. Her husband had committed her to the Gardner State Hospital beginning in the 1950s. She was diagnosed with paranoid schizophrenia. Elizabeth Barry probably inherited a gene for schizophrenia. In the 1990s, she reported to police that Ben LaGuer had been outside her home, vandalizing her car. The town's police chief demanded to be reassured that Ben LaGuer had not been in minimum, work released, or furloughed. As a classified level four inmate, Ben LaGuer had never been "outside of the walls", the Department of Corrections to the police chief.[40] While the trial prosecutor averred that mother and daughter were not on speaking terms only since the crime, the building manager testified he had never seen Barry in the neighborhood in his years in employment. Gomez may have been the only person she relied on for her daily chores. The fact that she denied Gomez raises whether the police rushed to investigate a rape rather domestic violence abuse.

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Patrolman Timothy L. Monahan asked her physician if her injuries might be the result of self-abuse. (Demartino refers to prior false rape accusations.) In his police report William C. Siegel[41] "stated that in his medical opinion she was raped and it was not self abuse. There was evidence of semen in her vagina

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[40] Rocheleau, Matt. Lenient sex assault sentence fits pattern. Boston Globe. 5 September 2016. A1 (The state sentencing guidelines recommend that defendents with no records or minor records receive anything from two years to no time served for convictions of indecent assault.)

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

and throat."[42] For Monahan, the difference between a rape and self-abuse pivots on that semen. But this statement appears very problematic. Cellmark, a world forensic leader, could not confirm the stain was semen: "Unknown stain, morphology of cellular material not recognized for identification.[43] "Twenty years ago," Ed Blake of Forensic Science Associates said, "scientists would not have been able to detect" the tiny amount of cellular material actually found. Siegel made no request for a semen test.[44] A State Police audit further exposed fractures when it was revealed that there was no evidence of a sperm analysis. "Please note that the method to remove the semen in 1983 from the cut pubic hair is unclear."[45] What happened here requires an evidentiary hearing. The lead investigator provided State Police forensic analyst Mark T. Grant his police narrative.[46] It can be inferred that Grant did not actually perform the sperm analysis.[47] In a practice known as "dry

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

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

[44] Burbank Hospital records of July 1983.

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

[46] 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

[47] 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"[48] samples, one can infer that Grant actually just provided a confirming report to match the police narrative.[49] (Siegel later denied to journalists that he made the sperm comment which patrolman Monahan attributed to him in his report. One of the journalists is John Strahinich, who is currently executive editor of the Boston Herald.)

Investigators recovered a tube sock was recovered from the victim's studio. The state police chemist determined its wearer was "O" bloodtype. Gomez is "O" bloodtype. On the night of the assault, he threatened her life if she revealed his identity but she denied knowing him.[50] The victim's pocketbook was recovered on a road to Fitchburg, where he had told her he lived.

Lemire proffered in his opening statement that complainant had seen LaGuer entering the apartment next door "on a number of occasions". (Tr. 25) At trial, though, she said she LaGuer was once -- when he rang her buzzer. (Tr. 181) Lemire was responsible for creating the myth of her identification. On 25 May 1998 Gomez was charged with crawling into his ex-wife's apartment via a window and raping her. Gomez could have climbed the seven feet up to the complainant's window.

At Lemire's first opportunity to question the victim in front of the jurors, he asked about an incident that had occurred some weeks prior to the crime. A man had rung her intercom for her to let him inside. This testimony was significant to the prosecution but also to LaGuer's mistaken identity

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[48] This unorthodox practice should not come as any surprise to the average reader of current events. Other state laboratory technicians, including Annie Dookhan, who was fired from the laboratory and ultimately jailed for this practice, have been documented "dry labbing" in recent years.

[49] Grant was never subpoenaed to testify at trial. Lemire ignored a pretrial request to retest those hair samples. Grant's forensic report has the telephone numbers of Lemire and Carignan scribbled on it. This practice of direct contact with state technicians no longer allowed under Forensic Standards of Professional Ethics.

[50] Burbank medical records, July 1983.

defense; how familiar she was with the accused? She had allowed the man in the foyer. She had shut her door as soon as she realized it wasn't her daughter. In testimony, she said she did not hear sounds of keys clinking, footsteps, or sound of a door slamming as if the man had walked through to enter LaGuer's apartment. When asked if Ben LaGuer was the man whose face she saw on the foyer, she said yes. Clearly, Lemire had discussed these questions with her. These were not easy questions. The trial was held seven months after the assault. How reliable could she be about these events when she faltered in what she told police about the assault itself? The woman did have a few details that would have enormously benefitted the defense. The man she saw on the foyer was not the same who she had previously seen leaving the apartment next door with a woman. One could not be certain that the man on the foyer, whom she had only seen for a few seconds, was Ben LaGuer or some other man. The only two people she could have seen leaving that apartment were Ben LaGuer and his mother Rosa. (Ben's father had left to Puerto Rico prior to his son's arrival from the military.) This left only mother and son. Carignan testified that she knew she was going to enter the courtroom to identify the man. Both had created an expectation that her assailant was in the courtroom. She had an enormous respect and admiration, whom she incorrectly refers to as "Lieutenant" Carignan even though she was familiar with these military style rankings as a former US veteran. The defense was totally in the dark also about the fact that she was prescribed Haldol. This drug was widely used in the 1950s by Soviet Union intelligence forces against dissidents. If Lemire wanted this woman to say that she had experienced an alien abduction, or that LaGuer had been the man she saw in the vestibule, Haldol was the ideal pharmaceutical.

According to lead police investigator, Patrolman Ronald N. Carignan, the victim had returned to her apartment from the food market, opened her door, and that's the last time she saw her keys. The building manager gave her a spare key. He told Carignan that she was forgetful with that key. Carignan later reports that the woman had described a man, a very dark

skinned negro, not latino, who had busted into her apartment. He was totally nude except for a pair of tube socks plus. Moreover, the window was too high for anyone to flee out of. All these alleged facts led most to believe that her assailant lived within the tenement. The manager revealed to police that nobody in the building fit the very dark skinned description but that there was Ben LaGuer. Carignan found a series of internal files on this LaGuer, a fact that he never revealed to the defense. According to Carignan's narrative, Ben LaGuer stole her keys, then returned that evening not only to rape the woman but to rob her of her money and jewelry. It was not possible that Ben LaGuer committed this crime also because of the unusual setup in which her door was found. The man had no point of exit except for a window which was opened and its shades half pulled. Patrolman Timothy L. Monahan was the first police on scene. The maintenance man, Dennis Benoit, opened the lock with his Master Key. But they still had a difficult time getting to the woman because the door was barricaded. Both officers had to push aside a lounge chair that was reclined under the doorknob from the inside. Moreover, there was a belt tightly fastening the chair under the handle. There was no reason for an ambition young veteran seeking a career to sexually assault or rob a woman. Why would Ben LaGuer rob his neighbor of twelve dollars, a couple of rings, and worthless pearls? A Superior Court probation officer that the Leominster/Fitchburg transit authority had offered LaGuer a job as a heating and cooling systems repairman.[51] LaGuer had also obtained an application to begin taking college courses at Fitchburg State College the following semester.

Contrary to Carignan's theory that LaGuer slid back to his next door apartment after assaulting and robbing his next door neighbor, every detail that supported that remote scenario fell to pieces either during the trial or thereafter. A former FBI agent named Richard Slowe found her previously assumed stolen key ring in her own pocketbook, which some boys had located

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[51] http://benlaguer.org/documents/Superior%20Court%20Pretrial%20Intake%20Report.pdf

on a road that led directly to the new home of Gomez's family. While Carignan had initially reported that her assailant was nude, the victim testified that he was wearing a jogging outfit; Assistant District Attorney Lemire conceded in his opening statement that he had undressed himself after entering the apartment. While Carignan reported that her window was twenty feet high, too high for her assailant to flee from, the drop was actually less than an eight feet. The investigators never asked any of the tenants if anyone saw a man fleeing the tenement at that predawn hour. The culprit must have fled through a window. Detective Carignan did not remember whether he dusted the windows for bloody palm prints. The revelations of Demartino that the woman let Jose Orlando Gomez essentially take up residency with her is consistent with the defense narrative that she was probably sleeping with her enemy. She testified that she had barricaded the door. That she made her studio into a fortress is a behavior of a paranoid schizophrenic. The jury would have been persuaded that the woman welcomed Gomez. A fight erupted between them. He beat her. He left her hogtied her. By the time he realized what had happened, the police were probably attempting to push open her door, so he fled through a window. He grabbed her purse. To credit Carignan's thesis, one had to assume that a nude LaGuer slipped back to his apartment, then created the barricade that officers had to push through to rescue the woman. If the door was barricaded, as the police report demonstrates, then how did LaGuer "slide" back to his apartment?

"The Judge observed that the testimony would have shown, if anything, that while the victim was friendly and unafraid of men of color prior to the attack, she became fearful of men of color afterward. The Judge did not err in finding that the defendant was not likely to benefit from such evidence." Commonwealth v. LaGuer, 89 Mass. App. Ct. 32, at 35 (2016) But Demartino's testimony that Gomez and complainant had a more than casual relationship is quite different than any general phobia of negroes after the crime.

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The search warrant authorized police to recover stolen artifacts, as well as a yellow and black sock.[52] On 20 July 1983 Carignan asked State Police Crime Laboratory assistant chemist Mark T. Grant to examine certain samples with a clear provenance to her studio as well as forensic specimens from Burbank Hospital. On 3 August, a day after a grand jury indicted LaGuer, Grant was asked to examine a second parcel of "underclothes from suspect" seized from LaGuer's apartment that included other fabrics. Grant examined the "interior crotch" of the underwear because the victim had a "rare yeast" infection. "If Mr. LaGuer in fact had sexual intercourse with Plante, especially over an 8 hr. period, it is very possible that biological material would have been transferred from her vagina to his penis and then from his penis to his underwear." The absence of her blood on the soles of eight socks seized from his apartment credits LaGuer's claim that he had never set foot in her apartment. Instead of disclosing this exculpatory material, Lemire falsely asserted that LaGuer's underclothes were never seized. He kept secret that the "interior crotch" swatches of LaGuer's underwear had cleared him of wearing those underpants to the crime. To minimize any risk that Grant might reveal those test results, Lemire never put his name on the government's witness list. The discovery of these fabrics began to undo Lemire's false account of that raid of LaGuer's apartment. It was incomplete, misleading, and false in ways large and small.

If her blood had been detected on LaGuer's fabrics, neither Carignan nor Lemire would have denied collecting those underclothes. Their deception impact on the samples sent for DNA extraction, sequencing and comparison. They distorted the trial record and provenance of physical and biological evidence.

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[52] http://benlaguer.org/documents/Investigation%20Documents.pdf

The Appeals Court tackled the DNA evidence. "Due to the limited amount of biological material available for testing, another Superior Court judge (not the motion judge in this instance) ordered the DNA analyst to conduct the testing with great caution and described in thorough detail how the samples should be handled, transported, and divided." Commonwealth v. LaGuer, 89 Mass. App. Ct. 32, at 36 (2016) The DNA analysis was supervised by Superior Court Associate Justice Timothy S. Hillman despite his prior business relationship. He had been a former probate lawyer to the victim's husband and daughter.[53] The Appeals Court related that certain reports "indicated that the array of possible genotype from the tested pubic hair samples "occur in less than one out of 100 million members of the Caucasian and Black population and less than one out of 10 million members of the Mexican American population." Commonwealth v. LaGuer, 89 Mass. App. Ct. 32, at 36 (2016). But this statistical evidence is invalid. The DNA analyst had added to the petri dish extraneous DNA collected from hairs and fabrics from LaGuer and his apartment. The Court skimmed over FSA's most glaring faux pas: "These findings fail to support Benjamin LaGuer's claim of factual innocence in the rape and murder of Lenice Plante."[54] Obviously, the genomic data could not suggest a murder. The victim died many years later. LaGuer's attorneys could have raised questions with the judge or the jury about the invalid scientific method behind that testimony. In a pleading to this Court dated December 4, 2006 attorney Rehnquist averred: "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."

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[53] Lawrence, J.M. Judge in rape trial said to be victim's exlawyer. Boston Herald. 6 November 2004.

[54] Blake, Edward T. Forensic Science Associates, 21 March 2002, pg. 9

In his 2011 motion for a new trial, LaGuer had offered a number of reports that State Representative Ellen Story (D–Amherst) had requested from the scientific community.[55] These reports had been key in Tucker's decision to order a live evidentiary hearing. He only rescinded that order after meeting with Lemire in secret, who afterward became Chief Justice of the Middle District Trial Court. "LaGuer's argument is basically that DNA samples stated as being recovered from the scene had been purposefully or negligently 'jumbled' and mixed with LaGuer's DNA recovered from clothing taken from his apartment. The court finds, upon this motion record, there is no evidentiary support for this assertion." This finding, of course, is disingenuous. LaGuer had no opportunity to compel testimony or subpoena documents. He had only 48 hours' notice, a violation of Rule 30(c)(7). This Court thus should not be surprised to find a record is not fully developed for a de novo review. How can an appellate court assess whether LaGuer's claims are newly discovered or withheld when he was denied an opportunity to develop an adequate record?

An evidentiary hearing should be ordered.

Respectfully submitted

Benjamin LaGuer,
Pro se

Dated: October 29, 2016

E-filed; signed copy on file.

Benjamin LaGuer W40280
P.O. Box 466
Gardner, MA 01440
BenLaGuer@gmail.com

[55] http://www.benlaguer.org/documents/forensiccasereview.pdf; http://www.benlaguer.org/documents/kessisletter.pdf; http://www.benlaguer.org/documents/danielhartlletter8-21.doc; http://www.benlaguer.org/documents/2016/The%20Justice%20Institute%20Sept%202006%20validation%20analysis%20of%20alleged%20human%20errors(1).pdf

CERTIFICATE OF SERVICE

The undermentioned defendant hereby certifies that on this 29th day of October, 2016, that an electronic version of the within Application For Further Appellate Review was served, by e-mailing to the Clerk for the Commonwealth of Massachusetts, sjccommclerk@sjc.state.ma.us and Sandra L. Hautanen, Esq., Assistant District Attorney for the Middle District, sandra.hautanen@state.ma.us.

Benjamin LaGuer, pro se